No. 15-118

In The

Supreme Court of the United States

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 OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes in technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

[1] This *amicus curiae* brief is filed with the written consent of all parties in this case. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. filed May 7, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganias, *United States v. Ganias*, No. 12-240-cr (2d. Cir. filed July 29, 2015) (en banc).

SUMMARY OF THE ARGUMENT

The Constitution establishes a government of laws, not men. For this reason, Alexander Hamilton rejected the view that the Constitution, as originally drafted, needed to include a separate bill of rights: "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[3] Hamilton recognized that because the Constitution established the total scope of power that government officials could exercise, any addition of a bill of rights would only invite "men disposed to usurp, a plausible pretense for claiming . . . power" that the Constitution otherwise gave them no basis to claim.[4] As Hamilton ultimately concluded, "why declare that things shall not be done which there is no power to do?"[5]

This case bears out the prescience of Hamilton's concern. On a hot summer day in 2010, U.S. border patrol agent Jesus Mesa shot and killed 15-year-old Sergio Hernandez—a Mexican citizen—without provocation or warning while Sergio was playing with a group of boys in a culvert straddling the U.S.-Mexico border. Sergio's family then sought justice for Sergio's death in the United States, suing Agent Mesa (*inter alia*) in his individual capacity for damages. One of the tort claims that Sergio's family raised was that Agent Mesa's arbitrary use of lethal force violated the Fourth

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[3] THE FEDERALIST NO. 84 (Alexander Hamilton) (capitalized text in original).

[4] *Id.*

[5] *Id.*

Amendment's guarantee against unreasonable government seizures.

This claim spurred a fierce debate in the lower courts over how to interpret the Fourth Amendment. What troubled the lower courts was the fact that at the time Sergio was killed, he was a Mexican citizen standing on Mexican soil (while Agent Mesa was standing on U.S. soil). In *United States v. Verdugo-Urquidez*, a plurality of this Court held that a Mexican national who lacked significant voluntary ties to the United States could not invoke the Fourth Amendment to challenge a warrantless search of his private home in Mexico by U.S. law enforcement. 494 U.S. 259, 275 (1990). Based on *Verdugo-Urquidez*, the lower courts here found that Sergio's family likewise could not invoke the Fourth Amendment given Sergio's death in Mexico and his lack of significant voluntary ties to the United States.

This is Hamilton's nightmare come to life. In drafting the Fourth Amendment, the Framers sought to limit "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). Yet, because the Framers put this right on paper as one retained by "the people," the Fourth Amendment has come to be viewed as a constructive grant to U.S. officials of unlimited powers to search and seize aliens outside the United States, since such aliens are not part of "the people." *See Verdugo-Urquidez*, 494 U.S. at 275. This case now represents the logical culmination of that view, with the lower courts finding

in effect that U.S. border patrol agents may arbitrarily kill aliens on foreign soil without incurring any risk of constitutional liability.

Restore the Fourth respectfully submits that such a state of affairs demands a return to first principles. Under those principles, the question that has to be answered here is not whether the Fourth Amendment protects a foreign alien killed by a U.S. border patrol agent on foreign soil. Rather, the question is whether the Constitution authorizes U.S. border patrol agents to use lethal force arbitrarily against *any* person—no matter the target's identity, nationality, or territorial location. And the answer to this question, as rooted in this Court's precedents since the Founding, is an unequivocal "no."

The only question that then remains is what the remedy should be when a U.S. official exceeds their constitutional authority and injures another person. "The very essence of civil liberty," after all, is "the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 1 U.S. (Cranch) 137, 163 (1803) (Marshall, C.J.). On this score, this nation's early history reveals examples of U.S. officials being held liable as individuals for damages when they conducted illegal seizures targeting aliens beyond this country's borders. This tradition counsels against applying the *Verdugo-Urquidez* plurality opinion to this case.

ARGUMENT

I. The Constitution is enforceable against all U.S. officials who exceed their power.

A. All actions by U.S. officials must be authorized by the Constitution.

The "first official action" of America was to acknowledge the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159–60 (1897). But the Declaration of Independence did more than just affirm the existence of unalienable rights. It also explained what was needed "to secure these rights": government by consent. For this reason, America has a written constitution.

