No. 11-50792

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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On Appeal from the United States District Court
for the Western District of Texas
No. 3:11-CV-331

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ACLU FOUNDATION OF ARIZONA, ACLU FOUNDATION OF NEW MEXICO, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS, AND ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES IN SUPPORT OF PLAINTIFFS-APPELLANTS IN CASE NO. 12-50217

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CONS w/ No. 12-50217

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Plaintiffs-Appellants,
v.
JESUS MESA, JR.,
Defendant-Appellee.

CONS w/ No. 12-50301

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUERE BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and
as Successor-in-Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs-Appellants,
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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The docket number of this case is 11-50792, consolidated with 12-50217 and 12-50301. The style of this case is *Jesus C. Hernandez, et al. v. United States of America, et al*.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

American Civil Liberties Union Foundation
Amicus Curiae

ACLU Foundation of Arizona
Amicus Curiae

American Civil Liberties Union Foundation of Texas
Amicus Curiae

ACLU Foundation of New Mexico
Amicus Curiae

ACLU Foundation of San Diego & Imperial Counties
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Pursuant to Rule 29.2, this certificate supplements the certificate in the parties' briefs.

/s/ Esha Bhandari
Esha Bhandari
Attorney for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*

Amici, the American Civil Liberties Union Foundation, the ACLU Foundation of Arizona, the ACLU Foundation of New Mexico, the American Civil Liberties Union Foundation of Texas, and the ACLU Foundation of San Diego & Imperial Counties have a longstanding interest in enforcing constitutional and statutory constraints on the federal government's immigration enforcement activities at the border. *See* Mot. for Leave to File Brief of *Amici Curiae* ¶ 1 (detailing interests of *amici*). *Amici* file this brief concurrently with a motion for leave to file a brief of *amici curiae* pursuant to Fed. R. App. P. 29(b).

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

No party or party's counsel has authored any portion of this brief, and no one other than *amici curiae* or their counsel have contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The parents of Sergio Hernandez ("Hernandez"), a 15-year-old Mexican citizen who was shot and killed by United States Border Patrol Agent Jesus Mesa, Jr., allege that Agent Mesa is liable under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for using excessive, deadly force against Hernandez in violation of the Fourth and Fifth Amendments. The district court held that, because Hernandez was a noncitizen standing on the Mexican side of the border when he was killed, he had no Fourth Amendment rights. The district court also found that the plaintiffs could not bring a claim for excessive force under the Fifth Amendment because such a claim could only be brought under the Fourth Amendment. The district court's decision was incorrect in both respects.

Contrary to the district court's conclusion, this case does not require extraterritorial application of the Constitution, because the action giving rise to the claim—Agent Mesa firing his weapon—took place entirely within U.S. territory. But even if this Court conducts an analysis of the extraterritorial application of the Constitution to the facts of this case, the district court still erred. Under the governing functional test, a noncitizen in Hernandez's position is entitled to constitutional protections because it

would not be "impractical and anomalous" for constitutional limits to apply here.

Furthermore, even if this Court finds that the plaintiffs cannot bring a Fourth Amendment claim, they have stated a cognizable Fifth Amendment claim. The district court's conclusion that the Fifth Amendment does not cover deadly force claims was based on an erroneous understanding of Supreme Court precedent, which holds only that the Fifth Amendment should not be used for such claims where the more specific protections of the Fourth Amendment are available. Thus, if this Court were to conclude that the Fourth Amendment did not protect Hernandez because he was on Mexican soil, but that the Fifth Amendment did do so, then the deadly force claim can be brought under the Fifth Amendment.

By their nature, immigration enforcement activities along the border can result in extraterritorial harms, as this tragic case demonstrates. Government action within the United States must be subject to constitutional limitations in these circumstances. Otherwise, government agents would be able to shoot across the border with virtual impunity. Indeed, the implications of defendant's extraordinary position are staggering. If defendant's position were adopted, it would mean U.S. agents could intentionally shoot Mexican or Canadian citizens across the border and those

individuals (or their families) would have no recourse against the agents. That could not be the law and is not the law.

