

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,  
U.S. Border Patrol agent,

*Defendant-Appellant.*

---

---

On Appeal from the United States District Court  
for the District of Arizona

---

---

**BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC.**  
in Support of Plaintiff-Appellee Araceli Rodriguez

Mahesha P. Subbaraman  
SUBBARAMAN PLLC  
222 S. 9th Street, Suite 1600  
Minneapolis, MN 55402  
(612) 315-9210  
mps@subblaw.com

*Counsel for Amicus Curiae  
Restore the Fourth, Inc.*

On the brief:

Vivek Krishnamurthy  
Christopher T. Bavitz  
Andrew F. Sellars  
CYBERLAW CLINIC  
HARVARD LAW SCHOOL  
1585 Massachusetts Ave.  
Cambridge, MA 02138  
(617) 384-9125  
clinic@cyber.law.harvard.edu<sup>1</sup>

---

<sup>1</sup> The Harvard Law School Cyberlaw Clinic wishes to thank students Travis West, Steven Wilfong, and Katherine Kwong for their invaluable contributions to this amicus brief.

## Corporate Disclosure Statement

In accordance with the requirements of Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that Restore the Fourth, Inc. is a nonprofit corporation that is incorporated under Massachusetts law and is further registered under Section 501(c)(4) of the Internal Revenue Code. Restore the Fourth, Inc. has no parent corporation or shareholders who are subject to disclosure.

Respectfully submitted,

Dated: May 7, 2016

**SUBBARAMAN PLLC**

By:           s/Mahesha P. Subbaraman  
Mahesha P. Subbaraman

Mahesha P. Subbaraman  
222 S. 9th Street, Suite 1600  
Minneapolis, MN 55402  
(612) 315-9210  
mps@subblaw.com

*Counsel for Amicus Curiae  
Restore the Fourth, Inc.*

## Table of Contents

	<b>Page</b>
Table of Authorities .....	ii
Amicus Identity, Interest, & Authority to File.....	1
Summary of the Argument.....	3
Argument .....	5
1.    The Fourth Amendment requires government searches and seizures of anyone to be reasonable .....	5
2.    The “substantial and voluntary connections” test determines what constitutes a reasonable search or seizure only when this test can be administered.....	6
Conclusion.....	10
Certificate of Compliance .....	12
Certificate of Service .....	13

## Table of Authorities

	Page
<i>Atwater v. City of Lago Vista</i> , 532 U.S. 318 (2001).....	9
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	4
<i>Brinegar v. United States</i> , 338 U.S. 160 (1949) .....	5, 10
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979) .....	6
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1995).....	6
<i>New York v. Belton</i> , 453 U.S. 454 (1981).....	7
<i>Rodriguez v. Swartz</i> , 111 F. Supp. 3d 1025 (D. Ariz. 2015) .....	3, 4, 9
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	5
<i>United States v. Aikins</i> , 946 F.2d 608 (9th Cir. 1990) .....	8
<i>United States v. Barona</i> , 56 F.3d 1087 (9th Cir. 1995) .....	9
<i>United States v. Davis</i> , 905 F.2d 245 (9th Cir. 1990) .....	8, 9
<i>United States v. Juda</i> , 46 F.3d 961 (9th Cir. 1995) .....	8
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990).....	passim
<i>United States v. Zakharov</i> , 468 F.3d 1171 (9th Cir. 2006) .....	8
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886) .....	6, 10

## **Amicus Identity, Interest, and Authority to File**

### **1. Identity of Restore the Fourth, Inc.**

Restore the Fourth, Inc. (“Restore the Fourth”) is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects. Restore the Fourth also believes that modern changes to technology, governance, and law should foster the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities to bolster political support for Fourth Amendment rights. Restore the Fourth also files amicus briefs in key Fourth Amendment cases.<sup>2</sup>

### **2. Interest of Restore the Fourth**

Restore the Fourth is interested in *Rodriguez v. Swartz* because of particular contentions made by *amicus curiae* United States about how the

---

<sup>2</sup> See, e.g., Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganius, *United States v. Ganius*, No. 12-240-cr (2d. Cir. filed July 29, 2015) (en banc).

Fourth Amendment applies to actions by American law enforcement agents against aliens abroad. The United States contends that the Fourth Amendment imposes no limit on the exertion of U.S. authority against aliens who lack substantial voluntary connections to the United States — even individuals within just a few miles of the U.S. border.

Restore the Fourth respectfully submits that such a contention is a gross misrepresentation of the relevant law. In particular, this contention overlooks the factual underpinning of Supreme Court and Ninth Circuit precedents addressing the application of the Fourth Amendment to aliens. Restore the Fourth writes specifically to address these concerns.

### **3. Authority of Restore the Fourth to File**

Restore the Fourth files this brief under Federal Rule of Appellate Procedure 29(a), with all parties in this case having consented to the filing of this brief. Also, in compliance with Federal Rule of Appellate Procedure 29(c)(5), Restore the Fourth certifies that no party nor counsel for any party in this case: (1) wrote this brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only Restore the Fourth, including its members and counsel, has contributed money to fund the preparation and submission of this brief.

