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

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The central dispute in this case is whether *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), meant what it said. Even as it declined to recognize a cause of action for damages in that case under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Abbasi* 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. *See, e.g.*, 137 S. Ct. at 1857 ("The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere."). This Court was clear that it did not intend "to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 1856.

As the Petition demonstrated, the Fifth Circuit in this case repeatedly failed to heed these admonitions (and others) in its decision on remand from *Hernández* v. *Mesa* ("*Hernández I*"), 137 S. Ct. 2003 (2017) (per curiam). Instead, it misread and misapplied *Abbasi* to collapse any distinction between the claims in that case and claims against rogue federal officers arising in the "common and recurrent sphere of law enforcement," even where, unlike in *Abbasi*, plaintiffs have no alternative remedy. Pet. 8–18. Such analysis would necessarily limit *Bivens* to its facts—and those of *Carlson* v. *Green*, 446 U.S. 14 (1980), and *Davis* v. *Passman*, 442 U.S. 228 (1979). Pet. 19–22. Tellingly, Respondent's brief in opposition does not dispute this reading of the Fifth Circuit's ruling; it merely parrots the Court of Appeals' problematic misinterpretations of *Abbasi*. Resp. Br. 8–11.

As for the Petition's argument that the Fifth Circuit's ruling raises serious constitutional concerns about the Westfall Act, Respondent contends that the "foreign country" exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(k), disproves any such claim. Resp. Br. 12–13. This misunderstands the FTCA, which has never provided a vehicle for directly enforcing constitutional rights. Instead, the only way the FTCA would be relevant here is if it authorized a common-law tort claim that provided an *alternative* to a *Bivens* remedy. By highlighting that it does not, the brief in opposition only bolsters the case for certiorari.

Any remaining doubt as to the need for this Court's intervention was settled by *Rodriguez* v. *Swartz*, No. 15-16410, 2018 WL 3733428 (9th Cir. Aug. 7, 2018). In that case, which arose from another CBP agent's fatal and allegedly unprovoked cross-border shooting of an unarmed Mexican teenager, the Ninth Circuit *recognized* a *Bivens* claim under *Abbasi*. As Judge Kleinfeld wrote for the panel, "no other adequate remedy is available, there is no reason to infer that Congress deliberately chose to withhold a remedy, and the asserted special factors either do not apply or counsel in favor of extending *Bivens*." *Id.* at *17.

In the process, *Rodriguez* created a circuit split. Today, "an alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse under *Bivens*," whereas "an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages." *Id.* at *25 (M. Smith, J., dissenting). Certiorari should therefore be granted not only because the questions presented are important in their own right, but because the disparity created by this circuit split "is an untenable result, and will lead to an uneven administration of the rule of law." *Id.*

I. RESPONDENT DOES NOT DISPUTE PETITIONERS' READING OF *HERNÁNDEZ II*

The central argument the Petition advanced in favor of certiorari was that the Fifth Circuit's analysis in this case ("*Hernández II*") would necessarily limit *Bivens* to its facts—and those of *Carlson* and *Davis*—despite this Court's explicit refusal to take such a step in *Abbasi*. *See, e.g.*, Pet. 19–22. Among other things, *Hernández II* would preclude judicial recognition of a *Bivens* remedy in any case: (1) that presents a "new context"; (2) in which the defendant simply *invokes* national security, foreign affairs, or extraterritoriality as "special factors counseling hesitation"; (3) in which Congress has been silent about the availability of *Bivens*; *or* (4) where the possibility of federal criminal or state tort liability could theoretically provide an adequate deterrent. *See id*. At most, this approach to *Bivens* would confine such remedies to the specific circumstances presented in *Bivens*, *Carlson*, and *Davis*. And it might not even have extended that far, given Congress's silence in those contexts, as well—and the availability of state-law tort remedies to the plaintiffs at the time each of those cases was decided.[1]

In his brief in opposition to certiorari, Respondent does not disagree with any of this reasoning. Instead, starting from the premise that, "[p]ursuant to *Abbasi*, our case analysis is simple," Resp. Br. 6, Respondent's submission consists primarily of repeating the Fifth Circuit's misreadings of *Abbasi*, including that "the

1. In *Bivens*, for instance, the Solicitor General's principal argument against recognition of a federal remedy was that the federal defendants could be held liable under New York state trespass law. *See* Brief for the Respondents at 34–38, *Bivens*, 403 U.S. 388 (No. 301), 1970 WL 116900; *see also* Pet. 25 & n.8.

newness of this 'new context' should alone require dismissal of the Petitioners' damage claims," *id*. at 8, and that the mere "presence of 'special factors' precludes a *Bivens* extension." *Id*. at 9. As the Petition explained, however, these conclusions do not follow either from *Abbasi* or from this Court's instructions to the Fifth Circuit in *Hernández I*. *See* Pet. 8–18.

As for the asserted "special factors," Respondent simply rehashes the Fifth Circuit's bogeymen:

- "[T]his extension of *Bivens* threatens the political branches' supervision of national security." Resp. Br. at 9–10.
- "The threat of *Bivens* liability will undermine the Border Patrol's ability to perform duties essential to national security." *Id*. at 10.
- "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*.

