No. ____

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 23, 2015

QUESTIONS PRESENTED

In *Boumediene v. Bush*, this Court held that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns," not a "formal sovereignty-based test." 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy's concurrence two decades earlier in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), rejecting four Justices' formalist approach to extraterritorial application of the Fourth Amendment's warrant requirement.

The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States?

2. May qualified immunity be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident?

LIST OF PARTIES TO THE PROCEEDINGS

The following petitioners were plaintiffs in the district court and appellants in the court of appeals: Jesus C. Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca; and Maria Guadalupe Güereca Bentacour, individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca.

Respondent Jesus Mesa, Jr. was a defendant in the district court and an appellee in the court of appeals.

The following entities and individuals were parties in two appeals that were consolidated by the court of appeals with the appeal that gave rise to this petition: the United States of America, the U.S. Department of Homeland Security, the U.S. Bureau of Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement Agency, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr. Those two appeals are not the subject of this petition, and these entities and individuals are not respondents here. (As a courtesy, a copy of this petition has been sent to the Solicitor General.)

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INTRODUCTION

Seven years ago, in *Boumediene v. Bush*, this Court held that "*de jure* sovereignty" is not and has never been "the only relevant consideration in determining the geographic reach of the Constitution" because "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. 723, 764 (2008). That "century-old" functionalist approach applies across a range of constitutional provisions. *Id.* at 759. And it is consistent with Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, in which he focused on practical concerns in deciding whether to apply the Fourth Amendment's warrant requirement abroad. 494 U.S. 259, 275-78 (1990).

Disregarding *Boumediene*'s functionalist approach, the en banc Fifth Circuit in this case concluded that the Constitution affords no protection to an unarmed teenager in a confined area of exclusive U.S. control who was shot to death at close range, without justification, by a U.S. Border Patrol agent standing on U.S. soil. Eschewing any consideration of pragmatic factors, the decision below relied on the formalist analysis of four Justices in *Verdugo-Urquidez* to hold that the Fourth Amendment's protection against excessive deadly force did not apply because the teenager was a Mexican citizen with no "significant voluntary connection" to the U.S., and the agent did not fire his weapon until the boy had crossed onto Mexican soil. App. 4a. If left standing, the Fifth Circuit's decision will create a unique no-man's land—a law-free zone in which U.S. agents can kill innocent civilians with impunity.

The Fifth Circuit achieves that result by adopting a reading of *Verdugo-Urquidez* that "cannot be squared with [this] Court's later holding in *Boumediene*." App. 31a (Dennis, J.). By contrast, the nation's other leading

border circuit, the Ninth Circuit, has adopted a more flexible approach that follows *Boumediene*'s functional inquiry. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012). The Ninth Circuit's divergent precedent has recently been applied to the facts of an indistinguishable cross-border shooting and produced a diametrically opposite result. *See Rodriguez v. Swartz*, No. 14-cv-02251 (D. Ariz. July 9, 2015) (reproduced at 153a). This Court should grant certiorari "to clarify the reach of *Boumediene* and apply Justice Kennedy's functional test" to these all-too-frequently "recurring" facts. App. 33a, 43a (Prado, J.). This case provides an ideal vehicle for the Court "to decide whether its broad statements in *Boumediene* apply to our border with Mexico and to provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights." App. 33a (Prado, J.).

This Court should also grant certiorari to resolve an important question concerning qualified immunity, which protects officers from suit if they acted reasonably "in light of clearly established law and the information [they] possessed" at the time, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987): May qualified immunity be granted or denied based on facts—such as a person's legal status—that would not have been known to "a reasonable officer on the scene," but could be discovered only with "the 20/20 vision of hindsight," *Graham v. Connor*, 490 U.S. 386, 396 (1989)?

The answer to that question is no, as the Ninth Circuit correctly held in *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005). By reaching the opposite conclusion with respect to the plaintiff's parallel Fifth Amendment due-process claim, the decision below brings the Fifth Circuit into direct conflict with the Ninth Circuit and other circuits, and undermines the purposes of qualified im-

munity as described by this Court. If the Fifth Circuit's approach is allowed to flourish, officers guilty of unjustified conduct may be accorded immunity based on facts of which they were unaware. At the same time, officers otherwise deserving of immunity may be forced to stand trial because of later-discovered facts. In both scenarios, immunity would turn on the "the fortuity of the circumstances," not the nature of the conduct. *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002).

This case thus presents the Court with a golden opportunity to decide two questions of pressing national importance, both of which are cleanly teed up. Absent this Court's intervention, Border Patrol agents in Texas will face one set of rules, while those operating in California and Arizona will face a very different set of rules, with agents in New Mexico left to wonder on which side of the divide their circuit will fall. This Court should put an end to this intolerable state of affairs, bring the law into conformity, and make clear that our border with Mexico is not an on/off switch for the Constitution's protections against the unreasonable use of deadly force.

OPINIONS BELOW

The decision of the en banc court of appeals is reported at 785 F.3d 117 and reproduced at 1a. The panel's decision is reported at 757 F.3d 249 and reproduced at 54a. The district court's decision on the claims against Agent Jesus Mesa is unreported and reproduced at 109a. The district court's decision on the claims against the United States is reported at 802 F. Supp. 2d 834 and reproduced at 120a.

JURISDICTION

The en banc court of appeals entered its judgment on April 24, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background

1. On a summer day in 2010, a fifteen-year-old boy named Sergio Hernández was playing with three friends in the concrete culvert separating El Paso, Texas and Juarez, Mexico. App. 146a. Once the flowing Rio Grande, the culvert splits the cities like a cement river, with the invisible borderline running through it. To one side, toward El Paso, is a banked incline that leads to an 18-foot fence built by the U.S. as "part of a 650-mile, $2.8 billion border wall." Andrew Rice, *Life on the Line*, N.Y. Times Magazine, July 28, 2011, http://nyti.ms/1H7VvX9; *see* App. 146a. To the other side, toward Juarez, is another incline leading to a wall topped with a guardrail. In between is a "concrete bank where the now-dry, 33-feet (10-meter) wide Rio Grande is." Christopher Sherman & Olivia Torres, *Mexico teen killed by US Border Patrol, anger high*, Scranton Times Tribune, June 9, 2010, http://bit.ly/1JJkCW9. Overhead, "a railroad bridge linking the two nations" spans the culvert. *Id.* A photograph of the bridge and the culvert can be found at http://bit.ly/1IHkVPZ and in the appendix at 181a.

