No. 15-118

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, *et al.*,

Petitioners,

—v.—

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES, THE ACLU FOUNDATION OF TEXAS, THE ACLU FOUNDATION OF ARIZONA, AND THE ACLU OF NEW MEXICO, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

REGULATIONS

Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No party or entity other than *amici*, their members, or their counsel, made a monetary contribution to this brief's preparation or submission. Additionally, letters of consent to the filing of *amicus curiae* briefs have been lodged with the Clerk of the Court.

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Foundation of Arizona, the ACLU Foundation of New Mexico, the ACLU Foundation of San Diego and Imperial Counties, and the ACLU Foundation of Texas are the four ACLU state affiliates along the U.S.-Mexico border.

The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. *Amici* have a longstanding interest in enforcing constitutional and statutory constraints on the federal government's immigration enforcement activities at the border. *Amici* have also developed significant expertise on the question of the extraterritorial application of constitutional rights.

The ACLU currently represents Araceli Rodriguez in her claims against U.S. Border Patrol Agent Lonnie Swartz for the cross-border shooting of her teenage son, J.A., a Mexican national who was standing in Nogales, Sonora, Mexico at the time of the shooting. *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. 2015).[1] *Amici* also litigated *Ali v. Rumsfeld*,

[1] The district court in *Rodriguez* concluded that that it would not be impracticable or anomalous to apply the Fourth Amendment. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1033-38 (D. Ariz. 2015). The Ninth Circuit held argument on defendant's appeal of the denial of his motion to dismiss on

649 F.3d 762 (D.C. Cir. 2011), and filed an *amicus* brief in *Boumediene v. Bush*, 553 U.S. 723 (2008). Both of those cases considered the extraterritorial application of constitutional rights.

Amici also have expertise regarding the *Bivens* question added by the Court, including having filed an *amicus* brief in *Bivens* itself. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The ACLU has also litigated numerous other *Bivens* cases before this Court and the lower courts.

Because this case raises important questions regarding the extraterritorial application of the Constitution and the availability of *Bivens* remedies, its proper resolution is a matter of great concern to the ACLU, its affiliates, and its members.

STATEMENT OF CASE

The parents of Sergio Adrian Hernandez-Guereca ("Sergio"), a 15-year-old Mexican boy who was fatally shot by United States Border Patrol Agent Jesus Mesa, Jr., brought this *Bivens* action alleging that Agent Mesa is liable for using deadly force against Sergio in violation of the Fourth and Fifth Amendments.[2] As alleged, on June 7, 2010, Sergio was playing with his friends along a concrete culvert where the Rio Grande once flowed directly adjacent to the barbed-wire fence separating El Paso,

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October 21, 2016, but postponed a decision on the matter until after resolution of the present case.

[2] *Amici*'s recitation of the allegations is taken from the Fifth Circuit's panel opinion. *See Hernandez v. United States*, 757 F.3d 249, 255-57 (5th Cir. 2014).

Texas from Juarez, Mexico. They were playing a game in which they would run up the steep banked incline and attempt to touch the U.S. border fence. As they were playing, Agent Mesa arrived on the scene and detained one of Sergio's friends, causing everyone else, including Sergio, to run away. Sergio ran to a pillar beneath a bridge on the Mexican side. Though Sergio was unarmed, Mesa drew his gun while standing on U.S. soil and shot at least twice at Sergio. One of the bullets struck Sergio in the face and killed him.

The district court dismissed the Fourth and Fifth Amendment claims against Agent Mesa, and a divided panel of the Fifth Circuit affirmed in part and reversed in part. The panel held that the functional approach set forth in *Boumediene* governs the extraterritorial application of the Fourth and Fifth Amendments, but concluded that even under a functional approach, Sergio's lack of voluntary connections precluded the extension of Fourth Amendment rights. *See Hernandez*, 757 F.3d at 259-67. The panel held, however, that under the same functional approach, the Fifth Amendment claim could proceed. *Id*. at 268-72. The panel also rejected the government's argument that a *Bivens* cause of action was unavailable in this context. *Id*. at 272-77.

