

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.

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

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff sued U.S. Border Patrol Agent Lonnie Swartz in his personal capacity for damages under *Bivens v. Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). [CR 1, 18; ER 50.]¹ The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

On July 9, 2015, the district court granted in part and denied in part Agent Swartz's motion to dismiss Plaintiff's First Amended Complaint. [CR 30, 58; ER 3.] A timely notice of appeal was filed in accordance with *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), and Rule 4 of the Federal Rules of Appellate Procedure. [CR 59; ER 1.] This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the doctrine of qualified immunity applies to protect a U.S. Border Patrol agent from personal liability based on the extraterritorial application of the Fourth Amendment to the United States Constitution, where a Mexican national, who is standing on Mexican soil and who has no significant voluntary connection to the United States, is shot and killed by an Agent operating from within the United States.

¹ The abbreviation "CR" refers to the Clerk's Record on Appeal and is followed by the corresponding document number and, where appropriate, the page/paragraph number. The abbreviation "ER" refers to Appellant's Excerpts of

STATEMENT OF THE CASE

This case involves a foreign national's attempt to invoke the protection of the Fourth Amendment to the Constitution for a seizure that occurred outside of the United States. Plaintiff Araceli Rodriguez filed a civil rights suit against Border Patrol Agent Lonnie Swartz for the death of her sixteen year old son, J.A.² [CR 1, 18; ER 50.] The complaint alleges that on October 10, 2012 at about 11:30 p.m., J.A. was suddenly shot while walking on the sidewalk of Calles Internacional, a street that runs alongside the border fence on the Mexican side of the border between the United States and Mexico. [CR 18, ¶¶ 9-10; ER 53-53.] According to the complaint, J.A. did nothing to provoke the shooting, which Plaintiff alleges was carried out by Agent Swartz intentionally and without legal justification. [CR 18, ¶¶ 14, 18, 37; ER 54, 55, 59.]

Plaintiff asserts that her claim against Agent Swartz, in his individual capacity, for deprivation of the J.A.'s constitutional rights under the Fourth and Fifth Amendments to the United States Constitution, is derived from *Bivens*, in which the Supreme Court held that money damages may be recovered against a federal official for a violation of a plaintiff's constitutional rights. *Bivens v. Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 397. [CR 18,

² The decedent was identified only as "J.A." throughout the district court proceedings.

¶4; ER 52.] In order to prove this *Bivens* claim, Plaintiff must demonstrate that J.A. was deprived of a constitutional right. *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir.2010).

Agent Swartz's motion to dismiss for failure to state a claim under Federal Civil Procedure Rule 12(b)(6) was granted as to Plaintiff's Fifth Amendment claim. As to the Fourth Amendment claim, however, the District Court found that Agent Swartz is not entitled to qualified immunity from suit. [CR 58, p. 21; ER 23.] This appeal challenges that decision.³

SUMMARY OF ARGUMENT

Under the governing pleading standard, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The doctrine of qualified immunity protects public officials, such as Agent Swartz, from liability for civil damages insofar as his conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In assessing qualified immunity, the Court must determine: (1) whether the facts alleged by the plaintiff allege a violation of a constitutional right; and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Id.* at 232. Qualified

³ Plaintiff has not cross-appealed the dismissal of her Fifth Amendment claim.

immunity is only applicable where both prongs are satisfied. *Wood v. Moss*, ___ U.S. ___, ___, 134 S.Ct. 2056, 2066 (2014).

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A seizure occurs “when there is a government termination of freedom of movement through means intentionally applied.” *Brower v. Cnty. Of Inyo*, 489 U.S. 593, 596-97 (1989). Law enforcement shootings are covered by the Fourth Amendment because “there can be no question that apprehension by the use of deadly force is a seizure[.]” *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The Plaintiff’s complaint alleges that Agent Swartz intentionally shot and killed J.A.

Although the Fourth Amendment covers the Plaintiff’s claim, J.A., an alien, did not automatically enjoy its protection. This is because the Constitution does not protect all people in all places, *Reid v. Covert*, 354 U.S. 1, 74 (1957), and the Supreme Court has foreclosed extraterritorial application of the Fourth Amendment to aliens where the violation occurs on foreign soil and the alien plaintiff lacks any prior significant voluntary connection to the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). The factual allegations in the complaint, that J.A. lived approximately four blocks from the border, and was visited frequently by his U.S. citizen grandparents, do not establish that J.A. had a significant voluntary connection to the United States, or

that he accepted some societal obligations that would entitle him to constitutional protection.

The “functional approach” announced in *Boumediene v. Bush*, 553 U.S. 723 (2008), plays no role in the analysis of Plaintiff’s Fourth Amendment claim because the Supreme Court expressly limited its holding to apply only to the Suspension Clause of the First Amendment. Additional Supreme Court decisions support the continued relevancy of *Verdugo-Urquidez*’s “significant voluntary connections” test. But even if *Boumediene*’s “functional approach” were applied here, the practical considerations of extending the Fourth Amendment’s reach into Mexico along its 2,000 mile-long border with the United States, weigh heavily against doing so.

Even if, assuming *arguendo*, the Fourth Amendment extended to protect J.A. in Mexico, Agent Swartz is nonetheless entitled to qualified immunity from suit because that right was not clearly established in October of 2012. The proper inquiry is not whether Agent Swartz exceeded constitutional limits relating to the use of deadly force, but whether the Fourth Amendment’s extraterritorial application to J.A. was clearly established at that time.

As stated above, the Court’s treatment of the First Amendment in *Boumediene* was expressly limited to the extraterritorial reach of the Suspension Clause. The Court was careful to disclaim any intention to disturb existing law

governing the extraterritorial application of any other constitutional provision. Moreover, no court has heretofore found a violation of the Fourth Amendment based on a claim of excessive force by a U.S. official standing on U.S. soil, against an alien who had no significant voluntary connection to, and was not in the United States when the alleged misconduct occurred. Accordingly, if J.A. had a right under the Fourth Amendment, it was not clearly established in October of 2012.

Plaintiff, for these reasons, has not alleged a plausible claim for relief and her complaint must be dismissed.

ARGUMENT

PLAINTIFF'S *BIVENS* CLAIM AGAINST AGENT SWARTZ IS BARRED BY QUALIFIED IMMUNITY

A. Standard of Review

This Court reviews *de novo* a district court's denial of qualified immunity on a Rule 12(b)(6) motion to dismiss. *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.1999).⁴ To overcome qualified immunity, plaintiff must allege that defendant violated plaintiff's clearly established constitutional rights. *Wood v. Moss*, ___ U.S. at ___, 134 S.Ct. at 2006. That means a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Ashcroft v. Iqbal, 556 U.S. at 678 (internal quotations and citations omitted). A

⁴ A *Bivens* action is the federal analog to an action against state or local officials under 42 U.S.C. § 1983 and, therefore, cases interpreting § 1983 apply in the *Bivens* context as well. *Starr v. Baca*, 652 F.3d 1202, 1206 (9th Cir.2011).

claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Bell Atlantic v. Twombly*, 550 U.S. 544, 557 (2007). A court may dismiss a claim if a successful affirmative defense appears clearly on the face of the pleadings. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

B. The Fourth Amendment Does Not Apply Extraterritorially to J.A., an Alien Without Significant Voluntary Connection to the United States.

1. Qualified Immunity

At all times alleged in the complaint, Agent Swartz was acting within the course and scope of his employment and discretionary authority. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court established that governmental officials performing discretionary functions are immune from civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818. Reasonableness “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Ryburn v. Huff*, ___ U.S. ___, ___, 132 S. Ct. 987, 992 (2012), citing *Graham v. Connor*, 490 U.S. 386, 396-397 (1989). Qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” and “protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Sjurset v. Button*, ___ F.3d ___, ___, 2015

WL 7873404, *4 (9th Cir.2015) (citations and internal quotations omitted). The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978), for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law").

A qualified-immunity analysis requires courts to ascertain (1) whether the facts alleged make out a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. at 232. Qualified immunity is only applicable where both prongs are satisfied. *Wood v. Moss*, 134 S.Ct. at 2066. The facts alleged by Plaintiff in the First Amended Complaint fail as to both prongs of the qualified immunity analysis.

2. The Fourth Amendment Does Not Apply Extraterritorially to J.A.

Plaintiff alleges that Agent Swartz's actions violated J.A.'s Fourth Amendment protection against seizures with excessive and unreasonable force, an injury which indisputably occurred in Mexico. [CR 18, pp. 5-6; ER X-X.]

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated. . .” U.S. CONST.

amend. IV. A seizure occurs “when there is a government termination of freedom of movement through means intentionally applied.” *Brower v. Cnty. Of Inyo*, 489 U.S. at 596-97. Law enforcement shootings are covered by the Fourth Amendment because “there can be no question that apprehension by the use of deadly force is a seizure[.]” *Tennessee v. Garner*, 471 U.S. at 7.

The complaint alleges that Agent Swartz intentionally shot and killed J.A. Although the Fourth Amendment covers the plaintiff’s claim, J.A., an alien, did not automatically enjoy its protection. This is because the Constitution does not protect all people in all places, *Reid v. Covert*, 354 U.S. at 74. The operative question is whether the Fourth Amendment applies extraterritorially under the circumstances presented here.

I.

Before answering that question, however, a brief detour is necessary to lay to rest any notion that this question need not be reached because of Agent Swartz’s presence on U.S. soil. This theory was flatly rejected in *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir.2011), in which the D.C. Circuit considered a *Bivens* action brought by Iraq and Afghanistan citizens who were captured and subsequently detained by the U.S. military. The suit alleged that various federal officials violated the plaintiffs’ constitutional rights by formulating policies that caused them to be

mistreated while detained by the U.S. government - mistreatment that included alleged rape, sexual humiliation, and the intentional infliction of pain after surgery. *Id.* at 765-66. The Court concluded that the plaintiffs, because they were detained abroad, lacked any clearly established rights under the Fifth Amendment due process clause or the Eighth Amendment; therefore, Secretary Rumsfeld and other defendants (despite the repugnance of the factual allegations) were entitled to qualified immunity. *Id.* at 770-72.

This Court's decision in *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), similarly illustrates the point. Wang, a Chinese national, was paroled into the United States and held in custody to ensure his testimony in an international drug conspiracy trial. The Ninth Circuit concluded that "the two-year American prosecutorial effort violated Wang's due process rights *on American soil*, where he was forced in an American courtroom, to choose between committing the crime of perjury or telling the truth and facing torture and possible execution." *Id.* at 817-18 (emphasis added).

These cases demonstrate the firmly rooted principle that a constitutional violation occurs, if at all, where the injury takes place. *Brower v. Cnty. Of Inyo*, 489 U.S. at 596-97 (a seizure occurs "only when there is a governmental termination of freedom of movement... .") In this case, that place is the Republic of Mexico.

II.

The question of whether the Fourth Amendment applies extraterritorially to J.A., is determined by an examination of his relationship to the United States. In *United States v. Verdugo-Urquidez*, 494 U.S. 259,⁵ the Supreme Court held that an alien with no voluntary attachment to the United States has no extraterritorial Fourth Amendment rights. *Id.* at 274-275. Chief Justice Rehnquist wrote for the majority, that the Fourth Amendment’s text refers to the right of “the people” to be free from unreasonable searches. “The people,” he said, “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country [such as by accepting some societal obligations] to be considered part of that community.” *Id.* at 265, 273. The Amendment’s purpose, Justice Rehnquist wrote, “was to protect the people of the United States against arbitrary action by *their own* Government[.]” *Id.* at 266. (emphasis added). In other words, the Fourth Amendment “restrict[s] searches and seizures which might be conducted by the United States *in domestic matters*.” *Id.*

⁵ DEA officers, working in conjunction with Mexican federal police, seized incriminating documents from the Mexican residences of a criminal defendant. 494 U.S. at 262-63. The district court granted the defendant’s motion to suppress, holding that “the Fourth Amendment applied to the searches and that the DEA agents had failed to justify searching [the defendant’s] premises without a warrant.” 494 U.S. at 263. The court of appeals affirmed. *Id.* The Supreme Court reversed, holding that that “the Fourth Amendment has no application” where “[a]t the time of the search, [the individual seeking its protections] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico.” *Id.* at 274-75.

(emphasis added). Contemporary historical understanding, the Court continued, confirmed this reading. *Id.* at 267. As a result, the Court held, “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” *Id.* at 271.

Plaintiff’s complaint establishes that she is a Mexican national who resides in Nogales, Sonora, Mexico. She is the mother of the deceased, J.A., who was also a Mexican National. [CR 18, ¶ 6; ER 53.] With regard to J.A.’s ties to the United States, the complaint states:

At the time of the shooting, J.A. lived in Nogales, Sonora, Mexico, approximately four blocks from where he was shot. Because J.A.’s mother was away for work, his grandmother was often with him in Nogales, Mexico to care for him. His grandmother and grandfather live in Arizona and were lawful permanent residents of the United States at the time of the shooting. They are now U.S. citizens. [CR 18, ¶ 17; ER 55.]

At no time prior to the shooting did J.A. reside in the United States. It does not appear that J.A. ever applied for admission to the United States, or even stepped foot into the United States. He was in the sovereign territory of the Republic of Mexico, where the conduct at issue occurred. The allegation that J.A. was present on a street that runs alongside the border, in a border community, and

had relatives who live in Arizona, does not create the type of nexus required by *Verdugo-Urquidez*.

J.A. had no “significant voluntary connection” to the United States, and the complaint fails to set forth any fact to demonstrate that J.A. had accepted any societal obligation in the United States, even including complying with our immigration laws. *United States v. Verdugo-Urquidez*, 494 U.S. at 273. As an alien to the United States, who was not within the territory of the United States, J.A. did not enjoy the protection of the Fourth Amendment.

III.

Justice Kennedy authored a concurrence in *Verdugo-Urquidez* to express his view that the Court’s conclusion need not rely on the Fourth Amendment’s reference to “the people,” but on general principles of interpretation, which, he said, historically rely on the distinction between citizens and aliens. *Id.* at 275 (Kennedy, J., concurring). “The distinction between citizens and aliens,” Justice Kennedy explained, “follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.” *Id.*

The Supreme Court’s decision in *Boumediene v. Bush*, *supra*, authored by Justice Kennedy, introduced a “function approach” to aid its resolution of the issue

before the Court, but did not repudiate the validity of *Verdugo-Urquidez*'s significant voluntary connections test. For the reasons that follow, the question before this Court should be resolved based on the test set forth in *Verdugo-Urquidez* alone, rather than in conjunction with *Boumediene*'s functional approach.⁶

First, the holding of *Boumediene* was expressly limited to its facts and to the Suspension Clause. *Boumediene* addressed whether the Suspension Clause of the U.S. Constitution applied to aliens detained outside the United States at the U.S. Naval Base in Guantanamo Bay, Cuba. 553 U.S. at 732–33. Although the Court drew on cases from contexts other than habeas corpus, the D.C. Circuit found that the Supreme Court “explicitly confined its constitutional holding ‘only’ to the extraterritorial reach of the Suspension Clause,” and “disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir.2009) (citations omitted).

This deliberate limitation has been recognized not only by the D.C. Circuit but by other Circuit Courts of Appeal as well, including the Ninth Circuit. See *Hamad v. Gates*, 732 F.3d 990, 1005 (9th Cir.2013) (“Although *Boumediene*

⁶ *Boumediene*'s general function approach is premised upon the Supreme Court's conclusion that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” 553 U.S. at 764.

ultimately concluded that the Suspension Clause applies to aliens detained at Guantanamo Bay, the Court expressly confined its holding to that constitutional provision alone”); *Ameur v. Gates*, 759 F.3d 317, 331 (4th Cir. 2014)(doubting that Congress would prefer “to open the floodgates to all sorts of detainee-related litigation merely because *Boumediene* required courts to allow one narrow subclass of cases under the Suspension Clause, a provision that does not even apply here.”); *Ali v. Rumsfeld*, 649 F.3d at 771 (finding that the Court’s opinion was “‘explicitly confined...only to the extraterritorial reach of the Suspension Clause’ and noting the plaintiffs’ “argument [to abandon prior holdings] is misplaced because we are, of course, bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court.” (quotations and citations omitted).

Neither the language used in *Boumediene* nor any suggestion from it, signals the Court’s intention to abrogate or overrule *Verdugo-Urquidez*. In addition, the Supreme Court has never stated that the test set forth in *Boumediene* applies to determine all questions of extraterritorial application of every constitutional provision.

Second, the Supreme Court has explicitly instructed lower courts to follow directly applicable precedents, which in this case is *Verdugo-Urquidez*, not *Boumediene*. See, e.g., *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (if decision “has

direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions” (internal quotation marks omitted)). The Supreme Court has thus “repeatedly” admonished courts “not to define clearly established law at a high level of generality.” *Ashcroft v. Al-Kidd*, 563 U.S. 731, ___, 131 S.Ct. 2074, 2084 (2011). Reliance on *Boumediene*, therefore, and its “practical and functional” balancing test, which applied only to the Suspension Clause, would contradict this principle.

Finally, as indicated above, qualified immunity questions must be answered “in light of the specific context of the case, not as a broad general proposition.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The specific context of this case is governed by *Verdugo-Urquidez*. In Part II above, Agent Swartz recounted the factors that demonstrate that J.A. did not have sufficient voluntary connections to the United States to justify the extraterritorial application of the Fourth Amendment to his circumstances. They will not be repeated here.

IV.

