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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA DEL SOCORRO)
QUINTERO PEREZ, CY, a Minor,)
And BY, a Minor,)

Case No. '13CV1417 H WMC

Plaintiffs,)

COMPLAINT

v.)

UNITED STATES OF AMERICA,)
UNITED STATES DEPARTMENT)
OF HOMELAND SECURITY,)
UNITED STATES CUSTOMS)
AND BORDER PROTECTION)
OFFICE OF BORDER PATROL,)
JANET NAPOLITANO, THOMAS)
S. WINKOWSKI, DAVID)
AGUILAR, ALAN BERSIN,)
KEVIN K. McALLEENAN,)
MICHAEL J. FISHER, PAUL A.)
BEESON, RICHARD BARLOW,)
RODNEY S. SCOTT, CHAD)
MICHAEL NELSON, and DORIAN)
DIAZ, and DOES 1 - 50)

JURY TRIAL DEMANDED

Defendants.)

COMPLAINT

This lawsuit seeks redress for the death of Jesus Alfredo Yañez Reyes (“Yañez”). Yañez was killed as a result of the United States Border Patrol’s so-

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

16 **PARTIES**
17

18 1. Plaintiff Maria Del Socorro Quintero Perez is the widow of Jesus
19 Alfredo Yañez Reyes. She brings this action in her individual capacity, on behalf
20 of the estate of Jesus Alfredo Yañez Reyes, and as the next friend of minor
21 children CY and BY. Yañez was a Mexican national of Hispanic descent.

22 2. Plaintiff CY is the minor child of Jesus Yañez Reyes.

23 3. Plaintiff BY is the minor child of Jesus Yañez Reyes.

24 4. Defendant United States of America is a sovereign nation that has
25 waived its sovereign immunity for the claims that Plaintiffs assert against it. At
26 all relevant times Defendant United States was the government entity that
27 controlled, directed, and otherwise oversaw the Department of Homeland Security
28 (“DHS”) and employed the Supervisor Defendants and Agents (identified below),

1 all of whom were acting under color of law and within the purported course and
2 scope of their employment with respect to the conduct about which Plaintiffs
3 complain. Defendant United States was responsible for the training of these
4 supervisors and agents and for making and implementing policies and practices
5 used by these agents regarding their use of force. Defendant United States was
6 responsible for authorizing, directing, and implementing the unlawful Rocking
7 Policy that resulted in Yañez's death.

8
9 5. Defendant DHS is a Cabinet-level department that is responsible for
10 the coordination and unification of national security efforts. Defendant DHS has
11 responsibility for and has oversight over the training of Border Patrol agents and
12 the policies, procedures, and practices relating to its agents' use of force at the
13 United States/Mexico border, including in the Border Patrol's San Diego Sector.
14 Defendant DHS was responsible for authorizing, directing, and implementing the
15 unlawful Rocking Policy that resulted in Yañez's death.

16 6. Defendant United States Customs & Border Protection ("CBP") is an
17 agency of DHS. Defendant CBP is responsible for securing the borders of the
18 United States and has responsibility for and oversight over policies, procedures,
19 and practices relating to its agents' use of force at the United States/Mexico
20 border, including in the Border Patrol's San Diego Sector. Defendant CBP was
21 responsible for authorizing, directing, and implementing the unlawful Rocking
22 Policy that resulted in Yañez's death.

23 7. Defendant Office of Border Patrol ("Border Patrol") is a subagency
24 within the CBP. Defendant Border Patrol is a federal law enforcement agency
25 responsible for the enforcement of the laws and regulations governing the
26 admission of persons into the United States. Defendant Border Patrol has
27 responsibility for and oversight over the training of Border Patrol agents and the
28 policies, procedures, and practices relating to its agents' use of force at the United

1 States/Mexico border, including in the Border Patrol's San Diego Sector.
2 Defendant Border Patrol was responsible for authorizing, directing, and
3 implementing the unlawful Rocking Policy that resulted in Yañez's death.

4 8. Plaintiffs sometimes refer herein to Defendants United States, DHS,
5 CBP, and Border Patrol collectively as the "Government Defendants."

6 9. Defendant Janet Napolitano is and was at all relevant times the
7 Secretary of DHS. She is and was the commanding officer of the Agents and is
8 and was responsible by law for enforcing the United States Constitution, laws, and
9 regulations and for ensuring that Border Patrol agents are properly trained and
10 obey the laws of the United States. Upon information and belief, Defendant
11 Napolitano was personally responsible for approving and implementing the
12 specific Border Patrol use-of-force policies, including the Rocking Policy, that
13 resulted in Yañez's death. Plaintiffs sue Defendant Napolitano in her individual
14 and official capacities.
15

16 10. Defendant Thomas S. Winkowski is currently the Commissioner of
17 the CBP, a position he has held since March 30, 2013. From December 2011 to
18 August 2012 Defendant Winkowski served as the Deputy Commissioner of CBP,
19 and before that he was the Assistant Commissioner of CBP in the Office of Field
20 Operations. Defendant Winkowski is and was the commanding officer of the
21 Agents and is and was responsible by law for enforcing the United States
22 Constitution, laws, and regulations and for ensuring that Border Patrol agents are
23 properly trained and obey the laws of the United States. Upon information and
24 belief, Defendant Winkowski was personally responsible for approving and
25 implementing the specific Border Patrol use-of-force policies, including the
26 Rocking Policy, that resulted in Yañez's death. Plaintiffs sue Defendant
27 Winkowski in his individual and official capacities.
28

1 11. Defendant David Aguilar served as the Acting Commissioner of CBP
2 from January 2012 to March 2012, and as the Acting Deputy Commissioner of
3 CBP from April 2010 to December 2011. Defendant Aguilar was the
4 commanding officer of the Agents and was responsible by law for enforcing the
5 United States Constitution, laws, and regulations and for ensuring that Border
6 Patrol agents were properly trained and obeyed the laws of the United States.
7 Upon information and belief, Defendant Aguilar was personally responsible for
8 approving and implementing the specific Border Patrol use-of-force policies,
9 including the Rocking Policy, that resulted in Yañez's death. Plaintiffs sue
10 Defendant Aguilar in his individual capacity.

11 12. Defendant Alan Bersin served as the Commissioner of the CBP from
12 March 2010 through December 2011, and is currently the Assistant Secretary of
13 International Affairs and Chief Diplomatic Officer for DHS. Defendant Bersin
14 was the commanding officer of the Agents and was responsible by law for
15 enforcing the United States Constitution, laws, and regulations and for ensuring
16 that Border Patrol agents were properly trained and obeyed the laws of the United
17 States. Upon information and belief, Defendant Bersin was personally responsible
18 for approving and implementing the specific Border Patrol use-of-force policies,
19 including the Rocking Policy, that resulted in Yañez's death. Plaintiffs sue
20 Defendant Bersin in his individual and official capacities.

21 13. Defendant Kevin K. McAleenan has served as the Deputy
22 Commissioner of CBP from March 2013 to the present. When Defendants killed
23 Yañez in June 2011, Defendant McAleenan was the Deputy Assistant
24 Commissioner of CBP in the Office of Field Operations. Defendant McAleenan
25 is and was the commanding officer of the Agents and is and was responsible by
26 law for enforcing the United States Constitution, laws, and regulations and for
27 ensuring that Border Patrol agents are properly trained and obey the laws of the
28

1 United States. Upon information and belief, Defendant McAleenan is personally
2 responsible for approving, maintaining, and implementing the specific Border
3 Patrol use-of-force policies, including the Rocking Policy, that resulted in Yañez's
4 death. Plaintiffs sue Defendant McAleenan in his individual and official
5 capacities.

6 14. Defendant Michael J. Fisher has served as the Chief of the Border
7 Patrol from May 2010 to the present. Defendant Fisher is and was the
8 commanding officer of the Agents and is and was responsible by law for
9 enforcing the United States Constitution, laws, and regulations and for ensuring
10 that Border Patrol agents are properly trained and obey the laws of the United
11 States. Upon information and belief, Defendant Fisher was personally responsible
12 for approving and implementing the specific Border Patrol use-of-force policies,
13 including the Rocking Policy, that resulted in Yañez's death. Plaintiffs sue
14 Defendant Fisher in his individual and official capacities.
15

16 15. Defendant Paul A. Beeson has served as the Chief Patrol Agent of
17 the Border Patrol's San Diego Sector from November 2010 to the present.
18 Defendant Beeson is and was the commanding officer of the Agents and is and
19 was responsible by law for enforcing the United States Constitution, laws, and
20 regulations and for ensuring that Border Patrol agents are properly trained and
21 obey the laws of the United States. Upon information and belief, Defendant
22 Beeson was personally responsible for approving and implementing the specific
23 Border Patrol use-of-force policies, including the Rocking Policy, that resulted in
24 Yañez's death. Defendant Beeson also had direct responsibility for and oversight
25 over the training of Border Patrol agents in the San Diego Sector, including
26 Agents Nelson and Diaz (discussed below). Plaintiffs sue Defendant Beeson in
27 his individual and official capacities.
28

