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

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INTRODUCTION

It is no secret that, over the past four decades, this Court has shown increasing skepticism toward the recognition of judge-made damages remedies for constitutional violations by federal officers under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). As the government notes in its *amicus* brief, U.S. Br. 11, since *Carlson* v. *Green*, 446 U.S. 14 (1980), nine merits rulings have declined to recognize a damages remedy under *Bivens*—and none have gone the other way. *See Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017); *Minneci* v. *Pollard*, 565 U.S. 118 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *see also Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (rejecting supervisory liability under *Bivens*).

But what the government fails to mention is that *none* of those nine decisions involved a "classic *Bivens*-style tort, in which a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines." *Sutton* v. *United States*, 819 F.2d 1289, 1293 (5th Cir. 1987). This case does. And unlike other contexts into which this Court has been wary of extending *Bivens*, suits challenging *ultra vires* actions by federal law enforcement officers have remained commonplace—and have produced judgments against those officers far more often than is generally understood. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 835–45 (2009).

This dichotomy is not an accident. "[I]ndividual instances of . . . law enforcement overreach . . . are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. And although such damages actions could once have been pursued under state law, the Westfall Act preempts *all* scope-of-employment state law tort claims against federal officers—and thereby extinguishes claims for which there is no corresponding waiver of sovereign immunity under the Federal Tort Claims Act (FTCA). Without a *Bivens* remedy, federal law enforcement officers in such cases (including this one) would face no meaningful prospect of civil liability even when they violate clearly established constitutional rights.

That is why the decision below represents such a sharp break from the rich tradition described in Petitioners' opening brief, in which the federal courts routinely fashioned judge-made damages remedies when necessary to hold individual federal officers to account. Pet. Br. 10–20. Neither Respondent nor the government disputes this history. Respondent ignores it, whereas the government dismisses it as "beside the point." U.S. Br. 11. It isn't. This tradition helps to explain why this case doesn't arise in a "new context" or present "special factors counseling hesitation." It underscores why the government is wrong that "petitioners exaggerate the lack of alternative remedies." *Id.* at 30. It demonstrates why declining to recognize a *Bivens* remedy here would raise a serious constitutional question about the Westfall Act. And, most importantly, it puts into perspective the grave stakes of shutting the courthouse doors altogether to plaintiffs plausibly alleging that federal law enforcement officers have violated their clearly established constitutional rights.

I. NO "SPECIAL FACTORS" COUNSEL AGAINST RECOGNITION OF A *BIVENS* REMEDY HERE

Because Petitioners seek damages for excessive force by an individual federal law enforcement officer, this case does not arise in a "new context" for purposes of *Bivens*. Pet. Br. 21–26. The government asserts otherwise, almost entirely because of the different *location* at issue in this case. U.S. Br. 15. That argument finds no support in *Abbasi*, which sets out "[t]he proper test for determining whether a case presents a new *Bivens* context." 137 S. Ct. at 1859.

Even in a new context, though, a *Bivens* remedy is still appropriate if no special factors counsel hesitation. Although the government invokes three special factors ("foreign affairs and national security"; congressional inaction; and extraterritoriality, U.S. Br. 15–29), none of them justify "hesitation" here, because Petitioners plausibly allege that an individual law enforcement officer acting *ultra vires* used excessive force in the discharge of his regular law enforcement duties.

A. Petitioners' Claims Do Not Intrude Into "Foreign Affairs and National Security"

Where "foreign affairs and national security" are invoked as a special factor, both this Court and the lower courts have focused their analyses on structural features of the underlying claims, including the function of the officers being sued and whether the claims seek to challenge governmental policies or merely *ultra vires* conduct by individual line officers. The former class of claims have usually implicated this special factor, whereas the latter have not.

For instance, it was fatal to most of the plaintiffs' claims in *Abbasi* that "[t]hey challenge[d] . . . major

elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security." 137 S. Ct. at 1861; *see Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam) ("The danger of obstructing U.S. national security *policy* is [a special] factor." (emphasis added)).

