No. 17-56610

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA DEL SOCORRO QUINTERO PEREZ, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

SUPPLEMENTAL BRIEF FOR APPELLEES

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Defendants-appellees respectfully submit this supplemental brief in response to the Court's request that the parties address the impact of *Hernández v. Mesa*, 140 S. Ct. 735 (2020), on this appeal.

I. *Hernández* Makes Clear That The District Court Correctly Dismissed Plaintiffs' *Bivens* Claims.

A. The district court, applying the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), granted defendants' motion for summary judgment on plaintiffs' Fourth Amendment *Bivens* claims, concluding that those claims arise in a new context and that special factors related to national security at the border militated against recognizing an implied cause of actions for damages. ER12-13. The district court further held that the individual defendants were entitled to qualified immunity because, under the circumstances, Agent Diaz did not violate Mr. Yañez's clearly established Fourth Amendment rights. ER15.

After briefing in this case was completed, this Court issued its decision in *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), which held that a plaintiff could maintain a *Bivens* action with regard to the cross-border shooting at issue in that case. In our October 4, 2018 Rule 28(j) letter to the Court, we urged that the decision in that case did not dictate recognizing a *Bivens* action here. We noted that the Court in *Rodriguez* implied a cause of action in light of what it determined was an "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." 899 F.3d at 744. The

Court's discussion was "limited to those facts," and the Court recognized that "[o]f course, in many hypothetical situations, a cross-border shooting would not give rise to a *Bivens* action." *Id.* We noted that, in contrast, the shooting in this case involved an alien who attempted to enter the United States unlawfully and who interfered with the apprehension of another alien at the border. And we urged that the Court's conclusion in *Rodriguez* that national security and foreign policy are not implicated when people "who are just walking down a street in Mexico" are shot, *id.* at 745-46, plainly does not apply here. Indeed, the Court in *Rodriguez* "recognize[d] that Border Patrol agents protect the United States from unlawful entries," which "help[s] guarantee our national security." *Id.* at 745. The dissenting opinion in *Rodriguez* would have held that no cause of action could be implied under the principles set out in *Abbasi*, and that this Court should have employed the analysis set out in the Fifth Circuit's en banc decision in *Hernández v. Mesa*, 885 F.3d 811, 818-23 (5th Cir. 2018), which concluded that a cause of action could not be implied in a case involving a cross-border shooting. *See Rodriguez*, 899 F.3d at 752-53 (M. Smith, J., dissenting).

B.1. The Supreme Court has now reached the same conclusion as the en banc Fifth Circuit, as well as the dissenting opinion in this Court's *Rodriguez* decision; and the Supreme Court's *Hernández* decision removes any doubt as to the correctness of

the district court's holding.[1] The Supreme Court explained in *Hernández* that "[w]hen asked to extend *Bivens*, we engage in a two-step inquiry. We first inquire whether the request involves a claim that arises in a "new context" or involves a "new category of defendants." *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). The Court stressed that "our understanding of a 'new context' is broad. We regard a context as 'new' if it is 'different in a meaningful way from previous *Bivens* cases decided by this Court.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1859). When a claim arises in a new context, the Court asks "whether there are any 'special factors [that] counse[l] hesitation' about granting the extension." *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857 (alterations in original)). "If there are—that is, if we have reason to pause before applying *Bivens* in a new context or to a new class of defendants—we reject the request." *Id.*

The Supreme Court emphasized in *Hernández* that its "watchword is caution" in implying new causes of action, and the Court "expressed doubt" as to its authority to "recognize any causes of action not expressly created by Congress." *Hernández*, 140 S. Ct. at 742. The Court explained that it has been "at least equally reluctant to create new causes of action" for constitutional cases, reiterating that Congress—not the

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[1] The Supreme Court vacated this Court's judgment in *Rodriguez* in light of *Hernández*, *see Swartz v. Rodriguez*, No. 18-309, 2020 WL 981778, at *1 (U.S. Mar. 2, 2020), and this Court has vacated the district court's decision and remanded for further proceedings consistent with *Hernández*, *see Rodriguez v. Swartz*, No. 15-16410, 2020 WL 1685930, at *1 (9th Cir. Apr. 7, 2020).

courts—"is best positioned to evaluate whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." *Id.* (quotation omitted).

