

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JESUS C. HERNANDEZ, ET AL.,)
)
)
)
)
)
)
)
)
)
)
)
)
)

Pages: 1 through 68
Place: Washington, D.C.
Date: November 12, 2019

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -

JESUS C. HERNANDEZ, ET AL.,)

Petitioners,)

v.) No. 17-1678

JESUS MESA, JR.,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 12, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:31 a.m.

APPEARANCES:

STEPHEN I. VLADECK, ESQ., Austin, Texas;

on behalf of the Petitioners.

RANDOLPH J. ORTEGA, ESQ., El Paso, Texas;

on behalf of the Respondent.

JEFFREY B. WALL, Principal Deputy Solicitor

General, Department of Justice, Washington, D.C.;

for the United States, as amicus curiae,

supporting the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	STEPHEN I. VLADECK, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	RANDOLPH J. ORTEGA, ESQ.	
7	On behalf of the Respondent	33
8	ORAL ARGUMENT OF:	
9	JEFFREY B. WALL, ESQ.	
10	For the United States, as amicus	
11	curiae, supporting the Respondent	52
12	REBUTTAL ARGUMENT OF:	
13	STEPHEN I. VLADECK, ESQ.	
14	On behalf of the Petitioners	65
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1678, Hernandez versus Mesa.

Mr. Vladeck.

ORAL ARGUMENT OF STEPHEN I. VLADECK
ON BEHALF OF THE PETITIONERS

MR. VLADECK: Mr. Chief Justice, and may it please the Court:

When this case was first argued to this Court two years ago, counsel for Respondent and counsel for the United States were both asked whether Petitioners would have a Bivens remedy if Sergio Hernandez had been standing on U.S. soil when he was shot and killed by Respondent. Both said yes.

The question before this Court today is, therefore, whether a Bivens action is nevertheless foreclosed because, in this case, Sergio was standing a few feet to the Mexican side of the border at the time he was shot.

For two reasons, we believe that it isn't. First, the fortuity of where a victim is standing does not, in fact, trigger any of the

1 special factors counseling hesitation identified
2 by Respondent or the United States.

3 Most importantly, it is difficult to
4 see how foreign relations could be a special
5 factor precluding a Bivens suit here if it
6 wouldn't have precluded a Bivens claim had
7 Sergio been standing just a few feet away.

8 Moreover, the government's assertion
9 that permitting Petitioners' suit would
10 dramatically undermine U.S. foreign relations
11 and diplomacy is belied by the long history of
12 successful tort claims against federal law
13 enforcement officers, including, as in the
14 Apollon, cases in which the victim was a
15 foreigner harmed on foreign soil, the Court
16 awarded damages, and the diplomatic sky did not
17 fall.

18 Nor does extraterritoriality cut
19 against a Bivens remedy here. Not only was
20 Respondent standing on U.S. soil when he pulled
21 the trigger, but he could not have known in that
22 instant where the bullet would even land, let
23 alone the nationality of anyone it might hit.

24 Second and as importantly, for
25 Petitioners here it is Bivens or nothing.

1 Neither Respondent nor the United States
2 seriously disputes that the Westfall Act
3 preempts the Texas tort remedy Petitioners could
4 otherwise have pursued, and neither has
5 identified any other alternative remedy for the
6 Petitioners here as opposed to other parties in
7 other cases.

8 All of this goes to why this Court was
9 right in Abbasi when it explained that there are
10 powerful reasons to retain Bivens as a remedy
11 for individual instances of law enforcement
12 overreach. And it goes to why, even though
13 Sergio was standing on Mexican soil when he was
14 shot and killed, this case presents the exact
15 kind of law enforcement overreach that Abbasi
16 had in mind.

17 I think Abbasi is a useful place to
18 begin our analysis because, in that case, not
19 only did this Court suggest that there were
20 still important reasons to retain Bivens in law
21 enforcement contexts, but this Court itself
22 actually preserved and retained one of the
23 plaintiffs' Bivens claims. This Court returned
24 to the district court, rather than dismissing,
25 the prisoner abuse claim against the warden of

1 the MDC.

2 And we think that reflects four of the
3 reasons why retaining Bivens in the law
4 enforcement sphere makes sense. First, as this
5 Court said in *Abbasi*, it is difficult to
6 contemplate other remedies when individual
7 instances of law enforcement overreach are at
8 play. In those contexts, a damages action after
9 the fact will usually be the only possible legal
10 recourse. It's going to be difficult to bring a
11 claim in advance.

12 Second, the deterrence effect, what
13 this Court has called the core purpose of
14 *Bivens*, which is to deter individual officers,
15 could quite easily be lost in the absence of
16 remedies in the law enforcement context, unlike
17 in *Abbasi*, where, as this Court stressed, there
18 were alternative remedies available to the
19 plaintiffs.

20 Third, the historical tradition that
21 we note in our brief, where federal courts and
22 state courts, going all the way back to the
23 founding, routinely imposed tort damages against
24 federal officers acting *ultra vires*, without
25 suggesting there were separation-of-powers

1 obstacles to doing so, without suggesting that
2 there was anything wrong with the federal courts
3 providing a cause of action in those cases.

4 As opposed to, I think, where the
5 inquiry historically has focused, immunity. Are
6 there reasons in these cases to actually hold
7 the -- the defendant officer harmless, not
8 because there's no cause of action but because
9 he was acting in good faith or, under the modern
10 standard, because he did not violate clearly
11 established rights of which a reasonable officer
12 in his position would have been aware.

13 JUSTICE KAVANAUGH: They argue --

14 JUSTICE ALITO: If the --

15 JUSTICE KAVANAUGH: Go ahead.

16 JUSTICE ALITO: If the officer in this
17 case had been a state officer and everything
18 else was the same, would the victim have a claim
19 in federal court?

20 MR. VLADECK: So, if the question is
21 in federal court, Justice Alito, I think it
22 would depend on diversity. I don't believe the
23 victim would be able to bring a claim under 1983
24 because, as the government points out, the
25 language of that statute limits the class of

1 plaintiffs to U.S. citizens and those subject to
2 the jurisdiction thereof.

3 But, Justice Alito, Congress, when it
4 enacted 1983, as Judge Prado noted in his
5 dissent below, was not thinking about limiting
6 remedies that were otherwise available; it was
7 thinking about expanding remedies, in that
8 context in 1871, to newly freed slaves.

9 So 1983 does nothing to displace
10 whatever state tort remedies might be available
11 against state officers. Now, of course, that's
12 going to vary a bit.

13 JUSTICE GINSBURG: Suppose -- suppose
14 there were no 1983, and a state officer had done
15 exactly what the Bureau of Narcotics agents did
16 in Bivens. Would there be an action against the
17 state officer?

18 MR. VLADECK: There would be, Justice
19 Ginsburg. And, actually, I think it's worth in
20 this context reminding the Court of the
21 government's position in Bivens. The
22 government's position in Bivens itself was not
23 that the federal courts should not be
24 recognizing these remedies in any context.
25 Rather, the government's position in Bivens was

1 that New York State tort law would have provided
2 an adequate remedy, Justice Ginsburg, not just
3 against the federal officer defendants in Bivens
4 but also had they been, say, New York City
5 police officers, that New York trespass law
6 would have provided the remedy.

7 To quote from the government's brief
8 in Bivens, a federal remedy should only be
9 recognized when it is necessary. And the
10 argument in Bivens was simply as to whether a
11 complementary federal remedy was necessary to
12 vindicate the plaintiff's Fourth Amendment
13 rights, given the existence of New York trespass
14 law, given the government's argument that New
15 York trespass law in that context was adequate
16 to vindicate the plaintiff's Fourth Amendment
17 interests.

18 And this was the common law model. I
19 mean, I think we are all familiar with Henry
20 Hart's dialectic where Professor Hart suggested
21 that the original understanding was that even
22 federal officers would be principally
23 responsible to judges in state court. There was
24 no general federal question statute.

25 CHIEF JUSTICE ROBERTS: You -- your --

1 you reference the government's position in
2 Bivens. That was almost 50 years ago. In the
3 interim, there's been a fairly dramatic change
4 in how we approach things as implying causes of
5 action, both under statutes and under Bivens.

6 I mean, it's been, what, 40 years,
7 right, since the last time we recognized a cause
8 of action in Bivens? So I -- I -- I think you
9 need to sort of move up half a century and
10 explain to us why we should take your -- your
11 approach today regardless of what the -- the
12 prevailing legal regime was in '71.

13 MR. VLADECK: I take the point,
14 Mr. Chief Justice, and if I may offer two points
15 in response. The first is I say all of this by
16 way of putting Bivens in context. That is to
17 say that, rather than a bolt from the blue,
18 Bivens was a continuation of this tradition.

19 But, to -- to wind the clock forward,
20 which I think is, of course, the -- the task for
21 the Court today, I think it's worth stressing
22 that, of the nine cases this Court has decided
23 since Carlson, which the government points out
24 at page 11 of its amicus brief, where this Court
25 has had the opportunity to recognize a Bivens

1 remedy and has chosen not to do so, none of
2 those involved a claim that an individual
3 federal law enforcement officer was acting ultra
4 vires. None of the suits involved the kind of
5 claim we have here. None of the suits involved
6 the context in which this historical tradition
7 was at its richest, Mr. Chief Justice. None of
8 the suits or at least not all of the cases even
9 involved claims that would have had a common law
10 parallel.

11 And so we certainly recognize that
12 this Court has been increasingly skeptical of
13 judge-made causes of action in general and of
14 Bivens in particular. Our point is simply that
15 that skepticism has been reserved or at least
16 focused on categories unlike this one.

17 JUSTICE KAVANAUGH: If Bivens were a
18 statute, in effect, we would apply the
19 presumption against extraterritorial
20 application. And the other side argues that,
21 therefore, even if it were a statute, it
22 wouldn't apply in a circumstance like this.

23 What's your answer to that?

24 MR. VLADECK: Well, I think we have
25 two answers, Justice Kavanaugh. And I think the

1 -- the first and most important is that but
2 Bivens is not a statute and that this Court has
3 never suggested, for example, that in looking at
4 whether particular constitutional provisions
5 apply extraterritorially, we would use any of
6 the typical presumptions that we apply to
7 statutes because it is a fundamentally different
8 task from the perspective of looking at the
9 extent to which the Constitution applies
10 overseas versus what Congress would have
11 intended.

12 But even if this Court, nevertheless,
13 believes that it's appropriate to map on that
14 presumption, I actually think Kiobel helps us
15 more than it hurts us, because, in Kiobel, this
16 Court said there will still be cases in which
17 the -- the underlying conduct, the gravamen of
18 the plaintiff's complaint, involves activity
19 that touches and concerns U.S. soil with
20 sufficient force to displace the presumption
21 against extraterritoriality.

22 And so I think this Court could assume
23 without deciding that extraterritoriality is a
24 special factor for purposes of Bivens and still
25 say this case is different because Respondent

1 was standing on U.S. soil at the time he pulled
2 the trigger, that is touching and concerning
3 U.S. territory from my perspective the way
4 Kiobel meant it.

5 JUSTICE GORSUCH: What would
6 distinguish --

7 JUSTICE GINSBURG: But the -- the --
8 the victim, Hernandez, this Court has -- has
9 said, I think, that a non-citizen who's injured
10 abroad doesn't have any Fourth Amendment rights.

11 So what is -- it seems like a rather
12 arid discussion if, at the end of the day, there
13 is no federal constitutional right that can be
14 asserted by a non-citizen who is injured abroad.

15 MR. VLADECK: So I think -- I think,
16 Justice Ginsburg, that Verdugo certainly stands
17 for the proposition that in that case there was
18 no Fourth Amendment protection for a Mexican
19 national whose home was searched by DEA agents
20 operating in conjunction with the Mexican
21 government.

22 I think this Court itself suggested in
23 Hernandez I, two years ago, that the Fourth
24 Amendment question in the context of a
25 cross-border shooting is more complicated, and

1 it is the fact that that question is unsettled

2 --

3 JUSTICE GORSUCH: Well, what --

4 MR. VLADECK: -- that is -- sorry.

5 JUSTICE GORSUCH: -- what -- this is
6 my question, too. I want to pick up on Justice
7 Ginsburg.

8 What -- what then is the limiting
9 principle? We have a foreign national injured
10 abroad by an action in the United States.

11 I can think of a lot of cases that
12 that's going to encompass, right? And not just
13 cross-boarder shootings but all kinds of torts
14 that can occur transnationally. Would you
15 capture all of those or -- or --

16 MR. VLADECK: Not at all, Justice
17 Gorsuch. And as I hope was clear --

18 JUSTICE GORSUCH: It can't -- it can't
19 be that this is good for one shooting only,
20 right?

21 MR. VLADECK: No. And, first, I mean,
22 I think -- I think this Court is well aware that
23 there's been more than one shooting, so --

24 JUSTICE GORSUCH: I understand that.

25 MR. VLADECK: But -- but no, I mean, I

1 think the -- the larger point is our position
2 focuses on the law enforcement nature of the
3 conduct at issue here.

4 And so many of the hypotheticals that
5 I suspect you are thinking of, Your Honor, that
6 I'd be thinking of, for a context in which a
7 U.S. government person in the United States
8 could --

9 JUSTICE GORSUCH: Why would it be
10 limited to law enforcement as opposed to other
11 governmental functions that happen here but
12 happen to injure persons abroad?

13 MR. VLADECK: Because I think it's in
14 the law enforcement context that there is the
15 strongest argument, the strongest appeal to the
16 historical tradition we note in our briefs,
17 where there is a straight line dating all the
18 way back to the founding where it was law
19 enforcement, where common law remedies against
20 federal officers were so important.

21 There aren't many examples, I could
22 find none, of combat operations, for example,
23 where state courts were imposing tort remedies
24 against federal officers.

25 JUSTICE GORSUCH: So you'd have us --

1 you'd draw a line there, actively in this case
2 and say that any -- any actions involving
3 military operations, diplomatic operations, any
4 other operations of government are not -- there
5 -- there's no Bivens action there, it's only for
6 law enforcement, whatever that means,
7 operations?

8 MR. VLADECK: So, I mean, I --
9 obviously, I wouldn't decide more than is
10 necessary. But I do think --

11 JUSTICE GORSUCH: Ah, ah, okay.
12 That's what -- that's what I thought you'd say.

13 MR. VLADECK: But -- but, Justice
14 Gorsuch --

15 JUSTICE GORSUCH: All right. And so
16 -- so where is, if -- if you're not willing to
17 draw that line, where is it? And how is this
18 Court supposed to draw it? You -- you say --
19 you say you could say this, but I wouldn't say
20 it. All right.

21 MR. VLADECK: I -- I -- I --

22 JUSTICE GORSUCH: Where would you draw
23 the line?

24 MR. VLADECK: I think -- I think based
25 on this Court's jurisprudence, and based on

1 Abbasi itself, I think the line could reasonably
2 plausibly, and --

3 JUSTICE GORSUCH: No, no, not
4 reasonably, plausibly. Where would you have
5 this Court draw the line?

6 MR. VLADECK: Well, I think, frankly,
7 there are decisions this Court has handed down
8 in the Bivens context that I think don't
9 necessarily -- aren't necessarily consistent
10 with this full tradition.

11 But it has still left open law
12 enforcement conduct, Justice Gorsuch. And it's
13 not just this Court that has done that.

14 Congress, in the 1974 amendment to the
15 Federal Tort Claims Act, went out of its way to
16 expand the liability of the United States for
17 intentional torts committed by law enforcement
18 officers. They are --

19 JUSTICE SOTOMAYOR: Well, but I --
20 it's not just intentional torts. It's rogue
21 intentional torts. That's an important limiting
22 principle.

23 MR. VLADECK: It absolutely is,
24 Justice Sotomayor. And I hope it's clear in our
25 briefs --

1 JUSTICE SOTOMAYOR: And accepting the
2 facts of this case, the use of force is on U.S.
3 land and it's unreasonable because the claim is
4 that this young man was doing nothing but
5 standing on the other side of the border.

6 MR. VLADECK: And I think this might
7 be a -- a -- sort of a more convincing answer, I
8 hope, to Justice Gorsuch, which is I do believe
9 that it is relevant to the claim and the
10 strength of our claim in this case that the
11 Respondent was, according to the plausible
12 allegations in the plaintiff's complaint,
13 violating not just the Constitution but his own
14 departmental regulations, that we have not just
15 a law enforcement officer, Justice Gorsuch, but
16 a law enforcement officer acting ultra vires.

17 JUSTICE BREYER: Are we supposed to
18 decide this? I mean, I thought -- I wrote a
19 dissent, I guess, but I thought this is special
20 because it's American law enforcement, American
21 soil, and he thought he might be shooting at an
22 American, and the -- the border in this case is
23 rather special, it's not just the line, it was
24 the river, and it's administered by an
25 international commission, dah-dah-dah, okay, I

1 have about six wonderful reasons that persuaded
2 only me. Okay.

3 But the --

4 (Laughter.)

