Nos. 17-1678 and 18-309

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL., PETITIONERS

v.

JESUS MESA, JR.

LONNIE SWARTZ, PETITIONER

v.

ARACELI RODRIGUEZ, INDIVIDUALLY AND AS THE SURVIVING MOTHER AND PERSONAL REPRESENTATIVE OF J. A.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Petitioners in *Hernández*, No. 17-1678, and respondent in *Swartz*, No. 18-309, brought civil actions under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), each seeking damages from a U.S. Border Patrol agent who, while standing in the United States, fatally shot a Mexican citizen who was in Mexico. The questions presented are:

1. Whether the remedy recognized in *Bivens* should be extended to the claims in these cases.

2. If the claims in *Hernández* cannot be asserted under *Bivens*, whether the Westfall Act, 28 U.S.C. 2679, violates the Due Process Clause of the Fifth Amendment.

3. If the *Bivens* remedy is extended to the Fourth Amendment claim in *Swartz*, whether the agent is entitled to qualified immunity.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the views of the United States in the above-captioned cases. Both cases present the same question whether the remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to a claim arising from an injury to a foreign citizen in foreign territory. In the view of the

United States, the petition for a writ of certiorari in *Hernández*, No. 17-1678, should be granted, limited to the first question presented in the petition, and the petition for a writ of certiorari in *Swartz*, No. 18-309, should be held pending the disposition of *Hernández*.

STATEMENT

The two petitions arise from similar fact patterns involving Mexican citizens fatally injured in Mexico by U.S. Border Patrol agents.

A. *Hernández* v. *Mesa*, No. 17-1678

1. Petitioners allege that on June 7, 2010, their son, Sergio Adrián Hernández Güereca, a 15-year-old Mexican citizen, was playing with friends in the cement culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico. *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam). The international border in this location runs down the middle of the culvert, and a fence sits at the top of the embankment on the U.S. side. *Ibid.* Hernández and his friends allegedly played a game in which they crossed the border into the United States, ran up the embankment to touch the fence, and then ran back into Mexico. *Ibid.*

Petitioners' complaint alleges that respondent Jesus Mesa, Jr., a U.S. Border Patrol agent, arrived on the scene, detained one of Hernández's friends on the U.S. side of the culvert, and then, while standing in U.S. territory, fatally shot Hernández, who had fled back into Mexico. *Hernandez*, 137 S. Ct. at 2005. According to petitioners, Hernández "had no interest in entering the United States" and was "unarmed and unthreatening" at the time. *Hernández* Pet. App. 199. The FBI, however, released a statement explaining that Agent Mesa had resorted to force only after Hernández and others

refused to follow commands to stop throwing rocks at him. *Id.* at 199-200.

After a "comprehensive" investigation, the Department of Justice (DOJ) declined to bring criminal charges against Agent Mesa. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Federal Officials Close Investigation into the Death of Sergio Hernández-Guereca* (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca. DOJ issued a statement expressing regret about Hernández's death and reiterating the United States' commitment to investigating and prosecuting allegations of excessive force, as well as "work[ing] with the Mexican government * * * to prevent future incidents." *Ibid.*

2. Petitioners initially sued the United States, several federal agencies, and unknown U.S. Border Patrol agents, asserting claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680; the Alien Tort Statute (ATS), 28 U.S.C. 1350; and the U.S. Constitution. *Hernández* Pet. App. 172 & n.3. Petitioners later named Agent Mesa as one of the individual defendants. *Id.* at 172.

Pursuant to the Westfall Act, 28 U.S.C. 2679, the district court substituted the United States as the sole defendant for petitioners' FTCA and ATS claims. *Hernández* Pet. App. 176. It then dismissed those claims on sovereign-immunity grounds. *Id.* at 176-192.

The district court separately addressed the individual-capacity claim against Agent Mesa, which petitioners had purported to bring under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for alleged violations of Hernández's Fourth and Fifth Amendment rights. *Hernández* Pet.