During the Founding era, "written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments." *Hurtado v. People of California*, 110 U.S. 516, 531–32 (1884). The Framers thus drafted the Constitution to ensure that the powers that were delegated to the federal government were "few and defined."[6] *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers."). As a result, it is no exaggeration to say that "the Constitution is the sun of the [American] political system, around which all

[6] THE FEDERALIST NO. 45 (James Madison).

Legislative, Executive and Judicial bodies must revolve." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

Hence, the first question that must always be asked whenever government officials injure private individuals is this: does the Constitution authorize the government's conduct in the first place? The Court's decision in the *Steel Seizures Cases* embodies this point. At issue was a presidential order directing a massive government seizure of privately-owned steel mills in the heat of a nationwide labor strike. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952). The Court could have defined this case in terms of whether the seizure order violated the mill-owners' Fourth Amendment right against unreasonable seizures, or their Fifth Amendment right against unjustified takings. *See, e.g.*, *id.* at 631 (Douglas, J., concurring). Instead, the Court focused on whether the Constitution gave the President the power to do what he did in the first place. *See id.* at 582 (majority opinion) (explaining that the Court was being asked to decide "whether the President was acting within his constitutional power").

Such analysis demonstrates that fidelity to the Constitution is about more than determining if the Constitution expressly forbids the government from doing something—e.g., abridging freedom of speech. Fidelity to the Constitution also requires observing that its enumeration of certain powers means that government "can exercise only the powers granted to it." *McCulloch v. Maryland*, 17 U.S. 159, 199 (1819). Put

another way, all government action must be authorized by the Constitution and further accord with "the general principles . . . common to our free institutions." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810). And based on this rule, the Court has invalidated government conduct on many occasions—even when no express provision of the Constitution could be said to bar the challenged government conduct.

Consider, for example, *Terrett v. Taylor*, 13 U.S. 43 (1815). Virginia passed a law confiscating "all the property of the Episcopal churches in the respective parishes of the state." *Id.* at 48. Were such a law to be passed today, it would undoubtedly be found to violate the First Amendment's protection of religious liberty. But in 1815, the First Amendment was not understood to apply to the states. *See Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties . . . ."). And yet, the Court still found Virginia's church-property-seizure law unenforceable. *See Terrett*, 13 U.S. at 55 (holding that Virginia's law did not divest private title of the lands at issue).

The Court reached this conclusion because neither "the fundamental laws of every free government" nor the "spirit and the letter of the [C]onstitution" gave Virginia the power to do what it did. *Id.* at 52. In the same vein, the Court rejected the argument that because of the Revolution, "all the public property acquired by the Episcopal churches . . . became the property of the state." *Id.* at 49. The Court noted that

before the Revolution, the church property at issue had been privately purchased and "[i]t was not in the power of the [C]rown to seize or assume it . . . unless by the exercise of a power the most arbitrary, oppressive and unjust." *Id.* at 49–50. And after the Revolution, Virginia "succeeded only to the rights of the crown," which meant that Virginia was not granted any new authority to do what it did. *Id.* at 50.

A similarly rigorous examination of government power may be seen in *Loan Association v. Topeka*, 87 U.S. 655 (1875). The Court confronted a Kansas state law that enabled towns and cities in Kansas "to take the property of the citizen under the guise of taxation . . . and use it in aid of the enterprises of others which are not of a public character." *Id.* at 659. Such a law today would likely invite close scrutiny under the Fourteenth Amendment's due process and equal protection guarantees. The Court, however, tackled the law in more basic terms: "unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of [private] manufacturing enterprises . . . for purposes of gain, the law is void." *Id.* at 660. The Court then proceeded to "inquir[e] whether such a power exists in the legislature of the State of Kansas." *Id.*

The Court found no such power existed. *See id.* at 664. The Court drew this conclusion from "[t]he theory of our governments, State and National, [which] is opposed to the deposit of unlimited power anywhere." *Id.* at 663. The Court further recognized "the limitations on . . . power which grow out of the essential

nature of all free governments"—limits "without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* And based on these limits, Kansas could not "lay with one hand the power of the government on the property of the citizen," and then, with the other hand, bestow that property "upon favored individuals to aid private enterprises and build up private fortunes." *Id.* at 664. This kind of government conduct was neither legislation nor taxation, but simple "robbery" perpetrated "under legislative forms." *Id.*

