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Standing on the Wrong Side: *Hernandez v. Mesa* and *Bivens* Remedies in the Context of Cross-Border Shootings by Federal Law Enforcement

Meg Green
Boston College Law School, margaret.green.2@bc.edu

STANDING ON THE WRONG SIDE: *HERNANDEZ v. MESA* AND *BIVENS* REMEDIES IN THE CONTEXT OF CROSS-BORDER SHOOTINGS BY FEDERAL LAW ENFORCEMENT

Abstract: *Bivens* claims provide individual plaintiffs the ability to seek civil remedies for violations of their constitutional rights by federal actors. In March of 2018, the Fifth Circuit held, in *Hernandez v. Mesa*, that a *Bivens* remedy was unavailable where a Border Patrol officer standing in the United States shot and killed a Mexican citizen on the other side of the border. In August of 2018, with nearly identical facts, the Ninth Circuit, in *Rodriguez v. Swartz*, split from the Fifth Circuit by holding that a *Bivens* remedy was indeed available for an extraterritorial shooting. This Comment acknowledges that the Fifth Circuit's denial of a *Bivens* remedy is consistent with the framework announced by the Supreme Court in 2017 in *Ziglar v. Abbasi* and will most likely be upheld. This Comment argues, however, that leaving victims of extraterritorial shootings without a cause of action is deeply problematic. Congress should act to provide a remedy for constitutional violations perpetrated by federal law enforcement at international boundaries, regardless of extraterritoriality.

PREFACE

As this Comment went to press, the Supreme Court released its *Hernandez v. Mesa* opinion declining to extend a *Bivens* remedy to a cross-border shooting.[1] The Court confirmed that the proper approach to extending *Bivens* is to determine (1) if the claim represents a new context and (2) whether any special factors counsel hesitation in extending the remedy.[2] The Court held that an extraterritorial shooting by a United States Border Patrol agent represents a new context in which there are several special factors that counsel hesitation by the Court.[3] Those factors include the foreign relations and national security issues inherently raised by a shooting at the border, as well as the absence of a remedy created by Congress.[4] The Court recognized that, most importantly,

[1] Hernandez v. Mesa, No. 17-1678, 2020 WL 889193, at *3 (S. Ct. Feb. 25, 2020); *see infra* notes 9–10 (defining a *Bivens* remedy).

[2] *Id.* at *5–6.

[3] *Id.* at *6–7.

[4] *Id.* at *11. The Court emphasized a border shooting is inherently an "international incident," and that issues implicating foreign relations are best left within the purview of the executive and legislative branches of government. *Id.* at *7. Moreover, the Court noted the "clear and strong connection" between border security and national security. *Id.* at *9. Additionally, the Court emphasized that Con-

these factors all relate to the central separation of powers inquiry in *Bivens*—whether it is better for the legislative or judicial branch to establish a remedy.[5] The Court held that a decision to extend a remedy to a cross-border shooting by a federal official should "undoubtedly" be left to Congress.[6] This Comment provides a historical overview of the *Bivens* remedy, discusses the recent circuit split on the issue, predicts the Court's holding in *Hernandez v. Mesa*, and argues that Congress should act to provide a suitable remedy for victims of cross-border shootings perpetrated by federal law enforcement.

INTRODUCTION

Causes of action against government officials for violations of constitutional rights have a storied past in American legal history.[7] In 1871, concerned with civil rights abuses in the former Confederate states, Congress enacted 42 U.S.C. § 1983 to create a cause of action allowing individuals whose constitutional rights are violated by state or local officials to seek damages.[8] One hundred years later, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court inferred a similar cause of action for violations of an individual's constitutional rights by a federal actor.[9] Known as *Bivens* claims or *Bivens* remedies, this implied cause of action provides an individual plaintiff the opportunity to seek civil redress under the limited set of circumstances recognized by the Court.[10]

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gress has declined to create a damages remedy for claims arising from an extraterritorial incident. *Id.* at *9.

[5] *Id.* *11–12.

[6] *Id.* at *12.

[7] *See generally* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 941–51 (2019) (describing the historical background of causes of action for violations of constitutional rights). A cause of action allows an injured person to seek a remedy in court against a person accused of the wrongdoing which produced the injury. *Cause of Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[8] *See* 42 U.S.C. § 1983 (2018) (providing a cause of action against state and local officials, but not federal officials, for constitutional violations); Rodriguez v. Swartz, 899 F.3d 719, 742 (9th Cir. 2018) (discussing the Civil War origins of causes of actions for constitutional violations, and Congress's intent to use the federal courts to protect citizens from the states). Congress enacted the 1871 statute in which § 1983 originated during Reconstruction in what was known at the time as the Ku Klux Klan Act. Fallon, *supra* note 7, at 946.

[9] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (recognizing an implied cause of action against federal law enforcement officials who violated an individual's Fourth Amendment right against unreasonable search and seizure). In this case, the petitioner brought suit against law enforcement officials who entered his home without a warrant, arrested him, and ultimately subjected him to a strip search. *Id.* at 389. Taken together with § 1983 claims, these causes of action are sometimes known as "constitutional torts." *See* Fallon, *supra* note 7, at 947.

[10] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–55 (2017) (noting that the Court has only extended a *Bivens* remedy for unreasonable search and seizures, sex-based employment discrimination, and inadequate medical care of a prisoner). When a constitutional right is violated by a federal employee,

Since 2010, an estimated one hundred people have died after coming into contact with United States Border Patrol agents.[11] Two cases involving a deadly, cross-border shooting by a Border Patrol agent, *Hernandez v. Mesa* and *Rodriguez v. Swartz*, have worked their way through the federal court system as the victims' families have raised *Bivens* claims against the individual federal agents involved.[12] Because criminal prosecution of an individual Border Patrol agent is unlikely to proceed, a civil remedy may be the only remaining re-

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a cause of action may be "implied" by the Court where neither a federal statute, nor the Constitution itself, explicitly provides for such a claim. *Id.* at 1855. Before *Bivens* was decided, the Court would imply a cause of action to fulfill a statute's intent even where the statute did not expressly provide for one. *Id.* This judicial practice led to the extension of an implied cause of action for a constitutional violation where a remedy was not explicitly contemplated or otherwise available. *Id.* In his famous concurrence in *Bivens*, Justice John Marshall Harlan opined that for a petitioner like Mr. Bivens, where the federal government cannot be sued directly and injunctive relief is unavailing because the violation has already occurred, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

