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# “IT’S OPEN SEASON AT THE BORDER”: WHY THE *BIVENS* REMEDY SHOULD EXTEND TO U.S. BORDER PATROL AGENTS IN CROSS-BORDER SHOOTINGS

Samantha Garza\*

## I. INTRODUCTION

In 2010, a boy and his friends were playing in a culvert in a border town in Mexico.<sup>1</sup> The boys were unarmed and not trying to gain entry into the United States.<sup>2</sup> Suddenly, a Border Patrol agent arrived.<sup>3</sup> He detained one boy and shot another in the face, killing him.<sup>4</sup> Two years later, another boy in a different border town was walking down the street after playing basketball with friends.<sup>5</sup> He was unarmed and not trying to gain entry into the United States.<sup>6</sup> In fact, he was on his way to meet his brother.<sup>7</sup> Suddenly, a Border Patrol agent started shooting at him.<sup>8</sup> He was hit ten times and killed.<sup>9</sup> In both cases, the agent was standing in the U.S. when he fired the shots, and in both cases, the bullet crossed the border and killed a boy in Mexico.<sup>10</sup>

What right to recovery do Mexican families have when the U.S. Border Patrol kills their children? That is the question before the Fifth

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1. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017).

2. Plaintiffs’ Original Complaint at 11–12, *Hernandez v. United States*, 802 F. Supp. 2d 834 (W.D. Tex. 2011) (No. 6:11-cv-00013), 2011 WL 333184; *Hernandez*, 137 S. Ct. at 2005.

3. Plaintiffs’ Original Complaint, *supra* note 2, at 11–12.

4. *Id.*

5. First Amended Complaint & Demand for Jury Trial at 2, *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (No. 4:14-CV-02251-RCC), 2014 WL 7670329.

6. *Id.* at 2–3.

7. Mark Binelli, *10 Shots Across the Border*, N.Y. TIMES MAG. (Mar. 3, 2016), <https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html>.

8. First Amended Complaint & Demand for Jury Trial, *supra* note 5, at 2–3.

9. *Rodriguez*, 111 F. Supp. 3d at 1029.

10. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017); *Rodriguez*, 111 F. Supp. 3d at 1028.

Circuit and the Ninth Circuit in light of the deaths of Sergio Hernandez and José Antonio Rodriguez. While the circuit courts wrestled with the question of whether the Constitution applies to a Mexican national who is killed on Mexican soil by someone standing in the U.S., the Supreme Court flipped the script.<sup>11</sup> It essentially said that the real question is whether the shooter can even be sued.<sup>12</sup>

Historically, if a federal agent violates someone's constitutional rights, he or she can sue the federal agent for monetary recovery in an "implied cause of action" pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>13</sup> However, the Supreme Court recently decided *Ziglar v. Abbasi*,<sup>14</sup> where it expressed its disfavor for expanding *Bivens* recovery to new contexts, preferring to defer to Congress to explicitly confer a right to recover via statute.<sup>15</sup> The case also laid out a framework for determining whether to allow a new *Bivens* claim.<sup>16</sup> Now the circuits must apply that framework and decide whether to allow the families of Hernandez and Rodriguez to recover from the Border Patrol agents for the loss of their sons.

Despite the Supreme Court's preference not to expand *Bivens*, for reasons explained below, the Fifth Circuit and the Ninth Circuit should allow the families to pursue a claim against the Border Patrol agents. Part II of this Comment will cover the facts of the tragic cases of Sergio Hernandez and José Antonio Rodriguez. Part III will summarize the ruling of the Supreme Court in *Hernandez v. Mesa*. Part IV will discuss the history of *Bivens* claims including the Supreme Court's ruling in *Ziglar v. Abbasi*. Finally, Part V will discuss how the families should be allowed to proceed with a *Bivens* claim because there are no "special factors counselling hesitation in the absence of affirmative action by Congress"<sup>17</sup> and because holding otherwise would leave the families with no means for redress. Moreover, allowing such claims will provide an important deterrent against constitutional violations by the Border Patrol.

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11. See *Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015); *Rodriguez*, 111 F. Supp. 3d at 1030–31.

12. See *Hernandez*, 137 S. Ct. at 2006–07.

13. 403 U.S. 388 (1971).

14. 137 S. Ct. 1843 (2017).

15. *Id.* at 1857.

16. *Id.* at 1865.

17. *Id.* at 1857.

