

No. 17-1678

IN THE
Supreme Court of the United States

JESUS C. HERNANDEZ, *et al.*,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

ON PETITION FOR A 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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INTEREST OF AMICUS CURIAE¹

The 2,000-mile-long border between Mexico and the United States is among the busiest in the world, with over 350 million crossings per year.² Each of the two nations is strongly engaged in and has a legitimate concern for the policies and practices of the other in connection with their shared border.

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.³ 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, both countries cooperated to build the concrete-lined

¹ Counsel for all parties have received timely notice of Mexico's intent to file this brief and have consented in writing to its filing. No counsel for a party authored this brief in whole or in part. No party or counsel for a party, nor any other person except for amicus curiae and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

² *See, e.g.*, Press Release, White House, Remarks by President Obama and President Calderón of Mexico at Joint Press Conference (March 3, 2011) (noting 1 million crossings a day); U.S. Dep't of Transp., Bureau of Transp. Statistics, Border Crossing and Entry Data, <https://www.bts.gov/content/border-crossingentry-data> (accessed July 16, 2018) (showing over 180 million passenger and pedestrian crossings in 2017 in the U.S.-bound direction alone).

³ 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.

channel along that section of the river. The maintenance of the border is overseen by an international boundary commission consisting of representatives of both nations. During the time leading up to the shooting, Sergio and some other boys had been playing a game, running up to the border fence on the U.S. side of the channel 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.

Mexico has a vital interest in working with the United States to improve the safety and security of the border and of members of the public in the border area. As a sovereign and independent state, Mexico also 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 has provided 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 had killed a U.S. national.

In this case, Sergio Hernández's parents sued Agent Mesa in U.S. District Court for damages for the unjustified killing of their son. The District Court granted Agent Mesa's motion to dismiss (Pet. App. 159). On appeal, a panel of the U.S. Court of Appeals for the Fifth Circuit partially reinstated the complaint (Pet. App. 100); but on rehearing en banc, the court of appeals affirmed the dismissal on consti-

tutional and qualified immunity grounds (Pet. App. 43). This court granted certiorari and, after briefing and argument, vacated the court of appeals' judgment and remanded the case for a decision on whether a cause of action exists under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). See *Hernández v. Mesa*, 137 S. Ct. 2003, 2006–07 (2017) (per curiam). On remand, the en banc court of appeals again affirmed the dismissal (Pet. App. 1), holding that no cause of action existed because Sergio was a Mexican national who was in Mexican territory when he was killed.

As with the previous petition granted by this Court, this case continues to raise important issues concerning the fundamental rights guaranteed by the Fourth and Fifth Amendments to the U.S. Constitution and the remedies for violations of those rights. Accordingly, Mexico submits this brief as amicus curiae in support of the petition. Mexico hopes and believes that this Court will find it helpful to hear Mexico's perspective on matters affecting Mexico's sovereign interests and the fundamental rights of Mexico's nationals.

SUMMARY OF ARGUMENT

This case involves an important and recurring fact pattern warranting the attention of this Court. The border between the United States and Mexico runs through heavily populated areas. Residents of border communities, as they go about their daily business, routinely come in contact with—or within range of the weapons of—agents of the U.S. government. In recent years, officers of the U.S. border agencies have killed dozens of individuals at or near

the U.S.-Mexico border. Yet the Fifth Circuit ruling effectively means the families of those killed may not obtain any remedy, no matter how unjustified the agents' actions, if the victims were not U.S. citizens and happened to be on the Mexican side of the border when the agent opened fire.

The court below 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. The court below failed to appreciate that this is an ordinary civil suit seeking damages for the unwarranted use of deadly force in the context of law enforcement, a context that *Abbasi* held falls squarely within the existing core of the *Bivens* remedy.

But even if this were a “new context,” there would be no “special factors” warranting denial of a *Bivens* remedy. There is no basis for the Fifth Circuit's suggestion that this case raises “diplomatic” issues. The case involves a civil claim for damages that falls squarely within the judicial power. Mexico of course is concerned that its nationals' rights are respected by both the U.S. executive branch and the U.S. courts, but that is true in all cases, not just cases involving shootings across the border.

Moreover, no national security concerns are implicated in this case. There is no suggestion that the shooting was part of an antiterrorism or other national security operation. As this Court has cautioned, invocation of the words “national security” is not a magic talisman that can ward off judicial scrutiny.

Finally, this case cannot be dismissed as seeking to apply U.S. law extraterritorially. Under this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the border is not a bright line beyond which all constitutional rights and remedies cease. At the time of the killing, Agent Mesa stood squarely on the U.S. bank of the Rio Grande. Sergio Hernández, in the dry concrete-lined riverbed separating the two countries, 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 Agent Mesa fired the fatal shot. Given the boy's presence in the United States during the moments leading up to his shooting, his proximity to the border at the time when he was shot, and the officer's presence in the United States at all relevant times, this case should not be regarded as involving extraterritorial application of U.S. law.