The Court also reiterated its admonition that "expansion of *Bivens* is 'a disfavored judicial activity,'" and again noted that had the Court decided now the few cases in which it had implied *Bivens* remedies, "it is doubtful that [it] would have reached the same result." *Hernández*, 140 S. Ct. at 742-43 (quoting *Abbasi*, 137 S. Ct. at 1856); *see also id.* at 743 (collecting authorities in which the Court has "consistently rebuffed requests" to imply additional *Bivens* claims).

2. As in *Hernández*, the circumstances here plainly present a "new context" under *Bivens*. The Court reiterated that "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." 140 S. Ct. at 744 (quoting *Abbasi,* 137 S. Ct. at 1859). As in *Abbasi,* the claims here "bear little resemblance" to the three *Bivens* claims that the Court approved in the past: "a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma." *Abbasi*, 137 S. Ct. at 1860 (citing

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Chappell v. Wallace*, 462 U.S. 296 (1983)).[2]

Plaintiffs nevertheless insist that this case does not involve a new context. Plaintiffs' apparent understanding is that *Hernández* involved a new context because the victim of the shooting was in Mexico; while law enforcement activities in the United States—even if conducted at the border with Mexico—do not present a new context. Plaintiffs thus urge that "Mr. Yañez was killed here, so this case is not in the *Hernandez* . . . world, but the *Abbasi* world, where the Court . . . did not cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." Supp. Br. 4 (quoting *Abbasi,* 137 S. Ct. at 1856-57).

But there is no "*Abbasi* world" distinct from a *"Hernández* world." The Supreme Court in both cases applied the same analysis, and concluded that both cases presented a new context. The passage that plaintiffs quote from *Abbasi* explained that the Court was not calling *Bivens* into question in the traditional "search-and-seizure context in which it arose." The "search-and-seizure" context of *Bivens* is plainly not the context presented here. As the Court recognized in *Hernández*, "*Bivens* concerned an allegedly unconstitutional arrest and search carried out in New York City," and just

[2] In *Hernández*, the Court clarified that its decision in *Carlson v. Green*, 446 U.S. 14 (1980) (not *Chappell*), extended *Bivens* to claims for violations of the Eighth Amendment, based on a failure to provide adequate medical treatment to a federal prisoner. *Hernández*, 140 S. Ct. at 741.

like in *Hernández* itself, "[t]here is a world of difference between" that claim and the claims here. *Hernández*, 140 S. Ct. at 744 (quoting *Abbasi*, 137 S. Ct. at 1860).

Plaintiffs are similarly wide of the mark in observing that "[d]ecades of jurisprudence recognize a *Bivens* claim for injuries inflicted by federal law enforcement agents within the United States, including injuries to foreign nationals." Supp. Br. 4. The cited cases were all decided before *Abbasi,* and for purposes of determining whether a claim involves a new context, the question is whether the context is different from the contexts in the three Supreme Court decisions that recognized a *Bivens* remedy. Those cases are thus simply irrelevant to the new-context inquiry here. Moreover, none of the cited cases involves the type of circumstances presented here. *See, e.g.*, *Chavez v. United States*, 683 F.3d 1102, 1111 (9th Cir. 2012) (holding that federal officers may not stop a vehicle near the border without reasonable suspicion that the "particular vehicle may contain aliens who are illegally in the country" or is involved in some other criminal conduct). And in another case cited by plaintiffs, the Fifth Circuit declined to extend a *Bivens* remedy to "deportation proceedings and extraordinary rendition." *De La Paz v. Coy*, 786 F.3d 367, 375 (5th Cir. 2015).

