No. 15-16410

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELI RODRIGUEZ, individually and as the surviving mother and personal representative of J.A.,

Plaintiff-Appellee,

v.

LONNIE SWARTZ, Agent of the U.S. Border Patrol,

Defendant-Appellant

Appeal from the United States District Court
District of Arizona, Tucson
D.C. No. 4:14-cv-02251-RCC

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CORPORATE DISCLOSURE STATEMENT

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1.) For non-governmental corporate parties please list all parent corporations:

None

2.) For non-governmental corporate parties please list all publicly held companies that hold 10% of more of the party's stock: None

Dated: April 29, 2016

Respectfully Submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

U.S. Border Patrol Agent Swartz brutally killed J.A., an unarmed 16-year-old boy, shooting him approximately ten times, mostly in the back, without any justification. Although Agent Swartz was on the United States side of the border when he shot through the fence and killed J.A., he contends that the U.S. Constitution does not apply to his actions because J.A. was a Mexican citizen on the Mexican side of the border when he was killed. More particularly, Agent Swartz argues that J.A. was not part of our "national community" and it was therefore constitutionally permissible to kill J.A. The Court should reject that argument and affirm the district court.

JURISDICTIONAL STATEMENT

This Court has interlocutory jurisdiction to review the denial of qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), but not to review *Amicus* United States' separate claim that remedy is unavailable in this case under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Section III.A. (discussing *Bivens* claim).

STATEMENT OF THE ISSUES

1. Whether the Fourth Amendment applies where a Border Patrol agent, standing on United States soil, shoots through the border fence and unjustifiably kills an unarmed 16-year-old Mexican boy on Mexican soil.

2. Whether the district court correctly denied Agent Swartz qualified immunity where at the time of the shooting Agent Swartz did not know whether J.A. was a U.S. citizen or had connections to the United States and, in any event, the shooting was objectively unreasonable and prohibited by criminal law, international law, and basic morality.

3. Whether the district court's ruling can be upheld under the Fifth Amendment if the Fourth Amendment does not apply.[1]

[1] *Amicus* United States attempts to insert a new issue into the appeal: whether a *Bivens* remedy is available. That issue is not properly before the Court. *See* Section III (explaining that the issue was waived by Agent Swartz and that the Court would in any event lack jurisdiction to decide the issue).

STATEMENT OF THE CASE

I. THE COMPLAINT'S ALLEGATIONS

1. The young boy at the center of this case, J.A., was a Mexican citizen living in the border town of Nogales, Sonora, Mexico. On the night of October 10, 2012, J.A. went to play basketball in his neighborhood with friends and later walked to Calle Internacional, a main pedestrian thoroughfare that runs alongside and parallel to the border fence separating Nogales, Mexico from Nogales, Arizona. ER 52 ¶ 2 (First Amended Complaint); ER 53 ¶ 9. At approximately 11:30 p.m., Border Patrol Agent Swartz, standing on the U.S. side of the border, began shooting through the fence at J.A. ER 53 ¶ 10. Agent Swartz hit J.A. approximately ten times, mostly in the back. ER 54 ¶ 12. J.A. collapsed on the spot, where he was found dead moments later. *Id.* ¶ 11. He was 16-years old and died four blocks from his home. ER 52 ¶ 1, 55 ¶ 17.

2. J.A. was not armed and presented no threat to Agent Swartz. In fact, Agent Swartz was behind the steel border fence, well above where J.A. was standing. On the U.S. side, the border fence sits on top of a cliff and looks down on the Mexican side. At the spot where J.A. was shot, the cliff is roughly 30 feet away and the fence rises approximately 50 feet high above the ground on the Mexican side. ER 54 ¶ 15 (noting that the cliff is

approximately 25 feet high and the fence is another 25 feet tall). *See* SER 136 (map and photo of scene, appended to Complaint). The fence is made of 6.5 inch steel beams separated by 3.5 inch gaps. ER 54 ¶ 15.

3. At the time of the shooting, Agent Swartz did not know whether J.A. was a U.S. citizen or whether he had significant contacts with the United States. ER 55 ¶ 17. But, like other residents of Nogales, Mexico, J.A. did have close ties to the United States. Among other things, J.A.'s grandmother and grandfather live just across the border in Arizona and were lawful permanent residents of the United States at the time of the shooting; they are now U.S. citizens. *Id*. J.A.'s grandmother frequently travelled the short distance across the border to J.A.'s home to take care of him while his mother was away for work. ER 55 ¶ 17.

That J.A. had connections to the United States is not surprising given the history of Nogales and the fact that he lived only four blocks from the border. Indeed, the interconnected nature of the region and the fluidity of the population are well known. As the district court noted, the area is sometimes called "'ambos Nogales,' or 'both Nogales,' referring to the adjacent towns of Nogales, Arizona and Nogales, Sonora—once adjacent cities flowing into one-another, now divided by a fence." ER 15.

4. The Nogales area also has another feature that distinguishes it from other areas of Mexico: the outsized and controlling presence of the U.S. Border Patrol. ER 55 ¶ 21. U.S. Border Patrol agents not only control the U.S. side of the fence, but, through the use of force and the assertion of authority, also exert control over the immediate area on the Mexican side. *Id.*

United States control of the Mexican side of the border in Nogales is apparent, longstanding, and well understood by the residents of Nogales. ER 55 ¶ 22. *See also* ER 15 ("Living in such proximity to this country, J.A. 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.").

A U.S. surveillance camera, with a clear line of sight over Calle Internacional, is mounted approximately 150 feet from the location where J.A. was shot. Border Patrol agents regularly use guns and other weapons, including military equipment and surveillance devices, across the border. ER 55-56 ¶ 23. Border Patrol agents have opened fire into Nogales from the U.S. side on prior occasions and are known to launch non-lethal devices, such as pepper spray canisters, into Nogales neighborhoods from the U.S. side of the border fence. *Id.*

By shooting at individuals on the Mexican side and engaging in other actions, the Border Patrol exercises substantial control over the area, especially in the immediate vicinity of the border fence (the area where J.A. was shot). *Id.* In addition, U.S. Border Patrol agents are authorized to be on Mexican soil to conduct pre-inspection of those seeking admission to the United States. ER 56 ¶ 24. U.S. Border Patrol helicopters also fly in Mexican airspace near the border. *Id.* As the former Chief of the U.S. Border Patrol once acknowledged, 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." *Id.*

5. Plaintiff Araceli Rodriguez, J.A.'s mother, brought this action against Agent Swartz for the killing of her teenage son. ER 53 ¶¶ 6-7. She alleged that the unjustified use of deadly force violated the Fourth and Fifth Amendments. ER 59-60 ¶¶ 35-42.

II. THE DISTRICT COURT'S DECISION

Agent Swartz moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), and the district court thus accepted as true the allegation that Agent Swartz had killed J.A. without justification. Agent Swartz argued that the case should be dismissed on the ground that the Fourth and Fifth Amendments do not apply extraterritorially. Specifically,

he argued that neither the Fourth nor the Fifth Amendment prohibited him from killing J.A. because J.A. was a Mexican national on Mexican soil and had insufficient connections to the United States to warrant constitutional protection. He further argued that, in any event, he was entitled to qualified immunity because it was unsettled at the time of the shooting whether those Amendments applied to J.A.

Applying *Boumediene v. Bush*, 553 U.S. 723 (2008), and *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012), the district court concluded that J.A. had significant connections to the United States and that there was no practical reason why the Fourth Amendment should not be applied in this case—particularly because Mexico wished for the suit to go forward and agents were already trained not to use unjustified deadly force on either side of the border. ER 15, 17-18 (noting that, among other things, J.A. was "a civilian foreign national" but "within the U.S.'s small-arms power to seize," and that J.A. "had strong familial connections to the United States"). The court concluded:

> At its heart, this is a case alleging excessive deadly force by a U.S. Border Patrol agent standing on American soil brought before a United States Federal District Court tasked with upholding the United States Constitution.

ER 18.

Turning to Agent Swartz's argument for qualified immunity, the court observed that this was "an 'obvious case' where it is clear that Swartz had no reason to use deadly force against J.A." and that Agent Swartz "was an American law enforcement officer standing on American soil and well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike." ER 21-22. The court did not hold that it was settled at the time of the shooting that the Fourth Amendment applied to a Mexican national like J.A. Instead, the court ruled narrowly that, in this case, Agent Swartz could not justify his actions on the basis of J.A.'s citizenship and connections to the United States because he only "learned of J.A.'s status as a non-citizen *after* the violation" and thus could not retroactively justify his conduct on the basis of that later-discovered fact. ER 21-22 (citing *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005)).