App. 159-169. The court concluded that Agent Mesa was entitled to qualified immunity because, under *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), an alien with no voluntary connection to the United States lacks extraterritorial Fourth Amendment rights, and because, under *Graham* v. *Connor*, 490 U.S. 386 (1989), an excessive-force claim could not be brought under the Fifth Amendment. *Hernández* Pet. App. 163-169.[1]

3. a. Initially, a three-judge panel of the court of appeals affirmed in part, reversed in part, and remanded. *Hernández* Pet. App. 100-158. As relevant here, the panel affirmed the district court's conclusion that the Fourth Amendment did not apply, but it determined that petitioners had adequately alleged a violation of the Fifth Amendment and that Agent Mesa lacked qualified immunity. *Id.* at 119-138, 150-154. The panel also determined that it was appropriate to extend a *Bivens* remedy to the new "context in which an individual located abroad asserts a right to be free from gross physical abuse under the Fifth Amendment against federal law enforcement agents located in the United States." *Id.* at 149; see *id.* at 138-150.

b. The court of appeals granted rehearing en banc and affirmed the district court's dismissal of petitioners' *Bivens* claims against Agent Mesa. *Hernández* Pet. App. 45-49. The court of appeals determined that peti-

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[1] Petitioners voluntarily dismissed their claims against two other agents, and the district court granted summary judgment to the remaining individual defendants because petitioners had failed to offer evidence that the defendants' alleged acts and omissions in supervising Agent Mesa proximately caused Hernández's death. *Hernández* Pet. App. 106-107. Those claims are not at issue here.

tioners had failed to allege a Fourth Amendment violation because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." *Id.* at 46 (quoting *Verdugo-Urquidez*, 494 U.S. at 271). And while the court was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," it was "unanimous in concluding that any properly asserted right was not clearly established." *Id.* at 48. Because it rejected petitioners' claims on the merits, the court did not consider whether *Bivens* should be extended to this context. See *id.* at 45-49.

4. This Court granted certiorari. In addition to the Fourth and Fifth Amendment questions, the Court directed the parties to address whether petitioners' claims may be asserted under *Bivens*.

a. While this case was pending, the Court decided *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017). In that case, the Court reaffirmed that "expanding the *Bivens* remedy is now a disfavored judicial activity." *Id.* at 1857 (citation and internal quotation marks omitted). Indeed, the Court noted that it had not extended *Bivens* to any new context "for the past 30 years." *Ibid.*

The Court in *Abbasi* clarified the *Bivens* inquiry in two ways. First, it explained that a case presents a "new context" for *Bivens* purposes if "the case is different in a meaningful way" from the three decisions in which the Court has previously recognized a *Bivens* remedy. 137 S. Ct. at 1859. Second, the Court reiterated the longstanding rule that *Bivens* should not be extended when "special factors counsel[] hesitation." *Id.* at 1857 (quoting *Carlson* v. *Green*, 446 U.S. 14, 18 (1980)). The Court explained that "the inquiry must

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." *Id.* at 1857-1858. Thus, if "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress." *Id.* at 1858. Applying those principles, the Court declined to extend the *Bivens* remedy to certain challenges to conditions of confinement in the wake of the September 11 terrorist attacks, and remanded another claim for the court of appeals to conduct the special-factors analysis in the first instance. *Id.* at 1860-1865.

b. In this case, the Court vacated the judgment of the court of appeals and remanded for the court to address the "antecedent" question whether a *Bivens* remedy is available in light of this Court's intervening guidance in *Abbasi*. *Hernandez*, 137 S. Ct. at 2006 (citation omitted). The Court explained that *Abbasi* had "clarified what constitutes a 'special factor counselling hesitation.'" *Ibid.* (quoting *Abbasi*, 137 S. Ct. at 1857) (brackets omitted). The Court observed that the Fourth Amendment question was "sensitive" and could have "far reaching" consequences that could be "unnecessary to resolve this particular case." *Id.* at 2007. It also concluded that Agent Mesa was not entitled to qualified immunity on the Fifth Amendment claim based on a fact—that Hernández was an alien without a significant voluntary connection to the United States—that was "unknown to Mesa at the time of the shooting." *Ibid.* But the Court remanded for the consideration of

other qualified-immunity arguments on remand "if necessary." *Ibid.*

Justice Thomas dissented. *Hernandez*, 137 S. Ct. at 2008. He noted that the circumstances of this case are "meaningfully different from those at issue in *Bivens* and its progeny." *Ibid.* "Most notably," he explained, "this case involves cross-border conduct, and those cases did not." *Ibid.* Accordingly, he would have "decline[d] to extend *Bivens*" and would have "affirm[ed] the judgment of the Court of Appeals on that basis." *Ibid.*

