FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA DEL SOCORRO QUINTERO PEREZ; BRIANDA ARACELY YANEZ QUINTERO; CAMELIA ITZAYANA YANEZ QUINTERO; J.Y., a minor,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES OFFICE OF BORDER PATROL; JANET A. NAPOLITANO; THOMAS S. WINKOWSKI; DAVID AGUILAR; ALAN BERSIN; KEVIN K. MCALEENAN; MICHAEL FISHER; PAUL BEESON; RODNEY S. SCOTT; CHAD MICHAEL NELSON; DORIAN DIAZ; DOES, 1–50,
Defendants-Appellees.

No. 17-56610

D.C. No.
3:13-cv-01417-WQH-BGS

OPINION

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted November 5, 2018
Submission Withdrawn May 28, 2019
Resubmitted August 9, 2021
Seattle, Washington

Filed August 16, 2021

Before: M. Margaret McKeown and Michelle T. Friedland, Circuit Judges, and Fernando J. Gaitan, Jr.,[*] District Judge.

Opinion by Judge McKeown;
Concurrence by Judge Friedland

SUMMARY[**]

Civil Rights

The panel affirmed the district court's (1) dismissal on the pleadings of plaintiff's claims brought under the Alien Tort Statute and the Federal Tort Claims Act; and (2) grant of summary judgment for defendants on plaintiff's claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in an action arising from the fatal shooting of a Mexican national by the U.S. Border Patrol on the U.S.-Mexico border fence.

[*] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel first rejected plaintiff's argument that the shooting and Border Patrol's Rocking Policy, authorizing deadly force in response to rock throwing, violated an international *jus cogens* norm against extrajudicial killing and thus was a tort actionable under the Alien Tort Statute ("ATS"). Citing this court's decision in *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011), and consistent out-of-circuit authority, the panel held that the ATS does not waive sovereign immunity, even for *jus cogens* violations. Without a waiver of sovereign immunity by the United States, plaintiff's ATS claim against the United States failed and was properly dismissed.

The panel held that the claims brought under the Federal Tort Claims Act ("FTCA") were time-barred and equitable tolling was not available under the circumstances. Plaintiff initially did not pursue an FTCA claim because she believed that, under Ninth Circuit authority in effect at the time, specifically *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008), judgment on an FTCA claim would have foreclosed her *Bivens* claims. Plaintiff amended her complaint to assert FTCA claims after the Supreme Court abrogated *Pesnell* in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016). The panel explained that under *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992), the FTCA's judgment bar did not foreclose a contemporaneously filed *Bivens* claim when the government had prevailed on the FTCA claim. Thus, the Supreme Court's abrogation of *Pesnell* was largely irrelevant to plaintiff's situation. Plaintiff's seeming lack of awareness of *Kreines* constituted a mistake of law that was not outside of her control and therefore did not qualify as an extraordinary circumstance supporting equitable tolling.

Addressing the *Bivens* cause of action, and applying *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), and *Hernandez v.*

Mesa, 140 S. Ct. 735 (2020), the panel first concluded that the *Bivens* claims, involving a fatal shooting at the border by a federal agent of a Mexican national who had crossed into the United States, arose in a new context. The panel next determined that plaintiff had no adequate alternative remedy because even if plaintiff could bring a timely FTCA claim, the FTCA on its own would not have afforded comparable deterrence and compensation options. Finally, the panel determined that a special factor counseled against extending the *Bivens* remedy to the Border Patrol Chief, because doing so would challenge a high-level executive policy. As to the Border Patrol agent involved in the shooting, applying *Hernandez*, the panel concluded that the *Bivens* claim implicated the special factor of national security and was therefore foreclosed.

Judge Friedland concurred other than concurring only in the judgment as to Part I. Judge Friedland would affirm the dismissal of plaintiff's ATS claim on the ground that plaintiff had not satisfied the required elements of her claim, namely that the Rocking Policy authorized extrajudicial killing, that this particular type of extrajudicial killing was a *jus cogens* violation, and that this particular type of extrajudicial killing constituted an actionable ATS tort. She therefore would not reach the broader question of whether the United States has sovereign immunity for claims of *jus cogens* violations that are brought under the ATS.

COUNSEL

Steve D. Shadowen (argued) and Matthew Charles Weiner, Hilliard & Shadowen LLP, Austin, Texas; Gerald Singleton and Brody A. McBride, Singleton Law Firm, Solana Beach, California; for Plaintiffs-Appellants.

