

No. 17-1678

In The
Supreme Court of the United States

—◆—
JESUS C. HERNANDEZ, et al.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

—◆—
**BRIEF FOR AMICI CURIAE AMNESTY
INTERNATIONAL USA, THE CENTER FOR
CONSTITUTIONAL RIGHTS, HUMAN RIGHTS
FIRST, AND THE RUTHERFORD INSTITUTE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

Amici curiae are international human rights organizations that engage in litigation, education, and advocacy to promote respect for and adherence to international human rights law and principles by all nations, including the United States. In finding that special factors foreclosed a *Bivens* remedy, the Fifth Circuit mistakenly fixated on the fortuity of the exact location of the victim of the cross-border shooting. Amici curiae are concerned that the formalistic approach adopted by the Fifth Circuit runs counter to the United States' obligations under international law to provide a remedy for gross violations of human rights, including as in this case, extrajudicial killing, committed by its officials on the U.S.-Mexico border.

More detailed descriptions of the particular mission and interest of each amicus curiae are provided in Appendix.



SUMMARY OF ARGUMENT

Petitioners seek compensation for the killing of their son, fifteen-year-old Sergio Hernández, by Jesus Mesa, Jr., a U.S. Customs and Border Patrol agent. But for the fact that Hernández died in a culvert, some feet over the U.S.-Mexico border, there is little question that Mesa's actions would be subject to constitutional

¹ The parties have consented to the filing of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief.

scrutiny and Petitioners would be eligible to seek an appropriate remedy. The Fifth Circuit, however, concluded that Hernández’s presence on Mexican soil when Mesa shot him presented a “special factor” that absolved Mesa of responsibility under the U.S. Constitution. *Hernandez v. Mesa*, 885 F.3d 811, 811 (5th Cir. 2018).

The Fifth Circuit’s rigid formalism is not mandated by *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) and runs counter to this Court’s jurisprudence. Among other factors in reaching its conclusion, the Fifth Circuit mistakenly invoked the presumption against extraterritoriality. *Id.* at 822-23. In so doing, the court erred in its reliance on *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) in several important ways. First, the Fifth Circuit wrongly concluded that *Kiobel* counsels against jurisdiction, when in fact it does the opposite. Mesa’s tortious conduct originated on U.S. soil, with deadly effect just across the border; under *Kiobel* those actions undoubtedly “touch and concern” the United States and would fall appropriately under U.S. jurisdiction.² Second, the Fifth Circuit’s misinterpretation of *Kiobel* simply cannot be squared with the Supreme Court’s functional test for the extraterritoriality of constitutional rights, which “turns on objective factors and practical concerns, not formalism.” *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).

² See also *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528-31 (4th Cir. 2014) (elaborating on the touch-and-concern test).

While not strictly binding on the Court, international law and principles of comity are nonetheless instructive as to whether the extraterritorial recognition of constitutional rights would be “impracticable and anomalous.” In *Boumediene*, for example, among the many factors leading to the Court’s determination that “there are few practical barriers to the running of the writ,” *id.* at 770, was the Court’s conclusion that “[t]here is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government.” *Id.* That decision stands in plain contrast with *Verdugo*, where a critical consideration was the fact that the actions involved Mexican officers within Mexican territory, where there existed no parallel to the Fourth Amendment’s warrant requirement and no means to enforce it. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1994) (Kennedy, J., concurring) (“The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment’s warrant requirement should not apply in Mexico as it does in this country.”).

In this case, as in *Boumediene*, “there is no indication” that providing a remedy here “would cause friction with the host government.” *Boumediene*, 553 U.S. at 770. First, under settled international legal principles, extraterritorial jurisdiction is especially appropriate where, as here, the primary tortious actions occurred on U.S. soil and by U.S. nationals. Second,

defendants' conduct constitutes an extrajudicial killing, a *jus cogens* violation and in plain violation of treaty obligations to which both the United States and Mexico have adhered. Finally, those same treaties obligate the United States to provide a remedy, particularly for gross human rights violations such as extrajudicial killing.

