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Extending Fourth Amendment Protections and Bivens Claims for Damages to Non-Citizens in Cross-Border Killing Context, 53 UIC J. Marshall L. Rev. 343 (2020)

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EXTENDING FOURTH AMENDMENT PROTECTIONS AND *BIVENS* CLAIMS FOR DAMAGES TO NON-CITIZENS IN CROSS-BORDER KILLING CONTEXT

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Abstract

In the cross-border killing context, individuals are left without a remedy. The Fifth and Ninth Circuits are currently split on the issues of whether the Fourth Amendment extends to protect non-citizens shot and killed by a United States Customs and Border Protection Agent at the United States-Mexico border and whether a Bivens cause of action is available in this context. This Comment will explore the legal reasoning for both circuits' conclusions and the legal arguments for and against each issue. This Comment will argue that the sufficient voluntary connections test should not be applicable in the cross-border killing context. This Comment will also argue that the courts' analysis should return to the roots of Bivens and emphasize whether there are any adequate alternative remedies available rather than the special factors present in each case.

I. INTRODUCTION

On October 10, 2012, border patrol agent Lonnie Swartz shot and killed sixteen-year-old J.A., a Mexican citizen walking down a street in Mexico near the United-States-Mexico border.¹ J.A. did not pose a threat to Swartz and “was not committing a crime,”² yet was brutally shot ten times.³ What happened to J.A. is a tragedy, but common reality as the United States has increased militarization at the United States-Mexico border.⁴ To achieve the ideal concept of a “secure border,”⁵ the United States has poured millions of dollars into border enforcement.⁶ Research has shown that border militarization has led to an increase of “deaths at the border.”⁷ The question remains what protections are afforded to non-citizens who are killed at the border.⁸

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1. *Rodriguez v. Swartz*, 899 F.3d 719, 727 (9th Cir. 2018).

2. *Id.* The court takes the facts as they are plead in the complaint and assumes they are true. *Id.*

3. *Id.*

4. Jeremy Slack, et al., *The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States*, 15 J. LATIN AM. GEOGRAPHY 10-11 (2016).

5. *Id.* at 10 (noting that no politician has been able to describe what constitutes a secure border, yet this is what the goal is in massive and increased spending).

6. *Id.*

7. *Id.* (noting various studies that have showed: exponential increase in border deaths since the 2000s, increase in migrant death rates “after implementation of prevention through deterrence strategy”, and hiring of previous military personnel).

8. *Id.* (Slack notes the dire nature of this question as border patrol funding has increased tremendously over recent years: funding for the Secure Border

The Fifth Circuit's recent decision held that the Fourth Amendment does not protect non-citizens against a deadly seizure by a United States border patrol agent.⁹ In contrast, the Ninth Circuit held that the Fourth Amendment does protect non-citizens from a deadly seizure under similar circumstances.¹⁰ The Ninth and Fifth Circuits remain split over whether the Fourth Amendment protects such individuals and whether they may bring a claim for damages under the Supreme Court decision *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.¹¹ Under a *Bivens* claim, a government agent may be sued for damages, but only under circumstances in which a *Bivens* claim has been extended.¹² This Comment will first discuss the contrary decisions of the Ninth Circuit and Fifth Circuit concerning Fourth Amendment protections as applied to non-citizens and whether *Bivens* extends to deadly force imposed on non-citizens at the border. This Comment will then discuss the primary arguments in favor and against the extension of Fourth Amendment rights to non-citizens shot and killed at the border and the primary arguments applied to extending or limiting a *Bivens* cause of action in this context.

Finally, this Comment will propose that courts should not consider the substantial connections test under *United States v. Verdugo-Urquidez*¹³ when the issue involves a non-citizen shot and killed at the border. The analysis should turn on the agent's actions and the specific circumstances surrounding the shooting. The question of extending *Bivens* should emphasize the lack of adequate alternative remedies in this context. Focusing on a lack of alternative remedies is consistent with the original basis of creating a *Bivens* cause of action.

II. BACKGROUND

The Fourth Amendment protects “the right of the people to be secure in their persons . . . against unreasonable searches and seizures.”¹⁴ The Supreme Court first noted in *Tennessee v. Garner* that “there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”¹⁵ Under the policy of the United States

Initiative had increased “to \$800 million in 2010, totaling \$4.5 trillion in spending” between 2005 and 2010.) *Id.*

9. *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018).

10. *Rodriguez*, 899 F.3d at 737.

11. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that a federal agent acting under the color of law that violates the constitution may be sued for damages).

12. *Id.*

13. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

14. U.S. CONST. amend. IV.

15. *Tenn. v. Garner*, 471 U.S. 1, 7 (1985).

Customs and Border Protection (CBP), “deadly force may only be used if an agent has a reasonable belief . . . that the subject of such force poses an imminent danger of death or serious physical injury to the agent or another person.”¹⁶ The use of unreasonable deadly force is undoubtedly a seizure under the Fourth Amendment, but the question remains whether a non-citizen is afforded this protection.

Considering the Fourth Amendment and the protection it provides *citizens* of the United States, it is important to consider the application of the Fourth Amendment to those that are non-citizens. This is crucial to the cross-border killing context. This Comment will first introduce the concept and implications of applying the Fourth Amendment to individuals located outside of the United States who are also non-citizens, such as J.A. and Sergio Hernandez. This Comment will then discuss *Bivens* and the importance of understanding *Bivens* when there may be no other opportunity for an individual killed at the border to have any possible recourse under the law. Finally, this Comment will introduce the Fifth and Ninth Circuit decisions that create a circuit split on these two issues: applying the Fourth Amendment extraterritorially and whether *Bivens* may extend to the cross-border killing context. Both issues are separately discussed by the courts, but both are important in understanding a non-citizens rights, or lack thereof, under the United States Constitution.

A. *Extraterritorial Application of the Fourth Amendment*

For J.A. or Sergio Hernandez to be protected by the Fourth Amendment of the United States Constitution, the court must decide that the Fourth Amendment applies to a non-resident, non-citizen extraterritorially. Applying the Constitution outside of the borders of the United States has had two polarized views.¹⁷ The “strict territorialists” believe the Constitution does not apply outside of the United States at all whereas the “universalists” believe it applies everywhere.¹⁸ The Supreme Court recognized a “compromise approach in *Boumediene v. Bush*.”¹⁹ In *Boumediene*,

16. Roxanna Altholz, *Elusive Justice: Legal Redress for Killings By U.S. Border Agents*, 27 BERKLEY LA RAZA L.J. 1, 4 (2017) (citing a Memorandum from Michael J. Fisher, Chief of U.S. Border Patrol, on Use of Safe Tactics and Techniques, to U.S. Custom’s and Border Protection Personnel at 1 (Mar. 7, 2014)).

17. Shawn E. Fields, *From Guantanamo to Syria: Extraterritorial Constitution in the Age of “Extreme Vetting,”* 39 CARDOZO L. REV. 1123, 1129 (2018).

18. *Id.*

19. *Id.*

the Supreme Court held that enemy combatants at Guantanamo Bay were entitled to a writ of *habeas corpus* under the United States Constitution.²⁰ The Court adopted a “functional approach” to the question of extraterritoriality by providing a flexible approach to deciding whether the Constitution extends in a particular case.²¹ *Boumediene* is a starting point for determining whether the Fourth Amendment applies extraterritorially in *Hernandez* and *Rodriguez*.

United States v. Verdugo-Urquidez provides additional framework for analyzing whether the Constitution applies to non-citizens who reside outside of the United States. Under *Verdugo-Urquidez*, the court must consider whether the non-citizen has sufficient voluntary connections with the United States to avail themselves of the protections of the Federal Constitution.²² The sufficient voluntary connections test considers any connection the individual may have to the United States, but primarily focuses on citizenship, residence, and any “voluntary attachment” to the United States.²³ Both *Verdugo-Urquidez* and *Boumediene* are essential to the Fifth and Ninth Circuit’s reasonings and contrary conclusions. The extraterritorial reach of the Fourth Amendment is necessary for an individual killed at the border to have any legal recourse. As this Comment will explain later, a constitutional violation is necessary for the individual to recover under *Bivens*, which likely is the individual’s only viable opportunity for a legal remedy.

B. Importance of a Bivens Claim for Damages

Understanding *Bivens* is crucial to understanding the distinctions made between the Ninth and Fifth Circuits. *Bivens* held that a federal agent that violates the Constitution while acting under the color of law may be sued for money damages.²⁴ In *Bivens*, federal agents searched and arrested Bivens without a warrant.²⁵ The Court heavily weighed the fact that a claim for money damages against federal agents was the only possible remedy for Bivens.²⁶ The Court in *Bivens* held that the individual could sue federal officials for the violation of Fourth Amendment rights.²⁷ While *Bivens* allows a person to recover against a federal agent that

20. *Id.*; *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

21. *Fields*, *supra* note 17, at 1147.