Like countless children before them, Sergio and his friends were playing a game in which they dared each other to run up the culvert's northern incline, touch the U.S. fence, and then scamper back down to the bottom. App. 146a. Because they were not trying to smuggle themselves into the U.S., the boys chose a site in plain view of the Paso del Norte Port of Entry—one of the busiest border crossings in the United States. App. 146a. And because the boys meant no harm, they were unarmed. App. 147a.

While the boys were playing, a U.S. border guard patrolling the culvert on bicycle seized one of them as

they ran down the ramp. App. 146-47a. The other boys fled back into Mexico, with Sergio running past the agent, Jesus Mesa, toward a pillar beneath the bridge on the Mexican side of the culvert. *Id.* Within seconds, Agent Mesa drew his firearm, aimed it at Sergio, and shot him in the head, just next to his eye. *Id.* Neither Agent Mesa nor any of the other Border Patrol agents who swarmed the scene offered the boy medical aid of any kind; instead, they got back on their bikes and left. App. 147a. Sergio died on the spot. *Id.*

Although just 60 feet separated Sergio from Agent Mesa at the time of the shooting, Sergio was formally in Mexican territory when he was killed, while Mesa was formally in the United States. App. 147a. CNN, *Youth fatally shot by border agent*, June 10, 2010, http://cnn.it/1gjK1t4. And Sergio, it turned out, was a Mexican citizen, App. 145a—a fact about which Agent Mesa could not have known when he pulled the trigger—marking "the second death of a Mexican at the hands of Border Patrol officers in less than two weeks." Sherman & Torres, *Mexico teen killed by US Border Patrol.*

2. One day after the shooting, federal authorities began claiming that Agent Mesa shot Sergio in self-defense. The FBI's El Paso Division put out a press release entitled "Assault on Federal Officer Investigated." FBI El Paso Press Release, June 8, 2010, http://1.usa.gov/1JUAdQ5. The statement asserted that Mesa "responded to a group of suspected illegal aliens being smuggled into the U.S. from Mexico," and Sergio "began to throw rocks" at Mesa from across the border. *Id.* According to the FBI, Mesa fired his gun only after he "gave verbal commands" for Sergio to "stop and retreat," and Sergio and the other boys "surrounded the

agent and continued to throw rocks at him." *Id.*; *see also* App. 147a.

But two days later, "several cellphone videos" surfaced that "show[ed] a different story." Bob Ortega & Rob O'Dell, *Deadly border agents incident cloaked in silence*, Arizona Republic, Dec. 16, 2013, http://bit.ly/1bHMq6p; *see* CNN, *Youth fatally shot by border agent*, June 10, 2010, http://cnn.it/1gjK1t4. The videos show that "Mesa wasn't surrounded" by the boys when he fired his weapon, nor did Sergio throw any rocks at him. Ortega & O'Dell, *Deadly border agents incident cloaked in silence*. In one video, Sergio is "visible, peeping out from behind a pillar beneath a train trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead." *Id.* As CNN reported at the time, the video "contradicts [the FBI's] account." CNN, *Youth fatally shot by border agent*.

Even before the videos came to light, the shooting sparked outrage on both sides of the border. In Mexico, the government condemned it as unjustified. *Id.* "The growing frequency of this kind of event," Mexico's Foreign Ministry lamented, "reflects a troubling trend in the use of excessive force by some border authorities." Tim Padgett, *After Teen's Death, a Border Intifadeh?*, TIME, June 10, 2010, http://ti.me/1CmTbiz. The Ministry cited records showing that "the number of Mexicans who ha[d] been killed or wounded by U.S. border authorities ha[d] increased from five in 2008 to 12 in 2009," and then to 17 in the first half of 2010. CNN, *Youth fatally shot by border agent*.

3. In the aftermath of Sergio's death, criminal prosecutors in both the U.S. and Mexico investigated the shooting. But to no avail: The Justice Department lacked jurisdiction to prosecute under federal criminal civil-

rights laws and the federal murder statute because Sergio was on foreign soil at the time of his death and was not a U.S. citizen. *See* 18 U.S.C. §§ 242 & 1119; DOJ Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, Apr. 27, 2012, http://1.usa.gov/1Cu6qy0 (explaining that DOJ lacked jurisdiction). And Mexican prosecutors, though they had jurisdiction to prosecute Mesa as a formal matter, could not do so in practice: After the State of Chihuahua issued a murder warrant for Mesa's arrest, the U.S. refused a request for extradition. Marisela Lozano, *Chihuahua officials seek extradition of border agent*, El Paso Times, May 4, 2012, http://bit.ly/1HkFZcF.

That left the Border Patrol to handle any discipline internally. Federal regulations restrict the use of deadly force by Border Patrol agents, requiring that an agent first have "reasonable grounds to believe that such force is necessary to protect [himself or herself] or other persons from the imminent danger of death or serious physical injury." 8 C.F.R. § 287.8(a)(2); *see also id.* § 287.8(a)(1)(iii). Customs and Border Protection (CBP) has incorporated this requirement into its use-of-force policies—policies the agency did not make publicly available until recently, in response to public outcry. *See* U.S. Customs & Border Prot., HB 4500-01C, Use of Force Policy, Guidelines and Procedures Handbook, at 3 (May 2014), http://1.usa.gov/1nADcFv; Ortega & O'Dell, *Deadly border agents incident cloaked in silence*.

