No. _____

In the Supreme Court of the United States

LONNIE SWARTZ, Agent of U.S. Border Patrol,
Petitioner,

v.

ARACELI RODRIGUEZ, individually and as
the surviving mother and personal representative of J.A.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Sean C. Chapman
100 N. Stone Avenue
Suite 701
Tucson, AZ 85701
(520) 622-0747
sean@seanchapmanlaw.com

Amy B. Krauss
P.O. Box 65126
Tucson, AZ 85728
(520) 400-6170
abkrauss@comcast.net

Michael J. Bloom, P.C.
Counsel of Record
100 N. Stone Avenue
Suite 701
Tucson, Arizona 85701
(520) 882-9904
mike@michaeljbloom.net

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the panel's decision to create an implied remedy for damages under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), in the new context of a cross-border shooting, misapplies Supreme Court precedent and violates separation-of-powers principles, where foreign relations, border security, and the extraterritorial application of the Fourth Amendment are some of the special factors that counsel hesitation against such an extension?

2. If the above "antecedent" question is answered in the negative, then this Court is asked to resolve the underlying constitutional issue: Whether Agent Swartz is entitled to qualified immunity because there is no clearly established law applying the Fourth Amendment to protect a Mexican citizen with no significant connection to the United States, who is injured in Mexico by a federal agent's cross-border shooting?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

DECISION BELOW

The Court of Appeals decision is reported at 899 F.3d 719 (2018), and is reprinted in the Appendix at Pet. App. 1.

JURISDICTION

The Court of Appeals entered its decision and final judgment in this case on August 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." *Id.* amend. V.

STATEMENT OF THE CASE

No federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer in the context of a cross-border shooting. Therefore, Respondent Araceli Rodriguez brought her lawsuit against Border Patrol Agent Lonnie Swartz pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Swartz violated her son's rights under the Fourth and Fifth Amendments.

This case presents a question recently posed by this Court: "When a party seeks to assert an implied cause of action under the Constitution itself, . . . separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether

to provide for a damages remedy, Congress or the courts?" *Ziglar v. Abbasi*, __ U.S. __, __, 137 S. Ct. 1843, 1857 (2017) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

REASONS FOR GRANTING THE PETITION

In this case, the answer is Congress. The Ninth Circuit erred by holding otherwise, in a decision that disregards Supreme Court precedent, abrogates separation-of-powers principles, and conflicts with a decision of the Fifth Circuit Court of Appeals, *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) (en banc) (cert. pet. docketed at No. 17-1678; distributed for conference 9/24/2018).

As the dissenting judge below noted, there are only three circuit courts that touch the border between the United States and Mexico, thus the split of authority that now exists "will lead to an uneven administration of the rule of law." *Rodriguez*, 899 F.3d at 758. This Court should exercise discretion to grant the petition for a writ of certiorari in order to resolve the conflict between two United States Courts of Appeal on the same important matter of federal law that has not been, but should be, settled by this Court. S. Ct. R. 10 (a) and (c).

I. Procedural History

The procedural posture of this case requires the Court to assume the truth of the unproven facts alleged by Rodriguez in her First Amended Complaint. *Wood v. Moss*, 572 U.S. __, __, 134 S. Ct. 2056, 2067 (2014); Fed. R. Civ. P. 12(b)(6). Thus, for purposes of this appeal

only, Agent Swartz accepts the panel majority's summary of the facts alleged in the Complaint: [1]

> Shortly before midnight on October 10, 2012, defendant Lonnie Swartz was on duty as a U.S. Border Patrol agent on the American side of our border with Mexico. J.A., a sixteen-year-old boy, was peacefully walking down the Calle Internacional, a street in Nogales, Mexico, that runs parallel to the border. Without warning or provocation, Swartz shot J.A. dead. Swartz fired somewhere between 14 and 30 bullets across the border at J.A., and he hit the boy, mostly in the back, with about 10 bullets. J.A. was not committing a crime. He did not throw rocks or engage in any violence or threatening behavior against anyone or anything. And he did not otherwise pose a threat to Swartz or anyone else. He was just walking down a street in Mexico.

