No. 17-1678

IN THE
Supreme Court of the United States

JESUS C. HERNÁNDEZ, *et al.*,
Petitioners,
v.

JESUS MESA, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE PROFESSOR GREGORY C. SISK IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE LACK OF ALTERNATIVE REMEDIES IS AN IMPORTANT, STANDALONE CONSIDERATION IN THE OVERALL *BIVENS* ANALYSIS 5

A. This Court Has Consistently Recognized The Central Importance Of The Lack Of Alternative Remedies In The *Bivens* Analysis 5

B. There Is A Need For Further Guidance On How To Weigh The Total Lack Of Alternative Remedies In The *Bivens* Analysis 8

C. The Fifth Circuit's Decision Is In Tension With This Court's Prior Decisions—And Exemplifies The Need For Clarity 10

II. THIS CASE IS AN EXCELLENT VEHICLE FOR CLARIFYING THE SIGNIFICANCE OF A LACK OF ALTERNATIVE REMEDIES 12

A. FTCA Remedies Are Unavailable Here 13

B. State Tort Remedies Are Also Unavailable Here By Operation Of The Westfall Act 17

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Agredano v. *United States Customs Service*, 223 F. App'x 558 (9th Cir. 2007) 16

Alvarez-Machain v. *United States*, 331 F.3d 604 (9th Cir. 2003) 14

Barnes v. *United States*, 776 F.3d 1134 (10th Cir. 2015) 2

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 5, 6, 12

Bodin v. *Vagshenian*, 462 F.3d 481 (5th Cir. 2006) 20

Buck v. *Blum*, 130 S.W.3d 285 (Tex. App. 2004) 20

Bush v. *Lucas*, 462 U.S. 367 (1983) 9

Carlson v. *Green*, 446 U.S. 14 (1980) 6, 19

Chappell v. *Wallace*, 462 U.S. 296 (1983) 10

Collins v. *United States*, 564 F.3d 833 (7th Cir. 2009) 2

Correctional Services Corp. v. *Malesk*o, 534 U.S. 61 (2001) 8, 9, 12

Davis v. *Passman*, 442 U.S. 228 (1979) 6

Dolan v. *USPS*, 546 U.S. 481 (2006) 13

FDIC v. *Meyer*, 510 U.S. 471 (1994) 9

Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 4, 17, 18, 19, 20

TABLE OF AUTHORITIES—Continued

Page(s)

Harbury v. *Hayden*, 444 F. Supp. 2d 19 (D.D.C. 2006) 16

Hui v. *Castaneda*, 559 U.S. 799 (2010) 18

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 6

Millbrook v. *United States*, 569 U.S. 50 (2013) 17

Minneci v. *Pollard*. 565 U.S. 118 (2012)..... 7, 8, 9, 11, 12, 19

Ortega-Chavez v. *United States*, 2012 WL 5988844 (S.D. Cal. Nov. 29, 2012) 15

Osborn v. *Haley*, 549 U.S. 225 (2007) 18

Padilla v. *United States*, 2007 WL 2409792 (W.D. Tex. Aug. 20, 2007) 16

Parrott v. *Sulkin*, 851 F.3d 1242 (Fed. Cir. 2017) 2

Richards v. *United States*, 369 U.S. 1 (1962) 13

Role Models America, Inc. v. *Brownlee*, 353 F.3d 962 (D.C. Cir. 2004) 2

Sami v. *United States*, 617 F.2d 755 (D.C. Cir. 1979) 15

Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 9

Simmons v. *Himmelreich*, 136 S. Ct. 1843 (2016) 14

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 4, 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Suburban Mortgage Associates, Inc. v. *HUD*, 480 F.3d 1116 (Fed. Cir. 2007) 2

Texas & Pacific Railway Co. v. *Hagenloh*, 247 S.W.2d 236 (Tex. 1952) 20

Thompson v. *Peace Corps*, 159 F. Supp. 3d 56 (D.D.C. 2016) 16

United States v. *Stanley*, 483 U.S. 669 (1987) 9

United States v. *Tohono O'odham Nation*, 563 U.S. 307 (2011) 2

Wilkie v. *Robbins*, 551 U.S. 537 (2007) 6, 7, 9, 10, 11

Williams v. *United States*, 350 U.S. 857 (1955) 20

Xue Lu v. *Powell*, 621 F.3d 944 (9th Cir. 2010) 21

Ziglar v. *Abbasi*, 137 S. Ct. 1843 (2017) 3, 5, 8, 9, 12

STATUTES

28 U.S.C.

§ 1346 13

§§ 2671-2680 13

§ 2674 13

§ 2679 .... 4, 17, 18

§ 2680 .... 4, 13, 14, 16

Tex. Civ. Prac. & Rem. Code Ann. § 71.031 19

TABLE OF AUTHORITIES—Continued

Page(s)

