No. 15-118

IN THE

Morris Tyler Moot Court of Appeals at Yale

JESUS C. HERNANDEZ, ET AL.
Petitioners,

v.

JESUS MESA, JR.
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Petitioners' fifteen-year-old son, Sergio Hernández, was shot and killed by respondent Jesus Mesa, Jr., a U.S. Border Patrol agent. Mesa deliberately fired at Hernández, who was unarmed, from the United States' side of the Paso del Norte border; Hernández died on the Mexican side. Petitioners filed this *Bivens* action, alleging that Mesa's actions violated the Fourth and Fifth Amendments. The questions presented are:

1. Whether the Fourth Amendment governs federal officers' use of excessive force in cross-border shootings; and
2. Whether qualified immunity may be granted or denied based on information unknown to the officer at the time of the incident.

PARTIES TO THE PROCEEDING

The petitioners here and plaintiffs-appellants below are Jesus C. Hernández and María Guadalupe Güereca Bentacour, both individually and as successors-in-interest to the estate of Sergio Adrián Hernández Güereca.

The respondent here and defendant-appellee below is Jesus Mesa, Jr.

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The en banc opinion of the court of appeals is reported at 785 F.3d 117. The panel opinion is reported at 757 F.3d 249. The opinion of the district court granting respondent Mesa's motion to dismiss is unreported. The opinion of the district court granting the United States' motion to dismiss is reported at 802 F. Supp. 2d 834.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 24, 2015. The petition for a writ of certiorari was filed on July 23, 2015. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. On July 7, 2010, U.S. Border Patrol Agent Jesus Mesa, Jr. shot and killed Sergio Adrián Hernández Güereca, a fifteen-year-old boy. The shooting was deliberate and unprovoked; as Hernández lay dying, Mesa and his fellow Border Patrol agents walked away without requesting medical aid.[1]

a. Hernández spent the last moments of his life playing in the Rio Grande culvert, the natural border that separates the United States and Mexico near El Paso, Texas. Compl. ¶ 24. He

[1] Because this Court reviews a decision granting Mesa's motion to dismiss, it must "accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N. A.*, 536 U.S. 506, 508 n.1 (2002).

and his friends would take turns running to touch the barbed wire fence demarcating the border, then running back down the incline. *Id.* Suddenly, Mesa, patrolling on his bicycle, approached the boys. Compl. ¶ 25. He detained one boy, dragging him along the concrete. *Id.* Hernández retreated from the border fence and stood beneath the pillars of the Paso del Norte Bridge, a major border crossing. *Id.* A citizen of Mexico, Hernández had no intention to enter the United States, was unarmed, and had not threatened Mesa. Compl. ¶¶ 24-25.

b. Mesa stopped, pointed his weapon at Hernández, aimed, and fired twice. Compl. ¶ 25. Hernández was struck in the face by a bullet. *Id.* Additional Border Patrol agents soon arrived at the scene. Compl. ¶ 26. Mesa picked up his bicycle, and the agents departed. *Id.* No agent took any action to aid Hernández or alert emergency services. *Id.* Thereafter, Mexican police arrived at the scene and pronounced Hernández dead. *Id.*

2. Petitioners are Hernández's parents, Jesus C. Hernández and María Guadalupe Güereca Bentacour. They filed this action in the United States District Court for the Western District of Texas. Their initial complaint included eleven claims for relief. As relevant here, they sought damages against Mesa under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Mesa used excessive force, in violation of the Fourth and Fifth Amendments, while acting under color of federal law.[2] Compl ¶¶ 71-75.

3. The district court granted Mesa's motion to dismiss petitioners' Fourth and Fifth Amendment claims.[3] *Hernandez v. Mesa*, No. 3:11-CV-00331-DB (W.D. Tex. Feb. 17, 2012),

[2] Petitioners also sought relief against the United States under the Federal Torts Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, under the Alien Tort Statute, 28 U.S.C. § 1350, and under the Fourth and Fifth Amendments to the Constitution. Compl. ¶¶ 30-81. They sought relief against Mesa's supervisors on similar grounds. Compl. ¶¶ 43-70. Those matters are not before this Court.

[3] The district court also granted the United States' motion to dismiss on sovereign immunity grounds. *Hernandez v. United States*, 802 F. Supp. 2d 834, 847 (W.D. Tex. 2011), *aff'd*, 757 F.3d 249 (5th Cir. 2014), *vacated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). It granted Mesa's supervisors' motion for summary judgment, holding that the requirements for supervisory liability were not met. *Hernandez v. Cordero*, No. 3:11-CV-00331-DB (W.D.

rev'd sub nom. Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014), *vacated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). Citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), it first held that the Fourth Amendment did not protect individuals outside the United States' territory without "voluntary connections" to this country. *Hernandez v. Mesa*, No. 3:11-CV-00331-DB, slip op. at 7. Although the court acknowledged that *Boumediene v. Bush*, 553 U.S. 723 (2008), might have overruled *Verdugo-Urquidez*, it rejected that contention because *Boumediene*'s "holding says nothing of the Fourth Amendment right against unreasonable searches and seizures." No. 3:11-CV-00331-DB, slip op. at 7. The district court also rejected petitioners' Fifth Amendment claim, explaining that excessive force "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 8 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

4. A panel of the Fifth Circuit reversed the grant of Mesa's motion to dismiss.[4] *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), *vacated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

a. The panel rejected the contention that the Fourth Amendment applies extraterritorially. 757 F.3d at 263-67. Although it acknowledged that "the *Boumediene* Court appears to repudiate the formalistic reasoning of *Verdugo-Urquidez*'s sufficient connections test," it noted that it could not ignore a Supreme Court decision "unless directed to do so by the Court itself." *Id.* at 265. Because the court considered itself "bound to apply" *Verdugo-Urquidez*'s reasoning, and because Hernández lacked voluntary connections to the United States, it held that the Fourth Amendment does not apply to this case. *Id.*

Tex. Feb. 29, 2012), *aff'd sub nom. Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), *vacated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

[4] The panel affirmed the district court's dismissal of claims against the United States, 757 F.3d at 257-59, and its grant of summary judgment for Mesa's supervisors, *id.* at 280.

However, the panel held that Mesa's actions violated the Fifth Amendment. 757 F.3d at 267-77. Applying *Boumediene*'s functional test, it held that "the heavy presence and regular activity of federal agents across a permanent border without any shared accountability weigh in favor of recognizing some constitutional reach." *Id.* at 270. It observed that, without the extraterritorial application of the Constitution, "the only check on lawful conduct would be that which the Executive Branch would provide." *Id.* at 271. It expressed concern that a contrary result would "establish a perverse rule that would treat differently two individuals subject to the same conduct merely because one managed to cross into our territory." *Id.* Accordingly it "extend[ed] a *Bivens* action" where, as here, a person located abroad "asserts a right to be free from gross physical abuse . . . against law enforcement agents . . . based on their conscience-shocking, excessive use of force across our nation's borders." *Id.* at 277.

Finally, the panel rejected Mesa's claim of qualified immunity. 757 F.3d at 277-80. It observed that, under the above analysis, the facts in petitioners' complaint were sufficient to establish a Fifth Amendment violation. *Id.* at 278. Noting that "[n]o reasonable officer would have understood Agent Mesa's alleged conduct to be lawful," it held that Mesa violated clearly established law because his actions failed the "objective legal reasonableness" test for qualified immunity. *Id.* at 279. It refused to credit Mesa's argument that "his alleged conduct was acceptable as long as its impact was felt within our borders," responding that "[i]t does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person." *Id.*

b. Two judges wrote separately. Judge Dennis concurred in part and concurred in the judgment. He expressed agreement "with those who have suggested that the *Verdugo-Urquidez* view cannot be squared with the Court's later holding in *Boumediene*." 757 F.3d at 280.

However, out of "concern for pragmatic and political questions rather than on a formal classification of the litigants involved," he agreed with the panel's refusal to extend the Fourth Amendment to this case. *Id.* at 281.

Judge DeMoss concurred in part and dissented in part. He argued that the Fifth Amendment should not apply where "the United States has no formal control or de facto sovereignty," and would have rejected petitioners' Fifth Amendment claim. 757 F.3d at 282.

