

# ***Bivens* at the Border: Supreme Court to Consider Whether Cross-Border Shooting Case Can Proceed**

November 7, 2019

On November 12, 2019, the Supreme Court is scheduled to hear oral argument in *Hernández v. Mesa*, a case arising from the fatal shooting across the United States-Mexico border of 15-year-old Mexican national Sergio Adrian Hernández Güereca by Customs and Border Protection Officer Jesus C. Mesa Jr. The victim's family brought suit seeking money damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, a 1971 Supreme Court decision holding that federal officers may be sued for certain constitutional violations despite the absence of a statutory cause of action. However, the Court has indicated in the decades following *Bivens* that this relief is only available in narrow factual circumstances. In its 2017 decision, *Ziglar v. Abbasi*, the Court [appears to shut the door](#) on recognizing new situations, [raising questions](#) over the availability of a remedy for constitutional violations by federal officials.

*Hernández* raises a number of legal issues with significant implications. A decision in *Hernández* may address the continued viability of *Bivens* post-*Abbasi*. *Hernández* also raises an issue as to the extraterritorial reach of *Bivens* when the alleged unconstitutional conduct—particularly cross-border actions—results in an injury to a non-U.S. national on foreign soil. *Hernández* further poses a question about the scope and effect of several factors—concerns of national security, foreign affairs, and alternative legal remedies—on the availability of a *Bivens* remedy post-*Abbasi*.

## ***Bivens* Jurisprudence**

Although a plaintiff [may sue state officers](#) for money damages for constitutional violations under federal law, no comparable statute gives a plaintiff the right to bring suit against *federal* officers for constitutional violations. Despite congressional silence on the matter, the Supreme Court held in *Bivens* that the plaintiff in that case—who [claimed](#) federal agents arrested and searched him without probable cause and with excessive force in violation of the Fourth Amendment—could pursue his claim under a [judicially created private cause of action](#) for money damages. *Bivens* rests on the premise that where a constitutional right [has been invaded](#), the plaintiff is entitled to a remedy—whether statutory or judicially created. Justice

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Brennan explained in *Bivens* that constitutional claims may be brought where Congress has not explicitly proscribed recovery and “no special factors counsel[] hesitation” by federal courts in implying a cause of action.

In the decades following, the Supreme Court has recognized a *Bivens* remedy in two other cases: *Davis v. Passman* and *Carlson v. Green*. *Davis* held that an administrative assistant was entitled to sue a congressman for sex discrimination in violation of the equal protection principles embodied in the Fifth Amendment for money damages. In *Carlson*, the Court held that a prisoner’s estate was entitled to a *Bivens* remedy for improper medical treatment, in violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. However, the Supreme Court has not expanded *Bivens* to a new context in over 30 years. Central to this hesitation is an institutional concern over whether Congress or the courts should provide a remedy for constitutional violations by federal officials.

In its 2017 decision in *Abbasi*, the Supreme Court addressed the availability of a *Bivens* remedy for a group of non-citizens—mostly Muslim and of Middle Eastern origin—detained by federal authorities following the September 11, 2001 attacks. The plaintiffs filed suit against the wardens and a group of federal executive officials, asserting the conditions of their confinement violated the Fifth Amendment.

In a 4-2 holding, Justice Kennedy clarified the test to determine whether a *Bivens* remedy may be available. Courts must engage in a two-part inquiry. First, courts ask whether the case presents a “new context,” that is, whether it meaningfully differs from *Bivens*, *Davis*, or *Carlson*. Examples of differences that “are meaningful enough to make a given context a new one” include: the rank of officers involved; the constitutional right; the specificity of the action; the extent of judicial guidance on how an officer should respond; the risk of intrusion by the judiciary into the function of other branches; or other special factors. Second, regardless of whether the case constitutes a “new context,” a court must also consider whether “special factors counsel hesitation” against judicial intrusion.

The *Abbasi* majority reasoned that the constitutional claims for conditions of confinement pursuant to a high-level executive policy following the September 11, 2001 attacks had “little resemblance” to *Bivens*, *Davis*, and *Carlson* and therefore constituted a new context. In its special factors analysis, the Supreme Court explained that factors of national security, foreign policy, and the availability of legal alternatives—injunctive and habeas corpus relief—weighed against an extension of *Bivens*. Because the case presented a new context and special factors counseled hesitation against judicial intrusion, the plaintiffs were not entitled to pursue money damages under *Bivens*. More broadly, the *Abbasi* decision suggests that courts should rarely, if ever, allow a *Bivens* suit to proceed against federal officials for alleged constitutional violations outside of the very narrow factual contexts of *Bivens*, *Davis*, and *Carlson*.