The decision below also 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 other things, 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. The Fifth Circuit's refusal to provide any remedy at all for an unjustified cross-border shooting fails to respect those obligations.

ARGUMENT**I.****REVIEW BY THIS COURT IS NECESSARY TO ENSURE
THAT THE UNITED STATES PROVIDES AN EFFECTIVE
REMEDY TO VICTIMS OF CROSS-BORDER VIOLENCE**

The border between the United States and Mexico is, as noted, one of the busiest in the world. (See *supra* note 2 and accompanying text.) The border runs through populated areas, in some cases dividing in two a single town, city or Indian tribal area. In some areas, residents going about their daily business on the Mexican side of the border spend much of their day within shooting distance of armed U.S. Border Patrol agents.

Mexico considers it essential that the United States make available an effective remedy, on an equal and nondiscriminatory basis, to all individuals seeking redress for unjustified violence by U.S. law enforcement officers in the border area. The Court of Appeals' decision in this case effectively bars any remedy when the victim is a non-U.S. national who happens to be on the Mexican side of the border when struck by a shot fired by U.S. officers. Review by this Court is important to ensure that victims of cross-border violence are not deprived of their day in court based solely on nationality or other irrelevant factors.

Shootings at the border are, unfortunately, far from a rare occurrence. U.S. Customs and Border Protection data on use of force disclose that agents of

CBP, including Border Patrol officers, have used firearms in 194 incidents since 2012.⁴ According to a recent analysis by a journalist, the use of force by CBP agents has resulted in 97 deaths since 2003, nearly all of them at or near the U.S.-Mexico border.⁵

While many of these killings occurred entirely on the U.S. side of the border, several of them, in addition to the one at issue in this case, involved shots fired across the border. For example, in 2012, 16-year-old José Rodríguez was shot and killed while walking down a busy street in Nogales, Mexico, which runs alongside the international border, by a U.S. Border Patrol officer in the United States.⁶ Also in 2012, Guillermo Arévalo Pedraza was shot by U.S. Border Patrol agents, who were standing on an airboat on the United States side of the Rio Grande near Laredo, while he was celebrating his wife's and daughter's birthday at a park on the Mexican bank

⁴ U.S. Customs & Border Protection, *CBP Use of Force Statistics* (June 18, 2018), <https://www.cbp.gov/newsroom/stats/cbp-use-force> [<https://perma.cc/K9EQ-9A2B>].

⁵ Sarah Macaraeg, *Fatal Encounters: 97 Deaths Point to Pattern of Border Agent Violence across America*, THE GUARDIAN (May 2, 2018), <https://www.theguardian.com/us-news/2018/may/02/fatal-encounters-97-deaths-point-to-pattern-of-border-agent-violence-across-america> [<https://perma.cc/KA2Q-KLPJ>].

⁶ See *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015), *appeal docketed*, No. 15-16410 (9th Cir. July 15, 2015) (appeal stayed pending outcome of this case).

of the river.⁷ That same year, Mexican national Juan Pablo Pérez Santillán was killed by U.S. Border Patrol agents while he was on Mexican soil near the Matamoros–Brownsville border.⁸ And in 2011, 17-year-old Ramses Barron Torres was shot and killed in Nogales, Mexico by Border Patrol agents standing on U.S. soil.⁹ These examples illustrate that this case is not isolated or unique. Rather, killings of this type have occurred on multiple occasions in the past and are likely to continue to occur in the future.

II.

THE DECISION BELOW MISUNDERSTOOD THE APPLICABLE LEGAL STANDARD, THE NATURE OF PLAINTIFFS' CLAIMS, AND MEXICO'S INTEREST IN FAIR TREATMENT OF ITS NATIONALS IN ALL CASES

The court below, in denying a *Bivens* remedy to Sergio Hernández's parents, gravely misunderstood both the conditions prevailing at the shared U.S.-Mexico border and the nature of Mexico's interest in seeing that its nationals are treated fairly. This Court should grant review to address the important issues raised by the Fifth Circuit's erroneous ruling.

⁷ See Amended Complaint, *Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. June 23, 2015), ECF Doc. 43 (stayed pending outcome of this case).

⁸ See First Amended Complaint, *Cazares Santillan v. United States*, No. 1:14-cv-00114 (S.D. Tex. July 29, 2014), ECF Doc. 3 (stayed pending outcome of this case).

⁹ Press Release, U.S. Dep't of Justice, Federal Officials Close the Investigation into the Death of Ramses Barron-Torres (Aug. 9, 2013).