5 JUSTICE BREYER: Or now -- now --

6 MR. VLADECK: I believe you also
7 persuaded --

8 JUSTICE BREYER: -- I thought we're
9 taking this case on the assumption that the
10 Fourth Amendment does apply, and the only issue
11 in front of us is not that but, rather, we
12 assume that the Fourth Amendment applied, that
13 it is a clear violation of the Fourth Amendment,
14 and the question is Abbasi, whether there is a
15 Bivens action for a clear rogue violation of the
16 Fourth Amendment that takes place in the way
17 this does.

18 Is that sufficient, to use the Abbasi
19 term that -- which I have now lost, but the
20 Abbasi term that this is some kind of extension
21 of the Fourth Amendment or that this is some
22 kind of special situation? That, I thought, was
23 the issue.

24 And at some point, I -- I feel, I'll
25 try to answer that question, but I'd like to

1 hear what you say about that.

2 MR. VLADECK: I -- I -- I agree
3 completely, Justice Breyer. I mean, I think
4 that Abbasi -- I don't think Abbasi --

5 JUSTICE BREYER: I don't care whether
6 you agree or not. All I want to hear is your
7 argument on -- I don't want to repeat myself --
8 but on the assumptions I gave --

9 MR. VLADECK: Yes.

10 JUSTICE BREYER: -- what is your
11 argument that this is not an extension, that
12 this is not special, that this is not an unusual
13 thing?

14 MR. VLADECK: I understand.

15 JUSTICE BREYER: What's your argument?

16 MR. VLADECK: So our argument is,
17 first, that this Court has long recognized that
18 claims against individual law enforcement
19 officers for excessive force are what the Fifth
20 Circuit called classic Bivens claims.

21 I believe there's an opinion by then
22 Judge Kavanaugh referring to it as the core of
23 Bivens to bring a claim that an individual law
24 enforcement officer is acting ultra vires.

25 So, Justice Breyer, I think there's at

1 least an argument that this might not even be a
2 new context. But, even if it is a new context,
3 the government and Respondent have identified
4 three special factors that they argue counsel
5 hesitation.

6 First, they say it's because this case
7 implicates foreign relations and national
8 security. As we suggest in our briefs, we don't
9 believe that follows simply from the fact that
10 Sergio Hernandez was standing on the Mexican
11 side of the border as opposed to the American
12 side of the border.

13 The government also argues
14 extraterritoriality as a special factor. As I
15 think I hope I explained in response to Justice
16 Kavanaugh's question, we don't think
17 extraterritoriality is implicated here because
18 this case touches and concerns U.S. territory
19 with sufficient force to displace the
20 presumption.

21 And the third extra -- the third
22 special factor invoked by Respondent and the
23 government is congressional action. And I
24 think, in that context, there's no example of
25 Congress specifically trying to preclude claims

1 like Petitioners here.

2 And the only time Congress has ever
3 spoken to the tort liability of, again, Justice
4 Gorsuch, this is where we get our test from,
5 individual federal law enforcement officers,
6 Congress has expanded that liability.

7 CHIEF JUSTICE ROBERTS: Counsel --

8 JUSTICE GINSBURG: Tell me --

9 CHIEF JUSTICE ROBERTS: -- just to go
10 with the first of the things you mentioned, the
11 international relations, there has been
12 diplomatic correspondence between the Mexican
13 government and our government with respect to
14 this -- this -- this incident.

15 The Border Patrol has conducted an
16 investigation, and it reached the determination
17 that the action of the agent was not contrary to
18 policy.

19 And you would have the courts look
20 into this by providing a Bivens remedy that
21 could well come to the opposite conclusion. So
22 that in terms of our relations with Mexico, we'd
23 have one agency saying this was not inconsistent
24 with policy. We'd have the court saying it is.

25 And that is the type of thing that it

1 makes it at least a -- a new context. You can
2 say it doesn't make a difference, but, in terms
3 of our relations with Mexico, they've got two
4 different things, and at least with respect to
5 foreign relations, I thought the country was
6 supposed to speak with one voice.

7 MR. VLADECK: So I do -- I certainly
8 agree that the -- that the country is supposed
9 to speak with one voice, Mr. Chief Justice. Two
10 -- two points in response. The first is, of
11 course, if the government continues to believe
12 and if Respondent continues to believe there
13 would be a Bivens remedy if Sergio Hernandez had
14 simply been standing on American soil, it's not
15 clear to me why the same concerns wouldn't be
16 equally present.

17 That is to say, by that logic, any
18 time a U.S. officer harms any foreign national,
19 even if Bivens itself -- if Bivens had been a
20 foreign national, it's not hard to imagine
21 similar diplomatic correspondence following from
22 that incident.

23 JUSTICE KAVANAUGH: They argue it's
24 not merely the foreign policy implications that
25 the Chief Justice identified but that border

1 security is also national security in some
2 respects and that that's a different context,
3 slightly different than the foreign relations.

4 Can you address that?

5 MR. VLADECK: Absolutely. And we
6 certainly agree that border security as a policy
7 is an important policy of the United States,
8 that if we were here challenging one of the
9 government's border patrol policies, this would
10 be a different case.

11 But I think it's important to note,
12 back to the Chief Justice's question, that the
13 dispute here is over whether Respondent violated
14 the very government policy at issue. That is to
15 say, we are not challenging a policy of the
16 government. We are claiming Respondent himself
17 did not comply with that policy.

18 The government's entitled, Mr. Chief
19 Justice, to its own preliminary determination of
20 that question. We don't think it is the kind of
21 policy to which this Court has historically
22 accorded deference in the foreign relations and
23 national security sphere, if it's an
24 after-the-fact factual determination about a
25 single incident, as opposed to, say, a challenge

1 to an entire border patrol policy.

2 JUSTICE ALITO: I thought you were
3 challenging the --

4 JUSTICE SOTOMAYOR: Can you go back
5 to --

6 JUSTICE ALITO: I thought you were
7 challenging the constitutionality of what was
8 done, not whether it was consistent with border
9 patrol policy.

10 MR. VLADECK: So, Justice Alito --

11 JUSTICE ALITO: Is that -- is that --
12 does that provide the basis for a federal claim?
13 If it were -- if you put the Fourth Amendment
14 aside, but the action was contrary to border --
15 border patrol policy, would that provide the
16 basis for a federal claim?

17 MR. VLADECK: Not for a damages suit,
18 of course, but --

19 JUSTICE ALITO: Yes.

20 MR. VLADECK: -- but it is our
21 position, Justice Alito, that -- just to go back
22 to my colloquy with Justice Gorsuch, again, the
23 reason why we believe this is in the heartland
24 of Bivens, notwithstanding the concerns that the
25 Chief Justice has referred to and that Justice

1 Kavanaugh alluded to, is because, here, we do
2 not have a case where the claim is that a
3 particular policy of the United States in the
4 foreign relations or national security sphere
5 was the source of the injury to the plaintiffs.

6 Here, our argument is that the policy
7 is actually coextensive with the Constitution,
8 and so that if we are correct, which we have not
9 yet, of course, had a chance to prove, but if we
10 are correct that Respondent violated
11 Petitioner's constitutional -- or Sergio
12 Hernandez's constitutional rights, Justice
13 Alito, there would also be a violation of
14 policy.

15 And so, to us, the questions blend
16 together because it helps to drive home why this
17 case is not like the nine cases this Court has
18 had since Carlson --

19 JUSTICE GINSBURG: Can -- can we --
20 can we go back to the question that I asked? If
21 breaking into someone's home and searching and
22 seizing, if that's not a Fourth Amendment
23 violation because the person is a non-citizen
24 and it happened abroad, you said a cross-border
25 shooting is more complicated. Why should it be

1 different?

2 MR. VLADECK: So, Justice Ginsburg,
3 with respect, I actually think it was this Court
4 that said that in Hernandez I. And I think the
5 reason why is because there is some uncertainty
6 in the lower courts, as reflected in the Ninth
7 Circuit's decision in the Rodriguez case, the
8 original three-judge panel decision in this
9 case.

10 There is some uncertainty about just
11 how broadly this Court's decision in
12 Verdugo-Urquidez, in which the Court said a
13 Mexican national could not invoke the Fourth
14 Amendment to challenge the search of his home --
15 the warrantless search of his home by a DEA
16 officer, there's uncertainty about how far that
17 sweeps. Is that a categorical on/off switch at
18 the border, or are there reasons to actually
19 think the Fourth Amendment question is more
20 complicated in the context in which you have
21 cross-border episodes, especially after
22 Boumediene? And that is say, does Verdugo still
23 have the same force? Now --

24 JUSTICE SOTOMAYOR: Mr. Vladeck, there
25 is one part of the Chief's question you didn't

1 answer. The government's speaking with one
2 voice, and you said the government should. But
3 he's posited a big difference here. The
4 government -- the executive has said this was
5 not a rogue action. This security guard.
6 They've concluded on -- based on what, we don't
7 know -- that this officer was being attacked and
8 that's why he shot. The allegations of this
9 complaint are to the contrary.

10 If the court were to rule in favor of
11 your client -- not the court, but a jury were to
12 have found in favor of your client, wouldn't we
13 be speaking in two voices? You haven't
14 addressed that.

15 MR. VLADECK: Thank you, Justice
16 Sotomayor. And I think our response is I think
17 that this Court has never suggested that every
18 single thing the United States says that has any
19 bearing on any possible sliver of foreign
20 relations is the kind of foreign policy where
21 this Court has said the -- the government should
22 be allowed to speak with one voice.

23 And so I think there's a meaningful
24 distinction between a policy that is ex ante
25 shaping the conduct of our border patrol

1 officers, of our government officers, where a
2 judicial decision might call into question the
3 policy, and a context where the dispute rises
4 and falls on whether the government's own policy
5 prohibiting excessive force in violation of the
6 Constitution was violated. That is to say, it
7 seems to me that there's merger.

8 JUSTICE KAGAN: But what if,
9 Mr. Vladeck, you had -- you have this one
10 incident and the executive branch had a very
11 different view of what happened, than a court
12 did? A court said there was unconstitutional
13 conduct here, the use of excessive force. But
14 the executive branch thought he did everything
15 by the book, and, you know, he isn't subject --
16 he shouldn't be subject to any action, even a
17 disciplinary one.

18 And then the court's decision,
19 contrary to that -- let's say Mexico wants to
20 extradite the border patrol officer. And that
21 puts, I would think, the executive branch in a
22 quite difficult situation. Should -- you know,
23 Mexico is pointing at a court judgment, but the
24 executive branch thinks that there's no earthly
25 reason to extradite. What happens then?

1 MR. VLADECK: Well, I think, Justice
2 Kagan, there's a critical difference between
3 what the preclusive effect of a civil judgment
4 about the unconstitutional conduct by the
5 officer would prove and whether the Mexican
6 government would be able to satisfy the very
7 different inquiry of whether there's sufficient
8 evidence to sustain a criminal indictment and to
9 warrant extradition under the terms of the
10 U.S./Mexico extradition treaty.

11 And I think that's the key point here,
12 is that, on the government's logic, all it takes
13 is the government showing up after an incident
14 and saying, oh, there's some reason why we don't
15 believe this was unlawful or there's some
16 foreign relations implication to a judgment
17 holding it's lawful. And if it's after the
18 fact, that won't matter; it would still preclude
19 Bivens.

20 CHIEF JUSTICE ROBERTS: Well, that's,
21 I think, a fairly unfair characterization of
22 what the government did in this case. According
23 to their representations, it was a fairly
24 thorough investigation.

25 And maybe it's -- at the end of the

1 day, maybe a jury would come to a different
2 determination than the governmental
3 investigation, but I don't think that's fully
4 responsive to the international relations
5 concerns.

6 MR. VLADECK: That -- that's fair that
7 you ask --

8 CHIEF JUSTICE ROBERTS: But, even if
9 not fully responsive, it has to be demonstrated
10 it's simply a new context for the Bivens
11 question.

12 MR. VLADECK: That -- that may well
13 be, and I think our submission is simply that
14 the question this Court has always suggested in
15 the Bivens context is how to preserve its core
16 deterrent purpose and in a context in which the
17 government's after-the-fact factual
18 determination that an officer had acted
19 appropriately under the circumstances were
20 sufficient to be a policy choice that does not
21 actually give rise to the kind of deference this
22 Court has historically accorded.

23 Right? That's what we're worried
24 about because it's not clear how that wouldn't
25 potentially, if not in this case, swallow the

1 category, right? That is to say, if Abbasi
2 meant what it said when it said there are
3 powerful reasons to retain Bivens in the law
4 enforcement context, we think that's true,
5 Mr. Chief Justice, even when the government has
6 other -- other equities at stake.

7 Because, again, the key for us is when
8 a court is saying an individual officer has
9 acted ultra vires, it is not the same thing as
10 saying the government's policy is somehow
11 inconsistent with the Constitution.

12 It's not the same thing as saying we
13 are second-guessing how the government has
14 chosen to conduct border patrol policies. It's
15 simply saying this one officer went out of
16 bounds. And that's the kind of claim that was
17 historically available at common law. It's the
18 kind of claim Congress preserved in the FTCA
19 amendment.

20 And if I may, I think the -- the point
21 of Abbasi at the end of the day is to draw the
22 distinction between the kind of claim this Court
23 rejected, which was a high-level challenge to
24 post-9/11 policies formulated by the attorney
25 general and the FBI director and the individual

1 law enforcement officer engaged in overreach.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. -- Mr. Ortega.

5 ORAL ARGUMENT OF RANDOLPH J. ORTEGA
6 ON BEHALF OF THE RESPONDENT

7 MR. ORTEGA: Mr. Chief Justice, and
8 may it please the Court:

9 The Petitioners are asking this Court
10 to create a cause of action, an implied cause of
11 action, where none has existed since the
12 formation of our republic, by extending Bivens
13 in a new context, where Congress has not -- has
14 declined to provide a remedy. And Congress's
15 silence is telling. They've addressed this
16 issue in the FTCA, which bars foreign claims.
17 They've addressed it again in the Alien Tort
18 Statute.

19 And they addressed it again in
20 Westfall, that carved out an exception for
21 Bivens.

22 The new context in this case is not
23 only the transnational aspect but also the
24 utilization of the Fifth Amendment's Due Process
25 Clause. The new context itself fails, and the

1 argument that there's a lack of a remedy fails
2 when the Court takes into consideration the
3 special factors that are involved in this case:
4 intruding on the separation of powers, where
5 Congress and the Executive have their domain;
6 national security -- and border patrol is
7 national security.

8 The border patrol is the forefront of
9 our national security. The border patrol, much
10 like the military, is a paramilitary
11 organization charged with protecting our
12 borders. Congress has chosen, and
13 non-inadvertently, not to create a damages
14 remedy.

15 And if a damages remedy is
16 appropriate, it is the unique domain of Congress
17 to consider the public policy, to balance the
18 projected costs. And it requires an assessment
19 of its impact system-wide.

20 The executive is in charge of foreign
21 affairs. There's an actual dispute in this case
22 as Mexico would like a remedy, and the United
23 States has argued against a remedy. Mexico --

24 JUSTICE GINSBURG: And if we can go
25 back to the -- this complaint, and at this

1 stage, this very preliminary stage, we're
2 supposed to accept the complaint's allegations
3 as true, which is that, here, we have a rogue
4 officer acting in violation of the agency's own
5 instruction, using excessive force to kill a
6 child at play.

7 How does that call into question any
8 foreign policy or national security policy?

9 MR. ORTEGA: Well, it would create a
10 chilling effect as to the border patrol agents
11 in conducting their day-to-day activities, but
12 not only a chilling effect, you would be -- the
13 lower courts would be in chaos. There would be
14 --

15 JUSTICE SOTOMAYOR: Well, doesn't that
16 happen if the shooting happened in our own land?
17 Meaning a border patrol agent who sees a child
18 at play and kills him two feet from the line is
19 not chilled. He knows he can't do that.

20 What makes it chilling to tell a
21 border patrol agent don't shoot indiscriminately
22 at children standing a few feet from the border?
23 We have to accept the facts of the complaint on
24 their face.

25 MR. ORTEGA: That's correct.

1 JUSTICE SOTOMAYOR: All right. And on
2 their face, the complaint says that's what the
3 border agent did.

4 MR. ORTEGA: But -- but you can't view
5 it in a vacuum. It would be applicable --

6 JUSTICE SOTOMAYOR: Well, the
7 vacuum -- what -- this doesn't involve a Mexican
8 defendant, Mexican law, or Mexican courts. It
9 involves a U.S. defendant acting on U.S. soil,
10 pulling the trigger on U.S. soil, and subject to
11 U.S. law. We're not dragging the border patrol
12 agent into a Mexican court.

13 So how would we be interfering?

14 MR. ORTEGA: Your Honor, are you --
15 are you suggesting that the decedent would be
16 inside of the border of the United States?

17 JUSTICE SOTOMAYOR: No, I just said to
18 you it involves a U.S. defendant, the border
19 patrol agent, acting on U.S. soil, pulling the
20 trigger on U.S. soil, and subjecting the U.S.
21 border agent to a U.S. court.

22 MR. ORTEGA: But the --

23 JUSTICE SOTOMAYOR: We're not dragging
24 the agent anywhere else.

25 MR. ORTEGA: That's correct, but the

1 agent would know when he took his actions that
2 he was inside of the jurisdiction of the United
3 States.