Justice Breyer, joined by Justice Ginsburg, also dissented. *Hernandez*, 137 S. Ct. at 2008-2011. He would have held that the Fourth Amendment applies, which, in his view, "would ordinarily bring with it the right to bring an action for damages under *Bivens*." *Id.* at 2008.

5. On remand, the en banc court of appeals again affirmed the dismissal of the claims against Agent Mesa. *Hernández* Pet. App. 1-23. The court recognized that "*Abbasi* instructs us to determine initially whether these circumstances present a 'new context' for *Bivens* purposes, and if so, whether 'special factors' counsel against implying a damages claim against an individual federal officer." *Id.* at 5. Applying that two-part framework, the court declined to extend *Bivens* to the circumstances here. *Id.* at 5-23.

The court of appeals first determined that "the cross-border shooting at issue here must present a 'new context' for a *Bivens* claim." *Hernández* Pet. App. 8. Relying on the considerations enumerated in *Abbasi*, the court explained that this case differs from prior cases in terms of 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 coequal branches." *Ibid.* Indeed, the court added, "[b]ecause 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." *Ibid.* The court thus rejected petitioners' contrary arguments, noting that they amounted to "a virtual repudiation of the Court's holding" in *Abbasi*. *Id.* at 11.

The court of appeals next held that this new context presents numerous "special factors" counseling against an implied *Bivens* remedy. *Hernández* Pet. App. 11-23. First, the court determined that extending *Bivens* to this context would "threaten[] the political branches' supervision of national security." *Id.* at 13. Specifically, the court explained that "the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security" by "increas[ing] the likelihood that Border Patrol agents will 'hesitate in making split second decisions.'" *Id.* at 13, 15 (citation omitted). Second, the court determined that extending *Bivens* to this context would "risk[] interference with foreign affairs and diplomacy more generally." *Id.* at 15. It observed that the United States and Mexico had engaged in diplomatic discussions regarding cross-border incidents and the United States had declined Mexico's request to extradite Agent Mesa. *Id.* at 15-16. Third, the court determined that Congress's intentional omission of damages remedies for injuries to foreign citizens on foreign soil counsels against implying such a remedy here. *Id.* at 16-18. Fourth, the court determined that "the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the

separation-of-powers issues already discussed." *Id.* at 19; see *id.* at 19-22. The court of appeals accordingly concluded that "this is not a close case." *Id.* at 22.

Judge Dennis concurred in the judgment. *Hernández* Pet. App. 23-25. He would have avoided the *Bivens* question and instead would have found that Agent Mesa is entitled to qualified immunity. *Ibid.*

Judge Haynes concurred but wrote separately to note that the ATS and FTCA claims against the United States had been severed from this case and were not before the en banc court. *Hernández* Pet. App. 25.

Judge Prado, joined by Judge Graves, dissented. *Hernández* Pet. App. 25-42. He agreed with the majority that this case presents a new context, but he would have concluded that no "special factors counsel hesitation in recognizing a *Bivens* remedy because this case centers on an individual federal officer acting in his law enforcement capacity." *Id.* at 26.

B. *Swartz* v. *Rodriguez*, No. 18-309

1. Respondent Araceli Rodriguez alleges that on October 10, 2012, her son, J.A., a 16-year-old Mexican citizen, was walking by himself on a street in Nogales, Mexico that runs parallel to the border fence dividing Mexico from the United States. *Swartz* Pet. App. 6. Respondent's complaint alleges that U.S. Border Patrol Agent Lonnie Swartz, who was standing in the United States, shot J.A. through the fence and killed him. *Ibid.* The complaint also alleges that J.A. was not threatening Agent Swartz. *Ibid.*

The United States prosecuted Agent Swartz for murder, but he was acquitted. *Swartz* Pet. App. 21; see 15-cr-1723 Docket entry No. 659 (D. Ariz. Dec. 17, 2018).