22. *Verdugo-Urquidez*, 494 U.S. at 271.

23. *Id.* at 274-75.

24. *Bivens*, 403 U.S. at 389.

25. *Id.*

26. *Id.* at 394. (noting how protections against trespass and invasion of privacy are inconsistent or even hostile to protecting the Fourth Amendment’s guarantee against unreasonable searches and seizures).

27. *Id.* at 397.

violated their constitutional rights, “it is not an automatic entitlement.”²⁸

Under *Bivens*, the victim can sue the individual federal officer for violations of the victim’s federal constitutional rights.²⁹ *Bivens* allows an individual “suffering a compensable injury to a constitutionally protected interest to invoke the general federal-question jurisdiction of the district court . . . to obtain an award of monetary damages against the responsible federal official.”³⁰ To recover under a *Bivens* claim, the individual must show a violation of a right guaranteed by the United States Constitution by a federal official acting under the “color of law.”³¹ The availability of *Bivens* as a remedy depends on the context in which it is being applied.³²

A *Bivens* claim for damages extends to a new context when there is no other adequate alternative remedy and when there are no special factors causing the court to hesitate in the absence of congressional action.³³ The Court in *Bivens* itself noted that there were “no special factors” present to cause the Court to hesitate in extending a *Bivens* claim in the context of the case.³⁴ In extending a *Bivens* claim to a new context, the Court considered how other remedies, such as state laws of trespass, are inadequate to right the constitutional wrong.³⁵ The Court also noted that damages have been historically accepted as a remedy for invasions against personal interests.³⁶ Additionally, no special factors, such as an impact on federal fiscal policy, warranted hesitation against extending a claim for damages in that context.³⁷

Courts have been reluctant to extend *Bivens* to new contexts; it is a “disfavored” judicial activity.³⁸ While *Bivens* itself emphasized a lack of adequate alternative remedies, courts in applying *Bivens* have shifted, “focusing less on the nature of the plaintiff’s constitutional right and more on ensuring separation of

28. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

29. James L. Buchwalter, Annotation, *Remediation of Constitutional Harm through Bivens Action in Immigration Context*, 80 A.L.R. Fed. 2d 201, 2 (2019).

30. *Id.*

31. *Id.*

32. *Rodriguez*, 899 F.3d at 737.

33. *Id.* at 738.

34. *Bivens*, 403 U.S. at 396.

35. *Id.* at 394.

36. *Id.* at 395-396 (citing *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Hernandon*, 273 U.S. 536, 540 (1927); and *Swafford v. Templeton*, 185 U.S. 487 (1902)).

37. *Bivens*, 403 U.S. at 396 -97 (noting how this was not a question of federal fiscal policy and it did not involve imposing liability on a congressional employee); *contra* *U.S. v. Standard Oil Co.*, 332 U.S. 301, 311 (1947) (refusing to extend a claim for damages against a negligently injured soldier that would require the Government to pay his medical expenses).

38. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

powers between the Legislature and the Judiciary.”³⁹ In light of *Ziglar v. Abbasi*, it is apparent that the Supreme Court has significantly limited cases in which *Bivens* may be extended.⁴⁰ The Supreme Court has refused to extend a claim for money damages in numerous contexts. For example, the Court did not extend *Bivens* for a First Amendment claim brought by an employee against their superior.⁴¹ The Court also barred a *Bivens* claim against a federal government agency⁴² and an Eighth Amendment negligence claim in a prison context.⁴³ The basis of *Bivens* itself, however, rested in part on the absence of alternative remedies, which is crucial in the cross-border killing context.⁴⁴ *Abbasi*, however, has been criticized “for reversing the pro-remedy default position that had prevailed since the Framers’ day.”⁴⁵

C. The Circuit Split

In the Ninth Circuit case, *Rodriguez v. Swartz*, defendant Lonnie Swartz was a CBP Agent on duty as a United States Border Patrol Agent at the United States-Mexico border.⁴⁶ Swartz shot and killed J.A., a Mexican citizen walking down a street in Mexico.⁴⁷ Swartz shot J.A. while Swartz was standing on American soil and J.A. was on Mexican soil.⁴⁸ The Ninth Circuit held that the Fourth Amendment extended to protect J.A. from deadly seizure by an agent acting on American soil.⁴⁹ The court also held that a *Bivens* claim for damages extended to this context in the absence of an

39. Christian Patrickwoo, *The “Final Blow” to Bivens? An Analysis of Prior Supreme Court Precedent and the Ziglar v. Abbasi Decision*, 43 OHIO N.U.L. REV. 511, 547 (2017)(explaining how *Abbasi* itself may have “issued the ‘final blow’ to *Bivens* availability in any situation—‘with the exception of claims mirroring the very specific facts of its early decisions.’”) *Id.* at 516.

40. *Abbasi*, 137 S. Ct. at 1857.

41. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (rejecting a *Bivens* cause of action brought by a federal employee against their superior based on the superior’s disciplinary actions against the employee for exercising his First Amendment rights because the question was meant for Congress)).

42. *Id.* (citing *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (holding that an individual cannot sue a Federal Government agency under *Bivens* because of the potential extraordinary financial burden it would place on the Government and because it is a question properly left to Congress)).

43. *Id.* (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (refusing to extend *Bivens* against a private corporation contracted with the Federal Bureau of Prisons)).

44. *Bivens*, 403 U.S. at 394.

45. Peter S. Margulies, *Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153, 1167 (2018).

46. *Rodriguez*, 899 F.3d at 727.

47. *Id.*

48. *Id.*

49. *Id.* at 731.

alternative remedy.⁵⁰ *Bivens* extended because there were no special factors present.⁵¹

The Fifth Circuit in *Hernandez v. United States* held to the contrary under factually similar circumstances.⁵² The court held that the Fourth Amendment did not protect a non-citizen, Adrian Hernandez Guereca, shot at the border as a result of unreasonable deadly force.⁵³ In *Hernandez*, a teenage Mexican citizen was shot and killed at the border. He did not have a claim against the agent under *Bivens* and was not protected by the Fourth Amendment.⁵⁴ *Hernandez* was decided after the Supreme Court remanded the case to determine whether *Bivens* should extend and avoid the Fourth Amendment question entirely.⁵⁵ On remand, the Fifth Circuit refused to extend *Bivens* to the new context of a Mexican citizen shot at the border on Mexican soil by a border patrol agent standing on American soil.⁵⁶

1. Ninth Circuit Holding

a. Fourth Amendment protections extend to non-citizens

The Ninth Circuit in *Rodriguez* distinguished J.A.'s case from the Supreme Court case, *Verdugo-Urquidez*, in its discussion of extending the Fourth Amendment extraterritorially.⁵⁷ The court noted that Swartz acted on American soil, and therefore American law would control his actions.⁵⁸ Federal agents in *Verdugo-Urquidez* knew that the property was owned by a Mexican citizen, whereas Swartz did not know J.A.'s citizenship status.⁵⁹ Therefore, J.A.'s connections to the United States were not relevant to the extension of Fourth Amendment rights.⁶⁰ *Verdugo-Urquidez* occurred solely on Mexican soil while agent Swartz acted on American soil.⁶¹ The court in *Rodriguez* concluded that "there are

50. *Id.* at 739

51. *Id.* at 734, 739, 744.

52. *Hernandez*, 885 F.3d at 814. *Hernandez* also involved a non-citizen, shot and killed while on Mexican soil, by a border patrol agent standing on American soil. *Id.*

53. *Hernandez v. U.S.*, 757 F.3d 249, 266 (5th Cir. 2014).

54. *Hernandez*, 885 F.3d at 814.

55. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007-8 (2017).

56. *Hernandez*, 885 F.3d at 823.

57. *Rodriguez*, 899 F.3d at 730-731. See *Verdugo-Urquidez*, 494 U.S. at 271 (applying a "sufficient voluntary connections" test to hold that the Fourth Amendment did not extend to a noncitizen where United States and Mexico agents searched defendant's home without a warrant or probable cause).

58. *Rodriguez*, 899 F.3d at 730-31.

59. *Id.* at 731.

