

No. 15-118

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**The Morris Tyler Moot Court of Appeals  
at Yale**

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JESUS C. HERNÁNDEZ, ET AL.,

*Petitioners,*

v.

JESUS MESA, JR.,

*Respondent.*

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

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**Brief for Respondent**

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## **QUESTIONS PRESENTED**

- (1) Whether the Fourth Amendment applies to the seizure in Mexico of a Mexican citizen with no prior substantial connection to the United States; and
- (2) Whether a court may grant qualified immunity to an officer when a plaintiff's legal status deprives him of any clearly established constitutional rights.

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## **JURISDICTION**

The en banc circuit court released its decision on April 24, 2015. A petition for certiorari was filed on July 23, 2015. This Court has jurisdiction under 28 U.S.C. § 1254.

## **PROVISIONS INVOLVED**

The Fourth Amendment to the Constitution reads, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Fifth Amendment to the Constitution reads, in part: "No person shall \* \* \* be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

## **STATEMENT**

This case involves a *Bivens* claim of an unusual nature. "[U]nder facts unique to [the Fifth] or any other circuit," Petitioners seek damages from Border Patrol agent Jesus Mesa for alleged violations of the Fourth and Fifth Amendments. *Hernández v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) [hereinafter *Hernández II*]. These alleged violations occurred in Mexico, against a Mexican citizen with no significant ties to the United States. *Ibid*. This Court's decisions in *United States v. Verdugo-Urquidez*, 464 U.S. 259, 269, 274-275 (1990), and *Johnson v. Eisentrager*, 339 U.S. 763, 771, 783-785 (1950), squarely foreclose Fourth and Fifth Amendment claims in such circumstances. For Petitioners to succeed in this case, this Court

would have to abrogate *Verdugo-Urquidez*, confine *Eisentrager* to its facts, change qualified immunity doctrine, and extend *Bivens* to an entirely new context. To do any of these, much less all of them, would be both unwarranted and unwise.

1. “U.S. Border Patrol agents are among the most frequently assaulted law enforcement personnel in the country.” *Border Patrol Limits Deadly Force Against Rock Throwers, Moving Vehicles*, L.A. Times (Mar. 7, 2014), <http://tinyurl.com/o25wt7m>. Between 2006 and 2014, Border Patrol agents endured over 6,000 assaults, ending in the death of three agents. *Ibid.* In 1,713 of these incidents, the individuals were throwing rocks. *Ibid.* Agents had to resort to deadly force in 43 instances during this period. *Ibid.*

Jesus Mesa is a Border Patrol agent stationed near El Paso, Texas. Compl. 11. On June 7, 2010, Agent Mesa responded to a report that a group of suspected illegal immigrants was being smuggled across the border. CNN Wire Staff, *Youth Fatally Shot By Border Agent Had Smuggling Ties, Official Says* (June 10, 2010, 5:52 PM), <http://tinyurl.com/28z8w2u>. Arriving on his bicycle, he encountered Sergio Hernández-Güereca (“Hernández”) and a number of other teenagers running along the cement culvert separating Mexico and the United States, attempting to reach the border fence. Compl. 11. Hernández, who “had a history of involvement with human smuggling,” had been apprehended multiple times by U.S. law enforcement personnel, but was never charged. CNN Wire Staff, *supra*. Hernández was unarmed at the time. Compl. 12.

After Agent Mesa arrived, the suspected smugglers began to pelt him with rocks. U.S. Dep’t of Justice, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (last updated Sept. 15, 2014), <http://tinyurl.com/qddd2k2>. Agent Mesa detained one of the individuals, Compl. 11, but did not handcuff him, CNN Wire Staff, *supra*. A civilian video of the incident shows that the smugglers continued to hurl rocks at Agent Mesa and the individual

he detained. *Ibid.*; U.S. Dep’t of Justice, *supra*. Agent Mesa discharged his weapon at least twice as Hernández retreated; one of the shots hit Hernández. Compl. 11. As U.S. Border Patrol agents are not allowed to cross the border,<sup>1</sup> Agent Mesa and the other agents who arrived on the scene did not render emergency aid, Compl. 12. Mexican police arrived soon after, and pronounced Hernández dead. *Ibid.* Several federal agencies conducted a two-year investigation, which was closed without prosecution. U.S. Dep’t of Justice, *supra*. The agencies also determined that Agent Mesa “did not act inconsistently with CBP policy or training regarding use of force.” *Ibid.*

2. Hernández’s parents, Jesus Hernández and María Guadalupe Güereca Bentacour, sued the United States, Agent Mesa, and unknown federal employees. *Hernández v. United States*, 757 F.3d 249, 255 (5th Cir. 2014) [hereinafter *Hernández I*], adhered to in part on reh’g en banc, 785 F.3d 117. Petitioners’ “tenth claim asserted that Agent Mesa was liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).” *Ibid.* The eleventh alleged that Agent Mesa violated the Alien Tort Statute (“ATS”). *Ibid.*

The district court consolidated the tort claims under the Westfall Act, 28 U.S.C. § 2679 (2012); Petitioners did not dispute that “Agent Mesa was acting in the course and scope of his employment,” *Hernández I*, 757 F.3d at 255-256. The district court granted the United States’ motion to dismiss because it “had not waived sovereign immunity for these claims under either the FTCA or the ATS.” *Id.* at 256. Agent Mesa also moved to dismiss, “asserting qualified immunity and arguing that Hernandez, as an alien injured outside the United States, lacked Fourth or Fifth Amendment protections.” *Ibid.* The district court granted the motion. *Ibid.*

Petitioners appealed. The Fifth Circuit panel held that Hernández could not “invoke the Fourth Amendment.” *Id.* at 266. However, the panel also ruled, 2-1, that Agent Mesa lacked

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<sup>1</sup> See Christopher Sherman & Olivia Torres, Assoc. Press, *Border Patrol Agent Shoots 15-Year-Old Boy At Bridge*, Huffington Post (last updated May 25, 2011, 4:45 PM), <http://tinyurl.com/2a6feot>.

qualified immunity on the Fifth Amendment claim. *Id.* at 277, 280.

The Fifth Circuit granted rehearing en banc. *Hernández v. United States*, 771 F.3d 818 (5th Cir. 2014). The en banc Fifth Circuit unanimously held that “Hernández, a Mexican citizen who had no ‘significant voluntary connection’ to the United States \* \* \* and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment.” *Hernández II*, 785 F.3d at 119 (citation omitted). Likewise, it unanimously held that Agent Mesa had qualified immunity from the Fifth Amendment excessive force claim, because “any properly asserted right was not clearly established to the extent the law requires.” *Id.* at 120.

### **SUMMARY OF ARGUMENT**

I. The Fifth Circuit correctly and unanimously held that the Fourth Amendment does not apply extraterritorially to foreign citizens, such as Hernández, with no substantial connections to the United States. This Court settled the issue of the Fourth Amendment’s extraterritoriality in *Verdugo-Urquidez* by holding that a seizure in Mexico against a Mexican citizen with no prior voluntary connection to the United States does not run afoul of the Fourth Amendment. Even adopting the three-factored approach of *Boumediene v. Bush*, 553 U.S. 723 (2008), the dire national defense and border security repercussions counsel against expanding the Fourth Amendment along the border, and a Court-created *Bivens* remedy is ill-advised here as well.

A. This Court should apply the same test that this Court developed and applied in earlier cases: the substantial connection test. Because Hernández, a Mexican citizen and resident, had no intention of ever becoming part of our national community, he does not receive the protections of the Fourth Amendment in Mexico. Touching the American border fence before retreating back into Mexico is insufficient. The Fourth Amendment’s term “the people” carried with it a limitation to members of our national community. The problems that the Founders tried to rectify

with the Fourth Amendment were primarily domestic, not extraterritorial. As the Court's jurisprudence developed, this Court continued to express its skepticism toward the full application of the Bill of Rights outside our incorporated territory, even for citizens of the United States. At the least, a Mexican citizen such as Hernández has no claim on the Bill of Rights when the seizure occurred on Mexican territory.