2. Respondent sued Agent Swartz for damages under *Bivens*, alleging that he violated J.A.'s clearly established Fourth and Fifth Amendment rights by shooting and killing J.A. without justification. *Swartz* Pet. App. 7-8. Agent Swartz moved to dismiss the complaint, and the district court granted the motion in part and denied it in part. *Id.* at 76-105. The court determined that Agent Swartz had violated J.A.'s clearly established Fourth Amendment rights, but it dismissed respondent's Fifth Amendment claim because it determined that the alleged conduct was more properly analyzed under the Fourth Amendment. *Id.* at 104.

3. Agent Swartz filed an interlocutory appeal challenging the district court's denial of qualified immunity. *Swartz* Pet. App. 8. In an amicus brief, the United States argued, among other things, that respondent lacked a *Bivens* cause of action for the Fourth Amendment claim. *Ibid.* Although Agent Swartz had not made that argument in district court or in his opening brief, he adopted the argument in his reply brief. *Ibid.*

While the appeal was pending, this Court decided *Abbasi*, *supra*, and *Hernandez*, *supra*. After receiving supplemental briefing on the impact of those decisions, the Ninth Circuit concluded that Agent Swartz was not entitled to qualified immunity on respondent's Fourth Amendment claim and that a *Bivens* remedy was available for that claim. *Swartz* Pet. App. 1-53.

a. The court of appeals first determined that Agent Swartz was not entitled to qualified immunity on the Fourth Amendment claim. *Swartz* Pet. App. 8-22. The court explained that J.A., a Mexican citizen, had been shot and thus "seized" in Mexico. *Id.* at 11. And it rejected the argument that, under *Verdugo-Urquidez*, *su-*

pra, the Fourth Amendment does not apply to the seizure of an alien abroad. *Swartz* Pet. App. 11-17. The court then concluded that it was clearly established that Agent Swartz could not shoot J.A. "for no reason," which the court treated as the relevant inquiry for qualified-immunity purposes. *Id.* at 21; see *id.* at 17-22. The court declined to analyze respondent's Fifth Amendment claim, though it noted that the Fifth Amendment might apply if the Fourth Amendment did not. *Id.* at 22 & n.62.

The court of appeals next determined that it was appropriate to extend *Bivens* to the circumstances here. *Swartz* Pet. App. 22-52. Given this Court's recent guidance in *Hernandez*, the court of appeals excused any waiver and concluded that it had jurisdiction to address the *Bivens* question. *Id.* at 23-24. The court also recognized that this case presents a "new context" under *Abbasi*, as it involves an injury to a foreign citizen in a foreign country. *Id.* at 31-32.

The court of appeals nonetheless extended *Bivens* because it concluded that respondent lacked an adequate alternative remedy and that no special factors counseled hesitation. *Swartz* Pet. App. 32-53. The court emphasized that respondent could not bring a tort claim against the United States or Agent Swartz, that restitution would not provide an adequate remedy, and that other potential alternative remedies were, in its view, inadequate. *Id.* at 33-43. The court then concluded that no "special factors" are present in this case. *Id.* at 43-53. The court performed that analysis at a "high level of specificity," evaluating the "specific facts alleged in the complaint, not cross-border shootings generally." *Id.* at 44-45. It concluded that no special

factors counseled hesitation in extending a *Bivens* remedy to "the unjustifiable and intentional killing of someone who was simply walking down a street in Mexico and who did not direct any activity toward the United States." *Id.* at 45. On those precise facts, the court rejected the argument that this context implicates national security or foreign policy, or that it involves policies or policymakers. *Id.* at 45-51. The court thus affirmed the district court's conclusions that Agent Swartz is not entitled to qualified immunity and that extending *Bivens* is appropriate here. *Id.* at 52-53.