## Summary of the Argument

This case concerns the killing of Appellee Araceli Rodriguez's 16-year-old son, J.A., along the U.S.-Mexico border by Appellant Lonnie Swartz, a U.S. border patrol agent. *See Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1028–30 (D. Ariz. 2015). Agent Swartz shot J.A. ten times in the back without warning or any knowledge of J.A.'s connections to the United States. *See id.* Based on these facts, the district court correctly determined that the Fourth Amendment protected J.A. *See id.* at 1033–38.

On appeal, *amicus curiae* United States contends that “[t]he Fourth Amendment does not extend extraterritorially to aliens without significant voluntary connections to the United States.” (U.S. *Amicus Curiae* Br. at 1.) The United States thus purports to explain the plurality opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This explanation, however, ignores key facts about *Verdugo-Urquidez* that cabin this opinion. Indeed, properly read, this opinion only applies when government agents think before they act—not when they shoot first, and ask questions later.

Restore the Fourth files this brief in order to address the United States's misreading of *Verdugo-Urquidez*. The plurality did not erase the



Fourth Amendment's core demand that all government searches and seizures be "reasonable" – even extraterritorial searches and seizures of aliens. *See Boumediene v. Bush*, 553 U.S. 723 (2008). Rather, the plurality merely established that the Fourth Amendment affords the government *reasonable* latitude when it is capable of reviewing an alien's connections with the United States *before* searching or seizing him. Here, by contrast, Agent Swartz killed J.A. without any such review. His actions were thus patently unreasonable, even if one were to conclude that J.A. lacked substantial voluntary connections to the United States.

Restore the Fourth otherwise agrees with the district court that *Boumediene* applies here, and the Fourth Amendment thus applied to J.A. *See Rodriguez*, 111 F. Supp. 3d at 1033–38. Restore the Fourth also believes *Boumediene's* "functional analysis" test is the right way to decide when the Constitution applies extraterritorially, and there is nothing impracticable or anomalous about applying the Fourth Amendment just 35 feet beyond the border. *See Boumediene*, 553 U.S. at 770. Finally, Restore the Fourth agrees with the district court that even if *Verdugo-Urquidez* controls here, J.A. had sufficient voluntary connections with the United States to be protected by the Fourth Amendment. *See Rodriguez*, 111 F. Supp. 3d at 1035.

## Argument

### 1. **The Fourth Amendment requires government searches and seizures of anyone to be reasonable.**

Ultimately, “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation and quotation marks omitted). This right thus applies whenever the United States government exercises its power against anyone. And so it must, considering that “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.” *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

With these principles in mind, it is clear that the plurality in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), did not presume to give the government *carte blanche* to perform unreasonable searches and seizures against aliens whenever they lack substantial and voluntary connections with the United States. Nor did the plurality hold that such persons “have no constitutional protection.” 494 U.S. at 278 (Kennedy, J., concurring). The

plurality instead asked “*what might be reasonable* in the way of searches and seizures conducted abroad” and then determined that this depends on the context. *Id.* at 274 (plurality op.) (emphasis added).

The *Verdugo-Urquidez* plurality thus followed “the underlying command of the Fourth Amendment”: that government searches and seizures must “always ... be reasonable.” *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *see also, e.g., Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (“[T]he Fourth Amendment ... impose[s] a standard of ‘reasonableness’ upon the exercise of discretion...”). This expectation of reasonableness is not unique to the Fourth Amendment, but is rather what the Constitution demands of government action in *any* situation. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369–70 (1886) (“When we consider the nature and the theory of our institutions of government ... they do not mean to leave room for the play and action of purely personal and arbitrary power.”).

**2. The “substantial and voluntary connections” test determines what constitutes a reasonable search or seizure only when this test can be administered.**

Given the basic constitutional expectation of government rationality, the real meaning of the “substantial and voluntary connections” test in

*Verdugo-Urquidez* comes into focus. This test is not meant to be read, as the United States contends here, as a categorical denial of Fourth Amendment protection to aliens who lack “substantial and voluntary connections” with the United States. (See U.S. *Amicus Curiae* Br. at 6–14.)

Instead, the operation of the substantial-and-voluntary-connections test must be read in line with the Fourth Amendment’s expectation of reasonableness. This expectation “can only be realized if the police are acting under a series of rules which, in most instances, *makes it possible to reach a correct determination beforehand* as to whether an invasion of privacy is justified in the interest of law enforcement.” *New York v. Belton*, 453 U.S. 454, 458 (1981) (emphasis added). Application of the substantial-and-voluntary-connections test is therefore inherently limited to those situations where government officials are capable of determining *before the fact* what an alien’s connections with the United States really are.