## II. STATEMENT OF THE CASE

## A. Hernandez v. Mesa

On a hot summer day in 2010, a group of boys were playing in a cement culvert at the border of Juarez, Mexico and El Paso, Texas.<sup>18</sup> The Rio Grande River once ran through the culvert, but it is now almost completely dry.<sup>19</sup> The international border is unmarked and runs along the center of the culvert.<sup>20</sup> At the top of the embankment on the United States side is a high barbed wire fence.<sup>21</sup> The boys were playing a game—they were daring each other to run up the embankment on the United States side, touch the barbed wire fence and then scamper back down the incline.<sup>22</sup>

At some point, U.S. Border Patrol Agent Jesus Mesa arrived on his bicycle.<sup>23</sup> Mesa detained one of the boys as he was running back down the embankment.<sup>24</sup> Another one of the boys, fifteen-year-old Sergio Hernandez, ran behind a pillar on the Mexican side of the culvert.<sup>25</sup> Mesa, from the United States side, fired multiple shots across the border at Hernandez as he peeked out from behind the pillar.<sup>26</sup> He was struck in the face and killed.<sup>27</sup> Mesa picked up his bicycle and left the scene.<sup>28</sup> Federal authorities claim that Hernandez was throwing rocks at Mesa so Mesa shot Hernandez in self-defense.<sup>29</sup>

18. Plaintiffs' Original Complaint, *supra* note 2, at 11–12.

19. Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017).

20. *Id.*

21. *Id.*; Plaintiffs' Original Complaint, *supra* note 2, at 11.

22. Plaintiffs' Original Complaint, *supra* note 2, at 11; 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>.

23. Hernandez, 137 S. Ct. at 2005.

24. *Id.*

25. *Id.*

26. *Id.*; John Burnett, *Supreme Court Sends Cross-Border Shooting Case Back to Lower Court*, NPR (June 26, 2017, 11:13 AM), <https://www.npr.org/sections/thetwo-way/2017/06/26/533968647/supreme-court-sends-cross-border-shooting-case-back-to-lower-court>; Steven D. Schwinn, *Civil Rights: Hernandez v. Mesa*, ABA (Feb. 21, 2017), [https://www.americanbar.org/publications/preview\\_home/articles/16-17\\_issue5vol44\\_hernandez\\_civil\\_rights.html](https://www.americanbar.org/publications/preview_home/articles/16-17_issue5vol44_hernandez_civil_rights.html).

27. Hernandez, 137 S. Ct. at 2005.

28. Plaintiffs' Original Complaint, *supra* note 2, at 12.

29. Plaintiffs' Original Complaint, *supra* note 2, at 11; Schwinn, *supra* note 26; Robert Barnes, *Supreme Court Considers Case of a Shot Fired in U.S. that Killed a Teenager in Mexico*, WASH. POST, (Feb. 19, 2017), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-considers-case-of-a-shot-fired-in-us-that-killed-a-teenager-in-](https://www.washingtonpost.com/politics/courts_law/supreme-court-considers-case-of-a-shot-fired-in-us-that-killed-a-teenager-in-)

However, bystander cell phone video footage of the shooting emerged that disputes this claim.<sup>30</sup>

Hernandez's parents sued for various claims and for damages under *Bivens*.<sup>31</sup> *Bivens* claims allow a plaintiff to seek damages from a federal officer who violates a Constitutional right.<sup>32</sup> They alleged that Mesa violated Hernandez's Fourth Amendment rights through unlawful seizure.<sup>33</sup>

The Fifth Circuit held en banc that Hernandez could not assert a claim under the Fourth Amendment.<sup>34</sup> Pursuant to *United States v. Verdugo-Urquidez*,<sup>35</sup> it held that he had no "significant voluntary connection" to the United States because he was a Mexican citizen who was on Mexican soil at the time that he was shot.<sup>36</sup> Since Hernandez had no Constitutional claim, the Court did not address whether he was entitled to damages under *Bivens*.<sup>37</sup> The Supreme Court granted certiorari in 2016.<sup>38</sup>

### B. Rodriguez v. Swartz

Two years after Hernandez's death, sixteen-year-old José Antonio Rodriguez was killed in another cross-border shooting in a different border town.<sup>39</sup> Rodriguez was walking down the street in Nogales, Mexico, which shares a border with Nogales, Arizona.<sup>40</sup> Rodriguez had been playing basketball with some friends and was on his way to meet his older brother who worked at a convenience store nearby.<sup>41</sup> He was walking on Calle Internacional, a street that runs alongside the border fence.<sup>42</sup> Suddenly, at least fourteen shots rang

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mexico/2017/02/19/c2935c36-f548-11e6-8d72-263470bf0401\_story.html?utm\_term=.341db286ecbd.

30. Plaintiffs' Original Complaint, *supra* note 2, at 11; Barnes, *supra* note 29; Schwinn, *supra* note 26.

31. *Hernandez*, 137 S. Ct. at 2005.

32. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388–89 (1971).

33. Plaintiffs' Original Complaint, *supra* note 2, at 24.

34. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015).

35. 494 U.S. 259, 271 (1990).

36. *Hernandez*, 785 F.3d at 119.

37. *Id.* at 121 n.1; *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017).

38. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016).

39. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1028–29 (D. Ariz. 2015).

40. *Id.* at 1029.

41. Binelli, *supra* note 7; *Rodriguez v. Swartz*, ACLU, <https://www.aclu.org/cases/rodriguez-v-swartz>, (last updated Aug. 7, 2018).

42. *Rodriguez*, 111 F. Supp. 3d at 1028.

out.<sup>43</sup> Rodriguez was hit approximately ten times.<sup>44</sup> The autopsy later revealed that nearly all of the bullets entered his body from behind.<sup>45</sup>

The Border Patrol contended that Rodriguez was throwing rocks at agents on the other side of the fence.<sup>46</sup> However, it is alleged that security camera footage of the shooting, which has not been released publicly, disputes this claim.<sup>47</sup> Eyewitnesses also stated that Rodriguez was not throwing rocks but simply walking down the street.<sup>48</sup> Moreover, Rodriguez was approximately thirty feet away from the fence at the time of the shooting and the top of the border fence is approximately forty-five feet from street level.<sup>49</sup> The sheer distance and height makes it unlikely that Rodriguez was throwing rocks over the fence. However, if he was, it is highly unlikely that it was life threatening to an agent.<sup>50</sup>

Rodriguez's mother brought suit against the shooter, Agent Lonnie Swartz, alleging among other things, that he violated Rodriguez's Fourth Amendment rights and sought damages pursuant to *Bivens*.<sup>51</sup> Swartz urged the Arizona District Court to follow the Fifth Circuit's decision in *Hernandez* and dismiss Rodriguez's claim.<sup>52</sup> However, the District Court held that Rodriguez was entitled to Fourth Amendment protection and that his claim could proceed.<sup>53</sup>

The Ninth Circuit heard oral argument on the case in October 2016 but declined to issue a ruling until after the Supreme Court decided *Hernandez v. United States*.<sup>54</sup>

43. *Id.*; Binelli, *supra* note 7.

44. *Rodriguez*, 111 F. Supp. 3d at 1029; Binelli, *supra* note 7.

45. *Rodriguez*, 111 F. Supp. 3d at 1029; Binelli, *supra* note 7.

46. Binelli, *supra* note 7.

47. *Id.*

48. *Rodriguez*, 111 F. Supp. 3d at 1029; First Amended Complaint & Demand for Jury Trial, *supra* note 5, at 3; Binelli, *supra* note 7.

49. *Rodriguez*, 111 F. Supp. 3d at 1029; Binelli, *supra* note 7. The section of the border fence near where Rodriguez was shot is twenty feet tall. The fence is on top of a twenty-five-foot cliff. Thus, the top of the fence is approximately forty-five feet from street level. *Rodriguez*, 111 F. Supp. 3d at 1029.

50. *See* Binelli, *supra* note 7.

51. First Amended Complaint & Demand for Jury Trial, *supra* note 5, at 1.

52. *Rodriguez*, 111 F. Supp. 3d at 1032.

53. *See id.* at 1037–38.

54. *15-16410 Araceli Rodriguez v. Lonnie Swartz*, U. S. COURTS FOR THE NINTH CIRCUIT, [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000010434](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010434) (Oct. 21, 2016); Richard Gonzales, *Federal Appeals Court Considers Border Shooting Case*, NPR (Oct. 21, 2016, 8:35 PM), <https://www.npr.org/sections/thetwo-way/2016/10/21/498910572/federal-appeals-court-considers-border-shooting-case>.

### III. RULING OF THE SUPREME COURT

In June 2017, the Supreme Court remanded *Hernandez*.<sup>55</sup> It directed the Fifth Circuit to determine whether Hernandez may assert a claim for damages under *Bivens* in light of the Supreme Court's ruling in *Ziglar v. Abbasi* issued seven days prior.<sup>56</sup> *Ziglar* laid out the analysis that a court must make to determine whether a *Bivens* remedy is available.<sup>57</sup> The Supreme Court stated that the *Bivens* question was "antecedent" to the other questions presented.<sup>58</sup> Since the Fifth Circuit did not have the *Ziglar* framework when it decided *Hernandez*, the Supreme Court remanded the case for determination of that issue.<sup>59</sup>

The Supreme Court declined to rule on the Fourth Amendment issue, noting that it is "sensitive and may have consequences that are far reaching."<sup>60</sup> It stated that it would be imprudent to decide the issue when it may be unnecessary to resolving the case.<sup>61</sup>

### IV. HISTORICAL FRAMEWORK

As briefly described above, a *Bivens* claim is an action for damages to compensate persons injured by federal officers who violated a constitutional right.<sup>62</sup> The Court has called it an "implied" cause of action because it is not based on a statutory provision.<sup>63</sup> Rather, it is a judge-made doctrine that allows the plaintiff to sue directly under the U.S. Constitution.<sup>64</sup> The doctrine was first established in 1971 in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.