On rehearing en banc, the Fifth Circuit issued a short per curiam decision reversing the panel. The court summarily stated, without analysis, that the extraterritorial application of the Fourth Amendment was controlled by the voluntary connections test set forth by the plurality in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and not the functional test from the later-decided

Boumediene. *See Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (per curiam). Applying *Verdugo-Urquidez*, the en banc court held that "a Mexican citizen who had no 'significant voluntary connection' to the United States" and who was in Mexico when shot could not assert a claim under the Fourth Amendment. *Id*. (quoting *Verdugo-Urquidez*, 494 U.S. at 271). On the Fifth Amendment claim, the court bypassed the merits, noting disagreement among the en banc panel as to whether the functional approach under *Boumediene* applied, and instead ruled that Agent Mesa was entitled to qualified immunity because the extraterritorial application of the Fifth Amendment was not clearly established on these facts. *Id*. at 119-21.

SUMMARY OF ARGUMENT

1. A *Bivens* cause of action should be available in this context. *Amici* write specifically to address two arguments made by the United States in opposing recognition of a *Bivens* remedy. First, the possibility of criminal charges against a Border Patrol agent does not provide an adequate alternative remedial scheme sufficient to outweigh the need for a civil remedy under *Bivens*. Even when the government decides to prosecute criminally, the mere possibility of a conviction and restitution does not preclude a *Bivens* remedy. Potential criminal remedies will be available in almost all cases of willful violations of constitutional rights, so this position would eviscerate *Bivens*. Further, such a rule would give the federal government sole discretion to decide when compensation for unlawful conduct by its own officials could be made available, effectively leaving the federal government

accountable only to itself. Indeed, in *Bivens* itself this Court recognized a cause of action even though the defendant federal agents were subject to criminal prosecution.

Second, the Court should reject the United States' argument that the extraterritorial character of the constitutional violation itself amounts to a special factor foreclosing a *Bivens* remedy. As the Fifth Circuit panel correctly recognized, the special factors analysis is not an opportunity to "double count" the very same arguments raised on the constitutional merits. If it is neither impracticable nor anomalous to apply a particular constitutional right extraterritorially, then there is no "special" concern that would warrant the refusal to recognize a remedy under *Bivens* for that constitutional violation.

2. The extraterritorial application of the Fourth and Fifth Amendments is governed by the functional "impractical and anomalous" test reaffirmed in *Boumediene*. The Fifth Circuit's rejection of that test in favor of an exclusive consideration of whether the victim had "significant voluntary connections" to the United States is particularly inappropriate in the context of a cross-border shooting. Such personal connections are of little relevance to the question of whether a civilian living just across the border should be denied any remedy for the use of lethal force against him by U.S. officials just over the border—a use of force that is illegal under all applicable laws, would be a clear constitutional violation if the victim were on the U.S.

side of the border line, and would, in a domestic setting, give rise to a claim for damages.

3. Because the court below applied the incorrect legal standard, and has not yet had an opportunity to apply the *Boumediene* functional test to these facts, *amici* suggest a remand to permit the court to apply the correct test in the first instance. In this brief, we set forth some of the considerations that might inform such an inquiry.

ARGUMENT

I. NEITHER THE POSSIBILITY OF A CRIMINAL CONVICTION FOR THE UNDERLYING MISCONDUCT NOR EXTRATERRITORIALITY PRECLUDES A *BIVENS* REMEDY.

Amici agree with Petitioners that a *Bivens* remedy is available here and will not repeat that general analysis. *Amici* write solely to address two arguments the United States has previously raised.

