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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ARACELI RODRIGUEZ, individually and as the surviving mother and personal representative of the ESTATE OF J.A., Deceased, *Plaintiff*, v. LONNIE SWARTZ, et al., *Defendants*.	CASE NO. 4:14-CV-02251-RCC **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS** **(Oral Argument Requested)**

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*** Admitted pursuant to Ariz. Sup. Ct. R. 38(f)*
**** Pro hac vice application forthcoming*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Calle Internacional, a main thoroughfare in Nogales, Sonora, Mexico, runs alongside the border separating the United States and Mexico. On October 10, 2012, J.A., a 16-year-old Mexican teenager, was peacefully walking along Calle Internacional, returning home after playing basketball. At approximately 11:30 pm, U.S. Border Patrol Agent Swartz opened fire from the U.S. side of the border fence, killing J.A, who was approximately 30 feet from the fence. An autopsy report shows that J.A. was hit with approximately ten bullets. At the time of the shooting, neither Agent Swartz nor any other agent was under threat by J.A. or anyone else standing near him—much less in immediate danger of deadly or serious bodily harm.[1]

Plaintiff Araceli Rodriguez brings this lawsuit against Agent Swartz on behalf of her deceased teenage son, alleging that Agent Swartz violated the Fourth and Fifth Amendments by using excessive and unjustified force. Defendant responds that the Fourth and Fifth Amendments do not apply extraterritorially and that the entire suit must be dismissed, because J.A. was standing on Mexican soil when he was shot and was later determined to be a Mexican citizen. But Agent Swartz was standing on U.S. soil when he shot J.A. Thus, this case does not involve "extraterritoriality" at all. Moreover, even if the case were properly viewed as involving extraterritoriality, the Fourth and Fifth Amendments would apply to Defendant's conduct. As the Supreme Court reaffirmed in *Boumediene v. Bush*, 553 U.S. 723, 759-60 (2008), the Constitution should be applied extraterritorially unless it would be "impracticable or anomalous" to do so in a particular case. Here, there is nothing impracticable or anomalous about requiring Defendant to comply with the constitutional limits on the use of deadly force

[1] The facts are taken from the First Amended Complaint ("FAC") and are presumed true on a motion to dismiss. Contrary to Defendant's suggestion, the FAC's allegations are hardly "threadbare" and "conclusory." Def. Br. 7. Defendant also notes that paragraph 42 of the FAC states that Defendant acted with "deliberate indifferen[ce]." Defendant argues, however, that a deliberate indifference claim cannot be brought against Agent Swartz because he is not a supervisor. Def. Br. 15 n.7. But even if that were true, paragraph 42, as well as numerous other paragraphs in the FAC, set forth ample allegations of Defendant's use of unjustified and excessive force, a standard that indisputably applies. *See, e.g.*, FAC ¶¶ 1, 18, 37, 38, 41.

when he fires through the fence at an unarmed civilian. What *would* be anomalous is a legal rule that allows border agents to fatally shoot someone on the other side of the border—even intentionally—with constitutional impunity.

Defendant appears to recognize the extraordinary ramifications of his argument and attempts to minimize its significance by suggesting that the lack of constitutional accountability could be offset by other checks. Defendant suggests, for instance, that Plaintiff might have sued under the Federal Tort Claims Act ("FTCA") or the Alien Tort Statute ("ATS"). But a plaintiff is not required to choose between constitutional claims and any statutory claims that might be available. Moreover, Defendant does not concede that Plaintiff could even have brought suit under either of those statutes. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711-12 (2004) (holding that FTCA did not apply because "injury" occurred in Mexico); *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc) (holding that, under the Westfall Act, the U.S. must be substituted as the defendant in an ATS suit and the case treated as if brought under the FTCA with all the FTCA's geographical limitations). Defendant also suggests that a criminal prosecution might serve as a check on the use of excessive force by Border Patrol agents. Yet there have been virtually no prosecutions in recent years despite the enormous number of incidents of alleged abuse by border agents. *See* FAC ¶¶ 25-31. More fundamentally, our constitutional system does not leave the executive branch to serve as a check on itself.