## *Hernández v. Mesa*

### Background

On June 7, 2010, Sergio Adrian Hernández Güereca, a 15-year-old Mexican national, was with a group of friends in a cement culvert that sits at the international boundary between El Paso, Texas and Ciudad Juárez, Mexico. Mesa, while standing on U.S. territory, fired at least two shots at Hernández, fatally injuring him as he stood on the Mexican side of the border. In 2011, Hernández’s parents filed suit seeking a *Bivens* remedy, claiming (1) the shooting was an unreasonable application of excessive force in violation of the Fourth Amendment and (2) the shooting violated Hernández’s Fifth Amendment Substantive Due Process rights.

The U.S. District Court for the Western District of Texas dismissed the suit, holding that the plaintiffs could not pursue a *Bivens* remedy because the injury occurred on foreign territory and Hernández, a foreign national, lacked sufficient connections to the United States. The district court relied on *United*

*States v. Verdugo-Urquidez*, in which the Supreme Court held the Fourth Amendment did not apply to a search by U.S. law enforcement agents of the home of a Mexican national located in Mexico. The district court also dismissed the Fifth Amendment claim on the ground of qualified immunity. Qualified immunity protects federal officials from suits that allege the official violated a plaintiff's rights, except where the official violated a "clearly established" statutory or constitutional right. A Fifth Circuit panel affirmed in part and reversed in part. On rehearing by the full court, the Fifth Circuit affirmed the district court's dismissal, holding: (1) the plaintiffs could not pursue a Fourth Amendment *Bivens* claim; and (2) Mesa was entitled to qualified immunity on the Fifth Amendment claim.

The Supreme Court granted certiorari and, in 2017, reversed the en banc Fifth Circuit's holding that Mesa was entitled to qualified immunity. The Supreme Court remanded the case to the Fifth Circuit and instructed it to address whether Hernández's parents may recover *Bivens* damages in light of the Supreme Court's holding and analysis in *Abbasi*—decided a week earlier. On remand, the en banc Fifth Circuit affirmed 13-2 the district court's dismissal, declining to extend *Bivens* to this "new context" due to the extraterritorial nature of the injury. The Fifth Circuit also reasoned that special factors—national security concerns, foreign affairs, congressional inaction, and alternative methods of deterrence—weighed against an extension of *Bivens*.

The Supreme Court granted certiorari to address whether Hernández's parents may pursue a *Bivens* remedy.

## Preview of Arguments

Before the Supreme Court, Hernández's parents argue the Fifth Circuit erroneously held they were not entitled to pursue a *Bivens* remedy. They contend this case does not present a "new context" because they are pursuing an excessive force claim similar to *Bivens* against an individual law enforcement officer. They further claim that even if this case constitutes a "new context," that is not determinative as to the availability of a *Bivens* remedy.

The plaintiffs also reject the Fifth Circuit's reliance on the presumption against extraterritoriality—which counsels against the application of U.S. law in foreign territories—as a factor in the "new context" analysis. The presumption is rooted in a canon of statutory construction that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." The Supreme Court has expanded this principle to other contexts, reasoning the principles underlying the presumption against extraterritoriality constrain courts as well. According to Hernández's parents, the presumption's purpose to avoid international discord resulting from the application of U.S. law in foreign territory is not relevant to this case because "any 'international discord' ... comes from the potential unavailability of civil remedies under U.S. law." They further argue that the principle that Congress legislates only with domestic application in mind is of no relevance to constitutional interpretation by the courts. Alternatively, they assert the presumption of extraterritoriality is overcome, as the incident "touch[es] and concern[s] the territory of the United States."

According to Hernández's parents, the "special factors" identified by the Fifth Circuit do not weigh against allowing a *Bivens* claim to proceed. The plaintiffs reason that the factors of national security and foreign affairs are not applicable because *Hernández* involves misconduct by a single law enforcement officer. They argue these facts are in stark contrast to *Abbasi*, in which the plaintiffs claimed executive officials implemented a high-level policy following the September 11, 2001 attacks. Nor, they argue, does extraterritoriality serve as a persuasive "special factor" for the same reasons above.

The plaintiffs also claim that Congress's failure to pass legislation creating a cause of action to sue for constitutional violations by federal officials or addressing the issue of extraterritoriality is not indicative of congressional intent to bar such claims. Lastly, Hernández's parents express concern over the unavailability of alternative remedies. They reject the Fifth Circuit's reasoning that potential criminal

liability and a potential state-law claim constitute sufficient remedies to compensate for harm and deter misconduct. Because the [Westfall Act](#) bars any state tort claim against a federal official acting within the scope of employment, they reason this case is “*Bivens* or nothing.”

The United States filed an [amicus curiae](#) brief and will be [arguing on Mesa’s behalf](#) before the Court. According to both the United States and [Mesa](#), this case presents a new context because it involves an injury to a foreign national on foreign territory. The United States also argues this case is meaningfully different from *Bivens*, *Davis*, and *Passman*, as the Supreme Court has never recognized a *Bivens* remedy for a violation of the substantive due process component of the Fifth Amendment.

