No. 17-56610

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA DEL SOCORRO QUINTERO PEREZ; BRIANDA ARACELY YANEZ QUINTERO; CAMELIA ITZAYANA YANEZ QUINTERO; J.Y., a minor,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES OFFICE OF BORDER PATROL; JANET A. NAPOLITANO; THOMAS S. WINKOWSKI; DAVID AGUILAR; ALAN BERSIN; KEVIN K. MCALEENAN; MICHAEL FISHER; PAUL BEESON; RODNEY S. SCOTT; CHAD MICHAEL NELSON; DORIAN DIAZ; DOES, 1-50,

Defendants-Appellees

Appeal from the United States District Court
Southern District of California

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

The senseless death in this case resulted from a U.S. Border Patrol policy, the existence and effect of which are undisputed on this appeal. That policy allowed field agents to use lethal force against alleged rock-throwers regardless of whether the agent was in imminent danger of death or serious injury.

The previous Chief Executive rescinded that policy only in the face of intense public criticism.[1] Yesterday (May 16, 2018) the current Chief Executive asserted in a national broadcast that Mexican nationals who cross into this country unlawfully are not human beings entitled to respect, dignity, or the protection of law. He said that "[y]ou wouldn't believe how bad these people are. These aren't people, these are animals…."[2]

A core function of the U.S. judiciary is to apply a check on the conduct of Executive officials, particularly to ensure that domestic

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[1] P.Br.12-13.

[2] Julie Hirschfeld Davis, "Trump Calls Some Unauthorized Immigrants 'Animals' in Rant, New York Times, May 17, 2018.

police do not cause civilian deaths through the use of excessive force.[3] In the circumstances of this case, the U.S. Executive's most extraordinary power—the power to deprive someone of his life—is beyond review by the Mexican judiciary. Defendants ask this Court to conclude that it is also beyond review by the U.S. judiciary—they ask for unreviewable power to take civilian human life.

Plaintiffs ask that a federal court review whether the conduct of a U.S. domestic police officer, standing on U.S. soil and acting in the scope of his employment by the U.S. government, was justified. That review is necessary in order to provide justice and compensation to this family, and to ensure that the lethal conduct of domestic U.S. police officers is subject to the rule of law.

[3] *See, e.g., Cnty of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

ARGUMENT

I. THE U.S. HAS NO SOVEREIGN IMMUNITY TO JUS COGENS CLAIMS LITIGATED AGAINST IT IN ITS OWN COURTS.

A. International Law Prohibits Sovereign Immunity in these Circumstances.

International law prohibits a sovereign from interposing a defense of sovereign immunity to a jus cogens claim litigated against it in its own courts.[4] The Government cannot, and does not, deny this foundational principle.

U.S. domestic law is fully consistent with the nation's international obligation. While the ATS is "in terms only jurisdictional," Congress provided the jurisdiction to enable federal courts to enforce as common law those "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [that originally underlay the ATS]."[5]

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[4] P.Br.37-46.

[5] *Sosa v. Alvarez Machain*, 542 U.S. 692, 725-26 (2004).

These enforceable standards include what are today known as *jus cogens* norms.[6]

The defining characteristic of those norms is that they bind the sovereign *regardless of its consent*. To permit a defense of sovereign immunity where Congress has authorized a tort claim to enforce a sovereign-binding norm would literally be a contradiction in terms. And Congress intended these norms to be "enforceable without further statutory authority" and therefore "to have practical effect the moment [the statute] became law."[7] No further waiver of sovereign immunity is required.

The Executive has likewise repeatedly committed the U.S. to refrain from violating jus cogens norms, including the prohibition on police use of unwarranted lethal force, and to provide effective remedies in our domestic courts notwithstanding that the conduct was taken on behalf of the sovereign.[8] That commitment is universally understood to

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[6] *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

[7] *Sosa*, 542 U.S. at 729, 724.

[8] P.Br.54.

prohibit the invocation of sovereign immunity to a jus cogens claim litigated against the sovereign in its own courts.[9]

The instruments in which the Executive has obligated the U.S. to provide immunity-free remedies for jus cogens violations include, for example: (1) International Covenant on Civil and Political Right[10]; (2) International Convention on the Elimination of All Forms of Racial Discrimination[11]; (3) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[12]; (4) Universal Declaration of Human Rights[13]; and (5) UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

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[9] P.Br.39.

[10] Dec. 19, 1966, ratified by the U.S. June 8, 1992, 999 U.N.T.S. 171.

[11] Dec. 21, 1965, ratified by the U.S. Nov. 20, 1994, 660 U.N.T.S. 195.

[12] Dec. 10, 1984, ratified by the U.S. Nov. 20, 1994, 1465 U.N.T.S. 85.

[13] G.A. Res. 217A (III), U.N. Doc. A/810 at 71, art. 6 (1948).

Violations of International Humanitarian Law.[14] Congress ratified the first three of these.