60. *Id.*

61. *Id.* (noting that *Verdugo-Urquidez* involved a search on Mexican soil whereas here, the United States agent acted on American soil, so there would

no practical obstacles to extending the Fourth Amendment” to a case involving unreasonable use of deadly force by a federal agent on American soil.⁶²

b. *Bivens* extends to the cross-border killing context

The Ninth Circuit held that *Bivens* extended in that case and Rodriguez could sue to recover monetary damages.⁶³ In extending *Bivens*, the court noted that there was no adequate alternative remedy⁶⁴ and no special factors existed, such as executive branch policy of regulating terrorism risks, that would be of concern in extending *Bivens*.⁶⁵ The dissenting opinion noted that the court lacked authority to extend *Bivens* to the cross-border context and in doing so “the majority creates a circuit split, oversteps separation of powers principles, and disregards Supreme Court law.”⁶⁶

2. *The Fifth Circuit Holding*

In *Hernandez v. United States*, a fifteen-year-old Mexican citizen was shot and killed by a CBP Agent.⁶⁷ “Hernandez and his friends were playing a game that involved running up” and touching the fence between the United States and Mexico.⁶⁸ The CBP Agent, Mesa, shot and killed Hernandez while he was standing on United States soil and Hernandez was standing on Mexican soil.⁶⁹ The Fifth Circuit held that Hernandez was not protected by the Fourth Amendment.⁷⁰

a. Fourth Amendment rights do not extend to a non-citizen in a cross-border context

Applying the sufficient voluntary connections test from *Verdugo-Urquidez*,⁷¹ the court held that Hernandez lacked

not be an imposition of regulating an action in Mexico).

62. *Id.*

63. *Id.* at 734.

64. *Id.* at 739, 741-42 (noting that the United States has sovereign immunity and could not be sued under the Federal Torts Claims Act due to the “foreign country exception” or the Westfall Act because it bars state tort claims, and explaining that restitution is not adequate in this case because it would only be available if Swartz was convicted of killing J.A. as a criminal offense and there is no evidence a Mexican court could grant a remedy). *Id.* at 739-41.

65. *Id.* at 744.

66. *Id.* at 749 (Smith, J., dissenting).

67. *Hernandez*, 757 F.3d at 255.

68. *Id.*

69. *Id.* at 266.

70. *Id.*

71. In *Verdugo-Urquidez*, the Supreme Court held that the respondent was not protected by the Fourth Amendment because he was a citizen of Mexico,

sufficient voluntary connections with the United States to invoke Fourth Amendment Protections.⁷² The court considered how Hernandez was a citizen of Mexico who “had no interest in entering the United States” and did not have societal obligations to comply with immigration laws.⁷³ Other circuits⁷⁴ have also relied on *Verdugo-Urquidez* to limit the extraterritorial effect of the Fourth Amendment.⁷⁵

The Fifth Circuit *en banc* affirmed the decision and concluded that the court properly dismissed Hernandez’s claims because he did not have a Fourth Amendment claim without significant voluntary connections to the United States.⁷⁶ The Supreme Court granted certiorari and narrowed the issue because the Fifth Circuit did not address whether *Bivens* would extend to the situation.⁷⁷ The case was remanded and the Fifth Circuit was instructed to consider *Bivens* in light of *Ziglar v. Abbasi*.⁷⁸

had “no voluntary attachment to the United States,” and his home was located and searched in Mexico, so he did not have sufficient voluntary connection to the United States and was not protected against unreasonable searches and seizures under the Fourth Amendment. *Verdugo-Urquidez*, 494 U.S. at 274-75.

72. *Hernandez*, 757 F.3d at 266. *But see Verdugo-Urquidez*, 494 U.S. at 283 (Brennan J., dissenting) (arguing that the important connections at issue are those that the government has to the individual—in this case, the government decided to investigate Verdugo-Urquidez and subject him to life in a United States prison, so the sufficient connection is thereby supplied by the government and not the individual).

73. *Hernandez*, 757 F.3d at 266.

74. *Id.* at 265. *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012), is cited as the case that used *Verdugo-Urquidez* to “limit the Fourth Amendment’s extraterritorial effect.” *Id.* However, in *Ibrahim*, the Ninth Circuit held that Ibrahim had a significant voluntary connection with the United States during her four years at Stanford University to be protected under the First and Fifth Amendments when she was detained and placed on a “No-Fly-List” and prevented from returning to the United States. *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 986-97.

75. *Hernandez*, 757 F.3d at 265 (citing *U.S. v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) (noting that aliens do not enjoy Fourth Amendment protection unless they have significant voluntary connection with the United States)). *See also U.S. v. Vilches-Navarrete*, 523 F.3d 1, 13 (1st Cir. 2008) (applying *Verdugo-Urquidez* to refuse to extend Fourth Amendment to a non-citizen with only involuntary connection to the United States).

76. *Hernandez v. U.S.*, 785 F.3d 117, 119 (5th Cir. 2015).

77. *Mesa*, 137 S. Ct. at 2007.

78. *Id.* at 2006-7. *Abbasi* addressed a claim by six non-citizens against high executive officers for their detainment policies and harsh conditions of detainment after the September 11 terrorist attacks. *Abbasi*, 137 S. Ct. at 1851. The Court refused to extend a *Bivens* claim for damages against the executive officers because of the special factors present, primarily that national security policy is suited for the executive branch – not the judicial branch. *Id.* at 1861. The Court concluded that the absence of congressional action here warranted hesitation in extending a *Bivens* claim to a new context. *Id.* at 1862, 1869. As a result, the Court refused to extend *Bivens* to the challenge against detainment policies. *Id.* at 1869.

- b. *Bivens* claims do not extend to a non-citizen in a cross-border killing context

On remand, the Fifth Circuit refused to extend *Bivens* to the context of deadly force used against a non-citizen by a U.S. border patrol agent.⁷⁹ The Fifth Circuit held that a cross-border shooting is a new context for a *Bivens* claim, relying heavily on the Supreme Court's rationale in *Abbasi*.⁸⁰

In *Abbasi*, a new context was established even though both *Abbasi* and *Bivens* involved Fourth Amendment violations.⁸¹ The court noted that the absence of another remedy does not indicate that improper border patrol agent action will not be deterred.⁸² For example, the agent may be criminally prosecuted.⁸³ The Department of Justice (DOJ) was, in fact, prosecuting the CBP Agent in the Ninth Circuit case.⁸⁴ State tort law also acts as a deterrent and source of damages.⁸⁵

The court also focused on the special factors that go against extending *Bivens* to this new context, including threatening supervision of national security by the executive branch, increasing risk of interfering with foreign affairs, and the silence of congress indicating a purposeful lack of legislative action.⁸⁶

D. Summary of Ninth and Fifth Circuit Holdings

Both the Ninth Circuit and Fifth Circuit cases are factually similar yet come to contrary conclusions. Both cases involve young Mexican citizens, shot and killed by a CBP agent who was acting on behalf of the United States, while the agent was standing on American soil.⁸⁷ The Fifth Circuit case of *Hernandez v. Mesa* utilized the *Verdugo-Urquidez* analysis of sufficient voluntary

79. *Hernandez*, 885 F.3d at 814.

80. *Id.* at 816-817.

81. *Abbasi*, 137 S. Ct. at 1859. The Court in *Abbasi* considered how *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) refused to extend *Bivens* to a new context under the Eighth Amendment when it “would not advance *Bivens*’ core purpose of deterring individual officers from engaging in unconstitutional wrongdoing.” *Id.*

82. *Hernandez*, 885 F.3d at 821.

83. *Id.*

84. *Rodriguez*, 899 F.3d at 757.

85. *Hernandez*, 885 F.3d at 821. The Fifth Circuit noted that a state tort claim is unavailable in this case because Agent Mesa was protected by the Westfall Act as he acted in the scope of his employment. *Id.*

86. *Id.* at 818-20.

87. *Rodriguez*, 899 F.3d at 719, 727; *Hernandez*, 885 F.3d at 814.

connections and was bound by Supreme Court precedent to do so.⁸⁸ The Ninth Circuit case of *Rodriguez v. Shwartz* distinguished the case from *Verdugo-Urquidez* and did not apply the sufficient voluntary connections test.⁸⁹ The Ninth Circuit concluded that a non-citizen may be protected under the Fourth Amendment's proscription of unreasonable deadly seizures.⁹⁰

The Fifth Circuit in *Hernandez* concluded that a *Bivens* claim did not extend to a non-citizen shot and killed at the border by a border patrol agent—the individual had no remedy to sue the agent for monetary damages.⁹¹ The Fifth Circuit emphasized the special factors that counseled against extending *Bivens*.⁹² Allowing a *Bivens* claim in a cross-border killing context may interfere with the power of the executive and legislative branches over national security and foreign affairs.⁹³ The Ninth Circuit in *Rodriguez* extended *Bivens* to allow the non-citizen to sue for damages.⁹⁴ The Ninth Circuit found no special factors to prohibit extending *Bivens* here.⁹⁵ Without a *Bivens* claim, *Rodriguez* lacked any adequate remedy.⁹⁶ The Ninth Circuit also noted other contexts in which a *Bivens* claim *has* been extended or granted.⁹⁷ The Ninth Circuit highlighted the other contexts to demonstrate that *Bivens* may be appropriate under certain circumstances.⁹⁸ The Ninth Circuit's analysis also discussed the same cases as the Fifth Circuit did to support their conclusion to allow a *Bivens* cause of action.⁹⁹ It is important to understand how the Ninth and Fifth Circuits use similar analyses to reach opposite conclusions.

