

No. 17-1678

In The
Supreme Court of the United States

—◆—
JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

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

—◆—
**BRIEF OF BORDER NETWORK FOR
HUMAN RIGHTS, SAN DIEGO IMMIGRANT
RIGHTS CONSORTIUM, SOUTHERN BORDER
COMMUNITIES COALITION, AND TEXAS
CIVIL RIGHTS PROJECT AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

—◆—
ARLEIGH P. HELFER III
STEPHEN A. FOGDALL
Counsel of Record
SCHNADER HARRISON SEGAL
& LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2430; 2581
sfgdall@schnader.com

Counsel for Amici Curiae

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**IDENTITY AND INTERESTS
OF *AMICI CURIAE*¹**

Amici are non-profit organizations that advocate for members of the Mexican-American community in Texas and elsewhere in the border region, particularly on border and civil rights-related concerns. Through this work and their interactions with members of the border community, *amici* can provide important input about the ways in which members of the community are affected by the operations of the United States Border Patrol.

Border Network for Human Rights (“BNHR”) was founded in 1998 for the general purpose of facilitating the education, organization, and participation of marginalized border communities to defend and promote human and civil rights, and to work to create political, economic, and social conditions where every human being is equal in dignity and rights. Most of BNHR’s strategies and activities are directed to accomplish four general goals: (1) to strengthen the capacity and organization of impacted border and immigrant communities to voice their opinions, concerns, and solutions on issues such as immigration and enforcement; (2) to establish clear mechanisms for border and immigrant communities to engage in permanent dialogues with policymakers and administration at the

¹ No counsel for any party authored the brief in whole or in part and no person or entity, other than the *amici*, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court’s Rule 37.2(a).

local, state, regional, and national levels; (3) for these communities to educate policymakers, stakeholders, and the public on the need for a comprehensive review and reaffirmation of our immigration laws; and (4) to work with and encourage policymakers to enact and implement effective oversight and accountability mechanisms for enforcement policies and practices at the border and in the interior.

Since 2007, the **San Diego Immigrant Rights Consortium** (“SDIRC”) has worked to bring together faith, labor, legal and community leaders to advocate for policies that promote the civil and human rights of immigrants. SDIRC comprises more than 40 organizations throughout San Diego County that include leaders from the immigrant and refugee communities.

Southern Border Communities Coalition (“SBCC”) brings together more than 60 organizations from San Diego, California, to Brownsville, Texas, and advances the common goal of promoting a safe and strong community for border residents. The coalition was formed in March 2011 as a response to a rash of Border Patrol-perpetrated violence against unarmed border residents and has focused on advocating for border enforcement policies and practices that are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region. SBCC has engaged in advocacy demanding justice for Sergio Adrián Hernández Güereca, Anastasio Hernandez Rojas, and several other victims of violence at the hands of federal immigration and border enforcement officers.

Texas Civil Rights Project (“TCRP”) boldly serves the movement for equality and justice in and out of the courts. They are Texas lawyers for Texas communities, and they use the tools of litigation and legal advocacy to protect and advance the civil rights of everyone in Texas. They undertake their work with a vision of a Texas in which all communities can thrive with dignity, justice, and without fear. In its almost 30 years of existence, TCRP’s efforts have focused on representing low-income and otherwise marginalized members of society. TCRP’s interest in this case stems from its years-long work on behalf of victims of civil rights violations at the hands of federal agencies, including the United States Border Patrol, particularly out of TCRP’s border offices. The outcome of this case will have a direct impact on TCRP’s clients and their families.



SUMMARY OF THE ARGUMENT

This case arises from a United States Border Patrol agent’s fatal act of violence against Sergio Adrián Hernández Güereca, an unarmed teenage boy who was playing with friends mere feet from the U.S.-Mexico border. That Border Patrol agent, Jesus Mesa, Jr., standing on the U.S. side of the border, drew his sidearm, fired bullets across the border, and, while Sergio sought cover, shot Sergio in the face, killing him. It was, as this Court described, “a disturbing incident resulting in a heartbreaking loss of life.” *Hernández v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam).