4 JUSTICE SOTOMAYOR: He always knows
5 he's inside and subject to U.S. law. Don't --
6 that never changes no matter what we do here.

7 MR. ORTEGA: That's correct. But, in
8 this case, you're asking for -- the Petitioners
9 are asking for an extension of the Constitution
10 into a foreign republic, which is quite --

11 JUSTICE BREYER: We assume -- we
12 assume here that it is extended. We assume the
13 Fourth Amendment applies, my understanding is.

14 So we know this place by picture.
15 It's a culvert. It's a big culvert like here to
16 the end of the room. And there's a bridge. And
17 across this bridge hundreds, perhaps thousands,
18 of people walk each day on their way to work or
19 on their way home.

20 Now a border agent who's standing near
21 the bridge picks up a gun and shoots one of
22 them. If he's crossed that imaginary line in
23 the center of the bridge, I take it, you agree
24 that you can bring a Bivens action?

25 MR. ORTEGA: That's correct.

1 JUSTICE BREYER: And if he is an
2 American and on the other side, you agree he can
3 bring a Bivens action.

4 MR. ORTEGA: That would be correct,
5 Your Honor.

6 JUSTICE BREYER: Okay. So the only
7 person who cannot bring a Bivens action -- and
8 the border agent has no idea whether he's
9 shooting such a person -- is someone who is just
10 on the Mexican side of the imaginary line on the
11 bridge and whom he shot deliberately or roguely
12 or whatever.

13 MR. ORTEGA: That would be correct,
14 but --

15 JUSTICE BREYER: See, all right, now
16 here is the standard. Justice Kennedy writes
17 it. The necessary inference is that the -- the
18 necessary -- the inquiry that we're after about
19 whether this is an extension of a Bivens action,
20 must concentrate on whether the judiciary is
21 well suited, absent congressional action, to
22 weigh the costs and benefits of allowing the
23 action to proceed, okay?

24 That's my standard. I've given you
25 the facts. What's the problem? We would like

1 -- we ordinarily have such actions. The
2 Mexicans want it. They want the action. So
3 what's the special problem?

4 MR. ORTEGA: It would become a matter
5 of line drawing. Where would the court --

6 JUSTICE BREYER: No, no, not line
7 drawing. There's no line drawing problem. We
8 assume -- the line drawing problem may come in
9 as to whether the Fourth Amendment applies, but,
10 here, we're assuming it does. And assuming it
11 applies, what's the problem with the Bivens
12 action? What's the line drawing problem there?

13 MR. ORTEGA: It would be the extending
14 of Bivens into a new country.

15 JUSTICE BREYER: Why is it extending?
16 I mean, after all, maybe in Hawaii there's never
17 been a Bivens action brought before on the 14th
18 island. Is that an extension?

19 MR. ORTEGA: It's not. It's within
20 the United States. Here, we have --

21 JUSTICE BREYER: Oh, I understand
22 that. And this is on the other side of the
23 line. Also, by the way, it was at 7:00 in the
24 evening, in fact, 7:02. And there never has
25 been a Bivens action brought at 7:02.

1 MR. ORTEGA: But there's never been a
2 Bivens action that involves a transnational
3 shooting.

4 JUSTICE BREYER: Ah, I got that point.
5 All I am saying is, why is that different in
6 terms of a problem caused than the fact that it
7 was 7:02:59 on the fourth island of Hawaii? You
8 got my point?

9 MR. ORTEGA: I do.

10 JUSTICE BREYER: Good. All right. He
11 got it. Now what's -- what is it?

12 MR. ORTEGA: It's -- it's --

13 (Laughter.)

14 JUSTICE BREYER: Don't ask my point.
15 I want to know your answer.

16 MR. ORTEGA: I have to go back to --
17 to it being different in so much as it is
18 transnational. And it --

19 JUSTICE BREYER: Well, you've said
20 that. All I'm asking you is why that makes a
21 difference? Where it's on a bridge, in the
22 culvert, the -- I won't repeat myself, but I
23 went through every factor I thought that I could
24 -- seems to me very, very similar, and I just
25 don't understand it.

1 So far, what you've said is: It will
2 freeze the border patrol, to which I think good.
3 I don't think there's an American who --
4 anywhere in the world who wouldn't want to stop
5 the kind of action here, so that doesn't seem a
6 factor cutting against.

7 And, anyway, he can do it if it's an
8 American, and he doesn't even know if it's an
9 American.

10 MR. ORTEGA: If there was a remedy to
11 be fashioned, that would be for Congress to
12 decide.

13 JUSTICE BREYER: That's a conclusion.
14 And my answer -- my question is, why?

15 MR. ORTEGA: Because they'll be able
16 to weigh the costs and benefits of the actual
17 remedy itself, the limits of the remedy, the
18 parameters of the remedy for the courts to be
19 able to provide guidance to the lower courts.

20 There would be very little guidance to
21 the lower courts --

22 JUSTICE SOTOMAYOR: I -- I don't
23 understand your answer. You can't shoot an
24 unarmed juvenile playing. And the remedies
25 limit is that one. That -- that's the only

1 thing that a court would be deciding, whether
2 there truly was cause or no cause for this
3 shooting.

4 MR. ORTEGA: But -- but then wouldn't
5 the determination be on an ad hoc basis,
6 creating instability in the lower courts?

7 JUSTICE SOTOMAYOR: Why? What's the
8 greater instability when you already admit that
9 Bivens -- Bivens would apply if that child was
10 standing two feet from the border? And if --
11 even would apply, according to you, if it was an
12 American child standing two feet on the Mexican
13 border. I don't see where the greater
14 instability arises in that situation.

15 MR. ORTEGA: Well, the instability
16 would rise because of the -- the actual areas
17 where you're at. It's a national border with
18 the border patrol providing national security in
19 that area.

20 JUSTICE SOTOMAYOR: So why -- what
21 you're basically saying is Bivens shouldn't
22 apply ever against a border -- a rogue border
23 patrol who just stands there shooting people
24 both on the U.S. side, indiscriminately, takes a
25 gun and just sweeps both sides of the border?

1 MR. ORTEGA: Well, it would apply to
2 those standing on the United States side
3 certainly.

4 JUSTICE SOTOMAYOR: Well --

5 JUSTICE BREYER: Let -- let me ask
6 because I'm putting all my -- this is actually
7 bothering me. I'm not asking you to -- look, if
8 we were talking about extending the Fourth
9 Amendment, I would see a problem. I might think
10 we should or I might think we shouldn't, but I
11 might think we should, but I certainly would say
12 there is a problem.

13 But, once we say the Fourth Amendment
14 is there in just the same way it is two feet on
15 the other side, at that point, what's the
16 special problem of giving a damages remedy to a
17 Mexican youth just as you would give it to an
18 American youth, whether that American youth is
19 over on one side of the border or the other?

20 MR. ORTEGA: Assuming --

21 JUSTICE BREYER: That's where I --
22 that's -- at that point, I hesitate. I say,
23 well, that's what we're supposed to find here
24 under the statute. And -- and what is it?

25 MR. ORTEGA: Assuming Verdugo did not

1 foreclose that, then there would not be a
2 difference.

3 JUSTICE BREYER: Well, if there's no
4 difference, then that's the end of it, isn't it,
5 because Kennedy says, look, he says you've got
6 to find -- he's not talking about the Fourth
7 Amendment. He's actually not even thinking
8 about that, possibly. I don't know. We're
9 thinking about Sixth Amendment, Eighth, Tenth
10 Amendment. I don't know. But -- but assuming
11 he is, once we're there, the Fourth Amendment
12 really does apply.

13 You say you can't think of a
14 difference. And I can't think of a difference.
15 So we send the case back. Now consider the
16 Fourth Amendment.

17 MR. ORTEGA: The Fourth --

18 JUSTICE BREYER: Is that what we
19 should do?

20 MR. ORTEGA: Well, the Fourth
21 Amendment, I believe, is foreclosed by Verdugo
22 in its language claiming that a U.S. agent, even
23 acting on foreign soil, is not constrained by
24 the Fourth Amendment.

25 JUSTICE KAVANAUGH: I thought your --

1 JUSTICE BREYER: I'm not sure --

2 JUSTICE KAVANAUGH: I thought your
3 point was the foreign policy implications are
4 triggered when it's on the other side of the
5 border, and that's why we give significance to
6 the border, but I want to press on that because
7 wouldn't there be foreign policy implications
8 even if the victim were a Mexican -- Mexican
9 national and killed even on the U.S. side of the
10 border? Those kinds of incidents create lots of
11 international and foreign policy implications as
12 well.

13 So why do foreign policy implications
14 track the border so neatly in your view?

15 MR. ORTEGA: They track the border
16 because the border is a paramilitary area that
17 the border patrol patrols under the guidance of
18 the executive.

19 JUSTICE KAVANAUGH: But do you agree
20 there could be serious foreign policy
21 implications even from a incident inside the
22 United States with a victim who's a Mexican
23 national?

24 MR. ORTEGA: Absolutely, just the way
25 that there were in this case dealing with the

1 extradition and the damage -- damages remedy
2 asked for by the Mexican government and the U.S.
3 government deciding -- or opposing their request
4 for a damages remedy.

5 So it's been 40 years and there's been
6 no extension of Bivens beyond the trilogy that
7 this Court has -- has outlined. The presumption
8 against the extension provides the lower courts
9 stability versus an ad hoc application of the
10 law.

11 JUSTICE KAVANAUGH: Should we think
12 about the lack of alternative remedies?
13 Mr. Vladeck mentioned that, there's just no
14 remedy at all, which is unlike not all the
15 Bivens cases but certainly some of them?

16 MR. ORTEGA: But, when you look at the
17 myriad of special factors, including the
18 separation of powers, national security, foreign
19 diplomacy, public policy, and the projected
20 costs, I think that that creates quite a
21 different -- a different picture of that. And
22 it's better left for Congress and the executive
23 to decide those issues and, specifically,
24 Congress to balance the public policy, the
25 limits of the law, and to provide guidance for

1 this Court to interpret an actual statute that
2 they would have created.

3 I believe the new context of this
4 nature in a transnational shooting should be
5 dispositive. An injury to a foreign national on
6 foreign soil is untenable because excessive
7 force that relates to a seizure, as we've
8 discussed, is covered by the Fourth Amendment
9 and is not a substantive due process claim.

10 It would require an extension of
11 Boumediene to a foreign country where the U.S.
12 maintains no jurisdiction whatsoever, whether de
13 facto or actual. It would create line drawing.
14 It would create an unpredictable application.
15 Even if this Court were to fashion a damages
16 remedy, the application of that remedy would be
17 very difficult and would create chaos, in my
18 opinion, of the lower courts in its very
19 application.

20 JUSTICE KAVANAUGH: Why -- why chaos?
21 I guess I'm not seeing that. You would just
22 extend it and it would apply just like Bivens
23 applies to lots of cases all the time.

24 MR. ORTEGA: Well, it would be line
25 drawing, wouldn't it? The line drawing of the

1 border, extension of the border.

2 JUSTICE KAVANAUGH: Well, Justice
3 Sotomayor gave you the line. You have a
4 defendant on U.S. soil who's a U.S. official.

5 MR. ORTEGA: Well, if he's on -- if
6 they're in the United States, there's no
7 question --

8 JUSTICE KAVANAUGH: And then you just
9 look -- and then you just look at the actions to
10 see whether it was excessive force. I guess I'm
11 -- I take your point on the new context, but I
12 guess the chaos argument's not resonating with
13 me.

14 MR. ORTEGA: The lower courts have
15 stood on this Court's presumption against the
16 extension in order to provide stability and
17 guidance to them in their decisions.

18 Extending it again and extending it
19 transnationally would create a myriad of
20 problems.

21 JUSTICE KAGAN: Mr. Ortega, I think
22 I'm a little bit confused. Do you or do you not
23 contest -- suppose there were a -- a border
24 patrol officer used excessive force but 10 miles
25 from the border while carrying out border

1 security operations.

2 MR. ORTEGA: Ten miles from the border
3 inside of the United States?

4 JUSTICE KAGAN: Yeah, he's a border
5 patrol officer, he's acting within the scope of
6 his employment, it's very important, he's trying
7 to find people who have crossed the border.
8 He's engaged in, you know, usual law enforcement
9 work.

10 Can you bring a Bivens action against
11 that officer?

12 MR. ORTEGA: The injury is occurring
13 in the United States or outside of the United
14 States?

15 JUSTICE KAGAN: You know -- yes, it's
16 -- it's in the United States, but this is border
17 patrol work. This is border work. This is
18 border security work.

19 MR. ORTEGA: Well, you can bring the
20 Bivens action if he was actually a rogue officer
21 acting outside of policy, which does not present
22 itself here.

23 JUSTICE KAGAN: Well, yeah -- I mean,
24 if -- if -- if we're assuming that the officer
25 used excessive force, you can bring the Bivens

1 action, is that correct?

2 MR. ORTEGA: If it fell outside the
3 policy, correct. Excessive force.

4 JUSTICE KAGAN: Okay. Now we're
5 bringing it 10 miles up to the border, except
6 the person involved -- this is Mr. Vladeck's
7 hypo -- is -- is on the U.S. side of the border.
8 Still a Bivens action?

9 MR. ORTEGA: Inside of the -- the
10 United States border, correct.

11 JUSTICE KAGAN: Okay. So a lot of
12 foreign affairs concerns are present there, so
13 too a lot of national security concerns, if
14 we're saying that border security is a facet of
15 national security, right?

16 MR. ORTEGA: Correct.

17 JUSTICE KAGAN: Okay. So then the
18 question is why, when we just moved three inches
19 over there, there's a different answer? That, I
20 think, is the question that many people have
21 been asking you.

22 MR. ORTEGA: That's correct. And I
23 believe that the border is real. It's a real
24 line. And it can't be extended. The
25 Constitution cannot be extended into a foreign

1 country. But --

2 JUSTICE KAGAN: Yes, it is a real
3 line. And, you know, one way to line-draw is
4 find a real line, I suppose.

5 (Laughter.)

6 JUSTICE KAGAN: But I guess, you know,
7 usually, the -- the -- the analysis that we go
8 through in a Bivens claim -- and I think that
9 this is the analysis that the government
10 warrants us to go through -- is to ask about,
11 are there special foreign affairs concerns? Are
12 there special national security concerns?

13 And the question is, why would there
14 be special foreign affairs and national security
15 concerns with respect to a shooting that occurs
16 three inches on one side of the border versus
17 three inches on the other side of the border or
18 even a little bit away from the border but very
19 much involving border security work?

20 MR. ORTEGA: If it keeps going,
21 extending into Mexico, then there would be no
22 line. It would just keep going and going. It
23 could be all of Juarez, it could be all of
24 Chihuahua, it could be all of Mexico. It would
25 never end. It would be no different than a

1 drone pilot in Colorado hitting the wrong
2 village in Syria. He would still be --

3 JUSTICE KAGAN: Well, I think we're
4 positing a defendant who is in the United States
5 and who is committing his action in the United
6 States. So, unless this is a very far-reaching
7 bullet, I don't think so.

8 MR. ORTEGA: That's correct. And that
9 was the -- the hypothetical I gave you regarding
10 a drone pilot in Colorado who happens to hit a
11 village in Syria. It would be the same action.
12 He would be in the United States, the victims
13 would be in Syria, the injury would occur --
14 would occur in Syria.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Wall.

18 ORAL ARGUMENT OF JEFFREY B. WALL
19 FOR THE UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING THE RESPONDENT

21 MR. WALL: Mr. Chief Justice, and may
22 it please the Court:

23 A foreign national was killed on
24 foreign soil by a federal officer patrolling an
25 international border. That is plainly a new

1 context for Bivens purposes, and several special
2 factors counsel hesitation here: clear foreign
3 relations concerns with Mexico and the need for
4 border security, clear extraterritoriality, and
5 clear signals from Congress in 1983 and the FTCA
6 that it does not approve of damages liability
7 for injuries abroad.

8 Taking a step back, Abbasi and other
9 decisions have made lower courts markedly less
10 willing to imply causes of action for damages.

11 If this Court extends Bivens here, on
12 these facts, it will threaten to reverse that
13 trend by undermining this Court's consistent
14 message about the importance of caution and
15 judicial modesty in this area.

16 To turn to the first of the three
17 special factors, the foreign relations with
18 Mexico, I don't think it's difficult to figure
19 out exactly why we think Congress might pause,
20 as it has in 1983 and the FTCA, before extending
21 damages liability here.

22 The United States and Mexico have an
23 active disagreement over what happened here. We
24 have bilateral mechanisms for working it out,
25 like the Border Violence Prevention Council,

1 which meets and talks about things like use of
2 force.

3 When we are conducting those
4 negotiations, if we are taking positions about
5 what has happened at the border and courts --

6 JUSTICE SOTOMAYOR: Mr. Wall, the
7 problem is that the allegation here is not about
8 their meeting and talking about policies. It's
9 about rogue actions.