88. *Hernandez*, 757 F.3d at 266.

89. *Rodriguez*, 899 F.3d at 730-31.

90. *Id.*

91. *Hernandez*, 885 F.3d at 823.

92. *Id.*

93. *Id.*

94. *Rodriguez*, 899 F.3d at 734.

95. *Id.* at 744.

96. *Id.* at 739, 744.

97. *Id.* at 736. *See* *Davis v. Passman*, 442 U.S. 228, 231, 248-49 (1979) (holding that there was a valid claim for damages against a congressman's violation of an individual's Fifth Amendment Due Process rights based on employment gender discrimination); *see also* *Carlson v. Green*, 446 U.S. 14, 16, 25 (1980) (extending a *Bivens* claim against prison officials for monetary damages).

98. *Rodriguez*, 899 F.3d at 737 (“*Bivens*, *Davis*, and *Carlson*, therefore establish that plaintiffs can sue for damages for certain constitutional violations.”).

99. *Id.* at 735-38 (citing *Lucas*, 462 U.S. at 367, 388-90 (1983); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *U.S. v. Stanley*, 483 U.S. 669, 681-82, 684 (1987); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); *Meyer*, 510 U.S. at 471, 484; *Robbins*, 551 U.S. at 537, 561-62; *Minneci v. Pollard*, 565 U.S. 118, 125 (2012)).

III. ANALYSIS

The Fifth and Ninth Circuits rely on similar precedents and factors for the respective analyses, and yet reach opposite results regarding the extraterritorial application of the Fourth Amendment and extension of *Bivens*.¹⁰⁰ The opposite conclusions of *Rodriguez* and *Hernandez* need to be critically analyzed and reconciled. First, this Comment will discuss *Boumediene* and *Verdugo-Urquidez* in the context of extending Fourth Amendment rights to non-citizens in cross-border killings. This Comment will then explore the arguments for and against extending a *Bivens* cause of action to this context. Both the Ninth and Fifth Circuits analyze *Boumediene* and *Verdugo-Urquidez* to come to opposite conclusions concerning the extraterritorial application of the Fourth Amendment.¹⁰¹ Both courts consider *Abbasi* and reach distinct conclusions with respect to extending *Bivens* to the cross-border killing context.¹⁰²

A. Does the Fourth Amendment Apply Extraterritorially to a Non-Citizen Killed at the Border?

1. *Boumediene* Considerations

Both circuits considered *Boumediene v. Bush* in their analysis for the possible extension of Fourth Amendment rights to non-citizens.¹⁰³ In *Boumediene*, the Supreme Court held that enemy combatants at Guantanamo Bay were entitled to a writ of *habeas corpus* under the United States Constitution.¹⁰⁴ *Habeas corpus* is a constitutionally provided process that protects an individual's "right to be free from wrongful restraints on their liberty."¹⁰⁵ The United States Constitution establishes the writ of *habeas corpus* and provides that it should not be suspended unless required by public safety.¹⁰⁶ Both *habeas corpus* and the Fourth Amendment are constitutionally provided and protected. The application of both

100. Compare *Rodriguez*, 899 F.3d at 730-31, with *Hernandez*, 757 F.3d at 266 (relying on and considering *Verdugo-Urquidez* and *Abbasi* and the same factors for evaluating extension of a *Bivens* claim).

101. *Rodriguez*, 899 F.3d at 730-32, 739-40; *Hernandez*, 757 F.3d at 262, 266.

102. *Id.*

103. *Id.*

104. *Boumediene*, 553 U.S. at 771.

105. Ann K. Wooster, *Jurisdiction and Ability of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning United States Citizen Detained or Allegedly Constructively Detained by United States Military*, 22 A.L.R. Fed. 2d 1, 2 (2019).

106. U.S. CONST. art. I § 9, cl. 2.

habeas corpus and the Fourth Amendment to non-citizens, outside of the United States, have been questioned.

Boumediene involved non-citizens who were enemy combatants that were imprisoned in Guantanamo Bay, Cuba.¹⁰⁷ The issue was whether the writ of *habeas corpus* extended to non-citizens.¹⁰⁸ The Court considered various factors, including sovereignty, “the citizenship and status of the detainee and the adequate process through which status determination was made,” “the nature of sites where apprehension and then detention took place,” and “practical obstacles inherent in resolving entitlement to” *habeas corpus*.¹⁰⁹ Sovereignty is not the only relevant factor to determine how far the Constitution reaches, although it is one factor.¹¹⁰ In *Boumediene*, the Court concluded that the *habeas corpus* right did apply to non-citizen enemy combatants, in Guantanamo Bay.¹¹¹

a. Arguments in favor of extending Fourth Amendment protections to non-citizens

Boumediene can advance the argument that Fourth Amendment rights apply to non-citizens.¹¹² Cross-border killing cases have advanced a “new legal theory” that the functional approach in *Boumediene* should be applied to the cross-border killing context.¹¹³ The Ninth Circuit discussed *Boumediene* in *Rodriguez*, noting that Guantanamo Bay’s location in Cuba was relevant, but the United States had practical control over Guantanamo Bay.¹¹⁴ Geography in *Rodriguez* was also relevant as Mexico has sovereignty and control over the street where Swartz shot J.A.¹¹⁵ The Ninth Circuit considered J.A.’s citizenship status, where the shooting occurred, and practical concerns that may arise, emphasizing that citizenship and voluntary submission to American law are not determinative factors.¹¹⁶ *Boumediene* can ultimately be used to support extending Constitutional rights to non-citizens.¹¹⁷ Just as the Court in *Boumediene* extended *habeas corpus* remedies to non-citizens, the Court should arguably be

107. *Boumediene*, 553 U.S. at 732.

108. *Id.*

109. *Id.* at 766.

110. *Id.* at 764.

111. *Id.* at 771.

112. *Rodriguez*, 899 F.3d at 729-30.

113. Evan Bitran, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 230 (2014).

114. *Rodriguez*, 899 F.3d at 729-30.

115. *Id.* at 730.

116. *Id.* at 729.

117. *Id.*

justified in extending the Fourth Amendment protection to non-citizens.

b. Arguments against extending Fourth Amendment protections to non-citizens

The Fifth Circuit used the same considerations under *Boumediene* to conclude that Fourth Amendment protections *do not* extend to non-citizens in *Hernandez*.¹¹⁸ When determining whether a constitutional principle applies abroad, the court must balance the potential of applying Fourth Amendment rights to non-citizens and the countervailing government interest.¹¹⁹ “[T]he question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances [and] the practical necessities.”¹²⁰ Practical obstacles to extending Fourth Amendment rights extraterritorially include consequences of the United States’ actions abroad, determining “substantive rules that would govern the claim,” and possible tension with a foreign government.¹²¹ There are functional considerations as well, such as the length of the border, the number of crossings every year, and the implication of Fourth Amendment extension on border patrol agent surveillance technology.¹²² Functional considerations may disrupt the legislative and executive function in responding to foreign situations in the interest of the United States and confuse CBP Agents’ understanding of the standard of reasonableness legally applied to their actions.¹²³

2. *Verdugo-Urquidez* Considerations

Verdugo-Urquidez can be used both in support and opposition of extending Fourth Amendment protections to non-citizens killed at the United States-Mexico border.¹²⁴ *Verdugo-Urquidez* held that the Fourth Amendment did not apply to a search and seizure by agents of the United States in Mexico.¹²⁵ *Verdugo-Urquidez* was a Mexican citizen that was believed to be involved in drug smuggling.¹²⁶ United States and Mexican law enforcement agents

118. *Hernandez*, 757 F.3d at 262.

119. *Id.*

120. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 75, 787 (1957)(alteration in original) (Harlan, J., concurring)).

121. *Hernandez*, 757 F.3d at 262.

122. *Id.* at 266-67.

123. *Id.* at 267.

124. *Compare Hernandez*, 757 F.3d at 266, *with Rodriguez*, 899 F.3d at 730-31 (reaching opposite conclusions although both discuss and rely on *Verdugo-Urquidez*).

125. *Verdugo-Urquidez*, 494 U.S. at 261.