Significantly, every operative fact—except the impact of the bullet that caused the child’s death—occurred on U.S. soil: the Border Patrol agent formed the intent; unholstered his pistol; took aim; placed his finger on the trigger; squeezed the trigger; discharged his weapon; and set the irrevocable fatal bullet in flight. Even though all of this happened on United States soil, the District Court held that it did not have jurisdiction over the boy’s parents’ civil rights suit because Sergio was a Mexican citizen who was killed on the Mexican side of the border. A deeply-divided Fifth Circuit Court of Appeals affirmed. This Court, observing that the Fifth Circuit had not had the opportunity to assess Sergio’s parents’ claim in light of the teachings of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), vacated the judgment and remanded the case to the Court of Appeals with instructions to apply *Abbasi*’s guidance and determine whether a *Bivens*² claim would be appropriate here.

Sitting en banc on remand, the Fifth Circuit ruled that Sergio’s parents’ claim against Mesa for damages could not proceed because it presented a “new context” and, independently, because “special factors,” including extraterritorial application of *Bivens*, barred the claim. If allowed to stand, the Fifth Circuit’s decision would mean that, along the United States-Mexico border, victims would have no legal recourse for—and there would be no civil liability deterrent to prevent—the abusive acts of Border Patrol agents, including

² *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

specifically any future fatal shootings of innocent bystanders in Mexican territory.

Amici are advocates for persons in the southern border region, which encompasses 2,000 miles of international border bounding four U.S. states and six Mexican states and extends 62.5 miles inland into the U.S. and Mexico on either side.³ As such, *amici* have intimate knowledge about the conditions along the U.S.-Mexico border, which have changed considerably since this Court last considered this case. Most significant is the deterioration in the Border Patrol's treatment of some of the most vulnerable persons in the Americas. The grievous harms inflicted on these individuals are often dismissed as the actions of an apparently ever-increasing number of "rogue" Border Patrol agents. As discussed below, however, the border violence at issue here is, sadly, not unique.

The Fifth Circuit's decision (and the purported "special factors" it identified as reasons not to extend *Bivens*) ignores the realities of the region, leaves non-citizens on the Mexican side of the border who are injured by federal officers no legal recourse or remedy to redress their injuries, and eliminates a significant deterrent to federal officer misconduct against individuals, a core goal of *Bivens*.

³ *Border Region*, United States-Mexico Border Health Commission, <https://www.hhs.gov/about/agencies/oga/about-oga/what-we-do/international-relations-division/americas/border-health-commission/us-mexico-border-region/index.html> (last visited Aug. 8, 2019) [hereinafter *Border Health Commission*].

Specifically, *amici* write to highlight three points:

First, Sergio's death cannot be viewed as an isolated incident. *Amici* are painfully familiar with other tragedies involving Border Patrol abuses with facts disconcertingly similar to Sergio's. Such tragedies caused by individual agents are not sanctioned by U.S. policy. Neither would the availability of a monetary damages remedy for Sergio's parents against Mesa raise a challenge to U.S. policy or national security. The common thread among these incidents is that the victims and their families are at once the most vulnerable to Border Patrol abuses and the most powerless to stop them. Deterrence of unconstitutional conduct is the keystone in the Court's *Bivens* jurisprudence, which allows civil suits for money damages against federal officers. Thus, this Court's decision will affect not just Sergio's family, but also other non-citizens injured, raped, abducted, or killed by Border Patrol agents along the entire 2,000 mile length of the border who, absent a *Bivens* remedy, have no remedy at all, especially if the agents victimized them on the Mexican side of the border.

Second, *Bivens* claims should be available to those who suffer abusive conduct at the hands of Border Patrol agents. The Constitution should protect residents on both sides of the southern border because individuals on both sides are subject to the consequences of the constant presence and far-reaching control of the United States Border Patrol, even when agents' initial actions occur entirely on the U.S. side of the border. To achieve the United States' goals of

sealing the border, the Border Patrol’s authority necessarily extends into the gray area just beyond the southern border into Mexico, allowing U.S. agents to monitor and control residents on both sides of the border. Wherever this authority extends, and wherever Border Patrol agents act pursuant to their ostensible authority, the Constitution should check Border Patrol agents’ actions and, via *Bivens* claims, offer a deterrent to protect and compensate their victims.