5. The court of appeals granted rehearing en banc. *Hernandez v. United States*, 771 F.3d 818 (5th Cir. 2014) (Mem.). The en banc court affirmed the district court's dismissal of claims against Mesa.[5] *Hernandez v. United States*, 785 F.3d 117, 121 (5th Cir. 2015) (en banc).

a. The per curiam opinion began by holding, without elaboration, that "Hernández, a Mexican citizen who had no 'significant voluntary connection' to the United States . . . cannot assert a claim under the Fourth Amendment." 785 F.3d at 119 (citing *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). Next, although it declined to decide whether the Fifth Amendment could apply extraterritorially, it concluded that "any properly asserted right was not clearly established to the extent the law requires." *Id.* at 120. Because "[n]o case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment," the court granted Mesa qualified immunity. *Id.*

b. Five judges filed concurring opinions.[6] Judge Jones (joined by Judges Smith, Clement, and Owen) would have reached and rejected petitioners' Fifth Amendment claim. 785 F.3d at 121-33. However, she agreed with the en banc court's Fourth Amendment holding, noting that *Verdugo-Urquidez* remains the law and that its "substantial connections test controls." *Id.* at 124.

[5] The en banc court reinstated the portions of the panel's decision relating to petitioners' claims against the United States and against Mesa's supervisors. 785 F.3d at 119.

[6] Judge Haynes (joined by Judges Southwick and Higginson) wrote separately to discuss the United States' sovereign immunity. 785 F.3d at 139.

She counseled against reading *Boumediene* to encompass either Fourth or Fifth Amendment claims, noting that lower courts "must assume that the Court 'explicitly confined its holding only to the extraterritorial reach of the Suspension Clause.'" *Id.* at 127 (quoting *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011)).

Judge Dennis concurred in part and concurred in the judgment, reiterating his panel concurrence and stating that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 785 F.3d at 133 (quoting *Boumediene*, 533 U.S. at 764).

Judge Prado concurred, arguing that Judge Jones's concurrence "sets forth an oversimplified and flawed analysis of . . . the Supreme Court's extraterritoriality precedents." 785 F.3d at 133-34. Acknowledging that "it will be up to the Supreme Court to determine whether its broad statements in *Boumediene* apply to our border with Mexico," *id.*, he suggested that the *Boumediene* Court's reasoning should not be limited to the Suspension Clause, *id.* at 137. Rejecting petitioners' claims, he asserted, "would enshrine an unsustainably strict, territorial approach to constitutional rights—one the Supreme Court rejected in *Boumediene*." *Id.* at 138. Judge Graves wrote separately, joining Judge Prado's opinion "except to the extent that it adopts the en banc court's reasons for denying the Fourth Amendment claim." 785 F.3d at 142-43.

SUMMARY OF ARGUMENT

I. The Fourth Amendment applies to the use of excessive force at the Paso del Norte border. The Fifth Circuit's conclusory analysis failed to appropriately weigh the extraterritoriality of the Fourth Amendment in light of *Boumediene v. Bush*, 553 U.S. 773 (2008). The en banc decision considered only whether Hernández was a Mexican citizen, and concluded that he had no "significant voluntary connection" to the United States.

But this Court's jurisprudence requires that courts eschew such simplistic formalism. Instead, courts must determine the extraterritorial reach of constitutional amendments by weighing objective factors relating to the claimant's relationship to the constitutional right asserted and to the United States, the level of control the United States exerts over the location where the dispute occurred, and any practical considerations that would lead to anomalous or impracticable results. That kind of inquiry is consistent with and required by *Boumediene*, earlier extraterritoriality cases, and the history and text of the Fourth Amendment. When the court of appeals failed to fully consider those factors, it disregarded the Court's settled extraterritoriality jurisprudence.

Considering the Fourth Amendment's extraterritoriality in light of *Boumediene* reveals that Mesa's use of excessive force across the Paso Del Norte border is subject to the Fourth Amendment's reasonableness requirement. Hernández seeks the protection of a fundamental right, the freedom from unlawful restraint. His status as a civilian and his connection to the El Paso-Juárez community similarly weigh in favor of extraterritoriality. The United States has exerted continuous, substantial control both over the location in El Paso where Mesa fired his weapon, and in the Rio Grande culvert where Hernández died. This case involves no national security concerns, and foreign relations with Mexico would be improved, not hurt, by application of the Fourth Amendment to Mesa's actions. For these reasons, the Court should reverse the Fifth Circuit and apply the Fourth Amendment's reasonableness standard to Mesa's actions.

Finally, because Hernández's Fourth Amendment rights were violated when Mesa killed him, a *Bivens* action would appropriately deter Mesa (and Border Patrol officers like him) and provide relief to his parents. Hernández's claim, a violation of the Fourth Amendment by a law enforcement officer, does not seek to expand *Bivens* actions past their traditional boundaries.

Here, there are no adequate, existing alternatives to redress Hernández's parents, and there are no special factors that could counsel against application. *Bivens* claims recognize that a federal agent, acting unconstitutionally, can cause much greater harm than an individual acting alone. Where, as here, a federal law enforcement agent abuses his position to kill an unarmed child in violation of the Fourth Amendment, *Bivens* applies.

II. Qualified immunity cannot shield Mesa from *Bivens* liability because Mesa did not act with "objective reasonableness" under the circumstances known to him at the time of his conduct. The en banc court's qualified immunity analysis ignores the objective reasonableness of Mesa's deliberate and unprovoked killing. Instead, it focuses on the facts and law as the court perceived them in hindsight. This retroactive approach to qualified immunity analysis masks two reasons why, in light of the information known to Mesa at the time of Hernández's death, the officer's action was not reasonable.

First, as the panel opinion correctly notes, no officer in Mesa's position would have believed his conduct conformed to the requirements of the law. Mesa had fair warning of the illegality of his actions. Qualified immunity does not protect brazenly unlawful conduct; the obvious cruelty of shooting an unarmed and nonthreatening child alone is sufficient to put him on notice that his action was unreasonable. And the laws a reasonable officer would have known—this Court's prohibition against excessive force, the Fifth Circuit's warnings against unreasonable force at the border, and the regulations prohibiting border agents from using unnecessary deadly force—all manifest the unreasonableness of Mesa's actions.

Second, the court of appeals' opinion disregards Mesa's ignorance of Hernández's legal status. Mesa did not know whether Hernández was a United States citizen or had significant voluntary connections to the United States. Accordingly, he could not have made any judgment

about the Constitution's application to his action. The court of appeals allowed Hernández's citizenship to bolster Mesa's qualified immunity defense, even though Mesa only learned of Hernández's citizenship later. That approach to qualified immunity defies the precedents of this Court, which require assessing officers' defenses in light of the information available to them at the time. Its approach also conflicts with the three other courts of appeals to answer this question. The court of appeals' failure to assess Mesa's actions in light of the circumstances known to him cannot be healed by raising, for the first time on certiorari, the argument that Mesa's assumption was reasonable. The information Mesa knew about Hernández—his race and presence in Mexico—is plainly insufficient to justify any conclusion about the child's ties to the United States.

Qualified immunity protects officers acting reasonable in legally uncertain environments, not officers transgressing established legal norms. Mesa's unprovoked deadly conduct falls into that latter category. His deliberate shooting cannot be justified by his training or by a reasonable officer's intuition. After all, the officer recklessly disregarded the real likelihood that his bullets would kill an unarmed child with strong ties to the United States. In the view of the courts below, Mesa was fortunate—the child he killed happened to die just outside the United States, and therefore possibly outside the reach of the Constitution's protections. But qualified immunity is based on an officer's reasonable knowledge of facts and law at the time of his action, not on discoveries after the fact. Under that standard, Mesa's conduct is revealed for what it is: unlawful, unreasonable, and undeserving of qualified immunity.

ARGUMENT

I. HERNÁNDEZ WAS ENTITLED TO FOURTH AMENDMENT PROTECTION AGAINST EXCESSIVE FORCE.

This Court should hold that the Fourth Amendment applies when a federal officer, standing in the United States, uses excessive force against a foreign national by firing his weapon into the Paso del Norte border. The Fifth Circuit, in determining whether the Fourth Amendment's reasonableness requirement applied to Agent Mesa's shooting of Hernández, stated only 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." *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (per curiam) (internal citations omitted) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

The Fifth Circuit failed to apply Supreme Court precedent, which requires courts to analyze "objective factors and practical concerns" when applying the Constitution extraterritorially. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008). This Court has instructed that questions of extraterritoriality must be resolved by weighing three factors: first, the relationship of the claimant to the constitutional right and the United States; second, the level of control exerted by the United States over the area where the dispute occurred; third, context-specific considerations that would make application anomalous or impracticable. *Id*. at 766. Because the Fifth Circuit considered only the "significant voluntary connections" of Hernández to the United States, this Court should reverse the judgment below.