Rodriguez, 899 F.3d at 727.

Swartz moved the district court to dismiss the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The district court granted Swartz's motion as to the Fifth Amendment claim, but ruled that the Fourth Amendment claim could proceed, finding that Swartz was not entitled to qualified immunity. *Rodriguez v.*

---

[1] It is important to note that a jury rejected some of these key facts by virtue of its verdict finding Swartz not guilty of second-degree murder, and the falsity of many others was proved during the criminal trial. *United States v. Swartz*, Dist. Ct. Doc. No. CR15-1723 (D. Ariz.).

Swartz, 111 F. Supp. 3d 1025, 1033-41 (D. Ariz. 2015). Swartz appealed that decision, and in a 2-1 opinion, the Ninth Circuit affirmed. *Rodriguez*, 899 F.3d at 748.

II. The Necessity to Consider the "Antecedent" *Bivens* Question Before The Constitutional Question

This case tests the bounds of the Court's recent and repeated admonition "that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (citing *Sosa v. Alvarez-Machain,* 542 U.S. 692, 727 (2004); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2011)).

Before explaining why this case does not present an exception to that general rule, it is necessary to take a brief detour to dispel the notion that Swartz may have waived this precursor argument by moving to dismiss the complaint based on qualified immunity. *Rodriguez*, 899 F.3d at 735. First, this Court has acknowledged that Swartz's approach, disposing of a *Bivens* claim on the constitutional question, is appropriate. *Id.* (citation omitted). Indeed, the district court appropriately dismissed Rodriguez's claim based on the Fifth Amendment.[2] *Rodriguez*, 111 F.Supp.3d at 1038.

Moreover, on interlocutory appeal from that decision, the antecedent *Bivens* question was fully briefed. *Rodriguez*, 899 F.3d at 735. Then, before the Ninth Circuit issued its opinion, this Court remanded

---

[2] Plaintiff did not cross-appeal that decision.

Hernandez to the Fifth Circuit to consider the "antecedent" question of whether *Bivens* applied. *Hernandez,* __ U.S. __, __, 137 S. Ct. 2003, 2006 (2017). This authority should resolve any doubt that there could be no waiver, but there is more. The Ninth Circuit also took note of its own precedent, deciding numerous other qualified immunity cases as implying the predecessor question of whether there is a *Bivens* cause of action. *Rodriguez*, 899 F.3d at 735 (citations omitted). For these reasons, the court below expressly determined that Swartz did not waive his right to contest the availability of a *Bivens* remedy to the facts alleged in the complaint. *Id.* That conclusion is not debatable, leaving the issue squarely before this Court.

III. Expanding *Bivens* is Disfavored Judicial Activity

Just last term, this Court carefully examined its jurisprudence leading to the landmark *Bivens* decision and declared it to be a now displaced "*ancien regime*." *Abbasi*, 137 S. Ct. at 1855 (quoting *Alexander v. Sandoval*, 532 U.S. at 287) (emphasis in original). To be sure, the Court stated in no uncertain terms that "expanding the *Bivens* remedy is now considered a 'disfavored' judicial activity." *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). The proof of the pudding is in the eating, as the Court has refused to extend *Bivens* to any new context or new category of defendants in the past three decades.[3] *Id.* at

[3] So far, the Court has decided against creating a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U.S. 367; a race-discrimination suit against military officers, *Chappell v. Wallace*, 462 U.S. 296 (1983); a substantive due

1856; *see also Malesko*, 534 U.S. at 68. Indeed, the Court has gone so far as to imagine that the only three *Bivens* cases on the books "might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1855. Why? Because this Court recognizes and heeds the strong deference owed to the separation of powers between Congress and the judiciary to create causes of actions that are not explicit in the statutory text itself. *Id.* (quotations and citations omitted). The Ninth Circuit's decision stands at odds with the more recent, controlling, precedent; it constitutes an exercise of judicial generosity that harkens back to the "*ancien regime*" that has been thoroughly and thoughtfully abandoned by this Court.