Despite these restrictions, Border Patrol agents have used deadly force in a number of "highly questionable" instances in recent years, and have done so with impunity. *Id.* An investigation conducted by the *Arizona Republic* revealed that agents and CBP officers "killed at least 42 people" from 2005 to 2013, "all but four of

which [were killed] along or near the southwest border." *Id.* Yet, "[i]n none of the 42 deaths is any agent or officer publicly known to have faced consequences—not from the Border Patrol, not from [CBP] or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts." *Id.* "Internal discipline," moreover, "is a black hole." *Id.*

This "lack of accountability" and "culture of secrecy about agents' use of deadly force" has persisted notwithstanding increased outside scrutiny. *Id.* In 2013, the Police Executive Research Forum—"an independent group of law enforcement experts" commissioned by CBP—studied 67 shootings that occurred from 2010 to 2012 (nearly a third of them fatal). Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, L.A. Times, June 15, 2015, http://lat.ms/1HK7SN5. The report "criticized the Border Patrol for a 'lack of diligence' in investigating its deadly incidents," *id.*, and concluded that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force." U.S. Customs and Border Prot., Use of Force Review: Cases and Policies, at 6 (Feb. 2013), http://1.usa.gov/1nKOBQS.

Rather than reform its ways, the Border Patrol first tried to keep the report secret, refusing even to give Congress a copy until it was leaked to the *Los Angeles Times*. Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*. Then, under pressure to act, the agency conducted a separate review of the same 67 cases—only this time internally—and in June 2015 "absolved agents of misconduct in all but three cases, which are still pending." *Id.* Keeping to "its tradition of closing ranks around its paramilitary culture," the Border Pa-

trol disciplined only two agents for these shootings—and "[b]oth received oral reprimands." *Id.*

B. Procedural History

Six months after Sergio Hernández's death, in early 2011, his parents sued Agent Mesa in federal district court in Texas, alleging that the agent violated the Fourth and Fifth Amendments to the U.S. Constitution. App. 151a. Jurisdiction over these claims was based on 28 U.S.C. § 1331.[1]

Mesa moved to dismiss, arguing that Sergio lacked any constitutional protection because he "was an alien without voluntary attachments to the United States" who was "standing in Mexico when he was killed." App. 113-14a. Mesa did not attempt to justify his actions or to explain why they were reasonable in light of the circumstances, nor did he claim to have had knowledge—at the time of the shooting—of the facts that, in his view, were constitutionally dispositive: Sergio's citizenship, the nature of his attachments to the U.S., and his precise location along the border.

The district court's decision. The district court dismissed all claims. App. 119a, 139-40a. It concluded that the Constitution's deadly-force protections, as applied to non-citizens like Sergio, stop at the border. App. 116-18a. The district court declined to follow this Court's decision in *Boumediene*, calling it "inapposite" because it "says nothing of the Fourth Amendment." App. 114a. Applying a formalistic test instead, the court declined to grant constitutional protection because Sergio "was

[1] The family also brought several tort claims against the United States. Those claims are not at issue in this petition, and the United States is not a respondent here.

standing underneath the Mexican side of the Paso Del Norte Bridge when Agent Mesa shot him." App. 131a. The court also dismissed the Fifth Amendment claim. App. 118a.

The Fifth Circuit panel's decision. A divided panel of the Fifth Circuit affirmed in part and reversed in part. App. 54-108a. It fractured badly on the claims against Agent Mesa, and held that the Fifth Amendment (but not the Fourth Amendment) applies. App. 71-89a. The court further held that Mesa is not entitled to qualified immunity because "[n]o reasonable officer" would think it permissible to kill an unarmed teenager just because he happened to be an alien with no significant voluntary connections to the U.S. who was standing outside the border—facts Mesa did not know when he pulled the trigger. App. 103a.

On the extraterritoriality question, two of the judges rejected the district court's formalistic analysis, finding that it "no longer represents the Supreme Court's view" after *Boumediene*, which held that "practical considerations" and objective factors "govern[] the application of constitutional principles abroad." App. 66a. Judge Prado explained that *Boumediene* "appears to repudiate the formalistic reasoning of *Verdugo-Urquidez*'s sufficient connections test" in favor of the "'practical and functional' test articulated in Justice Kennedy's [*Verdugo-Urquidez*] concurrence." App. 76-77a. And Judge Dennis stressed that a formalistic reading of *Verdugo-Urquidez* "cannot be squared with the Court's later holding in *Boumediene*." App. 105a. Judge DeMoss, by contrast, distinguished *Boumediene* on its facts and took the view that the Constitution should not apply "because there is a border between the United States and Mexico," and

Agent Mesa shot Sergio after he ran across it. App. 107-8a.

The en banc Fifth Circuit's decision. Rehearing the case en banc, the Fifth Circuit produced a per curiam opinion that masked deep divisions among the judges, many of whom wrote separately. Because the court was "divided on the question whether Agent Mesa's conduct violated the Fifth Amendment," and "[r]easonable minds can differ" about whether *Boumediene*'s functional approach requires applying constitutional protection here, the court chose not to decide the Fifth Amendment question. App. 5-6a. Instead, "avail[ing] itself of the latitude afforded by *Pearson v. Callahan*," 555 U.S. 223 (2009), the court held that Mesa is entitled to qualified immunity even assuming he violated the Fifth Amendment because its applicability "was not clearly established, under these facts, in 2010." App. 4a, 7a. The court acknowledged that *Boumediene* represents the "strongest authority for the plaintiffs," but determined that the case does not speak "with the directness that the 'clearly established' standard requires." App. 5-6a.

As to the Fourth Amendment, the court reached the merits and held that "pursuant to *United States v. Verdugo-Urquidez*," Sergio "cannot assert a claim under the Fourth Amendment" because he was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." App. 4a. The court did not discuss any other factor, including whether applying the Fourth Amendment in this case would be "impracticable and anomalous"—a factor that Justice Kennedy found critical in *Verdugo-Urquidez* when he concluded that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *See* 494 U.S. at 278.