10 And -- and I take a look at the amici,
11 the former, like the CPB, but others who tell me
12 pretty persuasively and extensively that the
13 border patrol might be a bit of a mess, and that
14 disciplining is at a minimum here,
15 investigating, et cetera, is not done in the way
16 that others of us would think would be
17 appropriate to an agency.

18 All of those things suggest to me that
19 the class you want to create is a class of
20 border patrol agents, whether they shoot across
21 the border or shoot in the border.

22 MR. WALL: Justice Sotomayor, I'm
23 happy to go through all the reports and the
24 evidence. I'm happy to say, look, there were 55
25 incidents of use of force with firearms in

1 fiscal year 12. There were 15 last year in
2 fiscal year 18. That's a more than 70 percent
3 drop.

4 We can go back and forth about whether
5 we think the Customs and Border Patrol is doing
6 a good job at the border or not.

7 I think my bottom line point, though,
8 is that all of that is the subject of
9 legislative debate. There is a body that can
10 consider these kinds of questions and tailor a
11 damages scheme to whatever --

12 JUSTICE SOTOMAYOR: But that --

13 MR. WALL: -- the facts on the --

14 JUSTICE SOTOMAYOR: -- that would mean
15 --

16 MR. WALL: -- ground are, but --

17 JUSTICE SOTOMAYOR: But that would
18 have been --

19 MR. WALL: -- that's Congress.

20 JUSTICE SOTOMAYOR: That would have
21 been true in Bivens itself. Someone could have
22 said there are all sorts of things that control
23 the FBI, and we shouldn't extend Bivens, but we
24 did because there's a fundamental belief that
25 unconstitutional actions that stem from the

1 United States, this agent fired that gun from
2 here, should provide a remedy.

3 MR. WALL: Yes, as you said in Abbasi,
4 Bivens was a product of an error in which you
5 freely --

6 JUSTICE SOTOMAYOR: No, it's not a
7 product of an error.

8 MR. WALL: But that's to be --

9 JUSTICE SOTOMAYOR: I -- I mean --

10 MR. WALL: Justice Sotomayor, that's
11 what the Court said in Abbasi. You said --

12 JUSTICE SOTOMAYOR: No, no, no. It --
13 it -- Abbasi, that's what Abbasi said, but if
14 you look at Bivens itself, it was based on a
15 historical finding that rogue actions, even in
16 foreign soils, taking a ship improperly, doing
17 other things across the border required a
18 remedy.

19 MR. WALL: I -- Justice Sotomayor, if
20 I may, they're very different. And I want to be
21 really clear on this with the Court.

22 Yes, it is certainly true that courts
23 for a long time applied the same common law
24 rules for trespass and the rest to federal
25 officers that they applied to everybody else.

1 And that was perfectly fine under federal common
2 law up until Erie. And it was perfectly fine
3 under state, statutory and common law right up
4 to the Westfall Act.

5 But that's not what the Court was
6 doing in Bivens and that's not the way it's
7 conceived of Bivens in its later cases.

8 It was implying a special rule, not
9 for everybody, but for federal officers directly
10 under the Constitution in the absence of any
11 statutory authorization from Congress. That's a
12 very different animal from what state and
13 federal courts were doing for a --

14 JUSTICE BREYER: I would like --

15 MR. WALL: -- really long time.

16 JUSTICE BREYER: -- at some point to
17 hear your three reasons. You had three reasons.
18 And I hope to leave you -- leave you enough time
19 to go to the same question I've asked 15 times:
20 Look, isn't this all a problem for the Fourth
21 Amendment?

22 But if you assume the Fourth Amendment
23 applies, what's the added problem?

24 MR. WALL: So --

25 JUSTICE BREYER: After all, the Fourth

1 Amendment suppresses evidence.

2 MR. WALL: So --

3 JUSTICE BREYER: We're not going to
4 change that, are we? And if the Fourth
5 Amendment applies, suppressing evidence will
6 still happen when there's a violation and, after
7 all, that's arguable in Congress. It creates a
8 mess in the court, dah-dah-dah. Okay.

9 So what's special about this?

10 MR. WALL: So I'll try to get through
11 a couple of things really quickly. One, the
12 friction with Mexico, which I think is pretty
13 obvious and exemplified by this very case.

14 Two, extraterritoriality. I don't
15 have much to add to what Justice Kavanaugh said
16 in Meshal in the D.C. Circuit. If there were a
17 statute and it were the same as 1983 for federal
18 officers, I don't take anybody to be disputing
19 that, absent some clear indication in the
20 language, that it wouldn't pick up an entry
21 across the border. And it seems in passing
22 strange that if this express statute didn't get
23 -- get it, an implied cause of action wouldn't.

24 And even if you disagreed with me on
25 that, then I think you'd say, look, Congress has

1 made judgments in this area. It cut off all
2 liability in the FTCA for things that happened
3 across the board, injuries abroad. And you
4 couldn't get it if you were a state office under
5 1983.

6 So at least as far as we can tell in
7 the judgments Congress has made, it has
8 recognized that the border is really
9 significant.

10 And why?

11 JUSTICE KAGAN: Mr. Wall --

12 MR. WALL: Because when you're injured
13 abroad, you don't work it out through damages
14 lawsuits. You work it out through diplomatic
15 and administrative processes. And that's always
16 been how Congress has done it.

17 JUSTICE KAGAN: I mean, I think I need
18 to -- somebody to explain to me a little bit the
19 kind of foreign affairs concerns that you're
20 worried about. And, you know, it's easy to just
21 sort of wave your hands and say foreign affairs
22 when there's been a cross-border shooting.

23 But I think it would help me, at
24 least, to have some specifics about what kind of
25 situations you're worried about.

1 I mean, here, obviously, Mexico would
2 prefer that a Bivens action be -- be given. And
3 that's not dispositive by any means.

4 But I guess I'm wondering what is the
5 problem?

6 MR. WALL: I guess the -- the problem
7 is that the United States and Mexico actively
8 discuss incidents at the border, both specific
9 incidents and general policies, right, as they
10 have for years.

11 And, for instance, CBP revised it's
12 use of force --

13 JUSTICE KAGAN: And as they did in
14 this case even while the Bivens suit was going
15 forward. The Bivens claims does not seem to
16 have prevented Mexico and the United States from
17 having discussions and negotiations about this
18 very incident. Did it?

19 MR. WALL: That's right. But the
20 question under Abbasi isn't, look, can you show
21 that in every case this is always the kind of
22 thing --

23 JUSTICE KAGAN: I'm looking for any
24 case.

25 MR. WALL: Right. And what I'm saying

1 is -- I -- take this case. We disagree with
2 Mexico. We had a pair of cases. In one of them
3 we thought the agent acted unlawfully.

4 In the other we did a very thorough
5 investigation, it's not in the record, but I've
6 reviewed all the evidence and be happy to talk
7 about it, we concluded he hadn't acted
8 unlawfully.

9 Mexico believes that we're wrong about
10 that. It believes we ought to extradite him,
11 they ought to get their crack.

12 It may believe as a result of this
13 incident that we're not taking seriously our
14 policy at the border. That's exactly the sort
15 of thing that we have an ambassador and a
16 foreign minister. We have a State Department
17 and they have one and they talk about these
18 issues. And this --

19 JUSTICE KAGAN: I guess I'm -- I'm
20 still looking for, you have -- you in one state
21 of the world you don't have a Bivens claim, in
22 Mr. Hernandez's position. In another state of
23 the world, he does have a Bivens claim.

24 How does that interfere with the
25 United States' foreign policy?

1 MR. WALL: Justice Kagan, do you
2 really think that the next time we go in to talk
3 to Mexico and we take a position on something at
4 the border they won't say, how is your
5 representation credible? You told us last time
6 that your officer didn't do anything wrong. And
7 your own courts, potentially even your Supreme
8 Court, told you you were wrong. I think it does
9 directly undermine the credibility of the
10 executive branch in working with a foreign
11 government.

12 But even if you thought I were wrong,
13 you still know --

14 JUSTICE KAGAN: Yeah, why wouldn't --

15 MR. WALL: -- under Chappell --

16 JUSTICE KAGAN: Why wouldn't the
17 United States then say, you know, we live in a
18 country in which courts play an important role
19 in determining whether conduct is lawful. And
20 that's not an embarrassment to the United States
21 or to the executive branch.

22 MR. WALL: Of course courts play a
23 role, but the role under Abbasi is a limited one
24 where, if there are special factors that counsel
25 hesitation, the court says we leave it to

1 Congress, even if you disagree with me on
2 foreign relations, you still have clear signals
3 from Congress in terms of the statutes it's
4 passed and you have clear extraterritoriality.

5 And we know from Chappell that you
6 weigh the special factors in aggregate. So the
7 question just is, across all of these things, is
8 there enough here to think that we ought to
9 pause before we judicially imply a cause of
10 action, and we ought to leave it to Congress.

11 And I just think looking at the
12 balance, there's clearly enough to say that
13 there is a body that can address these kinds of
14 on-the-grounds concerns at the border. But it's
15 Congress. It's not the courts.

16 And I guess the -- the last thing I'd
17 say is, you know, the Fifth Circuit looking at
18 this said, look, the facts are tragic. This
19 Court said last time it's a heartbreaking loss
20 of life but said this is not a close case under
21 Abbasi.

22 I -- I disagree with Respondent's
23 counsel about some of the hypotheticals, three
24 inches inside of the line or ten miles inside
25 the line, but you don't have to agree with us on

1 those or disagree whether there is a Bivens to
2 think that once you've crossed the border and
3 you are dealing with foreign nationals on
4 foreign soil, now you have crossed into
5 territory where Congress has never gone.

6 JUSTICE KAGAN: Did you say you
7 disagree, Mr. Wall?

8 MR. WALL: I do.

9 JUSTICE KAGAN: So the three inches
10 inside the line, what would be the -- the case
11 there?

12 MR. WALL: I think if you're -- I
13 mean, take the hypothetical of foreign nationals
14 going across the border, right. Certainly grant
15 that a couple of the special factors aren't
16 going to apply, extraterritoriality and
17 congressional action.

18 I think you still likely got foreign
19 relations and national security concerns. I
20 think probably best answer is there's not a
21 Bivens action.

22 JUSTICE KAGAN: And how about ten
23 miles from the border but doing border security
24 work?

25 MR. WALL: I think maybe you've still

1 got foreign relations and border security. But,
2 again, whether or not you agree with us on that,
3 this is the easy case where all of those special
4 factors are triggered.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Vladeck, three minutes.

8 REBUTTAL ARGUMENT OF STEPHEN I.

9 VLADECK ON BEHALF OF THE PETITIONERS

10 MR. VLADECK: Thank you Mr. Chief
11 Justice.

12 Let me just say briefly that I take
13 Mr. Wall's answer to Justice Kagan's last
14 question to mean that the government has now
15 changed its position from Hernandez I, where the
16 government argued that the inside the border
17 hypothetical would be actionable under Bivens.

18 That aside, I mean, I do want to go
19 back to putting this case in the broader context
20 because I think it's important to understand how
21 we got here. Historically, the whole way that
22 the tort liability regime worked for government
23 misconduct was that this Court and state courts
24 looked to existing common law causes of action
25 and focused on immunity defenses as the way of

1 calibrating the harm that citizens and others
2 faced when injured by government officers
3 against the need to protect officers acting in
4 good faith, back to Judge Hand in *Gregoire*
5 versus *Biddle*.

6 The court struck this balance by
7 fashioning immunity defenses where the fight
8 would be over whether the officer was entitled
9 to immunity or not. And for law enforcement
10 officers specifically, this Court has long
11 rejected the argument that there should be any
12 context in which law enforcement officers,
13 because of the frequency with which they
14 interact with average individuals, because of
15 the nature of their interactions, because of the
16 powers they have to search, to seize, to arrest
17 in this context, to use lethal force, did not
18 justify absolute immunity, and instead justified
19 a more narrower, qualified kind of immunity for
20 those most likely to come face-to-face with
21 private citizens.

22 Distilled to its simplest, the
23 government's position in this case is that
24 officers in what is self-described as the
25 nation's largest law enforcement agency should

1 have a functional absolute immunity, at least
2 where foreign nationals are concerned.

3 And our submission is that that is not
4 consistent with how this Court has always
5 understood the relationship between causes of
6 action and immunity defenses in this context.
7 It is not required by any of this Court's Bivens
8 decisions. It does not abide by this Court's
9 suggestion in Abbasi that there are strong
10 reasons and powerful reasons to retain Bivens in
11 this context.

12 And it would eliminate the one
13 deterrence that is meaningfully available to
14 ensure that officers in the nation's largest law
15 enforcement agency are complying with the law.
16 A rule is --

17 JUSTICE GINSBURG: Before you finish
18 --

19 MR. VLADECK: -- not case-specific.

20 JUSTICE GINSBURG: Before you finish,
21 can you address one decision that the government
22 seems to put a lot of stock -- stock in, and
23 that is RJR -- RS -- what is it -- R -- is it
24 RJR Nabisco?

25 MR. VLADECK: So, Justice Ginsburg,

1 that goes again to the question of whether
2 extraterritoriality is a special factor
3 canceling hesitation. And I want to be clear,
4 we agree that there will be much harder cases,
5 if, say, for example, Agent Mesa was miles into
6 Mexico, somehow acting under legal authority.

7 But RJR Nabisco reinforces, it does
8 not distinguish Kiobel and its suggestion that
9 the presumption against extraterritoriality --
10 Mr. Chief Justice -- can be displaced when the
11 underlying conduct touches and concerns U.S.
12 territory with sufficient force to displace the
13 presumption.

14 If ever there was a case, Your Honors,
15 where the underlying conduct touched and
16 concerned U.S. territory with sufficient force,
17 it's when a U.S. law enforcement officer
18 standing on U.S. soil uses lethal force.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, 12:33 p.m., the case was
22 submitted.)