Agent Swartz, standing on U.S. soil, killed an unarmed teenage boy innocently walking along the street on the other side of the border. If he believes the shooting was justified, he will have the opportunity to make that showing. But there is no support for Defendant's contention that he need not even answer the allegations because J.A. was on Mexican soil and subsequently determined to be a Mexican national.

ARGUMENT

This is a *Bivens* action alleging the use of excessive force by a federal agent. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S.

388 (1971) (permitting suit for excessive force); *Tekle v. United States*, 511 F.3d 839, 844-48 (9th Cir. 2007) (*Bivens* excessive force claim). Defendant argues, however, that the Fourth and Fifth Amendments do not apply extraterritorially and that this action must therefore be dismissed. But Agent Swartz was standing on U.S. soil when he fired his weapon. Accordingly, this case does not involve constitutional "extraterritoriality" and can be resolved on the ground that the relevant government activity—the agent's unlawful use of his weapon—occurred in the United States. *See* Section I, *infra*. In any event, even if this case were viewed as involving the extraterritorial application of the Constitution, the Fourth and Fifth Amendments apply under the Supreme Court's functional approach. *See* Section II, *infra*. Further, Defendant has expressly declined to press a claim for qualified immunity and would in any event not be entitled to such immunity. *See* Section III, *infra*. Finally, contrary to Defendant's argument, Plaintiff may pursue a Fifth Amendment claim if this Court were to deem the Fourth Amendment inapplicable. *See* Section IV, *infra*.[2]

I. THIS CASE DOES NOT REQUIRE EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION.

This case can be resolved in a narrow and straightforward manner without addressing the question raised by Defendant: whether the Fourth and Fifth Amendments have extraterritorial effect. Agent Swartz was on U.S. soil when he fired his weapon. That is the activity that is subject to the constitutional limits on the use of deadly force. Consequently, this case does not involve constitutional "extraterritoriality" at all.

The Supreme Court cases addressing constitutional extraterritoriality involve situations where the relevant events occurred abroad—both the injury and, critically, the government activity. For example, Defendant relies heavily on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), for the proposition that the Fourth

[2] In *Hernandez*, the Fifth Circuit held that the Fifth Amendment, but not the Fourth, applied where, as here, a U.S. Border Patrol agent on U.S. soil fatally shoots a Mexican citizen on Mexican soil. The case was recently taken en banc and the panel's decision was accordingly vacated. *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), *petition for reh'g en banc granted*, 2014 WL 5786260 (5th Cir. 2014). Plaintiff will therefore not address the panel decision.

Amendment does not apply in this case. Def. Br. 17, 25. But unlike this case, *Verdugo-Urquidez* involved government activity overseas—specifically a warrantless search of a Mexican citizen's property *in Mexico*. *Id*. at 273-74 (stressing that the case involved searches "*conducted abroad*") (emphasis added). In direct contrast, Agent Swartz never stepped foot outside of the United States when he shot J.A., yet he asks this Court to free him of all constitutional constraints.

Defendant also relies on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), for the proposition that the Fifth Amendment does not apply to this case. Def. Br. 17. *Eisentrager* was a World War II case in which German "enemy aliens" argued that their Military Commission trials, held in China and conducted collectively by delegations from various nations, violated the Fifth Amendment. But in *Eisentrager*, as in *Verdugo-Urquidez*, the relevant activity occurred overseas: the Germans' "capture, their trial and their punishment were all beyond the territorial jurisdiction" of the United States. *Id*. at 778. *See also Reid v. Covert*, 354 U.S. 1 (1957) (addressing the constitutional rights of citizens being tried *outside* the United States). Likewise, the D.C. Circuit extraterritoriality cases on which Defendant relies all involved government actions overseas in relation to the War on Terror or Iraq War. Def. Br. 18, 26. *See also Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (notwithstanding alleged possible planning on U.S. soil, the *actual treatment* of detainees at the hands of U.S. officials occurred in *Iraq*).