Mark B. Stern (argued), Nitin Shah, and Casen B. Ross, Appellate Staff; Robert S. Brewer Jr., United States Attorney; Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

OPINION

McKEOWN, Circuit Judge:

This case illustrates the law's inability to remedy certain wrongs. Jose Alfredo Yañez Reyes ("Yañez") was shot and killed by a U.S. Border Patrol agent while on the U.S.-Mexico border fence. Although these events unfolded at the border, the parties agree that the fencing was in the United States and that the shooting happened on American soil. Mexican territory was involved only when, after being shot, Yañez fell and landed halfway across the international border. Yañez's widow, Maria del Socorro Quintero Perez ("Quintero Perez"), and children, brought civil claims against the U.S. government and individual federal agents under a variety of theories. We withdrew submission of this case pending the Supreme Court's decision in *Hernandez v. Mesa*, which involved an analogous, but not identical, situation: a cross-border shooting of a Mexican citizen by a border patrol agent. 140 S. Ct. 735 (2020).

Without doubt, Yañez's death is tragic, as are the circumstances that caused it. We conclude, however, that the relief his family pursues is foreclosed by the holding of *Hernandez*, the constraints imposed by various statutes, and by the limits of equitable tolling. We regret that the law compels this result.

BACKGROUND

In 2011, U.S. Border Patrol Agent Dorian Diaz ("Diaz") shot and killed Yañez, a Mexican national, while Yañez was on the U.S.-Mexico border fence. The events leading up to the fatal moment began when Yañez and Jose Ibarra Murietta ("Murietta"), also a Mexican national, crossed the border, entering near the San Ysidro port of entry through a hole in a drainage grate that forms part of the border fence. Diaz spotted them and radioed for assistance from another agent, Chad Nelson ("Nelson"). Seeing the agents, Yañez and Murietta tried to return to Mexico. Yañez made it back through the hole in the drainage grate, but Murietta did not. When the agents attempted to arrest Murietta, he fled, then resisted, and an altercation ensued.

The parties offer differing accounts of Yañez's actions while the agents engaged Murietta near the border fence. The agents testified that Yañez swung a table leg studded with nails at Nelson through grating in the fence and then mounted the fence to throw rocks at him. Diaz said he warned Yañez to get down from the fence after he threw rocks, but Yañez appeared above the fence for a second time and threw the table leg at Nelson, which the agents testified hit Nelson in the head. As Diaz described the incident, Yañez "thr[ew] down the table leg . . . and hit[] Nelson in the back of the head," after which he saw "Nelson kind of jolt his head." Diaz testified he again told Yañez to get off the fence, and when Yañez appeared for the third time on the fence, Diaz shot him. Diaz said that, just before he fired the shot, he saw Yañez "cocking [his arm] back to throw something," and though Diaz "couldn't see [Yañez's] hand," he "kn[e]w [Yañez] had it in a fist."

Quintero Perez offers a different account of the killing, based primarily on Murietta's testimony. Murietta testified

that he saw Yañez appear over the fence, but that he never saw him throw rocks or anything else. Instead, Murietta recalled in a deposition that Yañez was holding onto the fence with one hand and holding his cell phone in the other, which Yañez may have used to record the agents' altercation with Murietta. Murietta also testified that Yañez had told the agents that "he had recorded" them, and that Agent Diaz responded by pointing his gun at Yañez and saying, "I kill you motherfucker."

Despite their divergent accounts of the killing, the parties agree that Diaz was on American soil when he shot Yañez and that Yañez was on the border fence when he was shot, which is also within the United States. The parties also agree that after Yañez was fatally shot, his body fell such that it was partially in the United States and partially in Mexico.

Quintero Perez brought claims against the United States under the Alien Tort Statute ("ATS") and the Federal Tort Claims Act ("FTCA"), and Fourth Amendment *Bivens* claims against Diaz and former Border Patrol Chief Michael Fisher ("Fisher"), who was in charge of border patrol policies when Yañez was shot. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). The district court dismissed the ATS and FTCA claims on the pleadings, and, following discovery, entered summary judgment in favor of the defendants on the *Bivens* claims. We affirm.