To similar effect is *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985), in which the court of appeals refused to recognize a *Bivens* claim against nine high-level government officials (including the President and four other Cabinet officers) arising out of the Iran-Contra affair. As then-Judge Scalia explained, "[t]he special needs of foreign affairs must stay our hand in the creation of damage remedies against *military and foreign policy officials* for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Id.* at 208–09 (emphasis added).

The government suggests that the reason why this Court treats "foreign policy and national security" as a "special factor" is because they are "area[s] that the Constitution commits to the political branches." U.S. Br. 17. But this Court has repeatedly stressed the significance of a meaningful judicial role even (if not especially) in foreign affairs and national security cases. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189 (2012); *Boumediene* v. *Bush*, 553 U.S. 723 (2008); *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion); *see also El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 856 n.3 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) ("[F]rom the time of John Marshall to the present, the Court has decided many sensitive and

controversial cases that had enormous national security or foreign policy ramifications.").

Instead, the skepticism toward fashioning judge-made damages remedies in these cases reflects a far more nuanced understanding—that, in light of the separation-of-powers implications of judge-made remedies, "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74). Insofar as the "core" purpose of *Bivens* is to deter individual officers, *Malesko*, 534 U.S. at 71, that purpose is hardly advanced by a successful judgment against individual officers merely carrying out their superiors' directives—especially where alternative mechanisms for redress will often be available. *See, e.g.*, *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc) ("Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them."); *see also Iqbal*, 556 U.S. at 675–76 (rejecting supervisory liability in *Bivens* cases).

In contrast, when plaintiffs challenge nothing more than the *ultra vires* actions of individual law enforcement officers, the separation-of-powers concerns that otherwise animate skepticism of judge-made remedies are necessarily at their nadir. After all, there is hardly "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), when an officer acts in violation of his department's policies—such as the limitation on lethal force by Customs and Border Protection (CBP) officers set out in 8 C.F.R. § 287.8(a)(2)(ii).

As was true in *Zivotofsky* (a case challenging the constitutionality of a federal statute), in considering a damages claim against an individual officer acting *ultra vires*, "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be." 566 U.S. at 196; *see also Rodriguez* v. *Swartz*, 899 F.3d 719, 745 (9th Cir. 2018) ("[N]o one suggests that national security involves shooting people who are just walking down a street in Mexico.").

Not only do such claims fail to raise the separation-of-powers concerns that have previously been found to counsel hesitation, but they present an especially compelling affirmative case for judge-made damages remedies because of both the importance of deterring unconstitutional conduct by individual officers and the absence of meaningful alternatives for doing so. That is why it was "of central importance" in *Abbasi* that the plaintiffs "d[id] *not* challenge individual instances of . . . law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." 137 S. Ct. at 1862 (emphasis added). Where that *is* what plaintiffs challenge, the case—and need—for a judge-made damages remedy is far clearer.

In its *amicus* brief, the government tries to elide the distinction between challenges to government policies and claims against individual officers acting *ultra vires*, arguing in successive paragraphs at one point that the specific facts of this case highlight the special factors counseling hesitation and that those facts are entirely irrelevant. U.S. Br. 19–20. But the most telling feature of the government's brief is what it *doesn't* say. The government fails to identify any

specific, concrete foreign policy (or national security policy) that Petitioners' claims, if successful, would call into question.

The closest the government comes is a citation to the unsigned statement issued by the Justice Department's Office of Public Affairs reporting the results of the government's investigation in this case. *See id.* at 19. It should go without saying that an unsigned Justice Department press release is not a statement of U.S. foreign policy. *See Leal Garcia* v. *Texas*, 564 U.S. 940, 942 (2011) (per curiam) (refusing to rely on "free-ranging assertions of foreign policy consequences" by the Executive Branch that are "unaccompanied by a persuasive legal claim"). But even if it could be, the cited release takes no position (for a judgment in Petitioners' favor to disturb) as to Respondent's *civil* liability.[1]

Otherwise, all that the government offers are hypotheticals that have little to do with this case. *See, e.g.*, U.S. Br. at 19 ("[T]he involvement of the Judicial Branch *may* interfere with the Executive Branch's negotiations or representations." (emphasis added)); *id.* at 21 ("Imposing damages liability on individual agents executing those important national-security functions at the border '*could* undermine the Border Patrol's ability to perform duties essential to national security.'" (quoting Pet. App. 13) (emphasis added)). These hypotheticals prove little besides the breadth of

