No. 17-1678

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL., PETITIONERS

v.

JESUS MESA, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Petitioners brought a civil action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages from a U.S. Border Patrol agent who, while standing in the United States, fatally shot a Mexican citizen who was in Mexico. The question presented is whether the remedy recognized in *Bivens* should be extended to the claim in this case.

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INTEREST OF THE UNITED STATES

This case concerns a claim for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against a U.S. Border Patrol agent based on the allegedly unconstitutional use of force at an international border. The United States has a significant interest in this matter because a ruling permitting aliens injured abroad to bring damages claims against federal officials would implicate the federal government's oversight of foreign policy and could interfere with its officials' performance of national-security functions. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a cause of action for damages against federal officials who allegedly violated a U.S. citizen's Fourth Amendment rights by conducting a warrantless search and arrest in his home in the United States. In this case, petitioners seek to invoke *Bivens* to recover damages from a U.S. Border Patrol agent for the death of their son, a Mexican national, in Mexico as the result of a shooting across the international border with the United States. Petitioners allege that the shooting violated standards for the use of force purportedly found in the Fourth and Fifth Amendments, and they contend that those constitutional provisions and the judicially created *Bivens* remedy should be extended to aliens injured abroad.

1. Petitioners allege that in 2010, their son, Sergio Adrián Hernández Güereca (Hernández), a 15-year-old Mexican citizen, was playing with friends in the cement culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico. *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam). The international border in that location runs down the middle of the culvert, with a fence atop the embankment on the U.S. side. *Ibid.* Petitioners allege that Hernández and his friends played a game in which they crossed the border into the United States, ran up the embankment to touch the fence, and then ran back into Mexico. *Ibid.*

Petitioners further allege that respondent, U.S. Border Patrol agent Jesus Mesa, Jr., arrived on the scene, detained one of Hernández's friends on the U.S. side of the culvert, and then, while standing in U.S. territory, fatally shot Hernández, who had fled back into Mexico.

Hernandez, 137 S. Ct. at 2005. According to petitioners, Hernández "had no interest in entering the United States" and was "unarmed and unthreatening" at the time. Pet. App. 199. The FBI, however, released a statement contradicting petitioners' version of events and explaining that Agent Mesa had resorted to force only after Hernández and others had refused to follow commands to stop throwing rocks at him. *Id.* at 199-200.

The Department of Justice (DOJ) conducted a "comprehensive and thorough investigation into the shooting" and declined to bring criminal charges against Agent Mesa. DOJ, *Federal Officials Close Investigation into the Death of Sergio Hernández-Guereca* (Apr. 27, 2012) (*DOJ Statement*).[1] DOJ's investigation indicated that, "on these particular facts," Agent Mesa "did not act inconsistently with [Border Patrol] policy or training regarding use of force." *Ibid.* DOJ expressed the United States' regret about Hernández's death and reiterated the United States' commitment to investigating and prosecuting allegations of excessive force, as well as "work[ing] with the Mexican government * * * to prevent future incidents." *Ibid.*

2. a. Petitioners initially sued the United States, several federal agencies, and unknown Border Patrol agents, asserting claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*; the Alien Tort Statute (ATS), 28 U.S.C. 1350; and *Bivens*. Pet. App. 172 & n.3. Petitioners later named Agent Mesa as one of the individual defendants, alleging that he had violated Hernández's Fourth and Fifth Amendment rights. *Id.* at 204.

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[1] https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-Hernández-guereca.

b. Pursuant to the Westfall Act, 28 U.S.C. 2679, the district court substituted the United States as the sole defendant for petitioners' FTCA and ATS claims. Pet. App. 176. It then dismissed those claims on sovereign-immunity grounds. *Id.* at 170-192.

The district court separately dismissed petitioners' *Bivens* claim against Agent Mesa. Pet. App. 159-169. The court concluded that Agent Mesa was entitled to qualified immunity because, under *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), an alien with no voluntary connection to the United States lacks extra-territorial Fourth Amendment rights, and, under *Graham* v. *Connor*, 490 U.S. 386 (1989), an excessive-force claim could not be brought under the Fifth Amendment. Pet. App. 163-169.[2]

3. a. Initially, a three-judge panel of the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 100-158. The panel agreed that petitioners could not invoke the Fourth Amendment, but it rejected Agent Mesa's qualified-immunity defense as to the Fifth Amendment. *Id.* at 119-138, 150-154. The panel also determined that a *Bivens* remedy was appropriate here. *Id.* at 138-150.

b. The court of appeals granted rehearing en banc and affirmed the dismissal of petitioners' *Bivens* claim. Pet. App. 45-49. The court determined that petitioners had failed to allege a Fourth Amendment violation because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." *Id.*

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[2] Petitioners voluntarily dismissed their claims against two other agents, and the district court granted summary judgment to the remaining individual defendants. Pet. App. 106-107. Those claims are not at issue here.

at 46 (quoting *Verdugo-Urquidez*, 494 U.S. at 271). And while the court was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," it was "unanimous in concluding that any properly asserted right was not clearly established." *Id.* at 48. Because it rejected petitioners' claim on the merits, the court did not consider whether *Bivens* should be extended to this context. See *id.* at 45-49.