b. Judge Milan Smith dissented. *Swartz* Pet. App. 55-75. He explained that, in determining whether to extend *Bivens*, the "question is who should decide whether to provide for a damages remedy, Congress or the courts?" *Id.* at 55 (quoting *Abbasi*, 137 S. Ct. at 1857) (internal quotation marks omitted). In this case, he concluded, "the obvious answer is Congress." *Ibid.*

Judge Smith observed that this case presents a new context for a *Bivens* claim and that, under this Court's precedents, such expansions of *Bivens* are disfavored. *Swartz* Pet. App. 56-64. In his view, several special factors counseled against authorizing a *Bivens* remedy here. *Id.* at 64-73. He noted that cross-border incidents implicate foreign relations and border security, both of which are prerogatives of the political branches. *Id.* at 65-67. He also emphasized that Congress had intentionally omitted a damages remedy in similar contexts, including 42 U.S.C. 1983, which suggested that the judiciary should not imply such a remedy. *Swartz* Pet. App. 67-70. Finally, he explained that the extraterritorial nature of the case provided additional reasons not to imply a damages remedy. *Id.* at 70-71.

Judge Smith criticized the majority for placing "undue weight on what is, in its view, an insufficient alternative remedial structure." *Swartz* Pet. App. 71. He explained that, under this Court's decisions, the lack of an alternative remedy "cannot, on its own, compel judicial creation of a damages remedy." *Ibid.* He thus warned that "the majority [had] create[d] a circuit split" with the en banc Fifth Circuit. *Id.* at 61.

DISCUSSION

Both petitions raise the first question presented: whether the judicially created *Bivens* remedy should be extended to a claim arising from an injury to a foreign citizen in foreign territory. The en banc Fifth Circuit correctly declined to extend the *Bivens* remedy to that new context, see *Hernández* Pet. App. 1-23, but a divided panel in the Ninth Circuit erroneously reached the opposite conclusion, see *Swartz* Pet. App. 1-53. Certiorari is warranted to resolve the conflict on that important question and to provide the lower courts additional guidance after this Court's decision in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017).

Although both cases would be appropriate vehicles for considering the first question presented, the United States recommends that the Court grant certiorari in *Hernández*, No. 17-1678, and hold the petition in *Swartz*, No. 18-309. The former case cleanly presents the threshold *Bivens* issue, and the en banc Fifth Circuit considered whether a *Bivens* remedy is available for both Fourth and Fifth Amendment claims. By contrast, the Ninth Circuit addressed *Bivens* only in the Fourth Amendment context, and its decision presents an additional complex question about qualified immunity, including the scope of the Fourth Amendment.

Finally, certiorari is not warranted on the second question presented in the *Hernández* petition—whether the Westfall Act violates the Due Process Clause of the Fifth Amendment—because that question was not pressed or passed upon below and is not the subject of any disagreement among the lower courts.

1. The Fifth Circuit correctly declined to extend *Bivens* to the novel and special circumstances in these cases, and the Ninth Circuit erred in reaching the opposite conclusion. In *Abbasi*, this Court strongly cautioned against extending the *Bivens* remedy to new contexts, explaining that the Court's willingness to imply private rights of action not created by Congress had fundamentally changed since *Bivens* was decided. 137 S. Ct. at 1855-1857. Because it is a "significant step under separation-of-powers principles for a court to determine that it has the authority * * * to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation," *id.* at 1856, the Court emphasized that "expanding the *Bivens* remedy is now a disfavored judicial activity," *id.* at 1857 (citation and internal quotation marks omitted). It explained that courts should not extend a *Bivens* remedy to any new context "if there are special factors counselling hesitation in the absence of affirmative action by Congress." *Ibid.* (citation and internal quotation marks omitted).

a. These cases present a new context for *Bivens* purposes because they differ in "meaningful way[s]," *Abbasi*, 137 S. Ct. at 1859, from the three prior cases in which this Court has recognized a *Bivens* remedy. In particular, this Court has never recognized a *Bivens* remedy arising from an injury inflicted on a foreign citizen in another country's sovereign territory. And, at

least as relevant in *Hernández*, this Court has never recognized a *Bivens* remedy for asserted violations of the substantive due process component of the Fifth Amendment. Like the claims in *Abbasi*, which presented new contexts, a claim for injury suffered by a foreign national in a foreign country as a result of the actions of a U.S. Border Patrol agent "bear[s] little resemblance" to a "claim against FBI agents for handcuffing a man in his own home without a warrant." *Id.* at 1860.