23
24
25

Official - Subject to Final Review

1	24 35:4 36:9,19 44:23 49:5,21 66:3 68:6 action ^[44] 3:19 6:8 7:3,8 8:16 10:5,8 11:13 14:10 16:5 19:15 21:23 22:17 25:14 28:5 29:16 33:10,11 37:24 38:3,7,19,21,23 39:2,12,17,25 40:2 41:5 49:10,20 50:1,8 52:5,11 53:10 58:23 60:2 63:10 64:17,21 65:24 67:6 actionable ^[1] 65:17 actions ^[7] 16:2 37:1 39:1 48:9 54:9 55:25 56:15 active ^[1] 53:23 actively ^[2] 16:1 60:7 activities ^[1] 35:11 activity ^[1] 12:18 actual ^[5] 34:21 41:16 42:16 47:1,13 actually ^[11] 5:22 7:6 8:19 12:14 26:7 27:3,18 31:21 43:6 44:7 49:20 ad ^[2] 42:5 46:9 add ^[1] 58:15 added ^[1] 57:23 address ^[3] 24:4 63:13 67:21 addressed ^[4] 28:14 33:15,17,19 adequate ^[2] 9:2,15 administered ^[1] 18:24 administrative ^[1] 59:15 admit ^[1] 42:8 advance ^[1] 6:11 affairs ^[6] 34:21 50:12 51:11,14 59:19,21 after-the-fact ^[2] 24:24 31:17 agency ^[4] 22:23 54:17 66:25 67:15 agency's ^[1] 35:4 agent ^[15] 22:17 35:17,21 36:3,12,19,21,24 37:1,20 38:8 44:22 56:1 61:3 68:5 agents ^[4] 8:15 13:19 35:10 54:20 aggregate ^[1] 63:6 ago ^[3] 3:12 10:2 13:23 agree ^[10] 20:2,6 23:8 24:6 37:23 38:2 45:19 63:25 65:2 68:4 Ah ^[3] 16:11,11 40:4 ahead ^[1] 7:15 AL ^[1] 1:3 Alien ^[1] 33:17 ALITO ^[11] 7:14,16,21 8:3 25:2,6,10,11,19,21 26:13 allegation ^[1] 54:7 allegations ^[3] 18:12 28:8 35:2 allowed ^[1] 28:22 allowing ^[1] 38:22 alluded ^[1] 26:1 almost ^[1] 10:2 alone ^[1] 4:23 already ^[1] 42:8 alternative ^[3] 5:5 6:18 46:12 ambassador ^[1] 61:15 Amendment ^[32] 9:12,16 13:10,18,24 17:14 19:10,12,13,16,21 25:13 26:22 27:14,19 32:19 37:13 39:	9 43:9,13 44:7,9,10,11,16,21,24 47:8 57:21,22 58:1,5 Amendment's ^[1] 33:24 American ^[12] 18:20,20,22 21:11 23:14 38:2 41:3,8,9 42:12 43:18,18 amici ^[1] 54:10 amicus ^[4] 1:23 2:10 10:24 52:19 analysis ^[3] 5:18 51:7,9 animal ^[1] 57:12 another ^[1] 61:22 answer ^[10] 11:23 18:7 19:25 28:1 40:15 41:14,23 50:19 64:20 65:13 answers ^[1] 11:25 ante ^[1] 28:24 anybody ^[1] 58:18 anyway ^[1] 41:7 Apollon ^[1] 4:14 appeal ^[1] 15:15 APPEARANCES ^[1] 1:16 applicable ^[1] 36:5 application ^[5] 11:20 46:9 47:14,16,19 applied ^[3] 19:12 56:23,25 applies ^[7] 12:9 37:13 39:9,11 47:23 57:23 58:5 apply ^[12] 11:18,22 12:5,6 19:10 42:9,11,22 43:1 44:12 47:22 64:16 approach ^[2] 10:4,11 appropriate ^[3] 12:13 34:16 54:17 appropriately ^[1] 31:19 approve ^[1] 53:6 area ^[4] 42:19 45:16 53:15 59:1 areas ^[1] 42:16 aren't ^[3] 15:21 17:9 64:15 arguable ^[1] 58:7 argue ^[3] 7:13 21:4 23:23 argued ^[3] 3:11 34:23 65:16 argues ^[2] 11:20 21:13 argument ^[21] 1:13 2:2,5,8,12 3:4,7 9:10,14 15:15 20:7,11,15,16 21:1 26:6 33:5 34:1 52:18 65:8 66:11 argument's ^[1] 48:12 arid ^[1] 13:12 arises ^[1] 42:14 arrest ^[1] 66:16 aside ^[2] 25:14 65:18 aspect ^[1] 33:23 asserted ^[1] 13:14 assertion ^[1] 4:8 assessment ^[1] 34:18 assume ^[7] 12:22 19:12 37:11,12,12 39:8 57:22 assuming ^[6] 39:10,10 43:20,25 44:10 49:24 assumption ^[1] 19:9 assumptions ^[1] 20:8 attacked ^[1] 28:7 attorney ^[1] 32:24 Austin ^[1] 1:17 authority ^[1] 68:6 authorization ^[1] 57:11 available ^[5] 6:18 8:6,10 32:17 67:	13 average ^[1] 66:14 awarded ^[1] 4:16 aware ^[2] 7:12 14:22 away ^[2] 4:7 51:18
2		B	
2019 ^[1] 1:10		back ^[13] 6:22 15:18 24:12 25:4,21 26:20 34:25 40:16 44:15 53:8 55:4 65:19 66:4 balance ^[4] 34:17 46:24 63:12 66:6 bars ^[1] 33:16 based ^[4] 16:24,25 28:6 56:14 basically ^[1] 42:21 basis ^[3] 25:12,16 42:5 bearing ^[1] 28:19 become ^[1] 39:4 begin ^[1] 5:18 behalf ^[8] 1:18,20 2:4,7,14 3:8 33:6 65:9 belied ^[1] 4:11 belief ^[1] 55:24 believe ^[14] 3:23 7:22 18:8 19:6 20:21 21:9 23:11,12 25:23 30:15 44:21 47:3 50:23 61:12 believes ^[3] 12:13 61:9,10 below ^[1] 8:5 benefits ^[2] 38:22 41:16 best ^[1] 64:20 better ^[1] 46:22 between ^[5] 22:12 28:24 30:2 32:22 67:5 beyond ^[1] 46:6 Biddle ^[1] 66:5 big ^[2] 28:3 37:15 bilateral ^[1] 53:24 bit ^[5] 8:12 48:22 51:18 54:13 59:18 Bivens ^[82] 3:14,19 4:5,6,19,25 5:10,20,23 6:3,14 8:16,21,22,25 9:3,8,10 10:2,5,8,16,18,25 11:14,17 12:2,24 16:5 17:8 19:15 20:20,23 22:20 23:13,19,19 25:24 30:19 31:10,15 32:3 33:12,21 37:24 38:3,7,19 39:11,14,17,25 40:2 42:9,9,21 46:6,15 47:22 49:10,20,25 50:8 51:8 53:1,11 55:21,23 56:4,14 57:6,7 60:2,14,15 61:21,23 64:1,21 65:17 67:7,10 blend ^[1] 26:15 blue ^[1] 10:17 board ^[1] 59:3 body ^[2] 55:9 63:13 bolt ^[1] 10:17 book ^[1] 29:15 border ^[90] 3:22 18:5,22 21:11,12 22:15 23:25 24:6,9 25:1,8,14,15 27:18 28:25 29:20 32:14 34:6,8,9 35:10,17,21,22 36:3,11,16,18,21 37:20 38:8 41:2 42:10,13,17,18,22,22,25 43:19 45:5,6,10,14,15,16,17 48:1,1,23,25,25 49:2,4,7,16,17,18 50:5,7,10,14,23 51:16,17,18,19	
3			
3 ^[1] 2:4 33 ^[1] 2:7			
4			
40 ^[2] 10:6 46:5			
5			
50 ^[1] 10:2 52 ^[1] 2:11 55 ^[1] 54:24			
6			
65 ^[1] 2:14			
7			
7:00 ^[1] 39:23 7:02 ^[2] 39:24,25 7:02:59 ^[1] 40:7 70 ^[1] 55:2 71 ^[1] 10:12			
A			
a.m ^[2] 1:14 3:2 Abbasi ^[22] 5:9,15,17 6:5,17 17:1 19:14,18,20 20:4,4 32:1,21 53:8 56:3,11,13,13 60:20 62:23 63:21 67:9 abide ^[1] 67:8 able ^[4] 7:23 30:6 41:15,19 above-entitled ^[1] 1:12 abroad ^[8] 13:10,14 14:10 15:12 26:24 53:7 59:3,13 absence ^[2] 6:15 57:10 absent ^[2] 38:21 58:19 absolute ^[2] 66:18 67:1 absolutely ^[3] 17:23 24:5 45:24 abuse ^[1] 5:25 accept ^[2] 35:2,23 accepting ^[1] 18:1 accorded ^[2] 24:22 31:22 according ^[3] 18:11 30:22 42:11 across ^[7] 37:17 54:20 56:17 58:21 59:3 63:7 64:14 Act ^[3] 5:2 17:15 57:4 acted ^[4] 31:18 32:9 61:3,7 acting ^[13] 6:24 7:9 11:3 18:16 20:			

Official - Subject to Final Review

<p>52:25 53:4,25 54:5,13,20,21,21 55:5,6 56:17 58:21 59:8 60:8 61: 14 62:4 63:14 64:2,14,23,23 65:1, 16 borders ^[1] 34:12 both ^[6] 3:13,17 10:5 42:24,25 60: 8 bothering ^[1] 43:7 bottom ^[1] 55:7 Boumediene ^[2] 27:22 47:11 bounds ^[1] 32:16 branch ^[6] 29:10,14,21,24 62:10, 21 breaking ^[1] 26:21 BREYER ^[29] 18:17 19:5,8 20:3,5, 10,15,25 37:11 38:1,6,15 39:6,15, 21 40:4,10,14,19 41:13 43:5,21 44:3,18 45:1 57:14,16,25 58:3 bridge ^[6] 37:16,17,21,23 38:11 40: 21 brief ^[3] 6:21 9:7 10:24 briefly ^[1] 65:12 briefs ^[3] 15:16 17:25 21:8 bring ^[9] 6:10 7:23 20:23 37:24 38: 3,7 49:10,19,25 bringing ^[1] 50:5 broader ^[1] 65:19 broadly ^[1] 27:11 brought ^[2] 39:17,25 bullet ^[2] 4:22 52:7 Bureau ^[1] 8:15</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>calibrating ^[1] 66:1 call ^[2] 29:2 35:7 called ^[2] 6:13 20:20 came ^[1] 1:12 canceling ^[1] 68:3 cannot ^[2] 38:7 50:25 capture ^[1] 14:15 care ^[1] 20:5 Carlson ^[2] 10:23 26:18 carrying ^[1] 48:25 carved ^[1] 33:20 Case ^[41] 3:4,11,20 5:14,18 7:17 12:25 13:17 16:1 18:2,10,22 19:9 21:6,18 24:10 26:2,17 27:7,9 30: 22 31:25 33:22 34:3,21 37:8 44: 15 45:25 58:13 60:14,21,24 61:1 63:20 64:10 65:3,19 66:23 68:14, 20,21 case-specific ^[1] 67:19 cases ^[14] 4:14 5:7 7:3,6 10:22 11: 8 12:16 14:11 26:17 46:15 47:23 57:7 61:2 68:4 categorical ^[1] 27:17 categories ^[1] 11:16 category ^[1] 32:1 cause ^[9] 7:3,8 10:7 33:10,10 42:2, 2 58:23 63:9 caused ^[1] 40:6 causes ^[5] 10:4 11:13 53:10 65:24 67:5 caution ^[1] 53:14</p>	<p>CBP ^[1] 60:11 center ^[1] 37:23 century ^[1] 10:9 certainly ^[9] 11:11 13:16 23:7 24: 6 43:3,11 46:15 56:22 64:14 cetera ^[1] 54:15 challenge ^[3] 24:25 27:14 32:23 challenging ^[4] 24:8,15 25:3,7 chance ^[1] 26:9 change ^[2] 10:3 58:4 changed ^[1] 65:15 changes ^[1] 37:6 chaos ^[4] 35:13 47:17,20 48:12 Chappell ^[2] 62:15 63:5 characterization ^[1] 30:21 charge ^[1] 34:20 charged ^[1] 34:11 CHIEF ^[23] 3:3,9 9:25 10:14 11:7 22:7,9 23:9,25 24:12,18 25:25 30: 20 31:8 32:5 33:2,7 52:15,21 65:5, 10 68:10,19 Chief's ^[1] 27:25 Chihuahua ^[1] 51:24 child ^[4] 35:6,17 42:9,12 children ^[1] 35:22 chilled ^[1] 35:19 chilling ^[3] 35:10,12,20 choice ^[1] 31:20 chosen ^[3] 11:1 32:14 34:12 Circuit ^[3] 20:20 58:16 63:17 Circuit's ^[1] 27:7 circumstance ^[1] 11:22 circumstances ^[1] 31:19 citizens ^[3] 8:1 66:1,21 City ^[1] 9:4 civil ^[1] 30:3 claim ^[21] 4:6 5:25 6:11 7:18,23 11: 2,5 18:3,9,10 20:23 25:12,16 26:2 32:16,18,22 47:9 51:8 61:21,23 claiming ^[2] 24:16 44:22 claims ^[9] 4:12 5:23 11:9 17:15 20: 18,20 21:25 33:16 60:15 class ^[3] 7:25 54:19,19 classic ^[1] 20:20 Clause ^[1] 33:25 clear ^[14] 14:17 17:24 19:13,15 23: 15 31:24 53:2,4,5 56:21 58:19 63: 2,4 68:3 clearly ^[2] 7:10 63:12 client ^[2] 28:11,12 clock ^[1] 10:19 close ^[1] 63:20 coextensive ^[1] 26:7 colloquy ^[1] 25:22 Colorado ^[2] 52:1,10 combat ^[1] 15:22 come ^[4] 22:21 31:1 39:8 66:20 commission ^[1] 18:25 committed ^[1] 17:17 committing ^[1] 52:5 common ^[8] 9:18 11:9 15:19 32: 17 56:23 57:1,3 65:24 complaint ^[6] 12:18 18:12 28:9 34: 25 35:23 36:2</p>	<p>complaint's ^[1] 35:2 complementary ^[1] 9:11 completely ^[1] 20:3 complicated ^[3] 13:25 26:25 27: 20 comply ^[1] 24:17 complying ^[1] 67:15 conceived ^[1] 57:7 concentrate ^[1] 38:20 concerned ^[2] 67:2 68:16 concerning ^[1] 13:2 concerns ^[15] 12:19 21:18 23:15 25:24 31:5 50:12,13 51:11,12,15 53:3 59:19 63:14 64:19 68:11 concluded ^[2] 28:6 61:7 conclusion ^[2] 22:21 41:13 conduct ^[10] 12:17 15:3 17:12 28: 25 29:13 30:4 32:14 62:19 68:11, 15 conducted ^[1] 22:15 conducting ^[2] 35:11 54:3 confused ^[1] 48:22 Congress ^[27] 8:3 12:10 17:14 21: 25 22:2,6 32:18 33:13 34:5,12,16 41:11 46:22,24 53:5,19 55:19 57: 11 58:7,25 59:7,16 63:1,3,10,15 64:5 Congress's ^[1] 33:14 congressional ^[3] 21:23 38:21 64: 17 conjunction ^[1] 13:20 consider ^[3] 34:17 44:15 55:10 consideration ^[1] 34:2 consistent ^[4] 17:9 25:8 53:13 67: 4 Constitution ^[8] 12:9 18:13 26:7 29:6 32:11 37:9 50:25 57:10 constitutional ^[4] 12:4 13:13 26: 11,12 constitutionality ^[1] 25:7 constrained ^[1] 44:23 contemplate ^[1] 6:6 contest ^[1] 48:23 context ^[33] 6:16 8:8,20,24 9:15 10:16 11:6 13:24 15:6,14 17:8 21: 2,2,24 23:1 24:2 27:20 29:3 31:10, 15,16 32:4 33:13,22,25 47:3 48: 11 53:1 65:19 66:12,17 67:6,11 contexts ^[2] 5:21 6:8 continuation ^[1] 10:18 continues ^[2] 23:11,12 contrary ^[4] 22:17 25:14 28:9 29: 19 control ^[1] 55:22 convincing ^[1] 18:7 core ^[3] 6:13 20:22 31:15 correct ^[14] 26:8,10 35:25 36:25 37:7,25 38:4,13 50:1,3,10,16,22 52:8 correspondence ^[2] 22:12 23:21 costs ^[4] 34:18 38:22 41:16 46:20 couldn't ^[1] 59:4 Council ^[1] 53:25 counsel ^[11] 3:12,13 21:4 22:7 33:</p>	<p>3 52:16 53:2 62:24 63:23 65:6 68: 20 counseling ^[1] 4:1 country ^[6] 23:5,8 39:14 47:11 51: 1 62:18 couple ^[2] 58:11 64:15 course ^[6] 8:11 10:20 23:11 25:18 26:9 62:22 COURT ^[73] 1:1,13 3:10,12,18 4: 15 5:8,19,21,23,24 6:5,13,17 7:19, 21 8:20 9:23 10:21,22,24 11:12 12:2,12,16,22 13:8,22 14:22 16: 18 17:5,7,13 20:17 22:24 24:21 26:17 27:3,12 28:10,11,17,21 29: 11,12,23 31:14,22 32:8,22 33:8,9 34:2 36:12,21 39:5 42:1 46:7 47:1, 15 52:22 53:11 56:11,21 57:5 58: 8 62:8,25 63:19 65:23 66:6,10 67: 4 Court's ^[7] 16:25 27:11 29:18 48: 15 53:13 67:7,8 courts ^[25] 6:21,22 7:2 8:23 15:23 22:19 27:6 35:13 36:8 41:18,19, 21 42:6 46:8 47:18 48:14 53:9 54: 5 56:22 57:13 62:7,18,22 63:15 65:23 covered ^[1] 47:8 CPB ^[1] 54:11 crack ^[1] 61:11 create ^[9] 33:10 34:13 35:9 45:10 47:13,14,17 48:19 54:19 created ^[1] 47:2 creates ^[2] 46:20 58:7 creating ^[1] 42:6 credibility ^[1] 62:9 credible ^[1] 62:5 criminal ^[1] 30:8 critical ^[1] 30:2 cross-boarder ^[1] 14:13 cross-border ^[4] 13:25 26:24 27: 21 59:22 crossed ^[4] 37:22 49:7 64:2,4 culvert ^[3] 37:15,15 40:22 curiae ^[3] 1:23 2:11 52:19 Customs ^[1] 55:5 cut ^[2] 4:18 59:1 cutting ^[1] 41:6</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. ^[3] 1:9,22 58:16 dah-dah-dah ^[2] 18:25 58:8 damage ^[1] 46:1 damages ^[15] 4:16 6:8,23 25:17 34:13,15 43:16 46:1,4 47:15 53:6, 10,21 55:11 59:13 dating ^[1] 15:17 day ^[4] 13:12 31:1 32:21 37:18 day-to-day ^[1] 35:11 de ^[1] 47:12 DEA ^[2] 13:19 27:15 dealing ^[2] 45:25 64:3 debate ^[1] 55:9 decendent ^[1] 36:15 decide ^[4] 16:9 18:18 41:12 46:23</p>
---	---	---	---