Appellant recognizes that this Court has, in a different context, applied both the “significant voluntary connection” test from *Verdugo-Urquidez* and the

“functional approach” factors from *Boumediene. Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 994-97 (9th Cir. 2012) (First and Fifth Amendment claims brought by Malaysian citizen and Stanford University doctoral student, based on her placement on a government “no fly” watch list). Appellant likewise recognizes that the Fifth Circuit recently applied both *Verdugo-Urquidez* and *Boumediene* to determine the extraterritorial applicability of the Fourth and Fifth Amendments, on substantially similar facts to those presented here. We therefore address the failure of Plaintiff’s *Bivens* claim even in light of *Boumediene*’s functional approach.

In *Hernandez v. United States*, 785 F.3d 117, 124 (5th Cir.2015) (En Banc),⁷ a 15-year-old boy was shot and killed by a Border Patrol Agent while the boy was playing in the cement culvert on the Mexican side of the the United States border at El Paso, Texas. One of the claims brought by his parents was a *Bivens* claim against the agent, based on alleged violations of the Fourth and Fifth Amendments. The Fifth Circuit unanimously held that Hernandez, a Mexican citizen who had no significant voluntary connection to the United States, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment. *Id.* at 119.⁸

⁷ A Petition for Writ of Certiorari is pending in the Supreme Court of the United States. See *Hernandez v. Mesa*, Sup. Ct. Dkt. No. 15-118.

⁸ The court also unanimously found that plaintiff’s Fifth Amendment claim was not clearly established in 2010. *Id.* at 121.

The practical concerns required to be considered by *Boumediene* were addressed in the panel opinion and reinstated by the en banc court. *Id.* at 119. The *Hernandez* Court found three factors relevant to the extraterritorial determination at issue here: (1) the citizenship and status of the claimant; (2) the nature of the location where the constitutional violation occurred; and (3) the practical obstacles inherent in enforcing the claimed right. *Hernandez v. United States*, 757 F.3d 249, 262 (5th Cir.2014).

As previously discussed, J.A. was a citizen of Mexico whose only connection to the United States was his proximity to the border and frequent visits from his U.S. citizen grandparents. The facts alleged in the complaint do not demonstrate that J.A. had an interest in entering the United States, or that he ever actually entered the United States, even for a brief period of time, and it certainly does not allege any facts on which this Court could find that J.A. was part of the U.S. “national community.” *United States v. Verdugo-Urquidez* 494 U.S. at 265, 273. In sum, J.A.’s status was as a citizen of Mexico with no meaningful ties to the United States.

The alleged violation occurred on Calle Internacional, the street that runs along the border on the Mexican side of the fence that separates Mexico from the United States. A significant factor underlying the Supreme Court’s decision in *Boumediene* was the political history of the location where the injury occurred, to

understand how the United States might exercise control there. *Boumediene v. Bush*, 553 U.S. at 764-65. Plaintiff has attempted to make this showing in paragraphs 21-24 of the complaint.⁹ [CR 18, ¶¶ 21-24; ER 55-56.] Plaintiff asserts, for example, that persons living in the area of the Arizona-Mexico border “recognize” U.S. control of the Mexican side of the border fence in Nogales. [CR 18, ¶ 22; ER 55.] This statement has no factual or legal import and should be regarded as mere opinion, which is not entitled to be accepted as true. *See Ashcroft v. Iqbal*, 556 U.S. at 680 (finding the “conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”)

Plaintiff also asserts that surveillance cameras mounted along the border fence demonstrate U.S. control of Mexican territory, but this example shows nothing of the sort. Cameras are used to enforce U.S. immigration laws and for border security, by monitoring unlawful entry into the United States at locations along the border other than at the Port of Entry. [CR 18, ¶ 23; ER X.] The same is true of pre-inspection activities and Border Patrol fly-overs, which Plaintiff acknowledges is accomplished through official channels with the authority of the Mexican government. [CR 18, ¶ 24; ER 55-56.]

⁹ Paragraphs 25-31 of the First Amended Complaint summarize Plaintiff’s belief that Border Patrol agents systemically abuse their authority near the border through failed use of force policies. These allegations in have no factual or legal relevance to Plaintiff’s claims and should be disregarded. [CR 18; ER 56-58.]

Plaintiff also supports her factual allegations with a quote from the Chief of the Border Patrol, but it does not. [CR 18, ¶ 24; ER 56.] The entire statement by Michael J. Fisher on February 11, 2011 can be found online at <http://www.dhs.gov/news/2011/02/15/us-customs-and-border-protection-border-patrol-chief-michael-fishers-testimony> [last visited December 21, 2015.] The portion quoted by Plaintiff appears in the Introduction, with the Chief explaining the agency's multi-layered approach to create a "zone of security" that extends "outward." He did not imply, as the complaint suggests, that Border Patrol activities extend south of the U.S. border, but rather, that coordinated efforts with law enforcement, law-makers and public and private sector actors have improved the agency's effectiveness at the U.S. border with Mexico.

What is left is Plaintiff's allegation that the U.S. has exerted a sort of brute force control of at least part of Nogales, Sonora, Mexico, by shootings such as occurred here.¹⁰ None of these allegations, even if true, establish the kind of extensive, recognized, extraterritorial control by the United States that was central to the Supreme Court's decision in *Boumediene*. The fact that a border agent has the capacity to fire a weapon into some portions of Mexican territory does not

¹⁰ The district court characterized J.A.'s status as "a civilian foreign national engaged in a peaceful activity in another country, but within the U.S.'s small-arms power to seize." [CR 58, p. 13; ER 15.] Respectfully, to counsel's knowledge, no other court has determined the extraterritorial application of a constitutional provision based on this novel characterization of foreign territory.

remotely approach the type of “complete jurisdiction and control” that the Court found persuasive in *Boumediene*. *Boumediene v. Bush*, 553 U.S. at 755.

On the contrary, citing the uniqueness for Fourth Amendment purposes of the 2,000-mile long border between the United States and Mexico, the Fifth Circuit *Hernandez* panel found that:

“[a]pplication of the Fourth Amendment to [these] circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest’ and could also plunge Border Patrol agents ‘into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.”

Hernandez v. United States, 757 F.3d at 267, citing *Verdugo-Urquidez*, 494 U.S. at 273-74. Judge Dennis wrote a concurring opinion expressing his concern “for pragmatic and political questions” that would arise from the extraterritorial application of the Fourth Amendment under these circumstances. *Id.* at 281. For all of those reasons, the panel concluded that the practical considerations do not support the extraterritorial application of the Fourth Amendment to the alleged seizure of Hernandez, occurring outside of the United States and involving a foreign national.

The same result is compelled here. There is no undefined area on the Mexican side of the U.S.-Mexico border that is analogous to the United States Naval Station at Guantanamo Bay, which is based on both a lease and a treaty.

Moreover, occasional exercises of authority across the border and enforcement activities such as described in the complaint, do not transform some undefined zone of northern Mexico into an area akin to Guantanamo Bay.

Finally, a decision to extend the Fourth Amendment into an area of Mexico would cause a great deal of confusion with respect to the limits of this Court's decision. If J.A. was protected by the Fourth Amendment because he was walking on Calle Internacional, does a plaintiff some other distance south also have federal constitutional rights? How far must a Mexican citizen be from the United States border in order to have a right to sue under the United States constitution? How would the limits of the newly protected area be defined?

These practical considerations, viewed under the rubric of *Boumediene's* functional approach, weigh heavily against the extraterritorial application of the Fourth Amendment to J.A.

C. Even Assuming Arguendo that the Fourth Amendment May Be Applied Extraterritorially to J.A., His Rights Were Not Clearly Established At The Time of Agent Swartz's Alleged Misconduct

The Supreme Court has carefully admonished courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 131 S.Ct. at 2084. As the District of Columbia Circuit Court in observed, the proper inquiry is not whether the Constitution prohibits the conduct at issue, but whether the rights pressed by the plaintiff under the specific Amendment was clearly established at

the time of the alleged violation. *Ali v. Rumsfeld*, 649 F.3d at 771 . The court went on to conclude that even though it was well-settled that the Constitution clearly forbids the torture of any detainee, it was not clearly established in 2004 that the Fifth and Eighth Amendments apply to aliens held in Iraq and Afghanistan. Therefore, the court found the defendants were protected from the plaintiffs’ constitutional claims by qualified immunity. *Id* .

Similarly here, even if the constitutional limits relating to the use of deadly force by the government were clearly established at the time of this incident, the proper inquiry is whether the Fourth Amendment’s extraterritorial application to J.A. was clearly established in October of 2012.

This question must be answered in the negative. The *Hernandez* En Banc court correctly found, when considering this very question, that nothing in the *Boumediene* opinion “presages, with the directness that the ‘clearly established’ standard requires, whether the Court would extend the territorial reach of a different constitutional provision [the Fifth Amendment] and would do so where the injury occurs on soil that is indisputably foreign and beyond the United States’ territorial sovereignty.” *Hernandez v. United States*, 785 F.3d. at 121.

In addition, eight months prior to the incident alleged in this case, this Court recognized that “[t]he Supreme Court has held in a series of cases that the border of the United States is not a clear line that separates aliens who may bring

constitutional challenges from those who may not.” *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d at 995.

Even today it is not clear that any constitutional provision applies to a cross-border shooting as occurred here. Perhaps the best evidence of this is the petition for writ of certiorari pending in the United States Supreme Court on behalf of the plaintiff in the Hernandez case. See *Hernandez v. Mesa*, Supreme Court Docket No. 15-118 (7/23/15).¹¹ Erwin Chemerinsky, Dean and Distinguished Professor of Law at the University of California, Irvine School of Law, is a nationally recognized constitutional scholar who filed a brief for amicus Curiae in support of petitioners. Dean Chemerinsky’s brief urges the Court to grant review in order to clarify: 1) the applicability of *Boumediene* to constitutional claims other than those involving the suspension clause; 2) how *Boumediene* and *Verdugo-Urquidez* govern Fourth Amendment claims that arise extraterritorially; and 3) how to evaluate recurring instances of deadly force at the border. See Brief amicus curiae of Dean Erwin Chemerinsky, Sup.Ct. Dkt. 15-118 (8/26/15). Such urging would be unnecessary, of course, if answers to these questions were already clear. That they are not supports Agent Swartz’s position that he is entitled to qualified immunity, because the extraterritorial application of the constitutional right at issue was not clearly established at the time of his alleged misconduct.

¹¹ On November 30, 2015, the Court invited the Solicitor General “to file a brief in this case expressing the views of the United States.” See S.Ct. Dkt 15-118.

CONCLUSION

For all the foregoing reasons, this Court should find that Agent Swartz is entitled to qualified immunity. Plaintiff's complaint must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6).

DATED December 23, 2015

/s/ Sean Chapman

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STATEMENT OF RELATED CASES

Counsel for Appellant is not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

DATED this December 23, 2015

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CERTIFICATE OF COMPLIANCE

Counsel for Defendant-Appellant certifies that the foregoing Brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14 point font and contains 6,127 words.

DATED this December 23, 2015

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CERTIFICATE OF FILING AND SERVICE

Undersigned counsel hereby certifies that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 23, 2015.

Counsel further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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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.

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

APPELLANT'S EXCERPTS OF RECORD

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ER 3	7/9/15	[CR58]	Order Denying Motion to Dismiss
ER 24	5/26/15		Transcript of Oral Argument on Motion to Dismiss
ER 50	9/10/14	[CR18]	First Amended Complaint
ER 61			District Court Docket Sheet 4:14-cv-02251-RCC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARACELI RODRIGUEZ,)	CASE NO.: CV-14-02251-TUC-RCC
)	
Plaintiff,)	
)	NOTICE OF APPEAL
v.)	
)	
LONNIE SWARTZ, et. al.,)	
)	
Defendants.)	

NOTICE IS HEREBY GIVEN that the Defendant in the above-captioned case, LONNIE SWARTZ, hereby appeals to the Court of Appeals for the Ninth Circuit from the District Court’s Order entered on July 9, 2015 (Doc. 58) denying the Fourth Amendment and Qualified Immunity aspects of the defendant’s Motion to Dismiss. This Order is appealable pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (we hold that a district court’s denial of a claim of qualified immunity is an appealable “final decision” within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment); *United States v. Chavez*, 683 F.3d 1102, 1108 (9th Cir. 2012).

1 RESPECTFULLY SUBMITTED this 14th day of July, 2015.

2 LAW OFFICES OF SEAN C. CHAPMAN, P.C.

3 By: /s/Sean Chapman
4 Sean C. Chapman

5
6 CERTIFICATE OF SERVICE

7 I hereby certify that on July 14, 2015, I electronically filed the foregoing with the Clerk
8 of Court for the United States District Court by using the appellate CM/ECF system. I further
9 certify that all participants in the case are registered CM/ECF users and that service will be
accomplished by the CM/ECF system.

10 By: /s/Sean Chapman
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Araceli Rodriguez,

10 Plaintiff,

11 v.

12 Lonnie Swartz,

13 Defendant.
14

No. 4:14-CV-02251-RCC

ORDER

15 **INTRODUCTION**

16 This case calls on the Court to answer two challenging questions: 1) whether a
17 Mexican national standing on the Mexican-side of the United States and Mexico border
18 at the time of the alleged violation can avail himself of the protections of the Fourth and
19 Fifth Amendments of the United States Constitution when a U.S. Border Patrol agent
20 standing in the United States uses excessive force against him; and 2) whether a U.S.
21 Border Patrol agent may assert qualified immunity based on facts he found out after the
22 alleged violation.

23 Specifically before the Court are Plaintiff Araceli Rodriguez' First Amended
24 Complaint ("FAC") (Doc. 18), Defendant Lonnie Swartz' Fed.R.Civ.P. Rule 12(b)(6)
25 Motion to Dismiss (Doc. 30), Rodriguez' Response (Doc. 46), and Swartz' Reply (Doc.
26 49). The Court heard oral arguments on this matter on May 26, 2015. For the reasons
27 stated below, the Court grants in part and denies in part Swartz' Motion to Dismiss.

28 //

BACKGROUND

The Court sets forth the following factual background and hereby imparts that these statements are reiterations of Rodriguez' allegations which may or may not be a complete and accurate rendition of the facts of this case. *See* (Doc. 18). At this stage in the proceedings, Swartz has made no concessions as to the veracity of Rodriguez' allegations nor presented any contravening facts; such facts are not required when filing a Rule 12(b)(6) motion to dismiss.

1. Rodriguez brings this suit on behalf of her deceased minor son, J.A. (Doc. 18 at ¶¶ 3, 6).
2. On the night of October 10, 2012, J.A. was walking home alone down the sidewalk of Calle Internacional, a street that runs alongside the border fence on the Mexican side of the border between the United States and Mexico. (Doc. 18 at ¶ 9).
3. According to an eyewitness who was walking behind J.A. that night, a Border Patrol agent stationed on the U.S. side of the fence, now known to be Swartz, opened fire. According to various reports, Swartz fired anywhere from 14 to 30 shots. Upon information and belief, Swartz did not issue any verbal warnings before opening fire. (Doc. 18 at ¶ 10).
4. J.A. was shot approximately ten times and collapsed where he was shot. Virtually all of the shots entered his body from behind. Upon information and belief, no one else was shot. (Doc. 18 at ¶¶ 11-13).
5. Immediately prior to the shooting, J.A. was visible and not hiding—he was peacefully walking down the street by himself. Eyewitnesses state that he did not pose a threat and was not committing a crime, throwing rocks, using a weapon or threatening U.S. Border Patrol agents or anyone else prior to being shot. (Doc. 18 at ¶ 14).
6. At the moment he was shot, J.A. was walking on the southern side of Calle Internacional, directly across the street from a sheer cliff face that rises approximately 25 feet from street level. The cliff is approximately 30 feet from where J.A. was standing when shot. The border fence, which is approximately 20-25 feet tall, runs along the top of the cliff. Thus, at the location where J.A. was shot, the top of the fence towards approximately 50 feet above street level on the Mexican side. The fence itself is made of steel beams that are 6.5 inches in

1 diameter. Each beam is approximately 3.5 inches apart from the next. (Doc. 18 at
2 ¶ 15).

3 7. At the time of the shooting, J.A. lived in Nogales, Sonora, Mexico, approximately
4 four blocks from where he was shot. Because J.A.'s mother (Plaintiff, Araceli
5 Rodriguez) was away for work, J.A.'s grandmother often visited Nogales, Mexico
6 to care for him. J.A.'s grandmother and grandfather live in Arizona and were
7 lawful permanent residents of the United States at the time of the shooting. They
8 are now U.S. citizens. (Doc. 18 at ¶ 17).

9 8. Swartz fired from the U.S. side of the fence. Swartz acted under color of law
10 when shooting J.A. Upon information and belief, Swartz did not know whether
11 J.A. was a U.S. citizen or whether J.A. had any significant contacts with the
12 United States. (Doc. 18 at ¶¶ 17, 19).

13 9. J.A.'s killing by Swartz is not a unique event, but part of a larger pattern of
14 shootings by Border Patrol agents in Nogales and elsewhere. (Doc. 18 at ¶ 20).

15 10. The U.S.-Mexico border area of Mexico is unlike other areas of Mexico. U.S.
16 Border Patrol agents not only control the U.S. side of the fence, but through the
17 use of force and assertion of authority, also exert control over the immediate area
18 on the Mexican side, including where J.A. was shot. (Doc. 18 at ¶ 21).

19 11. U.S. control of the Mexican side of the border fence in Nogales and other areas
20 along the Southern border is apparent and longstanding, and recognized by
21 persons living in the area. (Doc. 18 at ¶ 22).