ARGUMENT

I. This Case Does Not Require Extraterritorial Application Of The Constitution.

This case can be resolved without addressing the question of whether Fourth and Fifth Amendment limits on the use of deadly force have extraterritorial effect to protect a noncitizen. Because Agent Mesa was within U.S. territory when he fired his weapon, this case does not involve constitutional extraterritoriality at all.

The case law addressing constitutional extraterritoriality is concerned with government activities outside U.S. territorial boundaries. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), involving a warrantless search of a Mexican citizen's property in Mexico, the Supreme Court emphasized that "[f]or purposes of this case . . . if there were a constitutional violation, *it occurred solely in Mexico*," because a Fourth Amendment violation is fully accomplished at the time of the unreasonable government intrusion, regardless of any potential remedy of exclusion at a later trial in the United States. *Id*. at 264 (emphasis added). The Court's analysis of the applicability of the Fourth Amendment's warrant clause thus aimed to determine "what might be reasonable in the way of searches and seizures

conducted abroad" and whether allowing the constitutional claim "would have significant and deleterious consequences for the United States *in conducting activities beyond its boundaries*." *Id*. at 273-74 (emphases added). *See also Reid v. Covert*, 354 U.S. 1 (1957) (addressing the constitutional rights of citizens being tried outside the United States); *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (engaging in an extraterritoriality analysis of the rights of noncitizens detained abroad where all activities by the government against the individuals, including "their capture, their trial and their punishment were all beyond the territorial jurisdiction" of the United States).

By contrast, where the challenged activities did not occur wholly outside the United States, there is no extraterritorial issue. In *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), for example, the Ninth Circuit found that a Chinese citizen had suffered a deprivation of his due process rights when he was brought to a U.S. court for a drug trial and required to testify under oath about matters that might subject him to torture upon his return to China. *Id*. at 811-13. Among other misconduct, prosecutors in the United States had made misrepresentations in negotiating with the Chinese government for Wang's testimony. The Ninth Circuit distinguished the case from those involving extraterritorial acts, in part because even though Wang was

physically in China when the prosecutorial misconduct occurred, the challenged government actions "*were taken in the United States*, unlike the search in *Verdugo-Urquidez*." *Id.* at 817 n.16 (emphasis added). As such, the court did not accept the government's argument that Wang had no due process rights while in China, because to do so "would artificially place beyond our purview *any* [government] actions taken prior to the time Wang arrived in the United States." *Id.* (internal quotation marks and citation omitted).

Similarly, the line of cases holding that constitutional due process requires that a defendant have certain "minimum contacts" with a forum state before the courts of that forum can assert personal jurisdiction do not engage in an extraterritoriality analysis, even when the foreign defendants in such cases are outside the territorial boundaries of the United States. This is because the judicial proceedings (and therefore any government action constituting a constitutional violation) take place in the United States. *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (finding that "alien defendant" corporation outside the United States had due process rights and ruling that the company did not have sufficient "minimum contacts" to allow for exercise of personal jurisdiction in California state court). *See also* Gerald L. Neuman, *The Extraterritorial Constitution After*

Boumediene v. Bush, 82 S. Cal. L. Rev. 259, 285-86 (2009) (noting that the courts have eschewed an extraterritoriality analysis for the rights of foreign individuals or entities outside U.S. borders with respect to administrative or judicial process *in* the United States, instead deciding such cases as "ordinary domestic cases").

Thus, it is not the location of the claimant that is critical in triggering an extraterritoriality analysis but the location of government activity. In the instant case, the constitutional violation occurred when a U.S. Border Patrol agent fired his weapon while standing on U.S. soil, and it is therefore irrelevant whether Hernandez was on the Mexican or the American side of the border. Accordingly, the Court should decide this case on the merits of the constitutional claims in the same way it would resolve them in an entirely domestic context.

II. Even If This Case Were Viewed As Involving The Extraterritorial Application Of The Constitution, The Plaintiffs Have Asserted Cognizable Constitutional Claims.

