No. 15-118

In The Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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STATEMENT

Petitioners allege that on June 7, 2010, their fifteen-year-old son, Sergio Adrián Hernández Guereca ("Hernández"), a citizen and resident of Mexico, was playing with his friends at the border area near the Paso del Norte Bridge in El Paso, Texas. *Hernández, v. United States*, 785 F.3d 117 (5th Cir. 2015). According to Petitioners' pleadings, the boys were playing a game which involved running up and touching the border fence and then running back down the incline of the culvert into Mexico. *Id*. United States Customs and Border Patrol (CBP) Agent Jesus Mesa, Jr., arrived at the scene and detained one of the individuals.[1] *Id.* Hernández retreated under the Paso del Norte Bridge in Mexico. *Id.* There is no dispute that Agent Mesa, while standing in the United States, then pointed his service weapon at Hernández and shot across the border, striking Hernández twice. *Id*. Hernández subsequently died. *Id.*

After the shooting, the Justice Department conducted a comprehensive and thorough investigation into the shooting, concluding that the shooting took place while alien smugglers, including Hernández, unsuccessfully attempted an illegal border crossing, and

[1] The undocumented immigrants detained by Agent Mesa in this case were Augustin Alcaraz, cause number EP-10-M-03410(1)ML and Oscar Ivan Piñeda Ayala, cause number EP-10-M-03403(1)ML. Both cases were prosecuted in the United States District Court for the Western District of Texas, El Paso Division. Defendant Alcaraz was the undocumented immigrant apprehended and ultimately taken into custody by Agent Mesa when Hernández was shot.

began to hurl rocks from close range at Agent Mesa while he was attempting to detain a suspect.[2] U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Federal officials close investigation into the death of Sergio Hernández-Guereca (2012), *available at* https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca. Agents from the FBI, the Department of Homeland Security, the Office of the Inspector General (DHS-OIG), prosecutors from the Justice Department's Civil Rights Division, and the United States Attorney's Office, interviewed more than twenty-five law enforcement and civilian witnesses; collected, analyzed and reviewed evidence from the scene of the shooting, civilian and surveillance video, law enforcement radio traffic, 911 recordings, volumes of Custom and Border Patrol agent training and use-of-force materials, Agent Mesa's training, disciplinary records, and personal history; conducted site visits; and analyzed and consulted with the International Boundary and Water Commission concerning jurisdictional issues. *Id*.

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[2] It is not uncommon for human traffickers to use rock throwing to hamper law enforcement efforts to apprehend alien smugglers in the border regions. In the San Diego sector of the United States/Mexico border alone, United States Customs and Border Patrol recorded more than 400 assaults, including rock throwing, on agents since 2010. The numbers fluctuate in recent years, from 130 assaults in 2010, 77 in 2011, 133 in 2012, to 73 in 2013, per the agency's statistics. Michael Martinez & Jaqueline Hurtado, *Border Patrol agent shoots, kills migrant who threw rocks*, CNN, Feb. 19, 2014, www.cnn.com/2014/02/19/us/california-border-rock-throwing-death.

Afterwards, a team of experienced prosecutors examined the shooting as a possible violation of United States civil rights laws and as a possible violation of federal homicide statutes. *Id*. Regarding the federal homicide statutes, the team of prosecutors and agents concluded that there is insufficient evidence to pursue prosecution of Agent Mesa for a federal homicide offense. *Id*. The review considered evidence indicating that the agent's actions constituted a reasonable use of force or would constitute an act of self-defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. *Id*. The investigation also revealed that, on these facts, the agent did not act inconsistently with Customs and Border Patrol policy or training regarding use of force. *Id*. Based on a careful review and analysis of all the evidence, the investigative team concluded that evidence would not be sufficient to prove beyond a reasonable doubt that Agent Mesa violated the federal homicide laws in the shooting of Hernández, and found that Agent Mesa's use of force was a result of Hernández and the other individuals surrounding him and throwing rocks at him while refusing his verbal commands to stop. *Id*.

