No. 15-16410

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELI RODRIGUEZ, individually and as the surviving mother and personal representative of J.A.,

Plaintiff-Appellee,

v.

LONNIE SWARTZ, Agent of the U.S. Border Patrol,

Defendant-Appellant.

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

APPELLANT'S REPLY BRIEF

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I.
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Agent Swartz is under indictment for Second Degree Murder.[1] Whether his actions were criminal or his use of deadly force was justified is yet to be determined. In either case, J.A.'s death was tragic. The morality of Agent Swartz's conduct, however, is not a relevant factor for this Court's consideration, and Plaintiff's hyperbolic effort to characterize the potential dismissal of her lawsuit as tantamount to sanctioning unfettered cross-border shootings should be disregarded. *See Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir.2011) (finding that even though it was well-settled that the Constitutional clearly forbids mistreatment of detainees that included alleged rape, sexual humiliation, and the intentional infliction of pain after surgery, it was not clearly established in 2004 that the Fifth and Eighth Amendments applied to aliens detained in Iraq and Afghanistan).

Neither is this case about the legal standard governing the justifiable application of force. Rather, the issue is whether the complaint states a civil non-statutory claim for damages under the Fourth Amendment to the U.S.

[1] *United States v. Lonnie Swartz*, docket number 15-CR-1723, United States District Court for the District of Arizona.

Constitution.[2] More specifically, the question before this Court is whether the facts alleged by Plaintiff in her complaint, if true, establish a violation of a constitutional right that was clearly established at the time of Agent Swartz's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). If not, then Swartz is entitled to dismissal of the claim based on his qualified immunity from suit. *Wood v. Moss*, 134 S.Ct. 2056, 2066 (2014).

Because Plaintiff's allegations fail to satisfy both prongs of the qualified immunity analysis, the district court's decision on this issue must be reversed. Fed.R.Civ.P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II.
Whether Evaluated Under the "Significant Voluntary Connections" Test or the "Functional Approach," the Fourth Amendment Does Not Apply to J.A.

In order to evaluate whether J.A. had a constitutional right under the Fourth Amendment, Plaintiff devotes ten full pages of her brief to convincing this Court to apply the functional approach set forth in *Boumediene v. Bush*, 553 U.S. 723 (2008), rather than the "significant voluntary connections" test articulated in *United States v. Verdugo-Urquiez*, 494 U.S. 259 (1990), to evaluate whether J.A. was protected by the Fourth Amendment. Answering Brief ("Ans.Br."), pp. 12-22. Under either analysis, Plaintiff's claim lacks merit.

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[2] As such, the social justice position advanced by various groups who filed an amicus brief is not legally relevant to this Court's determination of the issues before it. *See* Dkt. 55.

First, the reason for Plaintiff's desire to move the ball away from *Verdugo-Urquidez* is obvious: J.A. had *no* voluntary connections to the United States, let alone significant ones. The district court's finding that J.A. "had strong familial connections to the United States" was based on the legal status of J.A.'s grandparents,[3] who frequently visited and cared for J.A. *in Mexico*. [CR 18, ¶ 17; ER 55; CR 58, ER 15.] Respectfully, their status and ties to Mexico are irrelevant. J.A. was a citizen of Mexico; he resided and was domiciled in Mexico; he lacked any territorial presence in the United States, either before or during the incident that led to his shooting; he expressed no interest in entering the United States; and, finally, J.A. did not accept any of this country's societal obligations. In *Verdugo-Urquidez*, the Supreme Court explained that an alien is "accorded a generous and ascending scale of rights as he increases his identity with our society." 494 U.S. at 269. Accordingly, "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." *United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir.1995) (citation omitted). Plaintiff has not quarreled with this bedrock principle of constitutional law.