22 12. Border Patrol agents use guns, non-lethal devices and other weapons, as well as
23 military equipment and surveillance devices to target persons on the Mexican side
24 of the border. For example, U.S. surveillance cameras are mounted along the
25 border fence, monitoring activity on the Mexican side of the fence. Additionally,
26 Border Patrol agents have opened fire into Nogales from the U.S. side on prior
27 occasions and are known to launch non-lethal devices such as pepper spray
28 canisters into Nogales neighborhoods from the U.S. side of the border fence.
(Doc. 18 at ¶ 23).

13. U.S. Border Patrol agents exercise control over areas on the Mexican side of the
border adjacent to the international border fence. U.S. Border Patrol agents make
seizures on the Mexican side of the fence. U.S. Bureau of Customs and Border
Protection officials are authorized to be on Mexican soil to conduct pre-inspection
of those seeking admission to the United States. U.S. Border Patrol helicopters
fly in Mexican airspace near the border and swoop down on individuals. (Doc. 18
at ¶ 24).

1
2 14. The Chief of the U.S. Border Patrol has acknowledged that U.S. border security
3 policy “extends [the United States’] zone of security outward, ensuring that our
4 physical border is not the first or last line of defense, but one of many.” *Securing*
5 *Our Borders—Operation Control and the Path Forward: Hearing Before the*
6 *Subcomm. on Border and Maritime Security of the H. Comm. on Homeland*
7 *Security*, 112th Cong. 8 (2011) (prepared by Michael J. Fisher, Chief of U.S.
8 Border Patrol). (Doc. 18 at ¶ 24).

9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

LEGAL STANDARD

“On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint ‘contains sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678; *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1108-09; see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). In determining plausibility, the court must accept as true all material factual allegations in the complaint, construe the pleadings in the light most favorable to the plaintiff and make any reasonable inferences therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). A court may dismiss a claim if a successful affirmative defense appears clearly on the face of the pleadings. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

DISCUSSION

I. *Bivens*, the extraterritorial application of the U.S. Constitution and qualified immunity

Rodriguez asserts her claims against Swartz in his individual capacity for deprivation of J.A.’s constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. (Doc. 18 at p.8). See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court of the United States held that money damages may be recovered against a federal official for

1 violation of a plaintiff's constitutional rights. In order to successfully allege a *Bivens*
2 claim, a plaintiff must plead factual matter demonstrating that he was deprived of a
3 clearly established constitutional right. *Iqbal*, 556 U.S. at 666.

4 Swartz argues that Rodriguez cannot state a claim that J.A. was deprived of a
5 constitutional right because J.A., a Mexican citizen without substantial voluntary
6 connections to the United States and standing on Mexican soil at the time of the alleged
7 violation, is not entitled to the protections of the Fourth and Fifth Amendments of the
8 United States Constitution. Should this Court hold that J.A. was protected by either or
9 both Amendments, Swartz asserts that he is entitled to qualified immunity because J.A.'s
10 rights pursuant to the Fourth or Fifth Amendments were not clearly established at the
11 time of the alleged violation.

12 Rodriguez responds by arguing that this Court need not analyze this case as an
13 extraterritorial application of the United States Constitution because Swartz' conduct
14 took place entirely within the United States. Should the Court consider the extraterritorial
15 application of the Constitution, Rodriguez asserts that J.A. was protected by both the
16 Fourth and Fifth Amendments even while on Mexican soil. Rodriguez further avers that
17 Swartz should not be entitled to qualified immunity because he knew it was a crime to
18 fatally shoot a Mexican citizen across the border without justification, and because
19 Swartz did not know J.A.'s legal status or citizenship when he shot J.A., such that
20 qualified immunity should not apply post-hoc Swartz' awareness of J.A.'s citizenship.

21 **II. *Hernandez v. United States et al.* is persuasive, not controlling, authority**

22 The parties' arguments before this Court are framed in reference to *Hernandez v.*
23 *United States*, 757 F.3d 249 (5th Cir. 2014), a case with very similar arguments to those
24 now before the Court:

25 On June 7, 2010, Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican
26 national, was on the Mexican side of a cement culvert that separates the United States
27 from Mexico. *Id.* at 255. Sergio had been playing a game with his friends that involved
28 running up the incline of the culvert, touching the barbed-wire fence separating Mexico

1 and the United States, and then running back down the incline. *Id.* U.S. Border Patrol
2 Agent Jesus Mesa, Jr. arrived on the scene and detained one of Sergio’s friends, causing
3 Sergio to retreat and hide behind the pillars of a bridge on the Mexican side of the border.
4 *Id.* Mesa, still standing in the United States, then fired at least two shots at Sergio, one of
5 which struck Sergio in the face and killed him. *Id.*

6 Sergio’s parents filed suit against the United States, unknown federal employees,
7 and Mesa. *Id.* Similarly to the case before this Court, the claim against Mesa was made
8 pursuant to *Bivens* for violations Sergio’s Fourth and Fifth Amendment rights through the
9 use of excessive, deadly force. *Id.* Mesa moved to dismiss the claims against him
10 asserting qualified immunity and arguing that Sergio, as an alien injured outside the
11 United States, lacked Fourth or Fifth Amendment protections. *Id.* at 256. The U.S.
12 District Court for the Western District of Texas agreed and dismissed the claims against
13 Mesa. *Id.* Sergio’s parents appealed.

14 A divided three judge panel of the Court of Appeals for the Fifth Circuit held that
15 in Sergio’s case when, “an alleged seizure occur[s] outside of [the U.S.] border and
16 involving a foreign national—the Fourth Amendment does not apply.” *Id.* at 267.
17 Nevertheless, the panel majority also held “that a noncitizen injured outside the United
18 States as a result of arbitrary official conduct by a law enforcement officer located in the
19 United States may invoke the protections provided by the Fifth Amendment.” *Id.* at 272.
20 The panel further found that *Bivens* extends to an individual located abroad who asserts
21 the Fifth Amendment right to be free from gross physical abuse against federal law
22 enforcement agents located in the United States based on their conscience-shocking,
23 excessive use of force across our nation’s borders. *Id.* at 277. Finally, the panel held that
24 the facts alleged in the complaint defeated Mesa’s claim of qualified immunity stating:
25 “It does not take a court ruling for an official to know that no concept of reasonableness
26 could justify the unprovoked shooting of another person.” *Id.* at 279-80 (citing *Hope v.*
27 *Pelzer*, 536 U.S. 730, 741 (2002)).

28 Upon Mesa’s motion, the Fifth Circuit Court of Appeals agreed to rehear

1 *Hernandez* en banc. 771 F.3d 818 (5th Cir. 2014). In a per curiam decision, a unanimous
2 Fifth Circuit Court of Appeals affirmed the district court's dismissal of both counts
3 against Mesa holding that Sergio's parents failed to allege a violation of the Fourth
4 Amendment, and that Sergio's Fifth Amendment rights were not "clearly established"
5 when he was shot. *Hernandez v. United States et al.*, --- F.3d --- (5th Cir. April 24, 2015);
6 2015 WL 1881566, at *1. In holding Sergio's Fifth Amendment rights were not "clearly
7 established," the Fifth Circuit Court of Appeals gave allegiance to the general rule of
8 constitutional avoidance and bypassed the issue of whether Sergio was entitled to
9 constitutional protection as a noncitizen standing on foreign soil. *Id.* at *2. At least three
10 judges wrote concurring opinions on the matter—each attempting to reconcile and apply
11 various Supreme Court holdings (including *Johnson v. Eisentrager*, 399 U.S. 763
12 (1950); *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Verdugo-Urquidez*, 494 U.S.
13 259 (1990); and *Boumediene v. Bush*, 553 U.S. 723 (2008)) to facts unique to the Fifth or
14 any other circuit.

15 Swartz urges the Court to follow the Fifth Circuit Court of Appeals' en banc
16 decision and dismiss both of Rodriguez' claims based on theories of constitutional
17 extraterritoriality and qualified immunity. Rodriguez avers that *Hernandez* was wrongly
18 decided and holds no precedential value in this Circuit. The Court agrees that *Hernandez*
19 is not controlling authority in this circuit. All the same, the Court has been guided by the
20 thorough historical and legal analysis of the complex issues addressed in the Fifth Circuit
21 Appellate judges' opinions and utilized the *Hernandez* decisions as a frame of reference.
22 Nevertheless, while *Hernandez* shares many similar arguments to the case at hand, this
23 Court evaluates Rodriguez' case on the facts alleged in her First Amended Complaint, on
24 the arguments made by the parties' in their pleadings, and in light of the Ninth Circuit
25 Court of Appeal's applicable and controlling case law. Applying this Circuit's case law
26 to the facts of this specific case, this Court respectfully disagrees with the Fifth Circuit
27 Court of Appeals and arrives at a different conclusion as outlined below.

28 //

III. J.A.'s seizure occurred in Mexico

The Court begins with Rodriguez' contention that there is no need to analyze J.A.'s seizure as an extraterritorial application of the constitution because Swartz' conduct occurred entirely within the United States. To support her position, Rodriguez cites to use the language in footnote sixteen of *Wang v. Reno*, 81 F.3d 808, 818 n.16 (9th Cir. 1996) stating that the government's conduct in the United States can constitute a violation abroad. However, the Court in *Wang* clearly stated that "[t]he deprivation [of Wang's due process rights] occurred on American soil when Wang was forced to take the witness stand," and that the actions taken while Wang was abroad were "inextricably intertwined with the ultimate violation." *Id.* Such is not the same in the present case where the ultimate violation, J.A.'s seizure, occurred entirely in Mexico.

A seizure occurs "only when there is a governmental termination of freedom of movement..." *Brower v. Cnty of Inyo*, 489 U.S. 593, 596-97 (1989). In this case, J.A. was not seized when Swartz shot at him, but when the bullets entered J.A.'s body and impeded further movement. As such, any constitutional violation that may have transpired materialized in Mexico. Accordingly, the Court now turns to the question of whether the Fourth and/or Fifth Amendments of the United States Constitution protect J.A. outside the United States.¹

IV. Rodriguez' claim that Swartz violated J.A.'s Fourth Amendment rights survives

A. Both *Boumediene* and *Verdugo-Urquidez* apply

The Supreme Court of the United States "has discussed the issue of the Constitution's extraterritorial application on many occasions." *Boumediene*, 553 U.S. at 755-71. However, it was not until 2008's *Boumediene v. Bush* that the Supreme Court held for the first time that noncitizens detained by the United States government in

¹ The Court also rejects as unpersuasive Rodriguez' argument pursuant to *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987): that judicial proceedings, and therefore, any government actions that could violate the litigants' rights take place inside the United States. *Asahi* focused on when a state court could exercise personal jurisdiction over a foreign corporation. Jurisdiction is not at issue in this case.

1 territory over which another country maintains de jure sovereignty have any rights under
2 the United States Constitution. *Id.* at 771 (addressing whether the Suspension Clause has
3 full effect at Naval Station in Guantanamo Bay in case where aliens detained as enemy
4 combatants sought the Writ of Habeas Corpus).

5 In their pleadings, the parties disagree as to which standard the Court should apply
6 to decide whether the Fourth and Fifth Amendments of the United States Constitution
7 apply in this case. Swartz argues that *Boumediene* is limited to the Suspension Clause and
8 inapplicable in the present case. Further, Swartz avers that the “voluntary connections”
9 test announced in *Verdugo-Urquidez*’ controls Rodriguez’ Fourth Amendment claim.
10 *Verdugo-Urquidez*, 494 U.S. at 261, 271 (holding that the Fourth Amendment does not
11 apply to the search and seizure by United States agents of property owned by a
12 nonresident and located in a foreign country where nonresident had no voluntary
13 connection to the United States). Rodriguez responds that *Verdugo-Urquidez*’ “voluntary
14 connections” test was repudiated by the Supreme Court in *Boumediene* where the Court
15 applied a “general functional approach” and “impracticable and anomalous” standard
16 when determining the extraterritoriality of the United States Constitution. 553 U.S. at
17 755-72.

18 The Fifth Circuit Court of Appeals grappled with this very question in addressing
19 *Hernandez* and decided to apply *Verdugo-Urquidez*’ “sufficient connections
20 requirement” in light of *Boumediene*’s “general functional approach” as to the Fourth
21 Amendment claim. *Hernandez*, 757 F.3d at 266. In arriving at this conclusion, the Fifth
22 Circuit Court of appeals rejected 1) Defendant Mesa’s argument that the Constitution
23 does not guarantee rights to foreign nationals injured outside the sovereign territory of the
24 United States, 2) the district court’s finding that *Boumediene* was limited to the
25 Suspension Clause, and 3) the plaintiffs’ argument that the Court should ignore *Verdugo-*
26 *Urquidez* in light of *Boumediene*. *Id.* at 260, 262, and 265. Applying both standards, the
27 appellate court considered the fact that Hernandez lacked: American citizenship,
28 territorial presence in the United States, interest in entering the United States, acceptance

1 of societal obligations, and sustained connections to the United States. *Id.* Additionally,
2 the Court weighed several practical considerations in determining whether Hernandez
3 was protected by the Fourth Amendment including the uniqueness of the border. *Id.* at
4 266-67 (discussing the limited application of the Fourth Amendment during searches at
5 the border, national self-protection interests, the increase of Border Patrol agents at the
6 southwest border, and the use of sophisticated surveillance systems). Ultimately, the
7 appellate court found that Hernandez was not entitled to the protections of the Fourth
8 Amendment based on the facts alleged.

9 The Ninth Circuit Court of Appeals similarly determined that both *Boumediene*'s
10 "functional approach" factors and *Verdugo-Urquidez*' "significant voluntary connection"
11 test applied in the case of a woman seeking to assert her rights under the First and Fifth
12 Amendments of the United States Constitution. *Ibrahim v. Dep't of Homeland Sec.*, 669
13 F.3d 983, 994-97 (9th Cir. 2012). The Court found a comparison of Ibrahim's case with
14 *Verdugo-Urquidez*, *Eisentrager*, and *Boumediene* instructive in rejecting the
15 government's bright-line "formal sovereignty-based" test and in holding that the plaintiff
16 had established voluntary connections to the United States during her studies at an
17 American university. *Id.* at 995-97. Similarly, this Court finds an analysis of these cases
18 instructive in finding that both *Boumediene*'s functional approach factors and *Verdugo-*
19 *Urquidez* "voluntary connections" test apply in this case.

20 In 1950's *Eisentrager*, the Supreme Court of the United States found that German
21 citizens who had been arrested in China, convicted of violating the laws of war after
22 adversary trials before a U.S. military tribunal in China, and sent to a prison in Germany
23 to serve their sentences did not have the right to seek the Writ of Habeas Corpus under
24 the United States Constitution. 339 U.S. at 770-77 (considering (a) petitioners' status as
25 enemy aliens; (b) lack of previous territorial presence or residence in the United States;
26 (c) capture and custody by U.S. military as prisoners of war; (d) convictions by Military
27 Commission sitting outside the United States; (e) for offenses against laws of war
28 committed outside the United States; and (f) at all times imprisoned outside the United

1 States.)

2 In 1990's *Verdugo-Urquidez*, a Mexican-national was extradited from Mexico to
3 face drug charges in the United States. 494 U.S. at 262. While awaiting trial, American
4 law enforcement agents working with Mexican authorities performed a warrantless
5 search of Verdugo-Urquidez' Mexican residences and seized various incriminating
6 documents. *Id.* The criminal defendant sought to suppress this evidence and alleged
7 violations of his Fourth Amendment rights. *Id.* at 263. The Supreme Court of the United
8 States considered the text and history of the Fourth Amendment, as well as Supreme
9 Court cases discussing the application of the Constitution to aliens extraterritorially. The
10 Supreme Court found that under the circumstances (where Verdugo-Urquidez was a
11 citizen and resident of Mexico with no voluntary attachment to the United States and the
12 place to be searched was located in Mexico), the Fourth Amendment had no application.
13 *Id.* at 274-75. Concurring in the opinion, Justices Kennedy and Stevens each wrote
14 separately to address the fact that applying the Warrant Clause to searches of noncitizens'
15 homes in foreign jurisdictions would be impractical and anomalous due to practical
16 considerations. *Id.* at 275-79.

17 In 2008's *Boumediene*, the plaintiffs were aliens who had been designated as
18 enemy combatants, were detained at the United States Naval Station in Guantanamo Bay,
19 Cuba, and sought the Writ of Habeas Corpus. 553 U.S. at 732. The government argued
20 that because of their status as enemy combatants and their physical location outside the
21 sovereignty of the United States, they had no constitutional rights and no privilege to
22 Habeas Corpus. *Id.* at 739. The Supreme Court rejected the government's argument
23 instead finding that "questions of extraterritoriality turn on objective factors and practical
24 concerns, not formalism." *Id.* at 764. In so holding, *Boumediene* addressed both
25 *Eisentrager* and *Verdugo-Urquidez* and found both of these decisions to stand for the
26 proposition that the extraterritorial reach of the constitution depends upon "practical
27 considerations" including the "particular circumstances, the practical necessities, and the
28 possible alternatives which Congress had before it" and in particular, whether judicial

1 enforcement of the provision would be “impracticable and anomalous.” *Id.* at 759-66.