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**BRIEF OF AMICUS CURIAE
PROFESSOR GREGORY C. SISK
IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Professor Gregory C. Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). His interest in this matter is that of a legal scholar studying the jurisprudence of federal sovereign immunity and statutory waivers.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented in writing to the filing of this brief.

For more than a quarter of a century, Professor Sisk's scholarly work has focused on civil litigation with the federal government. He has published both a treatise and the only law school casebook on the subject. *Litigation With The Federal Government* (West Academic Hornbook Series, 2016); *Litigation With The Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & 2015 Supp.). The treatise and the casebook each include a chapter devoted primarily to the Federal Tort Claims Act and a chapter on claims against federal officers including discussion of the Westfall Act and *Bivens*. Professor Sisk also has written several law review articles on federal sovereign immunity and the construction of statutory waivers of federal sovereign immunity.

Professor Sisk's scholarly publications on federal government litigation are cited regularly by the federal courts. *See, e.g.*, *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 314 (2011); *Parrott* v. *Sulkin*, 851 F.3d 1242, 1251 (Fed. Cir. 2017); *Barnes* v. *United States*, 776 F.3d 1134, 1144 (10th Cir. 2015); *Collins* v. *United States*, 564 F.3d 833, 836 (7th Cir. 2009); *Suburban Mortg. Assocs., Inc.* v. *HUD*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Role Models Am., Inc.* v. *Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004).

In addition to Professor Sisk's teaching and scholarly work, he continues to practice law, primarily on a pro bono basis. As a former appellate attorney with the Civil Division of the U.S. Department of Justice and now as a private attorney, Professor Sisk has litigated cases on behalf of both the government and private parties under statutory waivers of federal sovereign immunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a question of great importance in the realm of litigation against the government. This Court only recently reaffirmed that whether a plaintiff has available alternative remedies is of "central importance" to the inquiry into whether courts will find a judicially-implied remedy in a given case under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics* and its progeny. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). Indeed, the availability of alternative remedies, and more specifically, the adequacy of those remedies where there are some available, has again and again been a critical issue in this Court's *Bivens* decisions.

It has been decades, however, since the Court has addressed a scenario like the present case, where the issue is not merely the adequacy of alternative remedies, but the fact that there simply are no alternative remedies at all. And as the Fifth Circuit's decision here indicates, there is significant confusion about how courts should conduct the *Bivens* analysis in such circumstances. The Fifth Circuit dismissed the lack of alternative remedies in a sentence, stating that "the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension." Pet. App. 18. But that approach is inconsistent with this Court's *Bivens* decisions in multiple respects. Most fundamentally, it severely downplays the importance of the lack of available remedies to the overall *Bivens* inquiry, even though that issue is central to the logic of *Bivens* and to the Court's analysis in a number of decisions. This Court should provide needed guidance on a critical, keystone issue in the *Bivens* analysis: How to weigh the complete lack of alternative remedies.

And this particular case presents an ideal vehicle for addressing the issue because there is no doubt that the Hernández family, whose teenage son was killed by Customs and Border Patrol Agent Mesa in a shooting on the U.S.-Mexico border, has no alternative remedy. Two federal statutes—the Federal Tort Claims Act (FTCA) and the Westfall Act—combine to ensure that result. On the one hand, the "foreign country exception" to the FTCA means that, because the locus of the injury at issue was in Mexico, any claim against the federal government will be barred by sovereign immunity. *See* 28 U.S.C. § 2680; *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 700-712 (2004). On the other hand, the Westfall Act provides that, so long as Agent Mesa was acting within the scope of his employment when he shot the Hernández family's son, state tort law claims are barred, and an FTCA claim against the federal government is the exclusive non-*Bivens* remedy. *See* 28 U.S.C. § 2679(b). That is so even though an FTCA claim is unavailable due to the "foreign country" exception to the FTCA. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995).