Interestingly, per United States Department of Justice records, Hernández had been arrested twice before for alien smuggling and had been given voluntary returns to Mexico due to his juvenile status.

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SUMMARY OF ARGUMENT

IA. The Petitioners' claim for Fourth Amendment protection was answered in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and the functionality test put forth in *Boumediene v. Bush*, 553 U.S. 723 (2008) does not apply in cases where the United States clearly exercises no power, control, or authority over the area/territory where the incident complained of occurs.

B. Contrary to the Petitioner's assertion that the geographic area where Hernández was standing when he was shot is *de facto* United States soil because CBP routinely patrols that area and the area is in close proximity to the United States/Mexican border, the international border between the United States and Mexico politically fixed and cannot be enlarged to satisfy temporal expedience. To hold otherwise would create extraterritorial jurisdictional jurisprudence based on subjective determinations on where to draw the line.

C. Thirdly, to hold in favor of the Petitioners would create a Fourth Amendment jurisprudence that would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990).

II. Petitioners seek to raise the question as to whether qualified immunity can be granted or denied based on an agent's after-the-fact discovery of a person's legal status. Brief for Petitioners at 13, Hernández

v. Mesa, 136 S.Ct. 567, 193 L.Ed.2d 424, 84 USLW 3299 (2015) (No. 15-118). Specifically, the Petitioners argue that since Agent Mesa could not have known Hernández' citizenship status at the time of the shooting, Agent Mesa could not know have known he was an alien and thus unprotected by the Fourth Amendment protections identified by the lower court. *Id*. However, the Fifth Circuit's decision that agent Mesa is entitled to qualified immunity is correct; and the decision, based on Hernández' status as an alien who had no significant voluntary connection to, and who was not in the United States, could be reasonably inferred by Agent Mesa since he was responding to persons attempting to enter the United States illegally and while Agent Mesa detained one of the individuals attempting to cross into the United States illegally, the remaining persons including Hernández began to throw rocks at him. *Id*.

III. *Bivens* is not applicable where the facts of this case require the Petitioners to satisfy dual prongs to pierce the protection of qualified immunity: "(1) whether the facts that the Petitioners have alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013) (quoting *Brown v. Strain*, 663 F.3d 245, 249) (5th Cir. 2011) (internal quotation marks omitted); *see also Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Pursuant to the second prong, "[a] right is clearly established when 'it would be clear to a reasonable officer that his

conduct was unlawful in the situation he confronted.'" *Ramirez*, 716 F.3d at 375 (quoting *Jones v. Lowndes Cnty.*, 678 F.3d 344, 351 (5th Cir. 2012)). Here, Petitioners fail to prove, at the time that Agent Mesa found himself in the alleged incident, that any Fourth Amendment rights were "clearly established" to protect Hernández.

ARGUMENT

I. The Fourth Amendment's prohibition on the unjustified use of deadly force does not apply in a cross-border shooting of a Mexican civilian on Mexican soil by a United States federal agent.

The Petitioners' claim for Fourth Amendment protection was answered by this Court's previous holding in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); and the functionality test put forth in *Boumediene v. Bush*, 553 U.S. 723, 727 (2008) does not apply in this case where the United States clearly exercises no power or authority over the territory where Hernández was standing when he was shot.

A. *Verdugo* involved the question as to whether the Fourth Amendment applies to a search and seizure by United States agents of property that was owned by a nonresident alien and located in a foreign country. *Verdugo-Urquidez*, 494 U.S. at 261. In fact, after a roll call of the so-called "*Insular Cases*," which extended and curtailed applicable constitutional rights into