In 1871, Congress passed a statute that entitled a person to money damages if his or her constitutional rights were violated by a state official.<sup>65</sup> Interestingly, Congress never passed an analogous statute

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55. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006–07 (2017).

56. *Id.* at 2006; *see Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

57. *Ziglar*, 137 S. Ct. at 1865.

58. *Hernandez*, 137 S. Ct. at 2006.

59. *Id.* at 2006–07.

60. *Id.* at 2007.

61. *Id.*

62. *Ziglar*, 137 S. Ct. at 1854.

63. *Id.*

64. Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 719 (2012).

65. 42 U.S.C. § 1983 (2012); *Ziglar*, 137 S. Ct. at 1854.

for federal officials.<sup>66</sup> One hundred years later, the Supreme Court established such a recourse when it decided *Bivens*.<sup>67</sup>

In *Bivens*, agents of the Federal Bureau of Narcotics allegedly entered Bivens's home, arrested him in front of his wife and children, threatened to arrest his family, and searched the entire house.<sup>68</sup> He was subsequently taken to the federal courthouse in Brooklyn where he was booked for narcotics violations, interrogated, and strip searched.<sup>69</sup>

Bivens brought suit in federal court seeking monetary damages from each of the agents involved in their personal capacity.<sup>70</sup> He alleged that their entry and search was without probable cause or a warrant, and that they effectuated the arrest with unreasonable force, resulting in substantial humiliation and mental suffering.<sup>71</sup> The trial court dismissed the complaint on the basis that it failed to state a cause of action and the Court of Appeals for the Second Circuit affirmed.<sup>72</sup>

The Supreme Court reversed, holding that a violation of the Fourth Amendment by a federal agent acting under the color of his or her authority gives rise to a cause of action for damages, even without statutory authorization.<sup>73</sup> It reasoned that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”<sup>74</sup> This decision allowed plaintiffs to sue federal agents in their individual capacity directly under the Fourth Amendment for monetary relief.<sup>75</sup> The Court has since recognized implied causes of action for damages for violations of the Fifth Amendment's Due Process Clause<sup>76</sup> and the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>77</sup>

In *Bivens*, the Court noted in its decision that there were no “special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>78</sup> However, the Court never defined what

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66. *Ziglar*, 137 S. Ct. at 1854.

67. *Bivens*, 403 U.S. at 397.

68. *Id.* at 389.

69. *Id.*

70. *Id.* at 389–90.

71. *Id.*

72. *Id.* at 390.

73. *Id.* at 397.

74. *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

75. *Bernstein*, *supra* note 64, at 719.

76. *Davis v. Passman*, 442 U.S. 228, 242 (1979).

77. *Carlson v. Green*, 446 U.S. 14, 18 (1980).

78. *Bivens*, 403 U.S. at 396.



“special factors counseling hesitation” were, leaving courts to interpret that language when deciding whether a *Bivens* claim may move forward.<sup>79</sup>

In 2017, in *Ziglar v. Abbasi*, the Court outlined a framework for determining whether a federal agent may be sued for damages under *Bivens* and defined, for the first time, the meaning of “special factor counselling hesitation.”<sup>80</sup> It also outlined the history of *Bivens* claims in the Court and explained that expanding the *Bivens* remedy to other contexts is now a “‘disfavored’ judicial activity.”<sup>81</sup> While it did not preclude new *Bivens* contexts, it reasoned that Congress is best suited to determine whether to provide for a damages remedy.<sup>82</sup>

In *Ziglar*, illegal aliens who were detained in harsh conditions after the September 11th terrorist attacks sued three executives in the Justice Department and two wardens from the Metropolitan Detention Center where they were held.<sup>83</sup> They alleged various constitutional violations and sought damages pursuant to *Bivens*.<sup>84</sup>

In its opinion, the Court first looked to whether *Bivens* extended to the defendants named in the case.<sup>85</sup> It laid out the following framework for such an analysis. First, look to whether the context is new.<sup>86</sup> To make this determination, the Court looks at whether “the case is different in a meaningful way from previous *Bivens* cases decided by [the] Court.”<sup>87</sup> The Court interprets this test very broadly and something as minor as a difference in the rank of officers involved creates a new context.<sup>88</sup>

Second, if the context is new, a “*Bivens* remedy will not be available if there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’”<sup>89</sup> The Court defined a “special factor counselling hesitation” as a factor that causes hesitation when deciding “whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs

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79. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–58 (2017).

80. *Id.* at 1857.

81. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

82. *Id.*

83. *Id.* at 1851.

84. *Id.* at 1851–52.

85. *Id.* at 1854.

86. *Id.* at 1859.

87. *Id.*

88. *Id.* at 1860.