Judge Prado concurred, joined by Judges Dennis and Graves "except to the extent that [his opinion] adopts the en banc court's reasons for denying the Fourth Amendment claim." App. 50a (Graves, J.); *see also* App. 31a (Dennis, J.). Although Judge Prado adhered to his previous position on the Fifth Amendment, he reversed course on qualified immunity, apparently persuaded that "[t]he depth of [the court's] disagreement about the meaning of *Boumediene*, *Verdugo-Urquidez*, and [*Johnson v.*] *Eisentrager*," 339 U.S. 763 (1950), underscores the law's uncertainty. App. 42a.

In separate opinions, Judges Dennis and Graves expressed disagreement with the en banc court's formalistic Fourth Amendment test. Judge Dennis reiterated his view that such an approach conflicts with *Boumediene*, App. 31a, while Judge Graves agreed that the Fourth Amendment claim "ha[s] force," but disagreed "that this court should forgo the adjudication" of that claim—effectively dissenting from the per curiam opinion on this point. App. 50a.

Judge Jones, responding to her colleagues' "suggest[ion]" that "the Supreme Court take . . . up" the case, App. 22a, wrote to provide her views, which were shared by Judges Smith, Clement, and Owen. App. 7-30a She criticized the en banc "compromise" opinion for ducking the Fifth Amendment question, saying that it "simply delays the day of reckoning." App. 7a. Taking a formalistic position, she thought it "clear that United States constitutional rights do not extend to aliens who (a) lack any connection to the United States and (b) are injured on foreign soil," and thus would "resolve this appeal on the first prong of qualified immunity analysis." *Id.* Although she acknowledged that *Boumediene*'s functionalist approach could "ultimately be extended to determine

the extraterritorial reach" of the constitutional provisions at issue here, she concluded that "this court may not step ahead of the Supreme Court." App. 19a.

REASONS FOR GRANTING THE PETITION

I. This case presents an ideal vehicle to clarify the correct approach to the Constitution's extraterritorial application after *Boumediene*—a question that has bedeviled courts and commentators.

This Court held in *Boumediene* that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Yet the Fifth Circuit refused to heed that mandate. It did not consider *any* practical concerns and applied formalism alone. Relying exclusively on *Verdugo-Urquidez*, the Fifth Circuit held that Sergio Hernández lacks a constitutional claim because he was a Mexican citizen with no "significant voluntary connection" to the U.S. and "was on Mexican soil at the time he was shot." App. 4a. That holding contravenes *Boumediene* and diverges with the Ninth Circuit's extraterritoriality precedent—precedent that has already been applied to indistinguishable facts and produced conflicting results. This Court should take the opportunity "to clarify the reach of *Boumediene*" and apply a functionalist analysis to these "recurring" facts. App. 33a, 43a (Prado, J.).

A. *Boumediene*'s functionalist approach dates back more than 100 years. It is embodied in cases arising out of different continents and centuries and concerning a wide array of constitutional provisions. Taken together, these cases repudiate the Fifth Circuit's strict sovereignty-based rule.

At "the dawn of the 20th century," in what came to be known as the *Insular Cases*, this Court began its extraterritoriality jurisprudence by addressing whether

the Constitution "applies in any territory that is not a State." *Boumediene*, 553 U.S. at 756. *See De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904). Adopting a pragmatic approach, this Court created "the doctrine of territorial incorporation," under which certain fundamental constitutional rights (but not all constitutional rights) apply to noncitizens in unincorporated territories. *Boumediene*, 553 U.S. at 757-58. Rather than "enforc[e] all constitutional provisions 'always and everywhere,'" the Court "not[ed] the inherent practical difficulties" of full incorporation and considered each provision individually, sensitive to the specific concerns presented in each case. *Id.* at 759 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). As this Court put it in *Boumediene*, "the Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed." *Id.*

Functional considerations also proved "decisive" half a century later in *Reid v. Covert*, 354 U.S. 1 (1957), which held that the spouses of American servicemen living on military bases abroad were entitled to trial by jury. *Boumediene*, 533 U.S. at 760. Although the plurality opinion rested primarily on the petitioners' status as American citizens, two concurring opinions by Justices Frankfurter and Harlan—"whose votes were necessary to the Court's disposition"—instead relied on "practical considerations" unrelated to citizenship. *Id.* Justice Frankfurter rejected the "broad principle" that the Constitution has no application beyond the "limits of the United States," endorsing a flexible approach that looks at the "specific circumstances of each particular case." *Reid*, 354 U.S. at 54. And Justice Harlan likewise favored

pragmatism—not a "rigid and abstract rule." *Id.* at 75. To him, the "crucial" considerations are "the particular circumstances, the practical necessities, and the possible alternatives" presented, as well as whether enforcement would be "impractical and anomalous." *Id.* "The question is one of judgment," he explained, "not compulsion." *Id.*

"Practical considerations [also] weighed heavily" in *Johnson v. Eisentrager*, 339 U.S. 763, which denied access to the writ of habeas corpus to "enemy aliens" imprisoned "in Germany during the Allied Powers' post-war occupation." *Boumediene*, 553 U.S. at 762. The Court's opinion "stressed the difficulties" of granting this right and the "practical barriers" it would pose. *Id.* at 762-63. Although the opinion includes language suggesting that the Court may have "adopted a formalistic, sovereignty-based test," *Boumediene* "reject[ed] this reading," finding that "practical considerations" were "integral" to *Eisentrager*'s outcome. *Id.* at 762-63. *Boumediene* also expressed doubt that *Eisentrager* "used the term sovereignty only in the narrow technical sense," without taking into consideration "the degree of control" exerted by the U.S. and whether the U.S. could act "without accountability." *Id.* at 763. Had *Eisentrager* adopted a "bright-line test," *Boumediene* emphasized, its holding would have been "inconsistent with the functional approach to questions of extraterritoriality" in this Court's cases. *Id.* at 764.