With regard to special factors, the United States argues several considerations counsel hesitation against judicial intrusion. The United States encourages the judicial branch to not intervene in matters of national security and foreign policy, arguing those areas are best left to the political branches. The United States and Mesa maintain that the presumption against extraterritoriality highlights the inappropriateness of expanding *Bivens* remedies to foreign nationals injured on foreign territory. According to the United States, congressional inaction is illustrative of Congress’s declination to recognize a *Bivens* remedy for constitutional injuries suffered by foreign nationals on foreign territory. Additionally, the United States suggests the absence of an alternative remedy does not require an extension of *Bivens*. And regardless, the United States claims, executive redress—such as investigations and prosecutions of federal officials—serves *Bivens*’s core purpose of deterring unconstitutional conduct.

## Possible Outcomes

Despite the recent clarification and guidance in *Abbasi*, there are several possibilities in how the Supreme Court may balance the novelty of *Hernández*—particularly the extraterritorial nature of the injury—and the weight of any special factors.

The Supreme Court could decline to extend *Bivens* on the grounds that *Hernández* constitutes a new context and special factors weigh against an extension of *Bivens*. The Court may elect to focus on the extraterritorial nature of the injury as evidence of a new context. Alternatively, the Supreme Court could view the facts of *Bivens*, *Davis*, and *Carlson* narrowly and conclude that the facts and alleged constitutional violations in *Hernández* meaningfully differ. In either case, a determination of a “new context” would likely disfavor an extension of *Bivens* to *Hernández*, as the Court has continuously viewed the scope of *Bivens* in an increasingly narrow manner.

On the other hand, the Supreme Court could hold that *Hernández* presents a classic *Bivens* excessive force claim by an individual officer, reasoning *Bivens* also involved allegations of excessive force in effecting a seizure. The Court may reject Mesa and the United States’s argument that the location of the injury alters the new context analysis. Rather, it may conclude that extraterritoriality is best considered as a special factor as opposed to a new context.

Even if the Supreme Court were to conclude *Hernández* does not present a new context, it would, consistent with *Abbasi*, still consider whether special factors counsel against allowing a *Bivens* claim to proceed. The Court could determine one, or several, special factors counsel hesitation in recognizing a *Bivens* remedy. It could reason that, under *Abbasi*, the protection of the United States-Mexico border sufficiently implicates national security and foreign affairs and policy. If the Supreme Court were to conclude so, it would most likely hold that judicial intrusion is inappropriate under the principle of separation of powers. It could also conclude that the extraterritorial nature of the injury counsels against an extension of *Bivens*. Additionally, the Court could reason congressional inaction indicates that Congress does not intend for foreign nationals to pursue a claim against federal officials for injuries occurring on foreign territory.

Alternatively, the Supreme Court could find special factors do not weigh against an extension of *Bivens*. It may reason that national security and foreign policy are not sufficiently implicated where the alleged constitutional violation results from an altercation between a single law enforcement officer acting on U.S. territory and an individual who happened to be of foreign nationality and standing on foreign territory. The Court may elect to distinguish *Abbasi*, noting the high rank of the officials involved and the alleged violations stemming from high-level executive policy following the September 11, 2001 attacks. If the Court concluded this case involved a classic *Bivens* claim and special factors were not persuasive against judicial intrusion, the *Hernández* plaintiffs would most likely be permitted to pursue their suit.

The Supreme Court would likely address whether an extension of *Bivens* is required or merely a persuasive factor to consider when the plaintiff has no alternative civil remedy. The Court might point to *Abbasi* for the proposition that the plaintiff need not have a money damages remedy, as *Abbasi* reasoned that the availability of injunctive and habeas relief were sufficient legal alternatives. Then again, the Court might determine Hernández's parents lack an alternative remedy but conclude the unavailability of a remedy is merely a factor to consider and not determinative. The Supreme Court could conjecture that a damages remedy is unnecessary, as *Bivens*'s core purpose of deterrence is served by a threat of criminal prosecution for misconduct.

## Considerations for Congress

Regardless of *Hernández*'s outcome, the availability of a money damages remedy for constitutional violations by federal officers continues to be a topic of [discourse](#). Courts often [comment](#) that Congress is best-suited for establishing such a cause of action. Congress could pass legislation creating a cause of action with a money damages remedy for constitutional violations by federal officials acting within the scope of their employment. And more specifically to *Hernández*, Congress could pass legislation that extends a damages remedy for cross-border constitutional violations. Alternatively, Congress could repeal the provision in the Westfall Act that bars plaintiffs from pursuing state-law tort claims against federal officials acting within the scope of their employment.

On the other hand, Congress could adopt legislation limiting money damages remedies for constitutional violations by federal officials. Likewise, if Congress was concerned about the extension of *Bivens* to injuries on foreign territory, it could approve legislation restricting a *Bivens* remedy to domestic injuries.

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