Case No. 05-50472

In The United States Court of Appeals for the Fifth Judicial Circuit

MARIA ANTONIETA MARTINEZ-AGÜERO,
Plaintiff - Appellee,

v.

HUMBERTO GONZÁLEZ,
Defendant - Appellant.

Interlocutory Appeal from the United States District Court
for the Western District of Texas, El Paso Division

Civil Action No. EP-03-CA-0411-KC

BRIEF OF APPELLEE MARIA ANTONIETA MARTINEZ-AGÜERO

Jonathan Bridges
Suyash Agrawal
SUSMAN GODFREY L.L.P.
901 Main, Suite 4100
Dallas, TX 75202
Tel: (214) 754-1925
Fax: (214) 665-0856

LEAD APPELLATE COUNSEL FOR APPELLEE MARIA ANTONIETA MARTINEZ-AGÜERO

Javier N. Maldonado
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
118 Broadway, Suite 502
San Antonio, Texas 78205
Tel: (210) 277-1603
Fax: (210) 225-3958

Francisco X. Dominguez
521 Texas Ave.
El Paso, Texas 79901
Tel: (915) 532-5544
Fax: (915) 532-5566

CO-COUNSEL FOR APPELLEE MARIA ANTONIETA MARTINEZ-AGÜERO

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARIA ANTONIETA MARTINEZ-AGÜERO,	§	
	§	
Plaintiff-Appellee,	§	
	§	
v.	§	Case No. 05-50472
	§	
HUMBERTO GONZÁLEZ,	§	
	§	
Defendant-Appellant.	§	

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1. have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant (Defendant Below)

Humberto González

Trial and Appellate Counsel

Jeanne C. Collins
Ken Slavin
KEMP SMITH LLP
221 N. Kansas, Suite 1700
El Paso, Texas 79901
(915) 533-4424
(915) 546-5360 (facsimile)

Appellee (Plaintiff Below)	**Trial and Appellate Counsel**
Maria Antonieta Martinez-Agüero	Francisco X. Dominguez Attorney at Law 521 Texas Ave. El Paso, Texas 79901 Tel: (915) 532-5544 Fax: (915) 532-5566 Javier N. Maldonado Lawyers' Committee for Civil Rights Under Law of Texas 118 Broadway, Suite 502 San Antonio, Texas 78205 Tel: (210) 277-1603 Fax: (210) 225-3958 Jonathan Bridges Suyash Agrawal Susman Godfrey LLP 901 Main, Suite 4100 Dallas, TX 75202 Tel: (214) 754-1925 Fax: (214) 665-0856
Co-Defendant Below	**Trial Counsel**
The United States of America	John Smith, III Assistant U.S. Attorney U.S. Attorney's Office One Shoreline Plaza 800 Northshoreline Blvd., Suite 500 Corpus Christi, Texas 78401 Tel: (361) 888-3111 Fax: (361) 888-3200 or (361) 888-3234

STATEMENT REGARDING ORAL ARGUMENT

Appellee Martinez-Agüero respectfully submits that oral argument and full Class III treatment are appropriate and necessary for this appeal. This interlocutory appeal raises significant constitutional questions, as Appellant González asks this Court to reverse the district court and adopt a novel rule of law contrary to long-standing Supreme Court and Circuit Court authority concerning the protections afforded by the Fourth and Fifth Amendments.

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ISSUE PRESENTED

Outside Congress's plenary power with regard to immigration and deportation proceedings, the Supreme Court has repeatedly stated that the Constitution protects all people within the territory of the United States. When Martinez-Agüero presented herself for admission on the U.S. side of the border with Mexico, INS agent González attacked her, arrested her without reason and injured her by the use of excessive force. Is Martinez-Agüero entitled to the protections of the Fourth and Fifth Amendments?

It does not require a court ruling for a state official to know that even an excludable alien may not be denied the fundamental liberty interest to be free of gross physical abuse in the absence of some articulable, rational public interest that may be advanced by such conduct.

—Lynch v. Cannatella[1]

I. INTRODUCTION

More than 100 years ago, the Supreme Court ruled that the protection of our Constitution reaches all people within the territory of the United States regardless of their citizenship. In *Yick Wo v. Hopkins*,[2] the Court held that the Fourteenth Amendment's pledges of due process and equal protection apply "to all persons within the territorial jurisdiction [of the United States]," explaining that "[t]he rights of petitioners . . . are not less because they are aliens." That same year, in *Wong Wing v. United States*,[3] the Court held that "all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments]," stating that "even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law." Repeatedly

[1] 810 F.2d 1363, 1373 (5th Cir. 1987).

[2] 118 U.S. 356, 368-69 (1886).

[3] 163 U.S. 228, 238 (1896).

since its decisions in *Yick Wo* and *Wong Wing*, the Supreme Court has treated aliens' presence on U.S. territory as the touchstone of their constitutional rights.[4]

That aliens have rights under our Constitution once they have come within the territory of the United States has become so firmly entrenched in U.S. constitutional jurisprudence that González cannot deny it. Instead, his entire argument is devoted to misdirecting the Court's attention to an unremarkable proposition—that aliens ***outside*** the territory of the United States generally do not have constitutional rights—in hopes of distracting the Court from the real issue in this case. What is the real issue?

> Whether INS agents such as González can, within the bounds of the Constitution, attack a nonresident alien on U.S. soil, arrest

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[4] *See, e.g., Demore v. Hyung Joon Kim*, 538 U.S. 510, 543 (2003) ("It has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause."); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term" and thus entitled to the protections of the Fourteenth Amendment.); *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects [aliens] from deprivation of life, liberty, or property without due process of law . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution.'"); *see also United States v. Williams*, 617 F.2d 1063, 1078 n.17 (5th Cir. 1980) (en banc) ("[O]nce we subject . . . aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment."); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) ("It is beyond dispute that an alien may invoke the Fourth Amendment's protection against an unreasonable search conducted in the United States.").

> her without reason or provocation, and use excessive force in doing so.

The answer, of course, is no.

González's arguments regarding the Constitution's application to the rights of aliens ***outside*** U.S. territory has nothing to do with this case. Here, it is undisputed that Martinez-Agüero was ***within*** the territorial boundaries of the United States when González attacked her.[5] Because González cannot overcome this dispositive fact—this touchstone of constitutional rights—he instead must circumvent it. Thus, the foundation on which González builds his house of cards is the entry-fiction doctrine espoused in *Shaughnessy v. United States ex rel. Mezei* ("*Mezei*").[6] González proposes to apply the rule of *Mezei*—for the first time in its fifty-year history—outside the context of immigration and deportation proceedings, outside the arena of immigration law, and outside the bounds of Congress's plenary power[7] over immigration matters, the power that forms the rule's basis and rationale.

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[5] Appellant's Bf. at 11 ("She was in the zone of territory between the gates of the country and the physical border of U.S. sovereign territory . . . ."); R.E. tab 3, R. 232, Dist. Ct. Op. at 5 and n.3; R.E. tab 9, R. 195, Affidavit of Maria Antonia Agüero McDaniels ¶ 6 ("McDaniels Aff."). Although González at times appears to dispute this fact, it is only via the mechanism of the entry fiction that he does so.

[6] 345 U.S. 206 (1953).

[7] *See* discussion *infra* pp. 18-22.

Having so dislodged the entry-fiction doctrine from its roots, González implicitly proposes applying it ***for all purposes*** at the border. No court has ever applied the doctrine in this way.

Indeed, this Court has held that the entry-fiction doctrine only governs an alien's rights in immigration and deportation proceedings. In *Lynch*, this Court explained unequivocally,

> The "entry fiction" that excludable[8] aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment.[9]

Just as *Lynch* addressed Fifth and Fourteenth Amendment protections, the Supreme Court in *United States v. Montoya de Hernandez*[10] acknowledged that the Fourth Amendment protects nonresident aliens who present themselves for admission at the border. That Court stated,

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[8] The term "excludable" refers to those aliens who "were ineligible for admission or entry into the United States" before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Chi Thon Ngo v. INS*, 192 F.3d 390, 395 n.4 (3d Cir. 1999); 8 U.S.C. § 1182(a) (1994). "Deportable," in contrast, refers to aliens who had entered the United States but were subject to removal. 8 U.S.C. §§ 1251(a), 1252 (1994). With the passage of IIRIRA, this distinction has been abandoned in favor of the term "inadmissible," which includes aliens from both former categories who have not entered the United States or have done so illegally. 8 U.S.C. § 1182(a) (2000).

