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

GILBERTO GOMEZ VICENTE, individually as the surviving father of Claudia Patricia Gomez Gonzalez and as heir-at-law to the Estate of Claudia Patricia Gomez Gonzalez; LIDIA GONZALEZ VAZQUEZ, individually as the surviving mother of Claudia Patricia Gomez Gonzalez and as heir-at-law to the Estate of Claudia Patricia Gomez Gonzalez; and RICARDO DE ANDA, in his capacity as Administrator of the Estate of Claudia Patricia Gomez Gonzalez, Plaintiffs, v. 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.	§ §	Case No. 5:20-cv-00081

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' *BIVENS* CLAIMS

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INTRODUCTION

United States Border Patrol Agent Romualdo Barrera shot and killed Claudia Patricia Gomez Gonzalez ("Claudia"), a defenseless and unarmed petite twenty-year-old woman, in a fenced-in residential lot in south Texas on a May afternoon two years ago. Defendant Barrera's killing of Claudia had no justifiable basis. Claudia posed absolutely no threat to anyone. Nor did anyone else in the residential lot pose any imminent danger of serious physical injury or death to Defendant Barrera.

Plaintiffs Gilberto Gomez Vicente and Lidia Gonzalez Vasquez—Claudia's parents—and the administrator of Claudia's estate (collectively, "Plaintiffs") now bring this lawsuit to hold Defendant Barrera and the United States accountable for Defendant Barrera's unconscionable killing of Claudia. The United States has not moved for dismissal, but Defendant Barrera has. He argues that Plaintiffs have no remedy against him under the Constitution for his actions killing Claudia, even if wholly unjustified—as the complaint alleges and as must be taken as true for purposes of his motion.

But in fact, this is precisely the prototypical "garden variety excessive force case against a federal law enforcement officer" in which such a remedy is—and has long been—available. *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018) (en banc), *cert. granted in part*, 139 S. Ct. 2636, *and aff'd*, 140 S. Ct. 735 (2020). Defendant Barrera shot and killed Claudia, who had no weapon and posed no threat to him, in a fenced-in residential lot in a neighborhood in a small town in the United States. Plaintiffs' claims are grounded in well-established constitutional law under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That case, too, involved an excessive force claim against a federal law enforcement officer. There is nothing about Defendant Barrera's status as a Border Patrol agent, or any other

aspect of this case, that differentiates these actions or this case for constitutional purposes. The Fifth Circuit has long recognized, and most recently reaffirmed in 2018, the availability of "*Bivens* actions against immigration officers who deploy unconstitutionally excessive force when detaining immigrants on American soil." *Hernandez*, 885 F.3d at 819 n.14 (quoting *De La Paz v. Coy*, 786 F.3d 367, 374 (5th Cir. 2015)). This is, in short, a conventional *Bivens* case.

Moreover, even if this Court were to conclude that this case did present a "new context" for *Bivens* purposes, a *Bivens* remedy would still be available. The Supreme Court has long held that the United States' limited waiver of its sovereign immunity to allow certain claims for compensatory damages under the Federal Torts Claim Act, for example, is not an adequate substitute for constitutional claims against individual officers, and that remains controlling precedent. *Carlson v. Green*, 446 U.S. 14 (1980). Nor is there any contrary Congressional command here, nor any special factor that counsels hesitation as to the *Bivens* claims. Defendant Barrera's shooting of Claudia occurred wholly within the United States—not extraterritorially. A federal law enforcement officer used excessive force against a defenseless person standing in a residential lot in a small American town. This is precisely the type of conventional official abuse for which the *Bivens* doctrine has provided a remedy since its inception. Defendant Barrera attempts to evade accountability for his conduct. But under Supreme Court and Fifth Circuit precedent, the claims against him must proceed.

BACKGROUND

Defendant Barrera's killing of Claudia two years ago cut short a bright young life. Claudia was an excellent accounting student. Doc. 1 (Compl.) ¶ 15. She was known for her care for those around her, including for her community and for her mother. *Id.* ¶ 16.

Defendant Barrera killed Claudia on May 23, 2018, in a fenced-in residential lot in the Texas town of Rio Bravo. *Id.* ¶¶ 22-24. Rio Bravo is a quiet, safe community—in 2016, it did not have a single incident of violent crime. *Id.* ¶¶ 17-18. Claudia was walking along Centeno Lane in Rio Bravo, roughly a third of a mile away from the Rio Grande, with a small group on that May afternoon. *Id.* ¶ 20. She had no visible objects with her—no bag, no backpack, no weapon, and nothing that could be perceived as a weapon. *Id.* ¶ 21.

