No. 17-1678

In the Supreme Court of the United States

JESUS C. HERNANDEZ, *ET AL.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit association dedicated to ensuring that federal, state, and local agencies act within their substantive authority, consistent with applicable procedural requirements. Judicial review – both in retrospective damages claims as here and for prospective equitable or declaratory relief – enables the public to enforce the substantive limits on governmental authority. Cross-border actions, such as the shooting here, raise the important questions of *which* country's substantive

[1] *Amicus* files this brief with the consent of all parties, which all have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

laws apply to resolving these important issues. While sympathy naturally extends to any family that has lost a son, allowing an action under *Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971), without first exploring an action under diversity jurisdiction could displace available relief for federal officers' unauthorized or illegal actions abroad.

While it may be that Mexican law is inadequate, the same is not true for an identical shooting across the *Canadian* border. Injured parties could sue in federal court – or even state court – with Canada's substantive law applying under choice-of-law principles. This Court should not extend *Bivens* to cross-border torts without first considering alternate remedies. And this Court certainly should not *displace* alternate remedies that already exist for cross-border torts in countries – such as Commonwealth counties – that share our common law heritage. For example, APA Watch members are involved in defending the rights of Commonwealth citizens falsely imprisoned and maliciously prosecuted abroad, based on false extradition requests; Commonwealth citizens have (and deserve to keep) the right to sue federal officers in U.S. courts under substantive Commonwealth law for injuries that arise in Commonwealth countries.

For these reasons, *amicus* APA Watch has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The parents of Sergio Hernandez ("Plaintiffs") seek damages from U.S. Customs & Border Patrol Agent Jesus Mesa, Jr., under *Bivens* for the fatal cross-border shooting of their 15-year-old son. The parties dispute what preceded the fatal shooting here.

Compare Pets.' Br. at 1, 4 *with* Resp.'s Br. at 1-2. *Amicus* APA Watch has no idea whether the decedent was a child playing, involved in criminal activity, or simply caught in crossfire. For purposes of a motion to dismiss, however, this Court assumes the well-pleaded facts of the complaint. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2005 (2017) ("*Mesa I*"). Thus, although the Department of Justice cleared Agent Mesa of any wrongdoing in its internal investigation, U.S. Dep't of Justice, Office of Pub. Affairs, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012), this brief assumes *arguendo* that, while standing in Texas and for no reason, Agent Mesa shot the decedent – a Mexican national not connected to the U.S. – who was standing in Mexico.

SUMMARY OF ARGUMENT

Amicus APA Watch argues that Plaintiffs lack standing because the Fourth and Fifth Amendments do not extend protections to aliens abroad, so that Plaintiffs lack a legally protected interest under federal law (Section I.A). In addition, even if the outer limits of Article III jurisdiction and the Fourth and Fifth Amendments could extend extraterritorially to the Mexican side of the border, the federal-question statute, 28 U.S.C. §1331 extends only as far as Congress intended, which limits the *Bivens* remedy that derives from federal-question jurisdiction (Section I.B).

Given APA Watch's desire to protect the rights of Commonwealth countries to bring suit in U.S. courts under diversity jurisdiction and Commonwealth law for torts arising abroad, *amicus* next argues that the exclusivity clause in 28 U.S.C. §2679(b)(1) of the

Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA"), does not preclude the use of Mexican law in a diversity action because the *entire* FTCA does not apply here, by its express terms (Section II.A). Neither the 1988 FTCA amendments – the Federal Employees Liability Reform and Tort Compensation Act of 1988, PUB. L. NO. 100-694, 102 Stat. 4563 ("Westfall Act") – nor this Court's decision in *U.S. v. Smith*, 499 U.S. 160 (1991), bar the use of diversity jurisdiction against federal officers for torts arising abroad because the entire FTCA does not apply to suits excluded under the FTCA exceptions (Sections II.A.1-II.A.2). Under *lex loci delicti* or the more-prevalent Restatement choice-of-law rule, the substantive law applicable to such a suit would be the law of the country where the injury was felt (Section II.B.1-II.B.2).

The lack of constitutional and statutory subject-matter jurisdiction for *Bivens* relief and the available state-law remedy all counsel against this Court's finding a *Bivens* remedy here (Sections III.A-III.B). Further, the border-control and immigration contexts, as well as the nexus with foreign relations constitute "special factors" that would counsel against finding a *Bivens* remedy here, even assuming that jurisdiction existed (Section III.C).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CREATE A *BIVENS* REMEDY FOR TORTS ARISING ABROAD.

Because the Constitution does not apply abroad – not even *near* the border – Plaintiffs lack standing, and this Court lacks the federal-question jurisdiction

to extend a *Bivens* remedy. Moreover, the availability of diversity jurisdiction to redress claims under Mexican law triggers the canon of constitutional avoidance to this Court's interpreting the geographical coverage of the Constitution, when that may not be necessary.

