No. 17-56610

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA DEL SOCORRO QUINTERO PEREZ, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

BRIEF FOR DEFENDANTS-APPELLEES

CHAD A. READLER
Acting Assistant Attorney General

ADAM L. BRAVERMAN
United States Attorney

MARK B. STERN
NITIN SHAH
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5089

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331 (ER933), 1346(b) (ER933-34), and 1350 (ER1034). The district court entered final judgment for the United States and for the individual capacity federal defendants as to all claims on September 22, 2017. ER63. Plaintiffs filed a notice of appeal from that final judgment on October 19, 2017. ER57-59. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Two federal Border Patrol agents observed and pursued two Mexican nationals who unlawfully entered the United States through a hole in the primary border fence near San Diego, California. One of the Mexican nationals crawled back through the hole to the Mexican side of the border fence. During a lengthy physical struggle to apprehend the suspect who remained in the United States, the suspect who had returned to the Mexican side climbed to the top of the border fence and appeared to the agents to be throwing or attempting to throw rocks at one of the agents. Fearing for his safety and the safety of his fellow agent, one of the Border Patrol agents fired a single gunshot at the suspect who appeared to be throwing objects from the top of the fence, killing him.

The questions presented are:

1. Whether the district court correctly held that there is no applicable waiver of federal sovereign immunity for plaintiffs' claim under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.

2. Whether the district court properly declined to equitably toll the deadline for plaintiffs' Federal Tort Claims Act (FTCA) claims when plaintiffs provided no valid basis for failing to file their claims until nearly four years after the applicable deadline.

3. With respect to plaintiffs' *Bivens* claim, whether the district court correctly concluded (a) that plaintiffs do not have a valid non-statutory cause of action, in light of the new context presented by their claims and the national security and foreign relations concerns militating against recognition of those claims; or, alternatively, (b) that the Border Patrol agent was entitled to qualified immunity because he did not violate any clearly established Fourth Amendment right.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

1. This case arises out of an incident that occurred on June 21, 2011 at the U.S.-Mexico border near San Ysidro, California. Two Mexican nationals who were

running an immigrant smuggling operation—Jose Alfredo Yañez Reyes (Yañez) and Jose Ibarra Murietta—unlawfully entered the United States through a small hole in a metal drainage grate that forms part of a border wall separating the two countries. ER934, ER935 (Fourth Am. Compl. ¶¶ 27, 32).

Dorian Diaz, a U.S. Border Patrol agent, observed them at around 7 p.m. on the U.S. side within the drainage area and radioed for assistance. ER722-23, 725. Chad Nelson, a Border Patrol agent who was in the area, responded to the call. ER723-25, ER751. As Agent Diaz exited his vehicle to pursue the subjects, Yañez crawled back through the same hole to the Mexican side of the border fence, while Murietta remained on the U.S. side and began climbing a pole that led to a catwalk. ER726, ER751, ER934-35 (Fourth Am. Compl. ¶¶ 27-32). When Agent Diaz moved to cut Murietta off at the top of the catwalk, Murietta slid back down the pole, where Agent Nelson was approaching. ER728-29, ER752, ER935 (Fourth Am. Compl. ¶¶ 29-31). A struggle then ensued between Murietta and Agent Nelson, with Murietta attempting to bite and hit Agent Nelson while pulling him closer to the metal drainage grates and Yañez. ER752-54.

Agents Diaz and Nelson testified that at this point Yañez, from the Mexican side of the drainage grates, began swinging a 3-4 foot wooden table leg studded with nails at Agent Nelson through the slats in the grate. ER728-29, ER752-54. The table leg was recovered and photos of it were included in the summary judgment record. ER822-24. Murietta testified, however, that he never saw the table leg. ER508.

Yañez's actions enabled Murietta to avoid apprehension, and he jumped over a drainage wall and ran east along the border fence on the U.S. side. ER729-30, ER935 (Fourth Am. Compl. ¶¶ 33-34). Agent Nelson testified that as he gave chase, he yelled at Murietta (in Spanish) to stop and show his hands. ER756. Agent Nelson testified that Murietta tripped, and as Agent Nelson caught up, Murietta threw sewage dirt in his eyes. ER756-57. Around this time—recognizing the unusual and dangerous situation that was developing—Agent Diaz radioed for backup and requested that border cameras be directed to observe the incident. ER730-31.

When Agent Diaz caught up with Murietta and Agent Nelson, who by this point were struggling on the ground, he observed that Yañez appeared to be throwing projectiles at Agent Nelson from the top of the fence on the Mexican side. Agent Nelson testified that he saw Yañez throw at least two rocks at him (Agent Nelson) as Agent Diaz approached. ER731-32, ER735, ER737, ER758-59. Agent Diaz again radioed for backup and noted that rocks were being thrown. (This contemporaneous radio report of rocks being thrown was recorded. ER731-32, ER735, ER897.) Agent Diaz yelled in Spanish for Yañez to get off the fence, after which Yañez disappeared briefly, only to reappear atop the fence with the nail-studded wooden table leg, which he threw at Agent Nelson. ER731-32, ER734, ER738-39, ER760-61. The table leg glancingly struck Agent Nelson in the head. ER761. Agent Diaz saw the leg strike Agent Nelson and cause him to jolt his head back from the impact. ER731-32, ER734, ER739. Murietta and Agent Nelson continued to struggle on the ground—

with Murietta attempting to bite Agent Nelson and loudly claiming that he had AIDS—while Agent Diaz attempted to provide cover from Yañez. ER731-32, ER734, ER759-60, ER763.

Agent Diaz testified that at this point, he drew his firearm, pointed it at Yañez, and yelled for him to get down off the fence. ER732, ER739-40. Yañez retreated from the fence, and Agent Diaz re-holstered his weapon. ER732, ER739-40. Agent Diaz then began to join Agent Nelson in his struggle with Murietta, while also watching the fence for Yañez. ER732-33. At that point, Yañez reappeared at the top of the fence, and Agent Diaz saw him looking at Agent Nelson—who was still on the ground, struggling with Murietta—as he cocked his arm back as if to throw something else. Agent Diaz could not see what was in his hand, but assumed that Yañez had a rock or similar object. ER733, ER737-38, ER745.

Up to this point, based on both agents' testimony, Yañez had climbed the fence and thrown objects in the direction of Agent Nelson and disregarded warnings to discontinue his actions and come down from the fence. Fearful that Yañez would cause serious injury to Agent Nelson, who remained in a vulnerable position on the ground, Agent Diaz unholstered and fired his weapon once at Yañez. ER736, ER740, ER742-43. Yañez fell back behind the corrugated border fence. A subsequent survey concluded that where Yañez fell, his body was directly on the border between the United States and Mexico—his upper half in Mexico, his lower half in the United

States with his feet at the base of the fence, which is entirely within the United States at that point. ER887.