This analysis reflects the exact same talismanic invocation of special factors to which *Abbasi* objected. *Rodriguez*, 2018 WL 3733428, at *15. When subjected to meaningful judicial scrutiny, these same purported special factors were easily debunked. *See id*. at *9–15.

But regardless of which analysis is correct, what matters here is that Respondent defends *Hernández II* on the same terms on which Petitioners have challenged it. Properly understood, the decision below therefore impels this Court to clarify what (if anything) remains of *Bivens* after *Abbasi*. Even without the circuit split created by *Rodriguez*, the significance of that question would independently warrant this Court's review.

II. RESPONDENT'S BRIEF UNDERSCORES THE SERIOUS CONSTITUTIONAL QUESTION PROVOKED BY *HERNÁNDEZ II*

If *Bivens* claims are no longer available even to challenge "individual instances of . . . law enforcement overreach" by rogue officers for which there is no alternative legal remedy, that result raises a serious constitutional question about the Westfall Act—and its preemption of all state-law tort remedies against federal officers acting within the scope of their employment. Pet. 23–27; *see* 28 U.S.C. § 2679(b). For constitutional claims that plaintiffs would otherwise have been able to litigate against offending officers under state tort law,[2] and for which neither *Bivens* nor an alternative legal remedy is available today, the Westfall Act necessarily has the effect of "deny[ing] any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988).

Whether the Due Process Clause protects a right of access to a judicial forum for resolution of colorable constitutional claims is, undoubtedly, a constitutional question of the first order. This Court has never expressly answered that question—either in general or in the specific context of tort claims against federal officers. Instead, it has repeatedly construed statutes to "avoid[] the 'serious constitutional question' that would arise" if no forum was available for such claims.

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2. "Texas state law explicitly provides that, under specified conditions, an individual may bring an action for personal injury damages in Texas although the wrongful act causing the injury took place in a foreign country." *Delgado* v. *Zaragoza*, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 2008)). *See generally Dow Chem. Co.* v. *Castro Alfaro*, 786 S.W.2d 674, 675–76 (Tex. 1990) (summarizing the history and purpose of § 71.031).

Bowen v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975)). It could similarly avoid that question here by recognizing a *Bivens* remedy based upon the allegations as pleaded in Petitioners' complaint. Otherwise, the decision below—and the Respondent's defense thereof—squarely presents the constitutional question raised in the Petition.

In response, the brief in opposition maintains that (1) Petitioners' claim here would be barred by the FTCA's "foreign country" exception, Resp. Br. 12–13; and (2) there are normative reasons to disfavor subjecting federal officers to differing state tort regimes, *id.* at 13–15. The former contention only reinforces the constitutional problem that arises from the Fifth Circuit's decision, whereas the latter simply underscores the purpose of *Bivens* in the first place.

To the former, the fact that the FTCA does not waive the federal government's sovereign immunity for *common-law* torts arising on foreign soil has no bearing on whether individual officers could be held liable for *constitutional* torts in such cases under state tort law prior to the Westfall Act, or whether they can be subjected to *Bivens* liability today. *See, e.g.*, *Rodriguez*, 2018 WL 3733428, at *10–11; *see also Carlson*, 446 U.S. at 19–20 (summarizing the relationship between the FTCA and *Bivens*). Instead, the foreign country exception only underscores the *absence* of alternative legal remedies for Petitioners' claims. Were Petitioners able to bring a common-law tort claim against the United States under the FTCA, the argument that the Westfall Act unconstitutionally deprives them of access to any judicial forum would, obviously, be far weaker. *See* Pet. 26 (citing *Felker* v. *Turpin*, 518 U.S. 651, 658–62 (1996)).

As for Respondent's objection to subjecting federal officers to the vagaries of state tort law, that precise (and well-taken) concern was a large part of the motivation behind this Court's ruling in *Bivens* in the first place. In recognizing a self-executing damages remedy directly under the Fourth Amendment, *Bivens* held that, as between disuniform state tort regimes and a uniform body of judge-made federal common law, it made far more sense to both plaintiffs and defendants to enforce the Constitution against federal officers through federal law. *See, e.g.*, 403 U.S. at 392–95; *see also id.* at 409–10 (Harlan, J., concurring in the judgment) (questioning "the desirability of leaving the problem of federal official liability to the vagaries of common-law actions"). *See generally* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 543–48 (2013) (noting the centrality of federalism and uniformity concerns to *Bivens*).

But the constitutional question provoked by the Fifth Circuit's decision in this case is not whether, as between state and federal damages remedies for constitutional violations by federal officers, courts should prefer the latter. It is whether, if *no* remedies are available to plaintiffs who allege that their clearly established constitutional rights were violated by a rogue federal law enforcement officer, the Westfall Act's preemption of pre-existing state-law tort remedies violates the Due Process Clause.

The importance of that question is self-evident. And contra Respondent's brief in opposition, neither the existence of the FTCA's foreign country exception nor the normative undesirability of pegging federal officer liability to the idiosyncrasies of different state tort regimes bears remotely on its answer.

