No. 17-1678

In The Supreme Court of the United States

JESUS C. HERNANDEZ, 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

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners allege that on June 7, 2010, their fifteen-year-old son, Sergio Adrián Hernandez Güerca ("Hernandez"), a citizen and resident of Mexico, was playing with his friends at the border area near the Paso del Norte Bridge in El Paso, Texas. *Jesus C. Hernandez, et al. v. the United States of America, et al.*, 2012 WL 4783845. According to the Petitioners, the boys were playing a game which involved running up and touching the border fence and then running back down the incline of the culvert into Mexico. *Id*. United States Border Patrol Agent Jesus Mesa, Jr. arrived at the scene and detained one of the individuals. *Id.* Hernandez retreated under the Paso del Norte Bridge in Mexico. *Id.* Petitioners allege that Agent Mesa, while standing in the United States, then pointed his service weapon at Hernandez and shot across the border at least twice. *Id.* Hernandez was shot at least once and subsequently died. *Id.*

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S INTERPRETATION OF *ABBASI* REGARDING A *BIVENS* CLAIM IN THIS CAUSE IS CORRECT AND DOES NOT NEED TO BE CLARIFIED.

Upon receiving this cause on remand, the United States Fifth Circuit Court of Appeals reviewed the facts of this case, in light of *Ziglar v. Abbasi*, ___ U.S. ___, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017), and held that the *Abbasi* decision shuts the door on the

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

Circuit Judge Edith Jones, writing for the court in the remanded *Hernandez*, opened the opinion by explaining that "when Congress passed what is now 42 U.S.C. § 1983 in 1871, [Congress] enacted no comparable law authorizing damage suits in federal court to remedy constitutional violations by federal government agents." *Id*. at 815.

Judge Jones went on to write that beginning in 1971, the Supreme Court of the United States, in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), "broke new ground by allowing suits that made constitutional claims against the federal government and its entities." *Hernandez,* 885 F.3d at 815. *Bivens* began with a Fourth Amendment violation against federal law enforcement officers when searching a home. *Id.* Soon after *Bivens*, the Court then approved a Fifth Amendment equal protection claim against a United States Congressman for employment discrimination violations. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). And then right after *Passman*, the Court expanded *Bivens* recognizing an Eighth Amendment claim against federal jailers for inadequate inmate medical care. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

Upon re-examining this judicially created exception, Justice Kennedy writing the Court's opinion in

Abbasi recognized that *Bivens* and its progeny coincided during a time when the Court followed a different approach to recognizing implied causes of action than it follows now. *Abbasi*, 137 S.Ct. at 1855. During this "ancient regime," the Court followed a different approach to recognizing implied causes of action than it follows now. Justice Kennedy wrote that during the mid-20th century, the Court felt that it was a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose. *Abbasi*, 137 S.Ct. at 1855. Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

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

Thus, as of late, the Court makes it clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is in concurrence with the fact that the Court refused to extend *Bivens*

to any new context or new category of defendants during the past 30 years. *Abbasi*, 137 S.Ct. at 1856; *see also Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).

So far, the Court has decided against creating a First Amendment suit against a federal employer, *Bush v. Lucas,* 462 U.S. 367, 390, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); a race-discrimination suit against military officers, *Chappell v. Wallace,* 462 U.S. 296, 297, 304–305, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); a substantive due process suit against military officers, *United States v. Stanley,* 483 U.S. 669, 671–672, 683–684, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky,* 487 U.S. 412, 414, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer,* 510 U.S. 471, 473–474, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); an Eighth Amendment suit against a private prison operator, *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins,* 551 U.S. 537, 547–548, 562, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard,* 565 U.S. 118, 120, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012).

So when a party "seeks to assert an implied cause of action under the Constitution itself," Justice Kennedy wrote, "just as when a party seeks to assert

an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abbasi*, 137 S.Ct. at 1856. Ultimately, the question as to who should decide whether to provide for a damages remedy, Congress or the courts, the answer most often should be Congress. *Id*. at 1857. But even if we are to apply *Bivens* to our case, taking into account *Abbasi*'s ruling, there is still an "exacting" two-part analysis for implying *Bivens* claims. *Hernandez*, 885 F.3d at 816.