126. *Id.* at 262.

searched his home in Mexico without a warrant or probable cause.¹²⁷ In holding that the Fourth Amendment did not protect Verdugo-Urquidez from unreasonable searches and seizures, the Court noted how textually, “the people” protected by the Fourth Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹²⁸ The Court looked to the voluntary connections that the individual had with the United States to determine if they had availed themselves to constitutional protection.¹²⁹ Verdugo-Urquidez had very little voluntary connections to the United States because he was a Mexican citizen and lived in Mexico.¹³⁰ Whereas if Verdugo-Urquidez was a resident alien of the United States, he may have been afforded some protections under the United States Constitution.¹³¹ The Court concluded that the Fourth Amendment did not apply to Verdugo-Urquidez because he was a Mexican citizen with no voluntary connection or societal obligation to the United States.¹³² Practical considerations also warned against applying the Fourth Amendment extraterritorially.¹³³ The Court noted how a warrant would not have a legal effect outside of the United States and the executive branch would be severely impeded with uncertainty.¹³⁴

127. *Id.* at 262-64. The fact that Mexican agents were also involved is significant to the Ninth Circuit’s analysis that distinguished *Verdugo-Urquidez* from *Rodriguez*. *Rodriguez*, 899 F.3d at 731. The Ninth Circuit considers how the type of search in *Verdugo-Urquidez* implicates Mexican sovereignty and involves practical concerns of regulating conduct on Mexican soil and by Mexican agents. *Id.* *Rodriguez* did not implicate such practical concerns. *Id.*

128. *Verdugo-Urquidez*, 494 U.S. at 265. The court in *Rodriguez* recognized Justice Kennedy’s concurrence in *Verdugo-Urquidez*. *Rodriguez*, 757 F.3d at 730. The court noted that Kennedy would not place any weight on the text of “the people” in the Fourth Amendment but agreed that it would be impractical to warrant Fourth Amendment protections abroad. *Id.*

129. *Verdugo-Urquidez*, 494 U.S. at 265.

130. *Id.* at 262, 271.

131. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that illegal resident aliens are protected by Equal Protection for access to education); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment is not limited to protect only citizens, rather, it applies to all within the territorial jurisdiction, including resident aliens); *Bridges v. Wixon*, 326 U.S. 135, 147-48 (1945) (finding that resident aliens were entitled to First Amendment freedom of speech and press).

132. *Verdugo-Urquidez*, 494 U.S. at 273. *But see id.* at 283-84 (Brennan J., dissenting) (finding that there was an obvious connection between Verdugo-Urquidez and the United States as he was investigated by the agents of the United States and the government was thereby trying to subject him to United States law—the government creates the connection to the United States rather than any action by Verdugo-Urquidez).

133. *Id.* at 274.

134. *Id.*

a. Arguments in favor of extending Fourth Amendment protections to non-citizens

While the Court in *Verdugo-Urquidez* refused to extend Fourth Amendment protections to a non-citizen in a search and seizure context, *Verdugo-Urquidez* can be distinguished and used in support of extending Fourth Amendment rights to non-citizens. The Ninth Circuit found the application of *Verdugo-Urquidez* to be improper in the cross-border killing context.¹³⁵ Swartz, the CBP agent in *Rodriguez*, acted completely on American soil whereas the agents in *Verdugo-Urquidez*, acted on Mexican soil, which follows that American law controls in this case.¹³⁶ Additionally, *Verdugo-Urquidez* relied on the impracticality of extending the Fourth Amendment to situations involving foreign nations and the uncertainty this would impose on the executive branch.¹³⁷ The Court in *Verdugo-Urquidez* was specifically concerned with the application of warrants and searches abroad.¹³⁸ The practical concerns in *Verdugo-Urquidez* in applying warrants abroad and regulating conduct on Mexican soil are not present in cases like *Rodriguez* where the CBP agent acted within the United States.¹³⁹

b. Arguments against extending Fourth Amendment protections to non-citizens

The primary argument against the extraterritorial application of the Fourth Amendment to a non-citizen is that the non-citizen did not have sufficient voluntary connections with the United States to avail himself of its constitutional protections.¹⁴⁰ *Verdugo-Urquidez* has been used by courts, including the Fifth Circuit, to limit the extraterritorial reach of the Fourth Amendment.¹⁴¹ Hernandez was a citizen of Mexico, allegedly had no interest in entering the United States, and was only playing a game that involved running up to the border—he did not have societal obligations and was not trying to violate immigration laws by crossing the border.¹⁴² These considerations, coupled with the impractical effect of extending Fourth Amendment protections, support not extending the Fourth Amendment to non-citizens.¹⁴³

Other circuits have refused to extend the Fourth Amendment

135. *Rodriguez*, 899 F.3d at 730.

136. *Id.* at 731.

137. *Id.* at 730.

138. *Verdugo-Urquidez*, 494 U.S. at 274.

139. *Rodriguez*, 899 F.3d at 731.

140. *Hernandez*, 757 F.3d at 265.

141. *Id.*

142. *Hernandez*, 757 F.3d at 266.

143. *Id.*

or other constitutional rights under the *Verdugo-Urquidez* analysis. In *United States v. Vilches-Navarrete*, the First Circuit relied on *Verdugo-Urquidez* when they refuse to extend a Fourth Amendment claim to a non-citizen claiming an unreasonable search and seizure.¹⁴⁴ Vilches-Navarrete was a Chilean citizen that did not reside in the United States and was in international waters when his ship was searched for possible drug-trafficking.¹⁴⁵ The court relied on Vilches-Navarrete's citizenship and residence to conclude that he did not have voluntary connections to the United States.¹⁴⁶ Vilches-Navarrete was brought to the United States so his ship could be inspected, but this is an example of an *involuntary* connection.¹⁴⁷ The Eleventh Circuit in *United States v. Emmanuel* refused to extend Fourth Amendment protection against an unreasonable search and seizure because the defendant was a "resident of the Bahamas with no significant voluntary attachment to the United States."¹⁴⁸ Both *Vilches-Navarrete* and *Emmanuel* demonstrate how the *Verdugo-Urquidez* voluntary connections test weighs heavily on residency and citizenship.

B. Extending a Bivens Claim to the Cross-Border Killing Context

Under *Bivens*, an individual may sue a federal agent for damages if that agent, while acting under the color of law, violated the Constitution and there is no cause of action permitted under the Federal Tort Claims Act (FTCA).¹⁴⁹ The FTCA requires consent by the United States for certain tort claims brought against it, "including certain claims about abusive federal law enforcement officers."¹⁵⁰

144. *Vilches-Navarrete*, 523 F.3d at 13 (noting how there were no substantial connections to the United States because the defendant was brought to the United States for the purpose of searching his ship and he thus had no sufficient voluntary connection to the United States).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Emmanuel*, 565 F.3d at 1331. Even though *Emmanuel* involved wiretapping the Eleventh Circuit noted how the wiretapped telephones were located in the Bahamas. *Id.* The fact that the conspiracy for drug trafficking that was alleged was directed at the United States was not sufficient for the sufficient voluntary connections to the nation to afford the defendant Fourth Amendment protections. *Id.*

149. See *Bivens*, 403 U.S. at 397 (holding an individual could sue federal agents for damages when they searched his home without probable cause and without a warrant). "Color of law" is defined as "[t]he appearance that some act is allowed or required by law. Color of law is the apparent authorization by law of some action that would be otherwise forbidden." THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

150. *Rodriguez*, 899 F.3d at 739.

Courts can consider three factors to determine if *Bivens* should be extended: if there is a new context present, if there are “special factors” to consider, and if there are adequate alternative remedies.¹⁵¹ To determine if the present case is a new context, the court will consider if “the case is different in a meaningful way” from prior *Bivens* contexts.¹⁵² “Special factors” are factors that give the court pause before extending *Bivens*.¹⁵³ For example, there is a concern over extending *Bivens* absent congressional action to provide a remedy.¹⁵⁴ The Court tends to disfavor extending *Bivens* claims to new contexts and courts should exhibit caution when they do so.¹⁵⁵ There is also a concern over extending *Bivens* if it affects the separation of powers – which poses the question of whether the courts should authorize a suit for damages rather than Congress.¹⁵⁶ Generally, the Legislature is considered to be in a better position to decide where there is a “host of considerations that must be weighed and appraised” because it should be committed to “those who write the laws, rather than those who interpret them.”¹⁵⁷ For example, the Court in *Abbasi* relied on Congress and the President’s role in national security policy as a special factor that weighed against extending *Bivens*.¹⁵⁸ The implications on the separation of powers were crucial to the Court’s holding in *Abbasi* that refused to extend *Bivens* to the prisoners confined after the September 11th attacks.¹⁵⁹

1. Arguments Against Extending *Bivens* to Non-Citizens

Arguments against extending *Bivens* beyond the border emphasize the idea that the courts should exercise caution when extending *Bivens* due to implications on separation of powers principles.¹⁶⁰ The Supreme Court in *Abbasi* noted many cases where it has refused to extend *Bivens* in new contexts.¹⁶¹ *Abbasi* was

151. *Abbasi*, 137 S. Ct. at 1864-65.

152. *Id.* at 1859.

153. *Bivens*, 403 U.S. at 396.

154. *Id.*

155. *Abbasi*, 137 S. Ct. at 1857. The Court reasoned that caution must be exhibited in extending *Bivens* because it would be better suited for the legislature to determine if a new legal liability should be imposed. *Id.*

156. *Id.* at 1848.

157. *U.S. v. Gilman*, 347 U.S. 507, 511-13 (1954).

