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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ARACELI RODRIGUEZ, Plaintiff, v. LONNIE SWARTZ, et. al., Defendants.	CASE NO.: CV-14-02251-TUC-RCC **REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

The Defendant, through undersigned counsel, Sean C. Chapman of THE LAW OFFICES OF SEAN C. CHAPMAN, P.C., hereby files his Reply in support of his Motion to Dismiss the First Amended Complaint.

Plaintiff's response contains several significant factual and legal errors. Moreover, many of Plaintiff's arguments appear motivated to engender sympathy, rather than an objective analysis of the facts and the law. For example, Agent Swartz does not, as asserted by Plaintiff, argue that he should be permitted to act with constitutional impunity. Nor does defendant's position result in the executive branch serving as a check on itself. (Response at p. 2.) Each of these characterizations by Plaintiff is inaccurate and distracts from the critical

analysis that the Court must undertake in order to resolve the legal issues presented herein.[1] For the reasons advanced in the Motion to Dismiss and additionally supported below, the First Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. DEFENDANT'S PRESENCE ON U.S. SOIL DOES NOT RESOLVE THE QUESTION OF WHETHER THE DECEDENT, IN MEXICO, WAS PROTECTED BY THE FOURTH AND FIFTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Plaintiff oversimplifies the legal issues before this Court by suggesting they are resolved by virtue of the fact that Agent Swartz was on U.S. soil when he allegedly shot and killed J.A., in Mexico. (Response at p. 3.) In *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), relied on by Plaintiff, a Chinese national was paroled into the United States and placed in custody so that he would testify in an international drug conspiracy trial. The Ninth Circuit concluded that "the two-year American prosecutorial effort violated Wang's due process rights *on American soil*, where he was forced in an American courtroom, to choose between committing the crime of perjury or telling the truth and facing torture and possible execution." *Id.* at 817-18 (emphasis added). In so holding, the Court explained that when the government creates a special relationship with a person by placing him in a vulnerable

[1] Indeed, the circumstances here are no less sympathetic than, for example, those in *Ali v. Rumsfeld*, in which the D.C. Circuit considered a *Bivens* action alleging that various federal officials violated the plaintiffs' constitutional rights by formulating policies that caused them to be mistreated while detained in Iraq and Afghanistan - mistreatment that included alleged rape, sexual humiliation, and the intentional infliction of pain after surgery. 649 F.3d at 765-66. Nevertheless, the court concluded that the detainees, because they were detained abroad, lacked any clearly established rights under the Fifth Amendment due process clause or the Eighth Amendment; therefore, Secretary Rumsfeld and other defendants were entitled to qualified immunity. *Id.* at 770-72.

situation (paroling him into the United States and placing him in custody), the substantive component of the Due Process Clause obligates the government to provide for that person's basic needs and to protect him from deprivations of liberty. *Id.* at 818. Neither the facts of this case nor the outcome support Plaintiff's position.

Plaintiff's reliance on *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987), is equally misplaced. There, the U.S. Supreme Court determined that petitioner's intentional act of placing its valve assemblies into the stream of commerce by delivering them to a Taiwanese company, coupled with its awareness that some of them would eventually reach California, were sufficient to support state court jurisdiction under the Due Process Clause. The Court applied a "substantial connections" test to find jurisdiction proper over a foreign corporation because "'the constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established 'minimum contacts' in the forum State.'" *Id.* at 108-09 (quotations omitted.) To the extent this holding can be reasonably applied to this case, it supports Swartz's motion to dismiss because J.A. had no contacts, let alone minimum contacts, with the United States.

Plaintiff does not cite to a single case that supports her assertion that the occurrence of relevant government activity within the United States controls the constitutional limits on the use of deadly force. This argument must be rejected.

II. *BOUMEDEINE*'S FUNCTIONAL APPROACH IS NOT THE EXCLUSIVE TEST FOR DETERMINING WHETHER THE FOURTH OR FIFTH AMENDMENTS APPLY EXTRATERRITORIALLY TO J.A.

Plaintiff misstates the holding of *Boumediene* as demanding that the Constitution be applied extraterritorially unless it would be "impractical or anomalous" to do so in a particular case." (Response at pp. 1, 5.)

