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

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

18 Plaintiffs,

19  
20 vs.

21 DORIAN DIAZ, *et al.*,

22 Defendants.  
23  
24

Case No.: 13cv1417-WQH (BGS)

MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF DEFENDANT DORIAN DIAZ'S  
MOTION FOR SUMMARY JUDGMENT

DATE: May 8, 2017  
CTRM: 14B (Annex)  
JUDGE: Hon. William Q. Hayes

[NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT]

25 Defendant Dorian Diaz submits the following Memorandum of Points and  
26 Authorities in support of his motion for summary judgment based on qualified immunity.  
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I.

**INTRODUCTION**

1  
2  
3 This case arises out of a shooting incident at the United States-Mexico border which  
4 took place on June 21, 2011 (“the Incident”). Plaintiffs, who are the wife and children of  
5 Jose Alfredo Yañez Reyes (“Yañez”), a Mexican national, assert that Border Patrol Agent  
6 Dorian Diaz (“Agent Diaz”) wrongfully shot and killed Yañez while he was south of the  
7 international primary border fence that day. The shooting occurred shortly after Yañez and  
8 his cohort, Jose Ibarra Murietta (“Murietta”), illegally entered the United States and began  
9 assaulting the agents.<sup>1</sup> While Murietta was assaulting Border Patrol Agent Chad Nelson  
10 (“Agent Nelson”) on the United States side of the border within feet of the primary border  
11 fence, Yañez traveled back to Mexico and began attacking the agents from the south side.  
12 Acting in defense of Agent Nelson, Agent Diaz shot Yañez in order to stop the imminent  
13 threat he posed. Once the agents were able to finally get Murietta under control, Murietta  
14 was prosecuted, pled guilty, and was sentenced to 87 months in federal prison for his  
15 assault on Agent Nelson and his illegal entry into the country.

16 After a series of successful motions brought by the various Defendants that have  
17 been named in this lawsuit, what remains of this case is one *Bivens* cause of action against  
18 two individual defendants - - a Fourth Amendment excessive force claim against Agent  
19 Diaz and former Chief of Border Patrol Michael Fisher (“Chief Fisher”).

20 The Supreme Court has held that aliens, with no significant voluntary connections  
21 to the United States, are not protected under the Fourth Amendment to the United States  
22 Constitution. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Neither the  
23 Supreme Court nor the Ninth Circuit has ever extended Fourth Amendment liability in a  
24 situation where an alien without such connections was injured or killed by a federal agent  
25 south of the U.S./Mexican border fence. Despite this fact, Plaintiffs brought this lawsuit  
26 knowing, and even admitting, that they have no substantial connections to this country. By

27 <sup>1</sup> Murietta has used multiple aliases, including “Martin Ortiz Castaneda,” the name  
28 under which he has been prosecuted by this Court. (*See Exhibits K, L, M, N and O*).



1 this motion, Defendants will demonstrate that as tragic as it may be that Yañez was killed,  
2 his death was the result of his own attack on federal agents. Because he had no significant  
3 voluntary connections with the United States, Defendants are entitled to qualified  
4 immunity because the law was not clearly established in 2011 that Yañez would be entitled  
5 to the protections of our Constitution.

6 Similarly, Yañez’s wife and children have no significant voluntary connections to  
7 the United States and therefore Defendants move to dismiss their individual Fourth  
8 Amendment claims under the doctrine of qualified immunity. And even if they were  
9 somehow protected by the U.S. Constitution, they have no standing to sue under the Fourth  
10 Amendment because they were not the subject of any search or seizure by federal agents.

11 Lastly, even if the Court were to find Plaintiffs are entitled to Fourth Amendment  
12 protection, Agent Diaz moves for summary judgment on the ground that the particular facts  
13 of this case entitle him to qualified immunity based on the totality of the circumstances.

14 **II.**

15 **FACTUAL BACKGROUND**

16 **A. YAÑEZ & MURIETTA’S ILLEGAL ENTRY AND ASSAULT**

17 There is no dispute in this case that Yañez and Murietta entered the United States  
18 illegally through a hole in the border fence, and that Yañez ran back into Mexico through  
19 that same hole prior to being shot. In all of their complaints, including the operative Fourth  
20 Amended Complaint, Plaintiffs assert “the duo squeezed through a small hole in the  
21 primary border fence . . . **Yañez**, who had stayed in the culvert near the primary fence,  
22 **escaped back to Mexico through the small hole in the fence. . . .**” (ECF 165, Fourth  
23 Amended Complaint (“FAC”), ¶¶ 27, 32) (emphasis added). Plaintiffs admit that while  
24 on the United States side of the border, Murietta grappled with the agents, refused to submit  
25 to the agents’ authority, and that he continued to attempt entry further into the United  
26 States. *Id.* at ¶ 34. Plaintiffs also admit that “Yañez had run parallel to Agent Nelson and  
27 Murietta on the southern side of the primary fence,” and that “Yañez climbed into a tree  
28 that leaned against the southern side of the primary fence near the area where Agent Nelson

1 and Murietta were grappling in the road.” *Id.* at ¶ 37. There are only three witnesses to  
2 the incident that took place on June 21, 2011, Agent Diaz, Agent Chad Nelson, and  
3 Murietta. All three were deposed in this action.