What cases like *Loan Association* and *Terrett* demonstrate is that the Constitution limits the exercise of *all* government power, even when the Constitution may not expressly identify the relevant limit (e.g., a bar on government taxation for private gain). This accords with the "predominant political impulse" of the Framers, which was a "distrust of power" and "insist[ance] on constitutional limitations against its abuse." *Weems v. United States*, 217 U.S. 349, 372 (1910). The Framers recognized that such limits were essential to advance the Constitution's "great and paramount purpose": to unite our nation's "wealth and power" for "the protection of the humblest individual." *Gibbons v. Ogden*, 22 U.S. 1, 223 (1824) (Johnson, J., concurring). As such, the Constitution stands against any state of affairs that would cede to U.S. officials "a power of destroying at pleasure without the direction of laws."[7]

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[7] 1 WILLIAM BLACKSTONE, COMMENTARIES *133.

B. The Constitution does not authorize the arbitrary use of lethal force.

In establishing a government of limited powers, the Constitution leaves no room for the exercise of arbitrary power. In *Yick Wo v. Hopkins*, the Court made this clear in confronting a city's arbitrary use of government licensing power to harass Chinese-owned laundries. 118 U.S. 356, 373–74 (1886). The Court noted that "the very idea that one man may be compelled to hold his life . . . or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails." *Id.* at 370.

Of course, the rejection of arbitrary power under the Constitution is most often associated with the due process guarantees of the Fifth and Fourteenth Amendments. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citation omitted). And this makes sense insofar as the lineage of due process may be traced back to Magna Carta and the many volumes of law that have been dedicated to this term—all of which have led "the good sense of mankind" to conclude that the Constitution's due process guarantees are meant "to secure the individual from the arbitrary exercise of the powers of government." *Bank of Columbia v. Okley*, 17 U.S. 122, 127 (1819).

But there is also good reason to believe that the Constitution does not permit the exercise of arbitrary

power regardless of its due process guarantees. In *Yick Wo*, the Court nodded to this reality: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 118 U.S. at 370.

This observation matters today given how mired modern constitutional law has become in trying to figure out which Bill of Rights provision should be said to govern a given instance of arbitrary power. *Compare, e.g.*, *Graham v. Connor*, 490 U.S. 386, 388–89, 395 (1989) (majority opinion) (indicating that an excessive force claim is "properly analyzed" under the Fourth Amendment rather than "under a substantive due process standard"), *with, id.* at 399–400 (Blackmun, J., concurring in part) (refusing to "foreclos[e] the use of substantive due process analysis"). The present case is no exception, with the Fifth Circuit getting mired in a heated debate over whether the Fifth Amendment versus the Fourth Amendment protected Sergio Hernandez from being arbitrarily killed by a U.S. border patrol agent. *See Hernandez v. United States*, 785 F.3d 117, 133–34 (5th Cir. 2015) (Prado, J., concurring).

In earlier eras, however, this Court took a much simpler approach: the Constitution did not allow for arbitrary power because "[a]rbitrary power . . . is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." *Hurtado*, 110

U.S. at 536. Law, by contrast, is "the definition and limitation of power." *Yick Wo*, 118 U.S. at 370. To speak of a government of limited powers, then, is to speak of "a government of laws, and not of men." *Id.* And under a government of laws, courts are "constrained to pronounce . . . inoperative and void" any government action that "clothes" a person with power but then "lays down no rules" to ensure the "impartial execution" of this power or to prevent "partiality and oppression." *Id.* at 373.

In no arena does this principle matter more than when it comes to the use of lethal force. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). And since arbitrary power is not law, nothing in the Constitution—which establishes a government of law—can be said to authorize, or even tolerate, the arbitrary use of lethal force.

By the same token, "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). The Framers recognized this all too well by virtue of "[t]he struggles against arbitrary power in which they had been engaged for more than twenty years." *Boyd v. United States*, 116 U.S. 616, 630 (1886). This bitter experience taught the Framers that "[t]he

accumulation of all powers . . . in the same hands . . . [was] the very definition of tyranny."[8] The arbitrary use of lethal force also fits this definition, reflecting an accumulation of the powers of "prosecutor, jury, judge, and executioner" in the hands of a single government official. *Screws v. United States*, 325 U.S. 91, 106 (1945) (plurality op.). Thus, under the Constitution—under "a government of law, not a government of men"—no government official may wield such power, or escape legal liability for doing so. *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894).