The purposeful use of the phrase "judicial activity" by this Court was glossed over by the panel majority. *Abbasi* made abundantly clear that lower courts must "pause when implying a damages remedy implicates economic and governmental concerns," such as "the substantial monetary cost of defending and indemnifying claims against federal officials, as well as the time and administrative costs incident to the litigation." *Id.* at 1856. Yet the panel majority diminished the weighty governmental concerns at issue

---

process suit against military officers, *United States v. Stanley*, 483 U.S. 669 (1987); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky*, 487 U.S. 412 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer*, 510 U.S. 471 (1994); an Eighth Amendment suit against a private prison operator, *Malesko*, 534 U.S. at 68; a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins*, 551 U.S. 537 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard*, 565 U.S. 118 (2012).

here, which involve international relations, foreign policy and national security.

Dissenting Judge Smith correctly pointed out the substantial differences between this case and the three *Bivens* claims previously authorized by this Court:

> The differences are obvious: J.A. was a Mexican national, and his death, caused by the actions of a Border Patrol agent, occurred in Mexico. This case presents far more than "a modest extension" of the Supreme Court's *Bivens* cases. [*Abbasi*, 137 S.Ct.] at 1864. Indeed, "no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone a case implicating both." *Meshal v. Higgenbotham*, 804 F.3d 417, 424–25 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017). The Court also has never upheld a *Bivens* claim against Border Patrol agents, who perform different duties than FBI agents, Congressmen, or prison officials. Under the Supreme Court's new-inquiry test, which is "easily satisfied," *Abbasi*, 137 S. Ct. at 1859, the majority's attempt to liken this case to *Bivens* is unpersuasive.

Rodriguez, 899 F.3d at 752-53.

These variances meaningfully alter the context in which Rodriguez's claims arise compared to established, narrowly-construed *Bivens* contexts. *Abbasi*, 137 S. Ct. at 1859. Indeed, even the panel majority agreed, saying "[t]his case presents a new *Bivens* context." *Rodriguez*, 899 F.3d at 738. The

panel's unanimity on this threshold inquiry should have eased the entire panel to the next step of hesitation. Instead, as Judge Smith explained, the majority's willingness to superficially nod to the point and then move on "clearly flouts the Supreme Court's instructions," and "fails to heed the Supreme Court's warning that expanding *Bivens* is a 'disfavored' activity,…and that courts may not run roughshod across the separation of powers." *Id.* at 753 (citation omitted). Indeed, Justice Thomas authored a dissent in *Hernandez* to express his view that the Court should have answered the antecedent *Bivens* question as Swartz contends: *Bivens* should not be extended to cross-border conduct, because it is meaningfully different from the circumstances that arose in *Bivens* and its progeny. *Hernandez*, 137 S. Ct. at 2008 (Thomas, J., dissenting).

IV. Numerous Factors Counsel Against Providing a *Bivens* Remedy in this Case

Aside from the new context inquiry, a *Bivens* remedy is not available here because there are numerous "special factors counselling hesitation in the absence of affirmative action by Congress." *Hernandez*, 137 S. Ct. at 2006 (quoting omitted). The panel majority ignored this Court's observation in *Abbasi*, that in cases where numerous policy considerations must be weighed, a decision to expand or create private causes of action are best left to "those who write the laws," not "those who interpret them." *Id; see also Jesner,* 138 S. Ct. at 1402 ("The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law.").

A. Foreign Relations

Once again, Judge Smith spelled out the "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Abbasi,* 137 S. Ct. at 1957-58. First is that cross-border violence implicates foreign relations, "an area uniquely unsuitable for judicial interference." *Rodriguez*, 899 F.3d at 753; *see Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Jesner*, 138 S. Ct. at 1403 ("[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."). The panel majority gave short shrift to these substantial considerations by suggesting, without support, that the failure of the judiciary to act would impair our relationship with Mexico. *Rodriguez*, 899 F.3d at 746. On the contrary, Judge Smith chronicled the numerous initiatives undertaken by the political branches – in the wake of the incident at issue here and in *Hernandez* - to resolve cross-border violence. *Rodriguez*, 899 F.3d at 754. Further, the majority's dismissal of this significant factor by reference to the border districts' role in presiding over "smuggling cases" rings hollow. *Id.* at 747. Precluding a *Bivens* action here would not have the effect of excluding the federal courts from all incidents of border violence, as the majority portends. *Id*. at 754.

