No. 15-118

In The
Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners allege that on June 7, 2010, their fifteen-year-old son, Sergio Adrián Hernández Güerca ("Hernández"), a citizen and resident of Mexico, was playing with his friends at the border area near the Paso del Norte Bridge in El Paso, Texas. *Jesus C. Hernández, et al. v. the United States of America, et al.,* 2012 WL 4783845, 6. According to the Petitioners, the boys were playing a game which involved running up and touching the border fence and then running back down the incline of the culvert into Mexico. *Id*. United States Border Patrol Agent Jesus Mesa, Jr., arrived at the scene and detained one of the individuals. *Id.* Hernández retreated under the Paso del Norte Bridge in Mexico. *Id.* Petitioners allege that Agent Mesa, while standing in the United States, then pointed his service weapon at Hernández and shot across the border at least twice. *Id.* Hernández was shot at least once and subsequently died. *Id.*

After the shooting, the FBI initiated an investigation and found that Agent Mesa's use of force was a result of Hernández and the other individuals surrounding him and throwing rocks at him while refusing his verbal commands to stop. *Petitioners' Petition for a Writ of Certiorari, page 5.* In fact, according to Department of Justice records, the Petitioners' son had been arrested twice before for alien smuggling and had been given voluntary returns to Mexico due to his juvenile status. And, it is not uncommon for human traffickers to use rock throwing as a way to hamper law enforcement efforts to apprehend alien

smugglers in the border regions. In the San Diego sector of the U.S.-Mexico border alone, United States Border Patrol recorded more than 400 assaults, including rock throwings, on agents since 2010. The numbers have fluctuated in recent years, from 130 assaults in 2010, 77 in 2011, 133 in 2012, to 73 in 2013, according to the agency's statistics. http://www.cnn.com/2014/02/19/us/california-border-rock-throwing-death.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's interpretation of *Boumediene* and its limited holding regarding extraterritorial application of the Constitution is correct and does not need to be clarified.

A. The Petitioners' petition for a writ for certiorari is based on the idea that the three-part test inaugurated in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), inherently creates a new way for the courts to examine whether the protections of the Constitution can be extended extraterritorially in cases where the offending conduct occur outside of United States jurisdiction. In essence, the Petitioners seek to have *Boumediene* expanded to the extent that it overturns Supreme Court precedent which already addresses extraterritorial application of constitutional protections. But *Boumediene* was fact specific, dealt only with a specific area of law, and did not overturn any Supreme Court precedent. Thus the need to clarify *Boumediene* is unnecessary because

there is law that already addresses the Petitioners' complaints.

The original question of law giving rise to the *Boumediene* opinion was whether the Suspension Clause, art. I, § 9, cl. 2 of the Constitution, applies to enemy combatants detained in the Guantanamo Bay, Cuba, military facility. *Boumediene*, 553 U.S. at 771, 128 S.Ct. at 2262. The significance of the "Great Writ," as well as the United States' plenary control at Guantanamo, was equally critical to the Court's holding. *Id.* In fact, to emphasize the importance of the Writ issue, this Court pointed out that "[i]n the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause." *Id*. This Court even cited Blackstone, who called the great writ the "bulwark of our liberties." *Id*. at 739, 742, 128 S.Ct. at 2244, 2246 (citing 1 W. Blackstone, Commentaries). Additionally, the Court also held that the concerns regarding separation of powers have particular bearing upon the Suspension Clause question, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. *Id*. at 765, 128 S.Ct. at 2259. Thus the *Boumediene* Court fashioned a test that it claimed to derive from past decisions that considered the extraterritorial reach of other constitutional provisions. *See Boumediene*, 553 U.S. at 760, 128 S.Ct. at 2256 (citing *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581 (1891) (Fifth and Sixth Amendments)); *id*. at 762, 128 S.Ct. at 2257 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct.