89. *Id.* at 1857.

and benefits of allowing a damages action to proceed.”<sup>90</sup> Or in other words, whether there are “‘sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy’ in a suit like this one.”<sup>91</sup>

## V. ANALYSIS

Based on the Supreme Court’s decision to remand the case, the Fifth Circuit for *Hernandez*—and presumably the Ninth Circuit for *Rodriguez*—must now apply the *Ziglar* framework and decide whether *Bivens* claims extend to U.S. Border Patrol agents who shoot across the border at unarmed Mexican teenagers on Mexican territory.<sup>92</sup> The answer should invariably be yes.

While the context of Hernandez’s claim is new based on the Court’s easy-to-satisfy test, at its core, his claim is the same as the original *Bivens* case—that a federal law enforcement officer violated his Fourth Amendment rights. As a result, there are no special factors counseling hesitation in recognizing a *Bivens* claim in this context. Without such claims, there is no viable remedial structure for Mexicans unlawfully shot on Mexican soil by U.S. Border Patrol agents. In addition, allowing such claims to proceed will provide an important deterrent against violations of constitutional rights by Border Patrol agents.

Since the Supreme Court finds the *Bivens* issue to be antecedent to the question of whether Hernandez is entitled to Constitutional protection as a Mexican citizen in Mexican territory,<sup>93</sup> this Comment’s analysis focuses on the *Bivens* issue. This article sets aside the issue of the extraterritorial reach of the Constitution and discusses only why *Bivens* should extend to the Border Patrol in this context.

### A. Context

The first issue is whether Hernandez’s case is a new *Bivens* context. “If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new.”<sup>94</sup> The Court finds this test easily satisfied and it has noted that “even a

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90. *Id.* at 1858.

91. *Id.* at 1865.

92. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006–07 (2017).

93. *Id.* at 2006.

94. *Ziglar*, 137 S. Ct. at 1859.

modest extension is still an extension.”<sup>95</sup> For example, *Ziglar* was a case about prisoner mistreatment and the Court had previously recognized a *Bivens* claim for prisoner mistreatment in *Carlson v. Green*.<sup>96</sup> Nevertheless, the Court found the context to be different because *Carlson* raised an Eighth Amendment claim and *Ziglar* raised a Fifth Amendment claim.<sup>97</sup>

None of the previously decided *Bivens* cases involved the Border Patrol, let alone a federal agent shooting across an international border. Since *Ziglar* and *Carlson* were considered different contexts despite their similar facts, *Hernandez* easily satisfies the test for a new context.

### B. Special Factors

If the context is found to be new, the next step is to determine whether there are special factors that prevent the court from recognizing a damages remedy.<sup>98</sup> “[A] *Bivens* remedy will not be available if there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’”<sup>99</sup> In *Ziglar*, the Court instructed the lower courts to look at two things when performing the special factors analysis.<sup>100</sup> First, look at “whether there are ‘sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy’ in a suit like this one.”<sup>101</sup> This includes evaluating the impact that allowing a damages remedy to proceed will have on governmental operations systemwide.<sup>102</sup> Second, courts must look at whether there is an alternative remedial structure present because that may preclude the judiciary from creating one.<sup>103</sup>

Here, while the context is new based on the Court’s test, on a practical level, *Hernandez*’s claim is the same as the original *Bivens* claim. In *Bivens*, the plaintiff alleged that federal law enforcement agents,<sup>104</sup> acting under color of their authority, unreasonably seized

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95. *Id.* at 1864.

96. *Id.*; see *Carlson v. Green*, 446 U.S. 14, 25 (1980).

97. *Ziglar*, 137 S. Ct. at 1864.

98. See *id.* at 1865.

99. *Id.* at 1857.

100. *Id.* at 1859.

101. *Id.* at 1865.

102. *Id.* at 1858.

103. *Id.* at 1848.

104. See generally HISTORY, DRUG ENF’T ADMIN., <https://www.dea.gov/sites/default/files/>

him using excessive force in violation of the Fourth Amendment.<sup>105</sup> Hernandez also alleges that a federal law enforcement agent<sup>106</sup> acting under color of his authority unreasonably seized him using excessive force in violation of the Fourth Amendment.<sup>107</sup>

Hernandez is claiming an already recognized *Bivens* claim, not expanding its scope. The Court said in *Ziglar* that “it must be understood that [*Ziglar*] is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.”<sup>108</sup> The Court found itself well-suited to determine whether to allow a damages remedy in *Bivens* and, as such, it is well-suited to determine whether to allow a damages remedy in *Hernandez*. It noted in *Bivens* that there were “no special factors counseling hesitation” when faced with a case of a federal law enforcement agent that allegedly violated the Fourth Amendment,<sup>109</sup> and because Hernandez asserts the same violation, there are no special factors in his case either.