In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that the writ of habeas corpus, guaranteed by the Suspension Clause, had "full effect" at Guantanamo Bay, Cuba. *Id.* at 771. *Boumediene*, however, did not specify how other constitutional rights, such as the Fifth Amendment, are applicable to Guantanamo detainees. *Hamad v. Gates*, 732 F.3d 990, 999 (9th Cir.2013). The language of *Boumediene* itself says otherwise because the Court "explicitly confined its constitutional holding 'only' to the extraterritorial reach of the Suspension Clause" and "disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." *Boumediene v. Bush,* 553 U.S. at 795. This deliberate limitation has been recognized by Circuit Courts of Appeal, including the Ninth Circuit. See *Hamad v. Gates*, 732 F.3d at 1005 ("Although *Boumediene* ultimately concluded that the Suspension Clause applies to aliens detained at Guantanamo Bay, the Court expressly confined its holding to that constitutional provision alone"); *Ameur v. Gates*, 759 F.3d 317, 331 (4th Cir. 2014)(doubting that Congress would prefer "to open the floodgates to all sorts of detainee-related litigation merely because *Boumediene* required courts to allow one narrow sub-class of cases under the Suspension Clause, a provision that does not even apply here."); *Ali v. Rumsfeld*, 649 F.3d 762, 771

(D.C.Cir.2011)(finding that qualified immunity protected defendants from *Bivens* claim brought under the Fifth and Eighth Amendments because the holding in *Boumediene* only applied to the extraterritorial reach of the Suspension Clause).

To this day, the Supreme Court has never stated that the test set forth in *Boumediene* applies to determine all questions of extraterritorial application of every constitutional provision. Moreover, no Circuit Court has applied it in the wholesale manner suggested by Plaintiff.

Additionally, contrary to the Plaintiff's characterization, Swartz does not assert a categorical rule that the Fourth and Fifth Amendments do not apply extraterritorially. (Response at pp. 6, 9.) Instead, Swartz recognizes that while the *Boumediene* Court may have repudiated the formalistic reasoning of *Verdugo–Urquidez*'s sufficient connections test, courts have continued to rely on the sufficient connections test and its related interpretation of the Fourth Amendment text. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Other circuits have relied on *Verdugo–Urquidez*'s interpretation to limit the Fourth Amendment's extraterritorial effect. See, e.g., *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir.2012)(applying the sufficient connections test in conjunction with *Boumediene*'s functional approach); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir.2009)("Aliens do enjoy certain constitutional rights, but not the protection of the Fourth Amendment if they have 'no previous significant voluntary connection with the United States....' ") (alteration in original) (quoting *Verdugo–Urquidez*, 494 U.S. at 271, 110 S.Ct. 1056)). In addition, just two weeks after the Court issued *Boumediene*, which Plaintiff argues essentially overrules *Verdugo–*

Urquidez, the Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which it favorably cited *Verdugo–Urquidez*'s definition of "the people." The Heller Court explained that "the people" referred "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 580 (citing *Verdugo–Urquidez*, 494 U.S. at 265). These examples undercut the Plaintiff's attempt to discredit the continued relevance of *Verdugo–Urquidez* to resolve the questions before this Court.

The Motion to Dismiss addressed Plaintiff's claims under the rubric of the sufficient connections test set forth in *Verdugo-Urquidez*, and in light of *Boumediene*'s general function approach. Under this proper standard, for the reasons set forth in the Motion and herein, neither the Fourth nor Fifth Amendments apply extraterritorially to J.A.

III. QUALIFIED IMMUNITY SHEILDS AGENT SWARTZ FROM THIS LAWSUIT BECAUSE J.A.'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS WERE NOT CLEARLY ESTABLISHED.

In order for this lawsuit to proceed, Plaintiff must establish that J.A. had clearly established rights under the Fourth or Fifth Amendments; otherwise, Swartz is shielded from suit by virtue of qualified immunity. *Wood v. Moss,* 134 S.Ct. 2056, 2066-67 (2014)(citation omitted). Plaintiff is incorrect in her assertion that Agent Swartz has not pressed a claim for qualified immunity. (Response at p. 14.) Indeed, the core of his Motion to Dismiss, Part IV, argues that the Fourth and Fifth Amendments were not clearly established as applied to J.A. For that reason, Swartz is immune from suit and, therefore, Plaintiff failed to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