[9] 810 F.2d at 1373 (footnote omitted).

[10] 473 U.S. 531, 539-40 (1985).

> Balanced against the sovereign's interests at the border are ***the Fourth Amendment rights of respondent*** [the nonresident alien]. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, 19 U.S.C. § 482, respondent was entitled to be free from unreasonable search and seizure.[11]

Because González cannot invoke the entry-fiction doctrine, this case turns on location. Because Martinez-Agüero was arrested on U.S. soil for conduct on U.S. soil that allegedly violated U.S. law, and because she was attacked, arrested and injured on U.S. soil by a U.S. government agent, the Fourth and Fifth Amendments to the U.S. Constitution must apply.

II. FACTS & PROCEEDINGS BELOW

A. Background

Appellee Maria Antonieta Martinez-Agüero is a resident of Ciudad Juarez, Mexico; she is 49 years old and a Mexican citizen and resident.[12] Until the time of the incident at issue in this appeal, Martinez-Agüero visited the United States regularly—at least every 28 days—to accompany her aunt to the El Paso social security office and for other purposes.[13]

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[11] *Id.* (emphasis added).

[12] R.E. tab 8, R. 189, Affidavit of Maria Antonieta Martinez-Agüero ¶ 2 ("Martinez-Agüero Aff.").

[13] R.E. tab 9, R. 195, McDaniels Aff. ¶ 4; *see also* R.E. tab 3, R. 261, Dist. Ct. Op. at 34 (finding that Martinez-Agüero's visits were for "other purposes"). González purports to challenge this fact-finding that her visits were for "other purposes." Appellant's Bf. at 2 n.13. But the factual sufficiency of the district court's fact-finding

On all of these occasions, Martinez-Agüero entered the United States legally pursuant to a border crossing card that the INS issued to her.[14] Because Martinez-Agüero had read in the paper that her border crossing card would no longer be valid, on July 3, 2001, she went with her aunt, Antonia McDaniels Agüero, and her mother to the U.S. consular office in Juarez to apply for new cards.[15] At the consular office, Martinez-Agüero asked how she and her family could travel to the United States in the interim, before the new cards arrived by mail.[16] U.S. officials at the consular office told Martinez-Agüero that they could get a stamp on their old border crossing cards permitting entry into the United States until the new cards arrived in the mail.[17] She asked for this stamp, and a consular official stamped all three of their cards.[18] For the next three months, Martinez-Agüero and her aunt

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is not properly before the Court in this interlocutory appeal. *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005) ("[A] defendant may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.").

[14] Prior to the issuance of the biometric, machine-readable, border crossing cards (DSP-150), the INS issued Form I-186/I-586 border crossing cards. Under 22 C.F.R. § 41.32, Martinez-Agüero was issued a border crossing card for entry into the United States. The card allowed her to "travel up to 25 miles inside the United States for no longer than 72 hours per visit." R.E. tab 3, R. 262, Dist. Ct. Op. at 35.

[15] R.E. tab 8, R. 189, Martinez-Agüero Aff.¶ 3.

[16] *Id.* at ¶ 4.

[17] *Id.*

[18] *Id.*

used these stamped cards, without difficulty, to cross the border into the United States.[19] They did so at least once a month.[20]

Approximately three months after their visit to the U.S. consular office, on October 4, 2001, Martinez-Agüero and her aunt traveled by bus to El Paso, intending to go to the social security office as usual.[21] When the bus was crossing the international bridge between Juarez and El Paso at approximately 11:30 a.m., it was stopped on the U.S. side, and a U.S. immigration officer ordered Martinez-Agüero and her aunt off the bus.[22]

Once outside the bus, INS border patrol agent Humberto González, Appellant, asked for their documents and told Martinez-Agüero curtly that her border crossing card had expired and that she could not pass. González ordered

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[19] R.E. tab 8, R.190, Martinez-Agüero Aff.¶¶ 5-6.

[20] *Id.* These visits were pursuant to the INS's "temporary lawful waiver" policy, which had been publically announced in the Department of Justice/INS's News Release of September 28, 2001, available at *http://uscis.gov/graphics/publicaffairs/newsrels/BCCRel.htm* and elsewhere. Moreover, as is further explained in the Department of Justice/INS's News Release of May 17, 2002, available at *http://uscis.gov/graphics/publicaffairs/newsrels/oldcards.htm*, through a series of extensions, the INS pushed back the expiration date of old border crossing cards to the following year, October 1, 2002. In other words, contrary to González's claims, Martinez-Martinez-Agüero may have been entitled to admission into the United States pursuant to the "temporary lawful waiver" policy. *See* R.E. tab 3, R.262-63, Dist. Ct. Op. at 35-36.

[21] R.E. tab 8, R. 190, Martinez-Agüero Aff.¶¶ 5, 7; R.E. tab 9, R.195, McDaniels Aff. ¶¶ 4-5.

[22] R.E. tab 8, R.190, Martinez-Agüero Aff.¶ 7; R.E. tab 8, R.195, McDaniels Aff. ¶¶ 5-6.

Martinez-Agüero to go back to Mexico, treating her very rudely and raising his voice in the process.[23]

González spoke mostly to Martinez-Agüero rather than to her aunt.[24] Martinez-Agüero and her aunt were willing to leave, but González refused to return their border crossing cards.[25]

Martinez-Agüero asked to speak to someone in authority, but González said he was the authority ("!Yo soy la autoridad!") and that he was the only one who could allow someone to pass.[26] He addressed Martinez-Agüero and her aunt derogatorily, saying something similar to "You Mexicans don't have a right to cross. You should know better than to try and cross without proper documents."[27]

Martinez-Agüero asked González why he would not help them since he too was Mexican.[28] González became even angrier when he heard this, started pointing to the patches on his uniform and yelled, "Look at me! I am not a Mexican! Look at my uniform!" Then he yelled, "Vete a la chingada!" which is an extremely

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[23] R.E. tab 8, R. 190, Martinez-Agüero Aff.¶¶ 9-10; R.E. tab 9, R. 196, McDaniels Aff. ¶¶ 7-8.

[24] *Id.* at ¶ 9.

[25] *Id.* at ¶ 10.

[26] *Id.* at ¶¶ 12; R.E. tab 8, R. 190, Martinez-Agüero Aff.¶ 12.

[27] R.E. tab 9, R. 196, McDaniels Aff. ¶ 13.

[28] R.E. tab 8, R. 190, Martinez-Agüero Aff.¶ 13; R.E. tab 9, R. 196, McDaniels Aff. ¶ 14.

vulgar insult in Spanish.[29] Martinez-Agüero's aunt testified by affidavit that she became very nervous and afraid because she had never been treated so badly in her life.[30]

Finally, González threw Martinez-Agüero's and her aunt's border crossing cards on the ground and walked away, again saying "Vete a la chingada."[31] Martinez-Agüero picked up the cards and said quietly to her aunt, "Tia pues vamos a ver a donde esta la chingada" ("Well, Aunt, let's go see where 'la chingada' is").[32] She did not expect González to hear this, as he was standing about two car lengths away.[33]

Martinez-Agüero and her aunt turned to leave, heading back towards Mexico.[34] Martinez-Agüero told her aunt that she would call her husband to take them to a different bridge.[35] Then González yelled at them to "stop in the name of

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[29] R.E. tab 8, R. 190, Martinez-Agüero Aff.¶ 13; R.E. tab 9, R. 196, McDaniels Aff. ¶¶ 14-15.

[30] *Id.* at ¶ 11.

[31] R.E. tab 8, R. 191, Martinez-Agüero Aff.¶ 15.

[32] *Id.* at ¶ 16.

[33] *Id.*

[34] *Id.* at ¶ 17; R.E. tab 9, R. 196, McDaniels Aff. ¶ 16.

