No. 15-16410

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELI RODRIGUEZ, individually and as
the surviving mother and personal representative of J.A.,

Plaintiff-Appellee,

v.

LONNIE SWARTZ, Agent of the U.S. Border Patrol,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

AMICUS CURIAE BRIEF OF THE UNITED STATES IN SUPPORT OF REVERSAL

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INTRODUCTION

This case arises from a terrible tragedy—the shooting of a sixteen-year-old Mexican citizen by U.S. Border Patrol Agent Lonnie Swartz. The United States is prosecuting Swartz for murder and believes that his conduct was not merely wrong but also criminal.

The issue in this case is not the rightness of Swartz's actions. The issue, instead, is whether the complaint states a civil nonstatutory claim for damages under the Fourth Amendment to the U.S. Constitution. The answer to that question is no. The Fourth Amendment does not extend extraterritorially to aliens without significant voluntary connections to the United States. *See United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 267 (1990). The district court erred in reaching a contrary conclusion based on *Boumediene* v. *Bush*, 553 U.S. 723 (2008). *Boumediene* concerned the reach of the Suspension Clause in the unique setting of a U.S. military installation at Guantanamo Bay, over which the United States has exercised "complete and total control," *Boumediene*, 553 U.S. at 771, for over a century. The Supreme Court did not overturn its precedent or authorize a case-specific "functional approach" to the application of the

Fourth Amendment under which sovereign Mexican territory should be treated as if it were the United States, which would cast a cloud of legal uncertainty over every action taken by the U.S. government abroad.

Even apart from these considerations, moreover, the Court should be reluctant to create a *Bivens* cause of action in these sensitive circumstances because special factors counsel hesitation before doing so. If this Court were interpreting a statute that expressly created a cause of action, it would presume that the statute did not apply extraterritorially. That presumption should apply with at least equal force when the Court considers whether to recognize a nonstatutory constitutional cause of action in the first instance. When Congress created a statutory tort remedy against the United States in the Federal Tort Claims Act, it avoided the concerns that would be generated by applying the FTCA abroad by precluding liability for tort claims involving injuries occurring in a foreign country. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004). A court should be hesitant to create a constitutional tort with extraterritorial scope that implicates the problems that Congress avoided when it legislated in this area.

The concerns arising from applying the Fourth Amendment to sovereign Mexican territory in these circumstances are evident. Border control policies implicate core issues of national security and foreign affairs, as well as relations with the government of Mexico. Absent action by Congress to create a damages action in this sensitive field, it is for the Executive Branch to determine an appropriate course of action after considering options that may include criminal prosecution, as in this case, or extradition to a foreign country.

STATEMENT

I. The Alleged Facts

The complaint alleges that U.S. Border Patrol Agent Lonnie Swartz on October 10, 2012, shot and killed a sixteen-year-old Mexican citizen, who has been identified in these proceedings only by his initials, J.A. ER 53-54. At approximately 11:30 pm on that day, J.A. was walking by himself on a street in Nogales, Mexico, that runs parallel to the border fence dividing that country from the United States. ER 53. Swartz, standing in the United States atop a cliff that rises twenty-five feet above the street level where J.A. was walking, fired between fourteen and thirty gun shots at J.A. through that fence. ER 53-54.

J.A. was shot approximately ten times; virtually all the bullets entered through his back. ER 54. The complaint also alleges that J.A. was not throwing rocks at, or otherwise threatening, the agent. *Id.*

At the time of the shooting, J.A. was a resident of Nogales, Mexico. ER 55. Two of his grandparents were at that time lawful permanent residents of the United States residing in Arizona. (They have since become U.S. citizens.) *Id.* The complaint does not allege that J.A. was ever in the United States.

II. Proceedings Below

1. Plaintiff is J.A.'s mother. ER 52. She sued Swartz for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Swartz violated J.A.'s clearly established Fourth and Fifth Amendment constitutional rights by shooting and killing J.A. without justification.

