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IN THE SUPREME COURT OF THE UNITED STATES

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JESUS C. HERNANDEZ, ET AL., :

Petitioners : No. 15-118

v. :

JESUS MESA, JR., ET AL., :

Respondents. :

- - - - - x

Washington, D.C.

Tuesday, February 21, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:05 a.m.

APPEARANCES:

ROBERT C. HILLIARD, ESQ., Corpus Christi, Tex.; on
behalf of the Petitioners.

RANDOLPH J. ORTEGA, ESQ., El Paso, Tex.; on behalf of
the Respondent Mesa.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Federal Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 15-118, Hernandez v. Mesa.

Mr. Hilliard.

ORAL ARGUMENT OF ROBERT C. HILLIARD

ON BEHALF OF THE PETITIONERS

MR. HILLIARD: Mr. Chief Justice, and may it please the Court:

15-year-old Sergio Hernandez was standing in Mexico, barely across the border, unthreatening and unarmed, when he was shot and killed by a U.S. Border Patrol agent standing inside the United States.

This tragic case is one of the most simplest extraterritorial cases this Court will ever have in front of it for five reasons.

First, all of the conduct of the domestic police officer happened inside the United States. Second, it was a civilian domestic police officer. Third it was a civilian plaintiff, not an enemy combatant. Fourth, it was one of the most fundamental rights, the right to life. Fifth, the other government involved supports -- the government of Mexico supports the claim.

1 JUSTICE KAGAN: So is that -- I was trying
2 to figure out from your brief what exactly your rule is.
3 So are all five of those necessary, in your view, for
4 there to be a Bivens claim? Is anything else necessary?
5 Is that exactly the rule that you want us to adopt?

6 MR. HILLIARD: Justice Kagan, the rule that
7 we're asking this Court to adopt to avoid the anomalous
8 result, when a U.S. domestic officer on U.S. soil shoots
9 and there's no constitutional constraints, is that when
10 there is a cross-border shooting involving a Federal law
11 enforcement officer on U.S. soil, and the resulting
12 injury is in close proximity, then Fourth Amendment
13 constraints on that officer should apply.

14 And --

15 CHIEF JUSTICE ROBERTS: Well, that's a --
16 that's a test that, surprisingly, fits the exact facts
17 of your case.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: It seems to me that
20 the principles you're arguing for can't be so narrowly
21 confined. And -- for example, how -- how do you analyze
22 the case of a drone strike in Iraq where the plane in
23 piloted from Nevada.

24 Why wouldn't the same analysis apply in that
25 case?

1 MR. HILLIARD: Chief Justice, if it was a
2 drone strike, I'm assuming that it was -- it was
3 probably military. I'm assuming that there was
4 cooperation with other governments. Here, in our
5 case --

6 CHIEF JUSTICE ROBERTS: So if this were, in
7 your case, somebody from the -- the State National Guard
8 or whatever, then it'd be a different result?

9 MR. HILLIARD: Well, if it was a State
10 National Guard, I'm not sure that they would be shooting
11 across the border, Your Honor. I mean --

12 CHIEF JUSTICE ROBERTS: Well, you can
13 imagine a situation that is not precisely like the facts
14 of your case where military officials may be involved.

15 MR. HILLIARD: I can imagine that scenario,
16 but that's not the purpose or the intent of this rule.
17 The purpose of intent -- and intent of our rule is
18 simply to involve this Court in addressing an ongoing
19 domestic routine law enforcement issue along our
20 southwest border.

21 JUSTICE GINSBURG: Your --

22 MR. HILLIARD: So the --

23 JUSTICE GINSBURG: Your brief -- your brief
24 excluded military personnel and intelligence personnel.
25 Your -- your brief is limited to, as you said, civilian

1 border patrol officers. So your drone -- your drone
2 example, I take it from your brief, your answer is
3 that's a military operation.

4 MR. HILLIARD: That's right, Justice --
5 Justice Ginsburg. And we -- and we also recognize --

6 CHIEF JUSTICE ROBERTS: Well, I understand
7 that, but I'm trying to see what the logic is, other
8 than yours happened to involve a nonmilitary actor and
9 my hypothetical involves a military actor. Under a -- a
10 Bivens analysis, I'm not sure that that makes a
11 difference.

12 Maybe there will be some defenses once you
13 recognize the cause of action that have to do with the
14 military operation, but I'm not sure why you wouldn't
15 have a cause of action under your theory.

16 MR. HILLIARD: Our theory is meant to -- to
17 address the ongoing problem along the southwest border
18 that has resulted in at least ten cross-border shootings
19 and six Mexican national deaths. And every time the
20 Constitution, according to the government, turns off at
21 the border, even though all the conduct happens in the
22 United States.

23 I recognize that under the military
24 situation, there are orders that may be being followed.
25 Here we have a rogue officer who actually is not

1 following his own Federal regulations which says you
2 can't use deadly force without imminent peril.

3 JUSTICE KAGAN: I mean --

4 JUSTICE BREYER: But that isn't the
5 question.

6 JUSTICE KAGAN: I suppose the --

7 JUSTICE BREYER: No. The question -- the
8 question that we -- is our problem, but we have to have
9 your help in solving it, is you have a very sympathetic
10 case. We write some words. And those words you're
11 delighted with because you win. That isn't the problem.

12 The problem is other people will read those
13 words, and there are all kinds of things that happen,
14 maybe military, maybe not. Perhaps a foreign country
15 with the collusion of people in our country sets off the
16 drone. That's what the Chief Justice brought in.

17 And are we, in deciding for you, A, deciding
18 as well that anyone who suffers a drone strike can come
19 to New York and bring a law case? Are we deciding that
20 the matter is unclear so that when the proper
21 authorities get advice from their lawyers over in the
22 Executive Branch, they have to say we're confused?
23 Okay?

24 So what are the words that we write that
25 enable you to win, which is what you want, and that

1 avoid confusion, uncertainty, or decide these other
2 cases the proper way? That's the question you've been
3 given three times, and -- and I would certainly like to
4 know your answer.

5 MR. HILLIARD: Justice Breyer, this -- this
6 world does not involve a drone strike, and I do not
7 intend to suggest that it should. This involves only --

8 JUSTICE BREYER: We know that part. The
9 question is: what words do we write so that this
10 opinion doesn't affect the drone strike, which is what
11 you seem to want?

12 MR. HILLIARD: Again, so the -- the rule
13 that we are suggesting has a close proximity element to
14 it. It has all of the conduct of the United States, of
15 the officer on the United States' soil shooting across
16 the border. So --

17 JUSTICE ALITO: I mean, we can take --

18 JUSTICE SOTOMAYOR: Perhaps --

19 JUSTICE ALITO: -- your test point by point
20 and -- and ask you whether it would apply in a situation
21 where each of those factors was a little bit different.
22 So the -- your client was 15. What if he was 19? Would
23 that be different?

24 MR. HILLIARD: No, Justice Alito, of course
25 it wouldn't be different. But the -- the --

1 JUSTICE ALITO: So the rule would apply
2 there.

3 MR. HILLIARD: The rule would apply if he
4 was 19, standing unarmed in Mexico, when he was shot.

5 JUSTICE ALITO: All right. What if he was
6 armed, but he had his hands up?

7 MR. HILLIARD: Again, we're not asking for a
8 win here. We're simply asking if the Constitution
9 applies and that he can -- he can -- the defense of
10 self-defense by the officer can happen at the trial
11 court then.

12 JUSTICE ALITO: What if he wasn't in this
13 culvert, but he was 200 yards beyond in Mexico. Would
14 it be different then?