Third, Constitutional protections should not be limited by cartographic borders. Such borders are arbitrary and unclear; they are legal constructs. Cartographic borders are neither rational nor practical “bright line” determiners of a person’s Constitutional rights. As Justice Breyer observed, the area around the border is a “limitrophe” area, a liminal frontier region where special legal rules based on practical considerations apply. *Hernández*, 137 S. Ct. at 2009–10.

Amici therefore submit that the Court should consider the realities of the border region when deciding Sergio’s case. United States agents should not get a free pass to violate the Constitution so long as their targets happen to be on the other side of the border. Those injured by abusive Border Patrol conduct should be entitled to Fourth and Fifth Amendment protections and to vindicate those protections through claims for compensation for their injuries.



ARGUMENT

I. **BORDER PATROL INJUSTICES AGAINST MEXICAN AND OTHER CITIZENS HAVE OCCURRED IN THE PAST AND WILL CONTINUE TO OCCUR—WITHOUT REDRESS—IF THIS COURT ALLOWS THE FIFTH CIRCUIT’S DECISION TO STAND.**

Many persons in the border region have suffered at the hands of Border Patrol agents. Between January 2010 and July 2019 at least 90 people have died as the result of an encounter with U.S. border agents. Many more have been brutalized, in some cases causing life-altering injuries, including a minor who was punched in the stomach and a pregnant woman who lost her unborn child after being beaten at a border crossing.⁴

Some of these victims targeted by Border Patrol agents were attempting to cross the border into the U.S.; others, like Sergio, were not. None should have been subject to lethal force wielded by Border Patrol agents who, under the Fifth Circuit’s decision, would be immune from civil liability. Consider the following examples:

⁴ *Border Patrol Abuses*, Southern Border Communities Coalition (July 2019), <http://southernborder.org/border-patrol-abuses/>. In addition to her miscarriage, the woman suffered malformations and is disabled as a result of the Border Patrol beating. *Id.*; see also *Deaths and Injuries in CBP Encounters Since January 2010*, American Civil Liberties Union of New Mexico, 24 (May 19, 2016), available at https://www.aclu.org/sites/default/files/field_document/may_2016_dead_and_injured_by_cbp_officials.pdf [hereinafter ACLU Report].

Ramses Barron Torres. A Border Patrol agent shot and killed Ramses on January 5, 2011.⁵ He was 17 years old. Border Patrol agents were chasing drug smugglers on the U.S. side of the border when one agent fired a shot that passed through the metal fence into Mexico and killed Ramses.⁶ The Border Patrol agent who fired claimed Ramses and his friends were throwing rocks at him but Ramses' friend, who witnessed his death, stated that the Border Patrol agent's safety had not been threatened in any way.⁷ The Border Patrol agent was not criminally charged.⁸

Guillermo Arévalo Pedroza. Border Patrol agents killed Guillermo on September 3, 2012, while he was picnicking at a Mexican riverfront park with his wife and two daughters. A Border Patrol boat on the American side of the Rio Grande River, apparently chasing a young man swimming across the river,

⁵ Julianne Hing, *17-Year-Old Killed by Border Patrol for Allegedly Throwing Rocks*, ColorLines (Jan. 7, 2011), <http://www.colorlines.com/articles/17-year-old-killed-border-patrol-allegedly-throwing-rocks>.

⁶ Elizabeth Aguilera, *No Charges in Border Patrol Shooting Deaths*, San Diego Union-Tribune (Aug. 9, 2013), <http://www.sandiegouniontribune.com/news/immigration/sdut-border-patrol-shooting-lamadrid-ramses-border-immi-2013aug09-story.html>.

⁷ *More Accounts Emerge Following Deadly Border Shooting*, Nogales Int'l, (Jan. 6, 2011), http://www.nogalesinternational.com/news/more-accounts-emerge-following-deadly-border-shooting/article_998a4971-2351-5f03-a8f3-c43dd1d65cfe.html.