1. Nor would a potential civil judgment in favor of Petitioners call into question the Justice Department's refusal to bring criminal charges against Respondent. It "has long been settled" that even an "acquittal on a criminal charge is not a bar to a civil action . . . arising out of the same facts on which the criminal proceeding was based." *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938).

the government's position—that the "foreign relations and national security" special factor would foreclose any *Bivens* remedy against any CBP officer in any case; and/or in any case in which the plaintiff is a non-citizen, regardless of where the claim arises or against whom. This is the exact open-ended invocation of special factors, as "a talisman used to ward off inconvenient claims," 137 S. Ct. at 1862, that this Court warned against in *Abbasi*.

Ultimately, the government is correct that "the key question is whether special factors counsel against extending *Bivens* to the relevant *class* of cases." U.S. Br. 22. The problem is the high level of generality at which the government pitches the "relevant class"—to include all cases that "would implicate the federal government's oversight of foreign policy and could interfere with its officials' performance of national-security functions." *Id.* at 1. That vague and unspecific approach would swallow *Bivens* whole—and is not grounded in any of this Court's prior special factors analyses. Because Petitioners' claims, if successful, would not *actually* interfere with any foreign policy or national security policy of the United States, that special factor is not implicated here.

B. The Deliberate "Congressional Inaction" *Abbasi* Highlighted Is Absent Here

The government's argument that congressional inaction is its own "special factor" presents something of a moving target. In some places, the government's position appears to be that Congress has specifically rejected the availability of damages remedies to non-citizens injured outside the territorial United States. In other places, the government's argument is that Congress has shown insufficient support for such

remedies. Neither argument correctly applies *Abbasi*. And in any event, neither argument is a fair reading of the relevant statutes.

As *Abbasi* makes clear, congressional inaction is a special factor when, and only when, Congress's silence is "telling"—because congressional interest in the *specific* claims at issue was "frequent and intense," and yet Congress did not specifically provide a damages remedy. *See* 137 S. Ct. at 1862. Indeed, in *Abbasi*, "some of that interest ha[d] been directed to the conditions of confinement at issue" in that very case, including the Justice Department Inspector General's 300-page report on those conditions that was prepared "at Congress's behest." *Id.* Otherwise, congressional inaction would always be a special factor, since Congress has never "provide[d] a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government." *Id.* at 1854.

Here, Congress has shown no such "frequent and intense" interest in either the specific subject matter of cross-border shootings or the general topic of damages suits by non-citizens arising outside the territorial United States. And the examples the government marshals only prove the point.

For instance, the government invokes 42 U.S.C. § 1983 and its focus on claims by "citizen[s] of the United States or other person[s] within the jurisdiction thereof." U.S. Br. 22–23. But as Judge Prado pointed out below, because Congress was focused on newly freed slaves (and their defenders) "it is just as likely that by specifying 'other persons within the jurisdiction' Congress intended to extend a § 1983 remedy beyond U.S. citizenship, rather than

comment[] on its availability for wrongful conduct by state actors with extraterritorial effects." Pet. App. 37 (Prado, J., dissenting). Indeed, the government offers no evidence that Congress in 1871 was considering, one way or the other, the virtually empty set of cases in which officers acting under the color of *state* law cause extraterritorial injuries to anyone.

The same can be said for the government's invocation of the Torture Victim Protection Act of 1991 (TVPA), which creates a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. § 1350 note 2. From this language, the government derives the conclusion that "'Congress has deliberately decided not to fashion a cause of action' for aliens injured abroad by federal officials." U.S. Br. 24 (quoting *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring)).

But as its text makes clear, the TVPA provides a remedy against only those acting under color of foreign law. It does not create liability for *any* U.S. government officer—regardless of the plaintiff's nationality or whether the claim arose on U.S. soil. *See, e.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2012) (Kennedy, J., concurring). It therefore provides no support for the government's claim that Congress specifically intended to foreclose extraterritorial suits by non-citizens.