[11] *Deaths by Border Patrol*, SBCC (Feb. 5, 2020), https://www.southernborder.org/deaths_by_border_patrol [https://perma.cc/E52M-2XPZ]. Southern Border Communities Coalition (SBCC) bases its estimates on deaths connected to Border Patrol agents on official agency communications from the United States Customs and Border Protection, as well as local press coverage. *Id.* SBCC is an advocacy group made up of over sixty community organizations along the United States southwestern border. *About Southern Border Communities Coalition*, SBCC, https://www.southernborder.org/about [https://perma.cc/6NGM-7LR5]. The Border Patrol was founded in 1924 to secure the nation's borders and enforce its immigration laws. *Border Patrol History*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/border-security/along-us-borders/history [https://perma.cc/Q2PG-4DG2]. With nearly 20,000 Border Patrol agents, it is the largest federal law enforcement agency in the nation. Roxana Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1, 3 (2017); U.S. CUSTOMS & BORDER PROTECTION, SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES (2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Aug/CBP_Snapshot_07032019.pdf [https://perma.cc/2JL3-59V5]. Human rights advocates argue that this behemoth of an agency operates with dangerously insufficient oversight and accountability, particularly within the context of the anti-immigrant attitudes espoused by the Trump administration. Megan Specia & Rick Gladstone, *Border Agents Shot Tear Gas into Mexico. Was It Legal?*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html [https://perma.cc/WNT2-88FJ]; *see, e.g.*, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (severely restricting the ability of refugees to resettle in the United States by suspending the U.S. Refugee Admissions Program for 120 days and restricting the total number of refugees allowed into the country); Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (restricting federal funding available to "sanctuary cities," which are those jurisdictions that limited their cooperation with U.S. Immigration and Customs Enforcement); Eugene Scott, *Trump's Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/ [https://perma.cc/PU6B-EFU2] (describing President Trump's vitriolic language toward immigrants, including an infamous statement made during his 2015 presidential candidacy announcement in which he proclaimed, "[w]hen Mexico sends its people, they're not sending their best . . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists.").

[12] Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018), *cert. granted in part*, 139 S. Ct. 2636 (2019); *Rodriguez*, 899 F.3d at 726; *see infra* notes 58–71 and accompanying text (describing the facts and procedural histories of *Hernandez v. Mesa* and *Rodriguez v. Swartz*).

course.[13] The twin tragedies of these cases—two teenage boys shot and killed by Border Patrol agents—cannot be understated.[14]

Hernandez and *Rodriguez* have resulted in a circuit split that raises serious policy concerns related to the ability to recover damages against a federal official for a cross-border shooting in some jurisdictions along the southern border, but not in others.[15] In 2018, the U.S. Court of Appeals for the Fifth Circuit, in *Hernandez*, declined to extend a *Bivens* remedy to a victim's family after a Border Patrol agent in the United States shot across the international boundary and killed a Mexican citizen.[16] The U.S. Court of Appeals for the Ninth Circuit, however, in *Rodriguez*, made a *Bivens* remedy available under those exact circumstances.[17] The Supreme Court granted a petition for writ of certiorari in *Hernandez* and heard arguments in November 2019.[18]

Part I of this Comment gives an overview of the doctrinal framework of the *Bivens* remedy, the relevant facts and procedural history of *Hernandez* and *Rodriguez*, and the resulting circuit split on the issue.[19] Part II analyzes the different approaches taken by the circuit courts when extending a *Bivens* remedy to a new context.[20] Finally, Part III explains that the Fifth Circuit properly applied the Supreme Court's recent *Bivens* jurisprudence, and the court's decision in *Hernandez* will likely be upheld.[21] Part III additionally argues, however, that declining to extend a cause of action for cross-border shootings perpe-

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[13] *See* Altholz, *supra* note 11, at 16 (explaining that prosecution of Border Patrol agents in cases where lethal force is used is extremely rare). State prosecutors have only brought charges against a Border Patrol agent for lethal force in a few instances. *Id.* Similarly, the federal government has closed all but one investigation into deadly force by a Border Patrol agent without bringing charges. *Id.* The second-degree murder charges brought against Agent Lonnie Swartz are the sole exception. *Id.* A civil remedy is the legal or equitable means by which a court enforces a right or redresses a wrong. *Civil Remedy*, BLACK'S LAW DICTIONARY, *supra* note 7. The remedy most often takes the form of money damages or an injunction. *Id.*

[14] Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. TIMES (Oct. 17, 2016), https://www.nytimes.com/2016/10/18/us/politics/an-agent-shot-a-boy-across-the-us-border-can-his-parents-sue.html [https://perma.cc/7QCA-WJ8N] (discussing the deaths of the boys involved in both *Rodriguez* and *Hernandez*).

[15] *See Rodriguez*, 899 F.3d at 758 (Smith, J., dissenting) (noting the potential unequal administration of justice created by the circuit split).

[16] *See Hernandez*, 885 F.3d 811, 823 (declining to extend a *Bivens* remedy in the context of a cross-border shooting).

[17] *See Rodriguez*, 899 F.3d at 748 (extending a *Bivens* remedy in the context of a cross-border shooting).

[18] *Monthly Argument Calendar November 2019*, SUP. CT. U.S., (Nov. 1, 2019), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2019.pdf [https://perma.cc/KK8A-MEU7]. On February 25, 2020, as this Comment went to press, the Supreme Court decided *Hernandez*. *See supra* notes 1–7 and accompanying text (discussing the ultimate holding in this case).

[19] *See infra* notes 23–71 and accompanying text.

[20] *See infra* notes 72–100 and accompanying text.