Courts, both foreign and domestic, have unanimously concluded that a jus cogens violation strips the sovereign of immunity for such claims litigated against it in its own courts.[15] This Court's decision in *Siderman de Blake v. Republic of Argentina*,[16] has provided substantial support for those conclusions. The Court held that "[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture *therefore would not be entitled to the immunity afforded by international law*."[17]

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[14] Adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35, and adopted by the General Assembly by consensus on 16 December 2005, UN Doc.A/RES/60/147.

[15] P.Br.39.

[16] 965 F.2d 699, 715 (9th Cir. 1992).

[17] *Id.* at 718 (emphasis added).

B. The Government Cannot Undermine *Siderman*.

The government points to *Siderman*'s ultimate conclusion that Argentina was nevertheless immune from jus cogens claims litigated against it in U.S. courts.[18] But the Court reached that conclusion only because the Foreign Sovereign Immunities Act ("FSIA") specifically grants immunity to foreign sovereigns for claims litigated against them in our courts.[19] *Congress has not enacted any such statute to provide immunity* against the U.S. for jus cogens claims litigated against it in its own courts.

Other developed nations also provide immunity to sovereigns against jus cogens claims litigated against them in a foreign nation's courts; international law might *require* such immunity.[20] But all developed nations recognize that the sovereign cannot assert immunity to a jus cogens claim litigated against it *in its own courts*.[21] As the U.K. Supreme Court recently held, this comity-based immunity from suit in

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[18] Def.Br.17.

[19] 965 F.2d at 718-19.

[20] P.Br.41-43.

[21] *Id*.

foreign courts makes all the more essential that immunity not be available in the sovereign's own courts:

> "[The UK and its agencies] have no right of their own to claim immunity in English legal proceedings.... On the other hand, they would be protected by state immunity in any other jurisdiction, with the result that unless answerable here they would be in the unique position of being immune everywhere in the world."[22]

The government's analysis of *Saleh v. Bush*,[23] suffers from the same analytical defect as its analysis of *Siderman*.[24] *Saleh* held that U.S. officials are immune from jus cogens claims in U.S. courts because Congress specifically and expressly granted them that immunity in the Westfall Act.[25] Again, the government cannot cite any similar statute that would purport to grant immunity to the U.S. against such claims.

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[22] *Belhaj et al. v. Straw et al.*, [2017] UKSC 3 at ¶ 262 (Lord Sumpton, with whom Lord Hughes agrees).

[23] 848 F.3d 880 (9th Cir. 2017).

[24] Def.Br.17.

[25] 848 F.3d at 893.

C. The Government Cannot Undermine *The Charming Betsy*.

The absence of an immunity-granting statute drives the government to posit the existence of a purported substantive rule that the U.S. enjoys sovereign immunity unless federal legislation affirmatively waives it.[26] No such substantive rule exists.

Instead, the Supreme Court has repeatedly held that the rule posited by the government is not a substantive prohibition, but merely a "canon of [statutory] construction."[27] The Court has emphasized:

> "The sovereign immunity canon is just that – a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction. Indeed, the cases on which the Government relies all used other tools of construction in tandem with the sovereign immunity canon."[28]

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[26] Def.Br.13.

[27] *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008).

[28] *Richlin*, 553 U.S. at 589.

When the canon conflicts with "other tools of construction," courts will give the statute a neutral, most-reasonable reading.[29]

Plaintiffs have demonstrated that the *Charming Betsy* canon requires that the ATS and the law developed under it be construed to give effect to the international obligations to which both the Executive and the Congress have bound the nation.[30] Indeed, the *Charming Betsy* canon is especially trenchant here because Congress enacted the ATS specifically to "assure the world that the new Republic would observe the law of nations."[31]

The government points to a statement in *United States v. Corey*,[32] that "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party."[33] That statement—in a

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[29] P.Br.52 & n.144.

[30] P.Br.51-52.

[31] *Sosa v. Alvarez Machain*, 542 U.S. 692, 723 n. 15 (2004).

[32] 232 F.3d 1166 (9th Cir. 2000).

[33] *Id.* at 1179 n.9; *See* Def.Br.20.

footnote—was pure dicta, the Court having found that there was no conflict between the statute and international law.[34]

And the *Corey* dictum was factually incorrect: the Supreme Court had routinely applied the *Charming Betsy* canon against the United States and its agencies.[35] Likewise, this Court has regularly applied the *Charming Betsy* canon against the United States.[36] So have other

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[34] 232 F.3d at 1179.

[35] *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (applying *Charming Betsy* canon against the NLRB); *MacLeod v. United States,* 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong v. United States*, 5 S. Ct. 255, 261, 264 (1884) ("the presumption must be indulged" that Congress did not intend to violate international law; the Court "[a]ssum[es], always, that there was a [Congressional] purpose, in good faith, to abide by the stipulations of the treaty…."). The Supreme Court did so again after the *Corey* decision. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (construing against the United States the Congressional authorization for use of force in Afghanistan, because the U.S. interpretation conflicts with "clearly established principle[s] of the law of war").

