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11  
 12 **UNITED STATES DISTRICT COURT**  
 13 **SOUTHERN DISTRICT OF CALIFORNIA**  
 14

15 MARIA DEL SOCORRO QUINTERO  
 16 PEREZ, BRIANDA ARACELY  
 17 YANEZ QUINTERO, CAMELIA  
 18 ITZAYANA YANEZ  
 19 QUINTERO, and J.Y., a minor,

20 Plaintiffs,

21 vs.

22 UNITED STATES OF AMERICA,  
 23 MICHAEL J. FISHER, and DORIAN  
 24 DIAZ

25 Defendants.

Case No. 3:13-cv-01417 -WQH  
 (BGS)

**FOURTH AMENDED  
 COMPLAINT**

**JURY TRIAL DEMANDED**

1 This lawsuit seeks redress for the death of Jesus Alfredo Yañez Reyes  
2 (“Yañez”). Yañez was killed as a result of the United States Border Patrol’s so-  
3 called “Rocking Policy.” Pursuant to the Rocking Policy, Border Patrol agents  
4 along the nation’s southern border deem the throwing of rocks at them by persons  
5 of Hispanic descent and presumed Mexican nationality to be per se lethal force to  
6 which the agents can legitimately respond with fatal gunfire. Under the Rocking  
7 Policy, Border Patrol agents shoot to kill Mexican nationals who allegedly throw  
8 rocks at them, regardless of whether the alleged rock-throwing poses an imminent  
9 risk of death or serious injury to the agents or anyone else, and regardless of  
10 whether other, non-lethal means are available to avert any such risk. In recent  
11 years, Border Patrol agents acting pursuant to the Rocking Policy have shot and  
12 killed at least thirteen persons and have seriously injured more. The Rocking  
13 Policy has the imprimatur of the highest officials of the Department of Homeland  
14 Security and the Customs & Border Protection Agency. This institutionalized,  
15 systematic use of excessive, lethal force violates the U.S. Constitution, U.S.-  
16 ratified treaties, peremptory international norms, and our fundamental national  
17 values.  
18

## 19 **PARTIES**

### 20 **A. Plaintiffs**

21  
22 1. Plaintiff Maria Del Socorro Quintero Perez is the widow of Jesus  
23 Alfredo Yañez Reyes. She brings this action in her individual capacity, on behalf  
24 of the estate of Jesus Alfredo Yañez Reyes, and as the next friend of minor child  
25 JY. Yañez was a Mexican national of Hispanic descent.

26 2. Plaintiff Camelia Itzayana Yañez Quintero is the daughter of Jesus  
27 Yañez Reyes.  
28



1 regulations of the U.S. and for ensuring that Border Patrol agents are properly  
2 trained and obey the laws of the United States. At all relevant times as supervisor,  
3 Defendant Fisher, at a minimum, knew of and acquiesced in the unlawful Rocking  
4 Policy as defined herein and failed to conform agents' use of force to the  
5 requirements of law, thereby causing Yañez's death. Plaintiffs sue Defendant  
6 Fisher in his individual capacity.

7  
8 **C. Unnamed Government Entities, Supervisors, and Border Patrol  
Agents**

9  
10 8. DHS is a Cabinet-level department that is responsible for the  
11 coordination and unification of national security efforts. DHS has responsibility for  
12 and oversight over the training of Border Patrol agents and the policies,  
13 procedures, and practices relating to its agents' use of force at the United  
14 States/Mexico border, including in the Border Patrol's San Diego Sector. At all  
15 relevant times, supervisors of DHS had specific knowledge of and acquiesced in a  
16 pattern and practice of border patrol agents' excessive use of force pursuant to a  
17 Rocking Policy as alleged herein, and the failure of DHS to timely conform border  
18 agents' use of force to the requirements of law caused the unlawful death of Yañez.

19  
20 9. United States Customs & Border Protection ("CBP") is a federal law  
21 enforcement agency and a component of DHS. CBP is responsible for securing the  
22 borders of the United States with a stated mission to "safeguard the American  
23 homeland at and beyond our borders." *See* <http://www.cbp.gov/about> (last visited  
24 September 25, 2014). The agency is supervised by a Commissioner, who has the  
25 responsibility for and oversight over policies, procedures, and practices for several  
26 offices within the agency—one of which is the Office of Border Patrol. At all  
27 relevant times, supervisors of CBP had specific knowledge of and acquiesced in a  
28 pattern and practice of border patrol agents' excessive use of force pursuant to a

1 Rocking Policy as alleged herein, and the failure of CBP to timely conform border  
2 agents' use of force to the requirements of law caused the unlawful death of Yañez.

3 10. Office of Border Patrol ("Border Patrol") is a law enforcement agency  
4 and a component of CBP specifically responsible for patrolling the land and  
5 coastal borders of the United States. The Chief of Border Patrol has responsibility  
6 for and oversight over the training of all Border Patrol agents and the policies,  
7 procedures, and practices relating to agents' use of force. The Chief of Border  
8 Patrol has the authority and responsibility to issue directives to all personnel under  
9 his or her supervision to ensure agents' practices remain within the limits of the  
10 constitution and consistent with the policies of the DHS and CBP. The Chief of  
11 Border Patrol is the direct supervisor of, among others, each Chief Patrol Agent  
12 among twenty Border Patrol Sectors. In turn, the Chief Patrol Agent is the direct  
13 supervisor of the Border Agent in Charge of each Border Patrol Station within the  
14 Sector. Every border patrol agent on duty operates under the direct supervision of a  
15 Supervisory Border Patrol Agent. At all relevant times, supervisors of Border  
16 Patrol had specific knowledge of and acquiesced in a pattern and practice of border  
17 patrol agents' excessive use of force pursuant to a Rocking Policy as alleged  
18 herein, and the failure of any relevant supervisor within Border Patrol to timely  
19 conform border agents' use of force to the requirements of law caused the unlawful  
20 death of Yañez's death.

21 11. Janet Napolitano served as the 3rd Secretary of DHS from January 21,  
22 2009 through September 6, 2013. Napolitano was a supervisor of the Agents and  
23 was responsible by law for enforcing the United States Constitution, laws, and  
24 regulations and for ensuring that Border Patrol agents were properly trained and  
25 obeyed the laws of the United States. As Secretary, Napolitano, at a minimum,  
26 knew of and acquiesced in the unlawful Rocking Policy as defined herein and  
27  
28

1 failed to conform agents' use of force to the requirements of law, thereby causing  
2 the death of Yañez.

3 12. Thomas S. Winkowski was the Acting Commissioner of the CBP  
4 from March 30, 2013 until March 7, 2014 when current Commissioner Gil  
5 Kerlikowske assumed office. From December 2011 to August 2012 Winkowski  
6 served as the Deputy Commissioner of CBP, and before that he was the Assistant  
7 Commissioner of CBP in the Office of Field Operations.

8 13. David Aguilar became Chief of Border Patrol in 2004 where he  
9 presided over the largest expansion of the Border Patrol in its 88-year history. He  
10 then became Deputy Commissioner of CBP in April 2010, serving as Acting  
11 Commissioner of CBP in December 2011 until he retired on Feb 8, 2013. Aguilar  
12 was a supervisor of the Agents and was responsible by law for enforcing the  
13 United States Constitution, laws, and regulations and for ensuring that every  
14 Border Patrol agent was properly trained and obeyed the laws of the United States.  
15 At all relevant times as supervisor, Aguilar, at a minimum, knew of and acquiesced  
16 in the unlawful Rocking Policy as defined herein and failed to conform agents' use  
17 of force to the requirements of law, thereby causing the death of Yañez.

18 14. Alan Bersin served as the Commissioner of the CBP from March  
19 2010 through December 2011, and is currently the Assistant Secretary of  
20 International Affairs and Chief Diplomatic Officer for DHS. Bersin was a  
21 supervisor responsible by law for enforcing the United States Constitution, laws,  
22 and regulations and for ensuring that Border Patrol agents were properly trained  
23 and obeyed the laws of the United States. At all relevant times as supervisor,  
24 Bersin, at a minimum, knew of and acquiesced in the unlawful Rocking Policy as  
25 defined herein and failed to conform agents' use of force to the requirements of  
26 law, thereby causing the death of Yañez.

1           15. Kevin K. McAleenan has served as Acting Deputy Commissioner of  
2 CBP from March 2013 to the present. When Defendants killed Yañez in June  
3 2011, McAleenan was the Deputy Assistant Commissioner of CBP in the Office of  
4 Field Operations.

5           16. Paul A. Beeson has served as the Chief Patrol Agent of the Border  
6 Patrol's San Diego Sector from November 2010 to the present. Beeson is and was  
7 the commanding officer of the Agents and is and was responsible by law for  
8 enforcing the United States Constitution, laws, and regulations and for ensuring  
9 that Border Patrol agents are properly trained and obey the laws of the United  
10 States. Upon information and belief, Beeson was personally responsible for  
11 approving and implementing the specific Border Patrol use-of-force policies,  
12 including the Rocking Policy, that resulted in Yañez's death. Beeson also had  
13 direct responsibility for and oversight over the training of Border Patrol agents in  
14 the San Diego Sector, including Agents Nelson and Diaz.

15           17. Richard Barlow served as the Acting Chief Patrol Agent of the Border  
16 Patrol's San Diego Sector from 2009 to November 2010. Barlow was the  
17 commanding officer of the Agents and was responsible by law for enforcing the  
18 United States Constitution, laws, and regulations and for ensuring that Border  
19 Patrol agents are properly trained and obey the laws of the United States. Upon  
20 information and belief, Barlow was personally responsible for approving and  
21 implementing the specific Border Patrol use-of-force policies, including the  
22 Rocking Policy, that resulted in Yañez's death. Barlow also had direct  
23 responsibility for and oversight over the training of Border Patrol agents in the San  
24 Diego Sector, including Agents Nelson and Diaz.

25           18. Rodney S. Scott has served as the Acting Deputy Chief Patrol Agent  
26 or the Deputy Chief Patrol Agent of the Border Patrol's San Diego Sector from at  
27 least May 2010 to the present. Scott is and was the commanding officer of the  
28

1 Agents and is and was responsible by law for enforcing the United States  
2 Constitution, laws, and regulations and for ensuring that Border Patrol agents are  
3 properly trained and obey the laws of the United States. Upon information and  
4 belief, Scott was personally responsible for approving and implementing the  
5 specific Border Patrol use-of-force policies, including the Rocking Policy, that  
6 resulted in Yañez's death. Scott also had direct responsibility for and oversight  
7 over the training of Border Patrol agents in the San Diego Sector, including Agents  
8 Nelson and Diaz.

9 19. Plaintiffs sometimes refer herein to Defendant United States, DHS,  
10 CBP, and Border Patrol collectively as the "Government Defendants," though the  
11 United States is now the only party defendant among the Government Defendants.

12 20. Plaintiffs sometimes refer herein to Defendants Napolitano,  
13 Winkowski, Aguilar, Bersin, McAleenan, Fisher, Beeson, Barlow, and Scott as the  
14 "Supervisor Defendants," though Fisher is now the only party defendant among the  
15 Supervisor Defendants.

16 21. Plaintiffs sometimes refer herein to Defendants Nelson and Diaz  
17 collectively as the "Agents," though Diaz is now the only party defendant among  
18 the Agents.

## 19 20 **JURISDICTION AND VENUE**

21 22. This Court has jurisdiction over Plaintiffs' claims against Defendants  
22 Fisher and Diaz pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise  
23 under the U.S. Constitution and are authorized by *Bivens v. Six Unknown Named*  
24 *Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

25 23. This Court has jurisdiction over Plaintiffs' claims against the United  
26 States pursuant to 28 U.S.C. § 1346(b) because Plaintiffs' claims are for money  
27 damages for injury caused in the United States by the negligent or wrongful act or  
28

1 omission by employees of the United States while acting within the scope of  
2 employment.

3 24. Plaintiffs have exhausted the administrative remedies prescribed by 28  
4 U.S.C. § 2675 by timely presenting their claims to DHS/CBP on August 10, 2011.  
5 In May 2012, the government denied the claim based on, among other things, the  
6 contention that Yañez was injured in a foreign country.

