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 OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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Andreou v. Turkey, Eur. Ct. H.R., App. No. 45653/99 (Oct. 27, 2009) 25

Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19, 2005) 23

Celiberti de Casariego v. Uruguay, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 1981) 21

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Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 2004 I.C.J. 136 (July 9, 2004) 23

Lopez Burgos v. Uruguay, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981)................................ 22, 23, 26

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U.S. Customs & Border Protection, *Summary of Laws Enforced by CBP* (Mar. 8, 2014), https://www.cbp.gov/trade/rulings/summary-laws-enforced/us-code [https://perma.cc/J24S-DQ3Q] 15

U.S. Customs & Border Protection, *CBP Use of Force Statistics Fiscal Year 2018* (March 5, 2019), https://www.cbp.gov/newsroom/stats/cbp-use-force [https://perma.cc/TWV2-YAMW] 2

U.S. Dep't of Transp., Bureau of Transp. Statistics, *Border Crossing and Entry Data* (accessed July 23, 2019), https://www.bts.gov/content/border-crossingentry-data 1

U.S. White House, Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011) 1

INTEREST OF *AMICUS CURIAE*[1]

Mexico has a strong interest in seeing that the United States provides adequate means to prevent and redress the unjustified use of force by U.S. officers in the two countries' border area. Each of the two nations has a legitimate concern for the policies and practices of the other in connection with their shared border. In particular, Mexico has a vital interest in working with the United States to improve the safety and security of the border and to ensure that both countries' agents act to protect, rather than endanger, the safety of the public in the border area.

The 2,000-mile-long border between Mexico and the United States is among the busiest in the world, with hundreds of millions of crossings each year.[2] The border runs through populated areas, in some

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[1] Petitioners' and Respondent's blanket written consent to the filing of *amicus curiae* briefs in support of either party or neither party is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel has made such a contribution.

[2] *See, e.g.,* U.S. Dep't of Transp., Bureau of Transp. Statistics, *Border Crossing and Entry Data* (accessed July 23, 2019), https://www.bts.gov/content/border-crossingentry-data (showing nearly 193 million passenger and pedestrian crossings in 2018 in the U.S.-bound direction alone); U.S. White House, Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011) (noting 1 million crossings a day).

cases dividing a single town, city or Indian tribal area. In recent decades, the establishment of a secured and patrolled border has meant that residents of border communities come into frequent contact with officers guarding the border.

Shootings at the border are, unfortunately, not a rare occurrence. According to U.S. Customs and Border Protection's own statistics, its officers (including Border Patrol agents) have reported use of deadly force involving firearms over 200 times from October 2012 through October 2018, nearly all of them at or near the U.S.-Mexico border.[3] Many Border Patrol shootings have resulted in death, and a number of those killings involved shots fired across the border.

In this case, on June 7, 2010, U.S. Border Patrol agent Jesus Mesa shot and killed Sergio Adrián Hernández Güereca, a 15-year-old national of Mexico.[4] At the time of the shooting, the agent was in the United States. The boy was in the mostly dry, concrete-lined riverbed of the Rio Grande separating the United States from Mexico.

Under a 1963 treaty between the United States and Mexico, both countries cooperated to build the concrete-lined channel along that section of the

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[3] *See* U.S. Customs & Border Protection, *CBP Use of Force Statistics, Fiscal Year 2018* (March 5, 2019), https://www.cbp.gov/newsroom/stats/cbp-use-force [https://perma.cc/TWV2-YAMW].

[4] Because the district court dismissed the case on the pleadings (*see* Pet. App. 3), this brief assumes that all facts alleged in the complaint are true.

river. An international boundary commission consisting of representatives of both nations oversees the maintenance of the river channel and other border works. During the time leading up to the shooting, Sergio and some other boys had been playing a game in the channel, running up to touch the border fence on the U.S. side and then back down into the channel. But at the time the fatal shot struck him, Sergio happened to be on the Mexican side of the invisible center line of the jointly maintained channel, which constitutes the formal demarcation of sovereignty between the two nations.