3. Here, as in *Hernández*, it is clear that special factors preclude implying a damages remedy. The Supreme Court emphasized that "the conduct of [CBP] agents positioned at the border has a clear and strong connection to national security." *Hernández*, 140 S. Ct. at 746; *see also id.* (quoting 6 U.S.C. § 211(c)(5) (making CBP responsible for detecting, responding to, and interdicting "terrorists, drug smugglers

and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States")). Those concerns are reflected here even more clearly than in *Hernández* itself. The CBP agents were attempting to apprehend two foreign nationals who sought to illegally enter the country, who also ran a human-smuggling operation, ER848, ER858, ER934-35, one of whom had unlawfully entered the United States on at least forty-four prior occasions, ER852.

The Supreme Court also reiterated that courts should be "especially wary" of extending *Bivens* to a case that may have a "potential effect on foreign relations." *Hernández*, 140 S. Ct. at 744; *see also id.* (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("[M]atters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.")). The Court stressed that a shooting at the border involving a federal officer and a foreign national "is by definition an international incident." *Id.* And just as *Hernández* involved "an event that occur[ed] simultaneously in two countries," this case challenges conduct that left Mr. Yañez directly on the border between the United States and Mexico—the case thus certainly "affects both countries' interests." *Id.*; *see also* ER888. That is the case whether Mr. Yañez was standing in Mexico or the United States at the time he was shot.[3]

[3] Immediately preceding the shooting, Mr. Yañez ran back into Mexico and attacked the agents, all while standing on the Mexican side of the border. ER728-29, ER731-32, ER735, ER737, ER752-54, ER758-59.

As in *Hernández*, this Court should not "alter the framework established by the political branches for addressing cases in which it is alleged that lethal force was unlawfully employed by an agent at the border." 140 S. Ct. at 746. As the government noted in its principal brief (Gov't Br. 6), there were five separate investigations into the incident—including by the Department of Homeland Security's Office of the Inspector General, *see* ER802-03—and following those investigations, no disciplinary action was taken against the CBP agents for the actions at issue. *See* ER798 (Department of Justice Civil Rights Division), ER805 (Federal Bureau of Investigation), ER811 (Department of Homeland Security Office of Professional Responsibility), ER812 (CBP Discipline Review Board). As in *Hernández*, extending *Bivens* into this field would interfere with the Executive's regulation of the border and thus "risk[s] . . . undermining border security." *Hernández*, 140 S. Ct. at 747; *see also id.* at 746-47 (noting that the Court has declined to extend *Bivens* to cases that would interfere with the system of military discipline).

In sum, *Hernández* confirms that the district court correctly held that it could not properly imply a damages action in this case.[4]

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[4] Plaintiffs argue (Supp. Br. 7 & n.24) that "the Government expressly acknowledged that the victim's family would have a *Bivens* remedy if he had been injured within the United States." That is incorrect. During the second *Hernández* oral argument, government counsel explained that "there's not a *Bivens* action" for a foreign national who is killed by a federal official enforcing border security on the U.S. side of the border. Transcript of Oral Argument at 64-65, *Hernández v. Mesa*, 140 S. Ct. 735 (Nov. 12, 2019) (No. 17-1678). And although government counsel at the

II. *Hernández* Provides No Support For Plaintiffs' Claim Under The Alien Tort Statute.

Plaintiffs are on no firmer ground in urging that *Hernández* buttresses their claim under the Alien Tort Statute, 28 U.S.C. § 1350. The Supreme Court specifically noted in *Hernández* that even if Congress created a cause of action for a foreign national under the Alien Tort Statute by enacting the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, any such claim may not "be used to sue a United States officer." 140 S. Ct. at 748-49. The Court's only other reference to the Alien Tort Statute in that decision related to how the Court has *declined* to recognize various causes of action under that statute. *Hernández*, 140 S. Ct. at 742 (noting that the Court declined to recognize a claim against a foreign corporation under the Alien Tort Statute (citing *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018))).[5]

