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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Adhering to its position below, the government opposes certiorari because it agrees with the Fifth Circuit as to both questions presented. But despite its efforts to preserve those holdings, and thereby shield the Border Patrol from judicial oversight, the government does not undermine the need for this Court's review.

On the first question, the government does not contend that the Fifth Circuit applied anything resembling this Court's "century-old" functionalist approach to extraterritoriality, as articulated in *Boumediene v. Bush*, 553 U.S. 723, 759 (2008). Nor does the government explain why applying constitutional protection in the context of a close-range, cross-border shooting would be "impracticable and anomalous"—a consideration that Justice Kennedy found critical in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Instead, the government takes the position (like the Fifth Circuit) that *Verdugo-Urquidez* "foreclose[s]" any argument that the Fourth Amendment applies here. U.S. Br. 9. But *Verdugo-Urquidez* concerned the warrant requirement, not the prohibition on unjustified deadly force. And the tension between *Boumediene*'s functionalism and the formalist analysis of four Justices in *Verdugo-Urquidez* is a reason to grant certiorari, not deny it. The same goes for the discord between the Fifth Circuit and the Ninth Circuit—discord that has already led to opposite results on indistinguishable facts.

The government argues that constitutional protection is unnecessary because extradition or criminal proceedings are possible. U.S. Br. 12. Yet the government does not cite a single case in which the United States extradited a border guard to face charges stemming from on-duty incidents. And the lone example it gives of

a domestic criminal prosecution arising out of a cross-border shooting—an indictment issued two months after the petition was filed in this case (the first of its kind in American history)—only confirms that there is no pragmatic reason to deny constitutional protection here. In any event, it is the responsibility of the Judiciary to serve as a check on the Executive Branch—not the prerogative of the Executive to serve as a check on itself.

On the second question, the government does not dispute that, under the Fifth Circuit's decision, an officer is entitled to qualified immunity for an extrajudicial killing based solely on facts of which he was unaware when he pulled the trigger. The government offers neither a justification for the shooting nor any purpose that would be served by granting immunity. To the contrary, the government does not deny the upshot of its position: that officers would be immune from suit for even the most obviously unlawful conduct at the border, just so long as the victim is not on U.S. soil and turns out not to have been a U.S. citizen. Although the government tries to distinguish the Ninth Circuit's conflicting precedent, it barely articulates why the distinction it offers should matter. And by emphasizing the uncertainty surrounding extraterritoriality, the government only underscores the need for this Court's resolution of the first question presented, as well as the second.

In a final effort to avoid review, the government contends that this case is a poor vehicle, identifying what it says are two alternative grounds for the Fifth Circuit's judgment. But neither was addressed below or is encompassed within the questions presented, and neither stands in the way of this Court's review.

I. The government does not undermine the need for this Court's review of the Fifth Circuit's extraterritoriality holding.

As explained in the petition (at 13-18), *Boumediene* makes clear that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. That functionalist approach, embodied in cases stretching back over a century, focuses on whether extraterritorial application of a particular constitutional provision, in a particular context, would be "impracticable and anomalous." *Boumediene*, 553 U.S. at 759-60. And Justice Kennedy, in his *Verdugo-Urquidez* concurrence, "appl[ied]" this functional "extraterritoriality test" (as *Boumediene* put it, *id.* at 760), ultimately concluding that practical concerns dictate that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." 494 U.S. at 278.

The government does not contest any of this. Yet, like the Fifth Circuit, it takes the position that a different provision of the Fourth Amendment—its prohibition on unjustified deadly force—has no application beyond the border, regardless of whether applying the prohibition in this context would be impracticable or anomalous. That position cannot be reconciled with this Court's functionalist approach. And the government barely attempts to argue otherwise.

Nevertheless, the government makes three arguments why this Court's review is unwarranted: (1) *Verdugo-Urquidez* controls, (2) practical concerns would "support" the decision below anyway, and (3) there is no divergence between the Fifth Circuit's opinion and the Ninth Circuit's approach. None is persuasive.