[35] R.E. tab 8, R. 191, Martinez-Agüero Aff.¶ 17.

the law."[36] He grabbed Martinez-Agüero forcefully, twisted her arms behind her back, and pushed her into a concrete barrier.[37] González then began to "hit her with his fists and knees," kneeing her repeatedly in her lower back.[38]

Martinez-Agüero had done nothing to provoke the attack. She had not cursed at González or even raised her voice at him; she did not fight back or run away.[39] González was too big and the attack happened too quickly.[40] Martinez-Agüero's aunt asked González to stop beating her niece, but he did not stop.[41]

There were many witnesses to the attack, but none of them came to Martinez-Agüero's aid.[42] When other agents arrived, they said something to González in

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[36] *Id.* at ¶ 18. González now claims that he was arresting Martinez-Agüero for interfering with and disrupting official business at a port of entry pursuant to 18 U.S.C. § 111 and 41 C.F.R. § 102-74.390 (although this regulation had not yet been promulgated at the time). R.E. tab 3, R. 265, Dist. Ct. Op. at 38.

[37] R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 19.

[38] R.E. tab 3, R. 228, Dist. Ct. Op. at 1; R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 19; R.E. tab 9, R.196, McDaniels Aff. ¶ 16.

[39] *Id.* at ¶¶ 17-19; R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 19.

[40] R.E. tab 9, R.196, McDaniels Aff. ¶ 19; R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 22.

[41] R.E. tab 9, R.196, McDaniels Aff. ¶ 17.

[42] *Id.* at ¶ 18; R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 20.

English that Martinez-Agüero did not understand; only then did González stop hitting her.[43]

Next, Martinez-Agüero was taken into an office where she was handcuffed to a chair and left in solitude.[44] A short time later, González entered the office and showed Martinez-Agüero scratches on his arm.[45] He threatened her with going to prison for assaulting him; he laughed at her and showed her a photograph that he had taken of the scratches.[46] But Martinez-Agüero could not have caused the scratches because she had not even tried to resist him.[47] Eventually Agent González left and other agents came into the room and allowed her aunt in as well.[48]

Martinez-Agüero suffers from epilepsy, and she had an epileptic attack while she was still handcuffed to the chair.[49] She fell off the chair, hit her head on the

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[43] *Id.*

[44] *Id.* at ¶ 21; R.E. tab 9, R.196-97, McDaniels Aff. ¶¶ 20-21.

[45] R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 23.

[46] *Id.*

[47] *Id.*

[48] *Id.* at ¶ 24; R.E. tab 9, R.197, McDaniels Aff. ¶ 21.

[49] R.E. tab 8, R.189, 192, Martinez-Agüero Aff.¶¶ 2, 24-25; R.E. tab 9, R.197, McDaniels Aff. ¶¶ 21-22.

table and then fell to the ground in convulsions, still handcuffed to the chair.[50] Medical personnel arrived at some point and administered oxygen.[51]

Finally, at around 6:00 p.m.—more than six hours after she had been ordered off the bus—Martinez-Agüero was released from custody and allowed to return home.[52]

B. District Court Proceedings

Martinez-Agüero filed this *Bivens*[53] action in federal district court in El Paso, alleging that González violated her rights under the Fourth and Fifth Amendments to the U.S. Constitution, and bringing claims under the Federal Tort Claims Act that are not at issue in this appeal. With practically no discovery, González filed a motion for summary judgment based on the doctrine of qualified immunity.[54] He argued that he should be immune from suit because Martinez-Agüero is an alien who, he contends, does not have any constitutional rights.

The district court denied summary judgment because it found that González's attack took place while Martinez-Agüero was physically located within the sovereign territory of the United States and because the attack was not part of any

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[50] *Id.* at ¶ 25; R.E. tab 8, R.191, Martinez-Agüero Aff.¶ 22.

[51] *Id* , R. 192 at ¶ 26; R.E. tab 9, R.197, McDaniels Aff. ¶ 23.

[52] R.E. tab 8, R.192, Martinez-Agüero Aff.¶ 27.

[53] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[54] R.E. tab 3, R.228, Dist. Ct. Op. at 1.

immigration proceedings to which the entry-fiction doctrine might apply.[55] González appeals from that ruling.

III. SUMMARY OF THE ARGUMENT

González cannot justify his attack on Martinez-Agüero. He does not even try. Instead, in an attempt to avoid liability, González asks the Court to create new law piecemeal out of dicta and doctrine borrowed from marginally-related case law. The new proposition of law he advances—that nonresident aliens such as Martinez-Agüero have no constitutional rights even when present on U.S. soil—flies in the face of more than 100 years of Supreme Court precedent and contrary holdings of this Court.

González's proposed doctrine is primarily dependent upon an expanded interpretation of the entry fiction. The entry fiction is derived from Congress's broad authority—its plenary power—to regulate immigration. But it does not, as González would have it, place every U.S. port of entry or government agents at those ports of entry beyond the reaches of the Constitution. This Court should summarily reject González's attempt to distort the entry fiction beyond recognition and instead follow its holding in *Lynch* that the entry fiction pertains to immigration and deportation proceedings—not to inhumane treatment of aliens within the territory of the United States.

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[55] R.E. tab 3, R.228, 231-32, Dist. Ct. Op. at 1, 4-5.

Relying on his proposed extension of the entry-fiction doctrine, González next asks the Court to conclude that Martinez-Agüero had no cognizable Fifth Amendment rights. But again, the Court would have to ignore its long-standing precedent in *Lynch* to do so. In *Lynch*, the Court was unequivocal concerning the Fifth Amendment rights of nonresident aliens at the border, reasoning,

> [W]e cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien. We therefore hold that, whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.[56]

"Gross physical abuse at the hands of [Agent González]" is precisely what this case is about.

Finally, having failed to overcome *Lynch's* cabining of the entry fiction, González turns to dicta from a single case—dicta seemingly endorsed by only a plurality of the Supreme Court in *United States v. Verdugo-Urquidez* ("*Verdugo*").[57] Relying on this dicta, González argues that aliens have no Fourth Amendment rights even when they step onto U.S. territory unless, independent of their presence, they have prior "substantial connections" with the United States.

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[56] 810 F.2d at 1374.

[57] 494 U.S. 259 (1990). *See* discussion of Justice Kennedy's crucial fifth vote in *Verdugo infra* pp. 37-38.

But González misconstrues *Verdugo*, reading into its holding what this Court never has. As this Court and its sister circuits have recognized over the past fifteen years, *Verdugo* pertains to ***extraterritorial*** application of the Fourth Amendment. Because Martinez-Agüero and all events relevant to this case were exclusively within U.S. territory, *Verdugo's* extraterritorial analysis is simply inapposite. And in any event, as the district court found below,[58] Martinez-Agüero did have *Verdugo*-type substantial connections with the United States.

Therefore, in this interlocutory appeal, the Court should affirm the district court's denial of summary judgment because the Fourth and Fifth Amendments did protect Martinez-Agüero from gross physical abuse and inhumane treatment once she entered the territory of the United States.

IV. ARGUMENT

A. Standard of Review

This interlocutory appeal is from the denial of González's motion for summary judgment based on his defense of qualified immunity. In *Wallace*, this Court recently explained the controlling standard of review:

> A denial of summary judgment based on qualified immunity is reviewed de novo. Summary judgment may be granted if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. In determining whether summary judgment is appropriate, we generally view

[58] R.E. tab 3 at R. 264, Dist. Ct. Op. at 37.

> the evidence and all factual inferences from that evidence in the light most favorable to the party opposing the motion and all reasonable doubts about the facts are resolved in favor of the nonmoving litigant. However, in an interlocutory appeal based on qualified immunity, a defendant may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial. Thus, we are required instead [to] consider whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment.[59]

The same standard applies here.

B. Scope of Appeal

In this interlocutory appeal, González only raises narrowly-confined legal issues. To adhere to the scope of that appeal and the governing standard of review, it is important that the Court recognize the issues that are ***not*** properly before it because González has ***not*** raised them.[60] On this appeal:

- González has not raised any argument that he is entitled to qualified immunity on the basis that the law was not "clearly established" at the time of the attack.[61]

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[59] 400 F.3d at 288-89 (citations and quotations omitted).

[60] *See Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 275 n.3 (5th Cir. 2005) (en banc) (reiterating that issues inadequately briefed on appeal are abandoned) (citing *L&A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir. 1994); FED. R. APP. P. 28(a)(9)(A)).