1 16. Defendant Richard Barlow served as the Acting Chief Patrol Agent
2 of the Border Patrol’s San Diego Sector from 2009 to November 2010. Defendant
3 Barlow was the commanding officer of the Agents and was responsible by law for
4 enforcing the United States Constitution, laws, and regulations and for ensuring
5 that Border Patrol agents are properly trained and obey the laws of the United
6 States. Upon information and belief, Defendant Barlow was personally
7 responsible for approving and implementing the specific Border Patrol use-of-
8 force policies, including the Rocking Policy, that resulted in Yañez’s death.
9 Defendant Barlow also had direct responsibility for and oversight over the training
10 of Border Patrol agents in the San Diego Sector, including Agents Nelson and
11 Diaz (discussed below). Plaintiffs sue Defendant Barlow in his individual and
12 official capacities.
13

14 17. Defendant Rodney S. Scott has served as the Acting Deputy Chief
15 Patrol Agent or the Deputy Chief Patrol Agent of the Border Patrol’s San Diego
16 Sector from at least May 2010 to the present. Defendant Scott is and was the
17 commanding officer of the Agents and is and was responsible by law for
18 enforcing the United States Constitution, laws, and regulations and for ensuring
19 that Border Patrol agents are properly trained and obey the laws of the United
20 States. Upon information and belief, Defendant Scott was personally responsible
21 for approving and implementing the specific Border Patrol use-of-force policies,
22 including the Rocking Policy, that resulted in Yañez’s death. Defendant Scott
23 also had direct responsibility for and oversight over the training of Border Patrol
24 agents in the San Diego Sector, including Agents Nelson and Diaz (discussed
25 below). Plaintiffs sue Defendant Scott in his individual and official capacities.
26

27 18. Plaintiffs sometimes refer herein to Defendants Napolitano,
28 Winkowski, Aguilar, Bersin, McAleenan, Fisher, Beeson, Barlow, and Scott as
the “Supervisor Defendants.”

1 19. Defendant Chad Michael Nelson (“Nelson”) is and was at all relevant
2 times employed by the United States, DHS, and CBP as a Border Patrol agent. At
3 all times described in this Complaint, he was acting in his capacity as a sworn law
4 enforcement or peace officer, agent, servant, or employee of the Government
5 Defendants, and under color of legal authority. Plaintiffs sue Defendant Nelson in
6 his individual capacity.

7 20. Defendant Dorian Diaz (“Diaz”) is and was at all relevant times
8 employed by the United States, DHS, and CBP as a Border Patrol agent. At all
9 times described in this Complaint, he was acting in his capacity as a sworn law
10 enforcement or peace officer, agent, servant, or employee of the Government
11 Defendants, and under color of legal authority. Plaintiffs sue Defendant Diaz in
12 his individual capacity.

13 21. Plaintiffs sometimes refer herein to Defendants Nelson and Diaz
14 collectively as the “Agents.”
15

16 **JURISDICTION AND VENUE**

17
18 22. This Complaint is for compensatory damages and injunctive and
19 other relief based on civil rights and human rights violations committed by
20 officers and employees of the United States, all of whom were acting under color
21 of legal authority and within the purported course and scope of their employment
22 and in violation of the Fourth and Fifth Amendments to the U.S. Constitution. In
23 addition, the Government Defendants’ conduct violated the law of nations and
24 applicable treaties between the United States and Mexico, and is thus actionable
25 pursuant to the Alien Tort Statute, 28 U.S.C. § 1350.

26 23. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§
27 1331 and 1350, because Plaintiffs’ claims arise under the U.S. Constitution and
28 are authorized by *Bivens v. Six Unknown Named Agents of Federal Bureau of*

1 *Narcotics*, 403 U.S. 388 (1971), and properly invoke the law of nations and
2 applicable treaties.

3 24. To the extent that exhaustion of administrative remedies is required
4 with respect to Plaintiffs' claims pursuant to the Alien Tort Statute, 28 U.S.C. §
5 1350, which Plaintiffs deny, Plaintiffs have exhausted the administrative remedies
6 prescribed by 28 U.S.C. § 2675 by timely presenting their claims to Defendants on
7 August 10, 2011. As of the date of this Complaint, Defendants have neither
8 admitted nor denied Plaintiffs' administrative claims. This Complaint is filed
9 more than six months after Plaintiffs presented their administrative claims.

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

14 **FACTS**

16 **I. THE AGENTS' KILLING OF YAÑEZ**

17 26. Border Patrol agents have asserted to various investigators the facts
18 set forth in Paragraphs 27 to 44 below.

19 27. At dusk on June 21, 2011, Yañez and Jose Ibarra-Murrieta
20 ("Murrieta") crossed the border from Mexico to the United States together. Their
21 crossing began in the Castillo neighborhood of Ciudad Tijuana. The duo
22 squeezed through a small hole in the primary border fence that abutted the Castillo
23 neighborhood, and emerged into a dried-out concrete culvert between the primary
24 border fence (the corrugated solid metal fence closest to Mexico) and the
25 secondary border fence (the high-tech chain link fence closest to the United
26 States). The culvert runs north from the primary fence to Stuart's Bridge, which
27 abuts the secondary fence.
28

1 28. Murrieta led the pair and was the first to traverse the length of the
2 culvert and climb out at Stuart's Bridge. There he encountered Border Patrol
3 Agent Nelson.

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

8 30. Agent Nelson, who had chased Murrieta into the culvert, yelled to
9 Agent Diaz, who was already at the top of Stuart's Bridge, to cut off Murrieta's
10 escape.

11 31. Murrieta saw Agent Diaz above him and descended back into the
12 culvert where Agent Nelson waited.

13 32. Yañez, who had stayed in the culvert near the primary fence, escaped
14 back to the Castillo neighborhood in Mexico through the small hole in the fence.

15 33. Back on the ground at Stuart's Bridge, Murrieta evaded Agent
16 Nelson and ran south toward the primary fence where Yañez had just escaped.
17 But Agent Nelson caught Murrieta in the culvert close to the primary fence.

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

22 35. Before Agent Nelson could catch him, Murrieta tripped and fell to
23 the ground. When Murrieta stood up, Agent Nelson grabbed him by the neck in
24 an attempt to subdue him.

25 36. Murrieta and Agent Nelson began grappling again in the dirt road,
26 and Agent Nelson swept Murrieta's legs and wrestled him to the ground. Agent
27 Nelson then admittedly began to strike Murrieta while pinning him to the ground.
28

1 37. Meanwhile, Yañez had run parallel to Agent Nelson and Murietta on
2 the southern side of the primary fence. When Murietta fell and Agent Nelson
3 began to subdue him, Yañez climbed into a tree that leaned against the southern
4 side of the primary fence near the area where Agent Nelson and Murietta were
5 grappling in the road.

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

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

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

22 41. Agent Nelson acknowledges that then, without any warning and any
23 further alleged throwing of a rock or a board by Yañez, Agent Nelson pulled away
24 from the scuffle with Murietta. Agent Diaz removed his sidearm from its holster,
25 uttered not a single additional word, and shot Yañez in the head. Agent Diaz
26 likewise acknowledges that, although Yañez had allegedly raised his hand as if to
27 begin a throwing motion, Agent Diaz did not see any rock or anything else in
28

1 Yañez's hand, which Agent Diaz acknowledges was closed into a fist. Agent
2 Diaz then shot Yañez in the head. Yañez fell out of the tree, dead or dying, on the
3 southern side of the primary fence. Neither Agent Nelson nor Agent Diaz
4 attempted to render any assistance to Yañez.

5 42. Agent Nelson continued to subdue Murietta, which he was able to do
6 alone, without help from Agent Diaz. Two to three minutes later, additional
7 Border Patrol agents arrived and took control of Murietta. Those agents also
8 failed to attempt to render any assistance to Yañez.

9 43. The only injuries sustained by Agent Nelson were a swollen elbow
10 and a small cut on his hand, neither of which he received from any rock or board
11 allegedly thrown by Yañez, as well as stinging in his eyes from dirt that he says
12 Murietta threw. Agent Nelson had no visible marks or bleeding from the alleged
13 board. Upon information and belief, Agent Nelson received no medical treatment
14 for a blow to his head from a board or rock.
15

16 44. In the aftermath of Yañez's death, Border Patrol representatives gave
17 false information to the press and the public in order to try to justify the killing.
18 For example, a Border Patrol spokesperson told Fox News Latino that "two men
19 assaulted U.S. agents with a concrete slab." The Agents' statements to
20 investigators include no mention of a concrete slab. Another Border Patrol
21 representative falsely told a San Diego newspaper that the Agents were
22 confronting three men, not two, and misleadingly failed to advise the newspaper
23 that at the time of the killing one of the two men was face down in the dirt road
24 with an agent on top of him, and the other was in a tree on the other side of the
25 primary fence where he was a threat to no one.

26 45. Murrieta's account of the events that evening differs markedly from
27 those of the Agents with respect to the specific circumstances surrounding Agent
28 Diaz's shooting of Yañez.

1 46. Murrieta asserts that Yañez never threw anything at Nelson or
2 anyone else. Indeed, the shape and height of the tree, the height of the primary
3 fence, and the distance of the tree and the fence from Agent Nelson made it
4 impossible for Yañez (or any person) to throw rocks or wood at the agent with
5 lethal force or accuracy.

6 47. Instead, both Agent Nelson and Agent Diaz had Murrieta down on
7 the ground and were beating him. Agents Nelson and Diaz easily outweighed and
8 outmuscled the slight-framed Murrieta, who was facedown in the dirt road. In
9 fact, when Murrieta was eventually taken away by a cadre of Border Patrol agents,
10 he was disoriented and his mouth was covered with his own blood.

