

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

NORA ISABEL LAM GALLEGOS
individually and on behalf of the estate of
Guillermo Arevalo Pedraza, deceased, and as
next friend of P.A.L. and M.A.L., minor
children,

Plaintiffs,

v.

UNITED STATES OF AMERICA, JANET
NAPOLITANO, DAVID V. AGUILAR,
ALAN BERSIN, MICHAEL J. FISHER,
MICHAEL C. KOSTELNIK, ROBERT L.
HARRIS, JOHN ESQUIVEL, DANIEL
SCHAEFFER, RAMIRO RODRIGUEZ,
MATTHEW LAMBRECHT, CHRISTOPHER
W. BOATWRIGHT, and DOES 1-3,

Defendants.

Civil Action No. 5:14-CV-00136

JOINT ADVISORY

Pursuant to the Court’s Order of May 15, 2018, Defendants the United States of America, Janet Napolitano, David V. Aguilar, Alan Bersin, Michael J. Fisher, Michael C. Kostelnik, Robert L. Harris, John Esquivel, Daniel Schaefer, and Ramiro Rodriguez (collectively, the “Federal Defendants”), by and through their counsel; Defendant Matthew Lambrecht, by and through his counsel; Defendant Christopher Boatwright, by and through his counsel; and Plaintiffs Nora Isabel Lam Gallegos, P.A.L, and M.A.L., by and through her counsel (collectively, “the Parties”) jointly submit this advisory on the Fifth Circuit’s recent decision in *Hernandez et al. v. Mesa et al.*, 885 F.3d 811 (5th Cir. 2018), and its impact on this litigation. The Parties state the following:

1. This case arises from an incident whereby Defendant Boatwright, a U.S. Border Patrol Agent, shot across the Rio Grande River and into Mexico, killing Plaintiffs' husband and father. Under their amended complaint, Dkt. No. 43, Plaintiffs assert a claim (Claim 1) against Boatwright and the United States arising under the Alien Tort Statute (ATS) for a tort committed in violation of the law of nations (i.e., a violation of the *jus cogens* norm against extrajudicial killing). Plaintiffs' remaining claims (Claims 2-7) are against various defendants for various constitutional torts under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).
2. This Court previously stayed all proceedings in this case pending the U.S. Supreme Court's decision on the petition for *certiorari* review of *Hernandez, et al. v. United States*, 785 F.3d 117 (5th Cir. 2015). *See* Dkt. No. 47, Order Granting Unopposed Motion to Stay Proceedings and Set Consolidated Briefing Schedule. The basis for the previous stay was that *Hernandez*, an *en banc* decision by the United States Court of Appeals for the Fifth Circuit, the controlling jurisdiction, raises legal issues which are very similar to some of the core issues presented by this case. *See id.*; Dkt. No. 46, Unopposed Motion to Stay Proceedings and Set Consolidated Briefing Schedule.
3. Pursuant to the Unopposed Joint Motion, the Parties agreed, and the Court ordered that after *Hernandez* was decided by the Supreme Court, either by denying the petition for *certiorari* or by granting the petition and issuing a decision on the merits, the Parties would adhere to a consolidated briefing schedule for motions to dismiss which were to be filed by the Defendants.
4. The Supreme Court granted the petition in *Hernandez* and issued a decision on the merits. *See Hernandez, et al. v. Mesa, et al.*, No. 15-118, 2017 WL 2722409 (U.S. June 26,

2017). In a *per curiam* opinion, the Supreme Court vacated the Fifth Circuit's *en banc* judgment and remanded *Hernandez* for reconsideration in light of the Supreme Court's recent decision in *Ziglar v Abbasi*, No. 15-1358, 2017 WL 2621317 (U.S. June 19, 2017), in which the Court clarified what constitutes a "special factor counseling hesitation" in recognizing a remedy under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

5. Since the Supreme Court directed the Fifth Circuit to reconsider *Hernandez* in light of intervening judicial authority and *Hernandez* continues to raise legal issues similar to some of the core issues presented by this case, the Parties agreed, and the Court ordered that a continued stay of all proceedings in this case was warranted pending a final decision by the Fifth Circuit on the Supreme Court's remand of *Hernandez*.
6. On remand of *Hernandez*, the Fifth Circuit held that the cross-border shooting at issue there presented a "new context" for a *Bivens* claim. *Hernandez v. Mesa*, 885 F.3d 811, 816–17 (5th Cir. 2018). Applying the "elucidation of the 'special factors' inquiry," set forth by the Supreme Court in *Abbasi*, the Fifth Circuit held that numerous special factors counseled against recognizing a *Bivens* remedy for the Fourth and Fifth Amendment claims presented in *Hernandez* for a cross-border shooting against the officer who fired the shot. *Hernandez*, 885 F.3d at 818-23. The district court's judgment of dismissal was affirmed. *Id.* at 823.
7. The Federal Defendants take the position that the Fifth Circuit's recent decision in *Hernandez* bars the Fourth and Fifth Amendment *Bivens* claims that have been asserted against federal defendants in their individual capacities. The Federal Defendants also take the position that a prior decision in *Hernandez* bars the international law claims asserted

against Agent Boatwright and the United States. In that decision, the Fifth Circuit held that the Alien Tort Statute does not waive the United States' sovereign immunity for an alleged extrajudicial killing. *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014), *reh'g and reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014), *adhered to in relevant part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). It is the Federal Defendants' position that these binding precedents together bar all of the Plaintiffs' claims in this case.

8. Plaintiffs' position is that the Court should continue to keep the stay in place because the plaintiffs in *Hernandez* will be filing a petition for writ of certiorari in mid-June 2018.¹ There is a substantial possibility that the Supreme Court will grant the petition, given its demonstrated interest in the case and the importance of the issues that it raises. Moreover, another fully briefed and argued appeal is currently pending in the Ninth Circuit that also addresses the availability of a *Bivens* remedy in a cross-border shooting context. *Rodriguez v. Swartz*, 15-16410 (9th Cir.). The Ninth Circuit's decision, when issued, may create a circuit split that would provide yet another reason for the Supreme Court to grant review. The *Hernandez* litigation is not yet resolved, so the most appropriate course would be to extend the stay until the *Hernandez* appeal is fully exhausted.
9. Although not directly related to the question of whether to extend the stay, Plaintiffs dispute the Federal Defendants' characterization of the Fifth Circuit's disposition of the ATS claim in *Hernandez*. First, the Court of Appeals' disposition of the sovereign-immunity argument in *Hernandez* does not apply to Plaintiffs' ATS claim

¹ Plaintiffs' counsel here also represent the plaintiffs in *Hernandez*.

against Defendant Boatwright, who is an individual and not a sovereign. *Second*, the Court of Appeals in *Hernandez* also did not resolve the ATS claim against the United States *on the merits*. The government there argued that plaintiffs had waived their ATS claim against the United States by failing to challenge the government's certification that the agent had been acting within the course and scope of his employment. *See Hernandez*, 785 F.3d at 142 (Haynes, J., concurring). The per curiam opinion for the Court summarily held that the ATS claim was properly dismissed, without stating whether its affirmance was based on the merits or on the procedural defect. *Id.* at 119. No such procedural defect exists in this case. The government has not yet presented to this Court a certification that defendant Boatwright was acting within the course and scope of his employment. If and when the government does so, Plaintiffs will challenge that certification.

DATED: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2018, I electronically filed the foregoing **JOINT ADVISORY** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following parties:

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