No. 18-309

IN THE

Supreme Court of the United States

LONNIE SWARTZ,

Petitioner,

—v.—

ARACELI RODRIGUEZ, INDIVIDUALLY AND AS THE SURVIVING MOTHER AND PERSONAL REPRESENTATIVE OF J.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals correctly hold that a *Bivens* remedy exists in a Fourth Amendment fatal cross-border shooting case involving a domestic law enforcement agency where there is no other remedy available, including state court remedies by virtue of the Westfall Act?

2. Did the court of appeals correctly deny qualified immunity where a border agent fatally shot a Mexican teenager on Mexican soil, the agent was standing on U.S. soil when he fired his weapon, it is not impracticable or anomalous to apply the Fourth Amendment, and the agent was unaware of the victim's citizenship or ties to the United States at the time of the shooting?

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STATEMENT

A. The Complaint's Allegations

The young boy at the center of this case, J.A., was a Mexican citizen living in the border town of Nogales, Sonora, Mexico.[1] On the night of October 10, 2012, J.A. walked to Calle Internacional, a main pedestrian thoroughfare that runs alongside and parallel to the border fence separating Nogales, Mexico, from Nogales, Arizona. App. 6; C.A. App. 52 ¶ 2, 53 ¶ 9 (First Amended Complaint). Shortly before midnight, U.S. Border Patrol Agent Swartz, standing on the U.S. side of the border, began shooting through the fence at J.A. App. 6-7. Agent Swartz fired between 14 and 30 bullets and hit J.A. approximately ten times, mostly in the back. App. 6. J.A. collapsed on the spot, where he was found dead moments later. C.A. App. 54 ¶ 11. He was 16 years old and died four blocks from his home. C.A. App. 52 ¶ 1, 55 ¶ 17.

Federal rules governing border patrol officers unequivocally prohibit the use of deadly force in the absence of an "imminent danger of death or serious physical injury." 8 C.F.R. § 287.8(a)(2)(ii) (2012). J.A. did not "pose a threat to Swartz or anyone else." App. 6. In fact, Agent Swartz was behind the steel border fence, well above where J.A. was standing. On the U.S. side, the border fence sits on top of a cliff and looks down on the Mexican side. At the spot where J.A. was shot, the cliff is roughly 30 feet away

[1] This case is before the Court on a motion to dismiss. Accordingly, all non-conclusory allegations from the complaint are assumed to be true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

and the fence rises approximately 50 feet above the ground on the Mexican side. C.A. App. 54 ¶ 15; *see* App. 7; *id.* at 54 (photo of scene, appended to complaint). The fence is made of 6.5 inch steel beams separated by 3.5 inch gaps. App. 7.

At the time of the shooting, Agent Swartz did not know whether J.A. was a U.S. citizen or whether he had significant contacts with the United States. App. 8. But, like many residents of Nogales, Mexico, J.A. did in fact have close ties to the United States. Among other things, J.A.'s grandmother and grandfather live just across the border in Arizona. App. 7. They were lawful permanent residents of the United States at the time of the shooting; they are now U.S. citizens. *Id.* J.A.'s grandmother frequently travelled the short distance across the border to J.A.'s home to take care of him while his mother was away for work. *Id.*

That J.A. had connections to the United States is not surprising given the history of Nogales and the fact that he lived only four blocks from the border. "Nogales, Mexico, and Nogales, Arizona, are in some respects one town divided by the border fence. Families live on both sides of the border, and people go from one side to the other to visit and shop." *Id.* As the district court noted, the area is sometimes 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." App. 94.

B. Proceedings Below

1. Plaintiff Araceli Rodriguez, J.A.'s mother, brought this action against Agent Swartz for

the killing of her teenage son. App. 7. She alleged that the agent's unjustified use of deadly force violated, *inter alia*, the Fourth Amendment. *Id*.