The district court granted in part and denied in part Swartz's motion to dismiss the complaint, concluding that Swartz had violated J.A.'s clearly established Fourth Amendment constitutional rights. It based that conclusion on a "functional" analysis derived from *Boumediene* v. *Bush*, 553 U.S. 723 (2008), which applied the Suspension

Clause to certain aliens detained at Guantanamo Bay, Cuba. ER 14-15. The district court thought that portions of northern Mexico near the U.S. border were analogous to the U.S. Naval Base at Guantanamo. ER 15-16. The court also relied on *Ibrahim* v. *Department of Homeland Security*, 669 F.3d 983, 994-97 (9th Cir. 2012), ER 12, which held that a foreign citizen had First and Fifth Amendment rights based on the "significant voluntary connection" she had established with the United States during her years of doctoral studies at an American university, which she had left only in order to attend an academic conference abroad. The court here concluded that J.A. also had substantial voluntary connections to the United States because his grandparents were lawful permanent residents of the United States, and because one of them sometimes cared for J.A. in Mexico. ER 15.

Swartz appealed the district court's ruling to this Court in July 2015.

2. On September 23, 2015, a federal grand jury returned an indictment against Swartz on second-degree federal murder charges for killing J.A. *United States* v. *Swartz*, No. 15-cr-1723 (D. Ariz.). Swartz

has pleaded not guilty and the case currently has a trial date of March 22, 2016.

ARGUMENT

I. The Fourth Amendment Does Not Apply To Aliens Outside The United States Without Significant Voluntary Connections To This Country.

Whether a *Bivens* suit is barred by qualified immunity depends on two questions: first, whether the conduct violated any constitutional right; and second, whether the right in question was clearly established. *See, e.g.*, *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020 (2014). Because the Fourth Amendment has no application in this case, the first prong of qualified-immunity analysis is sufficient to preclude this suit.

A. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). In *United States* v. *Verdugo-Urquidez*, for example, the defendant was taken into custody at the asserted behest of U.S. law enforcement officials and his property was searched in Mexico. 494 U.S. 259, 263-64 (1990). The Supreme Court explained that the defendant, whose property was in Mexico when it was searched, lacked

any "previous significant voluntary connection with the United States," *id.* at 271, and had not accepted "societal obligations" in this country, *id.* at 273. The Court held that the defendant could not assert rights under the Fourth Amendment, rejecting the contention that the Fourth Amendment applies to "aliens in foreign territory or in international waters." *Id.* at 267.[1] "[T]he alien," the Court explained, "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.* at 269. As a consequence, "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." *United States* v. *Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995).

The en banc Fifth Circuit court of appeals in *Hernandez* v. *United States*, 785 F.3d 117 (5th Cir. 2015) (en banc) (per curiam), *petition for cert. filed sub nom. Hernandez* v. *Mesa*, (U.S. July 23, 2015) (No. 15-118), recently applied these principles in a case in which a fifteen-year-

[1] In the order under review, the district court dismissed plaintiff's Fifth Amendment claim. *See* ER 18-19. This Court need not address that claim because plaintiff has not cross-appealed that ruling, and because the Court would lack jurisdiction over any such cross-appeal in any event. *See Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 42-43 (1995); *George* v. *Morris*, 736 F.3d 829, 840 (9th Cir. 2013); *Cunningham* v. *Gates*, 229 F.3d 1271, 1284-85 (9th Cir. 2000).

old Mexican citizen was shot and killed in Mexico by a Border Patrol Agent standing in the United States. At the time of the shooting, the boy was allegedly playing a game that involved first touching a border fence in the United States and then running back into Mexico. The Fifth Circuit explained that the Fourth Amendment did not apply to the decedent because he had developed no significant voluntary connections to the United States. *Id.* at 119.[2]

