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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Araceli Rodriguez,

Plaintiff,

v.

Lonnie Swartz,

Defendant.

No. 4:14-CV-02251-RCC

ORDER

INTRODUCTION

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

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

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BACKGROUND

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

- 8 1. Rodriguez brings this suit on behalf of her deceased minor son, J.A. (Doc. 18 at
9 ¶¶ 3, 6).
- 10 2. On the night of October 10, 2012, J.A. was walking home alone down the
11 sidewalk of Calle Internacional, a street that runs alongside the border fence on
12 the Mexican side of the border between the United States and Mexico. (Doc. 18 at
13 ¶ 9).
- 14 3. According to an eyewitness who was walking behind J.A. that night, a Border
15 Patrol agent stationed on the U.S. side of the fence, now known to be Swartz,
16 opened fire. According to various reports, Swartz fired anywhere from 14 to 30
17 shots. Upon information and belief, Swartz did not issue any verbal warnings
18 before opening fire. (Doc. 18 at ¶ 10).
- 19 4. J.A. was shot approximately ten times and collapsed where he was shot. Virtually
20 all of the shots entered his body from behind. Upon information and belief, no one
21 else was shot. (Doc. 18 at ¶¶ 11-13).
- 22 5. Immediately prior to the shooting, J.A. was visible and not hiding—he was
23 peacefully walking down the street by himself. Eyewitnesses state that he did not
24 pose a threat and was not committing a crime, throwing rocks, using a weapon or
25 threatening U.S. Border Patrol agents or anyone else prior to being shot. (Doc. 18
26 at ¶ 14).
- 27 6. At the moment he was shot, J.A. was walking on the southern side of Calle
28 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).

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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).

7 LEGAL STANDARD

8 “On a motion to dismiss under Rule 12(b)(6), a court must assess whether the
9 complaint ‘contains sufficient factual matter, accepted as true, to ‘state a claim to relief
10 that is plausible on its face.’” *Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012) (*citing*
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 678; *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). “A
12 claim has facial plausibility when the plaintiff pleads factual content that allows the court
13 to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
14 *Id.* at 1108-09; see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-
15 23 (2007). In determining plausibility, the court must accept as true all material factual
16 allegations in the complaint, construe the pleadings in the light most favorable to the
17 plaintiff and make any reasonable inferences therefrom. *Broam v. Bogan*, 320 F.3d 1023,
18 1028 (9th Cir. 2003). A court may dismiss a claim if a successful affirmative defense
19 appears clearly on the face of the pleadings. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

20 DISCUSSION

21 **I. *Bivens*, the extraterritorial application of the U.S. Constitution and qualified** 22 **immunity**

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

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1 **III. J.A.’s seizure occurred in Mexico**

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

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

19 **IV. Rodriguez’ claim that Swartz violated J.A.’s Fourth Amendment rights survives**

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

21 The Supreme Court of the United States “has discussed the issue of the
22 Constitution’s extraterritorial application on many occasions.” *Boumediene*, 553 U.S. at
23 755-71. However, it was not until 2008’s *Boumediene v. Bush* that the Supreme Court
24 held for the first time that noncitizens detained by the United States government in
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27 ¹ The Court also rejects as unpersuasive Rodriguez’ argument pursuant to *Asahi*
28 *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.

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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.

1 immunity may not be asserted in this manner.

2 **VII. Conclusion**

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

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

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

20 Dated this 9th day of July, 2015.

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22
23 

24 _____
25 Raner C. Collins
26 Chief United States District Judge
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