Agent Swartz moved to dismiss, arguing that the Fourth Amendment does not apply extraterritorially. Specifically, he contended that the Fourth Amendment did not prohibit him from killing J.A. because J.A. was a Mexican national on Mexican soil and had insufficient connections to the United States to warrant any constitutional protection. He further maintained that, in any event, he was entitled to qualified immunity because the applicable law was unsettled at the time of the shooting.

Applying *Boumediene v. Bush*, 553 U.S. 723 (2008), the district court concluded that J.A. had significant connections to the United States and that there was no practical reason why the Fourth Amendment should not be applied in this case. App. 92-94 (noting that, among other things, J.A. was "a civilian foreign national" but "within the U.S.'s small-arms power to seize," and that J.A. "had strong familial connections to the United States"). The court concluded:

> 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.

App. 97.

The district court rejected Agent Swartz's argument for qualified immunity, observing that this was "an 'obvious case' where it is clear that Swartz

had no reason to use deadly force against J.A." and that Agent 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." App. 102.

2. The court of appeals affirmed. On the constitutional question, it concluded that, under *Boumediene*, the Fourth Amendment applies to the circumstances of this case, noting that J.A.'s citizenship is "one of several non-dispositive factors to consider," but that it is not "a prerequisite for constitutional rights." App. 12. The court then explained that, unlike *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), it would not be "impractical and anomalous" to apply the Fourth Amendment in this case, *see id*. at 278 (Kennedy, J. concurring). *Verdugo-Urquidez* challenged a search and seizure that took place entirely within Mexico, which "implicates Mexican sovereignty because Mexico is entitled to regulate conduct in its territory." App. 14. In this case, by contrast, the court of appeals stressed that Agent Swartz "acted on American soil subject to American law." App. 15.

While acknowledging that there "are many reasons not to extend the Fourth Amendment willy-nilly to actions abroad, as *Verdugo-Urquidez* explains," the court concluded that those reasons "do not apply" to this case. *Id*. Under the "limited circumstances" of a case "about the unreasonable use of deadly force by a federal agent on American soil," "there are no practical obstacles to extending the Fourth Amendment." App. 16.

Turning to qualified immunity, the court of appeals first noted that, as in *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam) (*Hernandez I*), "J.A.'s citizenship and ties to the United States" were unknown to Agent Swartz at the time of the shooting and therefore "irrelevant" to the qualified immunity analysis. App. 19. "For all Swartz knew, J.A. was an American citizen with family and activities on both sides of the border." App. 20. Therefore, the court noted, the question is "whether it was clearly established that it was unconstitutional for an officer on American soil to use deadly force without justification against a person of unknown nationality on the other side of the border." *Id.* The court concluded that "[a]ny reasonable officer would have known, even without a judicial decision to tell him so, that it was unlawful to kill someone—anyone—for no reason." *Id.*

Finally, the court of appeals held that a damages remedy is available under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Acknowledging this Court's warning to "exercise 'caution' in determining whether to extend *Bivens*," App. 29, the court concluded that this is an appropriate case to do so for several reasons.

First, the court observed, there is no alternative remedy available. App. 43. Nothing in the Federal Tort Claims Act, state tort law, possible future criminal restitution, the Mexican judicial system, the cause of action against state officers under 42 U.S.C. § 1983, or a collection of tangentially related statutes provides an alternative remedy or indicates that Congress sought to bar a remedy here. App. 31-42.

Second, the court found no "special factors" that would warrant denying a *Bivens* remedy here. The court noted that in *Ziglar v. Abbasi*, __ U.S. __, 137 S. Ct. 1843 (2017), this Court distinguished a challenge to a policy or policymakers from a case that, like this one, involves "'individual instances of . . . law enforcement overreach.'" App. 46-47 (quoting *Abbasi*, 137 S. Ct. at 1862). Indeed, the court noted, "federal regulations expressly *prohibited* Swartz from using deadly force in the circumstances alleged." *Id*. The court found no national security or foreign policy reasons to deny a remedy, given that the shooting had no connection to national security and that Mexico expressly supported a remedy. App. 47-51.