4 Agent Diaz has been an agent with the Border Patrol since 2008. Prior to attending  
5 the academy, he worked as a fireman. (Ex. A, Diaz Depo, 11:18-20). At the time of the  
6 Incident, and still today, he is serving in the Army Reserves. (Ex. A, Diaz Depo, 11:5-9).  
7 Other than in training practice, he has never fired his weapon before or after the Incident,  
8 nor has he ever had to draw his service weapon. (Ex. A, Diaz Depo, 11:2-4; 21:7-24).  
9 Agent Diaz has never been disciplined, and other than in this litigation, he has never been  
10 accused of using excessive force. (Ex. A, Diaz Depo, 11:10-13; 22:24-23:7). He was  
11 trained on the appropriate use of force through his attendance at the Border Patrol academy  
12 in 2008, and has received quarterly use of force training from the Agency ever since. (Ex.  
13 A, Diaz Depo, 128:24-129:21). He is trained and aware that any law enforcement officer,  
14 including a Border Patrol agent, can use deadly force only when someone poses an  
15 imminent threat of death or serious bodily injury to the agent or someone else. (Ex. F,  
16 CBP’s Use of Force Policy; Ex. A, Diaz Depo, 128:24-129:21; *Graham v. Connor*, 490  
17 U.S. 386, 395 n.10 (1989)).

18 On June 21, 2011, Agent Diaz started his shift near an area known as Stewart’s  
19 Bridge (or Stewart’s Grate) which is a storm overflow system that flows from Tijuana,  
20 Mexico into the United States through a concrete drainage area. (Ex. A, Diaz Depo, 43:9-  
21 16). The drainage area contains a metal grate which separates the two countries and  
22 constitutes part of the primary border fence. (FAC, ¶ 27). Stewart’s Grate is approximately  
23 1.6 miles west of the San Ysidro Port of Entry. (Ex. G, OIG Report, NOL-82; Villareal  
24 Decl., ¶ 2). Aliens often attempt to illegally cross over the border near Stewart’s Grate  
25 because of its close proximity to the Coral Gates community located just north of the border  
26 on Camino De La Plaza, San Diego. (Ex. B, Nelson Depo, 30:24-31:3; 31:23-32:12).  
27 Several photographs of Stewart’s Grate and the border fence just east of it were used by  
28 Plaintiffs in Agent Diaz’s deposition, and are attached to Defendant’s Notice of Lodgment

1 (“NOL”) as Exhibit I. (Ex. A, Diaz Depo, 30:4-17, 31:13-22; 48:21-49:7; 50:24-51:9).

2         Shortly after he arrived at Stewart’s around 7:00 p.m., Agent Diaz heard metal  
3 clanging coming from the southern grates within the drainage area. Soon thereafter he  
4 observed two aliens hiding in the brush on the U.S. side of the border, after having cut a  
5 hole in the metal grates. (Ex. A, Diaz Depo, 30:18-25; 31:1-22; 33:3-16; 40:10-15). Those  
6 aliens were later determined to be Yañez and Murietta. Due to his experience with this  
7 area being quite dangerous, Agent Diaz radioed for help from Agent Nelson who was the  
8 closest agent in the area. (Ex. A, Diaz Depo, 33:17-34:2; 42:5-8; 44:2-7; Ex. B, Nelson  
9 Depo, 38:8-15; 40:14-18). On the south side of the metal grates, which constitutes Mexico,  
10 there are normally several drug addicts and homeless people hanging around, with needles  
11 all over the area. (Ex. A, Diaz Depo, 41:6-25; 42:1-5). On this particular night, Agent  
12 Diaz noticed that nobody else was there, and from experience he believed that Yañez and  
13 Murietta had kicked everyone out of the drainage area on the Mexican side in order to carry  
14 out their smuggling activities without distraction. (Ex. A, Diaz Depo, 41:6-25; 42:1-5).