B. Even if the Court were to adopt the three-factored test of *Boumediene*, the stark contrast between the highly secure forty-five square miles of Guantanamo Bay and the amorphous proposed Fourth Amendment zone along the two thousand miles of the Mexican border counsels against overextending the reach of the Fourth Amendment. *First*, unlike in *Boumediene*, there is no dispute over the citizenship status of Petitioners, and Petitioners have adequate procedural protections. *Second*, Mexico, not the United States, retains complete control and jurisdiction over where the seizure occurred. *Third*, Petitioners are willing to risk major foreign policy and border security ramifications. Rather than risking the safety of Border Patrol officers and the nation as a whole, this Court should affirm the traditional presumption allowing more stringent protections along national borders.

C. Nor should the Court allow an unprecedented *Bivens* action for extraterritorial actions of American officials. Alternative remedies are available, even if Petitioners refused to seize them. Consistent with the presumption against extraterritoriality, the decision to dramatically expand *Bivens* is best left up to Congress, which might better understand the impact to our drone program and overall national security.

II. As the en banc Fifth Circuit unanimously held, qualified immunity protects Agent Mesa against Petitioners' constitutional claims. Whatever scope this or other courts may decide to give the Fourth and Fifth Amendments going forward, the law in 2010 did not grant Hernández any

clearly established rights under those amendments. This ends the qualified immunity inquiry, regardless of whether Agent Mesa knew of Hernández's legal status. But, even if a court cannot grant immunity directly based on Hernández's legal status, a reasonable officer could have believed that Agent Mesa's conduct was lawful given what Agent Mesa knew at the time.

A. Qualified immunity is an objective inquiry, focused on the law that existed at the time an official's conduct occurred. This inquiry creates a default rule: an official has immunity from suit unless the plaintiff can prove that he had a constitutional right, that the right was clearly established at the time, and that the official violated that right. Plaintiffs may not evade immunity doctrine simply because officials were unaware when they acted that the plaintiffs did not have the rights they now assert. It is the plaintiffs' possession of clearly established rights, and not the officials' knowledge of them, that matters for immunity doctrine.

Petitioners, like the few lower courts that agree with them, rely on a flawed understanding of *Anderson v. Creighton*, 483 U.S. 635 (1987). That case warned judges to analyze searches and seizures based only on the information an officer possessed at the time. This rule, however, does not supplant the plaintiff's duty to show that he had a clearly established right when the official acted. *Anderson* was based on the contours of Fourth Amendment doctrine; qualified immunity is a separate standard that applies to all constitutional claims. Moreover, the *Anderson* rule was designed to *serve* the immunity default: it prevents judges from declaring unlawful in hindsight conduct that was reasonable at the time.

B. Like immunity doctrine itself, the policy underlying the doctrine supports immunizing Agent Mesa in this case. *First*, officers should not be over-deterred from acting when the law would otherwise allow them to, merely because they are unsure of someone's legal status. But Petitioners' rule would do just that. *Second*, the law in 2010 clearly did not extend Fourth and

Fifth Amendment rights to Hernández. Yet Petitioners’ rule would force officers to predict whether a court might change the law in the future *before* they engage in any conduct related to those about whose rights they are unsure. *Third*, the immunity procedure allows courts to quickly decide cases like this one, in which it is difficult to decide whether a right exists but easy to decide that it was not clearly established. Petitioners’ rule would limit this flexibility.

The unique legal status of the border only strengthens these policy arguments. Border Patrol agents must have greater leeway to act in order to safeguard national security and prevent smuggling. For that reason, this Court strikes the constitutional balance between government and individuals differently at the border. For that reason, too, qualified immunity is all the more important at the border. Current doctrine is enough to deter clearly unlawful conduct.

C. Even if courts were unable to grant immunity based on facts unknown to the officer at the time, Agent Mesa would still be entitled to immunity here. Hernández’s location in Mexico, as well as his actions once Agent Mesa arrived, would allow a reasonable officer to conclude that Hernández was a Mexican national without Fourth or Fifth Amendment rights. Agent Mesa could also have reasonably believed—as the multi-agency review found—that his use of force was lawful given the dangerous situation he confronted. This Court should grant him immunity.

## **ARGUMENT**

### **I. The Fourth Amendment Does Not Apply To The Seizure On Mexican-Controlled Land in Mexico Of A Mexican Citizen With No Substantial Connection To The United States**

The unanimous Fifth Circuit correctly applied the holding of this Court in *United States v. Verdugo-Urquidez* that “the Fourth Amendment has no application” to extraterritorial seizures of foreign citizens not part of our national community. 494 U.S. 259, 275 (1990). The facts of the two cases do not differ in any relevant aspect: “At the time of the search, [Hernández] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place

searched was located in Mexico.” *Id.* at 274-275. Nor does the extension of the Suspension Clause to the forty-five square miles of Guantanamo Bay justify the unprecedented expansion of the Fourth Amendment to some unspecified strip of land along the nearly two thousand mile border with Mexico. Mexico, not the United States of America, controls the land where the alleged harm occurred. Further, “never before has a federal court recognized a *Bivens* action for conduct by U.S. officials abroad,” and this Court should tread lightly to avoid major foreign policy repercussions when alternative remedies are available. *Meshal v. Higgenbotham*, No. 14-5194, 2015 WL 6405207, at \*12 (D.C. Cir. Oct. 23, 2015) (Kavanaugh, J., concurring).

**A. This Court has consistently rejected attempts to apply the Fourth Amendment to extraterritorial seizures of foreign individuals with no previous significant voluntary connections to the United States.**

The rule of *Verdugo-Urquidez* bars the extraterritorial application of the Fourth Amendment to the seizure of a Mexican citizen on the sovereign land of Mexico. Just as in *Verdugo-Urquidez*, the seizure occurred in Mexico, “therefore, if there were a constitutional violation, it occurred solely in Mexico.” 494 U.S. at 264. Nevertheless, the Fourth Amendment extends only to “the people,” members of “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265. Sergio Adrián Hernández Güereca was a Mexican citizen and had “no interest in entering the United States” permanently. Compl. 11. Thus, the Fourth Amendment does not cover the seizure of this Mexican citizen.

**1. The relevant location is Mexico because the seizure occurred there.**

For purposes of the Fourth Amendment, “if there were a constitutional violation, it occurred solely in Mexico.” *Verdugo-Urquidez*, 494 U.S. at 264. As this Court reasoned in *Verdugo-Urquidez*, “a violation of the Amendment is ‘fully accomplished’ at the time of an

unreasonable governmental intrusion.” *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974); *United States v. Leon*, 468 U.S. 897, 906 (1984)). As Judge Jones correctly noted, “[a] seizure occurs ‘when there is a governmental termination of freedom of movement through means intentionally applied.’” *Hernández II*, 785 F.3d at 123 (Jones, J., concurring) (quoting *Brower v. Cty. of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis omitted)). Further, “there can be no question that apprehension by the use of deadly force is a seizure.” *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). In this case, the termination of freedom of movement and apprehension occurred in Mexico even though Respondent Mesa was in the United States at the time.

The involvement of American officials on either Mexican or American soil does not trigger the application of the Fourth Amendment just as this Court held in *Verdugo-Urquidez*. In that case, “Mexican police officers, after discussions with United States marshals, apprehended Verdugo-Urquidez in Mexico and transported him to the United States Border Patrol station in Calexico, California.” *Verdugo-Urquidez*, 494 U.S. at 262. United States marshals arrested Verdugo-Urquidez in the United States and kept him incarcerated in the United States until trial. *Ibid.* While Verdugo-Urquidez was awaiting trial, a Drug Enforcement Administration (“DEA”) agent in the United States contacted DEA agents in Mexico and coordinated the searches of Verdugo-Urquidez’s Mexican properties and the subsequent seizures of evidence in Mexico. *Id.* at 262-263. Despite the initiation of these searches and seizures in Mexico by an American DEA agent in the United States, this Court had no qualms in holding that “if there were a constitutional violation, it occurred solely in Mexico.” *Id.* at 264. Even if Mesa caused the seizure, the extraterritorial location is determinative of the Fourth Amendment’s application.