7 25. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2)  
8 and 1391(e)(1)(A)&(B), because this is the judicial district in which events and  
9 omissions giving rise to the claims occurred and in which a defendant resides.

10 **FACTS**

11  
12 **II. THE AGENT’S KILLING OF YAÑEZ**

13 26. Border Patrol agents have asserted to various investigators the facts  
14 set forth in the paragraphs below.

15 27. At dusk on June 21, 2011, Yañez and Jose Ibarra-Murietta  
16 (“Murietta”) crossed the border from Mexico to the United States together. Their  
17 crossing began in the Castillo neighborhood of Ciudad Tijuana. The duo squeezed  
18 through a small hole in the primary border fence that abutted the Castillo  
19 neighborhood, and emerged into a dried-out concrete culvert between the primary  
20 border fence (the corrugated solid metal fence closest to Mexico) and the  
21 secondary border fence (the high-tech chain link fence closest to the United  
22 States). The culvert runs north from the primary fence to Stuart’s Bridge, which  
23 abuts the secondary fence.

24 28. Murietta led the pair and was the first to traverse the length of the  
25 culvert and climb out at Stuart’s Bridge. There, he encountered Border Patrol  
26 Agent Nelson.

1           29. Agent Nelson arrived at Stuart's Bridge in response to Border Patrol  
2 Agent Diaz's radio call requesting backup to apprehend Yañez and Murietta.  
3 Upon seeing Agent Nelson, Murietta leapt back into the culvert and began scaling  
4 a pole up the side of Stuart's Bridge.

5           30. Agent Nelson, who had chased Murietta into the culvert, yelled to  
6 Agent Diaz, who was already at the top of Stuart's Bridge, to cut off Murietta's  
7 escape.

8           31. Murietta saw Agent Diaz above him and descended back into the  
9 culvert where Agent Nelson waited.

10          32. Yañez, who had stayed in the culvert near the primary fence, escaped  
11 back to Mexico through the small hole in the fence, fearing for his life.

12          33. Back on the ground at Stuart's Bridge, Murietta evaded Agent Nelson  
13 and ran south toward the primary fence where Yañez had just escaped. Agent  
14 Nelson caught Murietta in the culvert close to the primary fence.

15          34. After grappling for a short time, Murietta escaped Agent Nelson's  
16 hold, climbed out of the culvert, and ran east down a dirt road that is parallel to the  
17 primary fence but separated from it by a wide swath of grass. Agent Nelson gave  
18 chase, running parallel and to the south of Murietta.

19          35. Before Agent Nelson could catch him, Murietta tripped and fell to the  
20 ground. When Murietta stood up, Agent Nelson grabbed him by the neck in an  
21 attempt to subdue him.

22          36. Murietta and Agent Nelson began grappling again in the dirt road, and  
23 Agent Nelson swept Murietta's legs and wrestled him to the ground. Agent Nelson  
24 then admittedly began to strike Murietta while pinning him to the ground.

25          37. Meanwhile, Yañez had run parallel to Agent Nelson and Murietta on  
26 the southern side of the primary fence. When Murietta fell and Agent Nelson  
27 began to subdue him, Yañez, fearful that he might be the next victim of the  
28

1 Agents' aggression, climbed into a tree that leaned against the southern side of the  
2 primary fence near the area where Agent Nelson and Murietta were grappling in  
3 the road.

4 38. At this point, witnesses' versions of the critical events differ sharply.  
5 The Agents assert that during Nelson's struggle with Murietta, Yañez threw two  
6 rocks (per Agent Nelson) or one or possibly two rocks (per Agent Diaz) at Agent  
7 Nelson. The Agents acknowledge, however, that when Yañez was allegedly  
8 throwing the rock(s), he was wedged into the tree on the southern side of the  
9 primary fence. The Agents admit that the rock(s) was somewhere between the size  
10 of a golf ball and a baseball. The Agents further acknowledge that the alleged  
11 rock(s) did not hit Agent Nelson or anyone else.

12 39. The Agents apparently further assert that, while Agent Nelson and  
13 Murietta struggled on the ground, Yañez threw a nail-studded board that struck  
14 Agent Nelson in the head, glancing off his hat. Agent Nelson was not injured by  
15 this alleged board.

16 40. According to Agent Nelson, at about the time that Yañez allegedly  
17 threw the board, Diaz arrived to help subdue Murietta. Agent Diaz allegedly told  
18 Yañez to get off the fence, and then began helping Agent Nelson get control of  
19 Murietta.

20 41. Agent Nelson acknowledges that then, without any warning to Yañez  
21 and any further alleged throwing of a rock or a board by Yañez, Agent Nelson  
22 pulled away from the scuffle with Murietta. Agent Diaz removed his sidearm from  
23 its holster, uttered not a single additional word, and shot Yañez in the head. A  
24 sufficient amount of time elapsed between Agent Diaz standing up from the scuffle  
25 with Murietta and Agent Diaz shooting Yañez for Agent Nelson to intervene and  
26 stop the shooting.

1           42. Agent Nelson conspired with Agent Diaz to unlawfully beat Murietta  
2 and unlawfully provoke Yañez to respond to this beating either by throwing  
3 objects at Agent Nelson or threatening to record the beating with a cell phone. In  
4 commission and in furtherance of that conspiracy, Agent Diaz shot Yañez, a result  
5 that Agent Nelson knew, or should have known, would occur.

6           43. Agent Nelson further unlawfully provoked Yañez to respond to the  
7 Agents' beating of Murietta either by throwing objects at Agent Nelson or  
8 threatening to record the beating with a cell phone. As a result of that provocation,  
9 Agent Diaz shot Yañez, a result that Agent Nelson knew, or should have known,  
10 would occur.

11           44. Agent Diaz likewise acknowledges that, although Yañez had allegedly  
12 raised his hand as if to begin a throwing motion, Agent Diaz did not see any rock  
13 or anything else in Yañez's hand, which Agent Diaz acknowledges was closed into  
14 a fist. Agent Diaz then shot Yañez in the head. Yañez fell out of the tree, dead or  
15 dying, on the southern side of the primary fence. Neither Agent Nelson nor Agent  
16 Diaz attempted to render any assistance to Yañez.

17           45. Agent Nelson continued to subdue Murietta, which he was able to do  
18 alone, without additional help from Agent Diaz. Two to three minutes later,  
19 additional Border Patrol agents arrived and took control of Murietta. Those agents  
20 also failed to attempt to render any assistance to Yañez.

21           46. The only injuries sustained by Agent Nelson were a swollen elbow  
22 and a small cut on his hand, neither of which he received from any rock or board  
23 allegedly thrown by Yañez, as well as stinging in his eyes from dirt that he says  
24 Murietta threw. Agent Nelson had no visible marks or bleeding from the alleged  
25 board. Upon information and belief, Agent Nelson received no medical treatment  
26 for a blow to his head from a board or rock.

1           47. In the aftermath of Yañez’s death, Border Patrol representatives gave  
2 false information to the press and the public in order to try to justify the killing. For  
3 example, a Border Patrol spokesperson told Fox News Latino that “two men  
4 assaulted U.S. agents with a concrete slab.” The Agents’ statements to  
5 investigators include no mention of a concrete slab. Another Border Patrol  
6 representative falsely told a San Diego newspaper that the Agents were confronting  
7 three men, not two, and misleadingly failed to advise the newspaper that at the  
8 time of the killing one of the two men was face down in the dirt road with an agent  
9 on top of him, and the other was in a tree on the other side of the primary fence  
10 where he was a threat to no one.

11           48. Murietta’s account of the events that evening differs markedly from  
12 those of the Agents with respect to the specific circumstances surrounding Agent  
13 Diaz’s shooting of Yañez.

14           49. Murietta asserts that Yañez never threw anything at Nelson or anyone  
15 else. Indeed, the shape and height of the tree, the height of the primary fence, and  
16 the distance of the tree and the fence from Agent Nelson made it impossible for  
17 Yañez (or any person) to throw rocks or wood at the agents with lethal force or  
18 accuracy.

19           50. Instead, both Agent Nelson and Agent Diaz had Murietta down on the  
20 ground and were beating him. Agents Nelson and Diaz easily outweighed and  
21 outmuscled the slight-framed Murietta, who was facedown in the dirt road. In fact,  
22 when Murietta was eventually taken away by a cadre of Border Patrol agents, he  
23 was disoriented and his mouth was covered with his own blood.

24           51. While Agents Nelson and Diaz had Murietta on the ground and were  
25 beating him, Yañez climbed into the tree on the south side of the primary fence,  
26 fearing that he would be next, and tried to dissuade Agents Nelson and Diaz from  
27 continuing the beating.

1           52. In an apparent effort to stop the attack, Yañez felt compelled to yell  
2 that he was going to use his cellphone to take video and pictures of the beating.  
3 Upon hearing Yañez’s response to the Agents’ attack on Murietta, Agent Diaz  
4 stopped beating Murietta, stood up, and, without warning to Yañez or without any  
5 kind of provocation from Yañez that would justify Agent Diaz’s use of deadly  
6 force, shot Yañez in the head.

7           53. Whichever of these two versions of the shooting the jury believes, the  
8 Agents unlawfully used excessive, lethal force against Yañez.

9           54. If the jury believes Murietta, then Agents Diaz and Nelson murdered  
10 Yañez in an effort to keep him from recording the Agents’ beating of Murietta

11           55. If Murietta’s version of the facts is correct, then: (1) Agent Nelson  
12 and Agent Diaz unlawfully conspired to and did actually beat Murietta; (2) by  
13 collectively beating Murietta, Agent Nelson and Agent Diaz provoked the violent  
14 confrontation between Agent Diaz and Yañez, Yañez’s response of threatening to  
15 record the Agents’ beating of Murietta, and ultimately the fatal shot to Yañez; and  
16 (3) Agent Nelson and Agent Diaz unlawfully conspired to cover-up Agent Diaz’s  
17 murder of Yañez and the Agents’ provocation of Yañez by falsifying facts to  
18 “justify” the murder.

19           56. If the jury believes the Agents, the killing still resulted from their  
20 unlawful use of excessive, lethal force.

21           57. If the Agents’ version of the facts is correct, then (1) Agent Nelson  
22 and Agent Diaz conspired to and did actually beat Murietta; and (2) by collectively  
23 beating Murietta, Agent Nelson and Agent Diaz provoked the violent confrontation  
24 between Agent Diaz and Yañez, Yañez’s response to the Agents’ beating of  
25 Murietta of allegedly throwing rocks or boards, and ultimately the fatal shot to  
26 Yañez.

1           58. Under the Agents' version of events, neither Agent Nelson nor Agent  
2 Diaz ever gave Yañez any verbal command to stop throwing rocks or boards.  
3 According to Agent Nelson's version, he never gave Yañez any command at all,  
4 and all Agent Diaz told Yañez was to get down from the tree. According to Agent  
5 Nelson's own version of events, Agent Diaz's first and only show of force or  
6 authority to Yañez was lethal force.

7           59. Nor did Yañez's conduct, under the Agents' version of the events,  
8 create a risk of death or serious injury to Nelson or anyone else. The Agents  
9 acknowledge that Yañez threw only one or two rocks; the rock(s) was as small as a  
10 golf ball and no larger than a baseball; the rock(s) did not hit Agent Nelson; the  
11 allegedly thrown board glanced off Agent Nelson's head without causing him any  
12 injury; Yañez presented no imminent threat of throwing another board; and Agent  
13 Diaz did not see a rock or anything else in Yañez's closed fist when Diaz drew his  
14 weapon and shot Yañez.

15           60. Even if Yañez's conduct had somehow caused the Agents to fear for  
16 their lives, they had several alternatives to the use of lethal force. Yañez was on  
17 the other side of the primary fence. If, as the Agents contend, Yañez had thrown a  
18 rock(s) or a board at Nelson and they feared that he would throw another rock, the  
19 agents could have simply dragged Murietta (who is of slight build) further away  
20 from Yañez. Other, non-lethal alternatives were also available. Even if these  
21 alternatives were not feasible, the Agents could and should have simply let  
22 Murietta go – he posed no imminent risk of death or serious injury to the Agents or  
23 anyone else, and apprehending him was simply not worth the cost of a human life.