936, 94 L.Ed. 1255 (1950) (Fifth Amendment)); *id*., 128 S.Ct. at 2257 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990) (Fourth Amendment)). The Court concluded that daily changing sovereignty alone does not determine the extraterritorial reach of the Constitution; instead, questions of extraterritoriality turn on objective factors and practical concerns, not formalism. *Boumediene*, 553 U.S. at 764, 128 S.Ct. at 2258.

Ultimately, the Court held that its three-factor test was relevant in determining the reach of the Suspension Clause. *Id*. at 766, 128 S.Ct. at 2259. And more specifically, the Court stated that the *Boumediene* decision applies only to the premise that Petitioners before the Court are entitled to seek the writ and that the DTA review procedures were an inadequate substance for habeas corpus. *Id.* at 795, 128 S.Ct. at 2275. Nowhere in the opinion did the *Boumediene* court overturn *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights), or *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990) (Fourth Amendment protects only aliens with significant voluntary connections to the United States). To the contrary, in light of the Court's repeated references to the Suspension Clause, one can only assume that the Court explicitly confined its holding only to the extraterritorial reach of the Suspension Clause and

disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause. *See Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011); *Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (en banc) (Henderson, J., concurring) ("Whether *Boumediene* in fact portends a sea change in the extraterritorial application of the Constitution writ large, we are bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause."); *Igartúa v. United States*, 626 F.3d 592, 600 (1st Cir. 2010) ("[T]he *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

In essence, *Boumediene* and its three-factor test applies to a specific constitutional provision. Thus, the Petitioners request to have the constitution's extraterritorial application examined since the holding of *Boumediene* is unnecessary because there already exists clearly established law which applies to the Petitioners' rights to extraterritorial application of the Fourth or Fifth Amendment.

B. In addition to the obviousness of *Boumediene*'s limited holding, the Petitioners' claim for constitutional protection is answered by this court's previous holding in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990).

This Court's holding in *Johnson*, which has been reiterated since, is that as a general matter aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights. *Johnson*, 339 U.S. at 782-85, 70 S.Ct. at 945-47. Even the *Verdugo-Urquidez* Court described *Johnson* as unambiguously "rejecting the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269, 110 S.Ct. at 1063. *Johnson* was similarly described by the Court in *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500, 150 L.Ed.2d 653 (2001); *see also Castro v. Cabrera*, 742 F.3d 595, 599 n. 5 (5th Cir. 2014) (noting that *Johnson* "reject[ed] extraterritorial application of the Fifth Amendment").

II. The Fifth Circuit's decision regarding qualified immunity does not create a circuit split amongst circuit courts.

The Petitioners seek to raise the question as to whether qualified immunity can be granted or denied based on an agent's after-the-fact discovery of a person's legal status. Specifically, the Petitioners suggest that there is a split amongst circuit courts regarding this issue. The Petitioners offer *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005) as an example of this split. The Petitioners argue that Moreno is in conflict with the lower court's holding. In *Moreno*, police officers stopped and searched two men walking down the street. *Id*. The officers later justified their seizure

based on the fact that Moreno was a parole violator. *Id*. The officers first contend that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property; and second, the officers contend that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the officers did not know of either fact at the time. *Id.* at 638. The Ninth Circuit however, did not agree with the idea that police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition – i.e., the victim of the violations status. *Id*. at 641. The Petitioners assert that the aforementioned holding in *Moreno* is in conflict with the lower court's holding in this case.