15         Immediately after Agent Diaz got out of his patrol vehicle in order to pursue the  
16 subjects, Yañez again crawled through the hole in the metal grates and ran back south into  
17 Mexico. (FAC, ¶ 27, 32; Ex. A, Diaz Depo, 46:16-24; Ex. B, Nelson Depo, 42:25-43:6).  
18 Meanwhile, Murietta stayed in the United States and started climbing a pole in the drainage  
19 area that leads up to a catwalk. (FAC, ¶ 29-31; Ex. A, Diaz Depo, 48:5-23; 49:1-7; Ex. B,  
20 Nelson Depo, 43:7-13; Ex. I, NOL-100-102). Agent Diaz ran to the top of the catwalk in  
21 order to cut him off, while Agent Nelson stayed in the drainage area at the bottom. *Id.*  
22 Both agents were issuing verbal commands in Spanish for Murietta to get down off the  
23 pole. (Ex. A, Diaz Depo, 49:16-25; 50:1-51:9; Ex. B, Nelson Depo, 12:12-14; 49:24-50:3).  
24 Since Agent Diaz prevented Murietta from climbing onto the catwalk above, Murietta slid  
25 back down the pole. (FAC, ¶ 29-31; Ex. A, Diaz Depo, 52:12-53:5; 53:15-54:6; 55:3-25;  
26 Ex. B, Nelson Depo, 50:4-10). While Agent Nelson attempted to apprehend Murietta in  
27 the drainage area, Murietta was resisting, throwing Agent Nelson’s hands off, trying to bite  
28 him, hitting him with his elbow, and pulling Agent Nelson closer to the metal grates. (Ex.

1 B, Nelson Depo, 51:9-14; 51:18-52:19; 56:11-12; 56:17-25; 61:14-16; 61:18-22; 61:25-  
2 62:2; 62:6-7; 62:19-25).

3 At the same time, Yañez reappeared from the south side of the metal grates (located  
4 in Mexico) and began swinging a 3-4 foot wooden table leg with nails at Agent Nelson,  
5 through the slats in the grate adjacent to where Murietta and Nelson were struggling. (Ex.  
6 J; Ex. A, Diaz Depo, 52:12-53:5; 53:15-54:6; 55:3-25; Ex. B, Nelson Depo, 51:23-52:19;  
7 56:18-57:5; 59:6-12; 60:4-7; 60:17-20; 60:21-61:6). In so doing, Yañez effectively  
8 prevented Agent Nelson from apprehending Murietta. *Id.*

9 Due to Yañez's assistance in attempting to hit Agent Nelson with the nail-studded  
10 board, Murietta was able to avoid apprehension and jumped over a wall exiting the drainage  
11 area, running east alongside the primary border fence. (FAC, ¶ 33-34; Ex. A, Diaz Depo,  
12 58:4-17; 59:23-25; 60:1-17; Ex. B, Nelson Depo, 79:14-80:5). The primary border fence  
13 located east of Stewart's Grate was constructed in 1992 and consists of metal corrugated  
14 fencing (from surplus military landing mats), and many of the panels have numbers painted  
15 on them. (Villareal Decl., ¶ 3; Diaz Decl., ¶ 3). As he began to run, Agent Nelson chased  
16 him and yelled at Murietta, in Spanish, to stop and give him his hands. (Ex. B, Nelson  
17 Depo, 80:13-24). Murietta refused to comply, but eventually tripped near Panel 472 of the  
18 corrugated metal border fence. (FAC, ¶ 35; Ex. A, Diaz Depo, 60:14-17; 61:3-6; Ex. B,  
19 Nelson Depo, 82:7-16). When Agent Nelson caught up with him, Murietta threw sewage  
20 dirt in Agent Nelson's eyes, temporarily blinding him. (Ex. B, Nelson Depo, 82:7-83:10;  
21 84:7-8; 84:10-12; 85:3-14; 85:16-19; 86:11-19). Around this time, Agent Diaz radioed for  
22 help and asked dispatch to respond with additional agents to assist, and to move nearby  
23 border cameras in order to capture the Incident. (Ex. A, Diaz Depo, 61:7-62:22). It became  
24 clear to Agents Diaz and Nelson that they were not dealing with the normal alien illegally  
25 entering the country. The level of resistance from Yañez and Murietta was completely  
26 different than the typical encounter with aliens attempting to cross into the United States,  
27 wherein they usually give up easily and comply when faced with Border Patrol agents  
28 attempting to apprehend them. (Ex. A, Diaz Depo, 61:7-62:22; Ex. B, Nelson Depo, 50:11-

1 18). Yañez and Murietta were not responding to typical commands, and their continued  
2 assaults on the officers were not typical of aliens confronted by Border Patrol agents. (Ex.  
3 A, Diaz Depo, 61:7-62:22; Ex. B, Nelson Depo, 65:9-23).