C. No U.S. official is above the law.

The Constitution is the "supreme Law of the Land" and all government power must be exercised in accordance with this rule. U.S. Const., art. VI. Every government official in America is thus charged with the duty of exercising only those powers granted to them by the Constitution or in accordance with the Constitution. *See Marbury*, 1 U.S. at 179. Holding government officials to that duty, in turn, is the very essence of *the rule of law*—a concept that "has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by [mere] will alone." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring).

Hence, under the Constitution, no government official is above the law. This is true of presidents. *See,*

[8] THE FEDERALIST NO. 47 (James Madison).

e.g., *United States v. Nixon*, 418 U.S. 683, 715 (1974) (rejecting the notion that "a President is above the law"). It is also true of ordinary administrative officials, like Postal Service employees. *See, e.g.*, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but . . . . [t]he acts of all its officers must be justified by some law . . . ."). The only remaining question is how to enforce this rule of law against U.S. officials who exceed the limited power given to them by the "Constitution, and the laws of the United States which shall be made in pursuance thereof." U.S. Const., art. VI.

The Court, however, settled this question over two centuries ago in observing that "[i]f one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued." *Marbury*, 1 U.S. at 170. Indeed, the enforcement of "the limitations imposed by our constitutional law . . . . by judicial process is the device of self-governing communities to protect . . . against the violence of public agents transcending the limits of lawful authority." *Hurtado*, 110 U.S. at 536.

This has led the Court to reject various legal contrivances meant to defeat this principle. For example, the Court has noted that when "officers charged with the administration of [a] valid tax law . . . . go beyond the powers thereby conferred, . . . the fact that the[se]

[officers] are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts." *Reagan*, 154 U.S. at 390–91. Rather, it still remains the case that when an "official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing*, 187 U.S. at 108.

And that is how the Constitution is supposed to work. "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty-bound to exercise independent judgment in applying the law." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1219 (2015) (Thomas, J., concurring). The exercise of such judgment, in turn, checks the expansion of arbitrary power otherwise made possible by its selective application. *See Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

Now consider what this means in the context of government searches and seizures—including the use of lethal force. "[W]e must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the [most] fit and

responsible." *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting). We must also remember that "[i]n a government of laws, [the] existence of the government will be imperiled" unless government officials who exceed their power are held to account—especially those who kill without reason. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In this regard, private suits against government officials in their individual capacity have been an integral part of this nation's dedication to ensuring that no government official ever becomes "a law unto himself." *Id.*

II. In the Founding Era, government officials could *always* be held individually liable for illegal seizures, regardless of the seizure's location or the victim's nationality.

When Alexis de Tocqueville first visited America in the 1830s, one aspect of the young nation that quickly drew his attention was "[t]he right granted to the courts of justice of judging the agents of the executive government, when they have violated the laws."[9] He was surprised to find that this right was "so natural a one that it cannot be looked upon as an extraordinary privilege."[10] He was also surprised to find that this right, far from weakening "the springs of government," had actually "increased . . . that respect which is due

[9] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 107 (H. Reeve trans., 7th ed., 1847).

[10] *Id.*

to the authorities, and at the same time . . . rendered those who are in power more scrupulous of offending public opinion."[11]

These observations speak to a broader historical point: that for much of this nation's history, private tort suits against U.S. officials as individuals were the principal means of enforcing constitutional limits on government power, including the Constitution's general disallowance of arbitrary force. A case like *Jones v. Seward* puts this in perspective. 26 How. Pr. 34 (N.Y. Sup. Ct. Oct. 19, 1863). A U.S. diplomat sued U.S. Secretary of State William Seward for damages arising from false imprisonment. *See id.* at 34. The minister contended that Seward had illegally ordered the diplomat's arrest and jailing "under authority . . . from the President." *Id.* Seward subsequently asked the state trial court to transfer the action to federal court because he intended to defend himself by arguing that his alleged conduct was authorized under the Constitution. *Id.* at 35.

