

No. 17-1678

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 OF *AMICI CURIAE*
BORDER SCHOLARS
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE* ¹

Amici curiae are some of the foremost scholars on issues touching the United States-Mexico border, including transborder populations, binationalism in cultural identity, immigration and migration, asylum and detention, human rights, drug-related violence, political and cultural geography, environment and sustainability, and border economies. *Amici* are interested in providing the Court an accurate portrayal of the United States-Mexico border as it exists in El Paso-Juárez and other communities through which it runs. Identities of *amici* are described in the Appendix.

SUMMARY OF ARGUMENT AND INTRODUCTION

Sergio Adrián Hernández Güereca was shot and killed on the U.S.-Mexico border where it runs through Paso del Norte—a single metropolitan area made up of the twin cities of El Paso and Ciudad Juárez. Though it extends into two countries, Paso del Norte is one community. People here, both Mexicans and Americans, regularly go from one end of town to the other, many of them doing so every day, even though they cross an international border in the process. They cross because they work jobs on both sides; because they buy goods and services from

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for *amici curiae* states that all parties have consented to the filing of this brief.

businesses on both sides; because their friends and neighbors live on both sides; because their churches, schools, and families are on both sides.

The Court now confronts the question whether the killing in the center of this community by a rogue federal law enforcement officer gives rise to a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A key component of that inquiry is whether the location of the border guard's victim just across the U.S. border is a "special factor" that should "cause a court to hesitate before answering" that "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857-58 (2017). In the view of *amici*, the answer is no.

In prior cases, this Court has demonstrated the Judiciary's ability to apply the Constitution to locations outside the *de jure* sovereignty of the United States by weighing "objective factors and practical considerations," including the nature of the place where the alleged deprivation has occurred. *Boumediene v. Bush*, 553 U.S. 723, 764-66 (2008). The Court should instruct the Judiciary to make the same type of inquiry under the circumstances of this case, and reach the conclusion that a *Bivens* remedy is available.

Amici submit this brief about the kind of community where this killing occurred in order to aid the Court in two ways. First, regarding the question whether the setting of this incident presents a "special factor," the brief follows Court precedent in

addressing the nature of the place where the alleged deprivation occurred. See *Boumediene*, 553 U.S. at 766. Here, that place is a shared border community where citizens of two countries live, work, and play together. Their interactions and collaborations go on in the midst of the border and the border guards, who are governed by U.S. law and the Constitution.

Second and more broadly, *amici* intend this brief to illustrate the practical impact of the decision in this case, and to identify the people that it will affect. As the Court has noted, *Bivens* “serves a deterrent purpose” to discourage federal officers from injuring others in violation of the Constitution. *Carlson v. Green*, 446 U.S. 14, 21 (1980); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”). If the border agent prevails here, and the deterrent effect of *Bivens* is consequently reduced or eliminated for people near the U.S. border, the areas in the line of fire include neighborhoods full of schoolchildren and families, and market streets crowded with shopkeepers and tourists.

Paso del Norte is not unique in this regard. All along the border, which over 500,000 people cross *every day* in each direction,² binational communities

² U.S. DEP’T OF TRANSP., BORDER CROSSING/ENTRY | ANNUAL DATA, <https://explore.dot.gov/t/BTS/views/BTSBorderCrossingAnnualData/BorderCrossingTableDashboard> (last visited Aug. 5, 2019); Molly O’Toole et al., *As Trump threatens to close border, experts warn of billions in economic damage*, L.A. TIMES (Apr. 1, 2019), <https://www.latimes.com/politics/la-na-pol-trump-border-closing-chaos-20190401->

“function as unified entities despite the division imposed by the international boundary.”³ From San Diego-Tijuana in the West to Brownsville-Matamoros by the Gulf of Mexico, these cross-border twin-city sets are bound together by family ties, economic interdependence, and mutual support. The Court’s decision in this case is likely to have powerful effects on them all.



Figure 1. Cross-border communities, each comprising two twin cities, are found along the full length of the U.S.-Mexico border. MICHAEL DEAR, WHY WALLS WON'T WORK: REPAIRING THE US-MEXICO DIVIDE (2015) (map by Dreamline Cartography) (highlighting added).

story.html (estimating one million persons per day processed at ports of entry).

³ OSCAR J. MARTINEZ, BORDER PEOPLE: LIFE AND SOCIETY IN THE U.S.-MEXICO BORDERLANDS 12 (1994).

ARGUMENT

In the transborder communities along the U.S.-Mexico divide, life on one side is not neatly cut off from life on the other. A person who walks along the border in one of these cities walks through the middle of a single bustling community where the fence marking the border is absorbed as just another fixture in city life. Understanding this intermingling of peoples and cultures along the border is critical to appropriate application of constitutional protections: “[t]he Supreme Court has held in a series of cases that the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not.” *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 995 (9th Cir. 2012) (citing, *inter alia*, *Landon v. Plasencia*, 459 U.S. 21 (1982); *Boumediene*, 553 U.S. 723). Instead, the Court’s precedents “recogniz[e] a more practical and selective application of constitutional protection of rights . . . in acts by the United States government outside United States territory.” *Al Maqaleh v. Gates*, 605 F.3d 84, 93, 97 (D.C. Cir. 2010) (citing *Boumediene*, 553 U.S. 723).

