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Antitrust

Implied antitrust immunity applies to U.S. Olympic Committee restrictions on athlete sponsorships and advertising (Rawlinson, J.)

**Gold Medal, LLC v. USA Track & Field**

9th Cir.; August 7, 2018; 16-35488

The court of appeals affirmed a district court judgment. The court held that the U.S. Olympic Committee is entitled to implied antitrust immunity with regard to its restrictions on athlete sponsorships and advertising.

Gold Medal, LLC manufactures “Run Gum,” a caffeine-enhanced chewing gum. It sought to sponsor athletes for the track and field Olympic Trials. It was allegedly precluded from doing so due to logo and sponsorship restrictions imposed by the U.S. Olympic Committee and enforced by USA Track & Field (USATF). According to Gold Medal, USATF “severely restricts the type of individual sponsors that track and field athletes can display on their athletic apparel at the Olympic Trials…” These restrictions allegedly “excluded scores of sponsors from the marketplace” in violation of §1 of the Sherman Act. Gold Medal sued USATF and the Olympic Committee for violating the antitrust laws, alleging “an anticompetitive horizontal and vertical agreement among competitors to fix artificially—and unlawfully—the number of individual sponsors and the price paid to athletes for individual sponsorship.”

The district court granted defendants’ motion to dismiss, finding they were entitled to implied antitrust immunity on the basis that their advertising restrictions were integral to performance of their duties under the Ted Stevens Olympic and Amateur Sports Act (ASA).

The court of appeals affirmed, holding that, under the ASA, the Olympic Committee and USATF have the right to control the manner in which track and field athletes represent the United States in Olympic events. In light of the broad authority bestowed upon national governing bodies to fund the Olympic mission, the challenged advertising and logo restrictions precluding advertisers from impinging on this delegated authority fall within the mission to protect the value of corporate sponsorships and maximize sanctioned fundraising. To compel the Olympic Committee and USATF under the antitrust laws to permit any would-be advertiser to sponsor individual athletes without national governing body approval “would unduly interfere with the operation of the ASA.” Judge Nguyen concurred in the result only, finding that antitrust immunity does not apply, but that Gold Medal nonetheless failed to allege an antitrust claim.

Criminal Law

Trial court’s determination of defendant’s eligibility for resentencing may not contradict underlying jury verdict and findings (Manella, Acting P.J.)

**People v. Piper**

C.A. 2nd; August 7, 2018; B280033

The Second Appellate District reversed a trial court order. The court held that a trial court may not make a determination of a defendant’s eligibility for resentencing based on trial court findings contrary to the underlying jury verdict and findings.

In 2001, a jury found Charles Piper guilty of evading a pursuing peace officer and being a felon in possession of ammunition. In connection with the evading charge, the jury found not true the allegation that Piper was armed in the commission of the offense. The jury also acquitted Piper of all firearm-related counts, including being a felon in possession of a firearm and carrying a loaded firearm. Piper was sentenced to two concurrent terms of 25 years to life as a “three-strike” offender.

Following enactment of the Three Strikes Reform Act of 2012, Piper moved for resentencing, finding, after an evidentiary hearing, that the People had proven beyond a reasonable doubt that Piper was “armed with a firearm” during the commission of his offenses.

The court of appeal reversed, holding that the trial court erred in finding Piper ineligible for resentencing. Under established case law, on a resentencing petition, a trial court may not make an eligibility determination contrary to the jury’s verdict and findings. To do so would allow the People, contrary to the Reform Act, to “compensate for any potential evidentiary shortcoming at a trial predating the Act.” It also would allow a trial court to “turn acquittals and not-true enhancement findings into their opposites.” Here, Piper was acquitted of all firearm-related charges, and the jury found not true the allegation that he was “armed” in the commission of the offense of evading the police. The People nonetheless argued that the jury’s not-true finding on the arming enhancement did not preclude a determination that Piper was ineligible for resentencing under the “armed” exception in the Reform Act, because the former requires both a facilitative nexus and a temporal nexus, while the latter requires only a temporal nexus. Here, however, the jury’s acquittals constituted findings inconsistent with either a facilitative or temporal nexus between Piper and any firearm. All the firearm-related charges encompassed the same time period as the underlying convictions for evading the police and possession of live ammunition. The jury’s determinations thus conclusively rejected the claim that Piper was “armed with a firearm” on or about that date.
Inclusion of certain real property in beneficiary’s percentage share of estate residue did not constitute specific gift (Goodman, J.)

**Blech v. Blech**

C.A. 2nd; August 6, 2018; B268326

The Second Appellate District affirmed in part probate court orders and dismissed in part appeals. In the published portion of its opinion, the court held that a trust’s directive that a beneficiary’s percentage share of the residue include certain real property, if that property were still part of the estate, did not make that bequest a specific gift or in any way alter that beneficiary’s percentage share of the residue.

Arthur Blech established a living trust that set out the terms of administration and distribution of his assets upon his death. Following various specific bequests to each of his four children, it provided for distribution of the remainder of the trust estate as follows: 25 percent to Robert, 15 percent to Jenifer, 25 percent to Richard, and 35 percent to Raymond,” with the provision that Raymond’s share “shall include any interest that Arthur…owns” in the 3,050 acre Blech ranch. When Arthur died in 2011, the ranch was valued at about $7 million. It was sold in 2013 for $14 million.

In allocating Arthur’s assets in accordance with the terms of the trust, the probate court allocated to Raymond a 35 percent share of the ranch’s $14 million sales price. Raymond appealed, arguing that the ranch was bequeathed to him in its entirety, and he should have received its full value.

The court of appeal affirmed, holding that the 35 percent allocation to Raymond was a residuary gift only. The trust directed that Raymond and his siblings were each to receive a specified share of the remainder of the trust estate. Raymond’s share of that remainder was 35 percent. The directive that the ranch was to be included in Raymond’s share was merely an instruction to the trustee as to how to fund Raymond’s 35 percent interest: if the ranch were still a part of the estate, it was to be used to fund Raymond’s interest. The trust did not direct that Raymond was to receive both the ranch and a 35 percent share of the remainder. He was to receive 35 percent of the residue regardless of whether or not the ranch was part of the trust estate. The probate court accordingly properly determined that Raymond was entitled to a 35 percent share of the ranch’s $14 million sales price.

**Wrongful Death**

U.S. Border Patrol agent’s fatal cross-border shooting of Mexican teenager supports Fourth Amendment claim under *Bivens* (Kleinfeld, J.)
Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 7806

ARACELI RODRIGUEZ, individually and as the surviving mother and personal representative of J.A., Plaintiff-Appellee, v. LONNIE SWARTZ, Agent of the U.S. Border Patrol, Defendant-Appellant.

No. 15-16410
United States Court of Appeals for the Ninth Circuit
D.C. No. 4:14-cv-02251-RCC
Appeal from the United States District Court for the District of Arizona
Raner C. Collins, Chief Judge, Presiding
Argued and Submitted October 21, 2016
Submission Withdrawn October 21, 2016*
Resubmitted July 31, 2018
San Francisco, California
Filed August 7, 2018
Opinion by Judge Kleinfeld;
Dissent by Judge Milan D. Smith, Jr.

* We withdrew this case from submission pending the Supreme Court’s decision in Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam), and supplemental briefing on the effect of that decision.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

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OPINION
KLEINFELD, Senior Circuit Judge:

A U.S. Border Patrol agent standing on American soil shot and killed a teenage Mexican citizen who was walking down a street in Mexico. We address whether that agent has qualified immunity and whether he can be sued for violating the Fourth Amendment. Based on the facts alleged in the complaint, we hold that the agent violated a clearly established constitutional right and is thus not immune from suit. We also hold that the mother of the boy who was killed has a cause of action against the agent for money damages.

FACTS

We take the facts as they are pleaded in the First Amended Complaint. These facts have not been proven, and they may
not be true. But we must assume that they are true for the sake of determining whether the case may proceed.\(^1\)

Shortly before midnight on October 10, 2012, defendant Lonnie Swartz was on duty as a U.S. Border Patrol agent on the American side of our border with Mexico. J.A., a sixteen-year-old boy, was peacefully walking down the Calle Internacional, a street in Nogales, Mexico, that runs parallel to the border. Without warning or provocation, Swartz shot J.A. dead. Swartz fired somewhere between 14 and 30 bullets across the border at J.A., and he hit the boy, mostly in the back, with about 10 bullets. J.A. was not committing a crime. He did not throw rocks or engage in any violence or threatening behavior against anyone or anything. And he did not otherwise pose a threat to Swartz or anyone else. He was just walking down a street in Mexico.

The Calle Internacional, where J.A. was walking, is a main thoroughfare lined with commercial and residential buildings. The American side of the border is on high ground, atop a cliff or rock wall that rises from the level of the Calle Internacional. The ground on the American side is around 25 feet higher than the road, and a border fence rises another 20 or 25 feet above that. (See the Appendix for a photograph.) The fence is made of steel beams, each about 6½ inches in diameter, set about 3½ inches apart. Nogales, Mexico, and Nogales, Arizona, are in some respects one town divided by the border fence. Families live on both sides of the border, and people go from one side to the other to visit and shop. J.A.’s grandparents live in Arizona. They were lawful permanent residents at the time of the shooting, and they are now U.S. citizens. J.A.’s grandmother often stayed with him in Mexico when his mother was away at work. J.A. was a Mexican citizen who had never been to the United States, but Swartz did not know that when he shot J.A.

J.A.’s mother, Araceli Rodriguez, acting both individually and as a personal representative of J.A.’s estate, sued Lonnie Swartz for money damages. She has two claims: one for a violation of her son’s Fourth Amendment rights, and another for a violation of his Fifth Amendment rights. Her complaint alleges no facts that could allow anyone to characterize the shooting as being negligent or justifiable. What is pleaded is a simple and straightforward murder.

To summarize the facts alleged in the complaint: Swartz was an on-duty U.S. Border Patrol agent stationed on the American side of the border fence. J.A. was a Mexican citizen walking down a street in Mexico. Swartz fired his pistol through the border fence onto Mexico. He intentionally killed J.A. without any justification. Swartz acted entirely from within the United States, but J.A. was in Mexico when Swartz’s bullets struck and killed him. Swartz did not know J.A.’s citizenship or whether he had substantial connections to the United States, so for all Swartz knew, J.A. could have been an American citizen.

Swartz moved to dismiss the complaint based on qualified immunity. He conceded that Rodriguez had a \textit{Bivens} cause of action under the Fourth Amendment. In a carefully reasoned opinion, the district court held that Swartz was not entitled to qualified immunity on the Fourth Amendment claim. Because it treated the shooting as a “seizure” under the Fourth Amendment, the court dismissed the Fifth Amendment claim.\(^2\)

Swartz filed this interlocutory appeal to challenge the district court’s denial of qualified immunity. The United States filed an amicus brief that presented an argument that had not been made in district court: that Rodriguez lacks a \textit{Bivens} cause of action for a Fourth Amendment violation. Though Swartz had not raised that argument in his opening brief on appeal, he adopted it in his reply brief.

We affirm the district court’s decision to let Rodriguez’s Fourth Amendment claim proceed.

\section*{ANALYSIS}

\section*{1. QUALIFIED IMMUNITY}

Qualified immunity protects public officials “from liability for civil damages insofar as their conduct does not violate clearly established … constitutional rights of which a reasonable person would have known.”\(^3\) “To determine whether an officer is entitled to qualified immunity, a court must evaluate two independent questions: (1) whether the officer’s conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident.”\(^4\) A constitutional right is “clearly established” if “every reasonable official would have understood that what he is doing violates that right.”\(^5\)

Based on the facts alleged in the complaint, Swartz violated the Fourth Amendment. It is inconceivable that any reasonable officer could have thought that he or she could kill J.A. for no reason. Thus, Swartz lacks qualified immunity.

A. The Fourth Amendment forbids using unreasonable force to “seize” a person.

The Fourth Amendment prohibits law enforcement officers from using “objectively unreasonable” force to “seize” a person.\(^6\) In \textit{Harris v. Roderick}, a person shot by a federal agent brought a \textit{Bivens} claim for a Fourth Amendment violation.\(^7\) We held that the officer lacked qualified immunity.\(^8\) Following the Supreme Court’s decision in \textit{Graham v. Connor}, we wrote that “the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer

\begin{itemize}
\item \textit{Castro v. Cty. of L.A.}, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc).
\item \textit{Ashcroft v. al-Kidd}, 563 U.S. 731, 741 (2011) (citation, brackets, and internal quotation marks omitted).
\item \textit{Torres v. City of Madera}, 648 F.3d 1119, 1123 (9th Cir. 2011).
\item \textit{126 F.3d 1189, 1194 (9th Cir. 1997)}.
\end{itemize}

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1. See \textit{Doe v. United States}, 419 F.3d 1058, 1062 (9th Cir. 2005).
on the scene, rather than with the 20/20 vision of hindsight.”

“Ordinarly,” we continued, “our inquiry is . . . whether the totality of circumstances, (taking into consideration the facts and circumstances of the particular case including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether he is actively resisting arrest or attempting to evade by flight) justified the particular type of seizure.” Then, quoting the Supreme Court’s decision in Tennessee v. Garner, we wrote that even when a felony suspect tries to escape, “where the suspect poses no immediate threat to the officer and no threat to others, the harm from failing to apprehend him does not justify the use of deadly force to do so.”

These principles are clearly established. As we held in Harris, every reasonable law enforcement officer should know that “officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons.” And “whenever practicable, a warning must be given before deadly force is employed.”

B. The Fourth Amendment applies here.

Even though we must assume that Swartz shot and killed J.A. for no reason, Swartz nevertheless argues that he did not violate the Constitution. He relies on United States v. Verdugo-Urquidez, which held that the Fourth Amendment did not apply to the search and seizure of a non-citizen’s property that was located abroad. J.A. was a Mexican citizen who was shot, and therefore “seized,” in Mexico. We must therefore determine whether the Fourth Amendment applies in this case.

Boumediene v. Bush establishes that to determine whether the Constitution applies here, we must examine J.A.’s citizenship and status, the location where the shooting occurred, and any practical concerns that arise. Neither citizenship nor voluntary submission to American law is a prerequisite for constitutional rights. Instead, citizenship is just one of several non-dispositive factors to consider.

In Boumediene, the Supreme Court held that enemy combatants detained at the U.S. Naval Station at Guantanamo Bay, Cuba, were entitled to the writ of habeas corpus.

Geography was an important factor in Boumediene. Guantanamo Bay is in Cuba, and Cuba has sovereignty over it, but it is the United States that has complete practical control over Guantanamo. The geography is different in our case. Although Swartz was in the United States when he shot at J.A., Mexico has both sovereignty and practical control over the street where J.A. was hit. Nevertheless, we conclude that J.A. had a Fourth Amendment right to be free from the unreasonable use of such deadly force.

United States v. Verdugo-Urquidez held that the Fourth Amendment did not apply to the search and seizure of a Mexican citizen’s property in Mexico. There, Mexican authorities arrested suspected cartel leader Rene Verdugo-Urquidez in Mexico, brought him to the United States, and handed him over to American law enforcement so that he could be tried in the United States. Later, American and Mexican agents searched Verdugo-Urquidez’s house in Mexico without a warrant. During the search, agents seized evidence showing that Verdugo-Urquidez was a drug smuggler. Verdugo-Urquidez challenged the search and seizure, but the Supreme Court held that the U.S. Constitution did not apply.

According to the Verdugo-Urquidez majority opinion, the text of our Fourth Amendment “suggests that ‘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.” Because Verdugo-Urquidez was a Mexican citizen with no voluntary connection to the United States, he was not among “the people.” But the Fourth Amendment’s text was “by no means conclusive,” and the majority also relied on history, precedents, and practicalities in holding that the Fourth Amendment did not apply to the search and seizure of a nonresident alien’s property located abroad. Among the Court’s practical concerns were that a warrant from an American magistrate “would be a dead letter outside the United States” and that requiring warrants for searches abroad would plunge the executive branch “into Court precedent: “the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism”).

10. Id. (quoting Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991)) (internal quotation marks omitted).
12. See, e.g., Adams v. Speers, 473 F.3d 989, 993–94 (9th Cir. 2007).
13. Harris, 126 F.3d at 1201 (citing Curnow, 952 F.2d at 325; Ting v. United States, 927 F.2d 1504, 1511 (9th Cir. 1991)).
18. See Boumediene, 553 U.S. at 766.
19. See id. at 764 (describing a “common thread” in Supreme
a sea of uncertainty." 29 Justice Kennedy, concurring, said that he could not “place any weight on the reference to ‘the people’ in the Fourth Amendment.” 30 But he agreed with the majority that it would be “impractical and anomalous” to apply the Fourth Amendment warrant requirement to aliens abroad. 31

But this case is not like Verdugo-Urquidez for several reasons. For one, Verdugo-Urquidez addressed only “the search and seizure by United States agents of property that was owned by a nonresident alien and located in a foreign country.” 32 That type of search and seizure implicates Mexican sovereignty because Mexico is entitled to regulate conduct in its territory. But unlike the American agents in Verdugo-Urquidez, who acted on Mexican soil, Swartz acted on American soil. Just as Mexican law controls what people do there, American law controls what people do here. 33 Verdugo-Urquidez simply did not address the conduct of American agents on American soil. Also, the agents in Verdugo-Urquidez knew that they were searching a Mexican citizen’s property in Mexico, but Swartz could not have known whether J.A. was an American citizen or not. 34

The practical concerns in Verdugo-Urquidez about regulating conduct on Mexican soil also do not apply here. There are many reasons not to extend the Fourth Amendment willy-nilly to actions abroad, as Verdugo-Urquidez explains. 35 But those reasons do not apply to Swartz. He acted on American soil subject to American law. We recognize that on similar facts, the Fifth Circuit reached a contrary conclusion. 36 But its reasoning was about the Fourth Amendment generally, including warrantless searches of those crossing the border and electronic surveillance of the border itself. The concerns in Verdugo-Urquidez were also specific to warrants and overseas operations. 37 But this case is not about searches and seizures broadly speaking. Neither is it about warrants or overseas operations. It is about the unreasonable use of deadly force by a federal agent on American soil. Under those limited circumstances, there are no practical obstacles to extending the Fourth Amendment. Applying the Constitution in this case would simply say that American officers must not shoot innocent, non-threatening people for no reason. Enforcing that rule would not unduly restrict what the United States could do either here or abroad.

