No. 17-___

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION

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June 15, 2018

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-50217

[Filed March 20, 2018]

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez,

Plaintiffs - Appellants

v.

JESUS MESA, JR.,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and COSTA, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge, joined by STEWART, Chief Judge, JOLLY, DAVIS, SMITH, DENNIS,[**] CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES,[***] HIGGINSON, and COSTA, Circuit Judges.

This appeal returned to the court en banc following remand from the United States Supreme Court. Prompted by the High Court, we have carefully considered a question antecedent to the merits of the Hernandez family's claims against United States Customs & Border Patrol Agent Mesa: whether federal courts have the authority to craft an implied damages action for alleged constitutional violations in this case. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971) [hereinafter *Bivens*]. We hold that this is not a garden variety excessive force case against a federal law enforcement officer. The transnational aspect of the facts presents a "new context" under *Bivens*, and

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[*] Judges Jolly and Davis, now Senior Judges of this court, participated in the consideration of this en banc case. Judges Willett and Ho joined the court after this case was submitted and did not participate in the decision.

[**] Judge Dennis concurs in the judgment.

[***] Judge Haynes concurs in the judgment and with the majority opinion's conclusion that *Bivens* should not extend to the circumstances of this case.

numerous "special factors" counsel against federal courts' interference with the Executive and Legislative branches of the federal government.

BACKGROUND

Because the plaintiffs' claims were dismissed on the pleadings, the alleged facts underlying this tragic event are taken as true. Fed. R. Civ. P. 12(b)(6); *Toy v. Holder*, 714 F.3d 881, 883 (5th Cir. 2013). Sergio Hernandez was a 15-year-old Mexican citizen without family in, or other ties to, the United States. On June 7, 2010, while at play, he had taken a position on the Mexican side of a culvert that marks the boundary between Ciudad Juarez, Mexico, and El Paso, Texas. The FBI reported that Agent Mesa was engaged in his law enforcement duties when a group of young men began throwing rocks at him from the Mexican side of the border. From United States soil, the agent fired several shots toward the assailants. Hernandez was fatally wounded.

Hernandez's parents alleged numerous claims in a federal lawsuit against Agent Mesa, other Border Patrol officials, several federal agencies, and the United States government. The federal district court dismissed all claims, but was reversed in part by a divided panel of this court. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014). The panel decision allowed only a *Bivens* claim, predicated on Fifth Amendment substantive due process, to proceed against Agent Mesa alone. *Id.* at 277. This court elected to rehear the appeal en banc. Without ruling on the

cognizability of a *Bivens* claim in the first instance,[1] we concluded unanimously that the plaintiffs' claim under the Fourth Amendment failed on the merits and that Agent Mesa was shielded by qualified immunity from any claim under the Fifth Amendment. We rejected the plaintiffs' remaining claims. *See Hernandez v. Mesa*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc).

The Supreme Court granted certioriari and heard this case in conjunction with *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In *Abbasi*, the Court reversed the Second Circuit and refused to imply a *Bivens* claim against policymaking officials involved in terror suspect detentions following the 9/11 attacks. The Court, however, remanded for reconsideration by the appeals court whether a *Bivens* claim might still be maintained against a prison warden.

The Court's decision in this case tagged onto *Abbasi* by rejecting this court's approach and ordering a remand for us to consider the propriety of allowing *Bivens* claims to proceed on behalf of the Hernandez family in light of *Abbasi*'s analysis.

DISCUSSION

The plaintiffs assert that Agent Mesa used deadly force without justification against Sergio Hernandez, violating the Fourth and Fifth Amendments, where the fatal shot was fired across the international border. No federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. Thus,

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[1] *See Hernandez v. United States*, 785 F.3d 117, 128-33 (5th Cir. 2015) (en banc) (Jones, J., concurring).

plaintiffs' recovery of damages is possible only if the federal courts approve a *Bivens* implied cause of action. *Abbasi* instructs us to determine initially whether these circumstances present a "new context" for *Bivens* purposes, and if so, whether "special factors" counsel against implying a damages claim against an individual federal officer. To make these determinations, we review *Abbasi*'s pertinent discussion about "*Bivens* and the ensuing cases in [the Supreme Court] defining the reach and the limits of that precedent." *Abbasi*, 137 S. Ct. at 1854.

In *Abbasi*, the Court begins by explaining that when Congress passed what is now 42 U.S.C. § 1983 in 1871, it enacted no comparable law authorizing damage suits in federal court to remedy constitutional violations by federal government agents. In 1971, the *Bivens* decision broke new ground by authorizing such a suit for Fourth Amendment violations by federal law enforcement officers who handcuffed and arrested an individual in his own home without probable cause. Within a decade, the Court followed up by allowing a *Bivens* action for employment discrimination, violating equal protection under the Fifth Amendment, against a Congressman.[2] The Court soon after approved a *Bivens* claim for constitutionally inadequate inmate medical care, violating the Eighth Amendment, against federal jailers.[3] According to the Court in *Abbasi*, these

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[2] *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979).

[3] *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468 (1980).

three cases coincided with the "*ancien regime*"[4] in which "the Court followed a different approach to recognizing implied causes of action than it follows now." *Abbasi*, 137 S. Ct. at 1855.

The "*ancien regime*" was toppled step by step as the Court, starting in the late 1970s, retreated from judicially implied causes of action[5] and cautioned that where Congress "intends private litigants to have a cause of action," the "far better course" is for Congress to confer that remedy explicitly. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717, 99 S. Ct. 1946, 1968 (1979). *Abbasi* acknowledges that the Constitution lacks as firm a basis as congressional enactments for implying causes of action; but the "central" concern in each instance arises from separation-of-powers principles. *Abbasi*, 137 S. Ct. at 1857. Consequently, the current approach renders implied *Bivens* claims a "disfavored"[6] remedy. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 1948 (2009)). The Court then lists the many subsequent cases that declined to extend *Bivens* under varying circumstances and proffered constitutional violations. *Id.*

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[4] *Abbasi*, 137 S. Ct. at 1855 (citing *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S. Ct. 1511, 1520 (2001)).

[5] *See Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 97 S. Ct. 926 (1977); *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975).

[6] "Indeed," the Court states, its current approach suggests the possibility that the analysis in the three *Bivens* cases providing a damage remedy "might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856. The dissent never acknowledges that *Bivens* claims are, post-*Abbasi*, a disfavored remedy.

Abbasi goes on to reiterate with an exacting description the two-part analysis for implying *Bivens* claims. We turn to the two inquiries by comparing *Abbasi*'s separation-of-powers considerations and its facts to the present case.

A. New Context

The plaintiffs assert that because the allegedly unprovoked shooting of a civilian by a federal police officer is a prototypical excessive force claim, their case presents no "new context" under *Bivens*. This court, including our colleagues in dissent, disagrees.[7] The fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative. The detainees in *Abbasi* asserted claims for, *inter alia*, strip searches under both the Fourth and Fifth Amendments, but the Supreme Court found a "new context" despite similarities between "the right and the mechanism of injury" involved in previous successful *Bivens* claims. *Abbasi*, 137 S. Ct. at 1859. As *Abbasi* points out, the *Malesko* case rejected a "new" *Bivens* claim under the Eighth Amendment,[8] whereas an Eighth Amendment *Bivens* claim was held cognizable in *Carlson*; and *Chappell* rejected a *Bivens* employment discrimination claim in the military,[9] although such a claim was

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[7] Although the dissent purports to agree this is a "new context" for *Bivens* purposes, most of its reasoning about "special factors" asserts, contradictorily, that this case is "no different" than *Bivens* suits against federal law enforcement officers in wholly domestic cases.

[8] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515 (2001).

[9] *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362 (1983).

allowed to proceed in *Davis v. Passman*. The proper inquiry is whether "the case is different in a meaningful way" from prior *Bivens* cases. *Abbasi*, 137 S. Ct. at 1859.

Among the non-exclusive examples of such "meaningful" differences, the Court points to the constitutional right at issue, the extent of judicial guidance as to how an officer should respond, and the risk of the judiciary's disruptive intrusion into the functioning of the federal government's co-equal branches. *Abbasi*, 137 S. Ct. at 1860-61. The Court found it an easy conclusion that there were meaningful differences between prior *Bivens* claims and claims alleged in *Abbasi* for unconstitutional "confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil." *Id.* at 1860. Even more significant, the Court decided that claims against the prison warden for "compelling" allegations of detainee abuse and prison regulation violations also arose in a "new context" under *Bivens*. *Id.* at 1864. Despite close parallels between claims alleged against the warden and *Carlson*, the Court explained that "even a modest extension [of *Bivens*] is still an extension," *id.*, and the Court remanded for additional consideration of the "special factors."

Pursuant to *Abbasi*, the cross-border shooting at issue here must present a "new context" for a *Bivens* claim. Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any "constitutional" right benefitting him raises novel and disputed issues. There has been no direct judicial guidance concerning

the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil.[10] To date, the Supreme Court has refused to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against American law enforcement agents' search of his premises in Mexico. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056 (1990).[11] Language in *Verdugo*'s majority opinion strongly suggests that the Fourth Amendment does not apply to American officers' actions outside this country's borders. *See Verdugo-Urquidez*, 494 U.S. at 274-75, 110 S. Ct. at 1066. In *Hernandez*, the Supreme Court itself described the plaintiffs' Fourth Amendment claims as raising "sensitive" issues. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017).

Likewise, the plaintiffs can prevail on a substantive due process Fifth Amendment claim only if federal courts accept two novel theories. The first would allow a *Bivens* action to proceed based upon a Fifth Amendment excessive force claim simply because *Verdugo* might prevent the assertion of a comparable Fourth Amendment claim. *But cf. Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989) ("[*A*]*ll* claims that law enforcement officers have used

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[10] We will consider the potential intrusion on the Executive and Legislative branches in detail in the next section of this opinion.

[11] *See also Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 2500 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.") (citing *Verdugo-Urquidez*, 494 U.S. at 269, 110 S. Ct. at 1063; *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S. Ct. 936, 947 (1950)).

excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."). The second theory would require the extension of the *Boumediene* decision,[12] both beyond its explicit constitutional basis, Art. I, § 9, cl. 2, the Habeas Corpus Suspension Clause, and beyond the United States government's *de facto* control of the territory surrounding the Guantanamo Bay detention facility. *See Boumediene*, 553 U.S. at 771, 128 S. Ct. at 2262 ("The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the *complete and total control* of our Government.") (emphasis added). Moreover, even nine years later, no federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional provisions or geographically to locales where the United States has neither *de facto* nor *de jure* control. Indeed, the courts have unanimously rejected such extensions.[13]

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[12] *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008).

[13] *Bahlul v. United States*, 840 F.3d 757, 796 (D.C. Cir. 2016) (en banc) (Millett, J., concurring) ("That holding, however, was 'explicitly confined [] 'only' to the extraterritorial reach of the Suspension Clause,' and expressly 'disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.'" (quoting *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (quoting *Boumediene*, 553 U.S. at 795, 128 S. Ct. at 2275-76))), *cert. denied*, 138 S. Ct. 313 (2017); *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

The plaintiffs assert that because this is just a case in which one rogue law enforcement officer engaged in misconduct on the operational level, it poses no "new context" for *Bivens* purposes. On the contrary, their unprecedented claims embody not merely a "modest extension"—which *Abbasi* describes as a "new" *Bivens* context—but a virtual repudiation of the Court's holding. *Abbasi* is grounded in the conclusion that *Bivens* claims are now a distinctly "disfavored" remedy and are subject to strict limitations arising from the constitutional imperative of the separation of powers. The newness of this "new context" should alone require dismissal of the plaintiffs' damage claims. Nevertheless, we turn next to the "special factors" analysis assuming arguendo that some type of constitutional claims could be conjured here.

B. Special Factors

The plaintiffs argue that this case involves no "special factors"—no reasons the court should hesitate before extending *Bivens*. However remarkable this position may seem, it is unremarkable that the plaintiffs hold it. Indeed, they must. The presence of

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bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause." (citations omitted)); *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011) ("[The Court] explicitly confined its constitutional 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." (citations omitted)); *Igartúa v. United States*, 626 F.3d 592, 600 (1st Cir. 2010) ("The *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

"special factors" precludes a *Bivens* extension. Given *Abbasi*'s elucidation of the "special factors" inquiry, there is more than enough reason for this court to stay its hand and deny the extraordinary remedy that the plaintiffs seek.

Abbasi clarifies the concept of "special factors" by explicitly focusing the inquiry on maintaining the separation of powers: "separation-of-powers principles are or should be central to the analysis." *Abbasi*, 137 S. Ct. at 1857. Before *Abbasi*, the Court had instructed lower courts to perform "the kind of remedial determination that is appropriate for *a common-law tribunal*." *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 2598 (2007) (emphasis added) (quoting *Bush v. Lucas*, 462 U.S. 367, 378, 103 S. Ct. 2404, 2411 (1983)). Underscoring the Court's steady retreat from the "*ancien regime*" discussed above, that language appears nowhere in *Abbasi*. Instead, *Abbasi* instructs courts to "concentrate on whether 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." *Abbasi*, 137 S. Ct. at 1857-58. In light of this guidance, the question for this court is not whether this case is distinguishable from *Abbasi* itself—it certainly is—but whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id*. at 1858. If such reasons exist, "the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id*.

Applying *Abbasi*'s separation-of-powers analysis reveals numerous "special factors" at issue in this case. To begin with, this extension of *Bivens* threatens the political branches' supervision of national security. "The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). In *Abbasi*, the Court stressed that "[n]ational-security policy is the prerogative of the Congress and the President." *Abbasi*, 137 S. Ct. at 1861. The plaintiffs note the Court's warning that "national security" should not "become a talisman used to ward off inconvenient claims." *Id*. at 1862. But the Court stated that "[t]his danger of abuse" is particularly relevant in "domestic cases." *See id*. (citations omitted). Of course, the defining characteristic of this case is that it is *not* domestic. National-security concerns are hardly "talismanic" where, as here, border security is at issue. *See, e.g.*, *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States.").

In particular, the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security. Congress has expressly charged the Border Patrol with "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband." 6 U.S.C. § 211(e)(3)(B). Although members of the Border Patrol like Agent Mesa may conduct activities analogous to domestic law enforcement, this case involved shots fired across the border within the scope of Agent

Mesa's employment.[14] In a similar context—airport security—the Third Circuit recently denied a *Bivens* remedy for a TSA agent's alleged constitutional violations. *Vanderklok v. United States*, 868 F.3d 189, 207-209 (3d Cir. 2017). Relying on *Abbasi*, the Third Circuit's analysis is instructive:

> [The plaintiff] asks us to imply a *Bivens* action for damages against a TSA agent. TSA employees [ ] are tasked with assisting in a critical aspect of national security—securing our nation's airports and air traffic. The threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers. In light of Supreme Court precedent, past and very recent, that is surely a special factor that gives us pause.

Id. at 207. The same logic applies here.[15] Implying a private right of action for damages in this

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[14] Given the transnational context of this case, denying a remedy here does not, as the plaintiffs suggest, repudiate *Bivens* claims where constitutional violations by the Border Patrol are wholly domestic. *See, e.g.*, *De La Paz v. Coy*, 786 F.3d 367, 374 (5th Cir. 2015) (deferring to prior Fifth Circuit decisions "to the extent that they permit *Bivens* actions against immigration officers who deploy unconstitutionally excessive force when detaining immigrants on American soil").

[15] Although the dissent contends that the *Vanderklok* court focused on the lack of TSA law enforcement training, we believe public safety was the court's overriding concern. *See Vanderklok,* 868 F.3d at 209 ("Ultimately, the role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context.").

transnational context increases the likelihood that Border Patrol agents will "hesitate in making split second decisions." Considering the "systemwide" impact of this *Bivens* extension, there are "sound reasons to think Congress might doubt [its] efficacy." *Abbasi*, 137 S. Ct. at 1858.

Extending *Bivens* in this context also risks interference with foreign affairs and diplomacy more generally. This case is hardly *sui generis*: the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil. These are often delicate diplomatic matters, and, as such, they "are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 2774 (1981). In fact, in 2014 the United States and Mexican governments established the joint Border Violence Prevention Council as a forum for addressing these sorts of issues.[16] The incident involving Agent Mesa initiated serious dialogue between the two sovereigns, with the United States refusing Mexico's request to extradite Mesa but resolving to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents."[17]

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[16] DHS, *Written Testimony for a H. Comm. on Oversight & Gov't Reform Hearing* (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west.

[17] DOJ, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca.

Given the dialogue between Mexico and the United States, the plaintiffs are wrong to suggest that Mexico's support for a new *Bivens* remedy obviates foreign affairs concerns. It is not surprising that Mexico, having requested Mesa's extradition, now supports a damages remedy against him. But the Executive Branch denied extradition and refused to indict Agent Mesa following a thorough investigation.[18] It would undermine Mexico's respect for the validity of the Executive's prior determinations if, pursuant to a *Bivens* claim, a federal court entered a damages judgment against Agent Mesa. In any event, diplomatic concerns "involve[ ] a host of considerations that must be weighed and appraised"—a sign that they must be "committed to those who write the laws rather than those who interpret them." *Abbasi*, 137 S. Ct. at 1857 (citations omitted).

Congress's failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation. *Abbasi* emphasized that Congress's silence may be "relevant[] and . . . telling," especially where "Congressional interest" in an issue "has been frequent and intense." *Id.* at 1862 (citations omitted). It is "much more difficult to believe that congressional inaction was inadvertent" given the increasing national policy focus

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[18] *See Hernandez*, 785 F.3d at 132 (Jones, J., concurring) ("Numerous federal agencies, including the FBI, the Department of Homeland Security's Office of the Inspector General, the Justice Department's Civil Rights Division, and the United States Attorney's Office, investigated this incident and declined to indict Agent Mesa or grant extradition to Mexico under 18 U.S.C. § 3184.").

on border security. *Abbasi*, 137S. Ct. at 1862 (citations omitted).

Relevant statutes confirm that Congress's failure to provide a federal remedy was intentional. For instance, in section 1983, Congress expressly limited damage remedies to "citizen[s] of the United States or other person[s] within the jurisdiction thereof."42 U.S.C. § 1983. Given that *Bivens* is a judicially implied version of section1983, it would violate separation-of-powers principles if the implied remedy reached further than the express one. Likewise, under the Federal Tort Claims Act—a law that comprehensively waives federal sovereign immunity to provide damages remedies for injuries inflicted by federal employees—Congress specifically excluded "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).Congress also exempted federal officials from liability under the Torture Victim Protection Act of 1991. *See* 28 U.S.C. §§ 2671 *et seq*.[19] Taken together, these statutes represent Congress's repeated refusals to create private rights of action against federal officials for injuries to foreign citizens

[19] President George H.W. Bush stressed this interpretation of the TVPA when signing the legislation. *See* Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992), http://www.presidency.ucsb.edu/ws/index.php?pid=20715.

on foreign soil.[20] It is not credible that Congress would favor the judicial invention of those rights.[21]

Nor, under *Abbasi*, does the plaintiffs' lack of a damages remedy favor extending *Bivens*. The Supreme Court has held that "even in the absence of an alternative" remedy, courts should not extend *Bivens* if any special factors counsel hesitation. *Wilkie*, 551 U.S. at 550, 127 S. Ct. at 2598.Thus, the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension. Here, the absence of a federal remedy does not mean the absence of deterrence. *Abbasi* acknowledges the "persisting concern [ ] that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution." *Abbasi*, 137 S. Ct. at 1863. For cross-border shootings like this one, however, criminal investigations and prosecutions are already a deterrent. While it is true that numerous federal agencies investigated Agent Mesa's conduct and decided not to bring charges, the DOJ is currently prosecuting another Border Patrol agent in Arizona for the cross-border murder of a Mexican citizen. *See United States v. Swartz*, No. 15-CR-1723 (D. Ariz. Sept.

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[20] Of course, there are some very narrow exceptions. *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. §§ 1595, 1596, 3271 (creating private right of action for noncitizens against federal employees who engage in sex trafficking outside the United States).

[21] Congress has also repeatedly authorized the payment of damages for injuries to aliens in foreign countries through limited administrative claims procedures. *See, e.g.*, 22 U.S.C. § 2669-1.The existence of such procedures is additional evidence that Congress's failure to provide a remedy in this instance is intentional.

23, 2015). The threat of criminal prosecution for abusive conduct is not hollow. In some instances, moreover, a state-law tort claim may be available to provide both deterrence and damages. That claim is unavailable here because the DOJ certified that Agent Mesa acted within the scope of his employment, and so the Westfall Act protects him from liability. *See* 28 U.S.C. § 2679(b)(1), (d). The plaintiffs concede that Agent Mesa was acting within the scope of his employment. Regardless, *Abbasi* makes clear that, when there is "a balance to be struck" between countervailing policy considerations like deterrence and national security,"[t]he proper balance is one for the Congress, not the Judiciary, to undertake." *Abbasi*, 137 S. Ct. at 1863.

Finally, the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues already discussed. The plaintiffs argue that extraterritoriality cannot constitute a special factor because this would multiply extraterritoriality's significance. But this misunderstands the *Bivens* inquiry and misreads Supreme Court precedent. The plaintiffs' argument relies on *Davis v. Passman*, in which the defendant argued that his conduct was immunized by the Speech or Debate Clause and, alternatively, that the Clause was a "special factor"for *Bivens* purposes. The Court held that the scope of the immunity and weight of the special factor were "coextensive." *See Davis*, 442 U.S. at 246, 99 S. Ct. at 2277. In other words, if the Clause did not immunize the defendant's conduct, the nit was not a special factor. Similarly, the plaintiffs here suggest that extraterritoriality is not a "special factor" if the Constitution applies extraterritorially. This argument

conflates the applicability of a constitutional immunity with the scope of a constitutional right, and thereby turns the *Bivens* inquiry upside down. *Bivens* remedies are not "coextensive" with the Constitution's protections. Indeed, in *United States v. Stanley*, the Supreme Court rejected a similar *Davis*-based argument, finding it "not an application but a repudiation of the 'special factors' limitation."483 U.S. 669, 686, 107 S. Ct. 3054, 3065 (1987).

Plaintiffs also suggest that relying on extraterritoriality as an indicator of a "new context" and as a "special factor" double counts the significance of extraterritoriality and stacks the deck against extending *Bivens*. But *Abbasi* explicitly states that one rationale for finding a "new context" is "the presence of *potential special factors*." *Abbasi*, 137 S. Ct. at 1860 (emphasis added). To the extent that this court double counts the significance of extraterritoriality, the Supreme Court has not foreclosed our doing so.

Indeed, the novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel hesitation. As the Eleventh Circuit recently averred, the legal theory itself may constitute a special factor if it is "doctrinally novel and difficult to administer." *Alvarez v. U.S. Immigration & Customs Enf't*, 818 F.3d 1194, 1210 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2321 (2017). An extraterritorial *Bivens* extension is "doctrinally novel." The Supreme Court "has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." *Vance v. Rumsfeld*, 701 F.3d 193, 198-99 (7th Cir. 2012) (en banc). Nor has any court of appeals extended *Bivens* extraterritorially.

See Meshal v. Higgenbotham, 804 F.3d 417, 424-25 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017). Extraterritoriality, moreover, involves a host of administrability concerns, making it impossible to assess the "impact on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858.[22]

But novelty is by no means the only problem with an extraterritorial *Bivens* remedy. The presumption against extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad. According to the Supreme Court, "[t]he presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116, 133 S. Ct. 1659, 1664 (2013). Even when a statute's substantive provisions do apply extraterritorially, a court must "separately apply the presumption against extraterritoriality" when it

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[22] The critical administrability issue, of course, is the uncertain scope of an extraterritorial *Bivens* claim. A court could attempt to tailor its holding to the facts of this case, thereby making sure the plaintiffs win—at least, at the motion to dismiss stage. But that will hardly deter the next plaintiff in the next case. During enforcement operations on the U.S.-Mexico border, it is not unusual for Border Patrol officers to be shot at or otherwise attacked from the Mexico side during patrols on land, on water, and in the air. If the dissenters' position here prevails, whenever Border Patrol officers return fire in self-defense, and someone gets hurt in Mexico, *Bivens* suits will follow. Moreover, nothing written by the dissent herein assures that if *Bivens* should apply here, no case will be filed against the Nevada-based operator of a drone flown far beyond our borders.

determines whether to provide a private right of action for damages. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016). By extension, even if the Constitution applies extraterritorially, a court should hesitate to provide an extraterritorial damages remedy with "potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *Id.* at 2106.

The D.C. Circuit squarely addressed the issue of extraterritoriality in the *Bivens* context and concluded that it constituted a "special factor." *See Meshal*, 804 F.3d at 425-26. Like this case, the D.C. Circuit's decision in *Meshal v. Higgenbotham* involved a challenge to "the individual actions of federal law enforcement officers" for an injury that occurred on foreign soil. *Id*. at 426. Refusing to extend *Bivens*, the court noted that "the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies." *Id*. at 425. Given this presumption, the court concluded that extraterritoriality was a special factor. Concurring, Judge Kavanaugh stressed that "[i]t would be grossly anomalous . . . to apply *Bivens* extraterritorially when we would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Id.* at 430 (Kavanaugh, J., concurring). We agree. Not only would it be "anomalous," it would contravene the separation-of-powers concerns that lie at the heart of the "special factors" concept.

Having weighed the factors against extending *Bivens*, we conclude that this is not a close case. Even before *Abbasi* clarified the "special factors" inquiry, we

agreed with our sister circuits that "[t]he only relevant threshold—that a factor 'counsels hesitation'—is remarkably low." *See De La Paz v. Coy*, 786 F.3d 367, 378 (5th Cir. 2015) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc)). Here, extending *Bivens* would interfere with the political branches' oversight of national security and foreign affairs. It would flout Congress's consistent and explicit refusals to provide damage remedies for aliens injured abroad. And it would create a remedy with uncertain limits. In its remand of *Hernandez*, the Supreme Court chastened this court for ruling on the extraterritorial application of the Fourth Amendment because the issue is "sensitive and may have consequences that are far reaching." *Hernandez*, 137 S. Ct. 2003, 2007 (2017). Similar "consequences" are dispositive of the "special factors" inquiry. The myriad implications of an extraterritorial *Bivens* remedy require this court to deny it.

For these reasons, the district court's judgment of dismissal is **AFFIRMED**.

JAMES L. DENNIS, Circuit Judge, concurring in the judgment:

In my view, we need not decide the difficult question of whether a *Bivens* remedy should be available under the circumstances of this case because, under Supreme Court precedent, Agent Mesa is entitled to qualified immunity. I find compelling the plaintiffs' arguments that Hernández was entitled to protections under the Fourth Amendment in light of *Boumediene v. Bush*, 553 U.S. 723 (2008), and the circumstances surrounding the border area where Mesa shot and killed him. *See Hernandez v. Mesa*, 137

S. Ct. 2003, 2008–11 (2017) (Breyer, J., joined by Ginsburg, J., dissenting). But the extraterritorial application of these protections to Hernández was not clearly established at the time of Mesa's tortious conduct. Mesa is therefore entitled to qualified immunity. *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights." (internal quotation marks omitted)).

The plaintiffs contend that questions about the extraterritorial application of constitutional protections do not preclude Mesa's liability. After all, according to the complaint, Mesa essentially committed a cold-blooded murder.[1] Surely every reasonable officer would know that Mesa's conduct was unlawful, the plaintiffs argue. While that is a fair point, I believe this argument is foreclosed by Supreme Court precedent, which holds that the right giving rise to the claim—here, Hernández's Fourth Amendment rights—must be clearly established. *See Davis v. Scherer*, 468 U.S. 183, 197 (1984).

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[1] The majority opinion states, "The FBI reported that . . . a group of young men began throwing rocks at [Mesa] from the Mexican side of the border" and asserts that Mesa "fired several shots toward the assailants." Maj. Op. at 2. That statement is not compatible with the plaintiffs' complaint in this case, which alleges that Hernández was "standing safely and legally" on Mexican soil, "defenseless," "offering no resistance," and not threatening Mesa in any way. The complaint also alleges that the FBI's statement—before discovering that a video of the incident existed—that Mesa fired at rock-throwers who surrounded him was "a false and reprehensible cover-up statement."

In *Davis v. Scherer*, the Supreme Court held, "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those* rights were clearly established at the time of the conduct at issue." *Id.* (emphasis added). The Court stated that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages." *Id.* at 195. In light of *Davis*, the plaintiffs' argument that Mesa forfeited his qualified immunity because his conduct was shockingly unlawful cannot succeed. I am therefore compelled to concur in affirming the district court's dismissal of the plaintiffs' claims.

HAYNES, Circuit Judge, concurring:

I concur in the judgment and with the majority opinion's conclusion that *Bivens* should not extend to the circumstances of this case. I write separately to note that when we previously heard this case en banc, it was consolidated with two other appeals, which alleged issues arising under the Alien Tort Statute and Federal Tort Claims Act. *See Hernandez v. United States*, 785 F.3d 117, 139 (5th Cir. 2015) (Haynes, J., concurring). Those appeals and claims are not before us today, and they need not be addressed to resolve the *Bivens* claim against Mesa.

EDWARD C. PRADO, Circuit Judge, joined by GRAVES, Circuit Judge, dissenting:

Today's en banc majority denies Sergio Hernandez's parents a *Bivens* remedy for the loss of their son at the hands of a United States Border Patrol agent. The majority asserts that the transnational nature of this

case presents a new context under *Bivens* and that special factors counsel against this Court's interference. While I agree that this case presents a new context, I would find that no special factors counsel hesitation in recognizing a *Bivens* remedy because this case centers on an individual federal officer acting in his law enforcement capacity. I respectfully dissent.

I do not take issue with the majority's framework for analyzing whether there are special factors counseling hesitation. "[S]eparation-of-powers principles are or should be central to the analysis." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). And the majority's analysis purports to consider these principles by appropriately asking "whether 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." *See id.* at 1857–58. However, in conducting this analysis, the majority is quickly led astray from the familiar circumstances of this case by empty labels of national security, foreign affairs, and extraterritoriality. These labels—as we say in Texas—are all hat, no cattle.

The majority repeatedly attempts to frame this case around the issue of whether aliens injured abroad can pursue *Bivens* remedies. That characterization, however, overlooks the critical who, what, where, when, and how of the lead actor in this tragic narrative. This case involves one federal officer "engaged in his law enforcement duties" in the United States who shot and killed an unarmed, fifteen-year-old Mexican boy standing a few feet away. The Supreme Court in *Abbasi* went to great lengths to indicate

support for the availability of a *Bivens* remedy in exactly the circumstances presented here: an instance of individual law enforcement overreach. As the Court recently reaffirmed in no uncertain terms, *Bivens* is "settled law . . . in [the] common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857. For the following reasons, I would retain *Bivens* in that common sphere and recognize a remedy for this senseless and arbitrary cross-border shooting at the hands of a federal law enforcement officer.[1]

The Supreme Court directed this Court "to consider how the reasoning and analysis in *Abbasi* may bear on this case," so that is where I begin. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). In *Abbasi*, aliens detained for immigration violations following the September 11 attacks brought a class action suit against high-level federal executive officials and detention facility wardens. 137 S. Ct. at 1852–54. The detainees alleged that they had been detained in harsh conditions, including that they were confined in tiny cells for over 23 hours a day, subjected to regular strip

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[1] While the majority's opinion casts aspersions on the viability of plaintiffs' Fifth Amendment claim, I continue to disagree. As I discussed at length in my original panel majority opinion and in my original en-banc concurrence, a noncitizen injured outside the United States as the result of arbitrary official conduct by a law enforcement officer located in the United States should be entitled to invoke the protections provided by the Fifth Amendment. *See Hernandez v. United States*, 757 F.3d 249, 267–72 (5th Cir. 2014) (original panel opinion); *Hernandez v. United States*, 785 F.3d 117, 134–39 (5th Cir. 2015) (en banc) (Prado, J., concurring). However, I focus here only on the "antecedent" question regarding the availability of a *Bivens* remedy. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017).

searches, denied basic hygiene products and most forms of communication, and subjected to regular verbal and physical abuse by guards. *Id.* at 1853. Detainee-plaintiffs brought their *Bivens* claims alleging that the detention and policies authorizing it violated their Fourth and Fifth Amendment rights. *Id.* at 1853–54. After finding the case presented a new *Bivens* context because it challenged "confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack"—a far cry from the three *Bivens* cases the Court had approved in the past—the Court determined that several special factors counseled hesitation that precluded a *Bivens* remedy against the executive officials. *See id.* at 1860–63.

The Supreme Court's analysis of four special factors in *Abbasi* is particularly relevant given the vastly different circumstances presented in this case. First, the Court took issue with the fact that the detainees sought to hold high-level federal executive officials liable for the unconstitutional activity of their subordinates. *See Abbasi*, 137 S. Ct. at 1860. The Court warned that "*Bivens* is not designed to hold officers responsible for the acts of their subordinates." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). Because "[t]he purpose of *Bivens* is to deter the *officer*," a *Bivens* claim should be "brought against the individual official for his or her own acts, not the acts of others." *Id.* (quoting *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994)). Relatedly, the *Abbasi* Court found it problematic that that the detainees challenged a broad governmental policy, specifically the government's response to the September 11 attacks. *Id.* at 1860–61. The Court noted that "a Bivens action is not 'a proper

vehicle for altering an entity's policy.'" *Id.* at 1860 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Third, the Court disapproved of the fact that the detainees' claims challenged "more than standard 'law enforcement operations.'" *Id.* at 1861 (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 273 (1990)). Specifically, the Court found the detainees' claims involved "major elements of the Government's whole response to the September 11 attacks, thus . . . requiring an inquiry into sensitive issues of national security." *Id.* Finally, the Court found it of "central importance" that *Abbasi* was not a "damages or nothing" case. *Id.* at 1862. In contrast to suits challenging "individual instances of discrimination or law enforcement overreach," the *Abbasi* plaintiffs challenged "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners" which could be remedied with injunctive and habeas relief. *Id.* at 1862–63.