A. The Test for the Extraterritorial Application of Constitutional Rights is a Functional One That Asks Whether Judicial Enforcement of a Right Would Be "Impracticable and Anomalous."

The district court erred by applying a categorical test in which citizenship and ties to the United States were dispositive in determining the extraterritorial application of constitutional rights. Rather, the test for

extraterritorial application of the Constitution is a functional one, and highly context-specific. It asks, in essence, whether judicial enforcement of the right at issue would be "impracticable and anomalous." *Boumediene v. Bush*, 553 U.S. 723, 759-60 (2008) (citing *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring)); *id*. at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

The "impracticable and anomalous" test was first stated in Justice Harlan's concurring opinion in *Reid*, where, in rejecting a categorical rule against applying the Constitution to the trial of U.S. citizens abroad, he wrote that the Court should consider whether "adherence to a specific [constitutional] guarantee [would be] altogether impracticable and anomalous." 354 U.S. at 74 (Harlan, J., concurring).[1] Justice Harlan's test was subsequently adopted by Justice Kennedy in his concurring opinion in *Verdugo-Urquidez*, where he supplied the fifth vote for the majority's holding that no Fourth Amendment protection applied to a search of property in Mexico, but did so on the ground that "[t]he conditions and considerations of this case would make adherence to the Fourth

[1] Justice Harlan did not intend for his test to be limited to claims by U.S. citizens, because his reasoning relied upon the Insular Cases, most of which involved noncitizen claimants. *See* 354 U.S. at 74 (Harlan, J., concurring).

Amendment's warrant requirement impracticable and anomalous." 494 U.S. at 278 (Kennedy, J., concurring).

1. The Longstanding Functional Approach to Extraterritorial Constitutional Rights Was Reaffirmed in *Boumediene v. Bush*.

The Supreme Court has consistently rejected any categorical approach in deciding whether the U.S. government is constrained by constitutional limits outside the territory of the United States. Beginning with the Insular Cases over 100 years ago, and culminating in the Supreme Court's decision in *Boumediene v. Bush*, the Court has analyzed the particular circumstances of each case before determining whether and how the U.S. Constitution applies extraterritorially. Among the factors to be considered under the "impracticable and anomalous" test are the nature of the right asserted, the context in which the claim arises, the nationality of the person claiming the right, and whether recognition of the right would create conflict with a foreign sovereign's laws or customs. *See Boumediene*, 553 U.S. at 764 (noting that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism"); *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring).

In *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the Insular Cases, the Court emphasized that the "personal rights" of territorial inhabitants

could not be "unprotected by the provisions of our Constitution." *Id*. at 283. While the Court ultimately found that the plaintiff did not have rights under Article I's revenue clauses to recover tariffs, the Court emphasized that citizens and noncitizens alike can claim the Constitution's protections of individual rights. *Id*. at 268, 282-83 ("Even if regarded as aliens," the territorial residents "are entitled under the principles of the Constitution to be protected in life, liberty, and property."); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) ("The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico."); *Dorr v. United States*, 195 U.S. 138 (1904) (applying a functional approach in deciding that residents of the Philippine Islands had no right to trial by jury); *Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903) (using the same approach in finding no right to a grand or petit jury in the territory of Hawaii).[2] *See also Boumediene*, 553 U.S. at 757-58 (describing the approach of the Insular Cases as a functional, not categorical, test).

[2] Such fundamental rights are not the exclusive rights guaranteed abroad but are the minimum rights that must always apply. *See Reid*, 354 U.S. at 8-9 (emphasizing that constitutional protections abroad are not merely limited to certain "fundamental" rights as suggested by the Insular Cases). In *Boumediene*, the Court characterized the fundamental rights doctrine of the Insular Cases as an example of the functional approach that allowed the Court in those cases to use its power "where it would be most needed." 553 U.S. at

Likewise, the plurality opinion in *Reid* used a functional approach, expressly rejecting the idea that "the Constitution has no applicability abroad." 354 U.S. at 12; *see also id*. at 74 (Harlan, J., concurring) (denying the notion that the Constitution can never apply abroad); *id*. at 53-54 (Frankfurter, J., concurring) (same). In considering the claims of U.S. citizens on U.S. military bases in Japan and England, the plurality carefully examined the practical considerations, concluding that individuals who had been convicted by military tribunal were entitled to Fifth and Sixth Amendment rights outside the United States. *See id*. at 34-35.

