CASE 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.

On Appeal from the
United States District Court for the District of Arizona,
D.C. No. 4:14-CV-02251-TUC-RCC

AMICI CURIAE BRIEF BY PROFESSORS OF CONSTITUTIONAL LAW AND FOREIGN RELATIONS LAW IN SUPPORT OF APPELLEE (AFFIRMANCE)

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Both parties have consented to the filing of this brief.[2]

ARGUMENT

I. Under the Supreme Court's Functional Approach to Constitutional Rights, the Fourth and Fifth Amendments Applied to Support an Implied Right of Action under *Bivens* for an Officer's Unjustified Killing on the U.S. Border

The District Court correctly applied this Court's and the Supreme Court's precedents in concluding that a functional approach applies to determining whether a constitutional cause of action exists under the Fourth and Fifth Amendments against a federal officer who shot and killed an individual across the U.S. border. Both this Court's and the Supreme Court's most recent decisions confirm that the extraterritorial application of constitutional rights turns upon a number of factors, but does not—as the Government claims—formalistically require the plaintiff to establish that the victim had a significant voluntary connection to the United States. *See Boumediene v. Bush*, 553 U.S. 723, 766 (2008); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 995-97 (9th Cir. 2012). To the contrary, the functional approach turns on no single factor, but requires the Court to consider together the relationship of the victim to the United States, the location of the

[2] Pursuant to Federal Rule of Appellate Procedure 29, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

relevant acts, and any practical impediments associated with enforcing the right extraterritorially.

A. The Governing Standard for This Case Is the Functional Approach Set Forth in *Boumediene v. Bush* and Not, as the Government Claims, Portions of the Plurality in *United States v. Verdugo-Urquidez* That *Boumediene* Rejected

In *Boumediene v. Bush*, the Supreme Court explained that the enforcement of constitutional rights rests not on the nationality of the victim or territorial boundaries, but on functional considerations. *See* 553 U.S. at 755-66. "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject to 'such restrictions as are expressed in the Constitution.'" *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). The scope of these constitutional restrictions is thus not determined by formal nineteenth century categories of territorial sovereignty, but by a "functional approach" that takes into account the "practical obstacles" to the enforcement of a particular restriction in a particular location. *Id.* at 764, 766.

The Supreme Court held in *Boumediene* that noncitizens captured in foreign countries and detained as "enemy combatants" at the Guantanamo Bay Naval Base in Cuba were constitutionally entitled to habeas corpus inquiry into the legality of their detention. *Id.* at 770. In doing so, the Supreme Court refused to give effect to a congressional statute that provided these noncitizens less judicial review than the Constitution required. *Id.* at 787-92.

The *Boumediene* decision, supported by a unified majority, clarified the meaning and limits of earlier holdings about extraterritoriality, drawing upon elements of prior fragmented Court decisions. In particular, the Court adopted the analysis of the concurring Justices Harlan and Frankfurter in *Reid v. Covert*, 354 U.S. 1 (1957), and the controlling opinion of Justice Kennedy in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *See Boumediene*, 553 U.S. at 759-66. Both *Reid* and *Verdugo-Urquidez* involved circumstances in which, after review of the facts and context, the Court's decision turned on whether affording a particular constitutional right extraterritorially would be "impracticable and anomalous." *Id.* at 759-60 (quoting from Justice Harlan in *Reid v. Covert* and Justice Kennedy in *Verdugo-Urquidez*). In *Reid*, the Court found inadequate justification for denying spouses of U.S. servicemembers their Fifth and Sixth Amendment right to a jury trial in U.S. proceedings for allegedly murdering their husbands at military installations overseas. *See* 354 U.S. at 40-41. The *Boumediene* Court cited with approval Justice Harlan's reliance on the particular circumstances, the practical necessities, and the possible alternatives in determining whether the constitutional provisions could be applied. *See* 553 U.S. at 759-61. Likewise, in *Verdugo-Urquidez*, in which the Court upheld the warrantless search by U.S. agents of the home in Mexico of an alleged druglord, Justice Kennedy's controlling opinion rested upon the practical impact of applying extraterritorial limits on cooperative

law enforcement abroad. *See* 494 U.S. at 278. In tying together these functional considerations, the *Boumediene* decision expressly rejected simplistic reliance on status distinctions as a means of determining whether constitutional protections applied to noncitizens in foreign locations.