In contrast, where the critical activities did not occur wholly outside the United States, the Supreme Court and Ninth Circuit have employed a straightforward constitutional analysis. In *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), for example, the Ninth Circuit found that a Chinese citizen had suffered a deprivation of his due process rights when he was brought to a U.S. court for trial and required to testify under oath about matters that might subject him to torture upon his return to China. Among other misconduct, prosecutors in the United States had made misrepresentations in negotiating with the Chinese government to secure Wang's testimony. *Id.* at 811-12. The Ninth Circuit distinguished the case from those involving extraterritorial acts, noting that although Wang was physically in China when the prosecutorial misconduct

occurred, "many of the [challenged government] actions . . . *were taken in the United States*, unlike the search in *Verdugo-Urquidez*." *Id.* at 817 n.16 (emphasis added).

Similarly, it is well settled that foreign individuals and corporations have due process rights when sued in U.S. courts, even if they are located abroad and have few or no connections to the United States. *See, e.g., Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987) ("The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over [a foreign corporation located in Japan] under circumstances that would offend traditional notions of fair play and substantial justice.") (internal quotation marks omitted). This is because the judicial proceedings—and, therefore, any government actions that could violate the litigants' rights—take place *inside* the United States. Thus, "despite the foreign location of the litigant[s]," the Supreme Court has "decided the[se cases] as ordinary domestic cases," and not as cases involving extraterritoriality. Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 285-86 (2009).

Accordingly, the Court need not apply an extraterritorial analysis and can reject Defendant's motion on the narrow ground that Agent Swartz was on U.S. soil. But even if the Court concludes that it must analyze this case as one involving extraterritoriality, the Fourth and Fifth Amendments do apply here, as discussed below.

II. THE FOURTH AND FIFTH AMENDMENTS APPLY HERE UNDER AN EXTRATERRITORIAL ANALYSIS.

Constitutional rights should be applied extraterritorially unless it would be "impracticable and anomalous" to do so under the particular circumstances of a given case. Under this functional, context-specific test, Plaintiff has stated a claim that Agent Swartz violated J.A.'s rights under the Fourth and Fifth Amendments.

A. The Test for the Extraterritorial Application of Constitutional Rights Is a Functional One That Asks Whether Judicial Enforcement of a Right Would Be "Impracticable and Anomalous."

In *Boumediene*, the Supreme Court held that the Suspension Clause applied to alleged enemy combatants held at Guantanamo, and rejected the government's contention that the Constitution is inapplicable in areas where the United States lacks legal sovereignty. 553 U.S. at 755-72. The Court stressed that there are no bright-line,

formal rules for when the Constitution applies extraterritorially. Rather, courts must take a commonsense, functional approach based on objective factors and ask whether application of the Constitution in a particular situation would be "impracticable and anomalous." *Id*. at 759-60. Thus, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id*. at 764.

Defendant does not dispute that the Court in *Boumediene* applied the functional "impracticable and anomalous" test, but argues that the test does not govern here. Def. Br. 8-9. According to Defendant, the Supreme Court decided *categorically* in *Verdugo-Urquidez* and *Eisentrager* that the Fourth and Fifth Amendments do not apply extraterritorially to noncitizens lacking ties to the United States. Def. Br. 11, 17. Defendant's argument is demonstrably incorrect. As *Boumediene* made clear, the "impracticable and anomalous" test has general applicability and is not limited to determining whether just the Suspension Clause applies extraterritorially.[3]

The Court in *Boumediene* surveyed its extraterritoriality cases, beginning with the so-called Insular Cases from the early 1900s, and explained that the Court had consistently rejected categorical rules in this area. In the Insular Cases, the Court addressed the circumstances under which certain constitutional provisions applied to the newly-acquired U.S. Territories. As *Boumediene* explained, the Court had not adopted a bright-line approach in those cases, but rather employed a "functional approach to questions of extraterritoriality." 553 U.S. at 764 (noting that the Court in the Insular Cases had held that only certain constitutional provisions were applicable in the Territories given the various practical realities). *Boumediene* then examined the Court's 1950s extraterritoriality case in *Reid v. Covert*, 354 U.S. 1 (1957), and explained that "[p]ractical considerations likewise influenced the Court's analysis a half century later in *Reid.*" 553 U.S. at 759.