The court of appeals also rejected the argument that the extraterritorial aspect of this case is a special factor warranting denial of a *Bivens* remedy. Addressing the dissent's contention that the statutory presumption against extraterritoriality should foreclose a remedy, the court pointed out that the presumption "can be overcome when actions 'touch and concern the territory of the United States . . . with sufficient force to displace the presumption.'" App. 51 (quoting *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124-25 (2013)). Because Agent Swartz was "an American agent acting within the scope of his employment" when "he pulled the trigger . . . on our own soil," the court concluded that any presumption against extraterritoriality is overcome. App. 51-52.

3. Judge M. Smith dissented, addressing only the availability of a *Bivens* remedy. *See* App. 55 n.1. In his view, no *Bivens* remedy was available.

REASONS TO DENY THE PETITION

Petitioner urges the Court to grant review to resolve a disagreement between the Ninth Circuit and the Fifth Circuit on the threshold *Bivens* question. But the mere fact that two courts have reached different conclusions is not sufficient to warrant this Court's review. *See, e.g.*, *Rowan County, North Carolina v. Lund*, 138 S. Ct. 2564 (2018) (Mem.) (denying certiorari where the *en banc* Fourth and Sixth Circuits reached different results on the constitutionality of government officials opening town council meetings by delivering prayers written and delivered by state officials). Only last term, in *Abbasi*, this Court issued a significant decision clarifying when a *Bivens* remedy is available. There is no need for the Court to take up another *Bivens* question so soon, without allowing the lower courts time to apply this Court's guidance.

Moreover, the Ninth Circuit's narrow decision correctly applied this Court's recent guidance in *Abbasi*. As the court of appeals noted, a contrary ruling would mean that a United States border patrol agent standing on U.S. soil could shoot Mexicans and Canadians across the border with constitutional impunity.

Accordingly, the Court should deny *certiorari*. If, however, the Court decides to take up the question of remedies for cross-border shootings, this case provides a better vehicle for doing so than the Fifth Circuit decision, because the Fifth Circuit, unlike the Ninth Circuit, addressed only whether *Bivens* should apply.

I. THE CONFLICT ON THE THRESHOLD *BIVENS* QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

Last term, the Court issued a significant decision in *Abbasi* clarifying when a *Bivens* remedy is available. In light of *Abbasi*, this Court remanded *Hernandez I* to determine whether a *Bivens* remedy was available in that case, which involved a similar cross-border shooting. 137 S. Ct. at 2006-07. On remand, the Fifth Circuit, sitting *en banc*, concluded that no *Bivens* remedy was available. *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) (en banc) (*Hernandez II*). Hernandez's family has now sought review of that ruling in this Court. *Hernandez v. Mesa*, *pet. for cert. pending*, No. 17-1678 (distributed for conference September 24, 2018). The Ninth Circuit in this case disagreed with the Fifth Circuit's *Bivens* ruling, and found that a remedy is available. That circuit split, however, does not warrant this Court's review at this time.

While the Ninth and Fifth Circuits have disagreed about the application of *Abbasi* to this particular set of facts, that disagreement is too premature, circumstance-specific, and fact-bound to warrant this Court's review. Moreover, the Ninth Circuit's decision merely denies a motion to dismiss, so it remains possible that no judgment will be entered against Agent Swartz. As it often does where a split is recent and limited to two circuits, the Court should allow further percolation before addressing the question.

The Fifth and Ninth Circuits were largely in agreement on the proper reading of *Abbasi*. Both courts found that these cases presented a new

context under *Bivens*. *Compare* App. 31 *with Hernandez II*, 885 F.3d at 816-18. Both courts recognized that a *Bivens* remedy should not be afforded where special factors counsel against a damages action. *Compare* App. 30 *with Hernandez II*, 885 F.3d at 815. Both courts recognized that Congress can signal that it does not want a *Bivens* remedy, either explicitly or implicitly. *Compare* App. 32-33 *with Hernandez II*, 885 F.3d at 820-21. And both courts agreed that extraterritoriality could be a special factor under certain circumstances. *Compare* App. 50-51 (not disputing that "the presumption against the extraterritorial application of statutes suggests an analogous presumption against extraterritorial *Bivens* claims"), *with Hernandez II*, 885 F.3d at 822 (applying the presumption "[b]y extension" to *Bivens*).