[61] In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court explained that the qualified immunity analysis requires a two sequential step inquiry. The initial threshold question is, "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201 (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). Once the "existence or nonexistence of a constitutional right" is established, *id.*, the second question is "whether the law clearly

- González has not asserted that his attack on Martinez-Agüero was somehow justified or constituted a reasonable use of the force.

- González has never asserted that his conduct was within the scope of any immigration or deportation proceeding.

- González has not, and cannot, question the district court's finding that his attack on Martinez-Agüero took place on U.S. soil.[62]

Martinez-Agüero, therefore, has not briefed these issues.

By his own submission, what González ***has*** appealed—and what is properly before the Court here—is whether, outside the context of any immigration or deportation proceedings, an alien at a port of entry within U.S. territory has any Fourth or Fifth Amendment rights.[63]

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established that the officer's conduct was unlawful in the circumstances of the case." *Id.*

In this appeal, González's entire argument rests exclusively on the first question: whether Martinez-Agüero had a *constitutional right* that González could have violated. This is how González has framed the issue here, *see* Appellant's Bf. at *xi*, and this is the sole point he argues on appeal, *see id.* at 7-14. González has offered no argument on the second prong of the qualified immunity inquiry, so that question is simply not before this Court. To the extent that González *could have* argued whether the law was "clearly established" when he attacked Martinez-Agüero, he has now abandoned that argument—and for good reason, *see Lynch*, 810 F.2d 1374-75.

[62] Appellant's Bf. At 11 ("She was in the zone of territory between the gates of the country and the physical border of U.S. sovereign territory . . . ."). Regardless, this fact issue is not even appealable at this interlocutory stage. *Wallace*, 400 F.3d at 289.

[63] *See* Appellant's Bf. at *xi*, 7-14. Here, as in *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 n.4 (1985), the question of whether a nonresident alien at the border may have ***lesser*** Fourth or Fifth Amendment rights is not presented. González has argued only that he should be immune from suit because Martinez-Agüero has ***no*** constitutional rights. He has not even suggested that his conduct might survive Fourth or Fifth Amendment scrutiny under any standard that could apply.

C. The Entry-Fiction Doctrine

Although González never identifies it by name, his argument is premised entirely on the application of the entry-fiction doctrine to this case. By invoking the entry fiction, he proposes to treat Martinez-Agüero as if she had been completely outside U.S. territory when he attacked her. What González does not disclose, however, is that the entry fiction has never been applied to determine legal rights and obligations vis-à-vis mistreatment of aliens as opposed to admission or exclusion determinations. Nor does he acknowledge this Court's explicit rejection of the entry-fiction doctrine in such circumstances. An examination of the doctrine's source, its rationale and the cases applying it demonstrates its inapplicability here.

1. Congress's "Plenary Power" Over Immigration Is the Source of the Entry Fiction.

The entry-fiction doctrine derives from the recognition that the political branches of government are more appropriately suited to function as gatekeeper of the nation's borders, and thus, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[64] A century ago, Justice Harlan wrote that

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[64] *Mezei*, 345 U.S. at 212-13 (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 543-46 (1950)).

> the power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive offices, without judicial intervention, is settled by our previous adjudications.[65]

Likewise, in *Fong Yue Ting v. United States*,[66] the Court stated,

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.[67]

In light of this congressional authority, recognized as the "plenary power" to admit or exclude aliens,[68] courts have "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[69]

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[65] *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

[66] 149 U.S. 698 (1893).

[67] *Id.* at 713.

[68] *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

[69] *Mezei*, 345 U.S. at 210.

2. The Power to Exclude Aliens Is No License for Constitutionally Impermissible Conduct.

Even if plenary, Congress's immigration power has never been unlimited. In *I.N.S. v. Chada*,[70] the Supreme Court explained,

> The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976); "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, 424 U.S. at 132.[71]

In 2001, the Supreme Court reaffirmed this principle in *Zadvydas v. Davis*,[72] explaining that "Congress has 'plenary power' to create immigration law, and . . . the judicial branch must defer to executive and legislative branch decisionmaking in that area. But that power is subject to important constitutional limitations."[73]

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[70] 462 U.S. 919 (1983).

[71] *Id.* at 940-41 (parallel citation omitted).

[72] 533 U.S. 678 (2001).

[73] *Id.* at 695 (internal citation omitted). Similarly, in *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), the Court stated, "Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . ." *Cf. Montoya de Hernandez*, 473 U.S. at 563 (REHNQUIST, J., dissenting) ("Subject only to the other applicable guarantees of the Bill of Rights, this interest in 'national self-protection' is plenary."); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.").

Justice Scalia's dissent in that case articulated the same principle, explaining the Court's ruling a century earlier in *Wong Wing*:[74]

> [A]ll [*Wong Wing*] held is that [aliens] could not be subjected to the punishment of hard labor without a judicial trial. I am sure they cannot be tortured, as well—but neither prohibition has anything to do with their right to be released into the United States. Nor does *Wong Wing* show that the rights of detained aliens subject to final order of deportation are different from the rights of aliens arrested and detained at the border—unless the Court believes that the detained alien in *Mezei* could have been set to hard labor.[75]

Even aliens incarcerated as enemy combatants, according to the recent Guantanamo Bay detention cases, can challenge under the federal habeas statute whether they are being held in "custody in violation of the Constitution or laws or treaties of the United States."[76]

3. The Plenary Power Is Limited to Admission and Exclusion Proceedings.

As circumscribed by the courts, Congress's plenary power extends only to the admission and exclusion functions of immigration law. According to the Supreme Court's decision in *Landon v. Plasencia*,[77] this is because "[a]n alien

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[74] 163 U.S. at 238

[75] *Zadvydas*, 533 U.S. at 704.

[76] *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 2698 (2004) (quoting 28 U.S.C. § 2241(c)(3) & citing Justice Kennedy's concurring opinion in *Verdugo*, 494 U.S. at 277-78).

[77] 459 U.S. 21, 32 (1982) (emphasis added).

seeking initial admission to the United States requests a privilege and has no constitutional rights ***regarding his application***, for the power to admit or exclude aliens is a sovereign prerogative." This Court held the same in *Lynch*, declining to apply the entry-fiction doctrine other than to "aliens' rights with regard to immigration and deportation proceedings."[78] Other circuit courts agree.[79] The Court should not defer to Congress's exercise of plenary power outside the admission/exclusion arena.[80]

4. This Court Has Expressly Refused to Permit the Entry Fiction to Excuse Government Mistreatment of Aliens.

In *Lynch*, this Court concluded that Congress's plenary power over immigration matters does not serve as a shield against constitutional scrutiny when government agents mistreat aliens.[81] There, a group of sixteen Jamaican nationals were apprehended as stowaways on a barge attempting to enter the United States

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[78] 810 F.2d at 1373.

[79] *See, e.g., Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987) ("*[O]utside the context of admission and exclusion procedures*, excludable aliens do have due process rights. . . . [T]he mere fact that one is an excludable alien would not permit a police officer savagely to beat him, or a court to impose a standardless death penalty as punishment for having committed a criminal offense." (emphasis added)); *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 n. 29 (6th Cir. 2003) (en banc) ("[E]xcludable aliens have not 'entered' the country *for the purposes of immigration law*." (emphasis added)).

[80] *Cf. Wong Wing v. United States*, 163 U.S. 228, 236 (1896) (contrasting Congress's plenary power to exclude or expel aliens with the constitutional limits on its power to punish aliens as criminals).

[81] 810 F.2d at 1373.

via the Mississippi River.[82] The stowaways were deported after ten days, but they retained U.S. counsel and filed tort claims under 42 U.S.C. § 1983 and various other statutes and constitutional provisions, seeking damages from government agents who allegedly hosed them down with a fire hose, threatened and beat them, and mistreated them in various other ways.[83] The district court denied a summary judgment motion based on qualified immunity, and the government agents appealed.

