

1 Lee Gelernt*
2 Andre Segura*
3 AMERICAN CIVIL LIBERTIES UNION
4 FOUNDATION
5 IMMIGRANTS' RIGHTS PROJECT
6 125 Broad St., 18th Floor
7 New York, NY 10004
8 T: (212) 549-2660
9 *lgelernt@aclu.org*
10 *asegura@aclu.org*

Luis F. Parra (Bar No. 21570)
PARRA LAW OFFICES
571 North Grand Avenue
Nogales, AZ 85621
T: (520) 281-9369
F: (520) 281-1396
lfparra@azmxlaw.com

8 Daniel J. Pochoda (Bar No. 021979)
9 James Duff Lyall (Bar No. 330045)**
10 ACLU FOUNDATION OF ARIZONA
11 3707 North 7th Street, Suite 235
12 Phoenix, AZ 85014
13 T: (602) 650-1854
14 F: (602) 650-1376
15 *dpochoda@acluaz.org*
16 *jlyall@acluaz.org*

Roberto C. Montiel (Bar No. 003198)
ROBERTO MONTIEL LAW OFFICES
571 North Grand Avenue
Nogales, AZ 85621
T: (520) 281-2923
lawrobertomontiel@hotmail.com

15 *Attorneys for Plaintiff*

16 *(Additional Counsel on Subsequent Pages)*

17
18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE DISTRICT OF ARIZONA**

20 ARACELI RODRIGUEZ, individually
21 and as the surviving mother and personal
22 representative of the ESTATE OF J.A.,
23 Deceased,

Plaintiff,

v.

24 LONNIE SWARTZ, et al.,

Defendants.

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

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS**

(Oral Argument Requested)

1 *Additional Counsel*

2 Cecillia D. Wang*
3 Katherine Desormeau***
4 AMERICAN CIVIL LIBERTIES
5 UNION FOUNDATION
6 IMMIGRANTS' RIGHTS PROJECT
7 39 Drumm Street
8 San Francisco, CA 94111
9 T: (415) 343-0770
10 F: (415) 268-7522
11 *cwang@aclu.org*
12 *kdesormeau@aclu.org*

Arturo J. Gonzalez*
Elizabeth Balassone*
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
T: (415) 268-7000
F: (415) 268-7522
agonzalez@mofo.com
ebalassone@mofo.com

9 Mitra Ebadolahi*
10 ACLU FOUNDATION OF SAN DIEGO
11 AND IMPERIAL COUNTIES
12 P.O. Box 92138
13 San Diego, CA 92138-7131
14 T: (619) 232-2121
15 F: (619) 232-0036
16 *mebadolahi@aclusandiego.org*

17 * *Admitted pro hac vice*

18 ** *Admitted pursuant to Ariz. Sup. Ct.*
19 *R. 38(f)*

20 *** *Pro hac vice application forthcoming*

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

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

23
24 ¹ The facts are taken from the First Amended Complaint (“FAC”) and are presumed
25 true on a motion to dismiss. Contrary to Defendant’s suggestion, the FAC’s allegations
26 are hardly “threadbare” and “conclusory.” Def. Br. 7. Defendant also notes that
27 paragraph 42 of the FAC states that Defendant acted with “deliberate indifferen[ce].”
28 Defendant argues, however, that a deliberate indifference claim cannot be brought
against Agent Swartz because he is not a supervisor. Def. Br. 15 n.7. But even if that
were true, paragraph 42, as well as numerous other paragraphs in the FAC, set forth
ample allegations of Defendant’s use of unjustified and excessive force, a standard that
indisputably applies. *See, e.g.*, FAC ¶¶ 1, 18, 37, 38, 41.

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

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

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

26 ARGUMENT

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

1 388 (1971) (permitting suit for excessive force); *Tekle v. United States*, 511 F.3d 839,
2 844-48 (9th Cir. 2007) (*Bivens* excessive force claim). Defendant argues, however,
3 that the Fourth and Fifth Amendments do not apply extraterritorially and that this
4 action must therefore be dismissed. But Agent Swartz was standing on U.S. soil when
5 he fired his weapon. Accordingly, this case does not involve constitutional
6 “extraterritoriality” and can be resolved on the ground that the relevant government
7 activity—the agent’s unlawful use of his weapon—occurred in the United States. *See*
8 Section I, *infra*. In any event, even if this case were viewed as involving the
9 extraterritorial application of the Constitution, the Fourth and Fifth Amendments apply
10 under the Supreme Court’s functional approach. *See* Section II, *infra*. Further,
11 Defendant has expressly declined to press a claim for qualified immunity and would in
12 any event not be entitled to such immunity. *See* Section III, *infra*. Finally, contrary to
13 Defendant’s argument, Plaintiff may pursue a Fifth Amendment claim if this Court
14 were to deem the Fourth Amendment inapplicable. *See* Section IV, *infra*.²