24           61. Further, in either version of events, both Agent Diaz and Agent  
25 Nelson are liable for Yañez's constitutional deprivations. In one version of the  
26 events, Yañez threw a rock and a board at Agent Nelson to try to get him to stop  
27 the beating, and Agent Diaz shot Yañez to stop him from stopping the beating. In  
28

1 another version, Yañez did not throw any board or rock, and Agent Diaz shot  
2 Yañez to prevent him from videotaping the beating. In either version, Agent  
3 Nelson precipitated the events by beating Murietta. And even in the rock-throwing  
4 version Agent Nelson did not simply drag Murietta further away from the border  
5 fence, as he easily could have done. As the instigator of the beating, Agent Nelson  
6 plainly shares responsibility for Agent Diaz's shooting, the purpose of which was  
7 to allow the beating to continue and/or to keep it from being recorded.

### 8 9 **III. THE ROCKING POLICY**

10 62. The Agents' use of excessive, lethal force against Yañez did not  
11 spring from their spontaneous acts. Instead, they were acting pursuant to, and  
12 implementing, a Rocking Policy that has the imprimatur of the highest-ranking  
13 DHS and CBP officials.

14 63. Pursuant to this unlawful Rocking Policy, Border Patrol agents along  
15 the southern border regularly use excessive, lethal force against persons of  
16 perceived Hispanic descent and Mexican nationality. At all relevant times, all of  
17 the Government Defendants and Supervisor Defendants knew, or reasonably  
18 should have known, that Border Patrol agents along the southern border:

- 19 a. had a regular pattern and practice deeming others' throwing of  
20 rocks at them to be per se lethal force that justified the agents'  
21 shooting to kill the alleged rock-throwers;
- 22 b. had a pattern and practice of using excessive, lethal force along  
23 the United States border by shooting at people suspected of  
24 throwing rocks despite those agents having the ability to take  
25 cover, move out of range, or employ less lethal weapons or  
26 alternatives;
- 27 c. understood that their supervisors had, at a minimum, tacitly  
28 approved Border Patrol agents' shootings along the border so  
long as the agents claimed a rock was thrown;

1 d. had a pattern and practice of taking advantage of the existence  
2 of the Rocking Policy to justify the unlawful use of excessive  
3 force by falsely asserting that they were in mortal danger from  
4 rocks being thrown at them.

5 64. Pursuant to this unlawful Rocking Policy, Border Patrol agents along  
6 the southern border regularly used excessive, lethal force against persons of  
7 perceived Hispanic descent and Mexican nationality.

8 **IV. SUPERVISOR DEFENDANTS' KNOWLEDGE OF AND APPROVAL**  
9 **OF THE ROCKING POLICY**

10 65. Firing live bullets in response to thrown rocks is, absent highly  
11 unusual circumstances not present here, grossly excessive force. The National  
12 Law Enforcement Officers Memorial Fund has gathered records on all police  
13 officers killed in the line of duty since the first U.S. patrolman was killed in 1792.  
14 In those 200+ years, exactly one police officer (in 1942) was killed by a thrown  
15 rock. Most police departments teach their cadets that a rock is not deadly beyond  
16 50 feet. Unless they are performing a particularly important mission, like aiding a  
17 wounded colleague, officers facing thrown rocks should simply retreat beyond that  
18 perimeter.

19 66. Despite actual knowledge of the patently unlawful Rocking Policy,  
20 the Supervisor Defendants failed and refused to repudiate it publicly or through the  
21 chain of command; failed and refused to issue, publicly or through the chain of  
22 command, a lawful policy regarding the use of force in response to alleged rock-  
23 throwing; failed and refused to provide adequate training to agents regarding  
24 lawful responses to alleged throwing of rocks; and failed and refused to  
25 appropriately discipline agents who act unlawfully pursuant to the Rocking Policy.

26 67. The Supervisor Defendants were at all relevant times personally  
27 responsible for developing, authorizing, supervising, and/or implementing the  
28

1 policies, patterns, or practices governing the Border Patrol agents' use of lethal  
2 force. Each Supervisor Defendant in fact knew of, approved, and implemented the  
3 unlawful Rocking Policy. That knowledge and approval is demonstrated by a host  
4 of evidence, including (1) the Supervisor Defendants' knowledge of and  
5 acquiescence in a whole series of unlawful Border Patrol killings; (2) the  
6 Supervisor Defendants' knowledge of and acquiescence in public statements by  
7 Border Patrol agents' representatives that throwing rocks is per se lethal force  
8 justifying an agent's shooting to kill; (3) the Supervisor Defendants' knowledge of  
9 and acquiescence in the U.S. Department of Justice's conclusion that an agent's  
10 shooting of an unarmed and unthreatening teenager was consistent with Border  
11 Patrol policy and training; (4) the Supervisor Defendants' consistent rejection of  
12 repeated entreaties from numerous national and international human rights  
13 organizations deploring the Rocking Policy and requesting remedial action; (5) the  
14 findings of a Police Executive Research Forum ("PERF") report, which  
15 Defendants themselves had commissioned, which concluded that the Rocking  
16 Policy was unlawful and should be eliminated; and (6) admissions by a high-  
17 ranking CBP internal affairs official that Defendants knew of and condoned Border  
18 Patrol agents' unlawful use of excessive force.

19 68. Despite each Supervisor Defendant's actual knowledge, none of them  
20 objected to or demanded a stop to the systematic use of unlawful lethal force along  
21 the southern border. Because of the lack of objection, intervention, or clarification  
22 by any Supervisor Defendant, Border Patrol agents along the southern border  
23 considered the Rocking Policy to be approved all the way up the chain of  
24 command. When Defendants Nelson and Diaz killed Yañez on that night of June  
25 21, 2011, they did so knowing that the Supervisor Defendants had for years known  
26 of, acquiesced in, and condoned other similar killings.

1           **A. Supervisor Defendants’ Knowledge of and Acquiescence in**  
2           **Numerous Prior Border Patrol Killings Under the Rocking Policy.**

3           69. The CBP at all relevant times had a protocol that required the filing of  
4 a Significant Incident Report after every encounter in which a Border Patrol agent  
5 applied use of force. Once completed, every such Report was emailed to every  
6 supervisor at every level of the agency on a daily basis. At minimum, each  
7 Supervisor Defendant knew of the facts underlying each incident described herein  
8 through receipt of that email. Napolitano knew of each of these incidents because  
9 they resulted in the death of the victim. When questioned about her knowledge  
10 and reaction to previous deaths of Mexican nationals caused by border patrol  
11 agents, Napolitano stated at a congressional hearing: “With respect to use of force,  
12 an appropriate use of force, we examine each and every case in which there is a  
13 death, to evaluate what happened, and whether or not the agent or agents involved  
14 should be subject to some sort of disciplinary measure.” *Hearings Before a*  
15 *Subcommittee of the Committee On Appropriations House of Representatives*, 133-  
16 82380, at pg 76 (April 11, 2013) (statement of Secretary Napolitano).

17           70. Prior to Yañez’s death in June 2011, Supervisor Defendants were  
18 aware of the following killings by Border Agents acting pursuant to the Rocking  
19 Policy:

- 20           a. In 2003, Border Patrol agents killed Ricardo Olivares Martinez  
21 by shooting him five times as he attempted to flee. Agents  
22 alleged he was throwing rocks.
- 23           b. In 2005, Border Patrol agents in San Diego shot and killed  
24 Guillermo Martinez Rodriguez as he attempted to flee back into  
25 Mexico. The agents alleged he was simultaneously throwing  
26 rocks and running away.
- 27           c. In 2006, Border Patrol agents near the Andrade Port of Entry in  
28 California were apprehending a suspect who was swimming  
across the Colorado River when, they contend, a group of

1 Mexican nationals began throwing rocks from the bank on the  
2 Mexican side of the river. The agents opened fire into the  
3 group, killing one man.

4 d. In 2007, a Border Patrol agent shot and killed José Alejandro  
5 Ortiz-Castillo as he was attempting to illegally enter the United  
6 States. The agent claimed that Ortiz-Castillo provoked the  
7 shooting by threatening an agent with a rock.

8 e. In 2007, a Border Patrol agent shot and killed Francisco  
9 Dominguez, falsely claiming that Dominguez was about to hit  
10 him in the head with a rock.

11 f. In 2007, a Border Patrol agent in Calexico, California shot an  
12 unidentified Mexican who was in a raft in the All-American  
13 Canal. The agent claimed that the man, who had turned the raft  
14 back towards Mexico when he saw the agent, was attempting to  
15 throw a rock.

16 g. In 2008, Border Patrol agents in San Diego shot and killed  
17 Edgar Israel Ortega Chavez while he was across the border in  
18 Mexico. Agents alleged he was throwing rocks.

19 h. In 2010, a Border Patrol agent shot and killed 15-year-old  
20 Sergio Hernandez, whom a U.S. Department of Justice  
21 investigation later confirmed was unarmed and had not thrown  
22 any rocks at the agent.

23 i. In 2011, a Border Patrol agent shot and killed 17-year-old  
24 Ramses Barron Torres. Even though Torres was climbing the  
25 border fence at the time he was shot, agents alleged he was  
26 simultaneously throwing rocks.

27 j. In 2011, a Border Patrol agent shot and killed Carlos La  
28 Madrid. Even though La Madrid was climbing the border fence  
at the time he was shot, Border Patrol agents alleged he was  
simultaneously throwing rocks.

71. After Yañez's death, Border Agents continued to shoot to kill  
pursuant to the Rocking Policy, all with Supervisor Defendants' knowledge and  
acquiescence. For example:

- 1 a. In July 2012, Border Patrol agents shot and killed Juan Pablo  
2 Santillan. At the time of the shooting Santillan was at the bank  
3 of the Rio Grande, but agents claimed that others were throwing  
4 rocks, prompting them to shoot and kill Santillan across the  
5 river and in Mexico.
- 6 b. In August 2012, a Border Patrol agent shot and killed  
7 Guillermo Arevalo Pedraza, who was picnicking in a riverside  
8 park with family members on the Mexican side of the Rio  
9 Grande near Laredo, Texas. Border Patrol agents in a motorboat  
10 began aggressively circling a man who was attempting to swim  
11 across the river, and people in the park began to shout that the  
12 man was drowning. The agents opened fire on the crowd in the  
13 park, and later asserted that they had been “subjected to rock  
14 throwing from the Mexican side.” Cellphone video of the  
15 incident shows no rocks being thrown by the victim or anyone  
16 else.
- 17 c. In October 2012, near Nogales, Arizona, two alleged smugglers  
18 were attempting to climb the fence back into Mexico, while  
19 Border Patrol agents ordered them down. The agents assert that  
20 someone on the Mexico side of the fence began throwing rocks  
21 over the fence at them. A Border Patrol agent went to the fence  
22 and indiscriminately opened fire into a nearby street in Mexico,  
23 fatally shooting Jose Antonio Elena Rodriguez seven times.  
24 Rodriguez, a 16-year-old boy who was merely walking by in  
25 the street, was an entirely innocent bystander.

26  
27  
28  
72. Each of these killings was well known among the Supervisor  
Defendants. Each Supervisor Defendant knew that these killings, individually and  
collectively, reflected a pattern and practice of Border Patrol agents treating the  
throwing of rocks at them as per se lethal force to which CBP and DHS policy  
allowed them to respond with deadly force. The Supervisor Defendants’ failure  
and refusal to discipline the agents who fired the fatal shots in these incidents,  
and/or to promulgate a lawful policy regarding appropriate responses to rock-

1 throwers, reinforced Border Patrol agents' belief that the Rocking Policy was  
2 appropriate and lawful.

3 73. In response to the unlawful pattern and practice, the Government of  
4 Mexico sought to voice its concern about the Rocking Policy to those responsible  
5 for its implementation and continuance.

