

No. 15-16410

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELI RODRIGUEZ, individually and as the
surviving mother and personal representative of J.A.,

Plaintiff-Appellee,

v.

LONNIE SWARTZ, Agent of the U.S. Border Patrol,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona, Tucson,
D.C. No. 4:14-cv -02251-RCC

**BRIEF FOR THE GOVERNMENT OF THE UNITED
MEXICAN STATES AS AMICUS CURIAE IN SUPPORT
OF APPELLEE AND IN SUPPORT OF AFFIRMANCE**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT.....	3
I. There Is No Practical Reason to Deny a Remedy Merely Because the Fatal Shot Struck J.A. on the Mexican Side of the Border	3
II. A Nation’s Human Rights Obligations Apply Whenever It Exercises Effective Control or Power Over an Individual, Even Outside Its Sovereign Territory.....	10
CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE.....	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

U.S. Cases

<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	3, 5, 6, 7, 8, 9, 20
<i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950).....	6
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	11, 12
<i>McCulloch v. Sociedad Nacional de Marineros de Honduras</i> , 372 U.S. 10 (1963).....	11
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804).....	11
<i>Navarro v. Block</i> , 250 F.3d 729 (9th Cir. 2001)	1
<i>Perez v. Brownell</i> , 356 U.S. 44 (1958)	8
<i>Reid v. Covert</i> , 354 U.S. 1 (1950).....	6
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	11, 12
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)	12
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990)	6, 7, 8
<i>Weinberger v. Rossi</i> , 456 U.S. 25 (1982)	11

International Cases

<i>Al-Saadoon v. United Kingdom</i> , Eur. Ct. H.R., App. No. 61498/08 (June 30, 2009)	18
<i>Al-Skeini v. United Kingdom</i> , Eur. Ct. H.R., App. No. 55721/07 (July 11, 2011)	18
<i>Alejandro v. Cuba</i> , 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).....	17, 18, 19

<i>Andreou v. Turkey</i> , Eur. Ct. H.R., App. No. 45653/99 (Jan. 27, 2010) ..	18, 19
<i>Case Concerning Armed Activities on the Territory of the Congo</i> (<i>Dem. Rep. Congo v. Uganda</i>), 2005 I.C.J. 168 (Dec. 19, 2005).....	16
<i>Celiberti de Casariego v. Uruguay</i> , Comm’cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 2001).....	14
<i>Cyprus v. Turkey</i> , Eur. Ct. H.R., App. No. 25781/94 (May 10, 2001).....	18
<i>Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)</i> , Inter-State Petition IP-02, Inter-Am. Comm’n. H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, (Oct. 21, 2010)	17
<i>Kindler v. Canada</i> , Comm’cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991 (July 30, 1993).....	14
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)</i> , 2004 I.C.J. 136 (July 9, 2004)	16
<i>Lopez Burgos v. Uruguay</i> , Comm’cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981).....	16, 19
<i>Munaf v. Romania</i> , Comm’cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006 (Aug. 21, 2009).....	14
<i>Öcalan v. Turkey</i> , 41 Eur. Ct. H.R. 45 (May 12, 2005)	18
<i>Pad and Others v. Turkey</i> , Eur. Ct. H.R., App. No. 60167/00 (June 28, 2007)	19
 Constitutional Provisions	
U.S. Constitution, Amendment IV	5, 6, 7, 8, 13, 20
U.S. Constitution, Amendment V	13

Treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (in force Sept. 3, 1953).....	18
International Covenant on Civil and Political Rights, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171, 1966 U.S.T. LEXIS 521 (ratified by U.S. June 8, 1992).....	12, 13, 14, 15, 16, 17
Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 311 (opened for signature May 23, 1969)	11, 12

Other Authorities

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948).....	18
Daniel González & Rob O’Dell, <i>Use of Force by Border Agents Falls</i> , Arizona Republic, April 9, 2015	5
Dominic McGoldrick, <i>The International Covenant on Civil and Political Rights</i> , in <i>Extraterritorial Application of Human Rights Treaties</i> (Fons Coomans & Menno T. Kamminga eds. 2004)	14
<i>Restatement (Third) of the Foreign Relations Law of the United States</i> § 403 cmt. d (1987).....	9
Letter of Transmittal from the President to the Senate, 1966 U.S.T. LEXIS 521 (Feb. 23, 1978).....	13
U.N. H.R. Comm., General Comment No. 31, <i>Nature of the General Legal Obligation Imposed on States Parties to the Covenant</i> , U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).....	15
U.N. Int’l Law Comm’n, <i>Responsibility of States for Internationally Wrongful Acts</i> (draft Dec. 12, 2001).....	11
U.S. Dep’t of State, <i>Is the United States a Party to the Vienna Convention on the Law of Treaties?</i> , http://www.state.gov/s/l/treaty/faqs/70139.htm	12

INTEREST OF *AMICUS CURIAE*

The Government of the United Mexican States respectfully submits this brief as *amicus curiae* in support of appellee. All parties have consented to its filing. No party or party's counsel, nor any other person other than the *amicus curiae* or its counsel, authored this brief in whole or in part or contributed money to fund preparing or submitting the brief.