In the corner of a fenced-in residential lot on Centeno Lane, Defendant Barrera came into contact with the group, including Claudia. *Id.* ¶ 22. Claudia and one other person remained in the lot. *Id.* ¶ 23. Defendant Barrera drew his gun. *Id.* ¶ 24. He aimed his weapon at Claudia, pulled the trigger, and shot her in the head. *Id.*

Claudia fell to the ground, face-down. *Id.* Other Border Patrol agents then arrived at the scene, and another Border Patrol agent tried to turn Claudia over. *Id.* ¶¶ 24-25. A person living in the neighborhood heard the gunshot and began filming the scene. *Id.* ¶ 25. In the aftermath of Defendant Barrera's shooting, Claudia opened her mouth and gasped for air as she lay dying. *Id.* Blood was visible across one side of her face. *Id.* She died at least several minutes after Defendant Barrera shot her in the head. *Id.*

Plaintiffs now have brought, among other claims, *Bivens* claims under the Fourth and Fifth Amendments to the United States Constitution against Defendant Barrera for his use of excessive force in killing Claudia. *Id.* ¶¶ 45-83. Plaintiffs' third and fourth causes of action allege that Defendant Barrera's actions violated the Fourth Amendment in his excessive and unreasonable use of force in shooting Claudia. *Id.* ¶¶ 45-63. Plaintiffs' fifth and sixth causes of action allege that his actions violated the Fifth Amendment in depriving Claudia of her life

without due process of law, in actions that shock the conscience. *Id.* ¶¶ 64-83. Defendant Barrera now seeks to dismiss those claims. Doc. 30 at 4.

STANDARD OF REVIEW

On a motion to dismiss, under Rule 12(b)(6), courts must "accept[] all well-pleaded facts as true and view[] those facts in the light most favorable to the plaintiff[s]." *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007).

ARGUMENT

It is well established that suits against federal officials for damages can be an avenue for relief for violations of constitutional rights, through what are known as *Bivens* claims. *See generally Bivens*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). *Bivens* is an appropriate vehicle for Plaintiffs here to hold Defendant Barrera accountable. In assessing whether a *Bivens* remedy is available, courts first look to whether the case arises in a new context. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017). The type of Fourth and Fifth Amendment claims brought by Plaintiffs do not present a new context. And even if they did, a *Bivens* remedy is still available unless (1) an alternative remedy can adequately address plaintiffs' injuries and claims, or (2) other special factors counsel against providing the remedy. *Id.* at 1857-58. Here, no other remedy will adequately compensate Plaintiffs, and none of the other so-called "special factors" argued by Defendant counsels against applying *Bivens* here.

Taking the allegations in the complaint as true—as this Court must do at this stage—Defendant Barrera inexcusably and unconstitutionally shot Claudia. This sort of classic invasion of constitutional protection against excessive force has long given rise to liability in damages

against individual government officers. Indeed, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395.

I. Because Plaintiffs Allege "Garden Variety Excessive Force" Claims, This Action Does Not Arise in a New Context.

A. Plaintiffs' Claims Fall Within the Core of *Bivens*.

Plaintiffs' claims fall within the core of *Bivens*. 403 U.S. at 395. The Supreme Court's recent *Bivens* jurisprudence does not "cast doubt on the continued force" or "necessity" of the availability of *Bivens* relief "in the search-and-seizure context in which it arose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856. Rather, *Bivens* "provides instruction and guidance to federal law enforcement officers going forward." *Id.* at 1856-57. The Supreme Court has specifically underscored *Bivens*' continued vitality in this context, explaining that "[t]he 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." *Id.* at 1857. Such "individual instances of . . . law enforcement overreach . . . due to their very nature are difficult to address except by way of damages actions after the fact." *Id.* at 1862. *Bivens* itself recognized a damages remedy under the Fourth Amendment for an officer's use of "unreasonable force." *Bivens*, 403 U.S. at 389.[1] Thus, as an initial matter, these claims—seeking damages for unconstitutionally excessive force by an agent tasked with enforcing the law—do not involve any novel intrusion by the judiciary into areas in which it has historically not been involved.[2]

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[1] Defendant describes *Bivens* as "involv[ing] a warrantless search of the plaintiff's home" and "the temporary detention of the plaintiff and a strip search," Doc. 30 at 10, but this depiction erroneously omits the excessive-force claim. *See Bivens*, 403 U.S. at 389.

[2] In fact, "when the Fourth Amendment was adopted, the rules governing arrests and searches were enforced only by direct remedies such as suits for damages for false imprisonment or trespass." Edward L. Barrett, Jr., *Personal Rights, Property Rights, and the Fourth Amendment* [1960] Sup. Ct. Rev. 46, 54. As the Supreme Court recounted in the late 1800s, the law resulting from English civil cases involving searches and seizures and resulting in jury awards of punitive

In order to arise in a "new context," a claim must be "meaningful[ly]" different from prior *Bivens* cases. *See Abbasi*, 137 S. Ct. at 1859. While the Supreme Court has not defined precisely when this threshold is crossed, *compare Hernandez v. Mesa*, 140 S. Ct. 735, 743-44 (2020) (declining to offer specific factors for new context analysis), *with Abbasi*, 137 S. Ct. at 1859-60 (suggesting factors to guide new context analysis), it has made clear the touchstone of a "meaningful" difference is "the risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Hernandez*, 140 S. Ct. at 743-44 (quoting *Abbasi*, 137 S. Ct. at 1860). Insignificant differences "will not suffice." *Abbasi*, 137 S. Ct. at 1865. All claims contain differences; not all differences are meaningful. *See Brunoehler v. Tarwater*, 743 F. App'x 740, 744 (9th Cir. 2018) (explaining that *Abbasi* "does not require . . . perfect factual symmetry"); *Castellanos v. United States*, 438 F. Supp. 3d 1120, 1129 (S.D. Cal. 2020) (asking if claims involving excessive force at port of entry "*fundamentally* differ" from prior *Bivens* cases). Plaintiffs' claims do not arise in a new context; rather, they follow from precedent and preserve the separation of powers.