The state trial court rejected Seward's motion. *See id.* at 44. The court explained that it could find no "appearance or color of substance" in Seward's proposed defense: that the Constitution "has invested its chief executive officer with power to arrest or imprison, or to authorize another to arrest or imprison, any person not subject to military law, at any time" without judicial process. *Id.* at 35–36. Nothing in the Constitution could "be tortured into the conferring of such a power on the

[11] *Id.*

President in his civil capacity." *Id.* at 36. Indeed, it would be "the grossest contradiction and strangest anomaly to say that absolute and unlimited power . . . can be implied from a [C]onstitution which avowedly gives no power to any department of the government that is not specifically set forth." *Id.* The court thus found that "[t]he only questions in this action worthy of consideration, and which can be entertained, do not arise under the [C]onstitution . . . but are fitly within the jurisdiction of this court." *Id.* at 44.

Such analysis reflects an original understanding of how abuses of government power were meant to be processed vis-à-vis the Constitution: in short, above all else, U.S. officials could **always** be held liable in their individual capacity for exceeding their proper authority or engaging in unlawful acts. After all, "[w]hen these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf." *Olmstead*, 277 U.S. at 483 (Brandeis, J., dissenting).

But what if a U.S. official's unlawful acts are targeted at a foreigner rather than a citizen? Did the Framers believe that foreigners had less of a right to sue U.S. officials for tort damages than American citizens? Neither the history of the Constitution nor this Court's jurisprudence supports such a view. Rather, in arguing for a robust federal judiciary, Alexander Hamilton noted that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought

ever to be accompanied with the faculty of preventing it."[12] This led Hamilton to conclude that because "the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."[13]

After the Constitution was ratified, American leaders repeatedly affirmed the full measure of justice available to foreigners in U.S. courts. For example, in addressing Danish concerns about the U.S. navy's seizure of three Danish vessels abroad, Secretary of State James Madison explained that "general usage requires that redress should be first prosecuted judicially" and then touted "the scrupulous regard to the rights of foreigners by which [American] courts of justice are distinguished."[14] U.S. Attorney General Richard Rush later reinforced this view in a formal opinion on the "judicial privileges of foreigners."[15] He declared that the "courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them" and that such foreign subjects were "entitled to claim the benefit of every legal remedy in

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[12] THE FEDERALIST NO. 80 (Alexander Hamilton).

[13] *Id.*

[14] Letter from Secretary of State James Madison to Richard Soderstrom dated July 23, 1801, 3 AM. STATE PAPERS: FOREIGN RELATIONS 345 (Washington, D.C., Gales & Seaton 1832), *available online*, http://bit.ly.2haVZGQ.

[15] 1 Op. Att'y Gen. 192, 193 (1816).

as ample a manner as could be enforced by any citizen of the United States."[16]

Finally, there is this Court's decision in *The Sapphire*, in which the Court spoke directly to whether the French emperor could sue in federal court. 78 U.S. 164, 167 (1870). The Court replied: "On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling." *Id.*

Such a denial also would not be in keeping with "the great and leading principles of a free and equal national government," one of which is "to ensure justice to all." *Chisholm v. Georgia*, 2 U.S. 419, 477 (1793) (Jay, C.J.). To this end, "what is it to justice, how many, or how few; how high, or how low; how rich, or how poor; the contending parties may chance to be? Justice is indiscriminately due to all, without regard to numbers, wealth, or rank." *Georgia v. Brailsford*, 3 U.S. 1, 4–5 (1794) (Jay, C.J.). The same may be said about a person's citizenship, which helps to explain why the early legal history of our nation presents examples of foreigners holding U.S. officials individually liable for illegal seizures—even when the seizure took place outside the territory of the United States.

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[16] *Id.*

A. The early history of federal claims law indicates that U.S. officials could always be held individually liable for any illegal seizure they committed.

Gauging how the Framers would have viewed a foreigner's tort suit against a U.S. official for injuries caused by an illegal seizure beyond the country's borders is no easy task. History limits this inquiry to the extent that at the time of the Founding and in the decades that followed, there was no border patrol or federal law enforcement agency like the FBI empowered to engage in seizures either inside or outside the United States. To the contrary, as de Tocqueville observed during his 1830s visit, the means then available to the authorities "for the discovery of crimes and the arrest[ ] of criminals [were] few. A state police d[id] not exist and passports [were] unknown."[17]

Nevertheless, there are two sources of law from the Founding Era that provide insight on how the Framers understood the right of foreigners to challenge injurious extraterritorial conduct by U.S. officials. One of those sources is federal claims law, which is reflected in a series of reports created by the U.S. Committee on Claims, "one of the oldest standing committees in the United States House of Representatives."[18] The Committee was established on November 13, 1794, and its duty was to "take into consideration

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[17] ALEXIS DE TOCQUEVILLE, *supra* note 9, at 98.