The government is likely to argue that there are special factors counseling hesitation in *Hernandez* because the case implicates sensitive issues of border policy and national security. In *Ziglar*, the Court declined to allow a damages action against executive officials because the Court did not want to question a matter of general policy or interfere with the executive branch’s ability to execute its duties.<sup>110</sup> In addition, it declined to inquire into “sensitive issues of national security,” for that would “assume dimensions far greater than those present in *Bivens* itself.”<sup>111</sup> Indeed, border policy falls within the executive branch’s power and has important implications for national security.<sup>112</sup>

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2018-05/Early%20Years%20p%2012-29.pdf (last visited Sept. 8, 2018) (summarizing the early history of the Drug Enforcement Administration in the time leading up to *Bivens*).

105. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971).

106. See generally *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> (last updated May 21, 2019) (describing U.S. Customs and Border Protection’s mission).

107. Plaintiffs’ Original Complaint, *supra* note 2, at 24–25.

108. *Ziglar*, 137 S. Ct. at 1856 (emphasis added).

109. *Bivens*, 403 U.S. at 396.

110. *Ziglar*, 137 S. Ct. at 1860–61.

111. *Id.* at 1861.

112. *Our Government: The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/the-executive-branch/> (last visited Sept. 8, 2018); see *About CBP*, *supra* note 107.

But Hernandez is not questioning matters of border policy or national security in his claim against Mesa. Rather, he is trying to enforce his rights under the existing policies. Border Patrol agents are trained on the limits of the Fourth Amendment and the Border Patrol has policies against the use of excessive force.<sup>113</sup> Hernandez simply wants to hold Mesa accountable pursuant to those limits. Consequently, a suit for damages against Mesa would not require the judiciary to question the executive branch's approach to border policy or national security, only Agent Mesa's actions within that established approach. And while matters of national security are typically outside of the judiciary's wheelhouse, courts decide matters of constitutional law daily and cases involving excessive force regularly.<sup>114</sup>

Moreover, Congress has already impliedly approved of *Bivens* actions for Fourth Amendment violations through nearly fifty years of inaction on the matter. In *Ziglar*, the Court stressed that its current approach is deference to Congress to explicitly provide for a damages remedy.<sup>115</sup> It explained that, most often, Congress is best suited to weigh the "host of considerations."<sup>116</sup> However, the Court acknowledged that "no congressional enactment has disapproved of [prior *Bivens* cases]."<sup>117</sup> Congress has chosen not to act either to preclude actions for damages for Fourth Amendment violations by federal agents or to explicitly provide for alternative remedial measures.<sup>118</sup> Thus, there is no need to defer to Congress because Congress has already accepted the judiciary's actions and allowed the *Bivens* doctrine to control since 1971.

The Court also instructed lower courts to look at the impact a *Bivens* remedy in the new context would have on governmental operations systemwide.<sup>119</sup> For example, in *Ziglar*, the Court was concerned that allowing damages for the consequences of sensitive and difficult policy decisions would have a chilling effect on executive

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113. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1037 (D. Ariz. 2015); Paul Koscak, *Law Enforcement on a Constitutional Scale*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/frontline/cbp-use-force> (last visited Sept. 8, 2018).

114. *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (finding that police officer did not use excessive force).

115. *Ziglar*, 137 S. Ct. at 1857–58.

116. *Id.* at 1857.

117. *Id.* at 1856.

118. *See id.*

119. *Id.* at 1858.

officials' decision-making, thereby affecting governmental operations.<sup>120</sup>

Here, allowing a damages remedy against a Border Patrol agent who uses excessive force and shoots across the border at a Mexican national will have a minimal impact on governmental operations systemwide. First, as previously discussed, Hernandez's claim against Agent Mesa does not question matters of policy, only that Agent Mesa failed to abide by such policies.<sup>121</sup> Therefore, there will be no systemwide governmental impact resulting from a requisite policy change or from a chilling effect on policy decision-making.

Second, and the primary reason allowing a damages remedy will have a minimal impact, is because cross-border shootings are uncommon. According to Hernandez's lawyer, there have been ten cross-border shootings resulting in six deaths.<sup>122</sup> That figure is among 19,000 border patrol agents who patrol approximately 1,900 miles of U.S.-Mexico border every day.<sup>123</sup> Moreover, a *Bivens* remedy will only be implicated if the cross-border shooting was the result of excessive force causing an unlawful seizure. A justified use of force, for example, in self-defense against an armed gunman, would not invoke the doctrine. Based on how uncommon these situations are, the impact an award of damages against an individual officer who commits such a violation would have on the governmental operations *systemwide* would be negligible.

The Court also instructs us to analyze whether there are alternative remedial structures available to the plaintiffs.<sup>124</sup> "[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not."<sup>125</sup> Hernandez, Rodriguez, and similarly situated persons have no alternatives by which to obtain redress.