A proper application of the three-factor *Boumediene* test shows that the Fourth Amendment's reasonableness requirement restricts the actions of Border Patrol agents using excessive force along the Rio Grande culvert, the natural border between the United States and

Mexico. First, Hernández, a Mexican citizen, had significant ties to the El Paso-Juárez community, was a civilian, and suffered a violation of a fundamental constitutional right. Second, since the El Paso-Juárez community was formally divided in 1848, the United States has maintained both formal sovereignty over parts of the community and *de facto* control over the shared border zone. Third, application of the Fourth Amendment involves no national security concerns and would prevent, rather than promote, "friction with the host government." *See Boumediene*, 553 U.S. at 770. Because every factor weighs in favor of the Fourth Amendment's application, this Court should reverse the Fifth Circuit's determination and hold that the Fourth Amendment requires a federal officer to act reasonably when he fires his weapon from the United States into the Paso del Norte border zone.

A. The Fifth Circuit erred in considering only whether Hernández possessed "significant voluntary connections" to the United States.

By relying solely on the determination that Hernández was a Mexican with no "significant voluntary connection" to the United States, the Fifth Circuit misapplied Supreme Court precedent. The Fifth Circuit's superficial conclusions on the Fourth Amendment's reach epitomize the type of formalism the Court disclaimed in *Boumediene*. 553 U.S. at 755 ("[The Court has never held that] as applied to noncitizens, the Constitution necessarily stops when *de jure* sovereignty ends."); *cf. Reid v. Covert* 354 U.S. 1, 43 (1957) (Frankfurter, J., concurring) ("The Court's function in constitutional adjudications is not exhausted by a literal reading of the words. It may be tiresome, but it is nonetheless vital, to keep our judicial minds fixed on the injunction that 'it is a constitution we are expounding.'" (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819))). The Fifth Circuit failed to apply *Boumediene v. Bush* and its antecedents, instead focusing on only one part of the extraterritoriality analysis. But *Boumediene* is this Court's clearest statement on the extraterritoriality of constitutional provisions, not only

on the Suspension Clause. Further, neither the text nor the purpose of the Fourth Amendment counsel against context-specific extraterritoriality of the reasonableness requirement. Thus, the Fifth Circuit erred in concluding the Fourth Amendment did not apply to Mesa's actions, and this Court should reverse their decision.

1. *Boumediene* determines the scope of the Fourth Amendment's extraterritorial application.

This Court has never condoned the approach of the Fifth Circuit, which focused solely on Hernández's status as a Mexican domiciliary. Rather, this Court has repudiated the idea that "as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Boumediene*, 553 U.S. at 755. In every instance, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. This language applies with equal force to the Fourth Amendment.[7] Had the Court intended to analyze only Suspension Clause cases, the decision would not speak in such broad terms about the impact of the Constitution abroad. Instead, it addressed "questions of extraterritoriality" of the Constitution as a whole, *id.*, and held that courts must consider the "specific circumstances" of the case, not "rigid and abstract rule[s]," *id.* at 759.

a. *Boumediene*'s sources of authority make clear that its reasoning applies beyond the Suspension Clause context. The *Boumediene* opinion purposefully situated itself within a long line of historical extraterritoriality cases, all discussing different constitutional provisions. *Id.* at 755 ("The Court has discussed the issue of the Constitution's extraterritorial application on many occasions."). Few of these cases concerned habeas corpus rights. *See id.* at 755-64; *see also*

[7] In subsequent extraterritoriality cases, appellate courts noted the breadth of the Court's language, even when feeling obligated to apply it narrowly absent explicit authorization from this Court. *See, e.g., Hernandez*, 757 F.3d at 262, 265 (finding that *Boumediene*'s reasoning applied broadly to constitutional extraterritoriality while noting that it could not depart from applying the "significant voluntary connections" test alone "unless directed to do so by the Court itself"); *see also Al-Bahlul v. United States*, 767 F.3d 1, 32-33 (D.C. Cir. 2014) (Henderson, J., concurring) (same with respect to Ex Post Facto Clause).

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (concerning the application of the Fourth Amendment); *Reid v. Covert*, 354 U.S. 1 (1957) (Fifth and Sixth Amendments); *Eisenstrager v. Johnson*, 339 U.S. 763 (1950) (habeas corpus); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment); *Dorr v. United States*, 195 U.S. 138 (1904) (same); *Hawaii v. Manchiki*, 190 U.S. 197 (1903) (same); *Downes v. Bidwell*, 182 U.S. 244 (1901) (the Art. I, § 8 "uniform duties" requirement); *In re Ross*, 140 U.S. 453 (1891) (Fifth and Sixth Amendments). These cases revolve around claimants of different citizenships, in areas with varying relationships to the United States, asserting different constitutional protections. Their use, together, to inform the Court's decision in *Boumediene* demonstrates that the opinion was intended to provide instruction for all constitutional extraterritoriality questions, not merely those surrounding the Suspension Clause.

b. Because *Boumediene* applies broadly to all questions of constitutionality, the three factors it holds are critical to determining the reach of the Suspension Clause govern the present extraterritoriality determination. The Court developed its framework after considering the factors analyzed in extraterritoriality cases broadly. *Id.* at 766 ("Based on . . . the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause[.]"). In *Boumediene*, the Court instructed that questions of the Suspension Clause's extraterritoriality could be resolved only by analyzing three categories derived from its prior decisions. *Id.* Courts must consider factors relating to the claimant and the right asserted,[8] factors relating to the United States' control over the area in which the dispute

[8] Extraterritoriality cases analyzing factors within this category include *United States v. Verdugo-Urquidez*, 494 U.S. at 262 (analyzing the citizenship of the claimant and the nature of the right asserted; *Reid*, 354 U.S. at 6, 9-10 (plurality opinion) (analyzing the citizenship of the claimants and the importance of the right asserted); *Eisenstrager*, 339 U.S. at 770-71, 777 (analyzing the citizenship of the claimants and their status as enemy combatants); *Balzac*, 258 U.S. at 308-09 (analyzing the citizenship of the claimant and the importance of the right asserted); *Downes*, 182 U.S. at 251, 277, 282 (analyzing the citizenship of the claimant and importance of the right asserted); *Mankichi*, 190

occurred,[9] and context-specific factors that could make application anomalous or impracticable.[10] *Id. Boumediene* enshrined these categories of inquiry as constitutional requirements. Thus, the Fifth Circuit was required to consider the application of the Fourth Amendment to Agent Mesa's actions in the more comprehensive manner dictated by *Boumediene*.

c. Nothing in *United States v. Verdugo-Urquidez*, the case upon which the Fifth Circuit relied and respondent now relies, suggests otherwise. In *Verdugo-Urquidez*, a slim majority of the Court declined to extend Fourth Amendment warrant requirements to a Mexican defendant whose home in Mexicali was jointly searched by Mexican and American officials under authorization of the Mexican Federal Judicial Police. 494 U.S. 259, 262 (1990). The majority opinion, written by Chief Justice Rehnquist, considered not only Verdugo-Urquidez's citizenship but also the "consequences for the United States in conducting activities beyond its borders." *Id.* at 273. The Chief Justice specifically focused on the difficulty of transporting the warrant requirement abroad. *Id.* at 274. In his controlling concurrence, Justice Kennedy considered a number of additional factors before deciding that the Fourth Amendment did not protect Verdugo-Urquidez. Those factors included the availability of local judges or magistrates and the

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U.S. at 218 (analyzing the citizenship of the claimant and importance of the right asserted); *In re Ross*, 140 U.S. at 458 (analyzing the citizenship of the claimant).

[9] Extraterritoriality cases analyzing factors within this category include *Reid*, 354 U.S. at 32 (plurality opinion) (analyzing the control exerted by the United States on its military bases); *Eisenstrager*, 339 U.S. at 777 (analyzing the control exerted by the United States over Landsburg Prison in Germany); *Balzac*, 258 U.S. at 298, 306-07 (analyzing Puerto Rico's status as a territory and the control the United States exerts over unincorporated territories); *Mankichi*, 190 U.S. at 217-218 (analyzing Hawaii's status as a territory); *Downes*, 182 U.S. at 279-80 (analyzing Puerto Rico's status as a territory and the control the United States exerts over unincorporated territories); *In re Ross*, 140 U.S. at 464 (analyzing United States control over its ships and vessels).