Sergio's parents sued Agent Mesa in U.S. District Court for damages for the unjustified killing of their son. In the decision now under review (Pet. App. 1), the United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal of the action on the ground that no cause of action existed under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), because Sergio was a Mexican national who was in Mexican territory when he was killed.

As a sovereign and independent state, Mexico has a responsibility to look after the well-being of its nationals. When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States provides adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed and a Mexican government agent, standing in Mexico and shooting across the border, had killed an American child standing on U.S. soil.

SUMMARY OF ARGUMENT

Under this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), there is no bright line at the U.S. border beyond which all constitutional rights and remedies cease. Rather, this Court has employed a case-by-case inquiry to determine if it would be impractical or anomalous for U.S. courts to enforce U.S. constitutional rights outside U.S. borders. Here, Agent Mesa was on U.S. soil when he acted, he is subject to U.S. law in the performance of his duties, and there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio Hernández was on.

The Fifth Circuit erred in holding that, under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), this case arises in a "new context" involving "special factors" warranting denial of a remedy. In particular, the Fifth Circuit had no basis to suggest that this case raises special diplomatic or foreign-policy issues merely because of where Sergio Hernández was standing when Agent Mesa shot him. This case involves an ordinary civil claim for damages for unjustified use of force by a law-enforcement officer. That type of claim is squarely within the power of courts to adjudicate, and *Abbasi* recognized that excessive-force claims against law enforcement officers fall well within the existing core of the *Bivens* remedy. Mexico of course is concerned that its nationals' rights are respected by U.S. law enforcement officers and courts. But that is true in all cases in which Mexican nationals have dealings with the U.S. legal system, not just cases involving shootings across the border.

The suggestion that the case raises national security concerns is equally baseless. Agent Mesa's shooting of Sergio Hernández was not part of an antiterrorism operation or other national security operation. Rather, it arose in the context of ordinary law enforcement activities, just as if Sergio had been shot on U.S. soil. As this Court has cautioned, invocation of the words "national security" is not a magic talisman that can ward off judicial scrutiny of unlawful government action.

This notion that the Petitioners' claim seeks to apply U.S. law extraterritorially also is misconceived, because the events in question took place largely on U.S. soil. At the time of the killing, Agent Mesa stood squarely on the U.S. bank of the Rio Grande. Sergio Hernández was in a border area under joint U.S.-Mexican control—at times on the U.S. side of the boundary and at times on the Mexican side—and just happened to be on the Mexican side of the line when he was struck by Agent Mesa's bullet.

Finally, the decision below failed to take account of the binding international human rights obligations that the United States has undertaken by treaty to Mexico and its nationals. Those include, among others, the obligation to respect the fundamental right not to be arbitrarily deprived of life and the right to an effective remedy when fundamental rights have been violated. A nation's obligations to respect human rights do not stop at its borders but apply anywhere that the nation exercises effective control. Yet the Fifth Circuit's decision in this case means that the families of those killed by U.S. Border Patrol agents cannot obtain any effective

remedy if their loved ones happened to be on the Mexican side of the border when shot by U.S. agents.

ARGUMENT

I.

THERE IS NO PRACTICAL REASON TO DENY A REMEDY MERELY BECAUSE THE FATAL SHOT STRUCK SERGIO HERNÁNDEZ ON THE MEXICAN SIDE OF THE BORDER

Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers. The Fifth Circuit's decision in this case effectively prevents any such redress. The Ninth Circuit reached the opposite result in *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), *petition for cert. filed*, No. 18-309 (U.S. Sept. 7, 2018), which held that a *Bivens* remedy is available to the family of a Mexican national killed by a U.S. border officer standing in Arizona, regardless of where the victim was standing when the fatal shot struck.