4. This Court granted certiorari. In addition to the Fourth and Fifth Amendment questions, the Court directed the parties to address whether petitioners' claim may be asserted under *Bivens*.

a. While this case was pending, the Court decided *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017). In that case, the Court reaffirmed that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1857 (citation omitted). And it clarified the *Bivens* inquiry in two ways. First, it explained that a case presents a "new context" for *Bivens* purposes if "the case is different in a meaningful way" from the three previous decisions in which the Court has recognized a *Bivens* remedy. *Id.* at 1859. Second, the Court explained that, in determining whether "special factors" counsel against extending *Bivens* to a new context, if "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress." *Id.* at 1858-1859.

b. In this case, the Court vacated the judgment of the court of appeals and remanded for the court to address the "antecedent" question whether a *Bivens* remedy is available in light of the Court's intervening guidance in *Abbasi*. *Hernandez*, 137 S. Ct. at 2006 (citation omitted).

Given *Abbasi*'s clarification of the "'special factor[]'" analysis, the Court observed that deciding the "sensitive" Fourth Amendment question could be "unnecessary to resolve this particular case." *Id.* at 2006-2007 (citation omitted). The Court also rejected a portion of Agent Mesa's qualified-immunity defense as to the Fifth Amendment, although it remanded for the consideration of other qualified-immunity arguments "if necessary." *Id.* at 2007.

Justice Thomas dissented. *Hernandez*, 137 S. Ct. at 2008. He noted that this case is "meaningfully different from * * * *Bivens* and its progeny," including because it "involves cross-border conduct." *Ibid.* Accordingly, he would have "decline[d] to extend *Bivens*" and would have "affirm[ed] the judgment of the Court of Appeals on that basis." *Ibid.*

Justice Breyer, joined by Justice Ginsburg, also dissented. *Hernandez*, 137 S. Ct. at 2008-2011. He would have held that the Fourth Amendment applies, which, in his view, "would ordinarily bring with it the right to bring an action for damages under *Bivens*." *Id.* at 2008.

5. On remand, the en banc court of appeals again affirmed the dismissal of the claim against Agent Mesa. Pet. App. 1-23.

Applying *Abbasi*'s two-part framework, the court of appeals first concluded that "the cross-border shooting at issue here must present a 'new context' for a *Bivens* claim." Pet. App. 8. It explained that this case differs from previous cases in terms of 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." *Ibid.*

The court of appeals next concluded that this new context presents numerous "special factors" counseling against an implied *Bivens* remedy. Pet. App. 11-23. The court determined that extending *Bivens* to this context would "threaten[] the political branches' supervision of national security," *id.* at 13, and would "risk[] interference with foreign affairs and diplomacy more generally," *id.* at 15. It also explained that Congress's intentional omission of damages remedies for injuries to foreign citizens in foreign territory counsels against implying such a remedy here. *Id.* at 16-18. Finally, the court observed that "the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues already discussed." *Id.* at 19; see *id.* at 19-22. The court accordingly concluded that "this is not a close case." *Id.* at 22.

Judge Dennis concurred in the judgment. Pet. App. 23-25. He would have avoided the *Bivens* question and instead would have found that Agent Mesa is entitled to qualified immunity. *Ibid.*

Judge Haynes concurred but wrote separately to note that the ATS and FTCA claims against the United States were not before the en banc court. Pet. App. 25.[3]

Judge Prado, joined by Judge Graves, dissented. Pet. App. 25-42. He agreed with the majority that this case presents a new context, but he would have concluded that no "special factors counsel hesitation in recognizing a *Bivens* remedy." *Id.* at 26.

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[3] Because the case involving the United States was severed from this case, the United States participated below and participates here as an amicus curiae rather than a respondent.

SUMMARY OF ARGUMENT

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized an implied private right of action for damages against federal officials alleged to have violated a U.S. citizen's Fourth Amendment rights in his home. That judicially created damages remedy should not be extended to the markedly different claim in this case.

A. Given the "notable change in the Court's approach to recognizing implied causes of action, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)). The Court has thus "consistently refused to extend *Bivens* to any new context or new category of defendants" for nearly 40 years. *Ibid.* (citation omitted). And it has admonished that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," then courts "must refrain" from extending *Bivens*. *Id.* at 1858.

B. Petitioners seek to extend *Bivens* to an injury suffered by an alien abroad in a cross-border shooting by a U.S. Border Patrol agent. The injury alleged here plainly differs from the warrantless domestic invasion of a citizen's home in *Bivens*, and those differences have significant implications for the separation of powers. This case thus presents a "new context" for *Bivens* purposes, as every judge to have considered the question has agreed.

C. Several special factors counsel against extending a *Bivens* remedy to aliens injured abroad. To begin, such an extension would interfere with the political branches' constitutional power over foreign affairs. An injury inflicted by the United States on a foreign citizen

in another country's sovereign territory is, by definition, an incident with international implications. This case illustrates that point: Both the problem of border security in general and the specific incident at issue have prompted exchanges between the United States and Mexico. In addition, with respect to claims against Border Patrol agents for aliens' injuries abroad, national-security concerns increase the need for caution before inserting the courts into such sensitive matters.

