

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

MARIA FERNANDA RICO ANDRADE,
individually and on behalf of the estate of
Gerardo Lozano Rico, deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA,
UNITED STATES CUSTOMS &
BORDER PROTECTION, UNITED
STATES OFFICE OF BORDER PATROL,
JANET NAPOLITANO, DAVID V.
AGUILAR, ALAN BERSIN, MICHAEL J.
FISHER, ROSENDO HINOJOSA, DAVID
COULS, REYES DIAZ, JOSE TEJEDA,
and EBERTO CABELLO,

Defendants.

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT

1. This lawsuit seeks redress for the death of Gerardo Lozano Rico (“Lozano”). Lozano was killed as a result of a pattern and practice pursuant to which United States Border Patrol agents along the nation’s southern border intentionally place themselves in the exit path of moving vehicles in order to justify the use of deadly force against the vehicles’ occupants, regardless of whether the occupants pose an imminent risk of death or serious injury to the agents or anyone else, and regardless of whether other, non-lethal means are available to avert any such risk.

2. In recent years, Border Patrol agents have justified their use of deadly force pursuant to this pattern and practice (hereafter referred to as the “Vehicle Policy”) at least 15 times. The Vehicle Policy has the imprimatur of the highest officials of the Department of Homeland Security. This institutionalized, systematic use of excessive, lethal force violates the U.S. Constitution, U.S.-ratified treaties, peremptory international norms, and our fundamental national values.

PARTIES

A. Plaintiff

3. Plaintiff Maria Fernanda Rico Andrade is the mother of Gerardo Lozano Rico. She brings this action in her individual capacity and on behalf of the estate of Gerardo Lozano Rico. Lozano was a Mexican national of Hispanic descent.

B. Government Defendants

4. Defendant United States of America is a sovereign nation that has waived its sovereign immunity for the claims that Plaintiff asserts against it. At all relevant times Defendant United States was the government entity that controlled, directed, and otherwise oversaw the Department of Homeland Security (“DHS”) and employed the Supervisor Defendants and Agents (identified below), all of whom were acting under color of law and within the purported course and scope of their employment with respect to the conduct about which Plaintiff complains. Defendant United States was responsible for the training of these supervisors and agents and for making and implementing policies and practices used by these agents regarding their use of force. Defendant United States was responsible for authorizing, directing, and implementing the unlawful Vehicle Policy that resulted in Lozano’s death

5. Defendant DHS is a Cabinet-level department that is responsible for the coordination and unification of national security efforts. DHS has responsibility for and has oversight over the training of Border Patrol agents and the policies, procedures, and practices relating to its agents' use of force. Defendant DHS was responsible for authorizing, directing, and implementing the unlawful Vehicle Policy that resulted in Lozano's death.

6. Defendant United States Customs & Border Protection ("CBP") is a federal law enforcement agency and a component of DHS. CBP is responsible for securing the borders of the United States and has responsibility for and oversight over policies, procedures, and practices relating to its agents' use of force. The agency is supervised by a Commissioner, who has the responsibility for and oversight over policies, procedures, and practices for several offices within the agency—one of which is the Office of Border Patrol. At all relevant times, supervisors of CBP had specific knowledge of and acquiesced in a pattern and practice of border patrol agents' excessive use of force pursuant to the Vehicle Policy as alleged herein, and the failure of CBP to timely conform border agents' use of force to the requirements of law caused the unlawful death of Lozano.

7. Defendant United States Office of Border Patrol ("Border Patrol") is a law enforcement agency and a component of CBP specifically responsible for patrolling the land and coastal borders of the United States. The Chief of Border Patrol has responsibility for and oversight over the training of all Border Patrol agents and the policies, procedures, and practices relating to agents' use of force. The Chief of Border Patrol has the authority and responsibility to issue directives to all personnel under his or her supervision to ensure agents' practices remain within the limits of the constitution and consistent with the policies of the DHS and CBP. The Chief of Border Patrol is the direct supervisor of, among others, each Chief Patrol Agent among

the thirteen Border Patrol Sectors. In turn, the Chief Patrol Agent is the direct supervisor of the Border Agent in Charge of each Border Patrol Station within the Sector. Every border patrol agent on duty operates under the direct supervision of a Supervisory Border Patrol Agent. At all relevant times, supervisors of Border Patrol had specific knowledge of and acquiesced in a pattern and practice of border patrol agents' excessive use of force pursuant to the Vehicle Policy as alleged herein, and the failure of any relevant supervisor within Border Patrol to timely conform border agents' use of force to the requirements of law caused the unlawful death of Lozano.

8. Plaintiff sometimes refers herein to Defendants United States, DHS, CBP, and Border Patrol collectively as the "Government Defendants."

C. Agent Defendants

9. Defendant Eberto Cabello ("Cabello") is and was at all relevant times employed by the United States, DHS, and CBP as a Border Patrol agent. At all times described in this Complaint, he was acting in his capacity as a sworn law enforcement or peace officer, agent, servant, or employee of the Government Defendants, and under color of legal authority. Plaintiff sues Defendant Cabello in his individual capacity.

10. Defendant Jose Tejeda ("Tejeda") is and was at all relevant times employed by the United States, DHS, and CBP as a Border Patrol agent. At all times described in this Complaint, he was acting in his capacity as a sworn law enforcement or peace officer, agent, servant, or employee of the Government Defendants, and under color of legal authority. Plaintiff sues Defendant Tejeda in his individual capacity.

11. Plaintiff sometimes refers to Defendants Cabello and Tejeda collectively as the "Agents."

D. Supervisor Defendants

12. Defendant Janet Napolitano served as the 3rd Secretary of DHS from January 21, 2009 through September 6, 2013. Defendant Napolitano was a supervisor of the Agents and was responsible by law for enforcing the United States Constitution, laws, and regulations and for ensuring that Border Patrol agents were properly trained and obeyed the laws of the United States. As Secretary, Defendant Napolitano, at a minimum, knew of and acquiesced in the unlawful Vehicle Policy as defined herein and failed to conform agents' use of force to the requirements of law, thereby causing the death of Lozano. Plaintiff sues Defendant Napolitano in her individual capacity.

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

14. Defendant Alan Bersin served as the Commissioner of the CBP from March 2010 through December 2011, and is currently the Assistant Secretary of International Affairs and Chief Diplomatic Officer for DHS. Defendant Bersin was a supervisor responsible by law for enforcing the United States Constitution, laws, and regulations and for ensuring that Border Patrol agents were properly trained and obeyed the laws of the United States. At all relevant

times as supervisor, Defendant Bersin, at a minimum, knew of and acquiesced in the unlawful Vehicle Policy as defined herein and failed to conform agents' use of force to the requirements of law, thereby causing the death of Lozano. Plaintiff sues Defendant Bersin in his individual capacity.