Additionally, *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir.2012), on which Plaintiff relies, supports Swartz's position because it illustrates the kind of "significant voluntary connection" that is necessary to justify

[3] According to the complaint, J.A.'s grandparents were legal permanent residents at the time of the shooting, and are now U.S. citizens. [CR 18, § 17; ER 55.]

the extraterritorial application of the Fourth Amendment to an alien.[4] *Verdugo-Urquidez*, 494 U.S. at 272 (presence in the United States "for only a matter of days" insufficient to establish such connections), with *Ibrahim*, 669 F.3d at 994-97 (9th Cir. 2012) (concluding that a foreign citizen had sufficient connections to have First and Fifth Amendment rights because she had completed a four-year Ph.D. program at Stanford and had intended to leave the United States only briefly to attend an academic conference abroad). J.A.'s connection is even more attenuated than that of Verdugo-Urquidez. Moreover, the simple act of residing on the Mexican side of a border town, in and of itself, does not entitle one to the protections of the Constitution. Ans. Br., p. 31. If it was, then every citizen of Canada or Mexico who lives adjacent to the U.S. border would be entitled to its protections.

Thus, it is not J.A.'s physical location outside of the territory of the United States alone that is determinative; rather, J.A. is not entitled to the protection of the Fourth Amendment because, having chosen not to shoulder *any* burden that citizens must bear, he cannot establish that he was among the class of persons that the Fourth Amendment was meant to protect. *Barona*, 56 F.3d at 1093; *Verdugo-Urquidez*, 494 U.S. at 265, 273 (holding that the Fourth Amendment protects a

[4] *See also*, discussion by amicus curiae, the Government of the United States. [Dkt. 36, pp. 10-12.]

class of people who are part of a national community or have otherwise developed sufficient connection with this country to be considered part of that community."). Plaintiff's argument that J.A.'s compliance with immigration laws by *not* entering the United States demonstrates his acceptance of a societal obligation, is unreasonable and makes no sense. Ans. Br., p. 32. By that logic, every citizen of another country who has *not* attempted to violate the immigration laws of the United States would receive the protections of our Constitution. J.A. failed to enter the United States *not* because he adhered to our immigration laws, but because he had no meaningful connection to this country—and therefore had no reason to do so.

J.A.'s lack of connections to the United States fails to meet the *Verdugo-Urquidez* "significant voluntary connections" test, and it also applies to and resolves the first *Boumediene* factor against Plaintiff. This factor calls upon the Court to assess the citizenship and status of the claimant. *Boumediene*, 553 U.S. at 766. There is no dispute that J.A. was a citizen of Mexico. [CR 18, ¶ 6; ER 53.] In *Boumediene*, the question of status referred to the designation of detainees as "enemy aliens" or "enemy combatants" and the Court's concern was with the adequacy of the process that led to that determination *Id.* at 766-67. Because there is no comparable designation of status with respect to J.A., this factor turns exclusively on his lack of citizenship, and must be weighed against Plaintiff.

Boumediene's second factor, the nature of the location where the constitutional violation occurred, also weighs against Plaintiff. *Id.* at 766. The district court's acceptance of the allegations in the complaint stretches even the most generous construction of Rule 12(b)(6), which requires plausibility. *Ashcroft v. Iqbal*, 556 U.S. at 680 ("conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.") Plaintiff's allegations are superficially appealing but they lack believability for the reasons that follow.

Plaintiff claims that, in essence, the border between the United States and Mexico at Nogales is not a border at all. She claims that some undefined part of Nogales, Sonora is really part of the United States, which is itself a notion unsupported by any legal authority. Plaintiff makes this assertion because: 1) people living in Mexico recognize the authority of the United States in their sovereign territory; 2) cameras mounted on the U.S. side surveil activity on the Mexican side; 3) enforcement activities sometimes transgress the border; and 4) Mexico authorizes U.S. agents to conduct pre-inspections on Mexican soil. [CR 18, ¶¶ 21-24; ER 55-56.] None of these allegations, even if true, establish the kind of extensive, recognized, extraterritorial control by the United States that was critical to the Supreme Court's decision in *Boumediene*. Moreover, Plaintiff's characterization of her allegations as establishing U.S. "practical control" over the

border does not bridge this precipice. Ans. Br., p. 27. The plain language of Plaintiff's allegations establishes that the surveillance, enforcement, and pre-inspection activities occur primarily on the U.S. side of the border, and those that occur on the Mexican side are primarily carried out with the consent of the Mexican government. The fact that a border agent has the ability to fire a weapon across the border, and sometimes does, does not remotely approach the type of "complete jurisdiction and control" that the Court found persuasive in extending the Suspension Clause to Guantanamo Bay detainees. *Boumediene.* 553 U.S. at 755.

