No. 17-1678

In The Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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STATEMENT

Petitioners allege that on June 7, 2010, their fifteen-year-old son, Sergio Adrián Hernández Guereca ("Hernández"), a citizen and resident of Mexico, was playing with his friends at the border area near the Paso del Norte Bridge in El Paso, Texas. *Hernández v. United States*, 785 F.3d 117 (5th Cir. 2015). According to Petitioners' pleadings, the boys were playing a game which involved running up and touching the border fence and then running back down the incline of the culvert on to the Mexican side of the border. *Id*. United States Customs and Border Patrol (CBP) Agent Jesus Mesa, Jr., arrived at the scene and detained one of the individuals.[1] *Id.* Hernández retreated under the Paso del Norte Bridge in Mexico. *Id.* There is no dispute that Agent Mesa, while standing in the United States, then pointed his service weapon at Hernández and shot across the border, striking Hernández twice while Hernández stood on the Mexican side of the culvert. *Id*. Hernández subsequently died. *Id.*

After the shooting, the Justice Department conducted a comprehensive and thorough investigation into the shooting, concluding that the shooting took place while alien smugglers, including Hernández, unsuccessfully attempted an illegal border crossing, and began to hurl rocks from close range at Agent Mesa

[1] The undocumented immigrants detained by Agent Mesa in this case were Augustin Alcaraz, cause number EP-10-M-03410(1)ML and Oscar Ivan Piñeda Ayala, cause number EP-10-M-03403(1)ML. Both cases were prosecuted in the United States District Court for the Western District of Texas, El Paso Division.

while he was attempting to detain a suspect.[2] U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Federal officials close investigation into the death of Sergio Hernández-Guereca (2012), *available at* https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca. Agents from the FBI, the Department of Homeland Security, the Office of the Inspector General (DHS-OIG), prosecutors from the Justice Department's Civil Rights Division, and the United States Attorney's Office, interviewed more than twenty-five law enforcement and civilian witnesses; collected, analyzed and reviewed evidence from the scene of the shooting, civilian and surveillance video, law enforcement radio traffic, 911 recordings, volumes of Custom and Border Patrol agent training and use-of-force materials, Agent Mesa's training, disciplinary records, and personal history; conducted site visits; and analyzed and consulted with the International Boundary and Water Commission concerning jurisdictional issues. *Id*.

[2] It is not uncommon for human traffickers to use rock throwing to hamper law enforcement efforts to apprehend alien smugglers in the border regions. In the San Diego sector of the United States/Mexico border alone, United States Customs and Border Patrol recorded more than 400 assaults, including rock throwing, on agents since 2010. The numbers fluctuate in recent years, from 130 assaults in 2010, 77 in 2011, 133 in 2012, to 73 in 2013, per the agency's statistics. Michael Martinez & Jaqueline Hurtado, *Border Patrol agent shoots, kills migrant who threw rocks*, CNN, Feb. 19, 2014, www.cnn.com/2014/02/19/us/california-border-rock-throwing-death.

SUMMARY OF ARGUMENT

I. CONGRESS SHOULD DECIDE THIS ISSUE DUE TO ITS UNIQUE COMPETENCE IN THIS AREA

Congress is in the better position to decide issues involving proving private litigants with causes of action and remedies. The Court has held that it is far better course for Congress to confer that remedy explicitly. Private rights of action as well as the ability to enforce federal law must come from and be created by Congress.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED THIS COURT'S RULING IN *ABBASI*

Writing for the United States Fifth Circuit Court of Appeals majority, Judge Edith Jones wrote that the Petitioner's claim, the shooting of a foreign national on foreign soil by a U.S. governmental law enforcement agent while standing on United States soil, is a new context. And as such, *Abbasi*'s requirement that any claims seeking a *Bivens* remedy must not be a new context and thus fit into the established contexts. This limitation completely closes the door on the Petitioner's *Bivens* claim.

III. EXTRATERRITORIALITY IS A MISCHARACTERIZATION AND NOT A SPECIAL FACTOR

The Court has repeatedly recognized that the Courts have always sustained the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, this Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects. As such, extraterritoriality is not a special factor.