15. Defendant Michael J. Fisher has served as the Chief of the Border Patrol from May 2010 to the present. Defendant Fisher is and was the commanding officer of the Agents and is and was responsible by law for enforcing the Constitution, laws, and regulations of the U.S. and for ensuring that Border Patrol agents are properly trained and obey the laws of the United States. At all relevant times as supervisor, Defendant Fisher, at a minimum, knew of and acquiesced in the unlawful Vehicle Policy as defined herein and failed to conform agents' use of force to the requirements of law, thereby causing the death of Lozano's death. Plaintiff sues Defendant Fisher in his individual capacity.

16. Defendant Rosendo Hinojosa served as Chief Patrol Agent of the Rio Grande Valley Sector from December 2010 until his retirement in January 2014. At the time of Lozano's death, Defendant Hinojosa was the supervisor of the Agents, and was responsible by law for enforcing the United States Constitution, laws, and regulations and for ensuring that Border Patrol agents were properly trained and obey the laws of the United States. At all relevant times as supervisor, Defendant Hinojosa, at a minimum, knew of and acquiesced to the unlawful Vehicle Policy as defined herein and failed to conform agents' use of force to the requirements of law, thereby causing the death of Lozano. Plaintiff sues Defendant Hinojosa in his individual capacity.

17. Defendant David Couls at all relevant times served as Patrol Agent in Charge for Corpus Christi Station, which operated within the Rio Grande Valley Sector. At the time of

Lozano's death, Defendant Couls was the supervisor of the Agents, and was responsible by law for enforcing the United States Constitution, laws, and regulations and for ensuring that Border Patrol agents were properly trained and obey the laws of the United States. At all relevant times as supervisor, Defendant Couls, at a minimum, knew of and acquiesced to the unlawful Vehicle Policy as defined herein and failed to conform agents' use of force to the requirements of law, thereby causing the death of Lozano. Plaintiff sues Defendant Couls in his individual capacity.

18. Defendant Reyes Diaz at all relevant times served as a Supervisory Border Patrol Agent at Corpus Christi Station. At the time of Lozano's Death, Defendant Diaz was the Supervisory Border Patrol Agent supervising the Agents, and was responsible by law for enforcing the United States Constitution, laws, and regulations and for ensuring that they were properly trained and obey the laws of the United States. At all relevant times as supervisor, Defendant Diaz, at a minimum, knew of and acquiesced to the unlawful Vehicle Policy as defined herein and failed to conform agents' use of force to the requirements of law, thereby causing the death of Lozano. Plaintiff sues Defendant Diaz in his individual capacity.

19. Plaintiff sometimes refers to Defendants Napolitano, Aguilar, Bersin, Fisher, Hinojosa, Couls, and Diaz as the "Supervisor Defendants."

JURISDICTION AND VENUE

20. This Complaint is for compensatory damages and other relief based on civil rights and human rights violations committed by officers and employees of the United States, all of whom were acting under color of law and within the course and scope of their employment and in violation of the Fourth and Fifth Amendments to the U.S. Constitution. In addition, the Government Defendants' conduct violated the law of nations and is thus actionable pursuant to the Alien Tort Statute, 28 U.S.C. § 1350.

21. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1331 and 1350, because Plaintiff's claims arise under the U.S. Constitution and are authorized by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and properly invoke the law of nations.

22. The jurisdiction of this Court as to the Plaintiff's claims against Defendants under the Federal Tort Claims Act (FTCA) is based upon 28 U.S.C. §§ 1436(b) and 2671-2680.

23. To the extent that exhaustion of administrative remedies is required with respect to Plaintiff's claims pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, which Plaintiff denies, or Plaintiff's claims pursuant to the FTCA, Plaintiff has exhausted the administrative remedies prescribed by 28 U.S.C. § 2675 by presenting her claims to Defendants on June 11, 2014. Defendants denied Plaintiff's administrative claim on August 29, 2014. This Complaint is timely filed within six months of the denial of Plaintiff's administrative claim. All relevant statute of limitations have been tolled until November 2013 under the doctrine of fraudulent concealment.

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

FACTS

I. The Agents' Killing of Lozano

25. On the afternoon of November 3, 2011, twenty-year-old Lozano was traveling in a 1999 black Lincoln Navigator northbound on a rural stretch of road in San Patricio County, Texas. Several men were traveling in the Navigator with Lozano, including: Daladier Garcia-

Villa, Juan Jurado Rodriguez, Miguel Angel Santiago Peralta, Hugo Cesar Hinojosa, and Leonardo Daniel Reyes Sanchez.

26. Two border patrol agents in a Chevrolet Suburban, Eberto Cabello and Jose Tejeda, began to follow the Navigator. The Agents ran a registration check on the Navigator, which revealed that the vehicle was registered in Houston, Texas. Although the Navigator did not appear to violate any traffic laws and nothing appeared outwardly suspicious with the registration check, Cabello reportedly believed that the Navigator contained illegal aliens and initiated a traffic stop. The Navigator slowed and pulled to the southbound side of Farm Road 666, the road on which it was traveling. As the vehicle slowed, the occupants, unarmed and unthreatening, began to flee from the agents.

27. Cabello stopped the Suburban, exited the vehicle and ran towards the Navigator with his government issued ASP baton raised. As Cabello subdued one of the occupants, Lozano attempted to leave the Navigator from the driver's side rear passenger door. Cabello slammed the driver's side passenger door shut, preventing Lozano from exiting the vehicle. In an effort to escape, Lozano climbed from the rear passenger seat into the driver's seat. Cabello slammed his baton into the window at Lozano, shattering the window into pieces.

28. Lozano tried to back the vehicle away from Cabello until the vehicle came upon a fence behind the vehicle, which forced him to move the vehicle forward in order to escape. Cabello, rather than moving away from the vehicle's exit path, moved directly into it, placing himself between the vehicle and the roadway. As Lozano placed the vehicle into forward drive, Cabello drew his weapon and fired several rounds. Cabello kept firing into the vehicle even after it passed him.

29. As Cabello fired at the vehicle, the other agent on the scene, Jose Tejeda, also fired his service weapon at Lozano. Although Tejeda reported that he believed the Navigator was heading straight towards him and he feared that it would run him over, it appears only one bullet entered the vehicle from the front passenger side, all other bullets fired by the agents were fired at the side and rear of the passenger sides of the vehicle. The Navigator, now facing the roadway and past both of the officers, came to a stop with Lozano slumped over the steering wheel. Tejeda approached the vehicle, placed it in park and pulled Lozano's lifeless body from the driver's seat.

30. The autopsy report reveals that Lozano was shot in the head, arm, and abdomen. The shots to Lozano's head and arm entered from the left side. The shot to his abdomen entered from the right side. The bullet trajectories and gunshot wounds evidence that the officers fired the lethal shots at Lozano from the side, when any arguable threat posed by the vehicle had already passed.