6 74. After the death of Sergio Hernandez, the Ambassador of Mexico  
7 wrote to specifically to Napolitano, with copies to Aguilar, and Fisher, stating that  
8 Mexico "reiterates" its concerns about the Rocking Policy. The letter states that  
9 "the Government of Mexico is convinced that the use of lethal force by any  
10 authority to counter the throwing of rocks is clearly, by any standard, a  
11 disproportionate use of force." It nevertheless stated that it has "witnessed a  
12 worrisome and increased trend" of such incidents resulting in the death of its  
13 citizens and a "large majority of the investigations have not led to prosecution nor  
14 have adequate disciplinary measures nor have adequate disciplinary measures been  
15 adopted despite the seriousness of these tragic outcomes." The letter is attached  
16 hereto as Exhibit A.

17 75. In response to the death of Perez Santillan, the Government of Mexico  
18 again wrote specifically to Napolitano, with a copy to Aguilar, to "urge you once  
19 again to adopt all measures necessary to prevent the recurrent loss of lives" and to  
20 "reiterate[] its unwavering and emphatic appeal to the United States to abide by  
21 bilateral and international human rights standards." It stated that "investigations of  
22 cases similar to this one have not led to prosecution nor have adequate disciplinary  
23 measures been adopted despite the seriousness of these tragic outcomes." The  
24 letter is attached hereto as Exhibit B.

25 76. In response to the death of Guillermo Arevalo Pedraza the  
26 Government of Mexico wrote yet again to Napolitano and Aguilar, stating that it  
27 "continues to observe what has become an alarming trend of incidents in which the  
28

1 excessive use of force by Border Patrol (BP) and Customs and Border Protection  
2 (CBP) agents has resulted in the death of Mexican nationals at the border.” The  
3 letter continued: “The Government of Mexico has repeatedly recognized that there  
4 have been various incidents in which Border Patrol agents have been injured by  
5 stone-throwing from our side of the border and that Mexico has a responsibility in  
6 seeking to deter the use of violence against U.S. Federal agents from Mexican  
7 soil.” The Government of Mexico further noted that Aguilar had responded “to a  
8 letter regarding a similar case” and simply “refer[ed] to the ‘Department of  
9 Homeland Security Policy on the Use of Deadly Force’ and CBP’s ‘Use of Force  
10 Policy Handbook’ that are used for training and operational purposes.” But the  
11 Government of Mexico stated that those policies were the problem, not the answer:  
12 “the lack of prosecution or adequate disciplinary measures in similar cases with  
13 these tragic outcomes creates – albeit unwillingly – a tacit message of  
14 permissiveness and lack of accountability for those who engage in the use of  
15 excessive force. This pattern and every single incident of disproportionate use of  
16 force are unacceptable.” The letter is attached hereto as Exhibit C.

17 77. And yet again, in response to the death of Ramses Barron Torres, the  
18 Government of Mexico wrote specifically to Napolitano, with copies to Fisher and  
19 Winkowski, reiterating the same message it has been making and demanding that  
20 “prosecutorial and judicial measures should be enforced to deter the  
21 disproportionate use of force.” The letter is attached hereto as Exhibit D.

22 78. Between January 2010 to October 2012 alone, border patrol agents  
23 responded to an alleged thrown rock with deadly force at least 29 times. Not a  
24 single one of those agents was ever disciplined by the Supervisor Defendants; nor  
25 was there ever an attempt by Napolitano, Bersin, Fisher, Aguilar, or any other  
26 Supervisor Defendants to respond to the concerns of the Government of Mexico by  
27 bringing the unlawful Rocking Policy into compliance with the law.

1           **B. Supervisor Defendants’ Knowledge of and Acquiescence in**  
2           **Numerous Public Statements that the Rocking Policy Was**  
3           **Appropriate.**

4           79. Representatives of Border Patrol agents had regularly and publicly  
5 stated that agents were justified in treating the throwing of rocks at them as per se  
6 lethal force, regardless of whether the alleged rock-throwing posed an imminent  
7 risk of death or serious injury to the agents or anyone else, and regardless of  
8 whether the agents had available other, non-lethal alternatives. Upon information  
9 and belief, agents reiterated this same understanding of their justifiable use of  
10 lethal force to their superiors through the chain of command.

11           80. For example, after border agents killed Guillermo Martinez Rodriguez  
12 in 2005, claiming he was throwing rocks while simultaneously running away, an  
13 official spokesperson for the Border Patrol publicly justified the shooting, stating:  
14 “If I was put in the same shoes of this agent, that’s exactly what we’d have to do.”  
15 *Shooting condemned by Mexico*, San Diego Union-Tribune, Jan. 3, 2006.

16           81. On June 10, 2010, Lou Patch, another official spokesperson for the  
17 Border Patrol, was shown on primetime national television as making the  
18 following statement: “All along our river area, we’ve got rock throwing incidents.  
19 Unfortunately, when they escalate to using force or deadly force *in this case rocks*  
20 *or bricks, or things of that nature*, things change and the game is changed then  
21 from cat and mouse to *life and death*.” (emphasis added).

22           82. And just the day before Lou Patch’s official statement from Border  
23 Patrol, the National Border Patrol Council of the American Federation of  
24 Government Employees (“NBPC”) issued a nationwide press release that  
25 succinctly stated the Rocking Policy. The NBPC represents more than 17,000  
26 Border Patrol agents and support staff.

1           83. The heading of the NBPC press release stated bluntly, “Rock Assaults  
2 are Deadly Force.” The statement continued, “Since biblical times rocks have  
3 been used as a crude but effective weapon to injure and kill humans.” The  
4 statement made unmistakably clear that the Rocking Policy treats rock-throwing as  
5 per se lethal force to which agents are justified in responding with lethal force:  
6 “Rocks are weapons and constitute deadly force. If an agent is confronted with  
7 deadly force they will respond in kind.”

8           84. During that same month, T.J. Bonner, president of the NBPC,  
9 reiterated the Rocking Policy to the Associated Press in response to a Border Patrol  
10 agent’s fatal shooting of a Mexican teenager who was standing unarmed and  
11 unthreatening across the border near El Paso, Texas. Three separate videotapes of  
12 the incident conclusively show that the murdered teenager had not thrown any rock  
13 or anything else at the agent. The videotapes further appear to show that only one  
14 person, who was nowhere near the murdered teenager, had thrown a rock at the  
15 agent. And they conclusively show that the agent’s first show of any force was the  
16 use of lethal force; that if the agent somehow felt threatened, he could easily have  
17 retreated further away from the border area; and that if he still somehow felt  
18 threatened he could simply have released the person he was detaining near the  
19 border. Despite these facts, Mr. Bonner stated on behalf of 17,000 Border Patrol  
20 agents whom he represents that the agent was justified in killing the teenager: “It  
21 is a deadly force encounter. One that justifies the use of deadly force.”

22           85. In a further statement to the NBC Nightly News, Bonner crystalized  
23 the per se nature of the Rocking Policy, i.e., that it purports to justify agents’ use of  
24 deadly force in response to alleged rock-throwing, regardless of whether it poses  
25 an imminent risk of death or serious injury to the agents or anyone else, and  
26 regardless of whether other, non-lethal means are available to avert any such risk.  
27  
28

1 Mr. Bonner stated that “[w]hen you pick up a rock and throw it at a police officer  
2 you should expect to have deadly force directed back toward you.”

3 86. Other representatives of the agents have continually reiterated the  
4 same per se Rocking Policy. For example, the Vice-President of the NBPC,  
5 Shawn Moran, told the Christian Science Monitor in April 2011, “When rocks are  
6 thrown at us, that is considered deadly force.”

7 87. On a different occasion, in response to an agent’s killing of another  
8 Mexican teenager who was also an innocent bystander to someone else’s alleged  
9 rock-throwing, a Border Patrol spokesperson asserted flatly that “rocks are  
10 considered deadly weapons.”

11 88. Each Supervisor Defendant had actual knowledge of these repeated  
12 public statements by Border Patrol spokespersons and union representatives.  
13 Despite this knowledge, none of the Supervisor Defendants countermanded any of  
14 the statements either publicly or through the chain of command. The Supervisor  
15 Defendants’ failure and refusal to countermand these public statements of the  
16 Rocking Policy reinforced Border Patrol agents’ belief that the Rocking Policy was  
17 appropriate and lawful.

18 **C. Supervisor Defendants’ Failure and Refusal to Change the Rocking**  
19 **Policy After the Death of an Unarmed, Unthreatening Teenager.**

20 89. In June 2010 a Border Patrol agent at the border near El Paso, Texas  
21 shot across the border and killed 15-year-old Sergio Hernandez. The agent  
22 asserted to FBI investigators that he was “surrounded” by rock-throwers and that  
23 the victim was throwing a rock when the agent shot him. Fortunately, a passerby  
24 caught the incident on a cellphone video, and two other videotapes – one taken by  
25 the Border Patrol itself, and another by a nearby landowner – also later surfaced.  
26 Those videos conclusively show that the agent was not surrounded; the agent was  
27

1 not under attack from rocks or anything else; the victim had not thrown and was  
2 not throwing any rocks; and the agent had many non-lethal alternatives available to  
3 him if he somehow felt threatened, including simply backing up further away from  
4 the border.

5 90. After the shooting of Sergio Hernandez, the Interior Secretary of  
6 Mexico, Fernando Gómez Mont, personally called Napolitano, protesting the  
7 killing of Hernandez as well as the killing of another Mexican man on the  
8 California-Mexico border two weeks before the Hernandez killing. Gómez Mont  
9 demanded from Napolitano that the U.S. and Mexico carry out a joint review of  
10 protocols on the use of force by US Border Patrol, stating the “unjustified use of  
11 force against our population is unacceptable to the Government of Mexico.”

12 91. Some Mexican politicians even demanded that the United States  
13 detain and extradite the shooter to Mexico to stand trial.

14 92. Mexican President Felipe Calderon said he and his government are  
15 “worried” about what he called “this surge of violence against Mexicans” along the  
16 border.

17 93. In response to the public uproar, Bersin traveled to El Paso after the  
18 shooting and stated to the media that an investigation into Hernandez’s shooting  
19 would be “transparent and fair.” “We cannot and should not jump to conclusions,”  
20 Bersin said.

21 94. Several rank-and-file Border Patrol agents told The Washington  
22 Times that they were waiting to see what support the agent involved in the El Paso  
23 shooting will get from the agency’s leadership.

24 95. The U.S. Department of Justice conducted an investigation of the  
25 incident and concluded that Sergio Hernandez had not thrown any rock at the  
26 agent. But the DOJ nevertheless refused to pursue criminal charges against the  
27 agent because his conduct conformed to CBP policy.

1           96. The three videos show that Hernandez had not thrown any rock, that  
2 the agent's first show of any force was the use of lethal force, that if the agent  
3 somehow felt threatened he could easily have retreated further away from the  
4 border area, and that if he still somehow felt threatened he could simply have let  
5 the detainee go. The DOJ concluded that the Border Patrol's Rocking Policy  
6 permitted the use of lethal force in these circumstances: "the agent did not act  
7 inconsistently with [Border Patrol] policy or training regarding use of force."  
8 Press Release, Federal Officials Close Investigation into the Death of Sergio  
9 Hernandez-Guereca, Department of Justice, (April 27, 2012).

10           97. The Supervisor Defendants were keenly aware that CBP policy  
11 permitted the agent to shoot to kill Sergio Hernandez even though he was not  
12 throwing and had not thrown any rock; even though neither the agent nor anyone  
13 else was in imminent danger of death or serious bodily injury (except from the  
14 danger that the agent posed); and even though the agent had readily available  
15 alternatives to the use of deadly force. And they had no intention of changing the  
16 policy.

17           98. In September 2010, human rights organizations across the country met  
18 with CBP and DHS officials in Washington, D.C. to discuss CBP's training  
19 guidelines and criteria for use of force. When specifically confronted about the  
20 case of Sergio Hernandez, Bersin stated how Hernandez's death "was not an  
21 accident." Bersin claimed Hernandez's shooting was justified because someone  
22 else allegedly threw a rock at the agent. Bersin reached that conclusion, and made  
23 those statements, despite knowing that the agent could easily have backed up away  
24 from the alleged rock-thrower or used less-than-lethal force.

25           99. Bersin, Aguilar, Napolitano failed and refused to modify or abandon  
26 the Rocking Policy in the face of now several patently unlawful killings.