⁸ Rob O'Dell, *7 Times Rock-Throwing Ended in Deadly Force by U.S. Border Patrol Agents*, AZ Central (Oct. 12, 2016), <http://www.azcentral.com/story/news/politics/border-issues/2016/10/10/us-border-patrol-rock-throwing-killing-cases/85670112/>.

opened fire onto the Mexican park and killed Guillermo. The Border Patrol agents later alleged that the people in the park had been throwing rocks at them. No criminal charges were brought against Guillermo's killer.⁹

José Antonio Elena Rodríguez. In October 2012, in an incident strikingly similar to Sergio's, an agent shot and killed José when the agent suspected the teen was part of a group throwing rocks.¹⁰ José was on a busy Mexican street 40 feet from the border and carrying only a cell phone.¹¹ He was shot as many as seven times, with at least eight additional bullets striking an adjacent wall. An autopsy revealed the youth may have been shot in the back or even after he had already fallen to the ground.¹² José's family brought a case similar to this one in which the United

⁹ Jason Buch, *Mexican Girl Clutched Her Dying Father*, San Antonio Express-News (Sept. 8, 2012), http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php.

¹⁰ Michael Marizco, *Border Patrol Shootings Going Unresolved*, Fronteras (Oct. 26, 2012), <https://fronterasdesk.org/content/7301/border-patrol-shootings-going-unresolved>.

¹¹ José was in Nogales, Sonora across from its American counterpart, Nogales, Arizona. Many residents refer to them as a single town of Ambos Nogales meaning Both Nogales. Mark Binelli, *10 Shots Across the Border*, N.Y. Times (Mar. 3, 2016), <http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html>.

¹² Michael Marizco, *Autopsy Suggests Boy Shot by Border Patrol Was Already Down*, KJZZ (Feb. 7, 2013), <https://kjzz.org/content/6895/autopsy-suggests-boy-shot-border-patrol-was-already-down>.

States Court of Appeals for the Ninth Circuit decided a *Bivens* claim exists.¹³ See *Rodriguez v. Swartz*, 899 F.3d 719, 748 (9th Cir. 2018), *petition for cert. filed* (U.S. Sept. 7, 2018) (No. 18-309).

Juan Pablo Perez Santillán. A Border Patrol agent shot and killed Juan on July 7, 2012.¹⁴ He was standing on the Mexican side of the Rio Grande River acting as a lookout while others swam across. A Border Patrol agent using a long-range rifle with a high-powered scope shot Juan at least five times. The agent claimed to have seen Juan waving a gun and also reported rock throwing, but Juan was holding only a sweat rag when he died.¹⁵ The agent was not criminally charged.

Anastasio Hernández-Rojas.¹⁶ Border Patrol agents and Customs and Border Protection (“CBP”) agents killed Anastasio on May 28, 2010. He was attempting to cross the border to return to his family in

¹³ Rob O’Dell, *Supreme Court Vacancy Ripples Through Case Involving Cross-Border Shooting of Teen in Mexico by Border Patrol*, AZ Central (Oct. 24, 2016), <http://www.azcentral.com/story/news/politics/border-issues/2016/10/21/court-jose-antonio-elena-rodriguez-cross-border-shooting-teen-mexico-border-patrol/92490696/>.

¹⁴ Melissa del Bosque, *Federal Officials Investigate Fatal Border Patrol Shootings*, Texas Observer (Jun. 18, 2015), <https://www.texasobserver.org/federal-officials-probe-fatal-border-patrol-shootings/>.

¹⁵ O’Dell, *supra* note 8.

¹⁶ The remaining examples are factually different than Sergio’s case because they were not cross-border shootings. We include them to bring the Court’s attention to the extent of the problem of cross-border violence abuses by Border Patrol agents.