So under the particular circumstances of this case, J.A. had a Fourth Amendment right to be free from the objectively unreasonable use of deadly force by an American agent acting on American soil, even though Swartz’s bullets hit him in Mexico. Verdugo-Urquidez does not require a different conclusion.

And according to the complaint, Swartz used objectively unreasonable force. To determine whether a particular use of force is objectively unreasonable, we balance the “nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” 38 “The intrusiveness of a seizure by means of deadly force is unmatched,” 39 so deadly force is unreasonable unless there are strong countervailing government interests. But the government had no interest whatsoever in shooting J.A. He was not suspected of any crime. He was not fleeing or resisting arrest. And he did not pose a threat of harm to anyone at all. The use of deadly force was therefore unreasonable under the Fourth Amendment.

C. It was clearly established that Swartz could not shoot J.A.

Even though Rodriguez has more than sufficiently alleged that Swartz violated the Constitution, that does not automatically mean that Swartz lacks qualified immunity. Instead, Swartz lacks immunity only if J.A.’s Fourth Amendment right was “clearly established” when he was shot and killed. 40 A right is “clearly established” when it is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” 41 Although precedent is certainly relevant to determining what a reasonable officer would know, “it is not necessary … that the very action in question has previously been held unlawful.” 42 Instead, an officer loses qualified immunity, even in novel situations, if he or she commits a “clear” constitutional violation. 43 Swartz argues that when he shot J.A., it was not clearly established that he could not shoot someone on the other side of the border. We cannot agree.

“The qualified immunity analysis … is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question. Facts an officer learns after the incident ends—whether those facts would support

29. Id. at 274.
30. Id. at 276 (Kennedy, J., concurring).
31. Id. at 278.
32. Id. at 261 (majority opinion); see id. at 274–75.
35. See 494 U.S. at 273–74; id. at 278 (Kennedy, J., concurring).
36. See Hernandez v. United States, 757 F.3d 249, 266–67 (5th Cir. 2014), vacated in part on reh’g en banc, 785 F.3d 117 (5th Cir. 2015).
37. See 494 U.S. at 273–74; see also id. at 278 (Kennedy, J., concurring).
40. Some argue that the “clearly established” prong of the analysis lacks a solid legal foundation. See generally William Baude, Is Qualified Immunity Unlawful?, 106 CALIF. L. REV. 45 (2018); see also Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“In an appropriate case, we should reconsider our qualified immunity jurisprudence.”). But we must apply it here.
42. Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (capitalization altered, citation and internal quotation marks omitted).
granting immunity or denying it—are not relevant.”

This timing factor usually applies to protect an officer from being judged with 20/20 hindsight. Such hindsight often fails to take into account what an officer reasonably knew when he or she acted, especially when the officer had to make a split-second decision in a “tense, uncertain, and rapidly evolving” situation.

For example, if a police officer shot a suspect after the suspect brandished what looked like a gun, the officer’s reasonable perception that the suspect was armed would entitle the officer to qualified immunity—even if the “gun” turned out to be a cell phone. But the timing factor also applies when later-discovered facts arguably justify an officer’s actions even though the officer could not have known those facts when he or she acted. For example, if a police officer shot a suspect before perceiving any threat, the officer would lack qualified immunity—even if the suspect actually had a gun nearby and likely would have harmed the officer.

The Supreme Court recently reaffirmed this rule in Hernandez v. Mesa. There, a U.S. Border Patrol agent shot and killed 15-year-old Sergio Hernandez, a Mexican citizen, in a culvert between the United States and Mexico. The Fifth Circuit had held that even if the shooting violated the Fifth Amendment, it was not clearly established that the Constitution applied to aliens abroad. But the Supreme Court rejected that analysis, holding that because “Hernandez’s nationality and the extent of his ties to the United States were unknown to [the agent] at the time of the shooting,” those facts were irrelevant.

J.A.’s citizenship and ties to the United States are similarly irrelevant here. When he shot J.A., Swartz could not have known whether the boy was an American citizen. Thus, Swartz is not entitled to qualified immunity on the bizarre ground that J.A. was not an American. For all Swartz knew, J.A. was an American citizen with family and activities on both sides of the border. Therefore, the question is not whether it was clearly established that aliens abroad have Fourth Amendment rights. Rather, it is whether it was clearly established that it was unconstitutional for an officer on American soil to use deadly force without justification against a person of unknown nationality on the other side of the border.

Had there been a serious question about whether the Constitution banned federal officers from gratuitous cross-border killings, Tennessee v. Garner and Harris v. Roderick would have answered it. “It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person.” Any reasonable officer would have known, even without a judicial decision to tell him so, that it was unlawful to kill someone—anyone—for no reason. After all, Tennessee v. Garner held that an officer could not shoot a non-threatening, fleeing suspect. Would Swartz have us treat it as an open question whether an officer could kill a non-threatening person who was not a suspect and who was not fleeing? Or, since the police officer in Garner shot the fleeing suspect with a gun, would it be an open question if an officer shot a fleeing suspect with a crossbow? Any reasonable officer should know that the answer to both questions, despite the lack of a case on all fours.

We explained in Hardwick v. County of Orange that “malicious criminal behavior is hardly conduct for which qualified immunity is either justified or appropriate.” Qualified immunity “exists to protect mistaken but reasonable decisions, not purposeful criminal conduct.” Rodriguez’s complaint makes a persuasive case for murder charges.

To be sure, Brosseau v. Haugen holds that the Fourth Amendment prohibition on excessive force is “cast at a high level of generality.” That general prohibition clearly establishes a constitutional violation only “in an obvious case.” But this is an obvious case. Unlike officers in other situations, Swartz did not have to determine how much force to use; he was not permitted to use any force whatsoever against someone who was innocently walking down a street in Mexico.

One final note. The district court dismissed Rodriguez’s Fifth Amendment claim because the Fourth Amendment applied, and we do not analyze the Fifth Amendment claim here. But if the Fourth Amendment does not apply because J.A. was in Mexico, then the Fifth Amendment “shocks the
conscience” test may still apply.62 Swartz’s conduct would fail that test. We cannot imagine anyone whose conscience would not be shocked by the cold-blooded murder of an innocent person walking down the street in Mexico or Canada by a U.S. Border Patrol agent on the American side of the border.

II. BIVENS CAUSE OF ACTION

Under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, courts may extend a cause of action for money damages for certain constitutional violations.63 We hold that based on the facts alleged in the complaint, Rodriguez is entitled to bring a “Bivens cause of action” against Swartz.

A. We may consider whether to extend Bivens.

Before we consider whether Rodriguez has a Bivens cause of action, however, we must address two preliminary issues: jurisdiction and waiver. We previously held that on an interlocutory appeal of a denial of qualified immunity, we lacked appellate jurisdiction to decide whether there was a Bivens cause of action.64 Moreover, Swartz did not challenge whether Rodriguez could sue under Bivens until he filed his reply brief on appeal. That would normally constitute a waiver even though the United States addressed the issue in its amicus brief.65

But there is new law to consider. In Hernandez v. Mesa, the Fifth Circuit confronted a cross-border shooting similar to the one here. It held that even if the shooting was unconstitutional, the law was not clearly established at the time.66 It did not decide whether the family of the boy who was shot had a Bivens cause of action.67 In fact, the officer who shot him had not moved to dismiss on that basis.68 Yet the Supreme Court reversed, holding that whether Bivens applied was “‘antecedent’ to the other questions presented.”69 It then remanded the case so that the Fifth Circuit could consider whether the boy’s family had a Bivens cause of action.70 In a different context, we have also held that qualified immunity “by necessity” implicates whether there is a Bivens cause of action.71 We therefore hold that we have jurisdiction to decide whether Rodriguez has a Bivens cause of action.72 Given the Supreme Court’s instruction in Hernandez, we must now address that issue.

B. Bivens permits a cause of action for damages in certain cases.

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics held that a violation of the Fourth Amendment by federal agents acting under color of law gave rise to a cause of action for money damages.73 In that case, federal agents arrested Webster Bivens and searched his home. But the agents did not have probable cause or a search warrant, so their search and seizure violated the Constitution. The Court held that Bivens was entitled to sue the agents for damages.74 It explained that there were “no special factors counselling hesitation in the absence of affirmative action by Congress,” in part because the agents themselves, not the government, would be liable for damages.75

Justice Harlan concurred in the judgment. He agreed that the Court had the “judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization” by Congress.76 He then explained that damages were “the only possible remedy” for Bivens: an injunction could not prevent what had already happened, the United States was immune to suit, and the exclusionary rule would be irrelevant if Bivens had not committed any crimes.77 So for Bivens, it was “damages or nothing.”78

In Davis v. Passman, the Court extended Bivens to a case of employment discrimination in violation of the Fifth Amendment.79 A congressman had fired an administrative assistant because she was female; the congressman thought a male should hold the position.80 The Court held that the wrongfully terminated woman could sue the congressman for damages.81 Citing Justice Harlan’s concurring opinion in Bivens, the Court explained that for the woman, it was “damages or nothing.”82 Moreover, no “special factors” barred her cause of action. Although Congress had not passed a statute


72. Other circuits have reached the same conclusion. See Vanderklok v. United States, 868 F.3d 189, 197 (3d Cir. 2017); De La Paz v. Coy, 786 F.3d 367, 371 (5th Cir. 2015); Vance v. Rumsfeld, 701 F.3d 193, 197–98 (7th Cir. 2012) (en banc); Doe v. Rumsfeld, 683 F.3d 390, 393 (D.C. Cir. 2012); Koubriti v. Convertino, 593 F.3d 459, 466 (6th Cir. 2010).

73. 403 U.S. 388, 389 (1971).
74. Id. at 389–90.
75. Id. at 396.
76. Id. at 402 n.4 (Harlan, J., concurring in the judgment) (discussing J.J. Case Co. v. Borak, 377 U.S. 426 (1964)).
77. Id. at 409–10.
78. Id. at 410.
79. 442 U.S. 228 (1979).
80. Id. at 230.
81. Id. at 242, 244, 248.
82. Id. at 245 (quoting Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment)).

62. Compare Hernandez v. United States, 785 F.3d 117, 135 (5th Cir. 2015) (Prado, J., concurring) with id. at 122–23 (Jones, J., concurring).
63. 403 U.S. 388, 389 (1971).
64. See, e.g., Sissoko v. Rocha, 440 F.3d 1145, 1154 (9th Cir. 2006), reinstated in relevant part on denial of reh’g en banc, 509 F.3d 947, 948 (9th Cir. 2007).
65. See United States v. Salman, 792 F.3d 1087, 1090 (9th Cir. 2015); Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993).
67. See id. at 121 n.1 (Jones, J., concurring).
68. See Hernandez, 137 S. Ct. at 2011 (Breyer, J., dissenting).
69. Id. at 2006 (per curiam) (quoting Wood v. Moss, 134 S. Ct. 2056, 2066 (2014)).
70. See id. at 2006–07.
71. Solida v. McKelvey, 820 F.3d 1090, 1093 (9th Cir. 2016); see
prohibiting sex discrimination against congressional employees, there was also no evidence that Congress intended to permit such discrimination. And though the Speech and Debate Clause of the Constitution confers special protections on members of Congress, the Court reaffirmed that “all individuals, whatever their position in government, are subject to federal law.” The Court therefore held that unless the congressman could somehow show that the Speech and Debate Clause protected his actions, the woman he had fired could sue him for damages.

A year later, in Carlson v. Green, the Court extended Bivens to a claim that federal prison officials violated the Eighth Amendment by not providing an inmate with proper medical care. The Court extended a Bivens cause of action because there were “no special factors counselling hesitation” and because no substitute remedies were available. In so holding, the Court explained that Bivens actions are a desirable deterrent against abusive federal employees.

Bivens, Davis, and Carlson therefore establish that plaintiffs can sue for damages for certain constitutional violations. But other cases demonstrate that a Bivens cause of action is not available for every constitutional violation. Chappell v. Wallace and United States v. Stanley hold that Bivens does not apply to injuries that arise out of military service. Those two decisions emphasize Congress’s unique power over the military. Bush v. Lucas holds that a public employee fired in violation of the First Amendment does not have a Bivens cause of action because Congress has already created a detailed system for resolving personnel disputes. According to Schweiker v. Chilicky, there is no Bivens remedy for a procedural due process violation committed during a Social Security disability determination. That is because the Social Security Act already provides an elaborate scheme for resolving whether a person is entitled to Social Security benefits. FDIC v. Meyer holds that Bivens does not apply to suits against federal agencies, and Correctional Services Corp. v. Malesko similarly holds that one cannot bring a Bivens action against a private corporation. In Wilkie v. Robbins, the Court held that Bivens did not extend to a case about a ranch owner who claimed that the government intimidated and harassed him. Minneci v. Pollard holds that Bivens does not extend to suits against private prison employees for Eighth Amendment violations. Unlike the government employees in Carlson, the private contractors in Minneci could be sued under state tort law. And in Ziglar v. Abbasi, the Court held that those detained on suspicion of terrorism after the September 11 attacks did not have a Bivens cause of action to challenge their detention.

Abbasi demonstrates several principles that have emerged from this line of cases. First, Abbasi makes plain that even though a Bivens action lies for some constitutional violations (like the Fourth Amendment claim in Bivens), it does not lie for all violations (like the Fourth Amendment claim in Abbasi).

Second, Abbasi explains that if a case presents a “new context” for a Bivens claim, then we must exercise “caution” in determining whether to extend Bivens. That is because “expanding the Bivens remedy is now a ‘disfavored’ judicial activity.” And while Abbasi mandates caution and disfavor only when courts extend Bivens into a “new context,” a case presents a new context whenever it is “different in a meaningful way from previous Bivens cases decided by [the Supreme] Court.”

Third, if a case presents a new context for a Bivens claim, then we can extend it only if two conditions are met. One condition is that the plaintiff must not have any other adequate alternative remedy. The other condition is that there cannot be any “special factors” that lead us to believe that Congress, instead of the courts, should be the one to authorize a suit for money damages.

Together, these three principles restrict when we can extend a Bivens cause of action. But Bivens and its progeny are still good law. Bivens, Davis, and Carlson have never been overruled, implicitly or explicitly. Instead, Abbasi went out of its way to emphasize that the Court did “not intend[] to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose.” So at least in the “common and recurrent sphere of law enforcement,” Bivens is “settled law.” This brings us to a fourth principle of the Court’s Bivens jurisprudence: in the right case, we may extend Bivens into

83. Id. at 247.
84. See U.S. CONST. art. I, § 6, cl. 1 (providing that Senators and Representatives, “for any Speech or Debate in either House, ... shall not be questioned in any other Place”).
86. Id. at 246, 248; see id. at 235 n.11 (reserving the question of whether the Speech or Debate Clause protected the congressman’s actions).
87. 446 U.S. 14, 16 & n.1 (1980).
88. Id. at 18–19.
89. See id. at 21–22.
92. See Stanley, 483 U.S. at 379–84; Chappell, 462 U.S. at 300–04.
95. Id. at 425, 428–29.
100. See id. at 126–31.
102. See id. at 1854, 1859, 1863.
103. Id. at 1856.
104. Id. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
105. Id. at 1859; see id. at 1865 (“Given this Court’s expressed caution about extending the Bivens remedy, ... the new-context inquiry is easily satisfied.”).
106. See id. at 1857–58.
107. Id. at 1856.
108. Id. at 1857.
a new context. After all, if Bivens could not be expanded so that it applied in a new context, there would be no need for “caution” or treating expansion as a “disfavored judicial activity,” or considering whether there was an adequate alternative remedy or special factors. Determining that the context was new would be the end of the inquiry, not the beginning. If extension were prohibited, then Abbasi could simply have concluded that each of the claims presented a “new context” and ended its analysis there. But instead, Abbasi went on to explain why extension was inappropriate for certain claims. And for the remaining claim, it remanded the case to let a lower court consider in the first instance whether to extend Bivens. That instruction for a lower court to consider extension would have been superfluous if courts were barred from extending Bivens.

We apply these four principles in this case. This case presents a new Bivens context. Like Bivens, this case is about a federal law enforcement officer who violated the Fourth Amendment. But this case differs from Bivens because J.A. was killed in Mexico (by a bullet fired in the United States) and because we are applying the Constitution to afford a remedy to an alien under these circumstances. We therefore cannot extend Bivens unless: (1) Rodriguez has no other adequate alternative remedy; and (2) there are no special factors counseling hesitation. We now turn to those two inquiries, keeping in mind that extension is disfavored and that we must exercise caution.

C. Rodriguez does not have an adequate alternative remedy.

We cannot grant a Bivens cause of action if “any alternative, existing process for protecting a constitutional interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy to damages.” We also cannot extend Bivens if Congress’s “failure to provide money damages, or other significant relief, has not been inadvertent.”

Swartz and the United States have suggested several possible alternative remedies. But even though an alternative remedy need not be “perfectly congruent” with Bivens or “perfectly comprehensive,” it still must be “adequate.” None of the suggested alternatives is adequate. We also do not think that Congress meant to bar a remedy. Congressional legislation that does address Bivens (the Federal Tort Claims Act, as amended) signals at least acquiescence. That other statutes were silent in unrelated circumstances is irrelevant: here, “[a]s is often the case, [C]ongressional silence whispers” only “sweet nothings.”

1. Rodriguez cannot bring a tort claim against the United States.

The United States has sovereign immunity, meaning it cannot be sued without its consent. The Federal Tort Claims Act (FTCA) provides that consent for certain tort claims brought against the United States, including certain claims about abusive federal law enforcement officers. But the FTCA also specifically provides that the United States cannot be sued for claims “arising in a foreign country.” This “foreign country exception” means that the United States is completely immune from “all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” J.A. suffered his deadly injury in Mexico, so Rodriguez cannot sue the United States under the FTCA.

