No. 15-118

In the Supreme Court of the United States

JESUS C. HERNANDEZ, *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 FOR *AMICUS CURIAE* DEAN ERWIN CHEMERINSKY IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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Dean Chemerinsky is a nationally prominent expert on constitutional law and civil liberties and is the author of eight books. These include his treatise *Constitutional Law: Principles and Policies*, and the casebook *Constitutional Law*. He has also written more than 200 articles in top law reviews, some of which discuss decisions and issues addressed in this brief. He frequently argues cases before the nation's highest courts, including this Court, and also serves as a commentator on legal issues for national and local media. In January 2014, *National Jurist* magazine named Dean Chemerinsky the most influential person in legal education in the United States.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for Petitioners and Respondent received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date, and both consented. No party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or his counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

If Petitioners' allegations are true, this case presents a horrific example of official wrongdoing – the killing, for no reason, of a Mexican child playing only a few feet from the United States border by a U.S. Border Patrol agent. Whether non-citizens like fifteen year-old Sergio Hernández enjoy constitutional protection from such abuse has been called "[o]ne of the most contentious topics in modern constitutional law." Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1867 (Nov. 2012). But it is at least agreed that the right at issue – freedom from unjustified deadly force – is of the highest possible order. It is also agreed that cases like his are bound to recur. Judges Jones and Prado disagreed strenuously on the legal landscape governing this case, but both acknowledged that the issues involved are important and will inevitably confront other federal courts. As Judge Prado put it:

> The facts in this case – though novel – are recurring, and similar lawsuits have begun percolating in the federal courts along the border. Ultimately, it will be up to the Supreme Court to decide whether its broad statements in *Boumediene* apply to our border with Mexico and to provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights…. [T]he law is currently unclear.

Hernandez v. United States, 785 F.3d 117, 134 (5th Cir. 2015) (*en banc*) (Prado, J. concurring); *see also id*. at 121 (Jones, J., concurring).

Given the interests at stake, the probability of recurrence, and the confusion surrounding whether constitutional rights apply to people in Hernández's circumstances, the Court should grant the petition. Without so much as mentioning this Court's landmark decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Fifth Circuit disposed of Petitioners' claim that Hernández's killing violated the Fourth Amendment by holding it precluded by *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *See Hernandez*, 785 F.3d at 119. But that decision absolved DEA agents from the need to obtain a warrant before searching the foreign homes of a Mexican drug lord; it did not consider anything like the very different facts of this case. Moreover, *Boumediene* adopts a functional, pragmatic approach to extraterritoriality, echoing Justice Kennedy's concurrence in *Verdugo-Urquidez*. The Court eschewed categorical line-drawing based on citizenship or *de jure* sovereignty in favor of analyzing three factors: the claimant's citizenship and status, the nature of the place where alleged violations occurred, and practical obstacles to vindicating the claimed right. *See* 553 U.S. at 766.

Since *Boumediene*, courts and judges within circuits have divided over whether the decision supports the extension of other constitutional rights to aliens in different settings, and whether, more specifically, *Verdugo-Urquidez* precludes aliens abroad from invoking the Fourth Amendment despite the more recent teaching of *Boumediene*. Petitioners' positions on these questions have strong support among scholars; indeed, this case itself has already been the

subject of academic attention.[2] The Court should take this opportunity to clarify that *Boumediene* applies outside the limited context of the Suspension Clause, that it governs at least some aliens' Fourth Amendment claims together with *Verdugo-Urquidez*, and that the pragmatic considerations discussed in *Boumediene* support application of the Constitution in the circumstances of this case. Above all, it should forcefully repudiate the dubious constitutional regime endorsed by the Fifth Circuit – a free-fire zone where children at play steps away from the United States have lesser protection than aliens imprisoned as our country's most dangerous enemies.

ARGUMENT

I. The Court Should Grant the Petition to Clarify the Applicability of *Boumediene* to Constitutional Claims Other Than Those Involving the Suspension Clause

This Court's decision in *Boumediene* appears to reach beyond habeas corpus to establish a framework for analyzing other constitutional claims that arise extraterritorially. As a result, the panel opinion below and other courts have applied it to claims other than those based on the Suspension Clause. Leading scholars also read *Boumediene* this way. Yet some courts continue to hold that *Boumediene* is strictly

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[2] *See, e.g.,* Eva Bitran, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229 (Winter 2014); Guinevere E. Moore and Robert T. Moore, *The Extraterritorial Application of the Fifth Amendment: A Need For Expanded Constitutional Protections*, 46 ST. MARY'S L. J. 1 (2014).

confined to Suspension Clause claims and is otherwise a constitutional dead letter. The Court should take this opportunity to resolve this conflict and make clear that *Boumediene's* functional standard governs non-habeas claims.