2 In *Ibrahim*, the Court of Appeals for the Ninth Circuit considered that Ibrahim was
3 unlike the plaintiffs in *Eisentrager*—she had not been convicted of, or even charged with
4 violations of any law. 669 F.3d at 996. On the other hand, Ibrahim shared an important
5 similarity with the plaintiffs in *Boumediene*—she sought the right to assert constitutional
6 claims in a civilian court in order to correct what she contended was a mistake. *Id.* at 997.
7 Here, J.A. was also unlike the plaintiffs in *Eisentrager*—he had not been charged with or
8 convicted of violating any law. Similarly to the plaintiffs in *Boumediene*, J.A. was on
9 foreign soil when he was seized by American forces and now seeks to assert that his
10 seizure was unlawful. Per this Circuit’s precedent in *Ibrahim* and the Supreme Court’s
11 reasoning in *Boumediene*, this Court sees no reason why *Boumediene* should not apply in
12 this case. Because *Verdugo-Urquidez* has not been overruled and considers the Fourth
13 Amendment explicitly, this Court finds that it must also apply the “voluntary
14 connections” test. In sum, this Court finds most appropriate to apply the “practical
15 considerations” outlined in *Boumediene* in conjunction with *Verdugo-Urquidez*’
16 “voluntary connections” test to evaluate whether J.A. was protected by the Fourth
17 Amendment.

18 B. The facts alleged in this case weigh in favor of establishing that J.A. was entitled
19 to the protections of the Fourth Amendment of the U.S. Constitution

20 The Supreme Court stated three factors relevant to determining the extraterritorial
21 application of the Constitution (specifically the Suspension Clause) in *Boumediene*: (1)
22 the citizenship and status of the claimant, (2) the nature of the location where the
23 constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the
24 claimed right. 553 U.S. at 766-71. The relevant obstacles included, but were not limited
25 to, the consequences for U.S. actions abroad, the substantive rules that would govern the
26 claim, and the likelihood that a favorable ruling would lead to friction with another
27 country’s government. *Id.* at 766. The Court considers these along with the “voluntary
28 connections” test outlined in *Verdugo-Urquidez* to find that Rodriguez can assert J.A.’s
rights pursuant to the Fourth Amendment.

1 To begin, the Court considers J.A.’s citizenship, status, and voluntary connections
2 to the United States. J.A. was a sixteen-year-old Mexican citizen. *See* Doc. 18 at ¶¶ 1-2.
3 At the time Swartz seized him, J.A. was not suspected of, charged with, or convicted of
4 violating any law. Just prior to the shooting, J.A. was visible and not hiding. *Id.* at ¶14.
5 Observers stated that he did not pose a threat, but was peacefully walking down the
6 street. *Id.* He was not committing a crime, nor was he throwing rocks, using a weapon, or
7 in any way threatening U.S. Border Patrol agents or anyone else. *Id.* Further, J.A. was not
8 a citizen of a country with which the United States are at war, nor was he engaged in an
9 act of war or any act that would threaten the national security of the United States. *Id.*
10 Thus, J.A.’s status was that of a civilian foreign national engaged in a peaceful activity in
11 another country, but within the U.S.’s small-arms power to seize. The Court here finds
12 that while J.A.’s nationality weighs against granting him protection pursuant to the
13 Fourth Amendment, his status as a civilian engaged in peaceful activity weighs in favor
14 of granting him protection despite the fact that J.A. was in the territory of another country
15 when he was seized.

16 As to substantial voluntary connections to the United States, this Court finds that
17 J.A. had at least one. J.A. and his family lived within the region formerly called “ambos
18 Nogales,” or “both Nogales,” referring to the adjacent towns of Nogales, Arizona and
19 Nogales, Sonora—once adjacent cities flowing into one-another, now divided by a fence.
20 *Id.* at ¶ 17. In particular, J.A. had strong familial connections to the United States. Both
21 his grandparents were legal permanent residents (now citizens) of the United States
22 residing in Nogales, Arizona. *Id.* J.A.’s grandmother would often cross the border into
23 Mexico to care for J.A. while his mother worked. *Id.* Further, J.A.’s home in Nogales,
24 Sonora, Mexico was within four blocks’ distance from the U.S.-Mexico border. *Id.*
25 Living in such proximity to this country, J.A. was likely well-aware of the United States’
26 (and specifically the U.S. Border Patrol’s) *de facto* control and influence over Nogales,
27 Sonora, Mexico. *Id.* at ¶¶ 17, 21-24.

28 //

1 The Court here considers these same factors in assessing the nature of the location
2 where the alleged constitutional violation occurred.² Specifically, the Court considers
3 Rodriguez’ factual allegations that the U.S.-Mexico border is unlike other areas of
4 Mexico. *Id.* at ¶¶ 21-24. “U.S. Border Patrol agents not only control the U.S. side of the
5 fence, but through the use of force and assertion of authority, they also exert control over
6 the immediate area on the Mexican side, including where J.A. was shot.” *Id.* at ¶ 21.
7 “U.S. control of the Mexican side of the border fence in Nogales and other areas along
8 the Southern border is apparent and longstanding, and recognized by persons living in
9 this area.” *Id.* at ¶ 22. “Border patrol agents use guns, non-lethal devices and other
10 weapons, as well as military equipment and surveillance devices to target persons on the
11 Mexican side of the border....Border Patrol agents have opened fire into Nogales from
12 the U.S. side on prior occasions and are known to launch non-lethal devices such as
13 pepper spray canisters into Nogales neighborhoods from the U.S. side of the border
14 fence. By shooting individuals on the Mexican side of the border area, the United States,
15 through Border Patrol, controls the area immediately adjacent to the international border
16 fence on the Mexican side. This control extended to the street, Calle Internacional, where
17 J.A. was killed.” *Id.* at ¶ 23. The Court finds this factor to weigh in favor of granting J.A.
18 constitutional protection pursuant to the Fourth Amendment.

19 The Court also considers the practical obstacles inherent in enforcing the claimed
20 right. These considerations include the nature of the right asserted, the context in which
21 the claim arises, and whether recognition of the right would create conflict with a foreign
22 sovereign’s laws and customs. *Boumediene*, 553 U.S. at 755-65. The nature of the right
23 asserted here is the right to be free from unreasonable seizures—specifically, the
24 fundamental right to be free from the United States government’s arbitrary use of deadly
25 force. *See* Doc. 18 at ¶¶ 35-38. The claim here arises as a lawsuit in a United States court

26
27 ² *See Hernandez v. United States*, 757 F.3d 249, 267 (5th Cir. 2014) (outlining the scope
28 of the U.S. Border Patrol’s presence and influence along the U.S.’s southwest border with
Mexico.) *See also Boumediene*, 553 U.S. at 754 (“Our cases do not hold it is improper for
us to inquire into the objective degree of control the Nation asserts over foreign
territory.”)

1 and asks that this court apply U.S. constitutional law to the actions of a U.S. Border
2 Patrol agent firing his weapon from within the United States. *Id.* at ¶¶ 4-5.; *Cf.*
3 *Boumediene*, 553 U.S. at 759-64 (discussing practical considerations of providing
4 plaintiffs with ability to assert their rights abroad). Rodriguez has provided
5 documentation from the Mexican government such that there would be no conflict with
6 Mexico's laws and customs if this Court afforded J.A. protection under the Fourth
7 Amendment. *See* Doc. 46-1. The Court finds that these factors weigh in favor of granting
8 J.A. protection under the Fourth Amendment.

9 Finally, the Court gives weight to the Supreme Court's concerns in *Verdugo-*
10 *Urquidez*—that applying the Fourth Amendment to the warrantless search and seizure of
11 a Mexican national's home in Mexico “could significantly disrupt the ability of the
12 political branches to respond to foreign situations involving our national interest” and
13 could also plunge U.S. law enforcement and military agents “into a sea of uncertainty as
14 to what might be reasonable in the way of searches and seizures conducted abroad.” 494
15 U.S. at 273-74; *see also Hernandez*, 757 F.3d at 267 (noting that extending the Fourth
16 Amendment protections to a Mexican national on Mexican soil might carry a host of
17 implications for U.S. Border Patrol's use of sophisticated surveillance systems (including
18 mobile surveillance units, thermal imaging systems, unmanned aircrafts and other large-
19 and small-scale non-intrusive inspection equipment per, *Kyllo v. United States*, 533 U.S.
20 27, 40 (2001))).

21 The Court here finds that such concerns are ameliorated by the fact that this case
22 does not involve the Warrant Clause of the Fourth Amendment, magistrate judges, or the
23 issuance of warrants and/or the searches and seizure of property abroad. This case
24 addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals
25 at and near the United States-Mexico border. U.S. Border Patrol agents are already
26 trained in the limits of the Fourth Amendment when addressing citizens and non-citizens
27 alike when these individuals place foot within the United States. *See, e.g.* 8 C.F.R. §
28 287.8(a)(2). These agents would require no additional training to determine when it is

1 appropriate to use deadly force against individuals (whether citizens or noncitizens alike)
2 located on the Mexican side of the United States-Mexico border.

3 Weighing all of the aforementioned factors, this Court finds that J.A. was entitled
4 to protection pursuant to the Fourth Amendment. The Court acknowledges that it has
5 arrived at a different conclusion from that of the Court of Appeals for the Fifth Circuit in
6 *Hernandez v. U.S.*, 757 F.3d at 267. This Court respectfully disagrees with how the
7 Circuit Court weighed some factors, but bases its decision to extend J.A. protection
8 pursuant to the Fourth Amendment on the facts alleged in Rodriguez' First Amended
9 Complaint and this Court's own analysis of the relevant case law. (Doc. 18). At its heart,
10 this is a case alleging excessive deadly force by a U.S. Border Patrol agent standing on
11 American soil brought before a United States Federal District Court tasked with
12 upholding the United States Constitution—that the deceased was a Mexican national
13 standing on Mexican soil at the time the violation occurred is but one of the many
14 practical considerations and factors the Supreme Court of the United States has ordered
15 the lower courts to consider. Pursuant to the facts presented before this Court in
16 Rodriguez' First Amended Complaint, the factors outlined in *Verdugo-Urquidez* and
17 *Boumediene* weigh in favor of extending J.A. constitutional protection pursuant to the
18 Fourth Amendment.

19 **V. Rodriguez' claim pursuant to the Fifth Amendment is dismissed**

20 Rodriguez' First Amended Complaint alleges that Swartz' actions violated J.A.'s
21 Fifth Amendment guarantee of substantive due process. In his motion to dismiss, Swartz
22 alleges that Rodriguez' Fifth Amendment claim is improperly before this Court as a
23 substantive due process violation that is best analyzed pursuant to the Fourth
24 Amendment.

25 In fact, the Supreme Court of the United States has held that “all claims that law
26 enforcement officers have used excessive force—deadly or not—in the course of an
27 arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the
28 Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive

1 due process’ approach.” *Graham v. Connor*, 490 U.S. 386, 395 (1989); *see also Albright*
2 *v. Oliver*, 510 U.S. 266, 273 (1994); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843
3 (1998). “Because the Fourth Amendment provides an explicit textual source of
4 constitutional protection against this sort of physically intrusive governmental conduct,
5 that Amendment, not the more generalized notion of ‘substantive due process,’ must be
6 the guide for analyzing these claims.” *Id.*

7 Finding both that J.A. was ‘seized’ and that his excessive force claim pursuant to
8 the Fourth Amendment may proceed, this Court hereby grants Swartz’ motion to dismiss
9 Rodriguez’ claim pursuant to the Fifth Amendment because Swartz conduct is more
10 properly analyzed under the Fourth Amendment. In dismissing Rodriguez’ Fifth
11 Amendment claim, this Court does not reach Rodriguez’ argument that J.A. should be
12 entitled to protection under the Fifth Amendment’s prohibition against arbitrary
13 deprivation of life if this Court were to find that the Fourth Amendment did not protect
14 J.A. *See* Doc. 46 at pp. 21-22.

15 **VI. Swartz is not entitled to qualified immunity**

16 Qualified immunity “gives government officials breathing room to make
17 reasonable but mistaken judgments,” and “protects ‘all but the plainly incompetent or
18 those who knowingly violate the law.’” *Messerchmidt v. Millender*, 132 S.Ct. 1235,
19 1244-45, citing *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (quoting *Malley v.*
20 *Briggs*, 475 U.S. 335, 341 (1986)). “[W]hether an official protected by qualified
21 immunity may be held personally liable for an allegedly unlawful official action
22 generally runs on the ‘objective legal reasonableness’ of the action, assessed in light of
23 the legal rules that were ‘clearly established’ at the time it was taken.” *Id.*

24 Courts are to analyze this question from the perspective “of a reasonable officer on
25 the scene, rather than with the 20/20 vision of hindsight” and thus allow “for the fact that
26 police officers are often forced to make split-second judgments—in circumstances that
27 are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in
28 a particular situation.” *Graham*, 490 U.S. at 396.

1 Qualified immunity is not merely a defense. Rather, it provides a sweeping
2 protection from the entirety of the litigation process. *Harlow v. Fitzgerald*, 457 U.S. 800,
3 819 (1982). Indeed, qualified immunity guards against the “substantial social costs,
4 including the risk that fear of personal monetary liability and harassing litigation will
5 unduly inhibit officials in the discharge of their duties.” *Anderson v. Creighton*, 483 U.S.
6 635, 638 (1987). When law enforcement officers are sued for their conduct in the line of
7 duty, courts must balance between “the need to hold public officials accountable when
8 they exercise power irresponsibly and the need to shield officials from harassment,
9 distraction, and liability when they perform their duties reasonably.” *Pearson v.*
10 *Callahan*, 555 U.S. 223, 231 (2009).

11 Judges are to exercise their sound discretion in deciding which of the two prongs
12 of qualified immunity analysis should be addressed first in light of the circumstances of
13 the particular case. *Id.* at 236. The first inquiry is whether the facts demonstrate that the
14 defendant officer violated one or more of plaintiff’s constitutional rights. *Id.* If the answer
15 is “no,” the matter is concluded because without a violation there is no basis for
16 plaintiff’s lawsuit to proceed. *Id.* If the answer is “yes,” the court must decide whether the
17 right at issue was “clearly established” at the time of the alleged misconduct. *Id.* at 232.
18 A right is clearly established where “it would be clear to a reasonable officer that his
19 conduct was unlawful in the situation he confronted.” *Brosseau v. Haugen*, 543 U.S. 194,
20 199 (2004) (citations omitted). Qualified immunity is only applicable where both prongs
21 are satisfied. *Pearson*, 555 U.S. at 232.

22 Having previously found that J.A. was protected by the Fourth Amendment, the
23 two questions remaining before the Court are 1) whether the FAC alleges sufficient facts
24 to establish the plausibility that Swartz violated J.A.’s constitutional right to be free from
25 unreasonable seizures and 2) whether the right was clearly established at the time of the
26 violation. Both of these questions are to be analyzed accepting facts alleged in
27 Rodriguez’ First Amended Complaint as true and making all reasonable inferences in
28 favor of Rodriguez. Accordingly, the Court finds that Rodriguez alleges sufficient facts to

1 establish the plausibility that Swartz violated J.A.’s Fourth Amendment rights. Further,
2 the Court finds that J.A.’s rights were clearly established when Swartz seized him such
3 that Swartz is not entitled to assert qualified immunity.

4 Over thirty years ago, the Supreme Court of the United States established that law
5 enforcement officers could not use deadly force on an unarmed suspect to prevent his
6 escape. *Brosseau v. Haugen*, 543 U.S. 194, 203 (2004) (J. Breyer concurring) (“The
7 constitutional limits on the use of deadly force have been clearly established for almost
8 two decades. In 1985 [the Supreme Court of the United States] held that the killing of an
9 unarmed burglar to prevent his escape was an unconstitutional seizure.”) (citing
10 *Tennessee v. Garner*, 471 U.S. 1 (1985)). This means that for over thirty years, law
11 enforcement officers have been well-aware that it is unlawful (and in violation of an
12 individual’s Fourth Amendment rights to be free from unreasonable seizures) to use
13 deadly force against an unarmed suspect to prevent his escape. Additionally, officers are
14 also aware that in “obvious cases” rights can be “clearly established” even without a body
15 of relevant case law. *See Hope*, 536 U.S. at 738 (citing *U.S. v. Lanier*, 520 U.S. 259, 270-
16 271 (1997)).

17 The facts alleged in the First Amended Complaint are that J.A. was peacefully
18 walking home and was not engaged in the violation of any law or threatening anyone
19 when Swartz shot him at least ten times. (Doc. 18 at ¶¶ 10, 14). As alleged in Rodriguez’
20 First Amended Complaint, this is not a case involving circumstances where Swartz
21 needed to make split-second judgment—in circumstances that are tense, uncertain, and
22 rapidly evolving—about the amount of force that is necessary in a particular situation.
23 Instead, the facts alleged in the First Amended Complaint, demonstrate an “obvious case”
24 where it is clear that Swartz had no reason to use deadly force against J.A.