Boumediene's reliance on functionalism is reinforced by its explanation of the World War II-era decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which denied habeas corpus to convicted war criminals in an Allied prison in occupied Germany. *See* 553 U.S. at 762. The *Boumediene* Court characterized *Eisentrager* as a decision that rested on specific practical considerations relevant to its time and place, and rejected the "formalistic, sovereignty-based" interpretation of *Eisentrager* advanced by the Government. *Id.* at 762-64. It reiterated its earlier insistence in *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004), that the denial of rights in *Eisentrager* depended on the particular situation of the convicted war criminals in that case, "not formalism." 553 U.S. at 764.

The functional approach to the extraterritorial applicability of constitutional rights calls for attention to the context of the government or government agent's action, including at least three types of factors: the characteristics of the person whose rights are at issue, the location of relevant events, and the practical obstacles to the application of the right. For the particular right at issue in *Boumediene*, for example, the Supreme Court focused on:

> (1) the citizenship *and* status of the detainee *and* the adequacy of the process through which that status determination was made; (2) the nature of the *sites* where apprehension *and then* detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Id. at 766 (emphasis added). Thus the Court's decision did not turn simply on whether the individuals whose rights were at issue were citizens or noncitizens, and it did not demand as a prerequisite for constitutional protection proof of any voluntary connection between the individual and the United States or its territory. Indeed, there was no dispute that the petitioners in *Boumediene* were non-citizen prisoners brought to the naval base against their will.

The Supreme Court's decision emphasizes that under the functional test, the inquiry is fact-specific. Because constitutional limits are intended to restrict government misconduct rather than merely divert it to specific locations, the Court considered more than one relevant location as contributing to the analysis. It also treated the "nature" of "sites" as potentially varying in time. The Supreme Court did not simply distinguish between locations within or outside U.S. territory, or between foreign countries as a whole. The *Boumediene* Court's explanation of the unavailability of habeas corpus in *Eisentrager* focused with particularity on the

situation of "Landsberg Prison, circa 1950." *Id.* at 768.[3] The Supreme Court also indicated that the practical obstacles could vary with time as well as location, so that "if the detention facility were located in an active theater of war," the arguments against making the right available would have more weight. *Id.* at 770.[4]

In addition, the importance of the right at stake appears to play an implicit role in balancing the factors. The *Boumediene* opinion stressed the "centrality" of habeas corpus, and one of the closing paragraphs characterized it as "a right of first importance." *Id.* at 739, 798; *see also* Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 273 (2009).

The *Boumediene* decision thus confirmed that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. As detailed below, the District Court properly applied this "functional approach" in assessing whether rights afforded under the Fourth and Fifth Amendment should restrict the conduct of a border patrol officer who commits an unlawful killing by shooting an individual across the U.S. border.

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[3] *See also Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result) (emphasizing the relevance of "the particular local setting, the practical necessities, and the possible alternatives").

[4] *See also Reid*, 354 U.S. at 65 (Harlan, J., concurring in the result) (focusing on overseas court-martial "in times of peace"); *id.* at 45 (Frankfurter, J., concurring in the result) (limiting the question to "time of peace"); *id.* at 50-64 (Frankfurter, J., concurring in the judgment) (explaining that precedent upholding consular court trials in Japan must be understood in their particular historical context).