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damages "has been regarded as settled from that time to this, and . . . is considered as one of the landmarks of English liberty," *Boyd v. United States*, 116 U.S. 616, 626 (1886), *overruled in non-pertinent part by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of [British] constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution." *Id.* at 626-27. Individual damages suits against government officers for unlawful intrusions on liberty or property—including unlawful seizures—were familiar at the time of the Framing. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871-72 (2010). In the early 1800s, the Supreme Court repeatedly upheld federal officers' individual liability for damages due to unlawful conduct. *E.g.*, *Little v. Barreme*, 6 U.S. 170, 170 (1804) (upholding judgment against federal officer for unlawful seizure and explaining that an officer following unlawful instructions "is answerable in damages to any person injured by their execution").

Tellingly, *none* of the factors the *Abbasi* Court indicated might bear on whether a context is novel apply here. *First*, the Court observed that "the rank of the officers involved" might make a context new. 137 S. Ct. at 1860. This case involves a line-level officer, just like the defendants in *Bivens* itself. *Compare Abbasi*, 137 S. Ct. at 1863, 1869 (declining to allow claims against high-ranking federal executive officials to go forward but remanding for consideration of claims against federal prison wardens); *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009) (declining to allow claim against "high-ranking Government officials" to go forward). *Second*, the Court noted that the "constitutional right at issue" might make the context new. *Abbasi*, 137 S. Ct. at 1860. But here the constitutional rights at issue—challenges under the Fourth and Fifth Amendments, Compl. ¶¶ 45-83—are the same rights that the *Bivens* remedy has vindicated since its inception. *See Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 245, 249; *Carlson*, 446 U.S. at 16. *Bivens* itself recognized a damages remedy under the Fourth Amendment for a seizure involving an officer's use of "unreasonable force." *Bivens*, 403 U.S. at 389. Likewise, *Bivens* remedies have long been available under the Fifth Amendment. *Davis*, 442 U.S. at 245, 249. *Third*, the Court stated that the "generality or specificity of the official action" might make the context new. *Abbasi*, 137 S. Ct. at 1860. Here, the action could not be more specific: the unlawful, fatal use of a weapon. *Fourth*, the Court noted that "the extent of judicial guidance" available to officers regarding "how an officer should respond" to the situation might make a context new. *Id.* That factor plainly does not apply here, as Border Patrol officers are well aware that they may not shoot without justification; indeed, that is Customs and Border Protection ("CBP")'s own policy. *See, e.g.*, U.S. Customs and Border Protection, *Use of Force Policy, Guidelines and Procedures Handbook* at 3 (May 2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf. Regardless,

the law in this area is clear: the unreasonable use of force is never justified by any law enforcement officer—federal, state, or local. Shooting a defenseless person who poses no threat is unlawful. *E.g.*, *Tennessee v. Garner*, 471 U.S. 1, 9-12 (1985).

Fifth, the Court noted that courts should examine the "statutory or other legal mandate under which the officer was operating." *Abbasi*, 137 S. Ct. at 1860. But, as in *Bivens*, Defendant Barrera is not alleged to have been acting within the bounds of a statutory or legal mandate, but outside of one: no law conferred upon Defendant Barrera the authority to use lethal force against a person who posed no threat. *Bivens*, 403 U.S. at 389. Likewise, in *Davis*, the defendant engaged in gender-based employment discrimination that was outside any power conferred by statute or other legal provision. *See Davis*, 442 U.S. at 245. And in *Carlson*, no mandate provided defendants with the discretion to withhold treatment and exacerbate the plaintiff's asthma attack. *See Carlson*, 446 U.S. at 16 n.1. In each case, a *Bivens* remedy was permitted.

Finally, "the risk of disruptive intrusion by the Judiciary into the functioning of other branches" is not present here. *Hernandez*, 140 S. Ct. at 743-44; *Abbasi*, 137 S. Ct. at 1860. Here, unlike in *Abbasi*, which challenged a national security policy, there is no intrusion into policymaking by the other branches. Rather, a damages action holding Defendant Barrera accountable for his individual actions—actions *contrary to executive branch policy*—is no more intrusive than holding the individual agents accountable in *Bivens*. This is precisely the "individual instance[] of . . . law enforcement overreach" for which *Bivens* is intended—that "due to [its] very nature [is] difficult to address except by way of damages actions after the fact." *Id.* at 1862.[3]

[3] As described *infra*, nothing about the nature of a Border Patrol agent's position "risk[s] . . . disruptive intrusion by the Judiciary" in this context. *Abbasi*, 137 S. Ct. at 1860.

B. Plaintiffs' Excessive Force Claims Follow from Precedent.

Relying on *Cantú v. Moody*, 933 F.3d 414 (5th Cir. 2019), and *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020), Defendants assert the sweeping proposition that only claims involving "virtually identical facts to" the Supreme Court's decisions in *Bivens*, *Davis*, and *Carlson* do not involve a new context. Doc. 30 at 9-10. But, as explained below, those cases involved meaningful differences in conduct (in *Cantú*, falsification of affidavits) and in location (in *Oliva*, a checkpoint at a government hospital) that mattered to the *Bivens* analysis—unlike Defendant Barrera's unreasonable use of force in a residential setting, which presents no meaningful distinction from *Bivens*. Nor does the Supreme Court's most recent decision involving *Bivens*, *Hernandez v. Mesa*, which turned on the fact that conduct did not occur entirely within the United States, cast doubt on the availability of *Bivens* in the conventional context of excessive force claims against an individual officer arising wholly within the United States. Instead, Plaintiffs' constitutional claims stemming from Defendant Barrera's shooting of Claudia are—like many other *Bivens* excessive-force claims against Border Patrol officers for conduct on American soil recognized by courts inside and outside the Fifth Circuit, *see infra*—not meaningfully different from *Bivens* itself.