But this foreign country exception does not imply, as Swartz, the United States, and the dissent all argue, that Congress intended to prevent Rodriguez from having a Bivens remedy. This is because “the foreign country exception … codified Congress’s ‘unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.’” At the time, standard choice-of-law analyses, which have not been uniformly abrogated, focused on the place the harm occurred, and would have compelled U.S. courts to apply foreign law, even to a state common law claim, leading “to a good deal of difficulty.” Thus, “[t]he object being to avoid application of substantive foreign law, Congress evidently used the modifier ‘arising in a foreign country’ to refer to claims based on foreign harm or injury, the fact that would trigger application of foreign law to determine liability.” And even under modern choice of law rules, the application of state tort law could mean the application of state choice of law rules, which, in turn, could lead to the application of foreign substantive law, which is what Congress did not want. Allowing a Bivens cause of action here, however, does not implicate this concern because it arises under only U.S. constitutional law and does not implicate Mexican substantive law or even Arizona choice-of-law provisions.

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109. Id. at 1860–63.
110. Id. at 1865 (plurality opinion).
111. See Hernandez v. Mesa, 885 F.3d 811, 816 (5th Cir. 2018) (en banc); id. at 824 (Prado, J., dissenting); see also Hernandez v. Mesa, 137 S. Ct. 2003, 2008 (2017) (Thomas, J., dissenting).
113. Berry v. Hollander, 925 F.2d 311, 314 (9th Cir. 1991) (citation omitted).
115. Adams v. Johnson, 355 F.3d 1179, 1185 n.3 (9th Cir. 2004) (citation omitted).
116. See Minneci, 565 U.S. at 120; see also id. at 130 (“roughly similar”).

119. 28 U.S.C. § 2680(k).
121. See id. at 697–99, 701–02, 712.
122. Id. at 707 (quoting United States v. Spelar, 338 U.S. 217, 221 (1949)).
123. Id. (quoting Hearings on H.R. 5373 et al. Before the H. Comm. on the Judiciary, 77th Cong., 2d Sess., 35 (1942) (statement of Assistant Att’y Gen. Francis Shea)).
124. Id. at 707–08.
125. Id. at 710.
that could lead to the application of Mexican substantive law. This is all that Congress sought to avoid.\textsuperscript{126}

More significantly, an amendment to the FTCA called the Westfall Act shows that the FTCA is concerned only with common law actions. Under the Westfall Act, if a federal agent commits a tort while acting within the scope of his or her employment, then any resulting civil suit must be brought against the United States under the FTCA.\textsuperscript{127} If the agent is sued individually, the United States is substituted as the defendant.\textsuperscript{128} The purpose of the amendment was to “protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.”\textsuperscript{129} The Westfall Act is clear, however, that the protection afforded federal employees for common law torts “does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States.”\textsuperscript{130}

In other words, the FTCA has an “explicit exception for \textit{Bivens} claims,” allowing them to proceed against individuals.\textsuperscript{131} This ensures that federal officers cannot dodge liability for their own constitutional violations by foisting their liability onto the government. As a contemporaneous House Report explained, “[s]ince the Supreme Court’s decision in \textit{Bivens}, … the courts have identified [a constitutional] tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Westfall Act] would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.”\textsuperscript{132} Indeed, in discussing the FTCA, the dissent “acknowledge[s] that in a proper context, as delineated by the Supreme Court in \textit{Abbasii}, the \textit{Bivens} remedy may well be available.”\textsuperscript{133} We agree, and as we show, after \textit{Abbasii}, the facts here do present a proper context. The Westfall Act also shows why the dissent is wrong to claim an incongruity between an alien’s inability to sue the United States for injuries on Mexican soil under the FTCA and her inability to sue an individual for those same injuries under \textit{Bivens}. That is exactly the structure the Westfall Act imposes.

\textbf{2. Rodriguez cannot bring a state law tort claim against Swartz.}

The United States suggests that Rodriguez could sue Swartz for wrongful death under Arizona tort law. But its brief merely mentions the possibility, without fleshing it out with any citations to Arizona law. And it appears that the Westfall Act would bar such a claim. As just discussed, the Westfall Act in effect “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.”\textsuperscript{134}

At this stage of litigation, we must assume that Swartz acted within the scope of his employment. The complaint alleges that J.A. was shot by an agent “stationed on the U.S. side of the fence” and that Swartz “acted under color of law.” Swartz himself interprets the complaint as alleging that he was “on duty” when he shot J.A. He argued in district court that he had acted “within the course and scope of his employment.” Under 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.”\textsuperscript{135} 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.\textsuperscript{136} Thus, Rodriguez cannot bring a state-law tort action against Swartz without the Westfall Act converting it into an FTCA suit against the United States.\textsuperscript{137} At that point, as discussed, the claim would be barred by the FTCA’s foreign country exception because the injury occurred in Mexico. Although the application of Arizona law would not on its face qualify as the application of foreign law, the concern was that a state’s choice of law rules as applied to common law torts \textit{could} still require the application of foreign law.

\textbf{3. Restitution is not an adequate alternative.}

The United States indicted and tried Swartz for murdering J.A. Though a jury acquitted him of murder, the government has indicated that it will retry him for manslaughter. If he is convicted, federal law will require him to pay restitution to J.A.’s estate.\textsuperscript{138} The United States argues that such restitution is an adequate remedy.

But restitution is not an adequate remedy for several reasons. First, even if a federal agent commits a crime in the course of his employment, the government has discretion whether to charge him. A criminal charge is the government’s remedy, not the victim’s. Second, Swartz can be convicted of a crime only if his guilt is proven “beyond a reasonable doubt.” By contrast, a \textit{Bivens} claim requires the jury to find only that it is “more likely than not” that Swartz used objec-

\textsuperscript{126} Id.
\textsuperscript{127} 28 U.S.C. § 2679.
\textsuperscript{128} Id. § 2679(b)(1), (d).
\textsuperscript{133} Dissent at 65 n.3.
\textsuperscript{135} \textit{Engler v. Gulf Interstate Eng’g Inc.}, 280 P.3d 599, 602 n.1 (Ariz. 2012) (en banc) (citation omitted); see \textit{Wilson v. Drake}, 87 F.3d 1073, 1076 (9th Cir. 1996) (applying the agency law of the state where the alleged tort occurred).
\textsuperscript{138} See 18 U.S.C. § 3663(a)(1), (b)(2)–(4).
tively unreasonable force.\textsuperscript{139} So even if Swartz is acquitted of all criminal charges, he could still be liable for money damages.\textsuperscript{140} Third, criminal charges were potentially available in \textit{Bivens} itself, yet that availability did not bar a damages cause of action.\textsuperscript{141}

\textbf{4. Section 1983 does not preclude a \textit{Bivens} remedy.}

According to the United States and the dissent, 42 U.S.C. § 1983 implies the absence of a damages remedy here. Under § 1983, a state or local official who violates the constitution may be sued for damages by “any citizen of the United States or other person within the jurisdiction thereof.”\textsuperscript{142} Because J.A. was not an American citizen, and because he was not shot within the jurisdiction of the United States, Rodriguez could not sue a state or local police officer for this type of shooting. Thus, the argument goes, Rodriguez should not be allowed to sue Swartz under \textit{Bivens}, either. The dissent claims that it is “bizarre” for federal officers to face liability when state officers would not.

We disagree. Nearly 150 years ago, in response to an urgent message from President Grant, Congress enacted what became § 1983\textsuperscript{143} as part of legislation to ensure that state and local officials could not escape liability for constitutional violations, which were endemic in the recently defeated Confederate States.\textsuperscript{144} Proponents “continually referred to the failure of the state courts to enforce federal law designed for the protection of the freedman, and saw § [1983] as remediying this situation by interposing the federal courts between the State and citizens of the United States.”\textsuperscript{145} It is inconceivable that, at the same time, Congress thought about (and deliberately excluded liability for) cross-border incidents involving federal officials.

\textbf{5. There is no evidence a Mexican court could grant a remedy.}

Swartz argues that Rodriguez could seek a remedy in a Mexican court. But that argument appears to be a mere makeweight. Swartz does not cite any authority showing that a Mexican court could exercise jurisdiction over him or that Rodriguez would have a remedy under Mexican law.\textsuperscript{146} Nor does he attempt to show how Rodriguez could execute on a judgment from a Mexican court without running afoul of the Westfall Act.

\textbf{6. The remaining arguments also fail.}

We can summarily dispose of the three remaining arguments for the availability of some other remedy. First, even though the Torture Victim Protection Act (an amendment to the Alien Tort Claims Act) does not apply to American officials,\textsuperscript{147} that is because Congress was focused on allowing claims for violations of customary international law against foreign officials, not barring suits against American ones. The goal was the codification of a particular Second Circuit opinion construing the Alien Tort Claims Act to allow suit against foreign torturers; Congress was responding to an attack on that construction by an influential judge.\textsuperscript{148} Domestic officials were not at issue. Second, there is a history of diplomacy when the military harms aliens abroad.\textsuperscript{149} But this case is not about the military, and nothing in the record suggests that any diplomatic remedy for J.A.’s mother is available. And third, Congress does permit discretionary administrative payments for injuries suffered abroad if Drug Enforcement Administration, State Department, or military personnel cause those injuries.\textsuperscript{150} But unlike the Border Patrol, those agencies routinely operate and maintain an extended presence abroad.\textsuperscript{151} Congress thus granted those agencies, as aspects of the United States, the discretion to pay for foreign tort claims to promote international comity.\textsuperscript{152} Under these statutes, such a discretionary payment to an alien is an effect, not the purpose. These payments do not say anything about a Congressional intent to preclude \textit{Bivens} claims against individuals. If anything, these statutes mostly cross-reference

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\textsuperscript{142} 42 U.S.C. § 1983.

\textsuperscript{143} See \textit{The Civil Rights Act of 1871}, ch. 22, § 1, 17 Stat. 13, 13 (extending a cause of action to “any person within the jurisdiction of the United States”).

\textsuperscript{144} See \textit{Mitchum v. Foster}, 407 U.S. 225, 240–42 (1972); \textit{see also Hernandez v. Mesa}, 885 F.3d 811, 830 (5th Cir. 2018) (Prado, J., dissenting).


\textsuperscript{146} A brief that actually cites Mexican law argues that Border Patrol agents cannot be sued in Mexican courts in cases like this. See Brief of Mexican Jurists, Practitioners, and Scholars as \textit{Amici Curiae} in Support of Petitioners, \textit{Hernandez v. Mesa}, 137 S. Ct. 2003 (2017) (No. 15-118), 2016 WL 7229146.


\textsuperscript{151} \textit{See, e.g.}, \textit{S. REP. NO. 96-173}, at 36 (1979), as reprinted in \textit{1979 U.S.C.C.A.N.}, 2003, 2038–39 (stating the DEA “has a substantial foreign operation” and requested the ability to pay for torts its agents committed abroad).

\textsuperscript{152} \textit{See} 10 U.S.C. §§ 2734(a) (allowing payments “[t]o promote and to maintain friendly relations”), 2734a(a) (allowing payments under “international agreements”), 22 U.S.C. § 2699(b) (allowing payments “for the purpose of promoting and maintaining friendly relations with foreign countries”); \textit{S. REP. NO. 96-173}, at 36 (1979), as reprinted in \textit{1979 U.S.C.C.A.N.}, 2003, 2039 (seeking an alternative to the choice between pulling an agent from a foreign country and the resulting “hostility and unfavorable publicity” there and leaving the agent to “the mercy of a foreign court”).
the FTCA,\textsuperscript{153} under which, after the Westfall Act, the availability of discretionary administrative payments and lawsuits against the United States does not bar action against individual officers when the claim is a constitutional tort.\textsuperscript{154}

In short, for Rodriguez, it is damages under Bivens or nothing, and Congress did not intend to preclude Bivens.

\textbf{D. No “special factors” are present in this case.}

Though a Bivens action is Rodriguez’s only available adequate remedy, we cannot extend Bivens if a “special factor” counsels hesitation.\textsuperscript{155} Because we must proceed with caution and are reluctant to extend Bivens, we have carefully weighed all the reasons Swartz and the United States have offered for denying a Bivens cause of action. But this case does not present any such special factors. We are “well suited … to consider and weigh the costs and benefits of allowing a damages action to proceed” in this cross-border-shooting case, and there are no “sound reasons to think that Congress might doubt the efficacy or necessity of a damages remedy.”\textsuperscript{156}

The special factors analysis is almost always performed at a high level of specificity, not at the abstract level.\textsuperscript{157} For example, Ziglar v. Abbasi looked at specific claims about detention policies in the aftermath of the September 11 attacks, not at seizures and prison policies generally.\textsuperscript{158} Wilkie v. Robbins also focused on the concrete facts and circumstances of that case.\textsuperscript{159} Likewise here, we look for special factors in terms of the specific facts alleged in the complaint, not cross-border shootings generally.\textsuperscript{160} In so doing, it is essential to keep in mind that Rodriguez does not seek damages from the United States. Neither does she seek an injunction or declaratory judgment that might affect future government actions. Instead, she brings only a claim for money damages against Swartz as an individual.

Of course, in many hypothetical situations, a cross-border shooting would not give rise to a Bivens action. And in some situations (e.g., repelling an armed invasion or foiling violent smugglers), it would be frivolous to claim a Bivens remedy.

But this case involves the unjustifiable and intentional killing of someone who was simply walking down a street in Mexico and who did not direct any activity toward the United States. Our discussion is limited to those facts.

\textbf{1. This case is not about policies or policymakers.}

A Bivens claim is “not a proper vehicle for altering an entity’s policy,”\textsuperscript{161} and Abbasi holds that a special factor is present when a plaintiff challenges high-level executive branch policies.\textsuperscript{162} The plaintiffs in Abbasi sued policymakers, including the Attorney General and the FBI Director,\textsuperscript{163} in order to challenge “major elements of the Government’s whole response to the September 11 attacks” and any subsequent attacks that might have been planned.\textsuperscript{164}

But Rodriguez does not challenge any government policy whatsoever.\textsuperscript{165} And neither the United States nor Swartz argues that he followed government policy. Instead, federal regulations expressly prohibited Swartz from using deadly force in the circumstances alleged.\textsuperscript{166} Rodriguez also sued a rank-and-file officer, not the head of the Border Patrol or any other policy-making official. This case is therefore like the ones that Abbasi distinguished—those involving “standard law enforcement operations”\textsuperscript{167} and “individual instances of … law enforcement overreach.”\textsuperscript{168} The standards governing Swartz’s conduct are the same here as they would be in any other excessive force case. Thus, Abbasi implies that Bivens is available.

\textbf{2. Extending Bivens does not implicate national security.}

In Abbasi, there were national security concerns because plaintiffs challenged the government’s response to September 11. That was a special factor because determining how best to protect the United States is a job for Congress and the President, not judges.\textsuperscript{169} At the same time, however, Abbasi warned that “national-security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins.”\textsuperscript{170} “This danger of abuse,” Ab-
basi continued, “is even more heightened given the difficulty of defining the security interest in domestic cases.” Here, “national-security concerns” are indeed waved before us as such a “talisman.”

We recognize that Border Patrol agents protect the United States from unlawful entries and terrorist threats. Those activities help guarantee our national security. But no one suggests that national security involves shooting people who are just walking down a street in Mexico. Moreover, holding Swartz liable for this constitutional violation would not meaningfully deter Border Patrol agents from performing their duties. The United States and Swartz have identified no duty that would have required Swartz to shoot J.A. Border Patrol agents have faced Fourth Amendment Bivens claims in the past. Agents sued under Bivens are liable only when they violate a “clearly established” constitutional right, and the rules governing the use of lethal force are clearly established. It cannot harm national security to hold Swartz civilly liable any more than it would to hold him criminally liable, and the government is currently trying to do the latter. Thus, national security is not a special factor here.

3. Extending Bivens would not have problematic foreign policy implications.

The United States argues that we should not extend Bivens here because the cross-border nature of the shooting implicates foreign policy. The United States is correct that courts should not extend Bivens if it requires courts to judge American foreign policy. But the United States has not explained how any policy is implicated or could be complicated by applying Bivens to this shooting. It has not identified any policy that might be undermined. Just as national security cannot be used as a talisman to ward off inconvenient claims, neither does the “mere incantation” of the magic words “foreign policy” cause a Bivens remedy to disappear. In this case, extending Bivens would not implicate American foreign policy. There is no American foreign policy embracing shootings like the one pleaded here. To the contrary: it would threaten international relations if we declined to extend a cause of action, because it would mean American courts could not give a remedy for a gross violation of Mexican sovereignty.

The United States says that this case implicates foreign policy because the American and Mexican governments have discussed “the use of force at the border” and created a bilateral council to “address border violence, use of force, and ways to address and mitigate incidents of border violence.” It then says that if we extend Bivens here, it will “inject the courts into these sensitive matters of international diplomacy and risk undermining the government’s ability to speak with one voice in international affairs.”

But that argument proves too much. It would have the courts decline to address any crimes involving our border with Mexico. If the government’s argument were correct, then courts would be excluded from all “incidents of border violence.” Yet district courts along the border address such incidents routinely, in smuggling cases particularly, concurrently with whatever diplomacy may also be addressing them.

We fail to see how extending Bivens here would actually implicate American foreign policy. No policy has been brought to our attention, and no policymaking individuals have been sued, unlike in Abbasi. Swartz did not act pursuant to government policy. He broke the rules that were in the Code of Federal Regulations. And the only policy interest that the United States has put forward—maintaining dialogue with the Mexican government—shows that our government wants to reduce the number of cross-border shootings. To that end, the United States prosecuted Swartz for murder.

The only foreign policy concern that we can glean from the briefs is the need to avoid violating Mexican sovereignty. As Mexico says in its amicus brief, “giving Mexican nationals an effective remedy for harm caused by arbitrary and unlawful conduct directed across the border by U.S. Border Patrol agents would not conflict with Mexico’s laws and customs and could not possibly damage relations between our two countries.”

4. Any presumption against extraterritorial remedies is rebutted.

Finally, we do not dispute the dissent’s suggestion that the presumption against the extraterritorial application of

171. Id. (quoting Mitchell, 472 U.S. at 523) (internal quotation marks omitted).


174. E.g., Chavez v. United States, 683 F.3d 1102, 1106–07 (9th Cir. 2012); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006).


177. Hernandez, 885 F.3d at 830 (Prado, J., dissenting) (quoting Def. Distrib. v. U.S. Dep’t of State, 838 F.3d 451, 474 (5th Cir. 2016) (Jones, J., dissenting)).