United States territories, military bases, etc., the *Verdugo* Court (*citing Dorr v. United States*, 195 U.S. 138 (1904) declared that only "fundamental" constitutional rights are guaranteed to inhabitants of territories held by the United States. *Id.* The *Verdugo* Court held that "if that holding was true with respect to territories ultimately governed by Congress, then the claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker." *Id*. If the respondent in *Verdugo* was denied Fourth Amendment protection because the complained of conduct took place in Mexico, and he had been present in the United States for only a matter of days, which did not convey to him substantial contacts, how then can the Petitioners in this case claim Fourth Amendment protection? *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

However, the Petitioners assert that in *Boumediene v. Bush*, 553 U.S. 723, 727 (2008), the Court adopted a new approach to deciding jurisdictional matters – "the idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism" – thereby overruling *Verdugo* and its prodigy. However, this view is flawed in that *Boumediene* dealt with the application of the suspension clause to aliens detained by the United States at the Guantánamo Bay Naval station – a station over which the government admitted to exercising full control. *Id*. But *Boumediene* was narrowly focused as it dealt specifically with the application of the Suspension Clause to Guantánamo Bay detainees only. *Id*.

In its plurality opinion, Justice Kennedy wrote "we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene*, 553 U.S. at 766. In reaching this conclusion, this Court partly relied on its decision in *Rasul*, wherein it wrote that "[a]s we recognized in *Rasul*, the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*." *Boumediene*, 553 U.S. at 766 (2008) (*citing Rasul v. Bush*, 542 U.S. 466 (2004) (Kennedy, J., concurring in judgment). Clearly, the *Boumediene* decision limited the application of the Suspension Clause to areas controlled by the United States, and did not intend to apply all Constitutional protections abroad.

While the *Boumediene* Court did put forth a three-prong test where extra-territoriality decisions are determined by "objective and practical concerns," this test clearly was meant for situations where there was no question as to whether the government asserts control over the location where a constitutional right is being asserted. The *Boumediene* Court did not explicitly overrule *Verdugo*, or any of the other cases having to deal with Fourth Amendment protections and extra-territoriality determinations. In perhaps the

most telling statement contained within the *Boumediene* decision, Justice Kennedy astutely observed that there existed "inherent and practical difficulties of enforcing all constitutional provisions always and everywhere." *Id.* at 759 (*citing Balzac v. Puerto Rico*, 258 U.S. 298, 312 (1922)). And more specifically, the Court stated that the *Boumediene* decision applies only to the premise that Petitioners before the Court are entitled to seek the writ and that the DTA review procedures were an inadequate substance for habeas corpus. *Id.* at 795. Nowhere in the opinion did the *Boumediene* Court overturn *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights), or *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (Fourth Amendment protects only aliens with significant voluntary connections to the United States). To the contrary, considering the Court's repeated references to the Suspension Clause, one can only assume that the Court explicitly confined its holding only to the extraterritorial reach of the Suspension Clause and disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause. *See Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011); *Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (en banc) (Henderson, J., concurring) ("whether *Boumediene* in fact portends a sea change in the extraterritorial application of the Constitution writ large, we are bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause."); *Igartúa v. United States*, 626 F.3d 592, 600

(1st Cir. 2010) ("[T]he *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

And, in other courts, there seems to be a lack of desire to expand the holding of *Boumediene.* There are numerous cases wherein the courts have declined to extend constitutional protection extraterritorially. Brief for Amicus Curiae Supporting Petitioners at 9, Dean Erwin Chermerinsky, *Hernández v. Mesa*, 136 S.Ct. 567, 193 L.Ed.2d 424, 84 USLW 3299 (2015) (No. 15-118). Specifically, the rejection by the majority opinion in *Doe v. United States* holding that "nothing in *Boumediene* suggests that the Court intended its holding to broadly apply the Bill of Rights or to the takings clause, in particular." *Id*., (*citing Doe v. United States*, 95 Fed. Cl. 546, 570 (Fed. Cl. 2010)).