[21] *See infra* notes 101–108 and accompanying text.

trated by federal law enforcement is deeply problematic, and that Congress should take action to provide a remedy in these circumstances.[22]

I. Legal and Factual Context: The *Bivens* Doctrine and the Facts of *Hernandez v. Mesa* and *Rodriguez v. Swartz*

Bivens remedies have gained increased attention in cases involving excessive force perpetrated by federal law enforcement officials.[23] It is within this highly political climate that a circuit split has emerged.[24] Section A of this Part discusses the creation of the *Bivens* remedy and the evolving framework of the doctrine.[25] Section B explains the modern approach to *Bivens* causes of action.[26] Finally, Section C introduces the facts and procedural histories of *Hernandez v. Mesa* and *Rodriguez v. Swartz*.[27]

A. The Bivens *Remedy: Implied Causes of Action*

A cause of action against federal actors who violate constitutional rights was created in 1971.[28] In *Bivens*, the Supreme Court recognized an implied cause of action where a federal officer violated an individual's constitutional rights.[29] Specifically, the Court allowed the plaintiff to seek recovery of money damages as compensation for an alleged violation of his Fourth Amendment right against unreasonable search and seizure by a federal officer.[30] In doing so, the Court recognized that federal officers acting on behalf of the United States government can cause greater injury than an individual acting without such authority.[31] In what would become an important factor, the Court noted

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[22] *See infra* notes 109–114 and accompanying text.

[23] *See* Altholz, *supra* note 11, at 1, 5 (noting that although both civil and criminal actions against Border Patrol agents typically fail, public awareness of killings by agents is growing). Excessive force is defined as force that is unreasonable given the circumstances. *Excessive Force*, Black's Law Dictionary, *supra* note 7.

[24] *See* Liptak, *supra* note 14 (discussing both *Rodriguez* and *Hernandez*, as well as the international political landscape related to the cases). *Compare Rodriguez*, 899 F.3d at 748 (extending a *Bivens* remedy in the context of a cross-border shooting), *with Hernandez*, 885 F.3d at 823 (declining to extend a *Bivens* remedy in the context of a cross-border shooting).

[25] *See infra* notes 28–39 and accompanying text.

[26] *See infra* notes 40–57 and accompanying text.

[27] *See infra* notes 58–71 and accompanying text.

[28] *Bivens*, 403 U.S. at 397.

[29] *Id.*

[30] *Abbasi*, 137 S. Ct. at 1854; *Bivens*, 403 U.S. at 397. In *Bivens*, the petitioner alleged that Federal Bureau of Narcotics agents entered his apartment without a search warrant, arrested him, searched his apartment, and then took him to a courthouse where he was interrogated, booked, and strip searched. 403 U.S. at 389. The petitioner claimed to have suffered "humiliation, embarrassment, and mental suffering" from the violation of his constitutional rights, and he sought monetary damages from the federal officials involved. *Id.* at 390.

[31] *Bivens*, 403 U.S. at 392.

that, in *Bivens*, there were no "special factors counselling hesitation" in extending a remedy where Congress had not expressly provided one.[32]

Since *Bivens*, the Supreme Court has only extended an implied cause of action for constitutional violations in two other contexts.[33] In 1979, in *Davis v. Passman*, the Court extended a *Bivens* remedy in an employment discrimination case.[34] Then, in 1980, in *Carlson v. Green*, the Court further extended *Bivens* to apply where federal prison officials failed to treat a prisoner's medical condition adequately.[35] In the three decades since *Davis* and *Carlson*, however, the Court has refused to extend a *Bivens* cause of action to any new categories of defendants.[36] The Court has expressly announced that *Bivens* claims are now "disfavored" and has adopted a more cautious approach in extending implied causes of action.[37] The Court prefers for Congress to dictate remedies.[38] The Court's reference in *Bivens* to "special factors counselling hesitation" absent congressional action has become the central analytical question for courts deciding whether to extend a *Bivens* claim.[39]

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[32] *Id.* at 396; *see infra* notes 45–54 and accompanying text (describing the "special factors" analysis).

[33] *See Abbasi*, 137 S. Ct. at 1854–55 (noting that the Court has extended a *Bivens* remedy for sex-based employment discrimination and inadequate medical care of a prisoner).

[34] 442 U.S. 228, 231, 248–49 (1979) (extending a *Bivens* cause of action under a theory of Fifth Amendment violation of due process where an employee claimed she was fired by a congressman on the basis of her sex). In this case, Congressman Otto Passman had hired Shirley Davis to serve as a deputy administrative assistant in his office. *Id.* at 230. Six months later, Passman fired Davis after concluding that the position needed to be filled by a man. *Id.* Davis sued the congressman, alleging that the discrimination on the basis of her sex violated her Fifth Amendment right to due process. *Id.*

[35] Carlson v. Green, 446 U.S. 14, 19, 24 (1980) (holding that a prisoner's estate could recover damages under the Eighth Amendment's prohibition against cruel and unusual punishment). Here, the respondent brought suit on behalf of her deceased son, Joseph Jones, Jr., who died while in federal prison. *Id.* at 16. The respondent alleged that the prison's officials were aware the medical facilities were inadequate and of her son's serious asthma. *Id.* at n.1.

[36] *See Abbasi*, 137 S. Ct. at 1869 (declining to extend a *Bivens* cause of action to detainees held on suspicion of terrorist activity in the wake of the September 11 attacks); *see, e.g.*, Minneci v. Pollard, 565 U.S. 118, 120 (2012) (holding there was no *Bivens* cause of action for prisoners who claimed employees of a privately operated federal prison violated their Eighth Amendment rights); FDIC v. Meyer, 510 U.S. 471, 473 (1994) (declining to extend *Bivens* liability to an agency of the federal government); United States v. Stanley, 483 U.S. 669, 684 (1987) (holding there is no *Bivens* remedy available where injuries were incurred in the course of military service).

[37] *See* Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (stating that *Bivens* claims are disfavored and emphasizing that the Court has been averse to extending implied causes of action to new contexts).

[38] *See Abbasi*, 137 S. Ct. at 1855 (discussing the evolution of implied causes of action and the Court's hesitation to imply either statutory or constitutional causes of action absent direction from Congress).

[39] *Id.* at 1857; *see* Bush v. Lucas, 462 U.S. 367, 377–78 (1983) (holding that federal courts should consider "special factors counselling hesitation" before creating new federal causes of action without authorization from Congress); *infra* notes 48–54 and accompanying text (discussing the "special factors" analysis).