15 MR. HILLIARD: It may be under the
16 Boumediene element of nature of the site. So this
17 culvert is unique. If the -- if the Court -- I would
18 invite the Court to look at Exhibit 180 of the
19 Petition's exhibit -- appendix, which is a picture of
20 the culvert.

21 JUSTICE ALITO: And what if the officer was
22 not standing in the United States, but actually ran a
23 short distance across the border into Mexico? That
24 would seem to be worse, wouldn't it? But would you say
25 the rule would be different there?

1 MR. HILLIARD: Justice Alito, it may be
2 because the -- first, the Border Patrol agents are
3 strictly prohibited from crossing the border, like
4 federales are strictly prohibited from --

5 JUSTICE ALITO: Right. So suppose he
6 violates that rule. He -- he --

7 MR. HILLIARD: Well --

8 JUSTICE ALITO: -- crosses into Mexico and
9 then he shoots the --

10 MR. HILLIARD: Right.

11 JUSTICE ALITO: -- the Mexican nationals.

12 MR. HILLIARD: Right. It may not -- the
13 rule would not apply, but it doesn't mean that under
14 Boumediene standards that there's not constitutional
15 protections. Did he not know where the line was? Did
16 he intentionally go in hot pursuit? Was he called over
17 by a federale? The specifics of the facts would affect
18 the decision of whether the Constitution applied.

19 Under our -- under our proposed rule, as
20 Mexico pointed out in its brief, there's been 243
21 shootings along the border with the Border Patrol using
22 deadly force, 10 of those across the border.

23 JUSTICE ALITO: No, I understand that. But
24 as Justice Breyer said, we have to articulate a rule
25 that applies. We can't just say that in -- that -- that

1 on the particular facts here, there was -- the --
2 Mr. Hernandez's -- the -- the Petitioner's have a --
3 have a Bivens claim and -- and they're -- it states a
4 violation of the Fourth Amendment. We have to have a
5 rule to -- that can be applied in other cases.

6 And I don't know what the rule -- what rule
7 you want us to adopt other than to say you win. And, of
8 course, that's what you -- you need to do for your
9 client. But you need to give us a principle that is
10 workable.

11 Is it -- is your rule that if the U.S. agent
12 commits on foreign soil an action that would be a
13 violation had it occurred within the United States,
14 there is a Bivens claim and there is a Fourth Amendment
15 violation? Is that your rule?

16 MR. HILLIARD: Justice Alito, no. So our --
17 our rule involves all of the conduct occurring on the --
18 on the United States side.

19 And I -- and I acknowledge a W, as Justice
20 Breyer said, would be nice for our side. But more
21 importantly, the Border Patrol is 44,000 strong along
22 our southwest border, and they only interact with
23 Mexican nationals. We've had 10 shootings across the
24 border. So that we might get the W, it will at least
25 not turn off the Constitution.

1 JUSTICE KAGAN: Mr. Hilliard, if --

2 CHIEF JUSTICE ROBERTS: Well, your rule
3 would be the same if this was the first time it
4 happened, if it was one person and the other facts were
5 the same; right?

6 MR. HILLIARD: My rule may be the same, but
7 my response to the question wouldn't have as much meat
8 on it because we're here after many of these shootings
9 have occurred. And we're here because the interaction
10 of the Border Patrol in this area, the government has
11 taken the position that on the border, the Constitution
12 turns off if the deadly force goes across the border.

13 JUSTICE GINSBURG: What do -- an anterior
14 question. It has been argued that the Constitution is
15 only for people who are within the United States;
16 therefore, an alien injured abroad has no Fourth or
17 Fifth Amendment rights. How do you answer that?

18 MR. HILLIARD: Well, I think that the
19 Boumediene made clear, Justice Ginsburg, that aliens
20 abroad have constitutional rights, depending on whether
21 or not there is a -- after the evaluation, whether
22 functionally, the Constitution should apply. This Court
23 has --

24 JUSTICE GINSBURG: But that was dealing with
25 habeas.

1 MR. HILLIARD: That was dealing with habeas.
2 But the Boumediene court did a full survey of the
3 entirety of the extraterritory -- extraterritory cases,
4 and they said there's a common thread.

5 Now, what this Court does is it looks at,
6 where are we sending this -- where are we sending the
7 Constitution and what are we asking it to do? And I
8 acknowledge and recognize and this Court has already
9 said it's not a worldwide Constitution. But it has gone
10 abroad many times, depending on what it needs to do and
11 what it's being asked to do.

12 JUSTICE KAGAN: I think you said what your
13 rule is in a pretty clear way. You've said essentially
14 it's a border area and the shot came from the United
15 States. So that, I take it, is your rule.

16 So it seems to me that the harder question
17 is actually -- and this goes back to the Chief Justice's
18 question -- why is that your rule? You know, what makes
19 that confluence of factors different from everything
20 else?

21 MR. HILLIARD: Justice Kagan, the reason
22 that's our rule is because the interaction at the
23 border, at our southwest border, has -- has resulted
24 often in shots being fired across the border. It's not
25 unique to Sergio Hernandez.

1 JUSTICE KAGAN: Well, I guess you keep
2 saying that, Mr. Hilliard, that there's a problem here,
3 and I respect that. But there are problems -- there
4 might be problems in other situations as well. There
5 might be problems when U.S. officials go into a foreign
6 nation's territory. So -- so that leaves me still
7 uncertain why -- I mean, you're saying as a practical
8 matter, this is where the incidents are. But is that
9 all you have as to why this is your rule, why the border
10 cases are different?

11 MR. HILLIARD: So using the -- the framework
12 of Boumediene and the factors in Boumediene, and given
13 that this fact pattern is unique to the case we're here
14 about today, but not unique to the situation on the
15 border, yeah, the Boumediene factors are -- are used to
16 plug in the rule that we're asking for.

17 For example, the -- the Boumediene factors
18 are nature of the site, status of the person seeking the
19 constitutional protection, importance of the right. So
20 those factors we plugged into this rule to address not
21 just this specific problem, but in reliance on the
22 Boumediene opinion, which said there's a common thread
23 in all these cases. And as the functional application,
24 we took the -- we took the four elements of -- of the
25 framework of Boumediene and applied them into our rule.

1 CHIEF JUSTICE ROBERTS: Well, but the one
2 obvious difference with Boumediene is in there, you were
3 dealing with an area subject to an exclusive control of
4 the United States. Here, you're dealing with Mexico, an
5 entirely different situation.

6 MR. HILLIARD: Mr. Chief Justice, I would --
7 I would acknowledge that you're right. We are in --
8 Boumediene is in Cuba, but it's a -- it's a -- it's
9 basically, as Boumediene recognized, United States
10 territory.

11 Here, you have a U.S. law enforcement
12 officer whose -- 100 percent of his conduct is inside
13 the United States, de jure and de sovereign United
14 States property. No other government could control his
15 actions but our government. And while inside the United
16 States under his own Constitution, which he has sworn to
17 abide by, he shoots.

18 You know, the hypothetical that I have
19 may --

20 CHIEF JUSTICE ROBERTS: Well, but just to
21 stop you there. So is it any time that the U.S. officer
22 is in the United States that that's -- that satisfies
23 the question under Boumediene? It's --

24 MR. HILLIARD: No, it does not.

25 CHIEF JUSTICE ROBERTS: It's because the

1 injury occurs in a different jurisdiction; right?