Unlike the Fifth Circuit's decision in this case, the Ninth Circuit's decision in *Rodriguez* takes proper account of this Court's recognition that remedies for violation of U.S. constitutional rights can extend beyond the nation's sovereign territory. Most recently, in *Boumediene*, this Court held that questions of the judicial application of U.S. constitutional rights to persons outside the United States must be answered on the basis of "objective factors and practical concerns, not formalism." 553 U.S. at 764; *see also id.* at 726–28, 757–63. The *Boumediene*

case involved prisoners detained at the U.S. Naval Station at Guantánamo Bay, Cuba, an area within the sovereign territory of the Republic of Cuba but under the effective control of the United States. The Court accepted that Guantánamo was not part of the territory of the United States. But rather than apply a technical approach based on *de jure* sovereignty, the Court looked to the practical effects of U.S. control at Guantánamo and held that the constitutional right of habeas corpus applied there.

In so holding, this Court distinguished the case from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, the Court declined to extend the Fourth Amendment's search warrant requirement to a search conducted in Mexico by Mexican police at the request of the U.S. Drug Enforcement Administration. The Court noted that applying U.S. constitutional requirements to actions of Mexican law-enforcement officers acting in cooperation with U.S authorities would raise serious practical difficulties for the ability of the United States to "'functio[n] effectively in the company of sovereign nations.'" *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)). In his concurring opinion, Justice Kennedy emphasized that the inapplicability of the warrant requirement did not necessarily prevent the application of other U.S. constitutional rights, but joined the majority in concluding that the circumstances of that case would make adherence to the Fourth Amendment's warrant requirement "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring) (quoted in *Boumediene*, 553 U.S. at 759–60).

Here, unlike *Verdugo-Urquidez*, applying U.S. law would cause no clashes between U.S. and Mexican law. Nothing in the Petitioners' claim seeks to apply U.S. law to actions of Mexican officials. Agent Mesa was not acting in cooperation with Mexican law enforcement agencies, nor was he carrying out any operations on Mexican territory. He was operating on U.S. soil as part of his duties under U.S. law, and he was in the United States when he fired the fatal shot. Extending the requirements of the U.S. Constitution to cover the actions of a U.S. officer in the U.S. would not interfere in any way with Mexico's "control over its territory … and authority to apply law there." *Boumediene*, 553 U.S. at 754 (internal quotation and citation omitted). Thus, as the Ninth Circuit correctly concluded in *Rodriguez*, "the practical concerns in *Verdugo-Urquidez* about regulating conduct on Mexican soil … do not apply here." *Rodriguez*, 899 F.3d at 731.

According to the Complaint, just prior to the deadly shooting, Sergio Hernández and several other children were playing in the dry, concrete-lined channel of the Rio Grande, which separates El Paso from Ciudad Juárez. (Pet. App. 146.) The international border invisibly runs down the center line of that concrete channel. *See* Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185, Art. 3 [hereinafter Chamizal Convention]. The children were repeatedly running up the side of the channel, touching the U.S. border fence (which is on U.S. territory), and then running back down into the bottom of the channel. Sergio Hernández was apparently on the Mexican side of the border when

Agent Mesa shot him. But there would be no practical difficulties involved if the U.S. courts were to apply the same law of excessive force to Agent Mesa's actions, regardless of which side of that invisible line Sergio happened to be on when Agent Mesa's fatal shot struck him.

Because Agent Mesa "acted on American soil subject to American law," *Rodriguez*, 899 F.3d at 731, there is no reason why requiring Agent Mesa to answer for his actions in a U.S. court would require any different considerations than any other excessive-force case heard by the U.S. courts. Applying U.S. constitutional law in such a case does not disrespect Mexico's sovereignty. Any invasion of Mexico's sovereignty occurred when Agent Mesa shot his gun across the border at Sergio Hernández—not when the boy's parents sought to hold Agent Mesa responsible in U.S. courts for his actions.

When an illegal act is committed in one country and has a direct effect in another country, it is well recognized that *both* countries have jurisdiction to prescribe the applicable law, to punish violations and to adjudicate disputes. *See*, *e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 cmt. d, §§ 421(2)(i)-(j), 431(1) (1987). Exercise of jurisdiction by either of the two nations, therefore, is neither impracticable nor an affront to the sovereign interests of the other. Mexico has a fundamental interest in protecting the rights of its nationals and other persons in its territory. The United States also has an interest in holding accountable those who would use its territory to launch unjustified assaults on nationals of friendly foreign nations, particularly if those attacks are carried out

by a federal officer of the United States in the course of his duties.

