IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GILBERTO GOMEZ VICENTE, et al.,	§	
	§	
Plaintiffs,	§	
	§	
	§	
v.	§	**Civil Action No. 5:20-cv-00081**
	§	
UNITED STATES OF AMERICA; ROMUALDO BARRERA, Agent, United States Border Patrol, in his individual capacity; and DOES 1-20, Agents, United States Border Patrol, in their individual capacities,	§	
	§	
Defendants.	§	

DEFENDANT ROMUALDO BARRERA'S REPLY REGARDING MOTION TO DISMISS PLAINTIFFS' *BIVENS* CLAIMS

TO THE HONORABLE COURT:

Defendant Romualdo Barrera ("**Agent Barrera**" or "**Defendant**") files this Reply regarding Defendant's Motion to Dismiss Plaintiffs' *Bivens* Claims (the "**Motion**"), and in support would respectfully show:

I. INTRODUCTION

1. Plaintiffs are clinging to a view of the law that has long-since passed into history. In their Opposition to Defendant's Motion to Dismiss Plaintiffs' *Bivens* Claims (the "**Response**"), Plaintiffs ask this Court to adopt an expansive interpretation of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and its progeny to permit their claims against Agent Barrera to proceed. That interpretation may be one that some commentators (and perhaps some judges) shared when *Bivens* was first issued, and it may be the view that Plaintiffs wish would be adopted by the Supreme Court now. But that interpretation is not the law as it has been defined by the Supreme Court and the Fifth Circuit.

2. Over nearly a generation of decisions, the Supreme Court has repeatedly restricted the scope of *Bivens*, rejecting case after case that strayed even in the slightest degree from the facts of *Bivens* and the two principal Supreme Court decisions extending *Bivens*. These decisions have included a case just this year with striking similar facts – *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) – in which the Court refused to *extend* Bivens to claims similar to those asserted in this case. The Fifth Circuit has followed the Supreme Court's direction, repeatedly tightening the scope of *Bivens* cases to those in which there can be no credible distinction in relevant facts.

3. The facts of this case are not the same as those of *Bivens*. Indeed, they are functionally indistinguishable from *Hernandez* and other cases that have rejected the application of *Bivens*. Plaintiffs cannot escape the direction of the Supreme Court. Plaintiffs' *Bivens* claims against Agent Barrera must therefore be dismissed, leaving Plaintiffs to pursue remedies against both Agent Barrera and the United States of America ("**Government**") through the other avenues identified in their Complaint.

II. THIS CASE PRESENTS A NEW *BIVENS* CONTEXT

4. Plaintiffs first argue that their *Bivens* claims are merely garden-variety excessive force claims against a federal law enforcement officer and thus within the scope of *Bivens* itself. This argument ignores both the particular facts of *Bivens* and the case law that has evolved in the years since *Bivens*.

5. In *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859–60 (2017), the Supreme Court set forth a two-part test to determine whether a claim under *Bivens* could proceed. First, courts must determine whether a case presents a new context by asking whether it differs in a meaningful way from previous *Bivens* cases decided by the Supreme Court. *Id.* Second, if the case does present a new *Bivens* context, courts must analyze whether special factors counsel hesitation before allowing the suit to proceed. *Id.*

6. The Court warned, however, that the first prong of this test poses a very high bar: "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Id.* at 1859. The Court then gave a list of examples that, while not exhaustive, "might prove instructive." *Id.* at 1859–60. That list included potential meaningful differences in the rank of officers involved, the constitutional right at issue, the generality or specificity of the official action, the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted, the statutory or legal mandate under which the officer was operating, the risk of disruptive intrusion by the Judiciary into the functioning of other branches, or the presence of potential special factors that previous *Bivens* cases did not consider. *Id* at 1860.

7. The Fifth Circuit has observed that, under *Abbasi*, a case must present facts that are functionally identical to those of previous *Bivens* cases. Just this past September, the Fifth Circuit explained:

> Today, *Bivens* claims generally are limited to the circumstances of the Supreme Court's trilogy of cases in this area: (1) manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment . . . ; (2) discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment . . . ; and (3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment . . . .

Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020) (describing *Bivens*, *Davis*, and *Carlson*, respectively) (internal citations omitted). "***Virtually everything else*** is a new context." *Id.* (internal quotation marks omitted) (emphasis added). Similarly, last year, the Fifth Circuit emphasized that courts do not define a *Bivens* cause of action at the level of the constitutional provision allegedly violated or "even at the level of the unreasonable-searches-and-seizures clause"; the facts of the case must be materially indistinguishable. *Cantú v. Moody*, 933 F.3d 414, 422 (5th Cir. 2019) ("And he thinks he's home free because his malicious-prosecution-type-claim alleges a violation of his Fourth Amendment right to be free from unlawful seizures—the same right recognized in *Bivens*.

That's wrong.").

A. This case presents several meaningful differences from *Bivens* itself.

8. Plaintiffs characterize this case as falling "within the core" of *Bivens* because it involves the use of force by a federal law enforcement officer in a "residential" setting. An even cursory review of the facts of *Bivens* and this case rebut this argument.

9. In *Bivens*, agents of the Federal Bureau of Narcotics entered petitioner's New York City apartment and arrested him for alleged narcotics violations. 403 U.S. at 389. The agents then searched the apartment and later took petitioner to a federal courthouse where he was interrogated, booked, and subject to a visual strip search. *Id.* Based on these facts, the Court created an implied cause of action under the Fourth Amendment to recover money damages for any injuries, while recognizing that petitioner's only available remedy for such injuries at the time was under state tort law. *Id.* at 390—91. The factual differences between *Bivens* and this case are legion.

10. First, Plaintiff's suggestion that the incident in this case took place in a "residential" setting is fanciful. Plaintiffs' Opposition to Motion to Dismiss [Dkt. No. 38] at 3. Agent Barrera stumbled on Claudia Patricia Gomez Gonzalez ("**Decedent**") and her group in a vacant lot a few hundred yards from the U.S.-Mexico border. Complaint [Dkt. No. 1] at ¶22. The encounter was outside and in broad daylight. *Id.* at ¶20. There is no suggestion that the vacant lot was owned by the Decedent or anyone in her group, or that any of them were residing on that property. The encounter might has well have taken place on a city street. The fact that some third party owned the vacant lot is immaterial. These facts are a far cry from the warrantless incursion into petitioner's private home that was at issue in *Bivens*, with all the special constitutional concerns that arise from government intrusion into a private home. *See Payton v. New York*, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house."). Indeed, the fact that Plaintiffs believed it necessary to contort the term

"residential" to apply outdoors in a third-party's vacant lot itself demonstrates the futility of Plaintiffs' arguments. The location itself is sufficient difference to end the "new context" analysis.

11. A second material difference is the nature of the incident itself. Agent Barrera was alone when he happened upon a group of undocumented immigrants a few hundred yards from the U.S.-Mexico border. Plaintiffs' Opposition at ¶22. Agent Barrera's subsequent actions – even in Plaintiffs' account – were the product of surprise and impulse. *Id.* at 22–24. By contrast, in *Bivens*, multiple agents planned the entry into the plaintiff's apartment and thus had the opportunity to determine a constitutional plan and otherwise organize their actions. *Bivens*, 403 U.S. at 389. The ability to plan and respond is a material difference between the two cases. *See Abbasi*, 137 S. Ct. at 1860 (noting the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted as an example of a meaningful difference) (emphasis added).

12. Third, the encounter here occurred a few hundred yards from an international border by an officer tasked with enforcing immigration laws. *Id.* at ¶20, 22. *Bivens* took place in an apartment in New York City by officers enforcing the narcotics laws, raising an entirely different set of legal mandates. *See Abbasi*, 137 S. Ct. at 1860 (noting statutory or legal mandate under which officer was operating as an example of a meaningful difference); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior.").

13. Finally, as detailed in the Motion to Dismiss, there are multiple other factual differences between this case and *Bivens*. *Bivens* involved agents of the Federal Bureau of Narcotics; this case involved a different agency, the United States Border Patrol. *Bivens* involved the temporary detention of the plaintiff and a strip search; this case involves a quick-moving encounter in which the Decedent was shot. *Bivens* involved the law regarding searches and

seizures; this case involves the law regarding the use of deadly force. *See* Motion to Dismiss *Bivens* Claims [Dkt. No. 30] at ¶23; *Abbasi*, 137 S. Ct. at 1859–60.