[36] *See, e.g.*, *Alvarez-Machain v. U.S.*, 331 F.3d 604, 629 (9th Cir. 2003) (applying canon against the DEA), *rev'd on other grounds sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *and vacated*, 374 F.3d 1384 (9th Cir. 2004); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (*Charming Betsy* canon confirms Court's construal of statute against United States); *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000) (same), *vacated on other grounds sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001).

Courts of Appeals.[37] None of these authorities have endorsed *Corey*'s dictum that the *Executive* is presumed to have concluded that violating international law in a particular circumstance "serves the interests" of the United States.[38] They all instead apply a presumption that *Congress* never intended to violate international law in the first instance.

The government suggests that the *Charming Betsy* canon is inapplicable because the international instruments that evince the U.S.'s commitment to forgo asserting sovereign immunity are not self-executing.[39] That the instruments are not self-executing is irrelevant. The *Charming Betsy* canon provides that courts will construe statutes so as not to conflict with "international law *or with an international agreement of the United States*."[40] Accordingly, this Court holds that the canon requires that statutes be construed to avoid conflict with even

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[37] *See, e.g.*, *Union Pacific R. Co. v. U.S. Dept. of Homeland Sec.*, 738 F.3d 885 (8th Cir. 2013); *U.S. v. Ali*, 718 F.3d 929 (D.C. Cir. 2013); *Allegheny Ludlum Corp. v. U.S.*, 367 F.3d 1339 (Fed. Cir. 2004).

[38] *Corey*, 232 F.3d at 1179 n.9.

[39] Def.Br.19.

[40] Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) (emphasis added).

non-self-executing treaties.[41] And, of course, the Court must construe the ATS consistently with international law, regardless of the juridical status of the international Conventions, Principles, etc. that also reveal the U.S.'s international commitment.

That leaves the government to rely on *Tobar v. United States*,[42] which involved routine claims of loss from the U.S. Coast Guard's detaining a vessel and crew suspected of smuggling drugs.[43] The case presented no jus cogens claims and thus did not trigger the international principle prohibiting the sovereign from asserting immunity for such claims against it in its own courts. That is why *Tobar* did not cite the *Charming Betsy* doctrine, and neither did any of the cases on which *Tobar* relied.[44]

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[41] *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001).

[42] 639 F.3d 1191 (9th Cir. 2011). *See* Def.Br.13, 19.

[43] *Id.* at 1194 (claims for "unlawful imprisonment, humiliation, pain and suffering, destruction of personal property, loss of their catch, loss of the use of the vessel, and public ridicule").

[44] *See id.* at 1196.

D. The Government's New Arguments Are Meritless.

Finally, the government tries two new arguments—that States are not in the category of entities that can be defendants in ATS claims, and that the norm against extrajudicial killing is not among those that the ATS authorizes federal courts to enforce.[45]

The government was wise not to have pressed the arguments below, because neither survives scrutiny. The government asserts that a sovereign is not a proper defendant to an ATS claim. That contention is precluded by this Court's holding in *Siderman* that, but for the specific immunity afforded by the FSIA, the plaintiffs would have had a valid claim against Argentina.[46]

Moreover, the Supreme Court has ruled that the text of the ATS "does not distinguish among classes of defendants."[47] Chief Justice Marshall's dictum in *Cohens v. Virginia*,[48]—that "the [J]udiciary [A]ct

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[45] Def.Br.14-15.

[46] *See Siderman*, 965 F.2d at 718.

[47] *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

[48] 19 U.S. (6 Wheat.) 264, 411-12 (1821)

does not authorize … suits" against the United States—is not to the contrary. That case involved solely domestic law, not international law, and in any event the Court was construing "the 25th section of the judiciary act,"[49] not the 9th section that contains the ATS. The government's broader contention is that the prevailing rule in 1789 was that the U.S. was presumed to be immune from suit. Not so. In 1793 Chief Justice Jay considered whether the United States can "be compelled to do justice, and be sued by individual citizens;" consulting only domestic law, he found that the authorities conflicted and so concluded, "I leave it a question."[50] International law at that time had no such conflicts, instead clearly imposing responsibility on a sovereign for the torts committed by its agents: a sovereign who "refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in

[49] *Id*. at 329, 379, 424.

[50] *Chisholm v. Georgia,* 2 U.S (2 Dall.) 419, 478 (1793) (Jay, C.J.).

some measure an accomplice in the injury, and becomes responsible for it."[51]

Regardless, Congress intended Courts to apply under the ATS the international-law principles of the "present-day," not of 1789.[52] "The principal persons [with obligations] under international law are states."[53] And the Supreme Court has repeatedly noted that States are in the category of persons who can be defendants in an ATS action. In *Sosa*, for example, the majority assumed that the ATS applies to U.S. state and federal officials,[54] and Justice Scalia's concurrence gave specific examples of the ATS applying to Texas.[55] The Court took for granted that the ATS authorizes tort claims against governments and

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[51] E. de Vattel, 1 The Law of Nations, bk. II, § 77, at 145 (1760).