The facts of *Verdugo-Urquidez* bear out this point. *Before* the warrantless search at issue in *Verdugo-Urquidez* occurred, agents of the Drug Enforcement Administration (DEA) obtained a search warrant from a United States court. See 494 U.S. at 262. This search warrant was based on crimes that Mexican citizen Rene Martin Verdugo-Urquidez had allegedly

committed while residing in Mexico. *See id.* The search warrant also came *before* Mexican police captured Verdugo-Urquidez and then transferred him to U.S. Marshals at a U.S.-Mexico border crossing. *See id.*

The DEA's interactions with Verdugo-Urquidez thus provided ample basis for the DEA to know what Verdugo-Urquidez's connections with the United States were when the DEA decided to search his Mexican home. Put differently, the DEA *knew*, based on an individualized assessment, that Verdugo-Urquidez lacked substantial and voluntary connections to the United States *long before* the DEA conducted its warrantless search.

This Court's decisions addressing international searches after *Verdugo-Urquidez* reflect this same state of affairs. Most of this Court's decisions relying on *Verdugo-Urquidez* concern searches in international waters, where the nationality of a suspect vessel was apparent from its flag, or where law enforcement spoke with the suspect vessel's crew to ascertain the vessel's identity before searching it.<sup>3</sup> In other cases, this Court has cited

---

<sup>3</sup> *See, e.g., United States v. Zakharov*, 468 F.3d 1171, 1174 (9th Cir. 2006) (Coast Guard observed that vessel was flying Belizean flag and attempted to contact crew before initiating search); *United States v. Juda*, 46 F.3d 961, 964 (9th Cir. 1995) (extensive investigation of subjects made before search); *United States v. Aikins*, 946 F.2d 608, 611 (9th Cir. 1990) (same); *United States*

*Verdugo-Urquidez* but then assumed *arguendo* that the Fourth Amendment applied with full force and resolved the case on other grounds.<sup>4</sup>

The factual contrast between the preceding cases and the present case could not be greater. Here, Agent Swartz shot J.A. ten times in the back without warning, killing a teenage boy whose identity Swartz could not possibly have known or ascertained. *See Rodriguez v. Swartz*, 111 F. Supp. 3d at 1028–30. For all Agent Swartz knew, J.A. was an American citizen — or, as the district court found, a Mexican citizen whose ample “substantial and voluntary connections” with the United States made J.A. among “the people” that the Fourth Amendment protects. *See id.* at 1036–37.

For this reason, the substantial-and-voluntary-connections test cannot excuse Agent Swartz’s conduct in this case. This test is meant to be applied when government agents have *thought before they acted* — not when they have acted “on the spur (and in the heat) of the moment.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). The test affords latitude to government agents only when they *reason* about who they are dealing with.

---

*v. Davis*, 905 F.2d 245, 247 (9th Cir. 1990) (Coast Guard radioed the subject vessel to ascertain identity before search).

<sup>4</sup> *See, e.g., United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (avoiding the question “because even if [the defendants] were entitled to invoke the Fourth Amendment, their effort would be unsuccessful”).

As such, this Court should reject the United States's contrary view of the substantial-and-voluntary-connections test. (*See* U.S. *Amicus Curiae* Br. at 1.) Under this view, our constitutional system places no limit on how the government may treat aliens who lack significant voluntary connections to the United States – not even reasonableness. (*See id.*) Government agents may thus shoot first and benefit later from an *after-the-fact* inquiry about their victim's connections to the United States that should have occurred before the shooting. “[But] the very idea that one man may be compelled to hold his life ... at the mere will of another, seems to be intolerable in any country where freedom prevails.” *Yick Wo*, 118 U.S. at 370.

## Conclusion

Bitter experience teaches that “the authority ... to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible.” *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting). As a result, judges are obligated to uphold only *reasonable* exercises of this authority – and that is how the plurality's substantial-and-voluntary-connections test in *Verdugo-Urquidez* must be read. That test therefore does not excuse the conduct of government agents who shoot without warning or any knowledge of their target.

Respectfully submitted,

Dated: May 7, 2016

**SUBBARAMAN PLLC**

By:           s/Mahesha P. Subbaraman            
Mahesha P. Subbaraman

Mahesha P. Subbaraman  
222 S. 9th Street, Suite 1600  
Minneapolis, MN 55402  
(612) 315-9210  
mps@subblaw.com

*Counsel for Amicus Curiae  
Restore the Fourth, Inc.*



## Certificate of Compliance

The undersigned certifies under Federal Rule Appellate Procedure 32(a)(7)(C) that this *amicus curiae* brief complies with all the applicable type-volume limitations, and typeface and type-style requirements set forth under Rule 32(a). This brief was prepared using a proportionally spaced font (Book Antiqua). Exclusive of portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(III), this brief contains 2,052 words, according to the word-count function of the word processor (Microsoft Word 2010) that was used to prepare this brief.

Dated: May 7, 2016

**SUBBARAMAN PLLC**

By: s/Mahesha P. Subbaraman  
Mahesha P. Subbaraman

*Counsel for Amicus Curiae*  
*Restore the Fourth, Inc.*

## Certificate of Service

The undersigned certifies that on May 7, 2016, he caused this document – Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez – to be filed electronically with the Clerk of the Court using the CM/ECF System. The undersigned also certifies that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 7, 2016

**SUBBARAMAN PLLC**

By: s/Mahesha P. Subbaraman  
Mahesha P. Subbaraman

*Counsel for Amicus Curiae  
Restore the Fourth, Inc.*