However, the facts in *Moreno* are significantly different than the facts in this case. In *Moreno*, Moreno and his companion Rodriguez, were driving to a meeting at St. Lucy's Church in the City Terrace area of Los Angeles, California. *Id*. at 636. After their car broke down, Moreno and Rodriguez proceeded toward the meeting on foot. *Id*. At approximately 7 p.m., a marked Los Angeles County Sheriff patrol car passed them as they walked down the street, made a U-turn, and pulled the car onto the curb in their path. *Id*. Two deputies got out of the car. *Id*. Deputy Banks, who was riding in the passenger seat, ordered Moreno and Rodriguez to approach. *Id*. It is undisputed, however, that the deputies learned that Moreno was

on parole and that he had an outstanding arrest warrant only after searching and detaining him. *Id*. at 637. Moreno was subsequently charged in state court with possession of a controlled substance. *Id*. Deputies Banks and Garcia testified against him at trial and Rodriguez testified for the defense. *Id*. Moreno was acquitted by a jury in 2002. *Id*. Moreno then brought this action under 42 U.S.C. § 1983, contending that the two deputies violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested and searched him without cause. *Id.* The officers claimed they were protected by qualified immunity. *Id*.

The qualified immunity framework has been long established by the Supreme Court. In 1982, the Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) established that governmental officials performing discretionary functions are immune from civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Wyatt v. Cole*, 504 U.S. 158, 166 (1992). This doctrine ensures that governmental officers' on-the-spot judgments are not evaluated with twenty-twenty hindsight. *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, the court must decide whether the facts that Petitioners have alleged make out a violation of a

constitutional right. *See Pearson v. Callahan*, 129 S.Ct. 808, 815-816 (2009). In some cases, the ruling on this first question may end the legal inquiry, and the case against the agent, for "[i]f no constitutional right would have been violated were the [factual] allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201 (citing *Stiegert v. Gluey*, 500 U.S. 226, 232 (1991)).

If Petitioners satisfy the first question, the court must decide whether the right at issue was "clearly established that the officer's conduct was unlawful in the circumstances of this case" at the time of the defendant's alleged misconduct. *Saucier*, 533 U.S. at 201. In other words, qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Pearson*, 129 S.Ct. at 816 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

In *Pearson*, the Supreme Court further held that following the rigid two-step test under *Saucier* would no longer be mandatory, and that courts should "be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the case at hand." *Id*. at 818. Thus, Petitioners are required to show that Hernández had constitutional rights, and that Agent Mesa violated those rights in order to avoid Agent Mesa's qualified immunity defense.

And, the contours of the right have to be clear enough that a reasonable officer would have understood that what he or she was doing violated that right. *Anderson v. Creighton*, supra. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment, the Court has to first undertake an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978); *see also Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (reasonable suspicion is simply a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found); *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (holding that "factual determinations bearing upon search and seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment").

It is undisputed that Hernández was an alien without presence in, or any substantial connection with, the territorial United States when he was killed. Accordingly, Hernández lacked any Fourth or Fifth Amendment constitutional rights that could overcome Agent Mesa's right to qualified immunity. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that an alien with no

voluntary attachment to the United States has no extraterritorial Fourth Amendment rights. *Id*. at 274-275. In *Verdugo-Urquidez*, the defendant's property was in Mexico when it was searched and the Court noted the defendant lacked any "previous significant voluntary connection with the United States," *id*. at 271, and had not accepted "societal obligations" in this country. *Id*. at 273. In so finding, the Court distinguished previous cases in which the Court held that aliens enjoy certain constitutional rights by holding that aliens only receive constitutional protections when they have come within the territory of the United States and develop substantial connections with this country. *Id*. at 271, 274-275. The substantial connections test requires that an alien have significant voluntary connection with the United States and have accepted some societal obligations. *Id*. at 271-273.

The *Verdugo-Urquidez* Court, in analyzing the applicability of the Fourth Amendment to aliens, recognized that the Court in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed.2d 1255 (1950), previously rejected the claim that aliens have Fifth Amendment rights. *Verdugo-Urquidez*, 494 U.S. at 269 (citing *Johnson v. Eisentrager*, *supra*). In *Eisentrager*, the Supreme Court held that the Petitioners, who were held by the United States in military custody in Germany, could not invoke the protections of the Fifth Amendment because they were aliens "beyond the territorial jurisdiction of any court of the United States." 339 U.S. at 778. The *Verdugo-Urquidez* Court