1. The government first argues (at 9) that *Verdugo-Urquidez* "foreclose[s]" any possibility that the Fourth Amendment applies here. Seizing on a single sentence in

Justice Kennedy's concurrence and ignoring the rest of his opinion, the government relies on his statement that he "d[id] not believe" that his views "depart[ed] in fundamental respects from the opinion of the Court, which [he] join[ed]." 494 U.S. at 275. But Justice Kennedy expressly disagreed with the plurality's formalist analysis. *Id.* at 276-77. And the pragmatic concerns he identified were specific to the warrant requirement. *Id.* at 278 ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

Particularly in light of Justice Kennedy's concurrence and the Court's later decision in *Boumediene*, *Verdugo-Urquidez* should not be read to foreclose the possibility that some other part of the Fourth Amendment might, in narrow circumstances, apply to noncitizens beyond the border. And although the government argues to the contrary, it does not disagree with our core point: that an expansive reading of *Verdugo-Urquidez*—extending its formalist analysis to a case with radically different facts, involving a different constitutional provision—is inconsistent with this Court's functionalist approach. That is reason enough to grant certiorari.

Nor is the Court's brief, ancillary discussion of "practical considerations" in *Verdugo-Urquidez* relevant here. U.S. Br. 10. The Court discussed those considerations only at the end of its opinion, as an additional reason to reject the "global," "all-encompassing view of the Fourth Amendment" that had been adopted by the lower court. 494 U.S. at 268-69. Citing concerns about the prospect of having judges reviewing military decisions "aris[ing] half-way around the globe," the Court declined to adopt the "sweeping proposition" that "federal officials are constrained by the Fourth Amendment wherever and against whomever they act." *Id.* at 270, 274-75.

But that is not our argument. Our theory is far narrower: that the Fourth Amendment's prohibition on unjustified deadly force applies at the border, at least where (as here) the agent was on U.S. soil and fired his weapon at close range. Whatever practical concerns might attend applying constitutional protection in these circumstances, they have nothing to do with the specific concerns discussed in *Verdugo-Urquidez*.

2. This leads to the government's second argument: that the question does not deserve this Court's attention because pragmatic factors, had they been considered by the Fifth Circuit, would "support" its conclusion. U.S. Br. 13. Strikingly, however, the government itself does not even assert that applying constitutional protection in this context would be "impracticable and anomalous." *Boumediene*, 553 U.S. at 759-60.

And how could it? Two months after the petition was filed in this case, the government "brought a federal murder charge against another border patrol agent who was in the United States when he shot and killed a Mexican citizen in Mexico," U.S. Br. 12—"the first Border Patrol agent to be prosecuted by the Department of Justice for a cross-border shooting." Binelli, *10 Shots Across the Border*, N.Y. Times, Mar. 3, 2016 (Magazine), http://nyti.ms/21KKuXM. Even setting aside the indictment's timing, the possibility of criminal prosecution only shows that there is nothing impracticable or anomalous about applying constitutional protection here. If cross-border shootings fall within the "jurisdiction of the United States" under the federal-murder statute, 18 U.S.C. § 1111(b), then why shouldn't the constitutional prohibition on unjustified deadly force also apply? The government does not say. It makes a vague reference to diplomacy (at 13), but the only foreign nation affected supports a remedy in this case. *See* Gov't of Mexico Br. 3.

If anything, it would be anomalous to *not* afford constitutional protection here. On the government's theory, the Fourth Amendment applies if a border guard (a) kills an American citizen on either side of the border, (b) kills a foreign citizen with significant voluntary connections on either side of the border, or (c) kills a foreign citizen on the U.S. side of the border. Only if the victim happens to be a foreign citizen without significant voluntary connections, standing on the Mexican side of the border, does the Fourth Amendment not apply. And even in that scenario, the government believes that the agent may be criminally prosecuted. This patchwork regime might benefit the Border Patrol, but allowing "the applicability of the Fourth Amendment" to "turn on [such] fortuitous circumstance[s]" has little to recommend it as a practical matter. *Cf. Verdugo-Urquidez*, 494 U.S. at 272.