Official - Subject to Final Review

<p>decided ^[1] 10:22</p> <p>deciding ^[3] 12:23 42:1 46:3</p> <p>decision ^[6] 27:7,8,11 29:2,18 67:21</p> <p>decisions ^[4] 17:7 48:17 53:9 67:8</p> <p>declined ^[1] 33:14</p> <p>defendant ^[6] 7:7 36:8,9,18 48:4 52:4</p> <p>defendants ^[1] 9:3</p> <p>defenses ^[3] 65:25 66:7 67:6</p> <p>deference ^[2] 24:22 31:21</p> <p>deliberately ^[1] 38:11</p> <p>demonstrated ^[1] 31:9</p> <p>Department ^[2] 1:22 61:16</p> <p>departmental ^[1] 18:14</p> <p>depend ^[1] 7:22</p> <p>Deputy ^[1] 1:21</p> <p>deter ^[1] 6:14</p> <p>determination ^[6] 22:16 24:19,24 31:2,18 42:5</p> <p>determining ^[1] 62:19</p> <p>deterrence ^[2] 6:12 67:13</p> <p>deterrent ^[1] 31:16</p> <p>dialectic ^[1] 9:20</p> <p>difference ^[8] 23:2 28:3 30:2 40:21 44:2,4,14,14</p> <p>different ^[18] 12:7,25 23:4 24:2,3,10 27:1 29:11 30:7 31:1 40:5,17 46:21,21 50:19 51:25 56:20 57:12</p> <p>difficult ^[6] 4:3 6:5,10 29:22 47:17 53:18</p> <p>diplomacy ^[2] 4:11 46:19</p> <p>diplomatic ^[5] 4:16 16:3 22:12 23:21 59:14</p> <p>directly ^[2] 57:9 62:9</p> <p>director ^[1] 32:25</p> <p>disagree ^[5] 61:1 63:1,22 64:1,7</p> <p>disagreed ^[1] 58:24</p> <p>disagreement ^[1] 53:23</p> <p>disciplinary ^[1] 29:17</p> <p>disciplining ^[1] 54:14</p> <p>discuss ^[1] 60:8</p> <p>discussed ^[1] 47:8</p> <p>discussion ^[1] 13:12</p> <p>discussions ^[1] 60:17</p> <p>dismissing ^[1] 5:24</p> <p>displace ^[4] 8:9 12:20 21:19 68:12</p> <p>displaced ^[1] 68:10</p> <p>dispositive ^[2] 47:5 60:3</p> <p>dispute ^[3] 24:13 29:3 34:21</p> <p>disputes ^[1] 5:2</p> <p>disputing ^[1] 58:18</p> <p>dissent ^[2] 8:5 18:19</p> <p>Distilled ^[1] 66:22</p> <p>distinction ^[2] 28:24 32:22</p> <p>distinguish ^[2] 13:6 68:8</p> <p>district ^[1] 5:24</p> <p>diversity ^[1] 7:22</p> <p>doing ^[7] 7:1 18:4 55:5 56:16 57:6,13 64:23</p> <p>domain ^[2] 34:5,16</p> <p>done ^[5] 8:14 17:13 25:8 54:15 59:16</p>	<p>down ^[1] 17:7</p> <p>dragging ^[2] 36:11,23</p> <p>dramatic ^[1] 10:3</p> <p>dramatically ^[1] 4:10</p> <p>draw ^[6] 16:1,17,18,22 17:5 32:21</p> <p>drawing ^[8] 39:5,7,7,8,12 47:13,25,25</p> <p>drive ^[1] 26:16</p> <p>drone ^[2] 52:1,10</p> <p>drop ^[1] 55:3</p> <p>Due ^[2] 33:24 47:9</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[1] 37:18</p> <p>earthly ^[1] 29:24</p> <p>easily ^[1] 6:15</p> <p>easy ^[2] 59:20 65:3</p> <p>effect ^[5] 6:12 11:18 30:3 35:10,12</p> <p>Eighth ^[1] 44:9</p> <p>El ^[1] 1:19</p> <p>eliminate ^[1] 67:12</p> <p>embarrassment ^[1] 62:20</p> <p>employment ^[1] 49:6</p> <p>enacted ^[1] 8:4</p> <p>encompass ^[1] 14:12</p> <p>end ^[6] 13:12 30:25 32:21 37:16 44:4 51:25</p> <p>enforcement ^[29] 4:13 5:11,15,21 6:4,7,16 11:3 15:2,10,14,19 16:6 17:12,17 18:15,16,20 20:18,24 22:5 32:4 33:1 49:8 66:9,12,25 67:15 68:17</p> <p>engaged ^[2] 33:1 49:8</p> <p>enough ^[3] 57:18 63:8,12</p> <p>ensure ^[1] 67:14</p> <p>entire ^[1] 25:1</p> <p>entitled ^[2] 24:18 66:8</p> <p>entry ^[1] 58:20</p> <p>episodes ^[1] 27:21</p> <p>equally ^[1] 23:16</p> <p>equities ^[1] 32:6</p> <p>Erie ^[1] 57:2</p> <p>error ^[2] 56:4,7</p> <p>especially ^[1] 27:21</p> <p>ESQ ^[6] 1:17,19 2:3,6,9,13</p> <p>established ^[1] 7:11</p> <p>ET ^[2] 1:3 54:15</p> <p>even ^[27] 4:22 5:12 9:21 11:8,21 12:12 21:1,2 23:19 29:16 31:8 32:5 41:8 42:11 44:7,22 45:8,9,21 47:15 51:18 56:15 58:24 60:14 62:7,12 63:1</p> <p>evening ^[1] 39:24</p> <p>everybody ^[2] 56:25 57:9</p> <p>everything ^[2] 7:17 29:14</p> <p>evidence ^[5] 30:8 54:24 58:1,5 61:6</p> <p>ex ^[1] 28:24</p> <p>exact ^[1] 5:14</p> <p>exactly ^[3] 8:15 53:19 61:14</p> <p>example ^[4] 12:3 15:22 21:24 68:5</p> <p>examples ^[1] 15:21</p> <p>except ^[1] 50:5</p> <p>exception ^[1] 33:20</p>	<p>excessive ^[9] 20:19 29:5,13 35:5 47:6 48:10,24 49:25 50:3</p> <p>executive ^[11] 28:4 29:10,14,21,24 34:5,20 45:18 46:22 62:10,21</p> <p>exemplified ^[1] 58:13</p> <p>existed ^[1] 33:11</p> <p>existence ^[1] 9:13</p> <p>existing ^[1] 65:24</p> <p>expand ^[1] 17:16</p> <p>expanded ^[1] 22:6</p> <p>expanding ^[1] 8:7</p> <p>explain ^[2] 10:10 59:18</p> <p>explained ^[2] 5:9 21:15</p> <p>express ^[1] 58:22</p> <p>extend ^[2] 47:22 55:23</p> <p>extended ^[3] 37:12 50:24,25</p> <p>extending ^[8] 33:12 39:13,15 43:8 48:18,18 51:21 53:20</p> <p>extends ^[1] 53:11</p> <p>extension ^[10] 19:20 20:11 37:9 38:19 39:18 46:6,8 47:10 48:1,16</p> <p>extensively ^[1] 54:12</p> <p>extent ^[1] 12:9</p> <p>extra ^[1] 21:21</p> <p>extradite ^[3] 29:20,25 61:10</p> <p>extradition ^[3] 30:9,10 46:1</p> <p>extraterritorial ^[1] 11:19</p> <p>extraterritoriality ^[11] 4:18 12:21,23 21:14,17 53:4 58:14 63:4 64:16 68:2,9</p> <p>extraterritorially ^[1] 12:5</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face ^[2] 35:24 36:2</p> <p>face-to-face ^[1] 66:20</p> <p>faced ^[1] 66:2</p> <p>facet ^[1] 50:14</p> <p>fact ^[7] 3:25 6:9 14:1 21:9 30:18 39:24 40:6</p> <p>facto ^[1] 47:13</p> <p>factor ^[7] 4:5 12:24 21:14,22 40:23 41:6 68:2</p> <p>factors ^[10] 4:1 21:4 34:3 46:17 53:2,17 62:24 63:6 64:15 65:4</p> <p>facts ^[6] 18:2 35:23 38:25 53:12 55:13 63:18</p> <p>factual ^[2] 24:24 31:17</p> <p>fails ^[2] 33:25 34:1</p> <p>fair ^[1] 31:6</p> <p>fairly ^[3] 10:3 30:21,23</p> <p>faith ^[2] 7:9 66:4</p> <p>fall ^[1] 4:17</p> <p>falls ^[1] 29:4</p> <p>familiar ^[1] 9:19</p> <p>far ^[3] 27:16 41:1 59:6</p> <p>far-reaching ^[1] 52:6</p> <p>fashion ^[1] 47:15</p> <p>fashioned ^[1] 41:11</p> <p>fashioning ^[1] 66:7</p> <p>favor ^[2] 28:10,12</p> <p>FBI ^[2] 32:25 55:23</p> <p>federal ^[26] 4:12 6:21,24 7:2,19,21 8:23 9:3,8,11,22,24 11:3 13:13 15:20,24 17:15 22:5 25:12,16 52:24</p>	<p>56:24 57:1,9,13 58:17</p> <p>feel ^[1] 19:24</p> <p>feet ^[7] 3:21 4:7 35:18,22 42:10,12 43:14</p> <p>fell ^[1] 50:2</p> <p>few ^[3] 3:21 4:7 35:22</p> <p>Fifth ^[3] 20:19 33:24 63:17</p> <p>fight ^[1] 66:7</p> <p>figure ^[1] 53:18</p> <p>find ^[5] 15:22 43:23 44:6 49:7 51:4</p> <p>finding ^[1] 56:15</p> <p>fine ^[2] 57:1,2</p> <p>finish ^[2] 67:17,20</p> <p>firearms ^[1] 54:25</p> <p>fired ^[1] 56:1</p> <p>first ^[11] 3:11,24 6:4 10:15 12:1 14:21 20:17 21:6 22:10 23:10 53:16</p> <p>fiscal ^[2] 55:1,2</p> <p>focused ^[3] 7:5 11:16 65:25</p> <p>focuses ^[1] 15:2</p> <p>following ^[1] 23:21</p> <p>follows ^[1] 21:9</p> <p>force ^[20] 12:20 18:2 20:19 21:19 27:23 29:5,13 35:5 47:7 48:10,24 49:25 50:3 54:2,25 60:12 66:17 68:12,16,18</p> <p>foreclose ^[1] 44:1</p> <p>foreclosed ^[2] 3:20 44:21</p> <p>forefront ^[1] 34:8</p> <p>foreign ^[50] 4:4,10,15 14:9 21:7 23:5,18,20,24 24:3,22 26:4 28:19,20 30:16 33:16 34:20 35:8 37:10 44:23 45:3,7,11,13,20 46:18 47:5,6,11 50:12,25 51:11,14 52:23,24 53:2,17 56:16 59:19,21 61:16,25 62:10 63:2 64:3,4,13,18 65:1 67:2</p> <p>foreigner ^[1] 4:15</p> <p>formation ^[1] 33:12</p> <p>former ^[1] 54:11</p> <p>formulated ^[1] 32:24</p> <p>forth ^[1] 55:4</p> <p>fortuity ^[1] 3:24</p> <p>forward ^[2] 10:19 60:15</p> <p>found ^[1] 28:12</p> <p>founding ^[2] 6:23 15:18</p> <p>four ^[1] 6:2</p> <p>Fourth ^[30] 9:12,16 13:10,18,23 19:10,12,13,16,21 25:13 26:22 27:13,19 37:13 39:9 40:7 43:8,13 44:6,11,16,17,20,24 47:8 57:20,22,25 58:4</p> <p>frankly ^[1] 17:6</p> <p>freed ^[1] 8:8</p> <p>freely ^[1] 56:5</p> <p>freeze ^[1] 41:2</p> <p>frequency ^[1] 66:13</p> <p>friction ^[1] 58:12</p> <p>front ^[1] 19:11</p> <p>FTCA ^[5] 32:18 33:16 53:5,20 59:2</p> <p>full ^[1] 17:10</p> <p>fully ^[2] 31:3,9</p> <p>functional ^[1] 67:1</p> <p>functions ^[1] 15:11</p> <p>fundamental ^[1] 55:24</p>
---	---	---	---

Official - Subject to Final Review

<p>fundamentally [1] 12:7</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gave [3] 20:8 48:3 52:9 General [5] 1:22 9:24 11:13 32:25 60:9 GINSBURG [13] 8:13,19 9:2 13:7, 16 14:7 22:8 26:19 27:2 34:24 67: 17,20,25 give [3] 31:21 43:17 45:5 given [4] 9:13,14 38:24 60:2 giving [1] 43:16 GORSUCH [18] 13:5 14:3,5,17,18, 24 15:9,25 16:11,14,15,22 17:3,12 18:8,15 22:4 25:22 got [8] 23:3 40:4,8,11 44:5 64:18 65:1,21 government [31] 7:24 10:23 13: 21 15:7 16:4 21:3,13,23 22:13,13 23:11 24:14,16 28:2,4,21 29:1 30: 6,13,22 32:5,13 46:2,3 51:9 62:11 65:14,16,22 66:2 67:21 government's [15] 4:8 8:21,22,25 9:7,14 10:1 24:9,18 28:1 29:4 30: 12 31:17 32:10 66:23 governmental [2] 15:11 31:2 grant [1] 64:14 gravamen [1] 12:17 greater [2] 42:8,13 Gregoire [1] 66:4 ground [1] 55:16 guard [1] 28:5 guess [9] 18:19 47:21 48:10,12 51: 6 60:4,6 61:19 63:16 guidance [5] 41:19,20 45:17 46: 25 48:17 gun [3] 37:21 42:25 56:1</p>	<p>23 21:10 23:13 27:4 65:15 Hernandez's [2] 26:12 61:22 hesitate [1] 43:22 hesitation [5] 4:1 21:5 53:2 62:25 68:3 high-level [1] 32:23 himself [1] 24:16 historical [4] 6:20 11:6 15:16 56: 15 historically [5] 7:5 24:21 31:22 32: 17 65:21 history [1] 4:11 hit [2] 4:23 52:10 hitting [1] 52:1 hoc [2] 42:5 46:9 hold [1] 7:6 holding [1] 30:17 home [6] 13:19 26:16,21 27:14,15 37:19 Honor [3] 15:5 36:14 38:5 Honors [1] 68:14 hope [5] 14:17 17:24 18:8 21:15 57:18 hundreds [1] 37:17 hurts [1] 12:15 hypo [1] 50:7 hypothetical [3] 52:9 64:13 65:17 hypotheticals [2] 15:4 63:23</p>	<p>18,23 22:5 32:8,25 individuals [1] 66:14 inference [1] 38:17 injure [1] 15:12 injured [5] 13:9,14 14:9 59:12 66: 2 injuries [2] 53:7 59:3 injury [4] 26:5 47:5 49:12 52:13 inquiry [3] 7:5 30:7 38:18 inside [10] 36:16 37:2,5 45:21 49:3 50:9 63:24,24 64:10 65:16 instability [4] 42:6,8,14,15 instance [1] 60:11 instances [2] 5:11 6:7 instant [1] 4:22 instead [1] 66:18 instruction [1] 35:5 intended [1] 12:11 intentional [3] 17:17,20,21 interact [1] 66:14 interactions [1] 66:15 interests [1] 9:17 interfere [1] 61:24 interfering [1] 36:13 interim [1] 10:3 international [5] 18:25 22:11 31:4 45:11 52:25 interpret [1] 47:1 intruding [1] 34:4 investigating [1] 54:15 investigation [4] 22:16 30:24 31: 3 61:5 invoke [1] 27:13 invoked [1] 21:22 involve [1] 36:7 involved [6] 11:2,4,5,9 34:3 50:6 involves [4] 12:18 36:9,18 40:2 involving [2] 16:2 51:19 island [2] 39:18 40:7 isn't [5] 3:24 29:15 44:4 57:20 60: 20 issue [5] 15:3 19:10,23 24:14 33: 16 issues [2] 46:23 61:18 itself [10] 5:21 8:22 13:22 17:1 23: 19 33:25 41:17 49:22 55:21 56:14</p>	<p>Justice [162] 1:22 3:3,9 7:13,14,15, 16,21 8:3,13,18 9:2,25 10:14 11:7, 17,25 13:5,7,16 14:3,5,6,16,18,24 15:9,25 16:11,13,15,22 17:3,12,19, 24 18:1,8,15,17 19:5,8 20:3,5,10, 15,25 21:15 22:3,7,8,9 23:9,23,25 24:19 25:2,4,6,10,11,19,21,22,25, 25 26:12,19 27:2,24 28:15 29:8 30:1,20 31:8 32:5 33:2,7 34:24 35: 15 36:1,6,17,23 37:4,11 38:1,6,15, 16 39:6,15,21 40:4,10,14,19 41:13, 22 42:7,20 43:4,5,21 44:3,18,25 45:1,2,19 46:11 47:20 48:2,2,8,21 49:4,15,23 50:4,11,17 51:2,6 52:3, 15,21 54:6,22 55:12,14,17,20 56:6, 9,10,12,19 57:14,16,25 58:3,15 59: 11,17 60:13,23 61:19 62:1,14,16 64:6,9,22 65:5,11,13 67:17,20,25 68:10,19 Justice's [1] 24:12 justified [1] 66:18 justify [1] 66:18 juvenile [1] 41:24</p>
<p style="text-align: center;">H</p> <hr/> <p>half [1] 10:9 Hand [1] 66:4 handed [1] 17:7 hands [1] 59:21 happen [4] 15:11,12 35:16 58:6 happened [6] 26:24 29:11 35:16 53:23 54:5 59:2 happens [2] 29:25 52:10 happy [3] 54:23,24 61:6 hard [1] 23:20 harder [1] 68:4 harm [1] 66:1 harmed [1] 4:15 harmless [1] 7:7 harms [1] 23:18 Hart [1] 9:20 Hart's [1] 9:20 Hawaii [2] 39:16 40:7 hear [4] 3:3 20:1,6 57:17 heartbreaking [1] 63:19 heartland [1] 25:23 help [1] 59:23 helps [2] 12:14 26:16 Henry [1] 9:19 HERNANDEZ [9] 1:3 3:4,15 13:8,</p>	<p style="text-align: center;">I</p> <hr/> <p>idea [1] 38:8 identified [4] 4:1 5:5 21:3 23:25 imaginary [2] 37:22 38:10 imagine [1] 23:20 immunity [8] 7:5 65:25 66:7,9,18, 19 67:1,6 impact [1] 34:19 implicated [1] 21:17 implicates [1] 21:7 implication [1] 30:16 implications [6] 23:24 45:3,7,11, 13,21 implied [2] 33:10 58:23 imply [2] 53:10 63:9 implying [2] 10:4 57:8 importance [1] 53:14 important [9] 5:20 12:1 15:20 17: 21 24:7,11 49:6 62:18 65:20 importantly [2] 4:3,24 imposed [1] 6:23 imposing [1] 15:23 improperly [1] 56:16 inches [5] 50:18 51:16,17 63:24 64:9 incident [8] 22:14 23:22 24:25 29: 10 30:13 45:21 60:18 61:13 incidents [4] 45:10 54:25 60:8,9 including [2] 4:13 46:17 inconsistent [2] 22:23 32:11 increasingly [1] 11:12 indication [1] 58:19 indictment [1] 30:8 indiscriminately [2] 35:21 42:24 individual [9] 5:11 6:6,14 11:2 20:</p>	<p style="text-align: center;">J</p> <hr/> <p>JEFFREY [3] 1:21 2:9 52:18 JESUS [2] 1:3,6 job [1] 55:6 JR [1] 1:6 Juarez [1] 51:23 Judge [3] 8:4 20:22 66:4 judge-made [1] 11:13 judges [1] 9:23 judgment [3] 29:23 30:3,16 judgments [2] 59:1,7 judicial [2] 29:2 53:15 judicially [1] 63:9 judiciary [1] 38:20 jurisdiction [3] 8:2 37:2 47:12 jurisprudence [1] 16:25 jury [2] 28:11 31:1</p>	<p style="text-align: center;">K</p> <hr/> <p>KAGAN [23] 29:8 30:2 48:21 49:4, 15,23 50:4,11,17 51:2,6 52:3 59: 11,17 60:13,23 61:19 62:1,14,16 64:6,9,22 Kagan's [1] 65:13 KAVANAUGH [15] 7:13,15 11:17, 25 20:22 23:23 26:1 44:25 45:2, 19 46:11 47:20 48:2,8 58:15 Kavanaugh's [1] 21:16 keep [1] 51:22 keeps [1] 51:20 Kennedy [2] 38:16 44:5 key [2] 30:11 32:7 kill [1] 35:5 killed [4] 3:16 5:14 45:9 52:23 kills [1] 35:18 kind [15] 5:15 11:4 19:20,22 24:20 28:20 31:21 32:16,18,22 41:5 59: 19,24 60:21 66:19 kinds [4] 14:13 45:10 55:10 63:13 Kiobel [4] 12:14,15 13:4 68:8 known [1] 4:21 knows [2] 35:19 37:4</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack [2] 34:1 46:12 land [3] 4:22 18:3 35:16 language [3] 7:25 44:22 58:20 larger [1] 15:1 largest [2] 66:25 67:14 last [6] 10:7 55:1 62:5 63:16,19 65: 13 later [1] 57:7 Laughter [3] 19:4 40:13 51:5 law [47] 4:12 5:11,15,20 6:3,7,16 9: 1,5,14,15,18 11:3,9 15:2,10,14,18, 19 16:6 17:11,17 18:15,16,20 20: 18,23 22:5 32:3,17 33:1 36:8,11 37:5 46:10,25 49:8 56:23 57:2,3</p>