[3] *See*, *e.g.*, Neuman, *supra*, 82 S. CAL. L. REV. at 261 ("More broadly, *Boumediene* confirms and illustrates the current Supreme Court's 'functional approach' to the extraterritorial application of constitutional rights. The Court rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights, and essentially maintains that functionalism has long been its standard methodology for deciding such questions.").

Of particular relevance here, *Boumediene* addressed at length the Court's extraterritoriality decision in *Eisentrager* involving the Fifth Amendment rights of German "enemy aliens" tried in China before Allied Military Commissions, on which Defendant relies. Def. Br. 17-18. As *Boumediene* explained, the Court in *Eisentrager* did *not* rule categorically that the Fifth Amendment was inapplicable overseas to noncitizens. Rather, *Boumediene* noted that "[p]ractical considerations weighed heavily . . . in *Johnson v. Eisentrager* . . . ." 553 U.S. at 762. The Supreme Court in *Boumediene* stated emphatically that "[w]e reject" the government's argument that "the *Eisentrager* Court adopted a formalistic, sovereignty-based test . . . ." *Id.* The Supreme Court then pointedly stated that "if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach to questions of extraterritoriality." *Id.* at 764. Summing up its view of the test for extraterritoriality, the Supreme Court stated: "A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.*

Finally, *Boumediene* likewise made clear that *Verdugo-Urquidez* did not set forth a categorical rule regarding the Fourth Amendment's extraterritorial application to noncitizens overseas. In *Verdugo-Urquidez*, a four-Justice Plurality concluded that the Warrant Clause of the Fourth Amendment did not apply to the search of a Mexican citizen's home in Mexico. But, as with the Court's Fifth Amendment decision in *Eisentrager*, the holding was not categorical. Rather, the plurality opinion stated that "[*u*]*nder these circumstances*, the Fourth Amendment has no application." 494 U.S. at 275 (emphasis added).

Defendant, however, seizes upon additional language in which the Plurality suggested that the Fourth Amendment did not apply extraterritorially to noncitizens lacking voluntary attachments to the United States. Def. Br. 11 (citing *Verdugo-Urquidez*). But, critically, Justice Kennedy, who supplied a crucial concurring vote, made clear that he did not agree with the substantial connections test and stated that, in

his view, there was no real significance to the fact that the Fourth Amendment referred to "the People" rather than all "persons." Instead, he applied the "impracticable and anomalous" test and simply concluded that, as a practical matter, it would be too difficult to apply the warrant requirement overseas in that case. *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring); *see also id.* (stating that "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous") (Kennedy, J., concurring). *See also United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008) (rejecting the proposition that *Verdugo-Urquidez* strips all noncitizens outside the U.S. of constitutional rights as an "oversimplification"); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991) (stressing that *Verdugo-Urquidez* "hold[s] only that Fourth Amendment rights are not implicated when officials search the residence of a foreign national outside of the United States," and noting that the Court "expressly refused to rule on the issue of whether such a seizure could violate an accused's Fifth Amendment due process rights"); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1015 (2009) (in *Verdugo-Urquidez*, "Kennedy rejected both the Rehnquist definition of the 'people' and its relevance to the analysis. Instead, he advocated the adoption of . . . [the] 'impracticable and anomalous test.'").[4]

Thus, given Justice Kennedy's concurrence, the rule from *Verdugo-Urquidez* is that the Fourth Amendment, like other parts of the Constitution, applies unless it would be impracticable and anomalous. And even if there were the slightest doubt about Justice Kennedy's views in *Verdugo-Urquidez*, he himself put those to rest in *Boumediene*. Writing for the majority in *Boumediene*, Justice Kennedy specifically

[4] Justice Stevens also concurred in *Verdugo-Urquidez*, but did so on exceedingly narrow grounds, stating that he believed the search in the case was not "unreasonable" and that the Warrant Clause did not apply because "American Magistrates have no power to authorize" searches of "noncitizens' homes in foreign jurisdictions." 494 U.S. at 279 (Stevens, J., concurring in the judgment). Thus, nothing in Justice Stevens's concurrence supports Defendant's position here or a broad reading of *Verdugo-Urquidez*.