As a daily reality, residents in the twinned U.S.-Mexican cities interact with the border in routine and unremarkable ways. They commute across by the thousands each morning and evening. In 2018, some 46 million people crossed on foot, in addition to over 146 million as bus, train, and personal vehicle passengers.⁴ They sit through the checkpoint traffic

⁴ U.S. DEP’T OF TRANSP., BORDER CROSSING/ENTRY | ANNUAL DATA: QUERY DETAILED STATISTICS, <https://explore.dot.gov/>



Figure 2. The rooftops of El Paso blend almost imperceptibly into those of Ciudad Juárez. Denis Tangney, Jr., GETTY IMAGES (Oct. 9, 2013).

jams of spring break and *Semana Santa*, the Holy Week before Easter. They cross to go to the doctor's or to the shopping mall. The families living here in two countries but one community, the people drawn here by economic opportunities, tourists exploring the area's binational culture—all of them touch the border.⁵

t/BTS/views/BTSBorderCrossingAnnualData/BorderCrossingTableDashboard (last visited Aug. 5, 2019).

⁵ See LAURA VELASCO ORTIZ & OSCAR F. CONTRERAS, *MEXICAN VOICES OF THE BORDER REGION* ix (2011) (“The internationality and intense cross-border interaction of the border region have, more than any other factors, given it a unique personality and flavor. As a consequence, some argue, the borderlands in their entirety constitute a single transnational system in which human experiences become defined by ties to the other side.”) (quotation marks and citation omitted); LAWRENCE A. HERZOG,

Understanding how the border affects people who live with it, and people who grow up alongside it, is essential to understanding the facts of this case and of the future cases that will be controlled by the decision here.

I. U.S. and Mexican residents of the border region live their lives crossing between two countries and intermingling with people from both sides.

The culture of Paso del Norte has evolved through centuries of influences from both Mexico and the United States.⁶ In Juárez today, traveling down Avenida Benjamín Franklin, one passes the thirteen-foot statue of Abraham Lincoln before turning onto the street that bears his name, and then continuing north into Texas. A few minutes later, the same person can be driving along El Paso's Porfirio Díaz Street, named for Mexico's former president.⁷

Like the streets they travel, the lives of people in Paso del Norte are built on the connections that bind

FROM AZTEC TO HIGH TECH: ARCHITECTURE AND LANDSCAPE ACROSS THE MEXICO-UNITED STATES BORDER 9 (1999).

⁶ MARTINEZ, *supra* note 3, at 53 ("Above all, the distinctiveness of border Mexicans and Anglos is embedded in the long-term incorporation of many traits from each other's culture, including cross-borrowing of such things as language, religion, values, customs, traditions, holidays, foods, clothing, and architecture.").

⁷ SUSAN J. RIPPBERGER & KATHLEEN A. STAUDT, PLEDGING ALLEGIANCE 3-4 (2003).

the two sides together, not on the fact of the border.⁸ The same is true all along the U.S.-Mexico border where many families straddle both sides.⁹

⁸ In a recent poll, residents from both U.S. and Mexican border cities described “a sense of community and dependency between sister cities across the border.” On the Mexican side, 69 percent of residents polled reported that they depend on their neighbor across the border for economic survival. On the U.S. side, the number was 79 percent. Alfredo Corchado, *Common ground: Poll finds U.S.-Mexico border residents overwhelmingly value mobility, oppose wall*, DALLAS MORNING NEWS (July 18, 2016), <http://interactives.dallasnews.com/2016/border-poll/>; Michael Dear, *Whose Borderland? What Evidence? Divergent Interests Concerning the Impact of the US-Mexico Border Wall*, in WALLING IN, WALLING OUT: WHY ARE WE BUILDING NEW BARRIERS TO DIVIDE US (Laura McAtackney & Randall H. McGuire eds., forthcoming 2020) (manuscript at 9) (on file with counsel) (“Today, three-quarters of those polled on both sides recognized their economic codependency with the other side. Overwhelmingly they profess to like their neighbors across the line, and they cross frequently to visit family, shop, work, get a haircut or dental care, and attend school.”).

⁹ Raquel R. Márquez & Harriett D. Romo, *Introduction*, in TRANSFORMATIONS OF *LA FAMILIA* ON THE U.S.-MEXICO BORDER 1-2 (Raquel R. Márquez & Harriett D. Romo eds., 2008) (describing the many families living on both sides of the U.S.-Mexico border who are “economically, socially, and emotionally ‘transnational’”); RIPPBERGER & STAUDT, *supra* note 7, at xii (“The necessity of speaking both languages is a requirement that emerges from the daily commerce and trade, frequent work crossings, and cross-border familial and social relations that are omnipresent.”); *see also* CARLOS G. VELEZ-IBANEZ, BORDER VISIONS: MEXICAN CULTURES OF THE SOUTHWEST UNITED STATES 3 (1996) (“I was born *con un pie en cada lado*; that is, born with one foot on each side of the political border between Mexico and the United States.”).