On October 10, 2012, U.S. Border Patrol Agent Lonnie Swartz shot and killed a sixteen-year-old Mexican national, who has been identified in these proceedings only by his initials J.A. As alleged in the First Amended Complaint, which we take as true for the purpose of this brief,¹ J.A. was walking by himself on a street on the Mexican side of the border that runs parallel to the border fence between Mexico and the United States, when Agent Swartz—without provocation or justification, and without any verbal warnings—fired between fourteen and thirty gun shots. The shots hit J.A. approximately ten times. Virtually all of the shots entered J.A.'s body from behind.

At the time of the shooting, Agent Swartz was standing in the United States and J.A. in Mexico. This appeal raises the issue of whether, as the district court

¹ See, e.g., *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), “all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them”).

held, U.S. law allows J.A.'s mother to recover compensation from Agent Swartz for the unlawful killing of her minor son, as it would if he had been on U.S. soil at the time of the shooting.

As a sovereign and independent State, Mexico has among its top priorities looking after the well-being of its nationals and others within its territory. The 2,000-mile-long border between Mexico and the United States is one of the busiest in the world, and each nation is strongly engaged in and has a legitimate concern regarding the policies of the other in connection with the two nations' shared border. Mexico has a vital interest in working with the United States to improve the safety and security of the border and ensure that both governments' agents will act to protect, rather than harm, the safety of members of the public in the border area.

Mexico respects the right of the United States through its judicial branch to interpret its own Constitution and laws, but it is vital to Mexico that the United States respect the binding international obligations that the United States has voluntarily undertaken to Mexico and its nationals. When agents of the United States Government violate fundamental rights of Mexican nationals, it is one of Mexico's priorities to ensure that the United States has provided adequate means to hold the agents accountable and to compensate the victims.

In *Boumediene v. Bush*, 553 U.S. 723 (2008), and other cases, the United States Supreme Court has held that issues regarding application of U.S. constitutional law to officers acting outside the United States should take into account any practical difficulties in applying the U.S. Constitution in that situation. Mexico hopes that this *amicus curiae* brief will allay any concerns that the Court might have that a ruling in the plaintiff's favor in this case, in which Officer Swartz was wholly in the United States and J.A. was in Mexico, would somehow interfere with Mexico's sovereignty or otherwise create practical difficulties. Mexico also hopes to bring to the Court's attention the international human rights obligations that Mexico and the United States have undertaken to each other and to the community of nations as a whole, which Mexico believes should inform the Court's treatment of the issues in this case.

ARGUMENT

I. There Is No Practical Reason to Deny a Remedy Merely Because the Fatal Shot Struck J.A. on the Mexican Side of the Border

The border between the United States and Mexico runs through populated areas, in some cases dividing in two a single town, city or Indian tribal area. The residents of divided border communities like Nogales, Sonora, Mexico, and Nogales, Arizona, USA, often maintain close ties with both countries, as many individuals live on one side of the border and have family or business connections on the other. 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. In some areas, including where the shooting in this case occurred, 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.

In this case, 16-year-old J.A. was shot and killed in 2012 while walking down Calle Internacional, a street in Nogales, Mexico, which runs parallel to the international border. Calle Internacional is a busy thoroughfare lined with commercial buildings, where many residents of Nogales walk or drive when going about their daily business. According to the complaint in this case, J.A. lived just four blocks from the border, he had two grandparents who lived in the United States as lawful permanent residents, and his grandmother would regularly travel from the United States to Mexico to care for him when his mother was away for work.

Shootings at the border are, unfortunately, far from a rare occurrence. According to an April 2015 press report, U.S. Customs and Border Patrol officers and U.S. Border Patrol agents have killed fifty-one people since 2005, nearly all of them at or near the U.S.-Mexico border. Five of these killings occurred in the

period from October 2014 to April 2015 alone.² A number of the recent killings, in addition to the one at issue in this case, have involved shots fired across the border. Killings of this type have occurred on multiple occasions in the past and, tragically, are likely to occur again.