described *Eisentrager*'s rejection of extraterritorial application of the Fifth Amendment as "emphatic." *Verdugo-Urquidez*, 494 U.S. at 269. The Court wrote that at least since 1886, it had extended to the person and property of resident aliens important constitutional guarantees, but in extending constitutional protection beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within the territorial jurisdiction of the United States that gave the judiciary the power to act. *Eisentrager*, 339 U.S. at 771. As it relates to the Fourth and Fifth Amendments to the United States Constitution, there is clearly a territorial distinction between those who have rights and those who do not have rights. Given the Hernández' allegations, there is no dispute but that Hernández was not within the territory of the United States such that he might have enjoyed the protection of the Fifth Amendment. Hernández was an alien to the United States and there is no allegation that he ever applied for admission to the United States or entered the United States. Indeed, according to Hernández' original pleadings, he never stepped foot into the United States. Hernández was in the sovereign territory of the Republic of Mexico when the conduct about which Petitioners complain took place. As an alien to the United States, who was not within the territory of the United States, Hernández did not enjoy the protection of the Fifth Amendment.

Additionally, the district court concluded Hernández had no Fifth Amendment rights because the Fourth Amendment is the proper vehicle with which

to bring excessive force claims against the government. Relying on *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the district court noted "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 should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. Noting that not all encounters between law enforcement officers and citizens are seizures for purposes of the Fourth Amendment, the district court opined that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of the citizen." *United States v. Mask*, 330 F.3d 330, 336 (5th Cir. 2003) (internal quotations omitted). Because Agent Mesa's use of force against Hernández amounted to a seizure, and an "[a]pprehension by the use of deadly force is a seizure," *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011), the district court correctly held that Hernández failed to state a claim under the Fifth Amendment's Due Process Clause.

Getting back to the Petitioner's asserted conflict issue between *Moreno* and the lower court's holding in this case, Agent Mesa was responding to persons running up to and making contact with the border fence at the international border between Mexico and the United States. Agent Mesa detained one of the individuals whereas the remaining persons including Hernández began to throw rocks at him.

Petitioners' Petition for a Writ of Certiorari, page 5. In addition to the rock throwing, Hernández had been arrested twice before for alien smuggling and had been voluntarily returned to Mexico due to his juvenile status.

The circumstances surrounding *Moreno* and this case could not be more different. In *Moreno*, you have two men driving an automobile in the United States, who later began walking down the street, and were subsequently approached by police officers for no apparent reason. *Moreno*, 431 F.3d at 636. In this case, you have persons attacking a law enforcement officer, on an international border with rocks – the choice of weapon for alien smugglers.

When looking at the facts available to Agent Mesa at the time of his encounter with Hernández, using the aforementioned objective standard, it is plain to see that at the time of the shooting it could be reasonably assumed by Agent Mesa that Hernández was breaking the law as an alien smuggler.

Also, the Petitioner's argument that Hernández' status must be known to Agent Mesa prior to the encounter in order for qualified immunity protection to be afforded is flawed. Hernández' citizenship status is irrelevant for purposes of qualified immunity protection in this case. Both *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990) preclude aliens from Fourth and Fifth Amendment protections

unless the aliens have significant voluntary connections to the United States or are actually within the sovereign territory of the United States. Thus, it is Hernández' status at the time which governs the application of rights, not Agent Mesa's knowledge of Hernández' status at the time of the "seizure." Additionally, the rock throwing and alien smuggling activities of Hernández at the time of his interaction with Agent Mesa, places him in a circumstance totally different from that of Moreno. As such, a genuine split of authority does not exist.

When a defendant claims qualified immunity, and if no constitutional right has been violated, the inquiry ends and the defendant is entitled to qualified immunity. *See Linebrugger v. Abercia*, 363 F.3d 537, 540 (5th Cir. 2004). None of the cases cited by the Petitioner stand for the proposition that Hernández had any established constitutional rights.

CONCLUSION

The petition for certiorari should not be granted.

Respectfully submitted,

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