1           100. Instead, Bersin personally signed and issued CBP's amended use of  
2 force policy in October 2010 with no attempt to address what he and the other  
3 Supervisor Defendants knew or reasonably should have known was a pattern and  
4 practice of border agents unjustifiably using deadly force in response to alleged  
5 rock throwers. Napolitano, as Secretary of DHS, personally approved CBP's  
6 patently unlawful October 2010 use of force policy handbook despite having  
7 knowledge of the facts surrounding previous killings, and having been specifically  
8 told by Mexican officials, human rights organizations, and others of such unlawful  
9 practices by border agents.

10           101. Neither Napolitano, Aguilar, Bersin, Fisher nor any Supervisor  
11 Defendant ever publicly reprimanded or disciplined any agent for shooting at a  
12 Mexican so long as the Agent alleged a rock was thrown. Accordingly, Border  
13 Patrol agents knew that the existing use of force policy would allow them to  
14 continue to use lethal force in such situations.

15           **D. Supervisor Defendants' Failure and Refusal to Change the Rocking**  
16           **Policy Despite Repeated Pleas from National and International**  
17           **Human Rights Organizations.**

18           102. Before and after the killing of Yañez, national and international  
19 organizations had condemned the Border Patrol's routine use of excessive, lethal  
20 force along the southern border. For example:

- 21           a. In 2006, the Border Network for Human Rights reported to the  
22 United Nations that Border Patrol agents' killing of alleged  
23 rock-throwers constitutes "the use of excessive force by  
24 authorities which has arbitrarily taken the life of immigrants" in  
25 violation of binding international norms. U.S./Mexico Border  
26 Report to the United Nations Human Rights Committee  
27 Regarding the United States' Compliance with the International  
28 Covenant on Civil and Political Rights, *Behind Every Abuse Is  
a Community* (June 2006), at 9, [http://www.bnhr.org/wp-  
content/uploads/2010/01/BNHR-UN-Report3.pdf](http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-UN-Report3.pdf).

- 1           b.     In 2008, the executive director of the American Civil Liberties  
2           Union of San Diego wrote to members of Congress about  
3           Border Patrol’s acquiescence in agents’ shooting of rock  
4           throwers, stating: “Simply put, it is not acceptable to use lethal  
5           force when confronted with rock throwers in ... border  
6           protection situations.” *See* [https://www.aclusandiego.org/wp-](https://www.aclusandiego.org/wp-content/uploads/article/Kennedy%20%20Lofgren%20letter%2008-15-08.pdf)  
7           [content/uploads/article/Kennedy%20%20Lofgren%20letter%20](https://www.aclusandiego.org/wp-content/uploads/article/Kennedy%20%20Lofgren%20letter%2008-15-08.pdf)  
8           [08-15-08.pdf](https://www.aclusandiego.org/wp-content/uploads/article/Kennedy%20%20Lofgren%20letter%2008-15-08.pdf); *see also* ACLU, *U.S. Border Patrol Should Stop*  
9           *Using Lethal Force Against Rock Throwers* (Aug. 2008),  
10           [https://www.aclusandiego.org/u-s-border-patrol-should-stop-](https://www.aclusandiego.org/u-s-border-patrol-should-stop-using-lethal-force-against-rock-throwers-say-human-rights-groups-call-for-congressional-investigations-into-disproportionate-use-of-force-incidents-2/)  
11           [using-lethal-force-against-rock-throwers-say-human-rights-](https://www.aclusandiego.org/u-s-border-patrol-should-stop-using-lethal-force-against-rock-throwers-say-human-rights-groups-call-for-congressional-investigations-into-disproportionate-use-of-force-incidents-2/)  
12           [groups-call-for-congressional-investigations-into-](https://www.aclusandiego.org/u-s-border-patrol-should-stop-using-lethal-force-against-rock-throwers-say-human-rights-groups-call-for-congressional-investigations-into-disproportionate-use-of-force-incidents-2/)  
13           [disproportionate-use-of-force-incidents-2/](https://www.aclusandiego.org/u-s-border-patrol-should-stop-using-lethal-force-against-rock-throwers-say-human-rights-groups-call-for-congressional-investigations-into-disproportionate-use-of-force-incidents-2/).
- 14           c.     That same year, the U.N. Committee on the Elimination of  
15           Racial Discrimination expressed concerns “about allegations of  
16           brutality and use of excessive or deadly force by law  
17           enforcement officials against persons belonging to racial, ethnic  
18           or national minorities, in particular Latino and African  
19           American persons and undocumented migrants crossing the  
20           U.S.-Mexico border.” U.N. Committee on the Elimination of  
21           Racial Discrimination, *Consideration of Reports Submitted by*  
22           *States Parties Under Article 9 of the Convention: Concluding*  
23           *observations of the Committee on the Elimination of Racial*  
24           *Discrimination: United States of America*, U.N. Doc.  
25           CERD/C/USA/CO/6 (May 2008). The Committee  
26           recommended that the U.S. increase “significantly its efforts to  
27           eliminate police brutality and excessive use of force” against  
28           such persons “by establishing adequate systems for monitoring  
            police abuses and developing further training opportunities for  
            law enforcement officials.” *Id.*
- d.     In response to the killing of Sergio Hernandez near El Paso,  
            Texas in 2010 (referred to above), the United Nation’s Office of  
            the High Commissioner for Human Rights noted that the  
            Commissioner “had indeed received further allegations of  
            excessive use of force by US Border Patrol agents while  
            enforcing immigration laws” and that “OHCHR also urged the  
            United States authorities to ensure that all the actions of the US  
            Border Patrol were fully ascribed to the international standards

1 applicable to officials responsible for enforcing the law.”  
 2 Highlights of Regular Briefing by the Information Service  
 3 (May 29, 2012), [http://www.unog.ch/unog/  
 4 website/news\\_media.nsf/\(httpNewsByYear\\_en\)/768DA52D9D  
 5 3C583FC1257A0D004C8F42?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/768DA52D9D3C583FC1257A0D004C8F42?OpenDocument). The High  
 6 Commissioner later reiterated that “[t]here have been very  
 7 many young people, teenagers, who have been killed at the  
 8 border,” and that “[t]he reports reaching me are that there has  
 9 been excessive use of force by the U.S. border patrols while  
 10 they are enforcing the immigration laws.” Stephanie Nebehay,  
 11 *U.S. uses excessive force along Mexican border: U.N.*, (Oct. 18,  
 12 2012), [www.reuters.com/article/2012/10/18/us-mexico-us-un-  
 13 rights-idUSBRE89H13F20121018](http://www.reuters.com/article/2012/10/18/us-mexico-us-un-rights-idUSBRE89H13F20121018).

- 14 e. In June 2010, Mexico's Foreign Relations Department said  
 15 specifically to Napolitano that it “energetically condemn[ed]”  
 16 the Border Patrol’s killing of Sergio Hernandez, noting  
 17 particularly that “according to international standards, lethal  
 18 force must be used only when the lives of people are in  
 19 immediate danger and not as a dissuasive measure.” Laura  
 20 Carlsen, *Lethal Force on the Border*, Huffington Post, June 18,  
 21 2010.
- 22 f. That same month, Amnesty International issued a statement  
 23 concluding that “[t]his shooting across the border appears to  
 24 have been a grossly disproportionate response and flies in the  
 25 face of international standards that compel police to use  
 26 firearms only as a last resort, in response to an immediate,  
 27 deadly threat that cannot be contained through lesser means.”  
 28 *Mexican teenager shot dead by US border police* (June 10,  
 2013), [http://www.amnesty.org/en/news-and-updates/mexican-  
 teenager-shot-dead-us-border-police-2010-06-09](http://www.amnesty.org/en/news-and-updates/mexican-teenager-shot-dead-us-border-police-2010-06-09); see also  
 Amnesty International Annual Report 2011 – United States of  
 America (May 13, 2011) (listing the killing of Sergio  
 Hernandez under civil rights abuse of “excessive use of force”).
- g. In June 2010, Jose Miguel Vivanco, the Americas Director at  
 Human Rights Watch warned that “[t]he increasing number of  
 border patrol killings make it clear that an open and thorough  
 US investigation is needed” and that “[a]ny border agents found

1 responsible for using excessive force should be held  
 2 accountable.” See *Deaths of Unarmed Migrants Show Need for*  
 3 *Prompt, Thorough Inquiry*, HUMAN RIGHTS WATCH (June 11,  
 4 2010), [http://www.hrw.org/news/2010/06/11/usmexico-](http://www.hrw.org/news/2010/06/11/usmexico-investigate-border-killings)  
 5 [investigate-border-killings](http://www.hrw.org/news/2010/06/11/usmexico-investigate-border-killings). Mr. Vivanco specifically noted that  
 6 use of excessive, lethal force against alleged rock-throwers  
 7 violates the United Nations’ Basic Principles on the Use of  
 8 Force and Firearms by Law Enforcement Officials. *Id.*

9 h. In December 2010, the Inter-American Commission on Human  
 10 Rights noted in its report on United States immigration  
 11 detention “the terrible effects of certain immigration policies  
 12 along the border and ... the abuses and excesses committed by  
 13 officers charged with enforcing the law.” Inter-American  
 14 Commission on Human Rights, Report on Immigration in the  
 15 United States: Detention and Due Process, OEA/Ser.L/V/II,  
 16 Doc. 78/10 (December 30, 2010),  
 17 <http://cidh.org/countryrep/USImmigration/TOC.htm>.

18 i. In June 2011, 60 human rights organizations (including the  
 19 American Civil Liberties Union of California, the American  
 20 Friends Service Committee, and Amnesty International USA)  
 21 yet again reiterated: “To shoot stone throwers is exceptionally  
 22 disproportionate and inhumane.” Letter from American Civil  
 23 Liberties Union of California, et al., to U.S. Senator Patrick  
 24 Leahy and U.S. Representative Lamar Smith (June 2011).

25 j. In May 2012, 16 members of Congress wrote specifically to  
 26 Napolitano and requested an analysis of CBP’s use of force  
 27 policies by the DHS in light of its national and international  
 28 infamy.

103. Despite actual knowledge of the Rocking Policy and its open and  
 notorious conflict with fundamental human rights guarantees, each of the  
 Supervisor Defendants failed and refused to modify the Rocking Policy in order to  
 conform it to the requirements of law.

104. In response to the death of Yañez, the ACLU in San Diego as well as  
 advocacy groups in the four states on the southwestern border, wrote to Napolitano

1 urging her to tell agents it is “not acceptable” to shoot at rock throwers. But she,  
2 along with each of the Supervisor Defendants, did nothing.

3  
4 **E. PERF’s Conclusion that CBP had an Unlawful “Policy and Practice” of Permitting Unjustifiable Deadly Force.**

5 105. In 2012, DHS and CBP commissioned the Police Executive Research  
6 Forum (“PERF”), a highly respected non-profit organization that advises law  
7 enforcement agencies on best practices, to review the then-extant use of lethal  
8 force policies for border patrol agents and to review the deadly force incidents  
9 from January 2010 through October 2012. The PERF Report confirms that the  
10 Supervisor Defendants had permitted a policy and practice within the CBP of  
11 allowing Border Patrol agents to unjustifiably use deadly force in response to  
12 alleged rock-throwing.

13 106. The report that PERF submitted to DHS and CBP identified two  
14 “policy and practice areas” that “need significant change.” One of those two  
15 policies and practices was “using deadly force against subjects throwing objects  
16 not capable of causing serious physical injury or death to them.” *See*  
17 <http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>, at p. 2.

18 107. Of the 67 case files provided to PERF to examine, 29 involved border  
19 patrol agents use of deadly force against alleged rock throwers. An objective  
20 review of the facts reported in those 29 case files shows that “[t]oo many cases do  
21 not appear to meet the test of objective reasonableness with regard to the use of  
22 deadly force.” Report at p. 6.

23 108. The PERF Report specifically concluded and recommended, among  
24 other things:

- 25 a. “Review of shooting cases involving rock throwers revealed  
26 that in some cases agents put themselves in harm’s way by  
27  
28

1 remaining in close proximity to the rock throwers when moving  
2 out of range was a reasonable option.” Report at p. 6.