4 After Agent Diaz started running east and caught up to the struggle ensuing between  
5 Agent Nelson and Murietta, he noticed the sewage dirt that Murietta had thrown in Agent  
6 Nelson's face. (Ex. A, Diaz Depo, 61:23-62:24; Ex. B, Nelson Depo, 82:7-83:10; 84:7-8;  
7 84:10-12; 85:3-14; 85:16-19; 86:11-19). As Agent Nelson and Murietta continued to  
8 struggle on the ground in close proximity to the border fence, Agent Diaz also noticed that  
9 Yañez, who had been tracking them east while on the Mexican side, reappeared on the  
10 south side of the corrugated metal border fence near Panel 472. (Ex. A, Diaz Depo, 64:5-  
11 65:25; 76:10-16; FAC, ¶ 37). Yañez began throwing rocks at Agent Nelson while he was  
12 still fighting with Murietta on the ground. (Ex. A, Diaz Depo, 64:5-65:25; 81:23-82:18;  
13 Ex. B, Nelson Depo, 98:4-8; 100:17-101:1; 101:22-102:5; 102:25-103:6; 103:23-25).  
14 Agent Diaz recalls seeing Yañez throw either one rock or two, the size of golf balls or  
15 softballs. (Ex. A, Diaz Depo, 64:5-65:25; 81:23-82:18; 97:21-98:12). Agent Nelson  
16 recalls Yañez throwing two rocks, in two separate motions. (Ex. B, Nelson Depo, 104:1-  
17 6; 105:1-3; 105:9-15; 107:6-10). Agent Diaz was unsure whether the rocks actually hit  
18 Agent Nelson or not as he was running towards them, but thought they could have hit. (Ex.  
19 A, Diaz Depo, 64:5-65:25).

20 Agent Diaz again radioed Border Patrol dispatch to send back-up. (Ex. A, Diaz  
21 Depo, 64:5-65:25; 83:13-16). He then yelled to Yañez in Spanish to get down off the fence,  
22 and Yañez disappeared behind the border fence for a brief time. (Ex. A, Diaz Depo, 64:5-  
23 65:25; 75:24-76:1; Ex. B, Nelson Depo, 121:5-12). But he quickly reappeared, this time  
24 throwing the nail-studded wooden table leg at Agent Nelson, hitting him in the head. (Ex.  
25 A, Diaz Depo, 64:5-65:25; 73:11-25; 106:10-25; 107:1-10; Ex. B, Nelson Depo, 110:2-13;  
26 113:4-13; 113:23-114:24; 115:8-13; 115:16-21; 115:23-116:12; 117:3-5). Fortunately for  
27 Agent Nelson, the wooden leg impacted him with more of a glancing blow, versus an  
28 incapacitating one. (Ex. B, Nelson Depo, 116:5-12; 117:3-5). At that moment, Agent Diaz

1 observed Agent Nelson jolt his head back from the impact of the table leg. (Ex. A, Diaz  
2 Depo, 64:5-65:25; 73:11-25; 107:21-108:11). He saw blood but wasn't sure whether it was  
3 Agent Nelson's blood, or Murietta's. (Ex. A, Diaz Depo, 100:23-101:7). Agent Nelson  
4 continuously yelled for Agent Diaz to help him, but Agent Diaz was unable to due to the  
5 fact he was forced to cover Agent Nelson from the threat of Yañez, who would raise  
6 himself above the tall 8-foot border fence and throw objects at Agent Nelson on the ground.  
7 (Ex. A, Diaz Depo, 64:5-65:25; 73:11-25; Ex. B, Nelson Depo, 117:13-14; 117:16-19;  
8 117:21-23; 118:1-10; 119:4-7; 119:10-20; 119:23-120:2). Agent Nelson was able to get  
9 one handcuff on Murietta, but Murietta was hiding both hands underneath his body, and  
10 continuing to attempt to bite Agent Nelson, so that Agent Nelson could not grab or handcuff  
11 his other hand. (Ex. A, Diaz Depo, 65:13-25; 71:22-72:5; 72:24-25; Ex. B, Nelson Depo,  
12 107:19-23; 108:15-109:10; 109:21-110:13; 120:17-22). As he was trying to bite him,  
13 Murietta advised Agent Nelson that he had AIDS. (Ex. B, Nelson Depo, 127:23-128:8).