ANALYSIS

I. *JUS COGENS* CLAIM UNDER THE ALIEN TORT STATUTE

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort

only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. It is a purely jurisdictional statute that creates no new causes of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Rather, the "very limited category" of claims actionable under the ATS must be "defined by the law of nations and recognized at common law." *Id.* at 712. The paradigmatic historical examples are "violation of safe conducts, infringement of the rights of ambassadors, and piracy," *id.* at 724, but the Court recognized that the ATS also supports claims "based on the present-day law of nations," so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that the Court had listed. *Id.* at 725.

Quintero Perez argues that the shooting amounted to an extrajudicial killing that violates an international *jus cogens* norm and that fits within *Sosa*'s definition of torts actionable under the ATS. A *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679. Quintero Perez claims that Border Patrol's "Rocking Policy" violates a *jus cogens* norm against extrajudicial killing. The district court dismissed the claim, holding that the United States did not waive its sovereign immunity for this norm. We review de novo, and we affirm. *See Elmakhzoumi v. Sessions*, 883 F.3d 1170, 1172 (9th Cir. 2018).

Quintero Perez asserts an ATS claim only against the United States. We addressed the interplay between the ATS's jurisdictional grant and sovereign immunity in *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011). Joining three of our sister circuits, we concluded that the ATS does not "imply any waiver of sovereign immunity." *Id.* at 1196 (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)). This analysis was consistent with a position we took nearly twenty years earlier in *Koohi v. United States*, in which we noted that the ATS "does not waive sovereign immunity." 976 F.2d 1328, 1332 n.4 (9th Cir. 1992) (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980)). Following *Tobar*, "any party asserting jurisdiction under the [ATS] must establish, independent of that statute, that the United States has consented to suit." 639 F.3d at 1196 (quoting *Goldstar*, 967 F.2d at 968).

The D.C., Second, and Fourth Circuits are in accord. The D.C. Circuit has repeatedly held that the ATS "itself is not a waiver of sovereign immunity." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *see also Canadian Transp. Co.*, 663 F.2d at 1092. As we noted in *Tobar*, the Fourth Circuit similarly concluded that the ATS "has not been held to imply any waiver of sovereign immunity." *Goldstar*, 967 F.2d at 968. The Second Circuit agreed that the ATS does not waive sovereign immunity. *Arar v. Ashcroft*, 532 F.3d 157, 175 n.12 (2d Cir. 2008) (addressing the Torture Victim Protection Act, which is codified as a note to the ATS), *vacated on other grounds*, 585 F.3d 559 (2d Cir. 2009).

In the face of this authority, Quintero Perez urges that *jus cogens* violations do not warrant sovereign immunity. Although *Tobar* did not implicate a *jus cogens* violation, its

language is unequivocal and does not permit an exception to the waiver requirement for *jus cogens* violations. *Tobar*, 639 F.3d at 1196. Though Quintero Perez points to a Fourth Circuit decision, *Yousuf v. Samantar*, which stated that "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign" such that immunity was not available, that case rejected *foreign* official immunity, applicable to high-ranking foreign officials. 699 F.3d 763, 776–78 (4th Cir. 2012). Notably, the Fourth Circuit did not disturb or even discuss its precedent in *Goldstar* concluding that the United States must consent to suit under the ATS. *Goldstar*, 967 F.2d at 968.

For similar reasons, Quintero Perez's effort to apply principles from a Ninth Circuit Foreign Sovereign Immunities Act case to the ATS construct is not persuasive because that case did not involve the sovereign immunity of the United States. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). Nor does our circuit's decision in *Sarei v. Rio Tinto, PLC*, which involved a private rather than a U.S. government defendant, resonate here. 671 F.3d 736 (9th Cir. 2011) (en banc), *judgment vacated*, 569 U.S. 945 (2013). Without a waiver of sovereign immunity by the United States, Quintero Perez's ATS claim against the United States fails and was properly dismissed.

II. FEDERAL TORT CLAIMS ACT CLAIMS

Unlike in the ATS, in the FTCA the United States waives sovereign immunity for certain tort claims against the United States, including those that challenge the actions of federal law enforcement agents. 28 U.S.C. §§ 1346(b)(1), 2674, 2680(h). Initially, however, Quintero Perez did not pursue an FTCA claim. She harbored doubts about the viability of

such a claim[1] and thought that, under Ninth Circuit authority in effect at the time, judgment on an FTCA claim would have foreclosed her *Bivens* claims. By the time she amended her complaint to assert FTCA claims, the statute of limitations had expired, and Quintero Perez was left to rely on equitable tolling.