Both *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), similarly followed the functional approach to extraterritoriality. Although *Eisentrager* ultimately concluded that the German prisoners had no constitutional basis to challenge their war crimes convictions by U.S. military commissions, it made clear that there was no categorical rule against applying the Constitution abroad and that its holding was based on the unique factors present in that wartime setting. The Court considered the fact that the individual seeking constitutional protection

759. In any event, there is no more fundamental right than what is at stake in this case: the right not to be killed by the government.

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

339 U.S. at 777. No one factor was dispositive, but rather "the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant." *Rasul v. Bush*, 542 U.S. 466, 476 (2004); *see also Boumediene*, 553 U.S. at 761, 764 (noting that "[p]ractical considerations weighted heavily" in *Eisentrager*, where the Court had to consider the difficulties of habeas corpus proceedings during a post-War military occupation, and thus *Eisentrager* was "not inconsistent with a functional approach to questions of extraterritoriality").

In *Verdugo-Urquidez*, the Court again conducted a functional analysis that considered multiple factors, including, critically, the location of the challenged government action. 494 U.S. at 265-75. The Court stressed the practical difficulties in extending the protections of the Fourth Amendment's warrant clause to a foreign country, where different standards of reasonableness might govern searches and seizures and where a U.S. magistrate-issued warrant would, regardless, be a "dead letter." *Id*. at 274; *see also id*. at 273 (noting the "significant and deleterious consequences" for

foreign policy and for law enforcement activities abroad involving searches or seizures). Thus, although the Court ultimately held that a noncitizen tried for drug offenses in U.S. courts could not claim protection from the Fourth Amendment's warrant clause for a search in Mexico, the rule was not a categorical one. Rather, the Court stated that "[*u*]*nder these circumstances*, the Fourth Amendment has no application." *Id*. at 275 (emphasis added).

Finally, the Court in *Boumedine* applied the functional approach by engaging in a multi-factor analysis to determine the reach of the Suspension Clause abroad, in which citizenship and geographic location were but two of the many considerations. *See* 553 U.S. at 766 (listing factors). In concluding that the Suspension Clause applied to alleged enemy combatants in Guantanamo, the Court emphatically rejected any categorical rule against extraterritorial application of constitutional rights.[3]

[3] The D.C. Circuit recently confirmed that the functional approach applies to extraterritorial constitutional rights. *See Al Maqaleh v. Gates*, 605 F.3d 84, 95-97, 99 (D.C. Cir. 2010) (noting that, in considering the availability of habeas corpus for detainees in Afghanistan, the court was rejecting a "formalistic, sovereignty-based test for determining the reach of the Suspension Clause" and analyzing the relevant factors identified by *Boumediene* before concluding that, on the facts, the Bagram detention facility in the "Afghan theater of war" was sufficiently different from Guantanamo Bay to deny the availability of habeas corpus).

2. The District Court Erred in Applying a Categorical Rule That a Noncitizen Without "Substantial Connections" to the United States Cannot Assert Constitutional Rights.

As the foregoing cases make clear, the fact that the claimant is a noncitizen outside the territory of the United States is not the controlling factor, much less dispositive. The Court in *Boumediene* thus squarely held that the Suspension Clause applied to noncitizen detainees held in U.S. military custody at Guantanamo Bay, despite their lack of connection to the United States. *See* 553 U.S. at 755 (rejecting argument that for "noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends").