31. The Agents unlawfully used excessive, lethal force against Lozano. Lozano did not create a risk of death or serious injury to the agents or to anyone else. None of the Navigator's occupants possessed any weapons and none presented an imminent threat of death or serious injury to the agents or to anyone else.

32. Instead, Cabello intentionally placed himself into the path of the Navigator in order to be able to "justify" his use of lethal force against Lozano. Further, both Agents could have simply stepped out of the Navigator's exit path. Even if these alternatives were not feasible, the Agents could and should have simply let Lozano go—he posed no imminent risk of death or serious injury to the Agents or anyone else, and apprehending him was simply not worth the cost of a human life.

II. The Vehicle Policy

33. The Agents' use of excessive, lethal force against Lozano did not spring from their spontaneous acts. Instead, they were acting pursuant to, and implementing, a Vehicle Policy that has the imprimatur of the highest-ranking officials.

34. At the time of Lozano's death, CBP's 2010 Use of Force Handbook stated: "Deadly force may be used against the driver or other occupant of a moving motor vehicle, vessel, aircraft or other conveyance only when:

- a. The officer/agent has a reasonable belief that the subject of such deadly force poses an imminent danger of death or serious physical injury to the officer/agent or to another person and the hazard of an uncontrolled conveyance has been taken into consideration before firing; or
- b. The public safety benefits of using deadly force outweigh the risks to the safety of the officers/agents and/or of other persons."

35. From CBP's relaxed and ill-defined use of force guidelines developed a pattern and practice (referred to as the Vehicle Policy) of agents along the southern border regularly using excessive, lethal force against drivers of vehicles. At all relevant times, all of the Government Defendants and Supervisor Defendants knew, or reasonably should have known, that Border Patrol agents along the southern border:

- a. had a regular pattern and practice pursuant to which agents intentionally assumed positions in the paths of vehicles, thereby exposing themselves to additional risk and creating justification for the use of deadly force;
- b. understood the Supervisor Defendants to have, at a minimum, tacitly approved Border Patrol agents' shootings so long as the agents claimed a vehicle was in their path; and
- c. used the Vehicle Policy to justify the unlawful use of excessive force against persons of perceived Hispanic ancestry and Mexican nationality.

III. Defendants' Knowledge, Approval, and Concealment of the Unlawful Vehicle Policy.

36. The Government and Supervisor Defendants' actual knowledge of the Vehicle Policy and the wrongful actions of agents acting pursuant to the Vehicle Policy, and their failure to document, follow up or address these incidents, as well as their intentional concealment of the unlawful conduct of agents, constitutes fraud that equitably tolls all applicable statutes of limitation. The Government and Supervisor Defendants are estopped from relying on the statute of limitations as a defense because they actively and fraudulently concealed the Vehicle Policy and unlawful conduct of the agents by, among other things, distorting and concealing the facts underlying each instance in which an agent applied deadly force against drivers of automobiles.

37. Firing live bullets in response to a moving vehicle, absent highly unusual circumstances not present here, is grossly excessive force. Despite each Supervisor Defendant's actual knowledge of such practices, none of them objected to or demanded a stop to the systematic use of unlawful lethal force along the southern border. Because of the lack of objection, intervention, or clarification by any Supervisor Defendant, Border Patrol agents along the southern border considered the Vehicle Policy to be approved all the way up the chain of command. When the Agents killed Lozano on November 3, 2011, they did so knowing that the Supervisor Defendants had for years known of, acquiesced in, and condoned other similar killings.

38. The CBP at all relevant times had a protocol that required the filing of a Significant Incident Report after every encounter in which a Border Patrol agent applied use of force. Once completed, every such Report was emailed to every supervisor at every level of the agency on a daily basis. At minimum, each Supervisor Defendant knew of the facts underlying each incident pursuant to the Vehicle Policy through receipt of that email. Defendant Napolitano

knew of each of many of those incidents because they resulted in the death of the victim. When questioned about her knowledge of and reaction to previous deaths of Mexican nationals caused by border patrol agents, Defendant Napolitano stated at a congressional hearing: “With respect to use of force, an appropriate use of force, we examine each and every case in which there is a death, to evaluate what happened, and whether or not the agent or agents involved should be subject to some sort of disciplinary measure.” Hearings Before a Subcommittee of the Committee On Appropriations House of Representatives, 133-82380, at pg 76 (April 11, 2013) (statement of Secretary Napolitano).

39. Despite actual knowledge of this patently unlawful policy and practice, the Government Defendants and Supervisor Defendants failed and refused to repudiate it publicly or through the chain of command; failed and refused to issue, publicly or through the chain of command, a lawful policy regarding the use of force in response to moving vehicles; failed and refused to provide adequate training to agents regarding lawful responses to moving vehicles; and failed and refused to appropriately discipline agents who act unlawfully pursuant to the Vehicle Policy.

40. The highest-ranking DHS officials knew long before Lozano was killed that the Vehicle Policy: (a) permits Border Patrol agents to use lethal force when it clearly is not necessary; and (b) encourages Border Patrol agents to falsely assert that persons whom they shoot and kill were using a motor vehicle as a weapon. It was not until recently, however, that Plaintiff became aware of the policy’s existence.

41. Through their affirmative misrepresentations and omissions Defendants actively concealed from Plaintiff and the public any facts that would have shed light on the unlawful Vehicle Policy.

42. James F. Tomsheck, the former Assistant Commissioner for Internal Affairs at CBP, has recently acknowledged that CBP officials actively concealed Border Patrol's unlawful practices. Among other things, Tomsheck admitted:

- a. Border Patrol Agents actively and consistently tried to distort the narratives around fatal shootings to cover up wrongdoing by border agents. Tomsheck stated that at least seven Border Patrol shooting deaths since just 2010 were "highly suspect." Yet in none of those instances did the Supervisor Defendants take any disciplinary action against the shooter.
- b. Rather than respond to the shootings appropriately, Border Patrol officials intentionally thwarted the internal affairs agency's investigation. "In nearly every instance, there was an effort by Border Patrol leadership to make a case to justify the shooting versus doing a genuine, appropriate review of the information and the facts at hand."
- c. Top officials at DHS and CBP intentionally turned a blind eye to the consistent pattern of unjustified killings. "There were certainly many cases where border patrol agents or certainly CBP officers engaged in excessive use of force or abuse of migrants at the border that should have resulted in discipline where it did not." See Anna Werner, *order Patrol Killings Face Renewed Scrutiny* (Aug. 19, 2014), <http://www.cbsnews.com/news/investigating-unresolved-deaths-on-the-border/>.
- 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.*

43. According to published reports, Tomsheck said that "senior officials at Customs and Border Protection and elsewhere in the Department of Homeland Security interfered with, delayed or hindered his office from being more aggressive in rooting out corruption, abuse and other misconduct, including civil rights violations, by telling internal affairs to stand down or back off." Andrew Becker, *Ousted Chief Accuses Border Agency of Shooting Cover-Ups, Corruption* (Aug. 14, 2014), <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.