Even the Mexican government does not assert U.S. control over Nogales, Sonora. The Mexican government's argument in support of Plaintiff is based solely upon international human rights law, that Agent Swartz had "power and effective control" over *an individual*, J.A. Dkt. 52, p. 10.[5] There is no assertion by the Mexican government that the United States has any control, practical or otherwise (including a "small arms power to seize" that persuaded the district court), over Nogales, Sonora, Mexico. [CR 58; ER 15.]

[5] Even under international human rights law, however, the Mexican government concedes that whether the International Covenant on Civil and Political Rights applies outside of a State's own territory is not clear. Dkt. 52, p. 13. In any event, the Mexican government does not adopt the position advanced by the Scholars of U.S.-Mexico Border Issues, which blurs the border into non-existence. Dkt. 62.

The "location where the constitutional violation occurred" is within the sovereign territory of the Republic of Mexico, a fact that is not altered by the United States' enforcement of its immigration and customs laws on its own soil or with the consent of the Mexican government. Additionally, the occurrence of anomalous or outlying activity, however repugnant, does not answer the much broader question of whether the Fourth Amendment applies to Mexican citizens in Nogales, Sonora (or elsewhere along the 2,000-mile-long border between the United States and Mexico). Indeed, Plaintiff pays only cursory attention to this factor, Ans. Br., p. 27, probably because it does not weigh in her favor.

The final *Boumediene* factor, the practical obstacles inherent in enforcing the claimed right, also weighs against Plaintiff. *Id.* at 262. Plaintiff relies heavily on this factor because it is superficially appealing, but again, after the smoke is cleared, there is no fire to be found. Practical obstacles to extending the Fourth Amendment *on essentially identical facts* - not on hypothetical facts, as Plaintiff accuses, Ans. Br., p. 29, - were identified by the panel in *Hernandez v. United States*, 757 F.3d 249, 267, 281 (5th Cir.2014) (Dennis, J., concurring), and adopted by the Fifth Circuit, sitting *en banc* court. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir.2015) (*en banc*). In response, both the district court and Plaintiff point to the Mexican government's indication that, from their perspective, there would be no conflict if the Fourth Amendment was extended to J.A. Ans. Br., p.

25; Dkt. 52. [CR 58; ER 17-18.] That is fine, but the Mexican government's perspective is only part of the equation and frankly, not the most important part. Plaintiff seeks to extend the substantive reach of the Fourth Amendment abroad to hold an officer of the United States liable in damages. It is not the place of a foreign government to weigh in on whether our constitution should apply to these situations.

Contrary to the district court's conclusion and the position urged by Plaintiff, the fact that border agents are already trained in the limits of the use of force under the Fourth Amendment does not ameliorate the practical obstacles noted in *Hernandez*. Ans. Br., p. 7. [CR 58; ER 17-18.] As the United States explained in its amicus brief, protecting the border is a core sovereign and national security function of the United States. Application of the Fourth Amendment to an unspecified portion of Northern Mexico – especially if based on the undefined array of case-specific functional considerations by the district court – would cast a cloud of uncertainty over the manner in which U.S. officials conduct foreign operations generally, and "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 473-74. [Dkt. 36, pp. 11-12.][6] Even if a cross-border

[6] If the position of the Mexican government carries some weight, certainly the position of the United States government must be accorded even greater weight.

shooting is considered a reasonable extension of the Fourth Amendment's proscription against excessive force, the doctrine could be too easily broadened to other cross-border activities that more clearly impinge U.S. security operations, such as drones that are controlled from within U.S. territory and used to defend U.S. interests abroad. Another example is the short distance across the Bering Strait, only 58 miles, which separates the United States from Russia.[7] Providing a foreign citizen the basis on which to challenge the government's use of force based upon the ability of our security forces to reach foreign soil clearly tips the "practical and functional" balancing of interests against Plaintiff. *Boumediene*, 553 U.S. at 766.