IV. THE NINTH CIRCUIT IS INCORRECT IN ITS APPLICATION OF *ABBASI*

The United States Ninth Circuit Court of Appeals opinion, *Rodriguez v. Swartz*, is based on the idea that absence of a remedy for the Petitioners is the basis for discounting the special factors requirement outlined in *Abbasi*. This Court has made it abundantly clear that while the absence of an alternative statutory remedy for alleged violations of Constitutional rights sometimes necessitates judicial action in awarding monetary compensation, it in no way invites discounting the special factors examination when deciding whether a *Biven*'s remedy is warranted.

V. THE PETITIONERS' CLAIM IS A NEW CONTEXT

The Petitioners' claim that the unprovoked shooting of a civilian by a federal police officer is a

prototypical excessive force claim and thus presents no "new context" under *Abbasi*. Quite the contrary, a cross-border shooting by federal law enforcement is not one of the three original *Bivens* extensions and as such, the newness of this "new context" should alone require dismissal of the Petitioners' damage claims.

ARGUMENT

> "But the question you're asking the Court to do is to shape a remedy . . . , a remedy that Congress has not provided."
>
> Chief Justice John Roberts, Oral Argument, *Ziglar v. Abbasi*, ___ U.S. ___, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017)

I. CONGRESS SHOULD DECIDE THIS ISSUE DUE TO ITS UNIQUE COMPETENCE IN THIS AREA

Since the outset, this Court recognizes that it is a substantial step under separation-of-powers principles for a court to exercise its judicial authority to establish and apply a cause of action for "damages against federal officials in order to remedy a constitutional violation." *Ziglar v. Abbasi*, ___ U.S. ___, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017). And even when the Court does exercise its judicial authority to establish and apply a cause of action, the Court must do so with the greatest limitations in mind. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91

S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (allowing a *Bivens* action for employment discrimination, violating equal protection under the Fifth Amendment, against a Congressman); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (approved a *Bivens* claim for constitutionally inadequate inmate medical care, violating the Eighth Amendment, against federal jailers). *Bivens* started with a Fourth Amendment violation against federal law enforcement officers when searching a home. *Bivens, supra.* Soon after *Bivens*, the Court then approved a Fifth Amendment equal protection claim against a United States Congressman for employment discrimination violations. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). And then right after *Passman*, the Court expanded *Bivens* recognizing an Eighth Amendment claim against federal jailers for inadequate inmate medical care. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

Upon examining the now referred to "ancient regime," Justice Kennedy wrote that during the mid-20th century, the Court felt that it was a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose. *Abbasi, supra.* Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. *See*, *e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). However, upon re-examining this judicially created exception, Justice Kennedy recognized that

Bivens and its progeny coincided during a time when the Court followed a different approach to recognizing implied causes of action than it follows now. *Abbasi*, 137 S.Ct. at 1855.

Beginning in the late 1970s, Justice Kennedy observed that the Court began to move away from the "old regime's judicially implied causes of action" and cautioned that where Congress intends private litigants to have a cause of action, the far better course is for Congress to confer that remedy explicitly. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717, 99 S.Ct. 1946, 1968, 60 L.Ed.2d 560 (1979); *see*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (private rights of action to enforce federal law must be created by Congress).

Thus, as of late, the Court makes it clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is in concurrence with the fact that the Court refused to extend *Bivens* to any new context or new category of defendants during the past 30 years. *Abbasi*, 137 S.Ct. at 1856; *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001). So far, the Court decided against creating: a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U.S. 367, 390, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); a race-discrimination suit against military officers, *Chappell v. Wallace*, 462 U.S. 296, 297, 304–305, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); a substantive due process suit against military officers, *United States v. Stanley*, 483

U.S. 669, 671–672, 683–684, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky*, 487 U.S. 412, 414, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer*, 510 U.S. 471, 473–474, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); an Eighth Amendment suit against a private prison operator, *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins*, 551 U.S. 537, 547–548, 562, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard*, 565 U.S. 118, 120, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012). Even when a United States Citizen suffered a heart attack while working for a privately-operated prison, operating under the color of federal law, this Court refused to extend *Bivens* remedies beyond the very limited original boundaries that followed *Bivens*. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).