That need for caution is reinforced by the fact that, in a variety of related contexts—including the statutory remedy for persons deprived of constitutional rights by *state* officials, 42 U.S.C. 1983—Congress has declined to provide aliens injured abroad with the sort of judicial damages remedy that petitioners seek. Instead, where Congress has addressed injuries inflicted by the government on aliens abroad, it has relied on voluntary payments or administrative claims mechanisms. The general presumption against extraterritoriality further confirms that *Bivens* should not apply here: It would be anomalous to extend a judicially inferred remedy when the Court would not extend an express statutory cause of action absent a clear indication that Congress intended to reach injuries beyond our Nation's borders.

D. Petitioners contend that the Court should infer a *Bivens* remedy here because they lack adequate alternative remedies in light of Congress's preemption of state tort suits. Yet this Court has repeatedly recognized that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [a plaintiff] * * * an 'adequate' federal remedy for his injuries." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987). Moreover, petitioners overstate the lack of other remedies: State tort suits remain available where (unlike

here) the federal officer is found to have acted outside the scope of his employment, and a variety of executive responses are also possible.

Regardless of whether such other remedies are available in this particular case, a "freestanding damages remedy for a claimed constitutional violation * * * is not an absolute entitlement." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). Indeed, Congress's determination to preempt state tort remedies against Agent Mesa and not to waive sovereign immunity for the United States is precisely the sort of legislative judgment that this Court should respect by declining to substitute a damages remedy of its own.

ARGUMENT

THE JUDICIALLY CREATED *BIVENS* REMEDY SHOULD NOT BE EXTENDED TO ALIENS INJURED ABROAD

A. For Nearly 40 Years, This Court Has Consistently Declined To Extend *Bivens* To New Contexts Where Special Factors Counsel Hesitation

1. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). The Court held that, despite the absence of such a remedy in the Fourth Amendment or in any statute, federal narcotics agents could be sued for damages for conducting a warrantless search and arrest in a U.S. citizen's home in the United States. *Bivens*, 403 U.S. at 389. The Court reasoned that even though "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of

its violation," federal courts could infer that "particular remedial mechanism," as they had done for several federal statutes. *Id.* at 396-397. In creating that cause of action, however, the Court emphasized that the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Since deciding *Bivens* in 1971, this Court has "extended its holding only twice." *Malesko*, 534 U.S. at 70. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court allowed a Fifth Amendment claim against a Congressman for firing his female secretary. *Id.* at 248-249. And in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court allowed an Eighth Amendment claim against prison officials for a failure to provide medical treatment that led to an inmate's death. *Id.* at 19-23 & n.1. In each case, the Court reiterated that it found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 19; see *Davis*, 442 U.S. at 245.

In the nearly 40 years since *Carlson*, this Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citing *Malesko*, 534 U.S. at 68). Nine decisions of this Court have squarely rejected efforts to expand *Bivens*. See *Abbasi*, *supra*; *Minneci* v. *Pollard*, 565 U.S. 118 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Malesko*, *supra*; *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983).

In *Abbasi*, the Court explained that its consistent refusal to extend *Bivens* reflects its changed understanding of the scope of judicial authority to create private

rights of action. 137 S. Ct. at 1855-1587. As the Court observed in *Malesko*, 534 U.S. at 67, *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes." See *Bivens*, 403 U.S. at 397 (citing *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)); *id.* at 402-403 & n.4 (Harlan, J., concurring in the judgment) (same). "During this '*ancien regime*,'" the Court "assumed it to be a proper judicial function" to imply causes of action "not explicit in the statutory text itself." *Abbasi*, 137 S. Ct. at 1855 (citation omitted). But in the decades since *Bivens*, the Court has made clear that the creation of damages remedies is a legislative function, *ibid.*, and it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3. "Given the notable change in [its] approach to recognizing implied causes of action," the Court has explained that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857 (citation omitted). Indeed, "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id.* at 1856.

2. Petitioners ignore the separation-of-powers concerns that have motivated this Court's reluctance to extend *Bivens*. Instead, they attempt (Br. 10-20) to ground *Bivens*—and their proposed expansion of it—in a historical tradition of subjecting federal officers to "common law tort liability for their misconduct," *id.* at 10, most often under the law of trespass. See, *e.g.*, *Buck* v. *Colbath*, 70 U.S. (3 Wall.) 334 (1866); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806). That attempt misunderstands the doctrinal underpinnings of *Bivens*.

The Court in *Bivens* did not treat its newly created damages remedy as an extension of common-law tort

suits. Rather, it "recognized for the first time an implied private action for damages" directly under the Constitution. *Malesko*, 534 U.S. at 66; see *Bivens*, 403 U.S. at 428 (Black, J., dissenting) (noting that the Court had "create[d] a cause of action where none has existed since the formation of our Government"). To the extent it built on an existing doctrinal framework, the Court borrowed the reasoning that it had used to infer private rights of action under several federal statutes, see *Malesko*, 534 U.S. at 67—reasoning that "began to lose [its] force" shortly thereafter, *Abbasi*, 137 S. Ct. at 1855. The Court in *Bivens* therefore did not create the free-standing federal-common-law tort that petitioners envision. Nor could it reasonably have done so, as it had been clear since *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), that federal courts "are not general common-law courts." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981). The common-law tradition that petitioners emphasize is thus beside the point for *Bivens* purposes.