noted that in *Verdugo-Urquidez* he had applied "the 'impracticable and anomalous' extraterritoriality test in the Fourth Amendment context." 553 U.S. at 759-60 (quoting *Verdugo-Urquidez*, 494 U.S. at 277-278 (Kennedy, J., concurring)). *See* Neuman, *supra*, 82 S. CAL. L. REV. at 272 ("*Boumediene* provides a long overdue repudiation of Rehnquist's opinion in *Verdugo-Urquidez*, which Kennedy had nominally joined, while sharply limiting it in his concurrence.").[5]

In sum, the "common thread" in the Supreme Court's cases—including *Verdugo-Urquidez* and *Eisentrager*—is "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764. Thus, contrary to Defendant's argument, there is no categorical rule that the Fourth and Fifth Amendments do not apply extraterritorially.

B. The Fourth And Fifth Amendments Apply Here Under The Impracticable and Anomalous Test.

Among the factors to be considered under the "impracticable and anomalous" test are the nature of the right asserted, the context in which the claim arises, the nationality of the person claiming the right, and whether recognition of the right would create conflict with a foreign sovereign's laws or customs. *See Boumediene*, 553 U.S. at 755-65 (discussing factors examined in the Court's extraterritoriality cases). Here, the right at issue could not be more fundamental in that it involves limits on the use of

[5] Defendant cites *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), for the proposition that the Fourth and Fifth Amendments are categorically inapplicable here. Def. Br. 17. But *Zadvydas*—decided before *Boumediene*—does no such thing. As *Boumediene* clarified, the Supreme Court's earlier decisions merely held those Amendments inapplicable in certain circumstances; they do not mean that the Fourth and Fifth Amendments never apply. *Boumediene*, 553 U.S. at 764. Defendant also cites *Ibrahim v. DHS*, 669 F.3d 983 (9th Cir. 2012), for the proposition that a bright-line "voluntary connections" test applies. Def. Br. 11. But *Ibrahim*—which involved only First and Fifth Amendment claims and arose in the very different context of a challenge to the No-Fly List—specifically recognized that, after *Boumediene*, the Supreme Court now applies a "'functional approach' rather than a bright-line rule." *Id*. at 995 (quoting *Boumediene*, 553 U.S. at 764). *Ibrahim* simply acknowledged that an alien's connections to the U.S. could be *one* factor in such a multi-factored "functional approach." *Id*. In any event, although not necessary for the reasons discussed above, J.A. has sufficient attachments to the U.S. *See, e.g.*, FAC ¶¶ 9, 17, 21-24.

deadly force by the government. Nor can Defendant plausibly contend that allowing this case to go forward would create a conflict with Mexico's laws or customs. Indeed, the Mexican government has expressly stated that it believes Plaintiff should be allowed a remedy in a U.S. court. *See* Addendum (Letter from Mexican Government).

There is also nothing anomalous about applying the Constitution in this context. The limits imposed by the Fourth and Fifth Amendments are well known to Border Patrol agents and must be observed by agents during engagements with both citizens and noncitizens on the U.S. side of the border. *See, e.g.*, *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) ("whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials"). Thus, applying the Fourth and Fifth Amendments here would not subject Border Patrol agents to unfamiliar constitutional limits. As importantly, criminal statutes—as well as governing regulations and policies—already prohibit a Border Patrol agent on U.S. soil from using unjustified force against noncitizens across the border, including, of course, an unjustified cross-border shooting like that alleged here. *See, e.g.*, 8 C.F.R. § 287.8(a)(2). Consequently, applying the Fourth and Fifth Amendments in this context would impose no new standards or limits on Border Patrol agents, much less create an anomaly. What would be anomalous is if the Constitution did not apply to unjustified cross-border shootings even though such shootings are prohibited by both criminal law and the agency's own regulations.