This Court affirmed. In doing so, it examined the entry-fiction doctrine in detail, concluding that the doctrine did not prevent the stowaways—nonresident aliens at the border—from asserting a Fifth Amendment right to humane treatment.[84]

> The basis for limiting the constitutional protection afforded excludable aliens has been the overriding concern that the United States, as a sovereign, maintain its right to self-determination. "As the history of its immigration policy makes clear, this nation has long maintained as a fundamental aspect of its right to self-determination the prerogative to determine whether, and in what numbers, outsiders without any cognizable connection to this society shall be permitted to join it." Courts ordinarily should abstain from placing limits on government discretion in these circumstances because the sovereign interest in self-

[82] *Id.*

[83] *Id.* at 1367-68. The INS, the Port of New Orleans Harbor Police, and the Coast Guard each played a role in detaining the stowaways. *Id.*

[84] *Id.* at 1373.

> determination weighs so much more heavily in this scheme than does the alien's interest in entering the country.[85]

The *Lynch* court continued, distinguishing mistreatment of the stowaways from decisions concerning the admission or exclusion of aliens:

> That interest [the "sovereign interest in self-determination"], however, plays virtually no role in determining whether the Constitution affords any protection to excludable aliens while they are being detained by state officials and awaiting deportation. Counsel has not suggested and we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien. We therefore hold that, whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.[86]

And addressing the qualified immunity claim, the *Lynch* court concluded,

> While the extent of protection the fourteenth amendment affords to various groups of persons may turn on their status, that amendment applies by its express terms to "any person." Excludable aliens are not non-persons. It does not require a court ruling for a state official to know that even an excludable alien may not be denied the fundamental liberty interest to be free of gross physical abuse in the absence of some articulable, rational public interest that may be advanced by such conduct. If the argument advanced by the harbor police defendants were

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[85] *Id.* at 1373-74 (footnotes omitted) (quoting *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985)).

[86] *Id.*

> sound, the Constitution would not have protected the stowaways from torture or summary execution.[87]

Thus, *Lynch* leaves no room for doubt that even nonresident aliens at the border have a constitutional right to be free from gross physical abuse at the hands of government agents like González.

Because the entry fiction applies only to an "aliens' rights with regard to immigration and deportation proceedings,"[88] and because the Fourth and Fifth Amendment rights that Martinez-Agüero asserts here do not pertain to such proceedings, the entry fiction is inapplicable here.[89] Perhaps ordering Martinez-Agüero off the bus pertained to immigration or deportation proceedings. Detaining her and then sending her back to Mexico may have as well. But attacking her, hitting and kicking her, handcuffing her to a chair—the very acts that form the basis of her cause of action—these acts cannot be construed as part of any immigration or deportation proceeding.[90] Under *Lynch*, that issue is settled.

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[87] *Id.* at 1374-75.

[88] *Id.* at 1373.

[89] R.E. tab 3, R. 231-32, Dist. Ct. Op. at 4-5 (citing *Lynch*, 810 F.2d at 1373).

[90] *Compare Mezei*, 345 U.S. at 213 (applying entry fiction with regard to "exclusion proceedings"), *with Lynch*, 810 F.2d at 1374 (holding entry fiction inapplicable to "gross physical abuse").

González does not attempt to discredit *Lynch*, as well he could not.[91] It has been relied on recently by, among others, the Third Circuit in *Chi Thon Ngo*,[92] the Sixth Circuit in *Rosales-Garcia*,[93] and the Ninth Circuit in *Kwai Fun Wong v. United States*.[94] It has been continuously cited by this Court as well.[95]

González does, however, fleetingly attempt to distinguish *Lynch*, suggesting that "the factual scenario in *Lynch* was not subject to the same application of

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[91] According to *Shepard's*, it has been cited by 136 other decisions, including recent decisions of this Court, and not once has it been criticized, questioned or overruled.

[92] 192 F.3d at 396.

[93] 322 F.3d at 410 nn.28-29.

[94] 373 F.3d 952, 972 (9th Cir. 2004).

[95] Indeed, this Court again affirmed the vitality of *Lynch* in its original *Zadvydas* decision, then-styled *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), vacated and remanded by, *Zadvydas v. Davis*, 533 U.S. 678 (2001), *aff'd as modified*, 285 F.3d 398 (5th Cir. 2002). There, this Court concluded,

> Aliens can of course claim some constitutional protections. The language of the due process clause refers to "persons," not "citizens," and it is well established that aliens within the territory of the United States may invoke its provisions. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wong Wing v. United States*, 163 U.S. 228 (1896) (illegal resident alien could not be punished by sentence to hard labor without due process of law). While the cases have drawn a line for some purposes between excludable aliens who failed to effect entry into the country unimpeded and resident aliens, in this Circuit it is clear that the former also can be considered persons entitled to protection under the 14th Amendment. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) ("Excludable aliens are not non-persons."). We cannot suppose that the result in *Wong Wing* would have been different had the alien there been excludable rather than resident.

Id. at 289 (parallel citations omitted); *see also Medina v. O'Neill*, 838 F.2d 800, 803 (5th Cir. 1988) ("In *Lynch* we could conceive of no national interests that would justify 'the malicious infliction of cruel treatment' on an excludable alien.").

extraterritorial constitutional rights that was dispositive in *Mezei*."[96] Indeed, this is true. *Lynch* did not involve extraterritorial rights. But that only distinguishes it from *Mezei*—not from this case.[97]

In *Mezei*,[98] the Supreme Court addressed the constitutional claims of "an alien immigrant permanently excluded from the United States on security grounds but stranded . . . on Ellis Island because other countries [would] not take him back." Mezei challenged his continuing exclusion via a writ of habeas corpus.[99] In effect, he sought a court order ending his exclusion. The Court concluded that neither Mezei's detention on Ellis Island nor his prior U.S. residency "transforms this into something other than an exclusion proceeding," and accordingly applied the entry-fiction doctrine.[100]

Unlike *Mezei*, this Court's decision in *Lynch* did not involve immigration or deportation proceedings. So the *Lynch* court appropriately declined to invoke the entry-fiction doctrine despite the fact that the stowaways, like Martinez-Agüero in

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[96] Appellant's Bf. at 12.

[97] González implies that the length of the stowaways' detention in *Lynch* also distinguishes the case. But this argument is confounding. The *Lynch* stowaways were detained 10 days. *Lynch*, 810 F.2d at 1367. Mezei had been detained 21 months. *Mezei*, 345 U.S. at 209. González gives no indication why he believes Martinez-Agüero's approximately six-hour detention is more like the detention in *Mezei* than in *Lynch*.

[98] 345 U.S. at 207.

[99] *Id.* at 209.

[100] *Id.* at 213.

this case, were "legally considered detained at the border for purposes of immigrant status and deportation even if they [were] physically present in the United States."[101] In other words, in contrast to the circumstances in *Lynch* and in the present case, the issue in *Mezei* was a challenge—a direct challenge at that—to Congress's plenary power to admit and exclude aliens. Because Martinez-Agüero brings no such challenge in this case, *Lynch*, not *Mezei*, is controlling.

5. The Entry Fiction Has No Application Here.

This case involves no challenge to immigration or deportation proceedings; in fact, like the stowaways in *Lynch*, Martinez-Agüero was turned away and sent home. Also like the *Lynch* stowaways, she was physically abused in the process. *Lynch*, therefore, removes any doubt that the entry-fiction doctrine is inapplicable here.

Moreover, expanding the entry-fiction doctrine as González proposes would be fundamentally inconsistent with its rationale. As described above, the entry fiction is derived from the sovereign prerogative to admit or exclude aliens,[102] and to "prescribe the terms and conditions upon which they may come to this country."[103] No such issue is present here:

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[101] 810 F.2d at 1370.

[102] *Landon*, 459 U.S. at 32.

[103] *Lem Moon Sing*, 158 U.S. at 547.

- There is no threat to the security of the border.
- There is no challenge to the sovereignty of the United States or its self-determination.
- There is no challenge to Congress's power to set the terms and conditions of admission.
- There is no challenge to Martinez-Agüero's exclusion.

Besides his misplaced reliance on *Mezei*, González cites no authority and makes no argument for applying the entry-fiction doctrine in search and seizure or excessive force cases such as this one. No court has ever applied the doctrine to such cases. In short, González attacked Martinez-Agüero within the territory of the United States; the entry fiction gives the Court no reason to pretend otherwise.