The Petitioners also rely heavily on Justice Kennedy's concurring opinion in *Verdugo* to support the application a functional approach to extraterritorial jurisdiction questions. Brief for Petitioners, p. 15, Hernández v. Mesa, 136 S.Ct. 567, 193 L.Ed.2d 424, 84 USLW 3299 (2015). However, Justice Kennedy's concurring opinion in *Verdugo* clearly states that the *Verdugo* Court did not overrule either *In re Ross*, 140 U.S. 453 (1891), or the so-called *Insular Cases* (*i.e., 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); *Balzac v. Puerto Rico*, 258 U.S. 298 (1922)). *Verdugo*, 494 U.S. at 277. Justice Kennedy correctly states that "[t]hese authorities, as well as *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936),

stand for the proposition that the Court must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Verdugo*, 494 U.S. at 277. And Justice Kennedy agreed with the *Verdugo* Court's outcome because "[t]he conditions and considerations of the *Verdugo* case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous." *Id*. at 278.

And thus, Justice Kennedy's interpretation of examining constitutional protections while considering the undoubted power of the United States to take actions to assert its legitimate power and authority abroad is in no way contradictory to the holding in *Boumediene*, *supra*. In *Verdugo*, *supra*, the conduct occurred in the Republic of Mexico where the United States had no power or control, and in *Boumediene*, *supra*, conduct occurred in an area clearly under the control of the United States.

B. United States law enforcement does not enjoy free control over territory that extends a few feet past the U.S./Mexico border area on the Mexican side as stated by the Petitioners. In fact, quite the opposite is true. In the past, as well as recently as five months ago, whenever a United States or Mexican law enforcement official entered the other country's jurisdiction, even for law enforcement reasons, the result has been the arrests of the respective transgressing law enforcement officer. For example, in 1992, an El Paso police officer pursued a person suspected of committing a

crime into Mexico while driving his official vehicle over the international bridge. E. Ivey, *El Paso Cop arrested after pursuing suspect into Mexico*, El Paso Times, Oct. 27, 1992. The police officer was arrested by Mexican officials and the officer's official police vehicle was seized for a period by Mexican officials. *Id*., *see also* E. Ivey, *Mexico returns seized cop car to El Paso*, El Paso Times, Nov. 10, 1992. And this enforcement of the finite border is not one-sided, as the United States recently arrested a Transit Officer from Cuidad Juarez, as she chased a suspect into the United States from Mexico over the international bridge in her official police vehicle. R. Carillo, *Detienen a Agente de Vialidad en Puente Internacional*, El Diário, Aug. 9, 2016. And contrary to the Petitioners' position, as well as some of the amici, the relationship between the United States and Mexico, specifically El Paso, TX, and Cuidad Juarez, Chihuahua, MX, is not one of "happy neighborly feelings," but one that is dependant on "who" is having the better day. According to a 1994 study by the U.S. Commission on Immigration Reform, the relationship between the two cities is much more complex. *See* Bean, Chanove, Cushing, de la Garza, Freeman, Haynes, & Spener, U.S. COMMISSION ON IMMIGRATION REFORM, Illegal Mexican Migration & the United States/Mexico Border: The Effects of Operation Hold the Line on El Paso/Juárez (1994). Per the authors of the report, prior to the implementation of "Operation

Hold the Line,"[3] the large populations and the geographic isolation from other parts of the United States and Mexico, and the cross-border familial relationships between people in both cities resulted in a special relationship between El Paso and Juárez. *Id*. at p. 12. Relatives visited back and forth, and both resident populations regularly crossed the border to shop for items either not found in their home city or to take advantage of lower prices in the other city. *Id*. On Halloween, Mexican children routinely cross into El Paso to "trick or treat" (except in 1993, when INS port of entry inspectors denied entry to those without Border Crossing Cards). *Id*. That relationship ended with the implementation of "Operation Hold the Line." *Id*. The implementation of "Operation Hold the Line" raised concerns in Juárez, spawning anti-American protests