For that reason, every court of appeals judge to consider the question—including the dissenting judges in the en banc Fifth Circuit and the panel in the Ninth Circuit—has agreed that this type of case presents a new context. See *Hernández* Pet. App. 26; *Swartz* Pet. App. 31-32. Indeed, this Court's remand order in *Hernandez* presupposed that the case presents a new context, which is why the Court remanded in light of its "clarif[ication]" of "what constitutes a special factor counselling hesitation." 137 S. Ct. at 2006 (brackets, citation, and internal quotation marks omitted); see *id.* at 2007 (noting that it "may be unnecessary to resolve" the underlying Fourth Amendment question "in light of the intervening guidance provided in *Abbasi*").

b. Courts should not extend *Bivens* to the new context presented here. In *Abbasi*, this Court instructed that to determine whether a new context presents any "special factor counselling hesitation," a court "must 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." 137 S. Ct. at 1857-1858. If a court has any "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the

system for enforcing the law and correcting a wrong, the court[] *must refrain* from creating the remedy in order to respect the role of Congress." *Id.* at 1858 (emphasis added). Applying those principles, the en banc Fifth Circuit appropriately identified several special factors that counsel against implying a damages remedy here. See *Hernández* Pet. App. 13-23.

First, imposing a damages remedy on aliens injured abroad by U.S. government officials would implicate foreign-policy considerations that are committed to the political branches. *Hernández* Pet. App. 15-16; see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). As the Fifth Circuit observed, "the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil." *Hernández* Pet. App. 15. In *Hernández*, for example, the United States declined Mexico's request to extradite Agent Mesa, *ibid.*, although the two countries have maintained a "dialogue" about cross-border shootings, *id.* at 16. Judicial extension of a *Bivens* remedy would inject the courts into these sensitive matters of international diplomacy and would risk undermining the government's ability to speak with one voice in international affairs. See *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208-209 (D.C. Cir. 1985) (Scalia, J.).

Second, "extending *Bivens* would interfere with the political branches' oversight of national security." *Hernández* Pet. App. 23; see *id.* at 13-15. As the Fifth Circuit recognized, Congress has charged the U.S. Border Patrol with securing the border and preventing terrorist attacks. *Id.* at 13; see 6 U.S.C. 111 and 6 U.S.C. 202 (2012 & Supp. V 2017). Imposing damages liability on individual agents carrying out that important national-security function "could undermine the Border Patrol's

ability to perform duties essential to national security" by "increas[ing] the likelihood that Border Patrol agents will 'hesitate in making split second decisions.'" *Hernández* Pet. App. 13, 15 (citation omitted); see *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."), cert. denied, 544 U.S. 950 (2005). And other suits by aliens injured abroad might similarly implicate military or intelligence activities that affect national security. See, *e.g.*, *Sanchez-Espinoza*, 770 F.2d at 208-209.

Third, implying a *Bivens* remedy here "would flout Congress's consistent and explicit refusals to provide damage remedies for aliens injured abroad." *Hernández* Pet. App. 23; see *id.* at 16-18. Several statutes indicate that Congress's omission of the damages remedy that petitioners seek was not a "mere oversight." *Abbasi*, 137 S. Ct. at 1862. Most relevantly, when Congress enacted 42 U.S.C. 1983 to provide a statutory remedy for individuals whose constitutional rights are violated by state officials, Congress expressly limited that remedy to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." Congress similarly has declined to impose damages liability for federal officials' actions abroad in the FTCA, 28 U.S.C. 2680(k), and in the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. Because Congress has "repeated[ly] refus[ed]" to create private rights of action in these circumstances, "[i]t is not credible that Congress would favor the judicial invention of those rights." *Hernández* Pet. App. 17-18; see *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015)

(Kavanaugh, J., concurring), cert. denied, 137 S. Ct. 2325 (2017).