Finally, *Boumediene* drew on Justice Kennedy's concurrence in *Verdugo-Urquidez*, which adopted Justice Harlan's "'impracticable and anomalous' extraterritoriality test" and applied it "in the Fourth Amendment context." *Id.* at 760. Justice Kennedy expressly disagreed with the formalist reasoning of the four other Justices to join the *Verdugo-Urquidez* opinion, and instead "advocated a functional analysis of extraterritoriality" derived from the *Insular Cases* and Justice Harlan's

concurrence in *Reid*. App. 38a (Prado, J.). Conducting that analysis, Justice Kennedy listed a number of "conditions and considerations of this case [that] would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous," including "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Verdugo-Urquidez*, 494 U.S. at 277. These practical considerations, Justice Kennedy concluded, "all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.*

After surveying this Court's cases, *Boumediene* observed that the "common thread uniting" them is their shared recognition that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Although the Court acknowledged that some cases arguably could be read to support the notion that "*de jure* sovereignty" is "the only relevant consideration in determining the geographic reach of the Constitution," the Court refused to read its cases "to conflict in this manner." *Id.*

Having rejected a "formal sovereignty-based test," *Boumediene* applied a functional framework and held that detainees in Guantánamo Bay, Cuba, are "entitled to the privilege of habeas corpus to challenge the legality of their detention." *Id.* at 764, 771. The Court based its conclusion on the "objective degree of control" and "practical sovereignty" that the U.S. exerts over the Guantánamo Bay prison, and found that these factors outweighed the "costs to holding the Suspension Clause applicable," which are not "dispositive." *Id.* at 754, 769.

B. The Fifth Circuit's decision cannot be reconciled with this Court's functional approach, as articulated in

Boumediene. The decision holds that the Fourth Amendment does not apply here because Sergio Hernández was a Mexican citizen with no significant voluntary connection to the U.S. who was "standing on Mexican soil at the time he was shot." App. 4a. That is the extent of the Court's analysis. There is no discussion of any of the pragmatic and context-specific considerations *Boumediene* identified as central to extraterritoriality analysis, including whether the U.S. effectively controls the border area where Sergio was killed. Nor is there any mention of whether applying constitutional protection in these circumstances would be "impracticable and anomalous"—an inquiry Justice Kennedy twice emphasized as critical, first in his concurring opinion in *Verdugo-Urquidez*, and then again in his opinion for the Court in *Boumediene*.

Eschewing those opinions, the Fifth Circuit instead relied on the Court's opinion in *Verdugo-Urquidez*, which held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. The Court based this holding primarily on the Fourth Amendment's text (its use of the phrase "the people") and reasoned that Verdugo-Urquidez "had no voluntary connection with this country that might place him among 'the people.'" *Id.* at 273. The Court also looked to the pre-*Boumediene* caselaw, and noted that a "global view" of the Fourth Amendment "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," including its "foreign policy operations." *Id.*

Although Justice Kennedy joined the *Verdugo-Urquidez* opinion (thus supplying the fifth vote), and did not believe that his views "depart[ed] in fundamental respect from the opinion of the Court," he wrote sepa-

rately to explain why he disagreed with the formalist approach of the other four Justices. 494 U.S. at 275. He could not "place any weight on the reference to 'the people' in the Fourth Amendment," and instead focused on pragmatic considerations: whether "adherence to [the] warrant requirement" abroad would be "impracticable and anomalous." *Id.* at 276.

By extending *Verdugo-Urquidez*'s "significant voluntary connection" test beyond the warrant requirement—without asking whether extraterritorial application would be "impracticable and anomalous" under the circumstances—the Fifth Circuit disregarded the "common thread uniting" this Court's cases and flouted *Boumediene*. 553 U.S. at 764. This Court should grant certiorari to reassert its holding in *Boumediene* and make clear that the Fourth Amendment's applicability to a deadly shooting at the U.S.-Mexico border "turn[s] on objective factors and practical concerns, not formalism." *Id.*

C. Certiorari is also warranted because the decision below departs from the Ninth Circuit's extraterritoriality framework, which applies *Verdugo-Urquidez*'s "significant voluntary connection" test in conjunction with—rather than instead of—"the 'functional approach' of *Boumediene*." *Ibrahim*, 669 F.3d at 997.

1. Unlike the Fifth Circuit, the Ninth Circuit recognizes that "the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not." *Id.* at 995. Quoting *Boumediene*, the Ninth Circuit in *Ibrahim* explained that "[i]n determining the constitutional rights of aliens outside the United States, the [Supreme] Court applies a 'functionalist approach' rather than a bright-line rule." *Id.* The Ninth Circuit held that it was "bound to follow" this Court's functionalist approach in addition to *Verdu-*

go-Urquidez's "significant voluntary connections" test, thereby integrating an otherwise rigid test into a functionalist analysis. *Id.* at 997. Although the court ultimately determined that Ibrahim had sufficient connections with the U.S. and applied the Constitution on that basis, there is no reason to think that having such connections is a *prerequisite* to extraterritoriality in the Ninth Circuit, as it is in the Fifth Circuit. That would be a formalist approach—not a functionalist one.

Indeed, the Ninth Circuit's functionalist approach has already been applied to indistinguishable facts and led to an outcome that directly conflicts with the decision below. In *Rodriguez v. Swartz*, a Border Patrol agent shot and killed an unarmed Mexican teenager on the Mexican side of the border, and his parents asserted a Fourth Amendment claim against the agent. No. 14-cv-02251 (D. Ariz. July 9, 2015) (App. 153a). Because the agent was in Arizona when he fired his weapon, as opposed to Texas, the court applied "*Boumediene* in conjunction with *Verdugo-Urquidez*," as the Ninth Circuit requires. *Id.* at 12 (App. 168a). Under that framework, the court held that Rodriguez had a "fundamental right to be free from the United States government's arbitrary use of deadly force." *Id.* at 14 (App. 171a). The court did not give dispositive weight to the voluntary-connections factor, but assessed it along with "the many practical considerations and factors the Supreme Court of the United States has ordered the lower courts to consider." *Id.* at 16 (App. 173a). And it reached the opposite conclusion.