3. Finally, the government (at 13-15) tries to reconcile the Fifth Circuit's formalistic approach with the Ninth Circuit's more pragmatic approach, illustrated by *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (2012). But the government does not dispute that the Ninth Circuit's divergent precedent has already been applied to virtually identical facts and produced a diametrically opposite result. *See Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (reproduced at 153a).[1] Nor does the government say a word about the confusion surrounding the meaning of *Verdugo-Urquidez*, which *Boumediene* has only exacerbated. *See* Pet. 20-21.

This Court should not let these divergent approaches fester. It should take the opportunity to resolve the

[1] *Rodriguez* did not, as the government maintains (at 14), "require[] a 'substantial voluntary connection,'" but treated the factor as one of many that courts must consider in deciding whether to apply a constitutional provision extraterritorially. App. 172a-73a.

confusion, "clarify the reach of *Boumediene*[,] and apply Justice Kennedy's functional test" to these "recurring" facts. App. 33a, 43a (Prado, J.).

II. The government does not undermine the need for this Court's review of the Fifth Circuit's qualified-immunity holding.

This Court should also grant certiorari to review the Fifth Circuit's qualified-immunity holding. The practical consequences of leaving that holding in place are indisputable. If allowed to stand, officers will be able to escape liability for the most "obvious" acts of lawlessness, *Hope v. Pelzer*, 536 U.S. 730, 745 (2002)—even murder—based on facts unknown to them at the time.

That outcome would not remotely serve qualified immunity's purposes, and the government does not contend that it would. Qualified immunity is not an end in itself. It is a judge-made doctrine that aims to balance "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 v. Callahan*, 555 U.S. 223, 231 (2009). Thus, qualified immunity seeks to protect officers when they lack "notice [that] their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). But it is not designed to shield wrongdoers from liability when "the unlawfulness of the alleged conduct should have been apparent." *Hope*, 536 U.S. at 743. Qualified immunity "provide[s] no license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

By making immunity turn on later-discovered facts—the victim's citizenship, ties to the U.S., and precise location—the Fifth Circuit has erected a rule that does not in any way advance the aims of the doctrine. Under the Fifth Circuit's holding, Agent Mesa would not

have received immunity if Sergio were a U.S. citizen, had significant ties to the U.S., or were on the U.S. side of the border when he was shot. If any of those things were true, the Fourth Amendment would apply—on any reading of *Verdugo-Urquidez*—and the allegations in the complaint would make out a violation of clearly established law without the need to consider whether the Fifth Amendment applies. The government does not disagree.

The government seeks to dismiss the Fifth Circuit's reliance on later-discovered facts as "at most" an "implicit[]" holding. U.S. Br. 15. But we vigorously argued in our en banc briefing that these facts "cannot immunize Defendant Mesa's actions taken without [their] knowledge." CA5 Supp. Br. 43, 45-47. The en banc court nevertheless gave Mesa immunity because he was not "reasonably warned" that his conduct "violated the Fifth Amendment," given that Sergio was "an alien who had no significant voluntary connection to, and was not in, the United States." App. 5a. These later-discovered facts were thus central to the Fifth Circuit's conclusion that Sergio had no "clearly established" constitutional right.

Rather than defending the Fifth Circuit's decision, the government insists on rewriting it. The government asserts (at 16) that the qualified-immunity holding rests on a lack of clarity as to the antecedent question whether "an excessive-force claim could be amenable to substantive-due-process analysis at all." But the government conjures that rationale out of thin air. The per curiam opinion does not question that an excessive-force claim may generally be stated under the Fifth Amendment. Instead, it asks whether "Mesa's conduct violated the Fifth Amendment" given Sergio's citizenship status and physical location. App. 5a-6a. In concluding that there is

no "clearly established" answer, the decision necessarily turns on later-discovered facts.