11 48. While Agents Nelson and Diaz had Murietta on the ground and were
12 beating him, Yañez climbed into the tree on the south side of the primary fence
13 and tried to dissuade Agents Nelson and Diaz from continuing the beating.

14 49. In an apparent effort to stop the attack, Yañez yelled that he was
15 going to use his cellphone to take video and pictures of the beating. Upon hearing
16 Yañez's threat to record the Agents' attack on Murietta, Agent Diaz stopped
17 beating Murietta, stood up, and, without warning or provocation, shot Yañez in
18 the head.

19 50. Whichever of these two versions of the shooting the jury believes, the
20 Agents unlawfully used excessive, lethal force against Yañez.

21 51. If the jury believes Murietta, then Agents Diaz and Nelson murdered
22 Yañez in an effort to keep him from recording the Agents' beating of Murietta.

23 52. If the jury believes the Agents, the killing still resulted from their
24 unlawful use of excessive, lethal force.

25 53. Under the Agents' version of events, neither Agent Nelson nor Agent
26 Diaz ever gave Yañez any verbal command to stop throwing rocks or boards.
27 According to Agent Nelson's version, he never gave Yañez any command at all,
28

1 and all Agent Diaz told Yañez was to get down from the tree. According to Agent
2 Nelson's own version of events, Agent Diaz's first and only show of force or
3 authority to Yañez was lethal force.

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

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

23 **II. THE ROCKING POLICY**

24 56. The Agents' use of excessive, lethal force against Yañez did not
25 spring from their spontaneous acts. Instead, they were acting pursuant to, and
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27
28

1 implementing, a Rocking Policy that has the imprimatur of the highest-ranking
2 DHS officials.

3 57. Pursuant to this unlawful Rocking Policy, Border Patrol agents along
4 the southern border regularly use excessive, lethal force against persons of
5 perceived Hispanic descent and Mexican nationality. At all relevant times, all of
6 the Government Defendants and Supervisor Defendants knew, or reasonably
7 should have known, that Border Patrol agents along the southern border:

- 8 • had a regular pattern and practice of implementing a Rocking Policy
9 pursuant to which agents deemed others' throwing of rocks at them to be
10 per se lethal force that justifies the agents' shooting to kill the alleged rock-
11 throwers;
- 12 • understood the Government Defendants and Supervisor Defendants
13 to have, at a minimum, tacitly approved the Rocking Policy by, for
14 example, failing and refusing to countermand express statements by Border
15 Patrol agents' representatives that the Rocking Policy was lawful and
16 appropriate, and by failing to take remedial action when agents acted
17 unlawfully pursuant to the Rocking Policy;
- 18 • had a regular pattern and practice of taking advantage of the
19 existence of the Rocking Policy to justify the unlawful use of excessive
20 force by falsely asserting that others had been throwing rocks at them; and
- 21 • used the Rocking Policy to justify the unlawful use of excessive force
22 against persons of perceived Hispanic ancestry and Mexican nationality.

23 58. Representatives of Border Patrol agents have regularly and publicly
24 stated that agents are justified in treating the throwing of rocks at them as per se
25 lethal force, regardless of whether the alleged rock-throwing poses an imminent
26 risk of death or serious injury to the agents or anyone else, and regardless of
27 whether the agents had available other, non-lethal alternatives. Upon information
28

1 and belief, agents have reiterated this same understanding of their justifiable use
2 of lethal force to their superiors through the chain of command. Despite actual
3 knowledge of this patently unlawful policy and practice, the Government
4 Defendants and Supervisor Defendants have failed and refused to repudiate it
5 publicly or through the chain of command; have failed and refused to issue,
6 publicly or through the chain of command, a lawful policy regarding the use of
7 force in response to alleged rock-throwing; have failed and refused to provide
8 adequate training to agents regarding lawful responses to alleged throwing of
9 rocks; and have failed and refused to appropriately discipline agents who act
10 unlawfully pursuant to the Rocking Policy.

11
12 59. For example, on June 9, 2010, the National Border Patrol Council of
13 the American Federation of Government Employees (“NBPC”) issued a
14 nationwide press release that succinctly stated the Rocking Policy. The NBPC
15 represents more than 17,000 Border Patrol agents and support staff.

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

23 61. Similarly, in June 2010, T.J. Bonner, president of the NBPC,
24 reiterated the Rocking Policy to the Associated Press in response to a Border
25 Patrol agent’s fatal shooting of a Mexican teenager who was standing unarmed
26 and unthreatening across the border near El Paso, Texas. Three separate
27 videotapes of the incident conclusively show that the murdered teenager had not
28 thrown any rock or anything else at the agent. The videotapes further appear to

1 show that only one person, who was nowhere near the murdered teenager, had
2 thrown a rock at the agent. And they conclusively show that the agent's first show
3 of any force was the use of lethal force; that if the agent somehow felt threatened,
4 he could easily have retreated further away from the border area; and that if he
5 still somehow felt threatened he could simply have released the person he was
6 detaining near the border. Despite these facts, Mr. Bonner stated on behalf of
7 17,000 Border Patrol agents whom he represents that the agent was justified in
8 killing the teenager: "It is a deadly force encounter. One that justifies the use of
9 deadly force."

10
11 62. In a further statement to the NBC Nightly News, Bonner crystalized
12 the per se nature of the Rocking Policy, i.e., that it purports to justify agents' use
13 of deadly force in response to alleged rock-throwing, regardless of whether it
14 poses an imminent risk of death or serious injury to the agents or anyone else, and
15 regardless of whether other, non-lethal means are available to avert any such risk.
16 Mr. Bonner stated that "[w]hen you pick up a rock and throw it at a police officer
17 you should expect to have deadly force directed back toward you."

18
19 63. Other representatives of the agents have continually reiterated the
20 same per se Rocking Policy. For example, the Vice-President of the NBPC,
21 Shawn Moran, told the Christian Science Monitor in April 2011, "When rocks are
22 thrown at us, that is considered deadly force."

23
24 64. More recently, in response to an agent's killing of another Mexican
25 teenager who was also an innocent bystander to someone else's alleged rock-
26 throwing, a Border Patrol spokesperson asserted flatly that "rocks are considered
27 deadly weapons."

28
65. The nature and existence of the Rocking Policy has been further
confirmed by the U.S. Department of Justice, which purports to have conducted a
criminal investigation into the fatal El Paso shooting referred to above. Conclusive

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

11
12 66. The Rocking Policy results in the unlawful killing of persons who
13 were actually throwing rocks at Border Patrol agents. Even when rocks are in fact
14 being thrown, less-than-lethal force or other non-lethal tactics are often readily
15 available. But the El Paso incident highlights another pernicious aspect of the
16 Rocking Policy: it encourages Border Patrol agents who unlawfully use deadly
17 force to falsely claim that the victim was throwing rocks. Rocks are ubiquitous
18 along the border, so agents can always plausibly, but falsely, claim that rocks had
19 been thrown at them.

20 67. In the immediate aftermath of the El Paso killing, for example, the
21 agent asserted to FBI investigators that he was "surrounded" by rock-throwers and
22 that the victim was throwing a rock when the agent shot him. Fortunately, a
23 passerby caught the incident on a cellphone video, and two other videotapes – one
24 taken by the Border Patrol itself, and another by a nearby landowner – also later
25 surfaced. Those videos conclusively show that the agent was not surrounded; the
26 agent was not under attack from rocks or anything else; the victim had not thrown
27 and was not throwing any rocks; and the agent had many non-lethal alternatives
28

1 available to him if he somehow felt threatened, including simply backing up
2 further away from the border.

3 68. The El Paso agent's false assertion of rock-throwing is not unique.
4 Instead, the Border Patrol has demonstrated a pattern of falsely alleging rock-
5 throwing, or falsely asserting life-threatening danger from rock-throwing, in order
6 to justify using lethal force. For example:

- 7 • In 2003, Border Patrol agents killed Ricardo Olivares Martinez by shooting
8 him five times as he attempted to flee. Agents alleged he was throwing
9 rocks.
- 10 • In 2005, Border Patrol agents shot and killed Guillermo Martinez
11 Rodriguez as he attempted to flee back into Mexico. The agents alleged he
12 was simultaneously throwing rocks and running away.
- 13 • In 2006, Border Patrol agents near the Andrade Port of Entry in California
14 were apprehending a suspect who was swimming across the Colorado River
15 when, they contend, a group of Mexican nationals began throwing rocks
16 from the bank on the Mexican side of the river. The agents opened fire into
17 the group, killing one man.
- 18 • In 2007, a Border Patrol agent shot and killed José Alejandro Ortiz-Castillo
19 as he was attempting to illegally enter the United States. The agent claimed
20 that Ortiz-Castillo provoked the shooting by threatening an agent with a
21 rock.
- 22 • In 2007, a Border Patrol agent shot and killed Francisco Dominguez, falsely
23 claiming that Dominguez was about to hit him in the head with a rock.
- 24 • In 2007, a Border Patrol agent in Calexico, California shot an unidentified
25 Mexican who was in a raft in the All-American Canal. The agent claimed
26 that the man, who had turned the raft back towards Mexico when he saw the
27 agent, was attempting to throw a rock.
28