The Mexican government has sought the extradition of Agent Mesa to Mexico to face criminal charges, but the U.S. government denied that request, and it has not itself commenced a criminal prosecution. As a practical matter, if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts, regardless of any civil or criminal jurisdiction the Mexican courts might have.

II.
THE DECISION BELOW MISUNDERSTOOD THE APPLICABLE LEGAL STANDARD, THE NATURE OF THE HERNÁNDEZ FAMILY'S CLAIMS, AND MEXICO'S INTEREST IN FAIR TREATMENT OF ITS NATIONALS

In *Bivens*, this Court held that an individual may bring a civil action against federal officers for violation of constitutional rights in the absence of "special factors counseling hesitation." *Bivens*, 403 U.S. at 396. In *Ziglar v. Abbasi*, this Court clarified that courts should consider whether such "special factors" exist when a *Bivens* claim is asserted in a "new context." *Abbasi*, 137 S. Ct. at 1857. In that case, the new context was a suit seeking damages from senior government officials for "detention policy" following the September 11, 2001 terrorist attacks, as opposed to a classic *Bivens* suit seeking damages against individual officers who committed abuses against individual detainees. *Id.* at 1858. The Court held that no *Bivens* remedy was available for the plaintiffs' detention policy claims, *id. a*t 1863,

but remanded the case to the lower courts to consider a prisoner abuse claim against an individual guard, *id.* at 1869.

In the present case, the Fifth Circuit's efforts to come up with "special factors" justifying its denial of a remedy are based on a misapplication of the legal standard established in *Abbasi* and a fundamental misunderstanding of what this case is about.

A. An Excessive Force Claim Against a Law Enforcement Officer Is Not a "New *Bivens* Context"

As an initial matter, the complaint does not seek a *Bivens* remedy in a "new context." Agent Mesa was a law enforcement officer of the United States who used unnecessary and deadly force against a civilian. U.S. constitutional law on the use of excessive force by law enforcement officers is well developed, and the availability of a *Bivens* remedy in excessive force cases is hardly new or controversial. *See Abbasi*, 137 S. Ct. at 1857 (reaffirming that *Bivens* is settled law in the "common and recurrent sphere of law enforcement").

Unlike the complaint in *Abbasi*, the Petitioners' complaint in this case does not challenge U.S. government policy but only the abuse of power by one individual law enforcement officer. *See Rodriguez*, 899 F.3d at 745. The fact that the victim happened to be on Mexican soil when the officer's bullet struck him does not change the U.S. legal principles governing the use of force by U.S. law enforcement officers acting within the United States.

Accordingly, the Fifth Circuit erred in treating this case as arising in as a "new context."

B. An Excessive Force Claim Against a Law Enforcement Officer Is Not a Diplomatic or Foreign Policy Question

The Fifth Circuit majority also erred when, citing *Haig v. Agee*, 453 U.S. 280 (1981), it held that no remedy should be available because, it said, the case involved issues of "foreign policy." Contrary to what the Fifth Circuit seemed to think, however, the availability of a damages remedy for civil rights violations is not a foreign policy matter solely within the executive branch's competence. Rather, the adjudication of damages claims between individuals is a core judicial function.

As the Ninth Circuit observed in *Rodriguez,* "[t]here is no American foreign policy embracing shootings like the one pleaded here." 899 F.3d at 746. Granting a remedy in this case—in exactly the same manner as if Sergio had been a U.S. national or on U.S soil when shot—raises no foreign policy concerns. On the contrary, refusing to consider Sergio's parents' claim on the merits, based solely on where their son was standing at the time he was struck by Agent Mesa's bullet, is what has the potential to negatively affect international relations. *Id.*

Nor is there any basis for the Fifth Circuit's suggestion (Pet. App. 16) that Mexico's interest in this case somehow transforms a *Bivens* claim into a diplomatic matter. Of course Mexico has an interest in seeing that United States officials do not violate