Federal courts are courts of limited jurisdiction, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), and the party asserting jurisdiction bears the burden of establishing it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The parties cannot confer jurisdiction by consent or waiver, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), and federal appellate courts have the obligation to assure themselves not only of their jurisdiction but also of the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Plaintiffs fail at the jurisdictional threshold.

A. Plaintiffs lack Article III standing to sue under the Fourth or Fifth Amendments.

Plaintiffs assert rights under the Fourth and Fifth Amendments to the U.S. Constitution. If the decedent were a U.S. citizen or if he had been standing in the United States, Plaintiffs' version of the story would trigger rights under the Constitution, which "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Unfortunately for Plaintiffs' federal-law claims, "the Land" to which the Constitution applies does not extend to Mexico: "our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens." *U.S. v. Belmont*, 301 U.S. 324, 332 (1937); *Am. Banana Co. v. United Fruit Co.*, 213 U.S.

347, 356 (1909) ("the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done"); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act"). As the Court held in in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990), "our rejection of extraterritorial application of the Fifth Amendment [is] emphatic," and "it would seem even more true with respect to the Fourth Amendment." Neither Plaintiffs nor their son can invoke rights under the Constitution for the injuries in this case.

1. Article III standing requires a legally protected right.

At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's Article III jurisdiction raises an "injury in fact" that (a) constitutes "an invasion of a legally protected interest," (b) is caused by the challenged action, and (c) is redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992) (interior quotation marks omitted). Plaintiffs have no legally protected interest under U.S. law for their injuries.

Specifically, the threshold requirement for "the irreducible constitutional minimum of standing" is that a plaintiff suffered an "injury in fact" through "an invasion of a *legally protected interest* which is … concrete and particularized" to that plaintiff. *Defenders of Wildlife*, 504 U.S. at 560 (emphasis

added). As this Court recently explained in rejecting standing for *qui tam* relators based on their financial stake in a False Claims Act penalty, not all *interests* are *legally protected* interests:

> There is no doubt, of course, that as to this portion of the recovery — the bounty he will receive if the suit is successful — a *qui tam* relator has a concrete private interest in the outcome of the suit. But the same might be said of someone who has placed a wager upon the outcome. *An interest unrelated to injury in fact is insufficient to give a plaintiff standing*. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion[.]

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73 (2000) (emphasis added, interior quotation marks, citations, and alterations omitted); *accord McConnell v. FEC*, 540 U.S. 93, 226-27 (2003). Instead, "standing requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986). Here, a Mexican injured in Mexico has no nexus to the U.S. Constitution.

Although the requirement for a legally protected interest is analogous to the prudential zone-of-interests test, *Stevens* and *McConnell* make clear that the need for a *legally protected interest* is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential inquiry that a party could waive. When jurisdiction and the merits

"intertwine," federal courts can resolve the merits and jurisdictional issues together. *See Land v. Dollar,* 330 U.S. 731, 735 (1947). Here, the Court should reaffirm that the U.S. Constitution does not protect aliens abroad.

2. ***Boumediene*** **does not create non-*habeas* rights for aliens abroad.**

While this Court recently found extraterritorial application of the Suspension Clause, *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (majority's "concerns have particular bearing upon the Suspension Clause"), that has no bearing on the geographic scope of non-*habeas* provisions of the Constitution.

With respect to the Suspension Clause, the *Boumediene* majority found the historical reach of the common law writ of *habeas corpus* uncertain *vis-à-vis* aliens abroad and – for whatever reason – gave the petitioners the benefit of the doubt as to whether the challenged statute violated the Suspension Clause (*i.e.*, suspended the writ). Whether right or wrong, *Boumediene* has no bearing on constitutional rights that depend on the Constitution itself, as distinct from those that depend on the suspension of a common law right that pre-existed the Constitution.

With respect to the Constitution's geographic scope, *Boumediene* merely extended the scope of U.S. sovereignty from "formal" sovereignty to include "*de facto*" sovereignty over a military base in Cuba for which the United States has permanent "complete jurisdiction and control" under a lease, even though Cuba retained "ultimate sovereignty," 553 U.S. at 753; without extending that novel concept to a military prison where the United States lacked "absolute"

control because it held the prison "under the jurisdiction of the combined Allied Forces." 553 U.S. at 768 (citing *Eisentrager* and *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948)); *see also id.* at 754, 765 (U.S. had "plenary control" over Guantanamo Bay); *id.* at 771 ("complete and total control"). Moreover, sovereignty includes the "exclusion of other states." 553 U.S. at 754 (citing 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, §206, Comment b). Here, the United States has less control over the border area than it had in *Eisentrager* over Landsberg Prison – a U.S. Army base in occupied Germany – and shares control with Mexico. Because the United States share control with Mexico, the United States' control is not complete, total, plenary, or absolute, and the United States cannot *exclude* Mexico. Even under the expansive sovereignty that *Boumediene* fashioned for the Suspension Clause, the United States is not sovereign over the Mexican side of the border area. As such, the Constitution does not create rights on the Mexican side of the border.