Our decision in *Pesnell v. Arsenault* guided Quintero Perez's initial strategy. 543 F.3d 1038 (9th Cir. 2008), *abrogated by Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016). In *Pesnell*, we held that the FTCA's judgment bar, which provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. § 2676, prevented a plaintiff from bringing a subsequent *Bivens* action based in part on the same facts underlying his *earlier* FTCA action. *Pesnell*, 543 F.3d at 1042. Quintero Perez assumed that, under *Pesnell*, the judgment bar would apply if she pursued FTCA and *Bivens* claims in the *same* action and a judgment was rendered on her FTCA claims.

[1] Quintero Perez thought the FTCA's foreign country exception, which excludes claims "arising in a foreign country," might apply. 28 U.S.C. § 2680(k). In *Sosa*, the Court explained that the exception "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa*, 542 U.S. at 712. Following *Sosa* (and after Quintero Perez eventually filed her FTCA claims), we held that an "injury is suffered where the harm first impinges upon the body." *S.H. by Holt v. United States*, 853 F.3d 1056, 1058 (9th Cir. 2017) (quotation marks and alteration omitted); *see also id.* at 1060–62. Here, the injury took place in the United States, so the foreign country exception does not apply to Quintero Perez's claim.

Several years after the statute of limitations ran on Quintero Perez's potential FTCA claims, 28 U.S.C. § 2401(b), the Supreme Court abrogated *Pesnell*. *Simmons*, 136 S. Ct. at 1845–48, 1846 n.1. The Court held that a judgment on an FTCA claim would not bar some *Bivens* actions, even if based on the same facts, because the bar does not apply to claims that fall within the statute's exceptions—of which one is the foreign country exception. *See id.* at 1847–48.

Following *Simmons*, Quintero Perez promptly sought leave to amend her complaint to assert FTCA claims arising from Yañez's death, presumably because a dismissal based on the foreign country exception, which she thought might apply, would no longer harm her other claims. The district court permitted her to add FTCA claims but later granted the government's motion to dismiss the claims as untimely, an order that we review do novo. *See Elmakhzoumi*, 883 F.3d at 1172.[2]

Quintero Perez bears the burden of establishing two elements for equitable tolling: (1) diligent pursuit of her rights, and (2) an extraordinary circumstance that prevented timely filing. *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016). Extraordinary circumstances must be "both extraordinary *and* beyond [the litigant's] control." *Id.* at 257. Quintero Perez satisfied the first element by seeking leave to amend her complaint

[2] The district court's dismissal of Quintero Perez's FTCA claims as untimely does not itself trigger the judgment bar. The FTCA's statute of limitations is a "claim-processing rule," *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1035 (9th Cir. 2013) (en banc), and dismissal for failing to comply with it is not a merits judgment of the type that triggers the judgment bar.

immediately after the Court overruled *Pesnell*, but she cannot show an extraordinary circumstance.

In *Menominee*, the Court assumed that extraordinary circumstances might exist when a litigant relies on "*actually binding* precedent that is subsequently reversed." *Id.* at 258 & n.4. The Court did not define what constitutes actually binding precedent. Because such precedent creates an extraordinary circumstance only when it prevents timely filing, it follows that precedent was actually binding either when it foreclosed a factual or legal argument that later becomes available upon the change in law, or when it allowed a factual or legal argument that later becomes foreclosed upon the change in law (for example, when intervening authority makes untimely a claim that had been timely when it was filed).

Unfortunately for Quintero Perez, in her circumstances under this standard, *Pesnell* does not qualify as actually binding precedent because it did not clearly foreclose her ability to bring FTCA and *Bivens* claims based on the same facts *in the same suit*. In *Pesnell*, a plaintiff brought an FTCA action that was dismissed, and *later* brought an action alleging *Bivens* and Racketeer Influenced and Corrupt Organizations Act (RICO) claims. 543 F.3d at 1040–41. Because his RICO claims were based in part on the same facts underlying his *earlier* FTCA action, we held that those claims in his second action were foreclosed by the FTCA's judgment bar. *Id.* at 1042. But *Pesnell* did not address whether the judgment bar applied to bringing factually overlapping FTCA and *Bivens* claims *in the same suit*.