In sum, the Fifth Circuit's invocation of foreign affairs and the presumption against extraterritoriality was misplaced; an examination of the very factors of comity present in both *Kiobel* and *Boumediene* lead to the opposite conclusion. Here, a U.S. official stood on U.S. soil and shot across the border and killed a Mexican national. The Mexican courts have proved unable to provide a remedy, as the United States has refused cooperation.³ Without a remedy before a U.S. court, Petitioners will almost certainly be left without any recourse for the extrajudicial killing of their son, an outcome at odds with international treaty obligations by which both the United States and Mexico have agreed to be bound. Where, as here, the international legal backdrop to U.S.-Mexican relations recognizes both the underlying right to life and the appropriateness of extraterritorial jurisdiction, extension of the

³ Mexico requested extradition to pursue criminal charges against Mesa for Hernández's killing, but the United States refused. Marisela O. Lozano & Aaron Bracamontes, *Chihuahua Officials Seek Extradition of Border Agent in the Shooting Death of Teenager*, EL PASO TIMES (May 4, 2012), http://www.elpasotimes.com/ci_20544250/extradition-border-agent-sought; Adam Liptak, *An Agent Shot a Boy Across the U.S. Border: Can His Parents Sue?*, N.Y. TIMES (Oct. 17, 2016), <http://nyti.ms/2eaxeMc>.

U.S. Constitution would be neither impracticable nor anomalous. *See Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring).

◆

ARGUMENT

International legal principles, which echo the practical approach employed in *Boumediene*, weigh heavily in favor of the modest extension of extraterritoriality presented by this case.⁴ Like *Boumediene*, international tribunals have moved away from formalistic approaches to the application of extraterritorial jurisdiction.⁵ The

⁴ For a more detailed analysis of the interplay between the Court's extraterritoriality jurisprudence and international law principles and human rights norms, *see* Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE INT'L L.J. 308 (2011).

⁵ *The 'Lotus' (France v. Turkey)*, PCIJ Series A No. 10 (1927) ("Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain areas by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."). *See also Bankovic v. Belgium*, Appl. No. 52207/99 [2001] ECHR 890 ("While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. . . ."). Since *Bankovic*, jurisprudence from the European Court of Human Rights has moved decidedly in the direction of a functional analysis, even where the alleged violations occurred in the context of military

European Court of Human Rights has explained its approach to extraterritoriality as follows:

A state may be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter States. . . . Accountability in such situations stems from the fact that . . . the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

Issa v. Turkey, Appl. No. 31821/96 [2004] ECHR 629, para. 71.

operations overseas. *Jaloud v. The Netherlands*, Appl. No. 47708/08 [2014] ECHR (extending jurisdiction under the Convention to Dutch authorities who killed an Iraqi national at a checkpoint); *Issa v. Turkey*, Appl. No. 31821/96 [2004] ECHR 629 (setting forth test for extraterritoriality but declining to extend jurisdiction to Turkey's alleged violations in Iraq because there was insufficient "factual basis for holding that, at the relevant time, the victims were within that specific area" where Turkey had effective control); *Ilascu v. Moldova and Russia*, Appl. No. 48787/99 [2004] ECHR 376 (holding that Russian officers violated Article 3's prohibition of torture by arresting complainants on foreign territory and handing them over to foreign authorities despite the knowledge that they would be tortured). For a general overview of the extraterritorial application of the ECHR and other international human rights law instruments, see M. Milanović, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (Oxford, Oxford University Press, 2011).

The extraterritoriality principle has been codified into a number of international agreements, which explicitly call for extraterritoriality. For example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment mandates that “[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction” when the torture was “committed in any territory under its *jurisdiction*” or “[w]hen the alleged offender is a *national* of that State.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Art. 5(b) [adopted 10 December 1984, entered into force 26 June 1987] 1465 U.N.T.S. 112 (emphasis added). Contrast with *id.* at Art. 5(1)(c) (“When the victim is a national of that State *if that State considers it appropriate. . .*”) (emphasis added).