San Diego where he had lived for 25 years when Border Patrol agents detained him and beat him with a baton, and CBP agents shocked him with a Taser. Anastasio informed the agents that he wished to file a complaint, and the agents brought him alone to an isolated area outside the crossing station.¹⁷ The agents later reported that they were then required to subdue Anastasio because he was resisting. However, an amateur video of those events recorded the voice of Anastasio pleading for help; the eyewitness who recorded the video stated that the agents were beating Anastasio while he was lying prone on the ground, handcuffed and not resisting.¹⁸ The autopsy report ruled Anastasio's death a homicide, but the agent was not criminally charged.¹⁹

Carlos La Madrid. A Border Patrol agent shot and killed nineteen-year-old Carlos near Douglas, Arizona on March 21, 2011. Carlos was driving a car containing marijuana when the Border Patrol agents arrived. He attempted to flee across the border into Mexico, but one of the agents fired three shots, striking

¹⁷ Brian Epstein, *Crossing the Line at the Border*, Need to Know (ON PBS), embedded video 4:40–6:05, (Apr. 20, 2012), available at <http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/>.

¹⁸ Brian Epstein, *Crossing the Line at the Border*, Need to Know (ON PBS), embedded video 4:40–6:05, 7:46–9:38 (Apr. 20, 2012), available at <http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/>.

¹⁹ Dave Rice, *50 Murders by the Border Patrol?*, San Diego Reader (Nov. 14, 2016), <http://www.sandiegoreader.com/news/2016/nov/14/ticker-50-murders-border-patrol/#>.

him in the back and killing him. Carlos posed no threat to the Border Patrol at the time he died; early allegations of rock throwing were determined to be unfounded.²⁰

Alfredo Yañez Reyes. A Border Patrol agent shot and killed Alfredo on June 21, 2011. Alfredo and another individual were attempting to cross the border near San Diego, California when the Border Patrol spotted them and began a pursuit.²¹ As with Ramses, Carlos, and initially with Sergio, the agent who killed Alfredo claimed that he had been forced to shoot because rocks had been thrown at him.²² However, it is unknown whether any rocks were thrown at all, nor whether Alfredo was the person who threw anything.²³

J.E., M.E., and N.C. Border Patrol Agent Esteban Manzanares abducted a 14-year old, her teenage

²⁰ Jonathon Shacat, *Waiting for Answers One Year After Border Shooting*, Douglas Dispatch (Mar. 21, 2012), http://www.douglasdispatch.com/news/waiting-for-answers-one-year-after-border-shooting/article_30e6022e-a49e-5adc-9dcd-2c86a565315c.html.

²¹ Reports say that Alfredo climbed a tree before being shot. Kristina Davis, *Border Chief Sued in Rock-Throwing Death*, San Diego Union-Tribune (May 13, 2015), <http://www.sandiegouniontribune.com/sdut-border-patrol-chief-fisher-lawsuit-yanez-rocking-2015may13-story.html>. The tree was on the Mexican side of the fence but technically on U.S. soil. *Id.*

²² The ACLU reported that in at least 9 Border Patrol deaths and one serious injury between January 2010 and May 2016, the Border Patrol alleged that rocks had been thrown at them. *ACLU Report*, *supra* note 4, at 25.

²³ R. Stickney, *ACLU Calls for Probe in Border Shooting*, NBC San Diego, June 22, 2011, <http://www.nbcsandiego.com/news/local/ACLU-Calls-for-Probe-in-Border-Shooting-124372389.html>.

friend, and her teenage friend's mother just after they crossed the Rio Grande and arrived in Texas.²⁴ He drove them to an isolated wooded area where he sexually assaulted them and physically brutalized them. After leaving the friend and her mother for dead in the brush, he took the 14-year old to his apartment, where he repeatedly assaulted her before killing himself as the authorities arrived.

Claudia Patricia Gómez González. A Border Patrol agent shot and killed an undocumented 19-year-old woman from Guatemala on the U.S. side of the border, claiming that she and others had attacked him by throwing projectiles.²⁵ However, his story changed as he came under scrutiny. A later Border Patrol report no longer claimed that Claudia was one of the assailants and also dropped all mention of thrown objects.²⁶

These examples show that Sergio's death was not an isolated tragedy. As Border Patrol agents' abuses of authority increase, Sergio unfortunately will not be the last victim of the Border Patrol's unfettered control over the borderlands. Under the Fifth Circuit's decision, those who come after Sergio and their families

²⁴ Manny Fernandez, *They Were Stopped at the Texas Border. Their Nightmare Had Only Just Begun*, New York Times (Nov. 12, 2018), <https://www.nytimes.com/2018/11/12/us/rape-texas-border-immigrants-esteban-manzanares.html>.

