**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**

## SUPPLEMENTAL BRIEF


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## SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioners file this brief in response to the invited Brief for the United States as *Amicus Curiae* in this case and in *Swartz* v. *Rodriguez*, No. 18-309, which was filed on April 11, 2019 [hereinafter "U.S. Br."]. Both cases arise out of fatal cross-border shootings of unarmed Mexican teenagers by Customs and Border Protection (CBP) agents, and both cases raise the question this Court left unaddressed in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017):

> Where, as here, plaintiffs plausibly allege that a rogue federal law enforcement officer has violated clearly established constitutional rights for which there is no other possible legal remedy, can and should the federal courts recognize a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)?

Pet. 1. Unlike in *Swartz*, Petitioners here also raised a second question—whether declining to recognize a *Bivens* remedy casts doubt on the constitutionality of the Westfall Act, 28 U.S.C. § 2679(b)(1), insofar as it preempts the Texas state-law tort claims to which Petitioners could have otherwise resorted. Pet. 23–27.

In its invited brief, the Solicitor General agrees with Petitioners that (1) the *Bivens* question is sufficiently important to justify granting certiorari; (2) certiorari is further justified by the circuit split between the decision below and the Ninth Circuit's subsequent and contrary ruling in *Swartz*; and (3) this case "cleanly presents the threshold *Bivens* issue." U.S. Br. 13. Thus, the Solicitor General recommends that this Court grant certiorari here.

But the Solicitor General also recommends that the grant of certiorari in this case be limited to the first of the two questions presented. In short, the government asks this Court to take up whether Petitioners are entitled to a remedy under *Bivens*, but *not* the serious constitutional question that would arise with respect to the Westfall Act if they are not.

The government's principal argument in support of cleaving off the second question is that it wasn't fully raised and resolved below. *See id.* at 21–23. That contention is unavailing for three distinct reasons: Petitioners raised the relevance of the Westfall Act from the moment this Court added the *Bivens* question to the grant of certiorari in *Hernández I*; the Solicitor General's position on the merits necessarily provokes the same Westfall Act question as the Fifth Circuit's decision below—a question this Court would have to answer to provide the "guidance" the Solicitor General seeks; and, even if Respondent had not forfeited any objection to this Court's consideration of the Westfall Act question by refusing to raise it in his brief in opposition to certiorari, neither Respondent nor the Solicitor General would be prejudiced in any way by this Court's plenary consideration. Thus, the petition should be granted in its entirety.

## I. THE WESTFALL ACT HAS BEEN PART OF THIS CASE SINCE THIS COURT ADDED THE *BIVENS* QUESTION IN *HERNÁNDEZ I*

When this case first reached this Court, it was not about the scope of *Bivens*. In *Hernandez* v. *United States*, 785 F.3d 117 (5th Cir. 2015) (en banc) (per curiam), the Fifth Circuit had affirmed the dismissal of Petitioners' claims against Respondent solely on the basis of qualified immunity. It was this Court, not the

parties (or the United States), that raised the *Bivens* issue when it granted certiorari in *Hernández I*. *See Hernandez* v. *Mesa*, 137 S. Ct. 291, 291 (2016) (mem.).[1]

From that point on, the Westfall Act has figured prominently in Petitioners' analysis of the availability of a damages remedy under *Bivens*. That is because the Westfall Act displaces the Texas tort remedies to which Petitioners could otherwise have resorted. *See, e.g.*, Reply Br. at 5 & n.2 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 2016)). And the availability of alternative remedies has long been a central feature of this Court's *Bivens* analysis. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1858; *Minneci* v. *Pollard*, 565 U.S. 118, 120 (2012) (declining to recognize a *Bivens* remedy where "state tort law authorizes adequate alternative damages actions"). If no *Bivens* remedy is available, then the Westfall Act has the effect of depriving Petitioners of the only remaining judicial remedy to vindicate their constitutional rights.