So when a party "seeks to assert an implied cause of action under the Constitution itself," Justice Kennedy wrote, "just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abbasi*, 137 S.Ct. at 1856. Ultimately, the question as to who should decide whether

to provide for a damages remedy, Congress or the courts, the answer most often is Congress. *Id*. at 1857.

The underlying theme of the preceding cases, and reemphasized in the *Abbasi* decision, is the Court's recognition that correct assumption that "Congress will be explicit if it intends to create a private cause of action." *Abbasi*, 137 S.Ct. at 1856. The Court favors Congressional action to enact legislation because there are specific procedures, times for considering its terms, and the proper means for its enforcement. *Id*. The Court stressed that "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* And when "determining whether traditional equitable powers suffice to give necessary constitutional protection – or whether, in addition, a damages remedy is necessary – there are a number of economic and governmental concerns to consider." Justice Kennedy, writing for the majority, stated that "[c]laims against federal officials often create substantial costs, in the form of defense and indemnification." *Id.* Thus, Justice Kennedy wrote, it is Congress' "substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Id.* Additionally, he stated, "the time and administrative costs attendant upon these intrusions resulting from the discovery and trial process are significant factors to be considered." *Id.*

"For these and other reasons," Justice Kennedy penned, "the Court's expressed caution as to implied causes of actions under congressional statutes [has] led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. *Id.* "Indeed," Justice Kennedy stated, "considering the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." Interestingly there have been no congressional enactments that have set aside or adjusted the aforementioned decisions. *Id.*

In our case, nine years have passed since the shooting that started this litigation took place and to date, with ample opportunity to address the issue of cross-border shootings, Congress chooses not to do so.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED THIS COURT'S RULING IN *ABBASI*

In the original petition before this Court, the Court remanded the case back to the United States Fifth Circuit Court of Appeals with the instruction to reexamine the petitioner's *Bivens* claim in light of *Ziglar v. Abbasi*, ___ U.S. ___, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017) which was handed down two months prior to this case's decision. *Hernandez v. Mesa*, ___ U.S. ___, 137 S.Ct. 2003, 198 L.Ed.2d 625 (2017). Upon receiving this cause on remand, the Fifth Circuit followed the Court's instructions and shut the door on the

petitioner's claim. *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018).

Judge Edith Jones, writing for the majority of the court, opened the opinion by explaining that "when Congress passed what is now 42 U.S.C. § 1983 in 1871, [Congress] enacted no comparable law authorizing damage suits in federal court to remedy constitutional violations by federal government agents." *Id*. at 815. Judge Jones went on to write that beginning in 1971, the Supreme Court of the United States, in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) "broke new ground by allowing suits that made constitutional claims against the federal government and its entities to proceed under a judicially recognized cause of action." *Hernandez*, 885 F.3d at 815.

Circuit Judge Jones in *Hernandez*, begins by analyzing the Petitioners' first claim that the "unprovoked shooting of a civilian by a federal police officer is a prototypical excessive force claim, presents no 'new context' under *Bivens*." *Hernandez*, 885 F.3d at 816. Disagreeing, Judge Jones writes that "the fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative." *Id*. Judge Jones states that even though the detainees in *Abbasi* asserted claims for strip searches under both the Fourth and Fifth Amendments, the Supreme Court found a "new context" despite similarities between "the right and the mechanism of injury" involved in previous successful *Bivens* claims. *Id*.; *Abbasi*, 137 S.Ct. at 1859. As *Abbasi* points out, Judge Jones declares, "the *Malesko* case

rejected a 'new' *Bivens* claim under the Eighth Amendment, whereas an Eighth Amendment *Bivens* claim was held cognizable in *Carlson*; and *Chappell* rejected a *Bivens* employment discrimination claim in the military, although such a claim was allowed to proceed in *Davis v. Passman*." Judge Jones asserts that the proper inquiry is whether "the case is different in a meaningful way" from prior *Bivens* cases. *Abbasi*, 137 S.Ct. at 1859.