The circuits disagreed only in the application of these principles to the highly unusual circumstances of these particular cases. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In light of this Court's very recent guidance in *Abbasi*, and the absence of any other disagreement among the circuits on this question, review is premature to resolve such a limited and recent circuit split.

II. THE COURT OF APPEALS' DECISION WAS NARROW AND CORRECT.

A. The Court of Appeals Properly Applied *Abbasi* to Hold That A *Bivens* Remedy Is Available Under The Circumstances Of This Case.

In *Abbasi*, this Court explained that even in new contexts a *Bivens* remedy remains available where there is no alternative remedy and special factors do not counsel against providing a remedy for damages. Here, the court of appeals properly applied that law, finding there is no alternative remedy, nor are there special factors counseling hesitation. Thus, even assuming this is a new context, a *Bivens* remedy should be available.

1. No Alternative Remedy Exists. As in *Bivens* itself, this is a case "in which 'it is damages or nothing.'" *Abbasi*, 137 S. Ct. at 1862 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). Indeed, as this Court recently observed in *Abbasi*, challenges to "individual instances of . . . law enforcement overreach" are by "their very nature . . . difficult to address except by way of damages actions after the fact." *Id*. Thus, unlike *Abbasi*, there is no alternative remedy available. *See id*. at 1862 (explaining that the availability of alternatives was "of central importance" to the denial of a *Bivens* remedy in that case).

The court of appeals addressed various proffered alternative remedies, explaining why none could provide adequate relief to Respondent—and why none indicated that Congress intended to bar a remedy in a case such as this one.

First, no Federal Tort Claims Act ("FTCA") remedy is available here, as that statute bars relief for "claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). "But this foreign country exception does not imply . . . that Congress intended to prevent Rodriguez from having a *Bivens* remedy." App. 34. "[W]hat Congress intended to avoid by the foreign country exception" was the "application of foreign substantive law" in FTCA cases. *Sosa*, 542 U.S. at 707. Here, by contrast, the Fourth Amendment supplies the substantive rule of decision, not Mexican tort law.[2]

Second, the court of appeals concluded that there is also no remedy available under state tort law, because the complaint's allegations indicate that Agent Swartz was acting within the scope of his employment when he shot J.A. App. 37. As a result, the court held that Westfall Act, 28 U.S.C. § 2679, affords Agent Swartz immunity from tort claims arising out of the shooting, and converts any such claim into an FTCA claim—which, as noted, is barred by the foreign-country exception. App. 38. Agent Swartz does not suggest otherwise in his petition. Where no other remedy is available, the absence of a *Bivens* remedy would raise serious

[2] Moreover, even if a remedy were available under the FTCA, Congress explicitly contemplated that the availability of a tort remedy against the United States would not displace *Bivens* remedies against individual officers. *See* App. 36 (citing H.R. REP. NO. 100-700, at 6 (1988), as reprinted in 1988 U.S.C.C.A.N. 5945, 5950); *Carlson v. Green*, 446 U.S. 14, 19-20 (1980).

constitutional questions. *Cf. Webster v. Doe*, 486 U.S. 592, 603 (1988) (emphasizing that the denial of "any judicial forum for a colorable constitutional claim" would raise serious constitutional issues) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Because the Westfall Act, enacted in 1988, deprives individuals of any state forum for federal officials' violations of federal constitutional rights, a refusal to recognize a *Bivens* action here would leave Rodriguez with no remedy whatsoever.