[52] *See, e.g.*, *Sosa*, 542 U.S. at 725; *see also United States v. The La Jeune Eugenie,* 26 F.Cas. 832, 846 (No. 15,551) (C.C.D.Mass. 1822) (Story, J.) ("What, therefore, the law of nations is ... may be considered as modified by practice, or ascertained by the treaties of nations at different periods.").

[53] Restatement (Third) of Foreign Relations Law of the United States, Part II, Intro. Note (1987).

[54] 542 U.S. at 749-50.

[55] *id.* at 749-50 (Scalia, J., concurring).

their officials, and questioned only the extent to which the statute reaches private actors.[56] This Term in *Jesner v. Arab Bank, PLC*,[57] the Court reiterated that the principal parties that possess international obligations are States.[58]

The government's other new contention—that the "law of nations" actionable under the ATS is limited to the three paradigmatic international tort claims that existed in 1789—is readily rejected. The Supreme Court held in *Sosa*, and reiterated in *Jesner*, "that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the 'historical paradigms familiar when § 1350 was enacted.'"[59] There

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[56] 542 U.S. at 732 n. 20.

[57] 138 S. Ct. 1386 (2018).

[58] *See, e.g., id.* at 1397 ("[i]n the 18th century, international law primarily governed relationships between and among nation-states"); *id.* at 1400 ("international law now imposes duties on individuals as well as nation-states").

[59] *Jesner,* 138 S. Ct. at 1398 (quoting *Sosa*, 542 U.S. at 732).

simply is no doubt that the prohibition against extrajudicial killing is a jus cogens norm properly enforced pursuant to the ATS.[60]

We note, moreover, that extrajudicial killing is a violation that, by definition, can be committed *only* by a State or its agents. And, as noted above, the FSIA generally provides immunity to foreign sovereigns to claims against them litigated in our courts. But Congress made an exception, and overrode the international law of comity, to permit a claim against foreign States *in our courts* for extrajudicial killing in certain circumstances.[61] The notion that a State is not in the category of potential defendants in an ATS action is a non-starter.

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[60] *See, e.g.*, *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1091 (9th Cir. 2006) (en banc); *In re Estate of Ferdinand Marcos, Human Rights Litig.,* 25 F.3d 1467, 1475 (9th Cir. 1994); *Yousuf v. Samantar,* 699 F.3d 763, 778 (4th Cir. 2012); *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009); *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1157-1158 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Repbulic*, 726 F.2d 774, 791 n. 20 (D.C.Cir. 1984) (Edwards, J., concurring).

[61] 28 U.S.C. § 1605A(c).

In the *Belhaj* case, the United Kingdom's agencies faced jus cogens claims arising from the unlawful rendition and torture of non-UK citizens. British courts gave effect to the international-law principle that the Kingdom and its agencies have no sovereign immunity to such claims litigated against them in their own courts.[62]

The denouement of the *Belhaj* case illustrates the virtue of a nation's not succumbing to the temptation to refuse to live up to, in the heat of a particular case, obligations that the nation undertook in more calm and deliberative times. The *Belhaj* case was recently resolved, and the UK's Attorney General told the House of Commons:

> "There remains a considerable international threat to the UK and our allies and it is important that government and the security and intelligence agencies are able to respond properly so we can keep our country safe. … But it is also important that we should act in line with our values and in accordance with the rule of law. That means that when we get things wrong it is right and just that we should acknowledge it,

[62] P.Br.42-43.

> compensate those affected and learn lessons. I believe this is such a case."[63]

Sovereign immunity originated in England, a natural adjunct to the proposition that "the King can do no wrong." In this nation, we chose not to do the King Thing. We surely can join our modern cousins in adhering to the rule of law, compensating the victims of our egregious conduct, and learning (again) the lesson that it is precisely when perceived threats seem pressing that it is most urgent that we adhere to our values. None of those things can happen if the courts cede to the Executive the ability to avoid judicial review of even the most extraordinary State power—to take civilian human life—in violation of the most fundamental principles of law.

II. THE GOVERNMENT FAILS TO UNDERMINE EQUITABLE TOLLING.

The government offers no basis to withhold equitable tolling of Plaintiffs' FTCA claims. The government does not dispute that:

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[63] Ian Cobain, "Britain apologises for 'appalling treatment' of Abdel Hakim Belhaj," The Guardian, May 10, 2018, https://www.theguardian.com/world/2018/may/10/britain-apologises-for-appalling-treatment-of-abdel-hakim-belhaj.

- the unprecedented location of Mr. Yañez's death—his deceased body straddling across the international border—created a genuine prospect of FTCA dismissal under the foreign-country exception[64];
- where an FTCA claim was earlier dismissed, the Ninth Circuit's judgment bar law applied to preclude recovery under *Bivens*—even in the same action[65];
- the government urged that the judgment bar should preclude *Bivens* claims in another border shooting case where the FTCA's foreign country exception applied[66];
- Plaintiffs' *Bivens* claims could survive on the merits notwithstanding any finding of foreign injury[67];
- until the Supreme Court in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), rejected the government's position and

[64] P.Br.58; 28 U.S.C. § 2680(k).