The historical principle of *lex loci delicti* (“law of the place of injury”), which was in effect at the ratification of Fourth Amendment and remained dominant well into the twentieth

century, further confirms that this Court should apply the law where the Mexican citizen was injured. *Hernández II*, 785 F.3d at 125 n.6 (Jones, J., concurring); see also Restatement (First) of Conflict of Laws § 379 (Am. Law. Inst. 1934) (determining defendant’s liability by “the law of the place of the wrong”). As this Court explained in *Sosa v. Alvarez*, “[f]or a plaintiff injured in a foreign country, then, the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor’s liability.” 542 U.S. 692, 706 (2004). Despite the choice-of-law shift beginning in mid-twentieth century New York courts, many states, including Texas, still utilize the traditional principle of *lex loci delicti*. See *id.* at 709 (“[A] good many States still employ essentially the same choice-of-law analysis in tort cases that the First Restatement exemplified.”); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam) (noting that Texas would apply Cambodian law to a wrongful-death action involving the explosion in Cambodia of an artillery round manufactured in United States).

Congress has further confirmed that extraterritorial injuries do not support tort actions in American courts. Interpreting the Federal Tort Claims Act (“FTCA”), this Court held that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” *Sosa*, 542 U.S. at 712. Even though the Mexican citizen’s “abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents in California,” this Court refused to allow this “headquarters exception” to “swallow the foreign country exception whole.” *Id.* at 702-703. *Lex loci delicti* requires this Court to look to the location of the injury itself and not the location of Mesa’s alleged acts even if, as in *Sosa*, American law does not provide a remedy for a Mexican injury. See *id.* at 697 (“We hold that he is not entitled to a remedy under either statute.”).

**2. The Fourth Amendment only applies to “the people” and not to citizens of Mexico who lack prior substantial connections to our national community.**

Unlike the Fifth or Sixth Amendment, the Fourth Amendment is a “right of the people” and does not automatically apply to all foreign citizens in all places, from Abbottabad, Pakistan, to Ciudad Juárez, Mexico. U.S. Const. amend. IV. As this Court held in *Verdugo-Urquidez*, “the people” is not an “awkward rhetorical redundancy” but “a term of art employed in select parts of the Constitution” to “refer[] 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.” 494 U.S. at 265. Textual evidence from other amendments protecting individual rights, public debate of the Fourth Amendment, and early historical practices all confirm this understanding of “the people” as a term of art.

In *Verdugo-Urquidez*, this Court examined the constitutional meaning of “the people” and ruled that this limiting term of art “contrasts with the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments regulating procedure in criminal cases.” *Id.* at 265-266. In addition to the Fourth Amendment’s Search-and-Seizure Clause, “[t]he unamended Constitution and the Bill of Rights use the phrase ‘right of the people’ two other times, in the First Amendment’s Assembly-and-Petition Clause” and the Second Amendment’s Operative Clause. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008). “The Ninth Amendment uses very similar terminology” to refer to rights exercised “in some corporate body.” *Ibid.*; see also U.S. Const. amend. IX (“The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others *retained by the people*.”) (emphasis added). This Court has ruled that an additional three provisions describe “‘the people’ in a context other than ‘rights’—the famous preamble (‘We the people’), § 2 of Article I (providing that ‘the people’ will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with ‘the States’ or ‘the people’).” *Ibid.* What unifies these textual examples

is that the Fourth Amendment and “all six other provisions of the Constitution that mention ‘the people[]’ \* \* \* unambiguously refer[] to all members of the political community.” *Id.* at 580 (citing *Verdugo-Urquidez*, 494 U.S. at 265). Petitioners, Mexican citizens similarly situated as the Mexican defendant in *Verdugo-Urquidez*, have not “developed sufficient connection[s] with this country to be considered part of that community.” 494 U.S. at 265; see also *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (ruling that under the First Amendment, which also uses the term “right of the people,” an excludable alien “does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law”).

All members of the majority in *Verdugo-Urquidez* understood the significance of “the people” and have applied this term of art consistently in subsequent cases despite the Court’s explanation of the Suspension Clause in *Boumediene v. Bush*, 553 U.S. 723 (2008). While Justice Kennedy’s concurrence in *Verdugo-Urquidez* provided additional commentary on “the people,” Justice Kennedy was explicit in stating that “[a]lthough some explanation of my views is appropriate given the difficulties of this case, *I do not believe they depart in fundamental respects from the opinion of the Court, which I join.*” 494 U.S. at 275 (Kennedy, J., concurring in full). Further, “just two weeks after the Court issued *Boumediene*, which [Petitioners] argue essentially overrules *Verdugo-Urquidez*, the Court decided *District of Columbia v. Heller* and favorably cited *Verdugo-Urquidez*’s definition of ‘the people.’” *Hernández I*, 757 F.3d at 265. Justice Kennedy joined the majority opinion in *Heller* entirely, with no concurrence or dissent. 554 U.S. at 572. Thus, consistent with *Verdugo-Urquidez* and *Heller*, this Court should continue to apply the substantial connections test for “rights of the people” and refrain from applying the Fourth Amendment to “some undefined, limitless class of noncitizens who are beyond our

territory.” *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring in full).<sup>2</sup>

In addition to the text, the history of the Fourth Amendment and early cases confirm that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” *Id.* at 266 (majority opinion). James Madison, the original drafter of the Bill of Rights, “argued that ‘there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all of the powers vested in the Government of the United States,’ and that general warrants might be considered ‘necessary’ for the purpose of collecting revenue.” *Ibid.* (quoting 1 *Annals of Cong.* 437 (1789) (statement of James Madison)). To counter “widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods[] and general search warrants permitting the search of private houses,” James Madison and Federalists proposed the Fourth Amendment to placate the domestic concerns of the Anti-Federalists. *Ibid.*

If the Founding Fathers had wanted to extend the Fourth Amendment beyond “the people” and include “all persons,” they could have done so. Indeed, the prominent Anti-Federalist “‘Federal-Farmer,’ who was probably Richard Henry Lee” of Virginia proposed that exact textual arrangement by “extend[ing] the right beyond citizens to ‘all persons.’” William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* at 676 (2009) (quoting Richard Henry Lee, *Letter No. 16* (20 Jan. 1788), *reprinted in* Herbert J. Storing, 1 *The*

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<sup>2</sup> Relying on these decisions, lower “courts have applied the substantial connections test” to determine foreign citizens’ extraterritorial rights. *Hernández II*, 785 F.3d at 125 (Jones, J., concurring); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), vacated, 559 U.S. 131 (2010), reinstated in relevant part, 605 F.3d 1046 (D.C. Cir. 2010); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir.2009); *Atamirzayeva v. United States*, 524 F.3d 1320, 1329 (Fed. Cir. 2008); *United States v. Barona*, 56 F.3d 1087, 1093-94 (9th Cir.1995); see also *United States v. Bravo*, 489 F.3d 1, 9 (1st Cir. 2007) (“[T]he actions of the United States directed against aliens in foreign territory or in international waters are not constrained by the Fourth Amendment.”).

*Complete Anti-Federalist* 459 (1981)). The Federal-Farmer “went beyond the other Antifederalist authors by defining unreasonable searches to include more than general warrants.” *Id.* at 676. James Madison rejected this formulation when drafting the Fourth Amendment and, in light of the concerns about *domestic* searches and seizures, utilized “Pennsylvania’s constitution, however, []as the basis of both ‘the right of the people’ and of the oath or affirmation phrase.” *Id.* at 729 (citing Pa. Const. of 1776, cl. 1, § 10). This textual limitation remained as a constant aspect of the Fourth Amendment throughout the drafting and ratification debates and was no accidental feature of the Fourth Amendment. *Id.* at 694, 697.

In a context similar to the one in this case, [t]here is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters. *Verdugo-Urquidez*, 494 U.S. at 267. “Only seven years after the ratification of the Amendment, French interference with American commercial vessels engaged in neutral trade triggered what came to be known as the ‘undeclared war’ with France.” *Ibid.* In response, “Congress authorized President Adams” in 1798 “to ‘instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas.’” *Ibid.* (quoting An Act Further to Protect the Commerce of the United States § 1, ch. 68, 1 Stat. 578 (1798)). To supplement the then-meager forces of the navy, “Congress also gave the President power to grant to the owners of private armed ships and vessels of the United States ‘special commissions’” allowing them to seize French vessels and recapture formerly American ships. *Ibid.* (quoting An Act Further to Protect the Commerce of the United States § 2, ch. 68, 1 Stat. at 579).