1. In *Rodriguez v. Swartz*, the ACLU's case currently pending before the Ninth Circuit, the United States has argued that a *Bivens* remedy should be barred when a Border Patrol agent could be or is in fact criminally prosecuted for the underlying misconduct. *See* Br. for United States as *Amicus Curiae* at 18, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. Feb. 29, 2015); *see also Hernandez*, 757 F.3d at 274 (panel opinion rejecting possible criminal prosecution as a reason to foreclose a *Bivens* remedy); U.S. Br. in Opp'n to Pet. for Cert. at 12. This argument cannot be squared with this Court's precedent, and should be rejected.

Criminal prosecutions against federal officials for unconstitutional actions are often at least potentially available, but in practice are extremely rare. Thus, as in the vast majority of alleged constitutional violations by federal agents, the Department of Justice declined to prosecute Agent Mesa here for possible violations of federal criminal statutes.[3] But even when the government decides to bring charges—as it has, for the first time ever for a cross-border shooting, against the Agent in *Rodriguez*—a conviction and restitution remain far from a certainty. The burden of proof for a criminal conviction and the legal standards governing criminal liability are generally much more demanding than for civil liability. The mere possibility of criminal restitution is not an adequate remedy.

Permitting the possibility of criminal charges and restitution to dictate whether a *Bivens* remedy is available would also effectively accord the executive branch exclusive control over redress for and deterrence of the unconstitutional actions—including fatal actions—of its own officers. As illustrated here, there certainly is no guarantee that any particular case will result in an indictment, much less a conviction. The federal government could thus deny a victim any monetary relief and escape liability altogether by simply declining to prosecute. Not surprisingly, therefore, this Court has never denied

[3] Dep't of Justice, Office of Public Affairs, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca, *available at* https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca (Apr. 27, 2012).

the availability of a *Bivens* remedy based on a grant of restitution, much less the *possibility* that the government will bring charges, secure a conviction, and obtain restitution for the victim.

Moreover, the argument that criminal law should displace a *Bivens* remedy proves too much. If the possibility of restitution were enough to foreclose a *Bivens* claim, there would be no *Bivens* remedy for *any* civil rights violations that could be subject to prosecution. That rule would swallow *Bivens*, as a criminal conviction and restitution is theoretically available for *any* willful violation of constitutional rights. *See* 18 U.S.C. §§ 242, 3663.

Notably, *Bivens* itself involved conduct that could have been subject to criminal prosecution. The Second Circuit's decision in *Bivens*—ultimately reversed by this Court—specifically noted the existence of three federal crimes that could apply to the agents' conduct there and cited that as a factor in its decision declining to permit a civil remedy. *See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 724-25 (2d Cir. 1969) ("Congress has made it a federal crime to execute a search warrant with unnecessary severity or to exceed willfully one's authority in executing it, 18 U.S.C. § 2234; to procure the issuance of a search warrant maliciously and without probable cause, 18 U.S.C. § 2235; and, in certain circumstances, to search an occupied private building without a warrant, 18 U.S.C. § 2236."). [4] Nevertheless, the

[4] The criminal nature of the alleged conduct was also noted in the petitioner's brief in *Bivens*. Br. for Pet'r at 16, *Bivens*, 403 U.S. 388 (explaining that the alleged search and seizure was "punishable by criminal penalties under 18 U.S.C. § 2236").

Court held that a civil remedy for Fourth Amendment violations was available in *Bivens*. The Court should likewise reject any attempt to rely on the possibility of a criminal prosecution to foreclose a *Bivens* remedy here.

2. The United States has also argued that extraterritoriality considerations constitute a special factor foreclosing a *Bivens* remedy in the context of cross-border shootings. U.S. Br. in Opp'n to Pet. for Cert. at 20-21. That is likewise incorrect.