120. *See id.* at 1860.

121. Plaintiffs' Original Complaint, *supra* note 2, at 24–25.

122. Barnes, *supra* note 29.

123. SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Aug/cbp-snapshot-20180823.pdf> (last visited Nov. 4, 2018); *The Wall: How Long is the U.S.-Mexico Border?*, USA TODAY (Sept. 20, 2017, 1:49 AM), <https://www.usatoday.com/story/news/politics/border-issues/2017/09/19/wall-how-long-us-mexico-border/676001001>.

124. *Ziglar*, 137 S. Ct. at 1858.

125. *Id.* at 1863.

In an American court, the alternative to damages would be equitable relief.<sup>126</sup> But what would an injunction do in this type of case? It would not provide anything to Hernandez's family that would even begin to make them whole. The Court noted in *Ziglar* that individual instances of law enforcement overreach are difficult to address except by way of damages actions after the fact due to their very nature.<sup>127</sup> It characterized the *Bivens* case as "damages or nothing."<sup>128</sup> In *Bivens*, Justice Harlan said in his concurring opinion, "[I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court."<sup>129</sup> Hernandez is in the same position that Bivens was alleging. He is asserting a claim of an individual instance of law enforcement overreach in violation of his Fourth Amendment rights, so damages are the only viable remedy. Furthermore, the Border Patrol already has policies against violating Fourth Amendment rights,<sup>130</sup> so a judicial order to halt such behavior is moot.

The Court's current position on *Bivens* is to defer to Congress because they are best suited to evaluate whether to provide a damages remedy.<sup>131</sup> However, Congress is not likely to act in response to Hernandez's and Rodriguez's cases because they were not residents of the United States<sup>132</sup> and, as such, Hernandez's and Rodriguez's families are not constituents. They do not have congressional representatives to turn to that can champion their cause, leaving judicial redress as the only option. The Mexican government has filed amicus briefs with the Supreme Court urging it provide an effective remedy in cross-border shooting cases.<sup>133</sup> The Mexican government

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126. 30A C.J.S. *Equity* § 1, Westlaw (database updated June 2019).

127. *Ziglar*, 137 S. Ct. at 1862.

128. *Id.* (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (citation omitted)).

129. *Bivens*, 403 U.S. at 409–10 (Harlan, J., concurring).

130. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1037 (D. Ariz. 2015); *Legal Authority for the Border Patrol*, U.S. CUSTOMS & BORDER PROT., [https://help.cbp.gov/app/answers/detail/a\\_id/1084/~legal-authority-for-the-border-patrol](https://help.cbp.gov/app/answers/detail/a_id/1084/~legal-authority-for-the-border-patrol) (last updated July 28, 2018).

131. *Ziglar*, 137 S. Ct. at 1857.

132. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2004 (2017); *Rodriguez*, 111 F. Supp. 3d at 1028.

133. Brief of the Gov't of the United Mexican States as Amicus Curiae in Support of the Petitioners at 7, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118), 2016 WL 7210374.

also stated that doing so does not “disrespect Mexico’s sovereignty.”<sup>134</sup>

The government may argue that the Mexican government is best suited to address the issue. Indeed, the Obama Administration filed a brief urging the Supreme Court to deny review of the *Hernandez* case because the Mexican government has jurisdiction over events that happen in Mexico.<sup>135</sup> However, the Mexican government has attempted to act on Hernandez’s behalf but the U.S. government is obstructing that attempt. Mexico charged Agent Mesa with murder, but the U.S. is refusing to extradite him.<sup>136</sup> Moreover, the U.S. has declined to prosecute Mesa,<sup>137</sup> effectively insulating him from criminal charges. Meanwhile, he continues to work as a Border Patrol agent.<sup>138</sup>

Rodriguez’s case has gone marginally better in that the U.S. has charged Agent Swartz with second-degree murder.<sup>139</sup> However, Rodriguez’s family is still waiting for their day in court. Swartz was not indicted until three years after the shooting and it was only after the District Court held that the civil case could proceed.<sup>140</sup> Some have speculated that the Department of Justice decided to bring charges because the District Court used strong language and intimated that it appeared to be a case of excessive force.<sup>141</sup> The District Court stated that the facts, as alleged, demonstrate an “‘obvious case’ where it is clear Swartz had no reason to use deadly force against [Rodriguez].”<sup>142</sup> It has now been over five years since the shooting, and the criminal trial has yet to begin.<sup>143</sup>

Regardless of the indictment, a family like Hernandez’s or Rodriguez’s should be able to seek remedy rather than relying on

134. *Id.* at 10; Liptak, *supra* note 22.

135. Liptak, *supra* note 22; Brief for the United States at 8, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

136. Liptak, *supra* note 22.

137. *See Federal Officials Close Investigation into the Death of Sergio Hernandez--Guereca*, U.S. DEP’T OF JUSTICE (Apr. 27, 2012), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca>.