B. This Case Presents A New Context For A *Bivens* Remedy

1. *Abbasi* held that a case presents a "new context" for *Bivens* purposes if "the case is different in a meaningful way" from "the three *Bivens* claims the Court has approved in the past"—*i.e.*, the claims in *Bivens*, *Davis*, and *Carlson*. *Abbasi*, 137 S. Ct. at 1859-1860. A case might be "'different in a meaningful way'" from those cases if, for example, it creates a "risk of disruptive intrusion by the Judiciary into the functioning of other branches"; "if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases." *Id.* at 1860-1861, 1864 (citation omitted). As the

Court emphasized, "even a modest extension is still an extension." *Id.* at 1864.

Abbasi itself illustrates the point. The Court concluded that a prisoner-abuse claim against a prison warden presented a "new context" even though the claim had "significant parallels" to the claim in *Carlson* and involved "just as compelling" allegations of prisoner injury "as those at issue in *Carlson*." *Abbasi*, 137 S. Ct. at 1864. But because the asserted constitutional right was different, less judicial guidance existed on the warden's duties, and Congress had not extended *Carlson*'s damages remedy, the Court concluded that "the new-context inquiry [was] easily satisfied." *Id.* at 1865; see *id.* at 1864-1865.

This case likewise presents a new context under *Abbasi* because it differs in "meaningful way[s]" from the previous cases in which this Court has recognized a *Bivens* remedy. Pet. App. 8; see *id.* at 7-11. Most obviously, this Court has never recognized a *Bivens* remedy arising from an injury to a foreign citizen in another country's sovereign territory. For that reason, every court of appeals judge to consider the question—including the dissenting judges in the en banc Fifth Circuit and a panel in the Ninth Circuit that found *Bivens* liability in a parallel case—has agreed that this type of case presents a new context. See *id.* at 26; *Rodriguez* v. *Swartz*, 899 F.3d 719, 738 (9th Cir. 2018), petition for cert. pending, No. 18-309 (filed Sept. 7, 2018). Indeed, this Court's remand order in *Hernandez* presupposed that the case presents a new context, as the Court remanded in light of *Abbasi*'s "clarif[ication]" of "what constitutes a special factor counselling hesitation." 137 S. Ct. at 2006 (brackets, citation, and internal quotation marks omitted).

2. Petitioners nevertheless contend (Br. 21-26) that this case does not present a new context, in part because the Court has previously inferred *Bivens* remedies under the Fourth and Fifth Amendments. As an initial matter, the Court has never recognized a *Bivens* remedy for an asserted violation of the substantive due process component of the Fifth Amendment. More fundamentally, *Abbasi* rejected the notion that reliance on the same "constitutional right * * * at issue in a previous *Bivens* case" is dispositive of whether a plaintiff's challenge is brought in a novel context. 137 S. Ct. at 1859. If it were, then, for example, the "Court should have held that [*Malesko* and *Carlson*] arose in the same context," as the two cases involved the same constitutional right and "almost parallel circumstances." *Ibid.*

Petitioners also assert (Br. 22) that their claim "resemble[s] the specific facts of *Bivens*." To the contrary, like the various claims in *Abbasi*—including a prisoner-abuse claim that did not involve any "high-level policy decisions," *id.* at 23—a claim of injury suffered by a foreign national in a foreign country as a result of a Border Patrol agent's actions at an international border "bear[s] little resemblance" to a "claim against FBI agents for handcuffing a man in his own home without a warrant." *Abbasi*, 137 S. Ct. at 1860. After all, unlike any *Bivens* claim that this Court has recognized, "the defining characteristic of this case is that it is *not* domestic." Pet. App. 13. It thus plainly requires a (more than) "modest extension." *Abbasi*, 137 S. Ct. at 1864.

C. Multiple Special Factors Counsel Hesitation Before Extending A *Bivens* Remedy To Aliens Injured Abroad

In determining whether a new context presents a "'special factor counselling hesitation,'" a court "must

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. This Court has explained that relevant considerations include whether "Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere"; whether "an alternative remedial structure" is available; or whether "some other feature of [the] case," such as the implications for policymaking, the burdens of litigation and liability, or the potential for intrusion on the political branches' prerogatives, "causes a court to pause before acting without express congressional authorization." *Id.* at 1858; see *id.* at 1860-1863. If there are any "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress." *Id.* at 1858 (emphasis added).

Here, multiple special factors counsel hesitation. First, claims by aliens injured abroad risk judicial interference with matters that the Constitution has committed to the political branches. Second, the need for caution is reinforced by the fact that, in a variety of statutes, Congress has long taken care *not* to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Third, the general presumption against extraterritoriality further underscores the separation-of-powers consequences of the Judiciary's acting where Congress has not.

1. Claims by aliens injured abroad implicate foreign affairs and national security

a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2. "[F]oreign affairs" is thus "a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016). In recognition of the political branches' special competence and responsibility, this Court has long held that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

This Court has made clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. For example, in *Chappell* and *Stanley*, the Court declined to extend *Bivens* to claims in the military context, emphasizing that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683; see *Chappell*, 462 U.S. at 300-302. Likewise, in *Abbasi*, the Court declined to extend *Bivens* to challenges to confinement conditions imposed pursuant to executive policy in the wake of the September 11 attacks. 137 S. Ct. at 1858-1863. The Court emphasized that "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches,'" which are "even more pronounced" in the context of a claim seeking money damages. *Id.* at 1861 (citation omitted).