Murietta continued to resist and Agents Diaz and Nelson were unable to complete the arrest until additional agents appeared to assist. ER764-65. Agent Nelson was taken to a hospital for treatment of injuries inflicted by Murietta and Yañez. ER765.

2. The Department of Homeland Security's Office of the Inspector General (OIG) conducted an investigation of the incident. The 627-page OIG report stated that border cameras captured audio of Agent Diaz requesting assistance and reporting that rocks were being thrown at him and Agent Nelson; they also captured audio of a voice (assumed to be Agent Nelson) yelling for help in English. ER796, ER802-03, ER813. The OIG report further found that Agents Diaz and Nelson were still struggling to fully apprehend Murietta when additional backup arrived. ER802. A toxicology report showed that Yañez had methamphetamines in his system. ER802-03, ER868. Murietta admitted only to having had several beers. ER510.

The OIG found no evidence of wrongdoing on Agent Diaz's part. Separate reviews conducted by the Federal Bureau of Investigation, which investigates all lethal force cases (ER805), DHS's Office of Professional Responsibility (ER811), U.S. Customs and Border Protection's (CBP's) Disciplinary Review Board (ER812), and the Department of Justice's Civil Rights Division (ER798), all resulted in determinations not to take further action.

Although in deposition testimony Murietta minimized the incident and claimed he never saw Yañez throwing rocks, ER508, he pleaded guilty to assault on a federal officer (Agent Nelson) and illegal entry, and was sentenced to eighty-seven months in prison, which he is currently serving. ER839, ER857. During the course of its criminal investigation, the government learned that Murietta was known by the pseudonym "El Colas" and was the leader of a notorious immigrant smuggling ring that operated in the area where he was apprehended. ER806-10, ER852. He had unlawfully entered the United States on at least forty-four prior occasions. ER852. On the most recent of those known prior occasions, in 2008, Murietta had pleaded guilty to assaulting another federal agent in a manner similar to his assault of Agent Nelson, in addition to a smuggling charge, and had only just been released from federal custody several months prior to this incident, in January 2011. ER806, ER808, ER859, ER867.

B. Prior Proceedings

Plaintiffs, who are survivors of Yañez, submitted an administrative claim under the Federal Tort Claims Act to CBP, a component of the Department of Homeland Security (DHS), on August 10, 2011, which was denied on May 10, 2012. SER53. They filed suit in the Southern District of California on June 17, 2013. The original complaint alleged a violation of the law of nations under the ATS, and constitutional tort claims against Agent Diaz, Agent Nelson, and various supervisory defendants, alleging several Fourth and Fifth Amendment violations. SER35-48. Their original complaint also included a claim styled as a request for declaratory relief that the

judgment bar of the Federal Tort Claims Act, 28 U.S.C. § 2676, does not apply, and states that, "But for the adverse and erroneous case law" under that statute, "Plaintiffs would include in this Complaint claims against the Supervisor Defendants and Agents under the FTCA." SER47 (citation omitted). Plaintiffs did not plead an FTCA claim in their original complaint, and ultimately dismissed their request for declaratory relief. SER88.

As relevant to this appeal, the district court on September 3, 2014, dismissed plaintiffs' ATS claim. Applying this Court's precedents, it found that the ATS does not provide a waiver of sovereign immunity. ER40. Discovery proceeded on the other claims. The district court granted plaintiffs' motion for leave to amend the complaint to add FTCA claims on September 21, 2016, ER980, and then, on March 6, 2017, dismissed those claims because they were barred by the statute of limitations, ER28-29. The district court declined to equitably toll the FTCA's statutory limitations period because plaintiffs did not establish either reasonable diligence or extraordinary circumstances, as required to for tolling to be available. ER26-28. On September 21, 2017, the district court, applying the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), granted the motion for summary judgment on the Fourth Amendment *Bivens* claims, concluding that the claims in this case arise in a new context and that national security related special factors particularly acute at the border militate against recognizing the claims. ER12-13. The district court further held that the individual defendants were entitled to qualified immunity because, under

the circumstances, Agent Diaz did not violate Yañez's clearly established Fourth Amendment rights. ER15.

SUMMARY OF ARGUMENT

The district court correctly dismissed plaintiffs' claims under the ATS and the FTCA and their attempt to seek damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1. The law of this Circuit—and every other Circuit to have considered the question—is that the ATS does not provide a waiver of sovereign immunity. *See Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)). "Thus, any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *Id.*

Plaintiffs identify no other congressional enactment that waives the United States' sovereign immunity for an ATS claim. Instead, plaintiffs cite cases involving the immunity of foreign sovereigns with respect to violations of certain customary international law norms. Those cases have no bearing on the inquiry here, and no court has held that Congress has waived the immunity of the United States for claims alleging violations of customary international law norms. Indeed, this Court has held that two other, more limited forms of immunity—official immunity for federal employees and foreign sovereign immunity—are not abrogated by an alleged violation of customary international law norms. *See Saleh v. Bush*, 848 F.3d 880, 892-93 (9th Cir.

2017) (Westfall Act provides official immunity for federal officers from *jus cogens* claims); *Siderman de Blake v. Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (Foreign Sovereign Immunities Act bars all claims—including *jus cogens* claims—that do not fall within an enumerated exception).

2. Plaintiffs' FTCA claims are time-barred, and the district court correctly found no basis for equitable tolling. CBP denied plaintiffs' administrative claims on May 4, 2012. SER53. Thus, plaintiffs had until November 10, 2012 to file an FTCA suit. *See* 28 U.S.C. § 2401(b). An FTCA suit would have been untimely even if plaintiffs had included an FTCA claim when they filed this suit on June 17, 2013. But they did not amend their complaint to include a claim under the FTCA until September 21, 2016, more than three years later. ER980.

The district court cogently explained its decision to deny plaintiffs' request for equitable tolling. Plaintiffs failed to exercise reasonable diligence in pursuing their FTCA claims. They did not bring this action until well after the limitations period had run, and even then did not seek permission to add FTCA claims to the complaint until June 2016, more than three and a half years after the period expired. Plaintiffs demonstrate no extraordinary circumstances that would warrant tolling in these circumstances. Plaintiffs made the tactical decision not to file an FTCA claim because they were concerned that, as a result of the FTCA's judgment bar, 28 U.S.C. § 2676, dismissal of their FTCA claim would bar their *Bivens* claim as well. That is not a basis for equitable tolling.