158. *Abbasi*, 137 S. Ct. at 1861.

159. *Id.*

160. *Id.* at 1857. The Court has “consistently refused to extend *Bivens* liability to any new context or new category of defendants.” *Malesko*, 534 U.S. at 68.

161. *Abbasi*, 137 S. Ct. at 1857. *See Lucas*, 462 U.S. at 390 (refusing to extend *Bivens* to a First Amendment claim against a federal employee); *Meyer*, 510 U.S. at 473 (refusing to extend *Bivens* to a claim against a federal government agency); *Schweiker*, 487 U.S. at 414 (holding that *Bivens* did not extend to alleged improper denial of federal disability benefits in the face of

considered a new context, even though there were very little similarities between the Fourth Amendment claim in *Abbasi* and the claim in *Bivens*.¹⁶² In *Abbasi*, the Court considered the Fourth Amendment claim against the detention policy, including strip searches, to be a different context from an unreasonable search and seizure claim in *Bivens*.¹⁶³ The argument against extending *Bivens* to a cross-border shooting context is “[t]hat there has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil.”¹⁶⁴ The Fifth Circuit argued that this is a new context and that *Bivens* should not be extended due to the presence of special factors.¹⁶⁵

There are numerous special factors for extending *Bivens* presented by the cross-border deadly force context.¹⁶⁶ Just as the Court in *Abbasi* stressed that national security is an essential function of Congress and the President, extending *Bivens* in the cross-border killing context could undermine border patrol’s ability to enforce the law and perform their duties related to national security.¹⁶⁷ Extending *Bivens* here could cause CBP agents to second-guess their decisions in high-pressure situations due to the threat of liability.¹⁶⁸ There is also the risk that extending *Bivens*

absence of congressional action in the existing remedial scheme); *Chappell*, 462 U.S. at 297, 305 (holding that those in the military cannot sue to recover damages from their superior officer for race discrimination); *Stanley*, 483 U.S. at 683 (refusing again to extend *Bivens* to the military context due to the unique disciplinary nature of the military); *Minnecci*, 565 U.S. at 120 (holding that there was no right to a claim for damages for an Eighth Amendment violation in the prison context because there were adequate alternative remedies); *Robbins*, 551 U.S. at 541 (holding that a landowner did not have a *Bivens* claim against the Bureau of Land Management for harassment and intimidation).

162. *Abbasi*, 137 S. Ct. at 1860. The claims in *Abbasi* alleged that the detention policy after September 11 violated the detainee’s due process and equal protection rights and Fourth Amendment rights by “subjecting them to frequent strip searches.” *Id.* at 1858.

163. *Id.* at 1864.

164. *Hernandez*, 885 F.3d at 817.

165. *Id.* at 814. The Fifth Circuit also noted the Supreme Court’s refusal in *Verdugo-Urquidez* to extend Fourth Amendment protection to a foreign citizen whose property was searched by United States agents and the Supreme Court’s own description of *Hernandez*’s case as raising “sensitive” issues. *Id.* at 817.

166. *Id.* at 818.

167. *Id.* at 819. Congress has explicitly given border patrol agents authority to protect our nation in the interest of national security. *Id.* (citing 6 U.S.C. § 211 (e)(3)(B) (2017)).

168. *Abbasi*, 137 S. Ct. at 1861. *See also* *Vanderklok v. U.S.*, 868 F.3d 189, 207-9 (3rd Cir. 2017) (refusing to extend *Bivens* in an airport security context where a TSA agent was charged with constitutional violations). The court in *Vanderklok* similarly relied on the special factor in *Abbasi* because TSA agents are tasked with securing national security in airports and possible liability in the form of monetary damages could increase the probability that TSA agents would hesitate in making decisions, which would undermine their purpose in

here could “interfere with foreign affairs and diplomacy.”¹⁶⁹

Additionally, Congress’s silence with respect to cross-border killings may indicate what its view on the issue is.¹⁷⁰ Congress has not extended a remedy themselves but could do so if they wanted to – especially considering the increased interest in the area of border security.¹⁷¹ Congress’s inaction may indicate that Congress is deliberately not providing a remedy in the cross-border incident context.¹⁷² 42 U.S.C. § 1983 provides that “every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction . . . to the deprivation of any rights . . . shall be liable to the party injured in an action at law.”¹⁷³ The Fifth Circuit in *Hernandez* found that § 1983 “implies the absence of a damages remedy” in the cross-border context because it provides that a state or local official may be sued for damages by “any citizen of the United States or other person within the jurisdiction thereof.”¹⁷⁴ The language of § 1983 arguably demonstrates Congress’s intent to not provide a remedy in the cross-border context and only provide one to citizens of the United States or someone within its jurisdiction.¹⁷⁵ The Fifth Circuit also noted that even if *Bivens* is not available to deter agents from using deadly force, there is an adequate deterrent in criminal investigations and charges against the agent.¹⁷⁶

2. Arguments in Favor of Extending *Bivens* to Non-Citizens

Hernandez, in the Fifth Circuit case, argued that an unprovoked shooting by a federal officer is an excessive force claim that is not a new context under *Bivens*.¹⁷⁷ A new context is defined as being different in a “meaningful way.”¹⁷⁸ It is also recognized that federal law provides damages for claims in similar contexts

securing our national security in this context. *Id.* at 207.

169. *Hernandez*, 885 F.3d at 819. The Fifth Circuit additionally noted that there is a joint Border Violence Prevention Council between the U.S. and Mexico, where such issues can be addressed and imposing liability may interfere with the dialogue between Mexico and the United States. *Id.* at 820.

170. *Id.* at 820 (citing *Abbasi*, 137 S. Ct. at 1862).

171. *Id.* “It is much more difficult to believe that congressional inaction was inadvertent’ given the increasing national policy focus on border security.” *Id.* (citing *Abbasi*, 137 S. Ct. at 1862).

172. *Hernandez*, 885 F.3d at 820.

173. 42 U.S.C. § 1983 (2012).

174. *Rodriguez*, 899 F.3d at 742 (citing § 1983).

175. *Hernandez*, 885 F.3d at 820.

176. *Id.* at 821. (noting that the CBP agent in *Rodriguez v. Swartz* is being criminally charged).

177. *Hernandez*, 885 F.3d at 816.

178. *Abbasi*, 137 S. Ct. at 1859.

where constitutional violations arise.¹⁷⁹ Therefore, one argument in favor of applying *Bivens* in the cross-border killing context is that this context is not different from a context where a *Bivens* claim is already recognized. The Ninth Circuit in *Rodriguez* found the cross-border killing to be a new context but concluded there were grounds to extend a *Bivens* even though it is a disfavored judicial activity.

If there is a new context, *Bivens* can be extended if there are no special factors causing the judiciary hesitation in extending a cause of action for damages.¹⁸⁰ The Ninth Circuit in *Rodriguez* concluded that there were no “special factors” that apply to prohibit extending a *Bivens* claim in the cross-border killing context.¹⁸¹ *Abbasi* involved a challenge to a high-level executive detention policy.¹⁸² Extending *Bivens* here would not implicate national security.¹⁸³ The petitioners in *Abbasi* challenged a policy employed by the executive and legislative branches after the terrorist attacks on September 11, 2001,¹⁸⁴ and was, therefore, better-suited for either branch to handle.¹⁸⁵ The cross-border shooting context without a threat to national security does not implicate executive or legislative powers over national security.¹⁸⁶ Imposing liability in the cross-border killing context would not deter border patrol agents from carrying out their duties as Swartz had no duty to shoot J.A. in *Rodriguez*.¹⁸⁷ In fact, “border patrol agents have faced Fourth Amendment *Bivens* claims in the past.”¹⁸⁸ Extending *Bivens* also does not implicate foreign policy because policymaking individuals are not the target of the lawsuits.¹⁸⁹ For example, in *Rodriguez*, Swartz is sued as a federal agent rather than as a policymaking

179. *Abbasi*, 137 S. Ct. at 1872 (Breyer J., dissenting). The dissent argues that the situation in *Abbasi* is no different than longstanding *Bivens* law as a compensatory remedy for a constitutional tort and it falls within the scope of traditional constitutional tort law. *Id.*

180. *Rodriguez*, 899 F.3d at 738-39.

181. *Id.* at 744.

182. *Id.* at 745 (citing *Abbasi*, 137 S. Ct. at 1860-61)).

183. *Id.*

184. *Abbasi*, 137 S. Ct. at 1853. Petitioners in *Abbasi* specifically challenged the detention policy employed by the executive which clearly implicated the role of the executive branch and triggered the notion of separation of powers which ultimately becoming a driving force in the decision. *Id.* at 1858-59.

185. *Rodriguez*, 899 F.3d at 745.

186. *Id.*

187. *Id.* at 746.