14. Plaintiffs' argument is essentially unbound by any reasonable limiting principle. Under their interpretation, any claim seeking damages for unconstitutionally excessive force by an agent tasked with enforcing the law on any kind of private property would create an implied cause of action under *Bivens*. *See* Plaintiffs' Opposition at 5. There is no way to square that interpretation with the Supreme Court and Fifth Circuit's repeated, explicit, and clear limitations on the scope of *Bivens* claims. *See Abbasi*, 137 S. Ct. at 1864 (holding a claim for prisoner mistreatment presented a meaningful difference from *Carlson* because it was against the warden rather than prison guards themselves and judicial guidance available to the warden was less developed); *Oliva*, 973 F.3d at 441–42 (noting a modest extension of *Bivens* is still an extension).

15. Indeed, the import of the Supreme Court's recent opinion in *Hernandez* is inescapable. There, in a case involve the alleged use of excessive force by a Border Patrol agent along the U.S.-Mexico border, the Court summarily concluded that "[t]he *Bivens* claims in this case assuredly arise in a new context." 140 S. Ct. at 743. The Court rejected the plaintiffs' argument that their claims involved the same constitutional provisions as *Bivens* and *Davis* as resting on a "basic misunderstanding of what our cases mean by a new context." *Id.* The Court then observed that once it looked "beyond the constitutional provisions invoked in *Bivens*, *Davis*, and the present case" it was "glaringly obvious that petitioners' claims involve a new context, i.e. one that is meaningfully different." *Id.*

16. *Bivens* therefore cannot be said to have created a cause of action for Plaintiffs as the case here presents several meaningful differences from the circumstances in *Bivens*.

B. Fifth Circuit case law does not create an established *Bivens* claim for this matter.

17. Plaintiffs next argue that this case is controlled by a separate line of cases that recognize the availability of *Bivens* actions against immigration officers who deploy unconstitutionally excessive force. *See* Plaintiffs' Opposition at 2. That argument both ignores Supreme Court law and mischaracterizes the opinions of the Fifth Circuit.

18. First, in 2017, the U.S. Supreme Court stated that the test for determining whether a case presents a new *Bivens* context is as follows: "If the case is different in a meaningful way from previous *Bivens* cases decided by ***this Court***, then the context is new." *Abbasi*, 137 S. Ct. at 1859 (emphasis added). In the same holding, the Court explicitly stated that *Bivens*, *Davis*, and *Carlson*, briefly summarized above and in the Motion to Dismiss, "represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."[1] *Id.* at 1855.

19. Following the Supreme Court's direction, two Fifth Circuit decisions following *Abbasi* have reinforced that all cases other than those with virtually identical facts to the three approved *Bivens* cases will be considered a "new context." *See Cantú*, 933 F.3d at 423 (5th Cir. 2019) ("In the wake of *Abbasi*, our Court and at least one of our sister circuits have rejected new Fourth Amendment claims under *Bivens*."); *Oliva*, 973 F.3d at 442–443 (finding numerous meaningful differences with *Bivens*, including the location, the nature of the incident, the legal mandate, the type of force used, and the differing legal guidance in the two types of incidents).

20. Plaintiffs' reliance on selected quotes from a handful of other Fifth Circuit opinions is therefore misplaced. Plaintiffs point to footnote 14 in the Fifth Circuit's 2018 decision in *Hernandez v. Mesa* multiple times in their Response to support the assertion that excessive force

[1] Of the three cases, the only one remotely in the sphere of the matter at hand is *Bivens* itself, and Defendant has already shown above why *Bivens* itself does establish a cause of action here.

claims against border patrol officers under *Bivens* do not present a new context if the incident occurred on American soil. *See* Plaintiffs' Opposition at 2, 18, 19. Plaintiffs stretch that language too far. In that footnote, the Fifth Circuit stated: "Given the transnational context of this case, denying a remedy here does not, as the plaintiffs suggest, repudiate *Bivens* claims where constitutional violations by the Border Patrol are wholly domestic." *Hernandez v. Mesa*, 885 F.3d 811, 819 fn.14 (5th Cir. 2018), cert. granted in part, 139 S. Ct. 2636 (2019), and aff'd, 140 S. Ct. 735 (2020). The Fifth Circuit was merely reserving the right to reach a different conclusion in different cases, not setting forth a sweeping new rule authorizing *Bivens* claims in every excessive force case involving a Border Patrol Agent.