These illustrations expand on the point already made by the Supreme Court in *Verdugo-Urquidez*, which weighed the relevant, practical concerns implicated by extending the Fourth Amendment globally. There, the Supreme Court explained that doing so "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Verdugo-Urquidez*, 494 U.S. at 273. Contrary to the district court's reasoning, there is no meaningful distinction to be made on the ground that the activity at issue in *Verdugo-Urquidez* was search and seizure, implicating the Warrant Clause of the Fourth Amendment. [CR 58; ER 17.] The constitutional limits of the Warrant Clause are as well-

[7] http://www.worldatlas.com/aatlas/infopage/bering.htm [last visited May 28, 2016.]

established as they are in the context of Fourth Amendment's prohibition against the use of excessive force. [Id.] Importantly, the Supreme Court's concerns had little to do with the particularities of the Warrant Clause. Instead, the Court expressed its reservations about *any* extraterritorial application of the *Fourth Amendment*, noting in particular the burden the government would face by having to adjudicate, on a case-by-case basis, the availability of a *Bivens* action. *Id.* at 274. Plaintiff's lawsuit manifests exactly what the Supreme Court sought to avoid in *Verdugo-Urquidez*.[8]

For these reasons, whether evaluated under the framework established in *Verdugo-Urquidez* or *Boumediene*, the Fourth Amendment does not apply extraterritorially to J.A. The complaint therefore does not set forth plausible facts upon which relief may be granted. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-56 (2007) (claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged).

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[8] The Court's decision was reached despite the express recognition that a *Bivens* action might be unavailable in "such situations." *Id.* That recognition is not surprising since the Supreme Court "has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir.2012). Even outside the *Bivens* context, "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

III.
Plaintiff's Characterization of the Qualified Immunity Issue Conflates Legal Concepts and Proposes an Unprecedented Construction to Reach Her Desired Result

Plaintiff devotes another ten pages of her brief to supporting her sympathetic, though erroneous characterization of the qualified immunity issue. Ans. Br. pp. 34-44. Qualified immunity is not about the reasonableness or wrongfulness of an officer's conduct in the abstract. An action may be unreasonable, wrong, or illegal without being unconstitutional – and, as relevant here, without violating the Fourth Amendment. Plaintiff conflates the qualified immunity analysis when she overlays a reasonableness requirement onto the question of whether a constitutional right was clearly established. Ans. Br., pp. 34-35. She also misstates the issue by framing it as one of Swartz's knowledge of J.A.'s citizenship. Ans. Br., p. 38.

"To be clearly established" for qualified immunity purposes, "a right must be sufficiently clear that every reasonable officer would have understood that what is doing violates *that right*." *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012) (emphasis added; citations, internal quotation marks, and modifications omitted.) Here, the extraterritorial application of the Fourth Amendment was, at best, unclear in October of 2012. The reason this is so was discussed in the Opening Brief, pp. 22-24, and need not be repeated here.

The analysis in *Moreno v. Baca*, 431 F.3d 633 (9th Cir.2005), on which Plaintiff places much weight, is unpersuasive. Ans. Br., pp. 35-38. In *Moreno*, this Court denied qualified immunity to two police officers who arrested and searched a U.S. citizen within the United States in violation of clearly established Fourth Amendment law. In reaching that conclusion, the court rejected the officers' reliance on the fact that the plaintiff was on parole and that there was a warrant for his arrest, reasoning that the officers had no reason at the time to know or reasonably suspect that those facts were true. *Id.* at 638-639. It explained that "the facts upon which the reasonableness of a search or seizure depends…must be known to the officer at the time the search or seizure is conducted." *Id.* at 642.

The nature of the legal question in *Moreno* differs from the one implicated by the decision below. *Moreno* turned on "reasonableness," *id.*, and presented no uncertainty about the threshold question of whether the defendant, who was in the United States when he was searched, was protected by the Fourth Amendment. Here, by contrast, the relevant legal question is, as discussed above, not whether Agent Swartz acted reasonably (including his knowledge of J.A.'s legal status), but the antecedent question whether J.A. had any constitutional right at all.

Moreover, even if Agent Swartz's subjective knowledge was relevant when answering the threshold question of whether the Fourth Amendment's applicability to J.A. was clearly established, Plaintiff does not suggest that Swartz had any

reason to know if J.A. was a U.S. citizen or someone with substantial connections to the United States (which, in fact, he was not). And they identify no cases addressing whether an individual of unknown nationality has clearly established Fourth Amendment rights while outside the United States.