44. Tomsheck places much of the blame on Defendant Aguilar, who directed that Border Patrol management take control of deadly force investigations before the internal affairs department could review them. According to reports, Tomsheck said with respect to use of excessive force that “[a]llegations of wrongdoing he believed needed to be investigated instead would go to Border Patrol management for review and discipline. Those inquiries went nowhere or were inadequate.” *Id.* Tomsheck and other internal affairs investigators were then required to “fall in line” behind the Aguilar-directed conclusions.

45. The highest-ranking DHS officials knew long before Lozano was killed that the Vehicle Policy: (a) permits Border Patrol agents to use lethal force when it clearly is not necessary; and (b) encourages Border Patrol agents to falsely assert that persons whom they shoot and kill were creating a risk of death. Despite actual knowledge of the Vehicle Policy and its open and notorious conflict with fundamental human rights guarantees, each of the Supervisor Defendants failed and refused to modify the Vehicle Policy to conform it to the requirements of law, choosing instead to conceal its existence from Plaintiff and the public.

IV. PERF’s Exposure of the Unlawful “Policy and Practice” of Permitting Unjustifiable Deadly Force.

46. In 2012, the DHS and CBP commissioned the Police Executive Research Forum (“PERF”) to provide expert, objective guidance to DHS and CBP regarding the use of lethal force in response to alleged instances of individuals driving motor vehicles at agents. PERF is a highly respected non-profit organization that advises law enforcement agencies on best practices. PERF carefully studied the issue and submitted a report to DHS and CBP advising that the

Vehicle Policy is unlawful and in “need of significant change.” PERF recommended that the agencies should no longer permit an agent to shoot at motor vehicles unless the vehicle occupants were attempting to use deadly force, other than the vehicle, against the agent. PERF provided its report to the agencies in February 2013. *See* <http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>, at 2.

47. Between January 2010 and October 2012 alone, there were at least fifteen instances in which a border patrol agent fired at or into moving vehicles.

48. The PERF Report, upon reviewing those fifteen cases, determined:

[I]t appears that CBP practice allows shooting at the driver of any suspect vehicle that comes in the direction of agents. It is suspected that in many vehicle shooting cases, the subject driver was attempting to flee from the agents who intentionally put themselves in the exit path of the vehicle, thereby exposing themselves to additional risk and creating justification for the use of deadly force. In most of these cases, the agents have stated that they were shooting at the driver of a vehicle that was coming at them and posing an imminent threat to their life. *Id.* at 8.

49. The PERF Report goes on to note that

Little focus has been placed on defensive tactics that could have been used by shooting agents such as getting out of the way. It should be recognized that a ½ ounce (200 grain) bullet is unlikely to stop a 4,000 pound moving vehicle, and if the driver of the approaching vehicle is disabled by a bullet, the vehicle will become a totally unguided threat. Obviously, shooting at a moving vehicle can pose a risk to bystanders including other agents. *Id.*

50. PERF’s detailed review of the cases involving agents shooting at motor vehicles revealed that “some of the shots at suspect vehicles are taken out of frustration when agents who are on foot have no other way of detaining suspect who are fleeing in a vehicle,” *id.*, and “[m]ost reviewed cases involved non-violent suspects who posed no threat other than a moving vehicle.” PERF’s conclusion was clear: “There is little doubt that the safest course for an agent faced with an oncoming vehicle is to get out of the way of the vehicle.” *Id.*

51. The PERF Report recommended that CBP change its 2010 Use of Force Handbook, emphatically stating that “CBP Policy should be ‘Agents shall not discharge their firearms at or from a moving vehicle unless deadly physical force is being used against the police officer or another person present, by means other than a moving vehicle.’” *Id.* (emphasis in original).

52. On November 5, 2013, Defendant Fisher announced that the agencies had decided to reject the expert, objective recommendation that they had commissioned PERF to provide, and instead to reaffirm yet again the unlawful Vehicle Policy. *See* Associated Press Exclusive: Border Patrol Rejects Curbs on Force (November 5, 2013), <http://bigstory.ap.org/article/ap-exclusive-border-patrol-rejects-curbs-6force>.

53. Defendant Fisher’s November 5, 2013 announcement was the first instance in which Plaintiff or any of the public had any notice of the existence of the Vehicle Policy.

54. On March 7, 2014, at the insistence of the newly installed Secretary of Homeland Security, Jeh Johnson and newly installed Commissioner of CBP, Gil Kerlikowske, Defendant Fisher amended (in his words “clarified”) the policy. Addressing most, but not all, of PERF’s recommendations, Defendant Fisher issued a directive to all border patrol personnel, in which he stated for the first time that:

- a. “agents shall not discharge their firearms at a moving vehicle unless the agent has a reasonable belief, based on the totality of the circumstances that deadly force is being used against an agent or another person present; such deadly force may include a moving vehicle aimed at agents or others present, but would not include a moving vehicle merely fleeing from agents. Further, agents should not place themselves in the path of a moving vehicle or use their body to block a vehicle's path.” ...
- b. “Supervisors are instructed to address this directive at musters, to include using alternative methodologies, such as setting up controlled tire deflation devices, acquiring additional back-up, utilizing technology and less-than-lethal equipment, taking appropriate cover, and recognizing when to engage or subsequently disengage.”

55. Later in 2014, the agencies finally released the PERF report to the public—fifteen months after the agencies received it. The agencies also disclosed in 2014, for the first time, CBP’s 2010 Use of Force Handbook.

56. In May 2014—after Defendants Napolitano, Bersin, and Aguilar had stepped down from their supervisor roles at DHS and CBP—CBP finally revised its 2010 Use of Force Policy Handbook.¹ The new 2014 Handbook states for the first time, among other things, that:

- a. “Authorized Officers/Agents shall not discharge their firearms at the operator of a moving vehicle, vessel or aircraft unless deadly force is necessary – that is, when the officer/agent has a reasonable belief that the operator poses an imminent danger of serious physical injury or death to the officer/agent or to another person.” Pg 4
- b. “Such deadly force may include a moving vehicle aimed at officers/agents or others present, but would not include a moving vehicle merely fleeing from officers/agents unless the vehicle or the escape of the subject poses an imminent threat of serious physical injury or death to the officer/agent or to another person.” *Id.*
- c. “Except where otherwise required by inspections or other operations, Authorized Officers/Agents should avoid standing directly in front of or behind a subject vehicle. Officers/agents should not place themselves in the path of a moving vehicle or use their body to block a vehicle’s path.” Pg 6
- d. “Authorized Officers/Agents should, whenever reasonable, avoid placing themselves in positions where they have no alternative to using deadly force.” *Id.*

57. This change in policy, while potentially welcome (assuming it is adequately implemented), came too late to protect Plaintiff from the wholly unnecessary loss of her twenty-year-old son.