Boumediene does not appear to limit itself to disputes over the Suspension Clause. Instead, it speaks broadly of constitutional rights in general. For example, the Court introduced its discussion of the government's argument based on Cuban sovereignty over Guantanamo by observing: "The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." 553 U.S. at 755; *see also id*. at 764 ("Nothing in [*Johnson v*.] *Eisentrager* [339 U.S. 763 (1950)] says 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") (emphasis added). The Court also drew support from cases involving provisions other than the Suspension Clause, such as the Insular Cases and *Reid v. Covert*, 354 U.S. 1, 18-19 (1957), which holds that the Fifth and Sixth Amendments govern U.S. trials of American citizens held overseas. *See* 553 U.S. at 756-62.

Consequently, the panel opinion below rejected the district court's view that *Boumediene* "had no bearing on this case because it did not specifically address 'the Fourth Amendment right against unreasonable searches and seizures.'" 757 F.3d at 262. On the contrary, the panel concluded that, "[t]hough

Boumediene's underlying facts concerned the Suspension Clause, its reasoning was not so narrow… Our extraterritoriality analysis must therefore track *Boumediene's*." *Id*. Judge Prado reiterated the point in his concurrence to the court's *en banc* opinion, criticizing the opposite view expressed by four other members of the court:

> Citing *Eisentrager* and *Verdugo-Urquidez,* [Judge Jones'] concurrence asserts that the Supreme Court has foreclosed the question before our Court. This uncomplicated view of extraterritoriality fails to exhibit due regard for the Court's watershed opinion in *Boumediene,* which not only authoritatively interpreted these earlier cases but also announced the bedrock standards for determining the extraterritorial reach of *the Constitution* – not just the writ of habeas corpus.

Hernandez, 785 F.3d at 136 (Prado, J., concurring, emphasis in original).

Other courts have similarly applied *Boumediene* outside the context of the Suspension Clause. In *Ibrahim v. Dept. of Homeland Security*, the Ninth Circuit scrutinized First and Fifth Amendment claims stemming from placement on a no-fly list according to the dictates of *Boumediene* as well as *Verdugo-Urquidez*. 669 F.3d 983, 996-97 (9th Cir. 2012). Likewise, the Seventh Circuit recognized *Boumediene's* applicability to an alien's assertion that he enjoyed Sixth Amendment rights despite having fled the United States. *See United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008) (*Boumediene* "cautions against broad pronouncements about whether the right to a

speedy trial exists in Wanigasinghe's case"), *cert. denied*, 556 U.S. 1112 (2009); *accord Bayo v. Chertoff*, 535 F.3d 749, 754 (7th Cir. 2008) (applying *Boumediene* to alien's claim regarding visa waiver: "*Boumediene* suggests that [the alien] enjoyed some constitutional protections against arbitrary government action"), *vacated on other grounds, Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (*en banc*); *United States v. Hayes*, __ F. Supp. 3d __, 2015 WL 1740830 at * 2 (S.D.N.Y. March 20, 2015) (extending Fifth Amendment rights to alien defendant under *Boumediene* given relevant "objective factors and practical concerns"). Even before *Boumediene*, the Second Circuit relied on Justice Kennedy's concurrence in *Verdugo-Urquidez* to hold that the Fifth Amendment covered Haitian immigrants housed at Guantanamo. *See Haitian Ctr. Council, Inc. v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992), *vacated as moot*, 509 U.S. 918 (1993).