[18] *Guide to House Records: Chapter 6: Claims 1794–1946*, U.S. NAT'L ARCHIVES, https://www.archives.gov/legislative/guide/house/chapter-06-claims.html (last visited Dec. 7, 2016).

all petitions and matters or things touching claims and demands on the United States . . . and to report their opinion thereon."[19]

In this capacity, the Committee often considered claims by U.S. officials seeking indemnification for tort judgments entered against them as individuals. The Committee's responses to these claims, in turn, reveal several instances of U.S. officials or agents being held liable for illegal seizures even when a foreigner was the victim and/or the seizure happened to occur outside the United States.

One notable example of this may be seen in Claim Report No. 350, "Indemnity to a Teamster for Damages Awarded Against Him" (Feb. 7, 1817).[20] The claim was pressed by a New York merchant who was hired as a teamster by a U.S. army officer in 1814, during the midst of the War of 1812 between the United States and Britain. The teamster rode with the colonel on his march from the United States into Lower Canada—a British province. Once in Lower Canada, the officer ordered the teamster to seize a puncheon of rum from a British subject's private home and then carry it across the U.S.-Canada border to a guard-house in Vermont. After following these orders, the teamster was sued by

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[19] *Id.*

[20] *See* 1 AM. STATE PAPERS: CLAIMS 523 (Washington D.C., Gales & Seaton 1834), *available online*, http://bit.ly/2gIvDvn.

the British subject for conversion and was ultimately required to pay damages to the subject.[21]

The teamster asked the Claims Committee for indemnification, but the Committee refused (though Congress later agreed to pay). The Committee based this decision on the fact that the "United States have in no instance, while at war, justified the seizure or capture of private property belonging to a citizen or subject of the enemy." Thus, presuming the rum was the private property of a British citizen, the army officer's arbitrary seizure of it "was an offense in the officer, and a violation of private right, for which the individual injured would be entitled to damages." The Claims Committee did not appear to care that the seizure took place in Lower Canada during a time of war.

Now consider Claim Report No. 387, "Indemnity to Major Gen. Brown Against Certain Judicial Proceedings" (Feb. 9, 1818).[22] Jacob Brown, a major general in the U.S. Army, sought indemnity for a judgment entered against him by a New York state court. The judgment arose from Brown's arrest of a man named Henry Utley while Brown's forces were located on the

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[21] The Claims Committee's report states that the teamster was "arrested at the suit" of the British subject in "Missique bay." This appears to be a reference to a location in Vermont, indicating that the British subject sued in an American court. *See* R.A. DOUGLAS-LITHGOW, DICTIONARY OF AMERICAN-INDIAN PLACE & PROPER NAMES IN NEW ENGLAND 91 (1909) (identifying "Missique Bay" as the name of a place in Vermont).

[22] *See* 1 AM. STATE PAPERS: CLAIMS, *supra* note 20, at 551, *available online*, http://bit.ly.2h4npjT.

Canadian frontier. Brown had Utley arrested on suspicion of spying for the British; it is unclear what Utley's citizenship was at the time. Utley subsequently sued Brown in New York state court for assault, battery, and false imprisonment and was awarded damages. The Claims Committee found that Brown "acted only as a prudent officer would have done in the arrest of Utley" and agreed that Brown should be indemnified. The Committee's analysis did not turn on where the arrest took place or whether the arrestee was an American.

What these examples reveal is that the Claims Committee was singularly focused on arbitrariness in deciding whether U.S. officials were entitled to indemnification on court judgments arising from government seizures. In short, if a U.S. official had acted arbitrarily (i.e., without authority) then he alone was liable for his conduct; the United States would not indemnify him. But if a U.S. official had acted prudently, then indemnification was possible. In this calculus, an injured party's nationality or the location of the seizure was irrelevant—a point the Claims Committee articulated at length in Claim Report No. 560, "Goods in Canada, Belonging to a Merchant in New York, Captured by the Troops of the United States" (Dec. 21, 1821):[23]

> If . . . it was lawful for [a U.S. official] to take the enemy's property in the country of the enemy, the committee think it would be equally so for him to take the property of our own citizens found in the country of the enemy . . . .