Not only are all four of these special factors notably absent here, but this case also presents the limited circumstances in which *Abbasi* indicated a *Bivens* remedy would exist. First, Hernandez's parents do not seek to hold any high-level officials liable for the acts of their subordinates. Instead, and strictly comporting with *Bivens*, plaintiffs are suing an individual federal agent for his own actions. *See Abbasi*, 137 S. Ct. at 1860 ("[A] *Bivens* claim is brought against the individual official for his or her own acts."). Relatedly, in suing an individual officer, Hernandez's parents do not challenge or seek to alter any governmental policy. To the contrary, the constitutional constraints Hernandez's parents seek mirror existing Executive Branch policy for Border Patrol agents. Department of

Homeland Security regulations and guidelines already require Border Patrol agents to adhere to constitutional standards for the use of lethal force, regardless of the subject's location or nationality.[2] Furthermore, as a case against a single federal officer, this suit would not require unnecessary inquiry or discovery into governmental deliberations or policy-making—certainly not any more than any other regularly permissible *Bivens* suit alleging unconstitutional use of force by a Border Patrol agent. *See*, *e.g.*, *Martinez–Aguero v. Gonzalez*, 459 F.3d 618, 620–25 (5th Cir. 2006); *Valdez-Ortega v. Does*, No. 92-7772, 1993 WL 560259, at *1–2 (5th Cir. Dec. 27, 1993). Third, this case has nothing to do with terrorism, nor does it involve a high-level governmental response to a major national security event. Rather, plaintiffs merely challenge "standard 'law enforcement operations.'" *See Abbasi*, 137 S. Ct. at 1861. While the majority attempts to link this case to border security, which I address separately below, there is no question that a case which involves only one Border Patrol agent and a fifteen-

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[2] The regulations provide that "[d]eadly force may be used only when [a Customs and Border Protection ("CBP") officer] has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury." 8 C.F.R. § 287.8(a)(2)(ii); *see also* United States Customs and Border Protection, *Use of Force Policy, Guidelines and Procedures Handbook* 1 (2014), *available at* https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHand book.pdf ("CBP policy on the use of force by Authorized Officers/Agents is derived from constitutional law, as interpreted by federal courts in cases such as *Graham v. Connor*, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985), federal statutes and applicable DHS and CBP Policies.").

year-old boy is a far cry from *Abbasi*, which involved broad and sensitive national security policies following the deadliest terrorist attack in U.S. history. Finally, unlike the detainees in *Abbasi*, who had several alternative remedies including habeas relief, this is a "damages or nothing" case for Hernandez's parents. *See id.* at 1862. It is uncontested that plaintiffs find no alternative relief in Mexican law, state law, the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), or federal criminal law[3] for their tragic loss. Nor can injunctive or habeas relief redress the irreparable loss of life here. Indeed, individual

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[3] After an investigation, the Department of Justice declined to seek criminal or civil charges against Agent Mesa. *See* Dept. of Justice, Office of Public Affairs, *Federal Officials Close Investigation into Death of Sergio Hernandez–Guereca* (Apr. 27, 2012), *available at* http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca. This inaction does not appear to be unusual. According to a December 2013 report by the *Arizona Republic*, "[t]he Department of Justice has not been able to show any cases in which it recommended civil or criminal charges against a CBP agent or officer who killed in the line of duty in at least the past six years," and "[a]n extensive review by *The Republic* also found no instances." Bob Ortega & Rob O'Dell, *Deadly Border Agent Incidents Cloaked in Silence*, Ariz. Republic (Dec. 16, 2013, 9:58 PM), *available at* http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html?nclick_check=1. Additionally, the United States government refused to extradite Agent Mesa to Mexico for criminal prosecution. Brief for the Gov't of the United Mexican States as Amicus Curiae in Support of Appellants on Rehearing En Banc, at 8 (Jan. 15, 2015). The fact that one Border Patrol agent in Arizona is currently being prosecuted for a cross-border murder provides little comfort to Hernandez's parents and little deterrence for future shootings—particularly if we foreclose any hope of a damages remedy here.

instances of law enforcement overreach—as alleged here—are by "their very nature . . . difficult to address except by way of damages actions after the fact." *Id.* Given that a *Bivens* cause of action is plaintiffs' only available remedy, compensatory relief by way of *Bivens* is both necessary *and* appropriate in this case. *See Bivens*, 403 U.S. at 407 (Harlan, J., concurring) ("The question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted.").

The special factors identified by the majority do not convince me that the Judiciary is not "well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed"—particularly given the relatively straight-forward events here. *See Abbasi*, 137 S. Ct. at 1858. I disagree that recognizing a *Bivens* remedy in this case "threatens the political branches' supervision of national security." According to the majority, national security is implicated because the events giving rise to this suit took place at the border, thereby affecting border security and the operations of the Border Patrol. Relying on the Third Circuit's rejection of *Bivens* liability in the airport security context for a First Amendment retaliation claim, the majority also reasons that implying a *Bivens* remedy in the transnational context "increases the likelihood that Border patrol agents will 'hesitate in making split second decisions.'" *See Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017).

While the shooting in this case took place at the border, it does not follow that border security and the operations of the Border Patrol are significantly implicated. As the original panel majority noted, this

case "involves questions of precisely *Bivens*-like domestic law enforcement and nothing more." *Hernandez v. United States*, 757 F.3d 249, 276 (5th Cir. 2014). Plaintiffs allege that an individual Border Patrol agent while on duty on U.S. soil shot and killed an unarmed fifteen-year-old boy. If recognizing a *Bivens* remedy in this context implicates border security or the Border Patrol's operations, so too would any suit against a Border Patrol agent for unconstitutional actions taken in the course and scope of his or her employment. Yet, as the majority recognizes, Border Patrol agents are unquestionably subject to *Bivens* suits when they commit constitutional violations on U.S. soil. *See, e.g.*, *De La Paz v. Coy*, 786 F.3d 367, 374 (5th Cir. 2015); *Martinez–Aguero*, 459 F.3d at 620–25; *Valdez-Ortega*, 1993 WL 560259, at *1–2. It make little sense to argue that a suit against a Border Patrol agent who shoots and kills someone standing a few feet beyond the U.S. border implicates border and national security issues, but at the same time contend that those concerns are not implicated when the same agent shoots someone standing a few feet inside the border.

Moreover, the practical rationale given by the majority for not recognizing a *Bivens* remedy—that Border Patrol agents will hesitate making split-second decisions—is one more commonly and more appropriately invoked in the qualified immunity context. *See Graham*, 490 U.S. at 396–97 (holding that the excessive force qualified immunity analysis "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation"); *see also Pasco ex rel. Pasco*

v. Knoblauch, 566 F.3d 572, 582 (5th Cir. 2009) ("Importantly, qualified immunity purposefully shields police officers' split-second decisions made without clear guidance from legal rulings."). Given that the qualified immunity analysis already incorporates this practical concern, it is odd to invoke it at this stage, particularly when such concerns could be raised in nearly any *Bivens* suit against a federal law enforcement officer. *See Bivens*, 403 U.S. at 396 (failing to raise concern about hesitation by federal agents in tense search and arrest situations and holding that "no special factors counsel[ed] hesitation"). Indeed, although the majority does not reach the issue of qualified immunity, Agent Mesa has and could continue to raise it as a possible defense to the constitutional claims against him.

Finally, I am troubled by the majority's reliance on a First Amendment retaliation case to raise this "national security" concern. In *Vanderklok*, the Third Circuit considered whether under *Bivens* "a First Amendment claim against a TSA employee for retaliatory prosecution even exists in the context of airport security screenings." *Vanderklok*, 868 F.3d at 194. While the court refused to recognize such a claim in light of the new context presented and various special factors counseling hesitation, one such special factor the court found particularly relevant was the fact that "TSA employees typically are not law enforcement officers and do not act as such." *Id.* at 208. The court noted that "TSA employees are not trained on issues of probable cause, reasonable suspicion, and other constitutional doctrines that govern law enforcement officers." *Id.* Here, by contrast, Agent Mesa is a federal law enforcement officer well-trained on relevant

constitutional doctrines and permissible use of force. *See generally* United States Customs and Border Protection, *Use of Force Policy, Guidelines and Procedures Handbook* (2014). In light of Agent Mesa's status as a federal law enforcement officer, the practical concerns raised in *Vanderlock* pertaining to non-officer TSA employees in the First Amendment retaliation context have little bearing here.

Indeed, *Abbasi* itself cautions against taking the very path the majority errantly takes in this case. "[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Abbasi*, 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). As one prominent legal scholar has warned, "national security" justifications are "increasingly becom[ing] the rule in contemporary civil litigation against government officers" and threaten to "dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation." Steven I. Vladeck, *The New National Security Canon*, 61 Am. U. L. Rev. 1295, 1330 (2012). When one looks to substantiate the invocation of national security here, one is left with the impression that this case more closely resembles ordinary civil litigation against a federal agent than a case involving a true inquiry into sensitive national security and military affairs, which are properly committed to the Executive Branch. *See Abbasi*, 137 S. Ct. at 1861. On this record, I would not so readily abdicate our judicial role given the fundamental rights at stake here. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the

Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

The majority also invokes concerns about interference with foreign affairs and diplomacy as a special factor counseling hesitation. Asserting that the United States is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil, the majority argues that extending a *Bivens* remedy here implicates "delicate diplomatic matters." However, isn't the United States equally answerable to foreign sovereigns when federal officials injure foreign citizens on domestic soil? Again, the majority's argument proves too much. As plaintiffs persuasively argue, if there is a "U.S. foreign policy interest [implicated] in granting or denying a *Bivens* claim to foreign nationals, it is difficult to see how that interest would apply only if the injury occurred abroad." It also bears repeating that Agent Mesa's actions took place within the United States.

I also fail to see how recognizing a *Bivens* remedy here would undermine Mexico's respect for the Executive Branch or create tension between Executive and Judicial determinations. No case holds that a court must first consider whether the Executive Branch has found evidence of criminality before determining whether a civil *Bivens* remedy exists for a given constitutional violation. Further, the majority fails to acknowledge that distinct standards of proof govern civil and criminal proceedings making different outcomes in these proceedings hardly the stuff of an international diplomatic crisis. *See Addington v. Texas*,

441 U.S. 418, 423–24 (1979) (distinguishing between civil and criminal standards of proof). Even if one accepts that a Judicial finding of *Bivens* liability combined with an Executive Branch refusal to prosecute or extradite would undermine a foreign country's respect for the Executive Branch, it is difficult to explain how such concerns are only present when a foreign national is injured abroad, but not when a foreign national is injured in the United States. It is unclear how recognizing a *Bivens* remedy for the unconstitutional conduct of a single federal law enforcement officer acting entirely within the United States would suddenly inject this Court into sensitive matters of international diplomacy. Much as with national security, "the Executive's mere incantation of . . . 'foreign affairs' interests do not suffice to override constitutional rights." *Def. Distrib. v. United States Dep't of State*, 838 F.3d 451, 474 (5th Cir. 2016) (Jones, J., dissenting).

The majority also points to Congress's failure to provide a damages remedy as an additional factor counseling hesitation. Noting that the language of 42 U.S.C. § 1983 limits damage remedies to "citizen[s] of the United States or other person[s] within the jurisdiction thereof," the majority first argues that *Bivens* as the "judicially implied version of section 1983" cannot reach further than § 1983. However, it is just as likely that by specifying "other persons within the jurisdiction" Congress intended to extend a § 1983 remedy beyond U.S. citizenship, rather than commenting on its availability for wrongful conduct by state actors with extraterritorial effects. Indeed, Congress enacted § 1983 "in response to the widespread deprivations of civil rights in the Southern

States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers." *Felder v. Casey*, 487 U.S. 131, 147 (1988) (citing *Patsy v. Bd. of Regents of State of Fl.*, 457 U.S. 496, 503–05 (1982)). Furthermore, while a *Bivens* action is often described as "analogous" to a § 1983 claim, *Butts v. Martin*, 877 F.3d 571, 588 (5th Cir. 2017), the Supreme Court has "never expressly held that the contours of *Bivens* and § 1983 are identical." *Malesko*, 534 U.S. at 82 (Stevens, J., dissenting).

The other statutes highlighted by the majority fail to indicate that Congress expressly intended to preclude a remedy in the circumstances presented here. For instance, the FTCA's exclusion of "claim[s] arising in a foreign country," *see* 28 U.S.C. § 2680(k), was meant to codify "Congress's "unwilling[ness] to subject the United States to liabilities depending upon the *laws of a foreign power*." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)) (emphasis added). Notably, *Bivens* seeks to remedy violations of United States constitutional protections, and the FTCA expressly does "not extend or apply to a civil action . . . for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Additionally, any exception for federal officials under the Torture Victim Protection Act of 1991 ("TVPA") has little to say about the availability of a *Bivens* claim here. The TVPA provides a remedy for extrajudicial killings and torture at the hands of individuals acting under color of foreign law. *See* 106 Stat. 73, note following 28 U.S.C. § 1350. However, these individuals would not have been subject to *Bivens* liability anyways because *Bivens* is limited to federal officials acting pursuant to federal

law. *Dean v. Gladney*, 621 F.2d 1331, 1336 (5th Cir. 1980) (describing *Bivens* as creating "a remedy against federal officers, acting under color of federal law"); *Kundra v. Austin*, 233 F. App'x 340, 341 (5th Cir. 2007) ("[A] *Bivens* action requires that the defendant be a federal officer acting under color of federal law.").

It is also important to note that *Abbasi* found Congress's failure to provide a remedy to the detainees in that case notable because Congressional interest in the government's response to the September 11 terrorist attack "ha[d] been 'frequent and intense' and some of that interest ha[d] been directed to the conditions of confinement at issue." *Abbasi*, 137 S. Ct. at 1862 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988)); *see also id.* (noting that at Congress's behest the Department of Justice produced a 300-page report on the confinement conditions at the relevant detention facility). By contrast here, Congressional interest in cross-border shootings has been negligible making it more likely that congressional inaction is inadvertent rather than intentional. *See id.* (noting that where Congressional attention is high "it is much more difficult to believe that 'congressional inaction' was 'inadvertent'"). Indeed, as courts have recognized in the statutory interpretation context, drawing inferences from Congress's silence is a difficult and potentially dangerous exercise. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *La. Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 537 (5th Cir. 2006) ("As is often the case, congressional silence whispers sweet nothings in the ears of both parties."); *McGill v. E.P.A.*, 593 F.2d 631, 636 (5th Cir. 1979)

("The debate concerning the significance of congressional silence is almost as difficult to resolve as Bishop Berkeley's famous question concerning whether there is noise when a tree falls in the forest and no one is present to hear it."); *Castro v. Chi. Hous. Auth.*, 360 F.3d 721, 729 (7th Cir. 2004) (noting that "inferences from congressional silence are treacherous").

Finally, the majority asserts that "the extraterritorial aspect of this case" is itself a special factor counseling hesitation. Looking to the fact that Hernandez was standing on Mexican soil when he was shot, the majority fears the uncertain scope of *Bivens* liability—extending even to U.S.-based military drone operators—were we to recognize a *Bivens* remedy here. The majority's concern about the effects of such a decision is understandable and I do not take it lightly. However, the limited and routine circumstances presented here of individual law enforcement action as well as established Supreme Court precedent on *Bivens* claims in the military context assure me that there is little danger that recognizing a *Bivens* remedy here will open a Pandora's Box of liability.

First, as I emphasize above, this case is not *sui generis* among *Bivens* cases. In the "common and recurrent sphere of law enforcement," courts across the country routinely administer *Bivens* claims against federal officers for unconstitutional actions occurring within the United States. *See Abbasi*, 137 S. Ct. at 1857. I readily acknowledge Hernandez was standing on the Mexican side of the culvert when he was shot, but it cannot be forgotten that Agent Mesa was acting from the American side of the culvert. It is hard to understand how the mere fact that a plaintiff happens

to be standing a few feet beyond an unmarked and invisible line on the ground would suddenly create a host of administrability concerns or a systemwide impact on governmental operations that would not otherwise exist if the plaintiff was standing a few feet within the United States. As ordinary *Bivens* litigation against a federal law enforcement officer seeking damages for unconstitutional use of force, "the legal standards for adjudicating the claim pressed here are well-established and easily administrable." *Engel v. Buchan*, 710 F.3d 698, 708 (7th Cir. 2013) (noting that extending a *Bivens* remedy for alleged *Brady* violations under the Due Process Clause presented "no great problem of judicial interference with the work of law enforcement, certainly no greater than the Fourth Amendment claim in *Bivens*").

But even the majority's concerns about liability for overseas drone operations are also unlikely to materialize. Even assuming foreign nationals injured at the hands of U.S. military personnel overseas could state valid constitutional claims—a hotly debated topic—the Supreme Court has already repeatedly rejected *Bivens* claims in the military context. *See Chappell v. Wallace*, 462 U.S. 296 (1983) (rejecting *Bivens* claims brought by Navy sailors against superior officers who had allegedly mistreated them on the basis of race); *United States v. Stanley*, 483 U.S. 669 (1987) (rejecting *Bivens* claims brought by a former soldier against military and civilian officials who allegedly surreptitiously dosed him with LSD to study its effect on humans). Furthermore, it is likely that such claims would actually implicate various special factors counseling hesitation specifically identified in *Abbasi* such as requiring a true inquiry into national security

issues, intruding upon the authority of the Executive Branch in military affairs, and actually causing officials "to second-guess difficult but necessary decisions concerning national-security policy." *See Abbasi*, 137 S. Ct. at 1861.

In sum, this Court is more than qualified to consider and weigh the costs and benefits of allowing a damages action to proceed. This case simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an unarmed fifteen-year-old boy standing a few feet away. I would elect to recognize a damages remedy for this tragic injury. As Chief Justice John Marshall wrote, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In this case, I would recognize a *Bivens* remedy for this senseless cross-border shooting at the hands of a federal law enforcement officer. Therefore, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed April 24, 2015]

No. 11–50792

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca,
Plaintiffs–Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION; UNITED STATES BORDER PATROL; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF JUSTICE,
Defendants–Appellees.

CONS w/ 12-50217

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

JESUS MESA, JR.,
Defendant-Appellee.

CONS w/ 12-50301

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

RAMIRO CORDERO;

VICTOR M. MANJARREZ, JR.,
Defendants–Appellees

Appeals from the United States District Court
for the Western District of Texas

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and COSTA, Circuit Judges.[*]

PER CURIAM:

We rehear this matter en banc, *see Hernandez v. United States*, 771 F.3d 818 (5th Cir. 2014) (per curiam) (on petitions for rehearing en banc), to resolve whether, under facts unique to this or any other circuit,

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[*] Judge DeMoss was a member of the panel and, as a senior judge, elected to participate in the en banc proceedings pursuant to 28 U.S.C. § 46(c) and 5th Circuit Rule 35.6. Although Judge DeMoss participated in the oral argument and the court's deliberations, he subsequently retired from the court, effective April 16, 2015. Before retiring, Judge DeMoss authored the following special concurrence, which would have been issued if he were still a member of the court:

HAROLD R. DeMOSS, JR., Circuit Judge, concurring in part and concurring in the judgment:

I concur in the en banc court's reinstatement of Parts I, II, and VI of the panel's opinion. Furthermore, I concur in the en banc court's assessment that *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), precludes a Fourth Amendment claim on the facts of this case. As to the Fifth Amendment claim, I concur in the judgment of the en banc court for the reasons stated in my dissent from the panel opinion. *See Hernandez v. United States*, 757 F.3d 249, 281–82 (5th Cir. 2014) (DeMoss, J., concurring in part and dissenting in part).

the individual defendants in these consolidated appeals are entitled to qualified immunity. Unanimously concluding that the plaintiffs fail to allege a violation of the Fourth Amendment, and that the Fifth Amendment right asserted by the plaintiffs was not clearly established at the time of the complained-of incident, we affirm the judgment of dismissal.

The facts and course of proceedings are accurately set forth in the panel majority opinion of Judge Prado, *Hernandez v. United States*, 757 F.3d 249, 255–57 (5th Cir. 2014). We conclude that the panel opinion rightly affirms the dismissal of Hernandez's claims against the United States, *id.* at 257–59, and against Agent Mesa's supervisors, *id.* at 280, and we therefore REINSTATE Parts I, II, and VI of that opinion. We additionally hold that pursuant to *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), Hernandez, a Mexican citizen who had no "significant voluntary connection" to the United States, *id.* at 271, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment.

The remaining issue for the en banc court is properly described as whether "the Fifth Amendment . . . protect[s] a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." *Id.* at 281–82 (DeMoss, J., concurring in part and dissenting in part). To underscore the seriousness of the tragic incident under review, we elaborate on that description only to note that the injury was the death of a teenaged Mexican national from a gunshot fired by a Border Patrol agent standing on U.S. soil.

To decide the assertion of qualified immunity made by defendant Agent Mesa, regarding the plaintiffs' Fifth Amendment claim, the court avails itself of the latitude afforded by *Pearson v. Callahan*: "The judges of the . . . courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The prongs referred to are familiar: "First, a court must decide whether the facts . . . alleged . . . make out a violation of a constitutional right. . . . Second, if [so], the court must decide whether the right at issue was 'clearly established' at the time of [the] alleged misconduct." *Id.* at 232. "Qualified immunity is applicable unless [both prongs are satisfied]." *Id.*

The panel opinion correctly describes the substantive-due-process claim as "that Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat." *Hernandez*, 757 F.3d at 267. The question is whether, under the unique facts and circumstances presented here, that right was "clearly established."

The Supreme Court has carefully admonished that we are "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). To the contrary, a right is clearly established only where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier*, 533 U.S.

at 202) (internal quotation marks omitted). The question here is whether the general prohibition of excessive force applies where the person injured by a U.S. official standing on U.S. soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred. No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment.

Although the en banc court is somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment, the court, with the benefit of further consideration and en banc supplemental briefing and oral argument, is unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires. The strongest authority for the plaintiffs may be *Boumediene v. Bush*, which addressed whether the Suspension Clause of the U.S. Constitution applied to aliens detained outside the United States at the U.S. Naval Base in Guantanamo Bay, Cuba. 553 U.S. 723, 732–33 (2008). Although the Court drew on cases from contexts other than habeas corpus, *see id.* at 755–64 (discussing the Court's precedents on "the Constitution's extraterritorial application," including, *inter alia*, the *Insular Cases*, *In re Ross*, 140 U.S. 453 (1891), *Reid v. Covert*, 354 U.S. 1 (1957), and *Verdugo–Urquidez*, 494 U.S. 259), it expressly limited its holding to the facts before it, *see id.* at 795 ("Our decision today holds only that petitioners before us are entitled to seek the writ; that the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of

Appeals before proceeding with their habeas actions in the District Court."). Accordingly, nothing in that opinion presages, with the directness that the "clearly established" standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment—and would do so where the injury occurs not on land long controlled by the United States, but on soil that is indisputably foreign and beyond the United States' territorial sovereignty. By deciding this case on a ground on which the court is in consensus, we bypass that issue by giving allegiance to "the general rule of constitutional avoidance." *Callahan*, 555 U.S. at 241.

"There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id.* at 237. Reasonable minds can differ on whether *Boumediene* may someday be explicitly extended as the plaintiffs urge. That is the chore of the first prong of the qualified-immunity test, which we do not address.

The alleged right at issue was not clearly established, under these facts, in 2010.

The judgment of dismissal is AFFIRMED.

EDITH H. JONES, Circuit Judge, joined by SMITH, CLEMENT, and OWEN, Circuit Judges, concurring:

The court has unfortunately taken the path of least resistance. We hold unanimously that Agent Mesa has qualified immunity from this suit for a Fifth Amendment substantive due process violation because he did not violate any clearly established rights flowing from that Amendment. *Pearson v. Callahan*, 555 U.S.

223, 236, 129 S. Ct. 808, 818 (2009). This compromise simply delays the day of reckoning until another appellate panel revisits non-citizen tort claims for excessive force resting on extraterritorial application of the United States Constitution. Ongoing incursions across our national borders and our nation's applications of force abroad ensure that other lawsuits will be pursued. We should discourage this litigation before it takes root.

Because it is clear that United States constitutional rights do not extend to aliens who (a) lack any connection to the United States and (b) are injured on foreign soil, I would also resolve this appeal on the first prong of qualified immunity analysis. *See id.* at 236, 129 S. Ct. at 818 ("In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all.").[1]

Whether a constitutional violation occurred here is a straightforward inquiry with a definite answer. First, if the plaintiffs have a constitutional claim at all, it arises under the Fourth Amendment, not the Fifth. *See Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870-71 (1989). This en banc court re-confirms, however, that the Fourth Amendment protects only aliens with "significant voluntary connection[s]" to this country. *United States v. Verdugo–Urquidez*, 494 U.S.

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[1] The en banc court did not consider whether, even if a constitutional claim had been stated, a tort remedy should be crafted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971). Our en banc opinion neither assumes nor decides that question.

259, 271, 110 S. Ct. 1056, 1064 (1990). Because Hernandez had no such prior connections, the Fourth Amendment claim fails.

Additionally, substantive due process under the Fifth Amendment does not offer a fallback claim here, not least because of the expressly limited reach of the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008). Judge DeMoss's dissent from the panel opinion aptly expressed incredulity about extraterritorial application of the Fifth Amendment:

> If the fact that the United States exerts and has exerted powerful influence over northern Mexico, justifies application of the Fifth Amendment in a strip along the border, how wide is that strip? Is the Fifth Amendment applicable in all of Ciudad Juarez or even the entire state of Chihuahua? Ultimately, 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.

Hernandez v. United States, 757 F.3d 249, 281 (5th Cir. 2014) (DeMoss, J., concurring in part and dissenting in part) (internal quotation marks and citation omitted).

I also feel obliged to comment on the plaintiffs' Alien Tort Statute ("ATS") claim against the United States, which has been rejected by the panel, by the unanimous compromise en banc opinion, and indeed by every other circuit court of appeals.[2] A concurring

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[2] *See Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (rejecting the argument that *jus cogens* violations

opinion here arguably supports the assertion of nebulous claims for violations of "*jus cogens*" and blithely suggests that the United States' sovereign immunity may be ineffective in American courts against such claims. Among the many troubling implications of the separate opinion, it turns on its head the Supreme Court's obvious reluctance to expand federal judges' authority to import customary international law theories into domestic tort law without careful articulation and severe limitations or Congressional action. *See Sosa v. Alvarez–Machain*, 542 U.S. 692, 732, 124 S. Ct. 2739, 2765–66 (2004) (plaintiff's claim for "arbitrary arrest and detention" failed to state a violation of the law of nations with requisite "definite content and acceptance among civilized nations"); *Kiobel v. Royal Dutch Petroleum Co.,* ___ U.S. ___, 133 S. Ct. 1659, 1669 (2013) (presumption against extraterritoriality applies to Alien Tort Statute).

I. The Fourth Amendment, not the Fifth, Controls

The plaintiffs characterized their claims as arising under either the Fifth or the Fourth Amendment. But on these facts, they can only have a Fourth Amendment claim. Constitutional rights are not

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implicitly waive sovereign immunity under the Foreign Sovereign Immunities Act); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992) (same); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968–69 (4th Cir. 1992) (rejecting plaintiffs' argument that the ATS waived the United States' sovereign immunity); *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (holding that "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity").

interchangeable. When a litigant asserts multiple constitutional claims arising from the same conduct, we must "identify[ ] the specific constitutional right allegedly infringed. . . ." *Graham*, 490 U.S. at 394, 109 S. Ct. at 1870. If it becomes apparent that "a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.' " *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 813 (1994) (quoting *Graham*, 490 U.S. at 395, 109 S. Ct. at 1871) (internal quotation marks and footnote omitted). In essence, the specific trumps the general. This is especially true when a plaintiff brings both Fourth and Fifth Amendment claims asserting law enforcement misconduct. The Court has emphatically stated that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395, 109 S. Ct. at 1871 (emphasis in original). Accordingly, substantive due process analysis is appropriate only if the plaintiffs' claim is not "covered by" the Fourth Amendment. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S. Ct. 1708, 1715 (1998) (applying substantive due process where the passenger of a motorcyclist being pursued by police was killed).[3]

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[3] The plaintiffs argue that *Graham* is inapplicable here because its rule only applies to "free citizens." *Graham* does say all "seizure [s]

Agent Mesa undoubtedly seized Hernandez. A seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97, 109 S. Ct. 1378, 1381 (1989) (emphasis omitted). Law enforcement shootings are also covered by the Fourth Amendment because "there can be no question that apprehension by the use of deadly force is a seizure [.]" *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985). The plaintiffs' complaint alleges that Agent Mesa intentionally shot and killed Hernandez, thus terminating his "freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 596–97, 109 S. Ct. at 1381. Under governing law, if the plaintiffs have any claim at all, it arises from the Fourth, not the Fifth Amendment.

II. The Non–Extraterritoriality of the Fourth Amendment

Although the Fourth Amendment "covers" the plaintiffs' claim, Hernandez did not automatically enjoy its protection. The Constitution does not protect all

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of [ ] free citizen[s] should be analyzed under the Fourth Amendment. . . ." 490 U.S. at 395, 109 S. Ct. at 1871. But the Court could not have intended to give non-citizens the ability to pursue claims under the more nebulous "substantive due process" standard, while limiting American citizens to the Fourth Amendment's reasonableness test. Nothing in *Graham* (other than the above quoted language) supports such an inference. Taken in context, *Graham*'s reference to "free citizens" was intended to distinguish the scope of protection for "free citizens" from the rights accorded pretrial detainees (under the Fourteenth Amendment) and criminal convicts (under the Eighth Amendment). *See Lewis*, 523 U.S. at 843, 118 S. Ct. at 1715.

people in all places. *Reid v. Covert*, 354 U.S. 1, 74, 77 S. Ct. 1222, 1260 (1957) (Harlan, J., concurring) ("[T]here are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."). This en banc court recognizes that the Supreme Court has foreclosed extraterritorial application of the Fourth Amendment to aliens where the violation occurs on foreign soil and the alien plaintiff lacks any prior substantial connection to the United States. *Verdugo–Urquidez*, 494 U.S. at 261, 110 S. Ct. at 1059.

Chief Justice Rehnquist wrote in *Verdugo–Urquidez* that the Fourth Amendment's text refers to the right of "the people" to be free from unreasonable searches. "The people," in turn, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo–Urquidez*, 494 U.S. at 265, 110 S. Ct. at 1061. Turning to the Amendment's history, the Court explained that "[t]he driving force behind the adoption of the Amendment . . . was widespread hostility among the former colonists to the issuance of writs of assistance[.]" *Id.* at 266, 110 S. Ct. at 1061. The Amendment's purpose, "was to protect the people of the United States against arbitrary action by their own Government[.]" *Id.* In other words, the Fourth Amendment "restrict[s] searches and seizures which might be conducted by the United States in domestic matters." *Id.* Contemporary historical understanding, the Court continued, confirmed this reading. *Id.* at 267, 110 S. Ct. at 1061–62. As a result, the Court held, "aliens receive constitutional protections when they have come within the territory of the United States and

developed substantial connections with this country." *Id.* at 271, 110 S. Ct. at 1064.

Despite this seemingly clear pronouncement, critics, including the plaintiffs, claim that the substantial connections test is not—and never was—the law. Because Justice Kennedy concurred and his opinion allegedly differs from the purported majority, the skeptics argue, only four justices concurred in Chief Justice Rehnquist's opinion and it is nonbinding. Even if that were not the case, the skeptics continue, *Verdugo–Urquidez*'s substantial connections test was replaced by the majority opinion in *Boumediene.* This court disagrees.

Foremost, Justice Kennedy joined the majority in full, not just in judgment. Supreme Court justices know the difference between the types of joinder. Justice Kennedy began his concurrence by stating: "Although some explanation of my views is appropriate given the difficulties of this case, *I do not believe they depart in fundamental respects from the opinion of the Court, which I join.*" *Verdugo–Urquidez*, 494 U.S. at 275, 110 S. Ct. at 1066 (Kennedy, J., concurring) (emphasis added). If we take Justice Kennedy at his word—as we must—he undoubtedly joined the majority opinion, and the substantial connections test controls.

In any event, the substance of his concurrence does not undermine the substantial connections test—his opinion reinforces it. Concededly, Justice Kennedy did not rely on the Fourth Amendment's reference to "the people"; in his view, "[t]he force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its

terms."[4] *Id.* at 276, 110 S. Ct. at 1067. Instead, the Constitution's application abroad "depend[s] . . . on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.' " *Id.*, 110 S. Ct. at 1067. Applying such general interpretive principles, Justice Kennedy noted the Court's historic reliance on the distinction between citizens and aliens in determining the Constitution's reach. *Id.* at 275, 110 S. Ct. at 1066. "The distinction between citizens and aliens," he explained, "follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.*, 110 S. Ct. at 1066. This traditional distinction, Justice Kennedy noted, runs through the Court's cases. *Id.*, 110 S. Ct. at 1066.

For Justice Kennedy, the practical consequences of applying the Fourth Amendment extraterritorially also supports the Court's test. "The absence of local judges or magistrates available to issue warrants, the

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[4] This statement has led at least one court to refer to Justice Rehnquist's *reasoning*, specifically his reliance on the Fourth Amendment's text, as only adopted by a plurality. *See Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (explaining that "[t]o a plurality of the Court, the use of the phrase 'the people' suggested that the Framers of the Constitution intended the amendment to apply only to those persons who were part of or substantially connected to the national community"). But it does not throw Chief Justice Rehnquist's *holding*, that only aliens with a substantial connection to the United States have constitutional rights, into doubt. *See Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 996 (9th Cir. 2012).

differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment . . . should not apply [abroad]." *Verdugo–Urquidez*, 494 U.S. at 278, 110 S. Ct. at 1068 (Kennedy, J., concurring). "For this reason, in addition to the other persuasive justifications stated by the Court," Justice Kennedy "agree[d] that no violation of the Fourth Amendment [ ] occurred [.]" *Id.*, 110 S. Ct. at 1068. Justice Kennedy's concurrence reinforces rather than undermines Chief Justice Rehnquist's majority opinion.[5]

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[5] Since the Court decided *Verdugo–Urquidez*, courts have applied the substantial connections test. *See Ibrahim*, 669 F.3d at 997 (applying the significant voluntary connection test to an alien's First and Fifth Amendment claims); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (explaining that the "[D]ue [P]rocess [C]lause does not apply to aliens without property or presence in the sovereign territory of the United States"), *vacated and remanded,* 559 U.S. 131, 130 S. Ct. 1235 (2010), *reinstated in relevant part,* 605 F.3d 1046 (D.C. Cir. 2010); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) (holding that the Fourth Amendment does not protect a Bahamian citizen with no substantial connections to the U.S.); *Atamirzayeva v. United States*, 524 F.3d 1320, 1329 (Fed. Cir. 2008) (holding that a foreign citizen with no substantial connections to the U.S. has no claim under the Fifth Amendment's Takings Clause); *United States v. Barona*, 56 F.3d 1087, 1093–94 (9th Cir. 1995) (explaining that "with regard to foreign searches involving aliens with 'no voluntary connection' to the United States, [ ] the Fourth Amendment is simply inapplicable").