- 3 b. “The state[d] CBP policy should be: “Officers/agents are  
4 prohibited from using deadly force against subjects throwing  
5 objects not capable of causing serious physical injury or death  
6 to them.” *Id.* at 7 (emphasis in original).
- 7 c. “While rock throwing can result in injuries or death, there must  
8 be clear justification to warrant the use of deadly force. CBP  
9 needs to train agents to de-escalate these encounters by taking  
10 cover, moving out of range and/or using less lethal weapons.”  
11 *Id.* at 9 (emphasis in original).
- 12 d. “Deadly force shall not be used to effect an arrest or prevent the  
13 escape of a person unless that individual presents an imminent  
14 threat of death or serious physical injury to officers/agents or  
15 others.” *Id.* at 10.
- 16 e. “When sufficient time exists officers/agents should seek cover  
17 and/or move out of range. Such action may be especially viable  
18 when the attack is coming from the other side of the border.  
19 Officers/agents are prohibited from using deadly force against  
20 subjects throwing objects not capable of causing serious  
21 physical injury or death to them” *Id.* at 12.

22 109. On November 5, 2013, Defendant Fisher announced that the agencies  
23 had decided to reject the expert, objective recommendations that CBP had  
24 commissioned PERF to provide, and instead to reaffirm yet again the unlawful  
25 Rocking Policy. *See Associated Press Exclusive: Border Patrol Rejects Curbs on*  
26 *Force* (November 5, 2013) [http://bigstory.ap.org/article/ap-exclusive-border-](http://bigstory.ap.org/article/ap-exclusive-border-patrol-rejects-curbs-force)  
27 [patrol-rejects-curbs-force](http://bigstory.ap.org/article/ap-exclusive-border-patrol-rejects-curbs-force).

28 110. On March 7, 2014, at the insistence of the newly installed Secretary of  
Homeland Security, Jeh Johnson, Defendant Fisher then amended (in his words  
“clarified”) the policy. In a memorandum to agents he stated for the first time that  
agents should, among other things:

- 1 a. “avoid placing themselves in positions where they have no  
2 alternative to using deadly force;”
- 3 b. “not discharge firearms in response to thrown or hurled  
4 projectiles unless the agent has a reasonable belief, based on the  
5 totality of the circumstances, to include the size and nature of  
6 the projectiles, that the subject of such force poses an imminent  
7 danger of death or serious injury;” and
- 8 c. first “seek[] cover or distanc[e] themselves from the immediate  
9 area of danger.”

10 111. In May 2014—after Napolitano, Bersin, and Aguilar had stepped  
11 down from their supervisor roles at DHS and CBP—CBP finally revised its Use of  
12 Force Policy Handbook.<sup>1</sup> The Policy stated for the first time, among other things,  
13 that:

14 Authorized Officers/Agents shall not discharge their  
15 firearms in response to thrown or launched projectiles  
16 unless the officer/agent has a reasonable belief, based on  
17 the totality of circumstances (to include the size and  
18 nature of the projectiles), that the subject of such force  
19 poses an imminent danger of serious physical injury or  
20 death to the officer/agent or to another person.

21 Officers/agents may be able to obtain a tactical advantage  
22 in these situations, through measures such as seeking  
23 cover or distancing themselves from the immediate area  
24 of danger.

25 112. This change in policy, while potentially welcome (assuming it is  
26 adequately implemented), came too late to protect Plaintiffs from the wholly  
27 unnecessary loss of their husband and father.

28  

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<sup>1</sup> See <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

1           **F. Officials’ Statements Regarding the Existence and Unlawfulness of**  
2           **the Rocking Policy.**

3           113. James F. Tomsheck, the former Assistant Commissioner for Internal  
4           Affairs at CBP has recently acknowledged the existence and unlawfulness of the  
5           Rocking Policy.<sup>2</sup> Among other things, Tomsheck admitted:

- 6           a.     Border Patrol Agents actively and consistently tried to distort  
7           the narratives around fatal shootings to cover up wrongdoing by  
8           border agents. Tomsheck stated that at least seven Border  
9           Patrol shooting deaths since just 2010 were “highly suspect.”  
10           Yet in none of those instances did the Supervisor Defendants  
11           take any disciplinary action against the shooter or amend the  
12           Rocking Policy.
- 13           b.     Rather than respond to the shootings appropriately, Border  
14           Patrol officials intentionally thwarted the internal affairs  
15           agency’s investigation. “In nearly every instance, there was an  
16           effort by Border Patrol leadership to make a case to justify the  
17           shooting versus during a genuine, appropriate review of the  
18           information and the facts at hand.”
- 19           c.     Top officials at DHS and CBP intentionally turned a blind eye  
20           to the consistent pattern of unjustified killings. “There were  
21           certainly many cases where border patrol agents or certainly  
22           CBP officers engaged in excessive use of force or abuse of  
23           migrants at the border that should have resulted in discipline  
24           where it did not.” *See Anna Werner, order Patrol Killings*  
25           *Face Renewed Scrutiny* (Aug. 19, 2014),  
26           [http://www.cbsnews.com/news/investigating-unresolved-](http://www.cbsnews.com/news/investigating-unresolved-deaths-on-the-border/)  
27           [deaths-on-the-border/](http://www.cbsnews.com/news/investigating-unresolved-deaths-on-the-border/).
- 28           d.     Top agency officials intentionally created a culture and  
              atmosphere that promoted the excessive use of force. “The  
              Border Patrol has a self-identity of a paramilitary border  
              security force and not that of a law enforcement agency.” *Id.*

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26           <sup>2</sup> See Andrew Becker, Ousted Chief Accuses Border Agency of Shooting Cover-Ups, Corruption  
27           (Aug. 14, 2014), [https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-](https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/)  
28           [shooting-cover-ups-corruption/](https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/) (last visited September 24, 2014)

- 1 e. Accordingly to published reports, Tomsheck said that “senior  
2 officials at Customs and Border Protection and elsewhere in the  
3 Department of Homeland Security interfered with, delayed or  
4 hindered his office from being more aggressive in rooting out  
5 corruption, abuse and other misconduct, including civil rights  
6 violations, by telling internal affairs to stand down or back off.”  
7 Andrew Becker, *Ousted Chief Accuses Border Agency of  
8 Shooting Cover-Ups, Corruption* (Aug. 14, 2014),  
9 [https://beta.cironline.org/reports/ousted-chief-accuses-border-  
10 agency-of-shooting-cover-ups-  
11 corruption/?utm\\_source=CIR&utm\\_medium=social\\_media&utm\\_](https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/?utm_source=CIR&utm_medium=social_media&utm_campaign=twitter)  
12 [campaign=twitter.](https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/?utm_source=CIR&utm_medium=social_media&utm_campaign=twitter)
- 13 f. Tomsheck places much of the blame on Aguilar, who directed  
14 that Border Patrol management take control of deadly force  
15 investigations before the internal affairs department could  
16 review them. According to reports, Tomsheck said with respect  
17 to use of excessive force that “Allegations of wrongdoing he  
18 believed needed to be investigated instead would go to Border  
19 Patrol management for review and discipline. Those inquiries  
20 went nowhere or were inadequate.” *Id.* Tomsheck and other  
21 internal affairs investigators were then required to “fall in line”  
22 behind the Aguilar-directed conclusions.

23 114. Despite knowing or having reason to know of the widespread use of  
24 excessive, lethal force, the Supervisor Defendants failed to take timely and  
25 effective measures to prohibit, prevent, and punish such practices and to discipline  
26 the perpetrators and responsible commanders, who were all under Supervisor  
27 Defendants’ actual or effective command. Supervisor Defendants had an actual  
28 opportunity and a legal duty to prevent abuses by their subordinates before Yañez  
was killed, yet failed to take the necessary and required action. The Supervisor  
Defendants’ failures constituted a willful tolerance of and deliberate indifference to  
conditions that they knew and had reason to know would lead to the use of  
excessive, lethal force. As a direct and foreseeable result of this failure, the Agents  
unlawfully killed Yañez.

1           115. The highest-ranking DHS officials knew long before Yañez was killed  
2 that the Rocking Policy: (a) permits Border Patrol agents to use lethal force when  
3 it clearly is not necessary; and (b) encourages Border Patrol agents to falsely assert  
4 that persons whom they shoot and kill were throwing rocks. Despite actual  
5 knowledge of the Rocking Policy and its open and notorious conflict with  
6 fundamental human rights guarantees, each of the Supervisor Defendants failed  
7 and refused to modify the Rocking Policy in order to conform it to the  
8 requirements of law.

9  
10 **V. THE SUPERVISOR DEFENDANTS' FAILURE AND REFUSAL TO**  
11 **ADEQUATELY TRAIN THE AGENTS.**

12           116. The Government Defendants and Supervisor Defendants also failed to  
13 provide proper training to agents who may encounter rock throwing, including  
14 Agents Nelson and Diaz. During the time that Agents Nelson and Diaz were  
15 trained, CBP systematically failed and refused to, among other things:

- 16           a. Train new agents at CBP's basic academies on all less-lethal options;
- 17           b. Sufficiently train new agents at CBP's basic academies on high-risk situations, specifically including rock throwing;
- 18           c. Train agents in tactics to de-escalate use of force situations in order to prevent them from becoming deadly force incidents;
- 19           d. Ensure that agents understood and followed a proper use of force policy;
- 20           e. Provide scenario-based training to give agents the opportunity to practice real-life use of force situations;
- 21           f. Provide training in low-light conditions;
- 22           g. Provide agents the full number of required training hours;
- 23
- 24
- 25
- 26
- 27
- 28

- 1           h. Give written tests during less-lethal force recertification  
2           training; and
- 3           i. Standardize use of force policies across the CBP.

4           117. The Government Defendants and Supervisor Defendants knew and  
5 had reason to know that the lack of training created a permissive environment in  
6 which their subordinates believed that the Rocking Policy and the use of excessive,  
7 lethal force would be tolerated or approved. The Government Defendants' and  
8 Supervisor Defendants' failures constituted a willful tolerance of and deliberate  
9 indifference to conditions that they knew and had reason to know would lead to the  
10 use of excessive, lethal force.

11           118. Despite knowing or having reason to know of the widespread use of  
12 excessive, lethal force, the Government Defendants and Supervisor Defendants  
13 failed to take timely and effective measures to prohibit, prevent, and punish such  
14 practices and to punish or discipline the perpetrators and responsible commanders,  
15 who were all under the Government Defendants' and Supervisor Defendants'  
16 actual or effective command. The Government Defendants and Supervisor  
17 Defendants had an actual opportunity and a legal duty to prevent abuses by their  
18 subordinates before Yañez was killed, yet failed to take the necessary and required  
19 action. As a direct and foreseeable result of this failure, the Agents unlawfully  
20 killed Yañez.

21 **VI. INTERNATIONAL AND DOMESTIC STRICTURES ON EXCESSIVE,**  
22 **LETHAL FORCE.**

23           119. Extrajudicial killing is universally prohibited by the laws of all  
24 civilized societies. The prohibitions against use of excessive, lethal force are  
25 absolute, non-discretionary, and subject to no exception. They are designed to  
26 safeguard the security, dignity, and life of every human being. The prohibition  
27

1 against extrajudicial killing is a peremptory, *jus cogens* norm – a specific,  
2 universal, and obligatory norm from which no nation may lawfully depart. It is  
3 universally recognized and binding on all persons under all circumstances. The  
4 Rocking Policy flagrantly violates this peremptory international norm.

5 120. The international law provisions forbidding extrajudicial killing  
6 include Article 6(1) of the International Covenant on Civil and Political Rights  
7 (“ICCPR”), S. Exec. E, 95-2, 999 U.N.T.S. 171, 1966 U.S.T. LEXIS 521 (opened  
8 for signature Dec. 16, 1966, entered into force Mar. 23, 1976, ratified by Mexico  
9 Mar. 23, 1981, ratified by U.S. June 8, 1992). That Article provides that “[n]o one  
10 shall be arbitrarily deprived of his life.” *See also id.* at art. 9(1) (“Everyone has the  
11 right to liberty and security of person . . . . No one shall be deprived of his liberty  
12 except on such grounds and in accordance with such procedure as are established  
13 by law.”). The *jus cogens* norm against extrajudicial killings is universally  
14 recognized by all civilized nations. *See, e.g.*, the Universal Declaration of Human  
15 Rights, Dec.10, 1948, art. 3, G.A. Res. 217A(III), U.N. Doc. A/810; American  
16 Declaration of the Rights and Duties of Man, art. I, O.A.S. Res. XXX (May 2,  
17 1948), [http://www.cidh.org](http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm)  
18 [/Basicos/English/Basic2.American%20Declaration.htm](http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm); Restatement (Third) of  
19 Foreign Relations § 702 cmt. f, n (1987).