The same logic precludes the extension of *Bivens* to aliens injured by federal officials in foreign territory. As the Fifth Circuit explained, "the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil." Pet. App. 15. Judicial examination of the government's treatment of aliens outside the United States would inject the courts into sensitive matters of international diplomacy and risk "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (citation omitted). Moreover, "damage remedies * * * for allegedly unconstitutional treatment of foreign subjects causing injury abroad" could carry other "foreign affairs implications"—including "the danger of foreign citizens' using the courts * * * to obstruct the foreign policy of our government." *Ibid.*

This case illustrates the inevitable foreign-affairs implications of *Bivens* suits by aliens injured abroad. The Government of Mexico has filed an amicus brief explaining (at 1, 3) that "[a]s a sovereign and independent state," it has a "vital interest in working with the United States to improve the safety and security of the border and to ensure that both countries' agents act to protect * * * the safety of the public in the border area." Issues of border security, including cross-border shootings, have been of great concern to the United States' bilateral relationship with Mexico for several years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum

in which to address issues of border violence.[4] Mexico and the United States have also addressed cross-border shootings in other forums, including the U.S.-Mexico Bilateral Human Rights Dialogue.[5] And the particular incident here has prompted bilateral exchanges, including Mexico's request that Agent Mesa be extradited to face criminal charges. Pet. App. 30; Mexico Amicus Br. 10. After a comprehensive DOJ investigation concluded that Agent Mesa did not violate Border Patrol policy on the use of force, the United States declined to extradite him, but it has reiterated its commitment to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents." *DOJ Statement*.

Petitioners respond (Br. 29) that the mere presence of "a foreign *fact*" does not establish "genuine foreign affairs *concerns*." But the foreign-affairs concerns presented by these facts, far from being a "nonsensical non sequitur" (*ibid.*), are straightforward: The injury of an alien by a federal officer in foreign territory is a matter that triggers diplomatic discussions, and the involvement of the Judicial Branch may interfere with the Executive Branch's negotiations or representations. Here, for example, the Executive has determined that Agent Mesa did *not* act improperly and has taken that position

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[4] Dep't of Homeland Sec., *Written Testimony for a House Comm. on Oversight and Government Reform Hearing* (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west.

[5] Governments of Mexico and the United States of America, *Joint Statement on the U.S.-Mexico Bilateral High Level Dialogue on Human Rights* (Oct. 27, 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263759.htm.

in discussions with Mexico, a position that would be undermined if a federal court entered a contrary judgment, including by bolstering Mexico's request that Agent Mesa be extradited to Mexico. The fact that the Governments of Mexico and the United States disagree over the availability of a damages remedy in this case, see *id.* at 30, only underscores the foreign-affairs concerns with judicial intrusion.

More generally, petitioners suggest (Br. 29-30) that courts can mitigate foreign-affairs concerns by undertaking an ad hoc analysis of the international impact of recognizing a damages remedy in a particular case, based on their assessment of the reaction of foreign governments. The Judiciary is ill-suited to make such determinations—and attempting to make them on a case-by-case basis would itself intrude on foreign affairs. See *Stanley*, 483 U.S. at 682 (rejecting "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking," which "would itself require judicial inquiry into, and hence intrusion upon, military matters"). *Abbasi* accordingly makes clear that the question whether to imply a damages remedy is not limited to its impact in a particular case. By framing the question as whether the Judiciary or Congress should consider the impact of a damages remedy "on governmental operations systemwide," *Abbasi* acknowledged that the special-factors analysis must account for the costs and consequences of a new *class* of tort liability. 137 S. Ct. at 1858; see, *e.g.*, *Bush*, 462 U.S. at 389 ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees.").

b. Permitting aliens injured abroad to bring *Bivens* suits against the particular set of defendants here—

Border Patrol agents—also would have clear implications for national security. Just as with foreign affairs, the Constitution reserves questions of national security for the political branches. See *Abbasi*, 137 S. Ct. at 1861; see also *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" unless "Congress specifically has provided otherwise.").

As the court of appeals explained, Congress has charged the Department of Homeland Security (DHS) and its components, including the U.S. Border Patrol, with "prevent[ing] terrorist attacks within the United States" and "securing the homeland." 6 U.S.C. 111(b)(1)(A) and (E); see Pet. App. 13; see also *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."), cert. denied, 544 U.S. 950 (2005). Within DHS, Congress specifically charged the Border Patrol with carrying out that national-security mission by "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband." 6 U.S.C. 211(e)(3)(B); see 6 U.S.C. 211(c). Imposing damages liability on individual agents executing those important national-security functions at the border "could undermine the Border Patrol's ability to perform duties essential to national security" by "increas-[ing] the likelihood that Border Patrol agents will 'hesitate in making split second decisions.'" Pet. App. 13, 15 (quoting *Vanderklok* v. *United States*, 868 F.3d 189, 207 (3d Cir. 2017)).

Petitioners contend (Br. 26-28) that this particular suit does not implicate national security and is instead

akin to a matter of domestic law enforcement. That contention is both wrong and irrelevant. It is wrong because, at an appropriate level of generality, the facts alleged in petitioners' complaint do implicate border security, which Congress has linked to national security: Several individuals repeatedly crossed an international border, and a responding officer detained one suspect who had crossed the border illegally and fired a weapon across the border at another suspect. See Pet. App. 198-199. It is irrelevant because, even if the specific facts alleged do not implicate national security, the key question is whether special factors counsel against extending *Bivens* to the relevant *class* of cases. See *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 682; *Bush*, 462 U.S. at 389. A class of cases involving aliens injured *abroad* by Border Patrol agents by definition targets border-security activities distinct from the ordinary domestic activities performed by law enforcement (including Border Patrol agents) in the United States.