Several leading commentators concur. Harvard Law School Professor Gerald Neuman, perhaps the foremost academic authority on the extraterritorial application of the Constitution, writes: "Although the holding of *Boumediene* concerned the Suspension Clause, Justice Kennedy described his functional approach as an overall framework derived from precedents involving a variety of constitutional rights." Gerald Neuman, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 CORNELL L. REV. 1441, 1458 (Sept. 2014). He and many other scholars in the field conclude that *Boumediene* therefore governs other constitutional claims and now generally sets the terms for analyzing the extraterritorial application of constitutional

provisions.[3] As Second Circuit Judge Jose Cabranes concluded after surveying the full history of decisions exploring extraterritoriality: "Although some Justices have written in favor of a categorical approach, the trend in cases decided in the last half century strongly suggests an aversion to a categorical rule in favor of a judicially administered, multifactored analysis of the right invoked and the specific circumstances of the case." Jose A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application*

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[3] *See, e.g.*, Gerald Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 282 (Jan. 2009) (*Boumediene* "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. The lower court cases need to be rethought"); Bitran, *supra,* at 231 (*Boumediene*'s applicability beyond Guantánamo "finds support in the academy"); Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1411-12 (Oct. 2014) (*Boumediene* generally sets terms by which aliens "can claim the benefits of… constitutional rights, regardless of their location"); Joshua Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas and Due Process*, 14 U. PA. J. CONST. L. 719, 743 (Feb. 2012) (argument that *Boumediene's* "impracticable and anomalous" test will govern other claims "captured much of the scholarly emphasis"); Stephen Vladek, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2150 (July 2009) ("doubt[ing]" *Boumediene* can be "pigeonhole[d]… as a Guantanamo-specific (or, at least, War on Terrorism specific) decision"); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 309 (Summer 2011) ("government's attempt to cabin *Boumediene*" to its facts "unlikely to succeed").

of U.S. Constitutional Law, 118 YALE L. J. 1660, 1697 (June 2009).

Nonetheless, confusion persists because some courts have read *Boumediene* as narrowly limited to Suspension Clause claims. For example, the District of Columbia Circuit held that *Boumediene* does not authorize extending Fifth and Eighth Amendment rights to British citizens alleging mistreatment at Guantanamo. *See Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir.) ("*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause"), *cert. denied*, 558 U.S. 1091 (2009); *accord Al-Bahlul v. United States*, 792 F.3d 1, 71 (D.C. Cir. 2015) (Henderson, J., dissenting) ("This Court has declined to extend *Boumediene* beyond its narrow holding"); *Doe v. United States*, 95 Fed. Cl. 546, 570 (Fed. Cl. 2010) (rejecting applicability of Fifth Amendment to Iraqi citizen: "Nothing in *Boumediene* suggests that the Court intended its holding to broadly apply to the Bill of Rights or to the takings clause, in particular"). Judges Jones, Smith, Clement and Owen also expressed this view in their concurrence below: "*Boumediene* was expressly limited to holding that the Suspension Clause . . . applies to combatants detained [at] Guantanamo." *Hernandez*, 785 F.3d at 126.

The Court should therefore grant the petition to decide whether the functional, non-formalist test for extraterritorial applicability set forth in *Boumediene* applies to constitutional claims other than those based on the Suspension Clause.

II. The Court Should Grant the Petition to Clarify How *Boumediene* and *Verdugo-Urquidez* Govern Fourth Amendment Claims That Arise Extraterritorially

A second, more specific question concerns the interplay of *Boumediene* and *Verdugo-Urquidez*. The *en banc* decision's exclusive reliance on *Verdugo-Urquidez* – as if *Boumediene* had never been decided or has no relevance to this case – contradicts the approach taken by other courts and a significant body of scholarship. These show that the two decisions can operate in concert, especially under the unique but increasingly common circumstances present here.

Unlike the *en banc* decision, the panel's opinion recognized that *Verdugo-Urquidez* should be applied "in light of *Boumediene's* general functional approach," not in a vacuum. *Hernandez*, 757 F.3d at 266. Moreover, reconciling the two decisions "is not an impossible task… because the *Verdugo–Urquidez* Court relied on more than just the text of the Fourth Amendment to reach its holding. It relied on the history of the Amendment, prior precedent, and practical consequences – all factors that we must consider after *Boumediene*." *Id.* (citations omitted). The panel examined both whether Hernández had an adequate voluntary connection to this country and whether certain "practical considerations" supported his Fourth Amendment claim. *Id.* at 266-67.

The Ninth Circuit took a similar approach in *Ibrahim*. After *Boumediene*, that court recognized, "the right of an alien outside the United States to assert constitutional claims is based on 'objective factors and

practical concerns' rather than 'formalism.'" 669 F.3d at 995 (quoting *Boumediene*, 553 U.S. at 764). The *Ibrahim* court rejected "a bright line 'formal sovereignty-based test,'" holding: "The law that we are bound to follow is, instead, the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo–Urquidez*." *Id*. at 997.