- 1 • In 2008, Border Patrol agents shot and killed Edgar Israel Ortega Chavez
2 while he was across the border in Mexico. Agents alleged he was throwing
3 rocks.
- 4 • In 2010, a Border Patrol agent shot 15-year-old Sergio Hernandez in the
5 circumstances described above, falsely asserting that he was throwing rocks
6 at the agent.
- 7 • In 2011, a Border Patrol agent shot and killed 17-year-old Ramses Barron
8 Torres. Even though Torres was climbing the border fence at the time he
9 was shot, agents alleged he was simultaneously throwing rocks.
- 10 • In 2011, a Border Patrol agent shot and killed Carlos La Madrid. Even
11 though La Madrid was climbing the border fence at the time he was shot,
12 Border Patrol agents alleged he was simultaneously throwing rocks.
- 13 • In 2012, Border Patrol agents shot and killed Juan Pablo Santillan. At the
14 time of the shooting, Santillan was in the Rio Grande, but agents claim that
15 others were throwing rocks, prompting them to shoot and kill Santillan.
- 16 • In 2012, a Border Patrol agent shot and killed Guillermo Arevalo Pedroza,
17 who was picnicking in a riverside park with family members on the
18 Mexican side of the Rio Grande near Laredo, Texas. Border Patrol agents
19 in a motorboat began aggressively circling a man who was attempting to
20 swim across the river, and people in the park began to shout that the man
21 was drowning. The agents opened fire on the crowd in the park, and later
22 asserted that they had been “subjected to rock throwing from the Mexican
23 side.” Cellphone video of the incident shows no rocks being thrown by the
24 victim or anyone else.
- 25 • In the most recent incident, near Nogales, Arizona in October 2012, two
26 alleged smugglers were attempting to climb the fence back into Mexico,
27 while Border Patrol agents ordered them down. The agents assert that
28

1 someone on the Mexico side of the fence began throwing rocks over the
2 fence at them. A Border Patrol agent went to the fence and indiscriminately
3 opened fire into a nearby street in Mexico, fatally shooting Jose Antonio
4 Elena Rodriguez seven times. Rodriguez, a 16-year-old boy who was
5 merely walking by in the street, was an entirely innocent bystander.

6 69. The highest-ranking DHS officials knew long before Yañez was
7 killed that the Rocking Policy: (a) permits Border Patrol agents to use lethal force
8 when it clearly is not necessary; and (b) encourages Border Patrol agents to falsely
9 assert that persons whom they shoot and kill were throwing rocks.
10

11 **III. DEFENDANTS' CONSISTENT DISREGARD OF COMPLAINTS REGARDING THE**
12 **ROCKING POLICY**

13
14 70. Firing live bullets in response to thrown rocks is, absent highly
15 unusual circumstances not present here, grossly excessive force. The National
16 Law Enforcement Officers Memorial Fund has gathered records on all police
17 officers killed in the line of duty since the first U.S. patrolman was killed in 1792.
18 In those 200+ years, exactly one police officer (in 1942) was killed by a thrown
19 rock. Most police departments teach their cadets that a rock is not deadly beyond
20 50 feet. Unless they are performing a particularly important mission, like aiding a
21 wounded colleague, officers facing thrown rocks should simply retreat beyond
22 that perimeter.

23 71. Accordingly, for years international organizations have condemned
24 the Border Patrol's routine use of excessive, lethal force along the southern
25 border. For example:

- 26 • In 2006 the Border Network for Human Rights reported to the United
27 Nations that Border Patrol agents' killing of alleged rock-throwers
28

1 constitutes “the use of excessive force by authorities which has
2 arbitrarily taken the life of immigrants” in violation of binding
3 international norms. U.S./Mexico Border Report to the United
4 Nations Human Rights Committee Regarding the United States’
5 Compliance with the International Covenant on Civil and Political
6 Rights, *Behind Every Abuse Is a Community* (June 2006), at 9,
7 [http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-UN-](http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-UN-Report3.pdf)
8 [Report3.pdf](http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-UN-Report3.pdf).

- 9
- 10 • In 2008 the executive director of the American Civil Liberties Union
11 of San Diego similarly put the United States on notice: “Simply put,
12 it is not acceptable to use lethal force when confronted with rock
13 throwers in ... border protection situations.” ACLU, *U.S. Border*
14 *Patrol Should Stop Using Lethal Force Against Rock Throwers* (Aug.
15 2008), [http://www.aclusandiego.org/immigrants-rights/news-for-](http://www.aclusandiego.org/immigrants-rights/news-for-immigrants-rights/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/)
16 [immigrants-rights/u-s-border-patrol-should-stop-using-lethal-force-](http://www.aclusandiego.org/immigrants-rights/news-for-immigrants-rights/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/)
17 [against-rock-throwers-say-human-rights-groups-call-for-](http://www.aclusandiego.org/immigrants-rights/news-for-immigrants-rights/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/)
18 [congressional-investigations-into-disproportionate-use-of-force-](http://www.aclusandiego.org/immigrants-rights/news-for-immigrants-rights/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/)
19 [incidents-2/](http://www.aclusandiego.org/immigrants-rights/news-for-immigrants-rights/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/).
 - 20 • That same year the U.N. Committee on the Elimination of Racial
21 Discrimination expressed concerns “about allegations of brutality and
22 use of excessive or deadly force by law enforcement officials against
23 persons belonging to racial, ethnic or national minorities, in
24 particular Latino and African American persons and undocumented
25 migrants crossing the U.S.-Mexico border.” U.N. Committee on the
26 Elimination of Racial Discrimination, *Consideration of Reports*
27 *Submitted by States Parties Under Article 9 of the Convention:*
28 *Concluding observations of the Committee on the Elimination of*

1 *Racial Discrimination: United States of America*, U.N. Doc.
2 CERD/C/USA/CO/6 (May 2008). *Id.* The Committee recommended
3 that the U.S. increase “significantly its efforts to eliminate police
4 brutality and excessive use of force” against such persons “by
5 establishing adequate systems for monitoring police abuses and
6 developing further training opportunities for law enforcement
7 officials.” *Id.*

- 8
- 9 • In response to the killing of Sergio Hernandez near El Paso, Texas in
10 2010 (referred to above), the United Nation’s Office of the High
11 Commissioner for Human Rights noted that the Commissioner “had
12 indeed received further allegations of excessive use of force by US
13 Border Patrol agents while enforcing immigration laws” and that
14 “OHCHR also urged the United States authorities to ensure that all
15 the actions of the US Border Patrol were fully ascribed to the
16 international standards applicable to officials responsible for
17 enforcing the law.” Highlights of Regular Briefing by the
18 Information Service (May 29, 2012), [http://www.unog.ch/unog/
19 website/news_media.nsf/\(httpNewsByYear_en\)/768DA52D9D3C58
20 3FC1257A0D004C8F42?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/768DA52D9D3C583FC1257A0D004C8F42?OpenDocument). The High Commissioner
21 later reiterated that “[t]here have been very many young people,
22 teenagers, who have been killed at the border,” and that “[t]he reports
23 reaching me are that there has been excessive use of force by the U.S.
24 border patrols while they are enforcing the immigration laws.”
25 Stephanie Nebehay, *U.S. uses excessive force along Mexican border:*
26 *U.N.*, (Oct. 18, 2012), [www.reuters.com/
27 article/2012/10/18/us-
28 mexico-us-un-rights-idUSBRE89H13F20121018](http://www.reuters.com/article/2012/10/18/us-mexico-us-un-rights-idUSBRE89H13F20121018).

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- In June 2010, Mexico's Foreign Relations Department said it "energetically condemn[ed]" the Border Patrol's killing of Sergio Hernandez, noting particularly that "according to international standards, lethal force must be used only when the lives of people are in immediate danger and not as a dissuasive measure." Laura Carlsen, *Lethal Force on the Border*, Huffington Post, June 18, 2010.
 - That same month Amnesty International issued a statement concluding that "[t]his shooting across the border appears to have been a grossly disproportionate response and flies in the face of international standards that compel police to use firearms only as a last resort, in response to an immediate, deadly threat that cannot be contained through lesser means." *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>; 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").
 - 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 responsible for using excessive force should be held accountable." See *Deaths of Unarmed Migrants Show Need for Prompt, Thorough Inquiry*, HUMAN RIGHTS WATCH (June 11, 2010), <http://www.hrw.org/news/2010/06/11/usmexico-investigate-border-killings>. Mr. Vivanco specifically noted that use of excessive, lethal force against alleged

1 rock-throwers violates the United Nations' Basic Principles on the
2 Use of Force and Firearms by Law Enforcement Officials. *Id.*

- 3 • In December 2010, the Inter-American Commission on Human
4 Rights noted in its report on United States immigration detention "the
5 terrible effects of certain immigration policies along the border and
6 ... the abuses and excesses committed by officers charged with
7 enforcing the law." Inter-American Commission on Human Rights,
8 Report on Immigration in the United States: Detention and Due
9 Process, OEA/Ser.L/V/II, Doc. 78/10 (December 30, 2010),
10 <http://cidh.org/countryrep/USImmigration/TOC.htm>.
11
12 • Prompted by the unlawful killing of Yañez, 60 human rights
13 organizations (including the American Civil Liberties Union of
14 California, the American Friends Service Committee, and Amnesty
15 International USA) yet again reiterated: "To shoot stone throwers is
16 exceptionally disproportionate and inhumane." Letter from American
17 Civil Liberties Union of California, et al., to U.S. Senator Patrick
18 Leahy and U.S. Representative Lamar Smith (June 2011).