Finally, Plaintiff implores this Court to allow the case to go forward on policy grounds,[9] but she points to no authority allowing a *Bivens* action to proceed on this basis alone. Ans. Br., pp. 41-44. The sole case cited by Plaintiff, *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir.2009), does not support her position because there, the Court determined there was a clear violation of the Fifth Amendment when an officer coerced a defendant's confession. *Id.* at 927. The Court rejected the argument that the officer was not entitled to qualified immunity based on a lack of clarity on what it means to "use" a defendant's statement. Since the officer's role in the Fifth Amendment violation was complete when he turned over the coerced statement to prosecutors, the meaning of "use" was irrelevant. *Id.* at 927-28. Thus, contrary to Plaintiff's argument, this case does not stand for the proposition that qualified immunity can be denied despite the lack of clearly established law. Ans. Br., p. 43.

[9] Plaintiff asserts that qualified immunity was not intended to shield an officer who engages in murder. Ans. Br., p. 44. Whether Agent Swartz's conduct constituted murder will be determined in separate judicial proceedings.

IV.
This Court Should Determine There is No *Bivens* Remedy for a Cross-Border Shooting

The United States has argued in its amicus brief that applying the Fourth Amendment in this case would unreasonably extend a *Bivens* remedy to a new context - cross-border shootings. Dkt. 36, pp. 15-20. This Court is not precluded from considering this argument because it was raised by Swartz in the district court. [Doc. 30, pp. 23-28.][10] Although Swartz couched his argument in terms of the Fifth Amendment, his reasoning applies directly to the Fourth Amendment context as well. Thus, the issue is directly implicated by the defense of qualified immunity" and applies to the "entire cause of action" which, as the brief of the United States pointed out, Dkt. 36, p. 15 n.3, this Court has jurisdiction to review. *See Wilkie v. Robbins*, 551 U.S. 547, 550, n.4 (2007). *Wilkie* was an interlocutory appeal based on qualified immunity, but the first question addressed by the Supreme Court was "whether to devise a new *Bivens* damages action" for retaliating against the exercise of ownership rights… ." *Id.* at 549. Indeed, the Court reaffirmed *Wilkie*'s holding in *Ashcroft v. Iqbal*, 556 U.S. at 673-74, once again rejecting Plaintiff's premise that whether a cause of action exists is not intertwined with a denial of qualified immunity. In short, whether a *Bivens* remedy is available at all is a threshold question, not a jurisdictional one.

[10] The abbreviation "Doc." refers to the district court's docket and is followed by the relevant document number.

Additionally, the position asserted by Plaintiff, that footnote 4 is non-controlling dicta, Ans. Br., p. 47, conflicts directly with the position taken by the ACLU in *Martin v. Naval Criminal Investigative Service*, Ninth Circuit Docket No. 11-56717. There, Plaintiff's counsel argued that *Wilkie*'s footnote 4 conclusively established in this Circuit and others that that on interlocutory appeal from denial of qualified immunity, the Court of Appeals has jurisdiction to review a decision to infer a new *Bivens* remedy. [No, 11-56717, Dkt. 49, p.2 and Dkt. 51, p.2.] Indeed, this Court not only considered the issue, but also decided it. *Martin v. Naval Criminal Investigative Service*, 539 Fed.Appx. 830, 832 (9th Cir. 2013).

Finally, *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir.2007), does not help Plaintiff for several reasons. Although, as plaintiff stresses, this Court in that case previously held that the Court lacks appellate jurisdiction over whether the district court correctly declined to grant a Rule 59(e) motion based on a special-factors defense that had not previously been raised, *see Sissoko v. Rocha*, 440 F.3d 1145, 1153-54 (9th Cir.2006), this Court withdrew that opinion after the Supreme Court decided *Wilkie*. There is no basis for Plaintiff's assumption that this Court adhered to that jurisdictional holding in the teeth of the Supreme Court's unequivocal direction to the contrary in the very case that prompted this Court to issue a superseding opinion. That is especially so because, in the superseding *Sissoko* opinion itself, the Court did reach the merits of whether a *Bivens* action was