180. See 8 C.F.R. § 287.8(a)(2)(i)(ii) (2012) (“Deadly force may be used only when a designated immigration officer … has reasonable grounds to believe that such force is necessary to protect the … officer or other persons from the imminent danger of death or serious physical injury.”).
CONCLUSION

Under the particular set of facts alleged in this case, Swartz is not entitled to qualified immunity. The Fourth Amendment applies here. No reasonable officer could have thought that he could shoot J.A. dead if, as pleaded, J.A. was innocently walking down a street in Mexico. And despite our reluctance to extend Bivens, we do so here: no other adequate remedy is available, there is no reason to infer that Congress deliberately chose to withhold a remedy, and the asserted special factors either do not apply or counsel in favor of extending Bivens.

Of course, the facts as pleaded may turn out to be unsupported. When all of the facts have been exposed, the shooting may turn out to have been excusable or justified. There is and can be no general rule against the use of deadly force by Border Patrol agents. But in the procedural context of this case, we must take the facts as alleged in the complaint. Those allegations entitle J.A.’s mother to proceed with her case.

AFFIRMED.

[APPENDIX DELETED]


184. See 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e, at 420 (Am. Law Inst. 1971) (“[W]hen the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance.”).

M. SMITH, Circuit Judge, dissenting:

This case presents yet another “tragic cross-border incident in which a United States Border Patrol agent standing on United States soil shot and killed a Mexican national standing on Mexican soil.” Hernandez v. Mesa, 137 S. Ct. 2003, 2004 (2017) (per curiam). However, before we can appropriately address any of the other challenging issues presented by this case, we must first respond to a question recently posed by the Supreme Court: “When a party seeks to assert an implied cause of action under the Constitution itself, … separation-of-powers principles are or should be central to the analysis. The question is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts?” Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

In this case, the obvious answer is Congress. We lack the authority to extend Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), to the cross-border context presented in this case. In holding to the contrary, the majority creates a circuit split, oversteps separation-of-powers principles, and disregards Supreme Court law. I therefore respectfully dissent.

I. EXPANSION OF THE BIVENS REMEDY IS DISFAVORED.

In recent years, the Supreme Court has hewed consistently to a path of restraint in creating implied causes of action. However, the prevailing legal landscape was markedly different at the time the Court decided Bivens. “In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now.” Abbasi, 137 S. Ct. at 1855. “During this ‘ancien regime,’ the Court assumed it to be a proper judicial function to ‘provide such remedies as are necessary to make effective’ a statute’s purpose.” Id. (citation omitted) (first quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001); then quoting J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)). “[A]s a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.” Id. That ancien regime gave rise to the Court’s decision in Bivens, which created an implied cause of action to remedy a constitutional violation by federal officials. Id.

The Court’s current approach is very different. Gone are the days of apparent judicial generosity in recognizing implied causes of action. Instead, the Court has “adopted a far more cautious course before finding implied causes of action.” Id. Indeed, the Court “has made clear that expanding the Bivens remedy is now a ‘disfavored’ judicial activity,” id. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
and has “consistently refused to extend Bivens to any new context or new category of defendants,” id. (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)). To this day, the Court has authorized only two extensions of the original Bivens case, the most recent of which occurred thirty-eight years ago. See Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979)). All subsequent attempts to expand Bivens have failed. See Abbasi, 137 S. Ct. at 1857 (citing eight Supreme Court decisions).

This “notable change in the Court’s approach to recognizing implied causes of action” is rooted in respect for the separation of powers between Congress and the judiciary. Id. “[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.” Id. at 1856. In determining whether our “traditional equitable powers suffice to give necessary constitutional protection,” or whether a damages remedy is necessary, we must pause when implying a damages remedy implicates economic and governmental concerns. Id. These concerns include, among other factors, the substantial monetary cost of defending and indemnifying claims against federal officials, as well as the time and administrative costs incident to litigation. Id.

The Supreme Court’s present approach to implied causes of action has wrought profound changes to the Bivens landscape. Indeed, the Court recently mused that “the analysis in the Court’s three Bivens cases might have been different if they were decided today.” Id. In line with its reluctance to imply causes of action, the Court reaffirmed the viability of Bivens claims only narrowly in Abbasi, articulating a restrictive take on both halves of the Bivens test—(1) whether the case presents a new context for a Bivens remedy, and (2) whether there are “special factors counselling hesitation in the absence of affirmative action by Congress.” Id. at 1857 (quoting Carlson, 446 U.S. at 18). First, with respect to the new-context inquiry, the Court voiced misgivings about extending Bivens to new contexts beyond the narrow “context in which it arose.” Id. at 1856. Second, with respect to the special-factors inquiry, the Court observed that the decision to provide for a damages remedy should “most often” be left to Congress, particularly in cases where numerous policy considerations must be weighed. Id. at 1857. Thus, the Court has left little room, if any, for lower courts to extend Bivens further. 186

II. HERNANDEZ IS INSTRUCTIVE.

Our sister circuit’s recent en banc decision in Hernandez v. Mesa illustrates the proper application of these principles. The facts of Hernandez are nearly identical to the ones in this case. Agent Mesa, standing on United States soil, fatally shot Sergio Hernandez, a fifteen-year-old Mexican citizen, on Mexican soil. 885 F.3d 811, 814 (5th Cir. 2018) (en banc). Hernandez’s parents sued Agent Mesa for damages under Bivens, alleging that Agent Mesa violated Hernandez’s rights under the Fourth and Fifth Amendments. Hernandez, 137 S. Ct. at 2005.

The district court granted Agent Mesa’s motion to dismiss. Id. A panel of the Fifth Circuit affirmed in part and reversed in part, finding that Hernandez lacked Fourth Amendment rights, but that the shooting, as alleged, had violated Hernandez’s Fifth Amendment rights. Id. (citing Hernandez v. United States, 757 F.3d 249, 267, 272 (5th Cir. 2014), aff’d in part, 785 F.3d 117 (5th Cir. 2015) (en banc) (per curiam), vacated and remanded sub nom. Hernandez v. Mesa, 137 S. Ct. 2003 (2017)). The panel concluded that there was no reason to hesitate in extending Bivens to this new context, and that Agent Mesa was not entitled to qualified immunity. Id. at 2005–06 (citing Hernandez, 757 F.3d at 275, 279).

The Fifth Circuit reheard the case en banc. The en banc court unanimously affirmed the district court’s dismissal of the plaintiffs’ claims. Id. at 2006. The en banc court held that the Fourth Amendment did not apply extraterritorially to Hernandez, and that Agent Mesa was entitled to qualified immunity on the Fifth Amendment claim. Id. (citing Hernandez, 785 F.3d at 119–20). Having resolved the claims on these grounds, the en banc court “did not consider whether, even if a constitutional claim had been stated, a tort remedy should be crafted under Bivens.” Id. (quoting Hernandez, 757 F.3d at 121 n.1 (Jones, J., concurring)).

The Supreme Court granted certiorari. Id. Prior to deciding Hernandez, the Court decided Abbasi. Id. Although the availability of a Bivens remedy was not a question on appeal in Hernandez, the Supreme Court ordered supplemental briefing on that question. See Hernandez v. Mesa, 137 S. Ct. 291 (2016).

The Court subsequently vacated the judgment of the Fifth Circuit and instructed the court to consider, on remand, the availability of a Bivens remedy for the plaintiffs’ Fourth and Fifth Amendment claims, in light of “the intervening guidance provided in Abbasi.” Hernandez, 137 S. Ct. at 2006–07. The Court observed that the Bivens question, which was “antecedent” to the other questions in the case, might prove to be answerable.

186. The Supreme Court has further articulated these limiting principles. We must exercise “‘caution’ before extending Bivens remedies into any new context,” and abide by the rule that “a Bivens remedy will not be available” in the presence of special factors. Abbasi, 137 S. Ct. at 1857 (quoting Malesko, 534 U.S. at 74). In conducting our analysis, we must be mindful of the Supreme Court’s “general reluctance to extend judicially created private rights of action.” Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018). The Court has “recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (first citing Malesko, 534 U.S. at 68; then citing Alexander, 532 U.S. at 286–87).

“The Court’s recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law.” Jesner, 138 S. Ct. at 1402, to say no less of extending a judicially created private right of action extraterritorially. Put simply, decisions to expand or create causes of action are best tasked to “those who write the laws,” not “those who interpret them.” Abbasi, 137 S. Ct. at 1857 (quoting Bush, 462 U.S. at 380).
be dispositive, and render unnecessary the resolution of the difficult Fourth and Fifth Amendment issues presented in the case. Id. at 2006–07 (quoting Wood, 134 S. Ct. at 2066).

On remand, the Fifth Circuit, sitting en banc, held that “[t]he transnational aspect of the facts present[ed] a ‘new context’ under Bivens, and numerous ‘special factors’ counsel[ed] against federal courts’ interference with the Executive and Legislative branches of the federal government.” Hernandez, 885 F.3d at 814. The en banc court concluded that “extending Bivens would interfere with the political branches’ oversight of national security and foreign affairs”; “would flout Congress’s consistent and explicit refusals to provide damage remedies for aliens injured abroad”; and “would create a remedy with uncertain limits.” Id. at 823. Mindful that “[i]n its remand of Hernandez, the Supreme Court [had] chastened [the Fifth Circuit] for ruling on the extraterritorial application of the Fourth Amendment”—a “sensitive” issue with the potential to spawn “consequences that are far reaching”—the en banc court concluded that “[s]imilar ‘consequences’ [were] dispositive of the ‘special factors’ inquiry,” and that “[t]he myriad implications of an extraterritorial Bivens remedy require[d] the court to deny it.” Id. (quoting Hernandez, 137 S. Ct. at 2007).

Hernandez’s lengthy path through the federal court system underscores several points. First, the availability of a Bivens remedy is a critical threshold question. Second, Abbasi did not merely recapitulate the Supreme Court’s past law on Bivens—the Court characterized Abbasi as “intervening guidance.” Hernandez, 137 S. Ct. at 2007. Third, a principled application of Abbasi to the facts of this case can yield only one answer: We lack the authority to extend a Bivens remedy to the cross-border shooting context.

Unlike the Fifth Circuit, which faithfully followed the Supreme Court’s guidance, the majority fails to acknowledge the underlying principles of Abbasi, choosing instead to distinguish Abbasi on narrow factual grounds. The majority authorizes an impermissible extension of Bivens to a new context despite the presence of numerous special factors counselling judicial hesitation. In doing so, the majority creates a circuit split and tees up our court for a new “chastening” by the Supreme Court.

III. THIS CASE PRESENTS A NEW CONTEXT FOR A BIVENS’ CLAIM.

The majority acknowledges, as it must, that this case presents a new Bivens context. However, the majority downsplays the new-context inquiry, relegating its analysis on the question to only a few sentences. To properly address the majority’s error, we first consider the Supreme Court’s new instructions on the issue.

“The proper test for determining whether a case presents a new Bivens context is as follows. If the case is different in a meaningful way from previous Bivens cases decided by the Court, then the context is new.” Abbasi, 137 S. Ct. at 1859. That the differences between a given claim and previous Bivens cases are “small” is insignificant: “Given that Court’s expressed caution about extending the Bivens remedy, … the new-context inquiry is easily satisfied.” Id. at 1865.

The Court provided a non-exhaustive list of differences that may render a given context new. Id. at 1859–60. For example,

A case might differ in a meaningful way because of 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.

Id. at 1860. At bottom, the touchstone is whether the “claims bear resemblance to the three Bivens claims the Court has approved in the past,” namely, “a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate’s asthma.” Id. at 1860.

Rodriguez’s claims bear no resemblance whatsoever to the three Bivens claims previously authorized by the Court. The differences are obvious: J.A. was a Mexican national, and his death, caused by the actions of a Border Patrol agent, occurred in Mexico. This case presents far more than “a modest extension” of the Supreme Court’s Bivens cases. Id. at 1864. Indeed, “no court has previously extended Bivens to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone a case implicating both.” Meshal v. Higgenbotham, 804 F.3d 417, 424–25 (D.C. Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017). The Court also has never upheld a Bivens claim against Border Patrol agents, who perform different duties than FBI agents, Congressmen, or prison officials. Under the Supreme Court’s new-inquiry test, which is “easily satisfied,” Abbasi, 137 S. Ct. at 1859, the majority’s attempt to liken this case to Bivens is unpersuasive.

The majority fails to accord any meaningful significance to the conclusion that this case presents a new context for a Bivens claim. By the majority’s reckoning, the fact that a Bivens claim presents a new context means only that a court must perform the second half of the Bivens analysis—the special-factors inquiry—and nothing more. This approach clearly flouts the Supreme Court’s instructions. The majority fails to heed the Supreme Court’s warning that expanding Bivens is a “disfavored” activity, id. at 1857 (quoting Iqbal, 556 U.S. at 675), and that courts may not run roughshod across the separation of powers. As was the case in Hernandez, Rodriguez’s “unprecedented claims embody … a virtual repudiation of the Court’s holding” in Abbasi. 885 F.3d
at 818. In fact, “[t]he newness of this ‘new context’ should alone require dismissal of [Rodriguez’s] damage claims.” Id.

IV. NUMEROUS SPECIAL FACTORS COUNSEL AGAINST AUTHORIZING A BIVENS REMEDY IN THIS CASE.

Lest any doubt remain regarding our lack of authority to extend Bivens to the new context found in this case, I next consider the multiple special factors that also bar our conjuring a Bivens remedy in this case.

“A Bivens remedy is not available … where there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’” Hernandez, 137 S. Ct. at 2006 (quoting Carlson, 446 U.S. at 18). While the Supreme Court “has not defined the phrase ‘special factors counselling hesitation,’” it has explained that “the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” Abbasi, 137 S. Ct. at 1857–58. “[T]o be a ‘special factor counselling hesitation,’ a factor must cause a court to hesitate before answering that question in the affirmative.” Id. at 1858. “In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong,” we “must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.” Id. (emphasis added). Relatedly, “if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new Bivens cause of action.” Id.

This case is brimming with “sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy.” Id. First, cross-border violence implicates foreign relations, an area uniquely unsuitable for judicial intervention. “Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” Haig v. Agee, 453 U.S. 280, 292 (1981). Rather, “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018). The majority suggests that failure to imply a Bivens remedy in this case would “threaten international relations” and impair our relationship with Mexico, but the reality is that the judiciary is wholly ill-equipped to broker relations between two sovereign nations.

Indeed, the political branches have already undertaken several initiatives to resolve cross-border concerns. For example, the governments of the United States and Mexico established the joint Border Violence Prevention Council, a standing forum to address border violence issues. See Hernandez, 885 F.3d at 820 (citing DHS, Written Testimony for a H. Comm. on Oversight & Gov’t Reform Hearing (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west). Moreover, the fatal cross-border shooting incident in Hernandez led to a “serious dialogue between the two sovereigns, with the United States refusing Mexico’s request to extradite [Agent] Mesa but resolving to ‘work with the Mexican government within existing mechanisms and agreements to prevent future incidents.’” Id. (quoting DOJ, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca). That the two sovereigns are working to address cross-border violence counsels hesitation against judicial interference in this area. After all, “matters relating to the conduct of foreign relations … are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”” Haig, 453 U.S. at 292 (alteration in original) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)).

Second, border security is not the prerogative of the judiciary, but of the political branches. See Abbasi, 137 S. Ct. at 1861; see also United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (“[T]his country’s border-control policies are of crucial importance to the national security and foreign policy of the United States … ”). “The Supreme Court has never implied a Bivens remedy in a case involving the military, national security, or intelligence,” Doe v. Rumsfeld, 683 F.3d 390, 394 (D.C. Cir. 2012), and it is unlikely that the Supreme Court would entertain such an expansion of Bivens after Abbasi. Following suit, our sister circuits have rejected Bivens claims in the border-security context. See Hernandez, 885 F.3d at 818–19; Vanderklok v. United States, 686 F.3d 189, 207–09 (3d Cir. 2017) (concluding that special factors weighed against implying a Bivens action for damages against a TSA agent, because the TSA is “tasked with assisting in a critical aspect of national security—securing our nation’s airports and air traffic,” and because “[t]he threat of damages liability could … increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers”).

The majority’s effort to analogize this case to “standard law enforcement operations” does not withstand scrutiny. Although Border Patrol agents may perform some actions that are “analogous to domestic law enforcement” activities, Hernandez, 885 F.3d at 819, Border Patrol agents are tasked with carrying out fundamentally different policies than domestic law enforcement officers. “Congress has expressly charged the Border Patrol with ‘deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband.’” Id. (alterations in original) (quoting 6 U.S.C. § 211(e)(3)(B)).

Third, “Congress’ failure to provide a damages remedy” in the context of cross-border violence cannot be ascribed to “mere oversight” or “inadvertent[ce].” Abbasi, 137 S. Ct. at 1862 (quoting Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)). “[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant.” Id.
Here, as in *Abbasi*, “that silence is telling.” *Id.* The majority’s decision to authorize an implied damages remedy in this case is precisely the sort of “[congressionally uninvited] intrusion [that] is ‘inappropriate’ action for the Judiciary to take.” *Id.* (quoting *United States v. Stanley*, 483 U.S. 669, 683 (1987)).

What Congress has done in other instances is instructive. In *Abbasi*, the Supreme Court observed that “[i]n an analogous context,” Congress assumedly weighed “a number of economic and governmental concerns” when it enacted the Federal Tort Claims Act (FTCA) and “decide[d] not to substitute the Government as defendant in suits seeking damages for constitutional violations.” *Id.* at 1856 (citing 28 U.S.C. § 2679(b)(2)(A)). Congress did not stop there. It also expressly excluded “[a]ny claim arising in a foreign country.” 28 U.S.C. § 2680(k). In fact, “the FTCA’s foreign country exception bars 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 (emphasis added). Thus, the majority’s decision produces an incongruous result.

On one hand, an alien injured on Mexican soil by cross-border tortious conduct may not bring a claim for damages under the FTCA. On the other hand, an alien injured on Mexican soil by cross-border unconstitutional conduct may bring an implied claim for damages under *Bivens*.