Circuit Judge Jones in *Hernandez* begins by analyzing the Petitioners' first claim that the "unprovoked shooting of a civilian by a federal police officer is a prototypical excessive force claim, presents no 'new context' under *Bivens*." *Hernandez*, 885 F.3d at 816. Disagreeing, Circuit Judge Jones writes that "the fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative." *Id*. She states that even though the detainees in *Abbasi* asserted claims for strip searches under both the Fourth and Fifth Amendments, the Supreme Court found a "new context" despite similarities between "the right and the mechanism of injury" involved in previous successful *Bivens* claims. *Id*.; *Abbasi*, 137 S.Ct. at 1859. As *Abbasi* points out, she states, "the *Malesko* case rejected a 'new' *Bivens* claim under the Eighth Amendment, whereas an Eighth Amendment *Bivens* claim was held cognizable in *Carlson*;" and *Chappell* rejected a *Bivens* employment discrimination claim in the military, although such a claim was allowed to proceed in *Davis v. Passman*. Judge Jones asserts that the proper

inquiry is whether "the case is different in a meaningful way" from prior *Bivens* cases. *Abbasi*, 137 S.Ct. at 1859.

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

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

To date, the Supreme Court has refused to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against American law enforcement agents' search of his premises in Mexico. *United States v. Verdugo–Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Language in *Verdugo*'s majority opinion strongly suggests that the

Fourth Amendment does not apply to American officers' actions outside of this country's borders. *Hernandez*, 885 F.3d at 817; *see also Verdugo–Urquidez*, 494 U.S. at 274–275, 110 S.Ct. at 1066. In *Hernandez*, the Court itself described the Petitioners' Fourth Amendment claims as raising "sensitive issues." *Id.*; *Hernandez v. Mesa*, ___ U.S. ___, 137 S.Ct. 2003, 2007, 198 L.Ed.2d 625 (2017).

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

The second theory, according to Judge Jones, would require the extension of the *Boumediene* decision, both beyond its explicit constitutional basis, Art. I, § 9, cl. 2, the Habeas Corpus Suspension Clause, and beyond the United States government's de facto control of the territory surrounding the Guantanamo Bay detention facility. *See Boumediene v. Bush*, 553 U.S.

723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) ("The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government."). Moreover, Judge Jones writes, "even nine years later, no federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional provisions or geographically to locales where the United States has neither de facto nor de jure control." *Hernandez*, 885 F.3d at 817. Unfortunately, the courts have already unanimously rejected such extensions. *Id.*

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

According to the Fifth Circuit's opinion, the newness of this "new context" should alone require dismissal of the Petitioners' damage claims. *Id*.

In their brief, the Petitioners argue that this case involves no "special factors" and no reasons, and the court should hesitate before extending *Bivens*. *Id.* But

no matter how remarkable this position may seem, "it is unremarkable that the Petitioners hold it—they must." *Id*. Unfortunately for the Petitioners, the presence of "special factors" precludes a *Bivens* extension. *Id*. Given *Abbasi*'s explanation of the "special factors", there is more than enough reason for this Court to stay its hand and deny the extraordinary remedy that the Petitioners seek. *Id*.

Abbasi clarifies the concept of "special factors" by explicitly focusing the inquiry on maintaining the separation of powers: "separation-of-powers principles are or should be central to the analysis." *Id*.; *Abbasi*, 137 S.Ct. at 1857. Underscoring the Court's steady retreat from the mid-20th century's expansion of *Bivens*, the *Abbasi* opinion instructs the lower courts to "concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S.Ct. at 1857–1858. In light of this guidance, the question for this Court is not whether this case is distinguishable from *Abbasi* itself, but whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id*. at 1858. If such reasons exist, "the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.*

Applying *Abbasi*'s separation-of-powers analysis reveals numerous "special factors" at issue in this case. *Hernandez*, 885 F.3d at 818. To begin with, this

extension of *Bivens* threatens the political branches' supervision of national security. *Id.* "The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Id*. at 819; *see Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012).

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

Of course, the defining characteristic of this case is that it is not domestic. *Hernandez*, 885 F.3d at 819. As Judge Jones stated, "National-security concerns are hardly 'talismanic' where, as here, border security is at issue." *Id*.; *see, e.g., United States v. Delgado–Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States.").

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

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

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

II. THE PETITIONER'S WESTFALL ANALYSIS IS INCORRECT.

Congress specifically created a statutory schema for the redress of wrongs committed by federal

employees while acting within the course and scope of their employment. When drafting the Westfall Act, codified in 28 U.S.C. § 2679, as enacted as an amendment to the Federal Tort Claims Act, the directives contained within paragraph (b)(1) of section 2679 clearly specify the remedies available for those seeking compensation for potential claims. *See* 28 U.S.C. Chapter 171 et seq. Section 2672 provides for an administrative option for claimants, and section 2679 provides, among other things, for the Constitutional claims that may lead to rise under *Bivens*. *See* 28 U.S.C. §§ 2672, 2679(b)(2).