Neither does the FTCA, and its exception for torts arising in a foreign country, 28 U.S.C. § 2680(k). This Court has already held that the availability of an FTCA remedy does not bear upon the availability of a

Bivens remedy. *See Carlson*, 446 U.S. at 18–23. But even if it did, the government's only evidence that Congress in codifying the foreign-country exception was thinking specifically about claims by *non*-citizens is proposed language that Congress expressly rejected. U.S. Br. at 23–24. Under the plain language of the FTCA, Petitioners' claim would be barred even if Hernández was a U.S. citizen.

Moreover, as this Court has explained, the exception for claims arising in foreign countries "codified Congress's 'unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.'" *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting *United States* v. *Spelar*, 338 U.S. 217, 221 (1949)). That concern makes perfect sense in the context of the FTCA, which incorporates the law of the place in which the tort was committed. *See* 28 U.S.C. § 1346(b)(1). It is not implicated where, as here, the liability arises under the Constitution.

All of this goes to why the government's examples of "frequent and intense" interest by Congress are unavailing. But the government's brief also ignores several statutes that militate in *favor* of recognizing a *Bivens* remedy here. For instance, the government's brief has nothing to say about the 1974 amendment to the FTCA, in which Congress not only expanded the liability of law enforcement officers for intentional torts, but also expressly rejected a proposal to make such liability exclusive of *Bivens*. *See* Pet. Br. 34 (citing Jack Boger, Mark Gitenstein, & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 510–17 (1976)). The 1974 amendment thereby reflects Congress's *endorsement* of *Bivens*

claims in the specific context of intentional torts by individual law enforcement officers.

The Westfall Act likewise reflects congressional endorsement of at least some *Bivens* claims. Even as it converts all other scope-of-employment tort claims against federal officers into FTCA claims against the United States, it expressly preserves "a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

The government's brief also ignores statutes demonstrating Congress's awareness that damages actions *can* be available to foreign nationals injured abroad by federal officers. In section 1004(a) of the Detainee Treatment Act (DTA), Pub. L. No. 109-148, 119 Stat. 2680, 2740 (2005), for instance, Congress conferred immunity on federal officers from civil (and criminal) liability for "specific operational practices" arising from interrogations of noncitizen terrorism suspects—interrogations that took place only outside U.S. territory. Civil immunity would be unnecessary if no damages claims could even be brought.

The better reading of these statutes is that Congress has never shown the kind of deliberate refusal to provide a remedy for Petitioners' claims that this Court found "telling" in *Abbasi*. If anything, Congress has shown more support for *Bivens* claims against individual law enforcement officers than the government acknowledges, and an awareness of contexts in which non-citizens can seek damages against federal officers for claims arising abroad. In these circumstances, Congress's "inaction" is not a special factor counseling hesitation.

C. Even if "Extraterritoriality" Could Be a Special Factor, It Is Not in This Case

Finally, the government's brief only half-heartedly defends the Fifth Circuit's conclusion that "extraterritoriality" is its own special factor. U.S. Br. 26–29. Even if the extraterritorial nature of Petitioners' claims, by itself, could be a reason not to recognize a *Bivens* remedy, it isn't here.

The claim that extraterritoriality is a special factor rests on analogizing *Bivens* remedies to causes of action under federal statutes—where this Court has recognized a presumption against extraterritorial application. *See, e.g.*, *Morrison* v. *Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010). As noted in Petitioners' opening brief, though, neither of the justifications this Court has provided for the presumption applies to *Bivens* remedies. Pet. Br. 31–32.

Because the Constitution constrains only American government officers, there is no danger that recognition of a *Bivens* remedy would lead to the application of U.S. law to foreign conduct in foreign countries. *See RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). And because *Bivens* remedies enforce *constitutional* rights, there is no risk that courts in fashioning such remedies might misread Congress's intent as to the territorial scope of a statute. *See id.* Thus, when this Court has considered whether specific constitutional provisions apply outside the territorial United States, no similar presumption has applied. *See, e.g.*, *Reid* v. *Covert*, 354 U.S. 1, 5–14 (1957) (plurality opinion).