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

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

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

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

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

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

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

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

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

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

19 **II. THE FOURTH AND FIFTH AMENDMENTS APPLY HERE UNDER AN** 20 **EXTRATERRITORIAL ANALYSIS.**

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

25 **A. The Test for the Extraterritorial Application of Constitutional Rights** 26 **Is a Functional One That Asks Whether Judicial Enforcement of a** 27 **Right Would Be “Impracticable and Anomalous.”**

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

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

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

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

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

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

18 Finally, *Boumediene* likewise made clear that *Verdugo-Urquidez* did not set
19 forth a categorical rule regarding the Fourth Amendment’s extraterritorial application
20 to noncitizens overseas. In *Verdugo-Urquidez*, a four-Justice Plurality concluded that
21 the Warrant Clause of the Fourth Amendment did not apply to the search of a Mexican
22 citizen’s home in Mexico. But, as with the Court’s Fifth Amendment decision in
23 *Eisentrager*, the holding was not categorical. Rather, the plurality opinion stated that
24 “[u]nder these circumstances, the Fourth Amendment has no application.” 494 U.S. at
25 275 (emphasis added).

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

1 his view, there was no real significance to the fact that the Fourth Amendment referred
2 to “the People” rather than all “persons.” Instead, he applied the “impracticable and
3 anomalous” test and simply concluded that, as a practical matter, it would be too
4 difficult to apply the warrant requirement overseas in that case. *Verdugo-Urquidez*,
5 494 U.S. at 277-78 (Kennedy, J., concurring); *see also id.* (stating that “[t]he conditions
6 and considerations of this case would make adherence to the Fourth Amendment’s
7 warrant requirement impracticable and anomalous”) (Kennedy, J., concurring). *See*
8 *also United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008) (rejecting the
9 proposition that *Verdugo-Urquidez* strips all noncitizens outside the U.S. of
10 constitutional rights as an “oversimplification”); *United States v. Inigo*, 925 F.2d 641,
11 656 (3d Cir. 1991) (stressing that *Verdugo-Urquidez* “hold[s] only that Fourth
12 Amendment rights are not implicated when officials search the residence of a foreign
13 national outside of the United States,” and noting that the Court “expressly refused to
14 rule on the issue of whether such a seizure could violate an accused’s Fifth Amendment
15 due process rights”); Christina Duffy Burnett, *A Convenient Constitution?*
16 *Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1015 (2009) (in
17 *Verdugo-Urquidez*, “Kennedy rejected both the Rehnquist definition of the ‘people’
18 and its relevance to the analysis. Instead, he advocated the adoption of . . . [the]
19 ‘impracticable and anomalous test.’”).⁴

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

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

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

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

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

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

20 ⁵ Defendant cites *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), for the proposition that
21 the Fourth and Fifth Amendments are categorically inapplicable here. Def. Br. 17. But
22 *Zadvydas*—decided before *Boumediene*—does no such thing. As *Boumediene* clarified,
23 the Supreme Court’s earlier decisions merely held those Amendments inapplicable in
24 certain circumstances; they do not mean that the Fourth and Fifth Amendments never
25 apply. *Boumediene*, 553 U.S. at 764. Defendant also cites *Ibrahim v. DHS*, 669 F.3d
26 983 (9th Cir. 2012), for the proposition that a bright-line “voluntary connections” test
27 applies. Def. Br. 11. But *Ibrahim*—which involved only First and Fifth Amendment
28 claims and arose in the very different context of a challenge to the No-Fly List—
specifically recognized that, after *Boumediene*, the Supreme Court now applies a
“‘functional approach’ rather than a bright-line rule.” *Id.* at 995 (quoting *Boumediene*,
553 U.S. at 764). *Ibrahim* simply acknowledged that an alien’s connections to the U.S.
could be *one* factor in such a multi-factored “functional approach.” *Id.* In any event,
although not necessary for the reasons discussed above, J.A. has sufficient attachments
to the U.S. See, e.g., FAC ¶¶ 9, 17, 21-24.