25 Swartz attempts to differentiate this case from other deadly force cases by
26 alleging that at the time he shot J.A., it was not clearly established whether the United
27 States Constitution applied extraterritorially to a non-citizen standing on foreign soil.
28 Yet, at the time he shot J.A., Swartz was an American law enforcement officer standing

1 on American soil and well-aware of the limits on the use of deadly force against U.S.
 2 citizens and non-citizens alike within the United States. *See, e.g.* 8 C.F.R. § 287.8(a)(2).
 3 What Swartz did not know at the time he shot was whether J.A. was a United States
 4 citizen or the citizen of a foreign country, and if J.A. had significant voluntary
 5 connections to the United States. (Doc. 18 at ¶ 17). It was only after Swartz shot J.A. and
 6 learned of J.A.’s identity as a Mexican national that he had any reason to think he might
 7 be entitled to qualified immunity.³ This Court finds that Swartz may not assert qualified
 8 immunity based on J.A.’s status where Swartz learned of J.A.’s status as a non-citizen
 9 *after* the violation. *See Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005) (holding that
 10 “police officers cannot retroactively justify a suspicionless search and arrest on the basis
 11 of an after-the-fact discovery of an arrest warrant or a parole violation”).⁴

12 This holding again contravenes that of the Fifth Circuit Court of Appeals in
 13 *Hernandez v. United States*, --- F.3d --- (2015), 2015 WL 1881566. This Court
 14 respectfully disagrees with the en banc panel’s decision that “any properly asserted right
 15 was not clearly established to the extent the law requires.” *Id.* at *2. In part, this may be
 16 because this Court does not characterize the question before the Court as “whether the
 17 general prohibition of excessive force applies where a person injured by a U.S. official
 18 standing on U.S. soil is an alien who had no significant voluntary connection to, and was
 19 not in, the United States when the incident occurred.” *Id.* Instead, this Court focuses on
 20 whether an agent may assert qualified immunity on an after-the-fact discovery that the
 21 individual he shot was not a United States citizen; this Court concludes that qualified

22
 23 ³ Had Swartz subsequently found that J.A. was a citizen of the United States, he
 24 could not challenge that the Constitution applied to J.A. *See Reid v. Covert*, 354 U.S. 1
 25 (1957) (applying the Constitution to U.S. citizens abroad). Similarly, Swartz could not
 26 argue that the Constitution did not apply to legal permanent residents and perhaps even
 undocumented aliens who had established substantial voluntary connections with the
 United States. *See Ibrahim*, 669 F.3d at 994-95. Further, had J.A. been situated some
 thirty-five feet north in the territory of the United States, there would be no question that
 he would be protected by the Constitution. *Id.*

27 ⁴ Again, the Court does not reach Rodriguez’ arguments that the Fifth Amendment
 28 applies if the Fourth Amendment does not. *See* Doc. 46 at 21-22. Similarly, the Court
 does not reach the question of whether J.A.’s Fifth Amendment rights were violated or
 clearly established when he was seized by Swartz.

immunity may not be asserted in this manner.

VII. Conclusion

The Court finds that, under the facts alleged in this case, the Mexican national may avail himself to the protections of the Fourth Amendment and that the agent may not assert qualified immunity.

In addressing a Rule 12(b)(6) motion to dismiss, this Court must accept as true all material factual allegations in the complaint, construe the pleadings in the light most favorable to the plaintiff, and make any reasonable inferences therefrom. Applying this standard, Rodriguez has stated a claim upon which relief can be granted. J.A. was entitled to the protections of the Fourth Amendment, even as a non-citizen standing on foreign soil pursuant to both his substantial voluntary connections to the United States and *Boudemeine*'s functional approach in addressing his claim. Because Rodriguez' claim of excessive force should be analyzed under the Fourth Amendment, this Court dismisses Rodriguez' Fifth Amendment claim. Finally, Swartz cannot assert qualified immunity when he found out after-the-fact that he had exerted deadly force upon a noncitizen. Accordingly,

IT IS HEREBY ORDERED *granting in part and denying part* Swartz' Motion to Dismiss (Doc. 30). Rodriguez' claim pursuant to the Fifth Amendment is dismissed; Rodriguez' claim pursuant to the Fourth Amendment proceeds.

Dated this 9th day of July, 2015.



Raner C. Collins
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Araceli Rodriguez,

Plaintiff,

vs.

Lonnie Swartz,

Defendant.

)
)
)
) 14-CV-02251-TUC-RCC
)
) Tucson, Arizona
) May 26, 2015
) 1:30 p.m.
)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS HEARING

BEFORE: THE HONORABLE RANER C. COLLINS, DISTRICT JUDGE

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P R O C E E D I N G S

(Call to order, 1:30 p.m.)

MR. CHAPMAN: Good afternoon, your Honor. Sean Chapman for Agent Swartz who is not present.

THE COURT: Good afternoon.

MR. GELERNT: Good afternoon, your Honor. Lee Gelernt from the national office of the ACLU representing the plaintiff. With me, I'll let them introduce themselves.

MS. DESORMEAU: Good afternoon, your Honor. Kate Desormeau from the ACLU for the plaintiff.

THE COURT: Good afternoon.

MR. PARRA: Good afternoon, your Honor. Lee Fernando Parra on behalf of Rodriguez. Thank you, your Honor.

THE COURT: Good afternoon.

I'm not standing to intimidate you. I'm standing because I'm told sitting is not good for you, so I've been trying it lately.

Mr. Chapman, your motion.

MR. CHAPMAN: Your Honor, the plaintiff's claim in this case is brought under Bivens which held that money damages may be recovered against a federal agent for a violation of a plaintiff's constitutional rights.

The plaintiffs in this case have alleged that Agent Swartz' conduct violated both the Fourth and Fifth Amendments. But the operative fact is that the decedent was

1 on Mexican soil when he was shot. Thus, in order for his
2 Fourth and Fifth Amendment rights to be violated, the Court
3 would have to extend those constitutional rights to him
4 extraterritorially. There's no legal precedent for this.
5 Moreover, there's compelling authority that the Fourth and
6 Fifth Amendments don't apply extraterritorially in the manner
7 suggested by the plaintiff.

8 Our position therefore: He's entitled to dismissal
9 based on qualified immunity because the facts don't show that
10 he violated the plaintiff's constitutional rights given that
11 there's no extraterritorial application to either amendment,
12 and the rights asserted under the Fourth and Fifth Amendment
13 by the plaintiff were not clearly established at the time of
14 the event.

15 As you know, the Fourth Amendment governs claims of
16 this sort because it can be described as a seizure with
17 excessive and unreasonable force when someone is injured or
18 shot. The parties, in their briefing, disagree as to whether
19 the Fourth Amendment should apply extraterritorially, and the
20 plaintiffs are essentially relying on the Boumediene case
21 while we're relying on Verdugo, Urquides, as well as the
22 recent en banc Fifth Circuit decision in Hernandez v. Mesa.

23 Hernandez v. Mesa is factually almost identical to
24 this case. It was a shooting in Texas, not Arizona. A Border
25 Patrol agent fired his weapon across the international border

1 and shot and killed a Mexican citizen. Just as what occurred
2 in this case. The Fifth Circuit in Hernandez v. Mesa held
3 that a Mexican citizen with no significant voluntary
4 connection to the U.S. who was shot on Mexican soil cannot
5 assert a claim under the Fifth Amendment. And the Hernandez
6 court relied on the Supreme Court in Verdugo/Urquidez.

7 THE COURT: Let me ask you a question. How do we
8 know there was no sufficient voluntary connection with the
9 United States since there's been no --

10 MR. CHAPMAN: It's not alleged in the Complaint.

11 THE COURT: Okay.

12 MR. CHAPMAN: I mean, the whole litigation at this
13 point is premised on the plaintiff's allegations in the
14 Complaint, assuming they're correct and accurate.

15 THE COURT: All right.

16 MR. CHAPMAN: So in that case, Hernandez, the court,
17 the en banc court unanimously decided that if the plaintiffs
18 have a constitutional claim at all, it arises under the Fourth
19 Amendment.

20 THE COURT: Fifth, I thought.

21 MR. CHAPMAN: The Fourth, relying on Graham v.
22 O'Connor. And in that context there was a seizure, but
23 because it occurred extraterritorially and the
24 plaintiff/decedent had no significant voluntary connections to
25 the United States, the Fourth Amendment didn't apply

1 extraterritorial under the facts of that case which is
2 identical to this case.

3 And looking at the Verdugo case, the Supreme Court
4 case is also helpful because in that case it involved another
5 alien with no voluntary attachment to the United States. And
6 the Court concluded in that case, where the Government
7 effected a search of the alien's property on foreign soil,
8 that the Fourth Amendment was not implicated because, again,
9 he had no voluntary connections to the United States; and
10 therefore, the Fourth Amendment would not apply
11 extraterritorially under those circumstances.

12 Just to reiterate, the decedent in this case is a
13 Mexican national. He never entered the U.S. and he had no
14 significant voluntary connection to the U.S.

15 As to the Fifth Amendment claim, in Graham v.
16 O'Connor the Supreme Court held that where a constitutional
17 claim is covered by a specific constitutional provision, it
18 controls, not due process. In other words, you only look at
19 the Fifth Amendment due process where no other amendment
20 applies. The purpose of Graham is to avoid expanding the
21 concept of substantive due process where another
22 constitutional provision protects against challenged
23 governmental action -- protects individuals from challenged
24 governmental action.

25 Hernandez, again relying on Graham v. O'Connor,

1 found that the Fifth Amendment claim also failed because it
2 wasn't clearly established. In other words, at the time that
3 this event happened which was in 2010, there was no
4 controlling case law establishing that under the specific
5 facts of that case which, again, are similar to this case,
6 there was no established law saying that the Fifth Amendment
7 would apply under those circumstances. Our case happened in
8 2012, and I don't believe there have been any changes in the
9 law or any intervening law that would assist the plaintiff's
10 arguments in that time frame.

11 Also important is that Hernandez Court found that
12 the Boumediene analysis was inapplicable because nothing in
13 the Boumediene case which dealt with the extension of the
14 territorial reach of the Suspension Clause would extend that
15 to another constitutional provision like the Fifth Amendment.
16 In fact, it's interesting in that opinion, they say,
17 essentially, we don't know, you know, because the
18 Supreme Court has not answered that question yet for us as to
19 whether Boumediene would apply to different constitutional
20 provisions beyond the Suspension Clause.

21 But what's also important for your consideration is
22 that the Ninth Circuit, in Hamad v. Gates, specifically stated
23 that the Boumediene Court expressly confined its ruling to the
24 Suspension Clause and no other constitutional provision.

25 Also, we cited Ali v. Rumsfeld which is a

1 D.C. Circuit Court of Appeals case which found that Iraq and
2 Afghanistan detainees could not assert Fifth Amendment
3 constitutional violations for mistreatment because there was
4 no clearly established right under the Fifth Amendment that
5 would apply extraterritorially in their circumstances. And I
6 don't believe that there is any Ninth Circuit precedent that
7 is inconsistent with Hernandez v. Mesa or conflicts with our
8 arguments here that neither the Fourth or the Fifth Amendment
9 apply in this case under the circumstances.

10 I just wanted to respond to one of the plaintiff's
11 arguments that if the Court were to grant a motion to dismiss
12 under these circumstances it would create a legal vacuum. The
13 defendant's actions in this case are currently under review by
14 the U.S. attorney's office. I've been informed that he is a
15 subject of a criminal investigation. In fact, that's why I'm
16 standing here right now instead of a Department of Justice
17 attorney because the Department of Justice conflicted itself
18 out, because the possibility of a criminal investigation
19 still -- criminal Indictment still exists.

20 It is also subject to review, his actions, by the
21 FBI, the Homeland Security Office of Inspector General, the
22 D.O.J. civil rights division, and he could also seek a Federal
23 Court review of the Attorney General scope of employment
24 certification under the Westfall Act. So --

25 THE COURT: How would that work?

1 MR. CHAPMAN: I was hoping you wouldn't ask me that
2 question, but my understanding is that if they request it,
3 they would get a finding as to whether or not he was acting in
4 the course and scope of his employment. And if he wasn't,
5 then he would be subject to liability without the protections
6 that I'm talking about.

7 The plaintiff cites a lot of cases in its brief, but
8 I think more than anything they're muddying the waters. I
9 think that the Hernandez Fifth Circuit case is directly on
10 point and its analysis is sound. And I think that the
11 Supreme Court law that they cite is good law, still exists,
12 and it is the state of the law right now that there is no
13 Fifth Amendment claim or Fourth Amendment claim. So for those
14 reasons we would ask that you dismiss the Complaint.

15 MR. GELERNT: Good afternoon, your Honor.

16 THE COURT: Good afternoon again.

17 MR. GELERNT: Let me just jump into the conversation
18 very quickly and then return to some of the affirmative points
19 I want to make.

20 First of all, we have never in this country said
21 because there may be an executive branch oversight, whether
22 it's criminal or administrative, that extinguishes all rights
23 because we're talking about --

24 THE COURT: They did seem to talk about that in
25 Hernandez a little bit.

1 MR. GELERNT: Your Honor, not in the per curiam as I
2 understand it. Let me turn to Hernandez, then, and return
3 back to the remedy issue.

4 Obviously, you are not bound by Hernandez. It's a
5 different circuit.

6 THE COURT: True.

7 MR. GELERNT: And I want to stress something about
8 it. The only time you would look to other circuit law is, of
9 course, if it's persuasive. If the reasoning is persuasive.
10 The Fifth Circuit en banc chose not to offer an opinion. They
11 had per curiam opinion that's two pages. That does not lay
12 out its reasoning. We think the result it reached was
13 absolutely wrong. But for practical purposes, for your
14 purposes, what you would look to Hernandez for is, of course,
15 the reasoning to see how persuasive it is. There is
16 absolutely no reasoning. They chose not to provide reasoning,
17 and therefore we don't think of it could be of benefit to you.
18 And I'm going to explain why the result it reached was wrong.

19 The other thing I would just note about Hernandez is
20 there's some factual differences. Mr. Hernandez was at the
21 border. Our client was just going about his everyday life
22 business. He happens to live at the border and just -- well,
23 walking down that street all the time, and he wasn't playing
24 around at the border. There's also, I think most critically,
25 which I'm going get to, Ninth Circuit law that's different

1 than the Fifth Circuit. So for all those reasons, we think
2 you ought to put Hernandez to the side. Certainly no
3 reasoning to help you.

4 And just back to the no remedy, what we have here
5 is, of course, executive branch action, the Border Patrol
6 taking action. And Mr. Chapman is saying, well, of course
7 there's a remedy if the executive branch wants to offer a
8 remedy. Well, that's the executive branch overseeing the
9 executive branch. We have never said in this country that
10 that can be the only remedy, the executive branch. And just
11 as a practical matter and historical matter, the executive
12 branch has not taken a lot of action with respect to the
13 Border Patrol. But putting that aside, even if they had, that
14 cannot be the only oversight.

15 In terms of scope of employment, I know the Fifth
16 Circuit said, well, you might have challenged scope of
17 employment. In the Ninth Circuit, whatever the Fifth Circuit
18 may think about that issue, the Ninth Circuit in
19 Alvarez-Machain which we cite in our brief, has specifically
20 said that someone acting like this is within the scope of
21 their employment. So in the Ninth Circuit they have
22 extinguished that remedy, and the only remedy we would have,
23 we think, is the Bivens remedies here.

24 Let me then turn to just sort of putting this case
25 in context. We have, of course, as you know, a Border Patrol

1 agent shooting through the fence and killing a young man
2 without justification. And that's our allegation. That's the
3 facts as they come to you on a motion to dismiss. Walking
4 home from playing basketball and killing him.

5 The context is extreme. This is not a military case
6 like the D.C. Circuit cases or like Hamad which Mr. Chapman
7 just mentioned from the Ninth Circuit. He certainly wasn't an
8 enemy combatant. He certainly wasn't accused of a crime.
9 It's not an immigration case. He wasn't trying to sneak into
10 the country. There's no uncertainty about the course of
11 conduct. It's clear and has been clear for a long time that
12 it's a criminal act to shoot someone on the other side of the
13 border whether citizen or not citizen. That's 18 U.S.C. 1111
14 and 1112. So this is not Verdugo where there was a sea of
15 uncertainty about how to use a warrant in another country or
16 what reasonableness is.

17 This is a case where everything except the bullet
18 hitting the young man happened on U.S. soil. It's not where
19 some vague plan happened on U.S. soil. All of the action
20 happened on U.S. soil. It's not a case where there's friction
21 with another country. The letter from Mexico makes it clear
22 and as their position in Hernandez makes it clear, they would
23 like to see there be a remedy. Now, we're not saying that our
24 facts are necessarily true. We believe they, of course, are
25 true; but what we are saying is the Border Patrol agent must

1 come forward and defend his actions. There is no
2 justification for saying the Fourth and Fifth Amendments don't
3 apply under the particular circumstances here.

4 I mean, it's hard to imagine when the Fourth and
5 Fifth Amendments would apply if they're not going apply in a
6 case like this. And I think when you look at the
7 Supreme Court -- and certainly no Supreme Court case dictates
8 a result that the Fourth and Fifth Amendments don't apply
9 here. And I think when you actually step back and look at the
10 Supreme Court cases, they all pretty much follow the facts.
11 You know, there's a lot of doctrinal complexity in all these
12 cases, and I'm not saying that everyone agrees with every
13 decision they've reached in all these extraterritorial cases,
14 but they pretty much go by the facts.

15 I mean, Eisentrager, military allied forces during
16 World War II, I don't think it surprised a lot of people that
17 they held the Fifth Amendment wasn't applicable. Verdugo,
18 trying to get a warrant in another country, it's probably not
19 surprising although it may have upset people that they held
20 differently. Boumediene, I mean, I think a lot of people
21 thought they wouldn't apply the habeas corpus principles to
22 Guantanamo enemy combatants who had no voluntary connection
23 but they did.