Nor, finally, does this case raise the possibility of significant practical problems, much less the type of problems that would outweigh the importance of imposing constitutional limits on the use of deadly force. The lawsuit is taking place in a U.S. court, which is being asked to apply U.S. constitutional law to the actions of a U.S. Border Patrol agent firing his weapon from U.S. territory. Notably, in *Boumediene*, the Court acknowledged that allowing habeas challenges at Guantanamo could impose very real burdens on the military and "may divert the attention of military personnel from other pressing tasks." 553 U.S. at 769. Yet the Court still held that the Suspension Clause applied and stressed that the practical problems were outweighed by

other factors, including the importance of ensuring that fundamental constitutional protections were available. *Id*. at 793-97. In contrast, this case presents no serious practical concerns, yet raises equally important and fundamental constitutional issues.

Defendant argues, however, that the Constitution does not apply because the injury occurred on Mexican sovereign territory to a Mexican citizen with no ties to the U.S. But that fact cannot of course be determinative. If it were, *Boumediene* would necessarily have been decided differently, since Cuba has legal sovereignty over Guantanamo and the detainees were enemy combatants with no ties to the United States. *See* 553 U.S. at 755 (rejecting argument that for "noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends"). *See also* Neuman, *supra*, 82 S. CAL. L. REV. at 285 ("*Boumediene* . . . makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration.").

Defendant attempts to distinguish *Boumediene* on the ground that the United States has *de facto* control over Guantanamo. But here, the complaint alleges that the U.S. exercises practical control over the Mexican side of the border. FAC ¶¶ 21-25. Defendant disputes those allegations, but the extent to which the U.S. exercises practical control on the Mexican side of the border is a factual question that is not appropriately resolved on a motion to dismiss. In any event, Defendant misapprehends the reason why U.S. *de facto* control over Guantanamo was legally significant. As the Court explained in *Boumediene*, the United States' control over Guantanamo was important because it meant no other country's law applied. 553 U.S. at 764-65. Consequently, unless the U.S. Constitution applied in Guantanamo, the United States would not be answerable in any court for its unlawful actions, leaving the executive branch to police itself. That is the situation here. If the Constitution does not apply, Defendant is answerable to no other entity except the executive branch. The fact that Mexican laws apply in Mexico is of course meaningless, since a Mexican court could not provide a remedy unless Defendant were on Mexican soil. Indeed, as discussed previously, that is precisely why this case is not properly viewed through the extraterritorial lens. Thus, regardless of whether or not the United States is deemed to

exercise practical control on the Mexican side of the border, the failure to apply the Constitution in cases where the agent's actions occurred on U.S. soil would create a legal vacuum, just as it would have in *Boumediene* if the Constitution did not apply in Guantanamo.

Defendant also argues that the practical problems here are similar to those in *Verdugo-Urquidez* and *Eisentrager*. That is wrong. The practical considerations that drove those cases have no bearing here and, in fact, actually support applying the Constitution to Defendant's conduct in this case. In *Eisentrager*, for instance, the Court emphasized that the individual seeking Fifth Amendment protection:

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

339 U.S. at 777. No one factor was dispositive. Rather, "the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant." *Rasul v. Bush*, 542 U.S. 466, 476 (2004); *see also Boumediene*, 553 U.S. at 762, 764 (noting that "[p]ractical considerations weighed heavily" in *Eisentrager*, where the Court had to consider the difficulties of habeas corpus proceedings during a post-War military occupation). The instant case bears little resemblance to the wartime situation in *Eisentrager*.

The circumstances in *Verdugo-Urquidez* likewise bear no resemblance to the instant case. Unlike this case, *Verdugo-Urquidez* involved the warrant requirement, and not the Fourth Amendment's prohibition on the use of unjustified deadly force. The Supreme Court in *Verdugo-Urquidez* worried that application of the Fourth Amendment's warrant requirement to searches in foreign countries would force courts into a "sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." 494 U.S. at 274. Justice Kennedy pointedly stated in his concurrence:

> The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and

> privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.