[10] Extraterritoriality cases analyzing factors within this category include *Verdugo-Urquidez*, 494 U.S. at 273 (considering the effects on law enforcement activities outside the United States); *Reid*, 354 U.S. at 23 (plurality opinion) (considering the effect extraterritoriality would have on tradition of keeping military authority subordinate to civilian authority; *Reid*, 354 U.S. at 47, 49 (Frankfurter, J., concurring) (considering the effect on military discipline and United States foreign relations); *Eisenstrager*, 339 U.S. at 774, 779 (considering practical implications of gathering parties needed for a trial and the effects on war-time security); *Balzac*, 258 U.S. at 310-11 (considering the diplomatic relations between the United States and the people of Puerto Rico); *Mankichi*, 190 U.S. at 215-16 (considering the practical implications of voiding any verdicts that were not the result of jury deliberation and the diplomatic relations between the United States and the people of Hawaii); *Downes*, 182 U.S. at 287 (considering the effect on diplomatic relations between the United States and the people of Puerto Rico); *In re Ross*, 140 U.S. at 464 (considering the practical implications of requiring jury trials at consular courts in Japan).

need to cooperate with foreign officials. *Id.* at 278. Neither Justice Kennedy's controlling concurrence nor Chief Justice Rehnquist's majority opinion allows a court to end its inquiry into the applicability of the Constitution after weighing only the citizenship and connections of the party seeking protection.[11] By merely asserting the fact that Hernández was a Mexican in Mexico and ending the inquiry there, the Fifth Circuit erred in its conclusion that the Fourth Amendment did not bar Mesa's use of deadly force against an unarmed teenager.

2. The Fifth Circuit's cursory analysis is rejected by the history of the adoption of the Fourth Amendment.

Furthermore, respondent cannot rely on the text or history of the Fourth Amendment to argue that it never protects noncitizens or non-domiciliaries. In considering whether the Fourth Amendment applied to the search of a Mexican suspect's home in Mexico, Chief Justice Rehnquist, ostensibly writing for the majority, argued that the text and history of the Fourth Amendment counsel against extraterritorial application. *Verdugo-Urquidez*, 494 U.S. at 264-68 (1990). But, as Justice Kennedy wrote, nothing in the history of the adoption of the Fourth Amendment suggests that it should be rigidly restricted to prohibiting the actions of U.S. officers only against United States citizens or domiciliaries. *Id.* at 275-76 (Kennedy, J., concurring).

a. The text of the Fourth Amendment does not act as a *per se* limit on the application of the Fourth Amendment to noncitizens or non-domiciliaries. Instead, the Fourth Amendment in broad terms affirms the "right of the people to be secure in their persons." U.S. Const. amend. IV. Whether "the people" is a term of art in the Constitution, the Court has opined, is "by no means conclusive." *Verdugo-Urquidez*, 494 U.S. at 265; *see also id.* at 276 (Kennedy, J.,

[11] Some appellate courts have mistakenly read *Verdugo-Urquidez* in the same narrow way that the Fifth Circuit below did. Several of these cases, however, actually turn on practical considerations that stem from the Court's reticence to apply the Constitution extraterritorially to noncitizens who have been detained on terrorism charges. *See, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540, 556 (4th Cir. 2012).

concurring) ("I cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections."). Given the term's use in the Fourth Amendment, which constrains the government's ability to unlawfully restrain individuals and their property, the Court should be reticent to infer a restriction where one is not immediately apparent. Such a reading would violate the rule that "constitutional provisions for the security of person and property should be liberally construed." *Reid v. Covert*, 354 U.S. 1, 40 (1957) (plurality opinion). Furthermore, subsequent readings of the phrase "the people" suggest that its meaning changes based on the constitutional context in which it appears. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 579 (2008) (refusing to adopt a single uniform meaning of "the people"). Thus, the text of the Fourth Amendment does not itself limit the reasonableness requirement's application to a federal officer acting within the United States.

b. Nor does the history of the adoption of the Fourth Amendment indicate that its reach extends only to actions taken by government officials against American citizens or domiciliaries. At the time of the Founding, Americans were particularly concerned with preventing the new American government from perpetrating the same invasive searches that the British government had conducted. *See* Nelson B. Lasson, *History and Development of the Fourth Amendment to the United States Constitution* 51-79 (1937) (charting colonists' response to searches undertaken pursuant to general writs and writs of assistance, especially in Massachusetts, as leading directly to the demand for the passage of the Fourth Amendment and contributing to the American Revolution). There is no evidence that having been the victims of searches and seizures they believed to be unjust and perpetrated by a distant authority, the American people sought to allow their government to perpetrate that injustice on foreign nationals. Instead, the Founders' deep concern that the federal government's military and police powers not go unchecked resulted in

the passage of several amendments in the Bill of Rights. *See Reid v. Covert*, 354 U.S. 1, 29 (1957) (plurality opinion) ("And those who adopted the Constitution embodied their profound fear and distrust of military power . . . in the Constitution and its Amendments."); Tracy Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 201 (1993) ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion."). The Founders believed that the rights affirmed in the Fourth Amendment were among the "freedoms and entitlements of all men, everywhere, antecedent to and superior to government." Louis Henkin, *Rights: Here and There*, 81 Colum. L. Rev. 1582, 1584 (1981); *see also* Joseph Story, *Commentaries on the Constitution of the United States* 237 (1833) (4th ed. 2008) ("It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights which it proclaims to be 'unalienable and indefeasible' to be a matter of *contract* . . . ."). The purpose of the Fourth Amendment, then, was not to grant rights to citizens in exchange for their loyalty to the federal government, but to restrain the government from violating inalienable rights. *See* Lasson, *supra*, at 100 n.77 ("[T]he language of the proposal did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed.").

If anything, the text and history support the application of the reasonableness standard to an American official standing on American soil. There is thus no reason to treat the extraterritoriality of the Fourth Amendment differently than the extraterritoriality of other fundamental rights enshrined in the Constitution. Like the habeas right, prohibitions on excessive force protect "freedom from unlawful restraint," a "fundamental precept of liberty." *Boumediene*, 553 U.S. at 739. Courts must therefore engage in context-specific reasoning to determine the

claimant's citizenship and status, U.S. control over the territory, and attendant practical considerations.

B. The Fourth Amendment applies to the use of excessive force by an officer standing in the United States and firing a weapon into a U.S.-controlled border zone.

The Fifth Circuit failed to adequately analyze the Fourth Amendment's application to Hernández's claims. An analysis of the *Boumediene* factors shows instead that this Court's jurisprudence on extraterritoriality supports expanding the Fourth Amendment's reach in this case. Because each of *Boumediene*'s factors supports extraterritoriality, the Court should reverse the Fifth Circuit below and find that the Fourth Amendment applies to Agent Mesa's actions.

1. Hernández's citizenship, status, and the importance of the constitutional rights he asserts weigh in favor of the Fourth Amendment's application.

a. First, the nature of the right Hernández seeks to vindicate strongly supports extraterritoriality. "The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty . . . ." *Boumediene*, 553 U.S. at 739; *see also* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. Cal. L. Rev 259, 273 (2009) (noting the importance of the nature of the habeas right to the majority opinion in *Boumediene*). Hernández has alleged that a federal officer acted unreasonably by using excessive, deadly force against him. Compl. ¶ 73. He has alleged that an agent of the United States violated "a fundamental precept of liberty." In the Insular Cases, the Court distinguished among rights that existed in all United States territories, regardless of incorporation by Congress, and rights that applied only to territories incorporated and destined for statehood. *Boumediene*, 553 U.S. at 758. The Court drew a distinction between "remedial rights which are peculiar to [the United States] system of jurisprudence" and "natural rights enforced in the Constitution by prohibitions against interference with them." *Downes v. Bidwell*, 182 U.S. 244, 282 (1901). The latter rights,

applicable in the territories without a legislative grant, included "the right to personal liberty and individual property" and "immunities from unreasonable searches and seizures." *Id*. The fundamental nature of the right Hernández asserts weighs strongly in favor of its application.

b. Hernández's citizenship and status also counsel toward the Fourth Amendment's application. At the time of his death, Hernández was a Mexican citizen. Compl. ¶ 18. Although Hernández acknowledged that he was not subject to the *de jure* sovereignty of the United States, he alleged that he was part of the El Paso-Juárez community, and would frequently play in the Rio Grande culvert separating Mexico and the United States. Compl. ¶ 24. The panel opinion concluded that "while Hernández's citizenship weighs against extraterritorial application, his status does not." *Hernandez v. United States*, 757 F.3d 249, 269 (5th Cir. 2014), *vacated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). Hernández was not an enemy combatant. *See Boumediene*, 553 U.S. at 766-67 (noting the importance of this factor). He was not engaged in acts that would threaten the national security of the United States, Compl. ¶ 24, 73, and was unarmed, *id.* at ¶ 73. Nor was Hernández violating Mexican or American laws. Compl. ¶ 24. In an analogous case, an Arizona court found that a Mexican citizen was entitled to Fourth Amendment protections in part because "[the child's] status as a civilian engaged in peaceful activity weighs in favor of granting him protection despite the fact that [he] was in the territory of another country when he was seized." *Rodriguez v. Swartz*, No. 4:14-CV-02251-RCC, slip op. at 13 (D. Ariz. July 9, 2015), *appeal pending* (9th Cir. July 15, 2015). As in *Swartz*, Hernández's status weighs in favor of the Fourth Amendment's application. Together, his status, his connection to the El Paso-Juárez community, and the importance of the Fourth Amendment right he asserts support extraterritoriality.