In its *amicus* brief, the government does not dispute that these are the two justifications this Court has provided for the presumption. Instead, it points to

Kiobel for the proposition that the presumption also applies to judge-made remedies, such as in cases arising under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See* U.S. Br. 27. There too, however, this Court's concern was the specter of applying U.S. law to the actions of foreign parties (like the defendants in *Kiobel*) on foreign soil without clear guidance from Congress. *See Kiobel*, 569 U.S. at 116. That concern simply does not arise from judicial recognition of remedies for constitutional violations—remedies that, by definition, are available only against American defendants. *Cf. Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (foreclosing ATS claims against foreign, but not domestic, corporations).

In any event, even *Kiobel* recognized that plaintiffs could overcome the presumption by showing that their claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." 569 U.S. at 124–25. Here, unlike in *Kiobel*, the defendant was standing on U.S. soil at the time of his allegedly unconstitutional conduct. The government does not dispute that Petitioners' claims "touch and concern the territory of the United States"; its principal argument in response is that the "touch-and-concern" test should not even *apply*, because "[t]hat sort of inquiry is incompatible" with how this Court should analyze the availability of a *Bivens* remedy. U.S. Br. 29.

All that such an "incompatibility" proves, though, is the awkwardness of attempting to apply a statutory presumption to the scope of constitutional claims. If, as Petitioners plausibly allege, an individual federal law enforcement officer violates clearly established constitutional rights, and if neither "foreign relations and national security" nor congressional inaction are

special factors counseling hesitation, then the mere fact that the claim arises on foreign soil does not independently militate against a judge-made remedy.

II. THE ABSENCE OF ANY ALTERNATIVE REMEDY WEIGHS HEAVILY IN FAVOR OF RECOGNIZING A *BIVENS* CLAIM

Unlike in *Abbasi*, where it was "of central importance" to this Court's analysis that the plaintiffs had alternative remedies available to them, no such remedies are available here. The government's *amicus* brief insists that "petitioners overstate the lack of other remedies" for the constitutional violations at the heart of this case. U.S. Br. 9. At most, though, the government's proffered alternatives are available in cases bearing little resemblance to this one. What matters here, and what the government does not seriously contest, is that, for Petitioners, it's *Bivens* or nothing. As *Abbasi* makes clear, where no special factors counsel hesitation, the absence of alternative remedies underscores both the propriety of, and the imperative for, a *Bivens* remedy.

First, the government suggests that Petitioners could have avoided the Westfall Act's preemption of their state-law tort claim by successfully challenging the Attorney General's certification that Respondent's allegedly tortious conduct occurred within the scope of his employment. U.S. Br. 30. But the government knows that such a challenge would have been futile, since "[t]he scope-of-employment test often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort." *Harbury* v. *Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008).

Because "[m]any states and D.C. apply the scope-of-employment test very expansively," *id.*, and

because the Westfall Act incorporates the relevant state's standard, it will be the rare case in which a federal officer acts sufficiently under color of federal law that a claim arises under the Constitution while also acting outside the scope of his federal employment. Tellingly, the government nowhere suggests that this is such a rare case—or provides even a hypothetical example of one.[2]

The government also holds out the specter of executive redress through various claims processes. Again, however, none of the government's examples have any applicability to Petitioners' allegations here. The Foreign Claims Act, for example, authorizes discretionary remedies solely for damages "caused by, or . . . otherwise incident to noncombat activities of, *the armed forces*." 10 U.S.C. § 2734(a)(3) (emphasis added). The International Agreement Claims Act, 10 U.S.C. § 2734a, is likewise limited. And the State Department's authority under 22 U.S.C. § 2669(b) to settle tort claims brought by foreign governments, *see* U.S. Br. 25 n.6, is not only entirely discretionary, but also limited to payment of "a meritorious claim *against the United States*." But Petitioners do not have a claim against the United States; their claim is against Respondent.

The government's principal argument, though, is not that Petitioners have other legal remedies available to *them*; it is that there is no need for such

2. Not only does the government offer no suggestion in its *amicus* brief that the scope-of-employment certification was improper in Respondent's case, but it made no such argument in the district court—when it was a defendant to Petitioners' FTCA claim, and that argument would have provided an independent basis on which to seek dismissal.

remedies because other mechanisms exist to deter this kind of misconduct by CBP officers. *See id.* at 31–32. This argument suffers from two separate, but equally significant, shortcomings.