One example of the transborder existence so common in this region is the family of J.A. Rodriguez, the victim of another cross-border shooting by a U.S. border guard in a case heard by the Ninth Circuit.¹⁰ J.A. and his mother lived in Nogales, Sonora, four blocks from the U.S. border.¹¹ But while J.A.'s mother was at work, J.A.'s grandmother played a major role in raising him.¹² To care for him, she traveled frequently to Sonora from Arizona where she and J.A.'s grandfather live, eventually both as U.S. citizens.¹³

The border region is full of similar stories. Gloria Sandoval Caples, a Mexican elementary school teacher, first met her American husband while on a shopping trip in the United States.¹⁴ Their relationship began to grow with several friendly encounters on the U.S. side and one day when he walked Gloria home to Mexico to help her and her

¹⁰ See *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018). The plaintiff in *Rodriguez* alleges that, in 2012, a U.S. Border Patrol agent, standing at the edge of Arizona, shot and killed J.A., who was on the Mexican side, walking along one of the main streets of Nogales, Sonora. *Id.* at 727.

¹¹ *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1029 (D. Ariz. 2015).

¹² *Id.*

¹³ *Id.*

¹⁴ MARTINEZ, *supra* note 3, at 108-10; see also *id.* at 331 (noting that pseudonyms are used for some individuals discussed therein).

mother with some home repairs.¹⁵ The couple eventually married and established their home in the border community, with Gloria commuting daily across the border to her teaching job in Mexico.¹⁶ Later, Gloria's mother, like J.A.'s grandmother, helped care for the couple's children at her home in Mexico.¹⁷

Roberto Carrasco's life has little in common with Gloria's, but he too touched the border daily. An American citizen, Roberto attended elementary school in Mexico but high school, college, and graduate school in the United States.¹⁸ He served in the U.S. Navy, which took him abroad, but he spent most of his life on the U.S.-Mexico border.¹⁹ He commuted from his home in Juárez to work as a professor at The University of Texas at El Paso (UTEP), and would travel with his family into the U.S. for movie nights or for longer trips to mountain ranges and beach towns.²⁰

¹⁵ *Id.* at 109.

¹⁶ *Id.*; email from Oscar J. Martinez, Regents Professor of History, University of Arizona, to Courtney J. Chin, Gibson, Dunn & Crutcher LLP (Nov. 15, 2016, 19:29 PST) (on file with counsel).

¹⁷ MARTINEZ, *supra* note 3, at 109.

¹⁸ *Id.* at 86.

¹⁹ *Id.* at 87.

²⁰ *Id.* at 86-87; email from Oscar J. Martinez, *supra* note 16.

Even the people in this region who never cross the border are in constant contact with people from the other side. At UTEP, for example, the student body



Figure 3. A woman, who declined to give her name, is hugged by her husband as they chat through the border fence separating Nogales, Arizona and Nogales, Mexico on July 28, 2010. Jae C. Hong, *On the Border*, THE ATLANTIC (May 6, 2013), <http://www.theatlantic.com/photo/2013/05/on-the-border/100510/#img36>.

includes U.S. residents as well as nearly a thousand students who commute across the border to attend their classes.²¹ And that count may be under-

²¹ Mallory Falk, *Tension And Anxiety In Border Cities After Trump Threatens Closure*, NPR (Apr. 6, 2019), <https://www.npr.org/2019/04/06/710577331/tension-and-anxiety-in-border-cities-after-trump-threatens-closure>; Nestor Rodriguez & Jacqueline Hagan, *Transborder Community Relations at the U.S.-Mexico Border*, in *CAUGHT IN THE MIDDLE* 103 (Demetrios G. Papademetriou & Deborah Waller Meyers

inclusive of many students with dual citizenship who live on the Mexican side of the community.²² Meanwhile, eligible students of Mexican nationality pay the same tuition as in-state students,²³ reflecting the community's political judgment that educational opportunities for students from Juárez will benefit both sides of the border.²⁴

The sense of unity in these twin-city pairs is further borne out in joint celebrations of cultural events and in the classrooms of American and Mexican schoolchildren. In Paso del Norte, runners have competed in an annual race, the Run International U.S.-Mexico 10K, beginning in El Paso, crossing the Stanton Street Bridge into downtown Juárez, and then turning back to a finish line at the summit of the Paso del Norte Bridge (the bridge beside which Sergio Hernández was killed).²⁵

eds., 2001) ("Mexican students, many commuting daily from Ciudad Juárez, account for about 8 percent of the enrollment at [UTEP].").

²² Email from Jeremy Slack, Assistant Professor of Geography, The University of Texas at El Paso, to Eli M. Lazarus, Gibson, Dunn & Crutcher LLP (July 23, 2019, 12:58 PST) (on file with counsel).

²³ *Residency for Tuition Purposes*, THE UNIVERSITY OF TEXAS AT EL PASO, <http://catalog.utep.edu/grad/financialinformation/residency-for-tuition-purposes/> (last visited Aug. 5, 2019).

²⁴ Email from Jeremy Slack, *supra* note 22.

²⁵ See Rudy Gutierrez, *Run International U.S. Mexico 10K run*, EL PASO TIMES (Aug. 6, 2016), <http://www.elpasotimes.com/picture-gallery/news/2016/08/06/run-international-us-mexico-10k-run/88339584/>.