Thus, as *Rodriguez* illustrates, under the Ninth Circuit's approach, *Boumediene* applies and the "voluntary connections" factor is not given dispositive weight, but is considered alongside practical factors. Under the Fifth Circuit's approach, by sharp contrast, *Boumediene* is treated as irrelevant and an alien must have "significant

voluntary connections" to the U.S. to receive any Fourth Amendment protection at all beyond our formal borders.

Rodriguez expressly acknowledged the divergence between the two approaches: "Applying [the Ninth] Circuit's case law"—which requires "[w]eighing all of the [relevant] factors"—to indistinguishable facts generates "a different conclusion from that of the Court of Appeals for the Fifth Circuit in *Hernandez*." *Id.* at 7, 16 (App. 162a, 172a). Such a dramatic divergence between the two biggest border circuits on such a fundamental constitutional question cannot be tolerated. And because the Ninth Circuit is bound by its panel decision in *Ibrahim*, there is no need to await its decision in *Rodriguez*.

2. The disagreement in this area is not limited to just these two circuits or the interplay between *Boumediene* and *Verdugo-Urquidez*. For more than two decades, courts and commentators have struggled in interpreting the precise meaning of *Verdugo-Urquidez*, with some going so far as to call the opinion a "plurality." The Second, Third, and Ninth Circuits, for example, have noted that only "a plurality of the Court" embraced the opinion's formalist reasoning. *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); *see United States v. Boynes*, 149 F.3d 208, 211 n.3 (3d Cir. 1998) (explaining that "two of the six justices in the *Verdugo-Urquidez* majority coalition did not join the other four justices' reasoning completely"); *Sissoko v. Rocha*, 440 F.3d 1145, 1167 n.33 (9th Cir. 2006) (referring to "the plurality opinion in *United States v. Verdugo-Urquidez*"), *superseded by* 509 F.3d 947 (9th Cir. 2007). Judge Bates has similarly described the *Verdugo-Urquidez* "plurality opinion" as "suggesting that certain rights under the First and Fourth Amendments inure to the benefit of only those with sufficient connections to the United States." *Kadi v. Geithner*, 42 F. Supp. 3d 1, 25 (D.D.C. 2012). And Professor Gerald Neuman has explained that Justice Kennedy's *Verdugo-*

Urquidez concurrence "diverged so greatly from [the Court's] analysis and conclusions that [Chief Justice] Rehnquist seemed to really be speaking for a plurality of four." *Whose Constitution?*, 100 Yale L.J. 909, 972 (1991).

This confusion has only grown after *Boumediene*. Since that decision, "uncertainty has reigned" around how courts should determine when constitutional rights apply abroad. Joshua Geltzer, *Of Suspension, Due Process, and Guantanamo*, 14 U. Pa. J. Const. L. 719, 720 (2012); *see also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973 (2009). "Courts and commentators alike have already felled many forests grappling with the hard questions [the case] leaves in its wake." Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107 (2009). This case presents an ideal vehicle for this Court to resolve the confusion.

D. By applying the wrong methodology, the decision below reached the wrong outcome. Had the Fifth Circuit applied a functionalist analysis, the court would have held that the Fourth Amendment protects against the arbitrary use of deadly force under these circumstances.

Sergio Hernández was killed in a culvert that U.S. officials patrol and effectively control. Border Patrol agents exercise their duties "within feet" of where he was shot, and routinely "act on or even across" the border to "ensur[e] that [the] physical border is not the first or last line of defense, but one of many." App. 84a-85a. And when they do so, they "are not 'answerable to' U.S. border partners." App. 86a. Thus, "even though the United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a

permanent border without any shared accountability weigh in favor of recognizing" constitutional protection. *Id.*

Moreover, this case triggers none of the factors that make extending constitutional rights "impracticable and anomalous." *Boumediene*, 553 U.S. at 769. Border Patrol agents are already required to "use the minimum non-deadly force necessary" at all times, 8 C.F.R. § 287.8(a)(1)(iii), and are constitutionally liable for using deadly force without justification against any individual in the U.S., and against American citizens across the border. Recognizing a Fourth Amendment right in this case would have the "unremarkable effect" of applying the same constitutional requirement to foreign citizens who happen to be standing just south of the border. App. 88a. That would not force agents to change their conduct to conform to new standards; it would simply create an enforcement mechanism for rules already in place.

Nor would applying Fourth Amendment protection in this case subject activities like U.S. surveillance in Mexico to constitutional scrutiny, as the panel below incorrectly believed. App. 79a. "This case addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border." *Rodriguez*, No. 14-cv-02251, at 15 (App. 172a). It does not involve extraterritoriality of the Fourth Amendment more broadly.

While the costs of recognizing a Fourth Amendment right here are minimal, the costs of denying it are high. If this Court allows the Fifth Circuit's decision to stand, it will hand the Executive unaccountable power of the kind the Court has previously refused to grant. In 2004, this Court rejected the government's argument that U.S. courts lack jurisdiction over Guantánamo Bay, holding that the Executive may not exempt its activities from

judicial review. *Rasul v. Bush*, 542 U.S. 466, 486 (2004). The same separation-of-powers concern animated this Court's decision in *Boumediene*, which observed that "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." 553 U.S. at 797. It seems no stretch to say the same of the Executive's power to kill a person.