Defendant's reliance on *Cantú* is unavailing. The Fifth Circuit determined that the plaintiff's claims in *Cantú*, a case challenging alleged falsification of law-enforcement affidavits in order to suggest the plaintiff's involvement in a drug conspiracy and thereby induce baseless charges that would result in an arrest, differed meaningfully from *Bivens*. *Cantú*, 933 F.3d at 423-24. In *Cantú*, "[t]he connection between the officers' conduct and the injury . . . involve[d] intellectual leaps that a textbook forcible seizure"—like Defendant Barrera's shooting of Claudia— "never does." *Id.* at 423. There the alleged falsification of the affidavits started off a

chain of events in which intervening actors decided to charge the plaintiff and the plaintiff was then detained. *Id.* Judicial guidance as to falsification of affidavits is likewise distinct from that in the context of "a textbook forcible seizure." *Id.* At base, *Cantú*—unlike this case—involved "different conduct" from that in *Bivens*.

Further, the sole fact that Defendant Barrera was a Border Patrol agent, not an agent of the now-defunct Federal Bureau of Narcotics as in *Bivens*, is irrelevant to the new-context analysis. Defendants point to language in *Cantú* stating that in contrast to *Bivens* "[t]his claim involves different conduct by different officers from a different agency." 933 F.3d at 423; Doc. 30 at 9. The Fifth Circuit's analysis, however, solely examined the officers' "different conduct." *Cantú*, 933 F.3d at 423. It did not indicate that if the Federal Bureau of Investigation agents had engaged in the *same* conduct as the Federal Bureau of Narcotics agents in *Bivens*—a forcible seizure—that the mere fact of their differing agencies would create a new context.[4] Given that the Supreme Court has expressly confirmed the continued vitality of *Bivens*, *see, e.g.*, *Abbasi*, 137 S. Ct. at 1856-57, the distinction of "different officers from a different agency" cannot be meaningful. Nor, as discussed *infra*, does any special consideration regarding Border Patrol officers' work provide reason that a *Bivens* remedy is unavailable.

The new context in *Oliva* also is far afield from this case. *Oliva* involved government employees protecting the government's proprietary rights on the government's own property. That case stemmed from the plaintiff's attempt to enter a Veterans Affairs hospital and an altercation with Veterans Affairs officers guarding the security checkpoint, resulting from a

[4] In fact, pursuant to a Memorandum of Understanding, Border Patrol agents are cross-designated with the powers conferred by 21 U.S.C. § 878 on agents of the Drug Enforcement Administration—the successor to the Federal Bureau of Narcotics. *See* Compl. ¶ 14 n.1; *see also United States v. Perkins*, 177 F. Supp. 2d 570, 576 (W.D. Tex. 2001) (discussing cross-designation).

conversation with one of the officers as the plaintiff stood in line for the metal detector. *Oliva*, 973 F.3d at 440-41. The differences that *Oliva* highlighted that, together, made the context new stemmed from the location "in a government hospital, not a private home," at the particularized security location of a metal detector, over a dispute regarding the hospital's ID policy, and in a chokehold at the checkpoint itself. *Id.* at 442-43.[5] In other words, they pertained to the particularities of a security checkpoint on government property and a dispute over government policy. Applying *Bivens*, a case involving excessive force in a classic law-enforcement capacity, to government employees' use of force on government property may represent a meaningfully different context; an encounter on residential property does not.

Moreover, *Oliva* cannot be read as broadly as Defendant proposes in light of the Fifth Circuit's more recent decision in *Angulo v. Brown*, 978 F.3d 942, 2020 WL 6220005 (5th Cir. 2020). In that case, involving a forcible seizure on an international bridge and discussed more fully *infra*, the Fifth Circuit left open the question whether a *Bivens* action was available. *Id.* at *3 n.3. The panel did not adopt the highly fact-bound reasoning of *Oliva*. Instead, it continued to reason more broadly by analogy in the *Bivens* context, viewing *similarity* to "standard Fourth Amendment unreasonable seizure cases" as reason to hold the question open. *Id.*

Nor does the Supreme Court's decision in *Hernandez*, which held that a new context existed for claims arising from a "cross-border shooting," support Defendant's position regarding this shooting in a small Texas town in which the victim was on U.S. soil. 140 S. Ct. 735, 744 (2020). *Hernandez*'s determination that a new context existed turned entirely on the separation-of-powers implications in a *cross-border shooting*. *Id.* In that context, unlike the unconstitutional

[5] The Fifth Circuit's new-context analysis in *Oliva* does not appear to take into account the excessive-force claim in *Bivens*. *Oliva*, 973 F.3d at 443 ("The VA officers did not manacle Oliva in front of his family or strip-search him. *Cf. Bivens*, 403 U.S. at 389.").

arrest "in New York City" in *Bivens* itself, "the risk of disruptive intrusion by the Judiciary" on the other branches of government "is significant." *Id.* The Fifth Circuit's recent decision in *Angulo* contrasted "the international implications of a cross-border shooting" with "standard Fourth Amendment unreasonable seizure cases to which *Bivens* has applied in the past," indicating that *Bivens* remedies are still available for such ordinary, non-international claims. 2020 WL 6220005 at *3 n.3; *see also Hernandez*, 140 S. Ct. at 744 ("A cross-border shooting is by definition an international incident.").