19 72. The Government Defendants and Supervisor Defendants are or were
20 at all relevant times personally responsible for developing, authorizing,
21 supervising, and/or implementing the policies, patterns, or practices governing the
22 Border Patrol agents' use of lethal force. Despite repeated public statements by
23 agents' representatives that the Rocking Policy is lawful and appropriate, and
24 despite the evidence (including video evidence) of agents' regular use of
25 excessive, lethal force along the southern border, none of the Government
26 Defendants or Supervisor Defendants objected to or demanded a stop to such
27 unlawful force. Because of the lack of objection, Border Patrol agents along the
28 southern border consider the Rocking Policy to be approved by the highest levels

1 of command and accordingly have continued to implement that policy despite its
2 patent inconsistency with international and domestic law.

3 73. The Government Defendants and Supervisor Defendants also have
4 knowingly failed to provide for adequate training of Border Patrol agents
5 concerning the proper use of force. The Government Defendants and Supervisor
6 Defendants failed to ensure that agents knew that the Rocking Policy is unlawful
7 under international and domestic law. The Government Defendants and
8 Supervisor Defendants knew and had reason to know that the lack of training
9 created a permissive environment in which their subordinates believed that the
10 Rocking Policy and the use of excessive, lethal force would be tolerated or
11 approved. The Government Defendants' and Supervisor Defendants' failures
12 constituted a willful tolerance of and deliberate indifference to conditions that
13 they knew and had reason to know would lead to the use of excessive, lethal force.
14

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

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26 //

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1 **IV. INTERNATIONAL AND DOMESTIC STRICTURES ON EXCESSIVE, LETHAL**
2 **FORCE**

3
4 75. Extrajudicial killing is universally prohibited by the laws of all
5 civilized societies. The prohibitions against use of excessive, lethal force are
6 absolute, non-discretionary, and subject to no exception. They are designed to
7 safeguard the security, dignity, and life of every human being. The prohibition
8 against extrajudicial killing is a peremptory, *jus cogens* norm -- a specific,
9 universal, and obligatory norm from which no nation may lawfully depart. It is
10 universally recognized and binding on all persons under all circumstances. The
11 Rocking Policy flagrantly violates this peremptory international norm.

12 76. The international law provisions forbidding extrajudicial killing
13 include Article 6(1) of the International Covenant on Civil and Political Rights
14 (“ICCPR”), S. Exec. E, 95-2, 999 U.N.T.S. 171, 1966 U.S.T. LEXIS 521 (opened
15 for signature Dec. 16, 1966, entered into force Mar. 23, 1976, ratified by Mexico
16 Mar. 23, 1981, ratified by U.S. June 8, 1992). That Article provides that “[n]o one
17 shall be arbitrarily deprived of his life.” *See also id.* at art. 9(1) (“Everyone has
18 the right to liberty and security of person.... No one shall be deprived of his liberty
19 except on such grounds and in accordance with such procedure as are established
20 by law.”). The *just cogens* norm against extrajudicial killings is universally
21 recognized by all civilized nations. See, for example, the
22 Universal Declaration of Human Rights, Dec.10, 1948, art. 3, G.A. Res.
23 217A(III), U.N. Doc. A/810; American Declaration of the Rights and Duties of
24 Man, art. I, O.A.S. Res. XXX (May 2, 1948), [http://www.cidh.org](http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm)
25 [/Basicos/English/Basic2.American%20Declaration.htm](http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm); Restatement (Third) of
26 Foreign Relations § 702 cmt. f, n (1987).
27
28

1 77. U.S. courts have recognized that extrajudicial killing is among the
2 gravest violations of the law of nations. See, for example, *Sarei v. Rio Tinto, PLC*,
3 456 F.3d 1069, 1091 (9th Cir. 2006) (en banc); *In re Estate of Ferdinand Marcos,*
4 *Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Circ. 1994); *Mujica v. Occidental*
5 *Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); *Doe v. Saravia*,
6 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004); *Forti v. Suarez-Mason*, 672 F.
7 Supp. 1531, 1542 (N.D. Cal. 1987), amended, 694 F. Supp. 707, 710-11 (N.D.
8 Cal. 1989); *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009); *Cabello v.*
9 *Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Kadic v. Karadzic*, 70
10 F.3d 232, 243-44 (2d Cir. 1995).

11 78. The peremptory norm against extrajudicial killing includes a
12 prohibition on police use of excessive, lethal force. Police use of excessive, lethal
13 force is one of the core forms of “extrajudicial killings” defined by international
14 law. Specifically, “intentional lethal use of firearms [by police] may only be
15 made when strictly unavoidable in order to protect life.” Eighth United Nations
16 Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-
17 Sept. 7, 1990, Havana, Cuba, Basic Principles on the Use of Force and Firearms
18 by Law Enforcement Officials, art. 9 (1990). Again, this *jus cogens* norm is
19 recognized by all civilized societies. See, for example, Code of Conduct for Law
20 Enforcement Officials, G.A. Res. 34/169, U.N. Doc. A/RES/34/169, Annex I, art.
21 3 (Dec. 17, 1979); Principles on the Prevention of Human Rights Violations
22 Committed with Small Arms, Sub-Com. Res. 2006/22, Annex, U.N. Doc.
23 A/HRC/Sub.1/58/L.11/Add.1 at 6 (Aug. 24, 2006), U.N. Special Rapporteur on
24 extrajudicial, summary or arbitrary executions, Report to General Assembly,
25 ¶¶33-45, U.N. Doc. A/61/311 (Sept. 5, 2006); U.N. Human Rights Committee,
26 General Comment 6, 16th Sess., art. 6 (1982).
27
28

1 79. These binding standards are incorporated into standard training
2 manuals for police the world over. See, for example, Commonwealth Secretariat,
3 Commonwealth Manual on Human Rights Training for Police 65 (2006)
4 (“Unnecessary and unlawful use of deadly force by a police officer would
5 therefore constitute a violation of the right to life”); Organization for Security and
6 Cooperation in Europe, Guidebook on Democratic Policing 23 (2d ed. 2008)
7 (“Intentional lethal use of firearms may only be made when strictly unavoidable in
8 order to protect life.”); International Committee for the Red Cross, Human Rights
9 and Humanitarian Law in Professional Policing Concepts 22 (2002) (“The
10 intentional lethal use of firearms is allowed only when strictly unavoidable to
11 protect life.”).

12 80. For decades the U.S. Department of State has insisted that the
13 international norm against extrajudicial killings includes “deliberate, illegal, and
14 excessive use of lethal force by the police, security forces, or other agents of the
15 State whether against criminal suspects, detainees, prisoners, or others.” U.S.
16 Dep’t of State, Country Report on Human Rights Practices 1995, Appendix A:
17 Notes on the Preparation of the Reports (March 1996); *see also id.* (“lethal use of
18 excessive force by security forces ... is herein defined as a form of extrajudicial
19 killing”); U.S. Department of State Country Report on Human Rights Practices
20 1997 - Papua New Guinea (police’s unreasonable killing of innocent bystander is
21 extrajudicial killing). The State Department also acknowledges that this *jus*
22 *cogens* norm prohibits police from responding with lethal force to alleged rock-
23 throwers. See, for example, Country Reports on Human Rights Practices-2010:
24 India, United States Department of State Bureau of Democracy, Human Rights
25 and Labor, April 2011, <http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154480.htm>
26 (“[P]rotesters threw stones and rocks at security forces, and security forces
27 retaliated with excessive or deadly force.”); Country Reports on Human Rights
28

1 Practices – 2002: Israel and the Occupied Territories, United States Department of
2 State Bureau of Democracy, Human Rights and Labor, March 2003,
3 <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154463.htm> (“The use of lethal force
4 against a rock-thrower, in this instance and in many others like it, was
5 excessive.”); Country Reports on Human Rights Practices – 2004: Tanzania,
6 United States Department of State Bureau of Democracy, Human Rights and
7 Labor, February 2005, <http://www.state.gov/j/drl/rls/hrrpt/2004/41630.htm>.
8 (“During the year, the use of excessive force by security forces resulted in at least
9 two deaths ... [including one where] a member of a paramilitary unit fired into a
10 crowd, killing a 16-year-old student and seriously wounding two other persons”
11 who had been part of “a mob [that] had thrown stones at members of the
12 paramilitary unit.”).

13
14 81. The United States incorporates into its domestic law the preemptory
15 international norm against extrajudicial killing by police use of excessive, lethal
16 force. As the Executive Branch advised the Senate, with few exceptions not
17 relevant here, “the substantive provisions of [the ICCPR] are entirely consistent
18 with the letter and spirit of the United States Constitution and laws.” Letter of
19 Transmittal from the President to the Senate, 1966 U.S.T. LEXIS 521, at *2 (Feb.
20 23, 1978). For example, the Supreme Court has held that police use of deadly
21 force is permissible only when “the officer has probable cause to believe that the
22 suspect poses a significant threat of death or serious physical injury to the officer
23 or others. . . .” *Tennessee v. Garner*, 471 U.S. 1, 3 (U.S. 1985). Domestic law
24 makes this preemptory norm specifically applicable to the use of lethal force by
25 U.S. Border Patrol agents. 8 C.F.R. § 287.8(a)(2)(ii) (“Deadly force may be used
26 only when a designated immigration officer ... has reasonable grounds to believe
27 that such force is necessary to protect the designated immigration officer or other
28 persons from the imminent danger of death or serious physical injury”).