24 And it's hard to imagine this case saying there's no
25 Fourth and Fifth Amendments rights given the circumstances

1 here. I mean, what Mr. Chapman is asking you to do is write
2 an opinion that says a Border Patrol agent can put his gun up
3 to the fence, shoot through the fence without justification,
4 and kill a teenager, a civilian teenager 20 feet over the
5 fence and the Constitution has nothing to say about. We think
6 no Supreme Court case remotely dictates it. And what the
7 Supreme Court has basically said in Boumediene now is you use
8 the impractical and anomalous test. If it's not impractical
9 and anomalous to apply the Constitution in these
10 circumstances, you do it. And that's especially so where
11 there are fundamental rights and this is, of course, the most
12 fundamental right; the right not to be arbitrarily killed.

13 And I think ultimately the defendant doesn't really
14 make an argument that on these facts, if you apply the sort of
15 totality of the circumstances, impractical and anomalous test
16 from Boumediene, it would come out that you apply the Fourth
17 and Fifth Amendments here. What ultimately he is saying is
18 the Fourth and Fifth Amendments don't apply across the border,
19 and essentially that's a dispositive fact, that Mr. -- that
20 the young man in this case had no connections to the U.S.,
21 meaning he didn't live in the U.S. and that type of thing, and
22 so that's a dispositive factor. That's absolutely wrong after
23 Boumediene. It was clear in Verdugo and Eisentrager reading
24 those cases, but it's absolutely wrong after Boumediene that
25 there's a bright line test.

1 First of all in Verdugo, the bright line test that
2 it only applies to people with a connection to the U.S. came
3 from Justice Rehnquist use of the people in the Fourth
4 Amendment. Justice Kennedy said he's joining the opinion in
5 fundamental respects, but we don't have to guess which
6 respects he was joining. He specifically said, I don't buy
7 that part and I will apply the impractical and anomalous
8 tests, meaning I'm going to look at the factors. He would
9 have no reason to look at the factors in Verdugo had he not
10 been applying a multifactor test.

11 And most to the point, in Boumediene which he wrote,
12 he comes back at page 759 and 760 of the Boumediene decision
13 and cites only his concurrence, not the plurality, and he says
14 applying the impractical and anomalous test. So I think
15 there's no question after Boumediene that Verdugo does not
16 stand for a bright line rule that the Fourth Amendment doesn't
17 apply overseas. That the voluntary connections test is
18 dispositive. It may be a factor, but it's certainly not
19 dispositive.

20 And Mr. Chapman brought up the Ibrahim decision from
21 the Ninth Circuit which talks about the voluntary connections
22 test, but there it was using it as a factor, not as
23 dispositive. And it specifically said at page 995 when it
24 ended its discussion of Verdugo, Eisentrager, and Boumediene
25 that there was there was no longer a bright line test. It

1 went on to talk about voluntary factors test as just one
2 factor, but it certainly can't be dispositive. That's clear
3 now after Boumediene.

4 The same thing with Eisentrager. Eisentrager turned
5 on multiple factors, and the Supreme Court specifically talked
6 about six factors. These were enemy combatants, they were
7 held by all the allies together, it was during war time, all
8 of those factors that are not here. You then come along to
9 Boumediene. Boumediene talks about Eisentrager. Justice
10 Kennedy talked about Eisentrager and says it likewise turned
11 on practical considerations. And so I think after Boumediene
12 what you have now is no bright line test, and that Ninth
13 Circuit made clear in Ibrahim, and said it's a multifactor
14 test. And I think under these factors there's no question.

15 I want to make one additional point about which test
16 to apply. Because if your Honor chooses, he doesn't even need
17 to get into Boumediene and extraterritoriality. I think this
18 case can be thought of as either a domestic analysis or
19 perhaps one might say extraterritoriality of light. And I
20 think that's because the Ninth Circuit has different law than
21 the Fifth Circuit, and the case we cite from the Ninth Circuit
22 in our brief is the Wang decision. And that involved a
23 Chinese witness who U.S. prosecutors here, in this country,
24 mislead into coming here.

25 Now, the Ninth Circuit at Footnote 16 specifically

1 said the violation occurred here in the U.S., and that's
2 slightly different than our case, of course. But the larger
3 point the Court went on to make in Footnote 16 was that you
4 don't want to artificially place beyond its control events
5 that happened overseas if all the actions are being taken by
6 U.S. officials on U.S. soil. And I think that's a critical
7 point. That's the difference between this case and cases like
8 Verdugo where our agents went to Mexico and worked in
9 cooperation with Mexican officials. And in fact, in
10 Footnote 16 of Ibrahim, the Court specifically contrasted
11 Verdugo.

12 And the reason it's so critical that everything
13 happened on U.S. soil here other than the bullet hitting the
14 young man is that when we go over to another country, we have
15 to have that country's consent. The Border Patrol, the FBI,
16 DEA cannot operate in another country without that country's
17 consent. So when our agents go over to Mexico and work in
18 cooperation to search someone's house, like Verdugo's house,
19 Mexico has a say in it. If they think our agents have done
20 something wrong, they can take action, they can arrest.
21 There's no black hole where our agents can escape liability.
22 Mexico has a say, they're approving it, and they can also
23 arrest those agents if those agents do anything unlawful.

24 Here what's happening is this agent is trying to
25 escape liability by saying, Well, I'm on the U.S. side of the

1 fence and I'm shooting over there. He's a Mexican citizen so
2 therefore you can't get me with our Constitution. But Mexico
3 also -- excuse me, Mexico also has no say because Mexico
4 cannot -- they can hold an in absentia hearing if they want,
5 but they certainly can't do anything because our agent's here,
6 unless the executive branch chooses to extradite. And I think
7 that's the larger point that the Wang decision was making.
8 Yes, it's not directly on point, but the Court went out of its
9 way in Footnote 16 to make that point and contrast Verdugo;
10 that when everything happens on U.S. soil, you don't want a
11 sort of black hole where the other country can't get our
12 agents, but we're saying our Constitution doesn't apply to our
13 agents.

14 So I think ultimately we believe we win under
15 Boumediene, under a multifactor test. But I don't think that
16 this Court necessarily has to go there and can use the Wang
17 decision and the reasoning of the Wang decision which is
18 different, of course, than Fifth Circuit law.

19 Let me turn, then, to the qualified immunity
20 analysis. Mr. Chapman is saying, Well, suppose the Fourth and
21 Fifth Amendments apply. It wasn't clearly established that
22 the Constitution applies to this young man because he was
23 overseas; therefore, he should have qualified immunity. That
24 cannot possibly be the law. The law on qualified immunity has
25 an important purpose: to balance civil liberties and the

1 agent's rights. And what it's designed to do is give an agent
2 breathing room to make reasonable mistakes so the agent, every
3 time he has to act, doesn't have to guess is this unlawful or
4 not and hesitate each time. That's not the situation here.

5 He may not have known whether the Constitution
6 applied to this individual abroad, but he certainly knew the
7 conducted was unlawful and certainly knew that he needed to
8 hesitate. It's not like we're sandbagging. The criminal laws
9 very specifically prohibit this. Again, 18 U.S.C. 1111 and
10 1112 apply to this young man across the border very clearly.
11 So it can't possibly be that you would say, well, he has
12 qualified immunity because although he knew not to shoot
13 because he could go to jail for the rest of his life, he
14 didn't know there could be a civil Bivens action, and
15 therefore he wasn't on notice. That would completely pervert
16 the qualified immunity analysis.

17 And not only that, he didn't know the status of this
18 young man. He didn't know whether he was a citizen, a
19 noncitizen, had enormous connections to the U.S. and had lived
20 here 20 years. So he's indiscriminately firing. He
21 fortuitously, from his standpoint, hits a noncitizen, and then
22 he turns around and says, well, it's not clearly established
23 because I hit a noncitizen. That doesn't serve the purpose of
24 qualified immunity not to sandbag an agent after the fact.

25 Because the qualified immunity issue was brought up

1 more in the Reply brief, I think the Judge would benefit from
2 looking at Judge Tashima's decision from the Ninth Circuit in
3 Moreno v. Baca which is 431 F.3d 633. It involved a search.
4 And parolees have less rights not to be searched. Well, the
5 police searched this person not knowing whether he was a
6 parolee or not. It turns out to be a parolee, and the police
7 officer said, well, it certainly wasn't clearly established.
8 What Judge Tashima said that's not the qualified immunity
9 doctrine. That's not the purpose of the qualified immunity
10 doctrine. You didn't know whether he was a parolee or a
11 regular citizen so you can't turn around and say, well, I
12 wouldn't maybe have done it if I -- because he had no idea
13 because he, in our case, is indiscriminately shooting.

14 So this is not the kind of situation where you apply
15 qualified immunity. Again, Hernandez said they were going to
16 give qualified immunity in the Fifth Amendment. They didn't
17 discuss any of these issues so we don't know what the
18 reasoning is.

19 The final point I want to talk about is the Fourth
20 versus the Fifth Amendment. Mr. Chapman says you have to use
21 the Fourth Amendment because that's the more specific
22 provision. That's what Graham v. Connor says. And you can't
23 use the Fifth Amendment. That's simply wrong. What Graham v.
24 Connor says, what all the subsequent cases, Albright v. Oliver
25 say is if the Fourth Amendment applies, you use the Fourth

1 Amendment and not Fifth Amendment, substantive due process.
2 We think the Fourth Amendment applies here and so there's no
3 issue.

4 And we're not saying we want to double collect under
5 the Fourth and Fifth Amendment. But if the Fourth Amendment
6 doesn't apply, Mr. Chapman can't have it both ways. He can't
7 argue on the one hand the Fourth Amendment doesn't apply,
8 doesn't cover this case, but it still precludes the Fifth
9 Amendment. What the Supreme Court is saying if the Fourth
10 Amendment applies, use it. If it doesn't apply, use the Fifth
11 Amendment.

12 I think what Justice Souter said in his concurrence
13 in Albright v. Oliver is it's for homeless claims. If
14 your Honor were to rule -- again, we don't think you should --
15 but if you were to rule the Fourth Amendment doesn't apply,
16 cover the situation, certainly we can turn to the Fifth
17 Amendment.

18 And I would just conclude along these lines: One of
19 the things that Mr. Chapman's briefs have said is, well, you
20 would be opening up a pandora's box. There might be limitless
21 claims: drones, military actions. That's absolutely not
22 true. The thing that Justice Kennedy was doing in Boumediene,
23 the critical point he was making is look at all the
24 circumstances. This is a complex area of the law. You have
25 to make it fact-specific, context-specific,

1 circumstance-specific. We're not asking for a broad ruling
2 that the Fourth Amendment and Fifth Amendments always apply.
3 We are saying under the unique circumstances of this case it
4 has to apply.

5 Boumediene necessarily understood that cases would
6 have to be decided on their facts because it refused to lay
7 down the bright line rule that the Government asked for. And
8 I would just suggest that there is obviously not a limitless
9 class of cases in this situation because we have a U.S. agent
10 on U.S. soil, it's nonmilitary, so for all those reasons I
11 think you can lay down a fact-specific ruling that covers this
12 situation but doesn't sweep in an enormous amount of other
13 cases.

14 And I would just conclude by saying, you know,
15 Mr. Chapman's accused of us dramatizing the facts. I don't
16 believe we have. I believe that why he's recoiling, is the
17 facts are simply troubling. A young man walking home from
18 playing basketball, in his home town. He is not doing
19 anything and he shot ten times and he's dead. And now a
20 mother has to live with the worst possible pain any parent can
21 live with, is losing a child. I think that's about as bland
22 as you can put it, and that's the context of this case.

23 Unless your Honor has additional questions?

24 THE COURT: I don't.

25 MR. GELERT: Thank you, your Honor.

1 THE COURT: Mr. Chapman, you get the last word.

2 MR. CHAPMAN: Well, I didn't accuse the plaintiffs
3 of dramatizing the facts. The facts are horrible and they're
4 tragic. What I suggested was their briefing muddies the water
5 legally, and essentially what you're being asked to do is
6 ignore the reasoning of Hernandez v. Mesa.

7 THE COURT: He started off saying exactly that.

8 MR. CHAPMAN: That you should ignore it.

9 And I guess I would ask you this question, which is
10 what circuit law should you then rely on that interprets the
11 Boumediene case? And determines whether or not it goes beyond
12 the reaches of the Suspension Clause? And the answer is there
13 is no case law on that. The only case law there is Hernandez
14 v. Mesa and it says that it doesn't. And it says in a
15 factually identical situation, the Fourth Amendment and the
16 Fifth Amendment do not apply extraterritorially.

17 The Plaintiffs argue that the cases that -- the
18 Supreme Court cases that we briefed are factually specific.
19 But in nowhere in those opinions, in Verdugo or the other
20 opinions does the Supreme Court say we're limiting our
21 findings to the facts of this case. They are the law. This
22 is the state of the law right now. We may like it or we may
23 not like it but it's the law. And the only circuit that has
24 addressed a factually similar situation is the Fifth Circuit,
25 and if you follow its reasoning you must grant a motion to

1 dismiss at this point.

2 THE COURT: Question.

3 MR. CHAPMAN: Yes, sir.

4 THE COURT: There is a belief that he could be held
5 criminally liable for what he did, which is why you say you're
6 involved in the case, but not civilly liable because the kid
7 died on Mexican soil.

8 MR. CHAPMAN: That is a question that reflects kind
9 of the equities of the situation and whether that's really
10 fair or not fair. But it's also the state of the law. It's,
11 you know, applying the case law to the facts of this case.
12 The Fourth and the Fifth Amendment don't apply
13 extraterritorially. And a lot of people may think that's
14 wrong and that's not fair, but that's what the law is at this
15 point.

16 And it's up to the Supreme Court to say that we're
17 wrong. That Boumediene should be extended, its analysis, to
18 the Fourth and the Fifth Amendment. And if we're wrong, we're
19 wrong. But we don't know that, just like the Fifth Circuit
20 didn't know it at the time. So at this point Boumediene is
21 limited to the Suspension Clause. And the prevailing case
22 law, Supreme Court law which hasn't been overruled, says that
23 under these circumstances there is no Fourth and Fifth
24 Amendment violation, period.

25 Plaintiff's counsel is right that the Wang case in

1 the Ninth Circuit is different from the constitutional
2 violation that occurred here. In Verdugo, there necessarily
3 was Government action in the United States because the DEA was
4 directing the investigation in this case.

5 One final point. Essentially the argument in
6 plaintiff's briefs that the limits of the Fourth and Fifth
7 Amendments are well known to the Border Patrol, that's not the
8 proper analysis. The proper analysis was explained in Ali v.
9 Rumsfeld. And basically it says that the proper inquiry is
10 not whether the Constitution prohibits the conduct at issue
11 but whether the rights pressed by the plaintiff under the
12 specific amendment were clearly established at the time. So
13 it's not whether the agent knew he was doing something wrong,
14 it's whether a clearly established constitutional right was
15 violated.

16 We don't look into the agent's mind in attempt to
17 figure that out. We look at the law.

18 THE COURT: So he could know that he was doing
19 something wrong, but not know that the constitution did or did
20 not prohibit it.

21 MR. CHAPMAN: That's correct. If you look at Ali v.
22 Rumsfeld, that's what it says. So in this context if we
23 assume that the allegations in the plaintiff's complaint are
24 true, that this was simply an unprovoked attack and he killed
25 this Mexican citizen without any legal justification, you

1 still have to apply that analysis, that case law, and ask
2 whether this was a clearly established right; in other words,
3 whether the Fourth and the Fifth Amendments apply
4 extraterritorially to this situation. That's what you're
5 supposed to look at.

6 Now, his mens rea or his belief, that may impact
7 some other thing. I mean, it may impact his employment status
8 or subject him to criminal prosecution, but under the analysis
9 in the civil law, we look at whether it's a clearly
10 established right.

11 THE COURT: Thank you.

12 MR. CHAPMAN: Thank you.

13 THE COURT: I have a feeling no matter what I rule,
14 that will not be the last word.

15 MR. CHAPMAN: I think you're probably right.

16 THE COURT: Thank you both. I'll take the matter
17 under advisement.

18 (Proceedings concluded at 2:06 p.m.)
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C E R T I F I C A T E

I, Cheryl L. Cummings, certify that the
foregoing is a correct transcript from the record of
proceedings in the above-entitled matter.

Dated this 3rd day of August, 2015.

/s/Cheryl L. Cummings

Cheryl L. Cummings, RDR-CRR-RMR
Federal Official Court Reporter

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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, Agent of U.S.
 Border Patrol,

Defendant.

CASE NO. 4:14-CV-02251-TUC-RCC

**FIRST AMENDED COMPLAINT AND
 DEMAND FOR JURY TRIAL**

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13
14 * *Admitted pro hac vice*

15 ** *Admitted pursuant to Ariz. Sup. Ct.*
16 *R. 38(f)*
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1 Plaintiff Araceli Rodriguez, through counsel, hereby complains and alleges the
2 following:

3 INTRODUCTION

4 1. This civil rights case involves the brazen and lawless killing of a sixteen-
5 year-old boy, J.A., by Lonnie Swartz, agent of the United States Border Patrol. The
6 fatal shooting of J.A. is not an isolated incident by the Border Patrol. United States
7 Border Patrol agents have been responsible for multiple unjustified deadly shootings
8 and physical abuses along the U.S.-Mexico border over the past several years. J.A.'s
9 killing is one of the latest and most egregious of these incidents.