Mexican nationals' legal rights. But the same is true in every case when a foreign national comes in contact with U.S. government officials. The Fifth Circuit majority professed concern that the United States could be responsible to foreign sovereigns for injuring or killing their nationals. (Pet. App. 15.) But as Judge Prado pointed out in his dissent, "isn't the United States equally answerable to foreign sovereigns when federal officials injure foreign citizens on domestic soil?" (Pet. App. 36.) Mexico always has an interest in ensuring that the U.S. executive, legislative and judicial branches treat its nationals fairly and in accordance with the rule of law and due process. Surely that does not transform every civil or criminal case involving Mexican nationals into a foreign policy issue that courts must avoid deciding.

The Fifth Circuit's suggestion that the matter can be resolved by the Border Violence Prevention Council (Pet. App. 16) completely misunderstands that Council's function. The Council is a binational working group that has met on a few occasions to discuss and coordinate U.S. and Mexico law enforcement policy at the border. It is not a tribunal for adjudicating or settling individual claims. As a fact sheet about the Council on the U.S. Department of Homeland Security's website explains, the Council "is a policy-level decision making body that promotes initiatives aimed at preventing incidents of border violence through collaborative efforts, joint public engagement campaigns, increased transparency and information exchange, and the sharing of best

practices."[5] There is no conflict or overlap between the remedy sought here and the role of the Council.

Finally, the Fifth Circuit was incorrect in suggesting that "[i]t would undermine Mexico's respect for the validity of the Executive's prior determinations, if, pursuant to a *Bivens* claim, a federal court entered a damages judgment against Agent Mesa." (Pet. App. 16.) The U.S. executive branch, of course, has made no "prior determination" of Agent Mesa's potential civil liability to Sergio's parents. It only made a prosecutorial decision not to bring criminal charges. A nonprosecution decision by the government does not insulate an individual from liability in a civil suit by a private party.

The court below had no need to speculate about how Mexico might view a civil damages judgment; the Mexican government can speak for itself. The Mexican government fully understands that the United States—like Mexico—is a constitutional republic with separation of powers between the executive and the judiciary. The Mexican government also is well aware that criminal prosecution and civil litigation are different processes, involving different issues and standards of proof, and that the executive branch does not control private parties' pursuit of civil suits or the judiciary's resolution of those suits. Thus, Mexico's respect for the U.S. executive's prosecutorial discretion would not be affected, in any way, by the U.S. courts' adjudication

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[5] Border Violence Prevention Council, Fact Sheet (Jan. 24, 2017), https://www.dhs.gov/sites/default/files/publications/bvpc-fact-sheet.pdf [https://perma.cc/3CPW-KRTB].

of a civil damages claim by Sergio Hernández's parents against Agent Mesa. Mexico expects that the U.S. courts can and will perform their judicial functions in this case as in every other.

C. This Case Does Not Involve National Security Concerns

This case has nothing to do with international terrorism, espionage, or any other national security concerns. As this Court noted in *Abbasi*, the invocation of the label "national security" is not a talisman that can be invoked to "ward off inconvenient claims." 137 S. Ct. at 1862.

The mere fact that the defendant was a Border Patrol agent or that the events took place at an international border does not create a national security concern. The Border Patrol is a law enforcement agency tasked with enforcing laws against unauthorized entry and smuggling, among others, most of which seldom touch on issues of national security.[6] While the Border Patrol may at times deal with cases involving terrorism or other national security issues, the same is true of U.S. federal, state and local police agencies operating far from the border. In that respect, the Border Patrol is a law enforcement agency like any other. As this Court has recognized, a *Bivens* remedy is routinely available in

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[6] *See, e.g.,* 8 U.S.C. § 1357(a); U.S. Customs & Border Protection, *Summary of Laws Enforced by CBP* (Mar. 8, 2014), https://www.cbp.gov/trade/rulings/summary-laws-enforced/us-code [https://perma.cc/J24S-DQ3Q].

"this common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857.