188. *Id.* Compare *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (finding that a non-citizen had sufficient connections to the United States to allow a *Bivens* claim for Fourth Amendment violations of excessive force and unlawful arrest by a Border Patrol agent), with *Chavez v. U.S.*, 683 F.3d 1102, 1106-07 (9th Cir. 2012) (dismissing plaintiff's *Bivens* claim against Border Patrol agents that repeatedly stopped their shuttle in violation of the Fourth Amendment).

189. *Rodriguez*, 899 F.3d at 746-47.

individual.¹⁹⁰

Ultimately, there are no adequate alternative remedies available in cross-border shooting cases that are factually similar to that of *Rodriguez* or *Hernandez*.¹⁹¹ The United States cannot be sued without its own consent under the FTCA.¹⁹² The FTCA allows for monetary damage awards.¹⁹³ Even though the government consents to certain tort claims against officers of the United States through the FTCA, they still maintain the explicit exception “that the United States cannot be sued for claims arising in a foreign country.”¹⁹⁴ Therefore, even if the federal officer could be sued in an official capacity under the FTCA, the foreign country exception would likely bar relief because the FTCA prevents the United States from being sued for claims arising in another country.¹⁹⁵

In the case of *Rodriguez*, there was no adequate relief in state tort law because of Arizona’s Westfall Act.¹⁹⁶ The Westfall Act grants immunity to state officials in claims arising out of acts taken during their official duties, including their scope of employment.¹⁹⁷ Restitution is not an adequate remedy as an alternative to damages because even if the agent commits a crime, the government has discretion in charging the agent.¹⁹⁸ Additionally, the burden of proof is higher in cases where the government charges the agent compared to a *Bivens* claim against the officer; a conviction is only secured in a criminal case if the claim is proven beyond a reasonable doubt, whereas the standard of proof in a *Bivens* claim is more likely than not.¹⁹⁹ Even if the agent is found not guilty for criminal charges, he or she may be liable for monetary damages, so a criminal suit alone is not an adequate remedy.²⁰⁰ The Ninth Circuit rejects the argument that § 1983 precludes a *Bivens* remedy by providing that “any citizen of the United States or other person within the jurisdiction thereof” cannot bring a suit for money damages.²⁰¹ The purpose of enacting § 1983 was to ensure that state

190. *Id.*

191. *Id.* at 739.

192. *Id.*

193. *Id.*

194. *Id.* (citing 28 U.S.C. § 2680(k) (2012)). This is known as the “foreign country exception.” *Id.*

195. *Rodriguez*, 899 F.3d at 739.

196. *Id.* at 741 (citing *Osborn v. Haley*, 549 U.S. 225, 229 (2007)).

197. *Id.* The court in *Rodriguez* explained that “[u]nder the applicable law, an employee ‘acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.’” *Id.* If Swartz was ‘on duty’ when he shot J.A., then it seems that he would have been acting within the scope of his employment even if he violated rules governing his conduct. *Id.*

198. 28 U.S.C. § 2679(b)(1) (2012).

199. *Rodriguez*, 899 F.3d at 742.

200. *Id.*

201. *Rodriguez*, 899 F.3d at 739 (citing § 1983). The opposing argument is

officials could not easily escape liability in cases of constitutional violations and not to preclude suit for damages in cross-border shootings.²⁰² It is unlikely that Rodriguez, or someone similarly situated, could seek an adequate remedy in a Mexican court.²⁰³ Mexican courts would likely not have jurisdiction over the CBP agent.²⁰⁴ It would also be nearly impossible to execute a judgment against the CBP agent without violating state immunity laws.²⁰⁵

C. Summary of Analysis

1. Fourth Amendment

The Fourth Amendment analysis consists primarily of *Boumediene* and *Verdugo-Urquidez* considerations. Under *Boumediene*, a court must consider the geography involved, sovereignty over that geography, and any practical concerns that may arise with applying a constitutional right extraterritorially.²⁰⁶ Under *Verdugo-Urquidez*, a court must consider whether there are sufficient voluntary connections between the non-citizen claiming the right and the United States.²⁰⁷ *Verdugo-Urquidez* could be used to argue that a Mexican citizen with no ties to the United States cannot be afforded Fourth Amendment protection.²⁰⁸ In the alternative, *Verdugo-Urquidez* can be rejected by distinguishing its application of sufficient voluntary connections to a Fourth Amendment unreasonable search and seizure case to an unreasonable deadly seizure case.²⁰⁹

2. Bivens Claim

When considering whether to extend a *Bivens* claim, a court must consider if the case presents a new context, if there are any special factors to counsel hesitation in the absence of congressional action, and whether there are alternative remedies already available.²¹⁰ If there is a special factor present, the court may not extend a *Bivens* claim for damages to the new context.²¹¹ The Fifth Circuit refused to extend *Bivens* in *Hernandez* because it was a new

that Rodriguez cannot be sued because he was not shot in the jurisdiction of the United States and was not a United States citizen. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 742-43.

206. *Boumediene*, 553 U.S. at 766.

207. *Verdugo-Urquidez*, 494 U.S. at 265.

208. *Hernandez*, 757 F.3d at 266.

209. *Rodriguez*, 899 F.3d at 730-31.

210. *Abbasi*, 137 S. Ct. at 1864-65.

211. *Rodriguez*, 899 F.3d 738.

context and there was a special factor present – interfering with the executive branch’s function and its power over foreign affairs and diplomacy.²¹² The Ninth Circuit extended *Bivens* in *Rodriguez* because they did not find any special factors present and there was no alternative adequate remedy available.²¹³ The same analysis is used, yet contrary conclusions are made. The question remains which conclusion should be adopted in light of these narrow, yet grave circumstances.

IV. PROPOSAL

The Ninth Circuit’s reasoning is instructive and should be considered if the Supreme Court of the United States grants certiorari to resolve this circuit split. Under the Ninth Circuit’s reasoning, the Fourth Amendment should be extended to protect non-citizens against unreasonable deadly force and a *Bivens* claim for damages should extend to a non-citizen that is killed at the border by an agent of the United States. This is crucial to grant a remedy to an individual who is killed by a border patrol agent and who has no other source of a remedy.

First, this Comment will propose that the *Verdugo-Urquidez* sufficient voluntary connections test should not be applied to the cross-border killing context. Then, this Comment will set the reasoning to extend the Fourth Amendment and a *Bivens* claim to the cross-border killing context. Regarding *Bivens*, this is an effort to revert back to the original motivation behind *Bivens*: to provide a remedy where there is no other adequate, available remedy.

A. *The Fourth Amendment Should Extend to the Cross-Border Killing Context*

First, the *Verdugo-Urquidez* sufficient voluntary connections analysis should be rejected in the context of unreasonable deadly force exerted by a border patrol agent against a non-citizen.²¹⁴ As the Ninth Circuit observed in *Rodriguez*, the factual differences between *Verdugo-Urquidez* and the killing of a non-citizen at the

212. *Hernandez*, 885 F.3d at 819.

213. *Rodriguez*, 899 F.3d at 744.

214. See *Verdugo-Urquidez*, 494 U.S. at 274-75 (holding that a Mexican citizen with no significant voluntary connection with the United States did not have Fourth Amendment protection from an unreasonable search of his home and seizure of his property). In *Rodriguez*, the Ninth Circuit noted that *Verdugo-Urquidez* only addressed “the search and seizure by United States agents of property that [was] owned by a nonresident alien and located in a foreign country.” *Rodriguez*, 899 F.3d at 730-31 (citing *Verdugo-Urquidez*, 494 U.S. at 261).

border are apparent.²¹⁵ *Verdugo-Urquidez* involved a search and seizure of a Mexican citizen's property in Mexico, whereas in *Rodriguez*, the border patrol agent acted on American soil, where American law controlled, and the agent could not have known whether J.A. was a Mexican or American citizen.²¹⁶ Furthermore, the practical considerations of *Verdugo-Urquidez* do not apply to *Rodriguez* because the court in *Verdugo-Urquidez* was concerned with regulating conduct in Mexico, but the agent in *Rodriguez* was acting on American soil.²¹⁷ *Verdugo-Urquidez* had a specific concern that extending Fourth Amendment protections against unreasonable searches and seizures to a Mexican citizen would impact law enforcement abroad and foreign policy operations that may involve searches or seizures.²¹⁸ There is no such relevant consideration in cases that involve unreasonable deadly force employed by a border patrol agent acting on American soil—the fact that a non-citizen is killed while on Mexican soil is not dispositive.