B. The Plurality Opinion in *United States v. Verdugo-Urquidez* Does Not Provide Guidance for This Case

Appellant Swartz, and the Government as *Amicus Curiae*,[5] place inappropriate reliance on Chief Justice Rehnquist's plurality opinion for himself and three other members of the Court in *United States v. Verdugo-Urquidez*. Not only was that opinion never controlling, but also its reasoning was implicitly repudiated by the Supreme Court in *Boumediene*, which did not cite the *Verdugo-Urquidez* plurality a single time. Chief Justice Rehnquist's opinion thus does not provide the test for measuring extraterritorial application of rights, and does not assist in resolving the present case.

The Supreme Court held in *Verdugo-Urquidez* that the Fourth Amendment did not limit a search by U.S. agents inside Mexico of the home of a nonresident alien. 494 U.S. at 274-75 (Rehnquist, C.J., for a plurality). Chief Justice Rehnquist's opinion offered a variety of explanations for this conclusion that would severely limit the rights of noncitizens subjected to U.S. power who had not established a voluntary connection to the United States.

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[5] The Brief of the United States as *Amicus Curiae* in Support of Reversal treats the plurality opinion in *Verdugo-Urquidez* as if it stated the general rule, and treats *Boumediene* as if it were an extremely minor exception applying only to the right to habeas corpus and only at Guantanamo. It utterly ignores Justice Kennedy's key concurring opinion in *Verdugo-Urquidez*. This is a complete inversion of the constitutional analysis articulated by the Supreme Court in *Boumediene*.

The Chief Justice's opinion was not, however, controlling. Although the opinion was nominally the Opinion of the Court, the fifth vote came from Justice Kennedy, whose own concurrence instead applied the functional approach that Justice Harlan had applied in *Reid v. Covert*, and that a majority of the Supreme Court later approved as controlling law in *Boumediene*. *Id.* at 275-78 (Kennedy, J., concurring). The concurrence emphasized the unavailability of a warrant procedure for extraterritorial searches, the varying conceptions of privacy in other cultures, and the need for cooperation with foreign officials as reasons for limiting the reach of the relevant Fourth Amendment constraints. *Id.* "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted). Indeed, contemporaneous analysis of the opinion by courts and commentators confirm that Chief Justice Rehnquist's opinion spoke for only a plurality. *See Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 972 (1991); *see also* Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2520 (2005).

Were there any doubt that Chief Justice Rehnquist's opinion is neither binding nor persuasive, *Boumediene* refuted one of the fundamental propositions

that Chief Justice Rehnquist had proffered—namely, that the Constitution generally required a significant voluntary connection to the United States as a prerequisite for a noncitizen to enjoy constitutional rights. That element was obviously lacking in *Boumediene* (where there is no dispute the detainees had been brought to Guantanamo against their will), but the Supreme Court nonetheless invalidated an act of Congress without any showing of a significant voluntary connection. Justice Scalia, then the sole remaining member of the *Verdugo-Urquidez* plurality, indeed expressed his disappointment that the opinion of Chief Justice Rehnquist had not been adopted, vigorously denouncing the functional approach as inconsistent with the formalistic rule against extraterritorial rights for foreigners that he favored. *See, e.g.*, 553 U.S. at 841 (Scalia, J., dissenting) (citing *Verdugo-Urquidez*).

A "significant voluntary connection" requirement would also be incompatible with courts' frequent application of constitutional protections to noncitizens who boast little to no connection to the United States. For example, the Due Process Clauses of the Fifth and Fourteenth Amendments do not make such connections a condition for constitutional protection—to the contrary, *the absence* of "minimum contacts" between a civil defendant and the United States (or the particular forum State) provides the very reason why a U.S. court's exercise of jurisdiction over the defendant would *violate* the Due Process Clause. *See, e.g.*,

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (finding insufficient contacts to satisfy due process); *Holland Am. Line, Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450 (9th Cir. 2007) (same); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151 (9th Cir. 2006) (same); *Dow Chem. Co. v. Calderon*, 422 F.3d 827 (9th Cir. 2005) (same); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267 (9th Cir. 1995) (same). Likewise, in criminal cases, this Court has repeatedly protected defendants brought involuntarily to this country against being unfairly subjected to U.S. criminal law, by requiring a nexus between their activities and the United States sufficient to satisfy due process. *See, e.g., United States v. Perlaza*, 439 F.3d 1149, 1168-69 (9th Cir. 2006) (reversing conviction for lack of demonstration of due process nexus); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990) (finding sufficient nexus to comply with due process); *see also* Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* 171-72 (2009) (pointing out how making constitutional rights depend on connections conflicts with established precedent and practice).