14 After seeing the rocks and table leg thrown by Yañez from the south side of the  
15 border fence, and due to Yañez's non-compliance with Agent Diaz's multiple warnings  
16 and commands to cease his assault, Agent Diaz drew his firearm and pointed it at Yañez.  
17 (Ex. A, Diaz Depo, 66:1-5; 108:12-109:7; 109:17-20; 110:7-9). Yañez's eyes lit up upon  
18 seeing the gun, and he retreated back down from the fence. At that point Agent Diaz re-  
19 holstered his firearm. (Ex. A, Diaz Depo, 66:1-5; 108:12-109:7; 109:17-20; 110:7-9).

20 Agent Nelson continued to yell for help, and Agent Diaz got closer and began hitting  
21 Murietta in an attempt to assist Agent Nelson get Murietta under control. (Ex. A, Diaz  
22 Depo, 66:6-67:22; Ex. B, Nelson Depo, 122:25-123:12; 123:14-18). Agent Diaz was well  
23 aware at that point that Agent Nelson was exhausted from struggling with Murietta, that  
24 Agent Nelson's face and eyes were covered in sewage dirt, and that Agent Nelson was  
25 concerned about his safety in relation to both Murietta and the person attacking them from  
26 the other side of the border fence. (Ex. A, Diaz Depo, 88:17-89:23; Ex. B, Nelson Depo,  
27 122:25-123:12; 123:14-18). Agent Diaz was also concerned that Murietta could have easily  
28 grabbed Agent Nelson's firearm during the struggle, or use the second loose handcuff



1 which they were unable to place on Murietta as a weapon. (Ex. A, Diaz Depo, 88:17-  
2 89:23; 90:11-15; 92:2-4; 92:11-19; Ex. B, Nelson Depo, 109:21-110:1). Agent Nelson has  
3 had rocks thrown at him from the south side of the border fence at least 60 times, but he  
4 felt this time was different. (Ex. B, Nelson Depo, 27:7-9; 27:20-28:1; 28:8-10; 50:11-18;  
5 65:9-23). Despite both agents struggling with Murietta, he refused to give up and neither  
6 of the agents were able to handcuff his other hand. (Ex. A, Diaz Depo, 66:6-67:22).

7 The agents were also concerned that if Murietta got away, he could have run  
8 northbound or eastbound farther into the United States, possibly reaching the nearby  
9 community of Coral Gates just north of the border, where he could attack someone there.  
10 (Ex. A, Diaz Depo, 63:12-15; 63:23-64:3; Ex. B, Nelson Depo, 65:9-23; 74:21-75:6; 76:3-  
11 6; 76:10-20). At the same time, Agent Diaz anticipated that Yañez, and possibly other  
12 aliens south of the border, would reappear on the fence and continue to throw objects. (Ex.  
13 A, Diaz Depo, 66:6-67:22). Agent Diaz moved slightly west of the ongoing struggle in  
14 order to watch the border fence, which is at least 8 feet tall. (Ex. A, Diaz Depo, 66:6-  
15 67:22). He was unable to see through the metal fence, and therefore had no idea what  
16 threats would next come from behind the fence. (Ex. A, Diaz Depo, 66:6-67:22).

17 At that point Agent Diaz heard someone climbing the border fence from the south  
18 side and saw Yañez, chest up, looking at Agent Nelson on the ground and cocking his right  
19 hand back to throw something else. (Ex. A, Diaz Depo, 67:23-68:3). The border fence has  
20 grooves or rungs in it, making it easy to climb. (Ex. A, Diaz Depo, 86:3-5; 86:10-17;  
21 86:20-22; 112:23-113:10; 113:13-18). Agent Diaz did not see what was in Yañez's hand  
22 as it was cocked back, but based on the fact Yañez had already reappeared above the fence  
23 three times, and had already thrown one or two rocks and the nail-studded board, Agent  
24 Diaz reasonably assumed it was another rock or similar object. (Ex. A, Diaz Depo, 67:23-  
25 68:3; 102:10-103:3; 141:3-5; 141:7-22). Yañez had already shown himself to pose a  
26 serious threat during the other occasions he climbed the fence and threw objects, he had  
27 obviously refused to heed Agent Diaz's warnings (one of which included a gun pointed his  
28 way), so Agent Diaz had no reason to believe his behavior would change the third time he

1 reappeared. (Ex. A, Diaz Depo, 141:3-5; 141:7-22). Agent Diaz once again drew his  
2 firearm, this time taking the shot and hitting Yañez. (Ex. A, Diaz Depo, 68:4-7). Agent  
3 Diaz was aware of the serious injuries that could result from rocks hitting law enforcement  
4 officers (or anyone), and knew of one Border Patrol agent in particular who was still feeling  
5 the ill effects today from a serious injury caused by a rock he endured years ago. (Ex.  
6 A, Diaz Depo, 132:16-133:1; 133:23-134:3; 134:6-25). Agent Diaz was fearful that Yañez  
7 would kill or cause serious bodily injury to Agent Nelson, and was acting in his defense.  
8 (Ex. A, Diaz Depo, 88:17-89:23; 112:2-9; 112:18-22; 117:18-118:22).