The district court in this case incorrectly relied on *Verdugo-Urquidez*, quoting the Supreme Court's statement that the claimant in that case lacked "substantial connections" to the United States.[4] 494 U.S. at 271. Yet that language from *Verdugo-Urquidez* is not binding. Justice Kennedy supplied the fifth vote for the majority holding in *Verdugo-Urquidez*, and wrote separately to emphasize that the "impracticable and anomalous" test justified the holding, not any categorical rules. *See* 494 U.S. at 277-78 (Kennedy, J., concurring) (stating that he concurs in the majority's judgment because in the particular case before them, it would be "impracticable and anomalous"

[4] Although the "substantial connections" test is not appropriate for determining whether Hernandez had constitutional rights, the district court also erred in finding that the nature of Hernandez's connections do not satisfy that test. *Amici* do not address the arguments for why Hernandez satisfied the test.

to hold otherwise). Accordingly, the substantial connections test was rejected by a majority of the *Verdugo-Urquidez* Court, as explicitly acknowledged by this Court. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006) (noting that the majority opinion in *Verdugo-Urquidez*, "seemingly limiting the class of aliens that deserve protection to those with 'substantial connections' to the United States, is not binding, because Justice Kennedy, though joining the majority opinion in full, specially concurred to express disagreement with the majority's textual analysis").

Boumediene itself later adopted Justice Kennedy's "impracticable and anomalous" test rather than the *Verdugo-Urquidez* "substantial connections" test. *See* 553 U.S. at 760, 770; *see generally* Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. Cal. L. Rev. at 259, 285 (noting that *Boumediene* "repudiates the stance of the plurality in *United States v. Verdugo-Urquidez*" and that the "*Boumediene* opinion makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration").

Furthermore, even in *Verdugo-Urquidez*, the four justices who signed the majority opinion did not view the noncitizen's lack of substantial

connections as dispositive, and instead stressed the anomaly of applying the Fourth Amendment's warrant clause to searches in foreign countries. Thus, not surprisingly, other circuit courts have emphasized the context-specific nature of *Verdugo-Urquidez, i.e.*, that it was the application of the functional approach to a particular set of circumstances involving suppression motions and the warrant clause. *See, e.g.*, *United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008) (rejecting the proposition that *Verdugo-Urquidez* strips all noncitizens outside the U.S. of constitutional rights as an "oversimplification"); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991) (stressing that *Verdugo-Urquidez* is limited to the warrant clause of the Fourth Amendment, and noting that the Court "expressly refused to rule on the issue of whether such a seizure [of a noncitizen's property on foreign land] could violate an accused's Fifth Amendment due process rights").

In fact, reading *Verdugo-Urquidez* as stating a categorical rule that noncitizens without a substantial voluntary connection to the United States can never have constitutional rights would be inconsistent with the longstanding line of cases recognizing that noncitizens have due process rights, regardless of the nature of their ties to the country. As discussed in Section I, foreign individuals or business entities without a presence in the United States and with few or no connections to the country are nonetheless

entitled to due process rights when they are sued in U.S. courts. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-09, 113 (1987) (nonresident and non-U.S. corporation without minimum contacts in forum state could not be subject to personal jurisdiction by state court because of Fourteenth Amendment due process protections); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (same); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 709 (1982) (finding that defendant non-resident, non-U.S. corporations had liberty interests under the Fifth Amendment's due process clause but holding that their rights were not violated).

Nor is it correct that, as the district court found, the *Boumediene* Court's use of the "impracticable and anomalous" test should be limited to determining whether only one constitutional provision—the Suspension Clause—applies extraterritorially. *See* Mem. Op. and Order at 7 (Feb. 17, 2012) ("*Boumediene* is inapposite as its holding says nothing of the Fourth Amendment right against unreasonable searches and seizures."). Although the specific constitutional provision at issue in *Boumediene* was the Suspension Clause, the Court's analysis was not limited to that provision alone. Rather, *Boumediene* drew its reasoning from the Insular Cases, *Reid*, and *Verdugo-Urquidez*, all of which considered various other constitutional

provisions. 553 U.S. at 756-64. In particular, the *Boumediene* Court described Justice Harlan's initial articulation of the test in *Reid* as stating that "whether a *constitutional provision* has extraterritorial effect depends . . . in particular, [on] whether judicial enforcement of the provision would be 'impracticable and anomalous.'" *Id*. at 759 (emphasis added). *Boumediene* also rejected the government's argument that "*de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach *of the Constitution or of habeas corpus*." *Id*. at 764 (emphasis added).