3. Lacking a federal right means that Plaintiffs also lack a federal remedy.

The lack of federal rights answers Plaintiffs' and their *amici*'s invocation of precedents that reject constructions that "would, in many cases," result in "rights without corresponding remedies." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816). "Want of right and want of remedy are justly said to be reciprocal." *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Plaintiffs' lack of a federal right justifies their lack of a federal remedy: "where, although there is damage, there is no violation of a right no action can

be maintained." *Id*. As explained in Section II, *infra*, Plaintiffs can assert their rights under Mexican law in Texas state or federal court.

B. Federal-question jurisdiction is lacking for injuries arising abroad.

Regardless of whether the Constitution protects foreigners abroad, the federal-question statute on which *Bivens* relies does not extend to extraterritorial torts. Lack of federal-question jurisdiction provides a distinct jurisdictional basis to reject Plaintiffs' *Bivens* claims.

Bivens is simply an exercise of federal courts' power to fashion a remedy for suits within their statutory subject-matter jurisdiction:

> Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States."

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (quoting 28 U.S.C. §1331); *accord Schweiker v. Chilicky*, 487 U.S. 412, 420-21 (1988); *Bivens*, 403 U.S. at 398-99 (Harlan, J., concurring in the judgment). As the *Bivens* majority made clear, *Bivens* held what *Bell v. Hood*, 327 U.S. 678 (1946), prefigured: "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Bivens*, 403 U.S. at 396 (quoting *Bell*, 327 U.S. at 684). And *Bell* made clear that the entire enterprise was based on federal-question jurisdiction: "Whether the petitioners are

entitled to recover depends upon an interpretation of [the federal-question statute] and on a determination of the scope of the Fourth and Fifth Amendments' protection[.]" *Bell*, 327 U.S. at 684-85. Even if this Court interprets *the Constitution* to extend extra-territorially here, this Court cannot *sua sponte* extend statutory federal-question jurisdiction to do so.

The statutory and constitutional questions are different. The statutory question's focus is not the outer limits of the Constitution's reach – under either the Fourth and Fifth Amendments or Article III – but rather the limits that *Congress* intended when it created the lower federal courts and established their subject-matter jurisdiction. The "Article III … power to hear cases 'arising under' federal statutes… is not self-executing," and Congress need not provide the lower federal courts the full scope of judicial power that Article III makes available. *Merrell Dow Pharm., Inc. v. Thompson,* 478 U.S. 804, 807 (1986). Congress did not do so here.

The *statutory* issue is whether Congress intended federal-question jurisdiction to extend to an extraterritorial application of the Constitution. There is a widely-held – but incorrect – assumption that federal-question jurisdiction is available for any federal claim. As Justice Holmes recognized, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921). Until 1875, the lower federal courts did not have federal-question jurisdiction. *Merrell Dow Pharm.,* 478 U.S. at 807. As that history shows, unexamined assumptions cannot and do not accurately define the bounds of the lower federal courts' federal-question jurisdiction.

Instead, "because the Framers believed the state courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channeled to the federal courts." *South Carolina v. Regan,* 465 U.S. 367, 396 (1984). Whatever Congress did not expressly empower the lower federal courts to hear falls outside their jurisdiction:

> [T]he uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.

Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 620 (1875). As creatures of statute, the lower courts have only the jurisdiction that Congress gave them, which need not extend to the full Article III limits, whatever those limits may be *vis-à-vis* the extraterritorial application of the Fourth and Fifth Amendments.

In enacting the federal-question statute, Congress would have understood the Constitution's geographic scope as limited *to this Nation*:

> By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.

Lauritzen v. Larsen, 345 U.S. 571, 577 (1953); *United Fruit*, 213 U.S. at 356; *Belmont*, 301 U.S. at 332. As this Court has explained – early and often – "general

words must … be limited … to those objects to which the legislature intended to apply them." *U.S. v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818); *Lauritzen*, 345 U.S. at, 578 (quoting *Palmer*); *Small v. U.S.*, 544 U.S. 385, 388 (2005) (same). The federal-question statutes are thus entitled to a presumption against extraterritoriality, *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1398 (2018), which nothing rebuts here. Even if this Court wanted to find that the Constitution applies abroad, the lower courts' federal-question jurisdiction would not apply.