D. The Fifth Amendment

Without the benefit of the entry-fiction doctrine, González's Fifth Amendment argument is unsurprisingly feckless. González simply cannot avoid this Court's holding in *Lynch* that nonresident aliens at the border have a Fifth Amendment right to be free from inhumane treatment and gross physical abuse.[104] *Lynch* also holds that "[a] law enforcement officer's infliction of personal injury on

[104] 810 F.2d at 1373-74. Similarly, a nonresident alien at the border has Fifth Amendment *Miranda* rights. *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979), *overruled on other grounds by United States v. Corral-Franco*, 848 F.2d 536 (5th Cir. 1988).

a person by application of undue force may deprive the victim of liberty without due process of law."[105]

Here, the record shows that González attacked Martinez-Agüero at the border after she had crossed into the United States.[106] As a result of the attack, she suffered inhumane treatment and gross physical abuse as González shoved her into a concrete barrier, hit and kicked her, and then left her handcuffed to a chair, restraining her for approximately six hours.[107] González's attack injured her and deprived her of liberty without due process of law.

In the face of *Lynch*, González merely cites to *Mezei* and *Johnson v. Eisentrager*.[108] As already explained, *Mezei* is fundamentally inapposite because it concerned a challenge to an "exclusion proceeding," and thus, the plenary power and the entry fiction were in play.[109]

Eisentrager is also fundamentally inapposite. There, addressing World War II POWs in Germany, the Court merely held that the Fifth Amendment protections

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[105] 810 F.2d at 1375 (quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981)).

[106] R.E. tab 3, R. 232, Dist. Ct. Op. at 5 and n.3; R.E. tab 9, R. 195, McDaniels Aff. ¶ 6. González concedes the point. Appellant's Bf. at 11.

[107] R.E. tab 8, R.191-92, Martinez-Agüero Aff. ¶¶ 19, 21, 23, 27; R.E. tab 9, R. 196-97, McDaniels Aff. ¶¶ 16, 17, 21, 22; R.E. tab 3, R. 267, Dist. Ct. Op. at 40.

[108] 339 U.S. 763 (1950).

[109] *Mezei*, 345 U.S. at 213.

do not reach an alien who is an enemy combatant and "who, at no relevant time and in no stage of his captivity, has been within [U.S.] territorial jurisdiction."[110] Moreover, the *Eisentrager* Court explained that, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[111]

Martinez-Agüero, however, is not an enemy combatant and has never been charged with violating the laws of war outside the United States.[112] More to the point, she is only asking the Court to recognize that the Fifth Amendment applies

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[110] 339 U.S. at 768.

[111] *Id.* at 771. Of course, *Eisentrager* has considerable support on that point. Within the territory of the United States, "[e]ven an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process." *Chi Thon Ngo*, 192 F.3d at 396; *see also Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Rosales-Garcia*, 322 F.3d at 410 n. 29 ("[N]o circuit has concluded that the Due Process Clauses of the Fifth and Fourteenth Amendments do not apply to excludable aliens."); *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993) ("If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin."), vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994).

[112] *Cf. Eisentrager*, 339 U.S. at 777; *see also Rasul*, 124 S. Ct. at 2693-94 (limiting *Eisentrager* based on the characteristics of individuals entitled to the constitutional writ of habeas corpus).

in El Paso—not post-World War II Germany. Thus, *Eisentrager* cannot save González's argument.

E. The Fourth Amendment

Without the benefit of the entry-fiction doctrine, González's Fourth Amendment argument fares little better than his position on the Fifth Amendment. Because Martinez-Agüero and all relevant conduct were within the territory of the United States, González's mistreatment of Martinez-Agüero was actionable under *Bivens* and the Fourth Amendment's protections against wrongful arrest and excessive force.[113] González's contrary argument, if adopted, it would require overruling firmly-entrenched precedent.

Citing exclusively to *United States v. Verdugo-Urquidez*[114] and its test for ***extraterritorial*** application of the Fourth Amendment, González maintains that Martinez-Agüero cannot invoke the Fourth Amendment because purportedly (1) under the entry fiction, the Court should consider her to have been outside the territory of the United States even though she was not and (2) under his reading of

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[113] *See United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004) (holding that the Fourth Amendment protects "an individual's right to be free from arbitrary intrusions by law enforcement"); *United States v. Brugman*, 364 F.3d 613, 615-19 (5th Cir. 2004) ("[I]n the context of custodial interrogation, the use of nearly any amount of force may result in a constitutional violation when a suspect poses no threat to [the officer's] safety or that of others, and [the suspect] does not otherwise initiate action which would indicate to a reasonably prudent police officer that the use of force is justified." (internal quotations and citations omitted)).

[114] 494 U.S. 259 (1990).

Verdugo, her connections with the United States were insubstantial even though the district court found they were not.[115] Both of these arguments are wrong.

1. The Fourth Amendment Protects Aliens Once They Are Within the Territory of the United States.

An examination of the Fourth Amendment's application to aliens such as Martinez-Agüero should begin with the text of the Amendment:

> The right of ***the people*** to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[116]

Unlike other provisions of the Constitution, the Fourth Amendment's scope is not defined in terms of "citizen."[117] Nothing in the plain text of the Fourth Amendment excludes aliens. The actual text employs the term "people," which, as the district court correctly noted in its comprehensive historical analysis of the amendment, cannot be read as excluding aliens.[118]

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[115] R.E. tab 3, R. 264, Dist. Ct. Op. at 37; Appellant's Bf. at 8.

[116] U.S. CONST. amend IV (emphasis added).

[117] *Compare*, *e.g.*, *id.* with U.S. CONST. art. I, § 2; art IV, § 2, cl. 1; amend. XI, amend. XIV, §§ 1, 2; amend. XV, § 1; amend. XIX; amend. XXIV, § 1; amend. XXVI, § 1.

[118] *See* Dist. Ct. Op. at pp. 10-32.

2. *Verdugo* Pertains to Extraterritorial Searches.

Because González is without the benefit of the entry fiction, he is unable to distinguish long-standing Supreme Court precedent recognizing the Fourth Amendment's protection of aliens on U.S. territory.[119] Attempting to avoid that authority, González puts all of his Fourth Amendment eggs in the *Verdugo* basket. But *Verdugo* simply does not apply. It merely holds—as this Court explained in *United States v. Cardenas*[120]—that "[t]he Fourth Amendment does not apply to searches or seizures conducted ***on foreign soil***, even if the search involves agents of the United States government."[121] In a 2002 unpublished decision, *United States*

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[119] *See*, *e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that the search of a Mexican citizen's automobile, made without probable cause or consent by roving patrol of U.S. Border Patrol on a highway near the Mexican border, violated the Fourth Amendment).

[120] 9 F.3d 1139 (5th Cir. 1993).

[121] *Id.* at 1157 n.8 (emphasis added) (citing *Verdugo*, 494 U.S. at 274-75). *Accord, Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (citing *Verdugo* as a "case involv[ing] extraterritorial application of the Fourth Amendment"), *rev'd on other grounds*, *Christopher v. Harbury*, 536 U.S. 403 (2002); *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991) (describing *Verdugo* as "provid[ing] a helpful analytical framework for determining whether other constitutional provisions apply to governmental activities having ***extraterritorial dimensions***" (emphasis added)); *United States v. Davis*, 905 F.2d 245, 251 (9th Cir. 1990) ("Although *Verdugo*[] only held that the fourth amendment does not apply to searches and seizures of nonresident aliens ***in foreign countries***, the analysis and language adopted by the Court creates no exception for searches of nonresident aliens on the high seas." (emphasis added)); *Theck v. Warden, I.N.S.*, 22 F. Supp. 2d 1117, 1123 (C.D. Cal. 1998) ("The holding in *Verdugo* is limited to ***extraterritorial*** searches and seizures." (emphasis added)).

v. Kurdyukov,[122] this Court reached the same conclusion concerning searches in international waters. Indeed, the *Verdugo* Court claimed to be addressing no more, identifying the question before it as "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and ***located in a foreign country***."[123]

In *Verdugo*, government agents apprehended Verdugo-Urquidez in Mexico, where he resided, and transported him to the United States on narcotics-related charges.[124] The agents then arranged with Mexican officials to search Verdugo-Urquidez's Mexican residences, where they ultimately seized incriminating evidence against him while he remained in custody in San Diego.[125] The district court granted Verdugo-Urquidez's motion to suppress on Fourth Amendment grounds because the DEA agents had conducted the search without a warrant, and the Ninth Circuit affirmed.[126] But the Supreme Court reversed, stating,

> We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place

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[122] 48 Fed. Appx. 103, Slip Op. at 7 (5th Cir. 2002) (per curium) (unpublished).