2 MR. HILLIARD: It's because the injury
3 occurs in close -- close proximity. And this is a
4 unique area. Again, I would invite the Court to look at
5 Exhibit 180 of the appendix, which shows this culvert
6 does not delineate where the United States ends and
7 where Mexico --

8 CHIEF JUSTICE ROBERTS: Well, I assume
9 that's true of a lot of borders.

10 MR. HILLIARD: Well -- and the reason that
11 that's important in regards to the truth of that
12 statement is because the United States exercises some
13 degree of control into the culvert. And as Michael
14 Fisher said in his testimony to Congress, they project
15 outwards from the border.

16 CHIEF JUSTICE ROBERTS: Does the government
17 of -- of Mexico agree with that?

18 MR. HILLIARD: The government of Mexico
19 agree -- agrees that their sovereign is violated when
20 the United States shoots bullets into their land and
21 kills their citizens.

22 CHIEF JUSTICE ROBERTS: The question is
23 whether the government of Mexico agrees with your
24 statement that the jurisdiction of the United States
25 extends beyond the Mexican border.

1 MR. HILLIARD: Mr. Chief Justice, at -- it
2 was not that the jurisdiction extends beyond the border.
3 It's that the control projects from our physical border
4 as Michael Fisher, the head of Border Patrol said,
5 outward. It's not the first or last line of defense.
6 The -- the government of Mexico has not addressed his
7 statement, but as a fact, along the entirety of the
8 southwest border, the Border Patrol stays on the border
9 and projects authority outward.

10 JUSTICE KAGAN: May I ask about an anomaly
11 created by your rule? I take it everybody agrees that
12 if there were a Texas State trooper who was involved in
13 the exact same conduct, that trooper, you -- you would
14 not be able to sue that trooper.

15 So why is it that Bivens, which is usually
16 thought of as a more limited remedy than 1983, I mean,
17 why should you have this situation where you can sue the
18 Federal agent, but not the State agent?

19 MR. HILLIARD: Justice Kagan, in all
20 respects, except where the victim lie, this is a typical
21 Bivens case. You have a U.S. law enforcement officer
22 exercising unreasonable force, and Sergio Hernandez is
23 in the group of victims that are injured as a result of
24 excessive force.

25 The issue is, is where he fell and where he

1 shot, does it take it out of his right to a Bivens?

2 JUSTICE KENNEDY: Well, my -- I -- I -- I've
3 waited while the rule was being discussed because that's
4 important; but as Justice Kagan's question indicates,
5 whether or not there can and should be a Bivens action
6 is critical to your case.

7 Since 1988, this Court has not recognized a
8 single Bivens action. We look for special
9 considerations. You've indicated that there's a problem
10 all along the border. Why doesn't that counsel us that
11 this is one of the most sensitive areas of foreign
12 affairs where the political branches should discuss with
13 Mexico what the solution ought to be? It seems to me
14 that this is an extraordinary case for us to say there's
15 a Bivens action in light of what we've done since 1988
16 where we haven't created a single one.

17 MR. HILLIARD: Justice Kennedy, there is no
18 alternative remedy for the family. There has been 283
19 shootings, and when those shootings with the border --

20 JUSTICE KENNEDY: But that -- that means
21 it's a critical area of foreign affairs.

22 MR. HILLIARD: We're not attacking the
23 policy of the United States government in regards to
24 Mexico. In fact, the policy of the United States is a
25 Border Patrol agent should not use deadly force without

1 imminent peril. We're asking that when this --

2 JUSTICE KENNEDY: Well, the policy of the
3 United States, I suppose we can ask them if they're not
4 going to give any compensation from a special bill for
5 Congress or it might be picked up by an executor
6 agreement, the policy of the United States is that this
7 injury, a serious injury, goes unaddressed. And if we
8 assume that the officer was completely at fault and that
9 there's really no defense, we -- we don't know what the
10 facts are, but if we assume the facts most favorably --
11 favorably to you, there should be some relief.

12 But isn't this an urgent matter of
13 separation of powers for us to respect the duty that --
14 that the -- the principle rule that the executive and
15 the legislative have with respect -- respect to foreign
16 affairs?

17 MR. HILLIARD: Justice Kennedy, I would say
18 it is an urgent matter of separation of powers, but it
19 would be the opposite.

20 The -- the fact pattern, if the Court may
21 recall, is Officer Mason had actually grabbed one of
22 Sergio's friends and had him by the scruff of the collar
23 next to him in the United States. Had he shot that boy,
24 there would be a Bivens claim.

25 If a Mexican national is shot just inside

1 the United States, and the only thing the government can
2 say is it implicates one policy in national security, in
3 that situation, then you've taken away Bivens claims for
4 the largest police force in this country in the area
5 that they operate. The -- the location of the boy in
6 regards to being shot from the United States should not
7 counsel hesitation. If --

8 JUSTICE KENNEDY: So, Mr. Hilliard, you want
9 me to put down in my notes the location of the boy is
10 irrelevant to this case. That's what -- that's what
11 we're going to put in our opinion?

12 MR. HILLIARD: You start with -- you start
13 in your opinion that the -- that if all of the conduct
14 happens inside the United States and -- and there's a
15 close proximity cross-border shooting, then the Fourth
16 Amendment -- Fourth Amendment constraints on deadly
17 force apply.

18 To -- to hold otherwise, Justice Kennedy,
19 is -- is to prevent Bivens in the area of the border,
20 whether it's south or north of the line, because if
21 it -- if national security and foreign relations is
22 affected 30 feet across the line and the -- and an
23 officer stands in the same place and shoots Sergio's
24 friend right next to him, then you have one kind -- one
25 Bivens case and one non-Bivens case.

1 JUSTICE BREYER: When I write the reason for
2 that, I write the opinion just as you said it, and it
3 says, but if it's only 30 feet away, the victim, then
4 the Bivens action in the Fourth Amendment apply. But if
5 it's 30 miles away or 300 miles, they don't. Okay?
6 That's what you want me to write.

7 Now, the next sentence has to have the
8 reason why I drew that distinction, and that's what I
9 think people have been looking for. And so just please,
10 if -- if there's anything else you have to say, I think
11 you don't have anything else to say, but if you do, I
12 would say this is a good time to say it.

13 MR. HILLIARD: My point is the -- the close
14 proximity takes it away from your analogy, Justice
15 Breyer.

16 My -- my point is that if all the conduct --

17 JUSTICE KENNEDY: That isn't a reason you
18 normally can give in the opinion. I -- I had a few
19 problems with applying it across the board. I mean,
20 maybe I could, but is that what I'm supposed to say?
21 Because it took away from the problems that Justice
22 Breyer had.

23 No, of course, you can't say that. So --
24 so -- so what -- what is it I can say?

25 MR. HILLIARD: If I understand your

1 question -- question, Justice Breyer, the reason that
2 Bivens should be allowed if all of the conduct happens
3 in the United States, is -- is because the -- the
4 anomalous --

5 JUSTICE BREYER: Well, all the conduct
6 happens in the United States with the drones.

7 MR. HILLIARD: Right. But it would be
8 anomalous to say -- anomalous to say that if the Border
9 Patrol agent shoots north, west, and east --

10 JUSTICE BREYER: Same with the drones.

11 MR. HILLIARD: There's a Bivens claim --
12 if -- it's -- if -- with all due respect, it's not the
13 same with the drones because there is no proximity and
14 there's no cross-border shooting. There's a drone that
15 goes somewhere else to do something else.