2. The United States' control over El Paso and the Paso del Norte border zone supports the application of the Fourth Amendment.

The United States has a long history of control over and connection to the location in which Hernández died as a result of Agent Mesa's use of excessive force. El Paso-Juárez is a bi-national metropolitan area comprised of what was once a single city called El Paso and since 1848 has been a community of two cities, El Paso, Texas and Ciudad Juárez, Mexico. *See* OECD Regional Stakeholders Committee, *The Paso del Norte Region, U.S.-Mexico: Self Evaluation* 1 (2009).[12] Both cities share a single central business district, separated only by the international border. *Id.* at 3. Community members also emphasize the connection between the two regions. *See* Laura Barron-Lopez, *El Paso is Fighting to Reclaim the Border's Soul*, Huffington Post, Aug. 9, 2015 (quoting U.S. Representative Beto O'Rourke as saying "we (El Paso and Ciudad Juárez) are the largest truly binational community in the world and our connection is our strength");[13] Andrew Rice, *Life on the Line*, N.Y. Times Mag., July 28, 2011, (quoting an El Paso resident as saying "unless you are right here, I don't think you can get how intertwined this community is")[14]

Not only have these cities been inextricably linked for centuries, but the control exercised by the United States over the Paso del Norte border zone is substantial and indefinite in scope. Hernández was shot in the culvert that separates El Paso and Ciudad Juárez. The bridge under which he was killed, the Paso del Norte Bridge, was constructed and remains jointly owned by both Mexico and the United States. *See* Texas Dep't of Transportation, *Texas-Mexico International Bridges and Border Crossings* (2013).[15] The control the United States exercises daily in its operation of the Paso Del Norte border counsels in favor of extraterritoriality in this

[12] http://www.oecd.org/unitedstates/44210876.pdf.
[13] http://www.huffingtonpost.com/entry/el-paso-juarez-border-fight_55c77b2de4b0f73b20b9aa81.
[14] http://www.nytimes.com/2011/07/31/magazine/life-on-the-line-between-el-paso-and-juarez.html.
[15] https://ftp.dot.state.tx.us/pub/txdot-info/iro/2013_international_bridges.pdf.

case. In the last ten years, the number of Border Patrol agents has doubled, with the majority located on the Southwestern border of the United States. *Hernandez*, 757 F.3d at 267. The Chief of U.S. Border Patrol has explained the United States goal of exerting control "outward, ensuring that [the U.S.-Mexico] border is not the first or last line of defense." *Id.* at 270 (citing *Securing Our Borders—Operational Control and the Path Forward: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security,* 112th Cong. 8 (2011) (prepared statement of Michael J. Fisher, Chief of U.S. Border Patrol)).

The United States maintains a "heavy presence" and conducts "regular activity . . . across a permanent border without any shared accountability." *Hernandez*, 757 F.3d at 270. For these reasons, the Fifth Circuit panel concluded that the Border Patrol's control over the culvert between Ciudad Juárez and El Paso more closely resembled United States control over Guantánamo Bay than it did United States control over Landsberg Prison, which was limited in both time and authority. *Id*. at 269. Referring to a similar border in Arizona, the District of Arizona noted that "by shooting individuals on the Mexican side of the border area, the United States, through Border Patrol, controls the area immediately adjacent to the international border fence on the Mexican side." *Swartz*, 4:14-CV-02251-RCC, slip op. at 14. The United States' control both over Agent Mesa's actions within the United States and the culvert underneath the Paso del Norte Bridge, where the effects of those actions were felt, are sufficient to justify application of the Fourth Amendment.

3. Practical considerations reinforce the application of the Fourth Amendment to Mesa's actions.

Courts must also consider the practical concerns of applying constitutional protections extraterritorially. However, costs that amount to no more than the "incremental expenditure of resources," are not dispositive. *Boumediene*, 553 U.S. at 769. Just as there were no "credible

arguments" counseling against applying the Suspension Clause at Guantanamo Bay, practical considerations argue for, rather than against, the application of the Fourth Amendment's reasonableness requirement at the El Paso-Juárez border.

a. Frequently, courts express concern or decline to apply constitutional protections when national security concerns are implicated. *See Boumediene*, 553 U.S. at 850 (Scalia, J., dissenting) (noting national security concerns); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (same); *see also Eisenstrager*, 339 U.S. at 774 (recognizing the importance of allowing the executive enough latitude to ensure war-time security). Yet the application of the Fourth Amendment's reasonableness requirement to protect a noncitizen acting lawfully under both Mexican and American laws raises no such concerns. "This is not a case involving a drone strike, an act of war on a distant battlefield, or law-enforcement conduct occurring entirely within another nation's territory; it is a fatal shooting by small-arms fire in which the short distance separating those involved was bisected by an international border." *Hernandez v. United States*, 785 F.3d 117, 136 n.3 (5th Cir. 2015) (en banc) (Prado, J., concurring).

Furthermore, the application of the Fourth Amendment to Mesa's actions would not sow confusion among federal agents tasked with securing our borders. By contrast, it would prevent the "perverse and disturbing incentives" that would exist if government agents were immune from suit when using excessive force unprovoked against migrants before they crossed the border, but would face liability for unreasonable searches of personal property once migrants arrived at the border. *See Hernandez*, 785 F.3d at 138 n.8 (Prado, J., concurring). Because "U.S. Border Patrol agents are already trained in the limits of the Fourth Amendment when addressing citizens and noncitizens alike when these individuals place foot within the United States," extending those restrictions to noncitizens once they enter the culvert would not diminish agents'

ability to do their jobs efficiently and safely. *Swartz*, 4:14-CV-02251-RCC, slip op. at 15. Far from creating "impracticable or anomalous" results, the application of the Fourth Amendment to excessive force claims emerging from the shared border zone would promote consistency and reasonable policing. *See Boumediene*, 553 U.S. at 770.

b. The diplomatic relationship between the United States and Mexico further supports extraterritorial application. In determining the extraterritorial reach of constitutional provisions, this Court has taken caution to avoid upsetting diplomatic relationships. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (noting the need to cooperate with Mexican officials). Mesa remained in the United States while he used excessive force across the Paso del Norte border, killing Hernández. He remains outside the jurisdiction of Mexico; thus his actions, as in *Boumediene*, "are answerable to no other sovereign." *Hernandez*, 757 F.3d at 271 (citing *Boumediene*, 553 U.S. at 770). Likely for these reasons, Mexico has indicated its support of the extension of the Fourth Amendment to the border zone in this case. *See Hernandez*, 785 F.3d at 133 (Dennis, J., concurring); *see also Swartz*, 4:14-CV-02251-RCC, slip op. at 15 (noting same in an excessive force case on the Nogales border zone). To decline application of the Fourth Amendment for practical reasons would undermine the U.S.-Mexico relationship so crucial to maintaining security at the border.

Hernández's status and his connection to the U.S.-controlled Paso del Norte border zone, the importance of the right he seeks to vindicate, and the importance of ensuring strong diplomatic relationships between Mexico and the United States all weigh in favor of application. In short, there is nothing that suggests the Fourth Amendment should not apply to the actions of an American federal officer, standing in the United States, and using unprovoked, excessive force against a foreign national standing in a U.S.-controlled border zone. To the contrary, every

factor that this Court has emphasized in determining the reach of fundamental constitutional rights points toward its application. The opinion of the Fifth Circuit should be reversed.