[3] On September 19, 1993, Silvestre Reyes, the Chief of the El Paso Sector of the Border Patrol of the U.S. Immigration and Naturalization Service [INS], (now CBP) launched Operation Blockade along a twenty-mile stretch of the U.S./Mexico border between El Paso and Juárez. Renamed Operation Hold the Line three weeks later (to avoid the negative connotations associated with the word "blockade"), the initiative represented an effort to cut off illegal migration from Mexico into El Paso (and through El Paso into the United States). As such, it involved a major shift in strategy on the part of the El Paso sector Border Patrol. Previously the Border Patrol had allowed relatively unhindered movements across the river, concentrating on the subsequent interception of crossers who had already entered the city, including those who were trying to move inland at major transportation arteries (roads, railroad lines, and airports). Bean, Chanove, Cushing, de la Garza, Freeman, Haynes, & Spener, U.S. COMMISSION ON IMMIGRATION REFORM, Illegal Mexican Migration & the United States/Mexico Border: The Effects of Operation Hold the Line on El Paso/Juárez, p. 1 (1994).

and a proposed boycott on shopping in El Paso. *Id*. These hard feelings continue today.

And lastly, if the Court were to adopt the Petitioners' assertion that the United States enjoys *de facto* jurisdiction because the area where Hernández was shot was close to the official United States/Mexico border, the Court will have created a jurisdiction that is completely subjective depending on how much the United States wants to control or how much Mexico wishes to acquiesce. In the original panel opinion from the Fifth Circuit, Circuit Judge DeMoss, in his concurrence in part and dissenting in part, wrote that at the panel opinion's heart, the determination that Hernández enjoy constitutional protection, was based on the "dubious assessment that there is an undefined area on the Mexican side of the United States/Mexico border which is analogous to the United States Naval Station at Guantánamo Bay, Cuba." *Hernández v. United States*, 757 F.3d 249, 281 (5th Cir. 2014). Judge DeMoss declared that the majority's analogy was flawed in that the United States' presence at Guantánamo Bay, Cuba, was based on both a lease and a treaty. *Id*. Furthermore, Judge DeMoss stated, "the United States 'has maintained complete and uninterrupted control of [Guantánamo Bay] for over 100 years.'" *Id*. Then he astutely pointed out that the same could not be said of the Mexican side of the border. *Id*. Judge DeMoss rejected the proposition that occasional exercises of "hard power across the border," and practices such as "'preinspection' examination and inspection of passengers," somehow transformed a portion of northern

Mexico into anything resembling the Naval Station at Guantánamo Bay. *Id*. Judge DeMoss asked that "if the fact that the United States exerts, and has exerted, powerful influence over a strip of land along the border of northern Mexico, justifies application of constitutional protection, how wide then is that strip? *Id*. He logically followed the query to its rightful conclusion: is constitutional protection "applicable in all of Ciudad Juarez, or even the entire state of Chihuahua?" *Id*. One could continue this exercise pertaining to the question of "how wide": as far as the eye can see? As far as the bullet travels? Finally, Judge DeMoss stated, "the majority's approach devolves into a line drawing game which is entirely unnecessary because there is a border between the United States and Mexico." *Id*.

C. The Petitioners' position, if adopted by this Court, could have a very significant effect on the United States' ability to conduct and make foreign policy operations and decisions. Andrew Kent,[4] *Thoughts on the Briefing to Date in Hernández v. Mesa – The Cross-border Shooting Case*, LawFare, Dec. 27, 2016, *available at* www.lawfareblog.com/thoughts-briefing-date-hernandez-v-mesa-cross-border-shooting-case. This

[4] Andrew Kent is Professor of Law at Fordham University School of Law. He teaches and writes about constitutional law, foreign relations law, federal courts and procedure, national security law, public international law and professional responsibility. Professor Kent's academic writing has frequently focused on questions of the Constitution's domain – when, where and for whom are constitutional protections available. He is a faculty advisor to the Center on National Security and the Fordham International Law Journal.