That Defendant Barrera killed Claudia when both were in a residential, fenced-in lot roughly six hundred yards from the border is also not meaningfully different for *Bivens* purposes, despite Defendant's contention. *See* Doc. 30 at 10-11. Courts have sustained *Bivens* claims much closer to the border—for example, in the inspection zone "outside the port of entry but within the territorial United States," *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006), and in secondary inspection at the port of entry, *Lopez-Flores v. Ibarra*, No. 1:17-cv-00105, 2018 WL 6579180, at *2, 12 (S.D. Tex. Jan. 22, 2018). In *Angulo*, the Fifth Circuit described CBP's use of excessive force at immigration inspection at a port of entry in Brownsville—*much* closer to the border than the residential lot in the neighborhood where Defendant Barrera shot Claudia—as "more similar to standard Fourth Amendment unreasonable seizure cases to which *Bivens* has applied in the past" than to the cross-border shooting in *Hernandez*. *Angulo*, 2020 WL 6220005 at *3 n.3. There is no *meaningful* difference, for the context in which a *Bivens* claim arises, between a fenced-in residential lot in Rio Bravo and one in New York City or Omaha. The residential property on which Defendant Barrera killed Claudia parallels the residence where the claim arose in *Bivens* itself. In short, *Hernandez* turned on the fact that the victim was on Mexican sovereign land.

Indeed, for decades, courts inside and outside the Fifth Circuit have recognized excessive-force *Bivens* claims against Border Patrol agents in the United States. In *Martinez-Aguero*, the Fifth Circuit permitted a noncitizen's *Bivens* claim against a Border Patrol agent for unlawful arrest and excessive force to proceed, where the agent's conduct occurred outside the port of entry (prior to entry) though on United States soil. 459 F.3d at 620-21, 625 (stating that the plaintiff "may bring a *Bivens* claim for unlawful arrest and the excessive use of force under the Fourth Amendment"). Following on *Bivens*, numerous other decisions, including in the Fifth Circuit, have sustained similar damages actions against Border Patrol agents under the Fourth Amendment. *See, e.g.*, *Chavez v. United States*, 683 F.3d 1102, 1111-12 (9th Cir. 2012) (permitting claim against Border Patrol agent for unlawful traffic stops); *Castellanos v. United States*, 438 F. Supp. 3d 1120, 1123-24, 1126, 1130-31 (S.D. Cal. 2020) (permitting claims of excessive force and false arrest against CBP officers stemming from events at Calexico Port of Entry); *Sanchez v. Rowe*, 651 F. Supp. 571, 574 (N.D. Tex. 1986) (holding that Border Patrol agent was liable under *Bivens* for use of excessive force against noncitizen in violation of the Fourth and Fifth Amendments); *see also Lopez-Flores*, 2018 WL 6579180 at *8 (observing that "the Fifth Circuit has permitted a *Bivens* Fourth Amendment cause of action to proceed against immigration officers" in cases alleging excessive force and determining that the plaintiff's Fourth Amendment claim against Border Patrol agents presented a new context because "Plaintiff's complaint does not allege excessive force"); *Prado v. Perez*, 451 F. Supp. 3d 306 (S.D.N.Y. Apr. 3, 2020) (fact that claim against Immigrations and Customs Enforcement officers under the Fourth Amendment concerned the same constitutional violation as in *Bivens* "weigh[ed] heavily" in court's finding that claim did not present new context).

Moreover, in the Fifth Amendment context, this Circuit has impliedly recognized the availability of a *Bivens* claim by noncitizens against federal officials for "gross physical abuse" in violation of due process. *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70, 1374 (5th Cir. 1987); *Sanchez*, 651 F. Supp. at 574 (holding that Border Patrol agent was liable under *Bivens* for use of excessive force against noncitizen in violation of the Fifth Amendment); *cf. Pelayo v. U.S. Border Patrol Agent No. 1*, 82 F. App'x 986, 988 (5th Cir. 2003) (permitting due process claim against Border Patrol agent for wrongful deportation to proceed).[6]

In short, this case deals with a single line-level officer's decision to unreasonably apply lethal force to forcibly seize a single victim, contrary to executive branch policy. This lacks any meaningful difference from *Bivens*. Accordingly, this is not a new context, and that ends the analysis.

II. Even If the Court Concludes This Case Presents a New Context, "Special Factors" Do Not Counsel Against a *Bivens* Remedy.