B. The Evolving Bivens *Framework*

In the years after *Bivens*, an ill-defined, three-part approach evolved for evaluating whether to extend an implied cause of action for a constitutional violation by a federal official.[40] As a threshold matter, courts determined (1) if a case presented a "new context" for granting a *Bivens* remedy.[41] Then, courts evaluated (2) whether an alternative remedy existed.[42] Lastly, courts considered (3) whether any "special factors counsel[ed] hesitation" in making an implied cause of action available.[43] Courts, however, struggled to identify and apply a workable framework for extending a *Bivens* remedy because the Supreme Court had declined to identify what represented a new context and what constituted a "special factor counselling hesitation."[44]

Then, in 2017, in *Ziglar v. Abbasi*, the Supreme Court clarified the analysis for extending *Bivens* claims.[45] Leaning heavily on separation of powers doctrine, the Court expressed a strong disinclination to extend *Bivens*, and emphasized that the creation of implied causes of action are a "disfavored" judicial activity.[46] The Court then seemingly adopted a new, two-prong approach

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[40] *See Abbasi*, 137 S. Ct. at 1876 (Breyer, J., dissenting) (noting the ambiguity of the Court's previous *Bivens* decisions and describing the three-step analytical approach to the extension of *Bivens* claims); Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 720 (2012) (noting the Supreme Court's "ad hoc" development of the *Bivens* remedy).

[41] Wilkie v. Robbins, 551 U.S. 537, 549 (2007); *see infra* notes 33–37 and accompanying text (describing the contexts previously recognized by the Court); *see also* Meshal v. Higgenbotham, 804 F.3d 417, 423 (D.C. Cir. 2015) (noting that the court must first determine if a case would extend *Bivens* to a new context).

[42] *Wilkie*, 551 U.S. at 550.

[43] *Id.*; *see also Meshal*, 804 F.3d at 425 (describing the three-step analytical framework for extending *Bivens*).

[44] *See, e.g.*, *Meshal*, 804 F.3d at 423 (noting that the Supreme Court had not defined "new context" with regards to extending *Bivens*); Bernstein, *supra* note 40, at 720 (highlighting that *Bivens* jurisprudence has been developed on an ad hoc basis with special factors determined on a "case-by-case" basis). Although the Court has not defined "special factors," it has recognized that those factors have to do with whether the creation of a remedy should be left to Congress to decide, *not* whether a remedy is warranted. *See Abbasi*, 137 S. Ct. at 1858 (recognizing there are areas where Congress has made its authority in a given area clear, such as matters relating to the military).

[45] *Abbasi*, 137 S. Ct. at 1869; *see* Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (noting that the guidance the Court provided in *Abbasi* regarding the extension of *Bivens* claims was "intervening"). In *Ziglar v. Abbasi*, suspects detained on suspicion of terrorism after the September 11, 2001, attacks alleged federal officials perpetrated Fourth and Fifth Amendment violations against them, including harsh pre-trial conditions and strip searches. *Abbasi*, 137 S. Ct. at 1853–54. The respondents sought damages through a *Bivens* claim against federal officials for the violation of their constitutional rights. *Id.*

[46] *Abbasi*, 137 S. Ct. at 1857; *see also Iqbal*, 556 U.S. at 675 (stating that *Bivens* claims are disfavored). Separation of powers refers to the division of government authority into three branches of government: executive, legislative, and judicial. *Separation of Powers*, BLACK'S LAW DICTIONARY, *supra* note 7. In the three decades since *Bivens*, the Court has exercised much more caution, indicating that it is far preferable for Congress to explicitly provide for remedies. *See Abbasi*, 137 S. Ct. at 1857 (emphasizing there are a number of policy considerations for Congress to weigh before providing

to the *Bivens* analysis.[47] First, courts should determine whether a case presents a new context.[48] If a case does so, courts should then engage in the "special factors analysis."[49] The Court emphasized the analysis should be focused on "who should decide" whether to imply a cause of action—the legislative or the judicial branch—rather than on whether a remedy is warranted.[50]

Notably, in *Abbasi*, the Court clarified that a case presents a new context when it is "different in a meaningful way" from a previously identified *Bivens* claim.[51] If a case represents a new context, a *Bivens* remedy may not be extended where "special factors couns[el] hesitation."[52] Although the Court did not define what constitutes a special factor, it did emphasize that the analysis should focus on whether the judiciary is the appropriate branch to weigh the costs and benefits of creating a new remedy.[53] Thus, the underlying question is whether it is proper for the Court to imply a cause of action when Congress is silent.[54]

As it stands today, if a case presents a new context for the extension of a *Bivens* remedy, courts must proceed with broad deference to Congress by engaging in an analysis to identify if any "special factors counselling hesitation" exist.[55] In the wake of *Abbasi*, a circuit split emerged, in which the Fifth Circuit declined to extend a *Bivens* remedy for an extraterritorial killing by a United States Border Patrol agent, but the Ninth Circuit extended the remedy

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remedies against federal government officials, and therefore, the Court should proceed cautiously in creating remedies of its own). The Court went so far as to say that "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. The Court, however, stopped short of overruling any of those cases and expressly affirmed *Bivens* in its original Fourth Amendment search and seizure context. *Id.* at 1856–57.

[47] *Abbasi*, 137 S. Ct. at 1857–58; *see Hernandez*, 885 F.3d at 816 (describing the "two-part" analysis of *Bivens* claims after *Abbasi*).

[48] *Abbasi*, 137 S. Ct. at 1858. In *Abbasi*, the Court opined that the court of appeals should have found that the case represented a new context prior to analyzing the presence of special factors. *Id.* at 1860.

[49] *Id.*; *see Hernandez*, 885 F.3d at 818 (analyzing special factors after determining that the case in question represented a new *Bivens* context). In *Abbasi*, the Court de-emphasized the existence of alternative remedies as a formal step in the analysis, and instead considered the presence of alternatives in its analysis of special factors. 137 S. Ct. at 1858.

[50] *Abbasi*, 137 S. Ct. at 1857.

[51] *Id.* at 1859. The Court further explained that meaningful differences can include the federal officials involved, the constitutional right, the risk of judicial overreach, or "other special factors." *Id.*

[52] *Id.* at 1858 (explaining that the Court must not create a remedy where there are "sound reasons" Congress may doubt its necessity).

[53] *Id.* at 1857–58.

[54] *See id.* (holding that "separation-of-powers principles are or should be central to the analysis"). In *Abbasi*, the Court provided examples of factors that may "counsel hesitation," including issues that are ordinarily in the purview of the legislative or executive branches, such as national security. *Id.* at 1861.