21. Plaintiff's reliance on the Fifth Circuit's opinion in *De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015), is also unhelpful. *De La Paz* is pre-*Abbasi* and does not employ the restrictive interpretations of *Bivens* required by the Supreme Court and the Fifth Circuit in *Abbasi* and other recent decisions. *See id.* at 372. It is also distinguishable on its facts, in that it involved the mistreatment of undocumented immigrants that were held in custody and not the unplanned, chance encounter in a vacant lot at issue here. *See id.* at 370. Finally, the *De La Paz* court itself made clear that courts must examine the facts of each case and not just employ the rote formula advocated by Plaintiffs: "[Courts must] examine each new context—that is, each new potentially recurring scenario that has similar legal and factual components." *Id.* at 372 (internal quotations omitted).

22. Finally, the Fifth Circuit's recent holding in *Angulo v. Brown*, 978 F.3d 942, 948 fn.3 (5th Cir. 2020), provides no additional indication that a *Bivens* remedy automatically exists here. In that case, the Fifth Circuit expressly did not conduct a *Bivens* analysis since it was not raised by defendants and the district court had granted summary judgment in favor of the defendants on qualified immunity grounds. *Id.* (stating *in dicta* that it will "assume without

deciding that a *Bivens* remedy is available"). Notably, the Fifth Circuit explicitly acknowledged that it was not reaching the conclusion that Plaintiffs advocate here: "We can resolve this case now, without having to decide—lacking the benefit of a district court opinion and with only a single paragraph of briefing—whether *Hernandez* should be understood to categorically preclude *Bivens* actions against CBP agents at the border." *Id.*

23. Nothing Plaintiffs have pointed to indicates that a *Bivens* cause of action automatically exists in this case. To the contrary, the law is clear that the facts of this case are sufficiently different than existing *Bivens* cases that the court must move to the second step of the *Abbasi* analysis and determine whether to engage in the "disfavored judicial activity" of extending *Bivens* to a new set of facts. *Abbasi*, 137 S. Ct. at 1857.

III. ADEQUATE REMEDIES EXIST TO REDRESS ANY ALLEGED HARMS ABSENT *BIVENS*

24. Plaintiffs' argument in favor of extending *Bivens* to the facts of this case rests largely on their assertion that they "have no adequate alternative remedy" for Agent Barrera's actions. *See* Plaintiffs' Opposition at 15. That assertion is false.

25. The Federal Tort Claims Act ("**FTCA**") provides Plaintiffs with a redress against the Government and state tort law provides Plaintiffs with a redress against Agent Barrera. Both avenues provide incentives that deter unconstitutional conduct while also providing roughly similar compensation to victims, as Plaintiffs admit is the measure of adequacy. *See* Plaintiffs Opposition at 15. These avenues are in addition to any potential criminal charges that may be brought, which certainly provide an incentive that deters unconstitutional conduct. *See* United States' Motion To Stay [Dkt. No. 39] (asking for a motion to stay considering the ongoing criminal investigation in this matter); *see also De La Paz*, 786 F.3d at 376–77 (5th Cir. 2015) ("Agents may be prosecuted criminally for violating aliens' rights against excessive force.").