9 Agent Diaz had two other items of border patrol issued equipment on his body the  
10 day of the Incident, OC spray (or pepper spray) and his collapsible baton. (Ex. A, Diaz  
11 Depo, 104:9-21). However, he reasonably believed that neither of those weapons would  
12 have reached Yañez on top of the border fence, or would have been effective or safe in  
13 stopping the threat. (Ex. A, Diaz Depo, 104:9-21; 114:19-115:3; 115:14-24; 116:2-8;  
14 116:18-117:17). Agent Nelson likewise could not get to his OC spray due to the fact  
15 Murietta was fighting him on the ground. (Ex. B, Nelson Depo, 120:23-121:4). Agent  
16 Diaz also reasonably believed merely “backing up” was not feasible in light of the fact  
17 Agent Nelson was stuck on the ground fighting with Murietta, in close proximity to the  
18 border fence, and backing up would have put Agent Nelson in even greater danger from  
19 the continuing threat posed by both Murietta and Yañez. (Ex. A, Diaz Depo, 138:13-17:  
20 138:20-25; 139:1-4).

21 After being shot, Yañez fell back into Mexico but the agents were still concerned  
22 there might be other threats on the south side of the border. Despite having heard a gunshot,  
23 Murietta continued to resist and Agents Diaz and Nelson were still unable to get him fully  
24 handcuffed until other agents appeared on the scene to assist. (Ex. B, Nelson Depo, 123:20-  
25 124:7; 124:10-23; 125:2-23; 126:7-10; 126:12-24). After Murietta was taken into custody,  
26 Agent Nelson was taken to the closest hospital in Coronado for treatment of the injuries he  
27 sustained by both Murietta and Yañez. (Ex. B, Nelson Depo, 126:20-24; 127:23-128:8).

28



1 **B. INVESTIGATIONS OF INCIDENT BY MULTIPLE AGENCIES**

2 This Incident was fully investigated by multiple law enforcement agencies, as is the  
3 case with every incident of lethal force within CBP. (Ex. G, Excerpts from OIG Report;  
4 Ex. A, Diaz Depo, 14:24-15:3; 16:14-15; 17:4-6). In order to avoid any conflicts of  
5 interest, CBP is not allowed to investigate incidents of lethal force relating to its own  
6 agents.<sup>2</sup> (Fisher Decl., ¶ 4). Rather, whatever outside law enforcement agency has  
7 jurisdiction investigates instead. *Id.* In this case, that agency was the San Diego Police  
8 Department (SDPD), who conducted a full investigation and found no wrongdoing by  
9 Agent Diaz. (Ex. H, Excerpt from SDPD Report).<sup>3</sup>

10 The Department of Homeland Security's Office of Inspector General ("OIG")  
11 conducted a full investigation of this Incident as well, as it does with every lethal force  
12 incident. (Ex. G, OIG Report; Castro Decl., ¶ 2). Evidence from the OIG's 627-page  
13 Report of Investigation reveals that investigators reviewed the video and audio recordings  
14 of the Incident captured by the Remote Video Surveillance System (RVSS). (Ex. G, OIG  
15 Report, NOL-84-85, 95; Castro Decl., ¶ 10). While unfortunately the RVSS did not capture  
16 images of Agent Diaz actually firing his service issued weapon, it "captured audio of Diaz  
17 requesting assistance at Stewart's Bridge and reporting that rocks were being thrown at

18 \_\_\_\_\_  
19 <sup>2</sup> This includes Chief Fisher as the Chief of Customs and Border Protection, who did  
20 not receive investigative materials from the multiple agencies who investigate instances of  
21 lethal force by CBP agents. (Fisher Decl., ¶ 4). Nor did Chief Fisher play any role  
22 whatsoever in the discipline of Border Patrol agents using lethal force, as other departments  
23 and agencies determine whether discipline should be issued. (Fisher Decl., ¶ 3). Although  
24 CBP issues a document entitled Critical Incident Investigative Team (CIIT) Report for  
25 every instance involving use of force by an agent, there are no findings made by CBP or  
26 actions taken with respect to CIIT reports - they are mainly just duplicative copies of  
27 SDPD's report (or other agencies' reports) kept for internal purposes. (Fisher Decl., ¶ 4).