Celebrations with music and dancing for the Mexican holiday *el Día de los Muertos*, or Day of the Dead, span several days and both sides of the border.²⁶ And these communities mourn together. When Mexican singer Juan Gabriel passed away in August 2016, parallel celebrations of his life occurred on both sides of the border in Paso del Norte, and the cities passed his ashes across so that bishops of both Juárez and El Paso could commemorate his life and work.²⁷

In schoolrooms on both the U.S. and Mexican sides of the border region, many thousands of students enroll in bilingual education programs.²⁸ In El Paso, where some children walk across the border daily to attend class, teachers report higher absenteeism on Mexican national holidays, as well as students who showed up an hour early before Juárez matched its time to daylight savings in the United

²⁶ See, e.g., *Experience Dia de los Muertos*, SAN DIEGO, <https://www.sandiego.org/campaigns/fall-in-san-diego/dia-de-los-muertos.aspx> (last visited Aug. 5, 2019); *Things To Do*, VISIT EL PASO, <http://www.visitelpaso.com/places/dia-de-los-muertos> (last visited Aug. 5, 2019).

²⁷ See María Teresa Vázquez Castillo, *Juan Gabriel and the Taking Back of Downtown Ciudad Juárez*, FRONTERA NORTESUR (Sept. 21, 2016), <https://fnsnews.nmsu.edu/juan-gabriel-and-the-taking-back-of-downtown-ciudad-juarez/>.

²⁸ See Maria Esquinca, *Dual language education system expanding in border schools seeking to close learning gap*, BORDERZINE (Jan. 14, 2015), <http://borderzine.com/2015/01/dual-language-education-system-expanding-in-border-schools-seeking-to-close-learning-gap/>.

States.²⁹ Meanwhile, some parents in El Paso who want their children to be fully bilingual send their children to academically rigorous private schools in Juárez.³⁰

As all of these border life experiences show, the “nature of the site[],” *Boumediene*, 553 U.S. at 766, where Sergio Hernández was shot is not that of an alien land, severed entirely from the United States. The border running through Paso del Norte is a place traversed every day by Americans and Mexicans—grandmothers and fiancés, college students and schoolchildren. The wellbeing of the people living in and visiting these communities depends, in part, on the accountability to the Constitution of the law enforcement officers of the United States who do their work in the midst of the communities. And that accountability depends, in part, on the deterrent power at the core of *Bivens*.

II. Cities along the U.S.-Mexico boundary have a long and continuing history of community and cooperation with their cross-border neighbors.

Reflecting the connections among its people, the border region’s cities in many ways act in tandem with their counterparts on the other side. In fact, El Paso was once all Mexican territory; it was ceded to the United States in the 1848 Treaty of Guadalupe

²⁹ RIPPBERGER & STAUDT, *supra* note 7, at 16.

³⁰ *Id.* at 102-03.

Hidalgo.³¹ But workers and families continued to freely pass back and forth over the invisible line between Juárez and El Paso. It was not until 1993 that the United States began meaningfully restricting flows across the border.³²

The cross-border community of Ambos Nogales—comprising Nogales, Arizona, and Nogales, Sonora—shares a similar history. Founded as a single trading post in 1882, Nogales had no physical barrier at the borderline until 1918, and even thereafter, the barrier that was erected functioned like a picket fence allowing easy movement from one side to the other.³³ For several decades, living in these cross-border communities was not unlike living in Friendship Heights in D.C., where one might not even notice

³¹ See KATHLEEN STAUDT, *FREE TRADE? INFORMAL ECONOMIES AT THE U.S.-MEXICO BORDER* 33 (1998); DANIEL D. ARREOLA & JAMES R. CURTIS, *THE MEXICAN BORDER CITIES: LANDSCAPE ANATOMY AND PLACE PERSONALITY* 13 (1993); see also RIPPBERGER & STAUDT, *supra* note 7, at 25 (“A town that was once exclusively Mexican, Paso del Norte, was divided into two nations in the mid-1800s. . . . Because of a common history, though, the two cities have a natural affiliation that they maintain in spite of their political division.”).

³² STAUDT, *supra* note 31, at 32; ORTIZ & CONTRERAS, *supra* note 5, at 167.

³³ See EDWARD S. CASEY & MARY WATKINS, *UP AGAINST THE WALL: RE-IMAGINING THE U.S.-MEXICO BORDER* 28-29 (2014); Randall H. McGuire, *Steel Walls and Picket Fences: Rematerializing the U.S.-Mexican Border in Ambos Nogales*, 115 *AMERICAN ANTHROPOLOGIST* 466, 467 (2013); Daniel D. Arreola, *La Cerca y Las Garitas de Ambos Nogales: A Postcard Landscape Exploration*, 43 *J. SW.* 505, 516 (2001).

having crossed into Maryland—or living in Long Beach, Indiana, and crossing by chance into Michigan during a morning bike ride.

A sturdier wall was built through Ambos Nogales in the 1990s, but residents remember that, as recently as 2007, no passport was necessary to cross the border.³⁴ Even as of this writing, lack of a passport may result in only a few words of admonition before crossing is allowed.³⁵

The major effect of these barriers has been to increase the time that people must spend to cross the border. The region's residents are endlessly sharing strategies for time-efficient crossing. Websites, television news, and radio stations all provide updates and estimates for the current wait time. In recent years, U.S. Customs and Border Protection (CBP) has launched programming to speed up the process and has developed a smartphone application, "Border Wait Times," to provide traffic information to drivers and pedestrians.³⁶

³⁴ See Julia Preston, *Tighter Passport Rules for U.S. Citizens Start Tuesday*, N.Y. TIMES (Jan. 22, 2007), <http://www.nytimes.com/2007/01/22/us/22passport.html>.