Like the decedent in *Hernandez*, J.A. was, according to the complaint, in sovereign Mexican territory at the time of his death. ER 53-54. His only connection with the United States, as alleged in the complaint, is that his grandmother, then a lawful permanent resident of the United States, had looked after him in Mexico. ER 55. Like many Mexican citizens who live near the U.S. border, J.A. had a familial association with a resident of the United States. But that is not enough to be the kind of "significant voluntary connection" with the United

[2] The United States criminally investigated this shooting incident, but declined to bring any charges, concluding that there was evidence indicating that the agent acted in self-defense. *See* Press Release, Dep't of Justice, Federal Officials Close Investigation into Death of Sergio Adrián Hernández Güereca (Apr. 27, 2012), *available at*: http://www.justice.gov/opa/pr/2012/April/12-crt-553.html.

States that would trigger the application of the Fourth Amendment to those individuals. *Compare Verdugo-Urquidez*, 494 U.S. at 272 (presence in the United States "for only a matter of days" insufficient to establish such connections), *with Ibrahim* v. *Department of Homeland Security*, 669 F.3d 983, 994-97 (9th Cir. 2012) (concluding that a foreign citizen had sufficient connections to have First and Fifth Amendment rights because she had completed a four-year Ph.D. program at Stanford and had intended to leave the United States only briefly to attend an academic conference abroad).

B. The district court relied on this Court's decision in *Ibrahim* to apply a "functional" approach to whether the Fourth Amendment applies to Mexican citizens in Mexico in these circumstances. ER 14. That approach, the district court reasoned, made application of the Fourth Amendment abroad depend on a multi-factor balancing test consisting of "three factors" adapted from the Supreme Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). *Id.*

In *Boumediene*, the Supreme Court held that the Suspension Clause entitled certain aliens detained outside the United States at the U.S. Navy base in Guantanamo Bay, Cuba, to challenge the lawfulness

of their detention via a writ of habeas corpus. 553 U.S. at 771. In doing so, the Court weighed "three factors" that it found "relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766.

In *Ibrahim*, this Court "follow[ed]" this "functional approach" (in addition to the "significant voluntary connection test of *Verdugo-Urquidez*") in analyzing whether the plaintiff in that case had a First and Fifth Amendment right to challenge her allegedly mistaken placement on federal terrorist watchlists. 669 F.3d at 997 (citation marks omitted). To arrive at that conclusion, this Court observed that the plaintiff there "share[d] an important similarity with the plaintiffs in *Boumediene*": she was seeking "the right to assert constitutional . . . claims to correct . . . [alleged] mistakes" about her status. *Id.* The Court also noted that Ibrahim was outside the United States only because she had left to attend an academic conference, and was unable

to return because of her allegedly unlawful placement on terrorist watchlists—the very classification she sought to challenge. *Id.* at 996.

This case is much different. Here, unlike in *Ibrahim* or *Boumediene*, plaintiff is not challenging the lawfulness of a classification assertedly imposed by the federal government to deny J.A. the ability to enter into, and maintain his connections with, the United States. Instead, she seeks to extend the substantive reach of the Fourth Amendment abroad to hold an officer of the United States liable in damages. The Supreme Court in *Verdugo-Urquidez* has already weighed the relevant practical concerns with applying the Fourth Amendment globally in that fashion. The Court explained that doing so would "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." 494 U.S. at 273. "The United States frequently employs Armed Forces outside this country," *Verdugo-Urquidez* continued, and "[a]pplication of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-74.

Those practical considerations apply fully to the territory of Mexico near the United States-Mexico border. Protecting that border is a core sovereign and national-security function of the United States. There are 350 million crossings each year of that border, and tens of thousands of Border Patrol agents. Application of the Fourth Amendment to an unspecified portion of northern Mexico—especially if based on the undefined array of case-specific functional considerations considered by the district court—would cast a cloud of uncertainty over the manner in which U.S. officials conduct foreign operations generally, and "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 273-74.

C. In any event, the "functional considerations" adduced in *Boumediene* would not support application of the Fourth Amendment here.