3. The district court correctly granted summary judgment with respect to plaintiffs' *Bivens* claims. First, as the district court explained, where, as here, a *Bivens* claim arises in a new context other than the three affirmatively recognized by the Supreme Court, a court must consider whether special factors preclude implication of a constitutional damages remedy. *See Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The district court properly concluded that the claims here brought by an alien unlawfully attempting to enter the United States implicate foreign relations, border security, and national security policy concerns, and that these special factors weigh strongly against recognizing plaintiffs' claims. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2006-08 (2017) (per curiam) (remanding case involving a border shooting to determine whether a *Bivens* remedy exists in light of *Abbasi*'s clarification of the special factors analysis); *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc) (holding that special factors precluded implication of a *Bivens* remedy).

Second, Agent Diaz is entitled to qualified immunity. The district court correctly held that Agent Diaz did not violate a clearly established Fourth Amendment right. Yañez attempted to enter the United States illegally through a hole in a border fence; subsequently retreated to avoid arrest; then reappeared on top of the border fence and appeared to attempt to throw objects at Agent Nelson in an effort to thwart the agents' efforts to arrest his compatriot. As the district court held, no cases exist that establish that the underlying alleged conduct violates a clearly established constitutional right, let alone a case of controlling authority or a clear

consensus of persuasive authority in 2011, the time of the relevant events. Plaintiffs now argue that there are disputed factual issues preventing summary judgment on qualified immunity. But the district court, on the basis of the entire summary judgment record, properly concluded that Yañez appeared to Agent Diaz to be attempting to throw projectiles in the direction of Agent Nelson, and that evaluating the situation from Agent Diaz's perspective as controlling precedent requires, no clearly established Fourth Amendment right was violated.

STANDARD OF REVIEW

The district court's dismissal of plaintiffs' Alien Tort Statute claim on sovereign immunity grounds is reviewed de novo. *Harger v. U.S. Dep't of Labor*, 569 F.3d 898, 903 (9th Cir. 2009). A decision on equitable tolling of the FTCA's statute of limitations "is 'generally reviewed for an abuse of discretion, unless the facts are undisputed, in which event the legal question is reviewed de novo.'" *Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008) (quoting *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000)). Review of the district court's determinations of the availability of a *Bivens* remedy and qualified immunity are de novo. *Western Radio Servs. v. U.S. Forest Serv.*, 578 F.3d 1116, 1119 (9th Cir. 2009); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

ARGUMENT

I. Plaintiffs' Alien Tort Statute Claim Is Barred By Sovereign Immunity.

1. Only an act of Congress can effect a waiver of sovereign immunity. *See Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011) (citing *United States v. Park Place Assocs.*, 563 F.3d 907, 934 (9th Cir. 2009)), and such a waiver "must be unequivocally expressed," *United States v. King*, 395 U.S. 1, 4 (1969), and "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

The Alien Tort Statute ("ATS") contains no waiver of the federal government's sovereign immunity. By its terms, it provides the district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "[T]he ATS is a jurisdictional statute creating no new causes of action." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). As this Court has explained, "'the Alien Tort Statute has been interpreted as a jurisdiction statute only—it has not been held to imply any waiver of sovereign immunity.'" *Tobar*, 639 F.3d at 1196 (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)). "'Thus, any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit.'" *Id.* This Court's precedents, which accord with those of every court of appeals to consider the question, requires dismissal of plaintiffs' claims

under the ATS. *See Arar v. Ashcroft*, 532 F.3d 157, 175 n.12 (2d Cir. 2008) (collecting cases), *vacated on other grounds*, 585 F.3d 559 (2d Cir. 2009).

2. Plaintiffs nevertheless seek to rely on *Sosa* for the proposition that the ATS waives sovereign immunity for claims based on customary international law. Br. 47. That contention is foreclosed by *Tobar*, and, in any event, *Sosa* is entirely consistent with the conclusion that neither the ATS nor international law provide an applicable waiver of sovereign immunity. *Sosa* involved FTCA claims against the United States and an ATS claim against Sosa, a Mexican national who allegedly aided in the abduction and transfer of Alvarez-Machain from Mexico to the United States. 542 U.S. at 698. The plaintiffs there did not bring an ATS claim against the United States, and thus the Court had no occasion to decide whether the immunity of the United States was waived with respect to such a claim. The Court's reasoning, in any event, cannot be reconciled with plaintiffs' arguments here. The Supreme Court held that in enacting the ATS as part of the Judiciary Act of 1789, Congress intended to afford a cause of action for three primary offenses against the law of nations identified by Blackstone as "principal offen[s]es against the law of nations": violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa*, 542 U.S. at 724-25; *see* 4 William Blackstone, *Commentaries* 68. Contrary to plaintiffs' suggestion, Br. 49, all three of these offenses were capable of being committed by non-sovereign actors. *See, e.g.*, *id.* at 716-17 & 717 n.11 (reciting the "Marbois Incident," in which a French adventurer verbally and physically assaulted the Secretary of the French Legion in

Philadelphia, leading to a full-blown diplomatic incident). Blackstone himself, in enunciating the three "principal" offenses against the law of nations, contemplated that they would be actionable only where committed by "the individuals of any state," as when these offenses are committed by "whole states or nations," the only recourse is war. 4 William Blackstone, *Commentaries* 68. Neither the Court's analysis nor the history of the ATS provide any basis to infer a waiver of sovereign immunity.

On the contrary, the immunity of a sovereign from suit was a firmly rooted principle at the time of the Founding, and thus courts have properly refused to infer a waiver from early legislative enactments, including the Judiciary Act of 1789 (of which the ATS was part). *See* The Federalist No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."); 1 William Blackstone, *Commentaries*, 236, 238-39 (describing practice of sovereign immunity in England); *see also United States v. Lee*, 106 U.S. 196, 205 (1882) (reciting derivation of sovereign immunity "from the laws and practices of our English ancestors"). Indeed, in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821), Chief Justice Marshall stated that the Judiciary Act of 1789—which included the ATS—"does not authorize" suits against the United States. *Id.* ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the [J]udiciary [A]ct does not authorize such suits.").

3. Because the ATS does not provide a waiver of the United States' sovereign immunity, it was incumbent on plaintiffs to identify another congressional enactment

that unequivocally waives the government's sovereign immunity over their ATS claim. They have not done so, and, instead, advance the remarkable argument that the United States has no sovereign immunity from a tort suit under the ATS when a plaintiff alleges that the government has violated certain widely accepted principles of customary internal law known as "*jus cogens*" norms. Br. 33. An alleged violation of such a norm, plaintiffs argue, is not to be recognized as a sovereign act and therefore is not subject to sovereign immunity.

Plaintiffs point to no case holding that the federal government's sovereign immunity is abrogated when a plaintiff alleges a *jus cogens* violation. They rely instead on inapposite decisions discussing the waiver of the immunity of foreign sovereigns. Foreign sovereign immunity, at least in its origin, "is a matter of grace and comity rather than a constitutional requirement." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). The Foreign Sovereign Immunities Act of 1976 ("FSIA") was intended to represent the "codification of international law at the time of the FSIA's enactment, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007), and is thus inevitably connected to the application of international law. *See International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1357 (9th Cir. 1981) (describing foreign sovereign immunity as a "rule of international law").