10 2. On the night of October 10, 2012, J.A., a Mexican national, was
11 peacefully walking along a street in his hometown of Nogales, Sonora, Mexico. The
12 street on which he was walking, Calle Internacional, runs parallel to the border fence.
13 At approximately 11:30 pm, Defendant Swartz, who was standing on the U.S. side of
14 the fence, opened fire. An autopsy report shows that J.A. was fatally hit with ten
15 bullets. At the time of the shooting, no Border Patrol agent or officer of the United
16 States Customs and Border Protection (CBP) was under threat by J.A. or anyone else
17 standing near him — much less in immediate danger of deadly or serious bodily harm.
18 J.A.'s death was senseless and unjustified.

19 3. J.A.'s mother, Araceli Rodriguez, brings this lawsuit for monetary
20 damages for the killing of her youngest son, alleging claims under the Fourth and Fifth
21 Amendments to the United States Constitution.

22 JURISDICTION AND VENUE

23 4. This case is brought pursuant to *Bivens* and the Fourth and Fifth
24 Amendments to the United States Constitution. *See Bivens v. Six Unknown Named*
25 *Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court has
26 jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction).
27
28

5. Venue is proper in the District of Arizona because a substantial part of the events complained of and giving rise to Plaintiff's claims occurred in this District. *See* 28 U.S.C. §§ 1391(b), 1391(e), 1402(b).

PARTIES

6. Plaintiff ARACELI RODRIGUEZ is a Mexican national currently residing in Nogales, Sonora, Mexico. She is the mother of the deceased, J.A., who was also a Mexican national. J.A. resided in Nogales, Sonora, Mexico at the time of his death. Plaintiff brings this lawsuit individually and as the surviving mother and personal representative of J.A.'s estate.

7. Defendant LONNIE SWARTZ is the U.S. Border Patrol agent who shot and killed J.A. Defendant Swartz was acting under color of law. The Border Patrol is an agency within CBP, which itself is located within the Department of Homeland Security.

JURY DEMAND

8. Plaintiff demands a trial by jury in this action on each of her claims triable by jury.

FACTS

J.A.'s Death

9. On the night of October 10, 2012, after playing basketball in his neighborhood with his girlfriend and friends, J.A. was walking by himself down the sidewalk on Calle Internacional, a street that runs alongside the border fence on the Mexican side of the border between the United States and Mexico. Because Calle Internacional is a main thoroughfare, with commercial and residential buildings, residents of the town frequently walk down that street.

10. According to an eyewitness who was walking behind J.A. on Calle Internacional on that night, at approximately 11:30 pm, at least one U.S. agent, stationed on the U.S. side of the fence, opened fire. According to various reports,

1 anywhere from 14 to 30 shots were fired. Upon information and belief, no agents or
2 officers issued any verbal warnings before opening fire.

3 11. Defendant Swartz hit J.A. and he collapsed where he was shot, in front of
4 a medical office on the corner of Calle Internacional and Calle Ingenieros. He was
5 found moments later lying in a pool of his own blood.

6 12. J.A. was shot approximately ten times and virtually all of those shots
7 entered his body from behind.

8 13. Upon information and belief, no one else was shot.

9 14. Just prior to the shooting, J.A. was visible and not hiding; an observer
10 could see that he did not pose a threat. He was doing nothing but peacefully walking
11 down the street by himself when he was gunned down. He was not committing a crime,
12 nor was he throwing rocks, using a weapon, or in any way threatening U.S. Border
13 Patrol agents or anyone else. Furthermore, no one near J.A. at the time of the shooting
14 was throwing rocks or threatening U.S. Border Patrol agents in any manner (or
15 threatening anyone else).

16 15. At the moment he was shot, J.A. was walking on the southern side of
17 Calle Internacional, directly across the street from a sheer cliff face that rises
18 approximately 25 feet from street level. The cliff is approximately 30 feet from where
19 J.A. was standing when shot. The border fence, which is approximately 20–25 feet tall,
20 runs along the top of the cliff. Thus, at the location where J.A. was shot, the top of the
21 fence towers approximately 50 feet above street level on the Mexican side. The fence
22 itself is made of steel beams that are 6.5 inches in diameter. Each beam is
23 approximately 3.5 inches apart. Defendant Swartz fired from the U.S. side of the fence.
24 (A photograph from Google Maps of the border fence and the corner where J.A. was
25 killed is attached to this Complaint as Exhibit A.)

26 16. According to an emergency police dispatch, a Border Patrol agent phoned
27 authorities in Mexico approximately five minutes after shots were fired. The agent
28

1 informed Mexican authorities that there were shots fired on the borderline and that
2 someone was wounded on the Mexican side, but the agent did not identify the shooters.

3 17. At the time of the shooting, J.A. lived in Nogales, Sonora, Mexico,
4 approximately four blocks from where he was shot. Because J.A.'s mother was away
5 for work, his grandmother was often with him in Nogales, Mexico to care for him. His
6 grandmother and grandfather live in Arizona and were lawful permanent residents of
7 the United States at the time of the shooting. They are now U.S. citizens. Upon
8 information and belief, Defendant Swartz did not know whether J.A. was a U.S. citizen
9 or whether he had significant contacts with the United States.

10 18. Defendant's actions in killing J.A. were unreasonable and excessive, and
11 were unnecessary to defend against bodily injury or deadly force. Defendant acted
12 intentionally with the specific purpose of causing serious harm and/or death to J.A.,
13 without legal justification.

14 19. Defendant acted under color of law.

15 **Systemic Problems of Abuse at the Border by U.S. Agents**

16 20. J.A.'s killing is unfortunately not a unique event, but part of a larger
17 problem of abuse by Border Patrol agents in Nogales and elsewhere.

18 21. The U.S.-Mexico border area in Mexico is unlike other areas of Mexico.
19 U.S. Border Patrol agents not only control the U.S. side of the fence, but through the
20 use of force and assertion of authority, they also exert control over the immediate area
21 on the Mexican side, including where J.A. was shot.

22 22. U.S. control of the Mexican side of the border fence in Nogales and other
23 areas along the Southern border is apparent and longstanding, and recognized by
24 persons living in the area.

25 23. Border Patrol agents use guns, non-lethal devices and other weapons, as
26 well as military equipment and surveillance devices to target persons on the Mexican
27 side of the border. For example, U.S. surveillance cameras are mounted along the
28 border fence, monitoring activity on the Mexico side of the fence. One such camera,

1 with a clear line of sight over Calle Internacional, is mounted approximately 150 feet
2 from the location where J.A. was shot. Additionally, Border Patrol agents have opened
3 fire into Nogales from the U.S. side on prior occasions and are known to launch non-
4 lethal devices such as pepper spray canisters into Nogales neighborhoods from the U.S.
5 side of the border fence. By shooting at individuals on the Mexican side, and using
6 weapons and devices with a range extending to the Mexican side of the border area, the
7 United States, through the Border Patrol, controls the area immediately adjacent to the
8 international border fence on the Mexican side. This control extended to the street,
9 Calle Internacional, where J.A. was killed.

10 24. U.S. Border Patrol agents, with force, exercise control over areas on the
11 Mexican side adjacent to the international border fence. U.S. Border Patrol agents
12 make seizures on the Mexican side of the fence. CBP officials are authorized to be on
13 Mexican soil to conduct pre-inspection of those seeking admission to the United States.
14 U.S. Border Patrol helicopters fly in Mexican airspace near the border and swoop down
15 on individuals, inundating those individuals with dust and debris. Thus, as the Chief of
16 the U.S. Border Patrol has acknowledged, U.S. border security policy “extends [the
17 nation’s] zone of security outward, ensuring that our physical border is not the first or
18 last line of defense, but one of many.” *Securing Our Borders—Operational Control*
19 *and the Path Forward: Hearing Before the Subcomm. on Border and Maritime*
20 *Security of the H. Comm. on Homeland Security*, 112th Cong. 8 (2011) (prepared
21 statement of Michael J. Fisher, Chief of U.S. Border Patrol).

22 25. In recent years, physical abuse of persons near the border by U.S. Border
23 Patrol agents has been rampant in Nogales and elsewhere. The Border Patrol
24 consistently denies public access to basic information about its operations, including
25 whether agents responsible for abuse are disciplined in any way, thus shielding the
26 agency and individual agents from public accountability for abusive policies and
27 practices. Even after many fatal shooting incidents involving Border Patrol agents, the
28 agency has refused to release the names of those involved.

1 26. Based on an extensive investigation, the Arizona Republic found that
2 between 2010 and 2012, the year J.A. was killed, there were 487 “use of force incidents”
3 in the Border Patrol’s Tucson Sector, 233 of which occurred in the Nogales area. *See*
4 Bob Ortega and Rob O’Dell, *Force at the Border: Tucson Sector*, ARIZ. REPUBLIC
5 (Dec. 16, 2013).

6 27. Reports also found that nationwide there were 15 deaths caused by
7 Border Patrol agents in 2011–2012 alone, five of which occurred in the Tucson Sector.
8 Thirteen of these deaths were caused by shootings. Another source found that CBP
9 agents have killed 28 people since 2010. From 2005 to 2014, Border Patrol agents
10 caused 46 deaths nationwide, according to media reports and data provided by the
11 government.

12 28. A report by the American Immigration Council in May 2014 reviewed
13 809 complaints of alleged abuse by Border Patrol agents between 2009 and 2012 and
14 found that “CBP officials rarely take action against the alleged perpetrators of abuse.”
15 AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP
16 ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 3 (2014). The report
17 noted that it was impossible to determine which cases had merit based on the data
18 provided by the government, but concluded that it was “astonishing that, among those
19 cases in which a formal decision was issued, 97 percent resulted in ‘No Action Taken.’”
20 *Id.* at 1.

21 29. A former high ranking official at CBP has publicly stated: “With very
22 serious misconduct—borderline criminal activity—senior management often gave
23 Border Patrol agents a slap on the wrist or did nothing at all.” Andrew Becker,
24 *Removal of Border Agency’s Internal Affairs Chief Raises Alarms*, HUFFINGTON POST
25 (June 12, 2014).

26 30. In response to continuing public interest and controversy surrounding
27 CBP’s use of force policies and practices, and in particular to a letter sent by 16
28 members of Congress seeking information about CBP’s use of force policies, CBP

1 commissioned an external, independent review of its use of force policies and practices
2 from the Police Executive Research Forum (“PERF”), a non-profit research
3 organization comprised of experts on police practices. *See* POLICE EXEC. RESEARCH
4 FORUM, U.S. CUSTOMS AND BORDER PROTECTION USE OF FORCE REVIEW: CASES AND
5 POLICIES (2013). PERF reviewed all deadly force events from January 2010 through
6 October 2012, including 67 case files related to CBP officers’ use of deadly force.
7 PERF subsequently provided CBP with a report and recommendations, detailing
8 significant shortcomings in CBP use of force policies and practices, including the
9 following:

- 10 a) “It is not clear that CBP consistently and thoroughly reviews all use of deadly
11 force incidents.” (Report at 4);
- 12 b) Too many cases [involving shootings at rock throwers] do not appear to meet
13 the test of objective reasonableness with regard to the use of deadly force.”
14 (Report at 7);
- 15 c) Of the 25 case files PERF reviewed involving shots fired by Border Patrol
16 agents who responded to alleged rock throwing, “[s]ome cases seemed to be a
17 clear cut self-defense reaction to close and serious rock threats or assaults, while
18 other shootings were of more questionable justification. The more questionable
19 cases generally involved shootings that took place through the IBF [International
20 Border Fence] at subjects who were throwing rocks at agents from Mexico.”
21 (Report at 8).

22 31. In September 2013, a report by the Department of Homeland Security
23 Office of Inspector General noted that “many agents and officers do not understand use
24 of force and the extent to which they may or may not use force.” Department of
25 Homeland Security, Office of Inspector General, *CBP Use of Force Training and*
26 *Actions to Address Use of Force Incidents* (Redacted) 17 (2013).

27 32. Upon information and belief, Defendant Swartz is still employed by CBP.
28

Harm Suffered by Plaintiff Because of Defendant's Actions

33. There is a real and actual controversy between Plaintiff and Defendant, and Defendant's actions were the proximate cause of the death of Plaintiff's son.

34. Plaintiff and her son have suffered significant damages, in an amount to be proven at trial.

CAUSES OF ACTION

COUNT ONE

VIOLATION OF THE FOURTH AMENDMENT

35. The foregoing allegations are re-alleged and incorporated herein by reference.

36. At the time J.A. was fatally shot, Defendant was not in danger of fatal or bodily harm from J.A. or anyone else.

37. In fatally shooting J.A., Defendant acted intentionally and used unreasonable and excessive force with the purpose of causing harm to J.A. without legal justification.

38. Defendant's actions violated the Fourth Amendment's prohibition against seizures with excessive and unreasonable force.

COUNT TWO

VIOLATION OF THE FIFTH AMENDMENT

39. The foregoing allegations are re-alleged and incorporated herein by reference.

40. At the time J.A. was fatally shot, Defendant was not in danger of fatal or bodily harm from J.A. or anyone else.

41. In fatally shooting J.A., Defendant acted intentionally, maliciously, and used unreasonable and excessive force, with the purpose to cause harm to J.A. without legal justification. Defendant's actions were unnecessary to achieve any legitimate law enforcement objective.

42. Defendant's actions were grossly excessive and deliberately indifferent, and shocked the conscience, in violation of the substantive due process component of the Fifth Amendment.

RELIEF

WHEREFORE, Plaintiff respectfully requests relief as follows:

- 43. A declaration that Defendant's actions violated the Constitution.
- 44. Trial by jury.
- 45. Damages, including punitive damages, in an amount to be proven at trial.
- 46. Costs and reasonable attorney fees.
- 47. Such other relief as the Court deems just and equitable.
- 48. Demand for jury trial.

DATED: September 8, 2014

/s/Lee Gelernt
ACLU FOUNDATION IMMIGRANTS'
RIGHTS PROJECT

/s/Luis F. Parra
PARRA LAW OFFICES

/s/Roberto C. Montiel
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/s/ Daniel J. Pochoda
ACLU FOUNDATION OF ARIZONA
Counsel for Plaintiff

APPEAL,STAY-CASE,STD

**U.S. District Court
DISTRICT OF ARIZONA (Tucson Division)
CIVIL DOCKET FOR CASE #: 4:14-cv-002251-RCC**

Rodriguez v. Swartz
Assigned to: Chief Judge Raner C Collins
Case in other court: 9th CCA, 15-16410
Cause: 28:1331 Federal Question: Bivens Act

Date Filed: 07/29/2014
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Plaintiff

Araceli Rodriguez
*individually and as the surviving mother
and
personal representative of
J.A.*

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V.

Intervenor Plaintiff

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TERMINATED: 11/13/2014

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V.

Defendant

Unknown Parties
*named as John Does 1-10, Agents of
 U.S. Border Patrol, and Does 11-20
 Officers of U.S. Customs and Border
 Protection*
TERMINATED: 11/13/2014

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Defendant

Lonnie Swartz
Agent of U.S. Border Patrol

represented by **Sean Christopher Chapman**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
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07/29/2014	<u>1</u>	COMPLAINT. Filing fee received: \$ 400.00, receipt number 0970-10710021 filed by Araceli Rodriguez. (Pochoda, Daniel) (Attachments: # <u>1</u> Exhibit, # <u>2</u> Civil Cover Sheet)(DLC) (Entered: 07/29/2014)
07/29/2014	<u>2</u>	Filing fee paid, receipt number 0970-10710021. This case has been assigned to the Honorable Raner C. Collins. All future pleadings or documents should bear the correct case number: 4:14-CV-02251-TUC-RCC. Notice of Availability of Magistrate Judge to Exercise Jurisdiction form attached. (DLC) (Entered: 07/29/2014)
07/29/2014	<u>3</u>	MOTION for Admission Pro Hac Vice as to attorney Lee Gelernt by Araceli Rodriguez. (Attachments: # <u>1</u> Certificate of Good Standing)(Gelernt, Lee) (Entered: 07/29/2014)
08/01/2014	<u>4</u>	MOTION for Admission Pro Hac Vice as to attorney Cecillia D. Wang by Araceli Rodriguez. (Attachments: # <u>1</u> Certificate of Good Standing)(Wang, Cecillia) (Entered: 08/01/2014)
08/01/2014	<u>5</u>	MOTION for Admission Pro Hac Vice as to attorney Andre Segura by Araceli Rodriguez. (Attachments: # <u>1</u> Certificate of Good Standing)(Segura, Andre) (Entered: 08/01/2014)
08/04/2014	<u>6</u>	MOTION for Discovery <i>Prior to Rule 26(f) Conference</i> by Araceli Rodriguez. (Attachments: # <u>1</u> Memorandum In Support of Motion, # <u>2</u> Text of Proposed Order Proposed Order, # <u>3</u> Exhibit Declaration of Andre Segura In Support of Motion, # <u>4</u> Exhibit Proposed Subpoena to DHS, # <u>5</u> Exhibit Proposed Subpoena to CBP, # <u>6</u> Exhibit Proposed Subpoena to NPD)(Gelernt, Lee) (Entered: 08/04/2014)
08/04/2014	<u>7</u>	MOTION for Admission Pro Hac Vice as to attorney Dror Ladin on behalf of Araceli Rodriguez. (BAS) (Entered: 08/04/2014)
08/04/2014		PRO HAC VICE FEE PAID. \$ 140, receipt number PHX148920 as to Andre Segura, Cecillia D Wang, Dror Ladin, Lee Gelernt. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/04/2014)
08/04/2014	<u>8</u>	ORDER pursuant to General Order 09-08 granting <u>3</u> Motion for Admission Pro Hac Vice; granting <u>4</u> Motion for Admission Pro Hac Vice; granting <u>5</u> Motion for Admission Pro Hac Vice; granting <u>7</u> Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (BAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 08/04/2014)
08/06/2014	<u>9</u>	MOTION for Admission Pro Hac Vice as to attorney Hector Suarez on behalf of Araceli Rodriguez. (BAS) (Entered: 08/06/2014)
08/06/2014	<u>10</u>	MOTION for Admission Pro Hac Vice as to attorney Arturo J Gonzalez on behalf of Araceli Rodriguez. (BAS) (Entered: 08/06/2014)
08/06/2014		PRO HAC VICE FEE PAID. \$ 70, receipt number PHX149056 as to Arturo J Gonzalez, Hector Suarez. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/06/2014)
08/06/2014	<u>11</u>	ORDER pursuant to General Order 09-08 granting <u>9</u> Motion for Admission Pro Hac Vice; granting <u>10</u> Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (BAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 08/06/2014)
08/07/2014	<u>12</u>	ORDER granting <u>6</u> Motion for Discovery Prior to Rule 26(f) Conference. Signed by Chief Judge Raner C Collins on 8/5/2014.(BAR) (Entered: 08/07/2014)
08/11/2014	<u>13</u>	MOTION for Admission Pro Hac Vice as to attorney Mitra Ebadolahi on behalf of Araceli Rodriguez. (BAS) (Entered: 08/11/2014)