Even if the Court concludes Plaintiffs' claims present a new context, no special factors counsel against a *Bivens* remedy. *Bivens* embodies the principle that wrongdoers who exercise government power should be accountable for rights violations. "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. at 18. In determining whether special factors exist to overcome this principle, courts must focus on the concrete facts of each case. *See, e.g.*, *Wilkie* v. *Robbins*, 551 U.S. 537,

[6] Defendant attempts to separate out the Fourth and Fifth Amendment *Bivens* analyses, but this approach is inconsistent with *Hernandez*. The *Hernandez* plaintiffs brought claims under the Fourth and Fifth Amendments stemming from a fatal shooting. 140 S. Ct. at 740. The Supreme Court analyzed the availability of "[t]he *Bivens* claims" together, making no distinction between them for purposes of *Bivens* analysis. *Id.* at 743.

555-62 (2007). Here, Plaintiffs have no adequate alternative remedy for Defendant Barrera's unconstitutional killing of Claudia, and no other special factors counsel hesitation.

A. No Alternative Remedial Structure Counsels Against a *Bivens* Remedy.

Defendant Barrera argues that the mere existence of a remedy under the Federal Tort Claims Act ("FTCA") forecloses a suit under *Bivens.* Dkt. 30 at 14-15. Alternative remedies weigh against the application of *Bivens*, however, only when they are "adequate" to protect the constitutional interests at issue—*i.e*., when they provide incentives that deter unconstitutional conduct "while also providing roughly similar compensation to victims of violations." *See Minneci v. Pollard*, 565 U.S. 118, 130 (2012). Defendant fails to note that the Supreme Court has *explicitly* considered and rejected the contention that an FTCA claim against the United States is an alternative remedy that operates to foreclose a *Bivens* claim against an individual. *Carlson v. Green*, 446 U.S. at 19-23; *see also Cantú*, 933 F.3d at 421 (recognizing that "*Carlson* remain[s] good law"). The FTCA, alone or in tandem, cannot displace *Bivens* when it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20; *see also Prado*, 451 F. Supp. 3d at 314, 316 (allowing *Bivens* and FTCA claims arising out of ICE officers' search and seizure to proceed past motion to dismiss).

The Supreme Court's more recent *Bivens* jurisprudence likewise does not hold that the existence of the FTCA or the availability of a claim under the FTCA is a reason not to extend *Bivens*. In fact, in *Abbasi* the Court recognized the existence of the FTCA—and shortly thereafter explained that the "settled law of *Bivens*" "in the search-and-seizure context" and "the undoubted reliance upon it as a fixed principle in the law" "are powerful reasons to retain it." 137 S. Ct. at 1856-57. *Abbasi* noted that "if there is an alternative remedial structure present *in a certain case*," such a remedial scheme may be a reason not to extend *Bivens*—but it in no way

suggested that the existence of the FTCA as a general remedial scheme for federal torts would foreclose the extension of *Bivens*. *Id.* at 1858 (emphasis added) (notably citing specific remedial schemes as examples but *not* the FTCA).

Defendant Barrera ignores this settled Supreme Court precedent and instead relies on factually distinct cases for the proposition that the existence of a possible FTCA remedy must entirely foreclose *Bivens* in all contexts. But these cases do not and could not sweep so broadly. First, in *Cantú*, the Fifth Circuit did not find that the existence of an FTCA remedy was alone dispositive, but instead one of "legion" special factors that counseled against *Bivens* in that particular context. 933 F.3d at 423. Second, the Fifth Circuit's recent decision in *Oliva* also does not sweep as broadly as Defendant claims. Dkt. 30 at 15 (suggesting that under *Oliva* FTCA claims operate as a bar to *Bivens* remedies). *Oliva* solely indicates, at most, that hesitation is warranted in extending *Bivens* to certain specific claims in which the government is acting essentially in a proprietary capacity—as with the Veterans Affairs hospital there. *See* 973 F.3d at 443-44. Any broader reading would be contrary to the Supreme Court's *Bivens* jurisprudence and inconsistent with Fifth Circuit case law.

In fact, the Fifth Circuit's more recent decision in *Angulo* explicitly left open the question whether *Bivens* actions were available "against CBP agents at the border." 2020 WL 6220005 at *3 n.3. There, the plaintiff brought claims against CBP officers under both the FTCA and *Bivens* alleging unlawful detention and excessive use of force stemming from a forcible seizure in a routine vehicle stop—for inspection on entry into the United States—at the International Port of Entry Gateway Bridge. *Id.* at *1. The *Angulo* court reasoned that it would assume without deciding that a *Bivens* remedy was available, in part because "the international implications of a cross-border shooting—of vital importance in *Hernandez*—are not present here, where the

dispute is more similar to standard Fourth Amendment unreasonable seizure cases to which *Bivens* has applied in the past." *Id.* Notably, the Fifth Circuit did not address the plaintiff's concomitant FTCA claims as even relevant to the *Bivens* analysis, much less suggest that such claims, or the existence of the FTCA, could foreclose the availability of *Bivens*. *Id.* at *1, *3 n.3.

Carlson's instruction that Congress has made clear that the FTCA was not intended to displace *Bivens* remedies is still binding precedent. As many *Bivens* decisions—most recently, *Angulo*—demonstrate, the mere fact of the FTCA's existence or the fact of bringing FTCA claims does not foreclose the availability of a *Bivens* remedy. Defendant's unnecessarily broad reading of language in *Cantú* and *Oliva* cannot be correct unless the court assumes the Fifth Circuit intended simply to ignore the Supreme Court's direct pronouncement on the issue in *Carlson*.