B. Border Security is the Prerogative of the Political Branches of Government

The second reason for judicial restraint is the recognition that border security is the prerogative of the political branches. *Id.* (citations omitted). This, of course, was the conclusion of the Fifth Circuit in *Hernandez*, putting them in concert with the D.C. Circuit and the Third Circuit not to expand *Bivens* where national security interests are potentially at stake. *See Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) ("The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence"); *Vanderklok v. United States*, 868 F.3d 189, 207-09 (3rd Cir. 2017) (concluding that special factors weighed against implying a *Bivens* action for damages against a TSA agent, because the TSA is "tasked with assisting in a critical aspect of national security—securing our nation's airports and air traffic," and because "[t]he threat of damages liability could . . . increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers."). Similarly, implying a private right of action for damages in this transnational context will increase the likelihood that Border Patrol agents will hesitate when making split-second decisions. This concern, as it did in *Vanderklok*, provides ample reason to pause.

The panel majority's attempt to cast the work of Border Patrol agents as fungible with that of domestic law enforcement agents not only puts the Ninth Circuit at odds with the authority cited above, but it is specious given their substantially divergent statutory mandates. *See* 6 U.S.C. § 211(e)(3) (setting forth the

Agency's responsibility to interdict persons attempting to illegally enter or exit the United States, prevent goods from being illegally imported into or exported from the United States, and deter and prevent the illegal entry of terrorists, terrorist weapons, persons, and contraband.). This case does not arise in a garden variety search-and-seizure setting, but in a meaningfully unique and discrete circumstance, and the mere implication of the Fourth Amendment does not settle the question. *See, e.g. De La Paz v. Coy*, 786 F.3d 367, 380 (5th Cir. 2015) (rejecting amendment-by-amendment ratification of *Bivens* actions and declining to imply a *Bivens* remedy for alleged Fourth Amendment violations by Customs and Border Patrol agents in the course of civil immigration removal proceedings); *see also* Part V, below.

C. Extraterritorial Application of the Fourth Amendment

Judge Smith was also rightly concerned about the majority's willingness to apply the Fourth Amendment extraterritorially, a "critical" factor that is unprecedented in the *Bivens* context. *Id*. (citations omitted). The defining characteristic of this case, as in *Hernandez*, is its international underpinnings. *Hernandez*, 885 F.3d at 819. That fact cannot be divorced from the *Bivens* analysis; indeed, it is central to it. The D.C. Circuit concurred, criticizing Meshal for "downplay[ing] the extraterritorial aspect of the case," which it said is "critical." *Meshal*, 804 F.3d at 425. "After all, the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies." *Id.* (citations omitted). Further, no court has previously extended

Bivens to cases involving either the extraterritorial application of constitutional protections or to the national security domain, "let alone a case implicating both – another sign that the context is a novel one." *Id.* at 424-25; *accord Hernandez*, 885 F.3d at 822 ("[t]he very 'novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel[s] hesitation."). For these reasons, Judge Smith asked:

> How much more should we hesitate before implying a damages remedy extraterritorially by judicial mandate, in the absence of congressional action? "It would be grossly anomalous ... to apply *Bivens* extraterritorially when we would not apply an identical statutory cause of action for constitutional torts extraterritorially." [*Meshal*, 804 F.3d] at 430 (Kavanaugh, J., concurring). The majority's opinion creates exactly such a "grossly anomalous" result.

Rodriguez, 899 F.3d at 756.