Thus, as this Court recognized in *Ibrahim*, many factors other than the relationship between an individual and the United States may determine the applicability of the Fourth Amendment or other constitutional rights. *See Ibrahim*, 669 F.3d at 995, 997. Status is just one factor, considered along with other practical factors in analyzing the feasibility of applying a constitutional right

abroad. *See id.* The Second and Seventh Circuits have likewise focused on functional considerations—not just "voluntary connections"—in holding that the Warrant Clause of the Fourth Amendment does not apply to searches of citizens' property abroad. *See United States v. Stokes*, 726 F.3d 880, 890-93 (7th Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 170-72 (2d Cir. 2008).

Under the functional approach to extraterritorial constitutional rights, the notion of "significant voluntary connection" might nonetheless remain a relevant consideration. Thus, in *Ibrahim* this Court harmonized the functional approach of *Boumediene* with that element of the plurality opinion in *Verdugo-Urquidez* by treating a "significant voluntary connection" to the United States as *one* of the factors regarding the individual that strengthened her argument for First Amendment protection. *See* 669 F.3d at 997. But the decision did not hold that "significant voluntary connections" were either necessary or sufficient to the analysis. Allowing such connections to count in the individual's favor when striking the overall balance does not contradict *Boumediene*, so long as it remains

clear that such connections are not a necessary prerequisite for constitutional protection.[6]

[6] Appellant Swartz argues that this Court cannot apply the functional approach because *Boumediene* did not overrule *Verdugo-Urquidez*. (Appellant's Opening Br. 15-16.) But the cases are clearly distinguishable. Whatever precedential value *Verdugo-Urquidez* holds is limited to the question of searches and seizures of a nonresident alien's property outside the United States. *See* 494 U.S. at 261 (noting the question to be resolved in the plurality opinion's very first paragraph); 494 U.S. at 278 (Kennedy, J., concurring). The Supreme Court therefore had no occasion to overrule the *Verdugo-Urquidez* decision in *Boumediene*, which did not address the same Fourth Amendment question, and clearly marginalized the plurality opinion by citing exclusively to Justice Kennedy's concurrence. *See* 553 U.S. at 759-60, 762. *Verdugo-Urquidez* should therefore be distinguished from the context of the present case, which relates to the killing of a human being, not interference with privacy or property.

Neither the Supreme Court nor this Court has ever applied the *Verdugo-Urquidez* approach to a "seizure" of a person by killing or excessive use of lethal force. If the cross-border use of deadly force by Appellant Swartz is viewed as an extraterritorial "seizure" within the meaning of the Fourth Amendment, then a separate analysis under the functional approach becomes necessary, and Justice Kennedy's concurrence in *Verdugo-Urquidez* did not provide it. *Verdugo-Urquidez* also does not settle the question of when a cross-border killing amounts to an arbitrary deprivation of life in violation of the Due Process Clause of the Fifth Amendment.