Citing Justice Kennedy's opinion in *Abbasi*, Judge Jones writes "[a]mong the non-exclusive examples of such meaningful differences, the Court points to the constitutional right at issue, the extent of judicial guidance as to how an officer should respond, and the risk of the judiciary's disruptive intrusion into the functioning of the federal government's co-equal branches." *Hernandez*, 885 F.3d at 816; *citing Abbasi*, 137 S.Ct. at 1860–1861.

Applying *Abbasi*, our case analysis is simple. As the Fifth Circuit found, the cross-border shooting at issue here must present a "new context" for a *Bivens* claim. *Id*. at 817. Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any "constitutional" right benefitting him raises novel and disputed issues. *Id*. And, there is no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil. *Id*.

To date, the Court refuses to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against American law enforcement agents' search of his premises in Mexico. *United States v. Verdugo–Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Language in *Verdugo*'s majority opinion strongly suggests that the Fourth Amendment does not apply to American officers' actions outside this country's borders. *Hernandez*, 885 F.3d at 817; *Verdugo–Urquidez*, 494 U.S. at 274–275, 110 S.Ct. at 1066. In *Hernandez*, the Court itself described the Petitioners' Fourth Amendment claims as raising "sensitive issues." *Id*.; *Hernandez v. Mesa*, ___ U.S. ___, 137 S.Ct. 2003, 2007, 198 L.Ed.2d 625 (2017).

Judge Jones went on to point out that the Petitioners could prevail on a substantive due process Fifth Amendment claim but only if the federal courts accept two novel theories. *Id.* The first theory requires the federal courts allow a *Bivens* action to proceed based upon a Fifth Amendment excessive force claim simply because *Verdugo* prevents the assertion of a comparable Fourth Amendment claim. But this first theory already is a non-starter because the courts have already recognized that all claims alleging excessive force by law enforcement officers during an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

The second theory, according to Judge Jones, would require the extension of the *Boumediene* decision, both beyond its explicit constitutional basis, Art. I, § 9, cl. 2, the Habeas Corpus Suspension Clause, and beyond the United States government's de facto control of the territory surrounding the Guantanamo Bay detention facility. *See Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). Moreover, Judge Jones wrote, "even nine years later, no federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional provisions or geographically to locales where the United States has neither *de facto nor de jure* control." *Hernandez*, 885 F.3d at 817. Unfortunately, the courts have already unanimously rejected such extensions. *Id.*

Now, assume for arguendo sake that the Petitioners' assertation, that this is a case in which one rogue law enforcement officer engaged in misconduct on the operational level, it poses no "new context" for *Bivens* purposes. On the contrary, their unprecedented claims embody not merely a "modest extension" – which *Abbasi* describes as a "new" *Bivens* context – but a virtual repudiation of the Court's holding. *Id*. at 818. *Abbasi* is grounded in the conclusion that *Bivens* claims are now a distinctly "disfavored" remedy and are subject to strict limitations arising from the constitutional imperative of the separation of powers. *Id*. According to the Fifth Circuit's opinion, the newness of this "new context" should alone require dismissal of the Petitioners' damage claims. *Id*.

In their brief, the Petitioners argue that since this case involves no "special factors" there is no reason the Court should hesitate before extending *Bivens*. *Id.* But no matter how remarkable this position may seem; the Petitioners must hold it so. *Id*. Unfortunately for the Petitioners, *Abbasi* clarifies the concept of "special factors" by explicitly focusing the inquiry on maintaining the separation of powers: "separation-of-powers principles are or should be central to the analysis." *Id*.; *Abbasi*, 137 S.Ct. at 1857. Underscoring the Court's steady retreat from the mid-20th century's expansion of *Bivens*, the *Abbasi* opinion instructs the lower courts to "concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S.Ct. at 1857–1858. In light of this guidance, the question for this Court is not whether this case is distinguishable from *Abbasi* itself, but whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id*. at 1858. If such reasons exist, "the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* Given *Abbasi*'s explanation of the "special factors", there is more than enough reason for this Court to stay its hand and deny the extraordinary remedy that the Petitioners seek. *Id*.

And, applying *Abbasi*'s separation-of-powers analysis, the examination reveals numerous "special factors" at issue in this case. *Hernandez*, 885 F.3d at 818.