III. The Non–Extraterritoriality of the Fifth Amendment[6]

After agreeing that *Verdugo–Urquidez* forecloses the plaintiffs' Fourth Amendment claim, this court should have been quick to conclude that their alternate Fifth Amendment claim is equally thwarted by *Johnson v. Eisentrager*. 339 U.S. 763, 70 S. Ct. 936 (1950). The Supreme Court held in *Johnson*, and has reiterated since then, that as a general matter aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights. *Id.* at 782–85, 70 S. Ct. at 945–47. *Verdugo–Urquidez* described *Johnson* as unambiguously "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo–Urquidez*, 494 U.S. at 269, 110 S. Ct. at 1063. *Johnson* was similarly described by the Court in *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 2500 (2001); *see also Castro v. Cabrera*, 742 F.3d 595, 599 n. 5 (5th Cir. 2014) (noting that *Johnson* "reject[ed]

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[6] The plaintiffs argue without conviction that because Agent Mesa's conduct occurred solely on U.S. soil, this case does not require extraterritorial application of the Constitution. In both *Verdugo–Urquidez* and *Sosa*, however, the Supreme Court treated the cases as involving extraterritorial violations despite the presence of actions on American soil that preceded the foreign incidents. This case is no different. Indeed, the hoary principle of *lex loci delicti* ("law of the place of injury") historically required the application of the law at the place where the last act causing injury (here, the bullet hitting Hernandez) occurred. *Cf. Sosa*, 542 U.S. at 708–711, 124 S. Ct. at 2752–2754 (interpreting the Federal Tort Claims Act foreign country exception, 28 U.S.C. § 2680(k), to apply where the injury occurred, not where the last act or omission causing injury occurred).

extraterritorial application of the Fifth Amendment"). This court is not at liberty to "underrule" Supreme Court decisions when the Court has explicitly failed to overrule its own precedents. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22 (1989). Consequently, the plaintiffs' substantive due process claim is barred by these precedents.

The plaintiffs' implicit position is that *Johnson* was *de facto* overruled by *Boumediene*, 553 U.S. 723, 128 S. Ct. 2229, and *Johnson*'s refusal to apply the Fifth Amendment extraterritorially was replaced by the three-part test inaugurated in *Boumediene*.[7] As I have noted, this court squarely rejects the plaintiffs' argument in regard to the Fourth Amendment. The diffidence with regard to the Fifth Amendment must stem from *Boumediene*'s discussion and theoretical reframing of *Johnson*. *See Boumediene*, 553 U.S. at 766, 128 S. Ct. at 2259. *Boumediene* and *Johnson* admittedly share the factual similarity that enemy aliens incarcerated outside the continental United States were petitioning for habeas corpus review of their incarceration by the United States military. From the standpoint of this inferior court, however, reading tea leaves as to how far the Supreme Court plans ultimately to press extraterritorial application of

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[7] That test requires courts to examine "(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, 128 S. Ct. at 2259.

constitutional provisions is a useless exercise. Until the Court overrules *Johnson*, we remain bound by its holding.

To be more precise, *Boumediene* was expressly limited to holding that the Suspension Clause, art. I, § 9, cl. 2 of the Constitution, applies to enemy combatants detained in the Guantanamo Bay, Cuba, military facility. *Boumediene*, 553 U.S. at 771, 128 S. Ct. at 2262. The significance of both the "Great Writ" and the United States' plenary control at Guantanamo was equally critical to the Court's holding. The Court stated: "In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause," and cited *Blackstone*, who called it the "bulwark of our liberties." *Id.* at 739, 742, 128 S. Ct. at 2244, 2246 (citing 1 W. Blackstone, Commentaries *137). The Court also held that the concerns regarding separation of powers "have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers." *Id.* at 765, 128 S. Ct. at 2259. With respect to the unique circumstances at Guantanamo, the Court variously stated that the Government has "total military and civil control"; "complete jurisdiction and control"; "*de facto* sovereignty"; and had "complete and uninterrupted control of the bay for over 100 years." *Id.* at 747, 755, & 764, 128 S. Ct. at 2248, 2253, & 2258.

Boumediene fashioned a test that it claimed to derive from past decisions that considered the extraterritorial reach of other constitutional provisions. *See Boumediene*, 553 U.S. at 760, 128 S. Ct. at 2256

(citing *In re Ross*, 140 U.S. 453, 11 S. Ct. 897 (1891) (Fifth and Sixth Amendments)); *id.* at 762, 128 S. Ct. at 2257 (citing *Johnson*, 339 U.S. 763, 70 S. Ct. 936 (Fifth Amendment)); *id.*, 128 S. Ct. at 2257 (citing *Verdugo–Urquidez*, 494 U.S. at 277, 110 S. Ct. at 1067 (Fourth Amendment)). The Court concluded that *de jure* sovereignty does not alone determine the extraterritorial reach of the Constitution; instead, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764, 128 S. Ct. at 2258. But the Court ultimately held its three-factor test relevant "in determining the reach *of the Suspension Clause*. . . ." *Id.* at 766, 128 S. Ct. at 2259 (emphasis added). Moreover, the Court disclaimed any intention to overrule the holdings of *Johnson* or *Verdugo–Urquidez*. *Id.* at 795, 128 S. Ct. at 2275.

Given that *Boumediene* applied its three-factor test to a different constitutional provision than those with which we are confronted, and that it did not overrule the controlling precedents, it bears repeating: this court may not step ahead of the Supreme Court to hold *Johnson* (or *Verdugo–Urquidez*) no longer binding. Thus, this is not a case where no "clearly established law" articulates the plaintiffs' rights to extraterritorial application of the Fifth Amendment. Following *Boumediene*, there is no law at all supporting their position, and thus no Fifth Amendment claim exists.[8]

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[8] I need not speculate on whether *Boumediene*'s rationale will ultimately be extended to determine the extraterritorial reach of other constitutional provisions. It is important to note, however, that even a defender of this prediction acknowledges the need for refinements of the three-factor functional test if *Boumediene* is brought to bear on other constitutional provisions. *See* Gerald L.

Significantly, the plaintiffs cited no case holding that their Fifth Amendment extraterritoriality claim has any viability. To the contrary, in light of the Court's repeated references to the Suspension Clause, we must 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." *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011) (internal citations and quotation marks omitted); *see also 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." (internal citation omitted))[9]; *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.").

For all these reasons, the plaintiffs plainly have no cognizable constitutional claim against Agent Mesa.

Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 287 (2009) ("This nonexclusive [three-factor test] was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights.").

[9] *Al Bahlul*'s holding is not to the contrary. In *Al Bahlul*, the Government conceded that the Ex Post Facto Clause applies to aliens detained at Guantanamo Bay. 767 F.3d at 18. And the en banc court "assume[d] without deciding that the *Ex Post Facto* Clause applies at Guantanamo." *Id.* (italics in original).

IV. The Alien Tort Statute Does not Waive U.S. Sovereign Immunity

The plaintiffs seek damages *from the United States* under the ATS, urging as follows: Congress enacted the ATS to allow aliens to sue for violating "the law of nations." 28 U.S.C. § 1350. The tort alleged in this case is "extrajudicial killing," an alleged violation of *jus cogens* norms of customary international law.[10] Customary international law asserts that by their nature, *jus cogens* violations apply even without a nation's consent (consent being the ordinary prerequisite to rules of customary international law).[11] In cases involving foreign officials sued for *jus cogens* violations of human rights, courts have held that individual immunity from suit does not exist. Finally,

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[10] According to the Restatement (Third) of Foreign Relations Law § 702 and cmt. n (1987), a state violates a *jus* cogens norm if it as a matter of policy:

> [P]ractices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, [or] (g) a consistent pattern of gross violations of internationally recognized human rights.

[11] Vienna Conv. on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679 (*jus cogens* norm is "peremptory norm" of international law, "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"); *see also* Restatement (Third) of Foreign Relations Law § 102 and cmt. k (1987).

although the ATS has been held not to waive foreign states' sovereign immunity, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S. Ct. 683 (1989), the plaintiffs assert that "Congress has not enacted a similar comprehensive scheme regulating U.S. sovereign immunity for international law violations prosecuted in our own courts." And by this inaction, Congress has signaled that the United States is amenable to ATS suits.

The concurring opinion here finds this reasoning "logical," concludes that it has some force," and posits:

> [I]f there is a category of torts (violations of the law of nations, for example) that change the ordinary rules of sovereign immunity because these acts cannot be authorized by the sovereign, then a country either would lack any such immunity to waive or would not be permitted to substitute for one of its officers.

Post at 44, 46, & 42 (Haynes, J., concurring). The concurrence asserts that this question has not been addressed by the panel opinion or the en banc compromise opinion that reinstates the panel decision. The concurrence believes this issue was left "unaddressed" in *Sosa* and suggests the Supreme Court take it up. *Post* at 42, 46.

With due respect, the plaintiffs' theory has yet to be adopted by any circuit court of appeals and has been repeatedly rejected, and that is because it has no valid foundation in the American constitutional structure, in the ATS, or in Supreme Court precedent. To effectuate their theory would create a breathtaking expansion of federal court authority, would abrogate federal

sovereign immunity contrary to clearly established law, and would have severely adverse consequences for the conduct of American foreign affairs.

Taking the Supreme Court decisions first, *Sosa* did not consider U.S. sovereign immunity for ATS violations because the federal government was sued only under the Federal Tort Claims Act. 542 U.S. at 698, 124 S. Ct. at 2747. The ATS claim was alleged only against Sosa, a Mexican national, individually. *Id.* at 698, 124 S. Ct. at 2747. No issue of American sovereign immunity from ATS claims was presented for the Court to decide or even comment on. The overarching theme of *Sosa*, moreover, is one of caution, not expansion of federal court authority. Inferences that *Sosa* might leave open an implied waiver of sovereign immunity are implausible. First, the Court in *Sosa* held unanimously that the ATS is a strictly jurisdictional statute. *Sosa*, 542 U.S. at 714, 124 S. Ct. at 2755. It does not provide a substantive basis for aliens' general assertions of customary international law violations. Purely jurisdictional statutes do not waive sovereign immunity. *United States v. Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 953 (1976). Second, *Sosa* rejected the view that the ATS "ought to cover all [customary international law] claims, so long as they also qualify as torts" and instead gave "domestic legal force to an extremely limited subset of [customary international law] claims . . . based on its reading of the specific intent of Congress." *Al–Bihani v. Obama*, 619 F.3d 1, 19 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (quoting Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 29 (2007)). According to *Sosa*, the only claims authorized by the ATS for violations of

international law norms are those with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732, 124 S. Ct. at 2765. In addition, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, invariably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732–33, 124 S. Ct. at 2766 (footnotes omitted). The Court went on to deny Alvarez's claim for arbitrary arrest and detention in violation of an international treaty and the Universal Declaration of Human Rights. 542 U.S. at 738, 124 S. Ct. at 2769.

What does this cautionary opinion imply about federal sovereign immunity? As earlier noted, the Court decided in *Amerada Hess* that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court," 488 U.S. at 439, 109 S. Ct. at 690. The Court flatly rejected the argument that Congress, by failing explicitly to repeal the ATS when it amended the FSIA, had intended for federal courts to "continue to exercise jurisdiction over foreign states in suits alleging violations of international law outside the confines of the FSIA." 488 U.S. at 435, 109 S. Ct. at 689. That rejection would have been even more emphatic had the court considered whether the ATS waives the United States' sovereign immunity because, as then-Judge Scalia pointed out, foreign sovereign immunity rests only on international comity, while domestic sovereign immunity originates in the constitutional separation of powers. *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 207 n. 5 (D.C. Cir. 1985). The

plaintiffs here err twice in asserting the abrogation of federal sovereign immunity under the ATS.

First, my colleagues' argument in the negative—that Congress silently reserved the defense of sovereign immunity against potential violations of international law in U.S. courts, has it backward about the ATS, just as the Court held with respect to foreign sovereign immunity in *Amerada Hess.* Federal sovereign immunity is the overarching principle, which must be explicitly waived by the federal government.[12] "[T]he United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S. Ct. 1811, 1819 (1983). To consent, Congress must unequivocally waive sovereign immunity in statutory text; waiver will not be implied. *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096 (1996). As Judge Scalia held in *Sanchez–Espinoza*, "[i]t would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional*

[12] This is exactly the point my colleagues fail to acknowledge. As they explain, because "Congress does not appear to have acted in the same way [as it did with the FSIA] to define federal court jurisdiction over suits against the United States by foreign nationals under the ATS," the ATS, as interpreted in *Sosa*, can deny the government its immunity. *Post* at 41 n.4. But the United States' immunity from suit in federal courts is the rule, subject to explicit exceptions. Therefore, Congress need not do *anything* to preserve its sovereign immunity.

necessity, official actions of the United States." 770 F.2d at 207 (emphasis in original).[13]

Second, they mistakenly confuse cases deriving from foreign official immunity, an immunity based on officials' status or conduct (and separate from the sovereign state's own immunity), with the constitutional principle involved in U.S. sovereign immunity. *See, e.g., Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012). No case has ever held the United States government has forfeited its sovereign immunity from suit because of any alleged violation of international law, whether *jus cogens* or otherwise. Nevertheless, they would expose the United States, alone among the nations of the world, to liability in federal courts under the ATS without the protection of sovereign immunity. Contrary to the plaintiffs' assertions, the Supreme Court's circumspect readings of the ATS in *Sosa* and *Kiobel* (rejecting ATS's extraterritorial application) offer no basis for the novel proposition that the ATS impliedly forfeits federal sovereign immunity.

Neither the plaintiffs nor the concurring opinion mentions that every other circuit court asked to hold the United States potentially liable under the ATS has declined the invitation. For example, in *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011), Ecuadorian nationals sued the United States under the ATS after

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[13] He qualified this statement by noting that, "These consequences are tolerated when the officer's action is unauthorized because contrary to statutory or constitutional prescription, but we think that exception can have no application when the basis for jurisdiction [under the ATS] requires action authorized by the sovereign as opposed to private wrongdoing." *Id.* (citation and footnote omitted).

the Coast Guard stopped, boarded, and detained their ship. The Ninth Circuit considered a number of statutes that might contain waivers of sovereign immunity, including the ATS. With respect to the ATS, the court held "[t]he Alien Tort Statute has been interpreted as a jurisdiction statute only—it has not been held to imply any waiver of sovereign immunity." *Id.* at 1196 (internal citations and quotation marks omitted). This determination is particularly notable because it post-dates the Supreme Court's decision in *Sosa*.

The Fourth Circuit reached the same conclusion in *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). The plaintiffs there asserted ATS claims against the United States government for property damage that occurred during the U.S. invasion of Panama. Once again, the government asserted its sovereign immunity, and the court agreed, holding that "any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *Id.*

So too for the D.C. Circuit. In *Sanchez–Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), Nicaraguan citizens sued the United States for injuries incurred at the hands of the Contras. *Id.* at 205. The federal government asserted its sovereign immunity. Then–Judge Scalia held, in no uncertain terms, that "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity." *Id.* at 207; *see also Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

That these plaintiffs assert a violation of a *jus cogens* norm does not—and should not—change the outcome of the sovereign immunity analysis. The plaintiffs argue that *jus cogens* norms occupy such a high place in international law that their violation abrogates sovereign immunity. Other circuits to address such an argument have rejected it. In *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir.2009), the Second Circuit held that *jus cogens* norms cannot abrogate sovereign immunity when Congress has explicitly granted such immunity in the FSIA. It then broadly asserted that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Id.* at 15; *see also Princz*, 26 F.3d at 1174; *Siderman*, 965 F.2d at 718–719; *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242–44 (2d Cir. 1996). The same principle should apply to the constitutionally-footed doctrine of federal sovereign immunity. Given the unanimous decisions of the other circuits, there is no justification for a federal court's unilateral abrogation of our government's sovereign immunity under the ATS.

Returning once more to *Sosa*, it becomes clear that the Court, as it rejected Alvarez's broad claim for a violation of "the law of nations," fully realized the potentially untoward consequences of empowering lower courts to adopt a federal common law of international law torts. Not only did the Court limit the scope of such actions, but it also explained the difficulties that would ensue had it adopted Alvarez's facially appealing claim:

> Alvarez cites little authority that a rule so broad has the status of a binding customary

> norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, 42 U.S.C. § 1983, and *Bivens* . . ., that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

542 U.S. at 736–37, 124 S. Ct. at 2768 (footnote omitted).

> Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.

542 U.S. at 738, 124 S. Ct. at 2769 (footnote omitted).

The parallels between these concerns and those attending a claim for "extrajudicial killing" are obvious. The plaintiffs' advocacy here of a broad rule clearly has

implications for both domestic law enforcement and for the use of American lethal force in foreign confrontations. Such alleged violations of *jus cogens* could transform every use of deadly force by a federal officer against an alien into a litigable violation of a peremptory norm of international law, supplanting *Bivens* actions. These claims could also be asserted by aliens against state or local law enforcement officers, supplanting § 1983 actions. Finally, this alleged cause of action could be asserted directly against the United States, which contravenes federal sovereign immunity and is at odds with the FSIA immunity from suit every foreign nation enjoys in U.S. courts.

The existence of foreign sovereign immunity does not, however, eliminate the international complications of opening American courts to broad and vague claims under the ATS. As in *Sosa*, the plaintiffs' proffered rule "would support a cause of action in federal court for any [alleged extrajudicial killing], anywhere in the world." 542 U.S. at 736, 124 S. Ct. at 2768. Although certain *jus cogens* prohibitions, *e.g.* state-sponsored slavery or genocide, may be self-evidently within the scope of the Supreme Court's reasoning in *Sosa*, "[a]ny credible invocation of a principle against [extrajudicial killing] that the civilized world accepts as binding customary international law requires a factual basis beyond" mere conclusional pleadings. *Sosa*, 542 U.S. at 737, 124 S. Ct. at 2769. That a multiplicity of claims could aggravate relations with foreign nations and thwart the Executive and Legislative branches' discretion in conducting foreign affairs seems obvious and constitutes additional reasons, acknowledged in *Sosa*, for extreme caution in recognizing claims for

breach of "the law of nations" actionable via the ATS. 542 U.S. at 727, 124 S. Ct. at 2763.

In sum, the plaintiffs' ATS claim against the United States is without foundation, and the concurring opinion should not be read as improvidently providing them support.

Conclusion

A "Lawless" U.S. Border?

One final point is necessary in response to the plaintiffs' assertion that enforcement of United States borders will become "lawless" if aliens in the position of Hernandez lose access to American civil tort recovery. This court must, of course, assume, based only on the pleadings, that Hernandez was the victim of an unprovoked shooting. The plaintiffs' assertion of official, or officially condoned lawlessness is, however, inaccurate. This tragedy neither should, nor has, escaped review. Numerous federal agencies, including the FBI, the Department of Homeland Security's Office of the Inspector General, the Justice Department's Civil Rights Division, and the United States Attorney's Office, investigated this incident and declined to indict Agent Mesa or grant extradition to Mexico under 18 U.S.C. § 3184. There were other possible avenues for evaluation of Agent Mesa's conduct. Plaintiffs could have sought federal court review of the Attorney General's scope of employment certification under the Westfall Act. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420, 115 S. Ct. 2227, 2229 (1995); *see also Osborn v. Haley*, 549 U.S. 225, 229–30, 127 S. Ct. 881, 887–88 (2007). Further, state systems may superintend excesses of federal executive authority. *See* 28 U.S.C.

§ 2679(d)(3). A judicially implied tort remedy under *Bivens* for constitutional violations or the Alien Tort Statute is not and was not the plaintiffs' only source of review for this tragedy.

I respectfully concur in the en banc opinion.

JAMES L. DENNIS, Circuit Judge, concurring in part and concurring in the judgment:

I join the en banc court's opinion in its entirety except as to its reason for denying Appellants' Fourth Amendment claim, with which I agree in result. I also join the concurring opinion of Judge Prado, except to the extent that it adopts the en banc court's reason for denying this claim. In *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Supreme Court apparently ruled that the phrase "the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this community to be considered part of that community." *Id.* at 265. I am inclined to agree, however, with those who have suggested that the *Verdugo–Urquidez* view cannot be squared with the Court's later holding in *Boumediene v. Bush*, 553 U.S. 723 (2008), that "questions of extraterritoriality turn on objective factors, and practical concerns, not formalism." *Id.* at 764; *see* WAYNE R. LAFAVE ET AL., 2 CRIM. PROC. § 3.1(i) n. 237.1 (3d ed.2014) (citing Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 259, 272 (2008); Ellen S. Podgor, *Welcome to the Other Side of the Railroad Tracks: A Meaningless Exclusionary Rule*, 16 SW. J. INT'L L. 299, 310 (2010)); Baher Azmy, *Executive Detention*,

Boumediene, *and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 465 (2010); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1044 (2009); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1614 (2010).

The Mexican government has indicated that our adjudication of the Appellants' claims, whether under the Fourth or Fifth Amendment, in this particular case would not cause any friction with its sovereign interests. However, it appears that our judicial entanglement with extraterritorial Fourth Amendment excessive-force claims would be likely to involve impracticable and anomalous factors. For these reasons, I agree with the opinion of the court in declining to apply the Fourth Amendment to adjudicate the Appellants' claims but I do so out of concern for pragmatic and political questions rather than on a formal classification of the litigants involved.

EDWARD C. PRADO, Circuit Judge, concurring:

I agree with the en banc court's holding that the constitutional rights asserted by 15–year–old Sergio Hernández and his family were not clearly established in 2010, when Agent Mesa fired his fatal shots across the international border. However, I am compelled to write separately in response to Judge Jones's concurring opinion, which, in my view, sets forth an oversimplified and flawed analysis of the Fifth Amendment and the Supreme Court's extraterritoriality precedents. In her concurrence, Judge Jones offers an interpretation of the Fifth

Amendment implications of *Graham v. Connor*, 490 U.S. 386 (1989), that is contrary to Supreme Court precedent and is certain to sow confusion in our circuit. Further, the concurrence rests on a reading of the Court's pivotal extraterritoriality rulings in *Johnson v. Eisentrager*, 339 U.S. 763, *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), and *Boumediene v. Bush*, 553 U.S. 723 (2008), that sacrifices nuance for an unwarranted sense of certainty.

The facts in this case—though novel—are recurring, and similar lawsuits have begun percolating in the federal courts along the border.[1] Ultimately, it will be up to the Supreme Court to decide whether its broad statements in *Boumediene* apply to our border with Mexico and to provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights. Because the law is currently unclear, I join the en banc court's opinion in full and write separately only to respond to Judge Jones's concurring opinion.

I. The Applicability of the Fifth Amendment

The notion that the Fourth Amendment provides the exclusive means of relief for Hernández is rooted in a strained and incorrect reading of *Graham v. Connor.* The Court in *Graham* held that "*all* claims that law enforcement officers have used excessive force—deadly

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[1] *See*, *e.g.*, *Rodriguez v. Unknown Parties*, No. 4:14–cv–02251, 2014 WL 3734237 (D.Ariz. filed July 29, 2014).

or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395. The Court explained that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*

Judge Jones's concurrence rightly points to these portions of the Court's opinion, but it elides key limiting phrases in each: "free citizen" and "explicit textual source." If, as the Court held in *Verdugo–Urquidez*, 494 U.S. at 274–75, the Fourth Amendment does not shield aliens located abroad (*viz.* non-"free citizens"), then it cannot provide "an explicit textual source of constitutional protection" to persons in Hernández's position, and *Graham*'s directive to apply the Fourth Amendment to *covered* excessive-force claims is simply inapt.

Indeed, as the Court explained in *United States v. Lanier*, 520 U.S. 259 (1997), "*Graham* . . . does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that *if a constitutional claim is covered* by a specific constitutional provision, . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.* at 272 n. 7 (emphasis added). Subsequent cases have affirmed this view. *See*

Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment. It is not."); *Petta v. Rivera*, 143 F.3d 895, 901 (5th Cir. 1998) ("[A] plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right.").[2]

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[2] Apparently troubled by the implication that the Court in *Graham* excluded the class of claims at issue here from the presumptive coverage of the Fourth Amendment, Judge Jones's concurrence imputes a restrictive meaning to the Court's phrase "free citizens." According to the concurrence, the Court could not have intended to permit non-citizens to assert claims for excessive force under the Fourteenth Amendment while limiting citizens to the Fourth Amendment. But this misses the point. Even if, as the concurrence suggests, the Court used this term in *Graham*—a case centering on the use of excessive force during an investigatory stop of a citizen, 490 U.S. at 388–89—to distinguish between the constitutional protections afforded to civilians, pretrial detainees, and incarcerated individuals, this says nothing about whether a claim that falls outside of these set boundaries is "covered by" the Fourth Amendment. Where, as here, a *noncitizen* alleges excessive force *abroad*, and there is no indication that the show of authority was directed at *apprehension*, it cannot be that the claim arises under the Fourth Amendment or not at all.

The cases the concurrence cites are not to the contrary. *Cf. Lewis*, 523 U.S. at 843–44 (holding that the passenger of a vehicle being pursued by police was not "seized" during a fatal collision and therefore could assert a substantive due process claim under the Fourteenth Amendment); *Albright v. Oliver*, 510 U.S. 266, 273–74 (1994) (declining to recognize a substantive due process right to be free from criminal prosecution without probable cause because the Fourth Amendment was drafted to address pretrial

Hernández, a noncitizen, was fatally shot in Mexico by a U.S. government agent standing on U.S. soil. Accepting Hernández's allegations as true, as we must on a motion to dismiss, Agent Mesa made no effort to apprehend Hernández—he detained one of Hernández's companions, then fired his service weapon into Mexico, where Hernández hid behind the pillar of a bridge, and he ultimately left Hernández's body where it lay. Under *Verdugo–Urquidez* and *Lewis*, the Fourth Amendment does not "cover" this claim of excessive force. I would therefore hold that Hernández may invoke the Fifth Amendment's prohibition on constitutionally arbitrary official conduct.

II. The Extraterritoriality of the Fifth Amendment

Judge Jones's concurrence paints our extraterritoriality case law in broad strokes, with a palette of black and white. The state of the law, as the concurrence views it, permits no gray.[3] According to the

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deprivations of liberty); *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–99 (1989) (determining that the fatal use of a roadblock to terminate a suspect's flight constituted a seizure and observing that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*"; *Tennessee v. Garner*, 471 U.S. 1, 3, 7 (1985) (analyzing the apprehension of a fleeing suspect through the use of deadly force as a seizure).

[3] The absolutism of the concurrence's analytical framework is epitomized by its phrasing of the constitutional issue in this case:

concurrence, the Constitution cannot apply extraterritorially to the facts of this case because the Supreme Court has held, generally, that the Fourth and Fifth Amendments do not apply to noncitizens with no significant voluntary connection to the United States. Citing *Eisentrager* and *Verdugo–Urquidez*, the concurrence asserts that the Supreme Court has foreclosed the question before our Court. This uncomplicated view of extraterritoriality fails to exhibit due regard for the Court's watershed opinion in *Boumediene*, which not only authoritatively interpreted these earlier cases but also announced the bedrock standards for determining the extraterritorial reach of *the Constitution*—not just the writ of habeas corpus. Applying these standards, I would hold the Fifth Amendment applicable to the particular facts alleged by Hernández.

"United States constitutional rights do not extend to aliens who (a) lack any connection to the United States and (b) are injured on foreign soil." All nuance is lost, and only one conclusion follows from the question presented. But there is no question that Hernández had *some* connection to the United States, even if not the "significant voluntary connection" required to invoke the protections of the Fourth Amendment under *Verdugo–Urquidez*, 494 U.S. at 271, by virtue of the acts of Agent Mesa that originated in the United States and had their effect in Mexico. Likewise, it is misguided to focus exclusively on Hernández's location within Mexico when the bullets Agent Mesa fired from United States soil found their target. This is not a case involving a drone strike, an act of war on a distant battlefield, or law-enforcement conduct occurring entirely within another nation's territory; it is a fatal shooting by small-arms fire in which the short distance separating those involved was bisected by an international border. These distinct facts cast doubt on the concurrence's simplistic framework and belie its warning that this case implicates "our nation's applications of force abroad."

In *Boumediene*, the Court provided its clearest and most definitive articulation of the principles governing the application of constitutional provisions abroad. Although the Court was tasked with deciding the narrow question of whether aliens designated enemy combatants and detained at Guantanamo Bay had the constitutional privilege of habeas corpus, Justice Kennedy wrote a lengthy opinion for the Court that grappled with the foundations of extraterritoriality. The Court first discussed its sparse extraterritoriality precedents and found them to undermine "the Government's argument that, at least as applied to noncitizens, *the Constitution* necessarily stops where *de jure* sovereignty ends." *Boumediene*, 553 U.S. at 755 (emphasis added). Rather, the Court read beyond the bare holdings of these cases and concluded that they shared a common thread: "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764.[4] Based

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[4] Critically, while explaining its reasoning, the Court repeatedly cited Justice Kennedy's concurring opinion in *Verdugo–Urquidez*, in which he advocated a functional analysis of extraterritoriality. *Boumediene,* 553 U.S. at 759–62. In *Verdugo–Urquidez,* the Court held that the Fourth Amendment had no application to DEA agents' warrantless search of a Mexican citizen's residences in Mexico. 494 U.S. at 262, 274–75. Although he agreed with the Court's ultimate conclusion that no Fourth Amendment violation had occurred, Justice Kennedy wrote separately to express his view that the reach of the Constitution is not confined by the identity of the class of persons that ratified the instrument or by the text used to denominate those subject to its protection (e.g., "the people"). *Id.* at 275–76 (Kennedy, J., concurring). Rather, Justice Kennedy urged a functional approach to extraterritoriality—one that he traced as far back as *In re Ross*, 140 U.S. 453 (1891), the *Insular Cases* (e.g., *Downes v. Bidwell*,

on these considerations, the Court identified at least three factors that were relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the quality of the process underlying this finding; (2) the nature of the sites where the apprehension and detention occurred; and (3) the practical obstacles inherent in determining the detainee's entitlement to the writ. *Id.* at 766. After analyzing these factors, the Court held that the Suspension Clause "has full effect at Guantanamo Bay." *Id.* at 771.

This holding may have been limited to the Suspension Clause, but the Court's reasoning was decidedly not so constricted. Justice Kennedy's opinion drew from the analysis of numerous rights in numerous contexts *other than habeas*, *id*. at 755–64, framing its review of the case law as a survey of the Court's discussions of "*the Constitution's* extraterritorial

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182 U.S. 244 (1901), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922)), and *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring). *See id.* at 277–78 ("These [extraterritoriality] authorities . . . stand for the proposition that we 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."); *id.* at 278 (analyzing the extraterritorial reach of the Fourth Amendment by determining whether "[t]he conditions and considerations of this case would make adherence to the [Amendment] . . . impracticable and anomalous").

The significance of this opinion, which evinces Justice Kennedy's dedication to applying a functional approach to extraterritoriality even in a U.S.–Mexico cross-border law-enforcement context, cannot be understated. And it hardly bears repeating here that Justice Kennedy cast the deciding vote in both *Verdugo–Urquidez* and *Boumediene.*

application," *id.* at 755 (emphasis added). More importantly, when the Court rejected the Government's proffered reading of *Eisentrager*—the case that Judge Jones's concurrence cites as facially foreclosing Hernández's Fifth Amendment claim[5]—it announced in no uncertain terms that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic

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[5] As *Boumediene* recognized, the ruling in *Eisentrager* cannot reasonably be divorced from its idiosyncratic facts: the extension of Fifth Amendment rights and the writ of habeas corpus to alleged members of the German armed forces who were captured in China, convicted of violating the laws of war, and imprisoned in occupied, post-World War II Germany. *See Boumediene*, 553 U.S. at 762–64. If the enemy combatants at Guantanamo Bay were not sufficiently similar to the petitioners in *Eisentrager* to be bound by that case, then Hernández—an unarmed fifteen-year-old boy with the misfortune of standing on the wrong side of an international border—certainly is not.

Furthermore, while Judge Jones's concurrence is quick to emphasize *Boumediene*'s limited holding, it is conspicuously silent as to the significance of *Eisentrager*'s equally narrow ruling. *See Eisentrager*, 339 U.S. at 785 ("We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."). In any event, my point is not that *Boumediene* overruled *Eisentrager*, but that the 2008 case offers us the Court's authoritative reading of the 1950 case—one that eschews a formalistic approach to extraterritoriality. It is *this* interpretation of *Eisentrager*—according to which the case must be understood as consistent with the functional approach endorsed in *Boumediene*—that must guide our analysis.

reach of *the Constitution* or of habeas corpus." *Id.* at 764 (emphasis added).[6]

Boumediene, and its functionality-focused reading of the Court's previous extraterritoriality decisions, is instructive here. Confronted with a novel extraterritoriality question, we must apply the only appropriate analytical framework the Court has given us: the *Boumediene* factors. Adapted to the present context, three objective factors and practical concerns are relevant to our extraterritoriality determination: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. *Cf. id.* at 766–71.[7] The relevant practical obstacles include the

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[6] Even if these statements were mere dicta, we and our fellow circuits have long recognized that the Supreme Court's words carry special weight. *See Schwab v. Crosby*, 451 F.3d 1308, 1325–26 (11th Cir. 2006) (noting that the court has "previously recognized that dicta from the Supreme Court is not something to be lightly cast aside" and citing cases from eleven circuits expressing the deference owed to Supreme Court dicta (citation and internal quotation marks omitted)); *United States v. Becton*, 632 F.2d 1294, 1296 n. 3 (5th Cir. 1980) ("We are not bound by dicta, even of our own court. . . . Dicta of the Supreme Court are, of course, another matter.").