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 counselling 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. 137 S. Ct. at 1858. The Court held that no *Bivens* remedy was available for the plaintiffs’ detention policy claims, 137 S. Ct. at 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 court of appeals failed to apply the proper legal standard when it held that *Abbasi* bars a remedy.

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*, plaintiffs’ complaint in this case does not challenge U.S. government policy but only the abuse of power by an individual officer. The fact that an officer’s duties take him near the border does not transform his law enforcement duties into something other than law enforcement. Accordingly, the Fifth Circuit erred in treating this case as arising in as a “new context” for *Bivens* purposes.

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

In any event, the court of appeals’ efforts to come up with “special factors” justifying its denial of a remedy are based on a gross misunderstanding of what this case is about. Citing *Haig v. Agee*, 453 U.S. 280 (1981), the en banc majority 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 within the executive branch’s competence. Rather, the trial of damages claims between individuals is a core judicial function.

Of course Mexico has an interest in seeing that the United States respects its nationals’ rights, but that 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 is responsible to foreign sovereigns for injuring or killing their nationals. (Pet. App. 15.) But as Judge Prado pointed out in his dissent below, “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.

Mexico’s primary concern in this case is that Sergio Hernández’s parents should be entitled to pursue an effective remedy, just as if he were a U.S. national or standing on the U.S. side of the border. The court below relied on *Haig v. Agee*, in which this Court cautioned that “diplomatic matters” are “rarely proper subjects for judicial intervention.” (Pet. App. 15, quoting 453 U.S. at 292.) But the plaintiffs’ request that the courts apply established law to a civil claim is not a diplomatic matter at all; it is a judicial matter. If anything, the Fifth Circuit’s decision—in failing to apply an ordinary judicial remedy to a claim by a Mexican national—is what could give rise to new diplomatic issues, directly contrary to *Agee*’s caution that courts should avoid entanglement in international diplomacy.

Agent Mesa was clearly on U.S. soil when he shot Sergio Hernández, and there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio was on. Unlike *United States v. Verdugo-Urquidez*, 494 U.S. 259

(1990), applying U.S. law in this case would not interfere with Mexico's foreign affairs or diplomacy. On the contrary, providing an adequate and effective remedy would show appropriate respect for Mexico's sovereignty on its own territory and for the rights of its nationals.

The court of appeals' suggestion that the matter can be resolved by the Border Violence Prevention Council completely misunderstands that Council's function. The Council is a binational working group that meets occasionally 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 the Council's fact sheet 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." Border Violence Prevention Council, Fact Sheet, <https://www.dhs.gov/sites/default/files/publications/bvpc-fact-sheet.pdf> [<https://perma.cc/3CPW-KRTB>]. Thus, there is no overlap between the remedy sought here and the role of the Council.

Finally, the Fifth Circuit was far off base 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, made no "prior determination" of Agent Mesa's civil liability to Sergio's parents. It only made a prosecutorial decision not to bring criminal charges. In every

other context, a nonprosecution decision by the government does not insulate an individual from liability in an ordinary civil suit by a private party. This case should be no different.

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 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.

The court below also erred in invoking “national security” as a reason to deny a remedy. This case has nothing to do with international terrorism, espionage, or any other national security concerns. As this Court noted in *Abassi*, the mere 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.¹⁰ 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 “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 “extraterritoriality.” 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. As this Court held when the case was last before it, it “is undisputed ... that Hernández’s nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting.”

¹⁰ *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>].

Hernández, 137 S. Ct. at 2007. It also appears that Agent Mesa did not know whether Sergio Hernández was on the U.S. or Mexican side of the border when he fired the fatal shot. *See id.* at 2009 (Breyer, J., dissenting).

Contrary to what the court of appeals seemed to believe, there is no bright line between U.S. and Mexican control in the dry riverbed (or culvert) where Sergio Hernández was shot and killed. In 1963, the United States and Mexico settled by treaty a longstanding border dispute resulting from a change in the course of the Rio Grande. *See Chamizal Convention, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.* 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. Though the demarcation of the two nations' formal sovereignty runs along the invisible center line 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 responsibility for maintenance and control of those works. *See Chamizal Convention, art. 9; Water Boundary Convention, U.S.-Mex., Mar. 1, 1889, arts. I, II, VIII, 26 U.S.T. 1512.*

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.

Here, too, neither U.S. control nor Mexican control ends at the center line of the Rio Grande culvert. Sergio Hernández was killed just a few feet away from the formal boundary line in a border zone jointly maintained by the two countries. The area is within range of ordinary gunfire from the U.S. side of the river: Agent Mesa was standing on the U.S. bank when he fired the fatal shot. In other words, this case involved action taken in the United States by a U.S. government official against a nearby individual in an area under effective U.S. control. Unlike *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this case did not involve U.S. government operations in a foreign country. Thus, there are no “special factors” that require this case to be treated any differently than if Sergio Hernández had been standing a few feet away on the U.S. side of the boundary line when Agent Mesa killed him.