28 <sup>3</sup> For purposes of judicial economy, Defendant has not attached all pages of the  
investigations conducted by SDPD, OIG, or any other agency because to do so would be  
too voluminous and repetitive. There were thousands of pages of investigative materials  
produced by the parties in discovery, both from U.S. agencies and Mexican authorities, and  
Plaintiffs are in possession of all of those investigative materials.

1 them.” (Ex. G, OIG Report, NOL-84-85, 95; Castro Decl., ¶ 10). The audio recordings  
2 from the Incident further captured “a voice, in English, yelling for help, corroborating both  
3 statements by Diaz and Nelson that Nelson was yelling for help.” (Ex. G, OIG Report,  
4 NOL-84-85; Castro Decl., ¶ 10). The OIG investigation demonstrates that when additional  
5 Border Patrol agents finally arrived on the scene to assist, “it appeared to [Agent Gerardo  
6 Hernandez] as if the agents were having a hard time placing handcuffs on Ibarra [aka  
7 Murietta].” (Ex. G, OIG Report, NOL-84). During the course of their investigation, the  
8 OIG team conducted a search of Murietta’s past criminal and immigration history and  
9 discovered that Murietta (aka Castaneda, aka “El Colas”), had been apprehended by DHS  
10 on 44 prior occasions, and was the head of an Alien Smuggling Organization which  
11 smuggled undocumented aliens through zones 4, 5 and 6 of the Imperial Beach area of  
12 responsibility (which includes Stewart’s Grate). (Ex. G, OIG Report, NOL-88-91).

13 The FBI also investigates all lethal force cases. Here, the FBI found wrongdoing on  
14 the part of Murietta, not Agent Diaz, and participated in the investigation leading to  
15 Murietta’s prosecution for the assault on Agent Nelson. (Ex. G, OIG Report, NOL-87).  
16 The Office of Professional Responsibility (“OPR”), reporting directly to the Attorney  
17 General, investigated for any misconduct by law enforcement. That Agency found no  
18 wrongdoing by Agent Diaz. (Ex. G, OIG report, NOL-93, Castro Decl., ¶ 8). CBP’s  
19 Disciplinary Review Board reviewed the matter (which included a review of OIG’s entire  
20 627-page Report of Investigation), and concluded that no discipline was warranted because  
21 Agent Diaz’s actions were justified. (Ex. G, OIG report, NOL-94; Castro Decl., ¶ 9).

22 And finally, the U.S. Department of Justice’s Civil Rights Division investigates for  
23 criminal violations by agents, and concluded there was a lack of any evidence to suggest a  
24 crime was committed by Agent Diaz. (Ex. G, OIG Report, NOL-80).

25 **C. MURIETTA’S SUBSEQUENT PROSECUTION FOR ASSAULT**  
26 **ON A FEDERAL OFFICER (AGENT NELSON) AND ILLEGAL ENTRY**

27 After Murietta was finally handcuffed by multiple agents and taken into custody on  
28 June 21, 2011, he was prosecuted for his assault on Agent Nelson as well as his illegal

1 entry into the United States. During his criminal case, Murietta pled guilty to both counts  
2 and was sentenced by the Honorable William Q. Hayes to 87 months in prison, where he  
3 continues to serve his sentence today. *See United States v. Martin Ortiz-Castaneda* (aka  
4 Jose Silvino Ibarra Murietta), Case No. 11-CR-2653-WQH (S.D. Cal. June 24, 2011). *See*  
5 *also* Ex. K, Transcript from Plea Hearing dated August 9, 2011 (“Plea Hrg”); Ex. L,  
6 Sentencing Hearing dated June 5, 2012 (“Sentencing”); and Ex. M, Judgment in a Criminal  
7 Case dated June 12, 2012. Defendants request that the Court take judicial notice of the  
8 public records contained within Murietta’s criminal case. (*See* Req. for Judicial Notice).

9 In the course of Murietta’s indictment and prosecution related to this Incident,  
10 counsel and the Court learned that Murietta had illegally entered this country and been  
11 apprehended by DHS on 44 prior occasions. (Ex. L, Sentencing, p. 11). With respect to  
12 the last of those illegal entries on March 15, 2008, Murietta pled guilty to assaulting another  
13 federal agent in almost the identical manner in which he assaulted Agent Nelson.  
14 Specifically, in 2008, Murietta was indicted for (and pled guilty to) the following acts: (a)  
15 smuggling aliens into this country for private financial gain, and (b) assaulting a federal  
16 officer (Border Patrol Agent Officer J. Griffin) by kicking him, elbowing him, biting him  
17 on the bicep, throwing rocks at him, and threatening to strike him with another softball-  
18 sized rock thereafter. (Ex. N, Indictment dated April 15, 2008; Ex. O, Judgment In a  
19 Criminal Case dated November 4, 2008). Murietta was sentenced to 36 months in custody  
20 and was released and deported back to Mexico just a few short months before assaulting  
21 Agent Nelson in June of 2011. (Ex. K, Plea Hrg, p. 11).