Nothing has happened since 1875 to expand the scope of the statutory grant of federal-question jurisdiction to the lower courts: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957). Quite simply, federal-question jurisdiction as enacted did not allow extraterritoriality, and nothing has changed.

In a related context involving statutory subject-matter jurisdiction, this Court has accepted prior decisions as limiting the seemingly-broad scope of the subject-matter jurisdiction statutes:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant [in 28 U.S.C. §1332].

Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992).[2] A similar reading here should convince this Court that Congress did not authorize this Court's foray into an extraterritorial Constitution. To the contrary, for cases like the one here, Congress directed the courts to resolve such cases with diversity jurisdiction and choice-of-law analyses.

Plaintiffs' *amici* press examples of extraterritorial applications of U.S. law from our early history, Const'l Accountability Ctr. *Amicus* Br. at 5-10; Vazquez-Bernstein *Amicus* Br. at 5-19, but these examples are irrelevant here. First, they appear to involve either admiralty jurisdiction or other forms of jurisdiction from the Judiciary Act of 1789, 1 Stat. 73, not federal-question jurisdiction. Unlike federal-question jurisdiction, admiralty jurisdiction contemplates actions arising on the high seas. Judiciary Act of 1789, §9, 1 Stat. at 77. Second, the choice-of-law analysis for these decisions is neither developed in the decisions themselves nor – necessarily – consistent with current choice-of-law principles. As explained in Section II, *infra*, Plaintiffs' action now – and in 1789 – is properly viewed as a diversity action.

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[2] *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) ("[w]e disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board").

C. Constitutional avoidance counsels for requiring Plaintiffs to proceed under diversity jurisdiction and Mexican law before considering extraterritorial application of the U.S. Constitution.

Two canons of construction counsel for avoiding a constitutional issue. First, courts interpret statutes to avoid raising constitutional questions unnecessarily. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). Second, courts avoid issuing constitutional decisions in cases that a narrower ground could decide: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Both canons are relevant here.

Both canons counsel against expanding the flawed "*de facto*" sovereignty holding in *Boumediene* to new constitutional rights before first finding that Congress gave the lower courts federal-question jurisdiction over extraterritorial application of the Constitution. Similarly, both canons counsel against finding that the Westfall Act *sub silentio* preempted the diversity jurisdiction established in the Judiciary Act of 1789 (without replacing it) for torts that arise abroad. Plaintiffs recognize as much by making their own constitutional-avoidance argument against the Westfall Act's displacement of Texas law with no

Bivens remedy. Pets.' Br. at 38-43. Plaintiffs are half right: they never had a Texas-law remedy, but the Westfall Act did not displace their action under Mexican law under Texas's choice-of-law rules. *See* Sections II.B.1-II.B.2, *supra*.

II. TORTS ARISING ABROAD FALL UNDER DIVERSITY JURISDICTION.

Plaintiffs argue – incorrectly – that the Westfall Act displaces any other adequate remedy: "the Westfall Act … preempts the Texas tort remedy to which [Plaintiffs] could otherwise have resorted." Pets.' Br. at 1, 8-9, 20, 36, 40-43. But the either-or choice between *Bivens* and a Texas-law remedy presents a false dichotomy. *See also* Prof. Sisk *Amicus* Br. at 8-16. A similarly situated plaintiff could have sued in a federal court under diversity jurisdiction, 28 U.S.C. §1332(a), which would choose *Mexico's* substantive law to guide the case. Alternatively, that plaintiff could have sued sue in a Texas *state court*, although the defendant could have removed to federal court, 28 U.S.C. §1442, as was the typical practice. *Bivens*, 403 U.S. at 391; *cf. Belknap v. Schild*, 161 U.S. 10, 18 (1896) ("officers or agents, although acting under order of the United States, are … personally liable to be sued for their own infringement of a patent") (patent jurisdiction); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 490 (1806) ("argument … that lieutenant Maley is not liable … would have great weight, if the circumstances … had been such as to justify [the] seizure") (admiralty jurisdiction). Whether in state or federal court, Texas's choice-of-law rules would pick Mexican law as the substantive law to govern this tort arising in Mexico. *See* Sections

II.B.1-II.B.2, *infra*. But Plaintiffs here are simply wrong to claim that they lack any remedy other than *Bivens*.[3]

A. The FTCA does not bar diversity actions for torts arising abroad.

As explained, prior to the Westfall Act, plaintiffs could and did sue in federal and state court, which the Government typically would remove to federal court.[4] *Bivens*, 403 U.S. at 391. With that background, the question then becomes whether the Westfall Act or *Smith* denied parties injured by federal employees or agents the available remedy of suing under diversity jurisdiction. *Amicus* APA Watch respectfully submits that three categories of cases provide three different answers to that question:

- When the claim falls under the FTCA, the FTCA remedy against the United States "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim[,]" 28 U.S.C. §2679(b)(1);

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[3] Plaintiffs have no U.S. rights, *see* Section I.A, *supra*, and our federal courts would lack the jurisdiction to infer a federal remedy, even if Plaintiffs had a federal right. *See* Section I.B, *supra*. Plaintiffs' alternate remedy lies under Texas law, which would revert to Mexican tort law under Texas's choice-of-law rules. *See* Sections II.B.2-II.B.3, *infra*.