1 **V. APPLICABLE TREATIES**

2
3 82. The Rocking Policy also violates the sovereignty of Mexico by
4 permitting Border Patrol agents to fire their weapons into Mexico's sovereign
5 territory. Article V of the Treaty of Guadalupe Hidalgo establishes the border
6 between the United States and Mexico and provides that the border "shall be
7 religiously respected by each of the two republics." Treaty of Peace, Friendship,
8 Limits, and Settlement with the Republic of Mexico, 9 Stat. 922, art. IX (1850);
9 *see also id.* at art. I ("There shall be firm and universal peace between the United
10 States of America and the Mexican republic"); Gadsen Treaty Relating to the
11 Boundaries of 1853, 10 Stat. 1035, art. I. Likewise, the Charter of the United
12 Nations, Ch. 1, art. 2 (1945), provides that "[a]ll Members shall refrain in their
13 international relations from the threat or use of force against the territorial
14 integrity or political independence of any state, or in any other manner
15 inconsistent with the Purposes of the United Nations."

16 83. The Rocking Policy permits Border Patrol agents to fire their
17 weapons into the sovereign territory of Mexico. For example, the teenagers killed
18 near El Paso and Nogales were clearly within Mexican territory when Border
19 Patrol agents shot them. Yet the U.S. Department of Justice concluded with
20 respect to the El Paso killing, for example, that "the agent did not act
21 inconsistently with [Border Patrol] policy or training." Border Patrol
22 spokespersons have confirmed that Border Patrol policy allows agents to fire their
23 weapons into Mexico's territory.
24

25 84. The Border Patrol's policy of permitting agents to fire lethal shots
26 into the territory of Mexico violates that nation's sovereignty. The Government of
27 Mexico has asserted with respect to the El Paso killing, for example, that "[a]n
28 invasion of Mexico's sovereignty occurred when Agent Mesa shot his gun across

1 the border at Sergio Hernández.” Brief for the Government of the United
2 Mexican States as Amicus Curiae in Support of Appellants in No. 12-50217, U.S.
3 Ct. App. Fifth Circuit, No. 11-50792, filed July 2, 2012, at 15.

4 85. It is mere happenstance that Yañez was killed within U.S. territory
5 (see below at Para. 108). The Rocking Policy permits agents to fire lethal shots
6 into the sovereign territory of Mexico. And Agent Diaz fired the fatal shot at
7 Yañez without regard to Mexico’s sovereign boundary and without regard to
8 whether Yañez was within Mexico. The Rocking Policy and the killing of Yañez
9 violated Mexico’s sovereignty.

10 86. Moreover, bilateral agreements between the United States and
11 Mexico imposed on Defendants an unequivocal obligation to respect Yañez’s
12 fundamental right to life regardless of whether he was in Mexico or the United
13 States. See, for example, Convention Between the United States of America and
14 other American Republics Regarding the Status of Aliens, 46 Stat. 2753, art. V
15 (1928) (“States should extend to foreigners, domiciled or in transit through their
16 territory, all individual guarantees extended to their own nationals, in the
17 enjoyment of essential civil rights without detriment, as regards to foreigners, to
18 legal provisions governing the scope of and usages for the exercise of said rights
19 and guarantees”); Convention on the Rights and Duties of States, Dec. 26, 1933,
20 art. IX, 165 L.N.T.S. 19, *reprinted in* 28 Am. J. Int’l 75 (Supp. 1934) (“Nationals
21 and foreigners are under the same protection of the law and the national
22 authorities and the foreigners may not claim rights other or more extensive than
23 those of the nationals”).

24 //

25 //

26 //

27 //

28 //

1 **VI. INTENTIONAL DISCRIMINATION**

2
3 87. The Rocking Policy reflects intentional discrimination against Yañez
4 and others on the basis of their Hispanic descent and perceived Mexican origin,
5 thus violating their substantive due process rights guaranteed under the United
6 States Constitution. The Rocking Policy authorizes the use of excessive force
7 against them based solely on their race, ethnicity, and/or perceived national origin.
8 The Rocking Policy is one part of a broader U.S. effort to “get tough” on
9 unauthorized immigration by persons of Hispanic descent and Mexican
10 nationality. The Policy is an integral ingredient of a rancid brew of racial, ethnic,
11 and national animus, and it would not exist but for this animus against persons of
12 Hispanic descent and Mexican origin.

13 88. No other law enforcement agency in the country, whether local, state,
14 or national, permits its officers to treat the throwing of rocks at them as per se
15 lethal force that the officers can legitimately countermand with fatal gunfire. Nor
16 does the Border Patrol condone or implement a similar policy of systematic,
17 institutionalized use of excessive, lethal force with respect to encounters between
18 Border Patrol agents and foreign civilians at the nation’s northern border, or with
19 respect to any other ethnic or national group. The Government Defendants and
20 Supervisor Defendants would not condone or authorize the systematic,
21 institutionalized use of excessive, lethal force against Canadians or Caucasians.
22 The Government Defendants and Supervisor Defendants condone, authorize, and
23 implement the Rocking Policy solely because its victims are persons of Hispanic
24 descent and Mexican nationality – a group against whom a significant portion of
25 the United States population has a virulent racial, ethnic, and national animus.

26
27 //

1 **VII. DEFENDANTS' CAPACITY**

2
3 89. Each of the Defendants caused injury and damage to Plaintiffs by
4 personally participating in the unlawful conduct, or acting jointly or conspiring
5 with others to act; authorizing or allowing, explicitly or implicitly, policies, plans,
6 customs, practices, actions, or omissions that led to the unlawful conduct; failing
7 to take action to prevent the unlawful conduct; failing or refusing to initiate and
8 maintain adequate training or supervision; being deliberately indifferent to
9 Yañez's rights; and ratifying the unlawful conduct that occurred by agents under
10 their direction and control, including failing to take remedial or disciplinary
11 action.

12 90. At all relevant times, Defendants, and each of them, were the agents,
13 employees, servants, joint ventures, partners and/or coconspirators of the other
14 Defendants named in this Complaint; and each of the Defendants was acting
15 within the purported course and scope of that relationship with the other
16 Defendants. At all relevant times, the Defendants were acting under color of the
17 law and under color of their legal authority.
18

19 **CAUSES OF ACTION**

20
21 **First Claim for Relief:**

22 **Violation of the Law of Nations (Against the Government Defendants)**

23
24 91. Plaintiffs repeat and reallege, in each of their claims for relief, all of
25 the allegations set forth above.

26 92. The Rocking Policy and the Government Defendants' acts and
27 omissions described herein violate the law of nations, which prohibits
28 extrajudicial killing.

1 93. The Government Defendants' actions and omissions were the direct
2 and proximate cause of Yañez's death and give rise to a cause of action for a tort
3 in violation of the law of nations.

4 94. The Government Defendants had effective command and control of
5 the Agents who intentionally and knowingly used excessive, unlawful force to kill
6 Yañez, which is prohibited by the law of nations.

7 95. In addition to their liability for the unlawful use of excessive, lethal
8 force caused by their affirmative orders and authorizations, the Government
9 Defendants are also liable on the independent ground that they violated their legal
10 duty to prevent and prohibit the use of excessive, lethal force by subordinates
11 when the Government Defendants knew and had reason to know of it. Despite
12 numerous credible reports of use of excessive, lethal force -- indeed, despite
13 incontrovertible video evidence of such unlawful use of force -- the Government
14 Defendants failed to take the reasonable, necessary, timely, or adequate measures
15 against subordinates to prohibit and prevent such excessive, lethal force as
16 required by law. To this day, none of the key command officials responsible for
17 this widespread and systemic unlawful use of force have been disciplined. The
18 Government Defendants have acted with deliberate indifference to and in
19 conscious disregard of the high likelihood that persons such as Yañez would die
20 as a result of Border Patrol agents' use of excessive, lethal force.

21 96. The Government Defendants issued orders, adopted policies, and
22 granted authorizations that foreseeably led to the widespread use of excessive,
23 lethal force, including against Yañez. In doing so, the Government Defendants
24 authorized a deviation from longstanding international and domestic law
25 prohibiting the use of excessive, lethal force. The Government Defendants also
26 failed to take action to stop and prevent the use of excessive, lethal force after they
27 had knowledge that their officers and agents were committing or permitting such
28

1 unlawful use of force. Through their actions and derelictions, the Government
2 Defendants expressly permitted the use of excessive, lethal force. The
3 Government Defendants permitted such unlawful force whether the victims were
4 within the United States or Mexico.

5 97. The Government Defendants are liable for Yañez's death under the
6 law of nations, because those Defendants formulated, authorized, approved,
7 directed, and ratified the Rocking Policy.

8 98. In addition, the Government Defendants are liable because their
9 officers and agents intentionally and systematically used excessive, lethal force
10 while acting under the Government Defendants' effective command and control,
11 and the Government Defendants knew and had reason to know of their officers'
12 and agents' actions but failed to prevent or punish them.

13 99. Defendants' deliberate killing of Yañez was not authorized by the
14 doctrine of self-defense.

15 100. Defendants' deliberate killing of Yañez was not authorized by a
16 lawful judgment pronounced by a regularly constituted court affording all the
17 judicial guarantees which are recognized as indispensable by civilized peoples.

18 101. Government Defendants' conduct caused grave and foreseeable
19 injury (namely death) to Yañez.