As the Fifth Circuit panel in this case rightly recognized, the United States' suggestion to "double count" extraterritorial considerations is "improper." *Hernandez*, 757 F.3d at 276 n.12. Where, as here, the nature of the right and the circumstances of the case outweigh other concerns and justify extraterritorial application of the Constitution, those same concerns offer "no additional reason to hesitate in granting a remedy for that right." *Id.*; *cf. Davis v. Passman*, 442 U.S. 228, 246 (1979) (rejecting the argument that *Bivens* should not apply to a Congressman's official conduct because the asserted "special concerns" were "coextensive with the protections" already afforded under the Speech or Debate Clause). If extending a constitutional claim extraterritorially is not anomalous or impracticable, then the extraterritorial character of the claim similarly does not provide a reason not to provide a remedy in damages.

Permitting this form of double counting could eliminate *Bivens* altogether. Nearly every constitutional analysis involves competing considerations that, in the abstract, could be

reframed as "special factors." *Cf. Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (noting that Eighth Amendment prison condition claim implicated "the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system"); *Carlson v. Green*, 446 U.S. 14, 19 (1980) (holding that such prison conditions claims "involve[] no special factors counseling hesitation" in granting a *Bivens* remedy). Moreover, a blanket rule against extraterritorial *Bivens* actions would effectively immunize *all* violations of constitutional rights abroad, including those directed against U.S. citizens. The Court should reject the United States' argument, which is little more than an attempted second bite at the extraterritoriality apple.

II. THE FIFTH CIRCUIT'S REQUIREMENT OF VOLUNTARY CONNECTIONS IS PARTICULARLY INAPPROPRIATE IN THE CONTEXT OF A CROSS-BORDER SHOOTING.

Amici agree with Petitioners that the Fourth and Fifth Amendments' extraterritorial application is governed by the functional "impracticable and anomalous" test reaffirmed in *Boumediene*, 553 U.S. at 759-60. The Fifth Circuit, however, citing *Verdugo-Urquidez*, applied a rigid, formalistic requirement that a victim must have voluntary connections to the United States in order for the Fourth Amendment to apply extraterritorially. *Hernandez*, 785 F.3d at 119. That was incorrect, as explained in Petitioners' brief. *Amici* write to underscore that the Fifth Circuit's requirement of

voluntary connections is particularly inappropriate in the context of a cross-border shooting.

In some cases, an individual's particular connections to the United States may weigh heavily in the functional analysis. *Cf. Boumediene*, 553 U.S. at 760 (explaining that, in addition to practical considerations, the U.S. citizenship of the petitioners in *Reid v. Covert*, 351 U.S. 487 (1956) "was a key factor" in finding the jury trial right applicable). *See also, e.g.*, *Ibrahim v. Dep't of Homeland Security*, 669 F.3d 983, 995-97 (9th Cir. 2012) (applying the *Boumediene* functional test and emphasizing the noncitizen plaintiff's connections to the United States in holding that she could invoke the First and Fifth Amendments to challenge her inclusion on the no-fly list).

This case, however, concerns limits on the unlawful use of deadly force by law enforcement—protections that could not be more fundamental. *See Boumediene*, 553 U.S. at 758-59 (noting that even in unincorporated territories where constitutional rights do not always apply, the Court still held that noncitizens were entitled to "fundamental" rights); *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (explaining that the "intrusiveness of a seizure by means of deadly force is unmatched" and a "suspect's fundamental interest in his own life need not be elaborated upon"). And Petitioners seek to assert them against a U.S. official who fired his gun *within* the United States and killed someone just across the border.

The Fifth Circuit's requirement of particular connections to the United States would mean that

individuals without such connections, who are simply living their lives in proximity to the U.S. border, have no judicially enforceable right not to be killed by U.S. agents shooting at them across the border. It would mean that if a Border Patrol agent were to unjustifiably shoot and kill two young people standing side by side just over the border—one with significant voluntary connections and the other without them—the applicability of the constitutional protections against arbitrary death would turn on irrelevant considerations regarding the particular connections each minor might have to this country.[5] That is not, and cannot be, the correct constitutional rule.