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 Patrol officers. The precise issue in this appeal is whether the Fourth Amendment to the U.S. Constitution applies when a U.S. government agent standing in the United States unjustifiably shoots a foreign national who is standing across the border, and whether, in such instances, that agent is entitled to qualified immunity. The U.S. Supreme Court held in *Boumediene v. Bush*, 553 U.S. 723 (2008), that questions of 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.” *Id.* at 764. In this case, from Mexico’s perspective, the objective factors and practical concerns strongly favor the application of a U.S. constitutional remedy to Agent Swartz’s cross-border shooting of J.A.

² See Daniel González & Rob O’Dell, *Use of Force by Border Agents Falls*, Arizona Republic, April 9, 2015, at A1.

In *Boumediene*, the U.S. Supreme Court noted that certain of its earlier precedents had looked to practical considerations in deciding whether a particular U.S. constitutional right applied abroad. *Id.* at 726-28, 757-63. For example, the Court noted, it had declined to extend the writ of habeas corpus to enemy aliens detained in occupied Germany, *see Johnson v. Eisentrager*, 339 U.S. 763 (1950), had considered the practical difficulties of applying the constitutional right of jury trial to military trials of civilians in occupied Japan, *see Reid v. Covert*, 354 U.S. 1 (1950), and had declined to extend the Fourth Amendment’s search warrant requirement to a search conducted by Mexican police in Mexico at the request of the U.S. Drug Enforcement Administration, *see United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

The *Boumediene* case itself involved prisoners detained at Guantánamo Bay Naval Air Station, Cuba, an area technically under Cuban sovereignty but under the effective control of the United States. The Court accepted that Guantánamo Bay 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 right of habeas corpus applied there. *Id.* at 754-55, 797-98.

Applying the same analysis in its extraterritoriality determination, the district court in this case found that the “right to be free from unreasonable

seizures—specifically, the fundamental right to be free from the United States government’s arbitrary use of deadly force,” enshrined in the Fourth Amendment of the U.S. Constitution would not create practical obstacles here because, among other reasons, providing a remedy to the Mexican victim in this case would create “no conflict with Mexico’s laws and customs.” ER 16-17. The Government of the United Mexican States agrees with the Government of the United States of America that international cross-border shootings implicate relations between the two countries,³ but Mexico assures this Court that giving Mexican nationals an effective remedy for harm caused by arbitrary and unlawful conduct directed across the border by U.S. Border Patrol Agents would not conflict with Mexico’s laws and customs and could not possibly damage relations between our two countries.

From Mexico’s perspective, no practical difficulties are present here, unlike *Verdugo-Urquidez* and the other cases cited in *Boumediene*. In *Verdugo-Urquidez*, for example, the Supreme Court observed that applying U.S. search warrant requirements to a search in Mexico conducted in cooperation with Mexican law enforcement authorities would raise serious practical difficulties for the ability of the United States to “‘funcio[n] effectively in the company of sovereign nations.’”

³ See Brief of U.S. as Amicus Curiae in Support of Reversal, p. 20.

Id. at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)). Among other things, the Court suggested, differences between the U.S. and foreign legal systems would cause serious difficulties, and it would put U.S. courts in the uncomfortable position of issuing warrants having no legal effect in Mexico for searches in Mexico. *Id.* at 274-75. In his concurring opinion in *Verdugo-Urquidez*, Justice Kennedy emphasized that the inapplicability of the warrant requirement did not necessarily prevent the application of other U.S. constitutional rights, but he agreed with the majority 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.

In the present case, applying U.S. law would pose no threat to principles of comity among nations or to Mexico's sovereignty in its own territory. Agent Swartz here, unlike the U.S. DEA agents in *Verdugo-Urquidez*, was not acting in cooperation with any Mexican law enforcement agencies, nor was he carrying out any operations in Mexico that implicated the warrant requirement of the Fourth Amendment. He was operating on United States soil as part of his duties under U.S. law. He was in the United States when he used excessive deadly force against J.A., by firing the fatal shot. Extending the requirements of the Fourth Amendment to cover the actions of a U.S. officer in a situation like this would not interfere in

any way with Mexico's "control over its territory ... and authority to apply the law there." *Boumediene*, 553 U.S. at 754 (quotation and citation omitted).

There is no reason why requiring Agent Swartz to answer for his action in a civil suit in U.S. court would require any different considerations than any other excessive-force case heard by 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 Swartz shot his gun across the border at J.A.—not when J.A.'s mother sought to hold Agent Swartz responsible in court for his actions.