Fourth, "the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues already discussed." *Hernández* Pet. App. 19; see *id.* at 19-22. The presumption against extraterritoriality "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches," and that concern "is magnified" when "the question is not what Congress has done but instead what courts may do." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). And even when an underlying substantive rule has extraterritorial reach, the "presumption against extraterritoriality must be applied separately" to the question whether a private damages remedy extends to injuries suffered abroad. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2108 (2016). The presumption thus counsels against extending the *Bivens* damages remedy to injuries suffered by aliens abroad. See, *e.g.*, *Meshal*, 804 F.3d at 425-426 (declining to extend *Bivens* extraterritorially).

In light of any one of these four features—and certainly considering all four "[t]aken together," *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983)—the en banc Fifth Circuit correctly held that "special factors" counsel against extending *Bivens* to this new context.

c. The Ninth Circuit, by contrast, improperly discounted those factors. See *Swartz* Pet. App. 43-53. It also erroneously treated the supposed absence of an adequate alternative remedy as a reason to expand *Bivens*. See *id.* at 33-43. But this Court has made clear that while the *presence* of an alternative remedy may

preclude an extension of *Bivens*, the "*absence* of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-422 (1988) (emphasis added). To the contrary, the special-factors analysis applies "even in the absence of an alternative." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). Moreover, as the Fifth Circuit correctly noted, the absence of a *Bivens* remedy "does not mean the absence of deterrence." *Hernández* Pet. App. 18; see *id.* at 18-19 (discussing other means of deterrence, such as criminal investigations and prosecutions).

2. In addition to the fact that the Ninth Circuit has wrongly decided an important question of *Bivens* liability, the Fifth and Ninth Circuits have plainly reached differing conclusions based on materially identical facts. Compare *Hernández* Pet. App. 1-23, with *Swartz* Pet. App. 22-52; see also *Swartz* Pet. App. 59-61 (M. Smith, J., dissenting) (urging adherence to the Fifth Circuit's decision in *Hernandez* and criticizing the *Swartz* majority for "creat[ing] a circuit split"). A direct conflict thus exists between the Fifth Circuit and the Ninth Circuit about whether a *Bivens* remedy is available for aliens injured abroad in a cross-border shooting.

Certiorari is warranted to resolve that conflict. The division between the Fifth and Ninth Circuits suggests that lower courts would benefit from additional guidance regarding this Court's decision in *Abbasi*. And the question whether to extend a *Bivens* remedy to these circumstances is undeniably significant—as underscored by this Court's addition of that question when *Hernández* was previously before the Court. That question implicates substantial concerns about national

security and foreign policy. See *Hernández* Pet. App. 13-16; pp. 16-17, *supra*. Particularly in this sensitive area of international relations, "an uneven administration of the rule of law" is "an untenable result." *Swartz* Pet. App. 74 (M. Smith, J., dissenting).

3. Although both petitions would be suitable vehicles for addressing the *Bivens* question—and although the Fifth Circuit reached the correct outcome—the petition in *Hernández*, No. 17-1678, offers a few advantages. As a result, the Court should grant certiorari in that case and hold the petition in *Swartz*, No. 18-309.

First, *Hernández* is a well-vetted vehicle. It has already been before this Court, and the *Bivens* question received a full airing before the en banc court of appeals on remand. See *Hernández* Pet. App. 1-42.