D. This Case Does Not Involve Extraterritorial Application of U.S. Law

Finally, the Fifth Circuit erred in resting its decision on the presumption against "extraterritoriality" of domestic laws. This case involved a U.S. officer, standing on U.S. soil, discharging his firearm in such a way that he could have hit nationals of any country on either side of the border. Moreover, it is unclear if Agent Mesa even knew whether Sergio Hernández was on the U.S. or Mexican side of the border when he fired the fatal shot, or on which side of the boundary between the two nations the bullet would strike. *See Hernández v. Mesa*, 137 S. Ct. 2003, 2009 (2017) (Breyer, J., dissenting). He could not have known these facts with precision, because the border within the Rio Grande channel is not a physical barrier: it is merely an "engineer's imaginary line." *Id.* at 2010 (Breyer, J., dissenting) (internal quotation marks omitted). Treating this case as somehow involving an improper projection of U.S. law beyond the nation's boundaries ignores the facts.

As this Court held in *Boumediene v. Bush*, 553 U.S. 723 (2008), "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. In *Boumediene*, the Court recognized that Cuba, not the United States, had formal sovereignty over the land under the U.S. military base at Guantánamo Bay. Yet the Court held that the United States had "jurisdiction and

control" over the base for purposes of the constitutional rights asserted in that case.

Although the specific issue in *Boumediene* concerned the application of the Suspension Clause, U.S. Const. Art. I, § 9, the Court based its decision on extraterritoriality precedents in a variety contexts. (*See* Pet. App. 83–85 (Prado, J., dissenting from prior Fifth Circuit decision).) In *Boumediene*, this Court observed that it is not the case that "*de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus." *Boumediene*. 553 U.S. at 764. Thus, the Fifth Circuit's suggestion that the reasoning of *Boumediene* has no application outside the Suspension Clause context is plainly mistaken.

Here, Agent Mesa was standing on the U.S. bank of the river, in an area within U.S. sovereign territory and under U.S. law, when he fired the fatal shot. That fact, by itself, should be enough to demonstrate that this case does not involve extraterritorial application of U.S. law.

Moreover, it is not correct to say that Sergio Hernández was outside U.S. control at the time the fatal shot struck him. The dry riverbed where Sergio Hernández was shot and killed is within a zone of cooperation between the U.S. and Mexico, which has been the site of longstanding and constant activity by the citizens and governments of both nations. The concrete-lined channel where Sergio Hernández was fatally shot has its origin in a 1963 treaty by which the United States and Mexico settled a longstanding border dispute resulting from a change in the course

of the Rio Grande. *See* Chamizal Convention, *supra*. As part of the settlement, the two countries agreed to jointly build and maintain a concrete-lined channel to contain the Rio Grande's flow in the El Paso–Juárez area to prevent the river from shifting course in the future. *See id*. Arts. 1, 8. Although the demarcation of the two nations' formal sovereignty runs invisibly along the center of the concrete-lined riverbed, *see* id. Art. 3, management and control of the entire riverbed is effectively shared. *See generally Hernández*, 137 S. Ct. at 2009–2011 (Breyer, J., dissenting). The International Boundary and Water Commission, a binational entity established by an earlier treaty, has ongoing responsibility for maintenance and control of those works. *See* Chamizal Convention, *supra,* Art. 9; Boundary Convention, U.S.-Mex., Mar. 1, 1889, 26 U.S.T. 1512, Arts. I, II, VIII.

Thus, contrary to what the Fifth Circuit seemed to believe, no bright line of demarcation exists between areas of practical U.S. control and areas of practical Mexican control in the dry riverbed. The location where Agent Mesa's bullet struck Sergio Hernández, though within Mexican sovereign territory, was by treaty within a jointly administered area. As the facts of this case make clear, areas on the Mexican side of the line are within range of rifle fire from U.S. Border Patrol agents who are standing entirely on the U.S. side of the river. In this case, at the time of the shooting, only the United States was exercising control as a practical matter, as Agent Mesa was patrolling the area and it has not been alleged that Mexican officials also were present. *See infra* Part III.

For each of these reasons, there is no sound basis to treat this case any differently than if Sergio Hernández had been just a few feet away on the U.S. side of the formal boundary line when Agent Mesa killed him.