2. Congress's consistent decisions not to provide a judicial damages remedy to aliens injured abroad confirm that a* Bivens *remedy is inappropriate

A variety of statutes indicate that Congress's omission of the damages remedy that plaintiffs seek was not an "oversight," confirming that it would be inappropriate for the Judiciary to create a damages remedy here when Congress has elected not to do so. *Abbasi*, 137 S. Ct. at 1862; see *Schweiker*, 487 U.S. at 423.

a. Where Congress has provided judicial damages remedies against governmental officials, it has taken care not to extend those remedies to injuries suffered by aliens abroad. Most relevant, when Congress enacted Section 1983 to provide a statutory remedy for individu-

als whose constitutional rights are violated by state officers, it expressly limited the remedy to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. 1983. Because *Bivens* judicially implied a federal damages action against federal officers, whereas Congress expressly created such an action against state officers in Section 1983, Congress's express limitation on the reach of Section 1983 should, *a fortiori*, limit the reach of *Bivens*. See *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006) (describing *Bivens* as the "more limited * * * federal analog" to Section 1983). It would turn separation-of-powers principles on their head to judicially infer liability for federal officers that Congress has expressly rejected for state officers. Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975) ("It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.").

Similarly, although the FTCA waives the United States' sovereign immunity for certain injuries inflicted by federal employees generally, 28 U.S.C. 2674, Congress specifically excluded "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). The foreign-country exception was motivated in part by Congress's "unwillingness to subject the United States to liabilities depending upon the laws of a foreign power," which would have governed FTCA claims arising abroad. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 707 (2004) (brackets and citation omitted). But avoiding the application of foreign law was not Congress's only goal. Even before DOJ raised concerns about foreign law, the bill that became the FTCA excluded "all claims 'arising in a foreign country *in behalf of an alien*.'" *Ibid.* (quoting H.R. 5373,

77th Cong., 1st Sess. 8 (1941)) (emphasis added). That history demonstrates that Congress's decision not to provide an FTCA remedy to *aliens* injured in foreign countries reflected adherence to the traditional practice of addressing such injuries through nonjudicial means. See pp. 24-26, *infra*.

More recently, in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. 1350 note 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring), cert. denied, 137 S. Ct. 2325 (2017). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by federal officials. *Ibid.* Congress's repeated decisions not to provide such a remedy counsel strongly against the Judiciary's creating one.

b. When Congress *has* provided compensation for aliens injured abroad, it has done so through tailored administrative mechanisms, not by authorizing suits in federal court.

Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations, which could result in *ex gratia* payments to injured parties. See William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-65 & n.22 (1966); see also, *e.g.*, Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,486 (July 7, 2016)

(providing for *ex gratia* condolence payments to civilians injured or killed by certain uses of military force).

In certain recurring circumstances, Congress has determined that the United States' interests would be better served by establishing administrative claims procedures. In 1942, during World War II, Congress enacted the Foreign Claims Act (FCA), ch. 67, 57 Stat. 66, "[t]o promote and to maintain friendly relations" with the increasing number of foreign countries in which U.S. military personnel were stationed. 10 U.S.C. 2734(a). The FCA allows the military to establish administrative claims commissions to pay certain claims for personal injuries, death, or property damage suffered by "any inhabitant of a foreign country" as a result of the noncombat activities of U.S. military forces. 10 U.S.C. 2734(a)(3). A companion statute, the International Agreement Claims Act, 10 U.S.C. 2734a, also allows the military to make payments under "an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States." 10 U.S.C. 2734a(a).

In addition, Congress has in limited circumstances authorized specific agencies to pay claims for torts occurring abroad, including torts arising from the overseas operations of the Department of State, 22 U.S.C. 2669-1, and the Drug Enforcement Administration, 21 U.S.C. 904.[6] In those statutes, as under the FCA,

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[6] Congress has also authorized the Department of State to use appropriated funds to "settle and pay any meritorious claim against the United States which is presented by a government of a foreign country for damage to or loss of real or personal property of, or personal injury to or death of, any national of such foreign country," subject to various limitations. 22 U.S.C. 2669(b). The Department

Congress provided an administrative remedy subject to careful constraints, see, *e.g.*, 10 U.S.C. 2734(b); it did not permit the injured parties to bring suit in court.

c. Petitioners contend (Br. 32-34) that congressional inaction does not qualify as a "special factor" in this case because Congress has not legislated about cross-border shootings and has infrequently legislated about the tort liability of federal officers. That assertion ignores the FTCA's foreign-country exception—which precludes liability in the precise circumstances here, as petitioners elsewhere acknowledge (Br. 20)—and the various alternative administrative schemes that Congress has created for injuries suffered abroad. Moreover, by artificially excluding state officers, petitioners fail to give due weight to the analogous Section 1983 regime. In combination, Congress's actions demonstrate that it has given "careful attention to conflicting policy considerations" in this arena and the system it has adopted should not "be augmented by the creation of a new judicial remedy." *Bush*, 462 U.S. at 388; see *Schweiker*, 487 U.S. at 423.