Id. at 278 (Kennedy, J., concurring). The *Verdugo-Urquidez* Court's concerns are simply not present here. It would not be impracticable for Border Patrol agents to conform their behavior to reflect the fact that they may not use excessive force against noncitizens they encounter, whether inside or outside the U.S. border. Indeed, agents must already conform their conduct to this constitutional norm given that it is a crime to use excessive force across the border, as Defendant recognizes. Moreover, while the Fourth Amendment's warrant requirement might necessitate nuanced determinations turning on reasonable expectations of privacy in different countries that would lead to varying standards, there is no threat that courts would need to make those types of determinations in this context. An excessive force claim turns on whether an officer's use of force was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989) (internal citation omitted). And when a Border Patrol agent standing on U.S. soil decides whether to use deadly force against someone, it would be easier—not harder—for the agent to apply the same substantive standard regardless of which side of the border fence the victim is standing on.[6]

Nor, as already discussed, would recognizing constitutional rights in this case raise the specter of conflict with a foreign sovereign's laws or customs, a threat which

[6] Defendant cites a few D.C. Circuit cases in support of his argument that the Constitution does not apply to his conduct here. Def. Br. 18, 26-27. But the D.C. Circuit recognized that the test is a functional one that turns on the particular circumstances of the case. *See Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010) (noting that *Boumediene*, in addition to analyzing the reach of the Suspension Clause, "explored the more general question of [the] extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens"); *Ali*, 649 F.3d at 771-72 (discussing *Boumediene*'s "three factor[]" approach). The D.C. Circuit simply applied that functional test and refused to apply the Constitution under the particular circumstances of those cases, which involved the military, the Iraq War and terrorism-related activities.

troubled the *Verdugo-Urquidez* Court. As the plurality opinion noted, a warrant issued by a U.S. magistrate "would be a dead letter outside the United States." 494 U.S. at 274; *see also id*. at 279 (noting that "American magistrates have no power to authorize . . . searches" in a foreign country) (Stevens, J., concurring in the judgment). All of these considerations taken together led the Supreme Court to conclude that the Fourth Amendment's warrant requirement could not practically be applied to a search of property in Mexico. Such concerns are absent here.

Finally, Defendant argues that allowing this suit to go forward would open the door to suits by "the entire world population so long as the official act originated within the United States." Def. Br. 27. That contention ignores the teaching of *Boumediene*: that every case must be judged on its own facts to determine whether it would be impracticable or anomalous to apply the Constitution under the particular circumstances presented. A ruling here in favor of Plaintiff—particularly at the motion to dismiss stage—in no way portends the same result in a different hypothetical case with different circumstances.

In sum, there would be nothing impracticable or anomalous about providing a constitutional remedy where a U.S. agent chooses to fire his weapon through the border fence and kills an unarmed teenager. To the contrary, it would be anomalous if agents could engage in such actions without any constitutional ramifications.

III. DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

There are two steps in a damages action against an officer: was there a constitutional violation and, if so, was the illegality of the officer's conduct clearly established at the time. Because Defendant believes there was no constitutional violation in this case, he "has not addressed the second prong . . . ." Def. Br. 7 n.3. Accordingly, if the Court concludes that the complaint states a constitutional violation, Defendant's motion to dismiss should be denied, as he has declined to press a claim for qualified immunity at this stage of the proceedings.

In any event, Defendant plainly is not entitled to qualified immunity. The qualified immunity doctrine does not excuse conduct that was clearly unlawful at the time it was committed. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("qualified

immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'") (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)); *accord Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (where "in the light of pre-existing law the unlawfulness" of official action is "apparent," qualified immunity does not protect the action). The purpose of the qualified immunity doctrine is straightforward: it ensures that officers will not have to guess whether their actions are lawful. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("If the law at that time was not clearly established, an official could not . . . fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."). Qualified immunity is thus designed to ensure that the prospect of liability does not unduly chill a government official's lawful "exercise [of] discretion"—that is, his "willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984).

Here, Defendant contends that it was unclear whether the Fourth and Fifth Amendments applied extraterritorially. But that is inconsequential for immunity purposes because Defendant was on clear notice that it was a *crime* to fatally shoot a Mexican citizen across the border without justification.[7] Thus, in order for Defendant to claim qualified immunity in this case, he would have to make the implausible argument that he was willing to go to jail, but would have refrained from shooting J.A. had he known that the Fourth and Fifth Amendments applied.