[55] *Id.* at 1857.

under those circumstances.[56] The Supreme Court took up the issue in its 2019–2020 term.[57]

C. Factual and Procedural Histories of Hernandez v. Mesa *and* Rodriguez v. Swartz

Two recent cases involving lethal shootings by Border Patrol agents have tested the limits of *Bivens* claims.[58] On June 7, 2010, Sergio Hernandez, a fifteen-year-old Mexican citizen, was killed by Border Patrol Agent Jesus Mesa after the agent shot across the international boundary.[59] Hernandez's parents brought a *Bivens* claim against Agent Mesa, claiming that he violated their son's Fifth Amendment right to substantive due process.[60] The United States District Court for the Western District of Texas dismissed the *Bivens* claim, but was reversed by a panel of the Fifth Circuit.[61] The Fifth Circuit reheard the appeal en banc and, without addressing the *Bivens* claim, unanimously held Agent Mesa was protected by qualified immunity against a Fifth Amendment claim.[62]

The United States Supreme Court granted certiorari in 2016 to hear *Hernandez* in conjunction with *Abbasi*.[63] After deciding *Abbasi*, the Court remanded *Hernandez* to the Fifth Circuit and instructed that the availability of a

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[56] *Compare Rodriguez*, 899 F.3d at 748 (extending a *Bivens* remedy where a Border Patrol agent shot across the United States/Mexico border, killing a Mexican citizen), *with Hernandez*, 885 F.3d at 823 (declining to extend a *Bivens* remedy where a Border Patrol agent killed a Mexican citizen by firing his weapon across the southwestern border).

[57] *See* Hernandez v. Mesa, 139 S. Ct. 2636 (2019) (granting certiorari). As this Comment went to press, the Supreme Court decided *Hernandez v. Mesa* and affirmed the Fifth Circuit. *See supra* notes 1–7 and accompanying text (discussing the Court's decision to decline a *Bivens* remedy in the context of a cross-border shooting).

[58] *Rodriguez*, 899 F.3d at 748; *Hernandez*, 885 F.3d at 823.

[59] *Hernandez*, 885 F.3d at 814. According to the pleadings, Hernandez was near a culvert that separates Ciudad Juárez, Mexico and El Paso, Texas when a group of young men in Mexico began throwing rocks at the law enforcement officers in the United States. *Id.* It is unclear whether Hernandez was also throwing rocks, but the teenager did run from the agents. *See* Liptak, *supra* note 14 (describing the conflicting accounts of Hernandez's actions in the moments before he was killed). Agent Mesa fired his weapon toward the young men, killing Hernandez. *Hernandez*, 885 F.3d at 814.

[60] *Hernandez*, 885 F.3d at 814.

[61] Hernandez v. United States, 757 F.3d 249, 277 (5th Cir. 2014); Hernandez v. United States, 802 F. Supp. 2d 834, 837 (W.D. Tex. 2011).

[62] *Hernandez*, 757 F.3d at 277. The Fifth Circuit did not consider whether a *Bivens* remedy would be available because it did not find a constitutional violation. *Id.* Qualified immunity protects public officials from civil liability for damages related to their employment as long as their "conduct does not violate clearly established statutory or constitutional rights . . . ." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Court applies an objective reasonableness standard to the public official's conduct to determine whether it violates a clearly established right. *Id.*; *see also* Amanda Peters, *Mass Arrests & the Particularized Probable Cause Requirement*, 60 B.C. L. REV. 217, 241 (2019) (explaining that the objective reasonableness standard provides law enforcement "fair notice" that they may be sued for illegal conduct).

[63] *Hernandez*, 885 F.3d at 814.

Bivens claim should be analyzed before the merits of the constitutional claims.[64] On remand, following the Court's analysis in *Abbasi*, the Fifth Circuit declined to extend a *Bivens* remedy to the new context of a cross-border shooting.[65]

Two years after Hernandez was killed, on October 10, 2012, J.A., a sixteen-year-old boy who was on the Mexican side of the border, was shot and killed by Border Patrol Agent Lonnie Swartz.[66] In a similar *Bivens* cause of action, J.A.'s mother claimed Swartz violated her son's Fourth and Fifth Amendment rights.[67] Swartz argued that he was entitled to qualified immunity and that the court should dismiss the claim.[68] On July 9, 2015, the United States District Court for the District of Arizona held that Swartz was not entitled to qualified immunity and treated the shooting as a seizure under the Fourth Amendment.[69] Swartz then filed an interlocutory appeal arguing that the district court erred in its denial of qualified immunity.[70] Splitting from the Fifth Circuit, in August 2018, the Ninth Circuit affirmed the district court's decision in *Rodriguez* to extend *Bivens* to the new context of a cross-border shooting.[71]

II. LEGAL CONTEXT AND FRAMEWORK

Together, *Hernandez v. Mesa* and *Rodriguez v. Swartz* represent two of the most high-profile incidents of alleged excessive force by Border Patrol agents in the last decade.[72] The cases have created a divide among two of the

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[64] *See Hernandez*, 137 S. Ct. at 2006 (noting that the *Bivens* question is "antecedent" to the constitutional issues in the case).

[65] *Hernandez*, 885 F.3d at 823.

[66] *Rodriguez*, 899 F.3d at 727. As *Rodriguez* came before the Ninth Circuit on an interlocutory appeal, the facts were taken as pleaded and assumed to be true for the court's analysis. *Id.* at 727–28. According to the pleadings, J.A. was walking along the Calle Internacional in Nogales, Mexico when on-duty Border Patrol Agent Lonnie Swartz, who was standing in the United States, fired between fourteen and thirty bullets through a border fence. *Id.* at 727. Swartz struck J.A. with approximately ten bullets. *Id.*

[67] *Id.*

[68] *Id.*

[69] Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1040 (D. Ariz. 2015) (holding that a reasonable person would know killing another person without justification violated a constitutional right). Because the shooting was treated as a seizure under the Fourth Amendment, the Fifth Amendment due process claim was dismissed. *Id.* at 1038; *see* Graham v. O'Connor, 490 U.S. 386, 388 (1989) (holding that "seizures" in the context of excessive force by law enforcement are best analyzed under the Fourth Amendment's objective reasonableness standard and do not raise a substantive due process issue).