16 JUSTICE BREYER: Okay. What about a
17 different approach. And I just want your reaction
18 because you suggested at the end of your brief, if you
19 have anything to add, do it. And yes, all the action
20 took place in the United States, but it took place at
21 the border. Not beyond the border. At the border.

22 The border is the river. We have a treaty
23 that says the river. We also have a treaty that says
24 there will be a line down the middle of the culvert, but
25 the culvert will be maintained by Mexico and the United

1 States jointly. And there are many documents, including
2 the Treaty of Hidalgo -- you know, that famous treaty
3 which I'm drawing a blank on, but --

4 MR. HILLIARD: Hidalgo?

5 JUSTICE BREYER: Hidalgo, yes. Right. It's
6 referring to the river as the border.

7 So it has not taken place in a foreign
8 country. It's taking place on territory that
9 jurisdictionally, of course, is Mexico's, but which is a
10 special kind of -- you -- you started talking about the
11 curtilage. Is there any other word? "Curtilage"
12 suggests a house. Then you started talking about cannon
13 shots going off somewhere. So you did research into
14 this.

15 Now, if I want to say, this is a special
16 kind of physical place, what words do I use?

17 MR. HILLIARD: I -- I think, Justice Breyer,
18 I -- and I -- if I get -- get your question in, in the
19 middle of the river, according to the Treaty of Hidalgo
20 is the -- the -- the deepest trench of the middle of the
21 river. And there's no river here anymore. It's simply
22 a flat culvert, which is part of the --

23 JUSTICE BREYER: We are responsible for
24 maintaining it, not by ourselves, but with Mexico and
25 the reason we are maintaining it is because at one time

1 the whole river and now the line down the center are the
2 boundary, and we don't want the river to jump its banks
3 and create new boundaries. So this is a boundary case.

4 Now -- now, you obviously explored that and
5 then I think you gave up on it. And so I would like you
6 to tell me what you want me to hear about it.

7 MR. HILLIARD: So the curtilage cases were
8 used in order to show that there is a -- a substantive
9 reasonableness evaluation in -- in regards to the close
10 proximity requirement of our rule.

11 JUSTICE GINSBURG: Are you -- are you
12 relying at all -- I -- I'm not sure you did in your
13 brief -- but there in -- in tort law, generally, when
14 there's an act outside that causes injury inside, the
15 regulating rule can come from the place where the
16 conduct occurred. So that that act outside, injury
17 inside, is a familiar category in tort law.

18 As I understand it, the -- the regulating
19 rule can come from either place, the place where the act
20 occurs or the place where it's effect.

21 MR. HILLIARD: That's right,
22 Justice Ginsburg. And as a practical matter, as the --
23 the Mexican juris brief points out, there is no
24 practical way for the courts of Mexico to review this
25 conduct.

1 So I appreciate, if I can get back to
2 Justice Breyer's concern and inquiry, and that is, if
3 all of the conduct happens in the United States and as a
4 fact there is some exercise of control right at the
5 border, then if the injury occurs in close proximity to
6 that border, then that's a rule that would both be
7 workable and would take care not only of the issue with
8 Sergio Hernandez, but would also take care of the issue
9 of the entirety of the southwest border of the United
10 States where the conduct continues to occur even today.

11 JUSTICE ALITO: Could I ask you to go back
12 to Justice Kagan's question? If the -- if the officer
13 here was a State or a local officer, would you be able
14 to file a claim for damages in the United States in a
15 Federal court?

16 MR. HILLIARD: The issue in that regard is
17 if -- what does "jurisdiction" mean under 1983? And if
18 jurisdiction -- if you're not a citizen and you're not
19 in the jurisdiction, are you precluded under 1983?

20 The -- the point I was trying to make for
21 Justice Breyer is there is some issue of control in the
22 culvert, and it's -- it's never been decided what
23 jurisdiction is in regards to --

24 JUSTICE ALITO: Oh, well, put that aside.
25 Let's assume this is in Mexico. Plainly in Mexico.

1 Would -- would you have a claim against a State or a
2 local officer? And if not, isn't it anomalous for us to
3 say that you have a claim under Bivens?

4 MR. HILLIARD: You would not have a claim
5 over the State officer, but if you don't -- but a Bivens
6 claim -- a constitutional Bivens claim could apply to
7 the State officer. The issue --

8 JUSTICE SOTOMAYOR: I'm sorry. Why not? If
9 it's a State officer who lives in -- I guess this is
10 Texas, right? Why couldn't the family sue that State
11 officer under the theory that Justice Ginsburg raised,
12 which is if all the acts happened in the United States,
13 but were projected injuries into another State, most
14 States -- I think including Texas, but I could be
15 wrong -- we have counsel for -- for Officer Mesa to tell
16 us -- the family could sue the State officer in Texas.
17 He did the acts in Texas. He lives in Texas.

18 MR. HILLIARD: That's right.

19 JUSTICE SOTOMAYOR: Personal general
20 jurisdiction.

21 MR. HILLIARD: Justice Ginsburg -- I mean,
22 excuse me -- Justice Sotomayor. I do not --

23 JUSTICE SOTOMAYOR: That's the first time
24 ever.

25 (Laughter.)

1 MR. HILLIARD: I apologize.

2 Justice Sotomayor, I agree with you, but the
3 issue under 1983 is -- is citizenship and jurisdiction
4 of -- of where it occurred. If I take Justice Alito's
5 hypothetical and put the -- put the victim all the way
6 into Mexico, then -- then there would be a statutory
7 exclusion to -- based on jurisdiction. If he came into
8 the United States or was within the -- the control area,
9 that might be jurisdiction, then there would be a 1983
10 claim.

11 JUSTICE GINSBURG: How often do State
12 officers act under cover of State law and outside --
13 with an impact outside the United States?

14 MR. HILLIARD: Justice Ginsburg, I've never
15 heard of that. Generally, the interaction at the border
16 is the Border Patrol with Mexican nationals on the south
17 and -- south and north side of our border. It's
18 generally the Border Patrol.

19 If there are no other questions, I'd like to
20 reserve the rest of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Ortega.

23 ORAL ARGUMENT OF RANDOLPH J. ORTEGA

24 ON BEHALF OF THE RESPONDENT MESA

25 MR. ORTEGA: Mr. Chief Justice, and may it

1 please the Court:

2 The Fourth Amendment does not apply in a
3 cross-border shooting of a Mexican civilian on Mexico
4 soil by a United States Federal agent.

5 The Petitioners' claim for Fourth Amendment
6 protection was answered in Verdugo. I don't think this
7 Court gets to the question of the functionality
8 attest --

9 JUSTICE GINSBURG: In Verdugo, the U.S.
10 officers were acting in collaboration with -- with the
11 approval and cooperation of Mexican officers. That's
12 quite a different case, isn't it?

13 MR. ORTEGA: It is. However, in Verdugo,
14 the person claiming protection was in the United States.
15 The act occurred in Mexico.

16 Here we have Mr. Hernandez who was seized in
17 Mexico. He was never in the United States. The border
18 is very real and very finite. It's not elastic.

19 JUSTICE GINSBURG: But I thought in Verdugo
20 the -- the question was a search that occurred wholly
21 inside Mexico with the cooperation of the Mexican
22 authorities.

23 MR. ORTEGA: And this Court denied to extend
24 that protection. I believe those facts provide or
25 provided even a greater rationale for this Court to

1 extend those protections, given the fact that the
2 United States planned the acts in the United States with
3 Mr. Verdugo in the United States and the search
4 occurring in Mexico.