[65] P.Br.61 (citing *Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1150 (E.D. Cal. 2010)).

[66] P.Br.61 (citing *Hernandez et al. v. Mesa et al.*, No. 15-118, Br. for United States in Opposition, at 21-22 (Feb. 2016)).

[67] P.Br.60.

> overturned the Ninth Circuit's judgment bar law, plaintiffs in this circuit and under these circumstances were deterred from bringing FTCA claims and *Bivens* claims "in a single lawsuit (or as separate actions)."[68]

The Government nonetheless faults Plaintiffs for "choosing" not to file FTCA claims until one month after *Simmons*.[69] But asserting the FTCA claims before *Simmons* would have endangered *all* of plaintiffs' other claims. The law of equitable tolling does not demand that a plaintiff take such reckless steps; the test instead requires "reasonable diligence."[70] By arguing that Plaintiffs were required to act *unreasonably*, it is the Government, not Plaintiffs, that "stand[s] the doctrine of equitable tolling on its head."[71]

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[68] P.Br.61 (quoting Avery et. al., Police Misconduct: Law and Litigation § 5:2 *Bivens* cause of action (Nov. 2015)).

[69] Def.Br.22.

[70] *Fue v. Biter*, 842 F.3d 650, 654 (9th Cir. 2016).

[71] Def.Br.22.

Nor were Plaintiffs required to find equitable-tolling precedent on all fours with this case.[72] The "[g]rounds for equitable tolling … are highly fact-dependent," and "must be made on a case-by-case basis."[73] Equitable tolling applies here because Plaintiffs were "pursuing [their] rights diligently" and "extraordinary circumstance stood in [their] way and prevented timely filing."[74]

The Government argues that Plaintiffs should have filed earlier and tried to overturn the adverse law.[75] But that misses the point. Plaintiffs could not test the law without risking the barring of their *Bivens* claims. So long as the law remained, it was unreasonable to file FTCA claims, lest Plaintiffs risk the same fate as plaintiffs in

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[72] Def.Br.23-34 (attempting to distinguish the circumstances in *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (en banc) and *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008)).

[73] *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) (internal citations and quotations omitted); *see also Holland v. Florida*, 560 U.S. 631, 650 (2010).

[74] *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016).

[75] Def.Br.25.

Winnemem Wintu Tribe and have their right to recovery under *Bivens* foreclosed.

The Government cites to *Menominee* to argue that the risk in litigating a claim does not constitute an extraordinary circumstance.[76] But *Menominee* referred to the risk attendant to litigating the claim itself, akin to Plaintiffs arguing that an FTCA claim involves a risk of losing the FTCA claim. The critical fact here is that filing an FTCA claim would have risked prejudicing Plaintiffs' *other* claims.

Diligence required Plaintiffs to forgo FTCA claims, and the district court failed to give effect to this extraordinary and distinguishing circumstance.

III. *BIVENS* PROVIDES A REMEDY TO PLAINTIFFS.

Three propositions in *Ziglar v. Abbasi*,[77] are dispositive on the *Bivens* issue:

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[76] Def.Br.14-15.

[77] 137 S. Ct. 1843 (2017).

- "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."[78]
- "[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.' ... This 'danger of abuse' is even more heightened given 'the difficulty of defining' the 'security interest' in domestic cases."[79]
- It was "of central importance" that the plaintiffs in *Abassi* could have challenged their conditions of confinement by means of a claim for injunctive relief or for habeas corpus relief.[80]

Add to these dispositive aspects the fact that from 1971 through 2016 Border Patrol agents were defendants in 242 *Bivens* cases. Yet

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[78] *Id*. at 1856-57.

[79] *Id*. at 1862 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 523 (1985)).

[80] *Id*. at 1862-63.

never in that time did the Executive claim that national security weighed against allowing a *Bivens* action, and never did Congress so much as hint that courts should not provide that remedy.[81] Congress's "failure to disturb" judicial recognition of *Bivens* claims in these circumstances "provide[s] some indication that 'Congress at least acquiesces in, and apparently affirms, that [precedent].'"[82]

Each of these factors, standing alone, is sufficient ground for this Court to continue to recognize *Bivens* claims for police use of excessive, lethal force. The government has undermined none of them.

A. No National Security Concerns Preclude a Remedy.

The Government proposes that this Court adopt a sweeping, categorical new that there can be no *Bivens* claims "by aliens injured at an international border."[83] So, no claims by non-U.S. citizens standing on U.S. soil who are tortured, raped, murdered, or merely unduly harassed by Border Patrol agents at the border.

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[81] P.Br.64.

[82] *Monessen Southwestern R. Co. v. Morgan,* 486 U.S. 330, 338 (1988) (quoting *Cannon v. University of Chicago,* 441 U.S. 677, 703 (1979)).

[83] Def.Br.31.