[123] 494 U.S. at 261 (emphasis added).

[124] *Id.* at 262.

[125] *Id.*

[126] *Id.* at 263.

> searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.[127]

Thus, the Court determined that the Fourth Amendment is not implicated when its application would be extraterritorial and the individual attempting to invoke it has no "voluntary attachment" or, as characterized later in the opinion, "substantial connections" to the United States.[128] The opinion implies that such individuals who do not have substantial connections with the United States are not among "the people" to whom the text of the Fourth Amendment refers.[129]

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[127] *Id.* at 274-75.

[128] *Id.* at 271; *cf. National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) (concluding that nothing in *Verdugo* "purports to establish whether aliens who have entered the territory of the United States and developed connections with this country but not substantial ones are entitled to constitutional protections").

[129] *Verdugo*, 494 U.S. at 265. The principal opinion in *Verdugo* describes the weight of authority concerning aliens' constitutional rights as establishing "only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 271 (citing *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (extending protection of the Equal Protection Clause to illegal aliens); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (recognizing that an alien is a "person" under the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489-92 (1931) (requiring just compensation under the Fifth Amendment to "alien friends"); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (concluding that aliens are accorded Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (ruling that the Fourteenth Amendment protects aliens)).

But *Verdugo* offers no explanation of the relative importance of either consideration ("extraterritorial application" or "voluntary attachment") in isolation. Moreover, the principal opinion deems its analysis of the issue inconclusive "textual exegesis." 494 U.S. at 265. It merely holds that, when a criminal defendant has no substantial connection with the United States *and* the conduct at issue occurs outside the United States, in those circumstances the Court will not suppress evidence under the

But this interpretation of "the people" was wholly unnecessary to the Court's decision.[130] This point is evident in the concurring opinion of Justice Kennedy, who provided the crucial fifth vote for the majority.[131] Although Justice Kennedy agreed that no violation of the Fourth Amendment had occurred, he expressly rejected the principal opinion's analysis with respect to who constitutes "the people":

> I cannot place any weight on the reference to "the people" in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation's concern over warrantless and unreasonable searches, ***explicit recognition of "the right of the people" to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.*** The restrictions that the United States must observe with reference to ***aliens beyond its territory or jurisdiction*** depend, as a consequence, on general principles of interpretation, not on an

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Fourth Amendment.

[130] *See United States v. Iribe*, 806 F. Supp. 917, 919 (D. Colo. 1992) (recognizing that the language in *Verdugo* "suggesting that excludable aliens are not 'people' within the language of the Fourth Amendment . . . was not required for the holding and was not joined by the majority of the justices"), *aff'd in part and rev'd in part on other grounds*, 11 F.3d 1553 (10th Cir. 1993).

[131] The "rationale of the deciding vote is critical" for interpreting a fragmented Supreme Court decision. *N.W. Enterprises Inc. v. City of Houston*, 352 F.3d 162, 181 & n.18 (5th Cir. 2003). This is the so-called "*Marks* rule" from *Marks v. United States*, 430 U.S. 188 (1977), in which the Supreme Court explained that 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." *Id.* at 193.

> inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of "the people."[132]

In other words, Justice Kennedy explicitly limited his support of the principal opinion to its treatment of extraterritorial searches and seizures. He indicated as much in stating, "If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply."[133] In sum, because there is no question in this case concerning extraterritorial application of the Fourth Amendment, *Verdugo* is not on point.

3. Martinez-Agüero Meets *Verdugo's* Substantial Connection Test.

Despite *Verdugo's* inapplicability here, out an abundance of caution, the district court performed a "substantial connections" analysis and found that Martinez-Agüero has "established a substantial connection with the United States through her pattern of visitation and her efforts to comply with federal law governing admission."[134] Although unnecessary, that finding is nonetheless correct, and González's challenge to it is meritless.

There is very little case law interpreting or applying the "substantial connection" test, but the principal opinion in *Verdugo* mentions several factors or

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[132] 494 U.S. at 276 (KENNEDY, J., concurring) (emphasis added).

[133] *Verdugo*, 494 U.S. at 278 (KENNEDY, J., concurring).

[134] R.E. tab 3, R. 264, Dist. Ct. Op. at 37. This Court must construe all reasonable inferences in favor of Martinez-Agüero. *See Wallace*, 400 F.3d at 288-89.

types of connections it considered, seemingly in no particular order: citizenship, residency, voluntariness and lawfulness of prior entries, acceptance of societal obligations, and location of the search (or seizure).[135]

Here, the record facts and reasonable inferences demonstrate that the majority of these factors (citizenship and residency the exceptions) weigh in Martinez-Agüero's favor:

- She regularly, voluntarily and lawfully entered the United States, most recently pursuant to the INS's "temporary lawful waiver" policy.
- She was voluntarily present within U.S. territory during the time of all conduct relevant to this appeal.
- She accepted the responsibility to comply with U.S. immigration laws and submitted, voluntarily, to the authority of a U.S. government agent.[136]
- The unconstitutional seizure took place on U.S. soil.

No case has held contacts like these to be insufficient.[137]

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[135] 494 U.S. at 271-75.

[136] She also assisted her aunt and her mother in lawfully applying for new laser visas and in obtaining a "temporary lawful waiver" stamp on their border crossing cards and regularly aided her aunt in receiving U.S. social security benefits. *See supra* pp. 5-7 & n.20.

[137] González erroneously suggests that *American Immigration Lawyers Association v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998), stands for the proposition that regular visits for family purposes cannot establish a substantial connection as a matter of law. But that court merely concluded, summarily and in an entry-fiction case, that the plaintiff's regular trips "to visit her [ill] daughter and grandchild . . . [did] not rise to the level of a substantial connection." *Id.* at 59-60.

4. Fourth Amendment Protections Have Always Applied to Aliens Within the United States.

Consistent with *Yick Wo*, *Wong Wing* and similar authority extending other constitutional provisions to aliens, the Fourth Amendment has been applied evenhandedly to citizens and aliens alike on U.S. soil.[138] *Almeida-Sanchez*[139] is a classic example. There, the U.S. Border Patrol stopped Condrado Almeida-Sanchez, a Mexican citizen with a valid work permit, on a state highway in California, twenty-five miles north of the Mexican border.[140] In an attempt to justify the corresponding warrantless search, the Border Patrol invoked the Immigration and Nationality Act, which then permitted warrantless searches of automobiles "within a reasonable distance from any external boundary of the United States."[141] The Court nonetheless held that the Border Patrol's search of Almeida-Sanchez's vehicle violated the Fourth Amendment, explaining,

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of

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[138] *See* cases collected *supra* nn. 4, 111, 129.

[139] 413 U.S. 266.

[140] *Id.* at 267-68.

[141] *Id.* at 268. *See also id.* at 270.

> these pressures that counsels a resolute loyalty to constitutional safeguards.[142]

In reaching this conclusion, the Supreme Court expressly recognized that "[i]t is undoubtedly within the power of the Federal Government to exclude aliens from the country."[143] But that power does not trump the Fourth Amendment.

Indeed, courts routinely conduct Fourth Amendment review of searches and seizures of arriving aliens at the border. In *United States v. Montoya de Hernandez*,[144] for example, the Supreme Court reasoned,

> Balanced against the sovereign's interests at the border are ***the Fourth Amendment rights of respondent***. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, 19 U.S.C. § 482, respondent was entitled to be free from unreasonable search and seizure.[145]

Although the Court struck its Fourth Amendment balancing disfavorably to Montoya de Hernandez, in doing so it squarely answered the preliminary question of whether she had any such rights at all: "Balanced against the sovereign's

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[142] *Id.* at 273.

[143] *Id.* at 272 (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 603-604 (1889)).

[144] 473 U.S. 531 (1985).