Indeed, to the extent that connections to the United States are relevant at all in the context of cross-border shootings, what matters most is not one's specific connections but the unavoidable connection to the United States that border communities and the people who live in them often share. This point is illustrated by the circumstances of *Rodriguez*.[6] J.A. was shot approximately four

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[5] The decedents in both this case and *Rodriguez* were minors. The Fifth Circuit required *voluntary* connections; yet minors often have little say in where they live or what other connections they may or may not form.

[6] The allegations below relating to the shooting death of J.A. are taken from the first amended complaint in *Rodriguez v. Swartz*, No. 14-cv-2251, Doc. 18 (filed Sept. 10, 2014), except where otherwise noted. In finding that J.A. was protected by the Fourth Amendment at the time of the shooting, the district court noted, among other things, that "J.A. had strong familial connections to the United States"—J.A.'s grandmother and grandfather (lawful permanent residents of the United States at the time of the shooting and now U.S. citizens) frequently

blocks from his home. He was walking on a busy pedestrian thoroughfare alongside the border fence, where there are numerous stores, medical offices and other places which the residents of Nogales visit every day. An individual's particular connection to the United States is not determinative, particularly where, as here, the community and its residents have a shared day-to-day connection to the United States, and are routinely subjected to the conduct of its agents. In light of the fundamental right at issue in these cases, the Fifth Circuit's requirement of voluntary connections above and beyond simply living one's life in a border community is incorrect and should be rejected.

III. THE COURT SHOULD REMAND FOR THE LOWER COURTS TO APPLY THE FUNCTIONAL "IMPRACTICAL AND ANOMALOUS" TEST IN THE FIRST INSTANCE.

If the Court reverses the Fifth Circuit's rejection of the *Boumediene* test for an exclusive application of the "voluntary connections" test, *amici* suggest that the Court should remand to the lower courts to apply in the first instance the fact-intensive, multi-factor functional analysis that properly governs. Where a lower court applies the wrong standard, this Court will generally correct the error and remand for the court below to apply the correct standard in the first instance. *See, e.g.*, *eBay Inc. v.*

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travelled the short distance across the border to J.A.'s home to take care of him while his mother was away for work. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015).

MercExchange, L.L.C., 547 U.S. 388, 394 (2006); *Johnson v. California*, 543 U.S. 499, 515 (2005).

To *amici*'s knowledge, no lower court has applied the correct, functional analysis to a cross-border shooting free from the misconception that a "voluntary connections" requirement applies. *See Hernandez*, 785 F.3d at 119 (en banc court applying a rigid rule derived from *Verdugo-Urquidez*); *Hernandez*, 757 F.3d at 266 (earlier panel attempting to apply *Boumediene* while viewing itself as "bound to apply the sufficient connections requirement of *Verdugo-Urquidez*"); *Ibrahim*, 669 F.3d at 997 (9th Cir. 2012) (similarly trying to reconcile *Boumediene* and *Verdugo-Urquidez*); *Rodriguez*, 111 F. Supp. 3d at 1035 (applying *Ibrahim* to a cross-border shooting). Because no court has yet grappled with the relevant factors under the proper analysis, *amici* respectfully suggest that this Court reiterate the correct standard—including clarifying that there is no requirement of "voluntary connections"—and remand for application of the standard in the lower courts.

This would permit the lower courts to apply in the first instance the factors relevant to the fact-specific "impracticable and anomalous" test in the context of this case. Among the factors to be considered under the functional test are practical obstacles inherent in enforcing the right extraterritorially, the nature and location of sites at which the shooting occurred, the status of the individual claiming the right, and the nature of the right itself. *Boumediene*, 553 U.S. at 766, 798. *Amici* write to expand on Petitioners' discussion of the

considerations that may be relevant to the application of the correct analysis.

1. A variety of considerations may bear on whether application of the asserted rights would present practical problems or create anomalous results. Among other things, courts should consider whether the asserted constitutional right would impose different obligations and standards than are already in place in a particular setting. *See id.* at 757 (noting that in the so-called Insular Cases the Court placed some limitations on the extraterritorial application of the Constitution to unincorporated territories given the risk of "uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in . . . these newly acquired Territories").