Third, the court of appeals rightly rejected the theoretical possibility of criminal restitution as an adequate alternative remedy. Whether to prosecute is entirely within the government's discretion, and a conviction requires proof beyond a reasonable doubt. Moreover, were the speculative possibility of restitution enough, *Bivens* would be a dead letter, as restitution could in theory be available for *any* willful constitutional violation. *See* 18 U.S.C. §§ 242, 3663. Notably, the Second Circuit in *Bivens* itself denied a damages remedy in part on the ground that the defendant agents could be criminally prosecuted, yet this Court reversed and authorized a remedy. *See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 724-25 (2d Cir. 1969).

Fourth, the court of appeals dismissed as "mere makeweight" the fanciful suggestion that Respondent could obtain relief through the Mexican courts. App. 41. No such relief is available. *See* Br. of Mexican Jurists, Practitioners, and Scholars as Amici Curiae in Support of Petitioners, *Hernandez v.*

Mesa, 137 S. Ct. 2003 (2017) (No. 15-118), 2016 WL 7229146.[3]

In concluding that no alternative remedy exists here, the court of appeals also considered whether Congress had chosen to preclude a *Bivens* remedy in this context. It found that Congress had not chosen to do so directly, and also properly rejected any inference from unrelated statutory provisions: "That other statutes were silent in unrelated circumstances is irrelevant: here, 'as is often the case, Congressional silence whispers' only 'sweet nothings.'" App. 33 (quoting *La. Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 537 (5th Cir. 2006)) (alterations omitted).

Thus, for instance, the court rejected reliance on the Torture Victim Protection Act, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992), a statute uniquely focused on torture committed by foreign officials. App. 41-42. And it likewise concluded that extra-judicial payments in the context of the military or other unrelated federal agencies had no bearing on this case, noting that the existence of such schemes (like the FTCA) does not bar *Bivens* remedies. App. 42-43.

Agent Swartz asserts that these statutes show Congress "affirmatively declined to provide" a

[3] Agent Swartz suggests for the first time in his petition that the Mexican government could assert a claim based on this shooting in the U.N. International Court of Justice, but offers no meaningful support for this suggestion. Pet. 15 (asserting that it "it may be inaccurate to assert that Rodriguez has no other remedy"). The suggestion is wrong. It was also waived, both because it was not raised below and because it is not developed in the petition.

remedy in a case like this. Pet. 13. But when Congress affirmatively seeks to bar a *Bivens* remedy, it knows how to do so. *See, e.g.*, *Hui v. Castaneda*, 559 U.S. 799, 806-08 (2010) (holding that Congress "plainly" granted blanket immunity for public health service personnel, including from *Bivens* claims).

Agent Swartz further asserts that here, as in *Abbasi*, "the silence of Congress is . . . telling." Pet. 14 (quoting *Abbasi*, 137 S. Ct. at 1862). But *Abassi* cited several specific reasons to believe that Congress had decided not to provide a remedy for the injuries at issue in that case: "high-level policies" like the one challenged in *Abbasi* typically "attract the attention of Congress"; indeed, congressional interest in the government's responses to September 11 had been "frequent and intense"; and even more particularly, the government "at Congress' behest" had "compiled a 300–page report" documenting the very problems challenged in the suit. 137 S. Ct. at 1862 (internal quotation marks omitted). Here, by contrast, there is no indication Congress is even aware of J.A.'s killing. Thus, there is no remotely comparable indication of intentional congressional inaction in this case

2. Special Factors Are Not Present Here. The court of appeals also properly concluded there are no special factors that counsel against a *Bivens* remedy in this case. Rather, this case falls within that core category of cases in which *Bivens* remedies remain available.

In *Abbasi*, this Court concluded that a *Bivens* remedy was not appropriate in a challenge to "high-level executive policy created in the wake of a major terrorist attack on American soil." 137 S. Ct. at

1860. But the Court could not have been clearer that it was not disturbing the core of *Bivens*:

> . . . it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

Id. at 1856-57. Far from "call[ing] into question the formulation and implementation of a general policy," *id*. at 1860, this case concerns only a single agent who personally and directly *violated* federal policy in using unjustified deadly force. "Thus, *Abbasi* implies that *Bivens* is available." App. 47.