precluded in that case. *See id.* at 949 (concluding that the statute cannot be "read to allow [plaintiffs'] a *Bivens* damage remedy for false arrest" and citing *Wilkie*'s merits discussion). Any doubt is resolved by numerous post-*Wilke* decisions in which the applicability of a *Bivens* remedy has been addressed in the course of an interlocutory appeal based on qualified immunity. *See Solida v. McKelvey*, __ F.3d __, 2016 WL 2342127, *2, n.5 (9th Cir. 5/4/2016); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir.2013); *Mirmehdi v. United States*, 689 F.3d 975, 980, n.1 (9th Cir.2011); *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1111-12 (9th Cir.2009).

Congress has already determined that the United States should not be subject to liability for claims of injuries in foreign countries when it enacted the Federal Tort Claims Act. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). This Court should be reluctant to create a constitutional tort with extraterritorial scope that implicates the problems Congress sought to avoid when it legislated in this area. As the Supreme Court observed in *Verdugo-Urquidez*, "[i]f there are to be restrictions on [excessive force] which occur[s] incident to…American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275.

As amicus United States further explained, there is a strong presumption that judge-made causes of action do not apply extraterritorially, even where the power

to recognize such causes of action is specifically authorized by statute. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664-65 (2013). That presumption applies with even stronger force to the decision whether to recognize a *Bivens* action applicable abroad, where no statute explicitly sanctions the exercise of common-law-making authority *See Meshal v. Higgenbotham*, 804 F.3d 417, 425 (D.C. Cir.2015). More specifically, this Court has observed that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsel's hesitation' in extending *Bivens*." *Mirmehdi*, 689 F.3d at 982 (citation omitted).

It is clear that Congress's failure to create a damages action in this context was not inadvertent. *Western Radio Servs. Co.*, 578 F.3d at 1120. It is also clear that creating a constitutional tort remedy for an international cross-border shooting incident would implicate the very sensitivities that Congress sought to avoid when it precluded liability under the Federal Tort Claims Act for injuries occurring abroad. Id. at 1120-21; See Part V, below. This Court should not fashion a new damages action in a controversy that implicates national security and diplomatic concerns absent explicit action by Congress to create such a remedy.

V.
Other Remedies Are Available to Plaintiff, and any New Ones Should Be Created by the Executive or Legislative Branches Rather Than the Judiciary

This Court should not be persuaded by Plaintiff's argument that she has no other remedy, aside from a *Bivens* action, to hold Agent Swartz accountable for his actions. Plaintiff does have other remedies, but even if she didn't, special factors can preclude a *Bivens* action even where Congress has given a plaintiff no damages remedy for a constitutional violation, or where plaintiff has no alternative remedy at all. *See* Part IV, above.

First, Agent Swartz has been indicted and is facing criminal prosecution. A conviction could require restitution to Plaintiff, including J.A.'s funeral expenses and lost future wages. See 18 U.S.C. § 3663A(a)(1)(A) and (b)(2)(C), (b)(3); *United States v. Serawop*, 505 F.3d 1112, 1125-28 (10th Cir.2007) (affirming restitution to estate of three-month-old manslaughter victim, including $325,751 in lost future wages).

Second, the Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico. *See* Dkt. 52, p. 9. Should Plaintiff proceed in that fashion, the Executive Branch could determine that extradition to Mexico is appropriate. *See Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir.1997) ("[e]xtradition is a matter of foreign policy entirely within the discretion of the

executive branch, except to the extent that the statute interposes a judicial function.").

Third, the United States must answer to Mexico for how it handles this and similar shooting incidents. *See Boumediene*, 553 U.S. at 768 (considering *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and observing that the United States "was answerable to its Allies for all activities" at the Landsberg Prison).

Finally, Congress has authorized U.S. agencies to pay claims that would otherwise be barred by the FTCA. See 10 U.S.C. § 2734(a)(3) (claims arising from military activities abroad); 21 U.S.C. § 904 (claims arising from Drug Enforcement Administration activities abroad); 22 U.S.C. § 2669-1 (claims arising from State Department activities abroad). Congress clearly has the power to enact a statute providing for damages for those injured abroad in cross-border shootings as well. *See George v. Morris*, 736 F.3d 829, 856-67 (9th Cir.2013) (Trott, J., concurring and dissenting in part) (noting that the doctrine of qualified immunity require the judiciary to refrain from inappropriately intruding into and interfering with the assigned responsibilities of the executive branch of government.)