³⁵ Wren Abbott, *Unspoken rule allows passport-free border crossings*, NOGALES INTERNATIONAL (Nov. 1, 2010), http://www.nogalesinternational.com/news/unspoken-rule-allows-passport-free-border-crossings/article_c24349d7-6d03-57d1-a140-084ab521c7f7.html; email from Jeremy Slack, *supra* note 22.

³⁶ See Laura Barron-Lopez, *Here's A Border Program That Actually Works*, HUFFINGTON POST (Sept. 17, 2015), <http://www.huffingtonpost.com/entry/border-control-el->

Meanwhile, frequent crossers or commuters—if they clear an FBI background check and prove their employment—may sign up for CBP’s SENTRI program for expedited entry to the United States.³⁷ Cleared Mexican citizens are also eligible for repeat-visit B1/B2 visas for shopping, family visits, and tourism on the U.S. side up to 55 miles from the border.³⁸

But stronger barriers and longer wait times have not fundamentally changed the character of the cross-border communities along the U.S.-Mexico divide.³⁹

paso_us_55f33ec6e4b042295e365f84; Vic Kolenc, *App Gives Estimated Wait Times for Border Crossing*, GOV’T TECH. (Dec. 23, 2014), <http://www.govtech.com/applications/App-Gives-Estimated-Wait-Times-for-Border-Crossing-.html>.

³⁷ *Secure Electronic Network for Travelers Rapid Inspection*, U.S. CUSTOMS & BORDER PROTECTION (Oct. 2, 2017), <https://www.cbp.gov/travel/trusted-traveler-programs/sentri>.

³⁸ *Border Crossing Card*, U.S. DEPT OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/border-crossing-card.html> (last visited Aug. 5, 2019); *Border Crossing Card*, U.S. CUSTOMS & BORDER PROTECTION, https://help.cbp.gov/app/answers/detail/a_id/572/~/entering-the-u.s---documents-required-for-foreign-nationals-%28international%29 (last visited Aug. 5, 2019).

³⁹ See, e.g., Dear, *supra* note 8, at 3 (“Cultural and ethnic mixing swiftly became facts of life along the changing frontier A common refrain, then as now, was that the border had moved, not the people living of the newly-constituted borderland.”); ERIK LEE ET AL., THE STATE OF THE BORDER REPORT: A COMPREHENSIVE ANALYSIS OF THE U.S.-MEXICO BORDER 31 (Erik Lee & Christopher E. Wilson eds., 2013) (“[T]he border is a bicultural space with local interests overlapping in a way that largely ignores the international boundary”);



Figure 4. A man walks along the border in Agua Prieta, Mexico, separated from Douglas, Arizona by a painted fence. Courtney Pedroza, DALLAS NEWS (July 18, 2016), <http://interactives.dallasnews.com/2016/border-poll/>.

The streets that lie to either side of the borderline remain bustling places, and from Tijuana-San Diego to Ambos Nogales to Douglas-Agua Prieta, artists have painted murals over the border fence to make it blend in to their communities.⁴⁰

MARTINEZ, *supra* note 3, at 12 (“Twin-city complexes such as Brownsville-Matamoros, Laredo-Nuevo Laredo, Ciudad Juárez-El Paso, Douglas-Agua Prieta, Nogales-Nogales, Calexico-Mexicali, and San Diego-Tijuana are in the forefront of borderlands interaction. These urban centers function as unified entities despite the division imposed by the international boundary. A prominent borderlands scholar characterizes the urbanized border strip as ‘an overlap with a line drawn through the middle of it,’ while an experienced urban planner refers to the paired border communities as Siamese twins.”).

⁴⁰ See, e.g., Paulina Pineda, *Artist uses paint to ‘erase’ border fence*, NOGALES INTERNATIONAL (Oct. 14, 2015),

Numerous cross-border institutions engage in joint environmental efforts and also cement the political and economic interdependence of the sister cities.⁴¹ When a dam in Juárez threatened to burst and flood downtown El Paso, the two countries' joint International Boundary and Water Commission deployed engineers to build a new canal to relieve pressure and ensure the safety of both cities.⁴² Events like the U.S.-Mexico Border Governors Conference and the U.S.-Mexico Border Legislative Conference have also facilitated discussion and combined efforts to resolve issues facing both governments, recognizing that the health, environment, and economy of each city here is intimately tied to its cross-border sister.⁴³ Joint

http://www.nogalesinternational.com/news/artist-uses-paint-to-erase-border-fence/article_9c6d89b8-72a0-11e5-87f9-57978b03f324.html.