Lastly, Defendant misconstrues the posture of Plaintiffs' state tort claims. Plaintiffs have pled such claims only in the alternative, if the Court were to find that a remedy does not exist under the FTCA because Defendant Barrera was not acting within the scope of his employment. Compl. ¶¶ 1, 3; *see, e.g.*, *Osborn v. Haley*, 549 U.S. 225, 229-30 (2007). If that were to occur, Plaintiffs would and could press a claim under Texas tort law just as they could against any other private individual for tortious actions within the state.

B. Congress Did Not Intend to Bar a *Bivens* Remedy in this Context.

Defendant mistakenly argues that *Bivens* is unavailable here because of the Fifth Circuit's disapproval of *Bivens* as a remedy in certain immigration contexts. Dkt. 30 at 17. But this is a straightforward case of excessive force by law enforcement resulting in death. The fact that that excessive force was by a Border Patrol agent does not preclude a *Bivens* remedy. Otherwise,

Border Patrol agents would have impunity to use excessive, including fatal, force without constitutional consequence.

The Fifth Circuit's decisions in *Martinez-Aguero*, *De La Paz*, and *Hernandez* demonstrate that *Bivens* excessive-force claims against Border Patrol agents exist for events that occur wholly within the territorial United States, as in this case. In *Martinez-Aguero*, the Fifth Circuit permitted such a claim to go forward against Border Patrol agents, affirming denial of a motion for summary judgment seeking dismissal and stating that the plaintiff "may bring a *Bivens* claim for unlawful arrest and the excessive use of force under the Fourth Amendment." 459 F.3d at 625. In *De La Paz*, it confirmed that while it did not find a *Bivens* remedy available for the non-excessive-force claims at issue, it must "defer to . . . prior Fifth Circuit decisions[, including *Martinez-Aguero*,] 'to the extent that they permit *Bivens* actions against immigration officers who deploy unconstitutionally excessive force when detaining immigrants on American soil.'" 786 F.3d at 374; *Hernandez*, 885 F.3d at 819 n.14 (reaffirming this principle). And it confirmed in *Hernandez*, in the context of a fatal shooting by a Border Patrol agent, that its decision denying a *Bivens* remedy for a *cross*-border shooting "does not . . . repudiate *Bivens* claims where constitutional violations by the Border Patrol **are wholly domestic**." *Id.* (emphasis added). Nothing about general immigration enforcement counsels against a remedy in this kind of "garden variety excessive force case against a federal law enforcement officer." *Id.* at 814.

Here, Defendant Barrera shot Claudia in Rio Bravo, Texas. Compl. ¶¶ 22-25. Claudia was not in Mexico (nor even observed crossing the border); she was in an American town, in a residential area. Compl. ¶¶ 17, 20. As *Martinez-Aguero*, *De La Paz*, and *Hernandez* make clear, excessive force claims arising on American soil—including where a plaintiff is at a border crossing on American soil—are not shielded by the invocation of immigration enforcement, even

if the law enforcement officer involved is a Border Patrol officer. *Hernandez*, 885 F.3d at 819 n.14; *Martinez-Aguero*, 459 F.3d at 620, 625 (plaintiff "outside the port of entry but within the territorial United States" "may bring a *Bivens* claim for unlawful arrest and the excessive use of force"). Even supposing that Defendant Barrera suspected that Claudia might be subject to arrest for civil immigration violations, or even misdemeanor illegal entry—facts that appear nowhere in the complaint—that does not differentiate this case in the slightest from cases in which the Fifth Circuit has found *Bivens* remedies available.[7] *See Lynch*, 810 F.2d at 1374 ("[W]e cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien"). Nor does Defendant Barrera provide any logical reason why an armed law enforcement agent charged with enforcing immigration laws would be any different from an armed law enforcement agent charged with enforcing federal drug laws, as in *Bivens* itself.

Moreover, neither the Supreme Court's decision in *Hernandez* nor the Fifth Circuit's prior decision in that case determined that federal statutes governing immigration enforcement indicated the probable intent of Congress and therefore were special factors counseling hesitation in the cross-border-shooting context.

The circumstances in *De La Paz* further demonstrate why there is nothing pertaining to immigration enforcement that counsels hesitation regarding a *Bivens* remedy in this excessive-force case. There, the Fifth Circuit found that the CBP agents detained the vehicles and interrogated the plaintiffs specifically for immigration enforcement purposes, resulting in the plaintiffs' placement in immigration proceedings. 786 F.3d at 370-71. Under these facts, and

[7] There is no allegation before this Court that Defendant had any indication that Claudia might have recently crossed into the United States or that her immigration status was at issue.

where the plaintiffs had been placed in immigration proceedings, the Fifth Circuit held that "*Bivens* liability for civil immigration detention and removal proceedings" was unavailable. *Id.* at 378. Further, there is simply no way to remedy the harm from excessive force through the immigration-enforcement system here, since the person against whom immigration-enforcement proceedings would be brought is deceased.