C. Petitioners' Fourth Amendment claims are well-suited to resolution through a Bivens *action.*

For forty-five years, this Court has recognized that plaintiffs, like Hernández, may sue federal agents, like Mesa, for monetary damages when those agents violate their constitutional rights. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* claims recognize the need for redress in cases of constitutional violations by federal officers because "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id*. at 391-92. For that reason, a petitioner like Hernández is "entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Id.* at 397.

1. There is no alternative, existing process protecting Hernández's Fourth Amendment rights.

As the panel below found, petitioners "lack any alternative remedy" for vindicating their son's constitutional rights. *Hernandez*, 757 F.3d at 273; *see also Hernandez*, 785 F.3d at 142 (Graves, J., concurring) (noting that any "other forms of review or redress . . . are, for the most part, unavailable, ineffective, or do not provide the same relief as a *Bivens* action"). Courts may decline to recognize a *Bivens* claim if "any alternative, existing process for protecting the constitutionally recognized interest" provides "roughly similar incentives for potential defendants to comply with [the constitutional requirements] while also providing roughly similar compensation to victims of violence." *Minecci v. Pollard*, 132 S. Ct. 617, 621, 625 (2012). Hernández cannot sue Mesa in Mexico. *Hernandez*, 757 F.3d at 273. He cannot bring a state law

tort action against Mesa, a federal officer. *Minneci*, 132 S. Ct. at 623; *Osborn v. Haley*, 549 U.S. 225, 228 (2007). Nor can Hernández assert a claim under the Federal Tort Claims Act, *Hernandez*, 757 F.3d at 258, and even if he could, the FTCA and *Bivens* are "parallel, complementary causes of action," *Carlson v. Green*, 446 U.S. 14, 18 (1980). Congress has not provided "meaningful safeguards or remedies for the rights of persons situated" like Hernández, nor has it created an elaborate rights protecting regime for those killed by Border Patrol officers. *See Schwelker v. Chilicky*, 487 U.S. 412, 424 (1988) (finding that an elaborate scheme providing monetary damages for Social Security benefits delays created an "alternative remedy"); *see also Hernandez*, 757 F.3d at 274 (noting that immigration regulation does not constitute an "elaborate scheme" for the protection of lawful foreign nationals killed in the border zone).

2. No special factors counsel toward hesitation in allowing this *Bivens* claim.

Courts may decline to hear a *Bivens* claim if "special factors" counsel hesitation, especially when the claim is brought in a new context or against new defendants. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). Here, Hernández seeks to bring a *Bivens* action for the use of excessive force—as in *Bivens* itself. 403 U.S. at 390 (noting that Bivens's Fourth Amendment claim involved the use of unreasonable force). Hernández seeks to hold Mesa, a federal law enforcement officer, liable for his constitutional violations—again, as in *Bivens*. 403 U.S. at 389 (noting that defendants were officers of a Federal law enforcement agency, the Federal Bureau of Narcotics); *see also Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (maintaining a *Bivens* action against a Border Patrol agent); *Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992) (recognizing that Border Patrol agents are "federal law enforcement officers"); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988) (same). As the panel

below recognized, Hernández's claims "involve[] questions of precisely *Bivens*-like domestic law enforcement and nothing more." *Hernandez*, 757 F.3d at 276.

The application of *Bivens* to "domestic law enforcement" is a far cry from the contexts in which "special factors" counsel hesitation. Although the Court has never defined precisely what "special factors" argue against application of a *Bivens* claim, it has recognized that courts should not intrude into military chain of command or management concerns. *See United States v. Stanley*, 483 U.S. 669 (1987) (noting that enlisted military personnel may not maintain a *Bivens* suit against superior officers because of the need for military discipline). Some lower courts have expanded on this analysis by barring *Bivens* claims where violations occurred incident to terrorism investigations or implicated a national security policy. *See Meshal v. Higginbotham*, No. 14-5194, 2015 WL 6405207 (D.C. Cir. Oct. 23, 2015) (declining to hear a *Bivens* claim based on conduct occurring outside the United States involving national security and counterterrorism concerns); *Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012) (declining to hear a *Bivens* claim based on the development of allegedly unconstitutional global detention and interrogation policies). Hernández's parents do not ask the Court to intrude on military affairs or the development of counterterrorism policies. Instead, they seek remuneration for the excessive force Mesa exerted against their son. Here, there are no "special factors" counseling against the application of *Bivens*, and there is no alternative, existing process through which petitioners could seek a remedy. For the aforementioned reasons, the Court should not decline to adjudicate this Fourth Amendment claim.

II. MESA IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The court of appeals held that, even if the Fourth Amendment protected Hernández, the doctrine of qualified immunity shields Mesa from legal responsibility for his actions. *Hernandez*

v. United States, 785 F.3d 117, 120 (5th Cir. 2015) (en banc) (per curiam). Because "no case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct" was unconstitutional, the court reasoned, Mesa did not violate clearly established law. *Id.* As officers of the United States are liable under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), only when they violate a constitutional right "clearly established" at "the time of [the] alleged misconduct," the court concluded that Mesa was entitled to qualified immunity. 785 F.3d at 120 (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)) (alteration in original).

The en banc court's holding, which supplanted the panel's well-reasoned view, rests on a legal error. *See* 757 F.3d 249, 279 (5th Cir. 2015), *vacated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). It assesses Mesa's actions through its own knowledge of facts and law, rather than through the perspective of a "reasonable officer . . . in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds by Pearson*, 555 U.S. 223. This ex post reasoning, foreign to the law of qualified immunity, obscures two flaws fatal to Mesa's defense.

First, a reasonable officer in Mesa's shoes would not have believed, against training and intuition, that his action was lawful. On the contrary, Mesa had "fair and clear warning" that the Constitution and laws of the United States prohibit the use of unprovoked deadly force.[16] *United States v. Lanier*, 520 U.S. 259, 271 (1997). The court of appeals, by failing to analyze the "objective legal reasonableness" of Mesa's actions, misapprehends this Court's qualified immunity precedents. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

[16] The Fourth Amendment's prohibition on excessive force should govern this case, for the reasons discussed above. But even if this Court declines to apply the Fourth Amendment outside the United States, the court of appeals' qualified immunity ruling should still be reversed, and the case remanded for resolution of Hernández's Fifth Amendment claim on its merits. *See* 785 F.3d at 120.

Second—even assuming Hernández's noncitizen status complicates the Constitution's commands—Mesa did not know at the time of his conduct that Hernández lacked ties to the United States. The court of appeals allowed Mesa to use this then-unknown information to bolster his qualified immunity defense. That novel approach is inconsistent with this Court's qualified immunity doctrine, as well as with the judgment of all other courts of appeals to pass on this question. Its countenance of guesswork in the use of lethal force cannot be squared with the purposes of official immunity.

A. A "reasonable officer" would know Mesa's actions flout clearly established law.

"Courts must not judge officers with the '20/20 vision of hindsight.'" *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (citation omitted). A court analyzing a qualified immunity defense must place itself in the perspective of a "reasonable officer" identically situated to the defendant. *E.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). In assessing the understanding of such a reasonable official, courts must rely on "the information the [defendant] officers possessed" at the time of their conduct. *Id.* at 641; *see also Hope v. Pelzer*, 536 U.S. 730, 747 (2002) (applying the "objective immunity test of what a reasonable officer would understand").

The court of appeals' analysis does not conform to these commands. It fails to place itself in the position of a reasonable officer to assess her understanding of the law. Rather, it focuses only on its own legal views. Its reasoning thus glosses over a crucial impediment to Mesa's qualified immunity defense: a reasonable officer in the situation Mesa confronted would not need to consider case law to realize that Mesa's conduct was illegal. And even if a reasonable officer did consider legal precedents, that case law would reveal the unlawfulness of Mesa's reckless and unprovoked actions.

1. The "obvious cruelty" of Mesa's actions provided "fair warning" his conduct violated the law.

This case concerns the deliberate and unprovoked shooting of an unarmed fifteen-year-old. There is little question that such a heinous action, without regard to any uncertainty concerning Hernández's rights abroad, violates "clearly established" constitutional norms. Mesa cannot demonstrate the "objective legal reasonableness" required for qualified immunity because a "reasonable officer" in his shoes would have realized that such excessive force violates the law. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

As the panel correctly noted, "[n]o reasonable officer would have understood Agent Mesa's alleged conduct to be lawful." 757 F.3d at 279. But the court of appeals' qualified immunity analysis strays from this rule of reason. The en banc court declined to examine the objective legal reasonableness of Mesa's shooting of Hernández. Rather, it declared that a lack of "case law" prohibiting Mesa's precise conduct was sufficient to confer immunity. 785 F.3d at 120. This theory of qualified immunity is plainly inconsistent with this Court's precedents.