Boumediene is therefore not limited to any single provision of the Constitution, but rather applies whenever a court must determine whether a constitutional provision applies abroad. *See also Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010) (noting that *Boumediene*, in addition to analyzing the reach of the Suspension Clause, "explored the more general question of [the] extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens").[5]

[5] In *Rasul v. Myers*, 563 F.3d 527, 529-32 (D.C. Cir. 2009), the D.C. Circuit ruminated that *Boumediene* did not intend "to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." But the court declined to actually decide the extraterritorial application of the Fifth and Eighth Amendments because it found the defendants had qualified immunity.

Thus, the district court's conclusion that Hernandez's lack of connections to the United States is "dispositive" was erroneous. *See* Mem. Op. and Order at 7. In determining whether a Border Patrol agent who shot his weapon across the U.S. border was subject to the limitations of the Fourth and Fifth Amendments, this Court must apply the "impracticable and anomalous" test.

B. It Is Not Impracticable and Anomalous to Apply the Fourth Amendment to This Case.

This Court need not decide whether all noncitizens outside the territory of the United States could assert a Fourth Amendment claim for use of excessive force under all circumstances.[6] Rather, this Court can reach a limited holding—that where a U.S. Border Patrol agent uses excessive, deadly force while on U.S. territory that directly harms a noncitizen individual on the other side of the border, that individual has a claim under the Fourth Amendment. Such a finding would not be "impracticable or anomalous" and would be consistent with other cases finding that noncitizens have constitutional rights at the border when subject to the actions of immigration enforcement officials.

[6] *Amici* discuss the Fifth Amendment's application to this case below. *See infra* Section III.

1. Recognizing a Fourth Amendment Right Would Not Be Anomalous.

Recognizing a Fourth Amendment claim of excessive force by a noncitizen killed by cross-border shooting would not be anomalous. United States Border Patrol officials are already subject to the limitations of the Constitution at the border. Both citizens and noncitizens can invoke the protections of the Constitution when they are on the U.S. side of the border and subject to action by Border Patrol agents. That conclusion does not change because the noncitizen is physically on the other side of the border.

It is well established that noncitizens have certain constitutional rights in the border context, regardless of their immigration status or whether they have effected a legal entry into the U.S. In *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987), for instance, this Court held that noncitizens detained at the border for illegal entry have substantive due process rights, regardless of the "'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States." This Court concluded that "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." *Id*. at 1374.

This Court reaffirmed that principle in *Martinez-Aguero*, noting that "*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation." 459 F.3d at 626. *Martinez-Aguero* held that a Mexican citizen who was within the territorial United States could bring a claim of excessive force in violation of the Fourth Amendment against a U.S. Border Patrol agent even though she had not made a legal entry into the United States because she was stopped outside the port of entry. *See id*. at 622-23.

Here, as in *Lynch* and *Martinez-Aguero*, the border agent was on U.S. territory when he committed the acts at issue. The only difference was that in this case Hernandez was a few feet over the border. That difference is of no import—especially given that the noncitizens in *Lynch* were not even in the United States lawfully.

In short, under this Circuit's precedents, the government cannot contend that its border agents could unjustifiably shoot noncitizens within U.S. territory without running afoul of the Constitution, even where the victim is in the territory illegally. Given that such conduct is subject to the restrictions of the Fourth Amendment, it would in fact be anomalous to hold that the Fourth Amendment does not govern *identical conduct* by a border

agent, simply because the victim was a few feet over the territorial boundary (yet plainly in shooting distance of U.S. agents).