Agent Swartz seeks to make this case about more than a single agent who used unjustified deadly force, suggesting that national security or foreign policy considerations make a *Bivens* remedy inappropriate. The court of appeals properly rejected those arguments as untethered from the narrow circumstances of this case. The court found that Agent Swartz's argument amounted to precisely what *Abbasi* warned against: the rote reliance on "national security" (and foreign policy) as "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)); *see* App. 47-48.

Indeed, the “special factors analysis is almost always performed at a high level of specificity, not at the abstract level.” App. 44. Thus, as the court of appeals emphasized, future courts may consider whether such issues foreclose a remedy in cases that actually involve national security or foreign policy concerns—just as *Abbasi* considered the specific September 11 context of that case. App. 45-47.

Nor, finally, is the extraterritorial aspect of this case a special factor warranting the denial of relief. The argument to the contrary is little more than an attempted second bite at the extraterritoriality apple; such arguments should be considered only once, when deciding whether the Fourth Amendment applies extraterritorially. *Cf. Davis v. Passman*, 442 U.S. 228, 246 (1979) (rejecting the argument that *Bivens* should not apply to a Congressman’s official conduct because the asserted “special concerns” were “coextensive with the protections” already afforded under the Speech or Debate Clause).

As the court of appeals further observed, this Court’s decisions applying the *statutory* presumption against extraterritoriality indicate, if anything, that a *Bivens* remedy should not be foreclosed here. The statutory presumption is “overcome when actions ‘touch and concern the territory of the United States . . . with sufficient force to displace the presumption.’” App. 51 (quoting *Kiobel v. Royal Dutch Petrol. Co*., 569 U.S. 108, 124–25 (2013)). Agent Swartz was a federal agent, standing on U.S.

soil, and acting within the scope of his federal employment when he shot and killed J.A. just over the border in Mexico. Any presumption is therefore amply rebutted.

Respondent acknowledges that the Fifth Circuit reached a different conclusion on the *Bivens* issue in a similar cross-border shooting case. *See Hernandez II*, 885 F.3d 811. But, for the reasons set forth above, the Ninth Circuit's decision is more faithful to this Court's *Bivens* case law.

B. The Court of Appeals Properly Held That The Fourth Amendment Applies to Agent Swartz's Conduct.

The court of appeals correctly held that the Fourth Amendment applies to Agent Swartz's actions under the functional "impracticable and anomalous" test reaffirmed in *Boumediene*, 553 U.S. 723. It rejected Agent Swartz's argument that J.A.'s connections to the United States are dispositive, correctly noting that the extent of a noncitizen's connections is only one of many factors to be considered under *Boumediene*'s functional approach. Here, it is not only practicable to apply the Fourth Amendment, but would be anomalous not to do so given that Agent Swartz was standing on U.S. soil when he fired his weapon killing J.A.

1. In *Boumediene*, this Court held that the constitutional right of habeas corpus applied to noncitizens detained as enemy combatants at Guantanamo, and rejected the government's contention that the Constitution is inapplicable to noncitizens in areas where the United States lacks legal sovereignty. 553 U.S. at 755-72. The Court

stressed that there are no categorical rules for determining when the Constitution applies extraterritorially. Rather, courts must use a commonsense, functional approach based on objective factors and ask whether application of the particular constitutional right in a *particular situation* would be "impracticable and anomalous." *Id.* at 759-60 (internal quotation marks omitted).

In *Boumediene*, the Court stressed that it was not devising a new extraterritoriality test specific to the Suspension Clause, but was simply reaffirming and applying the functional test that the Court has historically used to determine the extraterritoriality of a wide array of constitutional provisions in a variety of contexts. *Id.* at 755 (beginning its analysis by observing that in many prior cases the Court had discussed "the Constitution's extraterritorial application").