²⁵ Samantha Schmidt, *'They Killed my child': Border Patrol shooting of Guatemalan woman stirs protests*, The Washington Post (May 29, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/05/29/why-did-you-kill-my-child-border-patrol-shooting-of-guatemalan-woman-stirs-protests/>.

²⁶ *Id.*

will have no way of vindicating their Constitutional rights. This approach has the absurd result failing to uphold the fundamental goal of *Bivens*: deterring federal law enforcement officers from abusing their authority.

II. BECAUSE BORDER RESIDENTS ARE UNDER THE CONTROL OF THE BORDER PATROL, THEY MUST NOT BE DENIED CONSTITUTIONAL PROTECTIONS.

The tragedies in the borderlands are a product of aggressive American policies aimed at securing the southern border. These policies have sent 17,500 Border Patrol agents to the region, equipping them with guns and the power to effectively control wide swaths of Mexican territory. Sadly, as described above, Sergio's death is but one example. Sergio was killed on Mexican soil in the deep cement culvert of a dried-up river. On paper, the Border Patrol controls only the area at the top of one side of the culvert, but as this case demonstrates, the Border Patrol agents exert their authority over the entire area. And where Border Patrol agents exercise their authority, those harmed by federal agents' actions should not be left without recourse.

The growing influence of the Border Patrol began in the 1990s when the United States increased its focus on immigration. The strategy at the border shifted from apprehending individuals who crossed into the United States without permission to preventing anyone from trying, causing the Border Patrol's focus to

extend past the border into Mexican territory.²⁷ With this strategy of deterrence came a series of aggressive immigration policies such as Operations Gatekeeper, Safeguard, Rio Grande, and Hold the Line.²⁸

United States Customs and Border Protection is now the largest law enforcement agency in the country.²⁹ There are four times as many agents stationed on the southern border today than there were in 1992.³⁰

²⁷ See *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody, No More Deaths*, 42 (2011), <https://archive.org/details/pdfy-y1yNVbQxW6lEOI2B> [hereinafter *A Culture of Cruelty*]. The Border Patrol's primary mission is "reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry." *Border Patrol Overview*, U.S. Customs and Border Protection (Apr. 26, 2018), <https://www.cbp.gov/border-security/along-us-borders/overview> [hereinafter *Border Patrol Overview*].

²⁸ Timothy J. Dunn, José Palafox, "Militaryization of the Border," *The Oxford Encyclopedia of Latinos and Latinas in the United States* (2005) [hereinafter *Oxford Encyclopedia*], available at <https://www.uua.org/sites/live-new.uua.org/files/documents/washingtonoffice/immigration/studyguides/handout4.1.pdf>.

²⁹ Andrew Kennis, *Supreme Court to Decide Fate of Case That Challenges Cross-Border Killings by U.S. Agents*, *Vice News* (Mar. 30, 2016), <https://news.vice.com/article/supreme-court-cross-border-killing-patrol-agent-usa-mexico>.

³⁰ There were 16,608 Border Patrol agents stationed at the southern border as of the 2018 Fiscal Year and only 3,555 in 1992. *Border Patrol Agent Staffing by Fiscal Year*, United States Border Patrol (Mar. 8, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/Staffing%20FY1992-FY2018.pdf>. The rapid growth of Border Patrol agents has caused quality concerns and led to problems with training and supervision. See Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico

Additionally, state and local law enforcement officers join in, enforcing federal immigration law under the power granted in Section 287 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g).³¹ The influx of agents at the southern border and the power they are granted allow the Border Patrol to control the land and people on both sides of the border.

In recent years, abuses by Border Patrol agents have increased as the government has relaxed hiring standards as it struggles to hire enough agents to meet President Trump's increasing demands for additional agents.³²

There is little question that the 15 million people who live in the southern borderlands acutely feel the presence and power of the United States Border Patrol.³³ Interactions with Border Patrol agents are

Magazine (Nov./Dec. 2014), available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2>.