However, when the owners of these seized ships brought suit against the privateers for unlawful seizures, “it was never suggested” by either the owners of the ships nor this Court “that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this.” *Id.* at 268. This Court instead based its rulings solely on the text of the statute. See, e.g., *Little v. Barreme*, 6 U.S. 170, 171, 177-178 (1804) (focusing on the congressional grant of authority). When the Court upheld the searches and seizures as lawful, the Court focused on the text of the Act Further to Protect the Commerce of the United States, even when it did “not appear that there was evidence on board to ascertain [the] character” of the seized ship. *Talbot v. Seeman*, 5 U.S. 1, 32 (1801) (upholding the seizure of a ship when the privateer knew only that the ship “was an armed vessel commanded and manned by Frenchmen”). While the Court did not squarely decide the extraterritorial application of the Fourth Amendment at the time, the parties and the Court understood the Fourth Amendment as inapplicable to searches of foreign vessels in international waters, a principle still in use in American courts. See, e.g., *United States v. Bravo*, 489 F.3d 1, 8 (1st Cir. 2007) (“The Fourth Amendment does not apply to activities of the United States against aliens in international waters.”).

The term “right of the people,” the drafting and ratification history of the Fourth Amendment, and early cases involving extraterritorial seizures all confirm that foreign citizens must demonstrate a “previous significant voluntary connection with the United States,” which Petitioners have not pled, in order to fall under the Fourth Amendment’s protection. *Verdugo-Urquidez*, 494 U.S. at 271.

**3. The Fourth Amendment does not apply extraterritorially to Petitioners who are Mexican citizens affected by a seizure that occurred in Mexico.**

This Court has consistently refused to extend the Fourth Amendment beyond our nation’s

territorial bounds, particularly when the seized individual is not an American citizen, and Petitioners in this case, who have never even attempted to participate in our “national community,” are no different. *Id.* at 265. “The Constitution does not require the United States, as a condition of applying its laws to its own citizens and residents, to be courthouse or law maker for the world.” *Vaz Borrhalho v. Keydril Co.*, 696 F.2d 379, 390 (5th Cir. 1983), overruled on other grounds, *In re Air Crash Disaster Near New Orleans, La.* 821 F.2d 1147 (5th Cir. 1987). This Court has ruled that “not every constitutional provision applies to governmental activity even where the United States has sovereign power.” *Verdugo-Urquidez*, 494 U.S. at 268. “If that is true with respect to territories ultimately governed by Congress, [Petitioners’] claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker.” *Ibid.*

The first example of this Court’s skepticism toward applying the Bill of Rights outside of our nation’s incorporated territory is the Insular Cases, which held that not every constitutional provision applies to governmental activity “even where the United States has sovereign power.” *Ibid.* For instance, in the case of *Dorr v. United States*, 195 U.S. 138 (1904), this Court “declared the general rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt ‘a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated,’” *Verdugo-Urquidez*, 494 U.S. at 268 (quoting *Dorr*, 195 U.S. at 149). This Court continued to limit application of the Bill of Rights outside of incorporated American territory by ruling that the Sixth Amendment jury trial right was inapplicable in Puerto Rico, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); holding that the Fifth Amendment grand jury right was inapplicable to the Philippines, *Ocampo v. United States*, 234 U.S. 91 (1914); and determining that both of these Fifth and Sixth Amendment rights did not apply in Hawaii, which

was not a state at the time, *Hawaii v. Mankichi*, 190 U.S. 197 (1903). If Constitutional provisions lacking limitations to “the people” were inapplicable in unincorporated territories such as Hawaii, Puerto Rico, and the Philippines, then the Fourth Amendment cannot apply to seizures in Ciudad Juárez, Mexico, which is in no ways “clearly destined for statehood.” *Verdugo-Urquidez*, 494 U.S. at 268.

Further, this Court has “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *Id.* at 269. “In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions.” *Ibid.* Although each foreign citizen “has been accorded a generous and ascending scale of rights as he increases his identity with our society,” “[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment.” *Eisentrager*, 339 U.S. at 770, 784. Nevertheless, “[n]o decision of this Court supports such a view.” *Ibid.*<sup>3</sup> “If such is true of the Fifth Amendment, which speaks in the relatively universal term of ‘person,’ it would seem even more true with respect to the Fourth Amendment, which applies only to ‘the people.’” *Verdugo-Urquidez*, 494 U.S. at 269.

Finally, despite determining that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens,” this

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<sup>3</sup> As discussed *infra*, the subsequent decision in “*Boumediene* was expressly limited to holding that the Suspension Clause, art. I, § 9, cl. 2 of the Constitution, applies to enemy combatants detained in the Guantanamo Bay, Cuba, military facility” and did not extend to foreign territory, such as Ciudad Juárez, Mexico, under the control and sovereignty of a foreign power. *Hernández II*, 785 F.3d at 126 (Jones, J., concurring).

Court has at times restricted the constitutional rights of *American citizens* abroad. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). For example, *Reid v. Covert*, 354 U.S. 1 (1957) “involved an attempt by Congress to subject the wives of American servicemen to trial by military tribunals without the protection of the Fifth and Sixth Amendments,” *Verdugo-Urquidez*, 494 U.S. at 269. Although a four Justice plurality would have held broadly “that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments,” Justices Frankfurter and Harlan cast the determining votes and concurred only in the result. *Id.* at 270. Their concurrences “resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions.” *Ibid.*; see *Reid*, 354 U.S. at 65 (Harlan, J., concurring in the result) (“I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces over-seas in times of peace.”).

Thus, this Court has left open the possibility that, in non-capital prosecutions, even citizens of the United States do not possess the full array of constitutional protections abroad. However, even under the broader reading of the *Reid* plurality, since Petitioners are “not [] United States citizen[s], [t]he[y] can derive no comfort from the *Reid* holding.” *Verdugo-Urquidez*, 494 U.S. at 270. If the criminal defendant in *Verdugo-Urquidez*, who was physically in the United States when DEA agents in the United States coordinated the search and seizure by American officials in Mexico, had no substantial connection to the United States, then neither does a Mexican civil plaintiff who experienced the seizure while in Mexico.

**B. The Fourth Amendment does not apply to the seizure of a Mexican citizen occurring in territory controlled by and under the jurisdiction of Mexico.**

Even if this Court were to reject the substantial connections test that *Verdugo-Urquidez*

mandated for the Fourth Amendment's application, the three-factored test of *Boumediene* also requires this Court to affirm the Fifth Circuit's reluctance to apply the Fourth Amendment to some ill-defined plot of Mexican-controlled land along Mexico's nearly two thousand mile border with our country. In *Boumediene*, the Court delineated "at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 553 U.S. at 766. While this test tailored for the Suspension Clause, particularly the first factor, is less useful outside of the habeas context, Ciudad Juárez is entirely under Mexican control, and expanding the Fourth Amendment to such foreign-controlled territory would have foreign policy and border security repercussions far beyond the contained forty-five square miles of Guantanamo Bay.

**1. Petitioners' Mexican citizenship is not in doubt, and Petitioners had more than adequate procedures for challenging Agent Mesa's conduct.**

Unlike in *Boumediene*, the status of Petitioners is "not a matter of dispute." *Ibid.* Petitioners agree that Sergio Adrián Hernández Güereca, Jesus Hernández, and María Guadalupe Güereca Bentacour have always been Mexican citizens. Compl. 9-10. Like *Eisentrager* and unlike *Boumediene*, there is no dispute over the "enemy combatant[]" status of Petitioners. *Boumediene*, 553 U.S. at 766. This disconnect between the emphases of the first *Boumediene* factor and the inquiries relevant for Fourth Amendment purposes is emblematic of the inability of the functionalist *Boumediene* test to cope with the formal requirements of the Fourth Amendment. "Even a defender of [the *Boumediene* test] acknowledges the need for refinements of the three-factor functional test if *Boumediene* is brought to bear on other constitutional provisions." *Hernández II*, 785 F.3d at 127 n.8 (Jones, J., concurring) (citing Gerald L. Neuman,

*The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 287 (2009) (“This nonexclusive [three-factor test] was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights.”)).