The combined effect of the FTCA and Westfall Act is perverse. Many States have liberally expanded *respondeat superior* liability principles to provide plaintiffs with a greater chance at redress. But expanded *respondeat superior* simply widens the Westfall Act net, channeling more claims into the exclusive domain of the FTCA, even though FTCA exceptions like the one applicable here will leave a plaintiff with no remedy at all.

But that dynamic also means that this case is an ideal vehicle for the Court to address the important *Bivens* issue presented. There is no question that, in light of the FTCA and the Westfall Act, the Hernández family has no remedies other than a claim pursuant to

Bivens. The case directly and cleanly raises an issue of "central importance" to the *Bivens* analysis, one on which this Court's guidance is needed now more than ever. Certiorari should be granted.

ARGUMENT

I. The Lack Of Alternative Remedies Is An Important, Standalone Consideration In The Overall *Bivens* Analysis

The availability of alternative remedies is of "central importance" to the question of whether a *Bivens* claim will lie in a given case. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). Yet there remains a great need to clarify the precise role that a lack of alternatives should play in a *Bivens* analysis. The Fifth Circuit's decision here exemplifies the need for further guidance on that point. The court seemed to acknowledge that there were no alternative remedies for the Hernández family stemming from the killing of their son by a federal agent, but then gave that fact virtually no weight, stating that "the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension." Pet. App. 18. That confused approach to the *Bivens* analysis is in tension with this Court's precedent.

A. This Court Has Consistently Recognized The Central Importance Of The Lack Of Alternative Remedies In The *Bivens* Analysis

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, this Court held that a damages action will lie against federal agents, acting under color of federal authority, for their alleged violation of a plaintiff's constitutional rights. 403 U.S. 388, 395-397

(1971). The Court grounded such claims in the proposition that the "'very essence of civil liberty'" requires that there be a remedy for injuries to rights. *Id.* at 397 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)); *accord id.* at 392 ("'[W]here federally protected rights have been invaded,'" courts can "'adjust their remedies so as to grant the necessary relief'"). In *Bivens* itself, then, Bivens's lack of available remedies for the violation of his Fourth Amendment rights justified creating a judicially-implied cause of action for damages. *Id.*; *see also id.* at 395 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

The Court reiterated this logic in its next two *Bivens* cases. In *Davis* v. *Passman*, the Court found a cause of action where "[f]or Davis, as for Bivens, 'it is damages or nothing.'" 442 U.S. 228, 246 (1979) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)). Unless litigants have some "effective means" to remedy constitutional injuries, the Court warned, constitutional rights could become "merely precatory." *Id.* The Court relied on similar logic again a year later to find a *Bivens* action for an Eighth Amendment violation in *Carlson* v. *Green*, 446 U.S. 14, 17 (1980).

Even in recent cases where the Court has declined to extend *Bivens*, the Court has consistently reaffirmed the importance of providing remedies for constitutional wrongs. In *Wilkie* v. *Robbins*, 551 U.S. 537, 549-550 (2007), the Court laid out the modern two-step *Bivens* analysis, which explicitly directs courts to consider whether the plaintiff has adequate alternative remedies. In the first step of the analysis, a court must expressly consider whether any alternative remedy "amounts to a convincing reason ... to refrain from providing a new and freestanding remedy in damages."

Id. at 550. Second, the court must consider whether any "special factors counsel[] hesitation ... ." *Id.*

The question in *Wilkie* was whether to authorize a *Bivens* action against Bureau of Land Management (BLM) officials for violations of the plaintiff's Fourth and Fifth Amendment rights. 551 U.S. at 543. At the first step of the analysis, the Court found that the plaintiff had alternative administrative and judicial remedies available to him. *See id.* at 551-553. But the Court did not stop its analysis at the first step. Rather, the Court explained that the availability of alternative remedies in Robbins's case "gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it." *Id.* at 554. The Court then proceeded, at step two, to consider the comparative quality of the various existing alternative remedies versus a new *Bivens* claim, which could arguably offer a more complete remedy that instead "look[ed] at the course of dealing as a whole." *Id.* at 555. The availability and the quality of alternative remedies was of central importance in *Wilkie*.