While foreign sovereign immunity analysis will thus sometimes include consideration of international law principles, such considerations have no bearing on

the immunity of the United States, which, as the Supreme Court has repeatedly emphasized, can be waived only by a clear congressional statement. *See Tobar,* 639 F.3d at 1195 ("Federal sovereign immunity insulates the United States from suit 'in the absence of an express waiver of this immunity by Congress.'") (quoting *Robinson v. United States,* 586 F.3d 683, 685 (9th Cir. 2009)). Indeed, even a ratified treaty that is not self-executing does not "create obligations enforceable in the federal courts." *Id.* at 1196 (citing *Sosa,* 542 U.S. at 735).

The case on which plaintiffs principally rely—*Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992)—underscores the error of their analysis. Plaintiffs in that case sought to sue Argentina under the ATS, alleging violations of *jus cogens* norms of international law. This Court concluded that the alleged violations did not abrogate Argentina's immunity under the FSIA, reasoning that "if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so." *Id.* at 719. That reasoning applies with even greater force with regard to a claim against the United States. And, indeed, citing the need for an express congressional waiver, this Court has concluded that *jus cogens* claims do not abrogate the domestic official immunity of an individual U.S. actor, which by its nature is more limited than federal sovereign immunity of the government as a whole. *See Saleh v. Bush*, 848 F.3d 880, 893 (9th Cir. 2017) ("Given those different origins [between foreign and domestic immunity], it should be easier for the violation of a *jus cogens*

norm to override foreign sovereign immunity than domestic official immunity") (citing *Siderman*).

Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated*, 569 U.S. 945 (2013), also relied on by plaintiffs, did not involve a question of sovereign immunity, foreign or domestic, as the defendants were private entities and individuals. Rather, the issue there concerned the applicability of the act of state doctrine, which is not a principle of immunity but provides, in certain circumstances, "a substantive defense on the merits." *Altmann*, 541 U.S. at 700. *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012), addressed the circumstances in which an individual foreign official was entitled to official immunity for his actions, which allegedly violated *jus cogens* norms. Applying principles of international law, the Fourth Circuit held that an individual official's actions cannot be attributed to the state where they violate *jus cogens* norms. *Id.* at 775-76. The immunity of the foreign sovereign itself was not implicated in the suit.[1]

[1] Although not directly relevant to the Court's disposition of this appeal, the United States disagrees with the Fourth Circuit's decision in *Yousuf* insofar as the court failed to give controlling weight to the State Department's immunity determination for a former foreign official. *See Samantar v. Yousuf*, 560 U.S. 305, 323 (2010) ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). The United States also disagrees with the Fourth Circuit's apparent adoption of a categorical rule that allegations of *jus cogens* violations are sufficient to defeat a claim of foreign official immunity.

Plaintiffs are on no firmer ground in reframing the same argument as a contention that international law "prohibits" the federal government from invoking sovereign immunity in response to a *jus cogens* claim, Br. 37. Plaintiffs seek to premise this argument on the Universal Declaration of Human Rights (Declaration), G.A. Res. 217 (III)A (Dec. 10, 1948), and the International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1966, 999 U.N.T.S. 171. Br. 37-39. But in *Sosa,* the Supreme Court rejected the argument that either of these documents could "create obligations enforceable in the federal courts," explaining that the Declaration "does not of its own force impose obligations as a matter of international law," and "the United States ratified the Covenant on the express understanding that it was not self-executing." 542 U.S. at 734-35. And, in *Tobar,* this Court rejected a plaintiff's reliance on the Covenant as the source of a waiver of sovereign immunity for an ATS claim. *Tobar*, 639 F.3d at 1196.[2] Plaintiffs cannot sidestep precedent by citation to the *Charming Betsy* canon of construction announced in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.), under which congressional enactments should, if possible, be interpreted harmoniously with the law of nations. As discussed, there is no conflict between federal law and the law of nations. And as this

[2] The other authorities cited by plaintiffs on this point are similarly inapplicable and likewise do not create any rights or obligations enforceable in a U.S. court. *See* Br. 39-45 (citing, among other things, the European Convention on Human Rights, a United Nations "Principles and Guidelines" document, and decisions of various international and foreign tribunals).

Court noted in *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000), "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party." *Id.* at 1179 n.9. The purpose of the *Charming Betsy* rule was to "avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress." *Id.* There is no such concern here, and the Court "must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.*; *accord ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1102 (9th Cir. 2005).[3]

II. The District Court Correctly Dismissed Plaintiffs' FTCA Claims.

The FTCA requires a claimant to file an administrative claim with the appropriate federal agency within two years "after such claim accrues." 28 U.S.C. §§ 2401(b), 2675(a). A claimant must file suit within six months of the agency's denial of such claim, or else it is "forever barred." *Id.* § 2401(b).

It is undisputed that CBP denied plaintiffs' administrative claim on May 10, 2012. SER53. Thus, pursuant to 28 U.S.C. § 2401(b), plaintiffs were required to file suit under the FTCA no later than November 10, 2012. Plaintiffs' FTCA suit would

[3] The conclusion that the ATS does not waive the United States' immunity is further supported by the Supreme Court's recent decision in *Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. Apr. 24, 2018), in which the Court held that the ATS does not authorize corporate liability. There, the Court repeated *Sosa*'s urging of "'great caution' before recognizing new forms of liability under the ATS" and underscored the primary role of Congress in these matters. *Id.* at 19 (quoting *Sosa*, 542 U.S. at 728).

therefore be untimely even if they had included an FTCA claim in their 2013 complaint. But they did not seek to include FTCA claims until June 2016, and the claims were added by leave of the district court in September 2016. ER980.[4]

Plaintiffs urge that the district court abused its discretion in declining their request to equitably toll the deadline. The doctrine of equitable tolling is "to be applied sparingly," *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), and thus a plaintiff "bears a heavy burden" to show that he or she is entitled to equitable tolling, *Rudin v. Myles*, 781 F.3d 1043, 1055 (9th Cir. 2014). A litigant must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016).

As the district court held, plaintiffs have satisfied neither element. "Central to the analysis is whether the plaintiff was 'without any fault' in pursuing his claim." *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (en banc) (quoting *Federal Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996)), *aff'd*, 135 S. Ct. 1625 (2015). To satisfy this element, plaintiffs must undertake "the effort that a reasonable

[4] The original complaint included a claim for declaratory relief that the FTCA's judgment bar would not apply so that plaintiffs could later add FTCA claims. SER47. The United States moved to dismiss that request, noting that the time for alleging FTCA claims had long passed, as the original complaint itself was filed more than six months after the denial of the administrative claim. In response to that timeliness argument, plaintiffs dismissed their request for declaratory relief with prejudice. SER88.

person might be expected to deliver under his or her particular circumstances." *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011).