The voluntary connections test set out in *Verdugo-Urquidez* is simply irrelevant to cases where a non-citizen is shot at the border by an agent acting on American soil. *Verdugo-Urquidez* notes that if one has voluntarily associated itself with the United States, then it has accepted some societal obligations and therefore can be considered “among the people of the United States.”²¹⁹ However, the Ninth Circuit noted that the textual analysis of the Fourth Amendment is not conclusive.²²⁰ The Court in *Verdugo-Urquidez* relied on precedent, history, and practical concerns to hold “that the Fourth Amendment did not apply to a *search and seizure of...property*,” a context that is extremely different than unreasonably deadly force used by an American agent against a non-citizen of the United States.²²¹ *Verdugo-Urquidez* hinged on, in part, the practical considerations of issuing a warrant to be applied abroad, but this has no relevance here.²²² There are ultimately “no practical obstacles” in extending the Fourth Amendment in the case of unreasonable use of deadly force of an agent acting on American soil.²²³

Alternatively, Justice Brennan's dissent in *Verdugo-Urquidez*

215. *Rodriguez*, 899 F.3d at 730-31.

216. *Id.* at 731.

217. *Id.*

218. *Verdugo-Urquidez*, 494 U.S. at 273.

219. *Id.* at 266. The Court in *Verdugo-Urquidez* suggested that “the people” in the Fourth Amendment refers to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265 (citing *United States ex re. Turner v. Williams*, 194 U.S. 279, 292 (1904)).

220. *Rodriguez*, 899 F.3d at 730.

221. *Id.*

222. *Id.*

223. *Id.* at 731.

noted an alternative analysis that could apply justly to the context of a non-citizen shot and killed at the border by an American agent.²²⁴ Justice Brennan noted that the majority misses an obvious connection—that Verdugo-Urquidez was investigated and prosecuted for violations of the laws of the United States and would have to be in a prison of the United States.²²⁵ Brennan argues that the connection is supplied by the government and not by the individual claiming protection from the Fourth Amendment.²²⁶ Brennan’s dissent is a valid application of the voluntary sufficient connections test that would offer protection to an individual in the cross-border killing context. Analogous to Brennan’s argument, an agent that decides to arbitrarily shoot a non-citizen at the border creates a connection between the United States and the non-citizen that should afford the non-citizen protections under the laws of the United States—“[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”²²⁷ An agent that uses unjustified deadly force against a non-citizen has created sufficient connection and we should, therefore, protect the non-citizen with the Fourth Amendment.

B. Bivens Should be Extended to Provide a Claim for Damages for a Non-Citizen Unjustifiably Killed at the Border

The Ninth Circuit’s reasoning for extending *Bivens* is demonstrative of factors the Supreme Court should consider in the cross-border killing context. Furthermore, the Supreme Court should re-examine the weight of the factors in deciding whether to extend a *Bivens* claim to a new context—the lack of an adequate alternative remedy should control, even in the presence of a “special factor” to provide a remedy in unique situations where there is no other recourse. This is consistent with the original spirit and holding of *Bivens*.

The Ninth Circuit’s holding in *Rodriguez*, that *Bivens* does extend to this new context, concluded that there were no special factors present to weigh against extending *Bivens* to this new context.²²⁸ A cross-border shooting case factually similar to the

224. *Verdugo-Urquidez*, 494 U.S. at 279 (Brennan J., dissenting). Justice Brennan criticized the majority in *Verdugo-Urquidez* for holding “the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them.” *Id.* at 282.

225. *Id.* at 283.

226. *Id.*

227. *Id.* at 284.

228. *Rodriguez*, 899 F.3d at 744.

Ninth Circuit case should extend a *Bivens* claim for damages to this type of new context. The Ninth Circuit noted that, unlike *Abbasi*, which is considered a challenge to high-level executive branch policy, there are no special factors at issue in this new context and only principles of excessive force cases apply to Swartz's action.²²⁹ There was also no implication of national security in the *Rodriguez* context because a border patrol agent needlessly killing someone at the border does not implicate national security—there was no special factor at play here. There was no threat to national security; therefore, holding the agent responsible would not interfere with executive action and discretion when the original action is not justified in the first place.²³⁰ Finally, there are no foreign policy²³¹ implications because there is no applicable American foreign policy in regard to the types of shootings in these cases and there is no risk of undermining international relations.²³² Under this unique context, there are no special considerations that would outweigh the absence of adequate alternative remedies.²³³

The Ninth Circuit noted the lack of alternative remedies available to a non-citizen killed at the border—which necessitates an extension of *Bivens* to this new context. Without a *Bivens* claim for damages, a non-citizen killed as the result of unreasonable deadly force by an agent of the United States would not have any adequate remedy. The “foreign country exception” under the FTCA essentially means that the United States is immune from all claims based on any injury in a foreign country, so a non-citizen shot and killed while on Mexican soil would not be able to sue the government under the FTCA.²³⁴ There is likely no state law tort claim against a border patrol agent due to the Westfall Act, which would likely bar any state tort claim brought against the agent.²³⁵ The Westfall Act grants immunity to federal employees from tort claims arising out of actions they took “within the scope of his office or employment.”²³⁶ The Ninth Circuit also noted that trying an agent for manslaughter or murder and paying restitution to an estate if the agent is found guilty is not an adequate remedy because the government has the discretion to charge him; it is the government's remedy, and guilt must be found beyond a reasonable doubt rather than a preponderance of evidence as in a *Bivens*

229. *Id.* at 744-45.

230. *Id.* at 745-46.

231. “[M]ere incantation of the magic words ‘foreign policy’ does not ‘cause a *Bivens* remedy to disappear.” *Id.* at 746. (citing *Hernandez*, 885 F.3d at 830 (Prado, J., dissenting)).

232. *Id.*

233. *Bivens* itself found that there were no special factors to cause the court to hesitate without “affirmative action by Congress.” *Bivens*, 403 U.S. at 396.

234. *Rodriguez*, 899 F.3d at 739.

235. *Id.* at 741.

236. 28 U.S.C. § 2679 (d)(1) (2012).

claim.²³⁷ Additionally, it is unlikely that a remedy could be granted by a Mexican court as it would not have jurisdiction over the federal agent and, even if there was a remedy in a Mexican court, enforcing a judgment from a Mexican court would violate the Westfall Act.²³⁸

The Ninth Circuit concluded that “for Rodriguez, it is damages under *Bivens* or nothing, and Congress did not intend to preclude *Bivens*.”²³⁹ In light of the absence of a special factor and a lack of an adequate remedy, the Ninth Circuit held that “Rodriguez is entitled to bring a *Bivens* cause of action against” the border patrol agent.²⁴⁰ The Ninth Circuit’s analysis should be applied to extend Fourth Amendment protections from unreasonable deadly force to a non-citizen shot by an official acting on American soil and should extend a *Bivens* cause of action to these individuals as well under circumstances similar to the Ninth and Fifth Circuit cases.

C. Reevaluating the *Bivens* Analysis

It would be consistent with the reasoning behind *Bivens* to weigh the absence of adequate alternative remedies in favor of extending *Bivens*, even if there is a special factor present. Basic notions of fairness and justice require this change in a context where no other relief is available. *Bivens* itself did not rely solely on the fact that there were no special factors present and focusing on the “special factor” analysis rather than the lack of adequate remedies already available misapprehends the reasoning behind *Bivens*. *Bivens* depended, in part, on the fact that other remedies to address “trespass and the invasion of privacy” may be “inconsistent or even hostile” to the guarantee against unreasonable searches and seizures.²⁴¹ The Court stresses that there is no safety for the citizen except for constitutional rights invaded by officials of the government in these cases.²⁴² Additionally, the Court noted that the idea of suing for damages from a federal official that violates constitutional rights is hardly surprising—“damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty.”²⁴³ Considering the Court’s emphasis on a lack of adequate remedy in the absence of a *Bivens* claim in contrast with the one sentence stating that the case involved no special factors counseling hesitation, the Court’s analysis should give significant

237. *Rodriguez*, 899 F.3d at 741-42.

238. *Id.* at 742-43. The court also noted a brief that cites Mexican law that suggests that border patrol agents cannot be sued in Mexican courts in these cases. *Id.* at n.146.

239. *Id.* at 744.

240. *Id.* at 734.

241. *Bivens*, 403 U.S. at 394.

242. *Id.* at 395.

243. *Id.*

weight to the absence of an adequate remedy as opposed to refusing to extend a *Bivens* claim in the presence of *any* special factors. The nature of *Bivens* itself and the injustice of the cross-border killing context, where there is no other recourse, compel this analysis.

V. CONCLUSION

When a border patrol agent acting on American soil shoots and kills a non-citizen with absolutely no justification, there is no possible remedy or recourse for the deprivation of the individual's life. The Ninth Circuit's analysis in extending Fourth Amendment protections against unreasonable deadly seizures to non-citizens killed at the border and a *Bivens* claim for damages against the agent recognizes the lack of an adequate remedy elsewhere. It is time we held agents of the United States responsible for their actions. The fact that their actions impact a non-citizen does not mean that the individual should be deprived of their life without any possible recourse or repercussions. Basic notions of fairness and justice compel this conclusion and we must at least allow the *opportunity* of a possible remedy.