20 121. U.S. courts have recognized that extrajudicial killing is among the  
21 gravest violations of the law of nations. *See, e.g.*, *Chavez v. Carranza*, 559 F.3d  
22 486, 491 (6th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1091 (9th Cir.  
23 2006) (en banc); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir.  
24 2005); *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995); *In re Estate of*  
25 *Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994);  
26 *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal.  
27  
28

1 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004); *Forti v.*  
2 *Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), amended, 694 F. Supp.  
3 707, 710-11 (N.D. Cal. 1989);

4 122. The peremptory norm against extrajudicial killing includes a  
5 prohibition on police use of excessive, lethal force. Police use of excessive, lethal  
6 force is one of the core forms of “extrajudicial killings” defined by international  
7 law. Specifically, “intentional lethal use of firearms [by police] may only be made  
8 when strictly unavoidable in order to protect life.” Eighth United Nations  
9 Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-  
10 Sept. 7, 1990, Havana, Cuba, Basic Principles on the Use of Force and Firearms by  
11 Law Enforcement Officials, art. 9 (1990). Again, this *jus cogens* norm is  
12 recognized by all civilized societies. *See, e.g.*, Code of Conduct for Law  
13 Enforcement Officials, G.A. Res. 34/169, U.N. Doc. A/RES/34/169, Annex I, art.  
14 3 (Dec. 17, 1979); Principles on the Prevention of Human Rights Violations  
15 Committed with Small Arms, Sub-Com. Res. 2006/22, Annex, U.N. Doc.  
16 A/HRC/Sub.1/58/L.11/Add.1 at 6 (Aug. 24, 2006), U.N. Special Rapporteur on  
17 extrajudicial, summary or arbitrary executions, Report to General Assembly, ¶¶33-  
18 45, U.N. Doc. A/61/311 (Sept. 5, 2006); U.N. Human Rights Committee, General  
19 Comment 6, 16th Sess., art. 6 (1982).

20 123. These binding standards are incorporated into standard training  
21 manuals for police the world over. *See, e.g.*, Commonwealth Secretariat,  
22 Commonwealth Manual on Human Rights Training for Police 65 (2006)  
23 (“Unnecessary and unlawful use of deadly force by a police officer would  
24 therefore constitute a violation of the right to life”); Organization for Security and  
25 Cooperation in Europe, Guidebook on Democratic Policing 23 (2d ed. 2008)  
26 (“Intentional lethal use of firearms may only be made when strictly unavoidable in  
27 order to protect life.”); International Committee for the Red Cross, Human Rights  
28

1 and Humanitarian Law in Professional Policing Concepts 22 (2002) (“The  
2 intentional lethal use of firearms is allowed only when strictly unavoidable to  
3 protect life.”).

4 124. For decades, the U.S. Department of State has insisted that the  
5 international norm against extrajudicial killings includes “deliberate, illegal, and  
6 excessive use of lethal force by the police, security forces, or other agents of the  
7 State whether against criminal suspects, detainees, prisoners, or others.” U.S.  
8 Dep’t of State, Country Report on Human Rights Practices 1995, Appendix A:  
9 Notes on the Preparation of the Reports (March 1996); *see also id.* (“lethal use of  
10 excessive force by security forces ... is herein defined as a form of extrajudicial  
11 killing”); U.S. Department of State Country Report on Human Rights Practices  
12 1997 - Papua New Guinea (police’s unreasonable killing of innocent bystander is  
13 extrajudicial killing). The State Department also acknowledges that this *jus cogens*  
14 norm prohibits police from responding with lethal force to alleged rock-throwers.  
15 *See, e.g.*, Country Reports on Human Rights Practices-2010: India, United States  
16 Department of State Bureau of Democracy, Human Rights and Labor, April 2011,  
17 <http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154480.htm> (“[P]rotesters threw  
18 stones and rocks at security forces, and security forces retaliated with excessive or  
19 deadly force.”); Country Reports on Human Rights Practices – 2002: Israel and the  
20 Occupied Territories, United States Department of State Bureau of Democracy,  
21 Human Rights and Labor, March 2003,  
22 <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154463.htm> (“The use of lethal force  
23 against a rock-thrower, in this instance and in many others like it, was excessive.”);  
24 Country Reports on Human Rights Practices – 2004: Tanzania, United States  
25 Department of State Bureau of Democracy, Human Rights and Labor, February  
26 2005, <http://www.state.gov/j/drl/rls/hrrpt/2004/41630.htm>. (“During the year, the  
27 use of excessive force by security forces resulted in at least two deaths ...  
28

1 [including one where] a member of a paramilitary unit fired into a crowd, killing a  
2 16-year-old student and seriously wounding two other persons” who had been part  
3 of “a mob [that] had thrown stones at members of the paramilitary unit.”).

4 125. The United States incorporates into its domestic law the peremptory  
5 international norm against extrajudicial killing by police use of excessive, lethal  
6 force. As the Executive Branch advised the Senate, with few exceptions not  
7 relevant here, “the substantive provisions of [the ICCPR] are entirely consistent  
8 with the letter and spirit of the United States Constitution and laws.” Letter of  
9 Transmittal from the President to the Senate, 1966 U.S.T. LEXIS 521, at \*2 (Feb.  
10 23, 1978). For example, the Supreme Court has held that police use of deadly  
11 force is permissible only when “the officer has probable cause to believe that the  
12 suspect poses a significant threat of death or serious physical injury to the officer  
13 or others. . . .” *Tennessee v. Garner*, 471 U.S. 1, 3 (U.S. 1985). Domestic law  
14 makes this peremptory norm specifically applicable to the use of lethal force by  
15 U.S. Border Patrol agents. 8 C.F.R. § 287.8(a)(2)(ii) (“Deadly force may be used  
16 only when a designated immigration officer. . . has reasonable grounds to believe  
17 that such force is necessary to protect the designated immigration officer or other  
18 persons from the imminent danger of death or serious physical injury”).

## 19 20 **VII. APPLICABLE TREATIES.**

21 126. The Rocking Policy also violates the sovereignty of Mexico by  
22 permitting Border Patrol agents to fire their weapons into Mexico’s sovereign  
23 territory. Article V of the Treaty of Guadalupe Hidalgo establishes the border  
24 between the United States and Mexico and provides that the border “shall be  
25 religiously respected by each of the two republics.” Treaty of Peace, Friendship,  
26 Limits, and Settlement with the Republic of Mexico, 9 Stat. 922, art. IX (1850);  
27  
28

1 *see also id.* at art. I (“There shall be firm and universal peace between the United  
2 States of America and the Mexican republic”); Gadsen Treaty Relating to the  
3 Boundaries of 1853, 10 Stat. 1035, art. I. Likewise, the Charter of the United  
4 Nations, Ch. 1, art. 2 (1945), provides that “[a]ll Members shall refrain in their  
5 international relations from the threat or use of force against the territorial integrity  
6 or political independence of any state, or in any other manner inconsistent with the  
7 Purposes of the United Nations.”

8         127. The Rocking Policy permits Border Patrol agents to fire their weapons  
9 into the sovereign territory of Mexico. For example, the teenagers killed near El  
10 Paso and Nogales were clearly within Mexican territory when Border Patrol agents  
11 shot them. Yet the U.S. Department of Justice concluded with respect to the El  
12 Paso killing, for example, that “the agent did not act inconsistently with [Border  
13 Patrol] policy or training.” Border Patrol spokespersons have confirmed that  
14 Border Patrol policy allows agents to fire their weapons into Mexico’s territory.

15         128. The Border Patrol’s policy of permitting agents to fire lethal shots into  
16 the territory of Mexico violates that nation’s sovereignty. The Government of  
17 Mexico has asserted with respect to the El Paso killing, for example, that “[a]n  
18 invasion of Mexico’s sovereignty occurred when Agent Mesa shot his gun across  
19 the border at Sergio Hernández.” Brief for the Government of the United Mexican  
20 States as Amicus Curiae in Support of Appellants in No. 12-50217, U.S. Ct. App.  
21 Fifth Circuit, No. 11-50792, filed July 2, 2012, at 15.

22         129. It is mere happenstance that Yañez was killed within U.S. territory  
23 (see below at Para. 108). The Rocking Policy permits agents to fire lethal shots  
24 into the sovereign territory of Mexico. And Agent Diaz fired the fatal shot at  
25 Yañez without regard to Mexico’s sovereign boundary and without regard to  
26 whether Yañez was within Mexico. The Rocking Policy and the killing of Yañez  
27 violated Mexico’s sovereignty.

1           130. Moreover, bilateral agreements between the United States and Mexico  
2 imposed on Defendants an unequivocal obligation to respect Yañez's fundamental  
3 right to life regardless of whether he was in Mexico or the United States. *See, e.g.*,  
4 Convention Between the United States of America and other American Republics  
5 Regarding the Status of Aliens, 46 Stat. 2753, art. V (1928) ("States should extend  
6 to foreigners, domiciled or in transit through their territory, all individual  
7 guarantees extended to their own nationals, in the enjoyment of essential civil  
8 rights without detriment, as regards to foreigners, to legal provisions governing the  
9 scope of and usages for the exercise of said rights and guarantees"); Convention on  
10 the Rights and Duties of States, Dec. 26, 1933, art. IX, 165 L.N.T.S. 19, *reprinted*  
11 *in* 28 Am. J. Int'l 75 (Supp. 1934) ("Nationals and foreigners are under the same  
12 protection of the law and the national authorities and the foreigners may not claim  
13 rights other or more extensive than those of the nationals").

14  
15 **VIII. INTENTIONAL DISCRIMINATION.**

16           131. The Rocking Policy reflects intentional discrimination against Yañez  
17 and others on the basis of their Hispanic descent and perceived Mexican origin,  
18 thus violating their substantive due process rights guaranteed under the United  
19 States Constitution. The Rocking Policy authorizes the use of excessive force  
20 against them based solely on their race, ethnicity, and/or perceived national origin.  
21 The Rocking Policy is one part of a broader U.S. effort to "get tough" on  
22 unauthorized immigration by persons of Hispanic descent and Mexican nationality.  
23 The Policy is an integral ingredient of a rancid brew of racial, ethnic, and  
24 nationalist animus, and it would not exist but for this animus against persons of  
25 Hispanic descent and Mexican origin.

1           132. Recent studies have confirmed that this and other mistreatment of  
2 migrants at the border is the result of an institutional culture of abuse within the  
3 CBP, rather than the actions of a few rogue agents. Daniel E. Martinez, Jeremy  
4 Slack, and Josiah Heyman, *Bordering on Criminal Part I: Migrant Mistreatment*  
5 while in U.S. Custody, Immigration Policy Center, December 2013, at 2. This  
6 culture could have developed only through the active encouragement or deliberate  
7 indifference of the Government Defendants and Supervisor Defendants.

8           133. Government Defendants and Supervisor Defendants failed to take any  
9 steps to reform the CBP, despite complaints from watchdog groups and the highly  
10 publicized incidents of unprovoked border shootings discussed elsewhere in this  
11 complaint. *See, e.g.*, Scott Phillips, Nestor Rodriguez, and Jacqueline Hagan,  
12 *Brutality at the Border: Use of Force in the Arrest of Immigrants in the United*  
13 *States*, *International Journal of Sociology and the Law* 30, no. 4, Dec. 2002, at  
14 285-306; Scott Phillips, Jacqueline Maria Hagan, and Nestor Rodriguez, *Brutal*  
15 *Borders? Examining the Treatment of Deportees during Arrest and Detention*,  
16 *Social Forces* 85, no. 1, Sept. 2006, at 93-109.