Plaintiffs here made a deliberate, strategic choice not to timely file their FTCA claim. Their calculations turned on their assessment of the significance of the FTCA's judgment bar, which provides that an FTCA judgment "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. In various contexts, therefore, dismissal of an FTCA suit bars a *Bivens* action arising from the same conduct. Apparently expecting that their FTCA claim would likely be dismissed, plaintiffs decided to forgo filing one, on the theory that including the claim might "have imperiled their otherwise viable *Bivens* claims[.]" Br. 60. After the Supreme Court's decision in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), which held that the judgment bar does not apply when an FTCA suit is dismissed on the basis of one of the statute's jurisdictional exceptions, plaintiffs decided that the calculus had shifted, and that it would be to their advantage to—very belatedly—include the FTCA claim that they could have asserted at any time after the denial of their administrative claim.

Plaintiffs stand the doctrine of equitable tolling on its head. A litigant who is aware of a governing statute of limitations must diligently seek to comply. This equitable doctrine does not excuse untimely filings where a litigant intentionally

forgoes the opportunity to file within the statutory deadline because of concerns regarding the potential impact of dismissal on other claims.

The circumstances here bear no resemblance to those in *Kwai Fun Wong*, on which plaintiffs principally rely. There, plaintiff filed a lawsuit alleging negligence by the United States based on the conditions of her confinement by the Immigration and Naturalization Service, and, on the same day, filed an administrative claim under the FTCA. 732 F.3d at 1033. Under 28 U.S.C. § 2401, a litigant may file suit after an administrative claim has been pending for six months, even if the agency has not yet acted on the claim. The plaintiff sought to amend her complaint to add an FTCA claim promptly after the six months had elapsed. But while her motion for leave to amend was pending, the agency denied her claim, thus resetting the six-month clock. Although plaintiff then renewed her request to add an FTCA claim, the district court did not act on the motion to amend until after the six-month period had concluded. The claim was thus untimely solely because of the court's failure to act on the motion. As this Court emphasized, the plaintiff in *Wong* at all points moved promptly to include an FTCA claim and made every attempt to meet the governing deadlines. Precisely the opposite is true here.

This case also stands in marked contrast to *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008), cited by plaintiffs, in which a prisoner seeking to file a habeas petition justifiably relied on governing circuit precedent establishing the relevant time limits. His petition became untimely when the Supreme Court established a different timing

rule than that previously recognized by this Court. In tolling the time for the petition, this Court explained that "Harris's petition became time-barred the moment that" the Supreme Court overruled the analysis adopted in this Court's prior decisions. *Id.* at 1056. This Court emphasized that "Harris diligently pursued his rights. He filed successive petitions for state post-conviction relief while ensuring that enough time would remain to file a federal habeas petition under the then-existing . . . rule." *Id.* at 1055-56. The Court further stressed that "Harris had no control over the operative fact that caused his petition to become untimely—the Supreme Court's decision [overturning the rule adopted by this Court]. These are precisely the circumstances in which equitable principles justify tolling of the statute of limitations." *Id.* at 1056.

Here, nothing in this Court's precedents suggested that plaintiffs were barred from instituting a timely FTCA claim. Instead, plaintiffs chose not to file an FTCA claim because they were concerned about the impact of an adverse ruling on their wholly separate *Bivens* claims. Moreover, as the district court explained, plaintiffs' argument fails even on its own terms. Plaintiffs simply chose to assume that a decision of this Court regarding the application of the judgment bar would necessarily govern in the event that their FTCA claim was dismissed. As the district court observed, this Court's prior judgment bar decision was factually distinguishable, and plaintiffs would have been free to argue that it should not govern here. *See* ER28. As the district court explained, *id.*, plaintiffs' tactical concern was based on this Court's application of the judgment bar in *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008). The plaintiff in

Pesnell had brought two separate lawsuits: an FTCA action in Arizona, followed by a separate *Bivens* action in California, which was instituted only after this Court had affirmed the district court's dismissal of the FTCA suit. 543 F.3d at 1040-41. If plaintiffs here had brought their FTCA claim, and if it were dismissed, it was open to them to contend that a different result should obtain in this case. Instead, plaintiffs apparently weighed their assessment of this argument together with their assessment of their FTCA claim and decided that the odds were not in their favor. That is not a basis for equitable tolling. *See Menominee Indian Tribe*, 136 S. Ct. at 757 (plaintiff's concern regarding "significant risk" and an "uncertain outcome based upon an uncertain legal landscape," was not a ground for equitable tolling).And again, even if plaintiffs had included FTCA claims in their original complaint, those claims would have been untimely.

III. The District Court Correctly Dismissed Plaintiffs' Fourth Amendment *Bivens* Claims.

A. There Is No Implied Non-Statutory Damages Remedy for Plaintiffs' Claims.

The district court correctly declined to extend a *Bivens* remedy to plaintiffs' Fourth Amendment claims, reasoning that this case presents a new context in which the Supreme Court has not previously recognized a claim, and that special factors—in particular, the strong national security and diplomatic interests that are implicated in a matter where a foreign national attempting to unlawfully enter the United States was shot at the border between the United States and a foreign country—weigh against

extending *Bivens* to this new context. The district court's decision is strongly supported by two recent decisions of the Supreme Court, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), and *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (*Hernandez I*), and is consistent with the en banc Fifth Circuit's recent decision on remand from the Supreme Court in *Hernandez*, 885 F.3d 811, 823 (5th Cir. 2018) (*Hernandez II*).[5]

1. In *Ziglar v. Abbasi*, the Supreme Court stressed that expanding the *Bivens* remedy is disfavored, explaining that a case presents a "new context" if "the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." 137 S. Ct. at 1859-60. The Court also clarified the longstanding rule that *Bivens* should not be extended when "special factors" counsel hesitation, explaining that the inquiry focuses on whether Congress or the Judiciary is better suited to balance the costs and benefits of allowing a damages action to proceed, and noting that most often the answer is Congress. *Id.* at 1857-58. Applying the special factors analysis, the Court declined to extend the *Bivens* remedy to challenges to conditions of confinement in a domestic facility in the wake of the September 11, 2001 terrorist attacks because of the national-security interests implicated by the plaintiffs' claims, Congress's failure to enact a damages remedy despite its attention to the issue, the inappropriateness of an implied remedy to address claims based on government

[5] The question presented in *Hernandez* is awaiting resolution by this Court in *Rodriguez v. Swartz*, No. 15-16410 (9th Cir.) (argued Oct. 21, 2016).

policy, and the availability of other, non-monetary remedies, among other reasons. *Id.* at 1860-63.