For all of these reasons, it is the proper role of the executive or legislative branches, not the judiciary, to provide a specific remedy (if at all) for extraterritorial, cross-border claims of excessive force by aliens.

VI.
This Court Lacks Jurisdiction Over Plaintiff's Fifth Amendment Claim, Which Was Not the Subject of a Final Order

This court has appellate jurisdiction over "final decisions" of district courts. 28 U.S.C. § 1291. Generally, a final decision under § 1291 "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). However, in certain circumstances, a decision that does not end the litigation may be considered final under the statute. The collateral order doctrine defines one such circumstance; Rule 54(b), another. *S.E.C. v. Capital Consultants, LLC*, 453 F.3d 1166, 1170 (9th Cir.2006).

One such collateral order permitting interlocutory appeal is a denial of qualified immunity. *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985).[11] In the same order denying qualified immunity to Agent Swartz, the district court also determined that Plaintiff's excessive force claim must be analyzed exclusively under the Fourth Amendment and, therefore, dismissed her Fifth Amendment claim. [CR 58; ER 18-19, 23.] At that point, Plaintiff could have moved the district court for a final judgment pursuant to Rule 54(b) so that she could appeal the

[11] Indeed, Plaintiff has argued that this Court has limited jurisdiction over Swartz's interlocutory appeal, that being review of the district court's denial of qualified immunity as to Plaintiff's Fourth Amendment claim. Ans. Br., pp. 44-45. It is perplexing, therefore, that she asserts a right to have this Court additionally review the dismissal of her *Bivens* claim based on the Fifth Amendment. Ans. Br., pp. 55-56.

district court's dismissal of her claim. Plaintiff did not proceed in that fashion, the district court's order was not a final judgment, and it therefore not appealable.

The two cases cited by Plaintiff are inapposite because they addressed the appeal and cross-appeal of final orders. *See Jennings v. Stephens*, 135 S.Ct. 793 (2015) (appeal following partial grant of federal habeas corpus relief); *Blum v. Bacon*, 457 U.S. 132 (1982) (appeal following grant of summary judgment concerning the eligibility standards imposed on state emergency assistance programs by the Social Security Act). Neither of these cases stand for the proposition that a party can make an end-run around the final judgment rule, which is precisely what Plaintiff is trying to accomplish. This Circuit's precedent in fact demonstrates that the opposite is true.

The mechanics of Rule 54(b) require a specific determination and direction from the district court. Fed.R.Civ. P. 54(b) ("…the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."). This Court has sternly counseled against interpreting an order as a Rule 54(b) determination without the required findings, because doing so would:

> "add uncertainty to the final judgment rule. Interpreting a judgment as a Rule 54(b) determination without the required findings would effectively read out those requirements from Rule 54(b). In turn, this practice would create the same concerns raised in *Fletcher v. Gagosian*, 604 F.2d 637, 639 (9th Cir.1979), that permitting jurisdiction without a clear indication of finality would confuse the

> parties and the public, possibly leading to premature or untimely appeals, as the case may be."

Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881, 889 (9th Cir.2003). The district court was not asked to certify its order as "final," and in the absence of strict compliance with Rule 54(b)'s requirements, this Court may not treat the order as such now. For all of these reasons, this Court lacks jurisdiction to review the dismissal of Plaintiff's *Bivens* claim based on the Fifth Amendment.

CONCLUSION

For all the foregoing reasons, together with those set forth in the Opening Brief, this Court should reverse the district court and find that Plaintiff's complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

DATED: June 1, 2016

/*s Sean Chapman*

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CERTIFICATE OF COMPLIANCE

Counsel for Defendant-Appellant certifies that the foregoing Reply Brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 5,492 words.

DATED: June 1, 2016

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CERTIFICATE OF FILING AND SERVICE

Undersigned counsel hereby certifies that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 1, 2016.

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

DATED: June 1, 2016

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