Finally, the court dismissed the Fifth Amendment claim without actually deciding whether the Fifth Amendment applied extraterritorially. Instead, the court held that this case was more properly analyzed under the Fourth Amendment and dismissed the Fifth Amendment claim on that ground alone. ER 19.

SUMMARY OF ARGUMENT

I. THE FOURTH AMENDMENT APPLIES HERE.

The Fourth Amendment's application to this case is governed by the functional "impracticable and anomalous" test reaffirmed in *Boumediene*, 553 U.S. 723. Contrary to Agent Swartz's argument, J.A.'s connections to the U.S. are not dispositive, but only one of several factors to consider under this test. *Ibrahim*, 669 F.3d 983.

Under the "impracticable and anomalous" test, Agent Swartz's conduct is subject to the Fourth Amendment. Applying the Fourth Amendment here would not create practical difficulties or anomalous results: Agent Swartz's conduct was murder, Mexico wishes for the suit to go forward, and Agent Swartz himself does not contend that the Fourth Amendment permits the unlawful cross-border shooting of a U.S. citizen or Mexican national with significant United States connections. Moreover, even if J.A.'s connections to the United States were dispositive, those connections are sufficient to warrant constitutional protection from deadly force. *See* Section I.

II. QUALIFIED IMMUNITY SHOULD BE DENIED.

The Fourth Amendment clearly prohibits an officer from killing an unarmed civilian without justification. Agent Swartz nonetheless contends that he is entitled to qualified immunity because it was unsettled at the time whether the Fourth Amendment applied to the unlawful killing in Mexico of a Mexican citizen like J.A. But Agent Swartz cannot claim immunity based on J.A.'s citizenship and connections to the U.S. because he only learned of those facts after the shooting. *Moreno*, 431 F.3d at 641. Moreover, and apart from what Agent Swartz knew at the time about J.A.'s citizenship, immunity is unwarranted because the unjustified shooting was objectively unreasonable and universally prohibited by criminal law, international law, and basic morality. *See* Section II.

III. THE *BIVENS* ARGUMENT SHOULD BE REJECTED.

The United States, as *Amicus*, raises an entirely new argument for the first time in this case—that a *Bivens* remedy is unavailable here. But as Agent Swartz has explicitly conceded that a *Bivens* remedy is available, the *Bivens* issue has been waived. And, even if the argument had not been waived, the Court would lack jurisdiction to reach it in an interlocutory appeal. In any case, *Amicus*' argument fails on the merits, because an excessive force claim against law enforcement falls within the heartland of

Bivens and there are no special factors outweighing the need for a remedy. *See* Section III.

IV. THE FIFTH AMENDMENT PROVIDES AN ALTERNATIVE BASIS TO AFFIRM.

The Fourth and Fifth Amendments are alternative theories in this case for recovering the same damages against the same defendant for the same injuries. Plaintiff-Appellee can therefore defend the ruling below on the alternative basis of the Fifth Amendment without cross-appealing. And, contrary to Agent Swartz's argument, the Fifth Amendment applies to excessive force claims where the Fourth Amendment is inapplicable. Thus, if the Court were to find that the Fourth Amendment is inapplicable here, it should affirm the district court's order on the alternative Fifth Amendment ground. *See* Section IV.

STANDARD OF REVIEW

On a motion to dismiss, the Court accepts the complaint's non-conclusory factual allegations as true and draws all reasonable inferences in favor of Plaintiff-Appellee. The legal issues are reviewed de novo. *Preschooler II v. Clark Cty. Sch. Bd. of Trustees*, 479 F.3d 1175, 1179-80 (9th Cir. 2007).

ARGUMENT

I. THE FOURTH AMENDMENT APPLIES TO AGENT SWARTZ'S CONDUCT.

The Fourth Amendment applies to Agent Swartz's actions under the functional "impracticable and anomalous" test reaffirmed in *Boumediene*, 553 U.S. 723. Agent Swartz's argument that J.A.'s connections to the United States are dispositive is wrong. Rather, as this Court made clear in *Ibrahim*, 669 F.3d 983, connections to the United States can sometimes be an important factor in assessing extraterritoriality, but the extent of a noncitizen's connections is only one of many factors to be considered under *Boumediene*'s functional approach. In any event, on the facts of this case, the Fourth Amendment would apply under either the *Boumediene* approach or if the focus were only on J.A.'s connections to the U.S.

A. The Extraterritorial Application Of Constitutional Rights Is Determined With A Functional Test: Whether Judicial Enforcement Of A Right Would Be Impracticable Or Anomalous.

1. In *Boumediene*, the Supreme Court held that the Suspension Clause applied to noncitizens detained as enemy combatants at Guantanamo, and rejected the government's bright-line rule that the Constitution is inapplicable to noncitizens in areas where the United States lacks legal sovereignty. 553 U.S. at 755-72. The Court stressed that there are no

categorical rules for determining when the Constitution applies extraterritorially. Rather, courts must use a commonsense, functional approach based on objective factors and ask whether application of the Constitution in a *particular situation* would be "impracticable and anomalous." *Id*. at 759-60 (internal quotation marks omitted).

Importantly, the Court made clear that the "impracticable and anomalous" test is one of general applicability, and is not limited solely to determining the extraterritorial reach of the Suspension Clause. The Court repeatedly stressed that it was not devising a new extraterritoriality test that was specific to the Suspension Clause, but was simply reaffirming the functional test that the Court has historically used to determine the extraterritoriality of a wide array of constitutional provisions in a variety of contexts. *Id.* at 755 (beginning its analysis by observing that in many prior cases the Court had discussed "the Constitution's extraterritorial application").

To that end, the Court surveyed its cases over the past century and explained that it had consistently rejected categorical rules in the extraterritoriality context. *Id.* at 755-64. The Court noted, for example, that in the so-called Insular Cases from the early 1900s, it had used a "functional approach" to determine the circumstances under which various

constitutional provisions would apply to the newly-acquired U.S. Territories. *Id*. at 756-59, 764 (emphasizing the various practical realities). The Court further observed that "a half century" after the Insular Cases, it had continued to look to "practical considerations" to determine the extraterritorial reach of the Constitution. *Id.* at 759-62 (discussing *Reid v. Covert*, 354 U.S. 1 (1957), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). *See also Ibrahim*, 669 F.3d at 995.

Summing up its decisions addressing claims under various constitutional provisions over the past century, the *Boumediene* Court noted that the "common thread" was "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764.

2. Agent Swartz contends that the *Boumediene* "impracticable and anomalous" test does not apply here for three reasons. Swartz Br. 13-15. *See also* U.S. Br. 9-12 (making similar arguments). Agent Swartz's first argument—that the *Boumediene* functional test is limited to determining the reach of the Suspension Clause—is foreclosed by this Court's decision in *Ibrahim*, which expressly applied the *Boumediene* functional test to determine whether the *First and Fifth Amendments* applied extraterritorially. 669 F.3d at 995 (stating that, after *Boumediene*, courts must apply a

"'functional approach' rather than a bright-line rule" to questions of extraterritoriality) (quoting *Boumediene*, 553 U.S. at 764). Moreover, even apart from *Ibrahim*, Agent Swartz's argument is inconsistent with *Boumediene* itself, which derived the "impracticable and anomalous" test from cases involving a variety of constitutional provisions. *Boumediene*, 553 U.S. at 759-64 (discussing history of the test).

Agent Swartz's second argument—that *Boumediene* did not repudiate the voluntary connections approach from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (plurality opinion)—is wrong because, as explained below, the test garnered the votes of only four Justices and was therefore not controlling. Moreover, to the extent there was any confusion about the continuing relevance of the plurality's voluntary connections test, *Boumediene* subsequently made clear that one's connections to the United States are only one factor to be considered under the "impracticable and anomalous" test.

The plurality opinion in *Verdugo-Urquidez* offered two reasons why the Fourth Amendment's warrant requirement did not apply in that case. First, it reasoned that because the Fourth Amendment applies by its terms to "the people"—rather than to all persons—its reach was limited to those with a "significant voluntary connection" to the United States. 494 U.S. at 265,

269, 271. Second, the plurality found that it would be impracticable to apply the warrant requirement to a search in Mexico. *Id*. at 274-75. But Justice Kennedy, who supplied the crucial fifth vote, adopted only the second reason.

Justice Kennedy stated that he could not "place any weight on the reference to 'the people.'" *Id*. at 276 (Kennedy, J., concurring). *See also id*. (stressing that "these words do not detract from" the Fourth Amendment's "force or its reach" and suggesting that the wording of the Amendment be "interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it"). Thus, rather than applying the plurality's voluntary connections test, he applied the "impracticable and anomalous" test from the Court's prior cases and concluded that it would not have been feasible to apply the warrant requirement in that case. *Id*. at 277-78 (stating that the "conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous").