The Court emphasized that it has only approved of an implied damages remedy under the Constitution in three cases: *Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980). *See Abbasi*, 137 S. Ct. at 1854-55. The Court explained that when *Bivens* was decided, it routinely implied causes of action not explicit in the statutory text. *Id.* at 1855. But the Court subsequently rejected that approach, instead reasoning that if a statute does not provide a cause of action, "a private cause of action will not be created through judicial mandate." *Id.* at 1856. This "caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context." *Id.*

Since this "notable change" occurred, the Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity," and it has "consistently refused to extend *Bivens* to any new context or new category of defendants" for the past thirty years. *Abbasi*, 137 S. Ct. at 1857 (citing cases). Indeed, the Court observed, "in light of the changes to the Court's general approach to recognizing implied damages remedies, 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's reluctance to extend *Bivens* is rooted in separation-of-powers principles. *Abbasi*, 137 S. Ct. at 1857. The Court explained that "[t]he question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Id.*

The answer, the Court observed, "most often will be Congress" because Congress is in a better position to consider the economic and other effects a damages remedy would have on "governmental operations systemwide." *Id.* at 1857-58; *see also id.* at 1857 ("In most instances," the "Legislature is in the better position.").

The circumstances of this case plainly present a "new context" under *Bivens*. In *Abbasi*, the Court held that a case presents a "new context" if "the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]" (*i.e.*, *Bivens*, *Davis*, and *Carlson*), and that "even a modest extension is still an extension." 137 S. Ct. at 1859, 1864. The Supreme Court has never recognized a *Bivens* action arising from an injury sustained by a foreign citizen at the border with another country's sovereign territory, let alone an alien attempting to illegally enter the United States or interfere with border protection activities. Indeed, the D.C. Circuit has observed that "no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone a case implicating both." *Meshal v. Higgenbotham*, 804 F.3d 417, 424-25 (D.C. Cir. 2015) (footnotes omitted) (challenges to the extraterritorial conduct of federal officials in a national-security and criminal investigation presented a "new context" under *Bivens*), *cert. denied*, 137 S. Ct. 2325 (2017).

Any doubt on this question is resolved by *Hernandez*, which also involved a border shooting. There, the Supreme Court vacated the Fifth Circuit's decision holding that the plaintiffs had no Fourth Amendment claim and directed the court on

remand to consider the "antecedent" question of whether a *Bivens* remedy is available in light of *Abbasi*. *Hernandez I*, 137 S. Ct. at 2006. The Court noted that resolving the underlying Fourth Amendment question "would be imprudent" and "may be unnecessary" in light of the intervening guidance provided by *Abbasi*. *Hernandez I*, 137 S. Ct. at 2007. That disposition presupposed that the claims in *Hernandez* arose in new contexts.

On remand, the en banc Fifth Circuit concluded that *Hernandez* indeed presented a new context, and that "numerous" special factors "counsel against federal courts' interference with the Executive and Legislative branches of the federal government." *Hernandez II*, 885 F.3d at 814. Although plaintiffs argue that the actions here were a routine law enforcement operation, Br. 63-68, and thus not a new context, that analysis cannot be reconciled with the facts present here, including (1) the identity of the parties here (Mexican nationals attempting to unlawfully enter the United States and two Border Patrol agents charged with safeguarding and securing the international border); (2) the location of the incident— Yañez was atop the international border fence when he was shot; and (3) the uncertainty of the legal rules applicable in such an instance.

2. The Court in *Abbasi* clarified that the analysis of whether "special factors counselling hesitation" are present "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." 137 S. Ct. at 1857-58; *see also*

Hernandez I, 137 S. Ct. at 2006. Indeed, if there are "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, courts *must refrain* from creating the remedy in order to respect the role of Congress." *Abbasi*, 137 S. Ct. at 1858 (emphases added). "In a related way," the Court explained, "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.* The standard for determining that special factors militate against inferring a new cause of action is "remarkably low." *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009).

Accordingly, the Fifth Circuit in *Hernandez* concluded that special factors strongly militated against recognizing a new *Bivens* claim in these circumstances. In particular, the Fifth Circuit found that "the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security." *Hernandez II*, 885 F.3d at 819 (citing *Vanderklok v. United States*, 868 F.3d 189, 207-09 (3d Cir. 2017)). The Fifth Circuit further held that implying a *Bivens* remedy would risk "interference with foreign affairs and diplomacy more generally," particularly given the dialogue between Mexico and the United States regarding the sorts of issues presented by this case. *Id.* at 819-20. And the extraterritorial aspect of the case "underlies and aggravates the separation-of-powers issues already discussed." *Id.* at 821. The en banc Fifth Circuit's decision in *Hernandez* follows directly from the

Supreme Court's decisions in *Abbasi* and *Hernandez*, and the same analysis applies here.

These separation-of-powers concerns strongly weigh against implying a damages remedy here.

First, claims by aliens injured at an international border implicate foreign affairs and national security concerns. The Constitution commits these areas to the political branches. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1861; *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016) (recognizing "controlling role of the political branches" in foreign affairs). Accordingly, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981); *see Abbasi*, 137 S. Ct. at 1861; *Hernandez II*, 885 F.3d at 819 (risk to national security counseled against recognizing *Bivens* claim in transnational border shooting case); *Vanderklok*, 868 F.3d at 207 (declining to recognize *Bivens* action against TSA agent given national security implications).

Consistent with these principles, the Supreme Court's decisions make clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. In *Chappell v. Wallace*, the Court declined to extend *Bivens* to claims by military personnel against superior officers because "Congress, the constitutionally authorized source of authority over the military system of justice," had not provided such a remedy and so a judicially created one "would be plainly inconsistent with Congress' authority." 462 U.S. 296, 304 (1983). In *United States v. Stanley*, the Court

relied on *Chappell* to hold that *Bivens* does not extend to any claim incident to military service, again emphasizing that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. 669, 683-84 (1987). And in *Abbasi*, the Court relied on these principles in declining to extend *Bivens* to challenges to the confinement conditions imposed on illegal aliens pursuant to executive policy in the wake of the September 11, 2001 terrorist attacks. 137 S. Ct. at 1858-63. The Court emphasized that "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches,'" which are "even more pronounced" in the context of a claim seeking money damages. *Id.* at 1861. The Court concluded that "congressionally uninvited intrusion [wa]s inappropriate action for the Judiciary to take." *Id.* at 1862 (quotation marks omitted).