In a similar vein, “[t]he Torture Victim Protection Actprovides a cause of action only against foreign officials, not U.S. officials.” *Meshal*, 804 F.3d at 420; see 28 U.S.C. § 1350. And where Congress has enacted a remedial scheme for aliens injured abroad by certain United States employees, Congress has authorized administrative—but not judicial—remedies. E.g., 10 U.S.C. §§ 2734(a), 2734a(a) (property loss, personal injury, or death incident to noncombat activities of armed forces); 21 U.S.C. § 904 (tort claims arising in foreign countries in connection with Drug Enforcement Administration operations abroad); 22 U.S.C. § 2669-1 (tort claims arising in connection with overseas State Department operations)). Congress has not authorized a comparable remedy for aliens injured abroad by Border Patrol agents.

I note also that the right to sue under 42 U.S.C. § 1983 is available only to “any citizen of the United States or other person within the jurisdiction thereof.” 42 U.S.C. § 1983. This express limitation strongly suggests that Congress did not intend to create a damages remedy for aliens injured abroad as the result of federal officials’ unconstitutional conduct—assuming *arguendo* that the relevant constitutional provisions apply extraterritorially.\(^{188}\) To infer otherwise, as the majority does, produces a bizarre result. A federal official who commits a cross-border violation of an alien’s constitutional rights must stand suit for damages—without any congressional authorization, no less. However, a state official who commits the same cross-border violation is statutorily exempt from a suit for damages.

Congress has not only hesitated, but has declined, to allow aliens injured abroad to sue federal officials for damages. Congress, not the judiciary, is best positioned “to consider and weigh the costs and benefits of allowing a damages action to proceed.” *Abbasi*, 137 S. Ct. at 1857–58. Congress’s silence in the area of cross-border violence is telling, and is yet another special factor counselling hesitation in this case.

Fourth, the cross-border nature of this case raises a “critical” special factor—extraterritoriality. *Meshal*, 804 F.3d at 425–26. It is unprecedented for *Bivens* to apply to aliens injured abroad. The very “novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel[s] hesitation.” *Hernandez*, 885 F.3d at 822; see *Alvarez v. U.S. Immigration & Customs Enf’t*, 818 F.3d 1194, 1210 (11th Cir. 2016) (concluding that a claim that “would be doctrinally novel and difficult to administer” is a special factor), *cert. denied sub nom. Alvarez v. Skinner*, 137 S. Ct. 2321 (2017). “After all, the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies.” *Meshal*, 804 F.3d at 425 (emphasis added) (first citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013); then citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)). How much more should we hesitate before implying a damages remedy extraterritorially by judicial mandate, in the absence of congressional action? “It would be grossly anomalous … to apply *Bivens* extraterritorially when we would not apply an identical statutory cause of action for constitutional torts extraterritorially.” *Id.* at 430 (Kavanaugh, J., concurring). The majority’s opinion creates exactly such a “grossly anomalous” result.

Finally, the majority places undue weight on what is, in its view, an insufficient alternative remedial structure. The majority’s position finds no support in Supreme Court law. “[T]he absence of a remedy is only significant because the presence of one precludes a *Bivens* extension.” *Hernandez*, 885 F.3d at 821. The *Bivens* remedy is not a freewheeling one—the lack of an alternative remedial structure cannot, on its own, compel judicial creation of a damages remedy.

The Supreme Court has “rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal

\(^{187}\) The majority cites 28 U.S.C. § 2679(b)(2) for the proposition that the FTCA allows an exception for *Bivens* claims. I acknowledge that in a proper context, as delineated by the Supreme Court in *Abbasi*, the *Bivens* remedy may well be available. Where the majority goes astray, however, is ignoring the import of § 2679(b)(2) with respect to the special-factors inquiry. As the Court observed in *Abbasi*, the fact that Congress enacted § 2679(b)(2) signals that Congress, rather than the judiciary, is in the best position to “weigh[]” various “economic and governmental concerns,” and to carry out the “substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government.” 137 S. Ct. at 1856 (citing § 2679(b)(2)(A)).

\(^{188}\) The majority thinks it “inconceivable” that Congress contemplated cross-border incidents involving federal officials when it enacted § 1983. The majority misses the point. The fact that Congress limited the pool of § 1983 plaintiffs to “any citizen of the United States or other person within the jurisdiction thereof,” shows that it is the role of Congress, not the judiciary, to determine, in the first instance, who may sue for damages.
court." Malesko, 534 U.S. at 69. In fact, “[i]f d[o]es not matter … that ‘[t]he creation of a Bivens remedy would obviously offer the prospect of relief for injuries that must now go unredressed.’" Id. (fourth alteration in original) (quoting Schweiker, 487 U.S. at 425). We may not use Bivens as a stop-gap wherever Congress has not created a remedial scheme: Even if Rodriguez has no alternative remedy, that alone is not dispositive, “because, ‘even in the absence of an alternative, a Bivens remedy is a subject of judgment[,]’” Vanderklok, 868 F.3d at 205 (alteration in original) (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)); see Meshal, 804 F.3d at 425 (holding that no Bivens remedy was available, even in the absence of an alternative remedy for the plaintiff). And, as previously discussed, Congress has declined to adopt a statutory remedial structure.

As previously noted, separations-of-powers principles underlie this point. Even “if equitable remedies prove insufficient,” and if “a damages remedy might be necessary to redress past harm and deter future violations,” still, “the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide.” Abbasi, 137 S. Ct. at 1858. Such concerns are considerable and wide-ranging. They include “the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies.” Id. “These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.” Id.

It is true, as the majority observes, that Bivens serves, in part, to deter individual officers. Id. at 1860. However, “the absence of a federal remedy does not mean the absence of deterrence” because “criminal investigations and prosecutions are already a deterrent.” Hernandez, 885 F.3d at 821. As is evident from the Department of Justice’s ongoing criminal prosecution of Agent Swartz, “[t]he threat of criminal prosecution for abusive conduct is not hollow.” Id. In any event, “Abbasi makes clear that, when there is a ‘balance to be struck’ between countervailing policy considerations like deterrence and national security, ‘[t]he proper balance is one for the Congress, not the Judiciary, to undertake.’” Id. (alteration in original) (quoting Abbasi, 137 S. Ct. at 1863). Applying that instruction to this case, how best to deter any future abusive conduct by Border Patrol agents is not our determination to make.

Contrary to the majority, I conclude that several special factors prevent us from implying a damages remedy in this case. The special factors in this case are weighty, and counsel strongly against judicial interference “in the absence of affirmative action by Congress.” Abbasi, 137 S. Ct. at 1857 (quoting Carlson, 446 U.S. at 18).

V. CONCLUSION

In dissenting today, I am fully mindful of the tragedy underlying this case. I am also aware of the Supreme Court’s warning that “[t]here are limitations … on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments,” and that “national-security concerns must not become a talisman used to ward off inconvenient claims—a ‘label’ used to ‘cover a multitude of sins.’” Id. at 1861–62 (quoting Mitchell v. Forstyth, 472 U.S. 511, 523 (1985)). Rather, heeding the Court’s guidance in Abbasi, I have undertaken my analysis with one controlling question in mind: “‘[W]ho should decide’ whether to provide for a damages remedy, Congress or the courts?” Id. at 1857 (quoting Bush, 462 U.S. at 380). Here, the task of deciding whether to create a damages remedy for Rodriguez lies squarely within the purview of Congress, not of the judiciary.

By creating an extraterritorial Bivens remedy in this case, the majority veers into uncharted territory, ignores Supreme Court law, and upsets the separation of powers between the judiciary and the political branches of government. The majority pays only lip service to the new-context inquiry, without any real regard for the principles set forth in Abbasi, and concludes, remarkably, that there are no special factors weighing against this unprecedented expansion of Bivens. The Supreme Court has made clear its views on expanding Bivens, and the majority has, in turn, made clear how it views the Court’s instructions. Instead of following suit, the majority turns back to the ancien regime now repudiated by the Court.

Three circuit courts touch the border between the United States and Mexico—our court, the Fifth Circuit, and the Tenth Circuit. Today, two of the three are split. The implications are troubling. Whereas an alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse under Bivens, an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages. This is an untenable result, and will lead to an uneven administration of the rule of law.

Applying Supreme Court law, I would adopt the reasoning of the Fifth Circuit. This case presents a new Bivens context, and numerous special factors counsel against judicial creation of an implied damages remedy in the cross-border context.

I respectfully dissent.
GOLD MEDAL LLC, DBA Run Gum, Plaintiff-Appellant, v. USA TRACK & FIELD; UNITED STATES OLYMPIC COMMITTEE, Defendants-Appellees.

No. 16-35488
United States Court of Appeals for the Ninth Circuit
Appeal from the United States District Court for the District of Oregon
Michael J. McShane, District Judge, Presiding
Argued and Submitted May 8, 2018
Portland, Oregon
Filed August 7, 2018
Opinion by Judge Rawlinson;
Concurrence by Judge Nguyen

* Judge Kim McLane Wardlaw was drawn to replace Judge Marvin Garbis, who retired after oral argument but before this opinion was published. Judge Wardlaw has read the briefs, reviewed the record, and listened to oral argument.

COUNSEL

OPINION
RAWLINSON, Circuit Judge:

Appellant Gold Medal LLC dba Run Gum (Run Gum) appeals the district court’s order dismissing its complaint. Run Gum alleged that Appellees USA Track & Field (USATF) and the United States Olympic Committee (Olympic Committee) engaged in an anticompetitive conspiracy in violation of antitrust law by imposing advertising restrictions during the Olympic Trials for track and field athletes. According to Run Gum, the district court erroneously deter-

ined that the Olympic Committee and USATF should be afforded implied antitrust immunity on the basis that their advertising restrictions were integral to performance of their duties under the Ted Stevens Olympic and Amateur Sports Act (ASA). See JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1226 (describing the ASA) (Alarcon, C.J., authoring judge). Reviewing de novo, we affirm the judgment of the district court.

I. BACKGROUND

This appeal involves the statutory framework devised by Congress in support of the mission of national sports governing bodies to promote and finance the participation of American athletes in “international amateur athletic competition.” 36 U.S.C. § 220503. Under the auspices of the ASA, the Olympic Committee exercises exclusive jurisdiction over “all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games,” and “the organization of the Olympic Games, the Paralympic Games, and the Pan-American Games when held in the United States.” Id. at § 220503(3). With respect to amateur athletics, the Olympic Committee may “organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Paralympic Games, and the Pan-American Games.” Id. at § 220505(c)(3). The Olympic Committee may also “obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games.” Id.

In its complaint, Run Gum, a manufacturer of “compressed functional chewing gum” containing “a proprietary mix of caffeine, taurine, and b vitamins,” averred that USATF, as the national governing body for the sport of track and field, “organizes and hosts the Olympic Trials, where the greatest track [and] field athletes in the United States compete to earn a position on the U.S. Olympic team.” Run Gum asserted that “[g]iven the unique nature and infrequency of the Olympic Trials, the public interest is overwhelming,” with “[i]n-person attendance typically exceed[ing] 20,000.”

Run Gum alleged that, despite its interest in sponsoring athletes during the Olympic Trials, it was precluded from doing so due to logo and sponsorship restrictions imposed by the Olympic Committee and enforced by USATF. According to Run Gum, USATF “severely restrict[s] the type of individual sponsors that track [and] field athletes can display on their athletic apparel at the Olympic Trials, including their competition kit, which greatly diminishes sponsorship opportunities for the athletes and excludes various would-be sponsors.” (internal quotation marks omitted) (emphasis in the original). Run Gum complained that USATF’s advertising restrictions provide that “with the exception of standard manufacturers’ equipment identification . . . the equipment, uniforms, and the bibs/numbers of the competitors and officials at the Trials may not bear any commercial identification or promotional material of any kind (whether commercial or
noncommercial).” (alteration and footnote reference omitted). Run Gum asserted that the USATF regulation nonetheless allows athletes to wear apparel containing the logo and names of certain pre-approved manufacturers, such as Nike.

Run Gum maintained that use of pre-approved manufacturers “exclude[d] scores of sponsors from the marketplace” in violation of Section I of the Sherman Act. Run Gum posed a single cause of action premised on violations of the antitrust laws stemming from the challenged advertising restrictions. Run Gum contended that the regulation limiting sponsorships of athletes during the Olympic Trials was “an anticompetitive horizontal and vertical agreement among competitors to fix artificially—and unlawfully—the number of individual sponsors and the price paid to athletes for individual sponsorship.” Run Gum further alleged that the advertising and logo restriction was “an unlawful group boycott of individual sponsors that do not manufacturer [sic] apparel or equipment, which are categorically excluded from sponsoring athletes at the Olympic Trials.” In addition to damages, Run Gum sought to enjoin the Olympic Committee and USATF from “preventing Run Gum from sponsoring individual athletes at the 2016 Olympic Trials in exchange for sponsor identification on clothing at the Olympic Trials.”

In a published opinion, the district court dismissed Run Gum’s action based on implied antitrust immunity under the ASA. See Gold Medal LLC v. USA Track & Field, 187 F. Supp. 3d 1219, 1222 (D. Or. 2016). While acknowledging that grants of implied antitrust immunity are generally disfavored, the district court nevertheless concluded that the advertising restrictions enabled the Olympic Committee and USATF to perform their statutory obligations under the ASA. See id. at 1228–30. The district court emphasized that “[a]s the only nation that does not provide its Olympic team with federal funding or subsidies, the United States instead relies on the [Olympic Committee] to raise the financial resources necessary to organize Team USA and to compete in the Olympic Games.” Id. at 1228 (citation omitted). According to the district court, the advertising restrictions “prevent a dilution of the Olympic brand,” and “permit the [Olympic Committee] and USATF to play a gatekeeping function which preserves the exclusivity—and thus value—of the Olympic symbols and name.” Id. at 1230. Due to the importance of the advertising restrictions in advancing the Olympic mission, the district court held that the Olympic Committee and USATF should be afforded implied antitrust immunity in enforcing the restrictions that were necessary to fulfillment of their statutory duties under the ASA. See id. at 1231–32.

Run Gum filed a timely notice of appeal.

II. STANDARDS OF REVIEW

“We review de novo the district court’s grant of a motion to dismiss.” Elmakhzoumi v. Sessions, 883 F.3d 1170, 1172 (9th Cir. 2018) (citation omitted).

“We [also] review de novo . . . the district court’s determinations of immunity from antitrust liability.” United Nat’l Maintenance, Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1006 (9th Cir. 2014) (citation omitted).

III. DISCUSSION

We have recognized that “implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.” Total TV v. Palmer Commc’ns, Inc., 69 F.3d 298, 302 n.6 (9th Cir. 1995) (citation and alteration omitted). Although we have not directly addressed implied antitrust immunity under the ASA, other circuit courts have found the requisite “clear repugnancy” between the ASA and antitrust laws. Id.

In JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224 (11th Cir. 2006), the Eleventh Circuit addressed a rule developed by the United States Equestrian Foundation (Equestrian Foundation) that imposed a mileage distance for equestrian competitions. See id. at 1226–27. The mileage rule generally required that any A-rated equestrian competitions on the same date be held a minimum of 250 miles apart. TheEleventh Circuit discerned the following two purposes for the rule: 1) “to concentrate elite riders into fewer competitions in order to yield the most competitive international equestrian team possible,” and 2) “to promote equestrianism nationwide by forcing promoters to hold recognized competitions in more diverse locations.” Id. at 1227. The Eleventh Circuit reasoned that, due to “the monolithic control” exercised by national governing bodies, “the question . . . is whether the application of the antitrust laws to the facts of this case would unduly interfere with the operation of the ASA.” Id. at 1231–32 (citation and internal quotation marks omitted). The Eleventh Circuit explained that it would “not substitute its own judgment for that of the [Equestrian Foundation] regarding the optimum way to fulfill its obligations,” and concluded that “implied immunity [was] called for in [the] case.” Id. at 1232. In reaching this conclusion, the Eleventh Circuit emphasized that, contrary to the plaintiffs’ assertions, it was not required to “focus on whether the rule is an effective or wise way of implementing [the Equestrian Foundation’s] powers,” id. at 1231, or to “consider whether the particular eligibility rule was necessary or otherwise examine the wisdom of the rule.” Id. at 1232 (emphasis in the original). The Eleventh Circuit held that “[b]ecause the ASA requires [a national governing body] to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is plainly repugnant to the ASA.” Id. (alteration and internal quotation marks omitted).

The Eleventh Circuit relied heavily on the Tenth Circuit’s approach in Behagen v. Amateur Basketball Ass’n of the United States, 884 F.2d 524 (10th Cir. 1989). See JES Props., 458 F.3d at 1231–32. In Behagen, the Tenth Circuit reversed a jury verdict in favor of a basketball player who challenged under the antitrust laws an eligibility rule developed by the national governing body for amateur basketball that prohibited a player from participating in amateur events if the player...
had participated in professional games. See Behagen, 884 F.2d at 526–27. The Tenth Circuit held that the antitrust issue should not have gone to the jury because the eligibility rule was exempt from the antitrust laws under the ASA. See id. at 527. The Tenth Circuit emphasized that “Behagen complains of exactly that action which the [ASA] directs—the monolithic control of an amateur sport by the [national governing body] for that sport.” Id. at 529. The Tenth Circuit clarified that “[t]he [Amateur Basketball Association of the United States of America] could not be authorized under the [ASA] unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation.” Id. The Tenth Circuit emphasized that “[a]lthough [a national governing body] is a private actor, the monolithic control exerted by [a national governing body] over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports Act.” Id. at 528 (footnote reference omitted).

We are persuaded that we should follow the analysis reflected in the decisions of our sister circuits applying implied antitrust immunity under the ASA. We are not persuaded that the Fifth Circuit’s decision in Eleven Line, Inc. v. N. Tex. State Soccer Ass’n, Inc., 213 F.3d 198 (5th Cir. 2000), mandates a reversal in this case. In Eleven Line, the Fifth Circuit held that the exclusionary activities of non-profit, volunteer-run soccer organizations should not be afforded implied antitrust immunity. See id. at 199, 204–05. The non-profit organization in that case promulgated and implemented a rule requiring soccer players, coaches, and referees to conduct soccer games only at “sanctioned” facilities, which did not include Eleven Line’s for-profit soccer facility. Id. at 199. Notably, the national governing body for youth soccer did not issue the challenged rule or explicitly approve it. See id. at 204 & n.1. For these reasons, Eleven Line is distinguishable from the present appeal, as well as from JES Properties and Behagen, because it involved a rule that was not sanctioned or approved by a national governing body, and the organization imposing the rule was the “only national state association to have such a rule.” Id.