Moreover, even if there were the slightest doubt about the narrow grounds on which Justice Kennedy had concurred in *Verdugo-Urquidez*, he put those to rest in his majority opinion for the Court in *Boumediene*. Justice Kennedy's *Boumediene* opinion, in surveying a hundred years of

extraterritoriality cases, does not cite the *Verdugo-Urquidez* plurality opinion a single time. The Court instead cites only to Justice Kennedy's own concurrence in *Verdugo-Urquidez*, doing so twice. And, critically, both citations to his *Verdugo-Urquidez* concurrence were in support of the functional extraterritoriality test.

One of the citations is to a portion of his concurrence where he explains that the Court's 1950s extraterritorial decision in *Reid v. Covert* was based on "practical considerations" and *not* on citizenship status. *Boumediene*, 553 U.S. at 761-62. The other citation is even more telling:

> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 . . . (1990) (KENNEDY, J., concurring) (applying the "impracticable and anomalous" extraterritoriality test in the Fourth Amendment context).

Boumediene, 553 at 759-60. In choosing this parenthetical, Justice Kennedy's *Boumediene* opinion could not have been clearer about the grounds on which he had concurred in *Verdugo-Urquidez*—and the Court could not have been clearer about which rationale for the outcome in *Verdugo-Urquidez* remains good law. Thus, contrary to Agent Swartz's argument, the voluntary connections test was never adopted by the full Court, and in any event, was repudiated in *Boumediene*. *See also Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (likewise citing only to Justice Kennedy's concurrence in *Verdugo-Urquidez*).

Agent Swartz's final argument—that *Boumediene* did not "overrule" *Verdugo-Urquidez*—is true but irrelevant. Agent Swartz conflates two distinct aspects of *Boumediene*: the enunciation of the proper extraterritoriality test and the application of the test. The *holding* that the Suspension Clause applied under the functional test was of course context-specific. The *holding* in *Verdugo-Urquidez* was likewise context-specific: that the Fourth Amendment's warrant requirement did not apply under the circumstances of that case. *Boumediene* had no need to disturb that holding; indeed, as already discussed, Justice Kennedy agreed with the outcome in *Verdugo-Urquidez* (that the warrant requirement was inapplicable), but he did so based on a different test than the one favored by the plurality in *Verdugo-Urquidez*. *Boumediene* dispelled all doubt that Justice Kennedy's "impracticable and anomalous" test controls. In short, Agent Swartz points to the outcome of *Boumediene* and confuses it with the test adopted by the Court.[2]

[2] Thus, Agent Swartz incorrectly relies on cases suggesting (in dicta) that *Boumediene* did not overrule the holdings of prior extraterritoriality cases. *See* Swartz Br. 14-15 (citing *Hamad v. Gates*, 732 F.3d 990, 1005 (9th Cir. 2013); *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (per curiam)). In any event, *Ibrahim* is the law in this Circuit and makes clear that the *Boumediene test* is not limited to the Suspension Clause.

3. Agent Swartz also relies on *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (per curiam) (en banc), *petition for cert. filed sub nom. Hernandez v. Mesa* (U.S. July 23, 2015) (No. 15-118). In *Hernandez*, the Fifth Circuit used only the voluntary connections test from the *Verdugo-Urquidez* plurality and held that the Fourth Amendment did not apply to the cross-border shooting in that case. But the Fifth Circuit's entire discussion of the Fourth Amendment issue consisted of a single sentence, which simply asserted, without *any* explanation, that the case was governed by the voluntary connections test and that the plaintiff had not satisfied that test. *Id.* at 119.

In a concurring opinion, Judge Jones attempted to justify the Fifth Circuit's decision to make the voluntary connections test dispositive by pointing out that Justice Kennedy stated in *Verdugo-Urquidez* that his views did not differ in "fundamental respects" from those of the *Verdugo-Urquidez* plurality. 785 F.3d at 124 (Jones, J., concurring) (emphasis omitted). But there is no reason to guess at what Justice Kennedy may have meant by that statement. As discussed above, his *Verdugo-Urquidez* concurrence specifically stated that he did not agree with the plurality's attempt to limit the Fourth Amendment based on the Amendment's reference to "the people," 494 U.S. at 276 (internal quotation marks omitted), and that he was deciding

the case on the sole ground that it would have been "impracticable and anomalous" to require a warrant under the circumstances presented there, *id*. at 277-78. Moreover, Judge Jones does not address the fact that Justice Kennedy's *Boumediene* opinion cites only to the "impracticable and anomalous" language from his *Verdugo-Urquidez* concurrence, and does not once cite to the plurality opinion, much less to the voluntary connections language in the plurality opinion.

4. The fact that the "significant voluntary connections" test is not dispositive does not mean one's connections to the United States are irrelevant. Rather, the importance of one's connections will vary depending on the nature of the case, the rights at stake, and the various other factors that are considered under a functional test. *See Boumediene*, 553 U.S. at 766 (examining the detainees' "citizenship and status" in conjunction with other factors).[3]

In *Ibrahim*, for example, this Court undertook the proper analysis in light of both *Boumediene* and *Verdugo-Urquidez* and applied a "functional

[3] *Amicus* quotes *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), for the proposition that "certain constitutional protections" available to persons inside the United States will not be available to noncitizens abroad in all contexts. *See* U.S. Br. 6. But that point is entirely consistent with *Boumediene*, which, in adopting a functional test, plainly did not hold that *every* constitutional protection will be available under *all* circumstances.

approach" that took into account whether the plaintiff had a "significant voluntary connection" to the United States. 669 F.3d at 997. Under that framework, the Court held that the plaintiff, a noncitizen residing abroad, could invoke the First and Fifth Amendments to challenge her inclusion on the No-Fly List. *Id*.

Agent Swartz cites *Ibrahim* in arguing that one's connections to the United States are dispositive. But, as noted, *Ibrahim* stated unambiguously that it was applying *both Boumediene* and *Ibrahim*, *see* 669 F.3d at 997, a point Agent Swartz acknowledges, Swartz Br. 16-17. And, under *Boumediene*'s functional test, the lack of significant voluntary connections plainly cannot always be dispositive. If it were, *Boumediene* would have come out differently, as the enemy combatants in that case had no connection to the United States. *See Boumediene*, 553 U.S. at 734 (describing detainees); *Ibrahim*, 669 F.3d at 996.

Moreover, on the facts in *Ibrahim*, it made perfect sense that the Court would place a heavy emphasis on the plaintiff's connections to the United States. She had been a graduate student at Stanford for four years and had left the United States only briefly "to present the results of her research at a Stanford-sponsored conference." 669 F.3d at 997. In the absence of any overwhelming practical difficulty in applying the First and Fifth

Amendments in that case, the plaintiff's substantial connections would of course be a decisive factor in her favor.

Indeed, the *Ibrahim* Court's concluding paragraph on extraterritoriality leaves no doubt that the heavy focus on one's connections to the United States was context specific. The Court noted that Congress has authority to exclude "aliens from the United States" and that "tourists, business visitors, and all student visa holders" would not necessarily present the same circumstances as Ms. Ibrahim. *Id*. The Court was thus making clear that the extent of one's connections to the United States may be highly probative in a case where the noncitizen is seeking to enter the United States. But given the *Boumediene* detainees' total lack of connections, *Ibrahim* cannot sensibly be read to imply that one would need Ms. Ibrahim's level of connections under all circumstances to invoke any constitutional rights, particularly the right not to be shot.[4]

[4] The manner in which *Ibrahim* was litigated also likely contributed to the Court's heavy emphasis on the plaintiff's connections to the United States. The plaintiff's briefs did not cite *Boumediene* and argued only that her connections to the United States were sufficient under *Verdugo-Urquidez*. Yet, tellingly, despite the plaintiff's exclusive focus on *Verdugo-Urquidez*, the Court stated that it was also "bound" by *Boumediene*'s functional approach. 669 F.3d at 997.

B. The Fourth Amendment Applies To Agent Swartz's Conduct Under The Impracticable And Anomalous Test And Because He Had Significant Connections To The United States.

1. 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. *Boumediene*, 553 U.S. at 755-65.

Here, the right at stake concerns the limits on the use of deadly force by law enforcement, a right that could not be more fundamental. *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).

Nor is there anything remotely anomalous about applying the Fourth Amendment here. The limits on excessive force imposed by the Fourth Amendment must already be observed by agents 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.").