[4] Plaintiffs easily satisfy the diversity-jurisdiction thresholds: "it is facially apparent that each plaintiff's wrongful death claim satisfies the amount in controversy requirement." *Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 67 (5th Cir. 2010); *see also* 28 U.S.C. §1332(a).

- For *Bivens* claims, however, the exclusivity clause just cited "does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States," *id.* §2679(b)(2)(A); and
- When the claim is one of the FTCA's exceptions listed in 28 U.S.C. §2689(a)-(n), "[t]he provisions of this chapter … shall not apply," *id.* §2689, which includes the FTCA's exclusivity clause.

As relevant here, the Court's task is to determine if Plaintiffs' claims fall under the second bullet (*Bivens*) or the third (no FTCA limits on otherwise-available remedies). As explained in Section III, *infra*, this is no *Bivens* claim; as explained in Sections II.A.1-II.A.2, *infra*, the FTCA does not displace other remedies.

1. <u>The Westfall Act did not displace diversity jurisdiction.</u>

Although *Minneci v. Pollard*, 565 U.S. 118, 126 (2012), cites the FTCA for the proposition that one "ordinarily cannot bring state-law tort actions against employees of the Federal Government," *id.* (emphasis omitted) (citing 28 U.S.C. §§2671, 2679(b)(1)), that proposition does not apply to situations to which the FTCA itself does not apply:

> *The provisions of this chapter … shall not apply* to—
>
> …
>
> (k) Any claim arising in a foreign country.

28 U.S.C. §2689(k) (emphasis added). Because FTCA's exclusivity clause is every bit as much a part of "this chapter" (*i.e.*, the FTCA) as the FTCA's foreign-country exception, the FTCA's bottom line for claims that arise in foreign countries is that the *entire* FTCA

does not apply. In short, neither FTCA remedies nor FTCA exclusivity applies here. That leaves Plaintiffs free to resort to alternate legal theories, including the ones outlined here.

Although the inapplicability of FTCA exclusivity is obvious from the FTCA's plain language, the same result would flow from the canon against repeals by implication:

> While a later enacted statute … can sometimes operate to amend or even repeal an earlier statutory provision …, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007). Indeed, the "canon [against repeals by implication] applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975). Under the "clear and manifest" standard, "[w]hen the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors" unsettling the canon. *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted). The FTCA and Westfall Act are clearly susceptible to their retaining a diversity action when torts arise abroad, based on the entire FTCA's not applying to such claims.

The alternate cause of action proposed here (suing under diversity jurisdiction) existed when Congress enacted the FTCA and the Westfall Act; indeed, the action has existed since the Judiciary Act of 1789. *See* 1 Stat. at 78 (§11); *cf.* Diego A. Zambrano, *The States'*

Interest in Federal Procedure, 70 STAN. L. REV. 1808, 1880 (2018) (citing diversity jurisdiction as "the precise reason why federal courts exist"). Under the canon against repeals by implication, this Court should not presume that Congress intended to eliminate that remedy *sub silentio*, without replacing it. Moreover, as Plaintiffs argue, it would raise grave constitutional questions if Congress had removed all available remedies. Pets.' Br. at 38-43; *accord* Section I.C, *supra*. In short, without *Smith*, it would be frivolous to argue that the FTCA or the Westfall Act preempts or displaces diversity jurisdiction for torts arising abroad.

2. *Smith* did not displace diversity jurisdiction.

While *Smith* might seem to have ruled out certain non-FTCA remedies for injuries arising abroad, this Court should recognize either that *Smith* does not bar diversity jurisdiction or that *Smith* was wrong. Either way, *Smith* poses no obstacle to Plaintiffs' pursuing a diversity action here.

Smith dealt with whether the Westfall Act's FTCA exclusivity provision prevented an injured Army patient's suit against an Army doctor for alleged medical malpractice that occurred in Italy, thereby displacing a cause of action under the Gonzalez Act, 10 U.S.C. §1089. As this Court recognized in finding *Smith* non-controlling, "*Smith* does not even cite, let alone discuss, the 'shall not apply' language 'Exceptions' provision." *Simmons v. Himmelreich*, 136 S.Ct. 1843, 1848 (2016). As discussed in Section II.A.1, *supra*, that shall-not-apply language is dispositive of the Westfall Act's inapplicability to torts that arise

abroad. As such, *Smith* is no answer to a party or court that raises the shall-not-apply language:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 170 (2004) (interior quotation omitted). Put another way, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality). This Court recognized as much in *Simmons*, 136 S.Ct. at 1848, in finding that *Smith* failed to consider a key argument. Indeed, it would violate due process to apply *stare decisis* from *Smith* so conclusively against non-parties that *Smith* created a non-rebuttable rule. *South Central Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999); *cf. Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998) ("[i]n no event … can issue preclusion be invoked against one who did not participate in the prior adjudication"). This Court should either narrow *Smith* to preempting only the Gonzalez Act or overturn *Smith* in all cases.