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

V. The Supervisor Defendants' Failure and Refusal to Adequately Train the Agents.

58. The Government Defendants and Supervisor Defendants also failed to provide proper training to agents, including the Agents, in response to suspects attempting to flee in a vehicle. During the time that the Agents were trained, CBP systematically failed and refused to, among other things:

- a. Train new agents at CBP's basic academies on all less-lethal options;
- b. Sufficiently train new agents at CBP's basic academies on high-risk situations, specifically including those involving vehicles;
- c. Train agents in tactics to de-escalate use of force situations in order to prevent them from becoming deadly force incidents;
- d. Ensure that agents understood and followed a proper use of force policy;
- e. Provide scenario-based training to give agents the opportunity to practice real-life use of force situations;
- f. Provide training in low-light conditions;
- g. Provide agents the full number of required training hours;
- h. Give written tests during less-lethal force recertification training; and
- i. Standardize use of force policies across the CBP.

59. The Government Defendants and Supervisor Defendants knew and had reason to know that the lack of training created a permissive environment in which their subordinates believed that the Vehicle Policy and the use of excessive, lethal force would be tolerated or approved. The Government Defendants and 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.

60. Despite knowing or having reason to know of the widespread use of excessive, lethal force, the Government Defendants and Supervisor Defendants failed to take timely and effective measures to prohibit, prevent, and punish such practices and to punish or discipline the

perpetrators and responsible commanders, who were all under the Government Defendants and Supervisor Defendants' actual or effective command. The Government Defendants and Supervisor Defendants had an actual opportunity and a legal duty to prevent abuses by their subordinates before Lozano was killed, yet failed to take the necessary and required action. As a direct and foreseeable result of this failure, the Agents unlawfully killed Lozano.

VI. International and Domestic Strictures on Excessive, Lethal Force.

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

62. The international law provisions forbidding extrajudicial killing include Article 6(1) of the International Covenant on Civil and Political Rights (“ICCPR”), S. Exec. E, 95-2, 999 U.N.T.S. 171, 1966 U.S.T. LEXIS 521 (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, ratified by Mexico Mar. 23, 1981, ratified by U.S. June 8, 1992). That Article provides that “[n]o one shall be arbitrarily deprived of his life.” *See also id.* at art. 9(1) (“Everyone has the right to liberty and security of person No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”). The *jus cogens* norm against extrajudicial killings is universally recognized by all civilized nations. *See, e.g.*, the Universal Declaration of Human Rights, Dec.10, 1948, art. 3, G.A. Res. 217A(III), U.N. Doc. A/810; American Declaration of the Rights and Duties of Man,

art. I, O.A.S. Res. XXX (May 2, 1948), <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm>; Restatement (Third) of Foreign Relations § 702 cmt. f, n (1987).

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

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

summary or arbitrary executions, Report to General Assembly, ¶¶33-45, U.N. Doc. A/61/311 (Sept. 5, 2006); U.N. Human Rights Committee, General Comment 6, 16th Sess., art. 6 (1982).

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

66. For decades, the U.S. Department of State has insisted that the international norm against extrajudicial killings includes “deliberate, illegal, and excessive use of lethal force by the police, security forces, or other agents of the State whether against criminal suspects, detainees, prisoners, or others.” U.S. Dep’t of State, Country Report on Human Rights Practices 1995, Appendix A: Notes on the Preparation of the Reports (March 1996); *see also id.* (“lethal use of excessive force by security forces ... is herein defined as a form of extrajudicial killing”); U.S. Department of State Country Report on Human Rights Practices 1997 - Papua New Guinea (police’s unreasonable killing of innocent bystander is extrajudicial killing).

67. The United States incorporates into its domestic law the peremptory international norm against extrajudicial killing by police use of excessive, lethal force. As the Executive Branch advised the Senate, with few exceptions not relevant here, “the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United States Constitution and

laws.” Letter of Transmittal from the President to the Senate, 1966 U.S.T. LEXIS 521, at *2 (Feb. 23, 1978). For example, the Supreme Court has held that police use of deadly force is permissible only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. . . .” *Tennessee v. Garner*, 471 U.S. 1, 3 (U.S. 1985). Domestic law makes this peremptory norm specifically applicable to the use of lethal force by U.S. Border Patrol agents. 8 C.F.R. § 287.8(a)(2)(ii) (“Deadly force may be used only when a designated immigration officer. . . has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury”).

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

VII. Fraudulent Concealment Tolling the Statute Of Limitations

69. Plaintiff had no knowledge of the unlawful Vehicle Policy and the Agents' unlawful actions taken pursuant thereto and could not have discovered these facts through the exercise of reasonable diligence during the applicable limitations periods.

70. This is so because the nature the Agents' actions and the Vehicle Policy is self-concealing. Over the years CBP has become notorious for its lack of transparency and accountability regarding border patrol agents' use of deadly force. For example, any and all information regarding agents' training and use of force policies were kept confidential from the public until 2014. In addition, most, if not all, information from investigations involving use of deadly force is kept confidential. In fact, every case file involving shots fired at or into vehicles by CBP agents between January 2010 and October 2012 (15 in total) was concealed from the public.

71. Notwithstanding the self-concealing nature of the practice, the Supervisor Defendants also wrongfully and affirmatively concealed the existence of the Vehicle Policy from Plaintiff and the public by, among other things:

- a. Publicly defending agents' use of deadly force by misrepresenting the agents were in life-threatening situations.
- b. Refusing to undertake any meaningful review of agents' actions pursuant to the vehicle policy.
- c. Refusing to take disciplinary measures, or otherwise publicly reprimand, agents' actions pursuant to the Vehicle Policy.
- d. Thwarting efforts by internal affairs representatives to conduct a review of agents' use of force that would otherwise have exposed the unlawful practices.
- e. Concealing from the public the PERF report, which specifically concluded that CBP's use of force guidelines are deficient.

- f. Concealing PERF's underlying finding that CBP permits a practice of shooting at the drivers of suspect vehicles that come in the direction of agents.
- g. Concealing PERF's underlying finding that agents were intentionally putting themselves in the exit paths of vehicles thereby exposing themselves to additional risks and creating a justification for the use of deadly force.
- h. Redacting a September 2013 OIG report that exposed PERF's findings of the unlawful Vehicle Policy.
- i. Refusing requests for information, or otherwise responding to such requests by providing heavily redacted files from which meaningful information could be ascertained about CBP's use of force policies and practices.