[70] *Rodriguez*, 899 F.3d at 728. An interlocutory appeal allows a party to challenge a legal matter in the case before a final ruling is issued. *Interlocutory Appeal*, BLACK'S LAW DICTIONARY, *supra* note 7.

[71] *Rodriguez*, 899 F.3d at 748; *Hernandez*, 885 F.3d at 823; *see infra* notes 89–100 and accompanying text (discussing the Ninth Circuit's decision).

[72] Liptak, *supra* note 14 (discussing both *Rodriguez* and *Hernandez*).

circuits touching the southern border of the United States.[73] Section A of this Part explains the Fifth Circuit's approach in *Hernandez* to the *Bivens* special factors analysis required for a case presenting a new *Bivens* context.[74] Section B analyzes the differing approach taken by the Ninth Circuit in *Rodriguez*, and highlights the split between the circuits.[75]

A. The Fifth Circuit's Application of the Abbasi *Special Factors Analysis*

In 2017, the Supreme Court decided *Ziglar v. Abbasi* and provided a clarified framework for adjudicating future *Bivens* claims.[76] Specifically, the Court held that where a case presents an extension of the *Bivens* remedy to a new context, courts should consider whether any special factors indicate that the extension of a remedy should be left to Congress.[77] On the same day, the Court remanded *Hernandez* to the Fifth Circuit to consider the merits of extending a *Bivens* claim to a cross-border shooting using the "intervening" guidance set forth in *Abbasi*.[78]

In 2018, upon remand, the Fifth Circuit in *Hernandez* examined the key threshold question set forth in *Abbasi*: does the case present meaningfully different circumstances from existing *Bivens* cases?[79] The Fifth Circuit affirmatively answered this question, concluding that a fatal shooting of a foreign citizen across an international border presented a new context under *Bivens*.[80] The court noted that because the extension of *Bivens* is generally disfavored, and that this case would represent an extraordinary extension, the new context it-

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[73] Rodriguez v. Swartz, 899 F.3d 719, 758 (9th Cir. 2018) (Smith, J., dissenting). The Ninth Circuit's southwestern border states include California and Arizona, and the Fifth Circuit includes Texas. *Id.* On February 25, 2020, as this Comment went to press, the Supreme Court decided *Hernandez v. Mesa* and resolved the circuit split. *See infra* notes 1–7 and accompanying text (discussing the Court's holding in *Hernandez*).

[74] *See infra* notes 76–88 and accompanying text.

[75] *See infra* notes 89–100 and accompanying text.

[76] Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017); *see* Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (noting that the Court had clarified the special factors analysis in *Ziglar v. Abbasi*).

[77] *Abbasi*, 137 S. Ct. at 1857.

[78] *See* Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018), *cert. granted in part*, 139 S. Ct. 2636 (2019) (noting that after the Supreme Court declined to extend a *Bivens* claim to the respondents in *Abbasi*, the Court remanded *Hernandez* to be considered); *see also Hernandez*, 137 S. Ct. at 2007 (characterizing the Court's guidance in *Abbasi* as "intervening").

[79] *See Hernandez*, 885 F.3d at 816 (beginning its *Bivens* analysis by considering if the case represented a new context); *see also Abbasi*, 137 S. Ct. at 1859–60 (explaining that a case represents an extension of *Bivens* where it differs meaningfully from previous claims recognized by the Court). Meaningful differences can include, for example, the rank of the federal official or the constitutional right at issue. *Abbasi*, 137 S. Ct. at 1859.

[80] *Hernandez*, 885 F.3d at 816 (noting that if *Abbasi* represented a "new context" even in light of similarities to other *Bivens* cases related to strip searches and prison abuses, then a fatal international shooting must also meet the meaningful difference standard). The Court previously indicated that "even a modest extension [of *Bivens*] is still an extension" that warrants a special factors analysis. *Abbasi*, 137 S. Ct. at 1864.

self warranted declining to extend a remedy.[81] The Fifth Circuit, however, opted to proceed with the analysis and consider whether any "special factors counsel[ed] hesitation" in extending *Bivens* to this new context.[82]

Following the framework set forth in *Abbasi*, the Fifth Circuit recognized that to determine whether the judiciary should extend a cause of action, legislative primacy is at the heart of the special factors analysis.[83] In *Hernandez*, the court identified the presence of several special factors that caused hesitation in extending *Bivens* to a cross-border shooting.[84] First, the Fifth Circuit recognized national security and potential interference with foreign diplomacy as special factors that are generally within the purview of legislative and executive branches of government.[85] Next, the court reasoned that Congress's failure to provide a remedy may have been intentional.[86] Most importantly, the Fifth Circuit emphasized the extraterritorial nature of the case as a special factor that should give the judiciary great pause before extending a *Bivens* claim.[87] Holding that the special factors present in *Hernandez* required careful consideration and balance, the Fifth Circuit confidently declined to extend a *Bivens* remedy in the novel context of an extraterritorial shooting by a federal officer standing in the United States.[88]

B. The Ninth Circuit's "Highly Specific" Approach to the Special Factors Analysis

In 2018, after the Fifth Circuit decided *Hernandez*, the Ninth Circuit confronted the same question of whether to extend a *Bivens* remedy for an extra-

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[81] *Hernandez*, 885 F.3d at 818.

[82] *Id.*

[83] *Id.*; *see also Abbasi*, 137 S. Ct. at 1857 (holding that when an issue involves a number of considerations that must be balanced, it is better for Congress, rather than the Courts, to act).

[84] *Hernandez*, 885 F.3d at 817.

[85] *Id.* at 818–19. The Fifth Circuit highlighted that it may be inappropriate for judicial involvement where U.S. officials had declined to extradite Agent Mesa to Mexico, and the two nations were in ongoing discussions about the case. *Id.* at 820.

[86] *Id.* at 820 (comparing *Bivens* with 42 U.S.C. § 1983, which limits damage remedies to citizens or persons in the jurisdiction of the United States).