The same logic precludes the extension of *Bivens* to an alien attempting to unlawfully enter the country and interfering with the apprehension of another alien unlawfully present at an international border by U.S. government officials. Just as the en banc Fifth Circuit recently concluded in *Hernandez*, this category of cases unquestionably implicates foreign relations.[6] Indeed, the United States and the government of Mexico have repeatedly addressed cross-border shootings in recent

[6] It is immaterial that the alien in *Hernandez* was more clearly on the foreign side of the border than in this case. Here, Yañez was indisputably at the U.S. border, and just as in *Hernandez*, the Border Patrol agents here were fulfilling their statutory function to protect the border and safeguard national security.

years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence.[7] Mexico and the United States have also addressed border shootings in other fora, including the annual U.S.–Mexico Bilateral Human Rights Dialogue.[8] Judicial examination of the incident at issue in this case would inject the courts into these sensitive matters of international diplomacy and risk undermining the government's ability to speak with one voice in international affairs. *See Hernandez II*, 885 F.3d at 819-20 (citing Border Violence Prevention Council as indication that recognizing *Bivens* claim "risks interference with foreign affairs and diplomacy more generally); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985).

Permitting *Bivens* suits in this context also would directly implicate the security of the border. Congress has charged the Department of Homeland Security and its components, including U.S. Customs and Border Protection, with preventing terrorist attacks within the United States and securing the border. 6 U.S.C. §§ 111, 202. "[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States." *United States v. Delgado-Garcia*, 374 F.3d 1337,

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

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

1345 (D.C. Cir. 2004). Moreover, this Court has recognized that the related context of "immigration issues 'ha[s] the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsels hesitation' in extending *Bivens*." *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012) (quoting *Arar*, 585 F.3d at 574); *see also Hernandez II*, 885 F.3d at 819-20; *Vanderklok*, 868 F.3d at 207.

Plaintiffs question the legitimacy of the national security interests at stake and argue that the incident here was nothing more than a standard law enforcement operation. Br. 63-68. But that argument disregards the context in which plaintiffs' claims arose. Border Patrol agents Diaz and Nelson confronted Yañez and Murietta, the two Mexican nationals, after they had already unlawfully entered the United States through a hole in the primary border fence. Yañez then retreated back through the hole in the fence—rendering the agents unable to pursue him further—while a physical struggle ensued with Murietta. While that struggle was ongoing, Yañez reappeared atop the border fence—again, beyond the reach of the agents—and began throwing projectiles in the direction of the border agents. Permitting constitutional claims against individual officers based on their conduct in such encounters would inevitably affect the national security and foreign policy interests of the United States in a manner that would threaten to significantly impede the political branches' ability to exercise their authority in these areas. "National-security concerns are hardly 'talismanic' where, as here, border security is at issue." *Hernandez II*, 885 F.3d at 819.

Second, although plaintiffs argue that their *Bivens* claim should proceed irrespective of whether Yañez suffered his injury in Mexico or in the United States, *see* Pl. Br. 62, their argument is in clear tension with Congress's repeated judgment not to provide for a cause of action in these circumstances. This includes the decision by Congress in enacting the FTCA to exclude claims arising in a foreign country—meaning "all claims based on any injury suffered in a foreign country." *Sosa v. Alvarez-Machain*, 542 U.S. at 712; *see* 28 U.S.C. § 2680(k). This judgment was anything but "inadvertent."*Abbasi*, 137 S. Ct. at 1862 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)); *see Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009).

Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations or by voluntary *ex gratia* payments to the injured parties. *See* Major William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-64 (1966). The United States continues to rely on such measures in many contexts. *See*, *e.g.*, Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,485, 44,486 (July 1, 2016). In certain recurring circumstances, Congress has authorized limited administrative remedies for aliens injured abroad by U.S. employees. *See* 10 U.S.C. §§ 2734(a), 2734a(a); 21 U.S.C. § 904; 22 U.S.C. § 2669-1. Tellingly, Congress has not adopted a similar claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents. Moreover, where Congress has provided remedies for aliens injured abroad by U.S. employees, it has done so through

administrative mechanisms, not by authorizing suits in federal court. And in addition to the FTCA, Congress limited the statutory remedy for individuals whose constitutional rights are violated by *state* officials to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. § 1983. As the Fifth Circuit observed in *Hernandez*, "it would violate separation-of-powers principles if the implied remedy [under *Bivens*] reached further than the express one [under § 1983]." *Hernandez II*, 885 F.3d at 820.

More recently, in the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. § 1350 note § 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by government officials. *Id.* Congress's repeated decisions not to provide such a remedy counsel strongly against providing one under *Bivens*.

Third, the presumption against extraterritoriality underscores the inappropriateness of extending *Bivens* to aliens injured abroad, as plaintiffs propose. It is axiomatic that, in general, "United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). The

presumption against extraterritoriality "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." *Id.* at 1664. And the Supreme Court has made clear that "the principles underlying the canon of interpretation similarly constrain courts" recognizing common-law causes of action. *Id.* Indeed, "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" when "the question is not what Congress has done but instead what courts may do." *Id.*

The Court recently held that even when the underlying substantive rule has extraterritorial reach, the "presumption against extraterritoriality must be applied separately" to the question of whether the private damages remedy extends to injuries suffered abroad. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2108 (2016). The Court held that the private right of action at issue did not reach injuries suffered abroad—even injuries caused by domestic conduct—because "[n]othing in [the statute] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* Likewise, here, the presumption counsels against extending the *Bivens* damages remedy to injuries suffered by aliens abroad. *See Hernandez II*, 885 F.3d at 822-23 (applying presumption against extraterritoriality in declining to extend *Bivens* remedy).

Plaintiffs attempt to argue that the analysis is different for their claim against Michael Fisher, who was then the Border Patrol Chief. They argue that in this claim,

they challenge Fisher's issuance of a general policy, rather than any discrete acts of Agent Diaz. Pl. Br. 66 n.178. Their argument only underscores the additional reasons why this claim fails. The Supreme Court in *Abbasi* held that "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Thus, "[e]ven if the action is confined to the conduct of a particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy." *Id.* Furthermore, "*Bivens* is not designed to hold officers responsible for acts of their subordinates." *Id.* Thus, more hesitation, not less, is warranted with respect to any effort to challenge, through *Bivens*, any government policy.

B. Agent Diaz Is Entitled to Qualified Immunity.

If the Court agrees that a *Bivens* claim is not available in these circumstances, it need not decide whether Agent Diaz is entitled to qualified immunity. If it reaches the question, however, it should affirm the district court's ruling that Agent Diaz is entitled to qualified immunity because in the particular circumstances of this incident, it was not "beyond debate" at the time that Yañez's Fourth Amendment rights were violated. ER15 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)).[9]

[9] That the district court found that the law was not clearly established itself is a reason to hold that Agent Diaz is entitled to qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) (where judges might disagree on a constitutional question, it is unfair to subject individuals to money damages for picking the losing side of the controversy); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (where judges disagree on a constitutional question, qualified immunity is "deserve[d]").