III.

**THE UNITED STATES HAS AGREED BY TREATY
TO PROVIDE AN EFFECTIVE REMEDY FOR
HUMAN RIGHTS VIOLATIONS TO INDIVIDUALS
ON BOTH SIDES OF THE BORDER**

Mexico and the United States have 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),¹¹ 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 in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. at 735, 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 right to life that the United States agreed to respect in Article 6(1) of the ICCPR has obvious parallels in the Fourth and Fifth Amendments to the U.S. Constitution, which also protect against unjustified killings. The right to an effective remedy under Article 2(3) of the ICCPR,

¹¹ International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty No. 95-20, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992).

in turn, has a parallel in this Court's *Bivens* decision.

In fact, a principal reason the United States declared the ICCPR non-self-executing in U.S. courts was that existing U.S. constitutional law was more than sufficient to comply with the ICCPR.¹² Because existing U.S. constitutional law was understood to incorporate all the applicable requirements of the ICCPR, it was seen as unnecessary to provide for direct enforcement of the ICCPR in U.S. courts. Narrowing the *Bivens* cause of action to exclude certain cases covered by the ICCPR would create an unexpected gap in the legal framework that the President and Senate relied upon to ensure the United States' compliance with the ICCPR.

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

¹² The President 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 President to the Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521, at *2.

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.”¹³ In keeping with the intent of the ICCPR to protect individual 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 sit-

¹³ See *Celiberti de Casariego v. Uruguay*, Comm’n No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1-10.3 (July 29, 1981); *Munaf v. Romania*, Comm’n No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (Aug. 21, 2009); *Kindler v. Canada*, Comm’n No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993); 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).

uated within the territory of the State Party.

U.N. Human Rights 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'n 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. 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)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 109-111 (July 9).

Under other similar human rights instruments, the same 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. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including the *Alejandro 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).¹⁴ The *Alejandro* case arose out of the well-known 1996 “Brothers to the Rescue” incident, in which the 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, O.A.S. Res. XXX (May 2, 1948). *Alejandro*, ¶ 53.

¹⁴ 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).

Similarly, in *Andreou v. Turkey*, Eur. Ct. H.R., App. No. 45653/99 (Oct. 27, 2009), the European Court of Human Rights held that the shooting of a civilian by Turkish troops across the cease-fire line in Cyprus engaged Turkey's obligations under the European Human Rights Convention, Nov. 4, 1950, 213 U.N.T.S. 222. The court reasoned 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." *Andreou*, ¶ 25.

This case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre*, *Andreou* and other cases cited, the killing at issue in this case did not involve military action. Unlike *Lopez Burgos*, it did not involve overseas activities by intelligence agencies. And unlike most of those cases, it did 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. He was patrolling the United States side of the border in the course of his law-enforcement duties for the U.S. government. And he exercised effective control and authority over Sergio Hernández through the use of deadly force while in the United States. Sergio was in an area under joint control of the United States and Mexico, but happened to be on the opposite side of the invisible line formally separating the two countries when he was shot. In these circumstances, the boy clearly was within the control and authority of the United States at the time of the fatal shooting. His family should be entitled to all the same reme-

dies as if he had been standing just a few feet away on the U.S. side of the line.

As noted, this Court has already reached a similar result in *Boumediene*, in which it rejected a rigid territorial approach to the application of remedies under 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 remedy for the unjustified use of deadly force does not vanish when the victim happens to be located just across the border in the territory of a foreign nation.

Mexico and the United States coexist in an international community where there are “limits on the freedom of each state to act as if the others did not exist.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 393 (July 8) (dissenting opinion of Shahabuddeen, J.). One of these limits is enshrined in the legal maxim *sic utere tuo ut alienum non laedas*, under which every state has an obligation not to allow its territory to be used for acts contrary to the rights of other states. *E.g.*, *Corfu Channel Case (U.K. v. Albania)*, Merits Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9). In the face of a violation of these principles, directly by the state or attributable to it because of the conduct of its agents,¹⁵ states are bound to provide, first, access to justice before their national courts to the victims; and second, when appropriate,

¹⁵ See G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, art. 4 (Dec. 12, 2001).

reparations for the damage caused. ICCPR art. 2; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 8 (Dec. 10, 1948). Without a doubt, unjustified cross-border shootings constitute an egregious violation of the principle of good-neighborliness that exists between Mexico and the United States. Both countries have recognized that they possess shared responsibility over border issues, among others. As such, incidents of this type—especially as they arise between neighbors and not between countries on opposite sides of the world—cannot be treated as occurring in a legal vacuum.

CONCLUSION

For the reasons stated, *amicus curiae* the Government of the United Mexican States respectfully urges the Court to grant the petition for certiorari.

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