To begin with, an extension of *Bivens* in this case threatens the political branches' supervision of national security. *Id.* Again Judge Jones writes, "[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Id*. at 819; *see Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). In *Abbasi*, the Court stressed that "[n]ational-security policy is the prerogative of the Congress and the President." *Abbasi*, 137 S.Ct. at 1861.

The Petitioners counter by highlighting the Court's warning that "national security" should not "become a talisman used to ward off inconvenient claims." *Id*. at 1862. But the Court emphasized that "[t]his danger of abuse" is really only relevant in "domestic cases." *Id.* Of course, the defining characteristic of this case is that it is not domestic. *Hernandez*, 885 F.3d at 819. As Judge Jones stated, "[n]ational-security concerns are hardly 'talismanic' whereas here border security is [the] issue." *Id*.; *see*, *e.g.*, *United States v. Delgado–Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States."). Thus, Judge Jones asserts, the threat of *Bivens* liability will undermine the Border Patrol's ability to perform duties essential to national security. *Hernandez*, 885 F.3d at 819. And since Congress expressly charges the Border Patrol with "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband, members of the Border Patrol like Agent Mesa may conduct activities analogous to domestic law enforcement; as this case

involved shots fired across the border within the scope of Agent Mesa's employment." *Id*.; 6 U.S.C. § 211(e)(3)(B).

Judge Jones also pointed out a similar context – airport security – where the Third Circuit recently denied a *Bivens* remedy for a TSA agent's alleged constitutional violations. *Vanderklok v. United States*, 868 F.3d 189, 207–209 (3d Cir. 2017). Relying on *Abbasi*, the Third Circuit's analysis is instructive in that to imply a *Bivens* action for damages against a TSA agent – TSA employees are tasked with assisting in a critical aspect of national security securing our nation's airports and air traffic – could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers. *Id*. In light of Supreme Court precedent, past and very recent, that is surely a special factor that gives us pause. *Id*. The same logic applies here. Implying a private right of action for damages in this transnational context increases the likelihood that Border Patrol agents will "hesitate in making split second decisions." *Id*. Considering the "systemwide" impact of this *Bivens* extension, there are "sound reasons to think Congress might doubt its efficacy." *Id*.; *Abbasi*, 137 S.Ct. at 1858.

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III. EXTRATERRITORIALITY IS A MISCHARACTERIZATION AND NOT A SPECIAL FACTOR

In our case, extraterritoriality is a mischaracterization; this is interference with a sovereign nation. The claim that the extraterritorial issues that surround the extension of *Bivens* in this instance do not invoke hesitation as a "special factor" is manifestly incorrect. Over time, this Court has held that caution needs to be exercised when dealing with different sovereigns. *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013). In *Kiobel*, this Court issued an opinion affirming the dismissal of a complaint filed under the Alien Tort Statute seeking damages against the Nigerian, Dutch and British

companies for alleged violations of the Law of Nations. *See Kiobel*, 569 U.S. at 108. In upholding the Second Circuit's decision dismissing the entire complaint filed, this Court cited the presumption against extraterritoriality and wrote "[t]he presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Id.* at 108-109 *citing EEOC v. Arabian American Oil Co*., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). Furthermore, the *Kiobel* decision tangentially addresses Congressional intent and extraterritoriality. *Id*. In the dicta following the invocation of the presumption against extraterritoriality, Chief Justice Roberts opined that "[i]t is typically applied to discern whether an Act of Congress regulating conduct applies abroad, . . . , but its underlying principles similarly constrain courts when considering causes of action that may be brought under the ATS. *Id.* at 109. Finally, Chief Justice Roberts provided an additional concern raised by extraterritorial extensions of domestic Courts in that he wrote "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in this context, where the question is not what Congress has done but what courts may do. *Id.* at 109.

This presumption, while usually invoked in situations dealing with statutory interpretation, should provide guidance for this Court in the *Bivens* context. In *Morrison v. Nat'l Australia Bank*, Justice Scalia wrote that "[t]his disregard of the presumption against extraterritoriality has occurred over many decades in

many courts of appeals and has produced a collection of tests for divining congressional intent that are complex in formulation and unpredictable in application." *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 2873, 177 L.Ed.2d 535 (2010). Justice Scalia goes on to hold that this presumption demonstrates "the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, this Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects. *Id.* at 247.