Stare decisis does not constrain this Court when "decisions are unworkable or are badly reasoned" like *Smith*. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "*Stare decisis* is not an inexorable command." *Id.* As in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2478-79 (2018), this Court should overrule its precedent because (1) *Smith* fails to consider the key statutory text, *see* Section II.A.1, *supra*; (2) preserving *Smith* is constitutionally doubtful, *see* Section I.C,

supra; (3) *Smith* allows a repeal by implication that Congress plainly did not intend, *see* Section II.A.1, *supra*; (4) *Smith* is inconsistent with *Simmons*, *supra*; and (5) government actors do not rely on *Smith*. *See Janus*, 138 S.Ct. at 2478-79. Before expanding *Bivens* to include new extraterritorial applications of the Constitution, this Court should require Plaintiffs to pursue their remedy under diversity jurisdiction.

B. Plaintiffs could sue – or *could have sued* – Agent Mesa in Texas under Mexico's substantive law.

This Court must perform a difficult balancing act when Congress has neither provided nor precluded a remedy for constitutional injury. *Bush v. Lucas*, 462 U.S. 367, 373 (1983). In this case, however, Congress has provided diversity jurisdiction, 28 U.S.C. §1332, and federal courts can easily determine whether to apply U.S. – *i.e.*, federal or state – law or Mexican law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 709 (2004) (citing RESTATEMENT (SECOND) OF TORTS §145)). As *Sosa* explained, the states' choice-of-law tests differ, and – whatever the test – can end up picking foreign law. *Id.* In the absence of this Court's or Congress's setting a uniform choice-of-law rule for diversity cases that arise abroad, this Court should apply Texas's law to the choice-of-law question. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Smith v. EMC Corp.*, 393 F.3d 590, 597-98 (5th Cir. 2004). As explained below, Mexico's substantive law applies to Plaintiffs' claims.

1. Mexican substantive law applies to Plaintiffs' claims.

Under the Restatement test cited by *Sosa* and adopted by the vast majority of states, *Sosa*, 542 U.S. at 751 (Ginsburg, J., concurring in part and concurring in the judgment), choice of law depends not only on where the parties live, where the tort takes place, and where the injury is felt, but also on which jurisdiction has the most significant relationship to the occurrence and the parties. *Compare* RESTATEMENT (SECOND) OF TORTS §145(2)(a)-(c) *with id.* §145(1). The now-minority view on choice of law is *lex loci delicti*, which "generally applie[s] the law of the place where the injury occurred." *Sosa*, 542 U.S. at 705. Both choice-of-law rules point to Mexico as the source of law for this alleged tort.[5]

The relative relationships between an allegedly unprovoked federal shooting and Mexico versus Texas would always favor the country where the unprovoked injury was felt. Under Plaintiffs' allegations, Mexico clearly has the greater interest in an unjustified shooting of a Mexican citizen standing in Mexico.[6]

In *Mesa I*, an *amicus* coalition of Mexican jurists, practitioners, and scholars explained Mexican law in

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[5] In atypical situations – such as detentions at Guantanamo Bay, where no other sovereign had an interest, *Boumediene*, 553 U.S. at 770-71 – it may make sense to consider our laws. But, in a standard cross-border tort like this, the proper resolution lies under diversity jurisdiction, as informed by foreign substantive law, limited as needed by our due-process protections.

[6] Agent Mesa would face liability only if Plaintiffs proved their rouge-agent theory; if a court found Agent Mesa's actions reasonable, it would not matter what substantive law applied.

cases like this, where a victim or the victim's estate has a right to reparations based on a criminal act. *See* Brief *amici curiae* of Mexican Jurists, Practitioners, and Scholars, at 4-5, *Hernandez v. Mesa*, 137 S.Ct. 2003 (2017) (No, 15-118), *reprinted at* 2016 U.S. S. Ct. Briefs LEXIS 4545 (hereinafter, "Jurists' Br."). Either a criminal court or a civil court can resolve reparations, either as part of the criminal trial or as an independent civil action. *Id.* at 5-9. Significantly, both types of Mexican courts would act only over someone within their jurisdiction or, in the case of the civil courts, one domiciled there. *Id.* That said, nothing would preclude a U.S. district court sitting in diversity jurisdiction from applying substantive Mexican law as described by in the *amici* jurists, practitioners, and scholars.