17           134. Despite this notice, the Government Defendants and Supervisor  
18 Defendants failed to make any attempts to prevent further mistreatment and  
19 discrimination. This inaction by Government Defendants and Supervisor  
20 Defendants indicates either tacit approval of or deliberate indifference to the  
21 widespread institutional culture of discrimination and abuse within the CBP.

22           135. No other law enforcement agency in the country, whether local, state,  
23 or national, permits its officers to treat the throwing of rocks at them as per se  
24 lethal force that the officers can legitimately counter with fatal gunfire. Nor does  
25 the Border Patrol condone or implement a similar policy of systematic,  
26 institutionalized use of excessive, lethal force with respect to encounters between  
27 Border Patrol agents and foreign civilians at the nation's northern border, or with  
28

1 respect to any other ethnic or national group. The Government Defendants and  
2 Supervisor Defendants would not condone or authorize the systematic,  
3 institutionalized use of excessive, lethal force against Canadians or Caucasians.  
4 The Government Defendants and Supervisor Defendants condone, authorize, and  
5 implement the Rocking Policy solely because its victims are persons of Hispanic  
6 descent and Mexican nationality – a group against whom a significant portion of  
7 the United States population has a virulent racial, ethnic, and national animus.

8  
9 **IX. DEFENDANTS' CAPACITY.**

10 136. Each of the Defendants caused injury and damage to Plaintiffs by  
11 personally participating in the unlawful conduct, or acting jointly or conspiring  
12 with others to act; authorizing or allowing, explicitly or implicitly, policies, plans,  
13 customs, practices, actions, or omissions that led to the unlawful conduct; failing to  
14 take action to prevent the unlawful conduct; failing or refusing to initiate and  
15 maintain adequate training or supervision; being deliberately indifferent to Yañez's  
16 rights; and ratifying the unlawful conduct that occurred by agents under their  
17 direction and control, including failing to take remedial or disciplinary action.

18 137. At all relevant times, Defendants were the agents, employees,  
19 servants, joint ventures, partners and/or coconspirators of the other Defendants  
20 named in this Complaint; and each of the Defendants was acting within the  
21 purported course and scope of that relationship with the other Defendants. At all  
22 relevant times, the Defendants were acting under color of the law and under color  
23 of their legal authority.

1 **CAUSES OF ACTION**

2 **First Claim for Relief**

3 **Fourth Amendment Unreasonable Seizure or Fifth Amendment Due Process**  
4 **(Against Defendant Fisher)**

5 138. Plaintiffs repeat and re-allege in each of their claims for relief all of  
6 the allegations set forth above.

7 139. Defendant Fisher's actions described herein violated Yañez's right to  
8 be free from unreasonable seizure and to substantive due process under the Fourth  
9 and Fifth Amendments to the U.S. Constitution, respectively. Defendant Fisher  
10 violated Yañez's Fourth and Fifth Amendment rights by personally developing,  
11 authorizing, and conspiring to effect, and permitting and directing their  
12 subordinates to implement, the Rocking Policy. Defendant Fisher also violated  
13 Yañez's Fourth and Fifth Amendment rights by failing to establish adequate  
14 procedures to train the Border Patrol agents, failing to establish adequate  
15 disciplinary procedures and adequate procedures to investigate agents' misconduct,  
16 and acting and failing to act in disregard of previous allegations of Border Patrol  
17 agents' use of excessive, lethal force.

18 140. As a foreseeable result of the Defendant Fisher's acts and omissions,  
19 the Agents used lethal force against Yañez in the circumstances described above.  
20 Defendant Fisher was aware of the danger and risk of serious harm or death that  
21 Yañez and others faced as a result of the Rocking Policy. Defendant Fisher  
22 nevertheless personally took affirmative steps that created and/or increased this  
23 danger and risk, which did, in fact, result in Yañez's death. Yañez's death was a  
24 foreseeable result of the Defendant Fisher's actions and omissions.

25 141. Defendant Fisher had actual or constructive knowledge that its, his, or  
26 her acts or omissions with respect to Yañez violated his right to live be free from  
27

1 unreasonable seizure, and Defendant Fisher had actual or constructive knowledge  
2 that his actions, orders, or omissions would lead to such violations.

3 142. Defendant Fisher acted under color of official authority and with  
4 deliberate, reckless, or callous indifference to Yañez's rights.

5 143. Defendant Fisher is liable for money damages to Plaintiffs in an  
6 amount to be determined at trial.

7 144. Defendant Fisher's violations of Yañez's right to live and be free from  
8 unreasonable seizure were deliberate, willful, intentional, wanton, malicious, and  
9 oppressive, and should be punished by an award of punitive damages in an amount  
10 to be determined at trial.

11  
12 **Second Claim for Relief**  
13 **Fourth Amendment Unreasonable Seizure or Fifth Amendment Due Process**  
14 **(Against Defendant Diaz)**

15 145. Agent Diaz's actions described herein violated Yañez's right to be  
16 free from unreasonable seizure and to substantive due process under the Fourth  
17 and Fifth Amendments to the U.S. Constitution, respectively. Agent Diaz violated  
18 Yañez's Fourth and Fifth Amendment rights by using lethal force against him in  
19 the circumstances described above.

20 146. As set forth in detail above, Agent Diaz used excessive force against  
21 Yañez, and Agent Diaz's conduct in committing these acts was not reasonable in  
22 light of all the circumstances.

23 147. Agent Diaz knowingly, intentionally, and/or with actual malice,  
24 combined, conspired and confederated together to deprive Yañez of his clearly  
25 established Fourth and Fifth Amendment constitutional rights.

26 148. Agent Diaz was aware of the danger and risk of serious harm or death  
27 that Yañez and others faced as a result of his use of excessive force. Agent Diaz  
28

1 nevertheless personally took affirmative steps that created and/or increased this  
2 danger and risk, which did, in fact, result in Yañez's death. Yañez's death was a  
3 foreseeable result of the Agent Diaz's actions and omissions.

4 149. Agent Diaz had actual or constructive knowledge that his conduct  
5 toward Yañez violated his right to live and be free from unreasonable seizure, and  
6 Agent Diaz had actual or constructive knowledge that his actions, orders, or  
7 omissions would lead to such violations.

8 150. Agent Diaz acted under color of official authority and with deliberate,  
9 reckless, or callous indifference to Yañez's rights.

10 151. Agent Diaz is liable for money damages to Plaintiffs in an amount to  
11 be determined at trial.

12 152. Agent Diaz's violations of Yañez's right to live and be free from  
13 unreasonable seizure were deliberate, willful, intentional, wanton, malicious, and  
14 oppressive, and should be punished by an award of punitive damages in an amount  
15 to be determined at trial.

16  
17 **Third Claim for Relief:**  
18 **Negligence pursuant to Cal. Civ. Pro. §§ 377.30 *et. seq.* and 377.60 *et. seq.***  
**(Against United States of America)**

19 153. At all times herein mentioned, Defendant United States of America,  
20 was, and is a sovereign governmental entity which has been engaged in, among  
21 other things, controlling access into its sovereign territory, and preventing entry of  
22 undocumented immigrants and illegal or controlled substances. The United States  
23 of America performs these activities by and through its agencies, DHS, CBP, and  
24 OBP. In so doing, Defendants, and each of them, had a duty to avoid subjecting  
25 persons, such as Plaintiffs' decedent, Yañez, to unreasonable risks of harm.  
26  
27  
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1           154. Further, at all times herein mentioned, Defendants, and each of them,  
2 owed a duty of care to Plaintiffs' decedent, Yañez, to protect him against  
3 foreseeable injurious conduct, including that of their agents and employees, and to  
4 ensure that defendant's employees in such a situation as described herein, would  
5 take adequate precautions for Yañez's safety and protect him from unreasonable or  
6 deadly force by agents and employees of the United States government used in an  
7 attempt to investigate, stop, detain and/or arrest and not subject him to  
8 unreasonable risks of harm.

9           155. Defendants, and each of them, breached their duty of care when  
10 Agent Diaz, negligently and carelessly, used unreasonable and unlawful deadly  
11 force against Yañez, proximately causing the injuries and death of Yañez, and the  
12 injuries and damages to Plaintiffs.

13           156. At all times herein mentioned, Defendant United States of America,  
14 had actual or constructive knowledge and knew, or in the exercise of reasonable  
15 care should have known, that United States Border Patrol agents, including agent  
16 Diaz, were predisposed to, intended to, and/or foreseeably would, and in fact did,  
17 become involved in the use of unreasonable and unlawful deadly force in the arrest  
18 for a non-violent crime in violation of California ordinances, statutes, departmental  
19 policies and procedures, and the United States Constitution, relating to the proper  
20 use of reasonable force and deadly force in effectuating an attempted investigation,  
21 stop, detention and/or arrest.

22           157. As the direct and proximate result of said breach of duty of care by  
23 Defendants, and each of them, Defendants permitted, ratified, condoned and  
24 allowed the negligent and careless use of unreasonable or deadly force by agents  
25 and employees of the United States government.

26           158. Yañez's injury and death occurred within the territorial jurisdiction of  
27 the United States, and in the state of California. At the moment Agent Diaz shot  
28

1 Yañez in the head, Yañez was on the border fence, which was approximately three  
2 feet North of the United States/Mexico border, and died instantly. Even if Yañez  
3 did not die instantly, he died in the United States while his body was still in the  
4 process of falling from the fence. Even if Yañez did not die until after his body  
5 assumed its final resting place on the ground, his body, either entirety or partially,  
6 always remained in the United States until it was moved and/or removed into  
7 Mexico by others who subsequently responded to the scene of the incident.

8 159. If the Defendant United States of America were a private person, it  
9 would be liable to Yañez and his heirs in accordance with the laws of California.

10  
11 **Fourth Claim for Relief:**  
12 **Negligent Training and Supervision pursuant to Cal. Civ. Pro. §§ 377.30 *et.***  
13 ***seq.* and 377.60 *et. seq.***  
**(Against United States of America)**

14 160. Defendant United States of America, by and through it's vested  
15 authorities, failed to afford proper and adequate training necessary for Border  
16 Patrol agents operating along the Southern Border, including Agent Diaz, to carry  
17 out their duties.

18 161. Defendant United States of America, by and through it's vested  
19 authorities, failed to adequately supervise Border Patrol agents operating along the  
20 Southern Border, including Agent Diaz.

21 162. Defendant United States of America was responsible for the hiring,  
22 training, disciplining, suspending, managing, supervising, directing, controlling,  
23 retaining, and conduct of United States Border Patrol agents operating along the  
24 Southern Border, including Agent Diaz.

25 163. Defendant United States of America, its agents, and employees,  
26 negligently and carelessly hired, trained, disciplined, retained, supervised,  
27 managed, directed, and controlled the conduct and activities of Agent Diaz and  
28

1 other United States Border Patrol agents operating along the Southern Border,  
2 proximately causing the shooting and death of Yañez, in that Government  
3 Defendants and Supervisor Defendants, unlawfully, and in violation of California  
4 ordinances, statutes, departmental policies and procedures, and the United States  
5 Constitution, implemented and/or perpetuated the Rocking Policy, and in that  
6 Agent Diaz, while in the course and scope of his employment with the United  
7 States of America negligently and carelessly used unreasonable and unlawful  
8 deadly force against Yañez consistent with Rocking Policy.

9  
10 **REQUEST FOR RELIEF**

11 WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment  
12 including:

- 13 a. Compensatory damages against all Defendants in an amount to  
14 be proven at trial;
- 15 b. Punitive damages against each of Defendants Fisher and Diaz  
16 in an amount to be determined at trial;
- 17 c. Reasonable attorneys' fees and costs of suit;
- 18 d. Such other relief as the Court deems just and reasonable.

19  
20 **DEMAND FOR JURY TRIAL**

21 Plaintiffs demand a trial by jury as to each claim brought against any Defendant in  
22 his or her individual capacity.

23  
24 SINGLETON LAW FIRM, APC  
25 LAW OFFICE OF MARK FLEMING  
26 HILLIARD MUNOZ GONZALES, LLP  
27 HILLIARD & SHADOWEN, LLP

1 Dated: September 22, 2016

*/s/ Gerald Singleton*

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