Other food for thought is that national security is endangered here due to the threat of over-deterrence; and the intentional omission of just this sort of remedy by Congress should be a harbinger to the Court about the willingness to create just such a cause of action.

IV. THE NINTH CIRCUIT IS INCORRECT IN ITS APPLICATION OF *ABBASI*

The entire Ninth Circuit *Swartz* opinion is based on the idea that absence of a remedy for the Petitioners is the basis for discounting the special factors presented by this case. *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018). This Court has made is abundantly clear that the absence of an alternative, statutory remedy for alleged violations of Constitutional rights, sometimes necessitates judicial action in awarding monetary compensation. *See* Br. For United States as Amicus Curiae on Petition for Writ of Certiorari at p. 19 *citing Schweiker v. Chilicky*, 487 U.S. 412, 412

(1988). As this Court has emphasized, the "special factor" considerations should be the critical consideration even in the absence of an alternative remedy for alleged wrongs. *See* Br. For United States as Amicus Curiae on Petition for Writ of Certiorari at p. 19 *citing Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In *Wilkie v. Robbins*, Justice Souter writing for the majority opinion opined that "paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct. 2588, 2598, 168 L.Ed.2d 389 (2007); *citing Bush v. Lucas*, 462 U.S. 367, at 378, 103 S.Ct. 2404 (2010).

Another flaw with the *Swartz* decision is the Ninth Circuit's inconsistency when dealing with *Bivens* issues. In *Vega v. United States*, 881 F.3d 1146 (9th Cir. 2018), the Ninth Circuit refused to extend *Bivens* in the context of a prisoner's First Amendment access to court or Fifth Amendment procedural due process claims arising out of a prison disciplinary process. Interestingly, the Ninth Circuit's rational was based on the idea that because neither the Supreme Court nor the Ninth Circuit have ever addressed these claims before, the circumstances of *Vega*'s case against private defendants plainly present a "new context" under *Abbasi*. *Id.* at 1153. And yet, the Ninth Circuit holds that cross-border shootings which have never been addressed at this level before our case and *Swartz* is not a "new context" issue.

And in recent cases since *Swartz*, courts are reluctant to expand *Bivens* and its progeny. In *Turkmen v.*

Ashcroft, No. 02-CV-2307 (DLI) (SMG), 2018 U.S. Dist. LEXIS 137492 (E.D.N.Y. 2018), the court found that arguments trying to assert that *Abbasi* does not restrict *Bivens* claims as narrowly as some courts claim; they even point to three post-*Abbasi* cases that permitted *Bivens* claims arising in new contexts to go forward. *See generally Cuevas v. United States*, 2018 U.S. Dist. LEXIS 44915, 2018 WL 1399910 (D. Colo. Mar. 19, 2018), appeal filed No. 18-1219 (10th Cir. May 18, 2018); *Leibelson v. Collins*, 2017 U.S. Dist. LEXIS 212026, 2017 WL 6614102 (S.D. W. Va. Dec. 27, 2017), appeal filed sub nom. *Leibelson v. Cook*, No. 18-1202 (4th Cir. Feb. 23, 2018); *Linlor v. Polson*, 263 F. Supp. 3d 613 (E.D. Va. 2017).

However, the aforementioned cases are distinguishable because they involve relatively low-level individual officers and do not implicate or touch upon overall policy. *See Cuevas*, 2018 U.S. Dist. LEXIS 44915, 2018 WL 1399910 (allowing an inmate's *Bivens* claim to proceed against BOP correctional officers who allegedly relayed sensitive information to other inmates with the intention that they retaliate violently against the plaintiff, after finding that "[t]he challenged actions are ordinary incidences of day-to-day prison operations, for which there is law clearly establishing that the practice is unconstitutional, such that there is no risk that this litigation will tread on complex matters of BOP policymaking"); *Leibelson*, 2017 U.S. Dist. LEXIS 212026, 2017 WL 6614102 (denying summary judgment and permitting a *Bivens* claim to proceed against a BOP captain for alleged indifference

to the ability of a transgender inmate plaintiff to eat in the prison cafeteria without risk of assault); *Linlor*, 263 F. Supp. 3d at 625 (allowing a *Bivens* claim to proceed against a TSA officer for allegedly using excessive force because the case "present[ed] a relatively simple, discrete question of whether a federal officer applied excessive force during a Fourth Amendment search").