Pesnell's focus on the judgment bar's application to sequential claims did not encompass claims filed in the same suit. To the contrary, the precedent that was actually relevant to Quintero Perez's situation did not stand in the

way of her filing simultaneous claims. In *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987), we held that an FTCA judgment *against* the United States barred a *Bivens* action that was filed in the same case and based on the same conduct as that underlying the FTCA action, apparently with both claims brought simultaneously. *Id.* at 489–90. But a few years later, in *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992), we distinguished *Arevalo* and held that the judgment bar did not foreclose a contemporaneously filed *Bivens* claim when the government had *prevailed* on the FTCA claim, reasoning that the purpose of the judgment bar was to prevent dual recovery. *Id.* at 838.

Accordingly, whether the judgment bar would have applied to Quintero's *Bivens* claims had they been filed in the same lawsuit as her FTCA claims was contingent on whether the government had prevailed on the FTCA claims. Thus, the Court's abrogation of *Pesnell* does not amount to an "extraordinary circumstance" supporting equitable tolling, because *Pesnell* was largely irrelevant to Quintero Perez's situation. Instead, Quintero Perez's seeming lack of awareness of *Kreines* constitutes a mistake of law that was not outside of her control, which the Court has confirmed does not qualify as an extraordinary circumstance. *Menominee*, 577 U.S. at 257 n.3.[3]

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[3] Notably, *Simmons* did not actually reverse any precedent that was binding on Quintero Perez: *Simmons* held only that the judgment bar does not apply to FTCA claims dismissed under statutory exceptions, and Quintero Perez's claim was ultimately not subject to the foreign country exception. Because we conclude that *Pesnell* does not qualify as actually binding precedent, we need not consider Quintero Perez's reliance on *Simmons* based on her ultimately mistaken understanding of the foreign country exception.

Additionally, the purpose of equitable tolling would not be vindicated in Quintero Perez's situation. Equitable tolling is designed "to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008) (citation and quotation marks omitted). *Harris* is a good example. The plaintiff's habeas petition became time barred when the Supreme Court overruled a previously controlling Ninth Circuit case. *Id.* at 1052–54. Because the plaintiff diligently pursued his rights and "had no control over the operative fact that caused his petition to become untimely," we concluded that "[t]hese [we]re precisely the circumstances in which equitable principles justify tolling of the statute of limitations." *Id.* at 1056. The same cannot be said here. Quintero Perez overlooked a binding precedent and made a strategic litigation decision that turned out to be a misguided judgment based on a certain reading of unclear precedent. Equitable tolling does not extend to that circumstance.

III. FOURTH AMENDMENT *BIVENS* CLAIMS

Because we are being asked to apply *Bivens* to the circumstances here, we engage in a two-part analysis: "We first inquire whether the request involves a claim that arises in a 'new context' or involves a 'new category of defendants.'" *Hernandez*, 140 S. Ct. at 743 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). If it does, we then consider "whether there are any special factors that counsel hesitation about granting the extension." *Id.* (cleaned up). On de novo review, we affirm the entry of summary judgment on Quintero Perez's *Bivens* claims against Fisher and Diaz. *S.B. v. County of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017).

A. THE CLAIMS AGAINST FISHER AND DIAZ PRESENT A NEW *BIVENS* CONTEXT

While we are now very familiar with the Supreme Court's decision in *Bivens*, the Court has counseled that the "watchword is caution" in extending a *Bivens* remedy to "new" contexts. *Hernandez v. Mesa*, 140 S. Ct. at 742. As the Court advised in *Hernandez*, "for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*." *Id.* at 743. The Court "expressed doubt" regarding its authority to "recognize any causes of action not expressly created by Congress." *Id*. at 742. A *Bivens* claim arises in a "new" context when the claim "differ[s] in a meaningful way" from earlier *Bivens* cases in which the Court approved a remedy. *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017)) ("We regard a context as new if it is different in a meaningful way from previous *Bivens* cases decided by *this Court*." (emphasis added) (internal quotation marks omitted)). At least the following differences would qualify as "meaningful":

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Abbasi, 137 S. Ct. at 1860.