2. Recognizing A Fourth Amendment Right Would Also Not Be Impracticable.

This case presents none of the practical difficulties that militate against extraterritoriality. In *Boumediene*, the Court acknowledged that allowing the petitioners to bring habeas challenges to their custody could impose burdens on the military, yet it nonetheless found in their favor. 553 U.S. at 769 (acknowledging that habeas corpus proceedings "may divert the attention of military personnel from other pressing tasks" but that such a concern is not dispositive). By contrast, the plaintiffs here seek a *post hoc* remedy for a constitutional deprivation via a damages action against a border agent. Such a claim does not implicate concerns about the adjudication of rights during wartime or under military jurisdiction. *Cf. Eisentrager*, 339 U.S. at 777-79 (considering the difficulties in granting rights to noncitizen prisoners of war held in military custody and tried for violations of the laws of war); *Reid*, 354 U.S. at 33-37 (assessing the needs of military tribunals but nonetheless finding in favor of constitutional rights).

Indeed, allowing such a damages claim would not create the type of additional administrative burdens or uncertainties that were at issue in *Verdugo-Urquidez*, where the Court worried that application of the Fourth

Amendment's warrant requirement to searches in foreign countries would force courts into a "sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." 494 U.S. at 274. Justice Kennedy stated that:

> The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply to Mexico as it does in this country.

Id. at 278 (Kennedy, J., concurring). The majority opinion determined that a warrant issued by a U.S. magistrate "would be a dead letter outside the United States." *Id*. at 274. All of these considerations taken together led the majority to conclude that the Fourth Amendment's warrant requirement could not practically be applied to a search of property in Mexico.

The *Verdugo-Urquidez* concerns about governmental or judicial burdens in enforcing the constitutional right are simply not present here. It would not be impracticable for Border Patrol agents to conform their behavior to reflect the fact that noncitizens whom they encounter, whether inside or outside the U.S. border, are protected against the use of excessive force. As discussed, such officers must already conform their actions to the Constitution.

Moreover, while the Fourth Amendment's warrant requirement might necessitate context-specific determinations turning on reasonable expectations of privacy in different countries that would lead to varying standards, there is no threat that courts would need to make such varying determinations in assessing the merits of an excessive force claim at the border, where the inquiry is whether an officer's use of force was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The physical location of the victim on one side or the other of the border simply does not affect the substantive standards to be applied in adjudicating such a claim.

Nor would recognizing constitutional rights in this case raise the specter of conflict with a foreign sovereign's laws or customs, a threat which troubled the *Verdugo-Urquidez* Court. In addition to concerns about the conflicting standards of reasonableness for searches that might govern in a foreign country, the Court noted that "American magistrates have no power to authorize . . . searches" in a foreign country, 494 U.S. at 279 (Stevens, J., concurring in the judgment), leading the Court to heavily weight the dangers of conflict with foreign sovereigns should the warrant clause be applied to searches abroad.

Such concerns are absent here. While border patrol and immigration enforcement implicates relations with foreign sovereigns, in this case it would *create* conflict not to recognize the claimed constitutional rights. The injuries and deaths of Mexican citizens along the U.S.-Mexican border at the hands of U.S. agents—including the death of Hernandez—have already created conflict between the U.S. and Mexican governments. By allowing victims to seek redress in U.S. courts for harms suffered at the hands of border authorities, this Court would in fact reduce the potential for conflict with foreign sovereigns—potential which is only heightened by such tragic incidents.

The circumstances which led the Court in *Verdugo-Urquidez* to find against the applicability of the Fourth Amendment's warrant clause do not apply here. This Court should hold that the facts of this case create a cognizable Fourth Amendment excessive force claim.