This evolution is particularly notable as to core human rights obligations, even where the acts and the injuries occurred outside sovereign territory and in the course of military activities. In *Al-Skeini and Others v. The United Kingdom*, the surviving family members of Iraqis killed by British soldiers in 2003 brought suit under the European Convention of Human Rights. *Al-Skeini v. United Kingdom*, App. No. 55721/07 [2011] ECHR 1093. There, the European Court of Human Rights held that “the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom. . . .” *Id.*

at para. 149. Or, in the words of Judge Bonello in his concurrence: “Jurisdiction flows not only from the exercise of democratic governance. . . . It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.” *Id.* at para. 28 (Bonello, J., concurring).

The Inter-American Commission on Human Rights (IACHR) is particularly instructive of extraterritoriality in this matter, given the participation of both the United States and Mexico in the Organization of American States. The Commission has held that “the American Declaration protects the rights of all human beings under a Member State’s jurisdiction,” which, in turn, means “subject to [a state’s] authority and control.” Under the Commission’s jurisprudence, “control” by a state over a victim is established “usually through the acts of the [state]’s agents abroad.” *Coard et al. v. United States*, Case No. 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶37 (1999) (hereinafter “*Coard*”).⁶ In *Coard*, the

⁶ For instances of the Commission’s general treatment of extraterritorial state conduct under the terms of its Statute and the American Declaration, see generally *Coard*, at paras. 9-10; Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17 (1985) (referring to Letelier assassination in Washington, D.C.); Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, doc. 21, rev. 1 (1985) (addressing allegations that Surinamese citizens residing in Holland had been harassed and/or attacked by agents of Suriname).

Commission examined allegations that U.S. officials had unlawfully detained petitioners during U.S. military operations in Grenada in 1983. The Commission found that the United States' obligations under the American Declaration applied because "the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Id.* at para. 37; *see also Khaled El-Masri v. United States* (United States), Admissibility, Inter-Am. C.H.R., Report No. 109/99, Case 419-08, OEA/Ser.L/V/I.157, doc. 25 at para. 25 (2016); *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 doc. 3 rev. at para. 23 (1999) (finding that Cuba's obligations under the American Declaration extended to four civilians who were killed when Cuban military shot down two civilian aircraft in international airspace).

Here, the "jurisdictional link" is more straightforward than in *Al Skeini* or *Coard*. Settled bases for prescriptive jurisdiction under the Restatement of Foreign Relations include "conduct that, wholly or in substantial part, takes place *within its territory*" and "the activities, interests, status, or relations *of its nationals* outside as well as within its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402 (1987) [hereinafter RESTATEMENT] (emphasis added). The Restatement lists a multitude

of factors relevant to whether the exercise of prescriptive jurisdiction is “unreasonable” when there are competing ties between states and the underlying activity or person. Among those factors are:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place *within the territory*. . . . ;
- (b) the connections, such as *nationality*, residence, or economic activity, between the regulating state and the *person principally responsible for the activity to be regulated*. . . . ;
- (c) the *character of the activity to be regulated*, the importance of regulation to the regulating state, the extent to which *other states regulate such activities*, and the degree to which the desirability of such regulation is *generally accepted*;
- (d) the existence of *justified* expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the *international political, legal, or economic system*;
- (f) the extent to which the regulation is *consistent with the traditions of the international system*;
- (g) the extent to which another state may have an interest in regulating the activity; and

(h) the *likelihood of conflict* with regulation by another state.

Id. at §403 (emphasis added).

These factors, while by no means binding on the Court, illuminate *Boumediene*'s functional analysis and weigh strongly in favor of extraterritoriality in this case. As a preliminary matter, the critical activity – the shooting – happened “within the territory” of the United States, and the “person[s] principally responsible for the activity to be regulated” are U.S. nationals. *Id.* at §403(a), (b).