D. Congressional Failure to Act is not Inadvertent

Finally, Congressional failure to enact a damages remedy in the cross-border shooting context cannot be said to be the result of "mere oversight" or inadverten[ce]." *Abassi*, 137 S. Ct. at 1862 (quotation and citation omitted).

The panel majority acknowledges, as it must, that the FTCA, while consenting to certain tort claims brought against the United States, also contains an exception for claims arising in a foreign country. *Rodriguez*, 899 F.3d at 739 (citing 28 U.S.C. § 2680(k)). This means that the United States is immune from "all

claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.* (citing *Sosa*, 542 U.S. at 712). The majority would find that the exception found in the Westfall Act, 28 U.S.C. § 2679(b)(2)(A), applies here, to allow Rodriguez's *Bivens* claim to proceed. *Id.* The consequence of such a decision is unacceptable, however, because it would have an incongruous result: "On one hand, an alien injured on Mexican soil by cross-border tortious conduct may not bring a claim for damages under the FTCA. On the other hand, an alien injured on Mexican soil by cross-border unconstitutional conduct may bring an implied claim for damages under *Bivens*." *Id.* at 755.

Similarly, Congress has not authorized a remedy for aliens injured abroad by U.S. officials, as it has for injuries sustained by foreign officials. *Meshal*, 804 F.3d at 420; 28 U.S.C. § 1350. Nor have administrative remedies extended to aliens injured abroad by some U.S. employees been applied to Border Patrol Agents. *See* 10 U.S.C. § 2734; 21 U.S.C. § 904; 22 U.S.C. § 2669-1. *Id.*

With respect to § 1983 actions, those are expressly limited to citizens of the United States, or persons within U.S. jurisdiction. 42 U.S.C. § 1942. By permitting a *Bivens* claim here, however, a federal agent would be susceptible to suit while a state official in the same situation would be statutorily exempt. *Id*. at 756. This too produces an unacceptable, anomalous result.

These laws demonstrate that Congress has acted in this sphere and has not only hesitated but has affirmatively declined to provide a mechanism for

aliens injured abroad to sue federal law enforcement agents. *Id.* As this Court said in *Abbasi*, "the silence of Congress is relevant" and "telling." *Abbasi*, 137 S. Ct. at 1862.

E. *Bivens* is not a Stop-Gap Cause of Action

Even if there is no remedial structure in place for the injury sustained by J.A., this Court has "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court." *Malesko*, 534 U.S. at 69; *see also Wilkie*, 551 U.S. at 550; *Meshal*, 804 F.3d at 425. The panel majority's overreach cannot stand without also ceding to an extraordinary usurpation of the role of Congress, which is far better suited to evaluate and weigh the impact of a damages remedy "on governmental operations systemwide." *Abassi*, 137 S. Ct. at 1858. This Court identified some of the governmental functions that apply here, including:

> the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *Id.* "These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Rodriguez, 899 F3d at 757. As Judge Smith said in concluding his opinion, "how best to deter any future

abusive conduct by Border Patrol agents is not our determination to make." *Id.*

F. Conclusion

An international cross-border shooting incident is precisely the kind of difference that was described in *Abbasi* as an example of a new *Bivens* context – one that risks disruptive intrusion by the Judiciary into the functioning of the other branches of government. *Abbasi*, 137 S. Ct. at 1859-60. Without a doubt, foreign policy is the province of the Executive and Legislative branches. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 213 (2012) ("The Constitution primarily delegates the foreign affairs powers 'to the political departments of the government, Executive and Legislative,' not to the Judiciary.") (citation omitted). Similarly, national security policy is clearly the prerogative of the Congress and President. *Abbasi*, 137 S. Ct. at 1861 (citations omitted). Together, there are compelling reasons to hesitate before expanding *Bivens* in this case. Moreover, it may be inaccurate to assert that Rodriguez has no other remedy. Mexico, on behalf of Rodriguez or on its own behalf, could file a claim against the United States with the United Nation's International Court of Justice. Mexico could assert a violation of sovereignty or a violation of a treaty addressing the situation. The fact that Rodriguez may not like the forum, claim or remedy does not alleviate the fact that an alternate remedy may be available.