The Government supports its proposal by invoking unspecified, undocumented "national security" concerns.[84] But if the Government were serious about this proposal it could not possibly limit it to non-U.S. citizens. If "national security" really required the overturning of 45 years of *Bivens* case law, that concern would be equally applicable to such claims by U.S. citizens. Any real national security concern would be entirely indifferent to the nationality of the person who poses the threat and to her precise location in relation to the international boundary. The Government's invocation of "national security" is self-evidently exactly the kind of "talismanic" conjuring about which *Abassi* warned.

The government ultimately retreats to the specific facts of this case, emphasizing that Mr. Yanez was atop the primary fence, thus allegedly "rendering the agents unable to pursue him further."[85] Police

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[84] *Id.*

[85] Def.Br.34. The Government also suggests that Plaintiffs are trying to hold Chief Fisher vicariously liable for Agent Diaz's conduct. Not true. Plaintiffs adduced a mountain of evidence that Chief Fisher is liable for his own conduct in maintaining and applying the unlawful Rocking Policy. P.Br.66n.178.

officers across the nation often find themselves unable to pursue a suspect further. A jury may certainly consider that circumstance in determining whether the agent's conduct was justified, subject to the caveat that an officer may not use lethal force simply to prevent a suspect from fleeing beyond the officer's reach.[86] But the government is silent as to how these facts somehow implicate the nation's national security or foreign policy interests and thereby render a *Bivens* claim altogether unavailable.

B. No Foreign Relations Concerns Preclude a Remedy.

The government's "foreign affairs" argument fares no better. Agent Diaz and Chief Fisher acted entirely within United States territory, so they are "for all practical purposes, answerable to no other sovereign for their acts."[87] Leaving a Mexican national without any redress for an unlawful killing by U.S. officials acting on U.S. soil would threaten to *harm* relations with Mexico. The Government of Mexico has made quite plain that "[w]hen agents of the United States government

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[86] *Tennessee v. Garner*, 471 U.S. 1 (1985).

[87] *Boumediene v. Bush,* 553 U.S. 723, 770 (2008).

violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed...."[88]

The Court in *Arizona v. United States*,[89] confirmed that protecting foreign nationals from mistreatment *promotes*, rather than interferes with, the U.S. national interest. The "mistreatment of aliens in the United States" could "lead to harmful, reciprocal treatment of American citizens abroad," and "'[o]ne of the most important and delicate of all international relationships … has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'"[90]

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[88] Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, in *Hernandez v. Mesa*, No. 15-118 (U.S. S. Ct.), filed December 9, 2016, at p. 3.

[89] 567 U.S. 387, 394-95 (2012).

[90] *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

C. Congress Did Not Intend to Withhold a Remedy.

The government next asserts that Congress has manifested an intent to withhold a remedy when federal officials injure a person abroad.[91] *First*, the jury here may reasonably conclude that Mr. Yañez was injured and died in the United States, not abroad.

Second, even if the jury concludes that Mr. Yañez was injured and died abroad, Congress in fact has not revealed any intent to deny a remedy. The government notes that Congress withheld an FTCA claim for injuries occurring abroad.[92] But the FTCA's "foreign country" exception "codified Congress's 'unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.'"[93] Significantly, however, Congress did *not* preclude a *Bivens* claim when

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[91] Def.Br.35-36.

[92] Def.Br.35.

[93] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)).

the injury occurs abroad[94]; under *Bivens*, U.S. substantive law (the Constitution) applies.

The government cites the Foreign Claims Act, 10 U.S.C. § 2734(a), noting that Congress has not enacted a claims procedure for victims of Border Patrol violence similar to the statutory scheme for victims of overseas military activities.[95] But that proves nothing. In other statutes Congress has signaled an awareness that damages actions *are* available to foreign nationals injured abroad by federal officers. In section 1004(a) of the Detainee Treatment Act (DTA),[96] for example, Congress conferred immunity on federal officers from civil liability for certain conduct during interrogations of non-citizen terrorism suspects. And Congress removed federal jurisdiction over any non-habeas claim against the U.S. or its agents by detainees at Guantanamo Bay.[97] Neither of these provisions was necessary unless Congress understood that otherwise a

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[94] *See* 28 U.S.C. § 2679(b)(2)(a) (FTCA and its exclusions do "not extend or apply to a civil action . . . which is brought for the violation of the Constitution").

[95] Def.Br.35.

[96] Pub. L. No. 109-148, 119 Stat. 2680, 2740 (2005).

[97] *Id*. § 1005(e)(1), 119 Stat. 2742.

Bivens remedy was available. And Congress did not broadly prohibit *Bivens* claims by any non-citizen injured abroad, but confined the limitation to the specific circumstances in the statute.

The government erroneously asserts that in the Torture Victim Protection Act of 1991 (TVPA)[98] Congress withheld a claim "for aliens injured abroad by government officials."[99] In fact, however, the TVPA expressly excludes *any* claim against a U.S. official, regardless of where it arises,[100] and the statute *provides* a claim for both citizens and non-citizens injured by proper defendants abroad.[101]

The government next cites *Kiobel* for the proposition that the "presumption against extraterritoriality" would counsel against a *Bivens* claim if the jury determines that Mr. Yañez was killed abroad.[102] But that presumption applies where the *conduct* occurs abroad, not

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[98] 28 U.S.C. § 1350 note.