[7] Judge Jones's concurrence is of course correct that Professor Neuman, "a defender of th[e] prediction" that *Boumediene* may be extended to other constitutional provisions, has acknowledged "the need for refinements of the three-factor functional test." But that is exactly what the panel majority's original opinion suggested, *see Hernández v. United States*, 757 F.3d 249, 262 (5th Cir. 2014), *vacated in part and reinstated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), and what federal courts of appeals are

consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government. *See id.*; *Verdugo–Urquidez*, 494 U.S. at 273–74; *id.* at 278 (Kennedy, J., concurring). As the panel majority's original opinion explained, the *Boumediene* factors, coupled with an analysis of the operation, text, and history of the Fifth Amendment, militate in favor of the extraterritorial application of substantive due process protections on these facts. *See Hernández v. United States*, 757 F.3d 249, 259–63, 267–72 (5th Cir. 2014), *vacated in part and reinstated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

In sum, were we to reach the constitutional merits, I would hold, as the vacated panel majority's opinion did, *Hernández*, 757 F.3d at 272, that a noncitizen situated immediately beyond our nation's borders may invoke the protection of the Fifth Amendment against

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uniquely well-equipped to propound—refinements that are faithful to the Court's opinion, which described the factors as non-exclusive and derived them from contexts *in addition to* habeas, *see Boumediene*, 553 U.S. at 766. Moreover, Professor Neuman also reads *Boumediene* as a case with implications beyond habeas corpus, and he has expressed optimism about the expansion of Justice Kennedy's functional approach. *See* Gerald L. Neuman, Essay, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 Cornell L.Rev. 1441, 1458, 1470 (2014) (observing that "[a]lthough the holding of *Boumediene* concerned the Suspension Clause, Justice Kennedy described his functional approach as an overall framework derived from precedents involving a variety of constitutional rights," and concluding that "[t]he selective functional approach of *Boumediene v. Bush* should be developed and strengthened to reconcile commitment to constitutional values with the extraterritorial exercise of power").

the arbitrary use of lethal small-arms force by a U.S. government official standing on U.S. soil. To hold otherwise would enshrine an unsustainably strict, territorial approach to constitutional rights—one the Supreme Court rejected in *Boumediene*.[8]

III. Conclusion

Contrary to Judge Jones's concurrence, I believe that the "path of least resistance" presents a prudent course for the en banc court. The depth of our disagreement about the meaning of *Boumediene*, *Verdugo–Urquidez*, and *Eisentrager* is compelling evidence that the law was not clearly established at the

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[8] Disturbingly, such a narrow approach could also create zones of lawlessness where the fortuity of one's location at the time of a gunshot would mark the boundary between liability and impunity. This would result, in turn, in perverse and disturbing incentives for government agents confronted with noncitizen migrants near the border. Because directing lethal force *into* Mexico would violate no constitutional norms, a government agent resorting to deadly force would have every reason to fire his weapon *before* the migrant reaches the U.S. border, or *after* the migrant crosses back into Mexico, to avoid possible civil liability. By contrast, if the agent shoots *while* the migrant is in U.S. territory, then the Constitution is suddenly—and undesirably—implicated. And it goes without saying that if the scenario were reversed, and Mexican government agents were firing weapons across the border into the United States, unyielding conceptions of territoriality would likely fall by the wayside.

Judge Jones's concurrence disputes the characterization of the border region as "lawless," citing the governmental investigations into Hernández's fatal shooting. But the fact that the United States "declined to indict Agent Mesa or grant extradition to Mexico" speaks not to the promise of accountability but to the practical obstacles associated with the criminal and political processes that exist to regulate official conduct.

time of the tragic events giving rise to this suit. But to affirmatively find no constitutional violation on these facts—which are without parallel in our precedents—requires a troublingly uncomplicated reading of the governing law. Just as *Graham* cannot be understood without *Lanier* and *Lewis*, *Verdugo–Urquidez* and *Eisentrager* cannot be understood without *Boumediene*. Reading these cases in context and with due regard for the novel facts presented here, it is evident that Agent Mesa's fatal cross-border shooting of Sergio Hernández cannot be painted in the simple black and white prevalent in Judge Jones's concurrence. It requires a shade of gray that only a careful engagement with our precedents and the record in this case can produce.

Were we in a position to reach the constitutional merits, I would hold that Agent Mesa's actions violated Hernández's Fifth Amendment right to be free from constitutionally arbitrary government conduct. But until the Supreme Court intervenes to clarify the reach of *Boumediene* and apply Justice Kennedy's functional test to these distinct facts, I remain satisfied that the en banc court has wisely resolved this appeal on clearly-established-law grounds.

I respectfully concur in the en banc opinion.

CATHARINA HAYNES, Circuit Judge, joined by SOUTHWICK and HIGGINSON, Circuit Judges, concurring:

I concur in the judgment of the court.[1] I write separately to address the question of sovereign immunity for the United States in more detail. As the reinstated panel opinion correctly notes, the Alien Tort Statute ("ATS") is a jurisdictional statute but is not "stillborn." *Hernandez*, 757 F.3d at 258; *Sosa v. Alvarez–Machain*, 542 U.S. 692, 714 (2004). It provides a forum in United States courts for tort claims by aliens alleging a violation of "the law of nations."[2] 28 U.S.C. § 1350. The panel majority opinion nonetheless determines that Congress must explicitly waive sovereign immunity to make such torts committed in violation of the "law of nations" actionable against the United States (substituted for one of its officers)—as eloquently described in the special concurrence filed by

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[1] I also concur in the reasoning of the en banc opinion as supplemented herein.

[2] The parties and panel majority opinion focus on whether sovereign immunity bars an ATS suit, rather than on whether killing an unarmed civilian without any provocation or just cause would violate the types of international norms contemplated by the ATS in the phrase "law of nations." *See, e.g.*, *Hernandez*, 757 F.3d at 259 (assuming *arguendo* that Plaintiffs averred a violation of the "law of nations" the ATS would recognize by alleging "that the United States violated the international prohibition against 'extrajudicial killings' "). For purposes of this discussion, I will assume that killing a civilian without any provocation or just cause would violate the law of nations, as did the panel majority opinion. *Id.*

Judge Jones ("Special Concurrence").[3] That may be a fair understanding of the current state of the law in this area. But I wish to address some undeveloped implications of what the Supreme Court has so far held, above all in its extended treatment of the ATS in *Sosa*.

As the panel majority opinion notes, *Sosa* holds that federal courts can recognize a "limited" number of international common law torts that fall within the rubric of the ATS. *See Sosa*, 542 U.S. at 712. Left unaddressed is the question of whether any such common law torts would make the sovereign immunity of the United States unavailable. Put another way, if the United States *has* sovereign immunity as the Special Concurrence asserts, then I agree that it must be expressly waived in order for a lawsuit such as this one to be viable. But if there is a category of torts (violations of the law of nations, for example) that change the ordinary rules of sovereign immunity because these acts cannot be authorized by the sovereign, then a country either would lack any such

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[3] Because Mesa's conduct occurred in the United States, I do not view *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), cited by the government here, as barring an action under the ATS. *See id.* at 1669 ("[A]ll the relevant conduct took place outside the United States," such that the ATS did not provide a United States forum for the international tort claimed in that case); *see also id.* at 1670 (Alito, J., concurring) ("[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality . . . unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.").

immunity to waive or would not be permitted to substitute for one of its officers.

The Fourth Circuit recently discussed this possibility, noting in the context of foreign official immunity:

> Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.

Yousuf v. Samantar, 699 F.3d 763, 775–76 (4th Cir. 2012) (citing *Siderman de Blake v. Republic of Argentina*,[4] 965 F.2d 699, 718 (9th Cir. 1992)

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[4] At issue in *Siderman* was a foreign state's immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* 965 F.2d at 718–19. The *Siderman* court's discussion of *jus cogens* supports the views expressed in this concurrence; yet, that court ultimately found that it had no jurisdiction over a foreign state (Argentina) because the Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428, 433 (1989), has interpreted the FSIA as a complete and exclusive scheme governing foreign state immunity in U.S. courts. *See Siderman*, 965 F.2d at 718–19; *see also Amerada Hess*, 488 U.S. at 433–34 (noting the Court "start[ed] from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress in the exact degrees and character which to Congress may seem proper for the public good" and holding that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction

("International law does not recognize an act that violates *jus cogens* as a sovereign act.")).

In turn, *jus cogens* norms are a form of customary international law, a term often used instead of the phrase "law of nations." *See generally* Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555, 565 (2013) ("The ATS gives federal courts jurisdiction over tort claims brought by aliens for violations of the law of nations, a term now seen as synonymous with customary international law."); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 448 (2002) ("[M]ost courts [interpreting the ATS] seem to have limited the scope of actionable customary international law to fundamental or jus cogens norms. . . ."); Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L. REV. 1, 5 n. 12 (2005) ("Jus cogens 'is now widely accepted . . . as a principle of customary law (albeit of higher status).'" (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 n. 6)); *cf. Siderman*, 965 F.2d at 715 (noting that *jus cogens* differs from customary international law in that

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over a foreign state in our courts" (citations and internal quotation marks omitted)). Congress does not appear to have acted in the same way to define federal court jurisdiction over suits against the United States by foreign nationals under the ATS, except through the ATS itself. Therefore, it is imperative to consider *jus cogens* and its impact on the United States's immunity in light of the Court's painstaking interpretation of the ATS in *Sosa* and the common law torts recognized therein.

"customary international law derives solely from the consent of states, [while] the fundamental and universal norms constituting *jus cogens* [derive from customary laws considered binding on all nations and] transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II"); *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 206–07 (D.C. Cir. 1985) (Scalia, Circuit J.) (describing "the law of nations [as] so-called customary international law, arising from the customs and usages of civilized nations" (citation and internal quotation marks omitted)).

Although not all *jus cogens* norms may fall within the category of international common law torts that federal courts can recognize under *Sosa*, it seems logical that cognizable *jus cogens* norms may preclude a sovereign immunity defense. *Cf.* Thomas H. Lee, *The Safe–Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 879–82, 890–95, 901–08 (2006) (analyzing history, *Sosa*, and legislative documents from the founding era to postulate about which international common law torts are cognizable under the ATS); Sarah H. Cleveland, *The Kiobel Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT'L L. 8, 17–19 (2013) (similar, but arguing for a more expansive view of which torts are cognizable, especially in the extraterritorial context); *cf. also The Paquete Habana*, 175 U.S. 677, 700–01 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . ."); *Estate of Amergi ex rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1363–64 (11th Cir. 2010) (describing the type of international tort that federal courts may recognize under the ATS and *Sosa*). Plaintiffs raise this

argument—that sovereign immunity may be unavailable for a category of *jus cogens* torts or other violations of the law of nations—but neither the reinstated panel nor the en banc opinion addresses it.

Sosa also did not address sovereign immunity vis-à-vis the ATS. In that case, the Court only considered the claims of a foreign national named Alvarez–Machain that he was kidnapped by another foreign national, Sosa, at the behest of the U.S. Drug Enforcement Administration ("DEA"). 542 U.S. at 698–99. The Court ultimately held that the alleged international norm in question was insufficient to support a claim under the common law underlying the ATS. *Id.* at 712. *Sosa*'s language, however, hints at the idea that the ATS contemplated something broader than merely giving jurisdiction for an action Congress authorizes: "[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress. . . ." *Id.* at 719.

Unlike *Sosa*, here the United States was substituted for Mesa under the Westfall Act. Plaintiffs could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); *see also Osborn v. Haley*, 549 U.S. 225 (2007). Indeed, given Plaintiffs' argument that *jus cogens* violations are not legitimate official acts, Plaintiffs may have had a strong basis for raising such a challenge.[5] *See, e.g.*,

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[5] Thus, Plaintiffs' concern that people in Mesa's situation can commit wrongful acts with impunity is not accurate. A *Bivens*

Yousuf, 699 F.3d at 776 (distinguishing between status- and conduct-based immunity). Moreover, I note that the Special Concurrence does not take issue with the observation that Plaintiffs chose not to pursue this viable option for challenging Mesa's conduct.

I conclude that Plaintiffs' argument on sovereign immunity and the ATS has some force. But in this area of great delicacy involving international diplomacy and United States sovereign immunity, I believe it is best to leave this issue to the Supreme Court or at least to a court more appropriately positioned to address these intricate issues. *See Sosa*, 542 U.S. at 725 ("[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind."); *id.* at 728 (similar); *see also id.* at 750 (Scalia, J., concurring in part and concurring in the judgment) (decrying the notion that lower federal courts will be determining "perceived international norms"). Accordingly, I concur in the judgment of the en banc court.

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action does not stand alone as Plaintiffs' last resort to seek review of this tragedy. In addition to challenging the substitution by the United States, Plaintiffs may be able to seek redress in Mexican courts or through Mexican diplomatic channels. *See* 18 U.S.C. § 3184. State processes may also be available. *See* 28 U.S.C. § 2679(d)(3). Finally, Congress has exemplars both for establishing a compensation system for victims of United States government overseas torts, *see* 21 U.S.C. § 904, and also for waiving foreign sovereign immunity, *see* 28 U.S.C. § 1605(a).

JAMES E. GRAVES, JR., Circuit Judge, concurring in part:

I agree with the majority that the Fifth Amendment right was not clearly established at the time of the incident. But I also join, in part, the concurring opinion of Judge Prado, except to the extent that it adopts the en banc court's reasons for denying the Fourth Amendment claim. Additionally, I join, in part, Judges Dennis and Haynes in concluding that the plaintiffs' claims under the Fourth Amendment and the Alien Tort Statute (ATS) have force. However, I disagree with the conclusions of Judges Dennis and Haynes that this court should forego the adjudication of such claims.[1] Instead, I would conclude that this court should carefully adjudicate the ATS and Fourth Amendment claims. *See Sosa*, 542 U.S. at 712–13, 724–26; and 28 U.S.C. § 1350. For these reasons, I respectfully concur with the majority opinion in part and join the separate opinions of Judges Dennis, Prado and Haynes in part.

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[1] I also disagree with Judge Haynes' concurrence to the extent that it lists various other forms of review or redress which are, for the most part, unavailable, ineffective, or do not provide the same relief as a *Bivens* action.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed November 5, 2014]

No. 11–50792

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca,
Plaintiffs–Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION; UNITED STATES BORDER PATROL; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF JUSTICE,
Defendants–Appellees.

CONS w/ 12-50217

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

JESUS MESA, JR.,
Defendant–Appellee.

CONS w/ 12-50301

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

RAMIRO CORDERO;

VICTOR M. MANJARREZ, JR.,)
Defendants–Appellees.)
_____)

Appeals from the United States District Court for the Western District of Texas, El Paso

ON PETITIONS FOR REHEARING EN BANC
(Opinion June 30, 2014, 5 Cir., 2014, 757 F.3d 249)

Before STEWART, Chief Judge, JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 30, 2014]

No. 11–50792

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca,
Plaintiffs–Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION; UNITED STATES BORDER PATROL; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF JUSTICE,
Defendants–Appellees.

Consolidated with 12-50217

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

JESUS MESA, JR.,
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JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

RAMIRO CORDERO;

VICTOR M. MANJARREZ, JR.,)
Defendants–Appellees.)
_____)

Appeals from the United States District Court
for the Western District of Texas

Before DeMOSS, DENNIS, and PRADO, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

This case involves a foreign national's attempt to invoke constitutional protection for an injury that occurred outside the United States. United States Border Patrol Agent Jesus Mesa, Jr. ("Agent Mesa"), standing in the United States, shot and killed Sergio Adrian Hernandez ("Hernandez") Guereca, a Mexican citizen, standing in Mexico. Hernandez's family sued, asserting a number of claims against the United States, the border patrol agent, and the agent's supervisors. For the following reasons, we AFFIRM the judgments in favor of the United States and the supervisors, but we REVERSE the judgment in favor of the border patrol agent.

I. BACKGROUND

Appellants' complaint sets forth the following factual allegations. On June 7, 2010, Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, was gathered with a group of friends on the Mexican side of a cement culvert that separates the

United States and Mexico.[1] Hernandez and his friends were playing a game that involved running up the incline of the culvert, touching the barbed-wire fence separating Mexico and the United States, and then running back down the incline. As they were playing, United States Border Patrol Agent Jesus Mesa, Jr. arrived on the scene and detained one of Hernandez's friends, causing Hernandez to retreat "beneath the pillars of the Paso del Norte Bridge" in Mexico to observe. Agent Mesa, still standing in the United States, then fired at least two shots at Hernandez, one of which struck him in the face and killed him.

Hernandez's parents, Jesus C. Hernandez and Maria Guadalupe Guereca Bentacour ("the Appellants"), sued, asserting eleven claims against the United States, Agent Mesa, and unknown federal employees. They brought the first seven claims under the Federal Tort Claims Act ("FTCA") based on multiple allegations of tortious conduct.[2] Their next two claims asserted that the United States and the unknown federal employees had violated Hernandez's Fourth and Fifth Amendment rights by knowingly adopting inadequate procedures regarding the use of

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[1] The culvert is located near the Paso del Norte Bridge in El Paso, Texas.

[2] Specifically, the FTCA claims were based on (1) assault and battery, (2) negligence, (3) Agent Mesa's use of excessive and deadly force, (4) the negligent adoption of policies that violated Hernandez's rights, (5) the negligent failure to adopt policies that would have protected Hernandez's rights, (6) the intentional adoption of policies that violated Hernandez's rights, and (7) the intentional failure to adopt policies that would have protected Hernandez's rights.

deadly force and by failing to adopt adequate procedures regarding the use of reasonable force in effecting arrests. Their tenth claim asserted that Agent Mesa was liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violating Hernandez's Fourth and Fifth Amendment rights through the use of "excessive, deadly force." Finally, for their eleventh claim, the Appellants invoked the district court's jurisdiction under the Alien Tort Statute ("ATS"), alleging that Hernandez "was shot in contravention of international treaties, conventions and the Laws of Nations."

The United States moved to dismiss the claims against it, which included all claims except for the *Bivens* action against Agent Mesa. As a preliminary matter, the district court determined that under the Westfall Act, 28 U.S.C. § 2679, the United States was the only proper defendant for the common law tort claims because Agent Mesa was acting in the course and scope of his employment. The Appellants did not dispute this determination, and the court substituted the United States as the only party-defendant for those claims. *See* 28 U.S.C. § 2679(b)(1) (establishing an FTCA claim against the United States as the exclusive remedy for any tort claim based on the acts of a government employee acting in the course and scope of his employment). The district court then granted the motion to dismiss, holding that the United States had not waived sovereign immunity for these claims under either the FTCA or the ATS.

After the court dismissed the claims against the United States, the Appellants amended their complaint to add four *Bivens* actions against Agent Mesa's

supervisors—Ramiro Cordero, Scott Luck, Victor Manjarrez, Jr., and Carla Provost. The Appellants asserted that these supervisors violated Hernandez's Fourth and Fifth Amendment rights "by tolerating and condoning a pattern of brutality and excessive force by Border Patrol agents; systematically failing to properly and adequately monitor and investigate incidents of brutality or supervise and discipline officers involved in such misconduct; creating an environment to shield agents from liability for their wrongful conduct; and inadequately training officers and agents regarding the appropriate use and restraint of their firearms as weapons." Additionally, the Appellants alleged that the supervisors "had actual and/or constructive knowledge" that Agent Mesa's conduct "posed [a] pervasive and unreasonable risk of constitutional injury" and that their response to such knowledge was "so inadequate as to show deliberate indifference or tacit authorization of alleged offensive practices."

Shortly thereafter, Agent Mesa moved to dismiss the claims against him, asserting qualified immunity and arguing that Hernandez, as an alien injured outside the United States, lacked Fourth or Fifth Amendment protections. The district court agreed and dismissed the claims against Agent Mesa. Specifically, the court relied on *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), to hold that Hernandez could not invoke the Fourth Amendment's protection because he was an alien with no voluntary ties to the United States. The court found *Boumediene v. Bush*, 553 U.S. 723 (2008), inapplicable because *Boumediene* said nothing about "the Fourth Amendment right against unreasonable searches and seizures." The court then dismissed the Appellants' Fifth Amendment claim,

holding under *Graham v. Connor*, 490 U.S. 386 (1989), that excessive force claims should be analyzed only under the Fourth Amendment.

Finally, the supervisors sought dismissal of, or alternatively summary judgment on, the remaining *Bivens* action against them. The supervisors argued that the Appellants had failed to adequately allege a violation of clearly established Fourth or Fifth Amendment rights and that, even if they had, the supervisors were not personally responsible for any constitutional violation. The Appellants responded by voluntarily dismissing Agent Luck and Agent Provost. The district court then granted summary judgment for the remaining defendants, Agent Cordero and Agent Manjarrez, holding that the Appellants had failed to show "that the Defendants were personally involved in the June 7 incident" or that there was a causal link "between the Defendants' acts or omissions and a violation of Hernandez's rights."[3] The court noted that Agent Cordero had not supervised agents in Agent Mesa's position "since 2006–four years before the June 7 incident." Additionally, Agent Manjarrez was transferred to a different sector from Agent Mesa's "eight months before the June 7 incident." The court found both of these gaps created "too remote a time period to raise a genuine issue of material fact that [the

[3] The court assumed for the sake of argument that the Appellants were entitled to invoke Fourth and Fifth Amendment protections in their claims against the supervisors.

supervisors'] actions or omissions proximately caused [the Appellants'] harm."[4]

The Appellants timely appealed each adverse judgment, and we consolidated the appeals for review.[5]

II. CLAIMS AGAINST THE UNITED STATES

A. Federal Tort Claims Act

We begin with the claims asserted against the United States, specifically those asserted under the FTCA. The FTCA "is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). The FTCA accordingly gives federal courts jurisdiction over claims against the United States for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the

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[4] The district court also denied the Appellants' request to seek discovery for the limited purpose of uncovering the names of other individuals who had supervised Agent Mesa so that they could file a fourth amended complaint naming the new defendants. Appellants do not argue on appeal that the court abused its discretion in denying their request.

[5] We have jurisdiction over all three appeals under 28 U.S.C. § 1291. Both the decision to grant a motion to dismiss and the decision to grant summary judgment are reviewed de novo. *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012); *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 753 (5th Cir. 2011).

claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA "also limits its waiver of sovereign immunity in a number of ways." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 700 (2004). The relevant limitation on the waiver of immunity here is the FTCA exception for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

The Supreme Court analyzed the scope of the FTCA's foreign country exception in *Sosa*. There, the DEA hired Mexican nationals to seize a Mexican physician believed to have participated in the interrogation and torture of a DEA agent. *Sosa,* 542 U.S. at 697–98. The physician was abducted from his house in Mexico, held overnight in a motel, and then brought to El Paso, where he was arrested by federal officers. *Id.* at 698. Upon his return to Mexico, the physician sued the United States for false arrest under the FTCA. *Id.* The Ninth Circuit held the United States liable under California law because the DEA had no authority to effect the physician's arrest and detention in Mexico. *Id.* at 699.

The Supreme Court reversed, holding that the FTCA's foreign country exception barred the claim. *See id.* at 712. The Court noted that some courts of appeals had allowed similar actions to proceed under what was known as the "headquarters doctrine," which provided that "the foreign country exception [would] not exempt the United States from suit for acts or omissions occurring here which have their operative effect in another country." *Id.* at 701 (internal quotation marks omitted). The Court, however, viewed this doctrine as inconsistent with the plain language of the foreign

country exception. *See id.* Specifically, the Court found good reason "to conclude that Congress understood a claim 'arising in a foreign country' to be a claim for injury or harm occurring in a foreign country." *Id.* at 704. When the FTCA was passed, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti:* courts generally applied the law of the place where the injury occurred." *Id.* at 705. Thus, for plaintiffs injured in a foreign country, "the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor's liability." *Id.* at 706. This was the exact result "Congress intended to avoid by the foreign country exception." *Id.* at 707. The headquarters doctrine, then, was inappropriate because its application would "result in a substantial number of cases applying the very foreign law the foreign country exception was meant to avoid." *Id.* at 710. As a result, the Court rejected the headquarters doctrine and held "that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.* at 712.

Here, it is undisputed that Hernandez was standing in Mexico when he was shot. Nevertheless, the Appellants argue that Hernandez's injury occurred in the United States. Specifically, the Appellants assert an assault claim and contend that "once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke assault." But at all relevant times, Hernandez was standing in Mexico. Any claim will therefore necessarily be based on an injury suffered in a foreign

country. Accordingly, these tort claims are barred by the foreign country exception under *Sosa*.[6]

B. Alien Tort Statute

The final claim against the United States was brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court has held that the ATS is a jurisdictional statute only and does not create a new cause of action for torts in violation of international law. *Sosa,* 542 U.S. at 713–14. The fact that the ATS does not establish a cause of action does not mean that the ATS has no effect. *See id.* at 714 (rejecting the argument that "the ATS was stillborn . . . without a further statute expressly authorizing adoption of causes of action"). Instead, courts are authorized under the ATS to "recognize private causes of action for certain torts in violation of the law of nations." *Id.* at 724. This authorization reflects the Supreme Court's belief that the First Congress enacted the ATS "on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* Courts must exercise

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[6] The Appellants also asserted in their eighth and ninth claims that the United States was liable under the U.S. Constitution. The district court correctly determined that the United States has not waived sovereign immunity for constitutional torts, and the Appellants have not addressed the constitutional claims against the United States on appeal.

restraint, however, in considering these causes of action and "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" the Court recognized. *Id.* at 725.

The Appellants believe they have satisfied this standard by alleging that the United States violated the international prohibition against "extrajudicial killings." Even assuming that to be the case, the Appellants still must show that the United States has waived sovereign immunity for this claim. Other courts to address this issue have held that the ATS does not imply any waiver of sovereign immunity. *See, e.g., Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) ("[T]he Alien Tort Statute has been interpreted as a jurisdiction statute only—it has not been held to imply any waiver of sovereign immunity." (alteration in original)); *Goldstar (Pan.) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (same); *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) ("The Alien Tort Statute itself is not a waiver of sovereign immunity."). These courts have held that "any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *Tobar*, 639 F.3d at 1196 (quoting *Goldstar*, 967 F.2d at 968.).

We agree with this interpretation of the ATS. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Freeman v. United States*, 556 F.3d 326, 334–35 (5th Cir. 2009) (quoting *Block v. N.D. ex rel. Bd.*

of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983)) (internal quotation marks omitted). Because sovereign immunity is jurisdictional in nature, "Congress's 'waiver of [it] must be unequivocally expressed in statutory text and will not be implied.'" *Id.* at 335 (alteration in original) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Nothing in the ATS indicates that Congress intended to waive the United States' sovereign immunity. The ATS simply provides, in full, as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This language contains no explicit waiver of sovereign immunity and does nothing more than establish that district courts have original jurisdiction to consider a discrete set of cases.

The Appellants must establish, independent of the ATS, that the United States has consented to suit. They have failed to do so. Though they reference several treaties to support their claim, the Appellants have not referenced any language indicating that the United States has consented to suit under any of these treaties. Accordingly, the district court properly dismissed the claim brought under the ATS.

III. *BIVENS* ACTION AGAINST AGENT MESA

We turn now to the *Bivens* action against Agent Mesa, which requires an analysis of Agent Mesa's entitlement to qualified immunity. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999). The doctrine of qualified immunity, which operates the same under both § 1983 and *Bivens,* "protects public officials from liability for civil damages insofar as their conduct does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Brown v. Strain*, 663 F.3d 245, 249 (5th Cir. 2011) (internal quotation marks omitted). In assessing qualified immunity, we determine "(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*, 716 F.3d 369, 375 (5th Cir. 2013) (quoting *Brown*, 663 F.3d at 249) (internal quotation marks omitted). "A right is clearly established when 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (quoting *Jones v. Lowndes Cnty.*, 678 F.3d 344, 351 (5th Cir. 2012)).

Agent Mesa attacks the Appellants' claims on both prongs of the qualified immunity analysis. His first argument, that there was no constitutional violation, is relatively straightforward: (1) any constitutional injury would have occurred in Mexico; (2) the Constitution does not guarantee rights to foreign nationals injured outside the sovereign territory of the United States; (3) therefore the Appellants cannot state a constitutional violation. This uncomplicated presentation of the Constitution's extraterritorial application, however, no longer represents the Supreme Court's view.

In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court provided its clearest articulation of the standards governing the application of constitutional principles abroad. The Court addressed whether aliens designated as enemy combatants and detained at

Guantanamo Bay had the constitutional privilege of habeas corpus. 553 U.S. at 732.

In addressing this question, the Court first discussed its sparse precedent on the Constitution's geographic scope and found it to undermine "the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Id.* at 755. For example, the *Insular Cases*[7] addressed "whether the Constitution, by its own force, applies in any territory that is not a State." *Id.* at 756. In those cases, the Court held that the Constitution has independent force in newly acquired territories but recognized the inherent difficulties of imposing a new legal system onto these societies. *Id.* at 757. "These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Id.* This doctrine illustrated that "the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution,'" while still recognizing the "inherent practical difficulties of enforcing all constitutional provisions 'always and

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[7] "The term *Insular Cases* refers to the series of cases from *De Lima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico,* 258 U.S. 298 (1922), that established the framework for selective application of the Constitution to 'unincorporated' overseas territories." Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. Cal. L.Rev. 259, 263 n. 22 (2009).

everywhere.'" *Id.* at 758–59 (quoting *Balzac*, 258 U.S. at 312).

Similar practical considerations were apparent in *Reid v. Covert*, 354 U.S. 1 (1957). *Id.* at 759. There, the *Boumediene* Court explained, six Justices held that civilian spouses of U.S. servicemen stationed abroad could not be tried before military courts for murder and were instead entitled to a trial by jury. *See id.* at 760–61. The key disagreement between the plurality of four and the two concurring justices was over the continued precedential value of *In re Ross*, 140 U.S. 453 (1891), in which the Court had held "that under some circumstances Americans abroad have no right to indictment and trial by jury." *Id.* at 760. The four-Justice plurality sought to overrule *Ross* as "insufficiently protective of the rights of American citizens," whereas the two concurring Justices sought simply to distinguish it based on "practical considerations that made jury trial a more feasible option for [the civilian spouses] than it was for the petitioner in *Ross*." *Id.* at 761. The *Boumediene* Court noted that if practical considerations were irrelevant and citizenship had been the only relevant factor in *Reid*, "it would have been necessary for the Court to overturn *Ross,*" something the two concurring justices were unwilling to do. *Id.* at 761–62.

Practical considerations "weighed heavily as well in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war." *Id.* at 762. There, the prisoners were detained in Germany, and the *Eisentrager* Court "stressed the difficulties of ordering

the Government to produce the prisoners in a habeas corpus proceeding," explaining that it "'would require allocation of shipping space, guarding personnel, billeting and rations' and would damage the prestige of military commanders at a sensitive time." *Id.* at 762 (quoting *Eisentrager*, 339 U.S. at 779). Though the prisoners were denied access to the writ, the *Boumediene* Court did not view the decision as having adopted "a formalistic, sovereignty-based test for determining the reach of the Suspension Clause." *Id.* Instead, the Court noted that practical considerations were integral to *Eisentrager* and stated that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus." *Id.* at 764.

The Court ultimately determined that all of these cases shared a common thread: "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. Based on these considerations, the Court concluded that at least three factors were 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.

Id. at 766. After analyzing these factors and finding "few practical barriers to the running of the writ," the

Court held that the Suspension Clause "has full effect at Guantanamo Bay." *Id.* at 770–71.

Thus, *Boumediene* precludes the categorical test Agent Mesa suggests. Whatever else we may derive from the decision, one principle is clear: *de jure* sovereignty is not "the only relevant consideration in determining the geographic reach of the Constitution." *Id.* at 764. Instead, *Boumediene* and the cases cited therein indicate that our inquiry involves the selective application of constitutional limitations abroad, requiring us to balance the potential of such application against countervailing government interests.[8] In other words, our inquiry is not whether a constitutional principle can be applied abroad; it is whether it should. *See Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) ("But, for me, the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternative which Congress had before it. The question is one of judgment, not of compulsion." (emphasis added)).

The district court concluded that *Boumediene* had no bearing on this case because it did not specifically address "the Fourth Amendment right against unreasonable searches and seizures." We disagree. Though *Boumediene's* underlying facts concerned the Suspension Clause, its reasoning was not so narrow. The Court surveyed extraterritoriality cases involving

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[8] *See* Gerald L. Neuman, *Strangers to the Constitution* 8 (1996) (associating this approach with the concurring Justices in *Reid v. Covert* and suggesting that it "boil[s] down to a single right: the right to 'global due process'").

myriad constitutional rights and spoke to the extraterritorial application of the Constitution, not simply the Suspension Clause. *See Boumediene*, 553 U.S. at 764 ("Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of *the Constitution* or of habeas corpus." (emphasis added)); *id.* ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism."). Our extraterritoriality analysis must therefore track *Boumediene's*.

Specifically, three "objective factors and practical concerns" are relevant to our extraterritoriality determination: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. *Cf. id.* at 766–71. The relevant practical obstacles include the consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government. *See id.*; *Verdugo–Urquidez*, 494 U.S. at 273–74; *id.* at 278 (Kennedy, J., concurring). These factors are not exhaustive, as the relevant considerations may change with the facts of an individual case, but they do provide a baseline for addressing questions of extraterritoriality.

The above factors do not obviate our reliance on the text of the Constitution itself. Not all constitutional provisions will have equal extraterritorial application, if any. Some contain geographical references, but others do not. *Compare* U.S. Const. amend. XIII

("Neither slavery nor involuntary servitude [ ] . . . shall exist within the United States, or any place subject to their jurisdiction."), *with* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."). In *Boumediene,* the "importance of the habeas right itself was an unlisted factor that . . . argued in favor of broader reach." Neuman, *The Extraterritorial Constitution, supra,* at 287. Accordingly, as with any case of constitutional interpretation, extraterritoriality determinations require an analysis of the operation, text, and history of the specific constitutional provision involved.

With these principles in mind, we analyze whether the Constitution may be held to apply to the Appellants' claims, beginning with those asserted under the Fourth Amendment.

IV. FOURTH AMENDMENT

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Supreme Court, in a 5–4 decision, addressed the question of the Fourth Amendment's extraterritorial reach. There, the DEA cooperated with Mexican police officers to apprehend Verdugo–Urquidez, a citizen and resident of Mexico. *Verdugo–Urquidez*, 494 U.S. at 262. Mexican officials then authorized the DEA to search Verdugo–Urquidez's Mexican residences, and DEA agents seized a tally sheet believed to reflect the quantities of marijuana Verdugo–Urquidez had smuggled into the United States. *Id.* at 262–63. The district court granted

Verdugo–Urquidez's motion to suppress this evidence, and the Ninth Circuit affirmed, concluding that the Fourth Amendment applied extraterritorially to the searches and that the DEA agents had failed to justify their warrantless search of the premises. *Id.* at 263.

On appeal, the Supreme Court began its review of the Ninth Circuit's decision by focusing on the text of the Fourth Amendment. The Court noted that the Fourth Amendment "extends its reach only to 'the people,'" which "seems to have been a term of art employed in select parts of the Constitution," including the Preamble, Article I, and the First, Second, Fourth, Ninth, and Tenth Amendments. *Id.* at 265. Although not conclusive, the Court found this "textual exegesis" to suggest that "the people" in the Constitution "refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* The Court then examined the history of the drafting of the Fourth Amendment and concluded that "[t]he available historical data shows . . . that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory." *Id.* at 266.