First, this Court has never suggested that the efficacy of internal accountability mechanisms, including the hypothetical possibility of criminal prosecution, is relevant to the availability of *civil* damages—especially in the context of enforcing the Constitution. Many (if not most) constitutional violations are not also violations of criminal statutes. And, more generally, remedies for constitutional violations "vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring in the judgment). As Judge Kleinfeld concluded in rejecting this argument in *Rodriguez*, "[a] criminal charge is the government's remedy, not the victim's." 899 F.3d at 742.

Second, even if discretionary internal disciplinary mechanisms *could* be sufficient to deter misconduct by individual officers, this Court has before it an *amicus* brief by former CBP officials suggesting that those mechanisms have been inadequate to deter individual wrongdoing by CBP officers. *See* Brief of Former CBP Officials at 14–28. These same officials filed an *amicus* brief raising similar concerns both in *Hernández I* and at the certiorari stage in this case, and they filed their *amicus* brief on the merits here before either Respondent or the government. Nevertheless, neither Respondent nor the government offers any response to their argument—and neither disputes the specific concerns that these former officials have raised.

Instead, the government rests on the theoretical availability of internal discipline and the fact that CBP has "revised its use-of-force policy, redesigned its training curriculum, and instituted a new procedure for reviewing incidents involving the use of force." U.S. Br. 31. But the existence of these mechanisms, standing alone, does nothing whatsoever to support the point for which the government invokes them—that individual CBP officers today *are* adequately deterred from violating the Constitution. The Former CBP Officials' brief, the pending petition in another case with allegations disturbingly similar to those at issue here, *see Swartz* v. *Rodriguez*, No. 18-309, and widespread media reports documenting repeated uses of excessive force by CBP officers, all tell a far more troubling story—one in which "the core deterrence purpose of *Bivens*," *Malesko*, 534 U.S. at 71, is sorely needed.

III. SERIOUS CONSTITUTIONAL AND PRACTICAL PROBLEMS WOULD RESULT FROM REFUSING TO RECOGNIZE A REMEDY HERE

Before 1988, *Bivens*'s "core deterrence purpose" could potentially have also been vindicated by state tort law. As noted in Petitioners' opening brief, "Texas state law explicitly provides that, under specified conditions, an individual may bring an action for personal injury damages in Texas although the wrongful act causing the injury took place in a foreign country." *Delgado* v. *Zaragoza*, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016) (citing TEX. CIV. PRAC. & REM. CODE. ANN. § 71.031(a) (Vernon 2008)); *see* Pet. Br. 19.

Such a remedy is unavailable today, however, because of the Westfall Act. *See* 28 U.S.C. § 2679(b)(1). And if this Court declines to recognize a *Bivens*

remedy here, the Westfall Act would have the effect of denying Petitioners "any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). Such preclusion would raise a "serious constitutional question," *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975), as to whether the Act thereby violates the Due Process Clause of the Fifth Amendment—especially in those cases, such as this one, in which the Westfall Act extinguishes common law remedies through which constitutional claims were historically asserted.

In its *amicus* brief, the government contends that "the Westfall Act does not purport to foreclose judicial review of constitutional claims." U.S. Br. 32. But that is the wrong answer to the wrong question. The due process question does not turn on whether the Westfall Act *purports* to foreclose all judicial review of constitutional claims; it turns on whether the Westfall Act *actually* does so.

And on that point, neither Respondent nor the government disputes that Petitioners would have a Texas tort remedy but for the Westfall Act. Neither disputes that the Westfall Act preempts that remedy. Neither disputes that, as explained in Petitioners' opening brief, courts have consistently read the Westfall Act to also preempt state constitutional tort claims. And, as explained above, neither meaningfully disputes that, absent a *Bivens* remedy, Petitioners will be left with nothing. Thus, if the decision below is affirmed, that would necessarily raise a serious constitutional question about the Westfall Act insofar

as it eliminates the only remaining remedy for a constitutional violation.[3]

As for whether the Westfall Act would violate the Due Process Clause to the extent it *does* "foreclose judicial review of constitutional claims," *id.*, the government's principal argument is a non sequitur. The government correctly notes that "traditional immunity doctrines illustrate that the Constitution does not guarantee a remedy when a governmental official violates an individual's constitutional rights, as those doctrines preclude recovery for certain constitutional violations." *Id.* at 33. But as the opening brief made clear, Petitioners do not suggest that the Constitution requires a remedy for *all* constitutional violations. Pet. Br. 40–42.