Second, *Hernández* would more definitively resolve the *Bivens* question for future similar cases. The Fifth Circuit considered whether a *Bivens* remedy is available for both Fourth and Fifth Amendment claims. See *Hernández* Pet. App. 8-10. By contrast, the Ninth Circuit in *Swartz* addressed only whether a *Bivens* remedy is available for the plaintiff's Fourth Amendment claim. See *Swartz* Pet. App. 11-22. In the view of the United States, the result of the analysis is the same under both the Fourth and the Fifth Amendments. But because this Court noted in *Abbasi* that a different "constitutional right" could present a new *Bivens* context, 137 S. Ct. at 1860, a ruling in *Hernández* would remove any doubt about whether the Court's holding in the Fourth Amendment context applies to Fifth Amendment claims as well. Cf. *Swartz* Pet. App. 22 & n.62 (reserving Fifth Amendment question).

Third, *Hernández* presents only the *Bivens* question. The Ninth Circuit's decision in *Swartz* presents

the additional question whether the Border Patrol agent is entitled to qualified immunity, including whether the Fourth Amendment applies to an alien injured abroad. See *Swartz* Pet. 16-21. When the Court last considered these issues, it indicated that it would prefer to focus on the "antecedent" *Bivens* question because the underlying Fourth Amendment issue "is sensitive and may have consequences that are far reaching." *Hernandez*, 137 S. Ct. at 2006-2007. In addition, the *Bivens* question and the Fourth Amendment question are sufficiently distinct, complex, and important that it would best serve the Court to focus the parties' and the Court's resources on the *Bivens* question alone. That said, if the Court grants review in *Hernández* and decides to extend *Bivens* to the new context here, the underlying Fourth Amendment question is sufficiently important that it would likely warrant review in a future case. Alternatively, then, the Court could choose to grant *Swartz* and hold *Hernández*, in order to consider both questions now.

Either way, at a minimum the Court should grant certiorari in one of these two cases to address the question whether to extend a *Bivens* remedy to the new context of an injury inflicted on a foreign citizen in another country's sovereign territory. If it grants one of these two petitions, the Court should hold the other, as granting both and consolidating them would not provide any additional benefit (and would complicate briefing and argument, given the different postures).

4. If the Court grants the petition in *Hernández*, certiorari is not warranted on the second question presented. Petitioners argue for the first time (*Hernández* Pet. 23-27) that the Westfall Act, 28 U.S.C. 2679, would violate the Due Process Clause of the Fifth Amendment

if it preempts state-law tort suits for constitutional violations by federal officers where no *Bivens* remedy exists. In petitioners' view (*Hernández* Pet. 26), the absence of either a federal or a state forum for seeking money damages against federal officers for constitutional violations would "raise[] serious constitutional problems" because it would "cut off access to any judicial forum for a colorable constitutional claim." Petitioners did not make that argument before the court of appeals (or before this Court previously). Because this Court "is one of review, not of first view," *Hernandez*, 137 S. Ct. at 2007 (citation omitted), it ordinarily does not entertain claims that were neither pressed nor passed upon in the courts below.

Nothing justifies a departure from that practice in this case. Petitioners do not allege a conflict on the second question presented; indeed, they do not allege that *any* court has ever addressed it. See *Hernández* Pet. 25-27. And the contention that the Westfall Act violates the Due Process Clause is meritless in any event. Petitioners rely (*id.* at 26-27) on this Court's statement in *Webster* v. *Doe*, 486 U.S. 592 (1988), that a "serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603 (internal quotation marks omitted). But the Westfall Act merely prohibits a specific type of remedy—damages against federal officers acting within the scope of their employment—and does not purport to "deny any judicial forum" for constitutional claims. *Ibid.*; see 28 U.S.C. 2679(b). Petitioners fail to cite any decision of this Court or any other court suggesting that the Constitution enshrines a right to sue federal officers for money damages. Cf., *e.g.*, *Wilkie*, 551 U.S. at 550 (noting that, "even in the

absence of an alternative, a *Bivens* remedy is a subject of judgment"). And if petitioners face barriers to asserting their claims through other avenues, such as a suit against the United States under the FTCA or a suit for injunctive relief, the Westfall Act does not erect those barriers.

CONCLUSION

The petition for a writ of certiorari in *Hernández*, No. 17-1678, should be granted, limited to the first question presented in the petition. The petition for a writ of certiorari in *Swartz*, No. 18-309, should be held pending the disposition of *Hernández*.

Respectfully submitted.

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