The Court next determined that the Ninth Circuit's global view was contrary to the Court's precedent, citing the same cases on which it would later rely in *Boumediene*. *See id.* at 268–70. The Court distinguished the cases Verdugo–Urquidez relied on, noting that those cases "establish[ed] only that aliens

receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271. Verdugo–Urquidez, by contrast, had no "significant voluntary connection" to the United States. *Id.*

Finally, the Court addressed the practical problems with the Ninth Circuit's ruling. The Court noted that the Ninth Circuit's global rule "would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in 'searches or seizures.'" *Id.* at 273. Because the United States "frequently employs Armed Forces outside of this country," the application of the Fourth Amendment "to those circumstances could significantly disrupt the ability of the political branches to respond to the foreign situation involving our national interest." *Id.* at 273–74. Additionally, the 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.

Based on all of the above considerations, the Court rejected the application of the Fourth Amendment to Verdugo–Urquidez's case:

> We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under

> these circumstances, the Fourth Amendment has no application.

Id. at 274–75.

Justice Kennedy, one of the five Justices to join the opinion, agreed that no Fourth Amendment violation had occurred but wrote separately to explain his views, even though he did not believe them to "depart in fundamental respects from the opinion of the Court." *Id.* at 275 (Kennedy, J., concurring). Specifically, Justice Kennedy believed that "[t]he force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms." *Id.* at 276. As a result, he could not "place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections." *Id.* Instead, Justice Kennedy concluded that the "restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend[ ] . . . on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.'" *Id.*

For Justice Kennedy, the lesson from the Court's prior cases was "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Id.* at 277 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). "In other words, . . . there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that

would make adherence to a specific guarantee altogether impracticable and anomalous." *Id.* at 277–78 (citation omitted). Based on this reasoning, Justice Kennedy agreed with the Court's outcome because "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous." *Id.* at 278. He noted that the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.* Thus, "[f]or this reason, in addition to the other persuasive justifications stated by the Court," Justice Kennedy agreed that no violation of the Fourth Amendment had occurred. *Id.*

The district court here relied on *Verdugo–Urquidez* to hold that Hernandez could not invoke the Fourth Amendment's protection because he was an alien without sufficient, voluntary connections to the United States. The Appellants rely on Justice Kennedy's concurrence to challenge this ruling. Because Justice Kennedy did not "place any weight on the reference to 'the people' in the Fourth Amendment," the Appellants argue that only a plurality of the Court agreed that aliens must have sufficient connections to the United States to be able to invoke the Fourth Amendment's protection. Rather than apply this nonbinding "sufficient connections" test, the Appellants urge us to rely on the "practical and functional" test articulated in Justice Kennedy's concurrence, which they believe was confirmed as the appropriate test in *Boumediene*.

Despite the Appellants' arguments to the contrary, we cannot ignore a decision from the Supreme Court unless directed to do so by the Court itself. *See Ballew v. Cont'l Airlines*, 668 F.3d 777, 782 (5th Cir. 2012). While the *Boumediene* Court appears to repudiate the formalistic reasoning of *Verdugo–Urquidez's* sufficient connections test, courts have continued to rely on the sufficient connections test and its related interpretation of the Fourth Amendment text. Other circuits have relied on *Verdugo–Urquidez's* interpretation to limit the Fourth Amendment's extraterritorial effect. *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (applying the sufficient connections test in conjunction with *Boumediene's* functional approach); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) ("Aliens do enjoy certain constitutional rights, but not the protection of the Fourth Amendment if they have 'no previous significant voluntary connection with the United States. . . .'" (alteration in original) (quoting *Verdugo–Urquidez*, 494 U.S. at 271)). In addition, just two weeks after the Court issued *Boumediene,* which Appellants argue essentially overrules *Verdugo–Urquidez*, the Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), and favorably cited *Verdugo–Urquidez's* definition of "the people." The *Heller* Court explained that "the people" referred "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 580 (citing *Verdugo–Urquidez*, 494 U.S. at 265). Indeed, our own court has relied on *Verdugo–Urquidez's* definition of "the people" in the context of the Second Amendment. *See United States v. Portillo–Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

These examples undercut the Appellants' attempt to discredit *Verdugo–Urquidez*.

We also reject the Appellants' argument that Chief Justice Rehnquist's opinion in *Verdugo–Urquidez* represented only a plurality view on the sufficient connections requirement. Justice Kennedy expressed no disagreement with the majority's justifications, instead describing them as "persuasive," 494 U.S. at 278 (Kennedy, J., concurring), and finding that his views did not "depart in fundamental respects" from those of the majority, *id.* at 275. This is unsurprising considering that Justice Kennedy joined the opinion of the Court. *Id.* We reject the Appellants' invitation to parse those writings in search of conflicts to nullify the Court's holding.

In sum, we are bound to apply the sufficient connections requirement of *Verdugo–Urquidez,* and we must do so in light of *Boumediene's* general functional approach. Reconciling these approaches is not an impossible task, though, because the *Verdugo–Urquidez* Court relied on more than just the text of the Fourth Amendment to reach its holding. *See Verdugo–Urquidez*, 494 U.S. at 265 (recognizing that its "textual exegesis [was] by no means conclusive"). It relied on the history of the Amendment, *id.* at 266, prior precedent, *id.* at 268–73, and practical consequences, *id.* at 273–75—all factors that we must consider after *Boumediene.*

Under this approach, we conclude that Hernandez lacked sufficient voluntary connections with the United States to invoke the Fourth Amendment. Though Hernandez's lack of territorial presence does not place a categorical bar on the Appellants' Fourth Amendment

claims, the Appellants nevertheless do not show that Hernandez formed sufficient connections with the United States. *See Boumediene*, 553 U.S. at 762–764 (rejecting formalistic, sovereignty-based test for determining extraterritorial reach); *see also Ibrahim*, 669 F.3d at 997 (noting that activities abroad can contribute to forming sufficient connections to United States). Hernandez was a citizen of Mexico, not the United States. *See Boumediene*, 553 U.S. at 766 (weighing citizenship and status of detainee in determining the reach of the Suspension Clause); *Verdugo–Urquidez*, 494 U.S. at 273 (citing cases that accord different protections to aliens than to citizens). This fact alone is not dispositive, *see Boumediene*, 553 U.S. at 766; based on the facts alleged, Hernandez lacked a sustained connection with the United States sufficient to invoke protection. Appellants only allege that Hernandez played a game that involved touching the border fence and "had no interest in entering the United States." *See Boumediene*, 553 U.S. at 766 (noting that detainees at Guantanamo Bay have been held "for the duration of a conflict that . . . is already among the longest wars in American history"); *Verdugo–Urquidez*, 494 U.S. at 272 (noting that Verdugo–Urquidez was in the United States "for only a matter of days"); *see also Ibrahim*, 669 F.3d at 997 (holding that Ibrahim established a sufficient connection as a result of her four years studying in the United States). Appellants do not suggest that Hernandez "accepted some societal obligations," including even the obligation to comply with our immigration laws, that might have entitled him to constitutional protection. *See Verdugo–Urquidez*, 494 U.S. at 273; *Martinez–Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (holding that alien's "regular

and lawful entry of the United States pursuant to a valid border-crossing card and . . . acquiescence in the U.S. system of immigration constitute[d] voluntary acceptance of societal obligations, rising to the level of 'substantial connections'"). Therefore, Hernandez's voluntary connections with the United States were insufficient to invoke the Fourth Amendment.

Finally, our reluctance to extend the Fourth Amendment on these facts reflects a number of practical considerations. "The 2,000–mile–long border between Mexico and the United States is the busiest in the world, with over 350 million crossings per year." Br. of Gov't of the United Mexican States as Amicus Curiae in Support of Appellants, 2. We have long recognized this area is unique for Fourth Amendment purposes. For instance, we allow broader search powers at our international borders and their functional equivalents because "national self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Almeida–Sanchez v. United States*, 413 U.S. 266, 272 (1973) (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)) (internal quotation marks omitted). In the past decade, "the number of Border Patrol agents has doubled from approximately 10,000 to more than 21,000 agents," with most of these agents working along the Southwest border. *Border Security, Economic Opportunity, and Immigration Modernization Act: Hearing on S. 744 Before the S. Comm. on the Judiciary*, 113th Cong. 6 (2013). The Department of Homeland Security now uses advanced technologies to monitor our borders, "including mobile surveillance units, thermal imaging systems, and large- and small-

scale non-intrusive inspection equipment," as well as "124 aircraft and six Unmanned Aircraft Systems operating along the Southwest border." *Id.* at 6–7. These sophisticated systems of surveillance might carry with them a host of implications for the Fourth Amendment, *cf. Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that when the government "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant"), and they do not look strictly inward. We cannot know all of the circumstances in which these tools will be used to effect a search or seizure outside our borders. But we do know that, as in *Verdugo–Urquidez*, "[a]pplication of the Fourth Amendment to [these] circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" and could also plunge Border Patrol agents "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." 494 U.S. at 273–74.

Thus, under the Supreme Court's directives and considering the national interests at stake along our borders, we hold that, under the circumstances presented here—an alleged seizure occurring outside our border and involving a foreign national—the Fourth Amendment does not apply.

V. FIFTH AMENDMENT

We turn now to the Appellants' Fifth Amendment claim. The Due Process Clause of the Fifth Amendment provides, "No person shall be . . . deprived of life,

liberty, or property, without due process of law." U.S. Const. amend. V. This constitutional protection contains both a substantive and a procedural component. The substantive component "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty,'" whereas the procedural component ensures that any government action surviving substantive due process scrutiny is "implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted).

The Appellants' claim implicates the substantive component of the Fifth Amendment's Due Process Clause. Specifically, the Appellants allege that Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat. This type of claim is unusual because excessive-force claims are typically analyzed under the Fourth Amendment. Indeed, when the Fourth Amendment applies, excessive-force claims *must* be analyzed under that amendment. *Graham v. Connor*, 490 U.S. at 395. But when a claim is not covered by the Fourth Amendment, we have recognized that an excessive-force claim may be asserted as a violation of due process. *See, e.g.*, *Petta v. Rivera*, 143 F.3d 895, 900 (5th Cir. 1998) (concluding that the plaintiffs had "asserted a valid claim under § 1983 for a constitutional violation for excessive force under the Fourteenth Amendment"). The question now is whether this constitutional protection can be applied extraterritorially.

A. Extraterritorial Application

The Appellants' Fifth Amendment claim is not constrained by prior precedent on extraterritoriality, unlike their claim under the Fourth Amendment. First, the Fifth Amendment's text does not limit the category of individuals entitled to protection. *See, e.g.*, *Lynch v. Cannatella*, 810 F.2d 1363, 1374–75 (5th Cir. 1987). Whereas the Fourth Amendment applies only to "the people," a term of art, the Fifth Amendment applies by its express terms to "any person." *Id.* Therefore, our court has concluded that "[e]xcludable aliens are not non-persons." *Id.* This significantly different language leads us to the conclusion that *Verdugo–Urquidez's* sufficient connections test, which provides a gloss for the term "the people," does not apply in interpreting the extraterritorial application of the Fifth Amendment. Additionally, the Supreme Court has recognized some Fifth Amendment protections apply extraterritorially. *See, e.g.*, *Reid*, 354 U.S. at 18–19 (plurality opinion); *id.* at 49 (Frankfurter, J., concurring) (concluding that, at least as to capital cases overseas, "the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments"). Thus, whether the Fifth Amendment applies here depends on the objective factors and practical concerns we recognized above. *See Boumediene*, 553 U.S. at 766.

The first relevant factor is the citizenship and status of the claimant. Inside U.S. territory, a claimant's citizenship will ordinarily have no impact on whether the claimant is entitled to constitutional

protection. But "[i]n cases involving the extraterritorial application of the Constitution, [the Court has] taken care to state whether the person claiming its protection is a citizen or an alien." *Verdugo–Urquidez,* 494 U.S. at 275 (Kennedy, J., concurring) (citations omitted). "The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id. Boumediene* teaches that a claimant's citizenship is not dispositive, as it provided an example of a limited "class of noncitizens" entitled to constitutional protection, i.e., those detained at Guantanamo Bay. But the focus on citizenship is still important given the significance of applying constitutional protections abroad at all, let alone to noncitizens. Here, it is undisputed that Hernandez was a Mexican citizen with no connection to the United States. Yet, unlike the "enemy aliens" detained during the Allied Powers' post-World War II occupation in *Eisentrager,* 339 U.S. at 765–66, or the "enemy combatants" held pursuant to the Authorization for Use of Military Force in *Boumediene,* 553 U.S. at 734, 767, Hernandez was a civilian killed outside an occupied zone or theater of war. Thus, while Hernandez's citizenship weighs against extraterritorial application, his status does not.

The second factor requires us to look at the "nature of the sites" where the alleged violation occurred. In *Boumediene,* the Court examined the level of control the United States exerted over the site where the individual's apprehension and detention occurred. The Court concluded that, although Guantanamo Bay was

"technically outside the sovereign territory of the United States," the United States "has maintained complete and uninterrupted control of the bay for over 100 years." *Boumediene,* 553 U.S. at 764, 768. The court looked to the "political history" of Guantanamo and took into consideration the lease agreement permitting the United States to maintain control over Guantanamo. *Id.* at 764–65. By contrast, the Court reasoned that the United States control over Landsberg Prison in occupied Germany in the *Eisentrager* case was transient and that the United States was accountable to its "Allies for all activities occurring there." *Id.* at 768.

We therefore reject Agent Mesa's argument that *Eisentrager*—which held that enemy aliens beyond the territorial jurisdiction of any court of the United States could not invoke the protections of the Fifth Amendment—compels a result in his favor. As mentioned above, *Boumediene* rejected such a formalistic reading of *Eisentrager*. Although *de jure* sovereignty "is a factor that bears upon which constitutional guarantees apply," nothing "in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution." *Boumediene,* 553 U.S. at 764.

Based on the nature of the border area where the shooting occurred, we cannot say that the United States exercises no control. Unlike both Guantanamo and Landsberg Prison, this is not a case requiring constitutional application in a far-away location. Agent Mesa was standing inside the United States, an area very much within U.S. control, when he committed the

act. Border Patrol agents exercise their official duties within feet of where the alleged constitutional violation occurred. In fact, agents act on or occasionally even across the border they protect. Amici for Appellants inform us that Border Patrol agents have reportedly fatally shot and killed individuals across the border in several incidents. *See* Br. of Amici Curiae Border Network for Human Rights, et al., in Support of Appellants, 8–12.[9] Therefore, in a very blunt sense, Border Patrol agents exercise hard power across the border at least as far as their U.S.-based use of force injures individuals.

Boumediene further instructs us to look at the political history of a location to understand how the United States might exercise control. Here, the control exercised in cross-border shootings reflects broader U.S. customs and border protection policies that

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[9] *See also More Accounts Emerge Following Deadly Border Shooting*, Nogales International, Jan. 6, 2011, http://perma.cc/Q335-QL34 (reporting that a Border Patrol agent shot and killed Mexican national Ramses Barron Torres, 17, who was standing in Nogales, Mexico); Office of Public Affairs, Dep't of Justice, *Federal Officials Close the Investigation into the Death of Ramses Barron–Torres,* Aug. 9, 2013, http://perma.cc/6Z3U-4MWJ (concluding that Barron–Torres was "on the Mexico side of the border fence when he was shot"); Office of Public Affairs, Dep't of Justice, *Federal Officials Close the Investigation into the Death of Carlos LaMadrid,* Aug. 9, 2013, http://perma.cc/H64L-AYD4 (declining to prosecute Border Patrol agent who fired at individual across border shot and killed U.S. citizen Carlos Madrid, 19, who was in the line of fire); R. Stickney, *ACLU Calls for Probe in Border Shooting,* NBC San Diego, June 22, 2011, http://perma.cc/TMD5-EMAQ (reporting that Border Patrol agent shot and killed Mexican national Jose Alfredo Yanez Reyes on Mexican side of border fence near San Diego, California).

expand U.S. control *beyond* the nation's territorial borders. The Chief of the U.S. Border Patrol explains that U.S. border security policy "extends [the nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many." *Securing Our Borders—Operational Control and the Path Forward: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. 8 (2011) (prepared statement of Michael J. Fisher, Chief of U.S. Border Patrol). For example, Bureau of Customs and Border Protection officials are authorized to conduct "preinspection" examination and inspection of passengers for final determination of admissibility and crew "at the port or place in foreign territory." 8 C.F.R. § 235.5(b); *see also* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 Stan. J. C.R. & C.L. 165, 174–77 (2007). Moreover, this recent articulation of extraterritorial policy appears to be only the latest manifestation in a long history of United States involvement beyond the U.S.-Mexico border. *See* Eva Bitran, Note, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 Harv. C.R.-C.L. L.Rev. 229, 244–47 (2014) (collecting historical examples showing that United States "exerts and has exerted powerful influence over northern Mexico").

The Border Patrol's exercise of control through its use of force at and across the border more closely resembles the control the United States exercised in Guantanamo than it does the control over Landsberg Prison in *Eisentrager*. First, U.S. power at the border is not transient. *Boumediene* distinguished *Eisentrager* because the control the United States exercised in

Landsberg Prison in *Eisentrager* was transient. But here, Border Patrol agents are not representatives of a temporary occupational force. They are influential repeat players in a "constant" border relationship. *See Boumediene*, 553 U.S. at 768–69. Second, U.S. officers at the border are not "answerable to" U.S. border partners in the way Landsberg jailers were to Allied authorities. *Id.* at 768. In fact, the Mexican government requests that U.S. government actors are held accountable in U.S. courts for actions on Mexican territory. Br. of Gov't of the United Mexican States as Amici Curiae in Support of Appellants, 16. Therefore, this situation is different from the Allied occupation of Germany, where authorities shared accountability.

In sum, even though the United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a permanent border without any shared accountability weigh in favor of recognizing some constitutional reach.

Finally, we address the practical obstacles and other functional considerations extraterritorial application would present. We recognized some of the practical concerns already: the national interest in self-protection; the constant need for surveillance, often with advanced technologies; and concerns over varying degrees of reasonableness depending on an agent's location at any given time. While these practical concerns counsel against the Fourth Amendment's application, they do not carry the same weight in the Fifth Amendment context because different standards govern the respective claims.

The Fourth Amendment protects against unreasonable searches and seizures, while, in this context, the Fifth Amendment protects against arbitrary conduct that shocks the conscience. The level of egregiousness required to satisfy the latter standard militates against protecting conduct that reaches it. We abstained from placing Fourth Amendment limits on actions across the border in part to allow officials to preserve our national interest in self-protection. A reasonableness limitation would have injected uncertainty into the government's decision-making process, perhaps resulting in adverse consequences for U.S. actions abroad. That interest, however, plays no role in determining whether an alien is entitled to protection against arbitrary, conscience-shocking conduct across the border. This principle protecting individuals from arbitrary conduct is consistent with those our government has recognized internationally,[10] and applying it here would hardly cause friction with the host government. The Mexican government submitted a brief seeking to "allay any concerns that . . . a ruling in the plaintiffs' favor would interfere with Mexico's sovereignty or otherwise create practical difficulties." Br. of Gov't of the United Mexican States as Amici Curiae in Support of Appellants 3.

Because Agent Mesa was inside our territory when he allegedly acted unconstitutionally, the United States, like in *Boumediene,* "is, for all practical purposes, answerable to no other sovereign for its acts."

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[10] *See, e.g.*, International Covenant on Civil and Political Rights art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

553 U.S. at 770. If the Constitution does not apply here, the only check on unlawful conduct would be that which the Executive Branch provides. *Cf. Boumediene*, 553 U.S. at 765 (noting a concern that "the political branches have the power to switch the Constitution on or off at will" and would represent "a striking anomaly in our tripartite system of government"). Indeed, a strict, territorial approach would allow agents to move in and out of constitutional strictures, creating zones of lawlessness. That approach would establish a perverse rule that would treat differently two individuals subject to the same conduct merely because one managed to cross into our territory.

Significantly, recognizing extraterritorial application of the Fifth Amendment for conscience-shocking conduct would not force agents to change their conduct to conform to a newly articulated standard. We have already recognized that aliens inside our borders, even those found to be excludable, are entitled "to be free of gross physical abuse at the hands of state or federal officials." *Lynch*, 810 F.2d at 1374; *see also Martinez–Aguero*, 459 F.3d at 626 ("*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez–Aguero alleges."). To extend that right to those injured across the border by U.S. officers located in the United States would have the unremarkable effect of informing federal officials that they are also prohibited from arbitrarily inflicting harm in this new, but similar, context.

We will enforce the applicable constitutional principle, unless textual, precedential, or practical barriers bar judicial redress of constitutional violations—that is, when enforcing it is not "impracticable and anomalous." *Boumediene,* 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Here it is not. We therefore hold that a noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment.

B. *Bivens* Action

Next, we must address whether Appellants have a cause of action against Agent Mesa for the violations they allege. "Under *Bivens* a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights." *Martinez–Aguero*, 459 F.3d at 622 n. 1. Yet *Bivens* is "not an automatic entitlement." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). The Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

1. New Context

As a preliminary matter, then, we must decide whether this case presents a "new context" in which *Bivens* might apply. The district court concluded that this case did not present an extension of *Bivens,* because the Supreme Court had previously recognized a *Bivens* action for a claim under the Fifth Amendment. *See Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (extending *Bivens* action for employee's

Fifth Amendment Due Process Clause unconstitutional gender discrimination action against congressional employer). But the district court's conclusion overlooks the context-specific approach the Supreme Court has adopted in deciding whether to extend a *Bivens* action. *See Malesko*, 534 U.S. at 68. After all, the Supreme Court has since rejected implying a *Bivens* action in a different Fifth Amendment Due Process case. *See Wilkie*, 551 U.S. at 562. (declining to recognize a *Bivens* action under the Fifth Amendment for a landowner against federal land management agents accused of harassment). Instead of an amendment-by-amendment ratification of *Bivens* actions, we are bound to examine each new context—that is, each new "potentially recurring scenario that has similar legal and factual components." *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir.2009) (en banc). In defining that context, we describe a scenario neither too general, nor too specific. *Id.*

This case appears to present a new context, though the category of federal defendants is not new. In *Bivens* itself, the Supreme Court recognized a Fourth Amendment claim for unreasonable search and seizure against federal law enforcement agents. 403 U.S. 388, 397. In addition, our Court has permitted a non-citizen to bring a *Bivens* action against Border Patrol agents for false arrest and excessive use of force under the Fourth Amendment for events occurring at the border. *Martinez–Aguero*, 459 F.3d at 625. Finally, our Court implicitly recognized noncitizens' rights against federal officials for Fifth Amendment gross physical abuse claims, but did not explicitly discuss whether the extension of *Bivens* in that case was appropriate. *Lynch*, 810 F.2d 1363, 1374. Because *Lynch* "gave the

matter only cursory attention," we still need to conduct "a more complete analysis of the question." *See Engel v. Buchan*, 710 F.3d 698, 703 (7th Cir. 2013) (conducting *Bivens* analysis even though a prior court had implicitly extended *Bivens* in the same context). In sum, faced with a new situation, we must analyze whether an individual should have a *Bivens* remedy arising under the Fifth Amendment against a federal law enforcement agent for his conscience-shocking use of excessive force across our nation's borders.

2. Extending *Bivens* Action

Having determined that this case raises a new context, we must decide whether to extend a *Bivens* remedy. We first ask "whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Minneci v. Pollard,* 132 S. Ct. 617, 621 (2012) (quoting *Wilkie*, 551 U.S. at 550) (alterations and internal quotation marks omitted). Then, we ask whether, in our own judgment, "special factors counsel[ ] hesitation in the absence of affirmative action by Congress." *Bivens,* 403 U.S. at 396; *see also Minneci*, 132 S. Ct. at 621.

a. Alternative Remedies

There is no question that Appellants lack any alternative remedy for their Fifth Amendment right. An alternative, existing process merely has to "provide roughly similar incentives for potential defendants to comply with [the constitutional requirements] while also providing roughly similar compensation to victims of violations." *Engel*, 710 F.3d at 705 (alteration in

original) (quoting *Minneci*, 132 S. Ct. at 625). According to the Mexican government, the Appellants cannot sue Agent Mesa in Mexican courts, because, as long as "Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts." Br. of Gov't of the United Mexican States as Amicus Curiae for Appellants 16. The Appellants may not sue Agent Mesa under state law either, because plaintiffs "ordinarily *cannot* bring state-law tort actions against employees of the Federal Government." *Minneci,* 132 S. Ct. at 623 (citing 28 U.S.C. §§ 2671, 2679(b)(1) ("the Westfall Act") (substituting the United States as defendant in tort action against federal employee)); *Osborn v. Haley*, 549 U.S. 225, 238, 241 (2007). Besides, as discussed above, an individual in Hernandez's position will never be able to recover under the FTCA because of the application of the foreign-country exception. *See supra* Part II.A.[11]

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[11] The Westfall Act also shows that Congress intended to make a *Bivens* remedy available in most circumstances. The Westfall Act of 1988 expanded officer immunity by making an FTCA claim against the United States an exclusive remedy, *see* 28 U.S.C. § 2679(b)(1), but Congress also implicitly ratified the availability of an action for damages against federal officers for constitutional violations—that is, a *Bivens* action—even where FTCA claims are available, *see* 28 U.S.C. § 2679(b)(2)(A) (the exclusiveness of a remedy under the FTCA "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States."). Courts have recognized that this provision expresses Congress's intent to preserve *Bivens* actions. *See, e.g., Simpkins v. D.C. Gov't*, 108 F.3d 366, 371–72 (D.C. Cir. 1997) (noting that § 2679(b)(2)(A) provides an "exception for *Bivens* actions against government employees"); *Vance v. Rumsfeld*, 701 F.3d 193, 208 (7th Cir. 2012) (en banc) (Wood, J., concurring in the judgment), *cert. denied*, 133 S. Ct.

Appellants also do not appear to lack an alternative remedy as a result of Congress's deliberate choice. Congress has not chosen to skip over a remedy within an "elaborate, comprehensive scheme" that otherwise would cover Appellants' alleged constitutional violation. *See Bush v. Lucas*, 462 U.S. 367, 385 (1983); *see also Zuspann v. Brown*, 60 F.3d 1156, 1161 (5th Cir. 1995) (holding that Congress created a comprehensive review of veterans' benefits disputes and explicitly precluded judicial review of veterans' benefits disputes, so that Congress's failure to create a remedy against individual Veterans Affairs employees was "not an oversight"). In particular, the elaborate system of remedies and procedures under the immigration system are not relevant to this case.

In *Arar v. Ashcroft*, the Second Circuit suggested but did not decide that Congress's "substantial, comprehensive, and intricate remedial scheme in the context of immigration" might preclude a *Bivens* remedy for a noncitizen who alleged that federal officials illegally detained him, ordered his removal to Syria, and encouraged and facilitated his interrogation under torture. 585 F.3d at 572. In *Mirmehdi v. United States*, the Ninth Circuit held that "Congress's failure

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2796 (2013); *see also* James E. Pfander and David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132–38 (2009) (arguing that Congress "joined the Court as a partner in recognizing remedies in the nature of a *Bivens* action [based on] the Westfall Act's preservation of suits for violation of the Constitution and [on] the considerations that led to its adoption."). As a result, Congress has indicated an intent to preserve the availability of *Bivens* actions at least in those instances where an alternative remedial scheme does not preclude it.

to include monetary relief [under the Immigration and Nationality Act for constitutionally invalid detention] can hardly be said to be inadvertent" in light of the frequent attention Congress has given the statute. 689 F.3d 975, 982 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2336 (2013). But unlike those contexts—extraordinary rendition and wrongful detention pending removal proceedings, respectively—it is far from clear that Congress intended for the Immigration and Nationality Act to provide remedies (or purposefully omit them) for a situation like that in the case presented. Quite plainly, even though Agent Mesa is an immigration law enforcement officer, *see* 8 U.S.C. § 1357 (providing law enforcement powers of immigration officers); 8 C.F.R. § 287.5 (giving law enforcements power to border patrol agents), this is not an immigration case. After all, Agent Mesa's alleged conduct foreclosed any possibility that Hernandez would access the remedial system for removal that Congress designed. Even had Hernandez survived, he could not have been detained by a U.S. immigration official, because he was in Mexico. Congress has not made it clear through its regulation of immigration that it intends for persons injured by Border Patrol agents—be they citizens or not—to lack a damages remedy for unconstitutional uses of force.

Defendants Cordero and Manjarrez alternatively contend that federal law enforcement agencies provide some remedy by conducting criminal investigations of the incidents. They point to federal homicide statutes, 18 U.S.C. §§ 1111, 1112, and criminal civil rights statutes, *id.* § 242. Far from an adequate alternative, these procedures fail to redress the alleged harm to Appellants, and at most represent a mere "patchwork" of remedies insufficient to overcome *Bivens*. *See Wilkie*,

551 U.S. at 554. Thus, for those in the Hernandez family's shoes, it is a *Bivens* remedy or nothing. *See Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

b. Special Factors Counseling Hesitation

We proceed to step two of the *Bivens* framework, which requires us to exercise our judgment in determining whether "any special factors counsel hesitation." We see none.

Bivens itself provided little guidance on what qualifies as a special factor. *Bivens,* 403 U.S. at 396. Since then the Supreme Court and our sister circuits have identified a handful of "special factors." *See Arar*, 585 F.3d at 573 (describing "special factors" as "an embracing category, not easily defined"). For example, one class of special factors focuses on Congress's express or implied "concerns about judicial intrusion into the sensitive work of specific classes of federal defendants." *Engel*, 710 F.3d at 707. The Supreme Court has especially emphasized this rationale in military contexts. *See United States v. Stanley*, 483 U.S. 669, 683–84 (1987) (no *Bivens* action for injuries arising out of or in the course of activity incident to military service); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (holding that "necessarily unique structure of the military" is a special factor counseling against providing *Bivens* remedy). Other circuits have relied on that rationale to refuse to extend *Bivens* suits in a variety of cases arising from actions taken by our government in its War on Terror. *See, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012) (holding that constitutional separation of powers and lack of judicial competence counsel hesitation in implying *Bivens*

action for enemy combatants held in military detention); *accord Vance v. Rumsfeld*, 701 F.3d 193, 200 (7th Cir. 2012) (en banc); *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011). One circuit has even extended that reasoning to immigration-related cases. *Mirmehdi*, 689 F.3d at 982. Another species of special factor is the workability of the cause of action. *See Wilkie*, 551 U.S. at 555 (doctrinal workability of cause of action).

This case does not implicate any of these special factors. Agent Mesa did not act in a military setting; nor did his actions implicate national security. Given the similarity of this case to the original *Bivens* remedy and the relative workability of the doctrine, we find no reason to hesitate in extending *Bivens* to this new context. The only argument that might cause us to decline to extend a *Bivens* remedy is the Ninth Circuit's identification of "immigration issues" writ large as necessarily creating a special factor counseling hesitation. *Mirmehdi*, 689 F.3d at 982. Yet, as our discussion of alternative remedies indicates, however, we think this case does not present an "immigration" context. Moreover, even if we did treat this case as involving an "immigration issue," we would not follow *Mirmehdi's* analysis.

In a case brought by aliens challenging their illegal detention prior to removal proceedings, the Ninth Circuit concluded that claims pertaining to immigration "'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsels hesitation' in extending *Bivens*." *Id.* (quoting *Arar*, 585 F.3d at 574). First, we decline to follow *Mirmehdi*, because the opinion

unjustifiably extends the special factors identified in *Arar* well beyond that decision's specific national security "context of extraordinary rendition." *Arar*, 585 F.3d at 574. As the Second Circuit remarked with more than a dash of understatement, *Arar* "is not a typical immigration case." *Id.* at 570. In fact, the government's treatment of Arar was so anomalous that the court concluded it could not rely on the provisions of the governing immigration statute, the Immigration and Nationality Act, for any of its holding. *See id.* at 571, 573.

Second, even while we acknowledge Congress's significant interest in shaping matters of immigration policy, which "can affect trade, investment, tourism, and diplomatic relations for the entire Nation," *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012), that fact alone does not give us cause to hesitate, let alone halt, in granting a *Bivens* remedy. The Supreme Court has recently written to emphasize the strong national interest Congress has in protecting aliens from mistreatment.[12] *See id.* The Court noted that

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[12] We note that Sergio's alienage does not amount to a special factor counseling hesitation. Our circuit has previously recognized that an alien may be entitled to a damages remedy against federal officers. *See Martinez–Aguero*, 459 F.3d at 621–22 & n. 1 (recognizing a *Bivens* remedy for an alien); *see also Vance*, 701 F.3d at 203 (rejecting alienage as special factor). The reason for this position is clear: to treat alienage as a special factor for not providing a damages remedy would be to double count our reasons for not providing a substantive right: having settled that Appellants are entitled to bring a claim for substantive due process under the Fifth Amendment even though Hernandez was an alien, we see no additional reason to hesitate in granting a remedy for that right. *See Davis*, 442 U.S. at 246 ("[A]lthough a suit against

immigration policy concerns the "perceptions and expectations of aliens in this country who seek the full protection of its laws," acknowledged that the "mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad," and reaffirmed that "'[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'" *Id.* at 2498–99 (alteration in original) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).[13] This strong national commitment to aliens' rights not only militates in favor of a uniform, federal policy, as the Court concluded in *Arizona v. United States*; it also militates in favor of the availability of some federal remedy for mistreatment at the hands of those who enforce our immigration laws. Where those who allege mistreatment have a right but lack a remedy, as here,

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a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause."). The same goes for extraterritoriality. Having already concluded that the right applies extraterritorially, we think it is improper to treat the location of the injury as a factor counting against extension of the remedy.

[13] Although the Supreme Court was not called upon to decide whether these same interests also extend to aliens outside the United States who are under the control of U.S. officers within the United States, we think the principle would be no different. The same concern for the protection of the rights of aliens applies with equal force here.

the Supreme Court suggests that Congress would want some remedy to be available.

Third, the case before us involves questions of precisely *Bivens*-like domestic law enforcement and nothing more. *Mirmehdi* implies that cases in the immigration context necessarily involve more than the "mere 'disclosure of normal domestic law-enforcement priorities and techniques,'" 689 F.3d at 983 (quoting *Reno v. Am.–Arab Anti–Discrim. Comm.*, 525 U.S. 471, 490 (1999)). The *Mirmehdi* court asserts such cases "often involve 'the disclosure of foreign-policy objectives and . . . foreign-intelligence products.'" *Id.* (quoting *Reno*, 525 U.S. at 490). But nothing in this case bears out that assertion. To accept that conclusion would require us to abandon our prior case law, in which we have permitted *Bivens* actions to proceed against immigration officers. *See Martinez–Aguero*, 459 F.3d at 621–25; *Lynch*, 810 F.2d at 1374. We find no reason for giving immigration officers special solicitude now.