Here, Border Patrol agents are already subject to restrictions on the use of deadly force during engagements with both citizens and noncitizens on *both* sides of the border. *See* 8 C.F.R. § 287.8(a)(2)(ii) (2012) ("Deadly force may be used only when . . . necessary to protect the [agent] or other persons from the imminent danger of death or serious physical injury."). Moreover, federal and state criminal laws prohibit a Border Patrol agent on U.S. soil from using unlawful deadly force against noncitizens across the border, regardless of the victim's citizenship status or connections to the United States. *See*, *e.g.*, 18 U.S.C. § 1111; Tex. Penal Code § 19.02; Ariz. Rev. Stat. § 13-1104(A). Thus where, as here, a federal official acts within the United States, there is nothing anomalous or impracticable about holding him accountable to federal constitutional constraints. That the application of

constitutional provisions under such circumstances would impose no new duties is an indication that the particular application of the Constitution would be neither impracticable nor anomalous.

By contrast, the application of other constitutional requirements in other contexts may present practical problems not implicated by cross-border shooting cases. *See*, *e.g.*, *Verdugo-Urquidez*, 494 U.S. at 274 (plurality opinion) (rejecting application of the warrant requirement to an extraterritorial search, explaining that a warrant issued by a U.S. magistrate under certain circumstances "would be a dead letter outside the United States"); *id.* at 278 (Kennedy, J., concurring) (noting practical and procedural problems with requiring a warrant for a search in Mexico, including the "absence of local judges or magistrates available to issue warrants"); *id.* at 279 (Stevens, J., concurring in the judgment) (similar).

Practical problems may also arise where the application of certain constitutional protections would require interpretation of differing or uncertain societal norms and obligations abroad. For example, the concerns in *Verdugo-Urquidez* about creating a "sea of uncertainty" were unique to the application of the warrant requirement and "what might be reasonable in the way of searches and seizures conducted abroad." *Id.* at 274; *id.* at 278 (Kennedy, J., concurring) (observing that application of the warrant requirement would involve "the need to cooperate with foreign officials" and implicate "the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad"). In contrast, Border Patrol agents would face no

uncertainty as to the standard governing the use deadly force across the border.

Boumediene demonstrates that even where the application of the Constitution may well affect sensitive national interests, such as national security or military operations abroad, courts must carefully weigh such concerns against other relevant considerations favoring extraterritorial application. In *Boumediene*, the Court acknowledged that allowing habeas challenges at Guantanamo could impose very real burdens and "may divert the attention of military personnel from other pressing tasks." 553 U.S. at 769. The Court nonetheless held that the Suspension Clause applied and stressed that the practical problems were outweighed by other factors, including the importance of ensuring that fundamental constitutional protections were available. *Id*. at 766-71, 793-97. This case presents nothing remotely approaching the practical concerns at issue in *Boumediene*.

2. The nature and location of the sites at which the relevant events occurred is also a relevant factor in determining whether the application of a particular constitutional right would be impracticable or anomalous. This factor may require, for example, an evaluation of the degree of control exercised by the United States over the area in which the events occurred. *Id*. at 763-69.

In the context of a cross-border shooting, the degree of U.S. control is an important factor that should be applied on the facts of each case under *Boumediene*'s functional test. U.S. control is not consistent along the long stretch of the U.S.-Mexico border, which ranges from heavily fortified and

controlled portions to undeveloped areas. In *Rodriguez*, for example, J.A. was shot in an area dominated by the presence of the border fence and U.S. authority. At the time of his death, J.A. was walking on a commercial street that runs alongside and directly below the fence. Agent Swartz shot J.A. while standing at a location on the U.S. side of the border set at the top of a cliff rising approximately 25 feet above the ground on the Mexican side, through a steel border fence rising another approximately 25 feet in the air. As alleged in the *Rodriguez* complaint, U.S. Border Patrol agents use a variety of means to exert *de facto* control over the border fence area where J.A. was killed, including by constantly surveilling both sides of the border through cameras and other devices; firing guns and launching non-lethal devices, such as pepper spray, into Mexico; conducting helicopter patrols in Mexican airspace; and engaging in authorized pre-inspection of individuals on Mexican soil.