[145] *Id.* at 539-40 (emphasis added) (citing *Carroll v. United States*, 267 U.S. 132, 154 (1925), and *Florida v. Royer*, 460 U.S. 491, 515 (1983) (BLACKMUN, J., dissenting)).

interests at the border are ***the Fourth Amendment rights of respondent***."[146] Indeed, if Montoya de Hernandez had no Fourth Amendment rights as a nonresident alien seeking admission at the border, then Fourth Amendment balancing would have been superfluous.[147]

5. This Court Has Consistently Applied the Fourth Amendment to All Border Searches.

a. The Border Is Not A "Constitution-Free" Zone.

This Court regularly applies Fourth Amendment protections to border searches without regard to citizenship or immigration status. In *United States v. Mejia*,[148] for example, a Columbian national named German Mejia attempted to enter the United States at the New Orleans International Airport. In applying a Fourth Amendment analysis to the Government's interrogation and X-ray search of Mejia, the Court did not even comment on his status as a nonresident alien.

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[146] *Id.* at 539-40 (emphasis added).

[147] The vitality of *Montoya de Hernandez* is evident in the Supreme Court's recent unanimous decision, *United States v. Flores-Montano*, 541 U.S. 149 (2004). There, the Court cited *Montoya de Hernandez* as standing for the proposition that "the expectation of privacy is less at the border than it is in the interior." 541 U.S. at 154 (citing *Montoya de Hernandez*, 473 U.S. at 538). In fact, the *Flores-Montano* Court again recognized that border searches of aliens may run afoul of the Fourth Amendment: "[W]e conclude that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. While it may be true that some searches of property are so destructive as to require a different result, this was not one of them." *Id.* at 155-56.

[148] 720 F.2d 1378 (5th Cir. 1983)

Instead, it simply applied the Fourth Amendment's reasonable suspicion standard, concluding that the search was justified.[149] Similarly, in *United States v. Oyekan*,[150] the Eighth Circuit conducted a full-blown Fourth Amendment analysis of the search of the defendants, Nigerian citizens, without comment on their immigration status.

b. Even Illegal Aliens Have Fourth Amendment Rights.

Since *Verdugo*, this Court and its sister circuits have consistently even extended Fourth Amendment protections to illegal aliens—for example, in cases involving criminal defendants charged with illegally reentering the United States. In one such case, *United States v. Aldaco*,[151] defendant Guillermo Aldaco was illegally in the United States after having been deported. He was traveling some

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[149] *See also United States v. Kelly*, 302 F.3d 291, 292-93 (5th Cir. 2002) (conducting Fourth Amendment analysis of canine-sniff search on international bridge between New Laredo, Mexico and Laredo, Texas, again without comment as to the defendant's citizenship or immigration status); *United States v. Adekunle*, 980 F.2d 985, 990 (5th Cir. 1992) (without regard to defendants' citizenship or immigration status, holding that "grave reservations" concerning the constitutionality of lengthy detentions of suspected alimentary canal smugglers requires notice to a U.S. Attorney and the court within 24 hours of such detentions); *United States v. De Gutierrez*, 667 F.2d 16, 18-20 (5th Cir. 1982) (applying the Fourth Amendment reasonable suspicion standard to a border search of what appears to be a nonresident alien, again, without inquiry into citizenship or immigration status); *United States v. Cruz*, 581 F.2d 535, 537 (5th Cir. 1978) (en banc) (observing that the law enforcement task enforcing the immigration laws "must, however, be performed with due regard to the Fourth Amendment to the Constitution, which affords citizen and alien alike protection against illegal stops, searches, and arrests"), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987).

[150] 786 F.2d 832 (8th Cir. 1986).

[151] 168 F.3d 148, 149 (5th Cir. 1999).

seventy-five or eighty miles from the border when he was stopped by the Border Patrol.[152] When Aldaco rolled down his window, the officers detected an odor of marijuana and recognized bricks of marijuana on his front passenger seat.[153] He was eventually charged with possession with intent to distribute marijuana, and with illegal reentry into the United States after deportation.[154]

Although Aldaco was an illegal alien, this Court nonetheless evaluated his stop on Fourth Amendment grounds.[155] It did not dispense with the reasonable suspicion requirement, which it could have done if—as Gonzaelz contends[156]—aliens have no Fourth Amendment rights to assert. Instead, the Court followed the same pattern as it did in *United States v. Saucedo-Munoz*,[157] and *United States v. Encarnacion-Galvez*.[158] Indeed, this is consistent with federal-court practice everywhere.[159]

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[152] *Id.* at 150.

[153] *Id.* at 149.

[154] *Id.*

[155] *See id.* 150-52.

[156] Appellant's Bf. at 7-11.

[157] 307 F.3d 344, 347, 350-51 (5th Cir. 2002).

[158] 964 F.2d 402, 410 (5th Cir. 1992).

[159] *See*, *e.g.*, *United States v. Vega-Rico*, 417 F.3d 976, 979-80 (8th Cir. 2005) (same); *United States v. Herrera Martinez*, 354 F.3d 932 (8th Cir. 2004); *United States v. Rodriguez-Suazo*, 346 F.3d 637 (6th Cir. 2003); *United States v. Ramirez-Garcia*, 269 F.3d 945 (9th Cir. 2001); *United States v. Wittgenstein*, 163 F.3d 1164 (10th Cir. 1998);

Thus, despite *Verdugo*, aliens whose entire "connection" to the United States is premised on their ***illegal status*** and circumvention of immigration law have nonetheless been accorded Fourth Amendment protections. It therefore cannot be that Martinez-Agüero falls outside those protections when she had been issued a border crossing card and routinely and used it routinely and lawfully to enter the United States.

V. CONCLUSION

More than a century after the Supreme Court's pronouncements in *Yick Wo* and *Wong Wing*, González asks the Court to re-examine the Constitution's protection of aliens who come within the territory of the United States. He asks this—not in the context of an criminal alien facing deportation proceedings, nor with regard to an enemy combatant in military confinement, nor in connection with an illegal alien who has clandestinely set foot upon our shores. Nothing of the sort. Instead, he asks the Court to deny constitutional protections to a border resident who was attacked and beaten while attempting to visit the United States lawfully, in what the district court concluded was "legitimate[] rel[iance] on an official statement of the law . . . by a consular official."[160] González asks the Court to deny that Martinez-Agüero was on U.S. territory, deny that she is one of "the people,"

United States v. Millan, 36 F.3d 886 (9th Cir. 1994).

[160] R.E. tab 3, R. 263, Dist. Ct. Op. at 36.

and deny the Constitution's power to protect her at the border. But some truths are self-evident. In light of precedent, in keeping with this nation's commitment to justice, and in response to the principles embodied in the Constitution, the Court must reject this request.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By:_____

Jonathan Bridges
Texas State Bar No. 24028835
Suyash Agrawal
Texas State Bar No. 24036110
901 Main Street, Suite 4100
Dallas, Texas 75202
Telephone: (214) 754-1900
Facsimile: (214) 754-1933

LEAD APPELLATE COUNSEL FOR APPELLEE MARIA ANTONIETA MARTINEZ-AGÜERO

Javier N. Maldonado
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
118 Broadway, Suite 502
San Antonio, Texas 78205
Tel: (210) 277-1603
Fax: (210) 225-3958

Francisco X. Dominguez
521 Texas Ave.
El Paso, Texas 79901
Tel: (915) 532-5544
Fax: (915) 532-5566

CO-COUNSEL FOR APPELLEE
MARIA ANTONIETA MARTINEZ-AGÜERO

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2005, pursuant to FED. R. APP. P. 31(a), a true and correct copy on paper and on diskette of the foregoing Brief of Appellee was sent by certified mail, return receipt requested, to **Jeanne C. Collins** and **Ken Slavin**, KEMP SMITH LLP, 221 N. Kansas, Suite 1700, El Paso, Texas 79901; and **John Smith, III**, Assistant U.S. Attorney, U.S Attorney's Office, One Shoreline Plaza, 800 North Shoreline Blvd., Suite 500, Corpus Christi, Texas 78401.

JONATHAN BRIDGES
Attorney for Appellee Maria Antonieta Martinez-Agüero

Dated: October 11, 2005

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JONATHAN BRIDGES
Attorney for Appellee Maria Antonieta Martinez-Agüero

Dated: October 11, 2005