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first *Hernández* oral argument stated that "there would be" a *Bivens* action available to someone shot on the U.S. side of the border, Transcript of Oral Argument at 47, *Hernández v. Mesa*, 137 S. Ct. 2003 (Feb. 21, 2017) (No. 15-118), counsel gave that answer before the Supreme Court's decisions in *Abbasi* and the second *Hernández* case. As both the government's most recent brief and the Court's recent *Hernández* decision explain, courts should hesitate before "alter[ing] the framework established by the political branches for addressing cases in which it is alleged that lethal force was unlawfully employed by an agent at the border." *Hernández*, 140 S. Ct. at 746; *see* Br. for the United States as Amicus Supporting Resp. at 17-22, *Hernández*, 140 S. Ct. 735 (Sept. 30, 2019) (No. 17-1678).

[5] The *Hernández* plaintiffs did not seek Supreme Court review of the dismissal of their Alien Tort Statute claim. *See Hernández v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (per curiam). No question involving the Alien Tort Statute was before the Supreme Court in either of the *Hernández* decisions.

Plaintiffs cite nothing in *Hernández* that supports their position, but they reiterate the argument that their claim under the Alien Tort Statute can go forward because a federal court may "flesh[] out the remedies available for a common-law tort" that is premised on the law of nations. Supp. Br. 8. Plaintiffs make no effort to identify anything in the Supreme Court's opinion suggesting that the Court disturbed its well-established rule that the Alien Tort Statute is "a jurisdictional statute creating no new causes of action," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), or that "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of" the Alien Tort Statute. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018); *see also id.* ("That the [Alien Tort Statute] implicates foreign relations 'is itself a reason for a high bar to new private causes of action for violating international law.'" (quoting *Sosa*, 542 U.S. at 727)). The Court should decline to recognize a new cause of action under the Alien Tort Statute, just as under *Bivens*.

Hernández also did not suggest any disapproval of the rule adopted by this Court (and every other court of appeals to consider the issue) that "the Alien Tort Statute . . . has not been held to imply any waiver of sovereign immunity." *See Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) ("The Alien Tort Statute itself is not a waiver of sovereign immunity."). As discussed in our principal brief, this Court has made clear that claims under the law of nations, by themselves, cannot overcome a federal

official's immunity. *See Saleh v. Bush*, 848 F.3d 880, 893 (9th Cir. 2017) (holding that immunity for federal officials is not abrogated by an alleged violation of customary international law norms); *see also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (rejecting the plaintiffs' claims under the Alien Tort Statute against a foreign state, which alleged *jus cogens* violations of international law, because alleged *jus cogens* violations did not come within an exception to a foreign state's sovereign immunity and plaintiffs failed to otherwise identify an exception to the foreign state's sovereign immunity). Plaintiffs have still failed to identify any waiver of sovereign immunity.

Plaintiffs instead use their supplemental brief to provide (Supp. Br. 9-12) an extended discussion of *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935 (E.D. Va. 2019), *appeal dismissed*, 775 F. App'x 758 (4th Cir. 2019), which bears no relationship to the Supreme Court's *Hernández* decision and is inapposite to the Court's supplemental briefing order. The defendant in that case, a government contractor, asserted that it was entitled to derivative sovereign immunity. The district court denied its motion to dismiss on the ground that the United States would not be protected by immunity. The contractor appealed, but the Fourth Circuit did not consider the merits because it held that the order was not immediately appealable.

In any event, the district court in that case fundamentally misunderstood principles of sovereign immunity and international law in holding that the United States is not protected by sovereign immunity from claims in federal court alleging

violations of international law *jus cogens* norms. As noted above, Congress has not enacted a statute that waives sovereign immunity for claims based on alleged violations of international law, and that district court failed to apply circuit precedent holding that the Alien Tort Statute itself does not waive federal sovereign immunity. *See Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("the Alien Tort Statute . . . has not been held to imply any waiver of sovereign immunity").

CONCLUSION

For the foregoing reasons and the reasons discussed in the government's response brief, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the volume limit of the Court's February 26, 2020 order because it contains 12 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Casen B. Ross
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