2. <u>Mexican immunity law applies to Plaintiffs' claims.</u>

In addition to advising this Court about the contours of substantive Mexican law for Plaintiffs' claims against Agent Mesa, *see* Section II.B.1, *supra*, the *amici* Mexican jurists, practitioners, and scholars also advised this Court that officers like Agent Mesa would be immune from civil liability under Mexican law. *See* Jurists' Br. at 9-11. This Court already has held that Mexican-law suits in Texas-based federal courts must import the exclusions from suit along with the cause of action. *Slater v. Mexican Nat'l R. Co.*, 194 U.S. 120, 126-27 (1904). As the Court put it in *Slater*:

> It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of

> whatever limitations on his liability that law would impose.

Id. at 126. That injustice precludes a choice-of-law selection for foreign law without also importing the foreign law of immunity. Thus, the plaintiffs cannot pursue a foreign-law suit even though the same action by a border agent at the Canadian border might prove liable – assuming *arguendo* that Canada's immunity laws are more favorable to victims – even though no liability lies in the Mexican context.[7]

Although *Slater* directly resolves only the foreign-suit approach that *amicus* APA Watch has proposed, it also informs the non-viability of the *Bivens* action for U.S. constitutional violations. A *Bivens* suit is not a human or international right. Some sovereigns are more generous with relief for governmental injury; others – including Mexico here – are less generous. In a typical case, this Court takes its cues from what Congress has or has not enacted in a field. *See*, *e.g.*, *Lucas*, 462 U.S. at 373. Here, the foreign government with sovereignty over the underlying tort allegations takes the place of Congress with respect to those tort allegations. That should give this Court pause to promulgate new rights, unsettling the rights that those closest to the issue have adopted. In a case –

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[7] As explained in Section II.B.3, *infra*, this divergence would not be based on race or national origin, but rather would reflect the legal traditions of Mexico and Canada and legal differences between the Mexican and Canadian borders. For example, many Caribbean islands have populations of predominantly African descent, but share Canada's legal traditions, owing to a common colonial history and English law.

such as a Guantanamo Bay case – without an alternate sovereign's laws to apply, this Court has more leeway to act without intruding on other nations' sovereignty. Here, this Court can – and should – defer to Mexico on immunity.[8]

3. Absent congressional action, this Court could adopt a federal choice-of-law rule for cross-border torts.

As signaled in the prior section, the application of U.S. law to the Canadian and Mexican borders can result in different treatments of otherwise similar events. The differences result from the differing histories and legal traditions of the countries. For example, federal immigration law recognizes "the right of American Indians born in Canada to pass the borders of the United States," with limitations on the definition of "American Indian." 8 U.S.C. §1359. That provision flows Article III of the Treaty of Amity, Commerce and Navigation, 8 Stat. 116, 117 (1794), with Great Britain. No similar rights extend to our southern border because neither Spain nor Mexico negotiated such rights. Similarly, as Plaintiffs' *amici* note, *see*, *e.g.*, Vazquez-Bernstein *Amicus* Br. at 8-9, the English Crown had liberalized government-liability laws, even before our independence. *See*, *e.g.*, *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) (damages action against colonial governor for assault

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[8] In deferring to Mexico on immunity or other principles, this Court would not give Mexico *carte blanche* to impose liability on our federal officers in tort suits because a U.S. court would likely reject such laws on due-process grounds unless the Mexican laws also applied the same liability to *Mexican officers* who commit comparable torts against Mexicans in Mexico.

and false imprisonment). While such legal protections exist here and throughout the Commonwealth, they do not exist to the same degree in countries such as Mexico that were not colonized by England. Of course, Congress could amend our laws to equalize the two borders, and Mexico could modernize its government-liability laws. Until those legislative changes occur, this Court remains a common law court deciding the case or controversy before it.

In *Sosa*, this Court rejected the argument that the FTCA should use a "headquarters rule" in cases where that rule would not result in applying foreign law:

> [T]he result of accepting headquarters analysis for foreign injury cases in which no application of foreign law would ensue would be a scheme of federal jurisdiction that would vary from State to State, benefiting or penalizing plaintiffs accordingly. The idea that Congress would have intended any such jurisdictional variety is *too implausible to drive the analysis* to the point of grafting even a selective headquarters exception onto the foreign country exception itself.

Sosa, 542 U.S. at 711-12 (emphasis added). At least until Congress acts to set its own rule of decision in such cases, this Court could decide not to allow this Nation's outward-facing legal system *vis-à-vis* other nations to hinge on the vagaries of state-by-state choice-of-law rules.