5 Here, the seizure occurs in Mexico.
6 Mr. Hernandez is in Mexico. He is outside the sovereign
7 territory of the United States. There is no de facto
8 jurisdiction of the culvert in this area. It's -- it's
9 very -- it's dissimilar from Boumediene.

10 JUSTICE BREYER: If Boumediene had control,
11 who controlled the base? And here we know that this
12 culvert, at least as far as paving it, keeping it up,
13 spending many millions of dollars, seeing that trade, if
14 it ever is filled with water, goes across and ships are
15 free, et cetera, is a joint effort of Mexico and the
16 United States. So this is not just like a fence. It is
17 an area of two fences, and between those two areas is
18 joint exercise of border maintenance authority.

19 So I guess it's like nothing I've seen
20 before. But if it's like nothing I've seen before,
21 what's the problem with taking Justice Ginsburg's
22 approach and applying it to that kind of area where, I
23 might add, 500,000 people walk across it every day and
24 it's a fair inference that -- perhaps that American
25 citizens, adolescents, play in the culvert, too.

1 MR. ORTEGA: Your Honor, the culvert, if I
2 may, is not an area where anybody plays. I have been
3 there. It's not an area --

4 JUSTICE BREYER: We'd have to take as a fact
5 here that the children were playing. A jury could find
6 to the contrary, but we have to take that as a fact.

7 MR. ORTEGA: The border in that area is
8 still finite, Your Honor. A -- a Border Patrol agent
9 cannot step into the sovereign Republic of Mexico. If
10 he were to do that, he would be subjected to a five-year
11 minimum mandatory penalty for stepping into Mexico with
12 his weapon.

13 JUSTICE SOTOMAYOR: He was riding a bike in
14 the culvert there, correct? The wall is on one side,
15 he's on the Mexico side of the wall in the culvert
16 riding his bicycle. That's American territory?

17 MR. ORTEGA: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: And so the dividing line
19 is just the overpass pillar?

20 MR. ORTEGA: The dividing line --

21 JUSTICE SOTOMAYOR: Was the boy at that
22 pillar? The boy was at the pillar or behind it?

23 MR. ORTEGA: The boy was at the pillar on
24 the Mexican side --

25 JUSTICE SOTOMAYOR: On the Mexican side.

1 MR. ORTEGA: -- in Mexican territory.

2 Yes, your Honor.

3 JUSTICE KAGAN: The dividing line isn't even
4 marked on the ground; isn't that right? You can't tell
5 on the ground where Mexico ends and the United States
6 begins.

7 I think the point that Justice Breyer is
8 making is this does seem like a very -- you know, it's a
9 sui generis kind of case. It's this liminal area. I
10 don't want to -- I don't know whether to call it a
11 no-man's land, but it's this liminal area, which is kind
12 of neither one thing nor another thing. So maybe it's
13 that both countries maintain it, maybe it's that -- it's
14 sort of neither country. Whatever it is, it's something
15 very different from most areas where we know exactly
16 whose jurisdiction operates and how.

17 MR. ORTEGA: It is very different, but it's
18 the center of the culvert that's the dividing line.

19 JUSTICE BREYER: We know from *Boumediene*
20 that the word "sovereign," and even the legal concept of
21 sovereign, which in *Boumediene* belonged to Cuba, is not
22 necessarily the line that distinguishes where the Fourth
23 Amendment does or does not apply.

24 MR. ORTEGA: But what was distinguishing in
25 that case, Your Honor, is that we exercise control over

1 Guantanamo --

2 JUSTICE BREYER: Yes. Yes. Correct.

3 Correct.

4 MR. ORTEGA: -- at least --

5 JUSTICE BREYER: Absolutely right. And
6 here, the control is significantly diminished compared
7 with the base at Guantanamo. Absolutely correct. But
8 the point is -- there are other factors which we've
9 heard for half an hour at least, you know, here that,
10 no, suggests maybe the Fourth Amendment should apply.

11 MR. ORTEGA: But the United States does not
12 exercise any de facto jurisdiction beyond the middle
13 line --

14 JUSTICE BREYER: We do two things. We do at
15 least have a commission that draws the boundary and with
16 Mexico also repairs the culvert. And that's expensive.

17 So we do two things with Mexico there. And
18 the fences are on either side of the culvert. And it is
19 a border. And all -- and those things, taken together,
20 either are or are not enough to apply the Fourth
21 Amendment. That's why I say add Justice Ginsburg's
22 point and add the fact that Mexico would like the Fourth
23 Amendment applied.

24 MR. ORTEGA: They would like it applied in
25 this case, but they have never ceded any of their

1 jurisdiction beyond the middle of the culvert.

2 I understand that the maintenance of the
3 culvert is a joint maintenance; however, the laws of the
4 United States do not apply beyond the middle of the
5 culvert.

6 JUSTICE GINSBURG: But the law of the United
7 States, the law is directed to an actor. The actor is
8 the Border Patrol member. And the instruction from the
9 United States is very clear: Do not shoot to kill an
10 unarmed, nondangerous person who is no threat to your
11 safety. Do not shoot to kill. That's U.S. law. And
12 that's U.S. law that governs the conduct of the Border
13 Patrol police.

14 So I don't understand all this about Mexico.
15 It's the United States law operating on the United
16 States official who's acting inside the United States.
17 This case has, as far as the conduct is concerned,
18 United States written all over it. There's nothing
19 about Mexico. The Border Patrol guard doesn't take his
20 orders from Mexico.

21 MR. ORTEGA: And then I think it would be up
22 to the United States to prosecute Mr. Mesa criminally if
23 they were to choose -- choose to do so, which would
24 provide a remedy to the Petitioners via a restitution --

25 JUSTICE SOTOMAYOR: Why?

1 MR. ORTEGA: -- order.

2 JUSTICE SOTOMAYOR: They wouldn't get any
3 damages for the death of their 15-year-old son for their
4 emotional suffering.

5 But I think I have, following up on what
6 Justice Ginsburg is saying, a more fundamental question,
7 which is I don't think you or the U.S. government is
8 suggesting that anyone is condoning people standing at
9 the border and taking potshots at passing Mexicans.

10 MR. ORTEGA: Absolutely not.

11 JUSTICE SOTOMAYOR: All right. And, yes,
12 there's a remedy -- criminal remedy for the government
13 to vindicate its position, but why should there be --
14 not be a civil remedy to ensure that border police are
15 complying with the Constitution? The entire -- either
16 under the Fourth or Fifth Amendment? Wouldn't shooting
17 potshots at Mexican citizens be shocking to the
18 conscience?

19 MR. ORTEGA: It is shocking. But -- but
20 where would the line apply? The ad hoc totality of the
21 circumstance test as presented by the Petitioners, would
22 it be as far as the bullet can travel? Would it --

23 JUSTICE BREYER: No --

24 MR. ORTEGA: -- it --

25 JUSTICE BREYER: It would be -- it would be

1 -- and that's why we use their analogy. It would apply
2 when the action that violates the amendment takes place
3 in the United States and where the victim is at the
4 border. And "at the border" is defined as including
5 those areas that are jointly administered as part of a
6 border set forth in the treaty, where administration
7 means spending significant amounts of money on the
8 upkeep of those border positions; where, if you want
9 some additional limitation, where both American children
10 and Mexican children might play.

11 And why do we do that? Because without such
12 a rule, the people of the United States who might play
13 there, too, are not secure in -- from unreasonable
14 seizures such as this one.

15 I mean, I made that up.

16 (Laughter.)