72. Because the Vehicle Policy was both self-concealing and affirmatively concealed by Defendants, Plaintiff had no knowledge of the Vehicle Policy or of any facts or information that would have caused a reasonably diligent person to investigate whether (1) the unlawful policy existed and (2) the Agents' actions were taken pursuant to that unlawful policy. Plaintiff only became aware of the Vehicle Policy when Defendant Fisher publicly rejected PERF's recommendation to address the Vehicle Policy in November 2013. And only in 2014, after Defendants Napolitano, Bersin, and Aguilar left their supervisory roles, did CBP first reveal the PERF report and CPB's deficient use of force policies.

73. As a result of Defendants' fraudulent concealment, all applicable statutes of limitations affecting Plaintiff's claims have been tolled.

CAUSES OF ACTION

First Claim for Relief Violation of the Law of Nations (Against the Government Defendants)

74. Plaintiff repeats and realleges, in each of their claims for relief, all of the allegations set forth in this Complaint.

75. The Vehicle Policy and the Government Defendants' acts and omissions described herein violate the law of nations, which prohibits extrajudicial killing.

76. The Government Defendants' actions and omissions were the direct and proximate cause of Lozano's death and give rise to a cause of action for a tort in violation of the law of nations.

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

78. In addition to their liability for the unlawful use of excessive, lethal force caused by their affirmative orders and authorizations, the Government Defendants are also liable on the independent ground that they violated their legal duty to prevent and prohibit the use of excessive, lethal force by subordinates when the Government Defendants knew and had reason to know of it. The Government Defendants failed to take the reasonable, necessary, timely, or adequate measures against subordinates to prohibit and prevent such excessive, lethal force as required by law. To this day, none of the key command officials responsible for this widespread and systemic unlawful use of force have been disciplined. The Government Defendants have acted with deliberate indifference to and in conscious disregard of the high likelihood that

persons such as Lozano would die as a result of Border Patrol agents' use of excessive, lethal force.

79. The Government Defendants issued orders, adopted policies, and granted authorizations that foreseeably led to the widespread use of excessive, lethal force, including against Lozano. In doing so, the Government Defendants authorized a deviation from longstanding international and domestic law prohibiting the use of excessive, lethal force. The Government Defendants also failed to take action to stop and prevent the use of excessive, lethal force after they had knowledge that their officers and agents were committing or permitting such unlawful use of force. Through their actions and derelictions, the Government Defendants expressly permitted the use of excessive, lethal force.

80. The Government Defendants are liable for Lozano's death under the law of nations, because those Defendants formulated, authorized, approved, directed, and ratified the Vehicle Policy.

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

82. Defendants' deliberate killing of Lozano was not authorized by the doctrine of self-defense.

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

84. The Government Defendants' conduct caused grave and foreseeable injury (namely death) to Lozano.

85. The Government Defendants are liable for their conduct that led to the extrajudicial killing of Lozano.

86. The Government Defendants are liable for the harm caused to Lozano's family members. The family members were forced to suffer—and continue to suffer—severe physical and psychological abuse and agony as a result of the extrajudicial killing.

87. The Government Defendants are liable for money damages to Plaintiff in an amount to be determined at trial.

88. The Government Defendants' violations of Lozano's rights were deliberate, willful, intentional, wanton, malicious, and oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial.

Second Claim for Relief
Violation of the Law of Nations
(Against the Supervisor Defendants)

89. The Vehicle Policy and Supervisor Defendants' acts and omissions described herein violate the law of nations, which prohibits extrajudicial killing.

90. The Supervisor Defendants' actions and omissions were the direct and proximate cause of Lozano's death and give rise to a cause of action for a tort in violation of the law of nations.

91. The Supervisor Defendants had effective command and control of the Agents who intentionally and knowingly used excessive, unlawful force to kill Lozano, which is prohibited by the law of nations.

92. In addition to their liability for the unlawful use of excessive, lethal force caused by their affirmative orders and authorizations, the Supervisor Defendants are also liable on the independent ground that they violated their legal duty to prevent and prohibit the use of excessive, lethal force by subordinates when the Supervisor Defendants knew and had reason to know of it. To this day, none of the key command officials or agents responsible for this widespread and systemic unlawful use of force have been disciplined. The Supervisor Defendants have acted with deliberate indifference to and in conscious disregard of the high likelihood that persons such as Lozano would die as a result of Border Patrol agents' use of excessive, lethal force.

93. The Supervisor Defendants issued orders, adopted policies, and granted authorizations that foreseeably led to the widespread use of excessive, lethal force, including against Lozano. In doing so, the Supervisor Defendants authorized a deviation from longstanding international and domestic law prohibiting the use of excessive, lethal force. The Supervisor Defendants also failed to take action to stop and prevent the use of excessive, lethal force after they had knowledge that their officers and agents were committing or permitting such unlawful use of force. Through their actions and derelictions, the Supervisor Defendants expressly permitted the use of excessive, lethal force.

94. The Supervisor Defendants are liable for Lozano's death under the law of nations, because those Defendants formulated, authorized, approved, directed, and ratified the Vehicle Policy.

95. In addition, the Supervisor Defendants are liable because their officers and agents intentionally and systematically used excessive, lethal force while acting under the Supervisor

Defendants' effective command and control, and the Supervisor Defendants knew and had reason to know of their officers' and agents' actions but failed to prevent or punish them.

96. Defendants' deliberate killing of Lozano was not authorized by the doctrine of self-defense.

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

98. The Supervisor Defendants' conduct caused grave and foreseeable injury (namely death) to Lozano.

99. The Supervisor Defendants are liable for their conduct that led to the extrajudicial killing of Lozano.

100. The Supervisor Defendants are liable for the harm caused to Lozano's family members. The family members were forced to suffer—and continue to suffer—severe physical and psychological abuse and agony as a result of the extrajudicial killing.

101. The Supervisor Defendants are liable for money damages to Plaintiff in an amount to be determined at trial.

102. The Supervisor Defendants' violations of Lozano's rights were deliberate, willful, intentional, wanton, malicious, and oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial.

Third Claim for Relief
Violation of the Law of Nations
(Against the Agent Defendants)

103. The Vehicle Policy and the Agent Defendants' acts and omissions described herein violate the law of nations, which prohibits extrajudicial killing.

104. As set forth in detail above, the Agents used excessive force against Lozano, and their conduct in committing these acts was not reasonable in light of all the circumstances.

105. Agent Tejeda witnessed and/or took part in Agent Cabello's excessive use of force against Lozano and took no action to protect Lozano, ratified Agent Cabello's excessive use of force against Lozano. Agent Tejeda conspired with Agent Cabello to commit and/or cover-up this excessive use of force against Lozano.