The critical fact in *Boumediene* was that the detainees sought application of the Suspension Clause to aliens detained by the U.S. military at the U.S. Navy base at Guantanamo Bay, Cuba—a site that the Court concluded "[i]n every practical sense" was "not abroad." 553

U.S. at 769. The Court thought it not impractical to apply the Suspension Clause to Guantanamo "in light of the plenary control the United States" had asserted over that "heavily fortified military base" for over a century, *id.* at 769, 770, emphasizing that the United States had long exercised "complete jurisdiction and control" equivalent to "*de facto* sovereignty" over that place, *id.* at 755. Northern Mexico is not remotely under the sovereignty or plenary control of the United States, *de facto* or otherwise.

The district court relied on the fact that the United States exercises some influence over portions of Mexico near the U.S. border, including by having the ability to use force and assert authority there. ER 16. But the same is true of much of the world. The same was true, for instance, of the Mexican cities in which agents exercised the searches in *Verdugo-Urquidez*. *See* 494 U.S. at 262. Indeed, the United States exercised a far greater extent of control inside Landsberg Prison in occupied Germany, to which the Supreme Court held the Fifth Amendment inapplicable in *Johnson* v. *Eisentrager,* 339 U.S. 763, 768, 778 (1950); as well as inside Bagram Air Force Base in Afghanistan, to which the D.C. Circuit held the Suspension Clause inapplicable after

Boumediene, *see Al Maqaleh* v. *Gates*, 605 F.3d 84, 96-97 (D.C. Cir. 2010).

Whereas *Boumediene* involved a site where "no law other than the laws of the United States" applied, and where under the Guantanamo lease agreement Cuba "effectively ha[d] no rights as a sovereign," 553 U.S at 751, 753, there is accountability for the unjustifiable use of force across the border apart from damages suits brought under the Fourth Amendment. The Court in *Boumediene* observed that in *Eisentrager*, the United States was "answerable to its Allies for all activities occurring" at Landsberg Prison, the site of the detention at issue there. *Id.* at 768. Here, the United States is answerable to Mexico for how it handles this and similar shooting incidents. In some cases, the Executive Branch might determine that extradition to Mexico is appropriate. In this case, the United States is prosecuting Swartz for murder. *See United States* v. *Swartz*, No. 15-cr-1723 (D. Ariz. filed Sept. 23, 2015). "If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275.

II. Special Factors Warrant Caution Before Creating A *Bivens* Remedy For Injuries Suffered In Mexico In An International Cross-Border Shooting Incident.

Even apart from the inapplicability of the Fourth Amendment to the circumstances of this case, "special factors" militate against implication of a private right of action for damages in this context.[3]

A. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court, for the first time, recognized a common-law damages action against federal officials who had violated the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home in the United States. In recognizing that common-law action, however, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396-97.

The Supreme Court has explained that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (quotation marks omitted)—that is, to a

[3] The Court may consider the propriety of implying a *Bivens* action at all in addition, or as an alternative, to the qualified-immunity question. *See Wilkie* v. *Robbins*, 551 U.S. 537, 549 n.4 (2007).

new "potentially recurring scenario that has similar legal and factual components." *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc). In the decades since *Bivens* was decided, "only twice has [the Supreme Court] extended *Bivens* remedies into new classes of cases—once in the context of a congressional employee's employment discrimination due process claim, *Davis* v. *Passman*, 442 U.S. 228 (1979), and once in the context of a prisoner's claim against prison officials for an Eighth Amendment violation, *Carlson* v. *Green*, 446 U.S. 14 (1980)." *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). And because the power to create a new constitutional cause of action is "not expressly authorized by statute," if it is to be exercised at all, it must be undertaken with great caution. *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66-70 (2001).