17 JUSTICE BREYER: But he has quite persuasive
18 analogies in the law with curtilages, cannon shots,
19 joint administration, and the purposes of the Fourth
20 Amendment, which is to protect the people, we can say
21 maybe American and maybe beyond, from unreasonable
22 searches. Okay? There is a set of arguments.
23 Limitation, absolute limitation. No worry about drones.
24 Flows directly from Boumediene and carries out the
25 purposes of the Fourth Amendment.

1 Now, that's a whole long argument. What do
2 you want to say?

3 MR. ORTEGA: Well, Your Honor, I believe
4 that if -- even if the approach, if taken as framed by
5 Your Honor were to be applied, it would still plunge the
6 lower courts into a sea of uncertainty as to where that
7 line actually ends. I understand that your question is
8 focused on the United States' care and upkeep of the
9 area and that it would end in that area. But I think
10 the ramifications and the tentacles of such an ad hoc
11 approach --

12 JUSTICE KAGAN: Well, Mr. Ortega, you say
13 "ad hoc," but --

14 CHIEF JUSTICE ROBERTS: Justice Kennedy.

15 JUSTICE KENNEDY: Justice Ginsburg outlined
16 all of the U.S. factors here. Was the U.S. officer in
17 the United States subject to U.S. regulation? If we
18 were to pull the officer here under Bivens, what would
19 be the practical obstacles that would prevent orderly
20 administration of that rule? It's a U.S. officer
21 subject to U.S. supervision. That's it.

22 MR. ORTEGA: The largest, or the most
23 profound practical obstacle, I -- I believe, would be
24 the application of the rule itself and not applying --
25 or not giving lower courts a clear certainty, a clear

1 defined rule on which to apply --

2 JUSTICE KAGAN: Well, Mr. Ortega, the rule
3 is very defined. If the shot comes from U.S. territory
4 and it hits somebody in the culvert, then there's a --
5 there's a -- there's an action. That's a very defined
6 rule. There's nothing unclear about that. You can
7 argue is that a good rule? Is that a bad rule? Is
8 there a good reason behind that rule? But it's a very
9 clear rule.

10 MR. ORTEGA: But in areas of the United
11 States that -- where there is a clearly defined border,
12 as we have here, the Fourth Amendment stops unless the
13 person seized -- in this case Hernandez -- had some
14 voluntary contact with the United States.

15 CHIEF JUSTICE ROBERTS: Could I ask you
16 briefly, because we haven't talked about it yet, a
17 question on the qualified immunity point.

18 It seems very odd to me that qualified
19 immunity would turn on a jurisdictional issue. Most of
20 our cases, you're interested in the conduct of the --
21 the officer and whether that conduct was reasonable and
22 lacked a precedence, not an issue about whether or not
23 he can be sued by the particular plaintiff. Are you
24 aware of any of our cases where qualified immunity
25 turned on -- in a -- a legal jurisdictional issue?

1 In other words, it's odd to say the
2 officer's conduct is reasonable so long as it turns out
3 the victim, you know, is -- is Mexican, but it's
4 unreasonable if the exact same conduct and it turns out
5 the victim is American. I'm not aware of any qualified
6 immunity case like that.

7 MR. ORTEGA: I don't know of any case that
8 fits that fact pattern, Mr. Chief Justice.

9 JUSTICE GINSBURG: Would you recognize
10 that -- let's say it was the -- the boy that the Border
11 Patrol grabbed and then shot him, so the -- the -- so
12 the death would have occurred in the United States,
13 Bivens claim?

14 MR. ORTEGA: Well, absolutely. Then he
15 would be in the territory of the United States, and all
16 constitutional protections would apply.

17 JUSTICE GINSBURG: So does it make a whole
18 lot of sense to say if the officer shoots somebody on
19 the U.S. side of the border, good Bivens claim? If the
20 officer standing in the same place shoots somebody who's
21 just across the border, no claim? That doesn't make a
22 whole lot of sense, does it, to distinguish those two
23 victims?

24 MR. ORTEGA: I think it's very
25 distinguishable because of the very real border. Wars

1 have been fought to establish borders. The border is
2 very real.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
4 Mr. Kneedler.

5 ORAL ARGUMENT OF EDWIN S. KNEEDLER
6 ON BEHALF OF THE FEDERAL RESPONDENTS

7 MR. KNEEDLER: Mr. Chief Justice, and may it
8 please the Court:

9 The antecedent question in this case is
10 whether this Court should create a cause of action for
11 damages under Bivens. As Justice Kennedy pointed out,
12 for many years, this Court has declined to extend Bivens
13 to new contexts because -- out of recognition that the
14 creation of causes of action is for Congress.

15 JUSTICE KAGAN: You're quite right,
16 Mr. Kneedler, but there is a difference between this
17 case and I think -- I think all -- maybe all but one --
18 of these other cases, which is in all of these others,
19 the Court has been able to point to some alternative
20 remedy. It might not have been the complete relief that
21 a plaintiff in a case wanted, but it was something. And
22 there was an ability to say, Congress has given you some
23 way to address the harm that you've suffered.

24 And here, there really is nothing. I mean,
25 there's the idea that you might prosecute this person

1 criminally, but what does the family get from that? And
2 anyway, you almost never do.

3 So -- so here, there's just no remedy. And
4 isn't that really quite different from all these other
5 Bivens cases that you referred to?

6 MR. KNEEDLER: First of all, the Court has
7 made clear in Stanley and Wilkie that the presence or
8 absence of a remedy is not the only factor, that there
9 is the additional --

10 JUSTICE KAGAN: Well, we said that, but, you
11 know, Stanley might be the only case on your side. And
12 Stanley is a military case where there is like the
13 ultimate special factor. So for the most part, every
14 time we've said no Bivens, we've said because there's an
15 alternative remedy. And here we can't say that.

16 MR. KNEEDLER: Well, when you say Stanley
17 and Chappell v. Wallace, ultimate special factors
18 because of the political branches' control over the
19 military. That is directly applicable here. Here, you
20 have a -- a cross-border incident which necessarily
21 gives rise to foreign relations problems, which are
22 committed to the political branches.

23 The -- the -- and when Congress has chosen
24 to address remedies as a statutory matter under the --
25 under the Federal Tort Claims Act, it has created an

1 exception for -- for injuries occurring in foreign
2 countries.

3 And in response to Justice Ginsburg's
4 question, as a matter of Federal law, under the FTCA,
5 under this Court's Sosa decision, if the injury occurs
6 outside the United States, it is excluded from liability
7 even if the conduct occurred in -- in the United States.

8 JUSTICE GINSBURG: That's the U.S. -- U.S.
9 liability, not the officer liability.

10 MR. KNEEDLER: Well, but I -- but I think if
11 the Court is considering whether to fashion a judicially
12 created remedy, looking to what Congress has done where
13 it has acted -- and 1983 is another very prime
14 example -- and where Congress has chosen to create
15 monetary compensation for persons injured abroad by the
16 United States, it has always done it in an
17 administrative --

18 JUSTICE BREYER: Well, why -- why -- why do
19 you use words like "create," "extend," et cetera,
20 "fashion," if, in fact, a Federal policeman, a Federal
21 agent violates the Fourth Amendment and seizes someone
22 unreasonably in Alaska, does the victim have a Bivens
23 remedy?

24 MR. KNEEDLER: Yes, but --

25 JUSTICE BREYER: Of course. Now, if he does

1 it in Puerto Rico, does the victim have a Bivens remedy?
2 I'll tell you by making this up, but there never has
3 been a Bivens action in Puerto Rico. It's the first
4 one.