106. Agent Tejeda and Agent Cabello knowingly, intentionally, and/or with actual malice, combined, conspired and confederated together to deprive Lozano of his life.

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

108. Each of the Agents acted under color of official authority and with deliberate, reckless, or callous indifference to Lozano's rights.

109. The Agent Defendants' actions and omissions were the direct and proximate cause of Lozano's death and give rise to a cause of action for a tort in violation of the law of nations.

110. The Agent Defendants' deliberate killing of Lozano was not authorized by the doctrine of self-defense.

111. The Agent Defendants' deliberate killing of Lozano was not authorized by a lawful judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

112. The Agent Defendants' conduct caused grave and foreseeable injury (namely death) to Lozano.

113. The Agent Defendants are liable for their conduct that led to the extrajudicial killing of Lozano.

114. The Agent Defendants are liable for the harm caused to Lozano's family members. The family members were forced to suffer—and continue to suffer—severe physical and psychological abuse and agony as a result of the extrajudicial killing.

115. The Agent Defendants are liable for money damages to Plaintiff in an amount to be determined at trial.

116. The Agent Defendants' violations of Lozano's rights were deliberate, willful, intentional, wanton, malicious, and oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial.

Fourth Claim for Relief
Fifth Amendment Due Process
(Against Supervisor Defendants)

117. The Supervisor Defendants' actions described herein violated Lozano's substantive and procedural due process rights under the Fifth Amendment to the U.S. Constitution. The Supervisor Defendants violated Lozano's Fifth Amendment due process rights by personally developing, authorizing, and conspiring to effect, and permitting and directing their subordinates to implement, the Vehicle Policy. The Supervisor Defendants also violated Lozano's Fifth Amendment due process rights by failing to establish adequate procedures to train the Border Patrol agents, failing to establish adequate disciplinary procedures and adequate procedures to investigate agents' misconduct, and acting and failing to act in disregard of previous allegations of Border Patrol agents' use of excessive, lethal force.

118. As a foreseeable result of the Supervisor Defendants' acts and omissions, the Agents used lethal force against Lozano in the circumstances described above. The Supervisor Defendants were aware of the danger and risk of serious harm or death that Lozano and others faced as a result of the Vehicle Policy. The Supervisor Defendants nevertheless personally took affirmative steps that created and/or increased this danger and risk, which did, in fact, result in Lozano's death. Lozano's death was a foreseeable result of the Supervisor Defendants' actions and omissions.

119. Each of the Supervisor Defendants had actual or constructive knowledge that its, his, or her acts and omissions with respect to Lozano violated his due process rights, and each had actual or constructive knowledge that its, his, or her actions, orders, or omissions would lead to such violations.

120. Each of the Supervisor Defendants acted under color of official authority and with deliberate, reckless, or callous indifference to Lozano's due process rights.

121. The Supervisor Defendants are liable for money damages to Plaintiff in an amount to be determined at trial.

122. The Supervisor Defendants' violations of Lozano's due process rights were deliberate, willful, intentional, wanton, malicious, and oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial.

Fifth Claim for Relief
Fifth Amendment Due Process
(Against Agents)

123. The Agents' actions described herein violated Lozano's substantive and procedural due process rights under the Fifth Amendment to the Constitution. The Agents

violated Lozano's Fifth Amendment due process rights by using lethal force against him in the circumstances described above.

124. As set forth in detail above, the Agents used excessive force against Lozano, and their conduct in committing these acts was not reasonable in light of all the circumstances and shocks the conscience.

125. Agent Tejeda is also liable for this constitutional violation because he witnessed Agent Cabello's excessive use of force against Lozano in violation of his Fourth and Fifth Amendment rights but took no action to protect Lozano, ratified Agent Cabello's excessive use of force against Lozano in violation of his Fourth and Fifth Amendment rights after it had occurred, and conspired with Agent Cabello to commit and/or cover-up this excessive use of force against Lozano in violation of his Fourth and Fifth Amendment rights.

126. Agent Tejeda and Agent Cabello knowingly, intentionally, and/or with actual malice, combined, conspired and confederated together to deprive Lozano of his clearly established Fourth and Fifth Amendment constitutional rights.

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

128. Each of the Agents had actual or constructive knowledge that his conduct toward Lozano violated his due process rights, and each had actual or constructive knowledge that his actions or omissions would lead to such violations.

129. Each of the Agents acted under color of official authority and with deliberate, reckless, or callous indifference to Lozano's due process rights.

130. The Agents are liable for money damages to Plaintiff in an amount to be determined at trial.

131. The Agents' violations of Lozano's due process rights were deliberate, willful, intentional, wanton, malicious, and oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial.

Six Claim for Relief
Fourth Amendment Unreasonable Seizure
(Against Supervisor Defendants)

132. The Supervisor Defendants' actions described herein violated Lozano's right to be free from unreasonable seizure under the Fourth Amendment to the U.S. Constitution. The Supervisor Defendants violated Lozano's Fourth Amendment rights by personally developing, authorizing, and conspiring to effect, and permitting and directing their subordinates to implement, the Vehicle Policy. The Supervisor Defendants also violated Lozano's Fourth Amendment rights by failing to establish adequate procedures to train the Border Patrol agents, failing to establish adequate disciplinary procedures and adequate procedures to investigate agents' misconduct, and acting and failing to act in disregard of previous allegations of Border Patrol agents' use of excessive, lethal force.

133. As a foreseeable result of the Supervisor Defendants' acts and omissions, the Agents used lethal force against Lozano in the circumstances described above. The Supervisor Defendants were aware of the danger and risk of serious harm or death that Lozano and others faced as a result of the Vehicle Policy. The Supervisor Defendants nevertheless personally took affirmative steps that created and/or increased this danger and risk, which did, in fact, result in

Lozano's death. Lozano's death was a foreseeable result of the Supervisor Defendants' actions and omissions.

134. Each of the Supervisor Defendants had actual or constructive knowledge that its, his, or her acts or omissions with respect to Lozano violated his right to be free from unreasonable seizure, and each had actual or constructive knowledge that its, his, or her actions, orders, or omissions would lead to such violations.

135. Each of the Supervisor Defendants acted under color of official authority and with deliberate, reckless, or callous indifference to Lozano's rights.

136. The Supervisor Defendants are liable for money damages to Plaintiff in an amount to be determined at trial.

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

Seventh Claim for Relief
Fourth Amendment Unreasonable Seizure
(Against Agents)

138. The Agents' actions described herein violated Lozano's right to be free from unreasonable seizure under the Fourth Amendment to the U.S. Constitution. The Agents violated Lozano's Fourth Amendment rights by using lethal force against him in the circumstances described above.

