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PERSPECTIVE

High court ruling will allow egregious misconduct to go unchecked

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In 1965, Webster Bivens was wrongly arrested in his New York home, in front of his family. The U.S. Supreme Court found that conduct so egregious that it held that Mr. Bivens could pursue a claim for damages against the federal officers who violated his constitutional rights by arresting him.

Half a century later, a U.S. border guard standing in Texas shot and killed a 15-year-old boy, Sergio Adrián Hernández Güereca, who was playing with his friends in a culvert that straddled the U.S.-Mexico border. But when the boy's parents brought suit against the border agent for killing their son, allegedly without provocation, the U.S. Supreme Court held that the family has no legal remedy against the officer.

In *Hernández v. Mesa*, 2020 DJDAR 1532, decided Feb. 25, the U.S. Supreme Court decimated *Bivens*. What changed in the past 50 years? The Supreme Court has allowed *Bivens*-type claims against federal officers for other constitutional infringements — sex discrimination by a congressman in *Davis v. Passman* (1979) and inadequate medical treatment by prison officials in *Carlson v. Green* (1980). But the Supreme Court of 2020 says there is no *Bivens* claim even for the killing of a teenager by a rogue federal officer.

Sure, the court has long disfavored “expansion” of the *Bivens*

doctrine into “new contexts” where, for example, higher-ranking officers are sued for policy decisions — or where plaintiffs assert novel constitutional rights, or where there is little judicial guidance on an officer's conduct.

But none of those factors applies to the *Hernández* case. Just like in *Bivens* itself, a rank-and-file U.S. federal law enforcement officer is accused of an unreasonable Fourth Amendment seizure — here, the unprovoked killing of a child. The only difference is that, in this case, the person injured was standing a few feet outside the U.S. border. As Justice Ruth Bader Ginsburg wrote in dissent, “Hernández's location at the precise moment the bullet landed should not matter one whit.” There was no line or physical barrier demarcating the border; the officer who shot Hernández could not have even known on which side of the border his bullet would land.

Further, the focus of *Bivens* has never been on the injured party

but the federal officer inflicting the injury. As the Supreme Court has repeatedly emphasized, “[t]he purpose of *Bivens* is to deter the officer.” This is the right incentive: a federal agent facing personal liability for constitutional violations is less likely to commit them. And that deterrence matters — not for the vast majority of federal officers, who do not commit constitutional violations, but for the few agents who might abuse their authority. The Supreme Court has now told such agents that they can go as far as killing a child without facing liability for damages, at least where the victim is across the border.

For anyone who encounters this kind of rogue agent, the death of *Bivens* is a dangerous prospect. Sergio Hernández died in the center of Paso del Norte — a single metropolitan area comprising the twin cities of El Paso in the United States and Ciudad Juárez in Mexico. Every day, people in this community, both Mexican and

American, cross from one side of the border to the other — for work, school, church, family, and friends. People in twinned cities all along the border regularly pass between the two countries. In 2018, some 46 million people crossed the border on foot, and over 146 million crossed in cars or busses. Virtually all of these people — Mexican, American, or otherwise — come within firing range of armed federal officers.

Eliminating *Bivens* and the deterrent effect it provides has real-life consequences for these people, just as it would for the millions of Americans who come into contact with federal officers within the United States every day. *Bivens* gave practical force to constitutional protections, ensuring that unconstitutional actors could face personal consequences for their unlawful actions. The Supreme Court's *Hernández* decision is an unfortunate step backward that allows egregious misconduct to go unchecked. ■

From left: **Ethan D. Dettmer, Joshua S. Lipshutz and Eli M. Lazarus** are attorneys at Gibson, Dunn & Crutcher LLP and filed an amicus brief in *Hernandez v. Mesa* on behalf of immigration scholars.