Nor is *Peña Arita v. United States*, No. 7:19-CV-00288, 2020 WL 3542256 (S.D. Tex. June 30, 2020), any more helpful to Defendant. That district court decision reasoned that "Congress has given thorough and intense consideration to the statutory regime concerning immigration *detention*." *Id.* at *14 (emphasis added). It had nothing to do with excessive force in the community and is, at most, in line with the distinction in *De La Paz* between excessive-force and some other sorts of claims. *Maria S. as Next Friend for E.H.F. v. Garza* pertained even more strongly to the immigration removal process. 912 F.3d 778, 784 (5th Cir. 2019). In that case, a CBP agent allegedly coerced a noncitizen who lacked legal status into signing a removal form, leading to her death upon her return to Mexico. *Id.* at 780. Instead, Fifth Circuit case law—*Martinez-Aguero*, *De La Paz*, and *Hernandez*—and the Supreme Court's decision in *Hernandez* show that for excessive-force claims against CBP officers, there is nothing relating to immigration considerations that counsels hesitation in determining that a *Bivens* remedy exists.

C. National Security Also Does Not Counsel Hesitation Here.

Defendant next attempts to invoke supposed national security concerns as a categorical bar against granting a *Bivens* remedy for any incident near the U.S.-Mexico border. Dkt. 30 at 19. As the Supreme Court cautioned in *Abbasi*, "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). "There are . . . no

identifiable national interests that justify the wanton infliction of pain." *De La Paz*, 785 F.3d at 374 (quoting *Martinez-Aguero*, 459 F.3d at 623). Defendant Barrera unlawfully and fatally shot Claudia in a residential neighborhood in a small Texas town about a third of a mile from the border. Compl. ¶ 20. In fact, one resident, upon hearing the gunshot, filmed the shooting's aftermath, including Claudia's death. *Id.* ¶ 25. National security concerns do not counsel against a *Bivens* remedy for an unjustified deadly shooting by a law enforcement officer of an unarmed person who posed no threat on a residential lot in an American neighborhood. Such a conclusion would be absurd, and Supreme Court precedent does not compel it.

The implications of Defendant's arguments are staggering. For example, had Defendant Barrera turned and shot dead the nearby neighbor who filmed the scene as Claudia was dying, Defendant's position would leave this resident without any recourse under *Bivens* for having been shot. There is no reason to view his killing of Claudia as analytically distinct. The mere fact that the shooter here is a Border Patrol agent cannot categorically shield him from any sort of individual liability for the kinds of "garden variety excessive force case[s] against a federal law enforcement officer" that form the very core of *Bivens*—no matter his conduct. *Hernandez*, 885 F.3d at 814.

Contrary to Defendant's assertion, the Supreme Court's decision in *Hernandez* is inapposite on this point. The harm there occurred on foreign soil. 140 S. Ct. at 741. If, as Defendant maintains, whether the victim is located in Mexico or within the United States "is immaterial to this analysis," Doc. 30 at 19, then any broad assertion of national security concerns would insulate unlawful conduct by Border Patrol agents across the board—even actions committed against U.S. citizens and residents on U.S. soil. No court has ever upheld such a radical principle.

Moreover, *Hernandez*'s reasoning hinged on the fact that the agent was "stationed right at the border," engaged in a cross-border shooting—it did not reach agents patrolling neighborhoods within the United States or excessive force that occurs wholly within the United States. *Id.* at 746. *Hernandez* viewed the location directly at the border—the agent who shot and killed a child there was located on the United States side of a concrete culvert through which the border runs—as a special factor counseling hesitation. *Id.* (contrasting location directly at the border with those agents not located directly at the border itself). It did not indicate that *Bivens* is not available to seek accountability for excessive force in a residential setting within the United States merely because the agent involved happened to work for the Border Patrol rather than a different federal law enforcement agency. And, fundamentally, the position of the agent immediately at the border was relevant in *Hernandez* only because the case involved a cross-border shooting; the Court never indicated that a *Bivens* remedy would be unavailable had agents positioned at the border killed someone standing on U.S. soil. *See id.* at 746-47; *Angulo*, 2020 WL 6220005 at *3 n.3 (describing "the international implications of a cross-border shooting" as "of vital importance in *Hernandez*").

Neither the Supreme Court nor the Fifth Circuit has held that *Bivens* is unavailable in the context of the domestic use of excessive force by a Border Patrol agent through any sort of reliance on immigration enforcement or national security. In fact, in *Angulo*, the Fifth Circuit specifically described the use of excessive force in that case by CBP officers—again, in an inspection at a port of entry in Brownsville—as "more similar to" such "standard Fourth Amendment unreasonable seizure" *Bivens* cases than the cross-border shooting involved in *Hernandez*. *Id.* Defendant Barrera's killing of Claudia is even further attenuated from the

international implications that existed in *Angulo*, in which the alleged violations occurred *on an international bridge*.

Defendant Barrera shot Claudia in a residential neighborhood approximately a third of a mile from the border. He was engaged in conventional law-enforcement activity—patrolling the quiet community of Rio Bravo. Nothing about the mere fact of this small town's location in south Texas or Defendant Barrera's status as a Border Patrol agent, rather than a law enforcement officer from a different agency, counsels hesitation in ensuring accountability for an unjustified fatal shooting. Instead, these are precisely the kinds of claims for which *Bivens* exists to provide redress—as "settled law . . . in this common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857.

CONCLUSION

Defendant Barrera's motion to dismiss Plaintiffs' *Bivens* claims should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon counsel of record through the Court's electronic filing system on November 19, 2020.

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