The Fifth Circuit recognized the propriety of applying implied antitrust immunity under the ASA when the rule, like the advertising and logo restriction before us in this case, is either developed or approved by a national governing body:

Although the facts of this case do not support an implied exemption from the antitrust laws, an implied exemption would be appropriate in many other situations. For example, if national state associations all over the country had a similar rule, one could infer that the rule was necessary to the management of the sport. . . . If [the national governing body] had promulgated the rule or expressly approved [the] rule in such a way as to indicate an awareness of its consequences, it would be a player eligibility rule exempted under Behagen. . . . Any of these circumstances, and no doubt others not described here, would merit an implied exemption. Id. at 204–05.

The Fifth Circuit expressed its belief that “Behagen was correctly decided,” but recognized that Behagen did not cover the facts of Eleven Line. Id. at 204. Ultimately, in Eleven Line, the Fifth Circuit concluded that implied antitrust immunity was unavailable because the non-profit soccer organization “promulgated a rule that could be found nowhere else in the country, that was not explicitly approved by the [the national governing body], and for which it was unable to articulate a convincing rationale related to its management of amateur soccer in the area.” Id. at 205.

We conclude that the decisions of the Tenth and Eleventh Circuits provide a sound basis for affirming the district court’s application of implied antitrust immunity to the advertising and logo restrictions enforced by the USATF. Under the ASA, the respective national governing body is authorized to “organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Paralympic Games, and the Pan-American Games, and obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games.” 36 U.S.C. § 220505(c)(3). The ASA broadly grants national governing bodies exclusive rights in “the name United States Olympic Committee,” “the symbol of the International Olympic Committee,” “the emblem of the corporation,” as well as “the words Olympic, Olympiad, Citius Altius Fortius, Paralympic, Paralympiad, Pan-American, America Espiritu Sport Fraternite, or any combination of those words.” 36 U.S.C. § 220506(a) (internal quotation marks omitted). In light of the broad authority bestowed upon national governing bodies to fund the Olympic Mission, the challenged advertising and logo restrictions precluding advertisers from impinging on this delegated authority falls within the mission to protect the value of corporate sponsorships and maximize sanctioned fundraising. To compel the Olympic Committee and USATF under the antitrust laws to permit any would-be advertiser to sponsor individual athletes without national governing body approval “would unduly interfere with the operation of the ASA.” JES Props., 458 F.3d at 1231–32 (citation and internal quotation marks omitted). Although the statute does not explicitly bestow antitrust immunity, the ASA establishes funding for the Olympic mission as a central responsibility of the Olympic Committee and its national governing bodies. See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 538–39 (1987) (recognizing that exclusive rights in the term “Olympics” “directly advances . . . governmental interests by supplying the [Olympic Committee] with the means to raise money to support the Olympics and encourages the [Olympic Committee’s] activities by ensuring that it will receive the benefits of its efforts”); see also Behagen, 884 F.2d at 529 (“Although the Amateur Sports Act does not contain an explicit statement exempting action taken under its direction from the federal antitrust laws, we find that the directives of
the Act make the intent of Congress sufficiently clear. . . .") (citation and footnote reference omitted).

The analysis of our sister circuits that we now adopt is consistent with the express purpose of the ASA. As noted by the United States Supreme Court, the ASA was “enacted to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States.” *San Francisco Arts & Athletics*, 483 U.S. at 544 (quoting H.R. Rep. No. 95-1627, p. 9, U.S. Code Cong. & Admin. News 1978 p. 7482). As discussed, the Supreme Court has clarified that it was the intent of Congress that the Olympic Committee be provided “with the means to raise money to support the Olympics,” including the “commercial and promotional value derived from the panache associated with the Olympics.” *Id.* at 532–33. Similarly to the plaintiff in *Behagen*, Run Gum “complains of exactly that action which the [ASA] directs—the monolithic control of an amateur sport by the [national governing body] for that sport,” *Behagen*, 884 F.2d at 529, as a “direct result of the congressional intent expressed in the [ASA].” *Id.* at 528 (footnote reference omitted).

Finally, Run Gum contends that the district court engaged in improper fact-finding that the advertising and logo restrictions prevented dilution of the Olympic brand. Run Gum specifically maintains that the district court’s factual findings contradicted its allegations that must be taken as true at the dismissal stage. However, the district court’s analysis was not premised on any improper factual findings, as the district court merely made the obvious and common-sense observation that elimination of the advertising restrictions would dilute the Olympic brand. *See San Francisco Arts & Athletics*, 483 U.S. at 532–33; *see also Gold Medal*, 187 F. Supp. 3d at 1230 (noting that Run Gum sought “to capitalize on the unique nature of the Olympic Brand”) and that the national governing body sought to “prevent a dilution of the Olympic brand.”

**IV. CONCLUSION**

Consistent with the purpose of the ASA, and the analytical framework reflected in *Behagen* and *JES Properties*, we conclude that the advertising and logo restrictions applied by the Olympic Committee and USATF to sponsorship of individual athletes during the Olympic Trials should be afforded implied antitrust immunity under the ASA. The district court properly applied implied antitrust immunity under the ASA in dismissing Run Gum’s complaint based on the “convincing showing of clear repugnancy between the antitrust laws” and the provisions of the ASA to advance the Olympic Committee’s mission to fund and administer Olympic events. *Total TV*, 69 F.3d at 302 n.6 (citation omitted). As the district court observed, an injunction preventing enforcement of the advertisement regulation “would open the floodgates” to potential advertisers, some of which might enhance the Olympic brand and some of which might devalue the Olympic brand. *See Gold Medal LLC*, 187 F. Supp. 3d at 1230. The regulation avoids placing the Olympic Committee in the unenviable position of having to face this conundrum in fulfilling its mission to finance American Olympic athletes. We thus view the regulation as protected from antitrust challenge. *See Behagen*, 884 F.2d at 529 (connecting implied antitrust immunity with Congressional intent for the ASA).

As made evident by the *Eleven Line* decision, application of implied antitrust immunity is not limitless. However, we are persuaded that the facts of this case fall comfortably within the framework contemplated by Congress when it enacted the ASA. *See San Francisco Arts & Athletics*, 483 U.S. at 538–39 (discussing Congressional intent to supply the Olympic Committee with “the means to raise money to support the Olympics” and “ensuring that the [Olympic Committee] will receive the benefit of its efforts”).

AFFIRMED.

NGUYEN, Circuit Judge, concurring in the result:

Respectfully, I disagree with the majority’s conclusion that defendants are immune from the antitrust claim alleged in the complaint. As the majority correctly recognizes, “[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.” *United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694, 719 (1975). We therefore don’t analyze conflict between antitrust and other laws at a high level of generality. *See Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (rejecting approach in which an organization’s “general power to adopt rules” renders “particular applications of such rules . . . outside the purview of the antitrust laws.”). “[T]he proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.” *Id.* at 357.

The antitrust claim here involves a narrow exception allowing athletes to wear apparel with the manufacturer’s logo notwithstanding a general rule prohibiting sponsorship and advertising on their clothes. The purpose of this exception, according to defendants, is “to permit athletes to purchase and wear store-bought apparel they preferred and could afford.” It has nothing to do with defendants’ statutory right “to exercise exclusive jurisdiction” over “all matters pertaining to United States participation in the Olympic Games.” 36 U.S.C. § 220503(3)(A), to “authorize contributors and suppliers of goods or services to use” Olympic marks, *id.* § 220506(b), or to otherwise “finance . . . the Olympic Games,” *id.* § 220505(c)(3).
While the rule banning advertising on athletic apparel may serve a revenue-raising purpose by protecting the value of the Olympic brand, it is the exception—not the rule—at issue here. Run Gum’s allegations don’t suggest that defendants profit from the exception. But neither do they establish a viable product market. See Hicks v. PGA Tour, Inc., No. 16-15370, slip op. at 25–30 (9th Cir. July 27, 2018). Therefore, while implied antitrust immunity does not apply, Run Gum nevertheless has failed to allege an antitrust claim.

Run Gum normally would be entitled to amend its pleadings, see id. at 31–32, but here any amendment would be futile. Even if Run Gum can allege a plausible conspiracy and a viable product market, its antitrust claim is still untenable. Either defendants received no economic benefit, in which case the apparel manufacturer exception is nonactionable, see O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1065–66 (9th Cir. 2015), or they are exercising their statutory right to finance the Olympic Games with implied immunity from suit.

Therefore, I concur in the result affirming the district court’s dismissal of Run Gum’s complaint with prejudice.

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2. The only entities alleged to profit from the exception are the apparel manufacturers, who compete for advertising space on athletes’ apparel with fewer potential rivals, thus suppressing their advertising costs. While it is possible that defendants indirectly profit from the exception by conspiring with the apparel manufacturers, Run Gum’s conclusory allegations do not plausibly show this or any other conspiracy. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 (2007).
Arthur Blech died in 2011, leaving an estate worth in excess of $65 million. At his death, his estate planning documents included the Arthur Blech Living Trust, as amended, and his will, which provided for the “pour over” of most of his remaining assets into the Trust, to be administered as part of the corpus of the Trust by a third party trustee. Arthur left most of his estate in unequal shares to his four children, Raymond, Richard, Robert and Jenifer.1 The current successor trustee is respondent Comerica Bank.

The issues presented in this appeal relate to how to account for the sale of the 3,050-acre Blech Ranch (the Ranch or the Blech Ranch), located in San Luis Obispo County, California. When the Trustee filed a petition for approval of its first accounting in October 2014, Raymond objected to the allocation, principally on the basis that all of the capital gains tax (income tax) on the sale was allocated to his share. The probate court bifurcated that issue from other objections to this petition and, after a hearing, determined that allocation to be appropriate. Thereafter, with the exceptions we consider on this appeal, the Blech Children resolved their differences, entered into separate settlement agreements with the Trustee and stipulated that the court could enter an order approving the Trustee’s first accounting.

Raymond has filed four separate appeals from the probate court’s rulings. In the unpublished portions of this opinion, we resolve which of those appeals is viable and other procedural issues; also confirming the award of attorney fees to three of the Blech Children. In the published portion of this opinion we determine that the gift of the Blech Ranch (and of its equivalent in cash as of the date of its sale) was a funding mechanism for Raymond’s 35% share of the remainder or residue of the estate rather than an additional specific gift to him.

FACTUAL AND PROCEDURAL HISTORY

Arthur executed the Arthur Blech Living Trust (the Trust) in 2009, designating himself its initial trustee. At the same time, he named Richard, Robert and Jenifer as residual beneficiaries.

COUNSEL


Adam L. Streltzer for Objector and Respondent Richard Blech.

Wolf, Rifkin, Shapiro, Shulman & Rabkin and Christopher J. Heck for Objectors and Respondents Robert Blech and Linda Sue Grear.

Buchalter, Robert M. Dato, Robert S. Addison, Jr., and Stuart A. Simon for Respondent Comerica Bank, as Trustee, etc.

OPINION

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Buchalter, Robert M. Dato, Robert S. Addison, Jr., and Stuart A. Simon for Respondent Comerica Bank, as Trustee, etc.

OPINION

Arthur Blech died in 2011, leaving an estate worth in excess of $65 million. At his death, his estate planning documents included the Arthur Blech Living Trust, as amended, and his will, which provided for the “pour over” of most of his remaining assets into the Trust, to be administered as part of the corpus of the Trust by a third party trustee. Arthur left most of his estate in unequal shares to his four children, Raymond, Richard, Robert and Jenifer. The current successor trustee is respondent Comerica Bank.

The issues presented in this appeal relate to how to account for the sale of the 3,050-acre Blech Ranch (the Ranch or the Blech Ranch), located in San Luis Obispo County, California. When the Trustee filed a petition for approval of its first accounting in October 2014, Raymond objected to the allocation, principally on the basis that all of the capital gains tax (income tax) on the sale was allocated to his share. The probate court bifurcated that issue from other objections to this petition and, after a hearing, determined that allocation to be appropriate. Thereafter, with the exceptions we consider on this appeal, the Blech Children resolved their differences, entered into separate settlement agreements with the Trustee and stipulated that the court could enter an order approving the Trustee’s first accounting.

Raymond has filed four separate appeals from the probate court’s rulings. In the unpublished portions of this opinion, we resolve which of those appeals is viable and other procedural issues; also confirming the award of attorney fees to three of the Blech Children. In the published portion of this opinion we determine that the gift of the Blech Ranch (and of its equivalent in cash as of the date of its sale) was a funding mechanism for Raymond’s 35% share of the remainder or residue of the estate rather than an additional specific gift to him.
time, he executed a will in which he made certain specific bequests, and provided for the “pour over” of the balance of his estate into the Trust. In 2010, he amended article 5.4 of the Trust, adjusting the share for his son Robert to reflect a loan made to him. Arthur died on January 13, 2011. Following the declaration by the originally named successor trustee to serve, first, Union Bank, N.A., and then Comerica Bank (the Trustee), served as successor trustee.

Article 5 of the Trust set out the terms of administration and distribution of Arthur’s assets on his death, providing for: distribution of his personal effects in article 5.2, and the making of specific distributions of cash to Robert, Richard and Jenifer and other named individuals, and of a gift of a specified parcel of real property to Raymond, in article 5.3. Article 5.4 provided for distribution of the remainder of the trust estate as follows: 25 percent to Robert, 15 percent to Jenifer, 25 percent to Richard, and 35 percent to Raymond, provided that Raymond’s share “shall include any interest that [Arthur] … owns in the ranch [in San Luis Obispo County].”

Article 5.5 provided for payment of income and estate taxes as follows: “All estate taxes payable by this Trust shall be paid by the beneficiaries listed in Paragraph 5.4 above in direct proportion to their respective percentage shares. Income taxes payable by any subtrust shall be paid by the beneficiary of such subtrust.” Article 5.7 provided that the gifts made in article 5.4 would be distributed to the Blech Children in fractional interests over a 10-year period.

In late 2013, Raymond negotiated the sale of the Ranch for $14 million, signing an agreement for its sale in December 2013. The sale price represented a gain over the estate tax basis for the Ranch of approximately $6.8 million.

Prior to presenting the sale to the probate court for approval, the Trustee distributed to the Blech Children a financial analysis (the spreadsheet) which contained estimated allocations of assets in the trust estate to each beneficiary pursuant to the terms of the Trust, also allocating estimated expenses chargeable to each sibling, as well as net distributable amounts to each. The second line of the spreadsheet contained the following: “For Discussion Purposes – Not Final Calculations and May Not Be Replied Upon for Any Purposes.”

On February 13, 2014, the probate court approved the sale, which closed on March 25, 2014. The income tax on the sale was charged against Raymond’s share.

The Blech Children became engaged in numerous intrafamily disputes, including those concerning allegations of mismanagement of a 19-story office tower owned by the Trust; allegations that two of the siblings had received improper distributions; and allegations of improper actions by Raymond acting as executor of the will. These disputes led to lawsuits among the Blech Children; by the then-trustee (Union Bank) against certain of the Blech Children; the filing by Robert and Jenifer of a petition for suspension of Raymond’s powers and his removal as executor; the filing of objections to Raymond’s First Account of Executor; and the filing by Raymond of a Petition for Contractual Indemnity and other relief arising out of his actions as executor.

The Blech Children reached a tentative settlement of their disputes over Raymond’s work as executor of the will six days prior to a July 2014 court hearing on that matter. That settlement was memorialized in a Settlement Agreement and Release, executed as of August 27, 2014 (the 2014 Settlement Agreement), in which the Blech Children agreed upon mutual releases of all claims, known or unknown, specifically referencing and waiving their rights under Civil Code section 1542, reserving, however, their individual rights to pursue certain claims (e.g., the right to dispute expenses of administration of the estate and trust arising on and after August 1, 2014, or not paid prior to that date).

Paragraph 15 of the 2014 Settlement Agreement specifies that each of the Blech Children “takes complete responsibility for any tax liability which may arise from that party’s receipt of any consideration, asset … or any other form of monetary or nonmonetary value received under this Agreement or in connection herewith, including from the Estate, the Trust, any asset of the Estate or Trust … [or] Blech Ranch Company, LLC . . . . Each party agree[s] that any tax liability, whether local, state, federal or other, arising from such receipt by or to that party … including but not limited to property taxes, reassessment penalties, gift taxes, income taxes, or estate taxes, shall be that party’s sole responsibility.”

The Trustee filed its First Account and Report of Trustee and Petition for Approval Thereof; Petition for Allowance of Extraordinary Trustee’s Fees (the Petition) on October 29, 2014. The probate court granted an extension of time in which to file objections to the Petition, setting the deadline to do so at January 15, 2015. On that date, Raymond filed a set of objections, as did Robert and Jenifer. Following the Trustee’s filing of responses to his objections, on May 19, 2015, Raymond filed a Supplement to Objections (Supplemental Objections) in which he raised for the first time the objection that the gift of the Ranch to him had been improperly characterized as a specific gift when, in his view, it should be characterized as a residuary gift. If characterized as a residuary gift, Raymond argued, the “expenses and costs of such gifts should be borne by the Trust as a whole.”

3. Raymond was designated manager of the Ranch in its Operating Agreement. He had lived for many years on an adjacent parcel in the house located on 78 acres of land which was also left to him in article 5.3 of the Trust.

Jenifer’s share included a provision similar to that for Raymond, referencing a certain residence in Montana if the Trust then owned it.

4. The income tax on this sale was estimated at 33 percent of the gain, or approximately $2,376,000.

5. This 2014 Settlement Agreement, among the Blech Children only, is to be distinguished from two settlement agreements, among different groups of the Blech Children and the Trustee, and which we describe and reference, post, as the 2015 Settlement Agreements.

6. Thus, the $2.3 million in income tax on the sale of the Ranch (see fn. 4, ante) would have been shared among all of the Blech Children, rather than being paid from Raymond’s inheritance alone.

On April 6, 2015, Raymond’s counsel had written a letter to the
At the June 11, 2015 trial setting conference on the Petition, and with the consent of the parties, the probate court bifurcated Raymond’s Supplemental Objections, setting them for determination in advance of hearing the parties’ other objections to the Petition.