3. The presumption against extraterritoriality reinforces the inappropriateness of extending* Bivens *to aliens injured abroad

a. The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal system that, in general, "United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (citation omitted). In statutory interpretation, that presumption is reflected in the canon that "[w]hen a statute gives no

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of State has not made a payment to petitioners (through Mexico) under that statute.

clear indication of an extraterritorial application, it has none." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 116.

This Court has made clear that "the principles underlying the canon of interpretation similarly constrain courts" in recognizing common-law causes of action. *Kiobel*, 569 U.S. at 116. Indeed, the Court explained in *Kiobel* that "the danger of unwarranted judicial interference in the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do." *Ibid.* (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a cause of action without even the minimal congressional guidance found in the ATS.

After *Kiobel*, the Court clarified that the presumption against extraterritoriality "separately appl[ies]" to a private damages remedy for injuries suffered abroad, even if the underlying substantive rule has extraterritorial reach. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2106 (2016); see *id.* at 2106-2108. In *RJR Nabisco*, the Court thus concluded that a statutory private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct, see *id.* at 2105—because the statute did not "provide[] a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States," *id.* at 2108. Under that reasoning, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional

rights are violated by federal officers, this Court would not extend that statutory remedy to this case absent a "clear indication" that Congress intended to reach "injuries suffered outside of the United States." *Ibid.* And it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

b. Petitioners respond (Br. 31) that the presumption against extraterritoriality should not apply because extending *Bivens* will not cause international discord in this case. But the presumption applies "across the board, regardless of whether there is a risk of conflict" with other nations in a particular case, as confirmed by the fact that the European Community was itself the plaintiff in *RJR Nabisco*. 136 S. Ct. at 2100 (citation and internal quotation marks omitted).

Petitioners next assert (Br. 31) that the presumption does not apply to constitutional claims because "th[e] Court is not acting as the agent of the legislature" when it interprets the Constitution, unlike when it interprets statutes. But in determining whether to extend a damages remedy for a constitutional violation, the Court is indeed attempting to ascertain "the likely or probable intent of Congress." *Abbasi*, 137 S. Ct. at 1862. As *Abbasi* explained, the touchstone of the Court's analysis is thus whether "*Congress* might doubt the efficacy or necessity of a damages remedy." *Id.* at 1858 (emphasis added).

Finally, petitioners for the first time contend that the presumption has been rebutted here because Agent Mesa's conduct sufficiently "touche[s] and concern[s]" the United States. Pet. Br. 32 (quoting *Kiobel*, 569 U.S.

at 124-125). Even if the Court considers that new argument, *RJR Nabisco* establishes that when a cause of action focuses on a plaintiff's injury, the presumption applies to claims that "rest entirely on injury suffered abroad." 136 S. Ct. at 2111; see *id.* at 2105-2107. And more generally, a "touch and concern" analysis would require a case-specific inquiry into whether a particular defendant's conduct sufficiently involved the United States. That sort of inquiry is incompatible with the categorical question whether this Court should extend a non-statutory remedy to the class of potential claims brought by aliens injured abroad.

D. The Purported Inadequacy Of Alternative Remedies Cannot Justify Extending *Bivens*

1. Petitioners contend (Br. 34-38) that they have asserted "a core *Bivens* claim," *id.* at 34, because they lack adequate alternative remedies. That argument is both legally and factually flawed.

Legally, this Court has made clear that while the *presence* of an alternative remedy may preclude the extension of *Bivens*, the "*absence* of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker*, 487 U.S. at 421-422 (emphasis added). Otherwise, courts would be forced to create remedies whenever Congress has specifically chosen *not* to do so. The Court has therefore emphasized that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [the plaintiff] * * * an 'adequate' federal remedy for his injuries." *Stanley*, 483 U.S. at 683. "[E]ven in the absence of an alternative," a *Bivens* remedy is inappropriate if there are "'any special factors

counselling hesitation.'" *Wilkie*, 551 U.S. at 550 (citation omitted).

The Court has accordingly declined to extend *Bivens* even when that leaves no "prospect of relief for injuries that must now go unredressed." *Schweiker*, 487 U.S. at 425. In *Stanley*, for example, the Court declined to extend *Bivens* to an Army veteran's claim that he had been secretly administered LSD as part of an Army experiment, even though he was also barred from bringing an FTCA suit against the United States. 483 U.S. at 671-672, 686. The Court explained that, if no alternative remedial scheme existed, "[t]he 'special factor' that 'counsels hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Id.* at 683 (brackets omitted). Similarly here, if special factors counsel hesitation, then the Court cannot extend *Bivens*, regardless of what other relief may be available to petitioners.

Factually, petitioners exaggerate the lack of alternative remedies. State tort suits against an individual officer remain available where the officer acts outside the scope of his employment. See *Wilkie*, 551 U.S. at 551-553 (considering availability of potential tort suits). Here, the Westfall Act protects Agent Mesa from state tort suits only because DOJ certified that he was acting within the scope of his employment. 28 U.S.C. 2679(b) and (d). Such "scope-of-employment certification[s] [are] reviewable in court," *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995). And although petitioners did not exercise their right to seek judicial review here, the certification process may allow claims to go forward in "egregious[]" cases of employees acting

outside the scope of their employment. *Vanderklok*, 868 F.3d at 204; see, *e.g.*, *Jamison* v. *Wiley*, 14 F.3d 222, 228-235 (4th Cir. 1994) (no certification for employee who sexually assaulted co-worker at work).

