No. 15-118

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

REPLY BRIEF FOR PETITIONERS

ROBERT C. HILLIARD
Hilliard Muñoz Gonzales, LLP
719 S. Shoreline Boulevard
Suite 500
Corpus Christi, TX 78401
(361) 882-1612

STEVE D. SHADOWEN
Hilliard & Shadowen, LLP
39 West Main Street
Mechanicsburg, PA 17055
(855) 344-3298

CRISTOBAL M. GALINDO
Cristobal M. Galindo, P.C.
4151 Southwest Freeway
Houston, Texas 77027
(713) 228-3030

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
BRIAN WOLFMAN
MATTHEW W.H. WESSLER
NEIL K. SAWHNEY
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

Counsel for Petitioners

October 15, 2015

REPLY BRIEF FOR PETITIONERS

This case presents important and recurring questions concerning the Constitution's extraterritorial reach and the contours of qualified immunity. Respondent Mesa barely challenges, let alone weakens, the petition's showing that both questions call for this Court's review. On the first question, he offers only a competing view of the merits, and on the second, irrelevant factual distinctions designed to downplay the circuit split. Those are not reasons for this Court to stay its hand. Unless the Court intervenes now, the constitutional confusion at our borders will only increase, a perverse brand of hindsight-based immunity will take root, and federal agents in Mesa's shoes may be given license to kill with impunity.[1]

1. Mesa does not deny that the first question—whether the functionalist approach set forth in *Boumediene v. Bush*, 553 U.S. 723, 764 (2008), governs extraterritorial application of the Fourth Amendment's prohibition on deadly force—is exceptionally important and "recurring." Pet. App. 33a (Prado, J.); *see also* Gov't of Mexico Br. 4–7. Nor does Mesa deny that the Fifth Circuit's formalist analysis, disregarding *Boumediene* and relying exclusively on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), conflicts with the Ninth Circuit's functionalist approach. Pet. 18–20. Mesa could not deny this, as the Ninth Circuit's divergent precedent has already been applied to a materially indistinguishable cross-border shooting, resulting in the opposite out-

[1] Although the petition stated (at ii) that the federal defendants are not respondents, the Solicitor General's waiver letter indicates that they should be treated as respondents because they were "parties to the proceeding in the court whose judgment is sought to be reviewed." S. Ct. Rule 12.6. On reflection, we agree, and the Court may wish to request a response from the federal respondents.

come within that circuit. Pet. App. 153a–180a. That the outcome on such a fundamental issue would turn on nothing but geography—one rule for Texas, another for Arizona and California—is intolerable.

Critically, Mesa concedes (at 3–4) that *Boumediene* "derive[s] from past decisions that considered the extraterritorial reach of other constitutional provisions," and that, under *Boumediene*, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Yet he maintains that *Verdugo-Urquidez's* formalism continues to govern Fourth Amendment claims because "one can only assume that [*Boumediene*] explicitly confined its holding only to the extraterritorial reach of the Suspension Clause." BIO 4.

That view, adopted by the Fifth Circuit, is directly at odds with the Ninth Circuit's conclusion—as well as those of other courts and leading scholars—that *Boumediene* governs "constitutional claims" outside the habeas context. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012); *see also* Chemerinsky Br. 5–9. "[T]he border of the United States," the Ninth Circuit has explained, "is not a clear line that separates aliens who may bring constitutional challenges from those who may not." *Ibrahim*, 669 F.3d at 995. As Judge Dennis recognized, the Fifth Circuit's formalistic reading of *Verdugo-Urquidez* "cannot be squared with th[is] Court's later holding in *Boumediene*." Pet. App. 31105a (Dennis, J.). While "the question of which specific safeguards . . . are appropriately to be applied in a particular context" may vary by constitutional claim, *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring), *Boumediene* makes clear that the underlying inquiry must be a functionalist, pragmatic one, 553 U.S. at 764.

Ultimately, Mesa is unable to refute that this case presents an ideal opportunity "to clarify the reach of

Boumediene," and "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." Pet. App. 33a, 43a (Prado, J.). Just as this Court in *Boumediene* rejected a formalist approach to extraterritoriality that gave the Executive "the power to switch the Constitution on or off at will," it should do the same here. 553 U.S. at 765.

2. On the second question, Mesa's only response is to try to minimize the split between the decision below and *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005), on the ground that "the facts in *Moreno* are significantly different than the facts in this case." BIO 7. But all Mesa can muster are distinctions without a difference.

The split is clear. In *Moreno*, the Ninth Circuit held that, when determining whether a right is "clearly established" for qualified-immunity purposes, the facts on which immunity turns "must be known to the officer at the time" of the conduct. 431 F.3d at 642. The Fifth Circuit, by contrast, predicated qualified immunity here on the fact—not "known to [Mesa] at the time," *id.*—that Sergio Hernandez was "an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred," Pet. App. 5a. That the later-discovered fact in *Moreno* was the petitioner's parole condition, rather than his citizenship status, is legally irrelevant. Indeed, in a case presenting virtually identical facts, a district court in the Ninth Circuit recently applied *Moreno* to conclude that an officer "may not assert qualified immunity based on [petitioner's] status where [the officer] learned of [petitioner's] status as a non-citizen *after* the violation." Pet. App. 178a.

Nor does Mesa even attempt to explain away the conflict between the decision below and the Seventh and Eleventh Circuits' approach, which likewise rejects the

use of "hindsight to judge the acts of [law enforcement] officers" for qualified-immunity purposes. *Rodriguez v. Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002); *see McDonald by McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992); Pet. 26–27.

Only this Court's intervention can resolve these conflicts. And Mesa does not deny that this case presents an excellent vehicle in which to do so. Mesa has never contended (and does not now contend) that he knew Sergio's citizenship when he pulled the trigger. Nor has he even claimed that he could say for sure whether Sergio had crossed the invisible line into Mexico before killing him.[2]

Those cleanly presented facts highlight the absurd consequences of the Fifth Circuit's hindsight rule, which Mesa does not deny (or even acknowledge). If allowed to flourish, the Fifth Circuit's approach will turn qualified immunity's rationale on its head: Competent officers may be exposed to liability based on later-discovered facts that had no bearing on their actions. At the same time, rogue officers like Mesa—those responsible for egregious and unjustifiable acts—may escape liability based on mere happenstance. That approach has little to recommend it. This Court should step in.

---

[2] Mesa argues (at 13–14) that qualified immunity is appropriate here because Sergio allegedly "began to throw rocks at him" and "had been arrested twice before for alien smuggling," making it reasonable to assume that Sergio "was breaking the law." Mesa cites nothing in the record to support these assertions. And video footage broadcast by several media outlets (including CNN) proves that Sergio did not throw *any* rocks at Mesa. *See* Pet. 6; Paso Del Norte Amicus Br. 8 n.3. In any event, this factual dispute was not passed on below and is irrelevant to the question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
BRIAN WOLFMAN
MATTHEW W.H. WESSLER
NEIL K. SAWHNEY
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

ROBERT C. HILLIARD
Hilliard Muñoz Gonzales, LLP
719 S. Shoreline Boulevard
Suite 500
Corpus Christi, Texas 78401
(361) 882-1612

STEVE D. SHADOWEN
Hilliard & Shadowen, LLP
39 West Main Street
Mechanicsburg, PA 17055
(855) 344-3298

CRISTOBAL M. GALINDO
Cristobal M. Galindo, P.C.
4151 Southwest Freeway
Houston, Texas 77027
(713) 228-3030

October 15, 2015