One other court has divided on the question. *See United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013). Faced with an Iraqi translator's claim that a court martial violated his Fifth and Sixth Amendment rights, a majority of the Court of the Armed Forces, like the *en banc* court below, relied on *Verdugo–Urquidez* and *Eisentrager* to reject the claim, ignoring *Boumediene*. *See id*. at 266-69. But Chief Judge Baker reached the opposite conclusion, since "*Boumediene* appears to significantly limit the blanket reach of both *Verdugo–Urquidez* and *Eisentrager* in favor of [a] more contextual and nuanced view." *Id*. at 278 (Baker, C.J., concurring). Judge Dennis expressed much the same opinion in this case. *See Hernandez*, 785 F.3d at 133 (Dennis, J., concurring).

Commentators have also widely concluded that *Verdugo–Urquidez* and *Boumediene* should be read together, refining the more formalistic approach taken by Justice Rehnquist's opinion in *Verdugo-Urquidez* alone. As Brigham Young Law School Professor D. Carolina Nunez summarizes: "Together, *Verdugo* and *Boumediene* suggest that strict territoriality no longer exclusively describes the Supreme Court's distribution of important constitutional rights. After *Boumediene*, *Verdugo* must be interpreted to adopt a post-territorial

approach to the Fourth Amendment, one that rejects presence within the United States as sufficient for the attachment of rights." D. Carolina Nunez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 134-35 (2011); *see also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1015-19 (June 2009) ("impracticable and anomalous test" now central to extraterritoriality questions); Neuman, *The Extraterritorial Constitution*, *supra* at 261 ("*Boumediene* confirms and illustrates the current Supreme Court's 'functional approach' to the extraterritorial application of constitutional rights. The Court rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights").

Judge Prado was correct that this Court should now "provide clarity" to those charged with reconciling this Court's extraterritoriality decisions, particularly *Verdugo–Urquidez* and *Boumediene*. *Hernandez*, 785 F.3d at 134. "Until the Supreme Court better articulates the threshold for applying the functional approach, lower courts are likely either to be groping case by case, or to rely on crude categorizations that the Court has rejected." Neuman, *Extraterritoriality*, *supra*, at 1467; *accord* Lobel, *supra* at 308 (*Boumediene's* "import and application remain unclear").

III. The Court Should Grant the Petition to Clarify How to Evaluate Recurring Instances of Deadly Force at the Border

Lastly, the Court should grant certiorari to elucidate the Fourth Amendment's applicability to the recurring scenario of American law enforcement officers using deadly force at the U.S. border. Unfortunately, Hernández's shooting is not an isolated incident. *See* Petition at 7-8. Border Patrol agents have killed dozens of Mexican nationals in the last several years on or near the border in what have been called "highly questionable" circumstances. *Id.* at 7; *see also* Moore and Moore, *supra*, at 3 (describing incidents). Worse, the agency's internal culture may resist outside inquiry and effective self-discipline, increasing the likelihood of further incidents. *See id*. Fifth Circuit judges on opposite sides of the *en banc* decisions below agree that the tragic facts here will repeat themselves and that courts will inevitably face similar additional lawsuits. *See Hernandez*, 785 F.3d at 134 (Prado, J., concurring); *id*. at 121 (Jones, J. concurring). The Court should not wait any longer to offer necessary guidance.

Petitioners have a strong argument under *Verdugo-Urquidez* and *Boumediene* that Hernández enjoyed Fourth Amendment protection from excessive force. When holding that the amendment did not cover DEA searches of the Mexican homes of "one of the leaders of a large and violent organization in Mexico that smuggles narcotics," *Verdugo-Urquidez*, 494 U.S. at 262, the Court did not purport to settle constitutional questions surrounding the use of deadly force by other personnel in a completely different setting – standing

inside the country facing unarmed teenagers who regularly play a few feet from U.S territory. *See* Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(h) at 448 (5th ed. 2012) ("Thus, the *most* that can definitely be concluded from *Verdugo-Urquidez* is that the Fourth Amendment's warrant clause is inapplicable to a search conducted under the circumstances of that case" (emphasis in original)).

Hernández was not an American citizen, but his status as a Juarez resident who often played very close to the border placed him in range of an area effectively controlled by the United States, at least for purposes of law enforcement. That is, U.S. agents continuously monitor and routinely project force just over the border where Hernández was killed in order to secure the area. *See, e.g., Hernandez*, 757 F.3d. at 270 ("The Chief of the U.S. Border Patrol explains that U.S. border security policy 'extends [the nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many'"). The "objective degree of control" matters more than *de jure* sovereignty when deciding extraterritoriality, and the United States exerts substantial *de facto* control in the place where Hernández was fatally shot. *Boumediene*, 553 U.S. at 754-55.