20 102. Government Defendants are liable for their conduct that led to the
21 extrajudicial killing of Yañez.

22 103. Government Defendants are liable for the harm caused to Yañez's
23 family members. The family members were forced to suffer – and continue to
24 suffer – severe physical and psychological abuse and agony as a result of the
25 extrajudicial killing.

26 104. The Government Defendants are liable for money damages to
27 Plaintiffs in an amount to be determined at trial.
28

1 the Border Patrol agents, failing to establish adequate disciplinary procedures and
2 adequate procedures to investigate agents' misconduct, and acting and failing to
3 act in disregard of previous allegations of Border Patrol agents' use of excessive,
4 lethal force.

5 110. As a foreseeable result of the Government Defendants' and
6 Supervisor Defendants' acts and omissions, the Agents used lethal force against
7 Yañez in the circumstances described above. The Government Defendants and
8 Supervisor Defendants were aware of the danger and risk of serious harm or death
9 that Yañez and others faced as a result of the Rocking Policy. The Government
10 Defendants and Supervisor Defendants nevertheless personally took affirmative
11 steps that created and/or increased this danger and risk, which did, in fact, result in
12 Yañez's death. Yañez's death was a foreseeable result of the Government
13 Defendants' and Supervisor Defendants' actions and omissions.

14 111. Each of the Government Defendants and Supervisor Defendants had
15 actual or constructive knowledge that its, his, or her acts and omissions with
16 respect to Yañez violated his due process rights, and each had actual or
17 constructive knowledge that its, his, or her actions, orders, or omissions would
18 lead to such violations.

19 112. Each of the Government Defendants and Supervisor Defendants
20 acted under color of official authority and with deliberate, reckless, or callous
21 indifference to Yañez's due process rights.

22 113. The Supervisor Defendants are liable for money damages to Plaintiffs
23 in an amount to be determined at trial.

24 114. The Supervisor Defendants' violations of Yañez's due process rights
25 were deliberate, willful, intentional, wanton, malicious, and oppressive, and
26 should be punished by an award of punitive damages in an amount to be
27 determined at trial.
28

1 115. As set forth in detail below, Plaintiffs are also entitled to injunctive
2 and declaratory relief against the Government Defendants and Supervisor
3 Defendants under this cause of action.

4 **Third Claim for Relief**

5 **Fifth Amendment Due Process (Against Agents)**

6
7 116. The Agents' actions described herein violated Yañez's substantive
8 and procedural due process rights under the Fifth Amendment to the Constitution.
9 The Agents violated Yañez's Fifth Amendment due process rights by using lethal
10 force against him in the circumstances described above.

11 117. As set forth in detail above, Agent Diaz used excessive force against
12 Yañez, and Agent Diaz's conduct in committing these acts was not reasonable in
13 light of all the circumstances.

14 118. Agent Nelson is also liable for this constitutional violation because
15 he witnessed this illegal conduct but took no action to protect Yañez, ratified
16 Agent Diaz's illegal conduct after it had occurred, and/or conspired with Agent
17 Diaz to commit and/or cover-up this illegal conduct.

18 119. The Agents were aware of the danger and risk of serious harm or
19 death that Yañez faced as a result of the Agents' use of excessive force. The
20 Agents nevertheless personally took affirmative steps that created and/or
21 increased this danger and risk, which did, in fact, result in Yañez's death. Yañez's
22 death was a foreseeable result of the Agents' actions and omissions.

23 120. Each of the Agents had actual or constructive knowledge that his
24 conduct toward Yañez violated his due process rights, and each had actual or
25 constructive knowledge that his actions or omissions would lead to such
26 violations.
27
28

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

5 126. Each of the Government Defendants and Supervisor Defendants had
6 actual or constructive knowledge that its, his, or her acts or omissions with respect
7 to Yañez violated his right to be free from unreasonable seizure, and each had
8 actual or constructive knowledge that its, his, or her actions, orders, or omissions
9 would lead to such violations.

10 127. Each of the Government Defendants and Supervisor Defendants
11 acted under color of official authority and with deliberate, reckless, or callous
12 indifference to Yañez's rights.

13 128. The Supervisor Defendants are liable for money damages to Plaintiffs
14 in an amount to be determined at trial.

15 129. The Supervisor Defendants' violations of Yañez's right to be free
16 from unreasonable seizure were deliberate, willful, intentional, wanton, malicious,
17 and oppressive, and should be punished by an award of punitive damages in an
18 amount to be determined at trial.

19 130. As set forth in detail below, Plaintiffs are also entitled to injunctive
20 and declaratory relief against the Government Defendants and Supervisor
21 Defendants under this cause of action.

22
23 **Fifth Claim for Relief**

24 **Fourth Amendment Unreasonable Seizure (Against Agents)**

25
26 131. The Agents' actions described herein violated Yañez's right to be
27 free from unreasonable seizure under the Fourth Amendment to the U.S.
28

1 Constitution. The Agents violated Yañez's Fourth Amendment rights by using
2 lethal force against him in the circumstances described above.

3 132. As set forth in detail above, Agent Diaz used excessive force against
4 Yañez, and Agent Diaz's conduct in committing these acts was not reasonable in
5 light of all the circumstances.

6 133. Agent Nelson is also liable for this constitutional violation because
7 he witnessed this illegal conduct but took no action to protect Yañez, ratified
8 Agent Diaz's illegal conduct after it had occurred, and/or conspired with Agent
9 Diaz to commit and/or cover-up this illegal conduct.

10 134. The Agents were aware of the danger and risk of serious harm or
11 death that Yañez and others faced as a result of their use of excessive force. The
12 Agents nevertheless personally took affirmative steps that created and/or
13 increased this danger and risk, which did, in fact, result in Yañez's death. Yañez's
14 death was a foreseeable result of the Agents' actions and omissions.

15 135. Each of the Agents had actual or constructive knowledge that his
16 conduct toward Yañez violated his right to be free from unreasonable seizure, and
17 each had actual or constructive knowledge that his actions, orders, or omissions
18 would lead to such violations.

19 136. Each of the Agents acted under color of official authority and with
20 deliberate, reckless, or callous indifference to Yañez's rights.

21 137. The Agents are liable for money damages to Plaintiffs in an amount
22 to be determined at trial.

23 138. The Agents' violations of Yañez's right to be free from unreasonable
24 seizure were deliberate, willful, intentional, wanton, malicious, and oppressive,
25 and should be punished by an award of punitive damages in an amount to be
26 determined at trial.
27
28

1 **Sixth Claim for Relief:**

2 **Fifth Amendment Equal Protection (Against Government Defendants and**
3 **Supervisor Defendants)**
4

5 139. Yañez had a constitutionally protected right under the Fifth
6 Amendment to the United States Constitution to be free from intentional
7 discrimination against him on the basis of his race, ethnicity, and national origin.

8 140. The Government Defendants and Supervisor Defendants acted under
9 color of law with a discriminatory purpose and treated Yañez and others
10 differently because of their race, ethnicity, and national origin. The Government
11 Defendants and Supervisor Defendants intentionally discriminated against Yañez
12 and others on the basis of their Hispanic descent and Mexican origin by
13 authorizing the use of excessive force against them solely on the basis of their
14 race, ethnicity, and/or perceived national origin.

15 141. Each of the Government Defendants and Supervisor Defendants had
16 actual or constructive knowledge that its, his, or her conduct toward Yañez
17 violated his right to be free from such discrimination, and each had actual or
18 constructive knowledge that its, his, or her actions, orders, or omissions would
19 lead to such violations.
20

21 142. Each of the Government Defendants and Supervisor Defendants
22 acted under color of official authority and with deliberate, reckless, or callous
23 indifference to Yañez's rights.

24 143. The Supervisor Defendants are liable for money damages to Plaintiffs
25 in an amount to be determined at trial.

26 144. The Supervisor Defendants' violations of Yañez's right to be free
27 from discrimination based on race, ethnicity, or national origin were deliberate,
28

1 willful, intentional, wanton, malicious, and oppressive, and should be punished by
2 an award of punitive damages in an amount to be determined at trial.

3 145. As set forth in detail below, Plaintiffs are also entitled to injunctive
4 and declaratory relief against the Government Defendants and Supervisor
5 Defendants under this cause of action.

6 **Seventh Claim for Relief:**

7 **Fifth Amendment Equal Protection (Against Agents)**

8
9 146. Yañez had a constitutionally protected right under the Fifth
10 Amendment to the United States Constitution to be free from intentional
11 discrimination against him on the basis of his race, ethnicity, and national origin.

12 147. The Agents acted under color of law with a discriminatory purpose
13 and treated Yañez differently because of his race, ethnicity, and national origin.
14 The Agents intentionally discriminated against Yañez on the basis of his Hispanic
15 descent and Mexican origin by using excessive force against him solely on the
16 basis of his race, ethnicity, and/or perceived national origin.

17 148. The Agents had actual or constructive knowledge that their conduct
18 toward Yañez violated his right to be free from such discrimination, and each of
19 the Agents had actual or constructive knowledge that his actions or omissions
20 would lead to such violations.

21 149. The Agents acted under color of official authority and with
22 deliberate, reckless, or callous indifference to Yañez's rights.

23 150. The Agents are liable for money damages to Plaintiffs in an amount
24 to be determined at trial.