⁴¹ Examples include the North American Development Bank, the Bilateral Executive Steering Committee, the Border Trade Alliance, and the United States-Mexico Border Health Commission. *See generally* WILSON CENTER, THE U.S.-MEXICO BORDER ECONOMY IN TRANSITION (Erik Lee & Christopher Wilson eds., 2015), *available at* https://www.wilsoncenter.org/sites/default/files/Border_Economy_Transition_Wilson_Lee.pdf; *see also* UNITED STATES-MEXICO BORDER HEALTH COMMISSION (Dec. 13, 2017), <https://www.hhs.gov/about/agencies/oga/about-oga/what-we-do/international-relations-division/americas/border-health-commission/index.html>.

⁴² *Juarez dam no longer a threat to El Paso*, ASSOCIATED PRESS (Aug. 7, 2007), <http://www.chron.com/news/houstontexas/article/Juarez-dam-no-longer-a-threat-to-El-Paso-1530054.php>.

⁴³ WILSON CENTER, *supra* note 41, at 25; *see also* Diane Austin, *Confronting Environmental Challenges on the US-Mexico*

efforts by the two countries to confront shared challenges help to ensure that each pair of cities continues to exist as one community.

Emergency services along the border also have a long history of helping one another. Mexican and U.S. hospitals coordinate with CBP to clear a lane of traffic for cross-border transfers of medical patients (including non-U.S. citizens) to U.S. hospitals.⁴⁴ In Nogales, the cities have passed water from one side to another during drought⁴⁵ and have sent fire trucks to safeguard cross-border neighbors during

Border: Long-Term Community-Based Research and Community Service Learning in a Binational Partnership, 18 J. CMTY. PRAC. 361 (2010); Federico G. de Cosío et al., *United States-Mexico Border Diabetes Prevalence Survey: lessons learned from implementation of the project*, 28 REV PANAM SALUD PUBLICA 151 (2010); Michael A. Flynn et al., *Improving Occupational Safety and Health Among Mexican Immigrant Workers: A Binational Collaboration*, 128 PUBLIC HEALTH REPORTS 33 (2013); BINATIONAL BORDER INFECTIOUS DISEASE SURVEILLANCE PROGRAM (BIDS) (June 2015), <http://www.cdc.gov/usmexicohealth/pdf/bids-fact-sheet.pdf>.

⁴⁴ Joseph J. Kolb, *Delivering Critical Care in Ciudad Juárez and on the U.S.-Mexico Border*, J. EMERGENCY MED. SERVS. (Apr. 1, 2014), <http://www.jems.com/articles/print/volume-39/issue-4/features/delivering-critical-care-in-ciudad-ju-rez-and-on-the-u-s-mexico-border.html>; Ieva Jusionyte, *Interview with CBP: Patient Transfer at the Port of Entry*, BORDER RESCUE PROJECT (Sept. 8, 2015), <http://www.borderrescueproject.com/journal/2015/9/8/d6deqxondncx8yjohr6aivtzgs9ami>.

⁴⁵ TERRY W. SPROUSE, WATER ISSUES ON THE ARIZONA-MEXICO BORDER: THE SANTA CRUZ, SAN PEDRO AND COLORADO RIVERS 4 (2005).

emergencies.⁴⁶ The U.S. Forest Service and Mexico's National Forestry Commission similarly share resources to combat wildfires near the border; U.S. helicopters conduct water drops over Sonora while Mexican firefighting crews confront blazes on the ground in Arizona.⁴⁷



Figure 5. Firefighters in Nogales, Arizona reach over the border fence to put out a fire in Nogales, Sonora. Manuel C. Coppola, NOGALES INTERNATIONAL (May 10, 2012), http://www.nogalesinternational.com/news/blaze-in-nogales-sonora-battled-from-both-sides-of-the/article_3267761e-9b0d-11e1-85e7-001a4bcf887a.html.

⁴⁶ See Manuel C. Coppola, *Blaze in Nogales, Sonora battled from both sides of the border*, NOGALES INTERNATIONAL (May 10, 2012), http://www.nogalesinternational.com/news/blaze-in-nogales-sonora-battled-from-both-sides-of-the/article_3267761e-9b0d-11e1-85e7-001a4bcf887a.html.

⁴⁷ IEVA JUSIONYTE, *THRESHOLD: EMERGENCY RESPONDERS ON THE US-MEXICO BORDER* 18 (2018).

The shared history of cooperation and mutual assistance among people and governments on both sides of the border ties them together, and ties the border communities themselves to the United States in practical and important ways. Though *de jure* sovereignty differs to the north and south of the border, nevertheless, on either side, the people and governments of the United States and Mexico interact and cooperate in countless ways, large and small. These facts are part of the daily lives of the people here, including the U.S. government actors who work on the border. The Judiciary is fully able to “consider and weigh the costs and benefits”—including the impact on residents of these border communities—of allowing a case like this to move forward. *Ziglar v. Abbasi*, 137 S. Ct. at 1858.