Agent Swartz's reliance in the courts below on the voluntary connections approach from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), is thus misplaced. As the court of appeals correctly explained, *Boumediene*'s reaffirmation of the functional approach is consistent with the practical rationale that commanded a majority of the Court in *Verdugo-Urquidez*. *See* App. 11-15 (explaining that Justice Kennedy's concurrence in *Verdugo-Urquidez*, which supplied the fifth vote, relied solely on practical considerations in holding that the warrant requirement of the Fourth Amendment did not apply in that context)

2. The functional approach reaffirmed by *Boumediene* yields the conclusion that the Fourth Amendment applies here. Among the factors to be

considered under the "impracticable and anomalous" test are the nature of the right asserted, the context in which the claim arises, the nationality of the person claiming the right, and whether recognition of the right would create conflict with a foreign sovereign's laws or customs. *Boumediene*, 553 U.S. at 755-65.

Here, the right at stake limits the use of deadly force by law enforcement, a right that literally protects life itself, and could not be more fundamental. *Boumediene*, 553 U.S. at 758-59 (noting that even in unincorporated territories where constitutional rights do not always apply, the Court still held that noncitizens were entitled to "fundamental" rights).

Nor is there anything remotely anomalous about applying the Fourth Amendment here. As the court of appeals noted, the limits on excessive force imposed by the Fourth Amendment must already be observed by agents during engagements with both citizens and noncitizens on *both* sides of the border. *See* 8 C.F.R. § 287.8(a)(2)(ii) (2012) ("Deadly force may be used only when . . . necessary to protect the [agent] or other persons from the imminent danger of death or serious physical injury.").

Indeed, Agent Swartz has never seriously contended that he could disobey the Fourth Amendment's limits on the use of deadly force when dealing with (1) an American citizen on United States or Mexican soil, (2) a Mexican national on United States soil, or (3) a Mexican national on Mexican soil who has significant connections to the United States. It is thus hardly anomalous to require him to obey the Fourth Amendment where he

is shooting at a Mexican national who lacks United States connections. Particularly as Agent Swartz could not know the citizenship or connections of J.A. when he shot him ten times, there is nothing impracticable about applying a single standard. Indeed, federal regulations already do so.

Applying the Fourth Amendment also does not raise significant practical problems, much less the type of problems that would outweigh the importance of imposing constitutional limits on the use of deadly force. Here, a U.S. court is being asked to apply U.S. constitutional law to the actions of a U.S. Border Patrol agent firing his weapon from inside the United States. Under these "limited circumstances, there are no practical obstacles to extending the Fourth Amendment." App. 16.

The practical problems that troubled the Court in *Verdugo-Urquidez* could hardly be more different. App. 14-15. There, the specific question was whether the Fourth Amendment's warrant clause should apply to a search in Mexico. The plurality noted that as no federal magistrate even had authority to issue a warrant for a search outside our borders, a warrant issued by a U.S. magistrate "would be a dead letter outside the United States." 494 U.S. at 274; *see also id*. at 278 (Kennedy, J., concurring) (noting problems with requiring a warrant for a search in Mexico); *id*. at 279 (Stevens, J., concurring in the judgment) (noting that "American magistrates have no power to authorize . . . searches" in a foreign country). Here in contrast, Agent Swartz "acted on American soil subject to American law," so there are no practical problems or conflict with Mexico's laws or sovereign prerogatives. App. 15.

Nor does the Court's concern in *Verdugo-Urquidez* about creating a "sea of uncertainty" if it applied the Fourth Amendment in that case have relevance here. *See* 494 U.S. at 274. Agent Swartz cannot claim that requiring him to observe the Fourth Amendment with respect to the cross-border shooting of a Mexican citizen would create a "sea of uncertainty" given that agents must already obey these limits by virtue of criminal law and their own regulations. In fact, it will be far easier for agents simply to apply the same standards in all cases, especially because they will rarely know the victim's connections to the United States.[4]

C. The Court of Appeals Properly Held That Agent Swartz Was Not Entitled To Qualified Immunity Based On Facts He Did Not Know At The Time.