Instead, Petitioners' argument is limited to claims in the same posture as this case, in which they have plausibly alleged that Respondent, an individual federal law enforcement officer, violated clearly established constitutional rights for which they have no other legal remedy. In these specific circumstances, "traditional immunity doctrines" are irrelevant, because they would be inapplicable if Petitioners' allegations are proven. And in these circumstances, this Court has *never* upheld a statute that foreclosed access to every judicial forum—especially one that did so by extinguishing longstanding common law

3. In *Boumediene*, for example, the Military Commissions Act was not *solely* responsible for leaving Guantánamo detainees with no forum in which to pursue their habeas petitions. This Court's jurisprudence had previously foreclosed the prospect of bringing such habeas claims in state court or as an original matter in this Court. But the Act nevertheless triggered the same constitutional concern insofar as it eliminated the one remedy that would otherwise remain. So too, here.

remedies. That is why a decision not to recognize a *Bivens* remedy here would provoke a "serious constitutional question" about the Westfall Act—a question that can (and therefore should) be avoided by reversing the decision below.

* * *

Having downplayed the serious constitutional implications of the ruling it seeks, the government closes with the novel suggestion that *recognizing* a *Bivens* remedy here would be a "constitutionally dubious step." *Id*. at 34. Such an argument is belied by the deep historical tradition that the government dismisses as being "beside the point." *Id*. at 11. After all, *Bivens* was much more than a product of the "*ancien regime*" of the 1950s and 1960s in which this Court assumed a wide range of lawmaking powers. *See Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). As Petitioners have demonstrated, its origins trace all the way back to the Founding—and the idea that state and federal courts alike have an obligation to fashion judge-made remedies where necessary to hold individual federal officers accountable. Pet. Br. 10–20.

That tradition did not die with this Court's decision in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *see Jesner*, 138 S. Ct. at 1413 n.1 (Gorsuch, J., concurring in part and concurring in the judgment). On the same day that this Court rejected the existence of "general" federal common law, it reiterated the propriety of federal judicial lawmaking in narrower—and more substantively appropriate—circumstances. *See Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *see also Collins* v. *Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring) (noting the contexts in which this Court

has continued to fashion federal common law after *Erie*). *See generally* Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 421–22 (1964). And this Court also continued, after *Erie*, to stress the central role *state* tort law played in holding federal officers accountable. *E.g.*, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963).

Thus, *Erie* called into question neither the general understanding that judge-made remedies are central to holding individual federal officers accountable, nor the specific possibility that judge-made federal remedies would be appropriate in some cases. Properly understood, *Bivens* was a variation on these themes, with the Court opting for a uniform federal damages remedy over 50 disparate state remedies. No one suggested in *Bivens* what Respondent and the government argue here: that victims of violations of clearly established constitutional rights by individual law enforcement officers should ever be left with nothing. Pet. Br. 17–19.

And even as this Court has shown increasing hostility toward judge-made remedies, it has continued to identify circumstances in which they are appropriate, if not affirmatively necessary. As Justice Scalia explained four years ago with regard to prospective relief, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). *Abbasi* likewise reiterated the "powerful reasons to retain" *Bivens* in suits challenging *ultra vires* actions by

individual federal law enforcement officers. 137 S. Ct. at 1857.

To nevertheless decline to recognize a *Bivens* remedy here would repudiate this tradition. It would leave Petitioners here with nothing, thereby raising a serious question about the constitutionality of the Westfall Act. And it would close the courthouse doors to an ever-growing array of violations of clearly established constitutional rights—leaving it up to the Executive Branch to enforce the Constitution against itself. *See Bivens*, 403 U.S. at 404 (Harlan, J., concurring in the judgment). Against that backdrop, the only "constitutionally dubious step" this Court could take would be to affirm the judgment below.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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