III. Cross-border trade, commerce, and tourism fuel the border region’s economy in both Mexico and the United States.

The economic vitality of borderland communities also depends to a great degree on the international flow of both people and goods. Different prices prevailing on opposite sides generate significant trade, and as noted above, the resulting cross-border traffic is immense. Studies estimate that the U.S. economy loses \$116 million for every *minute* of delay in inspection lanes at the five busiest points of entry on the border with Mexico.⁴⁸

A significant portion of this traffic represents individual residents from each country who cross to

⁴⁸ Barron-Lopez, *supra* note 36.

the other in order to purchase goods and services. In El Paso, over 20 percent of retail dollars—more than \$2 billion per year—are spent by Mexican shoppers.⁴⁹ They regularly cross the border seeking electronics, clothing, and household items, while El Pasoans cross for health and dental care, which is frequently less expensive in Mexico.⁵⁰ In Arizona's border communities, Mexican visitors yield some 60 to 70 percent of sales tax collections.⁵¹ And during the holiday season alone, cross-border shopping creates

⁴⁹ Mauricio Casillas, *Retailer research often overlooks impact of cross-border shoppers in El Paso*, KVIA (Nov. 2, 2017), <https://www.kvia.com/special-reports/impact-of-cross-border-shoppers-on-luring-major-retailers-to-el-paso/650593632>; see also STEVE NIVIN, SPENDING PATTERNS AND ECONOMIC IMPACTS OF MEXICAN NATIONALS ON EL PASO: A COMPARISON TO CENTRAL AND SOUTH TEXAS, 2010-2012, at 5 (2015); Robert Gray, *\$446M: What Mexicans spend in El Paso*, EL PASO INC. (Apr. 27, 2015), http://www.elpasoinc.com/news/local_news/article_bbb787ccecec-11e4-b6b5-3fbb35ffa014.html (noting that Mexican shoppers spent even more in Hidalgo County, home to McAllen, Texas).

⁵⁰ STAUDT, *supra* note 31, at 71-72; Jessica Chapin, *Reflections from the Bridge*, in ETHNOGRAPHY AT THE BORDER 10 (Pablo Vila ed., 2003); Kathleen Staudt et al., *In the shadow of a steel recycling plant in these neoliberal times: health disparities among Hispanics in a border colonia*, 21 LOCAL ENVIRONMENT 636, 645 (2016) (recounting the story of a man who could not receive treatment for his impending heart attack in the U.S., but sought medical care in Juárez and has survived in good health).

⁵¹ *Mexico Matters*, ARIZONA-MEXICO COMMISSION, <https://www.azmc.org/neighbors-for-good/mexico-matters/> (last visited Aug. 5, 2019).

over 5,000 jobs in the cities along the U.S. side of the border.⁵²

Tourism too constitutes an important industry in the border economy. Tijuana, Nogales, Juárez, and Mexicali are all popular destinations for U.S. travelers. In cities like these, restaurants and businesses catering to tourists are within a few blocks of the border.⁵³ Accordingly, travel guides note that American visitors can park their cars on the U.S. side and walk into Mexico.⁵⁴

Given the volume of people who cross between Mexico and the United States to vacation—in addition to those who cross to shop, eat, and work—it would be unwise to assume the nationality of any person seen just beside the border, on either side. The fact that these border communities are filled with American and Mexican citizens on both sides of the border makes clear the deterrent benefits of a *Bivens* remedy in cases like this one. *Amici* respectfully submit that

⁵² See Pauline Sullivan et al., *Mexican national cross-border shopping: Exploration of retail tourism*, 19 J. RETAILING & CONSUMER SERVS. 596, 601 (2012).

⁵³ See ARREOLA & CURTIS, *supra* note 31, at 86, 93; EDWARD R. BURIAN, *THE ARCHITECTURE AND CITIES OF NORTHERN MEXICO FROM INDEPENDENCE TO THE PRESENT* 181 (2015) (“The primary commercial strip through [Nogales, Sonora] is Avenida Obregón, with many tourist-oriented shops, restaurants, bars, and pharmacies only a few blocks from the border.”).

⁵⁴ See, e.g., JENNIFER KRAMER, *MOON HANDBOOKS, MOON BAJA* 51 (10th ed. 2017); BRENDAN SAINSBURY ET AL., *ROUGH GUIDES, THE ROUGH GUIDE TO MEXICO* 533 (10th ed. 2016).

the Judiciary can and should consider the practical benefits of such a deterrent here.

CONCLUSION

In considering this case, *amici* urge the Court to recognize that the metropolitan areas along the border region—though they extend into two countries—are unified communities of families, workers, and businesses. When a person who lives here walks beside the border, he walks beside a fence that is a mundane and unremarkable fixture in his world. He walks past shopkeepers working hard to attract tourists; he walks where his neighbors from both sides of the border buy their clothes and eat their meals. Whether Mexican or American, he walks through the middle of his community.

Respectfully submitted.

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Institutional affiliations are provided for identification purposes only.

Josiah Heyman is Professor of Anthropology, Endowed Professor of Border Trade Issues, and Director of The University of Texas at El Paso's Center for Interamerican and Border Studies. He is also the editor and author of several titles, including *The U.S.-Mexico Transborder Region* (University of Arizona Press, 2017), and author of more than 120 scholarly articles, book chapters, and essays.

Jeremy Slack is an Assistant Professor of Geography in the Department of Sociology and Anthropology at The University of Texas at El Paso. His research is focused on deportation and the problems forced removal creates for individuals and their families, the connections to place that are severed, and how these have intersected with drug-related violence on the border.

Daniel D. Arreola is a Professor Emeritus in the School of Geographical Sciences and Urban Planning at Arizona State University. He has published extensively in scholarly journals and in book chapters and has authored several books on topics relating to the cultural geography of the Mexican-American borderlands.