At the conclusion of the hearing on the Supplemental Objections on July 13, 2015, the probate court affirmed the Trustee’s deduction of the income tax and other expenses attributable to the Ranch from the proceeds of the sale and from Raymond’s share of the inheritance, rejecting Raymond’s contrary claims, and specifically finding that the Trustee’s actions “satisfied the intent of the Trustor, Arthur Blech.”

The probate court also ruled Raymond had “consented to and affirmed [the Trustee’s] treatment of the Blech Ranch gift [pursuant to Probate Code section 16465], and the other Beneficiaries relied upon Raymond’s actions, and Raymond is thus estopped from now challenging that treatment.” In addition, it ruled Raymond had released the specific objections made in his Supplemental Objections by signing the 2014 Settlement Agreement. The probate court filed an Order Overruling Raymond Blech’s Supplement to Objections to Trustee’s First Account and Report on August 19, 2015 (August 19, 2015 Order) setting out these determinations. Notice of entry of that order was given on September 10, 2015.

Two months later, on September 28, 2015, Robert and Jenifer sought to enforce the 2014 Settlement Agreement by filing their Motion to Enter Judgment on Settlement Agreement, Enforce Settlement Agreement, and for Attorney Fees and Costs. The probate court considered this motion to be “premature,” and, on October 30, 2015, placed it off calendar.

Seeking to overturn the August 19, 2015 Order, Raymond filed a motion for new trial and a motion to vacate. The probate court denied these motions on October 30, 2015, noting no judgment had been entered and the orders made in August following the trial on the bifurcated issue were not separately appealable.

During the late summer and fall of 2015, the parties had negotiated and reached agreements to resolve all of the objections to the Petition except for Raymond’s Supplemental Objections. They set out their settlements in two agreements, one among the Blech Children other than Raymond and the Trustee, and another between Raymond and the Trustee. (These documents are collectively referred to as the 2015 Settlement Agreements.) In the latter agreement, Raymond reserved his right to appeal the probate court’s August 19, 2015 Order. With the 2015 Settlement Agreements signed, the Blech Children stipulated to have the probate court enter an order approving the Petition based on those agreements, also preserving Raymond’s Supplemental Objections for appeal. The probate court filed its Order Granting Stipulated Ex Parte Application for Entry of Order Approving Settlement of Trustee’s First Account on October 23, 2015 (October 23, 2015 Order).

On October 30, 2015, the probate court denied Raymond’s motions for new trial and to vacate its rulings on his Supplemental Objections and took off calendar Robert and Jenifer’s motion to enforce the 2014 Settlement Agreement.

On November 6, 2015, Robert and Jenifer renewed their motion to enter judgment on the 2014 Settlement Agreement and for attorney fees. Also on that date, Raymond renewed his motion for new trial and his motion to vacate.

The motion for new trial and motion to vacate were heard and submitted on December 4, 2015; the probate court’s ruling on these matters was issued on December 29, 2015. Raymond filed a notice of appeal of these matters seven days prior to the ruling issued by the probate court, on December 22, 2015. The court denied both motions in its December 29, 2015 ruling.

Robert and Jenifer’s motion to enter judgment and for attorney fees and costs was heard and granted on January 7, 2016. Raymond filed a timely notice of appeal of these rulings on February 4, 2016.

8. We have considered – and reject – the argument that the October 23, 2015 Order left unresolved Raymond’s Supplemental Objections. As we read this Order in the context of the proceedings that had taken place in the probate court up to October 23, 2015, the Order signed and filed that date fully resolved in the probate court all of the issues between the parties with respect to the Petition. Thus, the October 23, 2015 Order was a final order with respect to the Petition, and the proper subject for an appeal. (See Discussion, Section I, post.) The probate court judge had the same understanding of this Order when the issue was discussed on October 30, 2015.

9. Because the record reflects two efforts to obtain entry of judgment but no judgment appears in the record on appeal, we sent a letter to the parties inquiring, inter alia, if a judgment had ever been entered. In response to our letter, Raymond, on the one hand, and Robert and Jenifer, on the other, filed requests that we take judicial notice of the judgment entered on February 19, 2016. While we grant those requests (Evid. Code, §§ 452, subd. (d) & 459, subd. (a)), we do not find these judgments relevant to resolving the issues raised by the several notices of appeal.

For reasons we discuss in footnote 8, ante, and more fully in the text, post, the October 23, 2015 Order fully resolved the issues in the Trustee’s Petition before the probate court and is itself an appealable order. We note that it was entered in part based on the 2014 and 2015 Settlement Agreements among the parties which contained provisions authorizing a court to enforce the terms of those agreements. The October 23, 2015 Order granted the Trustee’s Petition, also making reference to these settlement agreements and approving their terms.

It was not until February 2016 that the first of the two “judgments,” was signed and filed. This was well after the probate court no longer had jurisdiction over the matters determined in the October 23, 2015 Order as a consequence of Raymond’s December 22, 2015 appeal, which terminated the probate court’s jurisdiction over the orders identified in the December 2015 notice of appeal, including the October 23, 2015 Order. (Code Civ. Proc., § 916, subd. (a); see Critzer v. Enos (2012) 187 Cal.App.4th 1242, 1249 [trial court lacked jurisdiction to
Robert and Jenifer filed a second motion, for additional attorney fees and costs, which the probate court also granted, and from which Raymond filed a timely notice of appeal on May 2, 2016. With the stipulation of the parties, we consolidated these appeals.

CONTENIONS

Raymond frames the primary issue on appeal as whether the probate court erred in allocating the postdeath appreciation in the Ranch among all of the Blech Children (with a consequence that his share in that appreciation was limited to his 35 percent of the residue) while charging Raymond with all postdeath taxes and expenses on the sale of the Ranch. Raymond also contends the probate court erred in finding he: (a) released any objections to the Trustee’s allocations by his execution of the 2014 Settlement Agreement with his siblings, (b) consented to those allocations, and (c) is barred by equitable estoppel or laches from asserting his objections to the Trustee’s treatment of his interest in Arthur’s Trust. And, Raymond challenges the attorney fee awards made to his siblings as prevailing parties in the probate court.

Robert and Jenifer, joined by Richard, dispute Raymond’s contentions, arguing: (a) the release contained in their 2014 Settlement Agreement precludes Raymond from prevailing on any of his claims; (b) he is estopped from asserting his claim; (c) he is barred by laches from doing so; (d) the probate court properly upheld the Trustee’s allocation of gain; and (e) the attorney fee awards were proper.

The Trustee argues: (a) Raymond disclaimed in the probate court the allocation argument he now asserts; (b) his objections to the Trustee’s accounting were barred because he accepted the distribution of the net proceeds from the sale of the Ranch without then raising the impact of the distribution on the final amount to be allocated to him; and (c) he released all of his claims in the 2014 Settlement Agreement.

DISCUSSION

[SECTIONS I, II, III, IV AND V, See FOOTNOTE*, Ante]

VI. CONSTRUCTION OF THE RESIDUARY BEQUEST AND ALLOCATION OF APPRECIATION IN VALUE OF THE RANCH

Between the time of Arthur’s death and the sale of the Blech Ranch, its fair market value increased from $7.2 million to $14 million, at which price the Ranch was sold. The proceeds of the sale were allocated to Raymond’s subtrust and the income taxes on the sale of the Ranch, $2.3 million, were paid from that source.\(^\text{10}\) The probate court ruled that this allocation of tax liability was correct and that it was proper to use the $14 million valuation in allocating the remainder of the assets of the Trust among all of the Blech Children in accord with their percentage shares of the residue of the Trust.

Raymond contends the value of the Ranch should have been allocated based on its date-of-death value (with Raymond receiving the entire net proceeds of its sale, including the appreciation in the value of the Ranch following Arthur’s death) based on the probate court’s ruling that “The gift of Blech Ranch to Raymond Blech was not a residuary gift under California Probate Code § 21117(f).”\(^\text{11}\)

Raymond’s argument in support of this claim is that the probate court’s ruling that the Ranch was not a residuary gift meant that it must be valued at its date-of-death value of $7.2 million rather than at its $14 million sale price (as a substitute for its date-of-distribution value). Thus, Raymond contends the probate court’s ruling granting the Trustee’s Petition, in which the Ranch was valued for allocation among the siblings at its sale price, was erroneous.

Raymond supports his argument using the term “specific gift,” and, although the probate court did not use that term in its ruling, it is an acceptable shorthand to analyze Raymond’s contention. If Raymond were correct, he would be the sole distributee of the $4.5 million net proceeds of the sale of the Ranch (the difference between the sale price of $14 million and the sum of $7.2 million [the valuation of the Ranch on the date of Arthur’s death] and the $2.3 million in taxes paid])—and would additionally share in 35 percent of the remainder of the Trust estate.\(^\text{12}\)

On appeal, we review the probate court’s ruling, not its reasons, and affirm if the ruling is correct albeit the reasons are not; we also resolve any ambiguities in favor of affirmance. (See, e.g., In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133 ["A judgment or order of a lower court is presumed to be correct on appeal, and all inteniments and

10. That Raymond is solely responsible for the income tax on the sale of the Ranch is clearly stated in Article 5.5 of the Trust; its second sentence provides: “Income taxes payable by any subtrust shall be paid by the beneficiary of such subtrust.”

11. The quoted language is taken from the August 19, 2015 Order. The same legal conclusion appears in the probate court’s December 29, 2015 Statement of Decision, following the filing of the October 23, 2015 Order from which Raymond’s appeal is taken.

12. The actual amounts would be slightly different when costs of sale and expenses of operation of the Ranch are included.
presumptions are indulged in favor of its correctness.”]; *Munoz v. Olin* (1979) 24 Cal.3d 629, 635-636.)

The probate court’s characterization of this gift (and of all gifts made in the Trust) was a legal determination on undisputed facts which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods*, supra, 24 Cal.4th 415, 432; *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1145.) As we now discuss, that characterization was in error, but, once corrected, it does not alter the probate court’s determination to value the Ranch at its sale price in determining the distribution of the remainder of the Trust (including in the amount to be distributed the net proceeds from the sale of the Ranch) among the Blech Children. 13

A. Lexicon of gifts

A revocable living trust such as that under review in this case contains transfers to be effective on the death of the settlor. Such transfers are statutorily described as “at-death transfers.” (Prob. Code, § 21104.) The Probate Code provides for six types of “at-death transfers”: “(a) A specific gift is a transfer of specifically identifiable property. [¶] (b) A general gift is a transfer from the general assets of the transferor that does not give specific property. [¶] (c) A demonstrative gift is a general gift that specifies the fund or property from which the transfer is primarily to be made. [¶] (d) A general pecuniary gift is a pecuniary gift within the meaning of Section 21118. [¶] (e) An annuity is a general pecuniary gift that is payable periodically. [¶] (f) A residuary gift is a transfer of property that remains after all specific and general gifts have been satisfied.” (Prob. Code, § 21117.)

We observe, however, that while the parties and the probate court directed their analysis of the terms of the Trust to discuss application of these several types of postdeath transfers, to properly construe the terms of the Trust we must acknowledge the terms of Probate Code section 21102. That section provides: “(a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument. [¶] (b) The rules of construction in this part of the Probate Code] apply where the intention of the transferor is not indicated by the instrument.”15 (Cf. Probate Code § 16335, subd. (a)(1), which requires that the terms of the particular dispositive plan be carried out even when they differ from that which would otherwise be called for under a statute.)

We also consider in construing the terms of the Trust, Probate Code section 21121, which provides, “All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument.” And, Probate Code section 21122 advises: “The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in an instrument. Technical words are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor and that the transferor was unacquainted with the technical sense.”

The common law provides additional guidance: “The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein. [Citations.]” (*Burch v. George* (1994) 7 Cal.4th 246, 254; see *Tunstall v. Wells* (2006) 144 Cal.App.4th 554, 561 [same]; see Prob. Code, § 21102, subd. (c).) Our Supreme Court has explained: “Extrinsic evidence is ‘admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible’ [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; see *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888.)

In the case of undisputed evidence but conflicting inferences, we apply the following standard of review: “[W]here the evidence is undisputed and the parties draw conflicting inferences, [the appellate court] will independently draw inferences.” (*City of El Cajon v. El Cajon Police Officers’ Assn.*, supra, 49 Cal.App.4th at p. 71; see *Parsons v. Bristol*

13. We raised this issue with the parties in advance of oral argument, offering each an opportunity to submit a letter brief on this issue. The issue was also addressed at oral argument. Our determinations in this opinion include consideration of the parties’ written and oral views.

14. Section 21118, subdivision (b) defines a pecuniary gift as “a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument.”
As noted, ante, Probate Code section 21121 requires that we construe all parts of the instrument in relation to the others to form “a consistent whole.” And, if the meaning of any part of an instrument is ambiguous or doubtful, “it may be explained by any reference to or recital of that part in another part of the instrument.” (Ibid.; see Colburn v. Northern Trust Co. (2007) 151 Cal.App.4th 439, 448, fn. 6; Siegel v. Fife (2015) 234 Cal.App.4th 988, 996.)

We observe that, applying these principles, this district has previously held that there “is no substantial difference between the words ‘remainder’ and ‘residue,’ ” and that “in construing a will [or a trust] the aim is to ascertain the meaning of the testator [or settlor] rather than the meaning of the words used.” (Estate of Moorhouse (1944) 64 Cal.App.2d 210, 214-215.)

### B. Structure and Terms of the Trust

The principal dispositive provisions of the Trust are set out in its article 5. After gifting his personal effects to his children “in such manner as they mutually agree” (art. 5.2), and making specific pecuniary gifts to family members and others (art. 5.3), Arthur directed the disposition of the remainder of his trust estate in a separate paragraph, headed “Division of Remaining Trust Estate” (art. 5.4), as follows: “As soon as reasonably practicable after the death of Grantor and after distributions, if any, pursuant to the provisions of Paragraphs 5.2 and 5.3, and further subject to the provisions of this Paragraph, the Trustee shall divide the remaining Trust estate into separate shares as follows… .” In the next four subparagraphs, Arthur allocated the “Remaining Trust Estate” – by percentages – to his four children, subject to certain adjustments for outstanding loans, and in the case of Jenifer and Raymond, the direction to include in that child’s share “any interest that Grantor or this Trust directly or indirectly owns in [described real property] … .”

Article 5.5 provides: "All estate taxes payable by this Trust shall be paid by the beneficiaries listed in Paragraph 5.4 above in direct proportion to their respective percentage shares. Income taxes payable by any subtrust shall be paid by the beneficiary of such subtrust.”

Cash flow was to be distributed to each beneficiary quarterly from his or her share. (Art. 5.6.) Finally, the principal given to each beneficiary was to be distributed to that beneficiary over 10 years, beginning on the first anniversary of Arthur’s death. (Art. 5.7.)

In construing the terms of the Trust, as noted, we seek to ascertain the grantor’s intent by the language of the document as of the time he signed it. (Estate of Helfman (1961) 193 Cal.App.2d 652, 655.) Each case depends upon its particular facts. (Ibid., citing Estate of Henderson (1911) 161 Cal. 353, 357.)

### C. Discussion

We do not agree with the probate court’s ruling that the instruction in article 5.4 that Raymond’s 35 percent share was to occur only if the Ranch were an asset of the Trust at that time. Indeed, he had made such a gift to Raymond in article 5.3; there, he gave Raymond a specific gift, also of real property, i.e., of the house and land that adjoined the Ranch, using the following language: “(e) The Trustee shall distribute to RAYMOND that certain real property … .” (We omit the specific legal description of the land given, that included a home adjacent to the Ranch.) This gift in article 5.3(e) was unconditional and specific (as was a gift of a house to Jenifer, also set out in article 5.3), and was made with no language that is either conditional or equivocal: Neither gift was dependent on any other event.

By contrast, the “gift” of the Ranch to Raymond in article 5.4 was only a funding mechanism for the actual gift – which was stated as a percentage of the remainder or residue of the Trust estate. Thus, the gift of the Ranch to Raymond was to occur only if at the time of the distribution of the remainder of the trust assets, those assets included the Ranch. (Art. 5.4(b).) What was not conditional was that Raymond was to receive 35 percent of the residue regardless of whether the Ranch was part of the Trust estate: that was a residuary gift to Raymond.18

This means of expressing the desire that, if the Ranch were in the estate at the date of distribution, then it was to be used in funding Raymond’s share of the residue, rendered the gift of the Ranch an instruction to the Trustee on that with which to fund the percentage gift which Arthur unequivocally made to Raymond if the Ranch were an asset of the Trust at that

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16. The memorandum, dated January 18, 2011, prepared by the lawyer who drafted the Trust characterizes article 5.4 as applying to the “Division of the Remaining Trust Estate”; thus, the lawyer who drafted the Trust viewed article 5.4 in the same manner as we describe it in the body of this opinion, i.e., as dividing the remainder, or residue, of the estate.

17. The probate court reached a similar conclusion as to the Montana property allocated to Jenifer’s share.

18. The headings of the two articles of the Trust also suggest a difference in the nature of the gifts made. Article 5.3 is headed “Specific Distributions” and article 5.4 is headed “Division of Remaining Trust Estate.”
time, rather than a mandate that Raymond was to receive the Ranch as well as 35 percent of the remainder or residue of assets in the Trust on their distribution. Such an instruction is entirely consistent with Raymond’s long-standing and intense involvement with Ranch operations. One also must consider that Raymond receives a substantially greater percentage of the residue than any other sibling. We would expect that, had Arthur intended Raymond to also receive the entirety of any appreciation in the value of the Ranch, Arthur would have expressly so stated in the Trust.

Setting aside our conclusion that Arthur’s intention was to make the gifts of the balance of his estate as discussed above (as expressed in Probate Code section 21102), in the context of Probate Code section 21117 upon which the parties presented their arguments to the probate court, the direction in article 5.4(b) (and in article 5.4(c) with respect to Jenifer) concerns how to fund Raymond’s percentage share of the remainder or residue and not what specific property to give. In the context of section 21117, the gift to Raymond in article 5.4(b) was a gift of a 35 percent share of the residue within the meaning of Probate Code section 21117, subdivision (f), and not a specific gift as defined in subdivision (a) of that statute.