Throughout *Boumediene*, the Court emphasized the importance of maintaining “adequacy of the process” by which incarceration is reviewed, a concern unique to habeas corpus. 553 U.S. at 766. In fact, the Court distinguished the Suspension Clause as an essential element of the U.S. Constitution because “protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.” *Id.* at 739. “[T]he writ had a centrality that must inform proper interpretation of the Suspension Clause” as distinct and broader in its protections than the Fourth Amendment. *Ibid.* In contrast to the Fourth Amendment’s rigid terms of art, habeas corpus is “above all, an adaptable remedy,” with the Great Writ’s “precise application and scope changed depending upon the circumstances.” *Id.* at 779. Further, unlike habeas corpus, the Fourth Amendment protects defendants in the criminal context *and* “applies in the civil context as well,” where procedural requirements are often laxer. *Soldal v. Cook Cty.*, 506 U.S. 56, 67 (1992); compare U.S. Const. amend. VI (providing “the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” for “all criminal prosecutions”), with U.S. Const. amend. VII (ensuring only “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”).

Even if the Court does treat the Fourth Amendment as requiring additional procedure reminiscent of the habeas writ, Petitioners concede that they “filed an administrative claim for damages against the United States Department of Homeland Security on behalf of Decedent on June 23, 2010.” Compl. 8. The claim was denied, but “[n]umerous federal agencies, including

the FBI, the Department of Homeland Security's Office of the Inspector General, the Justice Department's Civil Rights Division, and the United States Attorney's Office, investigated this incident and declined to indict Agent Mesa or grant extradition to Mexico under 18 U.S.C. § 3184." *Hernández II*, 785 F.3d at 132 (Jones, J., concurring). Petitioners also failed to take advantage of "other possible avenues for evaluation of Agent Mesa's conduct" such as "federal court review of the Attorney General's scope of employment certification under the Westfall Act." *Id.* at 132-133. There is no need to expand the available procedure further when Petitioners do not contest the citizenship status and have failed to utilize already available procedures.

**2. Unlike Guantanamo Bay, the United States has neither absolute nor indefinite control of Mexican land along its border with the United States.**

The seizure occurred on Mexican land controlled by Mexico. Compl. 11-12 (noting that the Hernández had been standing "on his native soil of Mexico" when he was seized). Because the seizure occurred "outside the sovereign territory of the United States," the second factor "weighs against finding [Petitioners] have rights under the" Fourth Amendment. *Boumediene*, 553 U.S. at 768. Additionally, the relevant area "beneath Paso del Norte Bridge in the Territory of Mexico" was under Mexican control. Compl. 12. Accordingly, Mexican police and emergency services responded to the scene lest the United States violate Mexican sovereignty. *Ibid.*

In these aspects, the location of the seizure, Ciudad Juárez, Mexico, is more reminiscent of Germany in *Eisentrager* than Guantanamo Bay in *Boumediene*. Like the prison in Germany and "unlike its present control over the naval station" at Guantanamo Bay, "the United States' control over" Ciudad Juárez, Mexico, is "neither absolute nor indefinite." *Boumediene*, 553 U.S. at 768. Similar to occupied Germany, which was "under the jurisdiction of the combined Allied Forces," Ciudad Juárez is under the exclusive jurisdiction of Mexico, not the United States. *Ibid.* "Consistent with the Insular Cases," the United States does "not intend to govern indefinitely,"

nor at all, in Ciudad Juárez. *Ibid.* Unlike Guantanamo Bay, Ciudad Juárez is not “within the constant jurisdiction of the United States,” and thus the second factor weighs heavily against extending the Fourth Amendment to this extraterritorial context. *Id.* at 769.

**3. Expanding the Fourth Amendment into a vast yet indeterminate portion of Mexico would dramatically weaken our border security.**

Unlike *Boumediene*'s limited expansion of the Suspension Clause to “45 square miles of land and water” at the secured United States Naval Station at Guantanamo Bay, Petitioners propose encroaching into an unspecified amount of land along the two thousand miles dividing the United States and Mexico. *Id.* at 770. At Guantanamo Bay, “other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers.” *Ibid.* Not so for Ciudad Juárez and the rest of the border. “The 2,000-mile-long border between Mexico and the United States is the busiest in the world, with over 350 million crossings per year.” *Hernández I*, 757 F.3d at 266-267 (quoting Br. of Gov't of the United Mexican States as Amicus Curiae in Support of Appellants, 2). As the presence of the Mexican teenagers demonstrates, the culvert is no closed off area of Mexico inaccessible to Mexican citizens. Compl. 11. The exertion of “influence over northern Mexico” does not justify creating an amorphous Fourth Amendment zone as Judge DeMoss astutely observed:

If the fact that the United States exerts and has exerted powerful influence over northern Mexico, justifies application of the Fifth Amendment in a strip along the border, how wide is that strip? Is the Fifth Amendment applicable in all of Ciudad Juarez or even the entire state of Chihuahua? Ultimately, the majority's approach devolves into a line drawing game which is entirely unnecessary because there is a border between the United States and Mexico.

*Hernández I*, 757 F.3d at 281 (DeMoss, J., concurring in part and dissenting in part) (internal quotation marks and citation omitted).

Such an unprecedented policy would run afoul of this Court's tradition of allowing

broader search powers along our borders because “national self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.” *Almeida–Sanchez v. United States*, 413 U.S. 266, 272 (1973) (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)) (internal quotation marks omitted). The border is no “secure prison facility located on an isolated and heavily fortified military base.” *Boumediene*, 553 U.S. at 770. From 2007 to March 2014, there were “over 6,000 assaults against Border Patrol agents resulting in numerous injuries to our agents and the tragic death of agents.” *Border Patrol Limits Deadly Force*, *supra*. Additionally, from 2010 to March 2014, “agents ha[d] been assaulted with rocks 1,713 times.” *Ibid*. To counter increasing border security difficulties, the Department of Homeland Security now monitors the border with advanced technology “including mobile surveillance units, thermal imaging systems, and large- and small-scale non-intrusive inspection equipment,” as well as “124 aircraft and six Unmanned Aircraft Systems operating along the Southwest border.” *Border Security, Economic Opportunity, and Immigration Modernization Act: Hearing on S. 744 Before the S. Comm. on the Judiciary*, 113th Cong. 6-7 (2013). Expanding the Fourth Amendment’s protections along the border might undermine these programs and weaken national security. Cf. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (restricting use of “a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion”).

The three-factored *Boumediene* test confirms that expanding the Fourth Amendment to an indeterminate portion of Mexico along our border (1) is unnecessary when citizenship is agreed upon and adequate procedures are available; (2) fails to respect long-term Mexican control and sovereignty; and (3) would weaken national and border security.

**C. This Court should reject the unprecedented extension of *Bivens* to extraterritorial seizures by American officials due to the major foreign policy ramifications**

**and existence of alternative remedial schemes.**

As the D.C. Circuit recently ruled, “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*, 2015 WL 6405207, at \*6. This Court should refuse to expand *Bivens* to extraterritorial seizures due to the availability of alternative administrative and judicial remedies; the concerning impact to foreign policy and national security; and the presumption against extraterritoriality absent clear action by Congress.

“The first question is whether to devise a new *Bivens* damages action” to supplement existing “administrative and judicial remedies available.” *Wilkie v. Robbins*, 551 U.S. 537, 549 (2007). As mentioned *supra*, Petitioners failed to take advantage of “other possible avenues for evaluation of Agent Mesa’s conduct” such as “federal court review of the Attorney General’s scope of employment certification under the Westfall Act.” *Hernández II*, 785 F.3d at 132-133 (Jones, J., concurring). In addition to the investigations by numerous agencies, Petitioners did file “an administrative claim for damages against the United States Department of Homeland Security on behalf of Decedent on June 23, 2010.” Compl. 8. “In sum, Petitioners ha[ve] an administrative, and ultimately a judicial, process for vindicating virtually all of [their] complaints.” *Wilkie*, 551 U.S. at 553.

“[F]or *Bivens* step two” this Court must “weigh[] reasons for and against the creation of a new cause of action,” and the foreign policy and national security interests weigh decisively against creating a *Bivens* action for extraterritorial seizures, even when the American actor is on United States land. *Id.* at 554. “The rule” advocated by Petitioners “would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in ‘searches or seizures.’” *Verdugo-Urquidez*, 494 U.S. at 273. While this cross-border incident

might seem like an aberration, drone operators are frequently based in the United States and target terrorists around the globe. “Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.” *Id.* at 273-274. As this Court anticipated, even if “a *Bivens* action might be unavailable in some or all of these situations,” “the Government would still be faced with case-by-case adjudications concerning the availability of such an action.” *Id.* at 274. Due to these serious foreign policy and national security concerns, several circuit courts have refused to grant *Bivens* actions for extraterritorial actions of American officials against both American and foreign citizens. See *Meshal*, 2015 WL 6405207; *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). This Court should similarly refrain from extending *Bivens* to this extraterritorial context.