The Fifth Circuit's en banc decision in *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc), *cert. filed* No. 15-118 (Jul. 23, 2015), took a different stance, holding without an agreed analysis that *Verdugo-Urquidez* precludes any extraterritorial Fourth Amendment claim for the killing of a noncitizen who lacks "significant voluntary connection" to the United States. *Id.* at 119. Judges Dennis and Graves disagreed that *Verdugo-Urquidez* had that effect; Judge Graves argued that the Fourth Amendment claim should be adjudicated and Judge Dennis argued that under the functional approach the Fourth Amendment claim should not be reached "out of concern for pragmatic and political questions." *Id.* at 133 (Dennis, J., concurring in part and concurring in the (footnote continued)

C. The District Court's Analysis Correctly Applied the Supreme Court's Functional Approach

The District Court correctly reviewed the cross-border killing from a Fourth Amendment perspective,[7] and found that the functional approach gave strong reasons for applying the constitutional limits on use of lethal force. The relevant factors analyzed include the characteristics of the person whose rights are at issue, the locations of relevant events, and the practical obstacles to the application of the right. The Supreme Court demonstrated in *Boumediene* that in applying the functional approach, relevant factors also can include the actions and rights at stake. *See* 553 U.S. at 798 (describing the right of habeas corpus as "a right of first importance").[8] The District Court applied the legally required functional approach and weighed the factors correctly.

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judgment); *id.* at 142-43 (Graves, J., concurring in part). For the reasons stated in this brief, the Fifth Circuit's interpretation of precedent is unpersuasive.

[7] The Fourth and Fifth Amendments contain overlapping prohibitions against unjustified deprivation of life. Under the Fourth Amendment, a killing that amounts to a "seizure" of the person may violate the guarantee against unreasonable searches. Under the Fifth Amendment, a killing may violate the substantive due process guarantee against deprivation of life. The Supreme Court has made clear that when the Fourth Amendment applies and governs the case, courts should analyze the claim under the more specific Fourth Amendment standard rather than the more general Fifth Amendment standard, but that when the Fourth Amendment does not apply, Fifth Amendment analysis controls. *See, e.g.*, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998).

[8] The same criteria provide the relevant factors for analyzing the Fifth Amendment version of the right.

Personal characteristics. J.A. was a Mexican national. He was a vulnerable civilian only sixteen years old. He was not armed when he was shot ten times, mostly from behind.

Locations of relevant events. In this case, the functional analysis takes into consideration both the location where the victim was killed and the location from which the shot was fired. The killing took place on an urban street in Nogales, Sonora, Mexico, running alongside the U.S. border fence that now marks the division between the adjacent towns of Nogales. The complaint describes the unusual degree of control that the U.S. Border Patrol exercises in the vicinity, including surveillance and repeated interventions. The District Court correctly focused on the specific characteristics of this border area, rather than treating the location generically as "Mexico" or "foreign territory." It should be added that the United States and Mexico are allies, and at peace. The location from which Appellant fired was on the Nogales, Arizona side of the fence, looking down over the street. He was acting inside U.S. territory, from a position of strength with access to institutional support.

Practical obstacles to the application of the right. Practical obstacles to the application of the right in this situation are difficult to find. Whether one considers the Fourth Amendment right against unreasonable deployment of lethal force in making a seizure, or the Fifth Amendment right against arbitrary deprivation of

life, there is no apparent reason why U.S. law enforcement personnel acting in U.S. territory cannot refrain from killing civilians on the southern side of the fence under the same principles that protect civilians on the northern side of the fence.

In drawing a similar conclusion, the District Court properly concentrated on the prevailing conditions in the relevant area during the relevant time period. The functional approach, as *Boumediene* explains it, asks whether compliance with a constitutional command would be "impracticable and anomalous" in the relevant range of circumstances. It does not demand that the command be practicable always and everywhere, including in some hypothetical future war, before it can ever be applied extraterritorially. In short, Appellant did not face the logistical problems that U.S. officials actually operating in foreign territory may confront, and which could create practical obstacles to compliance with constitutional commands.[9] Likewise, there is no practical obstacle limiting the Court's capacity to fairly adjudicate this case. Courts have adjudicated many instances of material harm inflicted on physically absent noncitizens through government acts performed within the United States as within the scope of their constitutional rights. *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987);

[9] For that reason, it is not even clear that this case necessarily involves extraterritorial application of constitutional rights. But since the District Court decided it on that basis, *Amicus* addresses it from that perspective.