The proper construction of residuary clauses which include reference to specific property of a decedent has been an issue in this state for many years. For example, in 1907, our Supreme Court considered this matter in In re Painter’s Estate.19 (150 Cal. 498 (Painter’s Estate).) There, our Supreme Court was called upon to determine whether a provision in the codicil to the will of that decedent describing specific properties owned by the decedent were specific gifts and for that reason not chargeable with the payment of general legacies. (Id. at p. 503.) Because the listing of specific properties to be devised in that will was followed immediately by a statement that those properties were to be given together with all of the decedent’s other property, the court determined that they were part of the residue rather than specific gifts. In reaching this determination, our Supreme Court stated: “In short, the question is purely one of construction. The testator’s intent is to be determined in each case from a consideration of the particular language employed. A bequest or devise of the residue of an estate is general, because such residue is not ascertainable at the time the will is made. The fact that, in giving such residue, the testator describes, as included in it or forming a part of it, certain specific property owned by him, does not alter the character of the residuary gift.” (Id. at p. 507.) Confirming this reasoning, the court pointed out that a legacy is specific only when, if that property is not vested in the decedent at the time of his or her death, it fails, citing Civil Code section 1357.20 (Painter’s Estate, at p. 505.)

The language of the Trust in this case presents an even clearer statement of the nature of the gift of designated property than in Painter’s Estate: the gift here is of 35 percent of the residue, utilizing the Ranch as an asset with which to fund the gift to Raymond in recognition of his long and close association with it, but a 35 percent share nonetheless, even if the Ranch is no longer owned at the time of Arthur’s death.

[SECTIONS VII AND VIII, SEE FOOTNOTE*, ANTE]

DISPOSITION

The October 23, 2015 Order Settling the Trustee’s First Account, filed October 29, 2014, is affirmed. The Orders entered on January 7 and March 18, 2016, awarding attorney fees to Robert and Jenifer, and the Order entered on January 7, 2016, awarding attorney fees to Richard, are affirmed. All other appeals are dismissed.

Richard, Robert and Jenifer shall each recover his or her attorney fees and costs on appeal from Raymond.

GOODMAN, J. *

We concur: EDMON, P. J., LA VIN, J. *

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

19. In Painter’s Estate, the Supreme Court relied in part on Civil Code section 1357, which defined “specific legacy” as follows: “A legacy of a particular thing, specified and distinguished from all others of the same kind, belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.” (Former Civ. Code, § 1357, ¶ 1.) (The definition of “specific gift” now is subdivision (a) of Probate Code section 21117.) Paragraph 4 of former Civil Code section 1357 defined a residuary legacy as follows: “A residuary legacy embraces only that which remains after all the bequests of the codicil to the will of that decedent describing specific properties owned by the decedent were specific gifts and for that reason not chargeable with the payment of general legacies. (Id. at p. 503.) Because the listing of specific properties in it or forming a part of it, certain specific property owned by him, does not alter the character of the residuary gift.” (Painter’s Estate, at p. 505.) Confirming this reasoning, the court pointed out that a legacy is specific only when, if that property is not vested in the decedent at the time of his or her death, it fails, citing Civil Code section 1357, subdivision (f), paragraph 4. (Former Civ. Code, § 1357, ¶ 4.) (The definition of “specific gift” now is subdivision (a) of Probate Code section 21117.) Paragraph 4 of former Civil Code section 1357 defined a residuary legacy as follows: “A residuary legacy embraces only that which remains after all the bequests of the will are discharged.”

At that time, Civil Code section 1317 provided: “A will is to be construed according to the intention of the testator.” And section 1318 provided: “In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator’s intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.” (See, Estate of Loescher (1955) 133 Cal.App.2d 589, 593-594 (“Whether a devise is residuary, general, specific or administrative depends upon the intention of the testator as shown by the entire will. [Citations.]”).) The statutory definitions of specific and residuary legacies had not changed significantly from the time of the decision in Painter’s Estate when Estate of Loescher was decided. (Compare former Prob. Code, § 161, enacted by Stats. 1931, ch. 281, p. 595; and see Historical and Statutory Notes, 52 West’s Ann. Prob. Code (2002 ed.) foll., former § 161, p. 129, with Civ. Code, § 1357, extant at the time of the decision in Painter’s Estate.)

20. See footnote 37, ante.
In the underlying action, the trial court denied appellant’s resentencing petition. The court concluded, after an evidentiary hearing, that the People had proven beyond a reasonable doubt that appellant was armed in the commission of the offense. The jury also acquitted appellant of all firearm-related counts, including being a felon in possession of a firearm and carrying a loaded firearm. Appellant was sentenced to two concurrent terms of 25 years to life as a “three-strike” offender.

In the underlying action, the trial court denied appellant’s motion under Penal Code section 1170.126 to be resentenced pursuant to the Three Strikes Reform Act of 2012 (Reform Act). The court concluded, after an evidentiary hearing, that the People had proven beyond a reasonable doubt that appellant was “armed with a firearm” during the commission of the offenses targeted in the petition. Appellant contends the court’s determination is contrary to the jury’s verdict and must be reversed. For the reasons set forth below, we conclude the trial court erred in determining that appellant was ineligible for resentencing. We remand for further proceedings on appellant’s resentencing petition.

1. All further statutory citations are to the Penal Code, unless otherwise stated.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Convictions and Acquittals

Shortly after midnight on January 24, 2001, Los Angeles Police Sergeant Danny Contreras effected a traffic stop on Pacific Coast Highway of a car matching the description of one carrying suspects in a recent drive-by shooting. Appellant was driving the vehicle and codefendant Andre Luzano was a passenger. When a backup unit arrived, appellant was directed to exit his vehicle. He responded by asking, “Why are you stopping me? Why are you hassling me?” Appellant then drove away and the two patrol vehicles gave chase. During the ensuing pursuit, appellant drove through a residential neighborhood, slowed down, and then accelerated. Officers did not see any item being thrown from the vehicle. Hours later, a resident of the neighborhood reported finding a .38-caliber handgun in front of his home. No fingerprints were recovered from the handgun. Later in the pursuit, appellant slowed down while on a railroad bridge, and officers observed a “dark,” “boxy” and “shiny” object, which appeared to be a handgun, fly out the passenger’s window and over the edge of the bridge. After searching the area, police recovered a black box containing two live .45-caliber bullets. Appellant eventually stopped the vehicle. Both men fled on foot, but were apprehended. When appellant was discovered, seven live rounds of .45-caliber ammunition fell from his pocket. During the postarrest search of appellant, a live round of .45-caliber ammunition was recovered from his front pants pocket.

The drive-by shooting targeted the home of Gilbert Montalvo and his girlfriend Jannet Quintana. The shooting left multiple bullet holes in the front window and west wall of the residence, and police recovered five .45-caliber shell casings at the scene. Officer Contreras testified that at an in-field showup, Montalvo identified appellant as the driver of the vehicle involved in the drive-by shooting. However, Montalvo testified that during the showup, he told the police he could not identify either the driver or the passenger of the suspect vehicle, but was pressured to do so. He stated he told the officers that appellant and Luzano were not the suspects he saw, and claimed he signed the police incident report identifying appellant as the driver without being given an opportunity to read the report. Montalvo testified that appellant’s vehicle was “very different” -- in terms of color, styling and amount of tinted windows -- from the vehicle that he had seen drive by his home.

On October 31, 2001, appellant and Luzano were charged in a second amended information with shooting at an inhabited dwelling (§ 246; count 1), assault with a firearm on Montalvo and Quintana (§ 245, subd. (a)(2); counts 2 and 3), and discharge of a firearm with gross negligence (§ 246.3; count 4). Appellant was separately charged with being a fel-
on in possession of a firearm (former § 12021, subd. (a)(1); count 5), being a felon in possession of ammunition (former § 12316, subd. (b)(1); count 7), carrying a loaded firearm after suffering a prior conviction (former § 12031, subd. (a)(1); count 8), and evading a pursuing peace officer (Veh. Code, § 2800.2; count 10). The information alleged that appellant committed all the offenses “on or about January 24, 2001.” As to count 10 (evading police), the information further alleged that appellant was armed with a firearm in the commission and attempted commission of the offense. Finally, the information alleged that appellant had suffered seven prior serious or violent felony convictions.

On November 5, 2001, a jury convicted appellant of being a felon in possession of ammunition (count 7) and evading a pursuing peace officer (count 10). The jury found not true the allegation that while evading the police, appellant was armed with a handgun. It acquitted appellant of the remaining counts, including being a felon in possession of a firearm and carrying a loaded firearm. Codefendant Luzano was acquitted of all charges.

In a bifurcated court trial, the trial court found true the prior conviction allegations. The trial court found appellant had suffered five strikes and sentenced appellant to two concurrent terms of 25 years to life under the Three Strikes law. In an unpublished opinion, this court affirmed the judgment. (See People v. Piper (Oct. 28, 2003, B139604).)

### B. Petition for Recall of Sentence

In 2012, the electorate enacted the Three Strikes Reform Act (Reform Act) by approving Proposition 36. (People v. Yearwood (2013) 213 Cal.App.4th 161, 167-170.) The Reform Act amended the Three Strikes law to provide that absent specified exceptions, an offender with two or more prior strikes is to be sentenced as a two-strike offender unless the new offense also is a strike, that is, a serious or violent felony. (See ibid.) The Reform Act also added section 1170.126, which creates a postconviction resentencing proceeding for specified inmates sentenced under the prior version of the Three Strikes law. (People v. Yearwood, supra, at pp. 167-170.) Under that statute, a defendant sentenced as a three-strike offender may petition for recall of the sentence and for resentencing, subject to certain eligibility criteria. (§ 1170.126, subd. (e).) “The Reform Act’s resentencing mechanism has three separate aspects: (1) the initial petition for recall of the sentence, (2) a determination of eligibility, and (3) the court’s discretionary decision whether the defendant poses an unreasonable risk of danger to public safety.” (People v. Frierson (2017) 4 Cal.5th 225, 234 (Frierson).)

On January 11, 2013, appellant filed a petition for recall of sentence and resentencing pursuant to section 1170.126. The People opposed the resentencing petition, arguing that appellant was ineligible for resentencing under an exclusion that applies if, “[d]uring the commission of the current offense, [that is, the offense which the resentencing petition targets] the defendant . . . was armed with a firearm or deadly weapon . . .” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) The parties disputed whether the standard of proof for the ineligibility determination was beyond a reasonable doubt or by a preponderance of the evidence. On October 31, 2016, the trial court held an evidentiary hearing on appellant’s resentencing petition. On December 5, 2016, the trial court denied the petition with prejudice, concluding that “regardless of whether the correct standard of proof is beyond a reasonable doubt or by a preponderance of the evidence,” appellant was ineligible for resentencing because he “was armed with a firearm” during his commission of the target offenses. This appeal followed.

### DISCUSSION

The key issue before us concerns the circumstances under which a jury’s verdict and findings in the petitioner’s trial preclude or limit the trial court’s eligibility determination under the Reform Act. On this issue, we draw guidance from Frierson, supra, 4 Cal.5th 225, and People v. Arevalo (2016) 244 Cal.App.4th 836 (Arevalo). In Frierson, our Supreme Court discussed the second aspect of a resentencing petition -- the eligibility determination. After concluding that the People had the burden of persuasion on this issue, the court discussed the standard of proof. (See id. at p. 234.) The court first noted that the Reform Act applies prospectively to defendants who have not yet been sentenced and retrospectively to petitioners who have already been sentenced. “[T]he parallel structure of the Act’s amendments to the sentencing provisions and the Act’s resentencing provisions reflects an intent that sentences imposed on individuals with the same criminal history be the same, regardless of whether they are being sentenced or resentenced. Both the sentencing scheme and the resentencing scheme provide for a second strike sentence if the current offense is not a serious or violent felony, and they set forth identical exceptions to the new sentencing rules.” (Frierson, supra, 4 Cal.5th at p. 236, quoting People v. Johnson (2015) 61 Cal.4th 674, 686 (Johnson).) The court reasoned that “the parallel construction of the prospective and retrospective portions of the Reform Act reflects an electoral intent to apply the same standard for proof of ineligibili-
ty for second strike sentencing in both contexts.” (Frierson, at p. 236.) The court rejected the People’s argument that a lower standard of proof should apply on resentencing because the case had been “fully litigated.” It found that “nothing in the Reform Act’s language suggests the electorate contemplated that a lower standard of proof should apply at resentencing to compensate for any potential evidentiary shortcoming at a trial predating the Act.” (Id. at p. 238.) The court concluded that the People had the burden of proving beyond a reasonable doubt that the petitioner was ineligible for resentencing under the Reform Act. (Id. at p. 240, fn. 8.)

In concluding that the standard of proof was beyond a reasonable doubt, the Frierson court quoted extensively from Arevalo. (See Frierson, supra, 4 Cal.5th at pp. 235-236 [noting that defendant’s argument for a beyond a reasonable doubt standard mirrors the reasoning in Arevalo and that defendant has the “better view”].) In Arevalo, following a bench trial, the defendant was found guilty of grand theft auto and driving a vehicle without the owner’s consent. He was acquitted of burglary and possession of a firearm charges, and the court found the “armed with a firearm” allegation not true. After being sentenced as a third strike, Arevalo filed a resentencing petition under the Reform Act. (Arevalo, supra, 244 Cal.App.4th at p. 843.) The trial court denied the petition after concluding that under the preponderance of the evidence standard, Arevalo was “armed with a firearm” during the commission of the grand theft auto. (Id. at p. 844.) The appellate court reversed. The court held that the correct standard of proof was beyond a reasonable doubt, as “[u]nder a lesser standard of proof, nothing would prevent the trial court from disqualifying a defendant from resentencing eligibility consideration by completely revisiting an earlier trial, and turning acquittals and not-true enhancement findings into their opposites.” This would violate Johnson’s “equal outcomes” directive. (Id. at p. 853.) The appellate court concluded that “[u]nder the applicable beyond a reasonable doubt standard, Arevalo’s acquittal on the weapon possession charge and the not-true finding on the allegation of being armed with a firearm, preclude a finding that he is ineligible for resentencing consideration.” (Ibid.)

Under Frierson and Arevalo, on a resentencing petition, the trial court may not make an eligibility determination contrary to the jury’s verdict and findings. To do so would allow the People, contrary to the Reform Act, to “compensate for any potential evidentiary shortcoming at a trial predating the Act.” (Frierson, supra, 4 Cal.5th at p. 238.) It also would allow a trial court, contrary to Johnson, to “turn[] acquittals and not-true enhancement findings into their opposites.” (Arevalo, supra, 244 Cal.App.4th at p. 853.)

Citing People v. Bradford (2014) 227 Cal.App.4th 1322 (Bradford), respondent argues that the trial court was not constrained by the jury’s acquittals or not-true findings. Respondent’s reliance on Bradford is misplaced. There, the petitioner had argued that the trial court was precluded from making a determination that he was armed during the commission of the offenses targeted in his resentencing petition, as the prosecution “‘neither charged appellant with being armed with a deadly weapon nor was such an enhancement ever found true in relation to any of appellant’s current convictions.’” (Id. at p. 1331.) The appellate court rejected the petitioner’s argument, holding that the Reform Act permitted the trial court to make the eligibility determination on evidence found in the record of conviction. It never addressed the effect of a jury’s acquittal or not-true finding on an arming enhancement on the trial court’s eligibility determination.

Here, appellant was acquitted of all firearm-related charges, and the jury found not true the allegation that he was “armed” in the commission of the offense of evading the police. Respondent argues that the jury’s not-true finding on the arming enhancement does not preclude a determination that appellant was ineligible for resentencing under the “armed” exception in the Reform Act, because the former requires both a facilitative nexus and a temporal nexus, while the latter requires only a temporal nexus. (See People v. Cruz (2017) 15 Cal.App.5th 1105, 1111-1112 [jury’s not-true finding on knife use enhancement does not render defendant eligible for resentencing under the Reform Act].) We agree that as a matter of law, a jury’s not-true finding on an arming enhancement does not necessarily preclude a trial court from making an eligibility determination under the Reform Act that a defendant was armed. In this case, however, the jury’s acquittals constituted findings inconsistent with either a facilitative or temporal nexus between appellant and any firearm. As noted, the jury was presented with evidence about only two firearms -- the .38-caliber handgun found in front of a residence and a .45-caliber handgun never recovered but used in the drive-by shooting. With respect to the .45, the jury acquitted appellant of all related charges, including count 8 (carrying a loaded firearm). With respect to the .38, the jury acquitted appellant of count 5 (being a felon in possession of a firearm). All the firearm-related charges encompassed the same time period as the underlying convictions for evading the police and possession of live ammunition, viz., “[o]n or about January 24, 2001.” The jury’s determinations thus conclusively rejected the claim that appellant was “armed with a firearm” on or about that date. That rejection foreclosed any later finding beyond a reasonable doubt that appellant was “armed with a firearm,” either while evading the police or while in possession of live ammunition. Accordingly, appellant was not ineligible for resentencing under the “armed” exception. 4

Having reversed the trial court’s eligibility determination, we remand the matter to the trial court to exercise its discretion whether to deny resentencing to a defendant who poses an unreasonable danger to the public. “In exercising its

4. Appellant could not be found “armed” under the doctrine of vicarious arming, as appellant’s codefendant was acquitted of all charges. Nor could appellant be found “armed” with “a deadly weapon,” as no evidence suggests that during the chase, appellant drove his vehicle in such a manner as to render the vehicle a deadly weapon.
discretion, the court may consider a wide variety of factors, such as the petitioner’s whole criminal history, including ‘the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes,’ [the] petitioner’s ‘disciplinary record and record of rehabilitation while incarcerated,’ and any other relevant evidence.” (See Frierson, supra, 4 Cal.5th at p. 240.) “‘[T]he facts upon which the court’s finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence.’” (Id. at p. 239, quoting People v. Buford (2016) 4 Cal.App.5th 886, 901.)

**DISPOSITION**

The order denying appellant’s resentencing petition is reversed. The matter is remanded for further proceedings consistent with this opinion.

**CERTIFIED FOR PUBLICATION**

MANELLA, Acting P.J.
COLLINS, J., MICON, J.*

* Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.