[23] 1 AM STATE PAPERS: CLAIMS, *supra* note 20, at 793, *available online*, http://bit.ly/2hcm&rP.

> On the other hand, if it was not lawful to take . . . the property either of the enemy or our own citizens, the committee think the taking . . . [is] an act performed on [the official's] own personal responsibility, for which he alone . . . is liable. . . .

This comprehensive understanding of U.S. officer liability fits with this Court's observation that "where an individual is sued in tort . . . to which his defense is that he has acted under the orders of the government," this defense requires the individual to "show that his authority was sufficient in law to protect him." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 452 (1883). The Court did not further declare that this show-of-authority would be unnecessary if the tort crossed a border or the injured party was not a citizen.

B. The early history of federal maritime law indicates that U.S. officials could always be held individually liable for any illegal seizure they committed.

The early history of federal maritime law also provides useful insight on how the Framers would have reacted to a foreigner's tort suit against a U.S. official for injuries caused by an illegal seizure beyond U.S. territory. In particular, there are two key principles that can be discerned from this history that are helpful here: (1) that while the high seas are a jurisdictional no-man's-land, every vessel on the high seas is still answerable to its home nation; (2) that in exercising

power on the high seas, a U.S. vessel's captain owes a duty of reasonableness to every other vessel.

The Court's 1807 decision in *Hudson v. Guestier* speaks to the first principle: ongoing national control over vessels, even when situated on the high seas. 8 U.S. 293 (1807) (Marshall, J.). This principle was explained in the context of addressing whether any court in the world could take a vessel captured on the high seas away from its captor, or whether only the courts of the captor's nation had jurisdiction to do this. *See id.* at 293–94. The Court determined that the latter was true: a vessel "lawfully acquired under the authority of a sovereign state could not be divested by the tribunals of [another] country into whose ports the captured vessel was brought." *Id.* at 297.

In supporting this decision, the Court conceded that "cruisers are often commanded by men who do not feel a due respect for the laws, and who are not of sufficient responsibility to compensate the injuries their improper conduct may occasion." *Id.* at 296. The Court then emphasized that such cruisers "must [still] be considered as officers commissioned by their sovereign to make a seizure in the particular case, and to be ready to obey the legitimate mandate of the sovereign directing a restitution." *Id.* In short, a vessel on the high seas could properly be regarded as an extension "of the territory" of its home nation, *The Hamilton*, 207 U.S. 398, 403 (1907), thus preserving the home nation's authority to "govern the conduct of its citizens on the high seas." *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941).

The second helpful principle revealed by the early history of American maritime law is that U.S. vessel commanders owe a duty of reasonableness in dealing with the vessels of other nations on the high seas. This may be seen in *The Marianna Flora*, 24 U.S. 1, 41–47 (1826) (Story, J.). While patrolling the high seas, an American cruiser encountered a Portuguese ship and drew close to ascertain whether the ship was in distress. *See id.* Fearing the American cruiser to be a pirate, the Portuguese ship opened fire, prompting the American cruiser to return fire. *See id.* The American cruiser eventually captured the Portuguese ship and attempted to forfeit her in a U.S. court. *See id.* The court rejected the forfeiture and ordered the commander of the American cruiser, Lieutenant Stockton, to pay damages. *See id.* On appeal, the circuit court reversed the award, leading the owners of the Portuguese ship to appeal to this Court to reinstate the damages award. *See id.*

This Court proceeded to consider "what are the rights and duties of armed [ships], and other ships, navigating the ocean in time of peace." *Id.* at 42. The Court found that upon the ocean in peacetime, "all possess an entire equality. It is the common highway of all." *Id.* The Court also found that ships like the American cruiser, being authorized "to arrest pirates, and other public offenders," were likewise entitled to approach other vessels at sea "for the purpose of ascertaining their real characters." *Id.* at 43.