In fact, this case presents a scenario not unlike that in *Bivens.* Just as the Seventh Circuit explained in extending a *Bivens* remedy for alleged *Brady* violations under the Due Process Clause, providing a remedy for a claim of gross physical abuse by a federal law enforcement officer presents "no great problem of judicial interference with the work of law enforcement, certainly no greater than the Fourth Amendment claim in *Bivens.*" *See Engel*, 710 F.3d at 708; *cf. Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (arguing that the Supreme Court should cease to extend *Bivens* actions beyond the "precise circumstances that [*Bivens*] involved"). In *Bivens*, the plaintiff brought his lawsuit against federal agents for their warrantless search of

his apartment, but also for the unreasonable use of force in arresting him. *See* 403 U.S. 388, 389 ("[Bivens's]) complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause." Here, too, Appellants allege the use of unreasonable force by federal agents. The only difference is that—for the reasons stated above—the Appellants must avail themselves of the Fifth Amendment rather than the Fourth Amendment.

Moreover, "the legal standards for adjudicating the claim are well established and easily administrable." *Engel*, 710 F.3d at 708; *see Wilkie*, 551 U.S. at 555 ("defining a workable cause of action" may be a special factor). Relatedly, we foresee no "deluge" of potential claimants availing themselves of this particular *Bivens* action. *See Davis*, 442 U.S. at 248 (rejecting argument that implying *Bivens* action would cause a deluge of claims). The standards for extraterritorial application of the constitutional right and the substantive definition of that right are so stringent that the creation of a damages remedy will already limit the size of any potential class of claimants under this *Bivens* action.

Therefore, we extend a *Bivens* action in this specific context in which an individual located abroad asserts a right to be free from gross physical abuse under the Fifth Amendment against federal law enforcement agents located in the United States based on their

conscience-shocking, excessive use of force across our nation's borders.[14]

C. Qualified Immunity

Having concluded that the Fifth Amendment does apply in this particular extraterritorial context and that *Bivens* provides a remedy, we resume the familiar qualified immunity analysis, beginning with whether Appellants have alleged a constitutional right.

1. Constitutional right

We first address whether the Appellants have sufficiently alleged a Fifth Amendment violation. The district court determined that *Graham v. Connor* precluded the Appellants' Fifth Amendment claim because Agent Mesa's "apprehension by the use of deadly force" amounted to a seizure to be analyzed under the Fourth Amendment. As mentioned above, although it is true that *Graham* requires most excessive force claims to be pursued under the Fourth Amendment rather than under the more general substantive due process standard of the Fifth and Fourteenth Amendments, that rule is not absolute. *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments." *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997). Instead, "*Graham* simply requires that if a constitutional claim is covered by a specific

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[14] We do not rule on whether a *Bivens* action will be available beyond the scenario here. For example, we do not suggest that a *Bivens* action would be available where military personnel had allegedly violated the individual's right.

constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.*; *see also Petta*, 143 F.3d at 900 (explaining that *Graham* rejected the substantive due process standard "only in cases in which the alleged excessive use of force arguably violated a *specific* right protected under the Bill of Rights"). "Substantive due process analysis is therefore inappropriate in this case only if [the Appellants'] claim is 'covered by' the Fourth Amendment." *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

The inapplicability of the Fourth Amendment in this case establishes that the Appellants' claim is not "covered by" the Fourth Amendment. Thus, *Graham* does not preclude the Appellants from asserting their claim under the Fifth Amendment. Additionally, the facts alleged in the complaint, if proven, would be sufficient to establish a Fifth Amendment violation.

To state a valid claim for a violation of substantive due process, a plaintiff must establish that the officer's actions (1) caused an injury, (2) were grossly disproportionate to the need for action under the circumstances, and (3) were inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience. *Petta*, 143 F.3d at 902; *cf. Lewis*, 523 U.S. at 836 (holding that a state police officer did not violate the Fourteenth Amendment's guarantee of substantive due process by causing a person's death in a high-speed automobile chase because "only a purpose to cause harm unrelated to the legitimate object of arrest will

satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation"); *Salerno,* 481 U.S. at 746 (noting that the substantive due process component of the Fifth Amendment "prevents the government from engaging in conduct that shocks the conscience" (citations and internal quotation marks omitted)). "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'. . . ." *Lewis*, 523 U.S. at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

But if ever a case could be said to present an official abuse of power so arbitrary as to shock the conscience, the Appellants have alleged it here. According to the Appellants' complaint, Hernandez had retreated behind the pillars of a bridge when, unprovoked, Agent Mesa fired two gunshots in his direction. One of the gunshots struck him in the face and killed him. On these facts, Agent Mesa had no reason to suspect that Hernandez had committed any crime or engaged in any conduct that would justify the use of any, let alone deadly, force. With no apparent justification for this action, a reasonable trier of fact could conclude that Agent Mesa "acted out of conscience-shocking malice or wantonness rather than merely careless or excessive zeal." *Petta*, 143 F.3d at 902–03. We therefore conclude that the Appellants have satisfied the first prong of the qualified immunity analysis by adequately alleging a constitutional violation.

D. Clearly Established Law

Finally, we must determine whether Hernandez's rights were "clearly established" at the time of the incident. According to Agent Mesa, they were not,

because the uncertainty in the law surrounding the availability of constitutional rights abroad ensured that any right we might recognize could not have been clearly established at the time of the shooting. This argument, however, misconstrues qualified immunity doctrine. "Clearly established" in this context does not refer to whether Hernandez, specifically, had the clearly established right to invoke Fifth Amendment protection at the time of the incident. It refers instead to the "objective legal reasonableness" of Agent 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)). In other words, qualified immunity does not shield conduct that is known to be unlawful merely because it is unclear that such unlawful conduct can be challenged. That is, whether the right applied extraterritorially to Hernandez and thus whether Hernandez could assert the Fourth or Fifth Amendment right does not alter the standard for conduct under those rights. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends" the law governing the "circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Thus, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

No reasonable officer would have understood Agent Mesa's alleged conduct to be lawful. The obvious wrongfulness of the alleged conduct but also our

precedents concerning the rights of aliens confirm this conclusion. As mentioned above, we have already recognized that aliens inside our border are entitled "to be free of gross physical abuse at the hands of state or federal officials." *Lynch*, 810 F.2d at 1374; *see also Martinez–Aguero*, 459 F.3d at 626–27 ("*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez–Aguero alleges.").

Agent Mesa argues that his alleged conduct was acceptable as long as its impact was felt outside our borders. This is not a reasonable misapprehension of the law entitled to immunity. It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person. *See Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002) (noting that cases involving fundamentally similar facts "are not necessary" to finding a right clearly established and holding that "obvious cruelty inherent in [prison official's] practice should have provided respondents with notice that their alleged conduct violated Hope's constitutional protection."). Accordingly, we hold that the facts alleged by the Appellants defeat Agent Mesa's claim of qualified immunity.

VI. CLAIMS AGAINST THE SUPERVISORS

Finally, we address the constitutional claims against Agent Mesa's supervisors. "Because vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has

violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The Appellants allege that the supervisors promulgated policies they knew were inadequate regarding the use of deadly force and also failed to train officers regarding the appropriate use of their firearms. As the district court noted, however, neither of the remaining supervisors was shown to have any personal involvement in the alleged constitutional violation. Specifically, the district court found that Agent Cordero "had not served as a line supervisor for agents in Agent Mesa's position since 2006"—four years before the incident—and that it had been at least eight months since Agent Manjarrez had supervised Agent Mesa. The Appellants do not challenge these findings and point to no specific policy nor any other evidence that would suggest that the supervisors were personally responsible for the alleged constitutional violation. Under these circumstances, the district court properly granted summary judgment in favor of the supervisors.

VII. CONCLUSION

Because the United States has not waived sovereign immunity for any of the claims asserted against it, we AFFIRM the judgment in favor of the United States. Similarly, we AFFIRM the judgment in favor of the supervisors because the Appellants have failed to establish that either supervisor was personally responsible for the alleged constitutional violations. But because we hold that the Appellants can assert a Fifth Amendment claim against Agent Mesa and that they have alleged sufficient facts to overcome qualified immunity, we REVERSE the judgment in favor of

Agent Mesa and REMAND for further proceedings consistent with this opinion.

JAMES L. DENNIS, Circuit Judge, concurring in part and concurring in the judgment:

I join the court's opinion in its entirety except for Part IV, with which I agree in part and in result. In *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Supreme Court apparently ruled that the phrase "the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this community to be considered part of that community." *Id.* at 265. I am inclined to agree, however, with those who have suggested that the *Verdugo–Urquidez* view cannot be squared with the Court's later holding in *Boumediene v. Bush*, 553 U.S. 723 (2008), that "questions of extraterritoriality turn on objective factors, and practical concerns, not formalism." *Id.* at 764; *see* WAYNE R. LAFAVE ET AL., 2 CRIM. PROC. § 3.1(i) n. 237.1 (3d ed.2014) (citing Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush*,* 82 S. CAL. L. REV. 259, 259, 272 (2008); Ellen S. Podgor, *Welcome to the Other Side of the Railroad Tracks: A Meaningless Exclusionary Rule*, 16 SW. J. INT'L L. 299, 310 (2010)); Baher Azmy, *Executive Detention,* Boumediene, *and the New Common Law of Habeas,* 95 IOWA L. REV. 445, 465 (2010); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1044 (2009); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1614 (2010).

The Mexican government has indicated that our adjudication of the Appellants' claims, whether under the Fourth or Fifth Amendment, in this particular case would not cause any friction with its sovereign interests. However, it appears that our judicial entanglement with extraterritorial Fourth Amendment excessive-force claims would be far more likely to involve impracticable and anomalous factors than would a "shocks the conscience" Fifth Amendment claim. For these reasons, I agree with the opinion of the court in declining to apply the Fourth Amendment in adjudicating the Appellants' claims but I do so out of concern for pragmatic and political questions rather than on a formal classification of the litigants involved.

HAROLD R. DeMOSS, JR., Circuit Judge, concurring in part and dissenting in part:

I join in Parts I, II, and VI of the court's opinion and I concur in the result of Part IV. For the reasons stated below, I dissent from Part V.

The majority recognizes that "it is undisputed that Hernandez was a Mexican citizen with no connection to the United States." Majority Op. at 268. Additionally, the majority states "[a]ny claim . . . [is] based on an injury suffered in a foreign country[,]" *id.* at 258, a place the majority acknowledges "the United States has no formal control or de facto sovereignty." *Id.* at 270. Nevertheless, the majority determined that the Fifth Amendment is applicable in this case. At its heart, this determination is based on the dubious assessment that there is an undefined area on the Mexican side of the U.S.–Mexico border which is analogous to the United States Naval Station at Guantanamo Bay, Cuba.

The United States' presence at Guantanamo Bay, Cuba, is based on both a lease and a treaty. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008). Furthermore, "the United States 'has maintained complete and uninterrupted control of [Guantanamo Bay] for over 100 years.'" Majority Op. at 269 (quoting *Boumediene,* 553 U.S. at 768). The same cannot be said of the Mexican side of the border. I reject the proposition that occasional exercises of "hard power across the border," *id.* at 269, and practices such as "'preinspection' examination and inspection of passengers," *id.* at 270, have somehow transformed a portion of northern Mexico into anything resembling the Naval Station at Guantanamo Bay. If the fact that the "United States exerts and has exerted powerful influence over northern Mexico," *id.* (internal quotation marks and citation omitted), justifies application of the Fifth Amendment in a strip along the border, how wide is that strip? Is the Fifth Amendment applicable in all of Ciudad Juarez or even the entire state of Chihuahua? Ultimately, 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.

To be clear, the majority's opinion represents a significant expansion of Fifth Amendment protections which is not supported by precedent. Because I am persuaded that the Fifth Amendment does not protect a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty, I would affirm the district court's judgment in favor of Agent Mesa on the Fifth Amendment claim.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-11-CV-31-DB

[Filed February 17, 2012]

JESUS C. HERNANDEZ, *et al.*, Plaintiffs,	)
v.	)
JESUS MESA, JR., *et al.* Defendants.	)

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Defendant Jesus Mesa, Jr.'s "First Amended FRCP 12(b)(6) Motion to Dismiss" ("Motion to Dismiss"), filed in the above-captioned cause on August 11, 2011. Also before the Court is Plaintiffs Jesus C. Hernandez, *et al.*'s Response, filed on August 22, 2011. For the reasons that follow, the Court finds that the instant Motion should be granted.

BACKGROUND AND PROCEDURAL POSTURE

The tragic facts in this case are well known; as such, the Court provides only a brief summary here. On June 7, 2010, fifteen-year old Sergio Adrián Hernández

Güereca ("Decedent")—while standing on the Mexican side of the border separating the United States and Mexico—was shot to death by United States Border Patrol Agent Jesus Mesa, Jr. ("Agent Mesa"), who was standing on the American side of the border when the incident occurred. Plaintiffs filed their Original Complaint under cause number EP-11-CV-027-DB in early January 2011, alleging claims against the United States of America ("the United States") and various federal agencies under the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), and the United States Constitution ("the Constitution"). Moreover, Plaintiffs alleged claims against unknown border patrol agents under the Constitution.

On June 8, 2011, Plaintiffs filed an Amended Complaint, and on June 27, 2011, Plaintiffs filed their Second Amended Complaint. On August 11, 2011, the Court entered an order dismissing and severing all claims against the United States from the instant action. The same day, the Court entered final judgment pursuant to Federal Rule of Civil Procedure 58. On August 15, 2011, the Court entered an amended final judgment, dismissing Plaintiffs' claims against the United States with prejudice.

On August 22, 2011, Plaintiffs filed their Third Amended Complaint. The Third Amended Complaint raises allegations against Defendants Ramiro Cordero, Scott A. Luck, Victor Manjarrez, Jr., and Carla L. Provost. As to Agent Mesa, the Third Amended Complaint alleges that Agent Mesa acted unreasonably by using excessive, deadly force against Decedent in violation of the Fourth and Fifth Amendments to the Constitution pursuant to *Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ("*Bivens* claims"). Specificaly, Plaintiffs alleges that "Mesa shot Decedent . . . while attempting to apprehend him . . . on suspicion of illegal entry into the United States." Agent Mesa's Motion to dismiss followed.

LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Defendant files the instant Motion under Federal Rule of Civil Procedure 12(b)(6) ("Rule12(b)(6)"). To determine whether a claim survives a Rule 12(b)(6) motion, courts engage in a two step analysis. *See Ashcroft v. Iqbal*, _U.S._, 129 S. Ct. 1937, 1948-50 (2009); *see also Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 219 (3d Cir. 2010). First, courts review the complaint, separating assertions of fact from legal conclusions. *See id*. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Second, courts determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief." *Edwards*, 610 F.3d at 219 (internal quotations omitted). Whether a claim is plausible is context-specific, requiring "the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

B. Federal Bivens *Actions*

Pursuant to *Bivens* "the victim of a Fourth Amendment violation by federal officers acting under

color of their authority may bring suit for money damages against the officers in federal court." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). Since deciding *Bivens*, the Supreme Court has recognized a cause of action for damages against federal officers for violations of the Fifth Amendment as well. *Davis v. Passman*, 442 U.S. 228 (1979). *Bivens* actions are akin to those brought under 42 U.S.C. § 1983.[1] *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 452 (W.D. Tex. 1999). Therefore, as with cases brought under § 1983, the defense of qualified immunity is also available to federal officers sued under *Bivens*. *Id*.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgeral*, 457 U.S. 800, 818 (1982). To resolve government officials' qualified immunity claims, courts engage in a two-step inquiry. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (overturned on other grounds). First, a court determines whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. Second, a court determines "whether the right was clearly established . . . undertaken in light of the specific context of the case." *Id*. Courts, however, are "permitted to exercise their

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[1] Section 1983 provides a cause of action against persons acting under color of state law for actions that violate a right secured by the Constitution or federal statute. 42 U.S.C.A. § 1983 (West 2003).

sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

DISCUSSION

In the instant Motion, Agent Mesa's argument is based solely on the first step of the two-pronged qualified immunity inquiry: do the facts alleged show that the officer's conduct violated a constitutional right? Specifically, Agent Mesa argues that he is entitled to qualified immunity because Decedent was neither protected by the Fourth nor the Fifth Amendments to the Constitution. The Court addresses Agent Mesa's arguments as to Plaintiffs' Fourth Amendment claim before turning to those responding to Plaintiffs' Fifth Amendment claim.

A. Plaintiffs' Fourth Amendment Claim

Here, Agent Mesa argues that he is entitled to qualified immunity because Decedent was an alien without voluntary attachments to the United States, who never entered the country, and because the Supreme Court held in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that an alien with no voluntary attachment to the United States has no extraterritorial Fourth Amendments rights. In response, Plaintiffs argue that *Martinez-Aguero v. Gonzales*, 459 F.3d 618 (5th Cir. 2006), demands the extraterritorial application of the Fourth Amendment for excessive force inflicted by United States border patrol officers at ports of entry. The Court evaluates these arguments below.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. "[*A*]*ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis in original). Nevertheless, the Supreme Court has restricted the Fourth Amendment's reach based on the citizenship of the person claiming its protections and based on whether the alleged violation of the Fourth Amendment occurred within the territory of the United States or abroad.

In *United States v. Verdugo-Urquidez*, United States Drug Enforcement Agency ("DEA") officers, working in conjunction with Mexican federal police, seized incriminating documents from the Mexican residences of a criminal defendant. 494 U.S. at 262-63. The district court granted the defendant's motion to suppress, holding that "the Fourth Amendment applied to the searches and that the DEA agents had failed to justify searching [the defendant's] premises without a warrant." *Id*. at 263. The court of appeals affirmed. *Id*. The Supreme Court reversed, holding that that "the Fourth Amendment has no application" where "[a]t the time of the search, [the individual seeking its protections] 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.

Here, Agent Mesa asks the Court to dismiss Plaintiffs' Fourth Amendment claim given the Supreme Court's holding in *Verdugo-Urquidez*. Indeed, it is undisputed that Decedent—a resident and citizen of Mexico—was an alien, without voluntary ties to the United States, standing in Mexico when he was killed. Nevertheless, Plaintiffs argue that *Martinez-Aguero* demands the extraterritorial application of the Fourth Amendment for excessive force inflicted by United States border patrol officers at ports of entry. In *Martinez-Aguero*, a Mexican citizen and resident who accompanied her aunt once a month to the Social Security office in El Paso, Texas was stopped by United States immigration officials at the border "within the zone outside the port of entry but within the territorial United States." 459 F.3d at 620. An immigration official "grabbed [the Mexican national's] arms, twisted them behind her back, pushed her into a concrete barrier, which hit her in the stomach and then started kicking her with his [the immigration officer's] knees in her lower back." *Id*. at 621(internal quotations omitted). The plaintiff brought a claim under the Fourth and Fifth Amendments for excessive use of force. *Id*. The district court denied the officer's motion for summary judgment on the issue of qualified immunity and the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") affirmed. *Id*. On appeal, the defendant argued that the plaintiff lacked constitutional rights because although she was in the territorial United States when the incident occurred, she had not been admitted into the country, and as such, the "entry-fiction" doctrine required the court to treat the incident as if it had occurred in Mexico. *Id*. at 622, 623. Nevertheless, the Fifth Circuit found that the entry-fiction doctrine only applied in immigration and

deportation cases and proceeded to determine whether the plaintiff had sufficient voluntary connections to the country. *Id*. 624. The Fifth Circuit affirmed the district court's decision, finding that the plaintiff had sufficient voluntary contacts because "her regular and lawful entry into the United States pursuant to a valid border-crossing card and her acquiescence in the U.S. system of immigration constitute her voluntary acceptance of societal obligations, rising to the level of 'substantial connections.'" *Id*.

The instant case can be distinguished from *Martinez-Aguero*. Unlike *Martinez-Aguero*, where the plaintiff was in the territorial United States when the incident occurred, it is undisputed that, in this case, Decedent was outside the United States when shot. Moreover, unlike *Martinez-Aguero*, where the Fifth Circuit found that the plaintiff had voluntary connections, here, Plaintiffs plead nothing in the Third Amendment Complaint to indicate that Decedent had any voluntary connections to the United States. The Court notes that under the heading "Sergio was Entitled to Fifth Amendment Due Process of Law," Plaintiffs' Response briefly states that "Mesa ignores the most obviously sufficient connection between Sergio and the United States, the connection supplied by Mesa himself: Sergio was killed by the actions of a United States government employee acting within the scope of his U.S. government employment." Nevertheless, while this may be a tragic connection to this country, it was not voluntary, and voluntary connections are dispositive in determining whether an alien outside the United States can avail himself of the Fourth Amendment's protections. Finally, the Court briefly addresses Plaintiffs' suggestion that *Boumediene v.*

Bush, 553 U.S. 723 (2008), overturned *Verdugo-Urquidez*.

In short, Plaintiffs argue that after *Boumediene*, any notion that the Constitution does not apply extraterritorially to non-citizens is untenable because the Supreme Court in *Boumediene* held that aliens detained in Guantanamo Bay, Cuba had the constitutional privilege of habeas corpus. 553 U.S. at 732. Nevertheless, *Boumediene* is inapposite as its holding says nothing of the Fourth Amendment right against unreasonable searches and seizures. Without more, the Court finds that Plaintiffs' Fourth Amendment claim against Agent Mesa is dismissed. The Court now turns to Agent Mesa's argument under the Fifth Amendment.

B. Fifth Amendment Claim

In his Motion, Agent Mesa petitions the Court to dismiss Plaintiffs' substantive due process claim under the Fifth Amendment, arguing that aliens have no extraterritorial Fifth Amendment rights. To support this argument, Agent Mesa cites to dicta in *Verdugo-Urquidez*, wherein the Supreme Court states as follows:

> The [*Johnson v.*] *Eisentrager*[, 330 U.S. 763 (1950)] opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry: the alien has been accorded a generous and ascending scale of rights as he increases his identity with our society. [] But our rejection of extraterritorial application of the Fifth Amendment was emphatic.

494 U.S. at 269 (internal quotations omitted). In response, Plaintiffs argue that *Boumediene* "decisively rejected the argument . . . that the Constitution stops where *de jure* sovereignty ends." In other words, Plaintiffs contend that because the Supreme Court once found that a Constitutional right applies outside the United States, this Court should find that other constitutional rights also apply extraterritorially. Nevertheless, the Court need not determine whether the Fifth Amendment applies extraterritorial to a person in Decedent's shoes, because as explained below, Plaintiffs otherwise fail to state a claim for which relief can be granted under the facts presented.

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Nevertheless, as mentioned above, "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. While "[n]ot all encounters between law enforcement officers and citizens are seizures for purposes of the Fourth Amendment," a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of the citizen." *United States v. Mask*, 330 F.3d 330, 336 (5th Cir. 2003) (internal quotations omitted). Here, Agent Mesa's use of force against Decedent amounted to a seizure, as an "[a]pprehension by the use of deadly force is a seizure." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011).

Therefore, under *Graham*, Plaintiffs fail to state a claim under the Fifth Amendment's Due Process Clause, and the Court finds that Plaintiffs' Fifth Amendment claim against Agent Mesa should be dismissed.

CONCLUSION

The Court finds that Plaintiffs' Fourth and Fifth Amendment claims against Agent Mesa should be dismissed. First, Plaintiffs' Fourth Amendment claim against Agent Mesa is foreclosed by *Verdugo-Urquidez*. Decedent has no Fourth Amendment protections because he is an alien with no voluntary ties to the United States who was in Mexico when the incident occurred. Second, claims for excessive use of force are properly brought under the Fourth Amendment and not the Fifth Amendment. Therefore, Plaintiffs fail to state a claim under the Fifth Amendment.

Accordingly, **IT HEREBY ORDERED** that Defendant Jesus Mesa, Jr.'s "First Amended FRCP 12(b)(6) Motion to Dismiss" is **GRANTED**.

SIGNED this **17th** day of **February, 2012**.

/s/ David Briones
THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP–11–CV–027–DB

[Filed August 11, 2011]

JESUS C. HERNANDEZ, *et al.*, Plaintiffs,	)
v.	)
THE UNITED STATES OF AMERICA, *et al.* Defendants.	)

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Defendant the United States of America's ("the United States" or "the Government") "Motion to Dismiss the First Through Ninth and Eleventh Claims of the Plaintiffs' Original Complaint," filed in the above captioned cause on June 6, 2011, under Federal Rule of Civil Procedure 12(b)(1).[1] Therein, the Government petitions the Court

[1] The United States files this Motion on behalf of itself, its agencies, Agent Jesus Mesa, and unknown federal agents as to claims under the Federal Tort Claims Act and the Alien Tort Statute.

to dismiss with prejudice Plaintiffs Jesus C. Hernández, *et al.*'s First through Ninth and Eleventh claims filed in Plaintiffs' Original Complaint for lack of subject matter jurisdiction. Also before the Court are Plaintiffs' Response[2] and the Government's Reply filed June 20, and June 28, 2011, respectively. For the reasons stated below, the Court is of the opinion that the Government's Motion should be granted.

FACTS AND PROCEDURAL POSTURE

On Monday, June 7, 2010, fifteen-year-old Sergio Adrian Hernández Güereca ("Hernández") and a group of friends were playing in the cement culvert that separates the United States from Mexico near the Paso Del Norte Port of Entry, one of four international ports of entry linking El Paso, Texas, with Ciudad Juarez, Chihuahua, Mexico. The young boys were playing a game in which they would touch the barbed-wire fence between the United States and Mexico and then run back down the incline. While playing, United States Border Patrol Agent, Jesus Mesa, Jr., aka Jesus Meza, Jr. ("Agent Mesa"), detained one of the boys. Hernández retreated to the Mexican side of the border and observed Agent Mesa from underneath a pillar of the international bridge. Agent Mesa then pointed his weapon at Hernández and shot his firearm across the border at least twice. Hernández was fatally injured, having been shot at least once in the face. Additional United States Border Patrol agents subsequently arrived on the scene, but failed to render aid to Hernández. All agents then left the scene. Eventually,

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[2] The Court construes the Plaintiffs' Response as a Motion for Leave to Amend Pleadings.

Mexican police arrived and pronounced Hernández dead.

On January 17, 2011, Plaintiffs filed their Original Complaint with the Court alleging that the Government, unknown federal employees, and various federal agencies[3] were liable under the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), and the United States Constitution for Hernández's death. On June 8, 2011, Plaintiffs filed an Amended Complaint, which is different from the Original Complaint in two regards: (1) it names Agent Mesa and (2) it describes how Plaintiffs would serve process upon Agent Mesa.

On June 9, 2011, the Court entered an order granting the Government leave to file the instant Motion in excess of ten pages and held that Plaintiffs' First Amended Complaint did not moot the Government's Motion to Dismiss. On June 18, 2011, Plaintiffs filed their Motion for Leave to file their Second Amended Complaint. On June 27, 2011, the Court granted Plaintiffs' Motion for Leave to file their Second Amended Complaint and held that Plaintiffs' Second Amended Complaint also did not moot the instant Motion.

The claims before the Court on this Motion are Claims One through Nine and Eleven. Plaintiffs bring their First through Seventh Claims under the FTCA.

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[3] Plaintiffs have sued the following federal agencies: the United States Department of Homeland Security, the United States Bureau of Customs and Border Protection, the United States Border Patrol, the United States Immigration and Customs Enforcement Agency and the United States Department of Justice.

The First Claim alleges wrongful death under the FTCA against the United States based on assault and battery; the Second Claim alleges wrongful death under the FTCA against the United States based on negligence; in their Third Claim, Plaintiffs allege under the FTCA that Agent Mesa, acting in his official capacity, used excessive and deadly force against Hernández; the Fourth Claim is under the FTCA and alleges that unknown federal agents, acting in their official capacity, negligently adopted policies that violated Plaintiffs' constitutional rights; the Fifth Claim is against the United States for negligent failure to adopt policies to protect Hernández's constitutional rights under the FTCA; in their Sixth Claim, Plaintiffs bring a cause of action against the United States under the FTCA for intentionally failing to adopt policies that would prevent a violation of Plaintiffs' constitutional rights; and the Seventh Claim alleges a cause of action against the United States under the FTCA for intentionally failing to adopt policies to prevent a violation of Plaintiffs' constitutional rights.

Plaintiffs bring their Eighth and Ninth Claims under the United States Constitution. Under the Eighth Claim, Plaintiffs allege that the United States violated Plaintiffs' Fourth and Fifth Amendment rights, while Claim Nine alleges that the United States failed to adopt policies that would have prevented a violation of Hernández's Fourth and Fifth Amendment Rights. Finally, Plaintiffs bring their Eleventh Claim under the law of nations against all Defendants, invoking the Court's jurisdiction under the ATS. The Court now addresses the instant Motion.

STANDARD

The Government files the instant Motion under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), averring that the Court lacks subject matter jurisdiction over claims against the United States. A motion under Rule 12(b)(1) allows a party to challenge the subject matter jurisdiction of the district court to hear a case. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). The party asserting jurisdiction bears the burden of proving that jurisdiction exists. *Id.* If the party asserting jurisdiction does not meet its burden, the court must dismiss the action. *See* FED R. CIV. P. 12(h)(3). A court should only grant a motion to dismiss for subject matter jurisdiction "if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming,* 281 F.3d at 161.

DISCUSSION

The Government argues that Plaintiffs' First through Ninth and Eleventh claims should be dismissed because (1) the United States is the only proper Defendant as to those claims; (2) the United States has not waived sovereign immunity for Plaintiffs' claims under the FTCA because those claims arose in a foreign country; and (3) the United States has not waived sovereign immunity for Plaintiffs' claims under the ATS. Plaintiffs respond that the Court has subject matter jurisdiction over Plaintiffs' FTCA claims because those claims did not arise in a foreign country. Moreover, Plaintiffs aver that the ATS does waive the United States' sovereign immunity and cite *Rasul v. Bush*, 542 U.S. 466 (2004), for that

proposition. Finally, Plaintiffs seek leave to amend their pleadings a third time.

The Government replies that Plaintiffs' Response lacks merit as Plaintiffs have mischaracterized the United States Supreme Court's ("the Supreme Court") interpretation of *Sosa v. Alvarez–Machain*, 542 U.S. 692 (2004), in arguing that Plaintiffs' FTCA claims did not arise in a foreign country. Further, the Government contends that the Supreme Court did not hold in *Rasul* that the ATS waives the United States' sovereign immunity, but that custody at Guantanamo Bay, Cuba is not a bar to jurisdiction under the ATS. Finally, the Government does not address Plaintiffs' request for leave to amend their pleadings. The Court evaluates the Parties' arguments below.

As a preliminary matter, the Court notes that the United States is indeed the only party defendant as to Plaintiffs' FTCA and ATS claims. "Under the Westfall Act [28 U.S.C. § 2679(b)(1)], federal employees have absolute immunity from suit for common-law tort claims related to acts undertaken within the scope of their federal employment." *Dolenz v. Fahey*, 298 F. App'x. 380, 381 (5th Cir. 2008). "[T]he Westfall Act provides that, if the Attorney General or his designee certifies that a federal employee was acting within the scope of his employment when an alleged act or omission occurred, then the lawsuit automatically is converted to one against the United States under the Federal Tort Claims Act, the federal employee is dismissed as a party, and the United States is substituted as the defendant." *In re Iraq & Afghan. Detainees Litig.*, 479 F. Supp. 2d 85, 110 (D.D.C.2007); *see also* 28 § 2679(d)(1) (West 2011). Courts have

applied the Westfall Act to claims under the ATS asserting violations of the law of nations. *See In re Iraq & Afghan. Detainees Litig.*, 479 F. Supp. 2d at 112.

On June 20, 2011, the United States filed a "Notice of Substitution and Application for Order Thereon," wherein the Government agreed to substitute for Agent Mesa by operation of law as party defendant as to all of Plaintiffs' claims sounding in common law tort under the FTCA and the ATS pursuant to 28 U.S.C. § 2679. Plaintiffs did not oppose this substitution. Indeed, in their Response to the instant Motion, Plaintiffs state that "[n]ow that the United States has moved for substitution and filed the appropriate certification to the Court, Plaintiffs do not oppose substitution." Therefore, the Court granted the Government's request, and in an Order dated June 24, 2011 ("June 24 Order"), the Court dismissed all claims against Agent Mesa under the FTCA and ATS. The result of the Court's June 24 Order is that the United States is now the only party defendant as to all of Plaintiffs' claims under the FTCA and ATS. Having established that the United States is the only party defendant as to all of Plaintiffs' claims, the Court now turns to the question of whether the United States has waived its sovereign immunity for Plaintiffs' claims.

I. Whether the United States waived its Sovereign Immunity for Plaintiffs' Claims

"Liability may be imposed upon the United States only if two requirements are met: (1) there must be a waiver of sovereign immunity; and (2) there must be a source of substantive law that provides a claim for relief." *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 260 (5th Cir. 2006) (Dennis, J., concurring). With

respect to federal sovereign immunity, " '[t]he basic rule . . . is that the United States cannot be sued at all without the consent of Congress.' " *Freeman v. United States*, 556 F.3d 326, 334–35 (5th Cir. 2009) (quoting *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983)). "Plaintiffs bear the burden of showing Congress's unequivocal waiver of sovereign immunity." *Id.* at 334 (internal quotation omitted). "Because sovereign immunity is jurisdictional in nature . . . Congress's waiver of it must be unequivocally expressed in statutory text and will not be implied. . . ." *Id.* (internal quotations and citations omitted). Therefore, it follows that a federal court lacks subject matter jurisdiction over claims for which Congress has not waived sovereign immunity. *Id.* The Court first examines whether Congress has waived sovereign immunity for Plaintiffs' claims under the FTCA.

A. Sovereign Immunity under the FTCA

The FTCA allows a person to sue the United States for the negligence or other tortious conduct of its employees acting within the scope of employment in situations where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the tort occurred. 28 U.S.C.A. § 1346(b)(1) (West 2011). Therefore, the statute is both a waiver of the United States' sovereign immunity and a source of substantive law that imposes liability on the Government for the torts of its employees under certain circumstances.[4] *In re Supreme Beef Processors, Inc.,*

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[4] The statute provides in relevant part that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of

468 F.3d at 260 (Dennis, J., concurring); *see also* 28 U.S.C.A. §§ 1346(b)(1), 2674. This waiver is not unlimited, however, and for policy reasons, Congress decided that the FTCA would also categorically exclude liability for some harms. *In re Supreme Beef Processors, Inc.*, 468 F.3d at 260–61 (Dennis, J., concurring). For example, Congress precluded Government liability when a United States employee exercises a discretionary function. 28 U.S.C.A. § 2680(a) (West 2011). Moreover, Congress has immunized Government employees from intentional torts, except when the intentional tort was committed by an investigative or law enforcement officer of the United States. § 2680(h). Finally, Congress conferred immunity on Government employees against liability from torts arising in a foreign country. § 2680(k).