III.
The United States Has Undertaken an International Legal Obligation to Provide a Remedy for Human Rights Violations to Individuals on Both Sides of the Border

Mexico and the United States have both recognized that respect for basic human rights, including the right not to be arbitrarily deprived of life, is part of the international obligations of every nation. Among other things, both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR),[7] which provides in Article 6(1) that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR further provides, in Article 2(3), that individuals whose rights are violated "shall have an effective remedy," including judicial remedies, and that those remedies must be enforced when granted.

Although the United States' obligations under the ICCPR have not been treated as directly enforceable

[7] International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty Doc. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992).

in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court has recognized that decisions interpreting the ICCPR and other international human rights treaties may be persuasive to the extent they shed light on basic human rights principles that are common to those treaties and the U.S. Constitution. *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The international commitments that the United States undertook in Article 6(1) of the ICCPR have obvious parallels in the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In fact, the principal reason the United States declared the ICCPR non-self-executing in U.S. courts was that it regarded existing U.S. constitutional law as being more than sufficient to comply with the ICCPR.[8]

It is well established under the ICCPR and other international human rights treaties that a nation has human rights obligations whenever it exercises

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[8] The Executive Branch advised the Senate that "the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United States Constitution and laws," except in a few instances in which the U.S. took an explicit reservation against specific ICCPR provisions. Letter of Transmittal from the U.S. President to the U.S. Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521, at *2. Interpreting the U.S. Constitution and laws as inapplicable in a situation covered by the ICCPR would leave an unexpected gap in the intended U.S. legal framework for compliance with the ICCPR.

"effective control" over an individual, even if such control is exercised outside of its own territory. The claim in this case lies within the scope of the United States' international human rights commitments because the U.S. federal government, through the actions of Agent Mesa, exercised power and effective control over Sergio Hernández.

In particular, Article 2(1) of the ICCPR requires each party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]." This provision has been read disjunctively to apply to "all individuals within [the State's] territory" and "all individuals … subject to [the State's] jurisdiction."[9] In keeping with the intent of the ICCPR to protect individual

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[9] *Celiberti de Casariego v. Uruguay*, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1–10.3 (July 29, 1981) (Covenant applies to cases of kidnapping by State agents abroad); *Munaf v. Romania*, Comm'cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (Aug. 21, 2009) (State may be liable for violations of the Covenant outside of its area of control, as long as State's activity was "a link in the causal chain that would make possible violations in another jurisdiction"); *Kindler v. Canada*, Comm'cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993) (State party may be liable under the Covenant for extraditing a person within its jurisdiction or under its control if there is a real risk that the extradited person's rights under the Covenant will be violated in the receiving jurisdiction); Dominic McGoldrick, *The International Covenant on Civil and Political Rights*, § 4.3, in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds. 2004).

human rights, "jurisdiction" has been given a flexible reading, turning on the State's effective exercise of control rather than on legal technicalities. The United Nations Human Rights Committee—the body charged with interpreting the ICCPR—has observed that:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

This principle has been applied in a variety of situations in which States have violated the rights of individuals without fully controlling the territory on which those violations occur. For example, the U.N. Human Rights Committee has opined that the alleged secret detention and torture of a trade-union activist in Argentina by Uruguayan security officials would violate the ICCPR. *Lopez Burgos v. Uruguay*, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). The Committee observed that "it would be unconscionable to so interpret the responsibility under article 2 of the

Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *Id.* ¶ 12.3.[10]

Under other human rights instruments, a similar principle has been found to apply even in situations where the State has used lethal force without ever obtaining physical custody of the victim. It is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction under the relevant human rights instruments. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including *Alejandre v. Cuba*, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. (Sept. 29, 1999).[11] The *Alejandre* case arose out of the well-known 1996 "Brothers to the Rescue" incident, in which the

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[10] Similarly, the International Court of Justice has repeatedly recognized that the ICCPR applies in occupied territory under a State's control, even though that territory is not technically part of the State's sovereign territory. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004 I.C.J. 136, ¶¶ 109–111 (July 9, 2004).