Plaintiff confounds legal principles when she asks this Court to reject Swartz's entitlement to qualified immunity because his actions allegedly constituted a crime or violated agency regulations or policies. (Response at p. 15.) It is far from certain that Agent Swartz's conduct was "clearly unlawful" at the time it was committed, even if the facts as alleged in the Complaint are considered true.[2] As much as the Plaintiff tries to diminish the fact that J.A. was a Mexican national with no connection whatsoever to the United States, and that he was not within the territorial jurisdiction of the United States when he was shot and killed, those facts are highly relevant to this Court's analysis. Agent Swartz is entitled to qualified immunity if the constitutional rights pressed by Plaintiff were not clearly established at the time of the subject events. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

IV. ANALYZED UNDER THE PROPER LEGAL STANDARD, NEITHER THE FOURTH NOR FIFTH AMENDMENT WAS CLEARLY ESTABLISHED AS APPLICABLE TO J.A.

After applying the sufficient connections test for extraterritorial application of the Fourth Amendment set forth in *Verdugo-Urquidez*, even in light of *Boumediene*'s general function approach, this Court should conclude that J.A. was not protected by the Fourth Amendment.

Plaintiff attempts to satisfy this standard by alleging, in a footnote, that J.A. had sufficient contacts with the United States because: (1) he was present on a street that runs alongside the border; (2) he lived in a border community and had relatives who live in Arizona; and (3) that the U.S. allegedly controls the Mexican side of the border fence in

[2] Thus, Plaintiff's hypothetical paradox is nothing more than hyperbole, meant to detract from the real issues presented here.

Nogales. (Response at p. 9, n. 5.) The reasons that these factors are inadequate to invoke constitutional protection was set forth in detail the Motion to Dismiss at pp. 10-13 and, therefore, they will not be repeated here.

Being unable to meet this test, Plaintiff makes legally unsupportable claim that the limits imposed by the Fourth and Fifth Amendments with respect to the use of deadly force are well known to Border Patrol agents. (Response at p. 10.) As the court in *Ali* observed, however, the proper inquiry is not whether the Constitution prohibits the conduct at issue, but whether the rights pressed by Plaintiff under the specific Amendments were clearly established at the time of the alleged violations. *Ali v. Rumsfeld*, 649 F.3d at 771. The court went on to conclude that even though it is well settled that the Constitution clearly forbids the torture of any detainee, it was not clearly established in 2004 that the Fifth and Eighth Amendments apply to aliens held in Iraq and Afghanistan. Therefore, the court found the defendants were protected from the plaintiffs' constitutional claims by qualified immunity. *Id.*

Similarly here, even if the constitutional limits relating to the use of deadly force by the government were clearly established at the time of this incident, the proper inquiry is whether the Fourth or Fifth Amendments' application to J.A. under the circumstances presented here were clearly established in October of 2012.[3] As discussed previously, J.A.

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[3] This question must be answered in the negative, for even today it is not clear that the Fourth or Fifth Amendments apply extraterritorially to a cross-border shooting as occurred here. If such clarity existed, the Fifth Circuit would not have granted rehearing *en banc* in a case presenting the similar facts and legal issues, *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), *reh'g en banc granted* in 771 F.3d 818 (5th Cir. 2014).

lacked sufficient voluntary connections with the United States to invoke the Fourth Amendment. In addition, practical considerations relating to the U.S. border with Mexico, as well as political and pragmatic questions that would arise from the extraterritorial application of the Fourth Amendment under these circumstances, all demonstrate that the Fourth Amendment does not apply to the alleged seizure of J.A., occurring outside of the United States and involving a foreign national.

Graham v. O'Connor, 490 U.S. 386, 395, n.10 (1989) does not hold that the due process clause is the proper vehicle for analyzing excessive force claims when the Fourth Amendment is unavailable, as Plaintiff contends. (Response at p. 16.) Rather, *Graham* is straightforward in its pronouncement that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment ... ." *Id.* at 395. Because Plaintiff's claim of excessive deadly force falls squarely within the Fourth Amendment, this Court cannot review the claim under the Fifth Amendment.

A court is not permitted to extend a *Bivens* remedy where, as here, one already exists under the Fourth Amendment. (Motion at pp. 23-28.) The fact that Plaintiff's claim fails under the Fourth Amendment does not abrogate this principle.

V. CONCLUSION

For all the foregoing reasons, together with those advanced in the Motion to Dismiss, this Court should dismiss the First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

RESPECTFULLY SUBMITTED this 22nd day of December, 2014.

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

By: /s/Sean Chapman
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Electronically mailed this 6th day of December 2014 to:

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