



INSTITUTE FOR JUSTICE

February 26, 2020

Via Electronic Filing

Mr. Lyle W. Cayce
Clerk, United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

RE: *Gerardo Serrano v. U.S. Customs and Border Protection, et al.*, No. 18-50977

Dear Mr. Cayce:

We write to notify the Court of *Hernandez v. Mesa*, 589 U.S. ___, 2020 WL 889193 (Feb. 25, 2020) which supports reinstating Appellant's claims under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In *Hernandez*, the Supreme Court refused to extend *Bivens* to the "markedly new" context of "cross-border shootings" because Congress had never recognized damage claims for persons injured abroad by federal officers. *Hernandez*, 2020 WL 889193, at *3.¹

But the Supreme Court affirmed that Congress had expressly permitted existing *Bivens* remedies in 1988 by passing the Westfall Act. *Id.* at *10, n.9. The dissent agreed. *Id.* at *19 (Ginsburg, J. dissenting) (acknowledging "Congress carved out an exception [allowing] for *Bivens* suits"). Thus, at least seven Justices agree with Appellant that Congress expressly endorsed *Bivens* claims—at least those that existed in 1988. *Id.* at *10, n.9.

¹ The "distinctive characteristics of cross-border shooting claims," *id.*, share nothing in common with this case.

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This recognition necessarily means that *States Marine Lines Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974) is dispositive here. See Opening Br. 40-42. In *States Marine Lines*, the Fourth Circuit recognized a *Bivens* claim brought by a property owner who, like Appellant, complained that customs officers violated his Fifth Amendment rights by seizing his cargo for 17 months without a hearing. 498 F.2d at 1157. In 1979, the Supreme Court expressly relied on *States Marine Lines* in *Davis v. Passman* to recognize a distinct *Bivens* claim under the Fifth Amendment. 442 U.S. 228, 244, n.22 (1979); *see also* Opening Br. 40.

In light of *Hernandez*, the Supreme Court's express reliance on *States Marine Lines* shows that Appellant's Fifth Amendment claim is not a new *Bivens* context. After all, in 1979, nine years *before* Congress enacted the Westfall Act, the Supreme Court endorsed the propriety of Fifth Amendment *Bivens* claims arising from prolonged customs seizures. Moreover, even if customs seizures are a new context, the Supreme Court's reliance on *States Marine Lines* demonstrates there are no special factors here that counsel hesitation.

Respectfully submitted,

/s/ Darpana M. Sheth

Darpana M. Sheth

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Counsel for Plaintiff-Appellant

cc: Counsel of Record (via ECF)