The application of the Fourth and Fifth Amendments to the killing of a minor civilian in an area under this level of U.S. control presents none of the potential practical concerns that could be created by the assertion of constitutional rights in an "active theater of war." *Id.* at 770. And it is hardly anomalous to expect a Border Patrol agent whose conduct at issue occurred entirely while standing on U.S. soil, subject to complete governmental control, and who shot into a localized U.S.-dominated area in Mexico, to abide by the same Fourth Amendment limits on the use of deadly force that he must obey when shooting at an individual on this side of the border. By contrast, for example, U.S. agents in *Verdugo-Urquidez* were "working in concert" with

Mexican police to conduct the search in Mexico, and were thus subject to the approval and oversight of the Mexican government. 494. U.S. at 262 (plurality opinion).

The degree of control over an area, however, is just one factor. Notably, for example, Justice Kennedy provided a litany of practical reasons why the warrant requirement did not apply in the interior of Mexico in *Verdugo-Urquidez*, among them that no federal court had authority to issue a warrant for searches there. 494 U.S. at 278 (Kennedy, J., concurring). Had the lack of U.S. control of the search site in Mexico been sufficient, there would have been little need for further analysis. *See Boumediene*, 553 U.S. at 763 (making a similar point with regard to the significance of the "discussion of practical barriers" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

Other fact-specific aspects of the sites of the violation may also bear on the functional impracticable and anomalous analysis. For example, the application of constitutional rights is not anomalous in the context of border communities that—like "Ambos Nogales," or "Both Nogales," a common name for Nogales, Sonora, Mexico and Nogales, Arizona—are linked by a shared history, culture, and economy. *See* Br. for Scholars of U.S.-Mexico Border Issues as *Amici Curiae* Supporting Plaintiff-Appellee at 3, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. May 6, 2015) ("For many decades, there was no meaningful barrier between Nogales, Arizona and Nogales, Sonora, and today, the cities remain essentially identical in demographics, bound together by crossborder families, economic

interdependence, and a binational cultural unity."). Under circumstances in which citizens of each country and those with and without connections across the border mix and cross on a daily basis, as they do in Ambos Nogales, the application of uniform constitutional standards governing the use of deadly force to all potential victims is not anomalous.

3. The background and status of the individual asserting the constitutional right may also raise practical considerations relevant to the application of that particular right. In the instant case, as in *Rodriguez*, the victim was an unarmed civilian during peacetime. Application of Fourth and Fifth Amendment rights to such individuals poses significantly fewer complications than does extending constitutional rights to alleged enemy combatants during a time of war. *See Boumediene*, 553 U.S. at 766-67.

While citizenship status can be a relevant factor in applying the *Boumediene* test, it is not always relevant, much less dispositive. As discussed above, where the application of a particular constitutional right to a foreign national is neither anomalous nor impracticable, as in *Boumediene* and here, the victim's lack of "voluntary connections" to the United States poses no barrier to the provision's extraterritorial reach.

In this case, the en banc Fifth Circuit did not consider the full range of relevant factors and considerations because it erroneously applied the wrong standard. The Court might thus benefit from permitting the lower courts to apply the *Boumediene* standard in the first instance in this and other cases.

CONCLUSION

For the reasons above, *amici* respectfully request that the Court find that a *Bivens* remedy is available and hold that the extraterritorial application of the Fourth and Fifth Amendments is governed by the functional approach reaffirmed in *Boumediene*. In that event, we further suggest that a remand for the lower courts to apply the correct standard in the first instance may be appropriate.

Respectfully Submitted,

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