That conclusion is not just wrong; it also conflicts with the Ninth Circuit's decision in *Moreno v. Baca*, 431 F.3d 633 (2005). The government hardly grapples with this split, instead trying to distinguish *Moreno* (at 18) because "[t]he nature of the legal question" differed there. But as *Rodriguez* shows, that is a distinction without a difference: It reached the opposite result on facts indistinguishable from those here. App. 179a. That the "legal question" in *Rodriguez* and *Moreno* concerned Fourth Amendment "reasonableness" is irrelevant. *Rodriguez* itself acknowledged that its qualified-immunity holding directly "contravenes" the Fifth Circuit's decision, and commentators have said the same. *Id.* 178a; *see* Vladeck, *Cross-Border Shootings as a Test Case*, Just Security, July 10, 2015, http://bit.ly/1KeG31y.

It is intolerable that officers patrolling the border in Texas (but not Arizona or California) may now escape liability by retroactively manufacturing uncertainty. That outcome does not serve qualified immunity's purposes, and this Court should grant certiorari to say so.

III. This case is an ideal vehicle to address the questions presented.

Given everything at stake, there is no good reason to deny certiorari. Although the government contends (at 19) that this case is a "poor vehicle" to resolve the questions presented, it does not identify any genuine impediments to review on either question. Nor does it contest any of the factual allegations or background information detailed in the petition. And the government is conspicuously silent on the Border Patrol's use-of-force regulations, its well-documented history of unaccountability, and the recurring nature of these incidents. *See* Binelli,

10 Shots Across the Border; Becker, *Scathing report deems fatal Border Patrol shooting 'highly predictable'*, Center for Investigative Reporting, Mar. 4, 2016, http://bit.ly/1S2VN96.

Instead, the government proposes two possible "alternative grounds" for the Fifth Circuit's judgment. U.S. Br. 19. Neither was considered by that court, and neither poses a barrier to this Court's resolution of the questions presented.

1. The first proposed alternative ground (at 19-20) is that "the judicially inferred *Bivens* remedy should not be extended" to this context. But, as the government concedes (at 20), "the en banc court of appeals did not address this question," and the panel "concluded that no special factors counsel hesitation before extending the *Bivens* remedy." *See* App. 95a.

This Court's precedents do not compel a contrary conclusion. Although the government contends (at 20-21) that this lawsuit implicates "national security and international diplomacy," the panel concluded that it "involves questions of precisely *Bivens*-like domestic law enforcement and nothing more," App. 98a—a conclusion bolstered by the recent criminal prosecution on similar facts. And the government of Mexico supports "mak[ing] available an effective remedy" to individuals seeking "redress for unjustified violence by U.S. border officers." Gov't of Mexico Br. 7. Any *Bivens* questions, however, can be addressed on remand. They are no obstacle to this Court's review.

2. The government's second proposed alternative ground—that the action against Mesa is precluded by the Federal Tort Claims Act's judgment bar, 28 U.S.C. § 2676—fares no better. No court below passed on this question. Nor did Mesa preserve the issue. The FTCA's judgment bar "functions in much the same way" as "tra-

ditional res judicata." *Will v. Hallock*, 546 U.S. 345, 354 (2006). And like res judicata, it is "an affirmative defense ordinarily lost if not timely raised." *Arizona v. California*, 530 U.S. 392, 410 (2000). Because Mesa "failed to present this argument to the district court"—or even on appeal—he has "waived review of the issue." *E.A.F.F. v. Gonzalez*, 600 F. App'x 205, 209 (5th Cir. 2015), *cert. denied*, 135 S. Ct. 2364 (2015) (holding FTCA's judgment bar waived). Mesa's only mention of the judgment bar was in his supplemental en banc brief. He did not even raise the defense in opposing certiorari, and the government cannot now raise it for him. The defense is thus unavailable to him, regardless of what this Court decides in *Simmons v. Himmelreich*, No. 15-109.

In any event, the judgment bar is inapplicable here. The district court dismissed the claims against the United States under an FTCA exception, 28 U.S.C. § 2680(k). And the statute says that when an exception applies, "[t]he provisions of this chapter"—including the judgment bar—"shall not apply." *Id.* § 2680. Thus, even if the issue were properly preserved, the judgment bar would not be an "independent basis" for dismissal. U.S. Br. 22. It thus poses no barrier to this Court's ability to review the important questions cleanly presented here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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