To that end, Petitioners' opening merits brief in *Hernández I* specifically explained that the Westfall Act is the reason why "the Hernández family [cannot] hold Agent Mesa accountable in state court," Brief for the Petitioners at 41, *Hernandez* v. *Mesa*, 137 S. Ct. 2003 (2017) (per curiam); that a refusal to recognize a *Bivens* remedy "would break new ground in allowing constitutional harms to go unredressed," *id*. at 48; and

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1. The three-judge Fifth Circuit panel in *Hernández I* had initially recognized a *Bivens* remedy for Petitioners' Fifth Amendment claim, at least in part because of the Westfall Act's preclusion of alternative remedies. *See Hernandez* v. *United States*, 757 F.3d 249, 273–77 & n.11 (5th Cir. 2014). On rehearing en banc, the Court of Appeals declined to consider the *Bivens* question. *Hernandez*, 785 F.3d at 121 n.1 (Jones, J., concurring).

that this Court had never, in an ordinary law enforcement case, "left an aggrieved family with 'nothing.'" *Id*. Despite holding that the Fifth Circuit's qualified immunity analysis was erroneous, this Court did not resolve the *Bivens* issue in *Hernández I*—opting instead to return the case to the Court of Appeals for further consideration in light of *Abbasi*. *See* 137 S. Ct. at 2006–07.

It was only on remand that the en banc Fifth Circuit held, for the first time, that Petitioners could not proceed under *Bivens*—based almost entirely upon this Court's intervening ruling in *Abbasi*. *See* Pet. App. 4–23. Thus, although the Westfall Act had figured prominently in Petitioners' *Bivens* analysis up to that point, it was not until the Fifth Circuit's decision in *Hernández II* that the constitutionality of the Westfall Act was directly implicated.

The government's *amicus* brief nowhere disputes that, like the Fifth Circuit's decision in *Hernández II*, its *Bivens* analysis would leave Petitioners with no possible legal remedy—even for meritorious constitutional claims. Instead, the government argues that such a result raises no constitutional concerns, primarily because no decision of this Court "suggest[s] that the Constitution enshrines a right to sue federal officers for money damages." U.S. Br. 22. The government fails to note that this Court has never held to the *contrary*, either; it hasn't had to. Outside of cases arising in the military, this Court has never had a *Bivens* case where the ultimate choice was "*Bivens* or nothing," and it chose the latter. *See, e.g.*, *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70–71 (2001) (summarizing this Court's *Bivens* decisions). And in denying a *Bivens* remedy to the plaintiffs in *Abbasi*, the Court carefully noted that it was "of

central importance . . . that this is *not* a case like *Bivens* or *Davis* in which 'it is damages or nothing.'" 137 S. Ct. at 1862 (emphasis added; citations omitted). *Abbasi* repeatedly distinguished excessive-force cases, like *Bivens* and this one, in which plaintiffs "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." *Id.*

More fundamentally, this Court has never held that Congress can deprive plaintiffs with colorable constitutional claims of access to every possible judicial forum. To the contrary, it has repeatedly and consistently interpreted statutes to avoid the "serious constitutional questions" that would arise from such a result. *See* Pet. 26–27. In cases in which courts decline to recognize a *Bivens* claim—and, unlike *Abbasi*, no other remedy is available—the Westfall Act has that precise effect.[2] Although Petitioners therefore believe that the Westfall Act would be unconstitutional as applied here, *see id.*, the gravity and closeness of the

2. The government therefore misses the point when it suggests that, "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." U.S. Br. 23. It is the Westfall Act, not any of these other barriers, that precludes Petitioners from asserting their constitutional claims in a state-law tort suit—the very remedy that, in *Bivens*, the Solicitor General had argued rendered it unnecessary to recognize a *federal* judge-made remedy. *See* Pet. 25 n.8 (citing Brief for the United States at 34–38, *Bivens*, 403 U.S. 388 (No. 301), 1970 WL 116900).

In any event, a statute can unconstitutionally deprive plaintiffs of a remedy even where other statutes (or judicial decisions) have also contributed to the unavailability of alternatives. *See, e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723 (2008).

question could also potentially factor into whether this Court allows Petitioners to proceed under *Bivens*.

To nevertheless ask this Court to hold that Petitioners have no *Bivens* remedy *without* even considering the constitutional implications of such a holding not only ignores the role that the Westfall Act has already played in this litigation to date, but asks this Court to resolve this case with one arm tied behind its back (and in the government's favor).