139. As set forth in detail above, Agent Cabello used excessive force against Lozano, and Agent Cabello's conduct in committing these acts was not reasonable in light of all the circumstances.

140. As set forth in detail above, Agent Tejeda used excessive force against Lozano, and Agent Tejeda's conduct in committing these acts was not reasonable in light of all the circumstances.

141. Agent Tejeda is also liable for this constitutional violation because he witnessed Agent Cabello's excessive use of force against Lozano in violation of his Fourth and Fifth Amendment rights but took no action to protect Lozano, ratified Agent Cabello's Agent Cabello's excessive use of force against Lozano in violation of his Fourth and Fifth Amendment rights after it had occurred, and/or conspired with Agent Cabello to commit and/or cover-up this excessive use of force against Lozano in violation of his Fourth and Fifth Amendment rights.

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

143. Additionally, both Agent Cabello and Agent Tejeda are liable for intentionally and/or recklessly provoking a violent confrontation between themselves and Lozano.

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

145. Each of the Agents acted under color of official authority and with deliberate, reckless, or callous indifference to Lozano's rights.

146. The Agents are liable for money damages to Plaintiff in an amount to be determined at trial.

147. The Agents' violations of Lozano's right to be free from unreasonable seizure were deliberate, willful, intentional, wanton, malicious, and oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial.

Eighth Claim for Relief
Wrongful Death/Survival Pursuant To The Federal Tort Claims Act
Based On Assault And Battery
(Against Agents)

148. This claim for relief is brought on behalf of Lozano, when the Agents, while acting within the course and scope of their employment used unlawful, excessive deadly force in shooting and killing him on November 3, 2011, notwithstanding that he was defenseless, he had no weapon of any kind, and he had not threatened nor was threatening neither of the Agents or any third party, with deadly harm or otherwise.

149. At all times relevant hereto, the Agents were acting under color of law as an employee of the United States of America, United States Department of Homeland Security, United States Bureau of Customs and Border Protection, and/or United States Border Patrol. In such capacity, the Agents used excessive deadly force and intentionally shot Lozano on November 3, 2011, while in the course and scope of their employment as an investigative and law enforcement officer. The Agents, while acting under color of law during performance of their law enforcement functions, had a duty to refrain from the use of excessive force in attempting to effectuate the arrest of Lozano. The Agents intentionally and knowingly threatened Lozano with imminent bodily injury by pointing their weapons at Lozano and taking aim. In subsequently shooting Lozano under such circumstances, the Agents perpetuated a nonconsensual touching of Lozano's body, which resulted in Lozano's death.

150. As a direct and proximate result of the wrongful acts and omissions of the Agents while in the course and scope of their employment, Lozano suffered fatal injuries for which Plaintiff now complains. Such acts and omissions fall within the purview of 28 U.S.C. § 2671, et. seq.

151. As a direct and proximate result of the actions of the Agents, Plaintiff has suffered the loss of love, aid, comfort, and society of Lozano, who was a devoted son, funeral and burial expenses, and Lozano suffered conscious pain and suffering, loss of value of life to himself and any and all other damages allowed under the FTCA for which Plaintiff seeks compensatory damages.

Ninth Claim for Relief
Wrongful Death/Survival Pursuant To The Federal Tort Claims Act
Based On Negligence
(Against Agents)

152. On November 3, 2011, the Agents Defendants had a duty, while acting within the course and scope of their employment with Defendant the United States of America, United States Department of Homeland Security, United States Bureau of Customs and Border Protection, and/or United States Border Patrol to not cause personal injury or death through their own wrongful or negligent act or omission. The Agent Defendants further had a duty to act with due care including, but not limited to, not allowing a situation to develop in which they would, through lack of due care, cause the death of another human being.

153. Agent Defendants negligently or otherwise, breached this duty of care when they placed themselves in a position such as to wrongly and unjustifiably use excessive deadly force and discharge a firearm at Lozano, resulting in his death. The Agents were negligent in causing the death of Lozano, and their negligence or their other wrongful conduct resulted in the death of

Lozano and gives rise to a cause of action under the FTCA, 28 U.S.C. § 2671, et. seq. At all times relevant herein, the Agent Defendants should have maintained appropriate precautions such as to not discharge their firearms and cause the death of Lozano. The Agent Defendants breached these duties when they negligently or otherwise used excessive deadly force and wrongfully shot Lozano, causing his untimely death.

Tenth Claim for Relief
Violation Of Federal Tort Claims Act
(Agent Defendants)

154. At all times relevant hereto, Agent Defendants were acting under color of law as employees of the United States of America, United States Department of Homeland Security, United States Bureau of Customs and Border Protection, and/or United States Border Patrol. In such capacity, Agent Defendants shot Lozano while attempting to arrest him for suspected illegal entry into the United States.

155. While acting under color of law during the performance of their law enforcement functions, Agent Defendants had a duty to refrain from the use of excessive force, including but not limited to deadly force, in effecting the arrest of Plaintiff. In breach of that duty, Defendant Cabello and/or Defendant Tejeda shot Lozano.

156. As a direct and proximate result of the acts or omissions of Agent Defendants, Lozano was killed, giving rise to the injuries and damages for which Plaintiff now complain. Such acts and omissions by Agent Defendants fall within the purview of 28 U.S.C. § 2671, et. seq.

Eleventh Claim for Relief
Violation Of Federal Tort Claims Act
(Supervisor Defendants)

157. At all times relevant hereto, Supervisor Defendants exercised supervision and control over the Agent Defendants.

158. In shooting Lozano, Agent Defendants violated the prohibitions against the use of excessive force found in the Fourth and Fifth Amendments of the United States Constitution.

159. Supervisor Defendants had a duty to train, supervise, and control Agent Defendants in the performance of their law enforcement duties as agents or employees of the United States of America, United States Department of Homeland Security, United States Bureau of Customs and Border Protection, and/or United States Border Patrol.

160. Supervisor Defendants breached their duty of care by negligently establishing, promulgating, and enforcing policies and procedures, rules, and regulations regarding the use of deadly force which they knew, or should have known, were unconstitutional. In turn, those policies, procedures, rules, and regulations, directly and proximately resulted in Agent Defendants' use of deadly force against Lozano in an unconstitutional manner.

161. As a direct and proximate result of the acts or omissions of Supervisor Defendants, Agent Defendants killed Lozano, giving rise to the injuries and damages for which Plaintiff now complain. Such acts and omissions fall within the purview of 28 U.S.C. § 2671, et. seq.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment including:

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

- b. Punitive damages against all Defendants in an amount to be determined at trial;
- c. Reasonable attorneys' fees and costs of suit;
- d. Such other relief as the Court deems just and reasonable.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury as to each and every cause of action against each and every defendant.

Respectfully submitted on this 27th day of February, 2015,

/s/ Robert C. Hilliard

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