[99] Def.Br.36.

[100] 28 U.S.C. § 1350 note.

[101] *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)(Kennedy, J., concurring).

[102] Def.Br.36-37.

where, as here, all the conduct occurs in the U.S.[103] Moreover, *Kiobel* noted that the purpose of that presumption is "'to protect against unintended clashes between our laws and those of other nations which could result in international discord.'"[104] Here, it is the *failure* to recognize an ordinary *Bivens* action that would create international discord.

Lastly, the Government argues that Congress has limited constitutional claims against *state* officials to "citizen[s] of the United States or other person[s] within the jurisdiction thereof."[105] The Government does not, however, point to any indication that the term "persons within the jurisdiction thereof" refers to persons within the U.S.'s *physical territory* rather than within the U.S.'s *power*.

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[103] *See Kiobel,* 133 S. Ct. at 1664 (considering "whether a claim may reach conduct occurring in the territory of a foreign sovereign").

[104] *Id*. (quoting *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991)).

[105] Def.Br.36 (quoting 42 U.S.C. § 1983).

IV. THE GOVERNMENT ADMITS THAT THE DISTRICT COURT PREMISED ITS QUALIFIED IMMUNITY HOLDING ON A DISPUTED ISSUE OF FACT.

The district court erred by endorsing Agent Diaz's self-serving version of the facts as the basis for granting qualified immunity. The district court was required to examine "all the evidence in the record" and resolve all factual disputes "in plaintiff's favor."[106] The linchpin of the district court's qualified-immunity ruling was the factual finding—made against Plaintiffs on Defendants' motion for summary judgment—that at the moment of the shooting, "Yañez appeared to attempt to throw an object at Agent Nelson."[107]

The district court's finding, contrary to Defendants' assertion, was *not* "based on the testimony" of *both* "Agents Diaz and Nelson."[108] Nelson never even saw Mr. Yañez at the time of the shooting—he

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[106] *Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998, 1006 (9th Cir. 2017).

[107] E.R.0015; *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (before deciding qualified immunity "courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions.").

[108] Def.Br.42.

instead was "focused on Murietta."[109] The *only* evidence supporting the district court's finding is Diaz's own testimony that Mr. Yañez was "looking at Agent Nelson on the ground and cocking his right hand back to throw something else."[110] The district court's decision rests entirely on the self-serving account of a police officer, which, given the contradicting evidence in the record, cannot be accepted as true.[111]

First, Diaz's testimony is contradicted by Murietta, who testified that he saw Mr. Yañez reappear above the fence and Diaz immediately shoot him.[112] Murietta was "in shock" to see the shooting and his "friend Jose f[a]ll" back into Mexico.[113] Not "at any point" did Murietta

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[109] E.R.0763.

[110] Def.Br.42.

[111] *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014) ("[I]n the deadly force context, we cannot simply accept what may be a self-serving account by the police officer."); *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc) ("summary judgment should be granted sparingly in excessive force cases").

[112] E.R.0513.

[113] E.R.0506.

"see Mr. Yañez with a rock in his hand" or "see Mr. Yañez throw anything."[114]

Second, Diaz testified he never saw *anything* in Mr. Yañez's hand, which was in a fist.[115] He also testified that, "I couldn't see [Mr. Yañez's] hand," as Mr. Yañez's "head [was] in the way because I'm to his left."[116]

Third, Diaz testified that Mr. Yañez "looked at me as he was surprised" and "[h]e looked at me, and I took the shot."[117] That Mr. Yañez was looking at Diaz at the time of the shooting—instead of throwing something at Nelson—is also corroborated circumstantially. Diaz was positioned to the west of Nelson and Mr. Yañez.[118] If Mr. Yañez were looking at Nelson, then Diaz's bullet would have struck Mr. Yañez's left side of the head and traveled to the right. Yet the bullet struck Mr. Yañez's face—above the eye—and traveled from front to

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[114] E.R.0519.

[115] E.R.0742.

[116] E.R.741-72.

[117] E.R.0733-34.

[118] E.R.0437; E.R.0450-54; E.R.0390.

back, indicating Mr. Yañez was looking directly at Diaz, not Nelson, when he was shot.[119]

Fourth, Defendants rely on Diaz's testimony that Diaz unholstered his gun in response to perceiving Mr. Yañez's throwing motion.[120] But under this version of the facts, Diaz would need to identify the "threat," reach for and draw his holstered weapon from a security level holster, aim the weapon, fire it, and accurately hit Mr. Yañez in head some 20 feet away—all before Mr. Yañez could complete this alleged threatening throwing motion. Plaintiffs' expert explains that this testimony calls into doubt Diaz's credibility,[121] and a jury can reasonably conclude the same.[122] Moreover, Murietta testified that Diaz had his gun drawn and aimed at the top of the fence for about one minute.[123] A reasonable jury can therefore find that Diaz stood ready to shoot Mr. Yañez simply for popping his head over the fence.