Time and again, decisions of this Court have explained that reasonableness—not precedent—is the linchpin of qualified immunity analysis. The "object of the 'clearly established' immunity standard is not different from that of 'fair warning.'" *United States v. Lanier*, 520 U.S. 259, 270 (1997). Such fair warning does not demand "either a decision of this Court or the extreme level of factual specificity envisioned" by the court of appeals. *Id.* at 268. Where a constitutional norm applies with "obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,'" an officer cannot assert qualified immunity. *Id.* at 271 (quoting *Anderson*, 483 U.S. at 640) (alteration in original). And where, as here, the "obvious cruelty inherent in [an officer's] practice should have provided [that officer] with some notice that their alleged conduct violated . . . constitutional

protection[s]," a lack of legal precedent does not protect the officer. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

Thus, qualified immunity does not protect brazenly illegal conduct. As *Lanier* noted, "the easiest cases don't even arise. There has never been . . . [a] case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances." 520 U.S. at 271 (quoting *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting)). In this case, the fact that no court had previously condemned the shooting of an unarmed child across an international border does not excuse the apparent illegality of Mesa's actions. *See Hernandez*, 757 F.3d at 279 ("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.").

2. A reasonable officer's legal training would indicate the illegality of Mesa's actions.

The en banc court ignored the common-sense unlawfulness of Mesa's actions. It opined instead that it would not "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Hernandez*, 785 F.3d 117, 120 (5th Cir. 2015) (en banc) (per curiam) (quoting *Brosseau v. Haugen,* 543 U.S. 194, 199 (2004) (per curiam)). This reasoning rests on an unexplained assumption: that a reasonable officer in Mesa's circumstances would perceive a legal distinction between unprovoked deadly force inside the United States and unprovoked deadly force just across the border.

That assumption misconstrues a reasonable officer's knowledge of the law. Precedents of this Court and of the Fifth Circuit, as well as the regulations governing Border Patrol agents' conduct, unequivocally condemn unprovoked deadly force. These precedents, more than the

intricacies of extraterritoriality doctrine, are relevant to Mesa's qualified immunity claim. A reasonable officer would have prohibitions of excessive force in mind as she considered firing her weapon. It is far less probable that, as the court of appeals implied, such an officer would parse extraterritoriality's complexities as she aimed her gun. Indeed, nothing in the record at this stage indicates that Border Patrol officers were trained to apply the law differently in different parts of the border zone. By ignoring these factors, the court of appeals' rule applies post hoc legal analysis, rather than considering how a reasonable officer would have assessed the situation at the time.

a. This Court's precedent is sufficient to alert Mesa to the illegality of his conduct. "The constitutional limits on the use of deadly force have been clearly established for almost two decades." *Brosseau v. Haugen*, 543 U.S. at 202 (Stevens, J., dissenting). "[T]here can be no doubt that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 6 (1985). Three decades after *Garner*, there is no question that, but for the jurisdictional puzzles presented by this case, Mesa's actions would have violated Hernández's clearly established constitutional rights. *Cf. id.* at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

To be sure, this Court has counseled that courts should not "define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011). Precedent is not instructive if it states only a "general proposition," such as that "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201). Here, though, *Garner*'s specific holding suffices to put a reasonable officer on notice that shooting an unarmed child violates clearly established

law. Unlike *Brosseau*, where "an officer shot a fleeing suspect who presented a risk to others," *id.* at 200, nothing about Hernández's nonthreatening actions distinguish this case from the Court's excessive force jurisprudence.

b. Fifth Circuit precedent specific to the U.S.-Mexico border also emphasizes the unreasonableness of Hernández's death. "[E]xcludable aliens" within the United States' borders are "entitled . . . to be free of gross physical abuse at the hands of state or federal officials." *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987). "No reasonable officer would believe it proper to beat a defenseless alien without provocation . . . ." *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 626-27 (5th Cir. 2006). Although those cases arise within the United States, they underscore the oddity of the notion that Mesa would reasonably believe his conduct conformed to the requirements of the law.

c. Mesa's qualified immunity defense is further eroded by the inconsistency between his actions and the federal regulations governing U.S. Border Patrol agents' use of force. "Deadly force may be used only when a designated immigration officer . . . has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury." 8 C.F.R. § 287.8 (2015) (promulgated 2003). "Authorized Officers/Agents may use deadly force only when necessary, that is, when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person." *Use of Force Policy, Guidelines, and Procedures Handbook*, U.S. Customs & Border Protection 3 (May 2014).[17] These policies apply to citizens and noncitizens alike and are operative

[17] https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf. The *Handbook*'s language is materially identical to the CBP policies predating Mesa's shooting. *See* Off. Inspector Gen., *A Review of the September 2005 Shooting Incident Involving the Federal Bureau of Investigation and Filiberto Ojeda Ríos*, U.S. Dep't Just. (Aug. 2006), https://oig.justice.gov/special/s0608/chapter5.htm.

regardless of officers' location. Nothing in these regulations counsels officers to apply deadly force differently in Mexico than in the United States. That Mesa's actions flagrantly violated these rules indicates how likely it is that a "reasonable officer" in Mesa's shoes would have known that Mesa's "conduct was unlawful in the situation he confronted." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 202); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining qualified immunity does not protect those who "knowingly violate the law"). The court of appeals accordingly erred in assessing the law from its vantage point, rather than through a reasonable officer's perspective.

B. Facts unknown to Mesa cannot render his use of deadly force reasonable.

The court of appeals compounds its flawed analysis with respect to treatment of facts. Its holding relies on information—that Hernández lacked meaningful connections to the United States—that Mesa did not know, and could not reasonably have assumed, at the time of his deadly action. *Hernandez*, 785 F.3d at 120. That ex post reasoning is antithetical to qualified immunity doctrine, which focuses on the "information possessed by the . . . officials" whose acts are challenged. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Under a proper analysis, qualified immunity, which "gives government officials breathing room to make reasonable but mistaken judgments," *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011), does not protect Mesa's uninformed and unprovoked actions. Because Mesa possessed no relevant information on Hernández's ties to the United States, he could not have made a judgment about the Constitution's application to his action. This Court's qualified immunity precedents therefore foreclose his claim.

1. Qualified immunity requires officers to apply the law to facts known to them.

"It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances . . . that affords a basis for qualified immunity." *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). This Court has explained that, for an officer to be immune from suit, he must have acted reasonably "in light of clearly established law and the information [he] possessed." *Anderson*, 483 U.S. at 641. Lacking information on Hernández's legal status, a reasonable officer in these circumstances "could be expected to know that certain conduct would violate statutory or constitutional rights" and restrain herself accordingly. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). And information gained after the fact may not be considered under *Anderson*'s standard. *Cf. Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

When he shot Hernández, Mesa did not know whether Hernández was a U.S. citizen, protected by the Constitution even overseas. *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion). He did not know whether Hernández had a "significant voluntary connection" to the United States, and therefore "enjoy[ed] certain constitutional rights." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990). He did not know, for example, whether Hernández undertook "periodic visits to assist [his] aunt with retrieving her Social Security check," a level of connection the Fifth Circuit has held sufficient to confer constitutional rights. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006). Indeed, at the time he pulled the trigger, Mesa knew practically nothing about Hernández.

The court of appeals was untroubled by Mesa's ignorance. Rather, it treated Hernández's absence of ties to the United States as a fact that could be applied to Mesa's actions on an ex post

basis. *Hernandez*, 785 F.3d at 120. That holding contradicts the precedents of this Court and pits the Fifth Circuit against the three courts of appeals to reach the opposite result.

a. Since *Anderson*, this Court has reinforced the rule that externally verifiable "information," not baseless assumption or speculation, is required to establish the reasonableness of an official's actions. In *Groh v. Ramirez*, 540 U.S. 551 (2004), this Court denied an officer qualified immunity because he sought to execute a warrant but "the warrant in question failed to describe the items to be seized *at all*," *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1250 (citing *Groh*, 540 U.S. at 557), and where the officer thus had no information suggesting his conduct conformed to the Constitution. In contrast, in *Messerschmidt v. Millender*, a searching officer was granted qualified immunity for a search pursuant to an allegedly defective warrant because "information" on the warrant—about a "sawed-off shotgun"—made it "not . . . unreasonable for an officer to conclude" that a search for other weapons was lawful. 132 S. Ct. at 1246. *Messerschmidt*'s relentless focus on the reasonableness of the searching officer's behavior given "the facts set out in the affidavit," *id.* at 1247, demonstrates this Court's command. Officers must apply the law to available facts, not to pure conjecture or information acquired after the fact, to establish the "objective legal reasonableness" of their actions.