Official - Subject to Final Review

<p>65:24 66:9,12,25 67:14,15 68:17 lawful [2] 30:17 62:19 lawsuits [1] 59:14 least [8] 11:8,15 21:1 23:1,4 59:6,24 67:1 leave [4] 57:18,18 62:25 63:10 left [2] 17:11 46:22 legal [3] 6:9 10:12 68:6 legislative [1] 55:9 less [1] 53:9 lethal [2] 66:17 68:18 liability [7] 17:16 22:3,6 53:6,21 59:2 65:22 life [1] 63:20 likely [2] 64:18 66:20 limit [1] 41:25 limited [2] 15:10 62:23 limiting [3] 8:5 14:8 17:21 limits [3] 7:25 41:17 46:25 line [28] 15:17 16:1,17,23 17:1,5,18,23 35:18 37:22 38:10 39:5,6,7,8,12,23 47:13,24,25 48:3 50:24 51:3,4,22 55:7 63:24,25 64:10 line-draw [1] 51:3 little [4] 41:20 48:22 51:18 59:18 live [1] 62:17 logic [2] 23:17 30:12 long [5] 4:11 20:17 56:23 57:15 66:10 look [13] 22:19 43:7 44:5 46:16 48:9,9 54:10,24 56:14 57:20 58:25 60:20 63:18 looked [1] 65:24 looking [6] 12:3,8 60:23 61:20 63:11,17 loss [1] 63:19 lost [2] 6:15 19:19 lot [4] 14:11 50:11,13 67:22 lots [2] 45:10 47:23 lower [9] 27:6 35:13 41:19,21 42:6 46:8 47:18 48:14 53:9</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made [3] 53:9 59:1,7 maintains [1] 47:12 man [1] 18:4 many [3] 15:4,21 50:20 map [1] 12:13 markedly [1] 53:9 matter [4] 1:12 30:18 37:6 39:4 MDC [1] 6:1 mean [16] 9:19 10:6 14:21,25 16:8 18:18 20:3 39:16 49:23 55:14 56:9 59:17 60:1 64:13 65:14,18 Meaning [1] 35:17 meaningful [1] 28:23 meaningfully [1] 67:13 means [2] 16:6 60:3 meant [2] 13:4 32:2 mechanisms [1] 53:24 meeting [1] 54:8 meets [1] 54:1 mentioned [2] 22:10 46:13 merely [1] 23:24</p>	<p>merger [1] 29:7 MESA [3] 1:6 3:5 68:5 Meshal [1] 58:16 mess [2] 54:13 58:8 message [1] 53:14 Mexican [19] 3:21 5:13 13:18,20 21:10 22:12 27:13 30:5 36:7,8,8,12 38:10 42:12 43:17 45:8,8,22 46:2 Mexicans [1] 39:2 Mexico [19] 22:22 23:3 29:19,23 34:22,23 51:21,24 53:3,18,22 58:12 60:1,7,16 61:2,9 62:3 68:6 might [11] 4:23 8:10 18:6,21 21:1 29:2 43:9,10,11 53:19 54:13 miles [6] 48:24 49:2 50:5 63:24 64:23 68:5 military [2] 16:3 34:10 mind [1] 5:16 minimum [1] 54:14 minister [1] 61:16 minutes [1] 65:7 misconduct [1] 65:23 model [1] 9:18 modern [1] 7:9 modesty [1] 53:15 Moreover [1] 4:8 Most [3] 4:3 12:1 66:20 move [1] 10:9 moved [1] 50:18 much [5] 34:9 40:17 51:19 58:15 68:4 must [1] 38:20 myriad [2] 46:17 48:19 myself [2] 20:7 40:22</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>Nabisco [2] 67:24 68:7 Narcotics [1] 8:15 narrower [1] 66:19 nation's [2] 66:25 67:14 national [25] 13:19 14:9 21:7 23:18,20 24:1,23 26:4 27:13 34:6,7,9 35:8 42:17,18 45:9,23 46:18 47:5 50:13,15 51:12,14 52:23 64:19 nationality [1] 4:23 nationals [3] 64:3,13 67:2 nature [3] 15:2 47:4 66:15 near [1] 37:20 neatly [1] 45:14 necessarily [2] 17:9,9 necessary [5] 9:9,11 16:10 38:17,18 need [4] 10:9 53:3 59:17 66:3 negotiations [2] 54:4 60:17 Neither [2] 5:1,4 never [8] 12:3 28:17 37:6 39:16,24 40:1 51:25 64:5 nevertheless [2] 3:20 12:12 New [16] 9:1,4,5,13,14 21:2,2 23:1 31:10 33:13,22,25 39:14 47:3 48:11 52:25 newly [1] 8:8 next [2] 3:4 62:2</p>	<p>nine [2] 10:22 26:17 Ninth [1] 27:6 non-citizen [3] 13:9,14 26:23 non-inadvertently [1] 34:13 none [6] 11:1,4,5,7 15:22 33:11 Nor [2] 4:18 5:1 note [3] 6:21 15:16 24:11 noted [1] 8:4 nothing [3] 4:25 8:9 18:4 notwithstanding [1] 25:24 November [1] 1:10</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>obstacles [1] 7:1 obvious [1] 58:13 obviously [2] 16:9 60:1 occur [3] 14:14 52:13,14 occurring [1] 49:12 occurs [1] 51:15 offer [1] 10:14 office [1] 59:4 officer [30] 7:7,11,16,17 8:14,17 9:3 11:3 18:15,16 20:24 23:18 27:16 28:7 29:20 30:5 31:18 32:8,15 33:1 35:4 48:24 49:5,11,20,24 52:24 62:6 66:8 68:17 officers [22] 4:13 6:14,24 8:11 9:5,22 15:20,24 17:18 20:19 22:5 29:1,1 56:25 57:9 58:18 66:2,3,10,12,24 67:14 official [1] 48:4 okay [9] 16:11 18:25 19:2 38:6,23 50:4,11,17 58:8 on-the-grounds [1] 63:14 on/off [1] 27:17 once [3] 43:13 44:11 64:2 one [26] 5:22 11:16 14:19,23 22:23 23:6,9 24:8 27:25 28:1,22 29:9,17 32:15 37:21 41:25 43:19 51:3,16 58:11 61:2,17,20 62:23 67:12,21 only [13] 4:19 5:19 6:9 9:8 14:19 16:5 19:2,10 22:2 33:23 35:12 38:6 41:25 open [1] 17:11 operating [1] 13:20 operations [6] 15:22 16:3,3,4,7 49:1 opinion [2] 20:21 47:18 opportunity [1] 10:25 opposed [5] 5:6 7:4 15:10 21:11 24:25 opposing [1] 46:3 opposite [1] 22:21 oral [7] 1:13 2:2,5,8 3:7 33:5 52:18 order [1] 48:16 ordinarily [1] 39:1 organization [1] 34:11 original [2] 9:21 27:8 ORTEGA [47] 1:19 2:6 33:4,5,7 35:9,25 36:4,14,22,25 37:7,25 38:4,13 39:4,13,19 40:1,9,12,16 41:10,15 42:4,15 43:1,20,25 44:17,20 45:15,24 46:16 47:24 48:5,14,21 49:2,12,19 50:2,9,16,22 51:20 52:</p>	<p>8 other [19] 5:5,6,7 6:6 11:20 15:10 16:4 18:5 32:6,6 38:2 39:22 43:15,19 45:4 51:17 53:8 56:17 61:4 others [3] 54:11,16 66:1 otherwise [2] 5:4 8:6 ought [4] 61:10,11 63:8,10 out [10] 7:24 10:23 17:15 32:15 33:20 48:25 53:19,24 59:13,14 outlined [1] 46:7 outside [3] 49:13,21 50:2 over [5] 24:13 43:19 50:19 53:23 66:8 overreach [4] 5:12,15 6:7 33:1 overseas [1] 12:10 own [6] 18:13 24:19 29:4 35:4,16 62:7</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [1] 68:21 PAGE [2] 2:2 10:24 pair [1] 61:2 panel [1] 27:8 parallel [1] 11:10 parameters [1] 41:18 paramilitary [2] 34:10 45:16 part [1] 27:25 particular [3] 11:14 12:4 26:3 parties [1] 5:6 Paso [1] 1:19 passed [1] 63:4 passing [1] 58:21 Patrol [26] 22:15 24:9 25:1,9,15 28:25 29:20 32:14 34:6,8,9 35:10,17,21 36:11,19 41:2 42:18,23 45:17 48:24 49:5,17 54:13,20 55:5 patrolling [1] 52:24 patrols [1] 45:17 pause [2] 53:19 63:9 people [4] 37:18 42:23 49:7 50:20 percent [1] 55:2 perfectly [2] 57:1,2 perhaps [1] 37:17 permitting [1] 4:9 person [5] 15:7 26:23 38:7,9 50:6 persons [1] 15:12 perspective [2] 12:8 13:3 persuaded [2] 19:1,7 persuasively [1] 54:12 Petitioner's [1] 26:11 Petitioners [13] 1:4,18 2:4,14 3:8,14 4:25 5:3,6 22:1 33:9 37:8 65:9 Petitioners' [1] 4:9 pick [2] 14:6 58:20 picks [1] 37:21 picture [2] 37:14 46:21 pilot [2] 52:1,10 place [3] 5:17 19:16 37:14 plainly [1] 52:25 plaintiff's [4] 9:12,16 12:18 18:12 plaintiffs [3] 6:19 8:1 26:5 plaintiffs' [1] 5:23 plausible [1] 18:11 plausibly [2] 17:2,4</p>
---	---	--	---