In determining whether an officer is entitled to qualified immunity, courts consider whether a constitutional right was violated, and whether a violation has occurred of a right that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 3098 (quotation marks omitted). In other words, "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (quotation marks omitted). In conducting this analysis, the reasonableness of the use of force must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and allowing for the fact that law enforcement officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

This Court recently observed that it "hear[s] the Supreme Court loud and clear" that clearly established law should not be defined at too high a level of generality. *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) (citing, inter alia, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015)). Thus, in performing the "clearly established" analysis, the Court "must identify precedent as of [June 21, 2011]—the night of the shooting—that put [Agent Diaz] on clear notice that using deadly force in these particular circumstances would be excessive." *Id.* For these purposes, "[g]eneral excessive force principles" do not suffice; rather, plaintiffs must "identify a case where an officer acting under similar circumstances as [Agent

Diaz] was held to have violated the Fourth Amendment." *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)). This is an "exacting standard." *S.B.*, 864 F.3d at 1017.

Plaintiffs make no attempt to identify any such case, and indeed there is no precedent that would clearly establish that as of June 2011, Agent Diaz violated a clearly established constitutional right in the circumstances present in this case. As discussed, Yañez and Murietta had unlawfully entered the United States through a hole in the border fence. When confronted by Agents Diaz and Nelson, Yañez fled back through the hole into Mexico. Murietta was unable to follow Yañez back into Mexico, and after a footchase, Agent Nelson caught up to Murietta and the two began wrestling on the ground. Yañez then reappeared on top of the border fence near the area where Murietta and Agent Nelson were struggling. Agent Diaz caught up to Agent Nelson and Murietta. Agent Diaz and Agent Nelson both testified that Yañez threw rocks and a nail-studded table leg (which was subsequently recovered) at Agent Nelson. Although Murietta denies seeing Yañez throw anything, Agent Diaz was recorded calling for backup and reporting rocks being thrown while Agent Nelson shouted for help in the background. After briefly disappearing once again behind the border fence, Yañez reappeared on top of the fence, where Agent Diaz saw him begin to attempt to throw something in the direction of Agent Nelson. At that point, Agent Diaz unholstered his service weapon and fired at Yañez, killing him.

Plaintiffs concede that Agent Diaz is entitled to qualified immunity if Yañez was indeed "in the act of throwing a rock." Br. 71. They contend only that there remained a triable factual dispute as to whether or not he was *in fact* throwing a rock, and if he was not, they say there was "no valid reason" for Agent Diaz's actions. Br. 72. This argument fails, however, for two related reasons:

First, the critical inquiry is not what Yañez in fact did or did not do, but what Agent Diaz perceived from his vantage point. *See Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (use of force was reasonable even if it was not in fact necessary to protect fellow officer, because officer who fired shots perceived continued risk of harm). Thus, the relevant inquiry is whether, in the particular circumstances present here, Agent Diaz perceived a risk of harm to himself or to Agent Nelson, such that his actions did not violate Yañez's clearly established constitutional rights. The contemporaneous and uncontradicted report of rock-throwing in Agent Diaz's call for backup makes clear that, from the officers' perspective, the rock-throwing and danger were perceived, and that, under the circumstances, his perception was at a minimum entirely reasonable.

Second, there is no material dispute that Agent Diaz observed Yañez appear to begin to throw an object in the direction of Agent Nelson. The district court correctly found the following on the basis of the summary judgment record:

> In this case, Yañez illegally entered the United States through a hole in the primary border fence, retreated back through the hole in an attempt to avoid arrest, and reappeared on top of the border fence. Just before

> Defendant Diaz shot Yañez, *Yañez appeared to attempt to throw* an object at Agent Nelson.

ER15 (emphasis added). The district court's conclusion was based on the testimony of Agents Diaz and Nelson that Yañez appeared to attempt to throw an object at Agent Nelson. *See* ER145 (Undisputed Statement of Fact No. 61) (undisputed statement that Agent Diaz saw Yañez "looking at Agent Nelson on the ground and cocking his right hand back to throw something else"); *see also* ER145-46 (Undisputed Statement of Fact No. 63) (plaintiffs dispute statement about Yañez appearing to prepare to throw another rock but do not provide any contrary evidence). At most, Murietta testified that he did not see Yañez throw any rocks, and that if he *had* thrown any rocks at Agent Nelson, they likely would have hit him (Murietta). ER519. But that testimony does not contradict Agent Diaz's testimony that from his perspective, he perceived that Yañez was preparing to throw something in the direction of Agent Nelson.

Whereas in the cases cited by plaintiffs (Br. 72 n.194), there was a credible basis for doubting the officers' testimony, there is no such basis here: all available evidence supports the agents' testimony. Audio was captured of Agent Diaz contemporaneously calling for backup, prior to the shooting, and reporting that rocks were being thrown. ER813. The nail-studded wooden board that Agents Diaz and testified that Yañez threw—which Murietta denied ever seeing—was recovered. ER822. A toxicology report revealed that methamphetamine was found in Yañez's

system (ER872), and Murietta admitted having consumed several beers (ER510), which supports the agents' testimony of their aggressive and erratic behavior.

The district court therefore did not err in concluding that the record reflected that Agent Diaz perceived that Yañez appeared to be attempting to throw a projectile in Agent Nelson's direction, and that he posed a real risk of harm to the two agents. Plaintiffs do not attempt to identify precedent, as of June 21, 2011, that would put Agent Diaz "on clear notice that using deadly force in these particular circumstances would be excessive." *S.B.*, 864 F.3d at 1015; *see also District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) ("Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that *every reasonable official* would understand that what he is doing is unlawful" (emphasis added) (quotation marks omitted).). As plaintiffs have not met their burden, *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011), the district court's grant of qualified immunity for Agent Diaz should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ADAM L. BRAVERMAN
United States Attorney

MARK B. STERN
s/ Nitin Shah

NITIN SHAH
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5089
nitin.shah@usdoj.gov

April 2018

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), appellees state that the third question presented, pertaining to the availability of a *Bivens* remedy in circumstances involving a shooting at an international border, has been briefed in a case before this Court. *See Rodriguez v. Swartz*, No. 15-16410 (9th Cir.) (argued Oct. 21, 2016).

s/ NITIN SHAH
Nitin Shah

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,181 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ NITIN SHAH
Nitin Shah

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ NITIN SHAH
Nitin Shah

ADDENDUM

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28 U.S.C. § 1350

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 2401

§ 2401. Time for commencing action against United States

. . . .

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2676

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.