As Petitioners note, a district court in Arizona recently confronted the task of applying both *Verdugo-Urquidez* and *Boumediene* to facts almost indistinguishable from those here, and it concluded that the Fourth Amendment applies. *See Rodriguez v. Swartz*, No. 4:14-CV-02251 (D. Ariz., July 9, 2015) (Petitioners' Appendix 153a). Although the boy's

Mexican citizenship cut against the attachment of constitutional rights, the court nonetheless found that, unlike a Mexican drug lord, his "status as a civilian engaged in a peaceful activity weighs in favor of granting him protection." *Id*. at 13. The boy had relatives in the United States and by "[l]iving in such proximity to this country, [he] was likely well-aware of the United States' (and specifically the U.S. Border Patrol's) *de facto* control and influence over Nogales, Sonora, Mexico." *Id.* The Border Patrol's allegedly extensive, quasi-military control over the area immediately adjacent to the border further supported plaintiff's claim that the Fourth Amendment has some level of applicability under the framework set by *Verdugo-Urquidez* and *Boumediene*. *Id.* at 14. The district court's thoughtful, considered analysis of the question, taking both decisions into account, contrasts sharply with the *en banc* court's brief reference to *Verdugo-Urquidez* as dispositive despite the major factual differences between that case and Hernández's, and despite the later decision in *Boumediene*.

Nor do pragmatic concerns make applying the Fourth Amendment here "impracticable and anomalous." *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). Another key difference between this case and *Verdugo-Urquidez* is the role of the warrant requirement. "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 in Mexico as it does in this country." *Id*. Here though, the separate Fourth Amendment

command that U.S. law enforcement personnel shoot only when they or others face serious and imminent danger, *see Tennessee v. Garner*, 471 U.S. 1, 11 (1985), requires no cooperation with foreign officials or modification of American or foreign legal procedure. It only mandates that agents follow the same elementary law enforcement rules when dealing with everyone they encounter, not just those standing on the American side of the border.

This is undoubtedly why, far from causing "friction with another country," *Hernandez*, 757 F.3d at 262, applying the Fourth Amendment here is welcomed by Mexico and would facilitate rather than harm international relations. *See id*. at 270 ("In fact, the Mexican government requests that U.S. government actors are held accountable in U.S. courts for actions on Mexican territory"). Moreover, permitting Petitioners' claims to proceed also poses no threat to "sophisticated systems of surveillance" on the border. *Hernandez*, 757 F.3d at 124. Applying the Fourth Amendment is always context-specific, balancing the intrusion into a particular claimant's autonomy against specific government interests. *See Scott v. Harris*, 550 U.S. 372, 383 (2007). *This* case involves only the episodic use of deadly force by isolated law enforcement officers, just as in the United States – not policies or tactics broadly devised by the government to further national security and immigration enforcement though monitoring or otherwise.

Lastly, permitting Petitioners' Fourth Amendment claims to proceed serves a crucial interest that animated the Court in *Boumediene*: that the executive not be permitted to "switch the Constitution on or off at

will" without constraint from the judicial branch. 553 U.S. at 765. "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Id*. Yet the Fifth Circuit's decision creates a free fire zone only feet from the United States proper where law enforcement officers may literally shoot at will, at least as far as the Constitution is concerned, with no input from the judiciary. This is exactly the opposite of what would happen if the same officers simply turned around and fired in the other direction. As the panel recognized, "a strict territorial approach would allow agents to move in and out of constitutional strictures, creating zones of lawlessness." *Hernandez*, 757 F.3d at 271.

This cannot be what the Constitution contemplates. If "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty," *Boumediene*, 553 U.S. 739, freedom from sudden and unjustified death at the hands of government agents is even more essential. Just as the United States cannot simply kill aliens detained inside the United States for no reason, it cannot do so feet away from the border while agents stand safely on U.S. soil. *See, e.g.*, Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 716-17 (2005) (quoting acknowledgment of Deputy Solicitor General Kneedler that detained aliens have constitutional protection from extrajudicial killing in oral argument of *Clark v. Martinez*, 543 U.S. 371 (2005)).

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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