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[119] E.R.0390.

[120] Def.Br.40.

[121] E.R.0391.

[122] *Lopez*, 871 F.3d at 1007.

[123] E.R.0517-19.

Defendants argue that Diaz could have reasonably perceived a threat based on Mr. Yañez *previously* throwing objects—namely one or two rocks and a table leg.[124] To the extent the district court relied on this fact, it was error too, given the existence of contradicting evidence.

First, the evidence suggests that Diaz *never* perceived Mr. Yañez throwing a rock:

- Murietta testified that, instead of throwing rocks, Mr. Yañez was threatening to use his cell phone to record the agents' beating of Murietta.[125] Murietta even saw the cellphone in Mr. Yañez's hand.[126]
- Nelson and Murietta agree that Nelson happened to have Murietta in a hold that would have shielded Nelson from any rock thrown from the south; any rocks would have hit

[124] Def.Br.41.

[125] E.R.0518.

[126] E.R.0518.

Murietta, not Nelson.[127] Why would Mr. Yañez want to hit his friend with any rocks?

- While agent Diaz said rocks were previously thrown, he admits he was a "long distance" away and was unable to determine whether he thought he saw one or two rocks thrown.[128]
- Nelson was never hit with a rock and never saw any rock land.[129]
- Before the shooting, Diaz radioed for backup and video surveillance while running to assist Nelson with Murietta.[130]

Diaz *had the opportunity* to report the "deadly force" he

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[127] E.R.0480-81; E.R.0519.

[128] E.R.0440-43.

[129] E.R.0480-81.

[130] E.R.0431.

purportedly saw at that time, but, tellingly, *never once mentioned anything about rocks*.[131]

Second, the agents' "perception" of Mr. Yañez throwing a table leg is also highly suspect:

- Nelson was uninjured from this table leg, which he implausibly says, "glanced off [his] hat."[132]
- Defendants are unable to identify any DNA, blood, or any other objective evidence that could connect Mr. Yañez to this table leg.

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[131] Defendants repeatedly contend that Diaz reported rock throwing *before* the shooting occurred. Def.Br.40-42. Defendants never made this assertion before the district court and for good reason: it is pure fiction. Defendants' basis for their false assertion comes not from any testimony but from a poorly written page in the Office of Inspector General report. E.R.0813. The report first references a transmission in which Diaz merely requested assistance at Stewart's Bridge. It then references another transmission in which Diaz requested back up and reported rock throwing—*without making any reference as to when the transmission occurred*. Counsel are intimately familiar with that latter transmission, which was produced by Defendants. Had Defendants made the same factual assertion in the district court that they now make for the first time on appeal, Plaintiffs would have easily rebutted it by showing the second transmission, by its terms, is an obvious attempt by Diaz to justify his use of deadly force *after* the shooting actually happened.

[132] E.R.0484-85; E.R.0435.

- Murietta said he never saw the table leg, let alone Mr. Yañez throwing one while hanging from the top of the border wall.[133]
- Defendants attempt to discredit Murietta by pointing out that the table leg "was recovered."[134] Defendants fail to acknowledge that this leg was recovered *nowhere near where Diaz purportedly perceived it being thrown—at the site of the scuffle*. Diaz accounts for this discrepancy by testifying to having *moved the "weapon" that allegedly justified his use of deadly force*. A jury can discredit this testimony[135] and find instead that the table leg was merely part of the rubble that littered the general vicinity.[136] The jury can also reasonably

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[133] E.R.0508.

[134] Def.Br.42.

[135] Diaz's purported justification for moving this critical piece of evidence—to protect arriving officers from getting hurt—is patently unbelievable. Diaz further fails to explain how moving the leg north—the direction from where his back up would be approaching—would actually allay his purported safety concern.

[136] E.R.0757.

> conclude, as did Plaintiffs' expert,[137] that Diaz's manipulation of the crime scene discredits this "table leg" story entirely.

Based on this evidence, a jury may reasonably conclude that Diaz never perceived Mr. Yañez throwing any object or otherwise presenting a danger to Nelson when Diaz fired his weapon. Diaz never believed Mr. Yañez was armed[138] or planned to jump over the border wall.[139] Diaz also believed Nelson's repeated requests for help were to secure the arrest of Murrieta, not to neutralize any threat from Mr. Yañez.[140] Despite this, Diaz thought it justified to go on the offensive. With his gun drawn, he moved closer to the fence and west, so he could "surprise" a suspected fence climber.[141] A reasonable jury can find that when Diaz, without warning, shot and killed Mr. Yañez, he did so simply because Mr. Yañez showed his face over the fence. The district court

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[137] E.R.0391.

[138] E.R.0423; E.R.0509-10.

[139] E.R.0449.

[140] E.R.0733

[141] E.R.0437; E.R.0450-54; E.R.0390.

erred in accepting Defendants' contested version of the events as the basis for its qualified immunity ruling.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Dated: May 17, 2018

Respectfully Submitted,

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9th Circuit Case Number(s) 17-56610

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