Forms of executive redress also remain available. See *Schweiker*, 487 U.S. at 424 (considering availability of administrative scheme). In particular, DOJ investigates allegations of excessive force by federal law-enforcement officers, including Border Patrol agents, and may bring a federal criminal prosecution where appropriate. See *United States* v. *Swartz*, No. 15-CR-1723 Docket entry No. 659 (D. Ariz. Dec. 17, 2018) (prosecution of Border Patrol agent for murder, resulting in acquittal). A successful prosecution could result in an order providing restitution for the victim's family. See 18 U.S.C. 3663A(a); *United States* v. *Cienfuegos*, 462 F.3d 1160, 1165-1169 (9th Cir. 2006). Other compensation, such as administrative or *ex gratia* payments, may also be available, depending on the circumstances of the case. See pp. 24-26, *supra*.

Apart from compensation, several practical deterrents mitigate petitioners' concerns (Br. 40) that, absent *Bivens* liability, federal officers will "use unconstitutionally excessive force with impunity." For example, U.S. Border Patrol agents are subject to internal review and discipline under regulations promulgated pursuant to a specific congressional directive. See 8 U.S.C. 1357(a)(5); 8 C.F.R. 287.10. And CBP has revised its use-of-force policy, redesigned its training curriculum, and instituted a new procedure for reviewing incidents involving the use of force. See *CBP Releases Use of Force Policy*

Handbook and Police Executive Research Forum Report (May 30, 2014)[7]; CBP, *Investigations into Deaths in Custody and Use-of-Force Incidents* (July 27, 2015).[8] On the international front, too, the United States can be accountable to Mexico for federal officers' conduct at the border. And if concerns remain "that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution," the high "stakes on both sides of the argument" are for Congress to weigh. *Abbasi*, 137 S. Ct. at 1863.

2. Petitioners additionally contend (Br. 40-42) that the absence of a federal damages remedy would "raise[] a serious constitutional question" about "whether the Westfall Act violates the Due Process Clause," *id.* at 40. No court has ever suggested that the Westfall Act is unconstitutional, and this Court did not grant certiorari on that question. Regardless, petitioners' constitutional-avoidance argument fails.

Petitioners rely (Br. 42) on the statement in *Webster* v. *Doe*, 486 U.S. 592 (1988), that a "serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603 (internal quotation marks omitted). But the Westfall Act does not purport to foreclose judicial review of constitutional claims. It merely preempts state tort suits with a specific type of remedy: damages against federal officers acting within the scope of their employment. See 28 U.S.C. 2679(b). In fact, it

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[7] https://www.cbp.gov/newsroom/national-media-release/cbp-releases-use-force-policy-handbook-and-police-executive-research.

[8] https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20(CBP)%20-%20Investigations%20into%20Deaths%20in%20Custody%20and%20Use-of-Force%20Incidents.pdf.

expressly *excludes* constitutional claims (to the extent they are otherwise available) from its substitution provisions. 28 U.S.C. 2679(b)(2)(A). If petitioners are unable to bring a constitutional claim, it is not because the Westfall Act has closed the courthouse doors; it is because Congress has declined to create the constitutional damages action they desire.

Petitioners more broadly suggest (Br. 41) that the combination of the Westfall Act's preemption of state tort suits and Congress's decision not to create a constitutional damages action raises serious constitutional doubts. But petitioners cite no authority for the proposition that, although Congress may permissibly take each of those actions, it may not do both. Instead, petitioners invoke the general principle "that where there is a legal right, there is also a legal remedy." *Ibid.* (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). As they acknowledge (*ibid.*), however, that principle is far from absolute. For example, traditional immunity doctrines illustrate that the Constitution does not guarantee a remedy when a governmental official violates an individual's constitutional rights, as those doctrines preclude recovery for certain constitutional violations. See, *e.g.*, *Imbler* v. *Pachtman*, 424 U.S. 409, 427 (1976) (applying absolute immunity and acknowledging that it "leave[s] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty"). The *Bivens* context is no different: Even if petitioners have Fourth and Fifth Amendment rights and those rights were violated, a damages remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest." *Wilkie*, 551 U.S. at 550;

accord *Schweiker*, 487 U.S. at 421-422, 428; *Stanley*, 483 U.S. at 683.

Indeed, petitioners' constitutional-avoidance theory would have the opposite effect of *creating* constitutional doubt: It would require this Court to extend *Bivens* to precisely those circumstances where Congress has foreclosed liability against the United States under the FTCA. Petitioners lack an "alternative federal legal remedy" (Br. 41) for the alleged constitutional violation here in part because Congress has specifically barred FTCA liability for claims "arising in a foreign country." 28 U.S.C. 2680(k); see Pet. Br. 20. Accordingly, under their constitutional-avoidance theory, the Court would be forced to extend *Bivens* to areas where Congress has expressly determined that governmental liability would be inappropriate. That result would exacerbate the existing separation-of-powers concerns about judicially created damages actions. See *Abbasi*, 137 S. Ct. at 1856. The Court should not take that constitutionally dubious step here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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