As this Court has ruled in previous cases, “any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation.” *Wilkie*, 551 U.S. at 562. “Congress is in a far better position than a court to evaluate the impact of a new species of litigation” against Border Patrol officers. *Bush v. Lucas*, 462 U.S. 389 (1983). Additionally, a well-accepted principle of textual analysis stipulates a presumption against extraterritoriality. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (presumption against extraterritoriality applies to Alien Tort Statute); *Sosa*, 542 U.S. at 732 (plaintiff's claim for “arbitrary arrest and detention” failed to state a violation of the law of nations with requisite “definite content and acceptance among civilized nations”). Although the Court acknowledged without deciding the *Bivens* issue in *Verdugo-Urquidez*, the Court determined that “even were *Bivens* deemed wholly inapplicable in cases of foreign activity, that would not obviate the problems attending the application of the Fourth Amendment

abroad to aliens” because “[t]he Members of the Executive and Legislative Branches are sworn to uphold the Constitution.” 494 U.S. at 274. For that reason, this Court should presume that neither *Bivens* nor the Fourth Amendment itself apply extraterritorially to foreign citizens without substantial connection to the United States.

## **II. Agent Mesa May Receive Qualified Immunity Because Hernández Had No Clearly Established Fourth or Fifth Amendment Rights At The Time Agent Mesa Acted**

Whether or not Hernández has a valid Fourth Amendment claim—or, for that matter, a Fifth Amendment due process claim—those rights were not clearly established when Agent Mesa acted. *Hernández II*, 785 F.3d at 120. Agent Mesa is therefore entitled to qualified immunity. Petitioners would require courts to ignore facts showing that plaintiffs did not have clearly established rights, based solely on when the official discovered those facts. Such a rule finds no support in this Court’s cases. It also runs counter to the policy interests behind immunity—interests that are all the more potent because of the unique legal status of the border. Even under Petitioners’ proposed rule, moreover, Agent Mesa could reasonably have believed that his actions were lawful. Agent Mesa is therefore immune from suit.

### **A. Qualified immunity doctrine allows courts to consider facts relevant to whether plaintiffs had clearly established rights at the time the officer acted.**

The immunity analysis in this case begins—and ends—with existing law. Government officials receive qualified immunity for discretionary actions unless a plaintiff can prove (1) that the official “violated a statutory or constitutional right,” and (2) that the right “was clearly established at the time of the challenged conduct.” *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). Petitioners cannot meet this “exacting standard.” *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). Petitioners claim that Agent Mesa used “excessive deadly force” in violation of both the Fourth and Fifth Amendments. Compl. 25. These bare

claims of excessive force do not suffice for qualified immunity purposes; a right cannot be defined at such a “high level of generality.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Rather, a court must evaluate Hernández’s clearly established rights “in light of the specific context of the case,” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)—a case involving “facts unique to [the Fifth] or any other circuit,” *Hernández II*, 785 F.3d at 119.<sup>4</sup>

Viewed in this way, it is clear that Agent Mesa has immunity on both claims. First, this Court has said that all excessive force claims must be brought under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Petitioners’ Fifth Amendment claim therefore fails. But even if both claims remained viable, Petitioners cannot assert them. “It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). As a Mexican citizen with no ties to the United States, Hernández had no Fourth or Fifth Amendment rights in Mexico. *See supra* Part I. Certainly any such rights were not clearly established in 2010.<sup>5</sup> 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*, 2015 WL 6405207, at \*6. As the en banc Fifth Circuit unanimously held, Agent Mesa is entitled to immunity. *Hernández II*, 785 F.3d at 120.

**1. Qualified immunity doctrine creates a default rule based on the *law* at the time of the action taken.**

Petitioners attempt to complicate this analysis, claiming that an official cannot receive

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<sup>4</sup> The Fifth Circuit has more narrowly defined Petitioners’ Fifth Amendment claim as “that Agent Mesa showed callous disregard for Hernandez’s Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat.” *Hernández II*, 785 F.3d at 120.

<sup>5</sup> See, e.g., *Hernández II*, 785 F.3d at 121; *Hamad v. Gates*, 732 F.3d 990, 1005 (9th Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014); *Hedges v. Obama*, 724 F.3d 170, 194 (2d Cir. 2013), cert. denied, 134 S. Ct. 1936 (2014); *Ali v. Rumsfeld*, 649 F.3d 762, 771-72 (D.C. Cir. 2011).

immunity based on someone's legal status unless he knew that status at the time he acted. Such a requirement, however, runs headlong into established immunity doctrine. This Court's cases lay out a simple rule: "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); accord. *Camreta v. Greene*, 131 S. Ct. 2020, 2030-2031 (2011). Immunity is the default. A plaintiff can overcome the presumption against liability only by showing that he has a constitutional or statutory right, that the defendant violated that right, and that the right was clearly established when the defendant acted. *Al-Kidd*, 131 S. Ct. at 2080.

This default rule bars Petitioners' claims. Because of Hernández's legal status, he had no clearly established constitutional rights for Petitioners to assert. That Agent Mesa did not know about Hernández's status on June 7, 2010 does not change this simple truth. A fact that forecloses a plaintiff's claim does not become irrelevant merely because the official was unaware of that fact at the time he acted. Immunity is a "purely legal question," *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), "assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken," *Anderson*, 483 U.S. at 639. A plaintiff who did not have a clearly established *legal* right at the time the official acted cannot exploit the official's *factual* ignorance to evade qualified immunity doctrine. "If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau*, 543 U.S. at 198. Because Hernández had no clearly established constitutional rights when Agent Mesa acted, Agent Mesa has immunity.

The broader legal aim of qualified immunity likewise allows courts to consider facts like Hernández's legal status. The immunity analysis is meant to determine "whether the officer had fair notice that her conduct was unlawful." *Ibid*. To lose the protection of immunity, an officer

must know that he is violating the law when he acts, or else the law must be so clear that he should have known his conduct was illegal. See *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). This inquiry depends solely on the *law* existing at the time. If an individual had no clearly established right to be free from the officer’s actions, then the officer could not have had fair notice that his conduct was unlawful—because it was not, in fact, unlawful.

Petitioners’ proposed rule would thus have a perverse effect on qualified immunity doctrine. Officers are protected by immunity, for instance, whenever they make a mistake of fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Therefore, had Agent Mesa reasonably believed that Hernández was a Mexican citizen without constitutional rights, and it turned out that he was an American citizen, Agent Mesa would receive immunity for his mistake. Yet, under Petitioners’ rule, a court could deny Agent Mesa immunity if it thought he did not have enough information to make a definitive judgment about Hernández’s legal status—even though Hernández in fact *was* a Mexican citizen. To do this would be to subject Agent Mesa to the burdens of litigation for behavior that was legal at the time he acted. This turns immunity doctrine on its head. That none of the seventeen judges who heard this case mentioned the contemporaneous fact requirement shows how foreign it is to qualified immunity law.<sup>6</sup>

## **2. None of this Court’s cases support Petitioners’ rule.**

A few lower court cases follow Petitioners’ paradoxical rule, but they do so under a mistaken impression of this Court’s immunity jurisprudence.<sup>7</sup> As this Court said in *Anderson v. Creighton*, and has repeated since, the reasonableness of an officer’s search or seizure should be examined in light of the information the officer possessed when he acted. 483 U.S. at 641; see

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<sup>6</sup> The two panel judges who initially endorsed Petitioners’ rule, *Hernández I*, 757 F.3d at 279, determined “with the benefit of further consideration” that Agent Mesa should receive immunity, *Hernández II*, 785 F.3d at 120.

<sup>7</sup> See *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005); *McDonald ex rel. McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992); *Rodriguez v. Swartz*, No. 4:14-CV-02251-RCC, slip op. at 20-21 (D. Ariz. July 9, 2015).

*Saucier v. Katz*, 533 U.S. 194, 209 (2001), overruled on other grounds, *Pearson*, 555 U.S. 223. However, this is because “the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.” *Anderson*, 483 U.S. at 641. This is an inquiry based on what is needed for an officer to apply the Fourth Amendment’s reasonableness test, not on the requirements of qualified immunity doctrine itself.