Although the FTCA's foreign country exception clearly states that the provisions of the FTCA do not apply to "[a]ny claim arising in a foreign country," prior to 2004, some federal courts allowed plaintiffs' claims to withstand a motion to dismiss if plaintiffs could show that the act or omission giving rise to a tort occurred in the United States even when the claimant suffered injuries abroad. *See e.g. Mulloy v. United States*, 884 F. Supp. 622, 632 (D. Mass. 1995). Nevertheless, in 2004, in *Sosa*, the Supreme Court unequivocally held that "the FTCA's foreign country

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property, or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1).

exception bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred." 542 U.S. at 712. Notwithstanding the Supreme Court's unambiguous directive, Plaintiffs argue that *Sosa* does not control the case at bar. Therefore, the Court must first determine whether it is bound by *Sosa*'s clear holding in the instant cause.

In *Sosa*, Drug Enforcement Administration ("DEA") agents hired Jose Francisco Sosa ("Sosa") to abduct Mexican physician Humberto Alvarez–Machain ("Alvarez") in Mexico to stand trial in federal court in the United States because Alvarez assisted in torturing a fellow DEA agent. *Id.* at 697–98. Alvarez was acquitted of the federal criminal charges but subsequently filed a civil action against Sosa under the FTCA and ATS. The district court dismissed Alvarez's FTCA claim but awarded summary judgment and damages on Alvarez's ATS claim. *Id.* at 699. A three judge panel of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") affirmed the ATS claim but reversed the district court's dismissal of the FTCA claim; a divided en banc panel of the Ninth Circuit came to the same conclusion. *Id.* In reaching its holding on Alvarez's FTCA claim, the Ninth Circuit relied on the "headquarters doctrine." *Id.* at 701. Under the headquarters doctrine, "the foreign country exception [to the FTCA] does not exempt the United States from suit for acts or omissions occurring [in the United States] which have their operative effect in another country." *Id.* (internal quotations omitted). Thus, the Ninth Circuit reasoned "that [ ] since Alvarez's abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents

located in California, 'Alvarez's abduction fits the headquarters doctrine like a glove.'" *Id.* at 702 (quoting *Sosa v. Alvarez–Machain*, 331 F.3d 604, 638 (9th Cir. 2003) (en banc)). Thus, based on the headquarters doctrine, the Ninth Circuit held that Alvarez's claim did not arise in a foreign country. *Id.*

The Supreme Court reversed, rejecting the Ninth Circuit's interpretation of the foreign country exception. *Id.* at 712. In reaching this conclusion, the Supreme Court found reason to be skeptical of the Ninth Circuit's reliance on the headquarters doctrine because proximate cause[5] was needed to "connect the domestic breach of duty (at headquarters) with the action in the foreign country . . . producing the foreign harm or injury." *Id.* at 703. The Supreme Court expressed doubt that the acts of the DEA agents sitting in California were proximate causes of Alvarez's harm, given that "the actions of Sosa and others in Mexico were just as surely proximate causes, as well." *Id.* at 704.

Regardless, the Supreme Court reached its decision in *Sosa* "simply because the harm occurred on foreign soil." *Id.* at 703. The Supreme Court explained that when Congress passed the FTCA, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred." *Id.* at 705. As a result, if

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[5] The Supreme Court defined proximate cause as "causation substantial enough and close enough to the harm to be recognized by law" and found that "a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa*, 542 U.S. at 704.

the injury occurred in a foreign country, a federal court in the United States would have to apply foreign law to determine the tortfeasor's liability, and applying foreign substantive law in a federal court is precisely what Congress wanted to avoid in passing the foreign country exception to the FTCA. *Id.* at 706–07. Further, the Supreme Court found that even if a federal court did not have to apply the tort law of a foreign nation, a claimant injured in a foreign country would still be barred from bringing a claim against the United States because Congress did not write the foreign country exception to apply only "when foreign law would be applied." *Id.* at 711. Therefore, the Supreme Court held that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.*

Here, Plaintiffs ask the Court to ignore *Sosa*'s explicit holding because unlike in *Sosa*, where the Supreme Court expressed doubt about whether the proximate cause of Alvarez's harms had occurred in the United States, in the instant cause "[i]t is indisputable that each and every proximate cause of [Hernández's] injuries and death occurred on United States territory." Even if each and every proximate cause of Hernández's injuries occurred on United States territory, the Supreme Court also reached its holding in *Sosa* simply because the harm occurred on foreign soil. *See id.* at 703. Therefore, the Court is of the opinion that if Hernández suffered his injuries in Mexico—a foreign country—the Court would lack subject matter jurisdiction to hear Plaintiffs' FTCA claims given *Sosa*'s clear holding. Yet, Plaintiffs also argue that Hernández did not suffer his injuries in Mexico. The

Court must therefore determine where Hernández suffered his injuries.

Plaintiffs concede that Hernández was standing underneath the Mexican side of the Paso Del Norte Bridge when Agent Mesa shot him. Nevertheless, Hernández argues that the assault "occurred on United States' [sic] territory" because once Agent Mesa cocked his gun and put his finger on the trigger, it was not necessary for the bullet to strike Hernández to "invoke assault." The United States replies that because Hernández was standing in Mexico when he perceived Agent Mesa's threat, Hernández suffered any injury in Mexico and not the United States. The Court thus examines what is required to state a claim for civil assault under Texas law to determine whether Plaintiffs properly characterize the injury as one occurring in the United States and not Mexico.

Under Texas law, a plaintiff must establish the elements of criminal assault to state a claim for civil assault. *See Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex.App.—Houston [14th Dist.] 2005, pet. denied). The Texas Penal Code provides for three categories of assault. *See* TEX. PENAL CODE ANN. § 22.01 (West 2011). Here, Plaintiffs bring their claims under a type of assault called "assault-by-threat." *Olivas v. Texas*, 203 S.W.3d 341, 345 (Tex. Crim. App. 2006). A person commits an assault-by-threat when he "intentionally or knowingly threatens another with imminent bodily injury. . . ." TEX. PENAL CODE ANN. § 22.01(a)(2) (West 2011). For the State to convict a defendant of criminal assault, the State must prove that a threat occurred but the State need not necessarily prove that the victim perceived the threat. *Olivas*, 203 S.W.3d at 346; *Teeter*

v. Texas, No. PD–1169–09, 2010 WL 3702360, at *6 (Tex. Crim. App. Sept. 22, 2010). In contrast, under civil assault, "the victim must be shown factually to have experienced apprehension or fear." *See Olivas*, 203 S.W.3d at 346–47. In determining whether a civil assault has occurred, courts will look at the physical distance between the victim and the alleged perpetrator to determine whether the victim felt the harm of the assault. *See Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1012 (S.D. Tex. 1981) ("There is no assault where the defendant is too far away to do any harm.").

Here, Plaintiffs aver that "[t]he assault against [Hernández's] rights occurred at the very moment that Agent Mesa lifted his gun, pointed it at [Hernández's] head and pulled the trigger." Yet any rights Hernández may have had were held in Mexico since Hernández was standing in Mexico when Agent Mesa allegedly perpetrated the assault. Moreover, the fact that courts look to (1) whether the victim apprehended the assault, *Olivas*, 203 S.W.3d at 346–47, and (2) the physical distance between the victim and the alleged perpetrator of the assault to determine whether an assault has occurred, *Vietnamese Fishermen's Ass'n*, 518 F. Supp. at 1012, further supports the conclusion that the injury in an assault occurs where and when the victim perceives the assault. Therefore, the weight that Plaintiffs place on the *moment* when the assault occurred is misguided and irrelevant for the purpose of determining *where* Hernández suffered his injury.

Finally, to the extent that Plaintiffs argue that civil assault-by-threat can be proven under Texas law without establishing that a plaintiff experienced fear or

apprehension would run afoul of the standing requirements of the federal courts. "Standing to sue in any Article III court is . . . a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). To have standing to sue in federal court, a plaintiff must have suffered an "injury in fact—an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury is "particularized" when it "affect[s] the plaintiff in a personal and individual way." *Id.* at 561 n. 1. The only way that Hernández could have been affected in a "personal and individual way" is if he felt the harm of the assault; because Hernández was standing in Mexico when Agent Mesa allegedly assaulted him, there was no other place where he could have felt the harm.[6] As such, the Court finds that Hernández suffered his harms in Mexico.

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[6] Plaintiffs also argue that Hernandez's negligence claim is cognizable in this case because "the last act necessary to establish negligence against Agent Mesa and the United States occurred in the United States. . . ." Plaintiffs misstate the law of negligence. To state a claim in negligence, a plaintiff must prove "a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). Here, Plaintiffs Second Amended Complaint states that Plaintiff was standing in Mexico when Agent Mesa allegedly shot and killed him. As such, it is undisputed that the damages, the last act needed to state a claim in negligence, occurred in Mexico. Therefore, the Court finds the FTCA's foreign country exception bars Plaintiffs' negligence claims against the United States, its officers and agencies.

Having decided that *Sosa* applies to the case at bar and that Hernández suffered his injuries in Mexico, the Court now grants the Government's Motion to Dismiss Plaintiffs' First through Seventh Claims because Congress did not waive the United States' sovereign immunity for injuries suffered in a foreign country, "regardless of where the tortious act or omission occurred." *Sosa*, 542 U.S. at 712.

B. Sovereign Immunity for Constitutional Torts

The United States next argues that Plaintiffs' Eighth and Ninth Claims should be dismissed because the United States has not waived sovereign immunity for constitutional torts under the FTCA. Plaintiffs concede that the United States is not a proper party as to these claims. Therefore, the Court grants the United States' Motion as to the Eighth and Ninth Claims in Plaintiffs' Second Amended Complaint because it agrees that the United States has not waived its sovereign immunity for constitutional torts under the FTCA. *See Spotts v. United States*, 613 F.3d 559, 569 n. 7 (5th Cir. 2010).

C. Sovereign Immunity and the ATS

Finally, the Court determines whether the ATS waives the United States' sovereign immunity. The ATS is a jurisdictional statute, conferring jurisdiction upon the federal courts to "hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 542 U.S. at 712. Because "Congress's waiver of [sovereign immunity] must be unequivocally expressed in statutory text and will not be implied," *Freeman*, 556 F.3d at 334–35, the

Court looks first to the statutory language to determine if it waives the United States' sovereign immunity. The statute provides that "[t]he district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.A. § 1350 (West 2011). It is patent from the statute's plain language that a waiver of sovereign immunity is not "unequivocally expressed" as the ATS says nothing about sovereign immunity or a waiver. *See Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *see also Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (per curiam), *cert. denied* 506 U.S. 908 (1992). Notwithstanding the plain language of the statute, Plaintiffs insist that the ATS waives the United States' sovereign immunity because the Supreme Court pronounced in *Rasul*, that "indeed, [the ATS] explicitly confers the privilege of suing for an actionable tort committed in violations of the law of nations or a treaty of the United States on aliens alone." 542 U.S. at 485 (internal quotation omitted). Plaintiffs fundamentally misapprehend the holding in *Rasul*.

In *Rasul*, the Supreme Court decided "the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Id.* at 470. Petitioners in *Rasul* sued former President George W. Bush, among other federal employees, invoking the jurisdiction of the United States District Court for the District of Columbia ("District Court") under the ATS. The District Court dismissed the petitioners' ATS claim

and the United States Court of Appeals for the District of Columbia Circuit held that "the District Court correctly dismissed the claims founded on . . . [the ATS] for lack of jurisdiction, even to the extent that these claims 'deal only with conditions of confinement and do not sound in habeas,' because petitioners lack the 'privilege of litigation' in U.S. courts." *Id.* at 484. (quoting *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003)). Nevertheless, the Supreme Court reversed, holding that the District Court did have jurisdiction to hear the ATS claim and that the petitioners' confinement in military custody at Guantanamo Bay, Cuba was immaterial to the question of whether the District Court had subject matter jurisdiction over those claims. *Id.* at 485. The Supreme Court in *Rasul* said nothing about whether Congress waived the United States' sovereign immunity in the ATS.[7]

Here, Plaintiffs confuse federal jurisdiction with a waiver of sovereign immunity. While the Court may have jurisdiction to hear claims under the ATS because the ATS is merely a jurisdictional statute, "any party asserting jurisdiction under the [ATS to sue the United

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[7] The Court is not alone in this conclusion; indeed, the Court knows of no case decided before or after *Rasul* to have ever held that the ATS waives the United States' sovereign immunity; nevertheless, the case reporters are replete with examples of cases finding unambiguously that the ATS does not waive the United States' sovereign immunity. *See e.g. Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967–68 (4th Cir. 1992); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1210 (S.D.Fla.2002); *Czetwertynski v. United States*, 514 F. Supp. 2d 592, 596 (S.D.N.Y.2007); *Al–Aulaqi v. Obama*, 727 F. Supp. 2d 1, 43 (D.D.C.2010).

States] must establish, independent of that statute, that the United States has consented to suit." *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (internal quotations omitted) (holding that the ATS does not waive the United States' sovereign immunity). Moreover, if the United States waives its sovereign immunity in a treaty, the waiver must be unequivocally expressed. *See De Archibold v. United States*, 499 F.3d 1310, 1313 (Fed. Cir. 2007). Yet, Plaintiffs cite no language in any of the treaties that form the substantive basis for Plaintiffs' ATS claim that indicate that the United States has waived its sovereign immunity for suits in federal court under those treaties. Without more, the Court finds that it lacks subject matter jurisdiction over Plaintiffs' claims under the ATS and, as such, grants the Government's Motion as to the Eleventh Claim.

II. Plaintiffs' Construed Motion to Amend Pleadings

Having decided that the Court lacks jurisdiction as to all of Plaintiffs' claims against the United States, the Court now addresses Plaintiffs' construed Motion to Amend Pleadings. Here, Plaintiffs seek leave to amend their Second Amended Complaint to refashion claims against the United States as claims against unknown federal agents under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

A party may amend its pleading once as a matter of course within twenty-one days of serving it or twenty-one days after service of a motion under Rule 12(b), whichever is earlier. FED. R. CIV. P. 15(a)(1). In all other cases, a party may only amend its pleadings with the written consent of the opposing party or with the

court's leave. FED. R. CIV. P. 15(a)(2). Courts must "freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). Although Rule 15(a) creates a liberal standard for granting leave to amend a complaint, some factors weigh against granting leave. *Barnes v. Madison*, 79 F. App'x. 691, 698 (5th Cir. 2003). These factors, articulated in *Foman v. Davis*, 371 U.S. 178, 182 (1962), include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." *Id.* (internal quotations omitted).

In the instant cause, Plaintiffs amended their pleadings once as a matter of right and a second time with the Court's leave. The Court now finds that it would serve the interest of justice to allow Plaintiffs leave to file a third amended complaint. Nevertheless, the Court cautions the Plaintiffs, in the strongest terms possible, that it will not grant Plaintiffs leave to amend their complaint a fourth time.

III. Severance of Claims against the United States

Finally, the Court *sua sponte* considers whether the claims against the United States should be severed from those against Agent Mesa. Federal Rule of Civil Procedure 21 ("Rule 21") provides in relevant part that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." FED. R. CIV. P. 21. "Rule 21 is an appropriate vehicle to sever or dismiss the claims of even properly joined parties." *Blum v. Gen. Elec. Co.*, 547 F. Supp. 2d 717, 722 (W.D. Tex.

2008). By severing claims under Rule 21, a district court creates two separate actions by which severed claims may proceed as discrete, independent actions. *Allied Elevator, Inc. v. E. Tex. State Bank*, 965 F.2d 34, 36 (5th Cir. 1992). District courts may then render final judgment in "either one of the resulting two actions notwithstanding the continued existence of unresolved claims in the other." *Id.* (internal quotation omitted). Ultimately, district courts have broad discretion to sever claims under Rule 21. *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994).

In the instant Order, the Court dismisses all claims against the United States. As such, if the Court severs the claims against the United States, the Court may enter final judgment and allow Plaintiffs to appeal the instant Order, if they so choose, without having to wait for a resolution on their *Bivens* claims against Agent Mesa. Therefore, the Court finds that the claims against the United States should be severed from those against Agent Mesa and all unknown agents.

CONCLUSION

After due consideration, the Court finds that the Government's Motion should be granted in its entirety. The United States is party defendant as to all claims against Agent Mesa under the FTCA and the ATS. Moreover, Congress has not waived the United States' sovereign immunity under the FTCA when the tort arises in a foreign country. Because the harm that Plaintiffs allege under the FTCA was felt in Mexico, Plaintiffs' tort claims under the FTCA arose in a foreign country, therefore the Court dismisses Claims One through Seven. Further, the United States has not waived sovereign immunity for constitutional torts

under the FTCA. As such, the Court dismisses Claims Eight and Nine. In addition, Congress did not waive the United States' sovereign immunity under the ATS, and none of the treaties that form the substantive basis of Plaintiffs' ATS claims unequivocally waive the United States' sovereign immunity. It therefore follows that the Court must dismiss Plaintiffs' Eleventh Claim.

The Court also grants Plaintiffs leave to amend their pleadings and finds that it would be in the interest of justice to grant Plaintiffs' construed Motion for Leave to Amend Pleadings. Finally, the Court finds that all claims against the United States should be severed from those against Agent Mesa and all unknown federal agents such that final judgment may be entered as to the United States.

Accordingly, **IT IS HEREBY ORDERED** that Defendant the United States of America's "Motion to Dismiss the First Through Ninth and Eleventh Claims of the Plaintiffs' Original Complaint," is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs Jesus C. Hernandez, *et al.*'s construed Motion to Amend the Second Amended Complaint is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs are granted leave to amend their Second Amended Complaint within ten days of the date of this Order.

IT IS FURTHER ORDERED that all claims asserted against Defendants the United States of America, the United States Department of Homeland Security, the United States Bureau of Customs and Border Protection, the United States Border Patrol, the United States Immigration and Customs Enforcement Agency and the United States Department of Justice be

SEVERED from those claims against Jesus Mesa, Jr. and all unknown Defendants.

IT IS FURTHER ORDERED that the Clerk of the Court **AMEND** the caption in the present action to reflect that claims against Defendant Jesus Mesa, Jr. and all unknown Defendants are no longer included within the above-captioned cause.

IT IS FURTHER ORDERED that the above-captioned cause is **DISMISSED.**

IT IS FINALLY ORDERED that all other pending motions in the above-captioned cause, if any, are **DENIED AS MOOT.**

SIGNED this **11th** day of **August, 2011**.

/s/ David Briones
THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. 3:11-CV-00331-DB

[Filed August 22, 2011]

Jesus Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as Successor-in-Interest to the Estate of Sergio Adrián Hernández Güereca; María Guadalupe Güereca Bentacour individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as Successor-in-Interest to the Estate of Sergio Adrián Hernández Güereca, *Plaintiffs,*	)
vs.	)
Ramiro Cordero; Scott A. Luck; Victor Manjarrez, Jr.; Jesus Mesa, Jr., aka Jesus Meza, Jr.; and Carla L. Provost, *Defendants*.	)

Jury Trial Demanded

PLAINTIFFS' THIRD AMENDED COMPLAINT

Plaintiffs, Jesus Hernández Güereca and María Guadalupe Güereca Bentacour (hereinafter "Plaintiffs"), individually as the surviving parents of Sergio Adrián Hernández Güereca (hereinafter "Decedent," "Sergio"), and as Successors-in-Interest to the Estate of Sergio Adrián Hernández Güereca, complain and allege as follows:

PRELIMINARY STATEMENT AND NATURE OF THE CASE

1. Plaintiffs bring this action against Ramiro Cordero ("Cordero"); Scott A. Luck ("Luck"); Victor Manjarrez, Jr. ("Manjarrez"); Jesus Mesa, Jr., aka Jesus Meza, Jr. ("Mesa"), and Carla A. Provost ("Provost"), employees of the United States of America, in their individual capacities, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violation of Plaintiff Decedent's individual constitutional rights guaranteed by the Fourth and Fifth Amendments of the United States Constitution as set forth herein.

2. Defendant Jesus Mesa, Jr. used unlawful deadly force in shooting and killing Decedent on June 7, 2010, notwithstanding that Decedent was defenseless, was offering no resistance, had no weapon of any kind, and had not nor was threatening Mesa, or any third party, with harm, deadly or otherwise. Plaintiffs plead that, at all times relevant hereto, Mesa was an employee of the United States of America and, while acting within the course and scope or under the color of his agency with the United States, Mesa maliciously, and/or wrongfully, and/or otherwise tortuously shot Decedent

Sergio Adrián Hernández Güereca even though he showed no resistance to the Agent's demands, thereby causing Sergio Adrián Hernández Güereca's untimely death.

3. Defendants Ramiro Cordero, former United States Border Patrol Special Operations Supervisor, El Paso Sector; Scott A. Luck, United States Border Patrol, El Paso Sector; and Carla L. Provost, United States Border Patrol Deputy Chief Patrol Agent, El Paso Sector, through their own individual actions, violated Decedent's constitutional rights as guaranteed by the Fourth and Fifth Amendments by tolerating and condoning a pattern of brutality and excessive force by Border Patrol agents; systematically failing to properly and adequately monitor and investigate incidents of brutality or supervise and discipline officers involved in such misconduct; creating an environment to shield agents from liability for their wrongful conduct; and inadequately training officers and agents regarding the appropriate use and restraint of their firearms as weapons. Defendants had actual and/or constructive knowledge that the conduct of their subordinate, Mesa, posed pervasive and unreasonable risk of constitutional injury to Decedent and their response to that knowledge was so inadequate as to show deliberate indifference or tacit authorization of alleged offensive practices. Defendants' failure to safeguard against constitutional transgressions by Mesa constitutes an actionable wrong under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

4. Plaintiffs have/will effectuated service of process on Defendants in their individual capacities pursuant to

Fed. R. Civ. P. 4(i)(2), by sending a copy of the summons and Third Amended Complaint via certified mail, return receipt requested, to the following:

a. Ramiro Cordero
2132 E. Glen Dr.
El Paso, Texas 79936-3862

b. Scott A. Luck
3700 Hueco Valley Dr. Apt 203
El Paso, Texas 79938-5410

c. Victor Manjarrez, Jr.
12325 Tierra Limpia Dr.
El Paso, Texas 79938-4501

d. Jesus Mesa,Jr.
C/O Randy Ortega
609 Myrtle, Suite 100
El Paso, Texas 79901

e. Carla Provost
6390 Franklin View Dr.
El Paso, Texas 79912-8147

JURISDICTION

5. The jurisdiction of this Court is based on 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

VENUE

6. As more fully set forth herein, Plaintiffs contend that Defendant Mesa's acts occurred on the United States

side of the Rio Grande River in El Paso, Texas, in El Paso County, located on the border of the United States and Ciudad Juárez, Mexico. Defendants Cordero, Luck, Manjarrez, and Provost's actions and omissions occurred in El Paso, Texas. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b).

CONDITIONS PRECEDENT

7. All conditions precedent have been satisfied prior to filing this suit.

PARTIES

8. At all times relevant hereto, Plaintiff Jesus Hernández Güereca was, and now is, a citizen of the Republic of Mexico.

9. At all times relevant hereto, Plaintiff María Guadalupe Güereca Bentacour was, and now is, a citizen of the Republic of Mexico.

10. At all times relevant hereto, Decedent Sergio Adrián Hernández Güereca was a citizen of the Republic of Mexico.

11. At all times relevant hereto, Plaintiff Jesus Hernández Güereca individually as the surviving father of Decedent, and as Successor-in-Interest to the Estate of Decedent, may maintain a Federal Wrongful Death and Survival Action and recover damages for the value of the Decedent's life and the Decedent's pain and suffering.

12. At all times relevant hereto, Plaintiff María Guadalupe Güereca Bentacour individually as the surviving mother of Decedent, and as Successor-in-Interest to the Estate of Decedent, may maintain a

Federal Wrongful Death and Survival Action and recover damages for the value of the Decedent's life and the Decedent's pain and suffering.

13. At all times relevant hereto, Defendants Cordero, Luck, Mesa, and Provost were and/or are investigative or law enforcement officers for the United States Border Patrol, acting within the course and scope of their employment, or under the color of such employment, with the United States of America.

14. Plaintiffs believe and thereupon allege that, at all times relevant hereto, Mesa was acting within the course and scope of his employment with the Defendant the United States of America and/or other Defendants on June 7, 2010, when Decedent was wrongfully shot to death.

15. Plaintiffs believe and thereupon allege that, at all times relevant hereto, the United States Bureau of Customs and Border Protection was, and is, a subdivision of the United States Department of Homeland Security—a United States Federal Governmental entity with headquarters in Washington, D.C., and various branch offices throughout the country including this judicial district.

GENERAL FACTUAL ALLEGATION APPLICABLE TO ALL CLAIMS FOR RELIEF

16. Monday, June 7, 2010 reached a high of 109 degrees in El Paso, Texas. Sergio Adrián Hernández Güereca was spending the last few minutes of the day together with his friends in the all-but-dry cement culvert separating the sister countries of Mexico and the United States. Similar to the Native American Indian game "counting coup," Sergio and his friends would

physically run up and touch the barbed-wire United States high fence, and then scamper back down the incline. They had no interest in entering the United States. Rather, in a scene as old as time, a group of young boys were simply ending their day laughing and playing under the gathering clouds of a evening summer thunderstorm, before heading back home for dinner and bed.

17. Suddenly, a United States Border Agent, Jesus Mesa, Jr., aka Jesus Meza, Jr., emerged on his bicycle and detained one of the individuals, dragging the young boy along the concrete. Sergio retreated and stood still beneath the pillars of the Paso del Norte Bridge, observing. US Border Patrol Agent Jesus Mesa, Jr., aka Jesus Meza, Jr., then stopped, pointed his weapon across the border, seemingly taking careful aim, and squeezed the trigger at least twice, fatally wounding Sergio with at least one gunshot wound to the face. Sergio, who had been standing safely and legally on his native soil of Mexico, unarmed and unthreatening, lay dead on his back in his blue jeans and sneakers. He was fifteen years old.

18. More US Border Patrol agents arrived briefly, the shooter, Agent Jesus Mesa, Jr., aka Jesus Meza, Jr., picked up his bicycle, and then they all left. No one took any action to render emergency medical aid to Sergio, leaving him dead or dying beneath Paso del Norte Bridge in the Territory of Mexico. Shortly thereafter, Mexican police arrived on scene and pronounced Sergio dead.

19. Almost immediately, FBI spokeswoman Andrea Simmons, prior to discovering the existence of a

disturbing video depicting much of the event, issued a false and reprehensible cover-up statement:

> "This agent, who had the second subject detained on the ground, gave verbal commands to the remaining subjects to stop and retreat. However, the subjects surrounded the agent and continued to throw rocks at him. The agent then fired his service weapon several times, striking one subject who later died."

20. This litigation arises from the acts and omissions of the named Defendants acting in concert in their individual capacities, as appropriately pled herein.

21. Plaintiffs further contend that Defendants are individually, jointly, and severally liable for those violations of Decedent's constitutional rights, referenced above and below, in that Defendants have:

(1) tolerated, condoned, and encouraged a pattern of brutality and use of excessive force by members of the United States Department of Homeland Security, United States Bureau of Customs and Border Protection, United States Border Patrol, United States Immigration and Customs Enforcement Agency, and/or United States Department of Justice against citizens from Mexico and Central or South America;

(2) systematically failed to properly and adequately monitor and investigate such incidents and to supervise and discipline the officers involved;

(3) created an environment and culture in which officers and agents are encouraged to shield the misconduct of fellow officers, whereby officers and agents believe they can violate without legal consequence and with impunity the rights of persons such as Decedent;

(4) inadequately trained officers and agents regarding the proper restraint and use of firearms as weapons; and

(5) inadequately elected, trained, monitored, and supervised officers and agents.

FIRST CLAIM FOR RELIEF:
ADOPTION OF POLICIES THAT VIOLATED DECEDENT'S FOURTH AND FIFTH AMENDMENT RIGHTS

22. Plaintiffs repeat and incorporate above paragraphs 1 through 21 inclusive, as though fully set forth in this paragraph 22.

23. Plaintiffs allege that, at all times relevant hereto, Defendants Cordero, Luck, Manjarrez, and Provost, while acting in their respective official capacities, exercised supervision and control over Defendant Mesa. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

24. Plaintiffs allege that such supervisorial Defendants, acting in their respective individual capacities, were authorized final policy-makers. In such capacities, they adopted, acquiesced to, or ratified official customs, policies, procedures, and decisions, including training programs, which they knew, or should have known,

were inadequate regarding the use of deadly force. The inadequacy of such official customs, policies, procedures, and decisions, including training programs, directly and proximately caused Defendant Mesa to use unreasonable, unconstitutional, and excessive force, i.e. deadly force, in effecting the arrest of Decedent. The use of such force deprived Decedent of his Fourth and Fifth Amendment rights to be free from unreasonable search and seizure. The inadequacy of such customs, policies, procedures, and decisions, including training programs, manifested a deliberate indifference to the protection of Decedent's constitutional rights and was the moving force, which resulted in the deprivation of Decedent's constitutional rights.

25. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

SECOND CLAIM FOR RELIEF:
FAILURE TO ADOPT POLICIES WHICH RESULTED IN THE VIOLATION OF DECEDENT'S FOURTH AND FIFTH AMENDMENT RIGHTS

26. Plaintiffs repeat and incorporate above paragraphs 1 through 22, inclusive, as though fully set forth in this paragraph 26.

27. Plaintiffs allege that, at all times relevant hereto, Defendants Cordero, Luck, Manjarrez, and Provost, while acting in their respective official capacities, exercised supervision and control over Defendant Mesa. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

28. Plaintiffs allege that such supervisorial Defendants, acting in their respective individual capacities, were authorized final policy-makers who failed to adopt or ratify official customs, policies, procedures, and decisions, including training programs, regarding the use of reasonable force in effecting arrests. Such failure directly and proximately caused Defendant Mesa to use unreasonable, unconstitutional, and excessive force, i.e. deadly force, in effecting the arrest of Decedent. The use of such force deprived Decedent of his Fourth and Fifth Amendment rights to be free from unreasonable search and seizure. The failure to adopt such customs, policies, procedures, and decisions, including training programs, directly and proximately resulted in Decedent being shot by Defendant Mesa. The failure to adopt such customs, policies, procedures, and decisions, including training programs, manifested a deliberate indifference to the protection of Decedent's constitutional rights and was the moving force, which resulted in the deprivation of Decedent's constitutional rights.

29. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

THIRD CLAIM FOR RELIEF:
VIOLATION OF FOURTH AND FIFTH AMENDMENT RIGHTS BY JESUS MESA, JR., AKA JESUS MEZA, JR.

30. Plaintiffs repeat and incorporate above paragraphs 1 through 22, inclusive, as though fully set forth in this paragraph 30.

31. Plaintiffs allege that Defendant Mesa shot Decedent on June 7, 2010, while acting individually under color of law as an employee of the United States of America, United States Department of Homeland Security, United States Bureau of Customs and Border Protection, United States Border Patrol, United States Immigration and Customs Enforcement Agency, and/or United States Department of Justice while attempting to apprehend him in El Paso, Texas on suspicion of illegal entry into the United States.

32. Plaintiffs allege that in shooting Decedent, Mesa acted unreasonably by using excessive, deadly force against Decedent in violation of the Fourth and Fifth Amendments of the United States Constitution. At the time of the shooting, Decedent was unarmed and presented no physical threat to Mesa.

33. Plaintiffs allege that Mesa's shooting of Decedent evidences Mesa'a callous disregard for, and deliberate indifference to, Decedent's constitutional rights.

34. As a direct and proximate result of the acts or omissions of Mesa, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

WHEREFORE, Plaintiffs pray for judgment against all named and unnamed Defendants as follows:

A. Damages as allowed on each Claim for Relief in an amount according to proof at the time of trial;

B. All together with any interest, pre-and-post judgment, costs and disbursements; and

C. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

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OF COUNSEL
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ATTORNEY IN CHARGE FOR PLAINTIFFS, JESUS HERNÁNDEZ GÜERECA, INDIVIDUALLY AND AS THE SURVIVING FATHER OF SERGIO ADRIÁN HERNÁNDEZ GÜERECA, AND AS SUCCESSOR-IN-INTEREST TO THE ESTATE OF SERGIO ADRIAN HERNÁNDEZ GÜERECA; MARÍA GUADALUPE GÜERECA BENTACOUR INDIVIDUALLY AND AS THE SURVIVING MOTHER OF SERGIO ADRIÁN HERNÁNDEZ GÜERECA, AND AS SUCCESSOR-IN-INTEREST TO THE ESTATE OF SERGIO ADRIÁN HERNÁNDEZ GÜERECA

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CERTIFICATE OF SERVICE

On August 22, 2011, I certify that a copy of the above and foregoing was served on all counsel of record identified below in accordance with the Federal Rules of Civil Procedure.

By: /s/ Robert C. Hilliard
Robert C. Hilliard

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Attorney for Jesus Mesa, Jr a/k/a Jesus Meza, Jr.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 4:14-CV-02251-RCC

[Filed July 9, 2015]

Araceli Rodriguez, Plaintiff,	)
v.	)
Lonnie Swartz, Defendant.	)

ORDER

INTRODUCTION

This case calls on the Court to answer two challenging questions: 1) whether a Mexican national standing on the Mexican-side of the United States and Mexico border at the time of the alleged violation can avail himself of the protections of the Fourth and Fifth Amendments of the United States Constitution when a U.S. Border Patrol agent standing in the United States uses excessive force against him; and 2) whether a U.S. Border Patrol agent may assert qualified immunity based on facts he found out after the alleged violation.

Specifically before the Court are Plaintiff Araceli Rodriguez' First Amended Complaint ("FAC") (Doc. 18), Defendant Lonnie Swartz' Fed.R.Civ.P. Rule 12(b)(6) Motion to Dismiss (Doc. 30), Rodriguez' Response (Doc. 46), and Swartz' Reply (Doc. 49). The Court heard oral arguments on this matter on May 26, 2015. For the reasons stated below, the Court grants in part and denies in part Swartz' Motion to Dismiss.

BACKGROUND

The Court sets forth the following factual background and hereby imparts that these statements are reiterations of Rodriguez' allegations which may or may not be a complete and accurate rendition of the facts of this case. *See* (Doc. 18). At this stage in the proceedings, Swartz has made no concessions as to the veracity of Rodriguez' allegations nor presented any contravening facts; such facts are not required when filing a Rule 12(b)(6) motion to dismiss.