08/11/2014		PRO HAC VICE FEE PAID. \$ 35, receipt number PHX149208 as to Mitra Ebadolahi. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/11/2014)
08/11/2014	<u>14</u>	ORDER pursuant to General Order 09-08 granting <u>13</u> Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (BAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 08/11/2014)
09/08/2014	<u>15</u>	MOTION to Seal Document <i>First Amended Complaint</i> by Araceli Rodriguez. (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Exhibit First Amended Complaint (Redacted))(Gelernt, Lee) (Entered: 09/08/2014)
09/08/2014	<u>16</u>	(Filed at <u>18</u>)-SEALED LODGED Proposed First Amended Complaint (Unredacted, Under Seal) re: <u>15</u> MOTION to Seal Document <i>First Amended Complaint</i> . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Araceli Rodriguez. (Gelernt, Lee) Modified on 9/10/2014 (BAR). Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). (Entered: 09/08/2014)
09/10/2014	<u>17</u>	ORDERED granting the <u>15</u> Motion to Seal the <u>16</u> First Amended Complaint under seal. The Court further grants Plaintiff's Motion for Defendant to Show Cause why the First Amended Complaint should remain under seal. Signed by Chief Judge Raner C Collins on 9/9/2014. (See Order for further Details.)(BAR) (Entered: 09/10/2014)
09/10/2014	<u>18</u>	Sealed Document: First Amended Complaint filed by Araceli Rodriguez. (BAR) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). (Entered: 09/10/2014)
09/16/2014	<u>19</u>	*MOTION to Seal Document by Unknown Parties. (Chapman, Sean) *Modified restriction from public to sealed per case manager on 9/17/2014 (CEI). Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). (Entered: 09/16/2014)
09/16/2014	<u>20</u>	*(Filed at Doc. <u>22</u>)-SEALED LODGED Proposed Notice of Appearance re: <u>19</u> MOTION to Seal Document . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Unknown Parties. (Chapman, Sean) Modified on 9/18/2014 (MFR). Modified on 11/13/2014, UNSEALED BY DOC <u>40</u> (BAR). (Entered: 09/16/2014)
09/18/2014	<u>21</u>	ORDER granting <u>19</u> Motion to Seal Document <u>20</u> Sealed Lodged Proposed Document. Signed by Chief Judge Raner C Collins on 9/17/2014.(MFR) (cc: Lee Gelernt, Andre Segura, Daniel J. Pochoda, James Duff Lyall, Luis F. Parra, Roberto C. Montiel, Cecillia D. Wang, Mitra Ebadolahi, Arturo J. Gonzalez, Hector Suarez, and Sean C. Chapman) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). (Entered: 09/18/2014)
09/18/2014	<u>22</u>	Sealed Document: Notice of Appearance filed by Unknown Parties. (MFR) Modified on 11/13/2014, UNSEALED BY DOC <u>40</u> (BAR). (Entered: 09/18/2014)
09/19/2014	<u>23</u>	Second MOTION to Seal Document <i>Motion to Extend Time</i> by Unknown Parties. (Attachments: # <u>1</u> Text of Proposed Order)(Chapman, Sean) (Entered: 09/19/2014)
09/19/2014	<u>24</u>	(Filed at <u>25</u>)-SEALED LODGED Proposed Motion to Extend Time re: <u>23</u> Second MOTION to Seal Document <i>Motion to Extend Time</i> . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Unknown Parties. (Attachments: # <u>1</u> Text of Proposed Order)(Chapman, Sean) Modified on 9/22/2014 (BAR). Modified on 11/13/2014, UNSEALED BY DOC <u>40</u> (BAR). (Entered: 09/19/2014)
09/22/2014	<u>25</u>	SEALED MOTION for Extension of Time to File Answer and/or Responsive Motion and Response to Order to Show Cause by Unknown Parties. (BAR) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). (Entered: 09/22/2014)
09/22/2014	<u>26</u>	ORDER granting <u>23</u> Motion to Seal Document and <u>25</u> Sealed Motion for Extension of Time to Answer. Defendant shall have up to and including 11/7/2014 to file any answer and/or Motion to Dismiss and to respond to the Court's Order to Show Cause. Signed by Chief Judge Raner C Collins on 9/22/2014.(BAR) (Entered: 09/22/2014)

11/05/2014	<u>27</u>	MOTION for Admission Pro Hac Vice as to attorney Elizabeth Balassone on behalf of Araceli Rodriguez. (BAS) (Entered: 11/05/2014)
11/05/2014		PRO HAC VICE FEE PAID. \$ 35, receipt number PHX152032 as to Elizabeth Balassone. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 11/05/2014)
11/05/2014	<u>28</u>	ORDER pursuant to General Order 09-08 granting <u>27</u> Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (BAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 11/05/2014)
11/06/2014	<u>29</u>	*MOTION to Seal Document by Unknown Parties. (Attachments: # <u>1</u> Text of Proposed Order)(Chapman, Sean) *Modified restriction from public to sealed per case manager on 11/7/2014 (CEI). Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). (Entered: 11/06/2014)
11/06/2014	<u>30</u>	*Motion to Dismiss First Amended Complaint re: <u>29</u> MOTION to Seal Document . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Unknown Parties. (Chapman, Sean) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). Modified on 11/13/2014 (BAR). Modified on 11/18/2014 (BAR). Modified on 12/11/2014 (BAR). (Entered: 11/06/2014)
11/06/2014	<u>31</u>	*LODGED Proposed Motion to Exceed Page Limitation re: <u>29</u> MOTION to Seal Document . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Unknown Parties. (Chapman, Sean) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). Modified on 11/13/2014 (BAR). Modified on 11/18/2014 (BAR). (Entered: 11/06/2014)
11/06/2014	<u>32</u>	*SEALED LODGED Proposed Response to OSC re: <u>29</u> MOTION to Seal Document . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Unknown Parties. (Chapman, Sean) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). Modified on 11/13/2014 (BAR). (Entered: 11/06/2014)
11/06/2014	<u>33</u>	*SEALED LODGED Proposed Motion to Stay Discovery re: <u>29</u> MOTION to Seal Document . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Unknown Parties. (Chapman, Sean) Modified on 11/13/2014, UNSEALED BY <u>40</u> (BAR). Modified on 11/13/2014 (BAR). Modified on 11/24/2014 (BAR). Modified on 11/24/2014, changed from lodged to motion (BAR). (Entered: 11/06/2014)
11/07/2014	<u>34</u>	NOTICE of Attorney Substitution by Elizabeth Gilmore Balassone. (Balassone, Elizabeth) (Entered: 11/07/2014)
11/07/2014	<u>35</u>	ORDER Setting Hearing – In-Court Hearing set for 11/13/2014 at 11:00 AM before Chief Judge Raner C. Collins. Signed by Chief Judge Raner C. Collins on 11/7/2014. (SSG) (Entered: 11/10/2014)
11/10/2014	<u>36</u>	REPLY re: <u>17</u> Order on Motion to Seal Document by Plaintiff Araceli Rodriguez. (Gelernt, Lee) (Entered: 11/10/2014)
11/11/2014	<u>37</u>	MOTION to Intervene <i>Application of Phoenix Newspapers, Inc. to Intervene for the Limited Purpose of Securing an Order to Unseal Defendant Names and Pleadings</i> by Phoenix Newspapers, Inc.. (Attachments: # <u>1</u> Text of Proposed Order)(Moeser, James) (Entered: 11/11/2014)
11/11/2014	<u>38</u>	*Corporate Disclosure Statement by Phoenix Newspapers Incorporated, identifying Corporate Parents Gannett Company Incorporated, and Central Newspapers Incorporated for Phoenix Newspapers Incorporated. (Moeser, James) *Modified to correct party names on 11/12/2014* (REW). (Entered: 11/11/2014)
11/12/2014	<u>39</u>	ORDER granting <u>37</u> Motion to Intervene for the Limited Purpose of Securing an Order to Unseal Defendant Names and Pleadings. It is further ordered granting PNI leave to appear and be heard at the hearing on November 13, 2014 at 11:00 a.m.. Signed by Chief Judge Raner C Collins on 11/12/14. (KAH) (Entered: 11/12/2014)

11/13/2014	<u>40</u>	ORDER denying <u>29</u> Motion to Seal. Further ordered that only Defendant's name is to be released to the public by the parties. Further ordered that the Clerk of Court shall unseal all filings where a seal has been lodged. Ordered that Intervenor Phoenix Newspapers, Inc. is dismissed from this suit. Further ordered that the Clerk of Court shall amend the caption of this case to reflect the sole defendant, Mr. Lonnie Swartz. Signed by Chief Judge Raner C Collins on 11/13/2014. (See Order for specific details).(BAR) (Entered: 11/13/2014)
11/13/2014	<u>41</u>	MINUTE ENTRY for proceedings held before Chief Judge Raner C. Collins: In-Court Hearing re: <u>29</u> Motion to Seal Document filed by the defendant held on 11/13/2014. Counsel present argument to the Court. The Court takes the motion UNDER ADVISEMENT and intends to render a decision by the close of business this date. APPEARANCES: Telephonic appearance by Lee Gelernt for the ACLU. James Lyall for the ACLU. Luis Parra for the Plaintiff. Sean Chapman for Defendant. J. Christopher Moeser for the Intervenor. (Court Reporter Erica McQuillen.) Hearing held 11:00 AM to 11:26 AM. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SSG) (Entered: 11/13/2014)
11/17/2014	<u>42</u>	MOTION for Extension of Time to File Response/Reply as to <u>30</u> Sealed Lodged Proposed Document by Araceli Rodriguez. (Attachments: # <u>1</u> Text of Proposed Order)(Gelernt, Lee) (Entered: 11/17/2014)
11/18/2014	<u>43</u>	ORDER granting <u>31</u> Motion for Leave to File Excess Pages; granting <u>42</u> Motion for Extension of Time to File Response to <u>30</u> MOTION to Dismiss First Amended Complaint. Signed by Chief Judge Raner C Collins on 11/17/2014.(BAR) (Entered: 11/18/2014)
11/21/2014	<u>44</u>	Joint MOTION to Stay re: <u>33</u> Sealed Lodged Proposed Document by Araceli Rodriguez. (Attachments: # <u>1</u> Text of Proposed Order)(Gelernt, Lee) (Entered: 11/21/2014)
11/24/2014	<u>45</u>	ORDER denying as moot <u>33</u> Motion to Stay Discovery. Further ordered granting <u>44</u> Joint Motion Regarding Stay of Discovery. Discovery shall be stayed until 4/15/2015. Signed by Chief Judge Raner C Collins on 11/21/2014.(BAR) (Entered: 11/24/2014)
12/08/2014	<u>46</u>	RESPONSE in Opposition re: <u>30</u> MOTION to Dismiss Case filed by Araceli Rodriguez. (Attachments: # <u>1</u> Exhibit Letter from Mexican Government)(Gelernt, Lee) (Entered: 12/08/2014)
12/10/2014	<u>47</u>	MOTION for Extension of Time to File <i>Reply to Motion to Dismiss</i> by Lonnie Swartz. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order)(Chapman, Sean) Modified on 12/11/2014 (BAR). (Entered: 12/10/2014)
12/11/2014	<u>48</u>	ORDER granting <u>47</u> Motion for Extension of Time to File Reply to the <u>30</u> MOTION to Dismiss. Defendant shall have until 12/22/2014 to file a reply. Signed by Chief Judge Raner C Collins on 12/11/2014.(BAR) (Entered: 12/11/2014)
12/22/2014	<u>49</u>	REPLY to Response to Motion re: <u>30</u> MOTION to Dismiss Case filed by Lonnie Swartz. (Chapman, Sean) (Entered: 12/22/2014)
12/30/2014	<u>50</u>	MOTION for Admission Pro Hac Vice as to attorney Katherine Desormeau on behalf of Araceli Rodriguez. (BAS) (Entered: 12/30/2014)
12/30/2014		PRO HAC VICE FEE PAID. \$ 35, receipt number PHX153717 as to Katherine Desormeau. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 12/30/2014)
12/30/2014	<u>51</u>	ORDER pursuant to General Order 09-08 granting <u>50</u> Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (BAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 12/30/2014)

04/16/2015	<u>52</u>	Second MOTION for Discovery by Lonnie Swartz. (Chapman, Sean) (Entered: 04/16/2015)
04/29/2015	<u>53</u>	Joint MOTION to Hold Motion for Discovery in Abeyance by Araceli Rodriguez. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order)(Gelernt, Lee) Modified on 4/30/2015, incorrect motion event (BAR). (Entered: 04/29/2015)
04/29/2015	<u>54</u>	Notice of Supplemental Authority in Support of Motion to Dismiss re: <u>30</u> MOTION to Dismiss Case, <u>46</u> Response in Opposition to Motion, <u>49</u> Reply to Response to Motion by Lonnie Swartz. (Chapman, Sean) Modified on 4/30/2015 (BAR). (Entered: 04/29/2015)
04/30/2015	<u>55</u>	ORDER denying as moot the <u>52</u> Motion for Stay Discovery and granting <u>53</u> Motion to hold Defendant's Discovery Motion in Abeyance. Signed by Chief Judge Raner C Collins on 4/29/2015.(BAR) (Entered: 04/30/2015)
05/08/2015	<u>56</u>	ORDERED that oral argument on the <u>30</u> MOTION to Dismiss is set for 5/26/2015 at 01:30 PM in Courtroom 5D, 405 West Congress Street, Tucson, AZ 85701 before Chief Judge Raner C Collins. Signed by Chief Judge Raner C Collins on 5/7/2015. (BAR) (Entered: 05/08/2015)
05/26/2015	<u>57</u>	MINUTE ENTRY for proceedings held before Chief Judge Raner C. Collins: Motion Hearing held on 5/26/2015 re <u>30</u> Motion to Dismiss filed by the defendant TAKEN UNDER ADVISEMENT. APPEARANCES: Lee Gelernt, Mitra Ebadolahi, Katherine Desormeau, Luis Parra and James Lydall for Plaintiff. Sean Chapman for Defendant. (Court Reporter Cheryl Cummings.) Hearing held 1:30 PM to 2:08 PM. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SSG) (Entered: 05/26/2015)
07/09/2015	<u>58</u>	ORDER granting in part and denying in part <u>30</u> Motion to Dismiss. Rodriguez claim pursuant to the Fifth Amendment is dismissed; Rodriguez claim pursuant to the Fourth Amendment proceeds. Signed by Chief Judge Raner C Collins on 7/9/2015.(BAR) (Entered: 07/09/2015)
07/14/2015	<u>59</u>	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <u>58</u> Order on Motion to Dismiss by Lonnie Swartz. Filing fee received: \$ 505.00, receipt number 0970-11893460. (Chapman, Sean) (Entered: 07/14/2015)
07/15/2015	<u>60</u>	USCA Case Number re: <u>59</u> Notice of Appeal. Case number 15-16410, 9th CCA. (KAH) (Entered: 07/15/2015)
07/15/2015	<u>61</u>	TIME SCHEDULE ORDER of USCA re: <u>59</u> Notice of Appeal filed by Lonnie Swartz. (KAH) (Entered: 07/15/2015)
07/17/2015	<u>62</u>	TRANSCRIPT REQUEST by Lonnie Swartz for proceedings held on May 26, 2015, Judge Raner C Collins hearing judge(s). (Chapman, Sean) (Entered: 07/17/2015)
08/04/2015	<u>63</u>	TRANSCRIPT of MOTION TO DISMISS HEARING for date of 05/26/2015 before Judge RANER C. COLLINS re: <u>59</u> Notice of Appeal. Court Reporter Cheryl L. Cummings. The ordering party will have electronic access to the transcript immediately. All others may view the transcript at the court public terminal or it may be purchased through the Court Reporter by filing a Transcript Order Form on the docket before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/25/2015. Redacted Transcript Deadline set for 9/4/2015. Release of Transcript Restriction set for 11/2/2015. (CSL) (Entered: 08/04/2015)
12/10/2015	<u>64</u>	* NOTICE of Attorney Withdrawal filed by Katherine Desormeau terminating Katherine Desormeau. as to Araceli Rodriguez. (Desormeau, Katherine) *Modified to correct event type; modified to remove attorney Katherine Desormeau on 12/11/2015 (MFR). (Entered: 12/10/2015)