Agent Swartz argues that although he could not have killed J.A. on U.S. soil, he is entitled to qualified immunity because it was not clearly established that "the Fourth Amendment protects a Mexican citizen who is injured in Mexico by a federal

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[4] Even if the extent of J.A.'s connections to the country were dispositive, the Fourth Amendment would still apply here. As the courts below noted, J.A. had significant family connections to the United States. App. 7, 94. As importantly, J.A. lived in a border town and was shot on Calle Internacional, a main thoroughfare of Nogales, where the town's residents walk and where numerous U.S. citizens and permanent residents come to visit family and shop, App 7; C.A. App. 53 ¶ 9. It also runs right alongside the fence where heavily armed U.S. Border Patrol guards are positioned. *Id*. Living in Nogales, with family on both sides of the border, J.A. thus had an inescapable connection to the United States.

agent's cross-border shooting." Pet. 16. But Agent Swartz learned only after the fact that J.A. was a Mexican citizen.

In *Hernandez I*, this Court squarely rejected that same argument because there the agent also learned of the victim's citizenship only after he engaged in the cross-border shooting. As *Hernandez* explained, a "qualified immunity analysis . . . is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." *Hernandez I*, 137 S. Ct. at 2007 (internal quotation marks omitted). Here, as in *Hernandez*, the victim's "citizenship and ties to the United States are . . . irrelevant" because "[w]hen he shot J.A., Swartz could not have known whether the boy was an American citizen." App. 19-20.

The court of appeals thus properly recognized that "the question is not whether it was clearly established that aliens abroad have Fourth Amendment rights." *Id*. at 20. "Rather, it is whether it was clearly established that it was unconstitutional for an officer on American soil to use deadly force without justification against a person of unknown nationality on the other side of the border." *Id*.

Qualified immunity shields only those actions that an officer could reasonably have believed were lawful. *See Hernandez I*, 137 S. Ct. at 2007 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The court of appeals rightly rejected the argument that a reasonable officer might believe it was constitutionally permissible to stand at the border fence and, without justification, fatally shoot an individual directly across the border as long as he did

not know for certain that the victim had U.S. connections, observing that "[a]ny reasonable officer would have known, even without a judicial decision to tell him so, that it was unlawful to kill someone—anyone—for no reason." App. 20.

Agent Swartz contends that immunity is warranted merely because there is no prior case on all fours. Pet. 20. But as recently as last term, this Court reaffirmed that a "reported case 'directly on point'" is not required to defeat qualified immunity. *Abbasi*, 137 S. Ct. at 1867; *see also Hope v. Pelzer*, 536 U.S. 730, 743 (2002) (officers had fair warning even though case's facts were "not identical").

The doctrine of qualified immunity was never intended to protect "those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). That is assuredly the case here.

* * *

Calle International, the street in Nogales, Mexico, where J.A. was shot, runs alongside the U.S.-Mexico border fence. Every day thousands of Mexican citizens walk up and down the busy street in their home town, just a few feet from the border fence—going to school, shopping and otherwise going about their business. Neither they, nor others in similar towns along the Southern and Northern borders of the United States, should be left without a constitutional remedy if they are shot by a U.S. border patrol agent standing behind the fence on U.S. soil.

III. IF THE COURT CHOOSES TO GRANT REVIEW OF A CROSS-BORDER CASE, THE DECISION BELOW PRESENTS A BETTER VEHICLE.

For the reasons stated above, the Court should deny *certiorari*. If, however, the Court disagrees and decides to take up the question of remedies for cross-border shootings, this case is a more appropriate vehicle than *Hernandez*. While both the Ninth and Fifth Circuits addressed whether a *Bivens* remedy is available, only the Ninth Circuit additionally addressed the questions whether the constitutional prohibition against excessive force applies extraterritorially to cross-border shootings, and whether qualified immunity is appropriate.

CONCLUSION

The Court should deny the petition.

Respectfully Submitted,

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