1. Rodriguez brings this suit on behalf of her deceased minor son, J.A. (Doc. 18 at ¶¶ 3, 6).

2. On the night of October 10, 2012, J.A. was walking home alone down the sidewalk of Calle Internacional, a street that runs alongside the border fence on the Mexican side of the border between the United States and Mexico. (Doc. 18 at ¶ 9).

3. According to an eyewitness who was walking behind J.A. that night, a Border Patrol agent stationed on the U.S. side of the fence, now known to be Swartz, opened fire. According to various reports, Swartz fired anywhere from 14 to 30 shots. Upon information and

belief, Swartz did not issue any verbal warnings before opening fire. (Doc. 18 at ¶ 10).

4. J.A. was shot approximately ten times and collapsed where he was shot. Virtually all of the shots entered his body from behind. Upon information and belief, no one else was shot. (Doc. 18 at ¶¶ 11-13).

5. Immediately prior to the shooting, J.A. was visible and not hiding—he was peacefully walking down the street by himself. Eyewitnesses state that he did not pose a threat and was not committing a crime, throwing rocks, using a weapon or threatening U.S. Border Patrol agents or anyone else prior to being shot. (Doc. 18 at ¶ 14).

6. At the moment he was shot, J.A. was walking on the southern side of Calle Internacional, directly across the street from a sheer cliff face that rises approximately 25 feet from street level. The cliff is approximately 30 feet from where J.A. was standing when shot. The border fence, which is approximately 20-25 feet tall, runs along the top of the cliff. Thus, at the location where J.A. was shot, the top of the fence towards approximately 50 feet above street level on the Mexican side. The fence itself is made of steel beams that are 6.5 inches in diameter. Each beam is approximately 3.5 inches apart from the next. (Doc. 18 at ¶ 15).

7. At the time of the shooting, J.A. lived in Nogales, Sonora, Mexico, approximately four blocks from where he was shot. Because J.A's mother (Plaintiff, Araceli Rodriguez) was away for work, J.A.'s grandmother often visited Nogales, Mexico to care for him. J.A.'s grandmother and grandfather live in Arizona and were lawful permanent residents of the United States at the time of the shooting. They are now U.S. citizens. (Doc. 18 at ¶ 17).

8. Swartz fired from the U.S. side of the fence. Swartz acted under color of law when shooting J.A. Upon information and belief, Swartz did not know whether J.A. was a U.S. citizen or whether J.A. had any significant contacts with the United States. (Doc. 18 at ¶¶ 17, 19).

9. J.A.'s killing by Swartz is not a unique event, but part of a larger pattern of shootings by Border Patrol agents in Nogales and elsewhere. (Doc. 18 at ¶ 20).

10. The U.S.-Mexico border area of Mexico is unlike other areas of Mexico. U.S. Border Patrol agents not only control the U.S. side of the fence, but through the use of force and assertion of authority, also exert control over the immediate area on the Mexican side, including where J.A. was shot. (Doc. 18 at ¶ 21).

11. U.S. control of the Mexican side of the border fence in Nogales and other areas along the Southern border is apparent and

longstanding, and recognized by persons living in the area. (Doc. 18 at ¶ 22).

12. Border Patrol agents use guns, non-lethal devices and other weapons, as well as military equipment and surveillance devices to target persons on the Mexican side of the border. For example, U.S. surveillance cameras are mounted along the border fence, monitoring activity on the Mexican side of the fence. Additionally, Border Patrol agents have opened fire into Nogales from the U.S. side on prior occasions and are known to launch non-lethal devices such as pepper spray canisters into Nogales neighborhoods from the U.S. side of the border fence. (Doc. 18 at ¶ 23).

13. U.S. Border Patrol agents exercise control over areas on the Mexican side of the border adjacent to the international border fence. U.S. Border Patrol agents make seizures on the Mexican side of the fence. U.S. Bureau of Customs and Border Protection officials are authorized to be on Mexican soil to conduct pre-inspection of those seeking admission to the United States. U.S. Border Patrol helicopters fly in Mexican airspace near the border and swoop down on individuals. (Doc. 18 at ¶ 24).

14. The Chief of the U.S. Border Patrol has acknowledged that U.S. border security policy "extends [the United States'] zone of security outward, ensuring that our physical border is not the first or last line of defense,

> but one of many." *Securing Our Borders—Operation Control and the Path Forward: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. 8 (2011) (prepared by Michael J. Fisher, Chief of U.S. Border Patrol). (Doc. 18 at ¶ 24).

LEGAL STANDARD

"On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint 'contains sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012) (*citing Ashcroft v. Iqbal,* 556 U.S. 662, 678; *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1108-09; see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). In determining plausibility, the court must accept as true all material factual allegations in the complaint, construe the pleadings in the light most favorable to the plaintiff and make any reasonable inferences therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). A court may dismiss a claim if a successful affirmative defense appears clearly on the face of the pleadings. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

DISCUSSION

I. *Bivens*, the extraterritorial application of the U.S. Constitution and qualified immunity

Rodriguez asserts her claims against Swartz in his individual capacity for deprivation of J.A.'s constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. (Doc. 18 at p.8). *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court of the United States held that money damages may be recovered against a federal official for violation of a plaintiff's constitutional rights. In order to successfully allege a *Bivens* claim, a plaintiff must plead factual matter demonstrating that he was deprived of a clearly established constitutional right. *Iqbal*, 556 U.S. at 666.

Swartz argues that Rodriguez cannot state a claim that J.A. was deprived of a constitutional right because J.A., a Mexican citizen without substantial voluntary connections to the United States and standing on Mexican soil at the time of the alleged violation, is not entitled to the protections of the Fourth and Fifth Amendments of the United States Constitution. Should this Court hold that J.A. was protected by either or both Amendments, Swartz asserts that he is entitled to qualified immunity because J.A.'s rights pursuant to the Fourth or Fifth Amendments were not clearly established at the time of the alleged violation.

Rodriguez responds by arguing that this Court need not analyze this case as an extraterritorial application of the United States Constitution because Swartz'

conduct took place entirely within the United States. Should the Court consider the extraterritorial application of the Constitution, Rodriguez asserts that J.A. was protected by both the Fourth and Fifth Amendments even while on Mexican soil. Rodriguez further avers that Swartz should not be entitled to qualified immunity because he knew it was a crime to fatally shoot a Mexican citizen across the border without justification, and because Swartz did not know J.A.'s legal status or citizenship when he shot J.A., such that qualified immunity should not apply post-hoc Swartz' awareness of J.A.'s citizenship.

II. *Hernandez v. United States et al.* is persuasive, not controlling, authority

The parties' arguments before this Court are framed in reference to *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), a case with very similar arguments to those now before the Court:

On June 7, 2010, Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, was on the Mexican side of a cement culvert that separates the United States from Mexico. *Id*. at 255. Sergio had been playing a game with his friends that involved running up the incline of the culvert, touching the barbed-wire fence separating Mexico and the United States, and then running back down the incline. *Id.* U.S. Border Patrol Agent Jesus Mesa, Jr. arrived on the scene and detained one of Sergio's friends, causing Sergio to retreat and hide behind the pillars of a bridge on the Mexican side of the border. *Id.* Mesa, still standing in the United States, then fired at least two shots at Sergio, one of which struck Sergio in the face and killed him. *Id.*

Sergio's parents filed suit against the United States, unknown federal employees, and Mesa. *Id.* Similarly to the case before this Court, the claim against Mesa was made pursuant to *Bivens* for violations Sergio's Fourth and Fifth Amendment rights through the use of excessive, deadly force. *Id.* Mesa moved to dismiss the claims against him asserting qualified immunity and arguing that Sergio, as an alien injured outside the United States, lacked Fourth or Fifth Amendment protections. *Id.* at 256. The U.S. District Court for the Western District of Texas agreed and dismissed the claims against Mesa. *Id.* Sergio's parents appealed.

A divided three judge panel of the Court of Appeals for the Fifth Circuit held that in Sergio's case when, "an alleged seizure occur[s] outside of [the U.S.] border and involving a foreign national—the Fourth Amendment does not apply." *Id.* at 267. Nevertheless, the panel majority also held "that a noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment." *Id.* at 272. The panel further found that *Bivens* extends to an individual located abroad who asserts the Fifth Amendment right to be free from gross physical abuse against federal law enforcement agents located in the United States based on their conscience-shocking, excessive use of force across our nation's borders. *Id.* at 277. Finally, the panel held that the facts alleged in the complaint defeated Mesa's claim of qualified immunity stating: "It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person." *Id.* at 279-80 (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Upon Mesa's motion, the Fifth Circuit Court of Appeals agreed to rehear *Hernandez* en banc. 771 F.3d 818 (5th Cir. 2014). In a per curiam decision, a unanimous Fifth Circuit Court of Appeals affirmed the district court's dismissal of both counts against Mesa holding that Sergio's parents failed to allege a violation of the Fourth Amendment, and that Sergio's Fifth Amendment rights were not "clearly established" when he was shot. *Hernandez v. United States et al.*, --- F.3d --- (5th Cir. April 24, 2015); 2015 WL 1881566, at *1. In holding Sergio's Fifth Amendment rights were not "clearly established," the Fifth Circuit Court of Appeals gave allegiance to the general rule of constitutional avoidance and bypassed the issue of whether Sergio was entitled to constitutional protection as a noncitizen standing on foreign soil. *Id.* at *2. At least three judges wrote concurring opinions on the matter—each attempting to reconcile and apply various Supreme Court holdings (including *Johnson v. Eisentrager*, 399 U.S. 763 (1950);*Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and *Boumediene v. Bush*, 553 U.S. 723 (2008)) to facts unique to the Fifth or any other circuit.

Swartz urges the Court to follow the Fifth Circuit Court of Appeals' en banc decision and dismiss both of Rodriguez' claims based on theories of constitutional extraterritoriality and qualified immunity. Rodriguez avers that *Hernandez* was wrongly decided and holds no precedential value in this Circuit. The Court agrees that *Hernandez* is not controlling authority in this circuit. All the same, the Court has been guided by the thorough historical and legal analysis of the complex issues addressed in the Fifth Circuit Appellate judges' opinions and utilized the *Hernandez* decisions as a

frame of reference. Nevertheless, while *Hernandez* shares many similar arguments to the case at hand, this Court evaluates Rodriguez' case on the facts alleged in her First Amended Complaint, on the arguments made by the parties' in their pleadings, and in light of the Ninth Circuit Court of Appeal's applicable and controlling case law. Applying this Circuit's case law to the facts of this specific case, this Court respectfully disagrees with the Fifth Circuit Court of Appeals and arrives at a different conclusion as outlined below.

III. J.A.'s seizure occurred in Mexico

The Court begins with Rodriguez' contention that there is no need to analyze J.A.'s seizure as an extraterritorial application of the constitution because Swartz' conduct occurred entirely within the United States. To support her position, Rodriguez cites to use the language in footnote sixteen of *Wang v. Reno*, 81 F.3d 808, 818 n.16 (9th Cir. 1996) stating that the government's conduct in the United States can constitute a violation abroad. However, the Court in *Wang* clearly stated that "[t]he deprivation [of Wang's due process rights] occurred on American soil when Wang was forced to take the witness stand," and that the actions taken while Wang was abroad were "inextricably intertwined with the ultimate violation." *Id*. Such is not the same in the present case where the ultimate violation, J.A.'s seizure, occurred entirely in Mexico.

A seizure occurs "only when there is a governmental termination of freedom of movement..." *Brower v. Cnty of Inyo*, 489 U.S. 593, 596-97 (1989). In this case, J.A. was not seized when Swartz shot at him, but when the

bullets entered J.A.'s body and impeded further movement. As such, any constitutional violation that may have transpired materialized in Mexico. Accordingly, the Court now turns to the question of whether the Fourth and/or Fifth Amendments of the United States Constitution protect J.A. outside the United States.[1]

IV. Rodriguez' claim that Swartz violated J.A.'s Fourth Amendment rights survives

A. Both *Boumediene* and *Verdugo-Urquidez* apply

The Supreme Court of the United States "has discussed the issue of the Constitution's extraterritorial application on many occasions." *Boumediene*, 553 U.S. at 755-71. However, it was not until 2008's *Boumediene v. Bush* that the Supreme Court held for the first time that noncitizens detained by the United States government in territory over which another country maintains de jure sovereignty have any rights under the United States Constitution. *Id.* at 771 (addressing whether the Suspension Clause has full effect at Naval Station in Guantanamo Bay in case where aliens detained as enemy combatants sought the Writ of Habeas Corpus).

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[1] The Court also rejects as unpersuasive Rodriguez' argument pursuant to *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987): that judicial proceedings, and therefore, any government actions that could violate the litigants' rights take place inside the United States. *Asahi* focused on when a state court could exercise personal jurisdiction over a foreign corporation. Jurisdiction is not at issue in this case.

In their pleadings, the parties disagree as to which standard the Court should apply to decide whether the Fourth and Fifth Amendments of the United States Constitution apply in this case. Swartz argues that *Boumediene* is limited to the Suspension Clause and inapplicable in the present case. Further, Swartz avers that the "voluntary connections" test announced in *Verdugo-Urquidez*' controls Rodriguez' Fourth Amendment claim. *Verdugo-Urquidez*, 494 U.S. at 261, 271 (holding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident and located in a foreign country where nonresident had no voluntary connection to the United States). Rodriguez responds that *Verdugo-Urquidez*' "voluntary connections" test was repudiated by the Supreme Court in *Boumediene* where the Court applied a "general functional approach" and "impracticable and anomalous" standard when determining the extraterritoriality of the United States Constitution. 553 U.S. at 755-72.

The Fifth Circuit Court of Appeals grappled with this very question in addressing *Hernandez* and decided to apply *Verdugo-Urquidez' "*sufficient connections requirement" in light of *Boumediene*'s "general functional approach" as to the Fourth Amendment claim. *Hernandez*, 757 F.3d at 266. In arriving at this conclusion, the Fifth Circuit Court of appeals rejected 1) Defendant Mesa's argument that the Constitution does not guarantee rights to foreign nationals injured outside the sovereign territory of the United States, 2) the district court's finding that *Boumediene* was limited to the Suspension Clause, and 3) the plaintiffs' argument that the Court should ignore

Verdugo-Urquidez in light of *Boumediene*. *Id.* at 260, 262, and 265. Applying both standards, the appellate court considered the fact that Hernandez lacked: American citizenship, territorial presence in the United States, interest in entering the United States, acceptance of societal obligations, and sustained connections to the United States. *Id.* Additionally, the Court weighed several practical considerations in determining whether Hernandez was protected by the Fourth Amendment including the uniqueness of the border. *Id*. at 266-67 (discussing the limited application of the Fourth Amendment during searches at the border, national self-protection interests, the increase of Border Patrol agents at the southwest border, and the use of sophisticated surveillance systems). Ultimately, the appellate court found that Hernandez was not entitled to the protections of the Fourth Amendment based on the facts alleged.

The Ninth Circuit Court of Appeals similarly determined that both *Boumediene's* "functional approach" factors and *Verdugo-Urquidez'* "significant voluntary connection" test applied in the case of a woman seeking to assert her rights under the First and Fifth Amendments of the United States Constitution. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 994-97 (9th Cir. 2012). The Court found a comparison of Ibrahim's case with *Verdugo-Urquidez*, *Eisentrager*, and *Boumediene* instructive in rejecting the government's bright-line "formal sovereignty-based" test and in holding that the plaintiff had established voluntary connections to the United States during her studies at an American university. *Id.* at 995-97. Similarly, this Court finds an analysis of these cases instructive in finding that both *Boumediene*'s

functional approach factors and *Verdugo- Urquidez* "voluntary connections" test apply in this case.

In 1950's *Eisentrager*, the Supreme Court of the United States found that German citizens who had been arrested in China, convicted of violating the laws of war after adversary trials before a U.S. military tribunal in China, and sent to a prison in Germany to serve their sentences did not have the right to seek the Writ of Habeas Corpus under the United States Constitution. 339 U.S. at 770-77 (considering (a) petitioners' status as enemy aliens; (b) lack of previous territorial presence or residence in the United States; (c) capture and custody by U.S. military as prisoners of war; (d) convictions by Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; and (f) at all times imprisoned outside the United States.)

In 1990's *Verdugo-Urquidez*, a Mexican-national was extradited from Mexico to face drug charges in the United States. 494 U.S. at 262. While awaiting trial, American law enforcement agents working with Mexican authorities performed a warrantless search of Verdugo-Urquidez' Mexican residences and seized various incriminating documents. *Id.* The criminal defendant sought to suppress this evidence and alleged violations of his Fourth Amendment rights. *Id.* at 263. The Supreme Court of the United States considered the text and history of the Fourth Amendment, as well as Supreme Court cases discussing the application of the Constitution to aliens extraterritorially. The Supreme Court found that under the circumstances (where Verdugo-Urquidez was a citizen and resident of Mexico

with no voluntary attachment to the United States and the place to be searched was located in Mexico), the Fourth Amendment had no application. *Id*. at 274-75. Concurring in the opinion, Justices Kennedy and Stevens each wrote separately to address the fact that applying the Warrant Clause to searches of noncitizens' homes in foreign jurisdictions would be impractical and anomalous due to practical considerations. *Id.* at 275-79.

In 2008's *Boumediene*, the plaintiffs were aliens who had been designated as enemy combatants, were detained at the United States Naval Station in Guantanamo Bay, Cuba, and sought the Writ of Habeas Corpus. 553 U.S. at 732. The government argued that because of their status as enemy combatants and their physical location outside the sovereignty of the United States, they had no constitutional rights and no privilege to Habeas Corpus. *Id.* at 739. The Supreme Court rejected the government's argument instead finding that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. In so holding, *Boumediene* addressed both *Eisentrager* and *Verdugo-Urquidez* and found both of these decisions to stand for the proposition that the extraterritorial reach of the constitution depends upon "practical considerations" including the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Id.* at 759-66.

In *Ibrahim*, the Court of Appeals for the Ninth Circuit considered that Ibrahim was unlike the plaintiffs in *Eisentrager*—she had not been convicted of, or even charged with violations of any law. 669 F.3d at 996. On the other hand, Ibrahim shared an important similarity with the plaintiffs in *Boumediene*—she sought the right to assert constitutional claims in a civilian court in order to correct what she contended was a mistake. *Id.* at 997. Here, J.A. was also unlike the plaintiffs in *Eisentrager*—he had not been charged with or convicted of violating any law. Similarly to the plaintiffs in *Boumediene*, J.A. was on foreign soil when he was seized by American forces and now seeks to assert that his seizure was unlawful. Per this Circuit's precedent in *Ibrahim* and the Supreme Court's reasoning in *Boumediene*, this Court sees no reason why *Boumediene* should not apply in this case. Because *Verdugo-Urquidez* has not been overruled and considers the Fourth Amendment explicitly, this Court finds that it must also apply the "voluntary connections" test. In sum, this Court finds most appropriate to apply the "practical considerations" outlined in *Boumediene* in conjunction with *Verdugo-Urquidez*' "voluntary connections" test to evaluate whether J.A. was protected by the Fourth Amendment.

B. The facts alleged in this case weigh in favor of establishing that J.A. was entitled to the protections of the Fourth Amendment of the U.S. Constitution

The Supreme Court stated three factors relevant to determining the extraterritorial application of the Constitution (specifically the Suspension Clause) in

Boumediene: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. 553 U.S. at 766-71. The relevant obstacles included, but were not limited to, the consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government. *Id.* at 766. The Court considers these along with the "voluntary connections" test outlined in *Verdugo-Urquidez* to find that Rodriguez can assert J.A.'s rights pursuant to the Fourth Amendment.

To begin, the Court considers J.A.'s citizenship, status, and voluntary connections to the United States. J.A. was a sixteen-year-old Mexican citizen. *See* Doc. 18 at ¶¶ 1-2. At the time Swartz seized him, J.A. was not suspected of, charged with, or convicted of violating any law. Just prior to the shooting, J.A. was visible and not hiding. *Id*. at ¶14. Observers stated that he did not pose a threat, but was peacefully walking down the street. *Id.* He was not committing a crime, nor was he throwing rocks, using a weapon, or in any way threatening U.S. Border Patrol agents or anyone else. *Id*. Further, J.A. was not a citizen of a country with which the United States are at war, nor was he engaged in an act of war or any act that would threaten the national security of the United States. *Id.* Thus, J.A.'s status was that of a civilian foreign national engaged in a peaceful activity in another country, but within the U.S.'s small-arms power to seize. The Court here finds that while J.A.'s nationality weighs against granting him protection pursuant to the Fourth Amendment, his status as a civilian engaged in

peaceful activity weighs in favor of granting him protection despite the fact that J.A. was in the territory of another country when he was seized.

As to substantial voluntary connections to the United States, this Court finds that J.A. had at least one. J.A. and his family lived within the region formerly called "ambos Nogales," or "both Nogales," referring to the adjacent towns of Nogales, Arizona and Nogales, Sonora—once adjacent cities flowing into one-another, now divided by a fence. *Id.* at ¶ 17. In particular, J.A. had strong familial connections to the United States. Both his grandparents were legal permanent residents (now citizens) of the United States residing in Nogales, Arizona. *Id.* J.A.'s grandmother would often cross the border into Mexico to care for J.A. while his mother worked. *Id.* Further, J.A.'s home in Nogales, Sonora, Mexico was within four blocks' distance from the U.S.-Mexico border. *Id.* Living in such proximity to this country, J.A. was likely well-aware of the United States' (and specifically the U.S. Border Patrol's) *de facto* control and influence over Nogales, Sonora, Mexico. *Id.* at ¶¶ 17, 21-24.

The Court here considers these same factors in assessing the nature of the location where the alleged constitutional violation occurred.[2] Specifically, the Court considers Rodriguez' factual allegations that the

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[2] *See Hernandez v. United States*, 757 F.3d 249, 267 (5th Cir. 2014) (outlining the scope of the U.S. Border Patrol's presence and influence along the U.S.'s southwest border with Mexico.) *See also Boumediene*, 553 U.S. at 754 ("Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory.")

U.S.-Mexico border is unlike other areas of Mexico. *Id*. at ¶¶ 21-24. "U.S. Border Patrol agents not only control the U.S. side of the fence, but through the use of force and assertion of authority, they also exert control over the immediate area on the Mexican side, including where J.A. was shot." *Id.* at ¶ 21. "U.S. control of the Mexican side of the border fence in Nogales and other areas along the Southern border is apparent and longstanding, and recognized by persons living in this area." *Id.* at ¶ 22. "Border patrol agents use guns, non-lethal devices and other weapons, as well as military equipment and surveillance devices to target persons on the Mexican side of the border....Border Patrol agents have opened fire into Nogales from the U.S. side on prior occasions and are known to launch non-lethal devices such as pepper spray canisters into Nogales neighborhoods from the U.S. side of the border fence. By shooting individuals on the Mexican side of the border area, the United States, through Border Patrol, controls the area immediately adjacent to the international border fence on the Mexican side. This control extended to the street, Calle Internacional, where J.A. was killed." *Id.* at ¶ 23. The Court finds this factor to weigh in favor of granting J.A. constitutional protection pursuant to the Fourth Amendment.

The Court also considers the practical obstacles inherent in enforcing the claimed right. These considerations include the nature of the right asserted, the context in which the claim arises, and whether recognition of the right would create conflict with a foreign sovereign's laws and customs. *Boumediene*, 553 U.S. at 755-65. The nature of the right asserted here is the right to be free from unreasonable seizures—specifically, the fundamental right to be free from the

United States government's arbitrary use of deadly force. *See* Doc. 18 at ¶¶ 35-38. The claim here arises as a lawsuit in a United States court and asks that this court apply U.S. constitutional law to the actions of a U.S. Border Patrol agent firing his weapon from within the United States. *Id.* at ¶¶ 4-5.; *Cf. Boumediene*, 553 U.S. at 759-64 (discussing practical considerations of providing plaintiffs with ability to assert their rights abroad). Rodriguez has provided documentation from the Mexican government such that there would be no conflict with Mexico's laws and customs if this Court afforded J.A. protection under the Fourth Amendment. *See* Doc. 46-1. The Court finds that these factors weigh in favor of granting J.A. protection under the Fourth Amendment.

Finally, the Court gives weight to the Supreme Court's concerns in *Verdugo-Urquidez*—that applying the Fourth Amendment to the warrantless search and seizure of a Mexican national's home in Mexico "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" and could also plunge U.S. law enforcement and military agents "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." 494 U.S. at 273-74; *see also Hernandez*, 757 F.3d at 267 (noting that extending the Fourth Amendment protections to a Mexican national on Mexican soil might carry a host of implications for U.S. Border Patrol's use of sophisticated surveillance systems (including mobile surveillance units, thermal imaging systems, unmanned aircrafts and other large- and small-scale non-intrusive inspection equipment per, *Kyllo v. United States*, 533 U.S. 27, 40 (2001))).

The Court here finds that such concerns are ameliorated by the fact that this case does not involve the Warrant Clause of the Fourth Amendment, magistrate judges, or the issuance of warrants and/or the searches and seizure of property abroad. This case addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border. U.S. Border Patrol agents are already trained in the limits of the Fourth Amendment when addressing citizens and non-citizens alike when these individuals place foot within the United States. *See, e.g.* 8 C.F.R. § 287.8(a)(2). These agents would require no additional training to determine when it is appropriate to use deadly force against individuals (whether citizens or noncitizens alike) located on the Mexican side of the United States-Mexico border.

Weighing all of the aforementioned factors, this Court finds that J.A. was entitled to protection pursuant to the Fourth Amendment. The Court acknowledges that it has arrived at a different conclusion from that of the Court of Appeals for the Fifth Circuit in *Hernandez v. U.S.*, 757 F.3d at 267. This Court respectfully disagrees with how the Circuit Court weighed some factors, but bases its decision to extend J.A. protection pursuant to the Fourth Amendment on the facts alleged in Rodriguez' First Amended Complaint and this Court's own analysis of the relevant case law. (Doc. 18). At its heart, this is a case alleging excessive deadly force by a U.S. Border Patrol agent standing on American soil brought before a United States Federal District Court tasked with upholding the United States Constitution—that the deceased was a Mexican national standing on Mexican

soil at the time the violation occurred is but one of the many practical considerations and factors the Supreme Court of the United States has ordered the lower courts to consider. Pursuant to the facts presented before this Court in Rodriguez' First Amended Complaint, the factors outlined in *Verdugo-Urquidez* and *Boumediene* weigh in favor of extending J.A. constitutional protection pursuant to the Fourth Amendment.

V. Rodriguez' claim pursuant to the Fifth Amendment is dismissed

Rodriguez' First Amended Complaint alleges that Swartz' actions violated J.A.'s Fifth Amendment guarantee of substantive due process. In his motion to dismiss, Swartz alleges that Rodriguez' Fifth Amendment claim is improperly before this Court as a substantive due process violation that is best analyzed pursuant to the Fourth Amendment.

In fact, the Supreme Court of the United States has held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor,* 490 U.S. 386, 395 (1989); *see also Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*

Finding both that J.A. was 'seized' and that his excessive force claim pursuant to the Fourth Amendment may proceed, this Court hereby grants Swartz' motion to dismiss Rodriguez' claim pursuant to the Fifth Amendment because Swartz conduct is more properly analyzed under the Fourth Amendment. In dismissing Rodriguez' Fifth Amendment claim, this Court does not reach Rodriguez' argument that J.A. should be entitled to protection under the Fifth Amendment's prohibition against arbitrary deprivation of life if this Court were to find that the Fourth Amendment did not protect J.A. *See* Doc. 46 at pp. 21-22.

VI. Swartz is not entitled to qualified immunity

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Messerchmidt v. Millender*, 132 S.Ct. 1235, 1244-45, citing *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally runs on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.*

Courts are to analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and thus allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396.

Qualified immunity is not merely a defense. Rather, it provides a sweeping protection from the entirety of the litigation process. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Indeed, qualified immunity guards against the "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). When law enforcement officers are sued for their conduct in the line of duty, courts must balance between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Judges are to exercise their sound discretion in deciding which of the two prongs of qualified immunity analysis should be addressed first in light of the circumstances of the particular case. *Id.* at 236. The first inquiry is whether the facts demonstrate that the defendant officer violated one or more of plaintiff's constitutional rights. *Id*. If the answer is "no," the matter is concluded because without a violation there is no basis for plaintiff's lawsuit to proceed. *Id*. If the answer is "yes," the court must decide whether the right at issue was "clearly established" at the time of the alleged misconduct. *Id.* at 232. A right is clearly established where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199

(2004) (citations omitted). Qualified immunity is only applicable where both prongs are satisfied. *Pearson*, 555 U.S. at 232.

Having previously found that J.A. was protected by the Fourth Amendment, the two questions remaining before the Court are 1) whether the FAC alleges sufficient facts to establish the plausibility that Swartz violated J.A.'s constitutional right to be free from unreasonable seizures and 2) whether the right was clearly established at the time of the violation. Both of these questions are to be analyzed accepting facts alleged in Rodriguez' First Amended Complaint as true and making all reasonable inferences in favor of Rodriguez. Accordingly, the Court finds that Rodriguez alleges sufficient facts to establish the plausibility that Swartz violated J.A.'s Fourth Amendment rights. Further, the Court finds that J.A.'s rights were clearly established when Swartz seized him such that Swartz is not entitled to assert qualified immunity.

Over thirty years ago, the Supreme Court of the United States established that law enforcement officers could not use deadly force on an unarmed suspect to prevent his escape. *Brosseau v. Haugen*, 543 U.S. 194, 203 (2004) (J. Breyer concurring) ("The constitutional limits on the use of deadly force have been clearly established for almost two decades. In 1985 [the Supreme Court of the United States] held that the killing of an unarmed burglar to prevent his escape was an unconstitutional seizure.") (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). This means that for over thirty years, law enforcement officers have been well-aware that it is unlawful (and in violation of an individual's Fourth Amendment rights to be free from

unreasonable seizures) to use deadly force against an unarmed suspect to prevent his escape. Additionally, officers are also aware that in "obvious cases" rights can be "clearly established" even without a body of relevant case law. *See Hope*, 536 U.S. at 738 (citing *U.S. v. Lanier*, 520 U.S. 259, 270-271 (1997)).

The facts alleged in the First Amended Complaint are that J.A. was peacefully walking home and was not engaged in the violation of any law or threatening anyone when Swartz shot him at least ten times. (Doc. 18 at ¶¶ 10, 14). As alleged in Rodriguez' First Amended Complaint, this is not a case involving circumstances where Swartz needed to make split-second judgment—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. Instead, the facts alleged in the First Amended Complaint, demonstrate an "obvious case" where it is clear that Swartz had no reason to use deadly force against J.A.

Swartz attempts to differentiate this case from other deadly force cases by alleging that at the time he shot J.A., it was not clearly established whether the United States Constitution applied extraterritorially to a non-citizen standing on foreign soil. Yet, at the time he shot J.A., Swartz was an American law enforcement officer standing on American soil and well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike within the United States. *See, e.g.* 8 C.F.R. § 287.8(a)(2). What Swartz did not know at the time he shot was whether J.A. was a United States citizen or the citizen of a foreign country, and if J.A. had significant voluntary connections to the United

States. (Doc. 18 at ¶ 17). It was only after Swartz shot J.A. and learned of J.A.'s identity as a Mexican national that he had any reason to think he might be entitled to qualified immunity.[3] This Court finds that Swartz may not assert qualified immunity based on J.A.'s status where Swartz learned of J.A.'s status as a non-citizen *after* the violation. *See Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005) (holding that "police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole violation").[4]

This holding again contravenes that of the Fifth Circuit Court of Appeals in *Hernandez v. United States*, --- F.3d --- (2015), 2015 WL 1881566. This Court respectfully disagrees with the en banc panel's decision that "any properly asserted right was not clearly established to the extent the law requires." *Id.* at *2. In part, this may be because this Court does not

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[3] Had Swartz subsequently found that J.A. was a citizen of the United States, he could not challenge that the Constitution applied to J.A. *See Reid v. Covert*, 354 U.S. 1 (1957) (applying the Constitution to U.S. citizens abroad). Similarly, Swartz could not argue that the Constitution did not apply to legal permanent residents and perhaps even undocumented aliens who had established substantial voluntary connections with the United States. *See Ibrahim*, 669 F.3d at 994-95. Further, had J.A. been situated some thirty-five feet north in the territory of the United States, there would be no question that he would be protected by the Constitution. *Id.*

[4] Again, the Court does not reach Rodriguez' arguments that the Fifth Amendment applies if the Fourth Amendment does not. *See* Doc. 46 at 21-22. Similarly, the Court does not reach the question of whether J.A.'s Fifth Amendment rights were violated or clearly established when he was seized by Swartz.

characterize the question before the Court as "whether the general prohibition of excessive force applies where a person injured by a U.S. official standing on U.S. soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred." *Id.* Instead, this Court focuses on whether an agent may assert qualified immunity on an after-the-fact discovery that the individual he shot was not a United States citizen; this Court concludes that qualified immunity may not be asserted in this manner.

VII. Conclusion

The Court finds that, under the facts alleged in this case, the Mexican national may avail himself to the protections of the Fourth Amendment and that the agent may not assert qualified immunity.

In addressing a Rule 12(b)(6) motion to dismiss, this Court must accept as true all material factual allegations in the complaint, construe the pleadings in the light most favorable to the plaintiff, and make any reasonable inferences therefrom. Applying this standard, Rodriguez has stated a claim upon which relief can be granted. J.A. was entitled to the protections of the Fourth Amendment, even as a non-citizen standing on foreign soil pursuant to both his substantial voluntary connections to the United States and *Boudemeine*'s functional approach in addressing his claim. Because Rodriguez' claim of excessive force should be analyzed under the Fourth Amendment, this Court dismisses Rodriguez' Fifth Amendment claim. Finally, Swartz cannot assert qualified immunity when he found out after-the-fact that he had exerted deadly force upon a noncitizen. Accordingly,

IT IS HEREBY ORDERED *granting in part* and *denying part* Swartz' Motion to Dismiss (Doc. 30). Rodriguez' claim pursuant to the Fifth Amendment is dismissed; Rodriguez' claim pursuant to the Fourth Amendment proceeds.

Dated this 9th day of July, 2015.

/s/ Raner C. Collins
Raner C. Collins
Chief United States District Judge

Photograph of shooting location (view from Paso del Norte bridge), Paolo Pellegrin, Magnum Photos, available at http://bit.ly/1IHkVPZ.