Indeed, Agent Swartz does not contend that he could disobey the Fourth Amendment's limits on the use of deadly force when dealing with (1) an American citizen on United States or Mexican soil, (2) a Mexican national on United States soil, or (3) a Mexican national on Mexican soil who has significant connections to the United States. It is thus hardly anomalous to require him to obey the Fourth Amendment where he is shooting at a Mexican national who lacks United States connections.

Moreover, state and federal criminal statutes already prohibit a Border Patrol agent on U.S. soil from using unjustified 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 (2012); Ariz. Rev. Stat. § 13-1104(A) (2012).

Applying the Fourth Amendment would also not raise significant practical problems, much less the type of problems that would outweigh the importance of imposing constitutional limits on the use of deadly force. Here, a U.S. court is being asked to apply U.S. constitutional law to the actions of a U.S. Border Patrol agent firing his weapon from inside the United States.

Thus, contrary to Agent Swartz's argument, applying the Fourth Amendment in this case would not remotely raise the same type of practical

problems that troubled the Court in *Verdugo-Urquidez*. There, the plurality noted that a warrant issued by a U.S. magistrate "would be a dead letter outside the United States." 494 U.S. at 274. *See also id*. at 278 (Kennedy, J., concurring) (noting problems with requiring a warrant for a search in Mexico); *id*. at 279 (Stevens, J., concurring in the judgment) (noting that "American magistrates have no power to authorize . . . searches" in a foreign country). Here in contrast, there are no practical problems or conflict with Mexico's laws or sovereign prerogatives. In fact, the Mexican government has expressly stated that it believes Ms. Rodriguez should be allowed a civil remedy in a U.S. court. *See* SER 104 (Letter from Mexican Government). Thus, in the circumstances of this case, Agent Swartz's repeated emphasis on the fact that Mexico is a sovereign nation has little force.

Agent Swartz also notes that the Court in *Verdugo-Urquidez* was concerned about creating a "sea of uncertainty" if it applied the Fourth Amendment in that case. Swartz Br. 21 (internal quotation marks and citations omitted). But the concerns in *Verdugo-Urquidez* were unique to the warrant requirement and "what might be reasonable in the way of searches and seizures conducted abroad." 494 U.S. at 274. As Justice

Kennedy noted in his concurrence:

> 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. at 278 (Kennedy, J., concurring). Here, agents cannot plausibly claim that requiring them to observe the Fourth Amendment with respect to the cross-border shooting of a Mexican citizen would create a "sea of uncertainty" given that they must already obey these limits by virtue of criminal law and their own regulations. In fact, it will be far easier for agents simply to apply the same standards in all cases, especially because they will rarely know the victim's connections to the United States.

Notably, 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. In contrast, this case presents no serious practical concerns yet raises equally important and fundamental constitutional issues.

Agent Swartz attempts to distinguish *Boumediene* on the ground that the United States had *de facto* control over Guantanamo. Swartz Br. 20-22. But the complaint in this case alleges that the U.S. exercises practical control over the Mexican side of the border, and those allegations were properly accepted by the district court at the motion to dismiss stage. *See* ER 5-6, 16, 55-56 ¶¶ 21-25.

Moreover, the degree of control over an area is just one factor. Indeed, if Justice Kennedy believed that constitutional rights never apply in areas where another nation has legal sovereignty, there would have been little need for him to provide a litany of practical reasons why the *warrant* requirement did not apply in *Mexico* in *Verdugo-Urquidez*.

Finally, Agent Swartz misapprehends the reason why U.S. *de facto* control over Guantanamo was legally significant. As the Court explained in *Boumediene*, the United States' control over Guantanamo was important because it meant that no other country's law applied. 553 U.S. at 764-66. Thus, unless the U.S. Constitution applied at Guantanamo, the United States would not have been answerable in any court for its unlawful actions, leaving the executive branch to police itself. That is the situation here because of the unique cross-border nature of the shooting.

Agent Swartz has been at all relevant times within the United States, and his conduct occurred solely on U.S. soil. He is thus beyond the reach of Mexico's laws unless he is extradited, a decision solely in the hands of the executive branch. Consequently, if the Constitution does not apply, Border Patrol agents in *cross*-border shootings will be answerable to no entity except the executive branch.

That Agent Swartz's conduct occurred solely on U.S. soil is thus an additional reason why this case is different than *Verdugo-Urquidez*. In *Verdugo-Urquidez*, the U.S. agents were "working in concert" with Mexican police to conduct the search in Mexico, 494 U.S. at 262 (plurality opinion); accordingly, the U.S. agents' conduct on Mexican soil was already subject to approval and oversight by the Mexican government.[5]

2. Ultimately, Agent Swart makes little attempt to explain why it would be impracticable and anomalous to apply the Fourth Amendment

[5] *Amicus* contends that the United States had greater control over the prison in *Eisentrager*, 339 U.S. 763, than it does over the border area in Northern Mexico. U.S. Br. 13. But even if that were true, it ignores the fact that the "enemy" aliens were receiving trials and that the area was under the control of the "combined Allied Forces." *Boumediene*, 553 U.S. at 768. More importantly, *Amicus* ignores the context of that case, in which the Court refused to grant habeas rights to "enemy" aliens in a wartime military context. *See id*. at 762-63. *See also* U.S. Br. 13-14 (citing *Al Maqaleh v. Gates*, 605 F.3d 84, 96-97 (D.C. Cir. 2010) (similar wartime context)).

under the circumstances of *this case*. Instead, he suggests that there might be line-drawing problems in future cases. In particular, he speculates that:

> [A] decision to extend the Fourth Amendment into an area of Mexico would create a great deal of confusion with respect to the limits of this Court's decision. If J.A. was protected by the Fourth Amendment because he was walking on Calle Internacional, does a plaintiff some other distance south also have federal constitutional rights?

Swartz Br. 22. But, as discussed, agents are already prohibited from using unjustified cross-border force by their own regulations and by criminal statutes. And even Agent Swartz does not dispute that the Fourth Amendment prohibits the unjustified cross-border shooting of a U.S. citizen or Mexican national with significant voluntary connections. It is thus not clear why there would be confusion if this Court held that the Fourth Amendment applies here.

In any event, Agent Swartz's argument ignores the teaching of *Boumediene*: that whether it would be impracticable or anomalous to apply the Constitution in a given case is determined by the *particular* circumstances presented. *Boumediene*, 553 U.S. at 759-60. A ruling here in favor of Ms. Rodriguez—particularly at the motion to dismiss stage—in no way portends the same result in a different hypothetical case with different circumstances.

The United States, as *amicus*, likewise offers no reason why in *this case* the application of the Fourth Amendment would be impracticable and anomalous. Instead, the United States speculates that applying the Fourth Amendment to Agent Swartz's conduct "would cast a cloud of uncertainty over the manner in which U.S. officials conduct foreign operations *generally* . . . ." U.S. Br. 12 (emphasis added). It also suggests that applying the Fourth Amendment in this case could interfere with "a core sovereign and national-security function of the United States," noting that the United States "frequently employs the Armed Forces outside this country." U.S. Br. 11-12 (internal quotation marks and citations omitted). But, again, the Fourth Amendment already applies to the Border Patrol's use of force on both American and Mexican soil; foreign relations and national security cannot be implicated to a greater extent just because of the degree of J.A.'s connections to the United States. And, like Agent Swartz, the United States also does not grapple with the fact that agents are *already* criminally prohibited from engaging in unjustified cross-border shootings, regardless of the victim's connections to the United States.

Most importantly, the United States also ignores the teachings of *Boumediene*. A decision to apply the Fourth Amendment in this case in no

way suggests the outcome of a case involving the military or foreign operations.

3. Finally, even if this Court were to hold that the extent of J.A.'s connections to the country is dispositive, the Fourth Amendment would still apply here. As the district court noted, J.A. had significant family connections to the United States. ER 15. As importantly, J.A. lived in a border town, as the district court properly stressed, ER 17-18, and was shot on Calle Internacional, a main thoroughfare of Nogales, where the town's residents walk and where numerous U.S. citizens and permanent residents come to visit family and shop, ER 53 ¶ 9. It also runs right alongside the fence where heavily armed U.S. Border Patrol guards are positioned. *Id*. Living in Nogales, with family on both sides of the border, J.A. thus had an inescapable connection to the United States.

Agent Swartz stresses that J.A. had apparently never stepped foot in the United States and apparently had no "interest in entering the United States." Swartz Br. 18. Agent Swartz concludes, therefore, that J.A. had not "accepted any societal obligation in the United States, even including complying with our immigration laws" and that he was therefore not part of our "national community." *Id*. at 11, 13.