5 Does he have a Bivens action?

6 MR. KNEEDLER: Yes, but there's --

7 JUSTICE BREYER: Yes. Okay.

8 MR. KNEEDLER: But there's something --

9 JUSTICE BREYER: Now, let's see where I've
10 gotten -- I'm trying to go somewhere with the question.

11 MR. KNEEDLER: But -- but there's something
12 fundamentally different about creating a Bivens remedy
13 for --

14 JUSTICE BREYER: Well, why creating? I
15 would have thought if you want to say in there --

16 MR. KNEEDLER: Or extend --

17 JUSTICE BREYER: Wait. Extending. You see,
18 there those words assume the answer to the question.

19 I can absolutely see you're saying that if
20 this Court fashions a civil remedy for a violation of
21 the Third Amendment or the Second Amendment, you would
22 be extending Bivens, but I thought Bivens made
23 absolutely clear that where a Federal agent hurts
24 someone by violating the Fourth Amendment, there is a
25 Bivens action. Now we have an exception. And the

1 exception is the military.

2 So I think you can look at this either way.
3 But I think the -- the more -- I would tend to look at
4 it as saying, of course there is a Bivens remedy if
5 there is a Fourth Amendment violation unless you're in
6 the military, which no one says this is true.

7 So that's how I've been thinking about the
8 Bivens action. I've been thinking the answer to that
9 question turns on the answer to the Fourth Amendment
10 question.

11 Now you can tell me why it's better to use
12 the words you've been using.

13 MR. KNEEDLER: No. The -- the Court -- just
14 because the Court has recognized a Bivens action for
15 violation of a particular constitutional provision in
16 one context or with respect to one set of defendants, it
17 doesn't mean that it should extend it. And that's the
18 word the Court has used.

19 JUSTICE BREYER: Oh, yes. In, like, Puerto
20 Rico?

21 MR. KNEEDLER: Well, no, in the -- under the
22 Eighth Amendment, under -- in *Carlson v. Green*, the
23 Court recognized a Bivens remedy against Federal
24 employees that --

25 JUSTICE BREYER: That's Eighth versus

1 Fourth.

2 MR. KNEEDLER: I --

3 JUSTICE BREYER: I'm saying that's Fourth in
4 Puerto Rico.

5 MR. KNEEDLER: No, I'm -- I'm -- what -- my
6 point about the Eighth Amendment is that the Court
7 declined to recognize a Bivens remedy for Eighth
8 Amendment violations --

9 JUSTICE KAGAN: Mr. Kneedler, you --

10 Mr Kneedler: -- for private confirmations.

11 JUSTICE KAGAN: -- you get the point. The
12 point of it is that it's the heartland of Bivens for a
13 law enforcement officer to use deadly force in violation
14 of the Fourth Amendment. That's the heartland of
15 Bivens. We don't have to make up anything new. We
16 don't have to extend it. We don't have to create
17 anything. That's just Bivens.

18 MR. KNEEDLER: It is the heartland of
19 Bivens' special factors analysis for the Court to create
20 a damage remedy in a situation fraught with foreign
21 relations issues. And this ties directly into your
22 point about --

23 JUSTICE KAGAN: Well, could you say -- let's
24 talk about that. How is this fraught with foreign
25 relations issues? Because Mexico would surely prefer

1 that -- that its citizen have a Bivens remedy.

2 So you seem to be using foreign relations as
3 if sort of this touches some other country. But in the
4 usual case, I think we've asked what's the interference?
5 What's the disruption? So tell me what the interference
6 or the disruption is.

7 MR. KNEEDLER: Any -- any --

8 JUSTICE KAGAN: The problem we would
9 create --

10 MR. KNEEDLER: Any time --

11 JUSTICE KAGAN: -- not just the fact that it
12 has something to do with another country.

13 MR. KNEEDLER: Any time -- any time the
14 officers of one country injure someone in another
15 country, that creates the potential for a foreign
16 relations incident and it's illustrated here by a number
17 of factors.

18 Mexico requested the extradition of -- of
19 Mesa in this case, and the United States refused because
20 it had done its own investigation of this incident and
21 concluded that the -- that prosecution should not be
22 brought --

23 JUSTICE KAGAN: I'm sure Mexico cared a lot
24 about this. The question I'm asking is how does the
25 presence of the Bivens remedy disrupt or interfere with

1 the United States' ability to carry out its foreign
2 policy?

3 MR. KNEEDLER: And another illustration, and
4 I think -- I think it's tied to that is one of the
5 reasons is that -- why there is not a remedy in Mexico
6 is because Mexico would recognize the official immunity
7 of Officer Mesa in this circumstance according to the
8 amicus briefs. I have no reason to disagree with that.
9 That is a recognition by Mexico itself that the conduct
10 of a -- of a U.S. officer in these circumstances
11 involves foreign sovereign problems.

12 And the -- another -- another issue here is
13 that the plaintiff here is -- plaintiffs here are
14 seeking to insert the courts into the resolution of a
15 dispute about which the United States and Mexico have
16 a -- a different view of the facts. And -- and --

17 JUSTICE GINSBURG: But suppose -- suppose
18 the -- the victim, the same -- the same location across
19 the border, but were a U.S. citizen, as Justice Breyer
20 mentioned, many -- and many transients will go -- go
21 across from Juarez to El Paso. Suppose it had been a
22 U.S. citizen that was the victim of the shooting?

23 MR. KNEEDLER: We -- we think there would
24 not be a Bivens remedy there either because of the
25 extraterritorial applications.

1 JUSTICE GINSBURG: And then if it were, if
2 it were the young man who was grabbed by the Border
3 Patrol guard and shot on the U.S. side, Bivens?

4 MR. KNEEDLER: Yes, there would be. But --
5 but in -- in terms of the questions about line drawing
6 that were raised before, the two nations have drawn a
7 line here, and this is a circumstance where this -- the
8 conduct here is clearly extraterritorial. The fact that
9 there may be joint maintenance of the culvert is a very
10 minor factor considering that the only law that
11 governs --

12 JUSTICE BREYER: If it -- but that's the
13 point. If, in fact, all that mattered were the
14 existence of a well-recognized boundary line, this case
15 is over. You win.

16 But that well-recognized boundary line was
17 present in *Boumediene*, and certainly *Boumediene*
18 suggests, while it is a factor, it is not the only
19 factor that determines the reach of the Fourth
20 Amendment. So there -- there we are. We're in court,
21 because it is not the only factor.

22 And now you add in all the stuff about the
23 culvert and who's playing there and who might be playing
24 there, and the 500,000 people who cross every day, and
25 the joint maintenance of the culvert, and the fact that

1 all this conduct happened in the United States, that's
2 what your opponent brother over there is trying to do.

3 MR. KNEEDLER: Boumediene had to do with
4 the -- the substantive application of the Fourth
5 Amendment, which I want to get to in just a minute.

6 But the antecedent question is whether this
7 Court should answer those questions in a private damage
8 remedy when it hasn't recognized a new context for one
9 in 35 years.

10 JUSTICE ALITO: Well, what would the
11 government --

12 MR. KNEEDLER: If they're thinking --
13 think --

14 JUSTICE ALITO: What would the government of
15 Mexico say if we wrote an opinion that says because the
16 United States spent a lot of money to pave this culvert,
17 we think that the United States' authority with respect
18 to the culvert is basically the same as the authority
19 that we have in Guantanamo.

20 MR. KNEEDLER: I think the Mexican
21 government would be very offended by it.

22 JUSTICE KAGAN: I'm sure it wouldn't have to
23 be written that way.

24 (Laughter.)