III. *RODRIGUEZ* SETTLES THE NEED FOR THIS COURT'S INTERVENTION

The Petition explained why this Court's review of *Hernández II* would have been warranted even without a circuit split. And as the above analysis suggests, Respondent's brief in opposition does not actually undercut—and in several respects supports—that conclusion. But the Ninth Circuit's squarely conflicting decision in *Rodriguez* settles the case for granting this Petition beyond peradventure.

In *Rodriguez*, the Court of Appeals affirmed the district court's denial of a CBP agent's motion to dismiss a *Bivens* suit arising out of a disturbingly similar cross-border shooting. After holding that, under this Court's decision in *Hernández I*, the defendant was not entitled to qualified immunity at the motion-to-dismiss stage, *see* 2018 WL 3733428, at *2–7, the Court of Appeals affirmed the district court's recognition of a *Bivens* remedy. *Id.* at *7–17. In the process, the Ninth Circuit interpreted *Abbasi* in much the same way as Petitioners—and in direct and repeated contrast to the Fifth Circuit's analysis of materially similar claims in *Hernández II*.[3]

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3. The Ninth Circuit's analysis and application of *Abbasi* in *Rodriguez* conflicts with the Fifth Circuit's reasoning in *Hernández II* in at least six different respects: Whether (1) a *Bivens* remedy is ever available in a "new context," *Rodriguez*, 2018 WL 3733428, at *9; (2) the absence of alternative remedies weighs in favor of a *Bivens* claim, *id.* at *10–14; (3) these cases implicate high-level government policies, *id.* at *14–15; (4) "national security" is a special factor counseling hesitation, *id.* at *15; (5) extending *Bivens* into this context would have problematic foreign policy implications, *id.* at *16; and (6) the presumption against extaterritoriality weighs against recognition of a *Bivens* remedy, *id.* at *17.

There is no question that *Rodriguez* conflicts with *Hernández II*. *See id.* at *25 (M. Smith, J., dissenting) ("Three circuit courts touch the border between the United States and Mexico—our court, the Fifth Circuit, and the Tenth Circuit. Today, two of the three are split."); *id*. at *17 ("[T]he majority creates a circuit split."). And although Judge (Milan) Smith's dissent characterized the split as going to the availability of damages in the specific context of cross-border shootings by CBP agents, in reality, it runs far deeper.

The Fifth Circuit in *Hernández II* read *Abbasi* in a way that will all-but foreclose judicial recognition of new *Bivens* claims in almost any setting. The Ninth Circuit in *Rodriguez* did not just reach a different result on similar facts; it read *Abbasi* to stand for materially different conclusions about the availability and scope of *Bivens* remedies going forward. For as long as it persists, this conflict will have ramifications in cases far removed in both geography and substance from shootings across the U.S.-Mexico border.

* * *

Until 1988, state tort law ensured that, when federal officers acted in clear violation of their constitutional authority, victims of such misconduct had at least some opportunity to seek legal redress for their injuries. *Bivens* itself "drew far stronger support from the need for such a remedy when measured against a common-law and constitutional history of allowing traditional legal remedies where necessary." *Abbasi*, 137 S. Ct. at 1880 (Breyer, J., dissenting).

Whether or not lower courts subsequently went too far in extending *Bivens* into contexts that went *beyond* such "traditional legal remedies," only one of the six Justices who participated in *Abbasi* disputed "the

continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 1856 (majority opinion). One of the "powerful reasons to retain [*Bivens*] in that sphere," *id.* at 1857, is because the Westfall Act has preempted any possible alternative remedies under state tort law.

This Petition, then, does not just ask this Court to resolve the circuit split between *Hernández II* and *Rodriguez*. It also asks the Court to clarify whether, as *Abbasi* claimed, *Bivens* remedies remain available as a general matter today in cases in which plaintiffs allege violations of clearly established constitutional rights by rogue federal officers engaged in "individual instances of . . . law enforcement overreach," for which there is no alternative legal remedy, and in which no special factors truly counsel hesitation.

If *Bivens* remedies do indeed remain available in such circumstances, then certiorari should be granted and the decision below should be reversed. If they do not, however, then certiorari is all the more imperative, for this Court will then have to settle the far more important—and far more difficult—question of whether Congress violated the Constitution in the Westfall Act by taking away the one legal remedy that would otherwise have remained.[4]

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4. The defendant in *Rodriguez* has moved to stay the Court of Appeals' mandate pending this Court's disposition of his (forthcoming) petition for certiorari. *See* Motion to Stay Mandate, *Rodriguez* v. *Swartz*, No. 15-16410 (9th Cir. Aug. 13, 2018). In the alternative, this case could be held to be considered alongside that one. But because the defendant in *Rodriguez* is not seeking en banc rehearing, nothing in that petition will undermine any of the three independent reasons for granting this one. Indeed, among other things, it is unlikely that a petition in *Rodriguez* would raise the Westfall Act question presented here.

CONCLUSION

For the foregoing reasons and those previously stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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