But given that J.A. never entered the United States nor sought to do so, J.A. *did* comply with our immigration laws. Far more fundamentally, J.A. need not show a desire or attempt to live in the United States to assert a right not to be killed by U.S. agents four blocks from his home.

II. AGENT SWARTZ IS NOT ENTITLED TO QUALIFIED IMMUNITY.

It is clearly established that the Fourth Amendment prohibits a police officer from killing an unarmed civilian without justification. *See, e.g.*, *Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011) ("While locating the outer contours of the Fourth Amendment may at times be a murky business, few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'") (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

Agent Swartz does not dispute this point. Nor does he contend that the shooting was justified on the facts alleged in the complaint. Indeed, given that the complaint contains detailed and specific allegations that he "applied deadly force to an unarmed, nondangerous" person, "there could be no reasonable mistake that this use of force was proscribed by law." *Id*. at 1128. *See also* ER 21 (district court decision) (holding that this is an

"obvious case where it is clear that Swartz had no reason to use deadly force against J.A.") (internal quotation marks omitted).

Instead, Agent Swartz argues that although he could not have killed J.A. on U.S. soil, he is entitled to qualified immunity because it was not clearly established that the Fourth Amendment prohibited him from killing J.A. on Mexican soil. Agent Swartz's argument that he acted reasonably, and is thus entitled to qualified immunity, is wrong for two reasons.

First, under the circumstances here, granting qualified immunity would be antithetical to the doctrine. Agent Swartz did not know J.A.'s citizenship status at the time he fired his weapon and that is the relevant point in time when the reasonableness of Agent Swartz's actions must be assessed for purpose of qualified immunity. Second, even if Agent Swartz had been certain at the time of the shooting that J.A. was a Mexican citizen without connections to the United States, he would still not be entitled to qualified immunity because criminal law, international law, and basic morality put him on clear notice that he could not kill someone without justification, regardless of the victim's citizenship status.

A. Agent Swartz Cannot Claim Qualified Immunity On The Basis Of Facts He Did Not Know At The Time Of The Shooting.

1. The "touchstone" of the qualified immunity analysis is reasonableness. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). *See Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1078 (9th Cir. 2011) (per curiam) ("The linchpin of the qualified immunity analysis is the reasonableness of the officer's conduct in the particular case at hand.").

Agent Swartz contends that he acted reasonably in killing J.A. because it was unclear at the time that the Fourth Amendment proscribed the killing in Mexico of a Mexican citizen who lacked substantial voluntary connections to the United States. Yet Agent Swartz only learned that J.A. was a Mexican citizen and about his connections to the U.S. *after* the shooting. Agent Swartz cannot escape his responsibility by relying on such later-discovered facts.

Reasonableness must be assessed in light of the facts known to the officer at the time. *See, e.g.*, *Anderson*, 483 U.S. at 641 (explaining that qualified immunity must be based on the "information the . . . officers possessed" at the time); *Hope v. Pelzer*, 536 U.S. 730, 746 (2002) (emphasizing that an officer's entitlement to qualified immunity must be assessed based on the "situation he confronted" at the time) (quoting *Saucier*

v. Katz, 533 U.S. 194, 202 (2001)) (internal quotation marks omitted); *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (stating that qualified immunity is based on "the officer's conduct in the situation she confronted" at the time) (internal quotation marks and alteration omitted).

Any other rule would make little sense. In fact, the consideration of later-discovered facts as part of the qualified immunity analysis would frequently result in officers being found liable based on "the 20/20 vision of hindsight." *Saucier*, 533 U.S. at 205 (internal quotation marks omitted). *See, e.g.*, *Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1116, 1119 (9th Cir. 2005) (granting qualified immunity based on facts known to officers even though later-determined facts—including that the suspect did not hear the officers' warnings because he had earphones on—made deadly force questionable in hindsight).

In *Moreno*, 431 F.3d 633, this Court denied qualified immunity based on the principle that later-discovered facts do not bear on the immunity inquiry. There, the plaintiff, a parolee, alleged that he had been detained and searched in violation of the Fourth Amendment. The Court noted that Moreno's parolee status may have "rendered it unclear what level of suspicion was required" under the Fourth Amendment, but nonetheless denied qualified immunity because the officers did not know the plaintiff

was a parolee at the time of the search and only learned that fact afterwards. *Id*. at 642.

In rejecting the qualified immunity claim, the *Moreno* Court pointedly stated that police officers cannot justify their actions "on the basis of an after-the-fact discovery." *Id*. at 641. The Court stated that if the officers "had known of the parole condition at the time of the search and seizure," they might have been entitled to qualified immunity, but because "this fact was unknown to Appellants at the time of their actions and was not a fact on which Appellants relied," it "cannot justify their conduct." *Id*. at 642.

Moreno is conceptually identical to this case. There, like here, the threshold constitutional question was placed in doubt because of the plaintiff's status (here, J.A.'s status as a Mexican national; in *Moreno*, the plaintiff's parolee status). And, as in this case, the officers argued that they were entitled to qualified immunity even though the status was not "known to the officer at the time." *Id*. The district court in this case thus properly denied qualified immunity based on *Moreno* and the principle that an officer cannot justify his actions based on circumstances fortuitously discovered after the fact (any more than an officer can be held liable based on later-discovered facts). *See* ER 22.

Moreno is the law of this Circuit and forecloses Agent Swartz's argument. *See Motley v. Parks*, 432 F.3d 1072, 1087-88 (9th Cir. 2005) (en banc), *overruled in part on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc) (stating its "agreement with the *Moreno* court" and reiterating that officers cannot "justify their actions retroactively" on the basis of later-determined facts suggesting the victim had diminished constitutional protections at the time of the conduct); *Mendez v. Cty. of Los Angeles*, 815 F.3d 1178, 1189-90 (9th Cir. 2016) (relying on *Moreno* in rejecting qualified immunity for a warrantless raid of a home that led to the shooting of two individuals on the basis of facts of which the officer was unaware at the time of the entry—that the suspect had been categorized as armed and dangerous); *Rhodes v. Robinson*, 408 F.3d 559, 570 (9th Cir. 2005) (denying qualified immunity and stressing that the officer's argument "would make immunity hinge upon *precisely* the kind of post hoc judgment that the doctrine is designed to avoid"); *Beier v. City of Lewiston*, 354 F.3d 1058, 1071 (9th Cir. 2004) (holding that officers were "not entitled to qualified immunity on the basis of a mistaken interpretation" of a protection order, "even a reasonable one," because they "did not know the terms of the . . . order" at the time of the violation).

2. Although *Moreno* was the basis for the district court's denial of immunity, Agent Swartz does not mention the decision. Instead, he argues that qualified immunity is warranted because it was not clearly established that the Fourth Amendment's prohibition against unjustified killings applied extraterritorially to Mexican nationals like J.A. Swartz Br. 22-24. The flaw in Agent Swartz's argument is not his claim that the law must be clearly established, but in how he defines the constitutional right at stake here.

The immunity question here is not whether the Fourth Amendment clearly prohibited Agent Swartz's unjustified killing of *a Mexican national like J.A.* Instead, it is whether the Fourth Amendment clearly prohibited Agent Swartz's unjustified killing of a *person* (whose nationality and connection to the U.S were unknown to him at the time). To define the right otherwise would allow Agent Swartz to include a fact of which he was unaware (the status of the person he was shooting). But that is precisely what *Moreno* forecloses. Indeed, under Agent Swartz's reasoning, the *Moreno* Court would not have asked whether the Fourth Amendment clearly prohibited police officers from detaining and searching individuals without suspicion, but instead, whether the Fourth Amendment clearly prohibited the police from detaining and searching a *parolee* without suspicion.

Moreover, if Agent Swartz's reasoning were adopted, it would mean that cases in which officers were *granted* qualified immunity would now come out differently. Rather than asking whether a constitutional right was clearly established on the facts known to the officer at the time, courts would ask whether the officer's actions violated clearly established law in light of later-discovered facts (such as whether a fleeing felon actually had a gun or was otherwise a danger). *See, e.g.*, *Blanford*, 406 F.3d at 1116, 1119. That is not, and could not be, the way in which the qualified immunity analysis operates.

3. Agent Swartz also erroneously relies on *Ali*, 649 F.3d 762, and *Hernandez*, 785 F.3d 117. Swartz Br. 23-24. In *Ali*, noncitizen military detainees captured and held in Iraq and Afghanistan sued high-ranking U.S. officials alleging that their treatment violated the Fifth and Eighth Amendments. 649 F.3d at 764-65. The D.C. Circuit granted qualified immunity on the ground that it was unclear at the time whether noncitizen military detainees had such constitutional rights. *Id*. at 771. But, unlike this case, the officials in *Ali did* know the status of the plaintiffs at the time. In *Hernandez*, the Fifth Circuit's short per curiam decision contains almost no reasoning on the qualified immunity issue and nowhere addresses the

principle that an officer cannot use a later-discovered fact about the victim's status to justify his actions.