There are, moreover, several lower courts decisions dismissing *Bivens* claims in the wake of *Abbasi*. In *Abdoulaye v. Cimaglia*, 2018 U.S. Dist. LEXIS 56167, 2018 WL 1890488 (S.D.N.Y. Mar. 30, 2018), the court declined to extend *Bivens* to a claim against a deputy U.S. Marshal who allegedly pushed a wheelchair-bound detainee into a wall, exacerbating the detainee's back injury. *Id*. at *1, *7. The court held that the availability of an alternative remedy under the FTCA, and the decision of Congress not to include a stand-alone remedy for damages in the PLRA, counseled hesitation and warranted dismissal of the plaintiff's *Bivens* claim. *See also Free v. Peikar*, 2018 U.S. Dist. LEXIS 25293, 2018 WL 905388 (E.D. Cal. Feb. 15, 2018) (declining to extend *Bivens* to an inmate's First Amendment retaliation). And on a painful note, in *Morgan v. Shivers*, 2018 U.S. Dist. LEXIS 14235, 2018 WL 618451 (S.D.N.Y. Jan. 29, 2018), the court declined to extend a *Bivens* to cover an inmate's claim of abusive conduct in connection with a search of his rectum because Congress failed to establish a private right of action even when legislating in the area of prisoners' rights and because "balanc[ing] the challenges prison administrators and officers face in maintaining

prison security against the expansion of [a] private right of action for damages . . . is more appropriately suited for Congress, not the Judiciary." These post-*Abbasi* cases suggest that courts are resistant to efforts to expand *Bivens*, even when considering claims that do not implicate high-level policy concerns. *Abdoulaye*, *supra.*

At best, the reasoning in *Swartz* is arguably *dicta*, though, because the majority of the court first concluded that the FTCA was not an available alternative remedy because it "specifically provides that the United States cannot be sued for claims 'arising in a foreign country.'" *Rodriguez v. Swartz*, *supra* (quoting 28 U.S.C. § 2680(k)).

V. THE PETITIONERS' CLAIM IS A NEW CONTEXT

Circuit Judge Jones in *Hernandez*, begins by analyzing the Petitioners' first claim that the "unprovoked shooting of a civilian by a federal police officer is a prototypical excessive force claim, presents no 'new context' under *Bivens*." *Hernandez*, 885 F.3d at 816. Disagreeing, Circuit Judge Jones, writes that "the fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative." *Id*. She states that even though the detainees in *Abbasi* asserted claims for strip searches under both the Fourth and Fifth Amendments, the Supreme Court found a "new context" despite similarities between "the right and the mechanism of injury" involved in previous successful

Bivens claims. *Id*.; *Abbasi*, 137 S.Ct. at 1859. As *Abbasi* points out, the *Malesko* case rejected a "new" *Bivens* claim under the Eighth Amendment, whereas an Eighth Amendment *Bivens* claim was held cognizable in *Carlson*; and *Chappell* rejected a *Bivens* employment discrimination claim in the military, although such a claim was allowed to proceed in *Davis v. Passman*. Judge Jones asserts that the proper inquiry is whether "the case is different in a meaningful way" from prior *Bivens* cases. *Abbasi*, 137 S.Ct. at 1859.

Citing Justice Kennedy's opinion in *Abbasi*, "[a]mong the non-exclusive examples of such meaningful differences," Judge Jones writes, "the Court points to the constitutional right at issue, the extent of judicial guidance as to how an officer should respond, and the risk of the judiciary's disruptive intrusion into the functioning of the federal government's co-equal branches." *Hernandez*, 885 F.3d at 816; *citing Abbasi*, 137 S.Ct. at 1860–1861.

Pursuant to *Abbasi*, our case analysis is simple. As the Fifth Circuit found, the cross-border shooting at issue here must present a "new context" for a *Bivens* claim. *Id*. at 817. Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any "constitutional" right benefitting him raises novel and disputed issues. *Id*. There has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil. *Id*.