[87] *Id.* at 821. The Fifth Circuit also noted that the Supreme Court has never recognized a nonstatutory cause of action for extraterritorial conduct. *Id.* at 822. The D.C. Circuit has also found that extraterritoriality is a special factor that cautions judicial restraint as it relates to a *Bivens* claim for an injury occurring in a foreign country. Meshal v. Higgenbotham, 804 F.3d 417, 425–26 (D.C. Cir. 2015). In *Meshal v. Higgenbotham*, the petitioner filed a *Bivens* action against Federal Bureau of Investigation agents who allegedly tortured him over a period of months in three African countries. *Id.* at 418. The court held that a *Bivens* action could not be extended where the conduct in question took place overseas in the context of a terrorism investigation. *Id.*

[88] *Hernandez*, 885 F.3d at 823 (holding that the standard for a special factors analysis is low and the considerations involved with an extraterritorial application of *Bivens* are appropriately left to the legislative branch of government).

territorial killing by a Border Patrol agent.[89] Following the guidance set forth in *Abbasi*, the Ninth Circuit also readily concluded that applying *Bivens* to a foreign national shot in a foreign country would extend *Bivens* to a new context.[90] The court then returned to the pre-*Abbasi* approach to extending a *Bivens* claim by considering the existence of alternative remedies before turning to the special factors analysis.[91]

Finally, the court analyzed if any special factors existed to determine whether a *Bivens* remedy should be extended.[92] Noting that the Court's approach in extending *Bivens* has examined new contexts on a case-by-case basis, the Ninth Circuit inferred that the special factors analysis should be conducted through a highly specific lens.[93] Thus, the circuit court proceeded by analyzing the facts specific to *Rodriguez*, rather than "cross-border shootings generally."[94]

In its analysis, the circuit court carefully distinguished the facts of *Rodriguez* from those in *Abbasi*.[95] Finding that the claim in *Rodriguez* was directed at an individual officer, rather than the leadership of an executive agency, the court determined there was no special factor present related to existing government policy.[96] Next, the court dismissed the notion that holding a Border Patrol agent civilly liable for an unjustified murder would implicate national security concerns.[97] The Ninth Circuit also found that foreign policy implications were not a "special factor counseling hesitation" in extending *Bivens* in this specific case and noted that the United States had not identified a specific foreign policy that could be affected.[98] Finally, the Ninth Circuit was unconcerned by the extraterritorial nature of a cross-border shooting and declined to

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[89] *Rodriguez*, 899 F.3d at 726; *Hernandez*, 885 F.3d at 811.

[90] *Rodriguez*, 899 F.3d at 738.

[91] *See id.* at 738–39 (analyzing alternative remedies separately from the presence of special factors and holding that Rodriguez had no alternative outside of a *Bivens* claim); *see also* Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (illustrating the pre-*Abbasi* approach to *Bivens* claims by explaining that alternative remedies should be considered before any special factors).

[92] *Rodriguez*, 899 F.3d at 744.

[93] *See id.* (noting that in *Abbasi*, the Court examined post-September 11 detention polices, not "prison polices generally").

[94] *See id.* (stating that the special factors analysis should be applied to the specific facts of the case, which the court characterized as an "unjustifiable and intentional" murder).

[95] *See id.* at 745 (noting that unlike the plaintiffs in *Abbasi*, the plaintiff in *Rodriguez v. Mesa* sued an individual federal agent rather than a high-level government official, and that the claim of murder in *Rodriguez* did not contradict government policy).

[96] *Id.*; *see also* FDIC v. Meyer, 510 U.S. 471, 485 (1994) (noting that the purpose of *Bivens* is to deter individual officers from committing constitutional violations).

[97] *See Abbasi*, 137 S. Ct. at 1862 (holding that "national-security concerns must not become a talisman used to ward off inconvenient claims"); *Rodriguez*, 899 F.3d at 745–46 (noting that the national security concerns do not apply where law enforcement commits an unjustified killing).

[98] *Rodriguez*, 899 F.3d at 745–46. The Ninth Circuit emphasized that not extending a *Bivens* remedy would threaten the United States' relationship with Mexico. *Id.*

find that aspect of the case a special factor that should "couns[el] hesitation" by the court.[99] As a result, splitting from the Fifth Circuit, the Ninth Circuit extended a *Bivens* cause of action to the new context of a cross-border shooting.[100]

III. THE FIFTH CIRCUIT CORRECTLY APPLIED THE *BIVENS* FRAMEWORK SET FORTH IN *ABBASI*

The Ninth Circuit erred in *Rodriguez v. Swartz* by returning to the pre-*Abbasi* approach to extending *Bivens* remedies and failing to adequately consider the role of the legislature in its analysis.[101] The Ninth Circuit rejected the legitimate concerns of extending *Bivens* to an extraterritorial context because the agent was standing in the United States.[102] With the far-reaching policy implications of creating an implied cause of action for a shooting that occurs across a highly politicized border, however, extraterritoriality is precisely the type of special factor the Court has emphasized should be weighed by Congress, rather than the courts.[103]

Although there may be some merit to the Ninth Circuit's highly specific approach, the court's analysis fails when the foreign policy implications present in *Rodriguez* are considered.[104] The United States was in ongoing discussions with Mexico about the cross-border shooting and cautioned that an extension of *Bivens* could hinder its diplomatic goals.[105] This fact alone should

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[99] *See id.* at 747 (holding that a presumption against extending *Bivens* to an extraterritorial context is rebutted by the fact that Agent Swartz was standing on United States territory when he fired his weapon).

[100] *Id.* at 748; *Hernandez*, 885 F.3d at 823.

[101] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857–58 (2017) (holding that "separation-of-powers principles are or should be central to the analysis"); Rodriguez v. Swartz, 899 F.3d at 719, 738–39 (9th Cir. 2018) (analyzing the existence of alternative remedies prior to the special factors analysis); *Rodriguez*, 899 F.3d at 749 (Smith, J., dissenting) (noting that the Ninth Circuit majority ignored precedent and intruded on legislative primacy).

[102] *See Rodriguez*, 899 F.3d at 747 (holding that the presumption against extraterritoriality is rebutted by the fact that Agent Swartz's conduct took place in the United States, even if Rodriguez was standing in Mexico). *But see* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (emphasizing the difficulty in overcoming the presumption against extraterritoriality even where the facts involve activity in the United States).