For these reasons, this Court should grant the petition for a writ of certiorari, reverse the Ninth Circuit on the underlying *Bivens* question, and find the qualified immunity question moot.

Below, Swartz presents his alternative claim for relief, that he is entitled to qualified immunity from Rodriguez's lawsuit.

V. Swartz is Entitled to Qualified Immunity

The doctrine of qualified immunity shields officials from civil liability so long 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. Fitzgerald*, 457 U.S. 800, 818 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. __, __, 132 S. Ct. 2088, 2093 (2012) (internal quotation and alteration omitted). A case directly on point is not required, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011).

The constitutional question posed in this case is whether the Fourth Amendment protects a Mexican citizen who is injured in Mexico by a federal agent's cross-border shooting? This is not, however, the question answered by the panel majority.[4] "This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *Kisela v. Hughes*, __ U.S. __, __, 138 S. Ct. 1148, 1152 (2018) (citations and

---

[4] The dissenting judge did not consider Swartz's qualified immunity defense or the extraterritorial reach of the Fourth Amendment. *Rodriguez*, 899 F.3d at 749, n. 1.

quotations omitted). In spite of this chastening, the panel majority did just that, framing the issue as "about the unreasonable use of deadly force by a federal agent on American soil." *Rodriguez*, 899 F.3d at 731.

In fact, the issue is much more complex and deserved a deeper analysis than the panel majority gave, especially given the fluid structure of excessive force under the Fourth Amendment. *Kisela*, 138 S. Ct. at 1152 (citations omitted). The failure of the panel majority to fairly articulate and then critically examine the constitutional question makes its determination that this an "obvious" case, completely unsupportable. *Rodriguez*, 899 F.3d at 734. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (stating that "[t]he general proposition … that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of the particular conduct is clearly established.").

A careful examination is critical because "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue. *Kisela,* 138 S. Ct. at 1152 (internal quotation and citation omitted). Recent cases, all of which were available to the Ninth Circuit, bear this out. In *Kisela*, for example, the Court granted qualified immunity to an officer who shot a possibly threatening suspect and who only had "mere seconds to assess the potential danger"; *see also District of Columbia v. Wesby*, __ U.S. __, 138 S. Ct. 577, 591 (2018) (officer entitled to qualified immunity because there was no controlling case holding that a bona fide belief of a right to enter a premises defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his

conduct alone, or that officers must accept a suspect's innocent explanation at face value.); *Mullenix v. Luna*, 577 U.S. __, __, 136 S. Ct. 305, 308 (2015) (per curiam) (granting qualified immunity to officer who used deadly force in the course of a high speed car chase because existing precedent did not place the constitutional question "beyond debate").

In *Abbasi*, too, this Court explained that in the context of the Fourth Amendment, it can be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered. *Abbasi*, 137 S. Ct at 1867. The Court cited to *Saucier v. Katz*, 533 U.S. 194, 205 (2001), as an example, observing that "'[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts'"). *Id.*

Saucier was a military policeman who was on duty at an event where then-Vice President Al Gore was scheduled to speak. Katz attended the event to voice his opposition. As Katz moved toward the speakers' platform he removed a banner from his jacket. Saucier and another officer grabbed Katz from behind and rushed him out of the area, allegedly dragging him to a nearby military van, where Katz claimed that Saucier shoved him inside. *Saucier*, 533 U.S. at 197-98. Katz brought a *Bivens* action asserting that his Fourth Amendment rights were violated by Saucier's use of excessive force to arrest him. *Id.* at 199. This Court criticized the Ninth Circuit's conclusion that qualified immunity is merely duplicative in an excessive force case, thus "eliminating the need for the second step

where a constitutional violation could be found based on the allegations." *Id.* at 203.