The Court adopted a similar approach in *Minneci* v. *Pollard*, 565 U.S. 118, 125 (2012). There, the Court ultimately declined to extend *Bivens* as against federal prison employees for Eighth Amendment violations because state tort law served as an adequate remedy. *Id.* at 131. Still, the Court's analysis considered not merely the *existence*, but the adequacy and quality of alternative remedies. *See id.* at 130 ("[I]n principle, the question is whether ... state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations."). Since state tort law was "capable of protecting

the constitutional interests at stake," the Court did not need to imply a *Bivens* action to separately protect the right. *Id.* at 125. This context, the Court clarified, differed from those in which plaintiffs "'lack[] *any alternative remedy*' at all." *Id.* at 127 (quoting *Correctional Servs. Corp.* v. *Malesk*o, 534 U.S. 61, 70 (2001)).

And in its most recent examination of *Bivens*, the Court unanimously reaffirmed that the existence of alternative remedies was of "central importance" to the analysis. *See Ziglar*, 137 S. Ct. at 1862; *id.* at 1874 (Breyer, J., dissenting) (noting that the lack of alternatives was one of the "basic legal considerations" on which *Bivens*, *Carlson*, and *Davis* rested). As the *Ziglar* Court recognized, if existing remedies are unavailable or insufficient, allowing a plaintiff to seek damages in a *Bivens* action may be "necessary to redress past harm and deter future violations." *Id.* at 1858.

B. There Is A Need For Further Guidance On How To Weigh The Total Lack Of Alternative Remedies In The *Bivens* Analysis

While this Court's decisions have repeatedly affirmed that the lack of alternatives is a significant—indeed, central—concern in the *Bivens* analysis, it remains unclear exactly *how* courts should weigh the total absence of an alternative remedy—particularly at the second step of *Bivens* inquiry, where the Court has more typically considered the quality or sufficiency of the remedies that are available along with any special factors that may counsel hesitation in extending *Bivens* relief.

The lack of clarity is due mainly to the types of *Bivens* cases the Court has taken in the past few decades. During the past thirty-four years, this Court has

declined to extend *Bivens* to new types of claims in nine cases. Seven of those cases involved situations where there were available alternative remedies; these cases necessarily did not clarify the weight to be given to the *absence* of alternative remedies. *See Ziglar*, 137 S. Ct. at 1862-1863 (suit for injunctive relief challenging "large-scale policy decisions concerning … conditions of confinement," as well as possible habeas petition, were available to plaintiff); *Minneci*, 565 U.S. at 120 (state tort law provided an alternative, existing process capable of protecting the constitutional interests at stake); *Wilkie*, 551 U.S. at 553 (plaintiff had "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints"); *Malesko*, 534 U.S. at 73-74 (federal prisoners in private facilities could pursue remedies in tort, seek injunctive relief in in federal court, and file internal administrative grievances); *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994) (suit against individual officer available, though subject to qualified immunity defense); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988) (determining that Congress "provide[d] meaningful safeguards or remedies" for persons who may have been denied social security disability benefits in violation of due process); *Bush* v. *Lucas*, 462 U.S. 367, 386 (1983) (administrative process created by Congress "provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies").

The two other decisions arose in the military context, which the Court explained was a unique special factor that counseled hesitation before extending *Bivens* to new types of claims. *See United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987) ("[N]o *Bivens* remedy is available for injuries that arise out of … [military] service" in light of "the unique disciplinary struc-

ture of the Military Establishment and Congress' activity in the field" (quotation marks and citations omitted)); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (similar). Accordingly, those decisions also did not focus on the lack of alternative remedies. Since this Court's original set of *Bivens* cases, then, it has not had occasion to revisit the significance of the total lack of alternative remedies to the overall *Bivens* inquiry—despite the central importance of that issue.

C. The Fifth Circuit's Decision Is In Tension With This Court's Prior Decisions—And Exemplifies The Need For Clarity

The Fifth Circuit's confused approach in this case shows why this Court's guidance is needed. In conducting the *Bivens* analysis here, the Fifth Circuit effectively acknowledged (as it had to, *see infra* Part II) that there are no alternative remedies available to the Hernández family. But it nevertheless explained that "the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension." Pet. App. 18. That statement contains two interwoven propositions, both of which conflict with this Court's prior decisions.