is because the Fourth Amendment governs all manner of searches and seizure by U.S. officials; everything from electronic surveillance to physical searches of persons, buildings, computers and other devices, to thermal imaging to shootings. would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." *Id*. And this is exactly what Chief Justice Rehnquist was thinking when he stated in *Verdugo*, "[t]he United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security . . . [a]pplication of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo*, 494 U.S. at 273. He went on to state that if the respondent in *Verdugo* prevailed, aliens with no attachment to the United States "might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Id*. For example, extraterritorial foreign intelligence surveillance and even drone strikes, both of which have proceeded to date under the executive branch's assumption that noncitizens outside the United States have no relevant constitutional rights in those contexts would be affected should someone feel that their Fourth Amendment right was violated. Andrew Kent, *supra*. The *Verdugo* Court cautioned that the Ninth Circuit's rule would plunge government officials "into a sea of uncertainty as to what might be

reasonable in the way of searches and seizures conducted abroad." *Id.* at 274.

II. Agent Mesa is entitled to qualified immunity.

The Petitioners seek to raise the question as to whether qualified immunity can be granted or denied based on an agent's after-the-fact discovery of a person's legal status. Specifically, the Petitioners argue that since Agent Mesa could not have known Hernández' citizenship status at the time of the shooting, Agent Mesa could not have known he was an alien and thus unprotected by the Fourth Amendment protections. The Petitioners' reliance on a lower court decision, *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005), is misplaced. In *Moreno*, law enforcement seized two men walking down the street, a seizure law enforcement officials later justified because Moreno was a parole violator. *Id*. The state contended that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property; and second, the appellants contend that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the officers did not know of either fact at the time. *Id*. at 638. The Ninth Circuit however, did not agree with the idea that police officers cannot retroactively justify a suspicionless search and arrest based on an after-the-fact discovery of an arrest warrant or a

parole condition – i.e., the victim of the violations status. *Id*. at 641.

However, the facts in *Moreno* are significantly different than the facts in this case. In *Moreno*, the two individuals, Richard Moreno, and his companion Joe Rodriguez, are driving to a meeting at St. Lucy's Church in the City Terrace area of Los Angeles. *Id*. at 636. After their car broke down, Moreno and Rodriguez proceeded toward the meeting on foot. *Id*. At approximately 7 p.m., a marked Los Angeles County Sheriff patrol car passed them as they walked down the street, made a U-turn, and pulled the car onto the curb in their path. *Id*. Two deputies got out of the car. *Id*. Deputy Banks, who was riding in the passenger seat, ordered Moreno and Rodriguez to approach. *Id*. It is undisputed that the deputies learned that Moreno was on parole and that he had an outstanding arrest warrant only after searching and detaining him. *Id*. at 637. Moreno was subsequently charged in state court with possession of a controlled substance. *Id*. Deputies Banks and Garcia testified against him at trial and Rodriguez testified for the defense. *Id*. Moreno was acquitted by a jury in 2002. Moreno then brought this action under 42 U.S.C. § 1983, contending that Banks and Garcia violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested and searched him without cause. *Id.*

In the case at hand, Agent Mesa was responding to persons trying to enter the United States by going through the border fence at the international border

between Mexico and the United States. Agent Mesa detained one of the individuals whereas the remaining persons including Hernández began to throw rocks at him.

The circumstances regarding the two cases could not be more opposed. In one instance, you have two men driving, and then subsequently walking down the street who were approached by police officers for no apparent reason. In the other, you have persons attacking a law enforcement officer with rocks, the choice of weapon for alien smugglers, after running up to the border fence, on an international border.