That mistake would be repeated here, if the qualified immunity inquiry begins and ends with the clearly established principle that the Fourth Amendment prohibits a police officer from using deadly force without justification, no matter what the circumstances giving rise to the conduct. Even though an officer's pushes and shoves - like the use of deadly force - are clearly judged under the Fourth Amendment standard of reasonableness, the *Saucier* Court answered the qualified immunity question in favor of the officer, based on the discrete setting of the officer's duty to protect the safety and security of the Vice President at a public event. *Id.* at 209.

These cases provide a clear directive to lower courts to focus the qualified immunity inquiry on the discrete setting giving rise to the alleged excessive force. In this case, the setting is particularly unique – an international cross-border shooting incident. The panel majority failed to acknowledge this fact as significant at all, instead erroneously relying on Swartz's presence on U.S. soil as determinative. *Rodriguez*, 899 F.3d at 731.

In *Hernandez*, this Court held that facts an officer learns after the incident ends are not relevant factors for considering whether he is entitled to qualified immunity. *Hernandez*, 137 S. Ct. at 2007. Thus, the Court found the Fifth Circuit erred to the extent it granted qualified immunity based on the decedent's nationality and his ties to the United States, which were unknown to the agent at the time of the shooting. This Court recognized, however, there may be other

justifications for answering the qualified immunity question in favor of the agent. *Id.* Swartz's arguments in favor of qualified immunity do not rely solely on facts about J.A. that were unknown to him. Rather, as discussed herein, additional reasons include the nature of the location where the alleged constitutional violation occurred, the practical obstacles inherent in enforcing the claimed right, and most importantly, the lack of clearly established law applying the Fourth Amendment to a Border Patrol agent at the international border with Mexico.[5]

There is no authority that clearly establishes the extraterritorial application of the Fourth Amendment along the border with Mexico. Moreover, no case in existence at the time of this incident, or since, even considers the issue of use of force as applied to the framework of an agent's mandate to protect the border.

---

[5] Although Justices Breyer and Ginsburg would have extended the Fourth Amendment in *Hernandez*, their reasoning relied on qualities specific to the culvert that marked the border between the U.S. and Mexico where *Hernandez* was shot. 137 S. Ct. at 2009 (Breyer, J. and Ginsburg, J., dissenting) ("These six considerations taken together provide more than enough reason for treating the entire culvert as having sufficient involvement with, and connection to, the United States to subject the culvert to Fourth Amendment protections."). The bollard fence that separates Nogales, Arizona from Nogales, Sonora, bears none of the same qualities as the culvert; moreover, there is no question that the place where the injury occurred was south of the clearly demarked border fence, well within Mexican territory, and could not be considered to be connected to the United States for Fourth Amendment purposes.

This constitutional question is discernably not "beyond debate," *al-Kidd*, 563 U.S. at 741, and for that reason, the law Rodriguez seeks to invoke was not clearly established.[6] *Abbasi*, 137 S. Ct. at 1868-69.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

---

[6] Erwin Chemerinsky, Dean and Distinguished Professor of Law at the University of California, Irvine School of Law, is a nationally recognized constitutional scholar who filed a brief for Amicus Curiae in support of *Hernandez* last term. Dean Chemerinsky's brief urged the Court to grant review in order to clarify: 1) the applicability of *Boumediene* to constitutional claims other than those involving the suspension clause; 2) how *Boumediene* and *Verdugo-Urquidez* govern Fourth Amendment claims that arise extraterritorially; and 3) how to evaluate recurring instances of deadly force at the border. *See* Brief amicus curiae of Dean Erwin Chemerinsky, Sup.Ct. Dkt. 15-118. Such urging would be unnecessary if answers to these questions were already clear.

Respectfully Submitted,

Michael J. Bloom, P.C.
Counsel of Record
100 N. Stone Avenue, Suite 701
Tucson, Arizona 85701
(520) 882-9904
mike@michaeljbloom.net

Sean C. Chapman
100 N. Stone Avenue, Suite 701
Tucson, AZ 85701
(520) 622-0747
sean@seanchapmanlaw.com

Amy B. Krauss
P.O. Box 65126
Tucson, AZ 85728
(520) 400-6170
abkrauss@comcast.net

Counsel for Petitioner

September 7, 2018