An officer cannot claim that a stop was reasonable because a suspect had a gun, for instance, when the officer did not discover the gun until after he stopped the suspect. But the suspect in that case already had a right to be free of unreasonable seizures; the officer thus had to have a reasonable basis to stop the suspect before doing so. See, e.g., *Carmichael v. Vill. of Palatine*, 605 F.3d 451, 459-460 (7th Cir. 2010). That is different from this case, in which Hernández did not have a clearly established right when Agent Mesa acted. Whether a plaintiff had a clearly established right and whether an officer violated that right are two separate inquiries. Even in the excessive force context, “the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used.” *Saucier*, 533 U.S. at 197. Facts that may not be considered in a Fourth Amendment reasonableness analysis may nevertheless be considered when deciding whether the plaintiff had any Fourth Amendment rights in the first place.

Indeed, this Court has repeatedly “emphasized that the doctrine of qualified immunity reflects a balance that has been struck across the board.” *Anderson*, 483 U.S. at 642-643; accord. *Saucier*, 533 U.S. at 204; *Mitchell*, 472 U.S. at 527-528 (1985). To import a contemporaneous knowledge requirement into qualified immunity doctrine would force courts to apply that requirement to all statutory and constitutional rights. Courts would have to ignore even

characteristics that prevented a plaintiff from possessing, at the time the officer acted, the right he claims. To require such willful blindness would significantly degrade qualified immunity. It would be particularly harmful in situations where the merits of a constitutional claim are more difficult, so that the officers would be forced to litigate the contours of legal rights about which they could not have had fair warning.

Moreover, the contemporaneous knowledge rule outlined in *Anderson* was designed to serve the immunity default rule, not to undermine it. This Court has recognized that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Saucier*, 533 U.S. at 205. For that reason, the Court has “cautioned against the ‘20/20 vision of hindsight’ in favor of deference to the judgment of reasonable officers on the scene.” *Ibid.* Judges should not declare officers’ otherwise lawful decisions to be illegal based on factors of which they were unaware when they acted. But this does not mean that the court below should have ignored Hernández’s legal status—the key to deciding whether he had a clearly established right—merely because Agent Mesa was unsure of that status. *Anderson*’s contemporaneous knowledge requirement is a tool of deference, not a trap for the less-than-fully informed.

**B. The policy considerations that underlie qualified immunity doctrine counsel in favor of considering Hernández’s legal status.**

Just as doctrine supports Agent Mesa’s claim for qualified immunity, so too does the policy behind the doctrine. Immunity is based on three interrelated interests. First, it is designed to balance plaintiffs’ right to seek damages against “the need to protect officials who are required to exercise their discretion.” *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Second, it prevents officials from having to “anticipate subsequent legal developments.” *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998). Third, as the Court noted in rejecting *Saucier*’s “rigid order of battle,” it is

sometimes wasteful or unwise to decide constitutional issues on the merits when there was no clearly established right at the time an officer acted. *Pearson*, 555 U.S. at 234, 236-242. All three of these interests strengthen Agent Mesa's claim for immunity. These interests are all the more compelling here because the events took place in the unique legal environment at the border.

**1. Petitioners' rule would deter officers from making swift decisions, force officials to anticipate legal changes, and mire courts in difficult constitutional questions.**

Granting qualified immunity to those in Agent Mesa's position would further the policy considerations that govern immunity doctrine. Conversely, Petitioners' contemporaneous fact requirement would undermine them. This reality reinforces Agent Mesa's immunity claim.

*First*, qualified immunity shields Agent Mesa from having to defend himself in court for actions that did not violate Hernández's clearly established rights. The common law has long recognized that governments actors should not be "unduly hampered and intimidated in the discharge of their duties' by a fear of personal liability." *Filarsky v. Delia*, 132 S. Ct. 1657, 1661-62 (2012) (citation omitted). Qualified immunity prevents this, by "recogniz[ing] that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). There is both a personal and a societal element to this interest. On a personal level, it enables officers to speedily end lawsuits. This precludes officers from having to spend time and money on discovery and trial when a plaintiff cannot allege a violation of a clearly established right. *Siegert*, 500 U.S. at 232. Petitioners cannot allege that Hernández had any Fourth or Fifth Amendment rights that were clearly established when Agent Mesa acted. This fact depends on the law and Hernández's citizenship as they existed in 2010, and not on when Agent Mesa discovered Hernández's legal status. Agent Mesa should thus be spared the burdens of further litigation.

The societal benefits of qualified immunity likewise counsel against Petitioners' contemporaneous knowledge rule. Bringing lawsuits against government officials without fair notice that their actions violated someone's rights creates costs for society as a whole. These costs include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"—as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814. While damages actions are meant to deter illegal conduct, qualified immunity guards against over-deterrence. At the same time, immunity "encourages participation in government, allows courageous action in public service, and provides officials with the freedom to concentrate on their public responsibilities." *United States v. Stanley*, 483 U.S. 669, 695 (1987) (Brennan, J., concurring in part and dissenting in part).

It is important to deter law enforcement officials, including Border Patrol officers, from needlessly using force. But denying officers immunity because they did not know a suspect's legal status—even when the suspect had no clearly established rights to assert—creates a powerful incentive not to act. Officers, fearing liability, will be less willing to take action without gathering all possible information about a suspect's rights, even when action would be in the public interest. Petitioners' rule would have a negative effect, not only on border control, but also on other areas of national security in which officials may need to act with only limited information about the ties someone might have to the United States. It may force courts to wade into the issue of "signature strikes," for example, which involve targeting of unknown individuals based solely on their activities. See Margaret Hu, *Biometric ID Cyber-surveillance*, Ind. L.J. 1475, 1493 n.95 (2013). Under current doctrine, officials who target individuals with no

ties to the United States would receive immunity, because the victims had no clearly established rights when targeted. Under Petitioners' rule, however, those officials would have to litigate whether the victims should gain new rights. The threat of lawsuits could deter officers from making decisions vital to national security. Current law strikes the proper balance, deterring officials from acting where they reasonably believe they would violate another's rights.

*Second*, qualified immunity relieves Agent Mesa from having to predict changes in Fourth and Fifth Amendment law. Immunity doctrine recognizes that “the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action.” *Will v. Hallock*, 546 U.S. 345, 353 (2006). This is in part because ending such cases early prevents over-deterrence. However, this Court has also recognized that it is “unfair[.]”to “impos[e] liability on a defendant who ‘could not reasonably be expected to anticipate subsequent legal developments.’” *Crawford-El*, 523 U.S. at 590 (citation omitted).

In this case, Agent Mesa acted in the shadow of this Court's cases in *Verdugo-Urquidez*, 464 U.S. at 269, 274-275, and *Eisentrager*, 339 U.S. at 771, 783-785, which made clear that individuals without significant ties to the United States have no Fourth or Fifth Amendment rights outside of the United States. The Fifth Circuit below confirmed this rule as applied to the Fourth Amendment. *Hernández II*, 785 F.3d at 119. And, as the en banc court unanimously concluded, “[n]o case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment.” *Id.* at 120. Under established immunity doctrine, this is enough. See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527, 531-532 (D.C. Cir. 2009). Agent Mesa should not have had to predict, in 2010, whether a court might someday grant new constitutional rights to someone in Hernández's position.

*Third*, qualified immunity doctrine frees the Fifth Circuit to decide this case on “clearly established law” grounds. In *Pearson v. Callahan*, this Court overruled its requirement from *Saucier v. Katz* that courts decide the merits of plaintiffs’ constitutional claims before deciding whether those rights were clearly established. 555 U.S. at 236. The Court abandoned *Saucier*’s “rigid order of battle,” *id.* at 234, in part to allow courts to avoid making new constitutional law when it is unnecessary to decide a case, *id.* at 241. Additionally, *Pearson* frees judges from having to decide constitutional questions when “it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” *Id.* at 237. The instant case is exactly the sort for which *Pearson* was designed: the en banc Fifth Circuit was “somewhat divided” on whether to recognize a new Fifth Amendment right for Hernández, but easily determined that any such right was not clearly established in 2010. *Hernández II*, 785 F.3d at 120-121. Under current qualified immunity doctrine, the Fifth Circuit was free to take Hernández’s legal status into account and make the easy decision first.