When an illegal act is committed in one country with a direct effect in the other, it is well recognized that both countries have jurisdiction. *See, e.g., Restatement (Third) of the Foreign Relations Law of the United States* § 403 cmt. d (1987). Exercise of jurisdiction by either is no 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, but the United States also has an interest in preventing its own territory from being used to launch 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.

Although the United States Government in this case has commenced a criminal prosecution against Agent Swartz, the possibility of criminal prosecution

does not render civil remedies unnecessary. Criminal prosecutions are a matter of the Government's discretion, and in cross-border shootings committed by the Government's own agents, they have been the exception rather than the rule. Even when the Government chooses to prosecute, the higher standard of proof in criminal cases than in civil cases means that cases of wrongdoing may go without effective redress if criminal prosecution is the only option. And even when a prosecution succeeds, court-ordered restitution to the victim or the victim's family in a criminal case may not result in the same compensation as a civil wrongful-death action. There is no moral or practical justification for introducing these kinds of disparities in the right to compensation based solely on whether the victim was on one side of the border or the other when shot.

II. A Nation's Human Rights Obligations Apply Whenever It Exercises Effective Control or Power Over an Individual, Even Outside Its Sovereign Territory.

Under international human rights law, it is well established that a nation has human rights obligations whenever it exercises "effective control" over an individual, even outside its own territory. The claim in this case lies within the scope of the United States' international human rights commitments because the United States federal government, through the actions of Agent Swartz, exercised power and effective control over J.A.

The U.S. Supreme Court has often looked to international human rights precedents, as well as practices of other nations, in giving content to the open-ended provisions of the U.S. Constitution. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (citing international treaties); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing a European Court of Human Rights decision). Moreover, the Supreme Court has recognized that U.S. laws should be interpreted, where possible, to be consistent with the United States' international obligations to foreign nations. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (recognizing that “[i]t has been a maxim of statutory construction ... that ‘an act of congress ought never be construed to violate the law of nations, if any other possible construction remains.’”) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963). This reflects the principle that, as a matter of international law, no nation can invoke its own laws to excuse a breach of its international obligations; rather, each nation has a duty to conform its laws, as necessary, to the obligations that it has assumed to other nations.⁴

⁴ *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 311, art. 27 (opened for signature May 23, 1969), <http://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>; U.N. Int'l Law Comm'n, *Responsibility of States for Internationally Wrongful Acts*, arts. 3-4 (draft Dec. 12, 2001), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. Although the United States has not ratified the

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Mexico and the United States have recognized that respect for basic human rights, including the right not to be arbitrarily deprived of life, are part of the international obligations of every nation. For example, both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR).⁵ Though the ICCPR has not been treated as directly enforceable in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), decisions interpreting the ICCPR may be persuasive to the extent they shed light on basic human rights principles that are common to the ICCPR and the United States Constitution. *See, e.g., Roper*, 543 U.S. at 575-76; *Lawrence*, 539 U.S. at 573. 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. law as being sufficient to comply with the ICCPR.⁶

Vienna Convention on the Law of Treaties, the U.S. Department of State has recognized that in many respects the Convention codifies customary international law. *See, e.g., U.S. Dep't of State, Is the United States a Party to the Vienna Convention on the Law of Treaties?*, <http://www.state.gov/s/l/treaty/faqs/70139.htm>. The Draft Articles on State Responsibility also are cited here as a codification of customary international law.

⁵ International Covenant on Civil and Political Rights, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171, 1966 U.S.T. LEXIS 521 (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, ratified by Mexico Mar. 23, 1981, ratified by U.S. June 8, 1992).

⁶ The Executive Branch advised the Senate that “the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United
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As relevant here, Article 6(1) of the ICCPR provides that

“Every 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 also provides in Article 9(1) that

“Everyone has the right to liberty and security of person.... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

These international commitments of the United States have obvious parallels in the Fourth and Fifth Amendments to the United States Constitution. Indeed, as noted, the United States at the time of ratification of the ICCPR considered existing U.S. law to be at least as protective of human rights as these provisions. *See supra* note 6.

On the assumption that the allegations of the First Amended Complaint are true, it should be beyond dispute that Agent Swartz, acting as an agent of the United States federal government, violated J.A.’s rights to life, liberty and security of person by arbitrarily shooting and killing him, if the human rights obligations of the United States apply to this cross-border shooting. It is clear in these

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, 1966 U.S.T. LEXIS 521, at *3-4 (Feb. 23, 1978). Interpreting the U.S. Constitution and laws as inapplicable in a situation covered by the ICCPR would leave an unexpected hole in the intended U.S. legal framework for compliance with the ICCPR.

circumstances that they do apply. At times, the United States has advocated the disputable view that the ICCPR does not apply outside a State's own territory; however, the issue before this Court is not the proper interpretation of the ICCPR, but rather the proper interpretation of the Constitution of the United States, which the Supreme Court has recognized should be informed by widespread international understandings of human rights obligations.