4. Agent Swartz also does not grapple with the implications of his position. He does not and could not plausibly argue that, at the time of the shooting, he understood the Fourth Amendment to permit him to engage in the unjustified killing of an American citizen standing thirty feet over the border in Mexico. Yet he contends that he is entitled to qualified immunity even though he did not know at the time of the shooting whether J.A. was a U.S. citizen, a Mexican national with substantial connections to the United States, or a Mexican national without such connections. But if Agent Swartz's position is correct, then agents would be entitled to qualified immunity in myriad other situations that could not possibly warrant qualified immunity.

Suppose, for example, that J.A. was standing on the Nogales, Mexico side of the fence with a U.S. citizen friend who came to visit him from Nogales, Arizona. If Agent Swartz unjustifiably shot them both without knowing their citizenship status, and this Court then ruled that the Fourth Amendment prohibited both killings, Agent Swartz could not plausibly ask for qualified immunity as to the killing of J.A. but not as to the U.S. friend. Or suppose Agent Swartz used an automatic weapon to unjustifiably kill a

group of eight teenagers standing on the Mexican side of the fence. It would be perverse for him to ask for qualified immunity in three of the eight cases if it later turned out that three of the kids were Mexican nationals without any connection to the United States. Yet, conceptually, there is no difference between these scenarios and the actual circumstances at issue here. Under *Moreno*, Agent Swartz may not rely on later-discovered facts to retroactively justify the reasonableness of his actions.

B. Agent Swartz Is Also Not Entitled To Qualified Immunity Because An Officer's Unjustified Use Of Deadly Force Is Prohibited By Criminal Law, International Law, And Basic Morality.

The fatal shooting of an unarmed teenage boy without justification is murder, violates international law, and offends every imaginable norm of justice—regardless of the boy's citizenship status. *See* 18 U.S.C. § 1111 (2012); Ariz. Rev. Stat. § 13-1104(A) (2012); Restatement (Third) of Foreign Relations Law of the United States § 702(c) & comment (f) (1987). Under these circumstances, Agent Swartz's actions cannot be deemed reasonable, quite apart from whether he knew J.A.'s citizenship status.

Granting qualified immunity in a case involving murder would serve none of the purposes the doctrine was intended to further. Indeed, Agent Swartz has never even attempted to explain how the doctrine's purposes would support qualified immunity.

Qualified immunity is a judge-made doctrine designed to serve two main purposes. The first is fairness. Government officials must have clear "notice" that their actions are unlawful, thereby ensuring that they are not retroactively penalized for actions that were not clearly prohibited at the time. *See, e.g.*, *Hope*, 536 U.S. at 739. The second and related goal is for the benefit of society as a whole: officials should not be unduly deterred from engaging in actions that may only later be deemed unlawful. *Stoot v. City of Everett*, 582 F.3d 910, 927 (9th Cir. 2009) ("Qualified immunity is accorded so that reasonable officers are not deterred in carrying out their duties vigorously.").

Neither rationale remotely applies here. That is clear by viewing this case from the perspective of a hypothetical reasonable agent standing at the border deciding whether to shoot across the fence into Mexico at a Mexican teenager who he knows lacks connections to the United States. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) (asking how a "hypothetical reasonable officer" would react). In the scenario above, a reasonable agent would, of course, not shoot the boy if the boy presented no threat. He would not shoot the boy because it is immoral and criminal, regardless of whether he thought that he might later be able to show that the Fourth Amendment's application to this situation was not yet settled.

Thus, providing the agent with qualified immunity would not in any way affect the actions of a *reasonable* agent—he was already on fair notice that he could not kill the boy and would already be deterred from doing so because he would know that, among other sanctions, he could face murder charges. *See, e.g.*, *Stoot*, 582 F.3d at 927 (denying qualified immunity despite the lack of clearly established law, reasoning that granting immunity would not have furthered the goal of ensuring that "reasonable" officers perform "their duties vigorously"). Denying qualified immunity in this case properly acknowledges the oddity of Agent Swartz's qualified immunity position: that he acted reasonably under the Constitution when he engaged in murder.[6]

In sum, the district court correctly denied qualified immunity under *Moreno* because Agent Swartz had no knowledge of J.A.'s status at the time he killed him. But even apart from J.A.'s status, qualified immunity should

[6] Agent Swartz notes that there were allegations of torture in *Ali*, the D.C. Circuit's military detainee case. Swartz Br. 22-23. But the D.C. Circuit simply noted plaintiffs' contention that defendants' actions violated military laws and regulations, but did not address for itself whether that was true. 649 F.3d at 771 n.12. As a result, the court did not discuss whether the purposes of qualified immunity are served in a case where there is a clear violation of serious criminal prohibitions. *See also* Section II.A (noting that the plaintiffs' status was known to the defendants in that case and that *Ali* is distinguishable for that reason as well).

be denied. Qualified immunity was intended to protect officers from making reasonable mistakes, not to shield an officer who engages in murder.

III. *AMICUS' BIVENS* ARGUMENT IS NOT PROPERLY BEFORE THE COURT AND FAILS ON THE MERITS.

A. Agent Swartz Has Waived The *Bivens* Argument And This Court Would In Any Event Lack Interlocutory Jurisdiction To Consider It.

Amicus is seeking to inject an entirely new issue on a qualified immunity interlocutory appeal: whether there is a *Bivens* cause of action in a cross-border shooting. 403 U.S. 388. The Court should not reach this argument because it is both waived and jurisdictionally barred.

1. Agent Swartz has never argued—either in the district court or before this Court—that a *Bivens* cause of action is unavailable for the Fourth Amendment claim in this case. In fact, Agent Swartz's opening brief concedes the availability of a "*Bivens* claim." Swartz Br. 2. Agent Swartz made the same concession in the district court, acknowledging that "here" a *Bivens* remedy "already exists under the Fourth Amendment." SER 77 (MTD Reply at 9). *See also* SER 127-28 (MTD at 23-24) (same). Not surprisingly, therefore, the district court did not address whether a *Bivens* cause of action exists. Where, as here, an issue is "raised only by an amicus," and only on appeal, this Court does not, and should not, consider the issue. *Chaker v. Crogan*, 428 F.3d 1215, 1220 (9th Cir. 2005) (internal

quotation marks omitted). *See also Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1022 n.3 (9th Cir. 2010) (same).

2. Even if Agent Swartz had raised the *Bivens* issue, the Court would lack jurisdiction to reach it. This Court's limited interlocutory jurisdiction would allow review only if the *Bivens* issue were "inextricably intertwined" with the qualified immunity issue. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50-51 (1995). "Two issues are not 'inextricably intertwined' if we must apply different legal standards to each issue." *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000), *as amended* (Oct. 31, 2000).

The availability of a *Bivens* cause of action is not inextricably intertwined with review of the district court's denial of qualified immunity. Indeed, for decades this Court has consistently held that "whether a judicially created *remedy* is available" under *Bivens* "is not properly before" the Court when considering an interlocutory qualified immunity appeal. *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 871 (9th Cir. 1992) (citing *Todd v. United States*, 849 F.2d 365, 368 (9th Cir. 1988)). *Cf. Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (describing the availability of a *Bivens* action and the immunity of defendants as "logically distinct" issues) (internal quotation marks omitted).

Amicus ignores this Ninth Circuit precedent and, based solely on a cryptic footnote in *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007), asserts that the Court has jurisdiction to consider its *Bivens* argument. U.S. Br. 15 n.3. But this Court has reaffirmed its longstanding rule in a post-*Wilkie* opinion. *See Sissoko v. Rocha*, 509 F.3d 947, 948-49 (9th Cir. 2007).