Official - Subject to Final Review

<p>play [5] 6:8 35:6,18 62:18,22 playing [1] 41:24 please [3] 3:10 33:8 52:22 point [15] 10:13 11:14 15:1 19:24 30:11 32:20 40:4,8,14 43:15,22 45:3 48:11 55:7 57:16 pointing [1] 29:23 points [4] 7:24 10:14,23 23:10 police [1] 9:5 policies [5] 24:9 32:14,24 54:8 60:9 policy [35] 22:18,24 23:24 24:6,7,14,15,17,21 25:1,9,15 26:3,6,14 28:20,24 29:3,4 31:20 32:10 34:17 35:8,8 45:3,7,11,13,20 46:19,24 49:21 50:3 61:14,25 posited [1] 28:3 positing [1] 52:4 position [11] 7:12 8:21,22,25 10:1 15:1 25:21 61:22 62:3 65:15 66:23 positions [1] 54:4 possible [2] 6:9 28:19 possibly [1] 44:8 post-9/11 [1] 32:24 potentially [2] 31:25 62:7 powerful [3] 5:10 32:3 67:10 powers [3] 34:4 46:18 66:16 Prado [1] 8:4 preclude [2] 21:25 30:18 precluded [1] 4:6 precluding [1] 4:5 preclusive [1] 30:3 preempts [1] 5:3 prefer [1] 60:2 preliminary [2] 24:19 35:1 present [3] 23:16 49:21 50:12 presents [1] 5:14 preserve [1] 31:15 preserved [2] 5:22 32:18 press [1] 45:6 presumption [8] 11:19 12:14,20 21:20 46:7 48:15 68:9,13 presumptions [1] 12:6 pretty [2] 54:12 58:12 prevailing [1] 10:12 prevented [1] 60:16 Prevention [1] 53:25 Principal [1] 1:21 principally [1] 9:22 principle [2] 14:9 17:22 prisoner [1] 5:25 private [1] 66:21 probably [1] 64:20 problem [15] 38:25 39:3,7,8,11,12 40:6 43:9,12,16 54:7 57:20,23 60:5,6 problems [1] 48:20 proceed [1] 38:23 Process [2] 33:24 47:9 processes [1] 59:15 product [2] 56:4,7 Professor [1] 9:20 prohibiting [1] 29:5</p>	<p>projected [2] 34:18 46:19 proposition [1] 13:17 protect [1] 66:3 protecting [1] 34:11 protection [1] 13:18 prove [2] 26:9 30:5 provide [7] 25:12,15 33:14 41:19 46:25 48:16 56:2 provided [2] 9:1,6 provides [1] 46:8 providing [3] 7:3 22:20 42:18 provisions [1] 12:4 public [3] 34:17 46:19,24 pulled [2] 4:20 13:1 pulling [2] 36:10,19 purpose [2] 6:13 31:16 purposes [2] 12:24 53:1 pursued [1] 5:4 put [2] 25:13 67:22 puts [1] 29:21 putting [3] 10:16 43:6 65:19</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified [1] 66:19 question [28] 3:18 7:20 9:24 13:24 14:1,6 19:14,25 21:16 24:12,20 26:20 27:19,25 29:2 31:11,14 35:7 41:14 48:7 50:18,20 51:13 57:19 60:20 63:7 65:14 68:1 questions [2] 26:15 55:10 quickly [1] 58:11 quite [4] 6:15 29:22 37:10 46:20 quote [1] 9:7</p> <hr/> <p style="text-align: center;">R</p> <p>RANDOLPH [3] 1:19 2:6 33:5 rather [6] 5:24 8:25 10:17 13:11 18:23 19:11 reached [1] 22:16 real [4] 50:23,23 51:2,4 really [6] 44:12 56:21 57:15 58:11 59:8 62:2 reason [4] 25:23 27:5 29:25 30:14 reasonable [1] 7:11 reasonably [2] 17:1,4 reasons [12] 3:23 5:10,20 6:3 7:6 19:1 27:18 32:3 57:17,17 67:10,10 REBUTTAL [2] 2:12 65:8 recognize [2] 10:25 11:11 recognized [4] 9:9 10:7 20:17 59:8 recognizing [1] 8:24 record [1] 61:5 recourse [1] 6:10 reference [1] 10:1 referred [1] 25:25 referring [1] 20:22 reflected [1] 27:6 reflects [1] 6:2 regarding [1] 52:9 regardless [1] 10:11 regime [2] 10:12 65:22 regulations [1] 18:14</p>	<p>reinforces [1] 68:7 rejected [2] 32:23 66:11 relates [1] 47:7 relations [18] 4:4,10 21:7 22:11,22 23:3,5 24:3,22 26:4 28:20 30:16 31:4 53:3,17 63:2 64:19 65:1 relationship [1] 67:5 relevant [1] 18:9 remedies [11] 6:6,16,18 8:6,7,10,24 15:19,23 41:24 46:12 remedy [30] 3:15 4:19 5:3,5,10 9:2,6,8,11 11:1 22:20 23:13 33:14 34:1,14,15,22,23 41:10,17,17,18 43:16 46:1,4,14 47:16,16 56:2,18 reminding [1] 8:20 repeat [2] 20:7 40:22 reports [1] 54:23 representation [1] 62:5 representations [1] 30:23 republic [2] 33:12 37:10 request [1] 46:3 require [1] 47:10 required [2] 56:17 67:7 requires [1] 34:18 reserved [1] 11:15 resonating [1] 48:12 respect [4] 22:13 23:4 27:3 51:15 respects [1] 24:2 Respondent [20] 1:7,20,24 2:7,11 3:12,17 4:2,20 5:1 12:25 18:11 21:3,22 23:12 24:13,16 26:10 33:6 52:20 Respondent's [1] 63:22 response [4] 10:15 21:15 23:10 28:16 responsible [1] 9:23 responsive [2] 31:4,9 rest [1] 56:24 result [1] 61:12 retain [4] 5:10,20 32:3 67:10 retained [1] 5:22 retaining [1] 6:3 returned [1] 5:23 reverse [1] 53:12 reviewed [1] 61:6 revised [1] 60:11 richest [1] 11:7 rights [4] 7:11 9:13 13:10 26:12 rise [2] 31:21 42:16 rises [1] 29:3 river [1] 18:24 RJR [3] 67:23,24 68:7 ROBERTS [10] 3:3 9:25 22:7,9 30:20 31:8 33:2 52:15 65:5 68:19 Rodriguez [1] 27:7 rogue [8] 17:20 19:15 28:5 35:3 42:22 49:20 54:9 56:15 roguely [1] 38:11 role [3] 62:18,23,23 room [1] 37:16 routinely [1] 6:23 RS [1] 67:23 rule [3] 28:10 57:8 67:16 rules [1] 56:24</p>	<p style="text-align: center;">S</p> <p>same [10] 7:18 23:15 27:23 32:9,12 43:14 52:11 56:23 57:19 58:17 satisfy [1] 30:6 saying [11] 22:23,24 30:14 32:8,10,12,15 40:5 42:21 50:14 60:25 says [5] 28:18 36:2 44:5,5 62:25 scheme [1] 55:11 scope [1] 49:5 search [3] 27:14,15 66:16 searched [1] 13:19 searching [1] 26:21 Second [2] 4:24 6:12 second-guessing [1] 32:13 security [25] 21:8 24:1,1,6,23 26:4 28:5 34:6,7,9 35:8 42:18 46:18 49:1,18 50:13,14,15 51:12,14,19 53:4 64:19,23 65:1 see [5] 4:4 38:15 42:13 43:9 48:10 seeing [1] 47:21 seem [2] 41:5 60:15 seems [5] 13:11 29:7 40:24 58:21 67:22 sees [1] 35:17 seize [1] 66:16 seizing [1] 26:22 seizure [1] 47:7 self-described [1] 66:24 send [1] 44:15 sense [1] 6:4 separation [2] 34:4 46:18 separation-of-powers [1] 6:25 Sergio [7] 3:15,21 4:7 5:13 21:10 23:13 26:11 serious [1] 45:20 seriously [2] 5:2 61:13 several [1] 53:1 shaping [1] 28:25 ship [1] 56:16 shoot [4] 35:21 41:23 54:20,21 shooting [13] 13:25 14:19,23 18:21 26:25 35:16 38:9 40:3 42:3,23 47:4 51:15 59:22 shootings [1] 14:13 shoots [1] 37:21 shot [5] 3:16,22 5:14 28:8 38:11 shouldn't [4] 29:16 42:21 43:10 55:23 show [1] 60:20 showing [1] 30:13 side [17] 3:22 11:20 18:5 21:11,12 38:2,10 39:22 42:24 43:2,15,19 45:4,9 50:7 51:16,17 sides [1] 42:25 signals [2] 53:5 63:2 significance [1] 45:5 significant [1] 59:9 silence [1] 33:15 similar [2] 23:21 40:24 simplest [1] 66:22 simply [7] 9:10 11:14 21:9 23:14 31:10,13 32:15 since [4] 10:7,23 26:18 33:11</p>
---	---	--	--

Official - Subject to Final Review

<p>single [2] 24:25 28:18 situation [3] 19:22 29:22 42:14 situations [1] 59:25 six [1] 19:1 Sixth [1] 44:9 skeptical [1] 11:12 skepticism [1] 11:15 sky [1] 4:16 slaves [1] 8:8 slightly [1] 24:3 sliver [1] 28:19 soil [18] 3:16 4:15,20 5:13 12:19 13:1 18:21 23:14 36:9,10,19,20 44:23 47:6 48:4 52:24 64:4 68:18 soils [1] 56:16 Solicitor [1] 1:21 somebody [1] 59:18 somehow [2] 32:10 68:6 someone [2] 38:9 55:21 someone's [1] 26:21 sorry [1] 14:4 sort [4] 10:9 18:7 59:21 61:14 sorts [1] 55:22 SOTOMAYOR [28] 17:19,24 18:1 25:4 27:24 28:16 35:15 36:1,6,17, 23 37:4 41:22 42:7,20 43:4 48:3 54:6,22 55:12,14,17,20 56:6,9,10, 12,19 source [1] 26:5 speaking [2] 28:1,13 special [26] 4:1,4 12:24 18:19,23 19:22 20:12 21:4,14,22 34:3 39:3 43:16 46:17 51:11,12,14 53:1,17 57:8 58:9 62:24 63:6 64:15 65:3 68:2 specific [1] 60:8 specifically [3] 21:25 46:23 66:10 specifics [1] 59:24 sphere [3] 6:4 24:23 26:4 spoken [1] 22:3 stability [2] 46:9 48:16 stage [2] 35:1,1 stake [1] 32:6 standard [3] 7:10 38:16,24 standing [16] 3:15,21,25 4:7,20 5: 13 13:1 18:5 21:10 23:14 35:22 37:20 42:10,12 43:2 68:18 stands [2] 13:16 42:23 state [16] 6:22 7:17 8:10,11,14,17 9:1,23 15:23 57:3,12 59:4 61:16, 20,22 65:23 STATES [35] 1:1,14,23 2:10 3:13 4:2 5:1 14:10 15:7 17:16 24:7 26: 3 28:18 34:23 36:16 37:3 39:20 43:2 45:22 48:6 49:3,13,14,16 50: 10 52:4,6,12,19 53:22 56:1 60:7, 16 62:17,20 States' [1] 61:25 statute [10] 7:25 9:24 11:18,21 12: 2 33:18 43:24 47:1 58:17,22 statutes [3] 10:5 12:7 63:3 statutory [2] 57:3,11 stem [1] 55:25 step [1] 53:8</p>	<p>STEPHEN [5] 1:17 2:3,13 3:7 65:8 still [14] 5:20 12:16,24 17:11 27:22 30:18 50:8 52:2 58:6 61:20 62:13 63:2 64:18,25 stock [2] 67:22,22 stood [1] 48:15 stop [1] 41:4 straight [1] 15:17 strange [1] 58:22 strength [1] 18:10 stressed [1] 6:17 stressing [1] 10:21 strong [1] 67:9 strongest [2] 15:15,15 struck [1] 66:6 subject [6] 8:1 29:15,16 36:10 37: 5 55:8 subjecting [1] 36:20 submission [2] 31:13 67:3 submitted [2] 68:20,22 substantive [1] 47:9 successful [1] 4:12 sufficient [7] 12:20 19:18 21:19 30:7 31:20 68:12,16 suggest [3] 5:19 21:8 54:18 suggested [5] 9:20 12:3 13:22 28: 17 31:14 suggesting [3] 6:25 7:1 36:15 suggestion [2] 67:9 68:8 suit [4] 4:5,9 25:17 60:14 suited [1] 38:21 suits [3] 11:4,5,8 supporting [3] 1:24 2:11 52:20 Suppose [4] 8:13,13 48:23 51:4 supposed [6] 16:18 18:17 23:6,8 35:2 43:23 suppresses [1] 58:1 suppressing [1] 58:5 SUPREME [3] 1:1,13 62:7 suspect [1] 15:5 sustain [1] 30:8 swallow [1] 31:25 sweeps [2] 27:17 42:25 switch [1] 27:17 Syria [4] 52:2,11,13,14 system-wide [1] 34:19</p> <hr/> <p style="text-align: center;">T</p> <p>tailor [1] 55:10 talks [1] 54:1 task [2] 10:20 12:8 Ten [3] 49:2 63:24 64:22 Tenth [1] 44:9 term [2] 19:19,20 terms [5] 22:22 23:2 30:9 40:6 63: 3 territory [5] 13:3 21:18 64:5 68:12, 16 test [1] 22:4 Texas [3] 1:17,19 5:3 there's [32] 7:8 10:3 14:23 16:5 20: 21,25 21:24 27:16 28:23 29:7,24 30:2,7,14,15 34:1,21 37:16 39:7, 16 40:1 41:3 44:3 46:5,13 48:6 50: 19 55:24 58:6 59:22 63:12 64:20</p>	<p>therefore [2] 3:19 11:21 thereof [1] 8:2 they'll [1] 41:15 they've [4] 23:3 28:6 33:15,17 thinking [6] 8:5,7 15:5,6 44:7,9 thinks [1] 29:24 Third [3] 6:20 21:21,21 thorough [2] 30:24 61:4 though [2] 5:12 55:7 thousands [1] 37:17 threaten [1] 53:12 three [10] 21:4 50:18 51:16,17 53: 16 57:17,17 63:23 64:9 65:7 three-judge [1] 27:8 today [3] 3:18 10:11,21 together [1] 26:16 took [1] 37:1 tort [10] 4:12 5:3 6:23 8:10 9:1 15: 23 17:15 22:3 33:17 65:22 torts [4] 14:13 17:17,20,21 touched [1] 68:15 touches [3] 12:19 21:18 68:11 touching [1] 13:2 track [2] 45:14,15 tradition [5] 6:20 10:18 11:6 15:16 17:10 tragic [1] 63:18 transnational [4] 33:23 40:2,18 47:4 transnationally [2] 14:14 48:19 treaty [1] 30:10 trend [1] 53:13 trespass [4] 9:5,13,15 56:24 trigger [5] 3:25 4:21 13:2 36:10,20 triggered [2] 45:4 65:4 trilogy [1] 46:6 true [4] 32:4 35:3 55:21 56:22 truly [1] 42:2 try [2] 19:25 58:10 trying [2] 21:25 49:6 Tuesday [1] 1:10 turn [1] 53:16 two [14] 3:12,23 10:14 11:25 13:23 23:3,9,10 28:13 35:18 42:10,12 43:14 58:14 type [1] 22:25 typical [1] 12:6</p> <hr/> <p style="text-align: center;">U</p> <p>U.S. [33] 3:16 4:10,20 8:1 12:19 13: 1,3 15:7 18:2 21:18 23:18 36:9,9, 10,11,18,19,20,20,21 37:5 42:24 44:22 45:9 46:2 47:11 48:4,4 50:7 68:11,16,17,18 U.S./Mexico [1] 30:10 ultra [5] 6:24 11:3 18:16 20:24 32: 9 unarmed [1] 41:24 uncertainty [3] 27:5,10,16 unconstitutional [3] 29:12 30:4 55:25 under [18] 7:9,23 10:5,5 30:9 31: 19 43:24 45:17 57:1,3,10 59:4 60: 20 62:15,23 63:20 65:17 68:6</p>	<p>underlying [3] 12:17 68:11,15 undermine [2] 4:10 62:9 undermining [1] 53:13 understand [6] 14:24 20:14 39:21 40:25 41:23 65:20 understanding [2] 9:21 37:13 understood [1] 67:5 unfair [1] 30:21 unique [1] 34:16 UNITED [36] 1:1,14,23 2:10 3:13 4: 2 5:1 14:10 15:7 17:16 24:7 26:3 28:18 34:22 36:16 37:2 39:20 43: 2 45:22 48:6 49:3,13,13,16 50:10 52:4,5,12,19 53:22 56:1 60:7,16 61:25 62:17,20 unlawful [1] 30:15 unlawfully [2] 61:3,8 unless [1] 52:6 unlike [3] 6:16 11:16 46:14 unpredictable [1] 47:14 unreasonable [1] 18:3 unsettled [1] 14:1 untenable [1] 47:6 until [1] 57:2 unusual [1] 20:12 up [8] 10:9 14:6 30:13 37:21 50:5 57:2,3 58:20 useful [1] 5:17 uses [1] 68:18 using [1] 35:5 usual [1] 49:8 utilization [1] 33:24</p> <hr/> <p style="text-align: center;">V</p> <p>vacuum [2] 36:5,7 vary [1] 8:12 Verdugo [4] 13:16 27:22 43:25 44: 21 Verdugo-Urquidez [1] 27:12 versus [5] 3:4 12:10 46:9 51:16 66: 5 victim [7] 3:24 4:14 7:18,23 13:8 45:8,22 victims [1] 52:12 view [3] 29:11 36:4 45:14 village [2] 52:2,11 vindicate [2] 9:12,16 violate [1] 7:10 violated [3] 24:13 26:10 29:6 violating [1] 18:13 violation [7] 19:13,15 26:13,23 29: 5 35:4 58:6 Violence [1] 53:25 vires [5] 6:24 11:4 18:16 20:24 32: 9 VLADECK [46] 1:17 2:3,13 3:6,7,9 7:20 8:18 10:13 11:24 13:15 14:4, 16,21,25 15:13 16:8,13,21,24 17:6, 23 18:6 19:6 20:2,9,14,16 23:7 24: 5 25:10,17,20 27:2,24 28:15 29:9 30:1 31:6,12 46:13 65:7,9,10 67: 19,25 Vladeck's [1] 50:6</p>
--	---	---	--

voice ^[4] 23:6,9 28:2,22

voices ^[1] 28:13

W

walk ^[1] 37:18

WALL ^[30] 1:21 2:9 52:17,18,21 54:
6,22 55:13,16,19 56:3,8,10,19 57:
15,24 58:2,10 59:11,12 60:6,19,25
62:1,15,22 64:7,8,12,25

Wall's ^[1] 65:13

wants ^[1] 29:19

warden ^[1] 5:25

warrant ^[1] 30:9

warrantless ^[1] 27:15

warrants ^[1] 51:10

Washington ^[2] 1:9,22

wave ^[1] 59:21

way ^[16] 6:22 10:16 13:3 15:18 17:
15 19:16 37:18,19 39:23 43:14 45:
24 51:3 54:15 57:6 65:21,25

weigh ^[3] 38:22 41:16 63:6

Westfall ^[3] 5:2 33:20 57:4

whatever ^[4] 8:10 16:6 38:12 55:
11

whatsoever ^[1] 47:12

Whereupon ^[1] 68:21

whether ^[26] 3:14,19 9:10 12:4 19:
14 20:5 24:13 25:8 29:4 30:5,7 38:
8,19,20 39:9 42:1 43:18 47:12 48:
10 54:20 55:4 62:19 64:1 65:2 66:
8 68:1

who's ^[4] 13:9 37:20 45:22 48:4

whole ^[1] 65:21

whom ^[1] 38:11

will ^[6] 6:9 12:16 41:1 53:12 58:5
68:4

willing ^[2] 16:16 53:10

wind ^[1] 10:19

within ^[2] 39:19 49:5

without ^[3] 6:24 7:1 12:23

wonderful ^[1] 19:1

wondering ^[1] 60:4

work ^[9] 37:18 49:9,17,17,18 51:
19 59:13,14 64:24

worked ^[1] 65:22

working ^[2] 53:24 62:10

world ^[3] 41:4 61:21,23

worried ^[3] 31:23 59:20,25

worth ^[2] 8:19 10:21

writes ^[1] 38:16

wrote ^[1] 18:18

Y

year ^[3] 55:1,1,2

years ^[6] 3:12 10:2,6 13:23 46:5
60:10

York ^[5] 9:1,4,5,13,15

young ^[1] 18:4

youth ^[3] 43:17,18,18