In general, "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *U.S. v.*

Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); *accord Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) ("prudent course … is often to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation") (internal quotation omitted). If state law indeed was inconsistent, such inconsistencies could be inappropriate, per *Sosa*, *supra*. Instead, "[a] single nationwide rule would be preferable to one turning on state law." *West Virginia v. U.S.*, 479 U.S. 305, 309 (1987). Without any applicable congressional action, this Court should apply the Restatement test if the Court wishes to establish federal common law on the issue of cross-border torts involving another nation.

III. THIS COURT SHOULD NOT EXTEND *BIVENS* TO TORTS ARISING ABROAD.

This Court has identified two primary criteria for determining when to extend *Bivens* to new contexts: (1) "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new … freestanding remedy in damages," and (2) whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (interior quotations omitted). In addition, as with any federal appeal, this Court also must consider the lower courts' jurisdiction to entertain the suit.

A. This Court lacks jurisdiction to invoke *Bivens*.

As explained in Sections I.A-I.B, *supra*, Plaintiffs' claims lack both constitutional and statutory jurisdiction. That precludes a *Bivens* action and remedy.

B. *Bivens* mandates a search for alternate remedies.

Although the parties do not press the issue of the availability of a state-law action, the Court of Appeals considered it a "special factor" under *Bivens*: "a state-law tort claim may be available to provide both deterrence and damages." *Hernandez v. Mesa*, 885 F.3d 811, 821 (5th Cir. 2018) (*en banc*). Moreover, this Court should decide the statutory question of whether the FTCA displaces Plaintiffs' diversity action before this Court addresses the extraterritorial application of the Fourth and Fifth Amendments. *See* Section I.C, *supra* (constitutional avoidance doctrines).

Amicus APA Watch is agnostic about the prospect of Plaintiffs' prevailing in a diversity action, but that question is not presented here: "we are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). It is possible that Mexican law is inadequate or that Plaintiffs have waived the issue of a diversity suit under Mexico's substantive law. Those issues are anterior to the question presented here of whether to extend *Bivens* to torts arising abroad, but near the border:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to

> refrain from providing a new and freestanding remedy in damages.

Wilkie, 551 U.S. at 550. Since Plaintiffs' basis for claiming to lack an alternate remedy – namely, the Westfall Act – is plainly wrong, *see* Section II.A, *supra*, this Court cannot find that Plaintiffs lack an adequate remedy outside *Bivens*. That is enough for this Court to withhold *Bivens* relief: "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1858 (2017). Significantly, a non-federal tort suit can displace a *Bivens* claim, and the plaintiff bears the burden of demonstrating the inadequacy of the alternate remedy. *Minneci*, 565 U.S. at 129-30. Here, Plaintiffs have not rebutted the adequacy of their non-federal remedy, arguing instead – incorrectly – that the Westfall Act displaces that remedy. *See* Section II.A, *supra*. Certainly, a *Bivens* action "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest," *Wilkie*, 551 U.S. at 550, and Plaintiffs have not carried their burden to show their entitlement to that form of relief.

C. Special factors counsel against finding *Bivens* liability here.

Although perhaps not as commanding as military affairs – to which this Court has declined to extend a *Bivens* remedy, *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *U.S. v. Stanley*, 483 U.S. 669, 681 (1987) – the border-control and immigration contexts at issue here also counsel for this Court to defer to Congress to create rights here. Indeed, this Court's actions to

extend constitutional remedies here might harm U.S. officers' ability to work cooperatively with Mexican counterparts in law enforcement on border issues. If the community there realizes that Mexican officers are immune, while U.S. officers are not, focus and fire will be directed to U.S. officers.

The parade of horribles in some *amici* briefs is simply inapposite because the briefs concern alleged torts that occur *within* the United States. CUNY Law Sch. *Amicus* Br. *passim* (assault in U.S. detention facilities); Brady *Amicus* Br. *passim* (epidemic of gun violence nationwide, including excessive force by law enforcement). Even where policy arguments would be relevant to a common law court's decision to extend a remedy in a case otherwise within its jurisdiction, *see*, *e.g.*, Former Officials of U.S. Customs & Border Protection Agency *Amicus* Br. at 35-36 (creating civil liability would help reduce incidences of excessive force), *amicus* APA Watch respectfully submits that these *amici* complain to the wrong branch and likely also the wrong government. First, these are issues for a legislature; second, and more importantly, Mexico should amend its laws to allow excessive-force claims that would protect Mexicans from both Mexican officers and foreign officers.

CONCLUSION

This Court lacks jurisdiction to extend *Bivens* to torts that arise abroad. Even if jurisdiction existed, this Court should not extend *Bivens* because foreign plaintiffs injured abroad can bring diversity suits in our federal courts under their foreign law, subject only to due-process restrictions.

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