In its original decision in *Sissoko v. Rocha*, 440 F.3d 1145 (9th Cir. 2006), this Court held that the availability of a *Bivens* remedy may not be reviewed on an interlocutory appeal. *See id*. at 1154 (stating that "whether there is a *Bivens* remedy is not a logical predicate to the resolution of qualified immunity" and therefore "there is no jurisdiction in an interlocutory qualified immunity appeal . . . to review the district court's decision to infer a *Bivens* remedy") (internal quotation marks and alteration omitted). After the Supreme Court's decision in *Wilkie*, the Court withdrew its *Sissoko* decision and issued an amended opinion on denial of rehearing. *See* 509 F.3d at 948 (9th Cir. 2007). Critically, however, although the Court discussed *Wilkie*'s impact on various substantive aspects of its original opinion, the Court expressly maintained the "scope of review" section from its previous opinion. *Id*. at 948-49. *Sissoko* is therefore binding Ninth Circuit precedent. *See Paeste v. Gov't of Guam*, 798 F.3d 1228, 1235 (9th Cir. 2015), *petition for cert. filed* (U.S. Feb. 1, 2016) (No. 15-990) ("an

earlier-decided Supreme Court decision, offers no basis for . . . a three-judge panel" to reconsider a subsequent decision of this Court) (citing *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

Moreover, even apart from *Sissoko*, the footnote in *Wilkie* is not controlling because it was dicta insofar as it suggested that the courts of appeals have jurisdiction over the *Bivens* issue on an interlocutory appeal of the denial of qualified immunity (the posture in this case). *Wilkie*, 551 U.S. at 549 n.4. That is because the Tenth Circuit in *Wilkie* actually decided the *Bivens* issue on appeal from an earlier *final* decision, and not on an interlocutory appeal.[7]

[7] There were two Tenth Circuit decisions in *Wilkie*. In the original appeal, the Tenth Circuit clearly had jurisdiction to decide the *Bivens* issue because it arose from a *final decision* of the district court. *Robbins v. Wilkie*, 300 F.3d 1208, 1209, 1213 (10th Cir. 2002). The case later returned to the Tenth Circuit on an interlocutory appeal, but the Court did not revisit its prior decision holding that a *Bivens* action was available. *Robbins v. Wilkie*, 433 F.3d 755, 772 (10th Cir. 2006). The case then went to the Supreme Court from the Tenth Circuit's second decision (the interlocutory appeal) and the Court reversed on the ground that no *Bivens* remedy was available. 551 U.S. at 567-68. In a footnote, the Court stated that the Tenth Circuit had jurisdiction over the *Bivens* issue notwithstanding the interlocutory posture of the appeal. *Id*. at 549 n.4. But there was no question that the Tenth Circuit properly had jurisdiction over the *Bivens* issue, as the court of appeals had earlier reached the issue in an appeal of a *final* judgement. Thus, insofar as the Supreme Court implied that the courts of appeals have jurisdiction over the *Bivens* issue on an *interlocutory* appeal, that suggestion was unnecessary to decide the case.

B. *Amicus' Bivens* Argument Also Fails On The Merits.

To determine the availability of a *Bivens* remedy, courts first look to whether the case arises in a "new context" or involves a "new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). *See also Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012). If it does not, a *Bivens* remedy is available. But even if the case does arise in a new context or involve a new category of defendants, a *Bivens* action is still available unless (1) an alternative remedial scheme exists that provides a convincing reason for the judicial branch to refrain from providing relief; or (2) a balance of "special factors counseling hesitation" weighs against extending *Bivens* to a new kind of federal litigation. *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012). *See also Wilkie*, 551 U.S. at 550. Here, there is no new context or set of defendants. But even if there were, there is no alternative remedy and no special factors outweigh the need for a remedy.[8]

[8] *Amicus* suggests that, on top of this framework, the Court should also apply the *Kiobel* presumption against extraterritoriality. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-65 (2013). But *Kiobel* involves a presumption that *statutes* do not apply extraterritorially unless Congress says so. *See Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1027 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016). The whole point of *Bivens* is to provide a remedy in the absence of statutory authorization. Moreover, the *Kiobel* presumption applies only where the case does not "touch and concern" the United States. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 591-95 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S.

1. This case does not involve a new category of defendants. *Bivens* actions have long been available against Border Patrol agents. *See, e.g.*, *Chavez v. United States*, 683 F.3d 1102 (9th Cir. 2012). Nor does the case involve a new context. Indeed, *Bivens* itself involved a Fourth Amendment claim against law enforcement for the use of "unreasonable force." 403 U.S. at 389. Thus, this case falls within the "core holding of *Bivens*"—a Fourth Amendment claim "against federal officers who abuse their constitutional authority." *Malesko*, 534 U.S. at 67. *See also Ting v. United States*, 927 F.2d 1504 (9th Cir. 1991) (*Bivens* deadly force claim); *Tekle v. United States*, 511 F.3d 839 (9th Cir. 2007) (*Bivens* excessive force claim).

Amicus does not expressly address this first step of the analysis, and instead, simply assumes that the context is new because it involves extraterritoriality. But that cannot be the right context, as a blanket rule against extraterritorial *Bivens* actions would effectively immunize *all* violations of constitutional rights abroad, including those directed against

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Ct. 690 (2015). *Kiobel* involved an action under the Alien Tort Statute brought by Nigerian plaintiffs against foreign corporations for actions taken abroad. In contrast, this case plainly touches and concerns the United States: it is being litigated under the Fourth Amendment and involves the actions of a U.S. agent standing on U.S. soil.

U.S. citizens. Rather, the context is familiar: deadly force. Indeed, at bottom, *Amicus*' *Bivens* argument is little more than an attempted second bite at the extraterritoriality apple. *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 the Fourth Amendment applies extraterritorially to this shooting, then for the same reasons, this is not a new *Bivens* context.

2. Even if this were a new context, a *Bivens* remedy would still be proper. *Amicus* does not, and could not, argue that there is an alternative remedial scheme here. Instead, *Amicus* asserts that there are "special factors" that outweigh the need for a remedy, even in a case involving the unjustified use of deadly force.

First, *Amicus* suggests that Congress implicitly foreclosed a *Bivens* remedy in the extraterritorial context because the Federal Tort Claims Act (FTCA) bars claims against the United States for injuries that occur abroad. *Amicus* argues that the Court should therefore assume that Congress also intended to bar *Bivens* claims against individual officers in cases involving injuries abroad. U.S. Br. 17-18. But where Congress intends to foreclose a *Bivens* remedy, it does so *expressly*. *See Hui*, 559 U.S. at 806-08 (holding

that Congress "plainly" granted blanket immunity for public health service personnel, including from *Bivens* claims).

Moreover, the fact that Congress created an exception in the FTCA for injuries occurring abroad (the foreign country exception) has absolutely no bearing on whether a *Bivens* claim is available. The law applied in an FTCA claim is the substantive tort law of the forum in which the injury occurred. Thus, as the Supreme Court has explained, "what Congress intended to avoid by the foreign country exception" was the "application of foreign substantive law" in FTCA cases. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004). Those concerns are inapplicable, where, as here, the agent was standing on U.S. soil and the Fourth Amendment supplies the substantive rule of decision, not Mexican tort law. *Meshal v. Higgenbotham*, 804 F.3d 417, 437 (D.C. Cir. 2015) (Pillard, J., dissenting) (noting that the "concerns animating the FTCA's extraterritorial carve-out are inapplicable where the United States Constitution, not any foreign country's law, supplies the rule of decision").[9]

[9] *Meshal* involved "a terrorism investigation conducted overseas" in a joint operation between U.S. and foreign law enforcement. 804 F.3d at 424. The Court held that a *Bivens* claim was unavailable, but specifically stated that its "holding is context specific" to a case involving *both* extraterritoriality *and* a terrorism investigation. *Id*. at 422 ("As we understand it, the Supreme

Additionally, the exception in the FTCA for injuries occurring abroad applies equally to U.S. citizens and non-citizens. Thus, if *Amicus*' FTCA argument were correct, there would be no *Bivens* remedy for the unlawful killing of a U.S. citizen standing just over the border.

Amicus also argues that a *Bivens* remedy should be precluded because the government is prosecuting Agent Swartz for murder and Congress has provided for restitution for the estates of crime victims. U.S. Br. 18-19. Again, *Amicus*' argument proves too much. Under *Amicus*' reasoning, there would be no *Bivens* remedy for unlawful actions *within* the United States. Indeed, restitution could likewise be available for *any* willful constitutional violation of any sort. *See* 18 U.S.C. §§ 242, 3663. Not surprisingly, therefore, there appears to be no case that has ever denied the availability of a *Bivens* remedy based on *Amicus*' novel restitution theory.

The final set of special factors offered by *Amicus* is the same as those on which it relies to argue that the Fourth Amendment does not apply extraterritorially: that this case involves immigration, foreign relations and national security. But, as already noted, these arguments should be

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Court has taken a case-by-case approach in determining whether to recognize a *Bivens* cause of action.").

considered only once, when deciding whether the Fourth Amendment applies extraterritorially. *Davis*, 442 U.S. at 246.