III. Plaintiffs May Bring A Claim Under The Fifth Amendment If There Is No Fourth Amendment Claim.

If this Court finds that the Fourth Amendment does not apply in this case but that the Fifth Amendment does, then it should find that the district court's alternative ground for denying a Fifth Amendment claim was in error. Contrary to the district court's conclusion, the Fourth Amendment is

not the only source of constitutional protection for someone subject to deadly force.[7]

The plaintiffs are not precluded from asserting a Fifth Amendment substantive due process claim by *Graham v. Connor*, 490 U.S. 386 (1989), as the district court wrongly concluded. The district court stated that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" must be brought under the Fourth Amendment. Mem. Op. and

[7] The same extraterritoriality analysis framework, as described in Section II, that governs the Fourth Amendment claim would lead to finding that, in the particular circumstances of a cross-border shooting by a U.S. Border Patrol agent, it would not be "impracticable and anomalous" to find that Fifth Amendment protections apply.

Chief Justice Rehnquist's statement in *Verdugo-Urquidez* that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," 494 U.S. at 269, is not a categorical rule against the Fifth Amendment claim here. It is clear from the context that the statement did not mean that the Court must always reject such claims, but that it had done so in one particular instance—*Eisentrager*—which involved very different facts from the instant case. Additionally, the statement was dicta, because there was no Fifth Amendment claim in *Verdugo-Urquidez*. *See* 494 U.S. at 264 (noting that the Fifth Amendment "is not at issue in this case").

Other principles governing the United States' treatment of noncitizens at the border make clear that, at a bare minimum, substantive due process acted as a limit on Agent Mesa's use of arbitrary and outrageous deadly force against Hernandez. As discussed above, this Court has held that noncitizens who have never entered the United States—and thus are treated for legal purposes as if they are abroad under the "entry fiction" doctrine—are protected under the Fifth Amendment against "gross physical abuse at the hands of state or federal officials." *Lynch v. Cannatella*, 810 F.2d 1363, 1373-74 (5th Cir. 1987). When Hernandez was killed, he stood in a similar legal position to noncitizens who are arrested at the border and taken into custody by the U.S. government. Moreover, had Hernandez been seized through the use of less than deadly force and taken into U.S. custody, he would accordingly have been protected by substantive due process. The mere fact that he was shot as opposed to arrested by Agent Mesa cannot be determinative of his rights.

Order at 8 (citing *Graham*, 490 U.S. at 395.) But that rule from *Graham* only precludes Fifth Amendment claims where the Fourth Amendment actually applies. As this Circuit has noted, *Graham* displaces due process "only in cases in which the alleged excessive use of force arguably violated a *specific* right protected under the Bill of Rights" such that "a plaintiff whose claim is not susceptible to proper analysis with reference to" the Fourth Amendment or another "specific constitutional right may still state a claim . . . for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right." *Petta v. Rivera*, 143 F.3d 895, 900-01 (5th Cir. 1998); *see also United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (stating that *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."). Indeed, this Circuit has previously raised the possibility of the application of substantive due process in an excessive force case occurring at the border. *See Martinez-Aguero*, 459 F.3d at 624 n. 5 (stating that

"[b]ecause the Fourth Amendment applies to Martinez–Aguero, we need not decide whether the [substantive] due process protection . . . continues to apply of its own force to a case where the protection of the Fourth Amendment is unavailable.") (citations omitted).

If this Court finds that a Fourth Amendment claim cannot be brought in this case, it should accordingly find that the Fifth Amendment substantive due process protections apply. *Graham*—where a Fourth Amendment claim was available—cannot be read to bar a substantive due process claim where, for reasons unrelated to the merits, an individual does not have the option of bringing an excessive force claim under the Fourth Amendment. Such a holding would invert *Graham*'s rationale, which sought only to ensure that where "an explicit textual source of constitutional protection" covered the challenged conduct, that provision be the governing framework for analysis, rather than "the more generalized notion of 'substantive due process.'" *Graham*, 490 U.S. at 395. If a particular provision—in this case, the Fourth Amendment—cannot be invoked by an individual, it would be perverse to thereby hold that the claim cannot be analyzed under another constitutional provision that *does* otherwise apply to the challenged conduct.

CONCLUSION

This Court should hold that the plaintiffs have stated a valid constitutional claim under either the Fourth or Fifth Amendments for the cross-border death of Sergio Hernandez at the hands of a U.S. Border Patrol agent.

Dated: July 2, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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