³¹ See *A Culture of Cruelty*, *supra* note 27, at 43. Under the 287(g) program, U.S. Immigration and Customs Enforcement can enter into a joint Memorandum of Agreement with state and local law enforcement to delegate the authority of enforcing federal immigration laws. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/287g> (last visited Aug. 8, 2019).

³² See Joshua Breisblatt, *Two Border Patrol Agents Charged with Murder Highlights the Need for Robust Hiring Standards*, Immigration Impact (Sept. 19, 2018), <http://immigrationimpact.com/2018/09/19/border-patrol-agents-murder-hiring-standards/>.

³³ Joshua Breisblatt, *Forum Statement for Record on Fencing, Infrastructure and Technology Border Hearing*, National Immigration Forum, 1 (May 13, 2015), <https://immigrationforum.org/>

inevitable in the border region. A legal crossing takes an average of 45 minutes; almost 500,000 people legally cross the southern border each day to work, shop, or visit with friends and family.³⁴ After crossing, Border Patrol agents subject border residents to random checkpoint stops, searches, and interrogations.³⁵ In this context of cross-border life, border residents understand that American border authorities closely monitor their actions. At the same time, a rise in animus and chauvinistic attitudes among Border Patrol agents towards immigrants, when coupled with the increasing number of agents on the ground, many of whom the government hired under relaxed standards, are key ingredients in a recipe for abusive, unlawful actions by individual federal agents.³⁶

blog/forum-statement-for-record-on-fencing-infrastructure-and-technology-border-hearing/.

³⁴ Waiting times vary among the different crossing stations, ranging from 0 to 90 minutes. See *CBT Border Wait Times* (last visited Aug. 8, 2019), <https://bwt.cbp.gov/>. 192,913,686 train passengers, bus passengers, personal vehicle passengers, and pedestrians legally crossed the southern border in 2018. *Border Crossing/Entry Data: Query Detailed Statistics*, Bureau of Transp. Statistics, <https://explore.dot.gov/t/BTS/views/BTSBorderCrossingAnnualData/BorderCrossingTableDashboard?isGuestRedirectFromVizportal=y&embed=y> (last visited Aug. 8, 2019).

³⁵ See Oxford Encyclopedia, *supra* note 28; *Border Patrol Overview*, *supra* note 27.

³⁶ A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>; Jeremy Raff, *The Border Patrol's*

While *amici* recognize that some Border Patrol agents carry out their duties responsibly, the Fifth Circuit's decision upholds a Constitutional loophole that may only increase the likelihood of future abuse. *Amici* submit that if American policy grants the Border Patrol *de facto* authority over both U.S. and Mexican land, then all citizens within the *de facto* American-controlled area (both American and Mexican) deserve Fourth and Fifth Amendment protections.

III. CARTOGRAPHIC BORDERS, WHICH ARE ARBITRARY AND UNCLEAR, SHOULD NOT DETERMINE WHERE CONSTITUTIONAL RIGHTS END.

On a political map, the border between the U.S. and Mexico is a sharp black line. The land on one side of that line is one color; the land on the other side is another. But the real world is not so clearly defined. The border cannot be the end-all stopping point for Constitutional protections. In addition to being blurred by the *de facto* control of the U.S. Border Patrol over parts of Mexico, the cartographic border is especially arbitrary at the southern border where cultural intersectionality, policy, and landscape define the limitrophe area.

Corruption Problem, The Atlantic (May 5, 2017), <https://www.theatlantic.com/politics/archive/2017/05/not-one-bad-apple/525327/>.