Moreover, *Amicus* does not even attempt to argue that these factors are present under the circumstances of this case. This case does not involve immigration; in fact, Agent Swartz's extraterritoriality argument is premised on the fact that J.A. never entered the United States and apparently never wished to do so. For that reason, *Amicus*' reliance on *Mirmehdi* is wholly misplaced. *See* 689 F.3d at 981 (noting that the relevant "context" of the *Bivens* claim was "deportation proceedings"). Nor does this case involve foreign relations—the suit presents no conflict with Mexican law and the Mexican Government wishes for the suit to go forward. *See* SER 104.

The case likewise does not involve national security, much less an overseas terrorism investigation or military operation. For that reason, *Amicus*' reliance on *Meshal*, *Doe*, and *Arar* is off base. *See Meshal*, 804 F.3d at 424 (involving "a terrorism investigation conducted overseas"); *Doe v. Rumsfeld*, 683 F.3d 390, 395 (D.C. Cir. 2012) (rejecting *Bivens* claim challenging "the development and implementation of numerous military policies and decisions"); *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)

(en banc) (rejecting *Bivens* claim amounting to "a constitutional challenge to policies promulgated by the executive" regarding extraordinary rendition).[10]

Insofar as *Amicus* is suggesting that *any* action taken near the border by a Border Patrol agent should be viewed as a national security function, and thus not subject to a *Bivens* claim, that argument is too sweeping. It would preclude a claim by a U.S. citizen on Mexican soil. And, as importantly, it would mean that both citizens and non-citizens could not bring *Bivens* claims for actions that occurred on the *U.S. side* of the border, since those claims would likewise implicate "national security" concerns under the government's rationale. But *Bivens* claims are, in fact, permitted against Border Patrol agents. *See Chavez*, 683 F.3d at 1112 (denying qualified immunity in *Bivens* claim against Border Patrol agent arising from roving patrols near the border).

Amicus attempts to portray *Bivens* as a dead letter. But whatever else the Supreme Court has done in this area, it has never retreated from its core holding. *Malesko*, 534 U.S. at 70 (*Bivens* is necessary to "provide an otherwise nonexistent cause of action against individual officers alleged to

[10] The statements from the *Verdugo-Urquidez* plurality on which *Amicus* relies are dicta, as there was no *Bivens* claim at issue in that case. U.S. Br. 19.

have acted unconstitutionally" for "a plaintiff who lacked any alternative remedy for harms caused" by that conduct) (emphasis omitted).

IV. IN THE ALTERNATIVE, AGENT SWARTZ IS LIABLE UNDER THE FIFTH AMENDMENT.

The district court did not decide whether the Fifth Amendment applied to Agent Swartz's conduct because it concluded that excessive force cases are properly analyzed under the Fourth Amendment where the Fourth Amendment applies. ER 19, 21. If this Court concludes, however, that the Fourth Amendment does not apply, it should affirm the district court's decision under the Fifth Amendment.

A. The Fifth Amendment Claim Is Properly Before The Court.

Contrary to Agent Swartz's contention, the Court can address the Fifth Amendment claim without a cross-appeal. The Fourth and Fifth Amendments are alternative theories for recovering the same damages against the same defendant for the same injuries. "An appellee who does not take a cross-appeal may 'urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court.'" *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)). Accordingly, because the Fifth Amendment offers an alternative "theory" to obtain "the same relief" sought under the Fourth

Amendment, Plaintiff may defend the district court's ruling on the basis of the Fifth Amendment. *Id*. at 801-02. *See also Blum v. Bacon*, 457 U.S. 132, 137-38 & n.5 (1982) (without filing a cross-appeal, the party prevailing before the district court could offer an alternative legal basis—the statutory claim the district court rejected instead of a constitutional one it accepted—in support of the same ultimate relief).

Amicus asserts that the Court would have lacked jurisdiction over a cross-appeal, implicitly suggesting that the Court cannot consider the Fifth Amendment argument. *See* U.S. Br. 7 n.1. But *Amicus* cites only inapposite cases involving attempts to broaden the scope of an interlocutory appeal beyond the denial of qualified immunity. *See*, *e.g.*, *George v. Morris*, 736 F.3d 829, 833-34 & n.6, 839-40 (9th Cir. 2013) (declining to address plaintiff's additional claim against a different defendant for different injuries). Here, by contrast, the defendant, plaintiff, remedy sought, and operative facts are precisely the same under either the Fourth or Fifth Amendment claims.

B. The Fifth Amendment Applies In Cases Where The Fourth Amendment Does Not Apply.

In dismissing the Fifth Amendment claim, the district court relied on *Graham v. Connor*, 490 U.S. 386 (1989), which held that where Fourth Amendment protections *are* available, courts should not rely on more

general constitutional provisions. But *Graham* specifically noted that where the Fourth Amendment is *not* available for reasons unconnected to the merits, claims of excessive force are properly analyzed under other constitutional provisions, including substantive due process standards. *Id*. at 395 n.10. *See also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998) ("*Graham* simply requires that *if* a constitutional claim is covered by a specific constitutional provision," the claim is analyzed under that specific provision) (internal quotation marks omitted) (emphasis added).

Thus, contrary to Agent Swartz's argument, the Fifth Amendment is a proper basis for this lawsuit. In fact, Agent Swartz's argument tries to have it both ways. On the one hand, he argues that the Fourth Amendment does not apply extraterritorially to his conduct. Yet, he simultaneously argues that the Fourth Amendment *does* apply for purposes of displacing Plaintiff's Fifth Amendment claim. Swartz Br. 9. There is no support for that contradictory theory. Nor is there any basis for ignoring the rationale of *Graham*, which was not to deprive victims of any constitutional redress, but simply to ensure that the Fourth Amendment is used where it is applicable. *Graham*, 490 U.S. at 394-95. *See also Albright v. Oliver*, 510 U.S. 266, 288 (1994) (Souter, J., concurring in the judgment) (describing *Graham* as "reserving due process for otherwise homeless substantial claims"). Thus, if

the Court holds that the Fourth Amendment is inapplicable in this context, it should affirm the district court's order on the alternative Fifth Amendment ground.[11]

C. Qualified Immunity Is Equally Inappropriate As To The Fifth Amendment.

The arguments for applying the Fifth Amendment extraterritorially to Agent Swartz's conduct, and for denying him qualified immunity, are largely the same as those regarding the Fourth Amendment. The arguments will therefore not be repeated.[12]

Additionally**,** the Court should reject *Amicus*' *Bivens* argument for the same basic reasons already discussed with respect to the Fourth Amendment: (1) the claim has been waived by Agent Swartz, (2) the Court

[11] It is settled Fifth Amendment law in this circuit that shooting an individual "with a purpose to harm unrelated to a legitimate law enforcement objective (such as arrest, self-defense, or the defense of others) violates due process." *A.D. v. California Highway Patrol*, 712 F.3d 446, 455 (9th Cir. 2013).

[12] The Fifth Circuit in *Hernandez* treated the Fourth and Fifth Amendment claims differently. On the basis of *Verdugo-Urquidez*, the *en banc* Court held (incorrectly) that the Fourth Amendment did not apply extraterritorially. 785 F.3d at 119. But the Court reserved the question whether the Fifth Amendment applied to the agent's cross-border shooting and instead decided (incorrectly) the Fifth Amendment claim on qualified immunity grounds. *Id*. at 119-21 (noting that the Court was divided on the extraterritorial application of the Fifth Amendment).

lacks jurisdiction to consider the issue on an interlocutory appeal, and (3) it is wrong on its merits. *See* Section III.[13]

* * *

J.A.'s daily activities often brought him within feet of armed U.S. agents standing across the border on U.S. soil. Agent Swartz asks this Court to rule that J.A. cannot invoke U.S. constitutional protections and simply had to assume the risk of being killed by U.S. agents when he went about his everyday life. That position is wrong and was properly rejected by the district court.

[13] As noted, Agent Swartz has conceded that *Bivens* provides a cause of action for plaintiff's Fourth Amendment claim. *See* Section III.A. Agent Swartz did assert below, however, that *Bivens* does not supply a cause of action for plaintiff's Fifth Amendment claim. SER 77, 127-28. But he did not develop the argument at all and it should therefore be deemed waived.

CONCLUSION

The Court should affirm the district court on either Fourth or Fifth Amendment grounds.

Dated: April 29, 2016

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STATEMENT OF RELATED CASES

Plaintiff-Appellee is not aware of any related cases pending before this Court, as defined by Ninth Circuit Rule 28-2.6.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Lee Gelernt
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Dated: April 29, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,871 words, excluding parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

I certify that this brief complied with typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Office 2013 in 14 point Times New Roman.

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