The Supreme Court has never recognized a *Bivens* action arising from an injury occurring abroad as a result of a cross-border shooting. Whether to extend the judicially created *Bivens* remedy to a new context implicates two interrelated considerations. First, a court asks whether there is any evidence that "Congress' failure to provide money damages, or other significant relief, has not been inadvertent." *W.*

Radio Servs. Co. v. *U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009). Second, the court asks whether the proposed *Bivens* remedy would implicate sensitive "special factors" that counsel hesitation before creating a nonstatutory cause of action. *Id.* at 1120-21 (citing *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)).

B. Congress's failure to create a damages action in this context was not inadvertent.

There is a strong presumption that judge-made causes of action do not apply extraterritorially, even where the power to recognize such causes of action is specifically authorized by statute. *See Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-65 (2013). That presumption applies with even stronger force to the decision whether to recognize a *Bivens* action applicable abroad, where no statute explicitly sanctions the exercise of common-law-making authority *See Meshal* v. *Higgenbotham*, 804 F.3d 417, 425 (D.C. Cir. 2015).

Recognizing the problems that can arise from the creation of an extraterritorial tort scheme, Congress in the Federal Tort Claims Act expressly precluded a tort remedy against the United States for the conduct of its officials acting within the scope of employment for injuries

occurring outside the United States. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). Congress has, however, provided a limited remedy for such injuries—not by creating a damages action, but instead by authorizing U.S. agencies in many instances to pay claims that would otherwise be barred by that exception. *See* 10 U.S.C. § 2734(a)(3) (claims arising from military activities abroad); 21 U.S.C. § 904 (claims arising from Drug Enforcement Administration activities abroad); 22 U.S.C. § 2669-1 (claims arising from State Department activities abroad).

If the United States succeeds in prosecuting Swartz for murder, moreover, plaintiff has a potential statutory monetary remedy. Congress has provided for mandatory monetary restitution to the estates of crime victims. *See* 18 U.S.C. § 3663A(a). Plaintiff would likely assume the right to any restitution as the representative of J.A.'s estate. The statute provides for funeral expenses and lost future wages as part of a potential monetary award. *See id.* §§ 3663A(b)(2)(C), (b)(3); *see also United States* v. *Cienfuegos*, 462 F.3d 1160, 1165-69 (9th Cir. 2006). Special factors can preclude a *Bivens* action "[e]ven where Congress has given [a] plaintiff[] no damages remedy for a

constitutional violation," *Western Radio Servs.*, 578 F.3d at 1120, or, indeed, where the plaintiff has no alternative remedy at all, *see, e.g.*, *Wilkie*, 551 U.S. at 550. But here Congress's decision to create that tailored potential monetary remedy in this area, instead of a freestanding damages action akin to *Bivens*, reinforces that the Court should not infer the existence of an additional nonstatutory *Bivens* remedy. *See, e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988).

C. Creating a constitutional tort remedy for an international cross-border shooting incident would implicate the very sensitivities Congress sought to avoid when it precluded FTCA liability for injuries occurring abroad.

The Supreme Court in *Verdugo-Urquidez* refused to apply the Fourth Amendment to aliens abroad notwithstanding its recognition that a "*Bivens* action might be unavailable in some or all" such situations "due to 'special factors counseling hesitation.'" 494 U.S. at 274 (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983)). That recognition is not surprising since the Supreme Court "has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Doe*, 683 F.3d at 394; *see Meshal*, 804 F.3d at

421-22. Even outside the *Bivens* context, "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

This Court has further observed that "immigration issues 'have 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. 2011) (quoting *Arar*, 585 F.3d at 574). The Department of Homeland Security and its components, including U.S. Customs and Border Protection, have been charged by Congress with a primary mission of preventing terrorist attacks within the United States and securing the border. *See* 6 U.S.C. §§ 111, 202. International cross-border shootings also implicate our relations with the government of Mexico.

The Court should not fashion a new damages action in a controversy that implicates national-security and diplomatic sensitivities absent explicit action by Congress to create such a remedy.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,903 words excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Henry C. Whitaker
HENRY C. WHITAKER

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, 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.

/s/ Henry C. Whitaker
HENRY C. WHITAKER