The Fifth Circuit's decision also gives Border Patrol agents the ability to "switch the Constitution on or off"—a power the *Boumediene* Court explicitly denied the Executive. *Id.* at 727. The en banc opinion tells agents that if they simply ensure that Mexicans are standing on the Mexican side of the border, they can shoot with impunity, free of constitutional constraints. Not only does that resurrect the territorial formalism that *Boumediene* rejected; it also enables the Executive to play territorial arbitrage with the Constitution—manipulation that *Boumediene* forbids. *Id.*

II. The Fifth Circuit's qualified-immunity holding creates a circuit split and is in serious tension with the purposes of qualified immunity as articulated in this Court's cases.

Certiorari is equally warranted on the second question presented: Can qualified immunity be granted or denied based on an officer's after-the-fact discovery of a person's legal status? By answering yes, the decision below creates a circuit split with the Ninth Circuit's decision in *Moreno v. Baca*, 431 F.3d 633, as well as decisions from other circuits, and undermines the purposes of qualified immunity as described by this Court.

A. The Ninth Circuit's decision in *Moreno* involved the search and seizure of a parolee without reasonable suspicion. *Id.* at 636. Although Moreno's status as a

parolee arguably made the search and seizure constitutional because parolees have diminished Fourth Amendment rights, the officers did not learn that he was on parole until "*after* searching and detaining him." *Id.* at 637 (emphasis added). Nonetheless, the officers argued that they were entitled to qualified immunity even if their search violated the Fourth Amendment because "it was not clearly established that Moreno had *any* right to be free from suspicionless searches because of his parole status." *Id.* at 642 (emphasis added).

The Ninth Circuit rejected that argument and denied qualified immunity. *Id.* Had the officers "known of the parole condition at the time of the search and seizure," the court explained, they might have been entitled to qualified immunity. *Id.* But "[b]ecause the Deputies did not know of Moreno's parole status" when "they searched and seized him," the Ninth Circuit held that this later-discovered fact "cannot justify their conduct." *Id.* "At the time of the incident," the court elaborated, "it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted." *Id.*

Three weeks later, the en banc Ninth Circuit expressly "agree[d]" with *Moreno*'s rule that qualified immunity is unavailable to officers who "justify their actions retroactively" based on facts unknown to them at the time of the alleged misconduct. *Motley v. Parks*, 432 F.3d 1072, 1088 (9th Cir. 2005), *overruled in part on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). To receive qualified immunity, the court emphasized, an officer "must be aware" of the key facts "before" committing the disputed act. *Id.*

The decision below cannot be reconciled with *Moreno*. Without deciding whether Agent Mesa violated Sergio Hernández's Fifth Amendment rights—and thus assuming a violation for qualified-immunity purposes—the Fifth Circuit granted Mesa immunity based on the fact that Sergio was later determined to be a Mexican citizen "who had no significant voluntary connection to, and was not in, the United States" when he was killed. App. 5a. The court found that Mesa was not "reasonably warned" that killing someone under these circumstances "violated the Fifth Amendment." *Id.* The court reached that conclusion even though "[a]t the time of the incident" Mesa "did not know of [Sergio's] status" as a Mexican citizen with no significant U.S. connections, thus allowing Mesa to rely on that fact to "justify [his] conduct." *Moreno*, 431 F.3d at 642. That holding—that a later-discovered fact justified immunity even where it was not known to the officer when he acted—is exactly the opposite of what the Ninth Circuit held in *Moreno*.

As a result of these contradictory conclusions, there is now a "circuit split between, among other rulings, the en banc Fifth Circuit's analysis in *Hernandez* and the Ninth Circuit's 2005 decision in *Moreno*." Steve Vladeck, *Cross-Border Shootings as a Test Case for the Extraterritorial Fourth Amendment*, Just Security, July 10, 2015, http://bit.ly/1KeG31y. Consequently, if this shooting had occurred at the Mexican border in Arizona rather than Texas, the agent would not be entitled to qualified immunity and the court could not have avoided the constitutional question on the merits, as the Fifth Circuit did here.

And the risk of inconsistent outcomes is no mere hypothetical. Just this month, the U.S. District Court of Arizona held—on facts nearly identical to those here—that qualified immunity was *unavailable* to a border agent who shot and killed an unarmed teenager on the

Mexican side of the border. *Rodriguez*, No. 14-cv-02251, at 20 (App. 178a). As in this case, the agent "was an American law enforcement officer standing on American soil" who was "well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike within the United States." *Id.* at 19-20 (App. 177a). And, as in this case, the agent could not have known "whether [the boy] was a United States citizen or the citizen of a foreign country, and if [he] had significant voluntary connections to the United States." *Id.* at 20 (App. 177a). Instead, as here, "[i]t was only after [the agent] shot [the boy] and learned of [his] identity as a Mexican national that he had any reason to think he might be entitled to qualified immunity." *Id.* (App. 177-78a). But because that case arose from a shooting at the Arizona border—not the Texas border—the district court, following *Moreno*, denied the border agent qualified immunity because the agent only "learned of [the boy's] status as a non-citizen *after* the violation." *Id.* (App. 178a) (citing *Moreno*, 431 F.3d at 641).

Because *Rodriguez* simply "highlights an already *existing* circuit split," it cannot be resolved by the Ninth Circuit on appeal. Vladeck, *Cross-Border Shootings*. "So long as *Moreno* is on the books, the Ninth Circuit can't avoid the merits question merely by holding that [the agent] is entitled to qualified immunity," as the Fifth Circuit did. *Id.* Instead, it will have no choice but to deny the agent immunity if he violated the Constitution—in square conflict with the Fifth Circuit's holding below. This court should resolve that conflict now and bring the Fifth Circuit into harmony with the Ninth Circuit.