[11] *See also, e.g., Aisalla Molina Case (Ecuador v. Colombia)*, Inter-State Petition IP-02, Inter-Am. Comm'n H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, ¶¶ 87–103 (Oct. 21, 2010) (American Convention on Human Rights applied in Ecuador where Colombian armed forces conducted a bombing raid and thereafter "exercised acts of authority over the survivors" in the bombed area).

Cuban Air Force shot down two unarmed civilian airplanes in international airspace between South Florida and Cuba. The Commission found that the facts constituted "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority." *Id.* ¶ 25. The Commission went on to hold that the Cuban Air Force's unjustified use of lethal force violated fundamental principles of human rights, including the right to life as recognized in Article I of the American Declaration of the Rights and Duties of Man.[12] *Id.* ¶ 53.

The European Court of Human Rights has adopted a similar functional approach in cases arising under the European Human Rights Convention.[13] It

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[12] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948).

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. *See, e.g.*, *Pisari v. Moldova & Russia*, Eur. Ct. H.R., App. No. 42139/12, ¶ 33 (April 21, 2015) (convention applied to Russia where Russian solider shot and killed a Moldovan citizen even though Russian soldier was not in Russian territory when he fired his weapon); *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45, ¶ 91 (May 12, 2005) (convention applied in view of "effective Turkish authority" over individual in custody of Turkish officials in Nairobi, Kenya); *Cyprus v. Turkey*, Eur. Ct. H.R., App. No. 25781/94, ¶¶ 69–80 (May 10, 2001) (convention applied where Turkey exercised "effective control" in the purported Turkish Republic of Northern Cyprus); *Al-Saadoon v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86–89 (June 30, 2009) (convention applied in U.K. military prison in Iraq); *Al-Skeini v. United*
(continued)

has applied the Convention in several cases where, as here, a State's actions within its territory resulted in injuries to victims outside its territory. For example, in *Andreou v. Turkey*, Eur. Ct. H.R., App. No. 45653/99 (Oct. 27, 2009), a case involving the shooting of a civilian across the Turkish-Cypriot cease-fire line, the European Court of Human Rights held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey" so as to engage Turkey's human rights obligations. *Id.* ¶ 25.[14]

This case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre*, *Andreou* and the cases involving occupied territory, the killing at issue in this case does not involve military action.

Kingdom, Eur. Ct. H.R., App. No. 55721/07, ¶¶ 130–150 (July 7, 2011) (convention applied in Iraq where the Coalition Provisional Authority exercised control).

[14] *See also, e.g., Pad v. Turkey*, Eur. Ct. H.R., App. No. 60167/00, ¶¶ 52–55 (June 28, 2007) (convention applied where Turkish helicopter shot and killed seven Iranian men near the Turkey-Iran border, even if it was unclear whether the Iranian men had crossed the border into Turkey); *Pisari*, *supra* note 13, ¶ 33 (noting the accepted rule that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities" into its jurisdiction, such that the convention and its obligations apply).

Unlike *Lopez Burgos*, it does not involve overseas activities by intelligence or national security agencies. And unlike each of those cases, it does not even involve action outside a country's sovereign territory: Agent Mesa was standing on U.S. soil when he shot and killed Sergio Hernández. The agent was patrolling the United States side of the border in the course of his law-enforcement duties for the U.S. government and exercised effective control and authority over the boy through use of deadly force against him. The fact that the boy happened to be on the other side of the invisible line separating the two countries does not change the nature of the agent's actions in the United States or their lethal consequences.

This Court has already reached a similar result in *Boumediene*, in which it rejected a rigid territorial approach to the application of rights guaranteed by the U.S. Constitution to individuals outside the United States. Here, as in *Boumediene*, practicality and common sense—as well as the United States' international human rights obligations—demonstrate that the U.S. Border Patrol's obligation to refrain from unjustified use of deadly force does not vanish when the victim is located just across the border in the territory of a foreign nation.

CONCLUSION

For the reasons stated above, *amicus curiae* the Government of the United Mexican States respectfully urges the Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case for proceedings on the merits.

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