Second, there exists no credible conflict between the United States and Mexico over the legality of extrajudicial killing. The right to life is enshrined in the founding documents of international human rights, to which both the United States and Mexico have adhered. Universal Declaration of Human Rights (UDHR), adopted Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), Art. 3 (“Everyone has the right to life, liberty, and security of person.”); International Covenant on Civil and Political Rights (ICCPR), Art. 6, 999 U.N.T.S. 171 (Dec. 16, 1966). Under the American Declaration of Human Rights, signed by both the United States and Mexico, “[e]very human being has the right to life, liberty and the security of his person.” Decl. Art. 2; IACHR Art. 4 (“No one shall be arbitrarily deprived of his life.”). Given the ultimate and irreversible nature of death, “[t]he deprivation of life by the authorities of the State is a matter of utmost gravity.” U.N. Human Rights Comm., General Comment No. 6,

¶3, U.N. Doc. HRI/Gen/1 (1982). Thus, extrajudicial killing is one of only a handful of violations that the Restatement defines as *jus cogens* norms. RESTATEMENT §702 (1987) (listing murder alongside genocide, enforced disappearance, torture, slavery, slave trading, and prolonged arbitrary detention).⁷

Nor is there any genuine conflict over whether the plaintiffs in this case are entitled to a remedy for their son's death. The United States and Mexico have both acceded to the ICCPR, which requires the government to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy." ICCPR, Art. 2(3). That obligation includes the duty to "provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law." Basic Principles and Guidelines on the Right to a

⁷ Law enforcement officers may use deadly force only as a last resort and where doing so is necessary to protect life. *See* Restatement (Third) of Foreign Relations Law of the United States §702, comment f (1987) ("It is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to a conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officers in line of duty in defense of themselves or other innocent persons, or to prevent serious crime."). *See also* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/ rev. 1 (1990).

Remedy and Reparation, U.N. General Assembly, Resolution 60/47, Dec. 16, 2005, Art. IX, para. 15.⁸

The Inter-American human rights system has articulated a more detailed set of requirements. Both the Declaration, which the United States has signed, and the Convention, which the United States has not ratified, provide for a robust right to remedies.⁹ The Declaration states that “[e]very person has the right to submit respectful petitions to the competent

⁸ The term “gross violations of human rights” does not have a set definition under international law, but the U.S. Congress has defined that term in the context of determining when foreign aid must be denied to a given country. For that purpose, “gross violations of internationally recognized human rights” “include [] torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.” 22 U.S.C. §2304.

⁹ As noted above, although the United States is not a party to the Convention, the Commission’s jurisprudence nonetheless sets forth the United States’ obligations under the Declaration. Under Inter-American jurisprudence, the right to a remedy under the Declaration and the Convention are similar in scope and should be read in tandem. *See Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 doc. 5 rev. 1 at 727 (2004) (“The right to judicial protection acknowledged by Article XVIII of the American Declaration is affirmed in similar terms by Article 25 of the American Convention on Human Rights, with regard to which the Inter-American Court of Human Rights has stated.”). The Commission has referred to the right to remedy as the “object and purpose” of the American Declaration, following the basic principle that to every right there is a remedy. *See Chad Roger Goodman v. Bahamas*, Case 12.265, Report No. 78/07, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 doc. 22 rev. 1 ¶61 (2007).

authority.”¹⁰ The Convention further expounds on the obligations in the Declaration. It provides that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.¹¹

To that end, the Convention requires that States “ensure that any person claiming such remedy shall have his rights determined by the competent authority” and “develop the possibilities of judicial remedy.” *Id.* at Art. 25. Legal recourse is “ineffective” if it does not “recognize the violation of rights,” “protect the applicants in the rights affected,” and “provide adequate reparation.”¹²

In sum, where, as here, an action concerns a *jus cogens* violation and the international legal backdrop recognizes the appropriateness of extraterritorial jurisdiction, extension of the U.S. Constitution in this limited circumstance would be neither impracticable

¹⁰ Organization of American States, American Declaration of the Rights and Duties of Man Art. XXIV, O.A.S. G.A. Res. XXX, O.A.S. Doc. OEA/Ser.L/V/II.82 doc. 6 rev. 1 (1948).

¹¹ American Convention on Human Rights Art. 25, O.A.S. Treaty Series No. 36; 1144 U.N.T.S. 123 (1969).

¹² *The Mayagana (Sumo) Awas Tingni Community Case*, Inter-Am. Ct. H. R., Series C No. 79, ¶104 (Aug. 2001).

nor anomalous. *See Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring).



CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court reverse and remand.

Respectfully submitted,

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