Border residents' lives are not binary. They do not fit neatly on one side of the border line or the other, so their location in relation to the border at any given time is not a rational determiner of their Constitutional rights.³⁷ Many border residents grew up during a time when the border was more like a bridge than a wall; crossing over for a few hours was an unremarkable part of life. Communities organically sprang up along both sides of the Rio Grande River without much attention paid to the invisible border. It is not uncommon for many who live on one side of the border to grocery shop on the other. Today a steel fence and rigid mindset bisect the lives of borderland residents, but 15 pairs of sister cities such as San Diego-Tijuana and El Paso-Ciudad Juarez still flourish as symbiotic communities.³⁸ Under the Fifth Circuit's decision and its ruling that "extraterritoriality" is a special factor against extending *Bivens*, border residents who are part of

³⁷ "While the U.S.-Mexico borderlands resemble border regions in other parts of the world, nowhere else do so many millions of people from two dissimilar nations live in such close proximity and interact with each other so intensely." *Border People*, The University of Arizona Press, <http://www.uapress.arizona.edu/Books/bid289.htm> (last visited Aug. 8, 2019).

³⁸ See *Border Health Commission*, *supra* note 3. Another example is the community spread between Candelaria in Texas and San Antonio del Bravo in Mexico. For generations, families have lived on both sides of the river and "[m]any people in Candelaria view the two towns as one, with a river running through it." Sasha von Oldershausen, *Crossing Over: For Families Living on Both Sides of the U.S.-Mexico Border, Breaching the Divide Is a Way of Life*, *Texas Observer* (Oct. 10, 2016), <https://www.texasobserver.org/candelaria-crossing-over-border/>.

the same community are treated differently due to an arbitrary, fluid, and invisible line that has moved as the Rio Grande has shifted.³⁹

Additionally, cartographic borders should not define where Constitutional protections exist because the United States frequently ignores or redefines its borders to further its immigration policies.⁴⁰ Under Section 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182, for example, individuals who cross the border without permission are treated as if they never actually crossed the border, despite standing on, and in some cases residing on, United States land.⁴¹ Additionally, the United States creates “polka-dot borders” in places like foreign airports where United States officials can collect information from non-citizens under the US-VISIT program.⁴² In a similar vein, the

³⁹ The border has shifted as the Rio Grande has shifted, including in the location where Agent Mesa killed Sergio. *See* NPR Staff, *50 Years Ago, A Fluid Border Made The U.S. 1 Square Mile Smaller*, All Things Considered (Sept. 25, 2014), available at <https://www.npr.org/2014/09/25/350885341/50-yeaqrsgo-a-fluid-border-made-the-u-s-1-square-mile-smaller> (last visited Aug. 7, 2019).

⁴⁰ *See* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 Stan. J. C.R. & C.L. 165, 177 (2007) (“[D]ecoupling of legal authority from the geographic borders of the nationstate” extends the state’s power “far away from [its] own geographical boundaries”).

⁴¹ *See id.* at 171.

⁴² *See id.* at 174–75; *see also* *Notice to Nonimmigrant Aliens Subject to Be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System*, Department of Homeland Security, 69 Fed. Reg. 482, 482 (Jan. 5, 2004), available at <https://www.dhs.gov/xlibrary/assets/usvisit/USVisitnotice1-5-04.pdf>;

Immigration and Nationality Act allows immigration officers to search ships in foreign ports before they travel to the United States “as though made at the destined port-of-entry in the United States.”⁴³ As these examples illustrate, a cartographic test for Constitutional protection, like the one applied by the Fifth Circuit, makes little sense in the border region.

◆

CONCLUSION

The residents of the border community—American citizens and foreign nationals alike, whether located on one side of the border or the other—deserve certain basic Constitutional protections from abusive acts of federal agents. At bottom, the fortuity of where an aggressor and victim happen to find themselves with respect to an invisible and arbitrary line should

Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 Harv. C.R.-C.L. L. Rev. 647, 668 (2011) (using the term “polka-dot borders”).

⁴³ 8 C.F.R. § 235.5(b) (2006); *see also* Shachar, *supra* note 40, at 176.

not determine whether the victim's Constitutional rights are protected.

Respectfully submitted,

ARLEIGH P. HELFER III

STEPHEN A. FOGDALL

Counsel of Record

SCHNADER HARRISON SEGAL

& LEWIS LLP

1600 Market Street, Suite 3600

Philadelphia, PA 19103

(215) 751-2430; 2581

sfogdall@schnader.com

Counsel for Amici Curiae

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