First, when determining whether qualified immunity exists, the court must look to see if (a) the officer's conduct violated a constitutional right and if so, (b) whether that right was clearly established at the time the alleged violation occurred. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The contours of the right must be clear enough that a reasonable officer would have understood that what he or she was doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

"[A]lmost without exception in evaluating alleged violations of the Fourth Amendment, the Court has to first undertake an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137 (1978); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("We have described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity, and

probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (holding that "factual determinations bearing upon search and seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment"). When looking at the facts available to Agent Mesa at the time of his encounter with Hernández, using the objective standard, it is plain to see that at the time of the shooting it could be reasonably assumed by Agent Mesa that Hernández was breaking the law, by engaging in alien smuggling, and assaulting the agent with rocks.

Also, the Petitioners' argument that Hernández' status must be known to Agent Mesa prior to the encounter for qualified immunity protection to be afforded is also flawed. Hernández' citizenship status is irrelevant for purposes of qualified immunity protection in this case. Both *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), preclude aliens from Fourth and Fifth Amendment protections unless the aliens have significant voluntary connections to the United States or are actually within the sovereign territory of the United States. Given the rock throwing and suspected alien smuggling activities of Hernández at the time of his interaction with Agent Mesa, Hernández is in a circumstance totally different from what Moreno experienced.

III. *Bivens* is not applicable to the facts of this case.

The Petitioners' claim cannot be asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which requires a party to satisfy dual prongs to pierce the protection of qualified immunity: "(1) whether the facts that the plaintiff has alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Ramirez v. Martinez*, *supra*, (quoting *Brown*, *supra*; *see also Pearson v. Callahan*, *supra*. Pursuant to the second prong, "[a] right is clearly established when 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Ramirez*, 716 F.3d at 375 (quoting *Jones v. Lowndes Cnty*., 678 F.3d 344, 351 (5th Cir. 2012)).

Here, Petitioners have failed to prove, at the time that Mesa found himself in the alleged incident, that any Fourth Amendment rights were "clearly established" to protect Hernández. First, the procedural history below of the instant case exhibits that neither right was clearly established. Three Fifth Circuit Justices determined that "the Fourth Amendment does not apply," but that the Fifth Amendment does apply in this case and that it was clearly established. *Hernández v. United States*, 757 F.3d 248, 267, 279-80 (5th Cir. 2014). Then, sitting en banc, the entire Fifth Circuit Court reversed, including the original two panelists who gave Hernández initial protection, determining that neither the Fourth Amendment nor the Fifth

Amendment applies. *Hernández v. United States*, 785 F.3d 117, 117-21 (5th Cir. 2015). That is, fifteen distinguished jurists determined that neither right was clearly established at the time of the facts alleged. *Id*. at 120 ("No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment."). This determination favors the "objective legal reasonableness" of Mesa's action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

As it specifically pertains to the Fourth Amendment, Mesa agrees with the Fifth Circuit's opinion that, pursuant to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), "Hernández, a Mexican citizen who had no 'significant voluntary connection' to the United States, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment." *Hernández*, 785 F.3d at 119 (*citing Verdugo-Urquidez*, 494 U.S. at 271) (internal citation omitted).

As it specifically pertains to the Fifth Amendment, Mesa again agrees with the Fifth Circuit, which declined to read the tea leaves of *Boumediene v. Bush*, 553 U.S. 723 (2008); instead, it relied on the Court's clearly established language, which "expressly limited its holding to the facts before it." *Hernández*, 785 F.3d at 121 (*citing Boumediene*, 553 U.S. at 795 ("Our decision today holds only that Petitioners before us are entitled to seek the writ.")).

Ignoring this express language, Petitioners instead ask the Court to ignore "the general rule of constitutional avoidance," *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) and to fashion *ex post* constitutional protections through *Bivens*. And this Court held that *Bivens* "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances [the Court has] found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *see also United States v. Stanley*, 483 U.S. 669, 683 (1987) ("[I]t is irrelevant . . . whether the laws currently on the books afford Stanley, or any other particular serviceman, an 'adequate' federal remedy for his injuries."). Therefore, the Court should decline Petitioner's invitation to invade the province of the legislature by legislating new constitutional rules.

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CONCLUSION

The *en banc* opinion from the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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