138. Barnes, *supra* note 29.

139. Gonzales, *supra* note 54.

140. Binelli, *supra* note 7.

141. *Id.*

142. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1040 (D. Ariz. 2015).

143. Rob O’Dell, *Border Patrol Agent’s Murder Trial in Teen’s Death Set for Five Years After Shooting*, AZ CENT. (Mar. 27, 2017, 12:20 PM), <https://www.azcentral.com/story/news/politics/border-issues/2017/03/27/judge-let-border-patrol-agent-swartz-murder-case-proceed/99696226>.



whether the Department of Justice decides to bring charges. Criminal punishment is, ultimately, not redress for the family. While the family may feel some vindication in knowing the person that killed their son is behind bars, a sentence is handed down as punishment for a crime against the state, not the individual.<sup>144</sup> It is not intended to make the families whole.<sup>145</sup> Therefore, it is not an “alternative means of redress” for the victim’s families.

Families should also be allowed to pursue claims independently of the government because some question the government’s objectivity.<sup>146</sup> For example, after Hernandez was killed, the F.B.I. issued a statement that suggested that Agent Mesa was justified in shooting Hernandez because Hernandez and others surrounded Mesa and threw rocks at him.<sup>147</sup> The Justice Department also stated that a group of smugglers threw rocks at Mesa in its announcement that it would not be filing charges against Mesa.<sup>148</sup> However, cell phone footage appears to show that Hernandez was not throwing anything but, rather, that he was trying to hide.<sup>149</sup>

### C. Deterrence

A *Bivens* remedy should also be recognized in cross-border shooting cases because it will serve as a strong deterrent from constitutional violations. The Court has noted that

*Bivens* . . . vindicate[s] the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.<sup>150</sup>

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144. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 720 (2008).

145. *See id.* at 729.

146. Binelli, *supra* note 7.

147. Michael Martinez, *Assault on Federal Officer Investigated*, FED. BUREAU OF INVESTIGATION (June 8, 2010), <https://archives.fbi.gov/archives/el Paso/press-releases/2010/ep060810.htm>.

148. *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, *supra* note 138.

149. Liptak, *supra* note 22.

150. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017).

This statement applies with equal force to the Border Patrol, which is also a federal law enforcement agency. Border Patrol agents must respect constitutional limits in the course of their job performance so they, too, can glean instruction and guidance from *Bivens*.

There is a special need for Border Patrol agents to exhibit restraint because many of the people they encounter at the Border are not drug smuggling criminals, but children and families seeking asylum.<sup>151</sup> These families and unaccompanied minors peaceably surrender themselves to the Border Patrol, and it is often refuge after a long journey escaping persecution in Central America.<sup>152</sup> International law prohibits the U.S. from turning away asylum seekers.<sup>153</sup> They must be provided an opportunity to make their case to stay.<sup>154</sup> As a result, Border Patrol agents must be able to err on the side of caution because they are not only defending the borders but also providing safe passage to some of the world's most vulnerable people. An understanding of constitutional limitations on their actions is imperative in this type of complex job, and realizable, personal consequences for violations will encourage compliance.

Lastly, common sense and fairness demand that the U.S. provide a means for redress. The Court should not allow a federal agency to be able to kill people with impunity. If the Court declines to provide a remedy, it will render the border an area of legal limbo, where Border Patrol agents can kill innocent people without consequence.<sup>155</sup> If the judiciary does not step in, as the former Customs and Border Protection Head of Internal Affairs once said, the message would be: "It's open season at the border."<sup>156</sup>

## VI. CONCLUSION

The Court has taken on a deferential approach to *Bivens* cases, but it has not foreclosed the remedy. When applying the *Ziglar* framework, the circuit courts should allow Hernandez's and

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151. *Last Week Tonight with John Oliver: Border Patrol* (HBO television broadcast Aug. 6, 2017); Dara Lind, *The Staggering, Sudden Change at the U.S. Border*, VOX (Mar. 9, 2017, 2:10 PM), <https://www.vox.com/policy-and-politics/2017/3/9/14869194/trump-border-secure-illegal-immigration>.

152. Lind, *supra* note 152.

153. *Id.*

154. *Id.*

155. Binelli, *supra* note 7.

156. *Id.*

Rodriguez's claims to proceed because, while the claims qualify as a "new context" by the court's definition, the premise is not new. The substantive claim is the same claim that *Bivens* raised and the Court has acknowledged that *Bivens* has continued vitality and importance. Similar to *Bivens*, Hernandez's and Rodriguez's claims do not raise any special factors counseling hesitation and allowing their cases to proceed will create a powerful deterrent against future constitutional violations, while providing the families a means for redress.