Jeffrey M. Banister is Research Social Scientist, Editor, and Professor in the Southwest Center and the School of Geography and Development, University of Arizona. Dr. Banister has lived, worked, and researched in Sonora, Mexico, and in the U.S.-Mexico borderlands since the mid-1990s.

Howard Campbell is Professor of Anthropology and Chairman of the Department of Sociology & Anthropology at The University of Texas at El Paso. He is the author or editor of six books concerned with Mexico or the U.S.-Mexico border, and he has written numerous articles and one book concerned with issues that affect the lives of border residents.

Selfa A. Chew holds a Bachelor's Degree in Communication Science from Universidad Nacional Autónoma de México, a Master of Fine Arts degree in Creative Writing, and a Ph.D. in Borderlands History from The University of Texas at El Paso. Her latest publication is *Uprooting Community: Japanese Mexicans, World War II and the U.S.-Mexico Borderlands* (University of Arizona Press, 2015).

Mat Coleman is Professor in the Department of Geography at The Ohio State University and is a political geographer who works in the areas of policing and race, law and geography, migration, and border economies. Dr. Coleman is editor of the Geographies of Justice and Social Transformation series at the University of Georgia Press.

Wayne A. Cornelius is an emeritus professor in the UC San Diego School of Medicine's Division of Global Public Health, where he specializes in immigrant health. He is also a Distinguished Professor of Political Science, Emeritus, and the Theodore Gildred Professor of U.S.-Mexican Relations, Emeritus, at UCSD. He is the author, co-author, or editor of nearly 300 publications dealing with comparative immigration policy, the mass politics of immigration, and Mexican politics and development.

Irasema Coronado is the director of the School of Transborder Studies at Arizona State University. Her research focuses on the U.S.-Mexico border region, including the role of transboundary political elites, social justice, the role of women in politics, and cross-border cooperation at the local level along the border. She served as the president of the Association for Borderland Studies in 2005-2006, was the recipient of a Border Fulbright in 2004, and continues to collaborate at the Universidad Autónoma de Ciudad Juárez.

Jason De León is Professor of Anthropology and Chicana/o Studies at the University of California, Los Angeles and Executive Director of the Undocumented Migration Project, a long-term anthropological study of clandestine migration between Latin America and the United States that uses a combination of ethnographic, visual, archaeological, and forensic approaches to understand this violent social process. De León is the author of the award-winning book *The Land of Open Graves: Living and Dying on the Migrant Trail* (University of California Press, 2015) and currently serves as President of the Board of Directors for The Colibrí Center for Human Rights.

Michael Dear is Emeritus Professor in the College of Environmental Design at the University of California, Berkeley, and Honorary Professor in the Bartlett School of Planning at University College, London (England). His latest book, *Why Walls Won't Work: Repairing the US-Mexico Divide* (Oxford University Press, 2013) was awarded the Globe Prize for Geography in the Public Interest from the Association of American Geographers.

Miguel Diaz-Barriga is a Professor of Anthropology at The University of Texas Rio Grande Valley and recently served as the Carol L. Zicklin Endowed Chair for the Honors Academy at Brooklyn College. His research focuses on concepts relating to Mexican-American politics and identity, Latin American social movements, and border studies. Professor Diaz-Barriga served as the President of the Association of Latina and Latino Anthropologists of the American Anthropological Association from 2010-2012.

Linda Green is Professor of Anthropology and former Director of the Center for Latin American Studies (2011-2015) at the University of Arizona. Green conducts field research in rural Guatemala, the U.S.-Mexico border, and rural Alaska; her current research focuses on the struggles Mayan women face after being denied asylum in the United States and deported back to Guatemala.

Carina Heckert is Assistant Professor of Anthropology at The University of Texas at El Paso. Her research focuses on how public policies shape people's experiences with illness and experiences seeking healthcare, as well as HIV/AIDS, gender-based violence, and immigrant mental health in both Latin America and the United States. Her current research examines emotional distress and maternal health among immigrant women in the US-Mexico border region.

Lawrence Herzog, Professor Emeritus in the School of Public Affairs at San Diego State University, has focused his life's work on the subject of the "transfrontier metropolis" along the U.S.-Mexico

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Anita Huizar-Hernández is an Assistant Professor of Border Studies whose research investigates how narratives, both real and imagined, have shaped the political, economic, and cultural landscape of the U.S.-Mexico borderlands in general, and Arizona in particular. Drawing from a diverse array of nineteenth and twentieth century archival materials, her work recovers the underexplored history of race relations in the state and their continued impact on local, regional, national, and international politics.

Reece Jones is Professor and Chair of the Department of Geography and Environment at the University of Hawai'i at Manoa. He is the author of two books, *Border Walls: Security and the War on Terror in the United States, India and Israel* (Zed Books, 2012) and *Violent Borders: Refugees and the Right to Move* (Verso, 2016).

Ieva Jusionyte is Assistant Professor of Anthropology and Social Studies at Harvard University. She has done research on security infrastructures and emergency services along the border between Sonora and Arizona. Her most recent book, *Threshold: Emergency Responders on the U.S.-Mexico Border* (University of California Press, 2018),

delves into the lives of first responders under heightened security on both sides of the wall.

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