Here we confront a new *Bivens* context because the claims against Fisher and Diaz "differ[] in a meaningful way" from prior *Bivens* cases. The most analogous Supreme Court case—and the only one to approve a *Bivens* remedy for an excessive force claim—is *Bivens* itself.[4] There, the plaintiff alleged that federal narcotics agents violated his Fourth Amendment rights by arresting him, handcuffing him in his home, and searching his home without probable cause or a search warrant. *Bivens*, 403 U.S. at 389–90. This case, by contrast, involves a fatal shooting, at the border, by a federal agent, of a Mexican national who crossed into the United States. The shooting allegedly occurred pursuant to the "Rocking Policy," an executive policy authorizing deadly force in response to rock throwing. Though there are similarities between this case and *Bivens*, the differences suffice to satisfy the Court's permissive test for what makes a context "new."

B. SPECIAL FACTORS COUNSEL AGAINST EXTENDING THE *BIVENS* REMEDY HERE

Presented with a new context, we next consider whether there are "special factors" supporting the conclusion that "whether a damages action should be allowed [here] is a decision for the Congress to make, not the courts." *Abbasi*, 137 S. Ct. at 1860.

[4] The Supreme Court has approved a *Bivens* cause of action in only two other cases, one for "a claim against a Congressman for firing his female secretary" and a second for "a claim against prison officials for failure to treat an inmate's asthma." *Abbasi*, 137 S. Ct. at 1860 (describing *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980)). Both cases are clearly dissimilar from Quintero Perez's *Bivens* claims against Fisher and Diaz.

1. Quintero Perez has no adequate alternative remedy.

A *Bivens* cause of action cannot be extended if "any alternative, existing process for protecting the [constitutional] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). The alternative remedy must offer "deterrence and compensation" that is "roughly similar" to what is available under *Bivens*. *Minneci v. Pollard*, 565 U.S. 118, 120, 130 (2012). Importantly, *Bivens* claims serve a deterrent function because they are "recoverable against individuals," and provide the possibility of generous compensation by allowing for punitive damages and a jury trial. *Carlson*, 446 U.S. at 20–23.

Quintero Perez has no adequate alternative remedy. Though she may have been able to bring a viable claim under the FTCA if she had asserted it in a timely fashion, the FTCA on its own does not suffice because it would not have afforded comparable deterrence and compensation options. The Supreme Court has been unequivocal on this point: the FTCA, which provides "the threat of suit against the United States," is "insufficient to deter the unconstitutional acts of individuals." *Malesko*, 534 U.S. at 68. That deficiency explains why the Supreme Court "inferred a right of action against individual prison officials where the plaintiff's only alternative was a Federal Tort Claims Act (FTCA) claim against the United States." *Id.* at 67–68 (describing the holding in *Carlson*).

Just because there is no adequate alternative remedy does not imply that we "should award money damages against the officers responsible for the violation." *Schweiker v.*

Chilicky, 487 U.S. 412, 421–22 (1988). Rather, as *Abbasi* requires, we next examine whether special factors counsel against extending a *Bivens* remedy.

2. Quintero Perez's *Bivens* claim against Fisher implicates a special factor.

Before turning to Quintero Perez's claim against Diaz, we can dispense with her claim against Fisher. To demonstrate liability, Quintero Perez must show "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Fisher was the Border Patrol Chief at the time of the shooting, but he had no direct involvement in the shooting. Quintero Perez instead argues that Fisher is directly liable for his failure to reverse the Rocking Policy that led to Yañez's death. Even if that conduct is sufficiently direct, a *Bivens* claim is not "a proper vehicle for altering an entity's policy." *Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74). This is because such a legal inquiry into the "formulation and implementation" of policy would impose too high a burden on officials' ability to effectively discharge their duties. *Id.* "These consequences counsel against allowing a *Bivens* action against" executive officials such as Fisher when the action challenges a high-level policy such as the Rocking Policy. *Id.*

3. Quintero Perez's *Bivens* claim against Diaz implicates a special factor.

Unlike Fisher, Diaz did have direct involvement in the shooting. But the presence of a special factor still counsels against extending *Bivens* to the claim against him. *Hernandez* guides our analysis. The Court considered whether to extend *Bivens* to a claim where a border patrol

agent, standing on U.S. soil, shot and killed a fifteen-year-old standing on Mexican soil. *Hernandez*, 140 S. Ct. at 740. The Court declined the extension, noting that "[t]here is a world of difference between [earlier *Bivens*] claims and petitioners' cross-border shooting claims, where 'the risk of disruptive intrusion by the Judiciary into the functioning of other branches' is significant." *Id.* at 744 (quoting *Abbasi*, 137 S. Ct. at 1860). The Court particularly emphasized two special factors: the potential effect on national security and the potential effect on foreign relations. *Id.* at 744–50. Because the national-security special factor applies here to preclude the extension of *Bivens*, we need not consider whether the foreign-relations factor also applies. *Id.* at 747 (concluding that "the risk of undermining border security" alone "provides reason to hesitate before extending *Bivens* into this field").