This rule accords with settled Fourth Amendment doctrine. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967) (assessing qualified immunity in terms of the Fourth Amendment's "probable cause" standard). An action is "unreasonable under the Fourth Amendment" unless an officer has "at least articulable and reasonable suspicion" that justifies his conduct. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Because "an official's state of mind is easy to allege and hard to disprove," *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998), an officer must have a "particularized and objective basis" to justify his assumptions, *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

Fourth Amendment analysis "involves only a determination of . . . facts," *Ornelas v. United States*, 517 U.S. 609, 696 (1996), not of officers' "subjective[] belie[f]," *Whren v. United States*, 517 U.S. 806, 809 (1996). Where an officer has no contemporaneous fact-specific basis for his beliefs, his actions violate the Fourth Amendment's prohibition on excessive force, and his qualified immunity defense fails.

This rule is necessary to vindicate the purpose of qualified immunity. The doctrine protects those who act with "objective reasonableness," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), in a "legally uncertain environment," *Ryder v. United States*, 515 U.S. 177, 185 (1995). It does not shield those whose actions are reasonable "only with the 20/20 vision of hindsight." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015). Public policy does not justify insulating from suit those officers who act without an appropriate basis for their deadly conduct. "[T]he need to hold public officials accountable when they exercise power irresponsibly" requires allowing petitioners to obtain relief for violations of their son's constitutional rights. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").

b. The Fifth Circuit's reliance on hindsight and guesswork is at odds with that precedent and has been rejected by the three other courts of appeals to confront similar questions.

i. First, the Eleventh Circuit refuses to consider facts gained in hindsight as part of a qualified immunity analysis. Consistent with *Anderson*, this rule applies both when the facts undermine and bolster an officer's qualified immunity claim. Where, for example, an officer's otherwise reasonable actions exacerbated a victim's preexisting medical condition, the officer has qualified immunity because "[w]e do not use hindsight to judge the acts of police officers;

we look at what they knew (or reasonably should have known) at the time of the act." *Rodriguez v. Farrell*, 280 F.3d 1341, 1352-53 (11th Cir. 2002). Conversely, where an officer's otherwise unreasonable use of force turns out to injure his victim less than expected, the officer cannot claim qualified immunity simply because of the "fortuity of the circumstances." *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002). This rule contrasts with the Fifth Circuit's analysis, which gives Mesa immunity because of cruel "fortuity of the circumstances" learned only after the fact.

ii. The Tenth Circuit's rule is similar to the Eleventh Circuit's reasoning. In *Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014), that court rejected a prison nurse's qualified immunity defense because her claim relied on information she could not have known at the time of her action. "The main flaw in Defendant's argument is that she is focusing on the facts we now know . . . while the pertinent question for determining her entitlement to qualified immunity depends on the facts that were known at the time." *Id.* at 1194; *accord Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) (en banc) (noting, in the Fourth Amendment context, that "[k]nowledge of facts and circumstances gained after the fact . . . has no place in the trial court's . . . analysis of the reasonableness of the actor's judgment"). The Tenth Circuit's reasoning is consistent with this Court's requirement in *Anderson* and, if applied to this case, would defeat Mesa's defense.

iii. The Ninth Circuit has also explained that qualified immunity analysis is limited to the "circumstances presented to [the] officer." *Moreno v. Baca*, 431 F.3d 633, 623 (9th Cir. 2005) (quoting *Saucier*, 533 U.S. at 209) (alteration in original), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). In *Moreno*, two officers who conducted a warrantless search claimed that their violation of the law was not clearly established because their victim turned out to be on parole, and therefore possessed fewer Fourth Amendment rights.

Because the officers were "not aware of Moreno's parole status or of the outstanding arrest warrant at the time of the seizure," the Ninth Circuit rejected their defense. *Id.* at 639. Just as *Moreno* held that "officers must be aware that the individual is on parole before conducting a parole search," officers in Mesa's shoes must be aware that their victims are unprotected by the Fourth Amendment before violating their victims' potential rights. *Motley v. Parks*, 432 F.3d 1072, 1088 (9th Cir. 2005) (en banc) (discussing *Moreno*), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc).

A district court, relying on *Moreno*, has rejected an officer's qualified immunity defense in circumstances very similar to this case. In *Rodriguez v. Swartz*, the court rejected Border Patrol Agent Swartz's qualified immunity defense for the unprovoked cross-border shooting of a minor, J.A., because "[i]t was only after Swartz shot J.A. and learned of J.A.'s identity as a Mexican national that he had any reason to think he might be entitled to qualified immunity." *Swartz*, No. 4:14-CV-02251-RCC, slip op. at 20 (D. Ariz. July 9, 2015), *appeal pending* (9th Cir. July 15, 2015). The district court declined to follow the Fifth Circuit's reasoning because the en banc court's reliance on Mesa's "after-the-fact discovery," *id.*, contravened appropriate qualified immunity analysis.

2. Mesa had no information concerning Hernández's ties to the United States.

The en banc court's per curiam opinion demonstrates that the court did not assess Mesa's defense in light of the circumstances known to him. That defect is sufficient to reverse the judgment of the court of appeals. Its error cannot be corrected by raising here, for the first time, the argument that Mesa could reasonably assume Hernández lacked sufficient connections to the United States. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view." (citation omitted)).

But the idea Mesa made a reasonable assumption is untenable on its face. When Mesa shot Hernández, he had no information—other than Hernández's race and his presence in Mexico—that indicated whether the child was entitled to the Constitution's protections. Neither of those data points is sufficient grounds for Mesa's deadly decision to transgress clearly established limits on the use of lethal force.

Hernández's presence in Mexico cannot vindicate Mesa's assumption. One million U.S. citizens live in Mexico.[18] Over twenty million U.S. residents visit Mexico a year.[19] Tens of thousands of Mexicans commute to work within the United States.[20] And every weekday, over nine thousand children Hernández's age commute from Mexican border towns to the United States to attend school.[21] It is "clearly established" that unprovoked deadly force against an individual in any of those categories violates the Fourth Amendment; at the time he pulled his trigger, Mesa did not know whether Hernández was one of those individuals.

Nor can racial profiling justify Mesa's conduct. Millions of people with Hernández's skin tone are U.S. citizens, or have significant connection to the United States. This Court has rejected the contention that, "in the areas adjacent to the Mexican border, a person's apparent ancestry alone justifies [the] belief that he or she is an alien." *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975); *see also id.* at 886 ("Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry.").

Put plainly, many children playing on the Mexican side of the border have sufficient voluntary connections to invoke the protections of the Constitution. And no fact set forth in

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[18] *U.S. Relations With Mexico*, U.S. Dep't State (May 8, 2015), http://www.state.gov/r/pa/ei/bgn/35749.htm.
[19] *Id.*
[20] John Carlos Frey, *Border Gridlock: 'Alien Commuters' Travel Hours to U.S. Farm Jobs*, NBC News (Mar. 25, 2014), http://www.nbcnews.com/news/latino/border-gridlock-alien-commuters-travel-hours-u-s-farm-jobs-n58076.
[21] Ben Bartenstein, *Students Commute from Mexican Border Town for U.S. Education*, N.Y. Times: Student Journalism Inst. (May 29, 2015), http://tucson15.nytimes-institute.com/2015/05/29/students-commute-from-mexican-border-town-for-u-s-education/.

petitioners' complaint diminishes the likelihood Sergio Hernández was one of those children. Of course, such facts could emerge later in the litigation, either through general discovery or through the "tailored" discovery *Anderson* authorizes to resolve "fact-specific" qualified immunity claims. 483 U.S. at 641, 646 n.10. But this case comes to the Court on Mesa's motion to dismiss, where the record is limited to the facts stated in petitioners' complaint. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002). Under that set of facts, Mesa neither knew nor could reasonably have assumed that Hernández lacked Fourth Amendment rights at the time he fired his weapon. "In light of the facts and circumstances confronting him," he could not "have reasonably believed he acted lawfully." *Saucier*, 533 U.S. at 211. Consequently, he cannot claim qualified immunity at this stage of litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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NOVEMBER 2015