[103] *See Abbasi*, 137 S. Ct. at 1857 (holding that issues requiring the balancing of competing considerations should be entrusted to Congress); *Rodriguez*, 899 F.3d at 756 (Smith, J., dissenting) (arguing that extraterritoriality is a "critical" special factor); *see also Kiobel*, 569 U.S. at 116 ("The presumption against extraterritorial application 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"); Meshal v. Higgenbotham, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (stating that because there is a presumption against applying statutes extraterritorially, it would be "grossly anomalous" to apply *Bivens* in an extraterritorial context).

[104] *See Rodriguez*, 899 F.3d at 754 (Smith, J., dissenting) (noting that Mexico and the United States were engaging in active diplomacy about cross-border shootings).

[105] *Id.* at 746, 754.

have caused the court to hesitate, because its action would directly implicate foreign diplomacy related to the specific case at hand.[106]

The Fifth Circuit, in *Hernandez v. Mesa*, correctly applied the special factors analysis envisioned by the Supreme Court by emphasizing legislative primacy in its decision.[107] Given the current state of *Bivens* jurisprudence, the Court will likely affirm the ruling in *Hernandez*, declining to extend *Bivens* to the new context of an extraterritorial shooting of a non-citizen when it decides the issue during its 2019–2020 term.[108]

Although the Fifth Circuit correctly applied the Supreme Court's *Bivens* jurisprudence, scholars have argued that declining to extend a *Bivens* remedy for an extraterritorial shooting will create a dangerous loophole where federal law enforcement officials will face no consequences for extraterritorial killings.[109] The perception of a "no-man's land" not only damages the United States' relationship with Mexico, but is also antithetical to the reality that, very often, border residents consider their communities bi-national.[110]

It cannot be understated that the Supreme Court's analysis in *Bivens* cases does not center on whether a remedy is deserved or appropriate, but rather, "who should decide" to create a remedy—"Congress or the courts?"[111] Alt-

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[106] *See id.* (highlighting that the ongoing diplomacy between Mexico and the United States "counsels hesitation"); *see also* Hernandez v. Mesa, 885 F.3d 811, 819 (5th Cir. 2018), *cert. granted in part*, 139 S. Ct. 2636 (2019) (concluding that the extension of *Bivens* in the context of a cross-border shooting would affect diplomacy between the two nations). The United States cautioned in *Rodriguez v. Swartz* that extending a *Bivens* claim would "under[mine] the government's ability to speak with one voice in international affairs." *Rodriguez*, 899 F.3d at 746.

[107] *See Abbasi*, 137 S. Ct. at 1857 (holding that, most often, it should be Congress that decides whether to extend a remedy); *Hernandez*, 885 F.3d at 823 (holding that the special factors present in the case require deference to the legislature).

[108] *See Hernandez*, 885 F.3d at 822 (highlighting the "presumption against extraterritoriality" in extending rights to non-citizens whose rights are violated abroad); Fallon, *supra* note 7, at 957 (noting that the Roberts Court has been conservative in expanding governmental liability and strongly disinclined toward extending *Bivens* actions); *Monthly Argument Calendar November 2019*, *supra* note 18. As this Comment went to press, the Supreme Court affirmed the Fifth Circuit in its decision not to extend a *Bivens* remedy in *Hernandez v. Mesa*. *See supra* notes 1–7 and accompanying text (discussing the holding in *Hernandez*).

[109] *See Hernandez*, 885 F.3d at 823 (holding that the special factors present in the case require deference to the legislature); Altholz, *supra* note 11, at 39 (concluding that the ruling in *Hernandez* may create a legal exemption for extraterritorial shootings).

[110] *See* Petition for a Writ of Certiorari at 1, Hernandez v. Mesa, 137 S. Ct. 291 (2016) (No. 15-118) (characterizing the Fifth Circuit's decision not to extend a *Bivens* remedy as creating a "law-free zone" for Border Patrol agents); Alexandra A. Botsaris, Note, Hernandez v. Mesa*: Preserving the Zone of Constitutional Uncertainty at the Border*, 77 MD. L. REV. 832, 852 (2018) (describing the characteristics of El Paso, Texas and Ciudad Juárez, Mexico, a southwestern border community where residents share cultural celebrations and regularly cross the border for work and school); Liptak, *supra* note 14 (noting that Mexico has asked the Supreme Court to apply U.S. constitutional law in *Hernandez* to address the issue of border shootings).

[111] *Abbasi*, 137 S. Ct. at 1857 (indicating that the focus of a special factors analysis should turn on whether it is preferable for Congress to extend a remedy, and that in most cases the legislative branch is best suited to make this decision).

hough the Supreme Court will likely affirm the Fifth Circuit's approach to the special factors analysis, the underlying circumstances of these twin cases warrant immediate legislative action.[112] Congress, therefore, should ensure that federal agents are held accountable in the unique context of an extraterritorial shooting at one of the nation's international boundaries.[113] After all, that is exactly the division of responsibilities envisioned by the Court.[114]

CONCLUSION

In 2018, the Fifth Circuit correctly decided *Hernandez v. Mesa* by declining to extend a *Bivens* remedy to the new context of an extraterritorial shooting. After conducting a special factors analysis, the court rightly concluded that creating a cause of action for damages should be left to Congress. On similar facts, the Ninth Circuit erred in 2018, in *Rodriguez v. Swartz*, by ignoring the Court's recent *Bivens* guidance set forth in *Ziglar v. Abbasi*. When the Supreme Court considers *Hernandez* in its 2019–2020 term, it is likely to uphold the Fifth Circuit's approach to the special factors analysis that emphasized legislative primacy in its decision not to extend a *Bivens* claim. Congress, however, should act immediately to address civil liability in the context of extraterritorial excessive force by federal agents at the United States border.

MEG GREEN

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[112] *See* Altholz, *supra* note 11, at 3 (arguing that a "no man's land" at the southern border where federal law enforcement can kill without consequence de facto exists). On February 25, 2020, as this Comment went to press, the Supreme Court decided *Hernandez v. Mesa* and affirmed the Fifth's Circuit. *See supra* notes 1–7 and accompanying text (discussing the Court's holding).

[113] *See* Botsaris, *supra* note 110, at 857 (arguing for special constitutional treatment of incidents occurring at border zones since it is sometimes difficult to discern where the actual international boundary is located).

[114] *See Abbasi*, 137 S. Ct. at 1869 (holding that even in a tragic case, where the issues are complex or novel, it is the role of the legislature to create a remedy).