As to the national-security factor, *Hernandez* held that because "regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." *Id.* The Court explained that the responsibility for "attempting to prevent the illegal entry" of persons and goods "rests primarily with the U.S. Customs and Border Protection Agency." *Id.* at 746. Most explicitly, the Court recognized that "the conduct of agents positioned *at the border* has a clear and strong connection to national security." *Id.* (emphasis added).

The facts here fall squarely under *Hernandez.* Because Agent Diaz was an "agent[] positioned at the border," with "the responsibility of attempting to prevent illegal entry," and his use of force was in direct response to an actual illegal entry, the national-security factor applies. Indeed, the

Department of Homeland Security, which includes U.S. Customs and Border Protection, was one of five different executive branch agencies that undertook an investigation of the shooting.[5] Future cases may require further examination of what it precisely means to be "at the border," or to be engaged in an effort to prevent illegal entry, but this case presents no such complication: as in *Hernandez*, Diaz was patrolling the border, standing directly at the border, and engaged in an active, ongoing enforcement action to respond to an illegal entry.

In concluding that the national-security factor applies, we recognize that "national-security concerns must not become a talisman used to ward off inconvenient claims." *Abbasi*, 137 S. Ct. at 1862. But there is no risk of that happening here because we do not identify any new national-security concerns. Rather, we apply the Court's conclusion that regulating the conduct of agents at the border is a genuine national-security concern, not simply a useful talisman.

CONCLUSION

This case is a paradigmatic example of congressional parameters and Supreme Court precedent defining the scope of relief. The Alien Tort Statute does not reach the challenged conduct and the request for relief under the Federal Tort Claims Act came too late. And in accord with

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[5] Investigatory steps were taken by the Department of Homeland Security's Office of the Inspector General, the Department of Justice Civil Rights Division, the Federal Bureau of Investigation; the Department of Homeland Security Office of Professional Responsibility; and the Customs and Border Protection Discipline Review Board.

Abbasi and *Hernandez*, we conclude that a special factor precludes relief under *Bivens*.

AFFIRMED.

FRIEDLAND, Circuit Judge, concurring in the judgment as to Part I:

I join the majority opinion other than Part I, in which I concur only in the judgment. I would affirm the dismissal of Quintero Perez's Alien Tort Statute ("ATS") claim on other grounds.

Quintero Perez argues that Border Patrol's Rocking Policy—which characterized all rock-throwing as deadly force and authorized the use of deadly force in response—authorized extrajudicial killing. She asserts that this extrajudicial killing is a *jus cogens* violation for which the United States may not assert sovereign immunity, relying on our precedent acknowledging that international law, from which sovereign immunity derives, "does not recognize an act that violates *jus cogens* as a sovereign act." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992). The majority rejects this argument under *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011), but I do not read *Tobar* to have considered this question. To be sure, we stated in *Tobar* that "any party asserting jurisdiction under the [ATS] must establish . . . that the United States has consented to suit." *Id.* at 1196 (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)). But we never mentioned *jus cogens*, suggesting that we did not contemplate whether sovereign immunity is available at all for such violations.

And we need not decide that question here. Even assuming *arguendo* that the United States cannot invoke sovereign immunity for *jus cogens* violations, to prevail on her ATS claim, Quintero Perez would need to establish that: (1) the Rocking Policy authorized extrajudicial killing; (2) this particular type of extrajudicial killing is a *jus cogens* violation; and (3) she can satisfy the Supreme Court's "two-step test" for creating a cause of action under the ATS—namely, that she show both that the tort can "be 'defined with a specificity comparable to' the three international torts known in 1789" and that "courts should exercise 'judicial discretion' to create [such] a cause of action rather than defer to Congress." *Nestlè USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 736 n.27 (2004)). Quintero Perez has not met this high burden, so I would reject her claim on that basis and not reach the broader question whether the United States has sovereign immunity for claims of *jus cogens* violations that are brought under the ATS.