Within the ICCPR, Article 2(1) requires each party to the Convention “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.”⁷ In keeping with the intent of

⁷ *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) (Covenant applies to cases of kidnapping by State agents abroad), <http://www.refworld.org/docid/4028af854.html>; *see also* *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) (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”), <http://www.refworld.org/docid/4acf500d2.html>; *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) (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), <http://www.refworld.org/docid/51b6e4fc4.html>; Dominic McGoldrick, *The International Covenant on Civil and Political Rights*, § 4.3, in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & *(continued)*

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 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), <http://www.refworld.org/docid/478b26ae2.html>.

This principle has been applied in a variety of situations where 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

Menno T. Kamminga eds. 2004) (“The record clearly reflects an appreciation that in some situations the expression ‘within its territory and subject to its jurisdiction’ would have to be read disjunctively if the Covenant rights were to be protected....”).

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), <http://www.refworld.org/docid/4028d4954.html>. 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.* ¶ 12.3.⁸

The Appellant argues in his opening brief that the fact that a border agent has the capacity to fire a weapon into Mexico and kill Mexican nationals does not approach the type of “effective control” necessary to trigger the constitutional protections at issue in this case. Appellant’s Opening Brief, Dkt. No. 26, p. 19. However, as the U.N. Human Rights Committee made clear in *Lopez Burgos v. Uruguay*, that is exactly the type of excessive force that triggers a government’s

⁸ Additionally, the International Court of Justice similarly 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., Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005), <http://www.icj-cij.org/docket/files/116/10455.pdf>; *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), <http://www.icj-cij.org/docket/files/131/1671.pdf>.

international obligations under the ICCPR, even if the exercise of such force occurs outside of a State's territorial jurisdiction.

A similar principle has developed under other human rights instruments. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including the *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), <http://www.cidh.oas.org/annualrep/99eng/Merits/Cuba11.589.htm>.⁹ The *Alejandre* 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

⁹ See also, e.g., *Franklin Guillermo Aisalla Molina (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), <http://www.cidh.org/annualrep/2010eng/EC-CO.PI-02ADM.EN.doc>.

recognized in Article I of the American Declaration of the Rights and Duties of Man.¹⁰ *Alejandro v. Cuba*, ¶ 53.

Likewise, the European Court of Human Rights has adopted a similar functional approach in cases arising under the European Convention on Human Rights.¹¹ It 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 (Jan. 27, 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95295>, the European Court of Human Rights held that “even though the applicant sustained her injuries

¹⁰ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948), <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm>.

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953). *See, e.g., 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), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022>; *Cyprus v. Turkey*, App. No. 25781/94, ¶¶ 69-80 (May 10, 2001) (convention applied where Turkey exercised “effective control” in the Turkish Republic of Northern Cyprus), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454>; *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), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93398>; *Al-Skeini v. United 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), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606>.

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.* ¶ 25.¹² In these cases, it is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction under the relevant human rights instrument.

The present case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre* and the cases involving occupied territory, the killing at issue in this case does not involve military action or war. 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 Swartz was standing on U.S. soil when he shot and killed J.A. on Mexican soil. He was patrolling the United States side of the border in the course of his law-enforcement duties for the United States and exercised authority over J.A. through his use of deadly force against J.A. across the border.

¹² 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), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81672>.

In ratifying the ICCPR, the States parties agreed in Article 2(3) to ensure that individuals whose rights are violated “shall have an effective remedy,” including judicial remedies, and to ensure that those remedies are enforced when granted. Mexico respectfully urges the Court to consider the international commitments of the United States and other members of the international community, and the nearly universally accepted meaning of those commitments, in construing the analogous human rights protections that appear in the Fourth Amendment to the U.S. Constitution.

As discussed above, the U.S. Supreme Court 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 these reasons, the Government of Mexico respectfully asks the Court to affirm the judgment of the United States District Court and to return the case to that court for further proceedings that will afford the plaintiff the opportunity to obtain an effective remedy.

Dated: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,816 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Microsoft Office Word 2010 in 14-point Times New Roman.

Dated: May 6, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, the foregoing brief is being electronically filed with the Clerk and served on counsel for all parties using the appellate CM/ECF system.

Dated: May 6, 2016

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