Qualified immunity was never meant to excuse knowing violations of the law based on a *post hoc* argument that the victim's legal remedies were uncertain at the time of the violation.[8] In short, the doctrine of qualified immunity does not permit an agent to escape liability when he knew at the time that his conduct was unlawful, indeed, criminal.

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[7] Further, agency regulations and internal policies parallel constitutional standards and thus prohibit the unjustified use of deadly force across the board. *See* 8 C.F.R. § 287.8(a)(2); CBP, Use of Force Handbook (2010), *available at* http://www.dhs.gov/sites/default/files/publications/cbp-use-of-force-policy.pdf.

[8] Moreover, Defendant at the time had no idea what J.A.'s status was. FAC ¶ 17.

IV. THE FIFTH AMENDMENT APPLIES IF THE FOURTH AMENDMENT IS INAPPLICABLE.

Finally, Defendant incorrectly argues that only the Fourth Amendment applies to government seizures and that Plaintiff's Fifth Amendment claim should therefore be dismissed. Def. Br. 14-15. In effect, Defendant wants to have it both ways: He simultaneously argues that the Fourth Amendment *applies* (for purposes of displacing Plaintiff's due process claim) and does *not* apply (because Plaintiff was shot across the border and outside the Fourth Amendment's ambit). The upshot of Defendant's argument is that the Fourth Amendment provides no protection, yet also precludes other constitutional provisions from applying.

Defendant's reliance on *Graham v. Connor*, 490 U.S. 386 (1989), is misplaced. There, the Supreme Court held that where Fourth Amendment protections *are* available, courts should analyze the claim under the Fourth Amendment. But *Graham* specifically noted that where the Fourth Amendment is *not* available for a reason unconnected to the merits, claims of excessive force are properly analyzed under the Fifth Amendment's substantive due process standards. *Id*. at 395 n.10. The Supreme Court reiterated the limited nature of *Graham*'s holding in *County of Sacramento v. Lewis*, explaining that "*Graham* simply requires that *if* a constitutional claim is covered by a specific constitutional provision," then the Court should apply that specific provision, rather than the Fifth Amendment. 523 U.S. 833, 842-43 (1998) (internal citation omitted; emphasis added) (holding that because Fourth Amendment did not apply to excessive force claim, the claim should be analyzed under substantive due process).

Defendant does not cite a single case suggesting that where a Fourth Amendment claim is barred for reasons unrelated to the merits, the plaintiff does not have the option of bringing an excessive force claim under the Fifth Amendment. Nor is Plaintiff aware of any such case. Such a holding would invert *Graham's* rationale, which was simply to ensure that the Fourth Amendment is used where it is applicable. 490 U.S. at 395. *See also Albright v. Oliver*, 510 U.S. 266, 288 (1994) (Souter, J.,

concurring) (describing *Graham* as "reserving due process for otherwise homeless substantial claims"). Consistent with *Graham* and *County of Sacramento*, if the Court holds that the Fourth Amendment is inapplicable in this context, it should permit Plaintiff to proceed with her Fifth Amendment claim.

* * *

Countless Mexican and Canadian citizens live in towns bordering the United States. Their daily activities often bring them within feet of armed U.S. agents standing across the border on U.S. soil, as was the case when J.A. returned from playing basketball in his home town on the night of October 10, 2012. Defendant asks this Court to rule that these individuals cannot invoke U.S. constitutional protections and must simply assume the risk of being killed by U.S. agents while they go about their everyday lives. That is a truly extraordinary position in our constitutional system and should be rejected.

CONCLUSION

Defendant's motion to dismiss should be denied.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

/s/ Lee Gelernt
ACLU FOUNDATION IMMIGRANTS' RIGHTS PROJECT

/s/ Luis F. Parra
PARRA LAW OFFICES

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2014, I electronically submitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF system for filing and transmittal.

By: */s/ Lee Gelernt*
Lee Gelernt