Petitioners’ rule, on the other hand, would undermine *Pearson*. Courts would be unable to consider facts that are crucial to determining whether a plaintiff’s right was clearly established when the officer acted, simply because the officer was unaware of them at the time. In such cases, a court might be forced to “depart[] from the general rule of constitutional avoidance” and decide the plaintiffs’ constitutional claims on the merits. *Pearson*, 555 U.S. at 241. This could turn easy qualified immunity cases into difficult constitutional cases. Moreover, in fact-intensive areas like Fourth Amendment law, such a standard would often “place[] the question of immunity in the hands of the jury,” when “[i]mmunity ordinarily should be decided by the court long before trial.” *Hunter*, 502 U.S. at 228. This is the very situation that *Pearson* was meant to avoid. The Fifth Circuit should not have to wade into constitutional waters to decide this case.

## **2. The unique status of the border further supports Agent Mesa’s immunity claim.**

These policy considerations speak even more strongly in this case, because the actions at issue took place at the Mexican border. This Court has expressed a “longstanding concern for the protection of the integrity of the border.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Searches and seizures are necessary there, both to prevent smuggling of contraband and to safeguard national security. See *id.* at 537; *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Thus, “the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border,” and “the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border.” *Montoya de Hernandez*, 473 U.S. at 538, 540.

For this same reason, qualified immunity is all the more important for actions taken to defend the border. In some cases, including this one, a reasonable officer could believe that an individual on the Mexican side of the border is a Mexican citizen. See *infra* Part II.C. However, this would not always be true. Petitioners’ rule could thus create a “systematic disincentive to [act] in situations where \* \* \* [action] would serve an important societal interest.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001). “Further, and somewhat perversely, the disincentive to [act] produced by [Petitioners’] standard would be most pronounced in the very situations in which \* \* \* officers can least afford to hesitate: when acting on the spur (and in the heat) of the moment.” *Id.* at 351 n.22. A Border Patrol agent will find it difficult to ask individuals about their legal status while they pelt him with rocks, or while they attempt to hop the border fence. It is in these situations where over-deterrence of official action is most worrisome, and where it would be most likely to occur under Petitioners’ rule.

This is not to say that deterrence of official misconduct is somehow unwarranted at the

border. But current doctrine provides enough of a bulwark. As this Court has noted, “the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Under existing law, an agent who is unsure of an individual’s legal status runs the risk that he might search, seize, or use force against an American citizen. The threat of litigation from those with constitutional rights will properly deter unreasonable conduct. Moreover, these incidents already spurred the Border Patrol to release a new directive on the use of force. *Border Patrol Limits Deadly Force*, *supra*. Petitioners’ proposed rule would harm more than aid the policy interests that underlie immunity doctrine. These same interests support granting immunity here.

**C. Officer Mesa has immunity based solely on the facts available to him at the time.**

Even if courts could not directly consider facts unknown to officers when they acted, Agent Mesa would still have immunity. When making an immunity determination, “[t]he dispositive question is whether the violative nature of particular conduct is clearly established.” *Mullenix v. Luna*, No. 14-1143, 2015 WL 6829329, at \*3 (U.S. Nov. 9, 2015) (per curiam) (quotation marks omitted). Agent Mesa must have either reasonably believed (1) that Hernández had no significant ties to the United States, so that Hernández had no clearly established Fourth or Fifth Amendment rights; or (2) that his own use of force was constitutional *in the particular situation he faced*. “Such specificity is especially important” in excessive force cases, “where the Court has recognized that [i]t is sometimes difficult for an officer to determine how the relevant legal doctrine \* \* \* will apply to the factual situation the officer confronts.” *Ibid.* (quotation marks omitted). For this reason, the Court has often rejected broad formulations of the law on excessive force. See, *e.g.*, *ibid.*; *Brosseau*, 543 U.S. at 599. The issue must be articulated specifically enough to give the official fair warning that her conduct is illegal.

Based solely on what Agent Mesa knew at the time, a reasonable officer could have concluded that Hernández was a Mexican national with no significant voluntary connection to the United States. When Agent Mesa arrived on the scene, Hernández was on the Mexican side of the border. Compl. 11. He and others were running toward the border fence. *Ibid.* Taking as true that Hernández “had no interest in entering the United States,” *ibid.*, a reasonable officer could still have believed that Hernández was attempting to illegally cross the border—an action inconsistent with American citizenship. Moreover, once Agent Mesa detained another individual, Hernández ran, not toward a border checkpoint, but further into the Mexican interior. Agent Mesa could have reasonably believed, on the basis of these facts, that Hernández had no significant voluntary connection to the United States. Agent Mesa is thus entitled to immunity.

Though it is a closer case, a reasonable agent in Agent Mesa’s position could also have believed that the use of force was constitutional. “Because \* \* \* officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, \* \* \* the reasonableness of the officer’s belief as to the appropriate level of force should be judged from that on-scene perspective.” *Saucier*, 533 U.S. at 205 (citations and quotation marks omitted). Even accepting as true the claim that Hernández was “unarmed and unthreatening,” Compl. 12, the broader set of circumstances on June 7, 2010 shows that Agent Mesa’s actions were, if not constitutional on the merits, at least objectively reasonable. At the time Agent Mesa used force, a group of smugglers was attempting to illegally cross the border. U.S. Dep’t of Justice, *supra*. As a civilian video of the incident confirms, some of these smugglers “hurled rocks from close range” at Agent Mesa as he attempted to detain one of the other teens, whom he suspected to be a smuggler. *Ibid.*; see

CNN Wire Staff, *supra*.<sup>8</sup> As Customs and Border Protection has noted, “[t]he use of juveniles to smuggle people across the border is a common tactic.” CNN Wire Staff, *supra*.

Under these circumstances, a reasonable officer could have believed Agent Mesa’s actions to be lawful. *Anderson*, 483 U.S. at 641. In general, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Garner*, 471 U.S. at 11-12. However, “the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior,” *Montoya de Hernandez*, 473 U.S. at 538, reducing the level of cause required to use force at the border. Finally, “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine \* \* \* will apply to the factual situation the officer confronts.” *Saucier*, 533 U.S. at 205.

Combining these three elements of Fourth Amendment and immunity doctrine, a reasonable officer making a split-second judgment could have believed it constitutional to use deadly force against Hernández. Agent Mesa could have reasonably believed that Hernández and his friends were aiding the smugglers, and that Hernández might imminently join those throwing rocks at him. That this threat of injury may have been unwarranted in hindsight does not render Agent Mesa’s actions objectively unreasonable. Qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Given the “hazy border between excessive and acceptable force,” *Brosseau*, 543 U.S. at 198, as well as the “evidence indicating that [his] actions constituted a reasonable use of force,” U.S. Dep’t of Justice, *supra*, Agent Mesa did not knowingly violate the

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<sup>8</sup> As this Court noted in *Scott v. Harris*, “videotape capturing the events in question” may “contradict[] the version of the story told by” a plaintiff. 550 U.S. 372, 378 (2007). A court may rely on the video if no reasonable jury would believe the plaintiff’s version of the facts in light of that video. *Id.* at 378, 380. In this case, the civilian video contradicts the complaint’s implication that nobody in the vicinity was throwing rocks. Compl. 12.

Fourth or Fifth Amendments. Nor were his actions plainly incompetent. Indeed, the multi-agency investigation into the incident concluded that, “on these particular facts, [Agent Mesa] did not act inconsistently with CBP policy or training regarding use of force.” *Ibid.*

In weighting an immunity claim, “the court [must] ask whether the agent[] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.” *Hunter*, 502 U.S. at 228. There was more than enough evidence for a reasonable agent to believe that Hernández was a Mexican citizen with no Fourth or Fifth Amendment rights on the Mexican side of the border. And, in the “tense, uncertain, and rapidly evolving” circumstances he confronted, *Saucier*, 533 U.S. at 205, it was not objectively unreasonable for Agent Mesa to use force. Even applying Petitioners’ contemporaneous fact requirement, therefore, this Court should affirm the Fifth Circuit’s grant of qualified immunity.

### **CONCLUSION**

The events in this case ended in an unfortunate loss of life. This fact, though regrettable, does not entitle Petitioners to damages. That would require drastic and unnecessary changes to Fourth and Fifth Amendment doctrine, qualified immunity, and *Bivens*. For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 12, 2015