Russian Volunteer Fleet v. United States, 282 U.S. 481, 488-89 (1931) (finding a Fifth Amendment taking in the 1917 requisitioning of a contract for construction of two vessels); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106 (2d Cir. 1966) (Friendly, J.).[10]

The importance of the right at stake. The right at stake here—the right to life—is fundamental and universal. "The intrusiveness of a seizure by means of deadly force is unmatched. The [individual's] fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). The right to life is not a culturally specific practice or a historically contingent procedure, but a universal imperative. Whatever may be said about differing expectations of privacy in the home among different societies, the interest in not

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[10] In *Sardino*, Judge Henry Friendly wrote:

> The Government's second answer that 'The Constitution of the United States confers no rights on non-resident aliens' is so patently erroneous in a case involving property in the United States that we are surprised that it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders – and even to some without. *Cf. Reid v. Covert* . . . This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing that they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds.

361 F.2d at 111 (citation and footnote omitted). The case rejected on the merits a constitutional challenge to a regulation that prevented the transfer to Cuba of the proceeds of an insurance policy.

being killed is shared everywhere.[11] Here, the interest asserted is *the* bedrock constitutional guarantee not to be deprived of your life. These interests are heightened by the particular facts here: the killing of a defenseless teenager in his own home town.

* * *

Taken in combination, the factors discussed above weigh overwhelmingly in favor of the applicability to the present case of both the Fourth Amendment and Fifth Amendment versions of a prohibition against unjustified killing,[12] even without inquiring into the particular history of the victim and his "connections" to the United States.[13] Given the lack of practical obstacles, refusing to apply the

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[11] At the global level, restrictions on the use of lethal force are articulated in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and endorsed in General Assembly Resolution, 47th Sess., 69th plen. mtg. U.N. Doc. A/RES/45/166 (Dec. 18, 1990). These Basic Principles are a staple of international human rights monitoring. *See, e.g.*, U.N. Human Rights Comm., General Comm. No. 35, Article 9 (Liberty and security of person), para. 9, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

[12] Although each version should be applicable, a court would leave the substantive due process guarantee in the background if the Fourth Amendment right already provided protection. Having properly found that J.A.'s life was protected by the Fourth Amendment, the District Court saw no need to analyze the same factors under the functional approach with regard to the Fifth Amendment prohibition of arbitrary killing.

[13] As argued above, prior voluntary connections should not be a prerequisite for the Fourth and Fifth Amendment guarantees against being arbitrarily killed. But as the District Court noted, J.A. was not just any vulnerable civilian on the street (footnote continued)

right would mean dismissing the value of J.A.'s life solely because of his nationality.

CONCLUSION

Consistent with the Supreme Court's decision in *Boumediene* and this Court's decision in *Ibrahim*, this Court should apply a functional test that focuses on the facts of J.A.'s particular case. The District Court properly applied these precedents here and reached the correct result. The Government's proposed test, which rigidly focuses on nationality, is inconsistent with *Boumediene*, which rejected the formalistic approach of the *Verdugo-Urquidez* plurality. For the foregoing reasons, this Court should affirm the opinion of the District Court.

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below the fence, but someone with "substantial voluntary connections" to the United States. The functional approach permits these factors to strengthen the claim to constitutional rights, although it does not treat them as a *sine qua non*. The District Court considered the interdependent character of the two towns of Nogales, now divided by a fence, the close relationship between J.A. and his grandmother, a resident of Nogales, Arizona, who often crossed the border to care for him, and the fact that his home was only four blocks from the border. Each of these facts adds weight to the balance. Indeed, living in the symbiotic communities of "both Nogales" should itself be regarded as a substantial (or "significant") voluntary connection to the United States. Thus, the extent of J.A.'s voluntary connections with the United States weigh additionally in favor his constitutional rights under the Fourth and Fifth Amendments.

DATED: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 4964 words.

DATED: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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