First, the Fifth Circuit apparently concluded that, if any remedy is available, then *Bivens* necessarily is not. But that is directly contrary to this Court's analysis in *Wilkie*. There, the Court determined at the first step of its analysis that alternative remedies *did* exist for the plaintiff Robbins. *See Wilkie*, 551 U.S. at 551-554. But it *then* explained that, given the particular mix of alternatives available, it was "hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim." *Id.* at 554. The

Court reasoned that "[t]his, then, is a case for *Bivens* step two, for weighing reasons for and against the creation of a new cause of action." *Id.* *Wilkie* expressly demonstrates that the analysis is more complex than the Fifth Circuit's simple if-then formulation, and in fact that the presence of an alternative does not automatically preclude a *Bivens* action.

Second, the Fifth Circuit also concluded that the absence of an alternative remedy has no significance in the court's analysis beyond moving the reviewing court to "step two" for the consideration of whether special factors counsel hesitation in extending *Bivens*. But in both *Wilkie* and *Minneci*, this Court devoted significant attention to analyzing not only the existence of alternative remedies, but also, at the second step of the analysis, the adequacy or sufficiency of the particular alternatives available. *See Minneci*, 565 U.S. at 125-131 (lengthy analysis of the adequacy of state tort law); *Wilkie*, 551 U.S. at 553-555 (addressing concern that available alternative remedies would inflict a functional "'death by a thousand cuts'"). That approach strongly suggests that the lack of alternative remedies may be significant even at the second step of the overall analysis and, in all events, is more significant than the Fifth Circuit acknowledged.

The Fifth Circuit downplayed the absence of alternative remedies in yet another way: by considering the deterrence value of "remedies" that are unavailable to the plaintiffs in this case. *See* Pet. App. 18-19. The court of appeals reasoned that, although federal authorities chose not to prosecute Agent Mesa, criminal prosecution *could* be pursued in other cross-border shooting cases. *Id.* at 19. Likewise, the Fifth Circuit reasoned that although a state-law tort claim could not be brought in this case, one *could* be brought against an

officer who acted *outside* the scope of his employment. *Id.* This court has not suggested that deterrence concerns, independent of remedies that are actually available *to the plaintiff in the case*, can stand in for such remedies in the *Bivens* analysis. Rather, in *Malesko* and *Minneci*, this Court considered the deterrence value of remedies that *were* actually available to the plaintiffs in order to assess whether the available alternatives adequately protected the plaintiff's own interests. *See Minneci*, 565 U.S. at 120 (considering deterrence value of state tort law); *Malesko*, 534 U.S. at 74 (considering deterrence value of injunctive relief available to plaintiff).

This Court has long recognized that the availability of alternative remedies is of "central importance" to the *Bivens* analysis, *Ziglar*, 137 S. Ct. at 1862, and implicates "'the very essence of civil liberty,'" *Bivens*, 403 U.S. at 397. The Fifth Circuit's statement that "the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension" is not a distillation but a distortion of longstanding precedent. That court's evident confusion indicates that this Court's guidance is required on this question of "central importance."

II. THIS CASE IS AN EXCELLENT VEHICLE FOR CLARIFYING THE SIGNIFICANCE OF A LACK OF ALTERNATIVE REMEDIES

The core claim in this case—that Agent Mesa unjustifiably shot a teenage boy to death—comes within multiple exceptions to the FTCA's waiver of sovereign immunity. Nor can that claim be asserted under state tort law, because it is barred under the Westfall Act. Because tort claims under both the FTCA and state law are barred, this case cleanly and squarely presents

the important question of how a total lack of alternative remedies plays into the overall *Bivens* inquiry.

A. FTCA Remedies Are Unavailable Here

The FTCA, 28 U.S.C. §§ 1346(b)(1), 2671-2680, constitutes a "'sweeping'" waiver of the federal government's sovereign immunity. *E.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006). The FTCA was designed "to render the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962); *see also* 28 U.S.C. § 2674.

However, the government explicitly retained its immunity from suit for certain types of tort claims and for certain governmental activities, by including express statutory exceptions in the FTCA itself. 28 U.S.C. § 2680; *see also*, *e.g.*, *Richards*, 369 U.S. at 6. In a manner akin to an affirmative defense, such exceptions foreclose a tort remedy against the United States even when the individual tortfeasor was acting within the scope of federal employment and the pleadings otherwise state a cognizable tort claim under state law. *See* Sisk, *Litigation With The Federal Government* §3.6(a) (West Academic Hornbook Series, 2016).