The Westfall Act, entitled "Exclusiveness of Remedy", does not violate the Due Process protections contained within the Fifth Amendment. Pet. Cert. at 23. In fact, the Westfall Act is non-violative of the Fifth Amendment, due to the available remedies for tort claims by a federal officer acting within the course and scope of his or her employment. The preemption of state tort claims is intended to ensure consistent and fair adjudications of federal claims.

Petitioners' claim that the preemption of state tort claims by the Westfall Act, based upon the same or similar factual bases for which a *Bivens* claim is sought, violates the Due Process clause in the Fifth Amendment. Petitioners' assertion is founded on case law cited; and in the last sentence found in section (b)(1) which states that "precluded without regard to when the act or omission occurred." *See* 28 U.S.C. § 2679(b)(1). Petitioners ignore the fact that the exemptions found in section 2680 clearly prohibits actions arising in foreign countries. *See* 28 U.S.C.

§ 2680(k). The exclusion of claims arising in a "foreign country" clearly demonstrates Congressional intent to avoid questions of foreign sovereignty and diplomacy.

As early as 1942, the "foreign situs issue" appeared to be a concern for Congress. And in the hearings leading to an early draft of the Federal Tort Claims Act, the following comment was made: "[I]t is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the State is being applied. Otherwise, it will lead I think to a good deal of difficulty." Hearings on H.R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942). And the majority of cases similarly situated to the immediate case involve foreign actors or petitioners in some capacity.

In *Harbury v. Hayden*, the Court of Appeals for the District of Columbia addressed the issue of state tort claims remaining against the employees of the Central Intelligence Agency (CIA), and held that: a) the political question doctrine preempted any state law claim against the federal employees; and b) the foreign country exception applied given that the alleged harm occurred abroad to the petitioners. *See Harbury v. Hayden*, 522 F.3d 413, 423 (D.C. Cir. 2008) (widow of Guatemalan rebel fighter allegedly tortured and killed in that country by persons working for the CIA brought action against the CIA, Department of State, National Security Council (NSC), and numerous named individual federal government employees, alleging various claims arising under international law and common

law). State courts are not the venue to be deciding federal questions, nor are they equipped to do so. Even in the event that the aggrieved party is a United States' citizen, the proposition of applying fifty different bodies of substantive law is an untenable one.

By exposing the federal government to a myriad of state tort claims in every jurisdiction, the risk of fifty distinct outcomes is a very real possibility. This possibility becomes almost a probability given the differences in state tort law, immunity, and the application of case law, not to mention the disregard for the existing stare decisis that controls the adjudication of similar claims. A prime example is contained within this Court's decision in *Sosa v. Alvarez-Machain*, wherein the dismissal of a Mexican National's constitutional claims of abduction at the direction of the Drug Enforcement Agency (DEA) were addressed. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In holding that the Westfall Act's exception found in section 2680(k) prohibited the claim given that the alleged actions took place in the Republic of Mexico, this Court wrote that the immediate section "codified Congress's unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707, 124 S.Ct. 2739, 2752, 159 L.Ed.2d 718 (2004), *citing United States v. Spelar*, 338 U.S. 217, 221, 70 S.Ct. 10, 94 L.Ed. 3 (1949). *See also Sami v. United States,* 617 F.2d 755, 762 (D.C. Cir. 1979) (noting *Spelar*'s explanation but attempting to recast the object behind the foreign country

exception); *Leaf v. United States*, 588 F.2d 733, 736, n. 3 (9th Cir. 1978).

Of particular note is the following statement addressing this Court's rejection of the "headquarters rule": "The idea that Congress would have intended any such jurisdictional variety is too implausible to drive the analysis to the point of grafting even a selective headquarters exception onto the foreign country exception itself." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711–712, 124 S.Ct. 2739, 2754, 159 L.Ed.2d 718 (2004). Clearly, the desire for consistent outcomes is a prime factor for the foreign country exception contained within section 2870(k).

The absence of an alternative claim in the instant immediate case is not due to a violation of the Fifth Amendment; the lack of a federal cause of action lies in the international issue presented in the alleged harm occurring in the Republic of Mexico. For the foregoing reasons, Respondent respectfully disagrees with the premise contained within Petitioner's petition requesting this Court's review.

CONCLUSION

The petition for certiorari should not be granted.

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