26. Plaintiffs' argument that *Carlson* supports the proposition that the FTCA is not an adequate alternative remedy is misguided. In *Carlson*, the Supreme Court acknowledged that *Bivens* and the FTCA could work in parallel. *See Carlson v. Green*, 446 U.S. 14, 20 (1980). Case law since *Carlson*, however, indicates that the availability of a remedy under the FTCA is a significant factor, among others, that counsels against extending *Bivens* into a new context. *See Abbasi*, 137 S. Ct. at 1863 (explaining that when alternative methods of relief are available a *Bivens* remedy usually is not); *Cantú*, 933 F.3d at 423 (echoing *Abbasi*). In *Oliva*, for example, the Fifth Circuit held that the plaintiff's pursuit of an administrative complaint against federal officers and suing the United States under the FTCA showed there was a viable alternative remedial scheme to *Bivens*. *Oliva*, 973 F.3d at 444 ("That the FTCA might not give Oliva everything he seeks is therefore no reason to extend *Bivens*."); *see also Smith v. Clark*, No. 5:19-CV-00675-JKP, 2020 WL 5820534, at *5 (W.D. Tex. Sept. 29, 2020) ("The Fifth Circuit has therefore found that, post-*Abbasi*, the FTCA as a potential remedy counsels hesitation in extending a Bivens remedy."). Here, Plaintiffs have both pursued administrative tort claims against Agent Barrera and filed suit against the Government under the FTCA, the same relief pursued in *Oliva*.

27. Finally, Plaintiffs state law tort claims do provide another avenue for potential relief. Contrary to Plaintiffs' assertions in their Response, Defendant has not misconstrued the posture of Plaintiffs state tort claims against Agent Barrera. Rather, Defendant has merely pointed out that these claims exist and, even if Plaintiffs assert them in the alternative, indicate that an adequate alternative remedial structure exists in this case. *See Abbasi*, 137 S. Ct. at 1858 (noting state tort law that provides an alternative means for relief as an example of an alternative, existing process for protecting the injured party's interest) (collecting cases).

IV. SPECIAL FACTORS COUNSEL AGAINST EXTENDING *BIVENS* INTO THIS CONTEXT

28. Several other special factors, in addition to the existence of an alternative remedial structure, also counsel hesitation before extending *Bivens*.

29. First, this Court must consider congressional failure to create a statutory vehicle to recover damages from federal agents, particularly given the national attention received by events alleging excessive force by law enforcement along the U.S.-Mexico border. As the Fifth Circuit explained in *De La Paz*, 786 F.3d at 377, Congress's institutional silence regarding authorizing damages remedies against individual agents involved in civil immigration enforcement "speaks volumes". *See also Abbasi*, 137 S. Ct. at 1862 ("The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than inadvertent.") (internal quotations omitted).

30. Second, national security is another important factor for the Court to consider. Earlier this year, the Supreme Court explained that "[o]ne of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task." *Hernandez*, 140 S. Ct. at 746. Those national security concerns do not disappear simply because an incident took place shortly after an undocumented immigrant crossed the Rio Grande, rather than shortly before. Agent Barrera and other Border Patrol agents are daily involved in the "daunting task" of attempting to control movement of people across the border, including the Decedent and other members of her group. Indeed, the Court in *Hernandez* made clear that is the agents' role on the border – not whether a particular bullet crossed the river – that triggers national security concerns. *See Hernandez*, 140 S. Ct. at 746 ("For these reasons, the conduct of agents positioned at the border has a clear and strong connection to national security,

as the Fifth Circuit understood.").[2] Those concerns weigh strongly against extending *Bivens*: "Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." *See id.* at 747.

31. Defendant maintains that the Court should not disregard *Hernandez* and decades of case law to recognize a new *Bivens* context in this case. *See De La Paz*, 786 F.3d at 372 ("The Court has not created a new *Bivens* remedy in the last thirty-five years, although it has reversed more than a dozen appellate decisions that had created new actions for damages.") (internal quotations omitted). This Court should instead grant Defendant's motion and dismiss Plaintiffs' *Bivens* claims.

V. CONCLUSION

32. For the foregoing reasons and the reasons identified in the Motion, Plaintiffs' Third, Fourth, Fifth, and Sixth causes of actions do not state a claim under which relief can be granted and should be dismissed. Agent Barrera further requests all other relief, at law or in equity, to which he may be justly entitled.

Dated: December 11, 2020

[2] Defendant notes that while *Hernandez* dealt with a cross-border shooting rather than a shooting on the immediate U.S.-side of the border, the Court's national security special factor analysis was not dependent on the transnational nature of the incident there. *See Hernandez*, 140 S. Ct at 746–47.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of December 2020, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and all counsel of record will receive an electronic copy via the Court's CM/ECF system.

/s/ Jason Davis
Jason M. Davis