25 151. The Agents' violations of Yañez's right to be free from
26 discrimination based on race, ethnicity, or national origin were deliberate, willful,
27
28

1 intentional, wanton, malicious, and oppressive, and should be punished by an
2 award of punitive damages in an amount to be determined at trial.

3 **Eighth Claim for Relief:**

4 **Declaratory Relief Regarding the Judgment Bar (Against Supervisor**
5 **Defendants and Agents)**
6

7 152. Plaintiffs assert this claim against the Supervisor Defendants and
8 Agents solely under the Declaratory Judgment Act, 28 USC § 2201.

9 153. The so-called “judgment bar” provision of the Federal Tort Claims
10 Act, 28 U.S.C. § 2676 (“FTCA”), provides that a judgment in an action under the
11 FTCA shall constitute a “complete bar” to any action by the claimant “by reason
12 of the same subject matter, against the employee of the government whose act or
13 omission gave rise to the claim.” Some courts, including the Court of Appeals for
14 the Ninth Circuit, have held that a judgment rendered on a plaintiff’s claim under
15 the FTCA can bar the plaintiff’s claim for constitutional violations brought
16 pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,
17 403 U.S. 388 (1971), against the federal employee whose conduct gave rise to the
18 claim. See, for example, *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008);
19 *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994); *Arevalo v. Woods*, 811 F.2d
20 487 (9th Cir. 1987).
21

22 154. The Ninth Circuit decisions holding that constitutional claims are
23 barred have not addressed several arguments that should cause that Court to reach
24 the contrary conclusion. Among these arguments are: (1) Another section of the
25 FTCA, 28 U.S.C. § 2680, provides that, “[t]he provisions of this chapter
26 [including the judgment bar] and section 1346(b) of this title shall not apply to—
27 [cases in which the FTCA has not waived immunity];” (2) In 1946 when Section
28 2676 was enacted, the phrase “same subject matter” as used in the law of

1 preclusion meant that the second claim involved the same specific issue of
2 liability that had been resolved on the merits in the first case; and (3) Dismissal of
3 an FTCA claim for lack of jurisdiction is not a “judgment *under*” the FTCA
4 within the meaning of Section 2676 and therefore does not bar a subsequent claim
5 against the employee whose conduct was at issue in the FTCA claim.

6 155. But for the adverse and erroneous case law under 28 U.S.C. § 2676,
7 Plaintiffs would include in this Complaint claims against the Supervisor
8 Defendants and Agents under the FTCA. Absent a declaration that a judgment
9 under the FTCA will not bar Plaintiffs’ claims against the Supervisor Defendants
10 and Agents for constitutional torts pursuant to *Bivens v. Six Unknown Named*
11 *Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Plaintiffs’ have no
12 ability to test the adverse and erroneous case law without risking the barring of
13 their *Bivens* claims. Therefore, Plaintiffs are currently suffering a significant legal
14 and economic harm, and there exists an actual case or controversy between
15 Plaintiffs and the Supervisor Defendants and Agents with respect to the potential
16 effect of the judgment bar on Plaintiffs’ *Bivens* claims.

17 156. Moreover, the same thing is true with respect to Plaintiffs’ potential
18 claims against the Supervisor Defendants and Agents under the Alien Tort Statute,
19 28 U.S.C. § 1350 (“ATS”). It is the policy of the United States to contend that,
20 under the terms of the Westfall Act, 28 U.S.C. § 2679(b), ATS claims brought by
21 plaintiffs against federal employees for conduct within the course and scope of
22 their employment may proceed only under the terms of the FTCA. Some courts
23 have, erroneously, accepted that position. See, for example, *Harbury v. Hayden*,
24 522 F.3d 413 (D.C. Cir. 2008); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).
25 Thus, the adverse and erroneous case law under the FTCA’s judgment-bar
26 provision, 28 U.S.C. § 2676, is also preventing Plaintiffs from including in this
27 Complaint claims against the Supervisor Defendants and Agents under the ATS.
28

1 157. Absent a declaration that a judgment on a claim by Plaintiffs against
2 the Supervisor Defendants and Agents under the ATS will not bar Plaintiffs’
3 claims against the Supervisor Defendants and Agents for constitutional torts
4 pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,
5 403 U.S. 388 (1971), Plaintiffs’ have no ability to test the adverse and erroneous
6 judgment-bar case law without risking the barring of their *Bivens* claims.
7 Therefore, Plaintiffs are currently suffering a significant legal and economic harm,
8 and there exists an actual case or controversy between Plaintiffs and the
9 Supervisor Defendants and Agents with respect to the potential effect of the
10 judgment bar on Plaintiffs’ *Bivens* claims.

11 158. Plaintiffs are entitled to a declaration that, in the event of a judgment
12 on Plaintiffs’ potential claims under the FTCA or a judgment on Plaintiffs’
13 potential claims against the Supervisor Defendants and Agents under the ATS, the
14 terms of 28 U.S.C. § 2676 will not bar Plaintiffs’ *Bivens* claims.

15
16 **REQUEST FOR RELIEF**
17

18 159. The unlawful conduct, policies, and practices about which Plaintiffs
19 complain were developed, authorized, directed, and implemented at the highest
20 levels of the Executive branch of the U.S. Government. No mere monetary award
21 can adequately compensate Plaintiffs for the loss of their husband and father. Nor
22 can any monetary award to these Plaintiffs protect other persons from becoming
23 the next victims of Defendants’ unlawful policies and practices.

24 160. Defendants’ policies, practices, and procedures remain in effect and
25 continue to determine the use of lethal force by Border Patrol agents along the
26 southern border. Those agents continue to implement the unlawful use-of-force
27 policy that the Government Defendants and Supervisor Defendants designed,
28

1 authorized, and directed. Since Yañez's death in June 2011, at least three more
2 civilians have died as a result of those unlawful policies and practices, including a
3 16-year-old boy who was shot seven times and a father who was shot while
4 picnicking with his family on a riverbank.

5 161. The Government Defendants and Supervisor Defendants have not
6 renounced, revoked, or rescinded the Rocking Policy. On the contrary, since the
7 Defendants' killing of Yañez in June 2011, the Government Defendants and
8 Supervisor Defendants have continued to endorse and approve the Rocking Policy
9 and have continuously failed and refused to renounce it either publicly or
10 officially.

11 162. Absent a revocation and prohibition of Defendants' policies,
12 practices, and patterns as well the implementation of affirmative policies,
13 practices, and procedures ensuring compliance with the requirements of law,
14 many other persons remain at risk of being the next victims of extrajudicial
15 killings at the hands of U.S. Border Patrol agents.

16 163. No civilized nation can permit its police to devise and implement a
17 policy and practice of institutionalized, systematic use of excessive, lethal force
18 against civilians. No democracy worthy of the name can permit the Executive
19 branch to devise and implement such a policy and practice free from judicial
20 oversight – free from the checks and balances that constitute the rule of law.
21 Accordingly, in addition to monetary damages, Plaintiffs are entitled to a
22 declaration that Defendants' acts and omissions alleged herein are unlawful, and
23 to appropriate injunctive relief designed to put an end to the unlawful killing.

24 WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment
25 including:
26

- 27 a. Compensatory damages against all Defendants in an amount to be
28 proven at trial;

1 b. Punitive damages against all Defendants in an amount to be
2 determined at trial;

3 c. Reasonable attorneys' fees and costs of suit;

4 d. Declaratory and injunctive relief against the Government Defendants
5 and the Supervisor Defendants in their official capacities, enjoining them
6 from:

7 1. continuing to authorize and implement the Rocking Policy;

8 2. deeming others' throwing of rocks at agents to be per se lethal
9 force that, in turn, justifies the agents' counter-use of lethal force against
10 those others;

11 3. expressly or implicitly approving the Rocking Policy by any
12 means, including but not limited to, failing and refusing to countermand
13 express statements by Border Patrol agents' representatives that the
14 Rocking Policy is lawful and appropriate, and failing to take remedial
15 action when agents act unlawfully pursuant to the Rocking Policy;

16 4. failing and refusing to take disciplinary action against Border
17 Patrol agents who take advantage of the existence of the Rocking Policy to
18 justify the unlawful use of excessive force by falsely asserting that others
19 had been throwing rocks at them;

20 5. failing and refusing to establish and communicate to Border
21 Patrol agents a clear policy that in response to rocks being thrown at them,
22 they must, unless necessary to avoid imminent death or serious bodily harm
23 to themselves or others, retreat beyond the range of the thrown rocks, use
24 nonlethal force against the perpetrator, or use some other nonlethal force or
25 tactic;

26 6. failing and refusing to train Border Patrol agents that in
27 response to rocks being thrown at them, they must, unless necessary to
28

1 avoid imminent death or serious bodily harm to themselves or others,
2 retreat beyond the range of the thrown rocks, use only nonlethal force
3 against the perpetrator, or use some other nonlethal force or tactic; and

4 7. using race, ethnicity, or nationality as a motivating factor in
5 developing, authorizing, and implementing the use-of-force policy for
6 encounters between Border Patrol agents and others along the southern
7 border.

8 e. Such other relief as the Court deems just and reasonable.
9

10 **DEMAND FOR JURY TRIAL**

11
12 164. Plaintiffs demand a trial by jury as to each and every cause of action
13 against each and every defendant.

14 SINGLETON LAW FIRM, APC
15 HILLIARD MUNOZ GONZALES, LLP
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17
18 Dated: June 17, 2013

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