One of those exceptions—the "foreign country" exception—unambiguously applies here. The foreign country exception excludes "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The most obvious function of the foreign country exception is to insulate the United States from liability based on foreign law when the tort occurs outside the borders of the United States. Sisk, *Litigation* § 3.6(e). However, as this Court has made clear, § 2680(k) is not limited to on-

ly those circumstances in which foreign law would apply.[2]

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 700-712 (2004), the Court held that the foreign country exception applied where an injury suffered in another country had been caused by tortious wrongdoing within the United States. *Sosa* involved a DEA mission to kidnap, capture, and render to the United States a Mexican national who had been indicted in the torture and murder of a DEA agent. *Id.* at 697-698. After trial, the suspect was acquitted. *Id.* at 698. Upon his return to Mexico, the suspect brought an FTCA claim of false arrest against the United States Government. *Id.* at 698-699.[3]

This Court held that the foreign country exception to the FTCA applied because the alleged tortious conduct was "most naturally understood as the kernel of a 'claim arising in a foreign country.'" *Sosa*, 542 U.S. at

[2] The fact that Congress saw fit to exclude claims arising in foreign countries from the ambit of the FTCA does not weigh against allowing such claims to be asserted under *Bivens*. Indeed, such reasoning would be impossible to square with this Court's decision in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), where this Court held that that a *Bivens* claim could proceed even where substantively similar FTCA claims had already been dismissed pursuant to a § 2680 exception. As the Court made clear in its unanimous opinion, the FTCA's "judgment bar" provision expressly "does not apply" where a case has been dismissed pursuant to any of the exceptions. *Id.* at 1848.

[3] Importantly, once Alvarez-Machain was in the United States, his detention was no longer tortious, *see Alvarez-Machain* v. *United States*, 331 F.3d 604, 636-637 (9th Cir. 2003) (en banc), *rev'd by Sosa*, 542 U.S. 692, since at that point he was under arrest for the alleged murder of the DEA agent. Alvarez-Machain's claim was based on his kidnapping and detention in Mexico. *Sosa*, 542 U.S. at 700-701.

701. It rejected the so-called "headquarters doctrine," under which the availability of the foreign country exception hinges on where the tortious *act* occurred, as opposed to the location of the injury. *See, e.g.*, *Sami* v. *United States*, 617 F.2d 755, 762 (D.C. Cir. 1979) (finding FTCA liability "for acts or omissions occurring [in the United States] which have their operative effect in another country"), *abrogated by Sosa*, 542 U.S. at 710 n.8. Under *Sosa*'s locus of the injury test, the foreign country exception would preclude an FTCA claim here.[4] Because Hernández was shot in Mexico, it does not matter that Agent Mesa was standing in the United States when he pulled the trigger. The foreign country exception still applies, leaving Hernández's estate with no claim against the United States under the FTCA.

In fact, that was the holding of the District Court here in its dismissal of FTCA claims brought by the petitioners. Pet. App. 185. It was also the holding in another, virtually identical cross-border shooting case. *See Ortega-Chavez* v. *United States*, 2012 WL 5988844, at *2 (S.D. Cal. Nov. 29, 2012) (dismissing shooting victim's FTCA claim and holding that despite the tortious activity occurring in the United States, "domestic proximate causation does not eliminate application of the

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[4] Justice Ginsburg, joined by Justice Breyer, would have held the foreign country exception applicable under a narrower "last significant act or omission" test. *Sosa*, 542 U.S. at 759-760 (Ginsburg, J., concurring in part and concurring in the judgment). That test might still foreclose FTCA liability in this case, as the completion of the tort occurred when the bullet struck the decedent on the Mexican side of the border.

foreign country exception"). Other courts applying *Sosa* have reached the same result.[5]

Sosa is clear: The foreign country exception exempts from the FTCA's sovereign immunity waiver all claims based on injuries that were suffered abroad, regardless of where the tortious activity took place. Accordingly, the FTCA does not provide an alternative remedy in this case, and more generally, it provides no remedy for a category of serious harms like those asserted in this case, including the most severe harm imaginable: loss of human life.[6]

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[5] *E.g.*, *Agredano* v. *United States Customs Service*, 223 F. App'x 558, 558-559 (9th Cir. 2007) (foreign country exception immunized United States from suit arising from arrest and imprisonment that took place in Mexico); *Thompson* v. *Peace Corps*, 159 F. Supp. 3d 56, 60-62 (D.D.C. 2016) (foreign country exception barred claims brought by former Peace Corps volunteer alleging injuries suffered abroad but caused by anti-malarial drugs given to him by the Peace Corps); *Padilla* v. *United States*, 2007 WL 2409792, at *7-8 (W.D. Tex. Aug. 20, 2007) (applying *Sosa* rule to case where individual was killed in Mexico, even though he was abducted from his home in the United States); *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 23 (D.D.C. 2006) (action alleging torture and murder by CIA agents was barred by foreign country exception), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008).