## II. THE GUIDANCE THE GOVERNMENT SEEKS CANNOT BE PROVIDED WITHOUT ANSWERING THE SECOND QUESTION PRESENTED

Before the Ninth Circuit created a circuit split in *Swartz*, Petitioners' initial argument in support of certiorari was the need to resolve the question *Abbasi* had left unanswered. In its *amicus* brief, the government agrees that the need for such guidance is an additional justification for granting certiorari—beyond the need to resolve the now-extant circuit split. U.S. Br. 13; *see also id.* at 19 ("[L]ower 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.").

But a decision by this Court in this case would not provide the guidance the government seeks without considering the implications for the Westfall Act of a refusal to recognize a *Bivens* remedy—especially if this Court accepts the government's arguments on the merits and affirms the en banc Fifth Circuit's ruling in *Hernández II*. After all, one of the most important differences between this case and *Abbasi* is the unavailability here of any alternative legal remedy—

a result that follows directly from, and therefore has implications for, the Westfall Act. *See* Pet. 16–18.

If this Court expressly declines to take up the second question presented, lower courts could reasonably be left to wonder whether and to what extent this Court considered the constitutional implications for the Westfall Act in deciding not to recognize a *Bivens* remedy. It is virtually inevitable, as a result, that the Westfall Act question would eventually return to this Court—and that lower courts might divide on the matter in the interim.

It would be one thing if such uncertainty were the result after this Court considered the issue through plenary briefing and argument. But there is no reason to grant certiorari under conditions that would *prevent* this Court from resolving the serious constitutional question that arises from Respondent's (and the government's) position on the merits.

This analysis also undercuts the government's "alternative" suggestion that this Court grant certiorari in *Swartz* and hold this petition. *See* U.S. Br. 21. Because the Ninth Circuit recognized a *Bivens* remedy in *Swartz*, *see Rodriguez* v. *Swartz*, 899 F.3d 719, 734–48 (9th Cir. 2018), the petition in that case does not even allude to the constitutionality of the Westfall Act, and the Respondent did not raise it in her brief in opposition. A decision by this Court in that case alone, especially along the lines for which the government advocates in its *amicus* brief, would therefore provide even less guidance to lower courts going forward. *See* Reply Br. 10 n.4.

Thus, although Petitioners agree with the Solicitor General that this case "cleanly presents the threshold *Bivens* issue," U.S. Br. 13, part of why Petitioners are

of that view is *because* it also presents the Westfall Act question. This Court may ultimately decide that it does not need to resolve the second question presented (especially if Petitioners prevail on the first question). But preventing the parties and *amici* from briefing and arguing the Westfall Act issue in the first place would artificially distort both the *Bivens* analysis and its implications—especially if the decision below is affirmed.

## III. NEITHER RESPONDENT NOR THE UNITED STATES WOULD BE PREJUDICED BY GRANTING THE SECOND QUESTION PRESENTED

Tellingly, in his brief in opposition to certiorari, Respondent not only did not *object* to Petitioners' inclusion of the second question presented, but he responded to it (in detail) on the merits. *See* Resp. Br. 11–15. Whether or not Respondent thereby forfeited any objection to this Court's consideration of the issue, *see* S. Ct. R. 15.2, there is no argument that Respondent—or the United States, which also addressed the merits in its *amicus* brief—would in any way be prejudiced by subjecting the second question to plenary review. Indeed, the government does not argue to the contrary. *See, e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("Although we do not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts." (citing *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957))).

Ultimately, as Petitioners noted in our Reply Brief, this case is about far more than the circumstance-specific circuit split between the Fifth Circuit's decision in *Hernández II* and the Ninth Circuit's

decision in *Swartz*. What is really at stake is the future viability of *Bivens* after and in light of *Abbasi*—and whether *Abbasi* effectively limits *Bivens* to its facts, as the Fifth Circuit all-but held, or whether this Court "meant what it said" when it "stressed the importance of preserving *Bivens* claims in cases in which damages were the only possible legal remedy for constitutional violations by a rogue federal law enforcement officer." Reply Br. 1. The proper way for this Court to resolve this "important question and to provide the lower courts additional guidance," U.S. Br. 13, is to grant both of the questions presented in the petition and decide this case accordingly.

* * *

## CONCLUSION

For these reasons and those previously stated, the petition for a writ of certiorari should be granted—in its entirety.

Respectfully submitted,

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