To date, the Supreme Court has refused to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against American law enforcement agents' search of his premises in Mexico. *United States v. Verdugo–Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Language in *Verdugo*'s majority opinion strongly suggests that the Fourth Amendment does not apply to American officers' actions outside this country's borders. *Hernandez*, 885 F.3d at 817; *see also Verdugo–Urquidez*, 494 U.S. at 274–275, 110 S.Ct. at 1066. In *Hernandez*, the Court itself described the Petitioners' Fourth Amendment claims as raising "sensitive issues." *Id*.; *Hernandez v. Mesa*, ___ U.S. ___, 137 S.Ct. 2003, 2007, 198 L.Ed.2d 625 (2017).

In *Abbasi*, the Court stressed that "[n]ational-security policy is the prerogative of the Congress and the President." *Abbasi*, 137 S.Ct. at 1861. The Petitioners note the Court's warning that "national security" should not "become a talisman used to ward off inconvenient claims." *Id*. at 1862. But the Court stated that "[t]his danger of abuse" is particularly relevant in "domestic cases." *See id.*

The threat of *Bivens* liability will undermine the Border Patrol's ability to perform duties essential to national security. *Hernandez*, 885 F.3d at 819. Congress has expressly charged the Border Patrol with "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband." *Id*.; 6 U.S.C. § 211(e)(3)(B). Although members of the Border Patrol like Agent Mesa may conduct activities

analogous to domestic law enforcement, this case involved shots fired across the border within the scope of Agent Mesa's employment. *Id.*

VI. CANNOT FASHION AN "EL PASO CULVERT" DECISION ON THIS ISSUE

During the first oral argument, Justice Breyer inquired of counsel "why can't this Court fashion a decision that deals specifically with the "El Paso Culvert?" Justice Breyer, *Hernandez v. Mesa*, 15-118, Oral Argument, February 21, 2017. The idea was that because the government maintains the concrete culvert running down the middle of the national borders, why couldn't the Court fashion a ruling that dealt specifically with this concrete culvert. Unfortunately, such a narrow decision wouldn't work. First, such a narrow decision would automatically limit any foreign nationals claims that happen outside of the concrete culvert. Those shot in Fabens, TX, a desert area with no concrete culvert, or shot in Mexico standing 2 feet from the concrete culvert would not be protected. Even the petitioners' claim in *Swartz* would be precluded from *Bivens* protection because the teenage Mexican citizen who was shot and killed was walking down a street in Mexico while the U.S. Border Patrol agent stood on American soil. *Rodriguez v. Swartz*, 899 F.3d at 726. The Mexican street is not the culvert and actually goes to the original question of just how far does U.S. protection apply – as far as the bullet flies? *See Hernandez v. United States*, 757 F.3d 249, 281 (5th Cir. 2014),

where Judge DeMoss argues in his dissent that even if the United States exerts and has exerted powerful influence over northern Mexico and justifies application of constitutional protection in a strip along the border, how wide is that strip? *Id*. Judge DeMoss asks, are constitutional protections applicable in all of Ciudad Juarez, or the entire state of Chihuahua? *Id*. Ultimately, Judge DeMoss finds the narrow approach "devolves into a line drawing game which is entirely unnecessary because there is a border between the United States and Mexico." *Id.*

Secondly, narrow decisions are never narrow. As Justice Ginsburg wrote in her dissent in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 134 S.Ct. 2751, L.Ed.2d 675 (2014), "the Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects." "Although the Court attempts to cabin its language to closely held corporations," she penned, "its logic extends to corporations of any size, public or private." *Id.* at 756–757. Justice Ginsberg goes on to state that "[l]ittle doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith." *Id.*

One need only look at the "narrow" decision in *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009), where the Court upheld a challenge to an application of Section 5 of the Voting Rights Act. Chief Justice Roberts's

decision was "narrow," and it even drew the votes of the court's more liberal members. *Id*. Four years later, citing the Northwest Austin precedent, the Court used the narrow decision to set aside both Section 4 and Section 5 of the Voting Rights Act, as well as much of its effectiveness. *Shelby Cty. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013).

CONCLUSION

The writ for certiorari should be denied.

Respectfully submitted,

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September 23, 2019