[6] While it does not apply in this case, another FTCA exception would bar many claims like those asserted here, even where the locus of the alleged injury is the United States. The FTCA excludes "[a]ny claim arising out of assault [or] battery." 28 U.S.C. § 2680(h). This "assault and battery exception" also covers numerous intentional torts. *Id.* The exception would not apply here because it is subject to the so-called "[law enforcement] proviso," which waives sovereign immunity for an assault or battery based on "acts or omissions of … law enforcement officers of the United States Government." *See generally* Sisk, *Litigation* § 3.6(d); 28 U.S.C. § 2680(h); Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. St. Thomas L.J.

B. State Tort Remedies Are Also Unavailable Here By Operation Of The Westfall Act

Any state law claims brought against Agent Mesa in his individual capacity would also be precluded by the Westfall Act, which makes the FTCA the exclusive remedy when a personal injury claim arises from the tortious act of a federal employee acting within the scope of employment. 28 U.S.C. § 2679(b)(1). Such claims against Agent Mesa would be precluded even though the United States is separately immune from FTCA liability under the foreign country exception to the FTCA. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995).

The Westfall Act essentially turns state law against itself. As Professor Sisk has observed:

> If the federal employee is found to have acted within the scope of employment, he or she individually will be immune from liability. … Thus, rather than expanding tort liability and enhancing the opportunity for plaintiffs to sue a financially-responsible defendant—which was generally the intent behind state court decisions broadening the reach of *respondeat superior* in recent decades—application of liberal state scope-of-employment rules sometimes

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375 (2011). Because Border Patrol agents are law enforcement officers, the law enforcement proviso would likely have allowed for an FTCA claim against the government here if the shooting had occurred completely on American soil. *See Millbrook* v. *United States*, 569 U.S. 50, 56-57 (2013). However, claims "arising out of" assaults by non-law enforcement federal employees—who make up the lion's share of both the federal civil service and the armed services—are generally not actionable under the FTCA, even where they involve unjustified violence, serious physical harm, or death. In those cases, too, no alternative remedy to *Bivens* exists.

> may operate to narrow tort liability in the federal employee/Federal Government context.

Sisk, *Litigation* § 5.6(c)(4), at 373.

Under the Westfall Act, 28 U.S.C. § 2679, the FTCA is the exclusive remedy for torts committed by federal employees within the scope of their employment. *Id.* § 2679(b)(1). If a federal employee is sued under state law for actions that fall within the scope of their employment, the Attorney General is required to substitute the United States as the sole defendant in the case, whereupon the suit is restyled as an FTCA action and removed to federal court, while the individual employee is granted immunity for the act in question. *See id.* § 2679(c)-(d); *see also, e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 229-230 (2007).

Importantly, *Bivens* claims are expressly exempted from the Westfall Act's exclusive remedy provision. *See* 28 U.S.C. § 2679(b)(2)(A); *see also Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting ("[t]he Westfall Act's explicit exception for *Bivens* claims"). But in the absence of a *Bivens* remedy, the Westfall Act may bar recovery altogether in cases like this one, where the United States is immune from suit under FTCA exceptions. *See supra* Part II.A.

In *Lamagno*, which involved a lawsuit by citizens of Colombia who were injured by a DEA agent in an auto accident, this Court acknowledged that under the Westfall Act, the substitution of the United States for the individual employee defendant was "unrecallable," and that once the substitution was accomplished, the United States could be dismissed pursuant to its sovereign immunity under the foreign country exception to the FTCA. 515 U.S. at 422; *see also supra* Part II.A.

Accordingly, as a practical matter, once the Attorney General certifies that the alleged tortious conduct was within the scope of the tortfeasor's employment, the FTCA and *Bivens* are the *only* two routes to a remedy for misconduct by government actors in myriad situations. Where, as here, FTCA claims are barred by exceptions such as the foreign country exception, *Bivens* is the only remaining path. *See Lamagno*, 515 U.S. at 420 (noting that, in situations like this one, "the plaintiff may be left without a tort action against any party").