Nor does the Fifth Circuit's holding comport with the approach of other circuits. Like the Ninth Circuit, the Seventh and Eleventh Circuits reject the use of "hindsight to judge the acts of police officers" and instead "look at what they knew (or reasonably should

have known) at the time of the act"; information "unknown to the officer at the time" does not factor into the analysis. *Rodriguez v. Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002). That rule has been applied to ensure that officers deserving immunity are not subjected to trial based on facts beyond their ken. Reasonable force, for example, "does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Id.* This rule, the Eleventh Circuit has explained, ensures that qualified immunity does not turn entirely on "the fortuity of the circumstances." *Lee*, 284 F.3d at 1200. The Seventh Circuit follows the same rule, emphasizing that the only relevant "information" is that which the officer "possessed at the time the incident occurred." *McDonald by McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992).

B. The Fifth Circuit's decision does more than create conflict among the circuits; it also misconstrues this Court's qualified-immunity cases.

This Court has long emphasized that qualified immunity "provide[s] no license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). To the contrary, the doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. To carry out these dual aims, this Court has devised a two-part test, which lower courts may answer in either order: Do the facts "make out a violation of a constitutional right"? *Id.* at 232. If so, is the officer nevertheless entitled to qualified immunity because he was not "on notice," at the time of the incident, that his conduct was unlawful? *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The Fifth Circuit's decision misapprehends this test and in doing so severely undermines its purpose. As this Court has explained, the "relevant question" for qualified immunity is "whether a reasonable officer could have believed [the conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed" at the time. *Creighton*, 483 U.S. at 641. Under that approach, "an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.'" *Kinglsey v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (emphasis added)). By focusing on the information the officer possessed at the time, this inquiry mirrors the Court's approach to the excessive-force question on the merits, which looks at "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham*, 490 U.S. at 396, and considers only "the facts available to the officer at the moment" of the alleged violation, *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). Yet the Fifth Circuit did not follow this approach. It did not ask whether Mesa violated clearly established law based on what he knew (or reasonably should have known) in the situation he confronted, but instead used hindsight and asked whether he violated clearly established law based on what the facts *later turned out to be*.

The consequences of that novel approach are intolerable. Under the Fifth Circuit's new "hindsight" rule, which now operates in Texas, Louisiana, and Mississippi, competent officers will be subjected to suit based on after-the-fact discoveries about which they could not have known at the time, even if the officers otherwise acted reasonably. Just as unpalatable, officers like Mesa will be allowed to escape liability even if they are "plainly incompetent," *Malley v. Briggs*, 475 U.S. 335, 341 (1986),

or exhibit "obvious cruelty," *Pelzer*, 536 U.S. at 745—"simply because the fortuity of the circumstances" end up creating some uncertainty about which the officer could not have known at the time, *Lee*, 284 F.3d at 1200. That makes no sense. The correct rule—the one adopted by the Ninth Circuit in *Moreno*, and the one that is faithful to this Court's qualified-immunity jurisprudence—avoids these outcomes. By doing so, it advances (rather than undermines) the two competing interests at the heart of the doctrine.

Had the Fifth Circuit applied the correct rule here, it would not have granted Mesa qualified immunity. Mesa does not argue that a reasonable officer in his shoes would have believed that deadly force was necessary in the situation that he faced. *See Graham,* 490 U.S. at 397. Rather, he argues that his conduct, even if "far beyond the hazy border between excessive and acceptable force," should be immunized because, as fortune would have it, Sergio happened to be a Mexican citizen with no voluntary connections to the U.S., who was standing just across the border when he was killed. *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997).

But no reasonable officer would have known those facts at the time. Roughly one million U.S. citizens live in Mexico, including more than 500,000 children, many of whom were born in American border cities like El Paso, but whose families are Mexican and reside across the border in Mexico. *See* U.S. State Department, *U.S. Relations With Mexico: Fact Sheet* (Sept. 2014), http://1.usa.gov/1cogco2; Adriana Gomez, *U.S.-born kids lose basic rights in Mexico*, Associated Press, July 18, 2012, http://bit.ly/1JbJNzq. Sergio could have been one of those children, playing with his friends on a summer day, and Mesa would not have known. Nor is it clear that Mesa knew that Sergio happened to be just across the borderline running through the culvert at that particular

location, rather than just inside it. And if either fact had turned out to be different, Mesa would not be entitled to qualified immunity.

But even if a reasonable officer would have known these facts, or could have made a reasonable guess that Sergio was a Mexican citizen standing on Mexican soil at the time, there is no way the officer could have known, ex ante, the extent of Sergio's voluntary connections with the U.S., and whether they were significant. So why should Mesa be permitted to rely on that later-discovered fact for qualified-immunity purposes—particularly when he was not trained to take these facts into account when deciding whether to use lethal force?

Indeed, Border Patrol agents are required by law to focus on objective risk factors in determining whether to use lethal force—not the citizenship of the subject, whether they have significant connections to the U.S., or whether they happen to be on one side of the border as opposed to the other. *See* 8 C.F.R. §§ 287.8(a)(1)(iii) & (2). These regulations are "[r]elevant to the question" whether Mesa had "fair warning" of the "wrongful character of [his] conduct," regardless of whether they were treated by Border Patrol agents as "merely a sham" they "could ignore . . . with impunity." *Pelzer*, 536 U.S. at 743-44.

Finally, granting qualified immunity is especially inappropriate here, in a case involving an unjustified extrajudicial killing. "One of the less controversial aspects of the due process clause is its implicit prohibition against a public officer's intentionally killing a person, or seriously impairing the person's health, without any justification." *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990) (Posner, J.). In such cases, where the wrongfulness of the conduct is "obvious," *Pelzer*, 536 U.S. at 745, it would turn the doctrine on its head to grant the

officer qualified immunity based on later discoveries about citizenship, voluntary connections, and precise physical location. *See Lee*, 284 F.3d at 1199-1200 (declining to grant immunity based on later developments where "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits"). And if Agent Mesa thinks otherwise—if his defense is that it wasn't clear that *any* law prevented an unjustified, extrajudicial killing at the border—then that is all the more reason for this Court to grant certiorari on the first question presented as well as the second.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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