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

5 There is also nothing anomalous about applying the Constitution in this context.
6 The limits imposed by the Fourth and Fifth Amendments are well known to Border
7 Patrol agents and must be observed by agents during engagements with both citizens
8 and noncitizens on the U.S. side of the border. *See, e.g., Lynch v. Cannatella*, 810 F.2d
9 1363, 1374 (5th Cir. 1987) ("whatever due process rights excludable aliens may be
10 denied by virtue of their status, they are entitled under the due process clauses of the
11 fifth and fourteenth amendments to be free of gross physical abuse at the hands of state
12 or federal officials"). Thus, applying the Fourth and Fifth Amendments here would not
13 subject Border Patrol agents to unfamiliar constitutional limits. As importantly,
14 criminal statutes—as well as governing regulations and policies—already prohibit a
15 Border Patrol agent on U.S. soil from using unjustified force against noncitizens across
16 the border, including, of course, an unjustified cross-border shooting like that alleged
17 here. *See, e.g.,* 8 C.F.R. § 287.8(a)(2). Consequently, applying the Fourth and Fifth
18 Amendments in this context would impose no new standards or limits on Border Patrol
19 agents, much less create an anomaly. What would be anomalous is if the Constitution
20 did not apply to unjustified cross-border shootings even though such shootings are
21 prohibited by both criminal law and the agency's own regulations.

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

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

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

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

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

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

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

16 339 U.S. at 777. No one factor was dispositive. Rather, "the Court in *Eisentrager*
17 made quite clear that all six of the facts critical to its disposition were relevant." *Rasul*
18 *v. Bush*, 542 U.S. 466, 476 (2004); *see also Boumediene*, 553 U.S. at 762, 764 (noting
19 that "[p]ractical considerations weighed heavily" in *Eisentrager*, where the Court had
20 to consider the difficulties of habeas corpus proceedings during a post-War military
21 occupation). The instant case bears little resemblance to the wartime situation in
22 *Eisentrager*.

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

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

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

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

18 Nor, as already discussed, would recognizing constitutional rights in this case
19 raise the specter of conflict with a foreign sovereign's laws or customs, a threat which
20

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

1 troubled the *Verdugo-Urquidez* Court. As the plurality opinion noted, a warrant issued
2 by a U.S. magistrate “would be a dead letter outside the United States.” 494 U.S. at
3 274; *see also id.* at 279 (noting that “American magistrates have no power to
4 authorize . . . searches” in a foreign country) (Stevens, J., concurring in the judgment).
5 All of these considerations taken together led the Supreme Court to conclude that the
6 Fourth Amendment’s warrant requirement could not practically be applied to a search
7 of property in Mexico. Such concerns are absent here.

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

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

20 **III. DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY.**

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

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

1 immunity operates ‘to ensure that before they are subjected to suit, officers are on
2 notice their conduct is unlawful.’”) (quoting *Saucier v. Katz*, 533 U.S. 194, 206
3 (2001)); accord *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (where “in the light
4 of pre-existing law the unlawfulness” of official action is “apparent,” qualified
5 immunity does not protect the action). The purpose of the qualified immunity doctrine
6 is straightforward: it ensures that officers will not have to guess whether their actions
7 are lawful. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“If the law at
8 that time was not clearly established, an official could not . . . fairly be said to ‘know’
9 that the law forbade conduct not previously identified as unlawful.”). Qualified
10 immunity is thus designed to ensure that the prospect of liability does not unduly chill a
11 government official’s lawful “exercise [of] discretion”—that is, his “willingness to
12 execute his office with the decisiveness and the judgment required by the public good.”
13 *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974), *overruled on other grounds by Davis*
v. Scherer, 468 U.S. 183 (1984).

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

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

26 ⁷ Further, agency regulations and internal policies parallel constitutional standards and
27 thus prohibit the unjustified use of deadly force across the board. See 8 C.F.R.
28 § 287.8(a)(2); CBP, Use of Force Handbook (2010), *available at*
<http://www.dhs.gov/sites/default/files/publications/cbp-use-of-force-policy.pdf>.

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

1 **IV. THE FIFTH AMENDMENT APPLIES IF THE FOURTH AMENDMENT**
2 **IS INAPPLICABLE.**

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

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

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

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

5 * * *

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

14 **CONCLUSION**

15 Defendant’s motion to dismiss should be denied.

16
17 RESPECTFULLY SUBMITTED this 8th day of December, 2014.

18 /s/ Lee Gelernt
19 ACLU FOUNDATION IMMIGRANTS’
20 RIGHTS PROJECT

21 /s/ Luis F. Parra
22 PARRA LAW OFFICES

23 *Counsel for Plaintiff*
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CERTIFICATE OF SERVICE

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

By: /s/ Lee Gelernt
Lee Gelernt