This Court addressed the Westfall Act's stark consequences in *Minneci*, explaining that "the potential existence of an adequate 'alternative, existing process' differs dramatically" in cases where the Westfall Act applies. 565 U.S. at 126. Thus, in *Minecci*, the Court held that no *Bivens* claim was available against a private employee of a federal prison who *could* be reached by state tort law. *Id.* The Court expressly contrasted that situation with one where the defendant was a federal employee whose conduct would be covered by the Westfall Act. *Id.* (contrasting private employee scenario with *Carlson*, 446 U.S. at 16-18, where *Bivens* claim was available to federal prisoner).

Here, Texas permits recovery in its state courts for death or personal injury in cases where the wrongful act occurs in a foreign country. Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a). However, the government has long since made its unrecallable certification that Agent Mesa was acting within the scope of his employment. Thus, due to the combined effect of the Westfall Act and the FTCA, there is no doubt that the petitioners lack a remedy in either the FTCA or in state tort law for the legal wrongs they have alleged.

The Westfall Act bars state tort-law remedies not only in this case but in *any* case where a government employee defendant acted within the scope of employment under the law of the state in which the tort was committed. *E.g.*, *Bodin* v. *Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) (citing *Williams* v. *United States*, 350 U.S. 857 (1955) (per curiam)). In states with broader *respondeat superior* liability for employers, the Westfall Act will channel a greater number of suits into FTCA actions against the federal government. But where the government is exempt from liability under one of the FTCA exceptions, a plaintiff's ability to recover damages without a *Bivens* remedy hinges entirely on whether the defendant acted within the scope of employment. *Lamagno*, 515 U.S. at 421-422.

As a result, particularly under liberal *respondeat superior* rules in many states, plaintiffs have little chance of resisting a scope of employment certification by the Attorney General that will bar them from any remedy in the absence of a *Bivens* action. Here, for example, under Texas law, assault falls within the scope of employment for the purposes of *respondeat superior* where the employee is authorized to use force in the performance of his or her duties "so that the act of using force may be in furtherance of the employer's business, making him liable even when greater force is used than is necessary." *Texas & Pac. Ry. Co.* v. *Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952). *Respondeat superior* applies if the assault is "so connected with and immediately arising out of authorized employment tasks as to merge the task and the assaultive conduct into one indivisible tort imputed to the employer." *Buck* v. *Blum*, 130 S.W.3d 285, 289 (Tex. App. 2004).

Under that standard, and on the facts of this case, the Attorney General's determination that Mesa's ac-

tions fell within the scope of employment under Texas law—effectively precluding recovery under both state law and, because of the foreign country exception, the FTCA—would have been extremely difficult to contest.[7]

And while *respondeat superior* standards for intentional torts vary widely by state, Texas's approach is actually narrower than most—*i.e.*, under the law of most states, contesting the application of the Westfall Act would have been *even more difficult*. For example, California provides that an employee's willful, malicious, or even criminal acts may fall within the scope of employment, even if unauthorized, if they foreseeably arose from the conduct of the employer. *E.g.*, *Xue Lu* v. *Powell*, 621 F.3d 944, 948 (9th Cir. 2010).

The broader evolution of the law in this area, toward increasingly liberal *respondeat superior* rules, thus yields paradoxical results. "[O]ver time, state law rules have tended to broaden the scope of employment concept so as to expand employer accountability to others for the misdeeds of employees." Sisk, *Litigation*, § 5.6(c)(4), at 373. But "[i]ronically—or some might say, perversely—application of these state law expectations to the peculiar Westfall Act context may have precisely the opposite effect." *Id.* Absent an available *Bivens* claim, a considerable number of tort victims in states with broad approaches to *respondeat superior* may find themselves with no remedy at all.

That is the case here. The Hernández family has no alternative remedies in the absence of a *Bivens* claim

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[7] It is therefore unsurprising that petitioners "could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act." Pet. App. 94 (Haynes, J., concurring).

due to the combined operation of the FTCA and the Westfall Act. Their case is accordingly an ideal vehicle for the Court to consider the how the total absence of alternative remedies should be weighed in the overall inquiry into whether to extend *Bivens* to new types of claims.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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