25 MR. KNEEDLER: This -- this case -- this --

1 no, but this -- this -- this case is -- this case is
2 fundamentally different than Boumediene.

3 In Boumediene, the Court said that the
4 United States is not answerable to anyone else. Here
5 the United States is answerable to Mexico. In
6 Boumediene, the Court said only --

7 JUSTICE GINSBURG: How? How?

8 MR. KNEEDLER: Pardon?

9 JUSTICE GINSBURG: You did say in your brief
10 the United States is answerable to Mexico for any
11 cross-border use of force. How is the United States
12 answerable to Mexico?

13 MR. KNEEDLER: Mexico -- Mexico holds us
14 accountable for doing something about it. We
15 investigated criminally and -- and concluded that a
16 criminal prosecution should not be brought, but Mexico
17 regards it as the United States' responsibility to
18 control this conduct.

19 JUSTICE GINSBURG: The responsibility to
20 Mexico is prosecution in the United States? That's --

21 MR. KNEEDLER: To -- to control -- to
22 control the conduct, yes.

23 And -- and let me just reemphasize here.
24 Where Congress has -- has decided the damage remedies
25 are important, it has never provided for judicial

1 remedies. It has provided for administrative remedies
2 and it has not done it in this context.

3 JUSTICE KENNEDY: So you wanted to talk
4 about the Fourth Amendment?

5 MR. KNEEDLER: Yes. This Court's decision
6 in *Verdugo*, as we read in this, established a
7 categorical rule that the Fourth Amendment does not
8 apply to some mass of persons outside the United States.
9 Nothing in *Boumediene* changes that.

10 *Boumediene*, looking at the insular cases and
11 whatnot, was talking about territory over which the
12 United States exercised jurisdiction, independent of the
13 incident that was at issue there.

14 Here the United States --

15 JUSTICE SOTOMAYOR: Can we --

16 MR. KNEEDLER: Does not --

17 JUSTICE SOTOMAYOR: -- go back to my
18 hypothetical. Border policemen are shooting
19 indiscriminately from within the United States across
20 the border. This is the allegation in this complaint.
21 And I understand you say the government has investigated
22 and sees the facts differently.

23 Have you seen the -- the film that appeared
24 on the YouTube?

25 MR. KNEEDLER: I have.

1 JUSTICE SOTOMAYOR: I did, and I can't
2 square the police officer's account of this incident
3 with that film.

4 MR. KNEEDLER: There were other videos.
5 The -- the -- the press release -- nothing in the record
6 and nothing in a -- in a public account --

7 JUSTICE SOTOMAYOR: That's fine.

8 MR. KNEEDLER: But there was --

9 JUSTICE SOTOMAYOR: I'm just curious.

10 MR. KNEEDLER: -- there was other evidence
11 and other video -- surveillance videos that were taken
12 into account in the investigation. If I could --

13 JUSTICE KENNEDY: Let me ask one other
14 question.

15 Are -- are there examples in the past ten
16 years of the Congress of the United States passing
17 special laws for -- to compensate victims for instances
18 somewhat like this where the United States has either
19 accidentally or deliberately transgressed on the rights
20 of foreign persons?

21 MR. KNEEDLER: I don't know if the -- if
22 there have been private bills, but that would be the
23 solution. This is -- this is something that should be
24 up to Congress.

25 And, again, on the application --

1 JUSTICE KENNEDY: Of course, I guess you
2 could say that with reference to Bivens acts generally,
3 even in the United States.

4 MR. KNEEDLER: Well, and this -- this Court,
5 in deciding whether to apply Bivens, has -- has looked
6 to the question of whether Congress is the right body to
7 decide rather than the courts.

8 And here we think it clearly is because of
9 the foreign relations implications, not to mention the
10 deeply-rooted presumption against extraterritoriality,
11 all the more so in -- in with respect to this Court's
12 creation --

13 JUSTICE GINSBURG: As far --

14 MR. KNEEDLER: -- of a cause of action.

15 JUSTICE GINSBURG: As foreign relations are
16 concerned, at least a Justice of this Court has said
17 that the behavior of our law enforcement agents abroad
18 sends a powerful message about the rule of law to
19 individuals everywhere. And you're asking us to make a
20 distinction that if the law enforcement agent shoots and
21 kills somebody who's on one side of the border, there is
22 Bivens liability, you tell me that. If it's just on the
23 other side, although the conduct is identical, the
24 officer is standing in exactly the same place. I don't
25 know what kind of powerful message about the rule of law

1 that would send.

2 MR. KNEEDLER: Well, Bivens has to do with a
3 particular remedy and -- and who should create that
4 remedy. The rule of law can be enforced and
5 demonstrated in other ways; by discipline, by -- the --
6 the Border Patrol --

7 JUSTICE GINSBURG: Yeah, but it doesn't
8 happen. We know that.

9 MR. KNEEDLER: No. The border -- the Border
10 Patrol, since this incident -- and we -- we cite this in
11 our brief, has undertaken numerous reforms. It has
12 changed its training, it has given more detailed
13 instructions on the use of deadly force, it has
14 adopted -- and this -- this does go to the rule of law.
15 Adopted a transparent system of investigations after --

16 JUSTICE KAGAN: If the.

17 MR. KNEEDLER: And the --

18 JUSTICE KAGAN: -- if the Border Patrol
19 agent stood where he stood and took the shot he did, and
20 the only difference was that the teenager in the culvert
21 was an American citizen, is there a Bivens action?

22 MR. KNEEDLER: We think there would not be,
23 but that -- that's obviously a different question
24 than -- than whether an alien should have a cause of
25 action given 1983, and Congress's action in this area,

1 which indicates a judicial remedy should not be
2 available.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 And, Mr. Hilliard, you have a minute left.

5 REBUTTAL ARGUMENT OF ROBERT C. HILLIARD

6 ON BEHALF OF THE PETITIONERS

7 MR. HILLIARD: Thank you, Mr. Chief Justice.

8 To Justice Ginsburg's hypothetical, both of
9 my friends on the other side have now said there's a
10 Bivens claim for the boy who shot next to the officer.

11 Take that position into this hypothetical.
12 The officer shoots the bullet -- shoots the gun. The
13 bullet leaves the gun. It's constitutionally -- there's
14 constitutional consequences as the bullet travels all
15 the way to the border.

16 If there's a boy between the bullet -- I
17 mean, the gun and Sergio, and that bullet goes through
18 that boy in the -- in the U.S., and then the same bullet
19 hits Sergio, their position is that there's a Bivens
20 claim and there's a constitutional constraint as to the
21 first boy who dies, but not the second boy that dies.

22 The -- the -- the conduct occurring in the
23 United States, a hundred percent of it, if it gives a
24 Bivens claim, if it gives a normal, standard Bivens
25 claim to the boy who shot somewhere with the -- with the

1 bullet and then does not give one to Sergio Hernandez
2 is -- ends up being anomalous.

3 As to Justice Kennedy's question on the
4 Fourth Amendment, Boumediene decided that it is a -- it
5 is a functional test. It's a question of judgment, not
6 compulsion, as Justice Harlan said in Reid, and as -- as
7 Boumediene suggested.

8 Verdugo has nothing to do with the
9 application of the seizure by shooting someone dead to
10 the search inside the property. I think Boumediene --
11 Boumediene confirms that the fact pattern of someone
12 being killed is enough in a practical way to provide
13 limited constraints.

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 11:06 a.m., the case in the
18 above-entitled matter was submitted.)

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