This left only the question of how Lieutenant Stockton should have responded to the mistaken salvo

fired by the Portuguese ship. On this score, the Court found "[t]he real duty imposed upon Lieutenant Stockton was . . . **to exercise an honest and fair discretion on the subject**, and to obtain such explanations as might guide his judgment." *Id.* at 51 (bold added). And that defeated any claim for damages against him, since it was "conceded on all sides . . . that he acted with honorable motives." *Id*. at 52. By contrast, "[i]f Lieutenant Stockton had acted with gross negligence or malignity, and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages." *Id.*

The Court thus affirmed the principle that *reason* and *respect* for the inherent rights of others are the critical lodestars for determining the individual liability of U.S. officials. That principle can also be seen in a later maritime decision by this Court indicating that an American vessel that violates American laws on the high seas to the injury of another vessel is liable no matter what the nationality of the other vessel happens to be. Specifically, in *The Scotia*, the Court affirmed the liability of an American ship for colliding with a British ship on the high seas—a collision caused by the American ship's failure to display the correct lights required under American navigation laws. 81 U.S. 170, 183–89 (1871).

The Court noted that American navigation laws "were intended to secure the safety of life and property, as well as the convenience of commerce." *Id.* at 185. With this in mind, the Court reasoned that even if these laws could not be said to govern "the ships and

people of other nations," these laws were "at least designed for the security of the lives and property of our own people." *Id.* In that regard, they operated as rules of reason—ones that were "as useful and as necessary on the ocean as they are upon inland waters." *Id.* This prompted the Court to ask: "How, then, can our courts ignore [these laws] in any case? Why should it ever be held that what is a wrong when done to an American citizen, is right if the injured party be an Englishman?" *Id.*

The present case beckons the same question: why should it ever be held that a U.S. official's arbitrary use of lethal force is an actionable constitutional violation when done to an American citizen, but is not actionable, and thereby excused, when done to a Mexican national standing on Mexican soil? The relevant abuse is not rendered less arbitrary by where it transpired or the nationality of the person injured by it. And the early history of federal claims law and federal maritime law stand for the opposite view: that individual liability attaches to U.S. officials for all illegal seizures, no matter the location of the seizure or the nationality of the victim. The Court should take that history into account in considering the facts of this case—facts that do not bear any meaningful resemblance to those considered by this Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

III. The plurality opinion in *Verdugo-Urquidez* should not be followed in *Hernandez*.

In *Verdugo-Urquidez*, a plurality of this Court held that the Fourth Amendment did not apply to the warrantless search of an individual's home by U.S. officials where the individual "was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico." *Id.* at 274–75 (plurality op.). Based on this holding, the Fifth Circuit here found that the Fourth Amendment could not be invoked to hold a U.S. border patrol agent liable for arbitrarily killing a 15-year-old Mexican teenager on Mexican soil. *See Hernandez*, 785 F.3d at 119 (en banc).

The *Verdugo-Urquidez* plurality opinion, however, has no proper application in this case. The Fourth Amendment claim at issue here is not about a criminal defendant attempting to suppress evidence in the face of a drug-trafficking prosecution. Rather, the Fourth Amendment claim at issue here implicates the very heart of "our institutions of government" and the remedy that these institutions have always provided to address "the play and action of purely personal and arbitrary power": a claim for damages against the offending U.S. official in his individual capacity. *Yick Wo*, 118 U.S. at 370.

With this in mind, the Court now has before it another path to affirm that the Hernandez family may hold the U.S. official who arbitrarily killed their son liable for this conduct—a path that does not turn on

extraterritorial application of the Bill of Rights or parsing the connectedness of foreigners with the United States. This path instead focuses on whether the Constitution authorized the U.S. border patrol agent in this case to do what he did: arbitrarily use lethal force against an unarmed, defenseless teenage boy. No such authority exists. The Hernandez family is therefore entitled to hold the agent individually liable for tort damages—a proposition that is supported by the early history of federal claims law and federal maritime law.

CONCLUSION

The Constitution "was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues." *Hurtado v. People of California*, 110 U.S. 516, 530–31 (1884). In that spirit, the Hernandez family has come to this nation's courts seeking to hold a U.S. official accountable for his arbitrary use of lethal force—a power not given to him by the Constitution. "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Butz v. Economu*, 438 U.S. 478, 506 (1978). That is especially true for the constitutional guarantee at stake here: that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

The rule must be discharged.

Respectfully submitted,

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