22 At the Sentencing Hearing related to Murietta’s assault on Agent Nelson, Judge  
23 Hayes noted the following facts, admitted to by Murietta through his guilty plea:

- 24 • Ibarra (aka Murietta) did not follow Agent Nelson’s commands to stop
- 25 • Ibarra (aka Murietta) attempted to bite Agent Nelson four or five times
- 26 • Quinones (aka Yañez) was on the Mexican side yielding [sic] a long wooden board  
27 that was studded with nails, and attempted to hit the victim agent seven to eight times  
28 with the board, and the struggle continued - eventually the agent let go of Ibarra (aka  
Murietta) and backed away to avoid being hit from the board

- 1 • as the agent approached the defendant to again restrain him, Ibarra grabbed a handful  
2 of sewage dirt, threw it in the victim agent's face, the victim immediately felt pain  
3 in his eyes, was unable to see, causing him to be surprised and disoriented
- 4 • Quinones (aka Yañez) threw rocks at the agent
- 5 • Ibarra continued to struggle and tried to kick the victim agent off of him
- 6 • the agent did end up, in addition to the dirt in his face, with a swollen right elbow  
7 and cut on top of his left hand between two fingers - the agent was also concerned  
8 that his hands were covered with the defendant's blood

9 (Ex. L, Sentencing, p. 7-8; Ex. K, Plea Hrg, p. 10-12). Judge Hayes further noted that “the  
10 nature and circumstances of the offense, it can only in my view be fairly described as  
11 aggravated.” (Ex. L, Sentencing, p. 8). He noted that the assault on Agent Nelson was  
12 prolonged, Murietta had a significant prior criminal record (as well as a number of  
13 immigration-related convictions starting as early as 2001), and Judge Hayes detailed the  
14 various convictions, assaults and illegal entries committed by Murietta prior to his attack  
15 on Agent Nelson (including a conviction for false statement to a federal officer). *Id.* at p.  
16 9. Judge Hayes found that Murietta's actions in the 2008 assault on Agent Griffin were  
17 “strikingly similar to the assault on Agent Nelson,” in that in the prior circumstance,  
18 Murietta “grabbed the handcuffs the officer tried to use and prevented them from being  
19 used,” he “bit the agent in the bicep,” he “continued to violently resist arrest,” and during  
20 the struggle while his blood transferred with the agent's blood, he said he “had a life  
21 threatening borne disease.” *Id.* at p. 9-10. Lastly, Judge Hayes noted that “Murietta had  
22 not been deterred at all from his prior offenses and convictions, they had absolutely no  
23 impact or deterred him in any way, but rather that his offenses continued to increase in  
24 severity since 2001.” *Id.* at p. 10-12. “The need to protect the public from further crimes  
25 of the defendant I think is significant in this case . . . he went to great lengths with respect  
26 to the '08 case and great lengths in this case to avoid being apprehended . . . I have no  
27 reason to think that he wouldn't take the same measures or extreme measures if he was  
28 able to should he be apprehended again.” *Id.* at p. 11. Based on the aggravated facts  
relating to Murietta's assault on Agent Nelson, Judge Hayes sentenced him to 87 months  
in prison where he continues to reside today. *Id.* at p. 10).

1 **D. BOTH YAÑEZ AND MURIETTA WERE ON METHAMPHETAMINE**

2 Evidence in this case has revealed that at the time of the Incident, both Yañez and  
 3 Murietta had methamphetamine in their system. Yañez’s autopsy conducted in Mexico  
 4 (which was produced by Plaintiffs in the discovery phase) demonstrates that blood and  
 5 urine samples were collected and submitted for toxicological analysis, and revealed the  
 6 presence of methamphetamine. (Ex. P, Toxicology Report produced by Plaintiffs, with  
 7 English translation; Ex. G, OIG Report, NOL-84-85). Records from the OIG further reveal  
 8 that Murietta “admitted that he had used a small amount of Methamphetamine the day  
 9 before the incident.” (Ex. G, OIG Report, NOL-83, 87; Castro Decl., ¶ 3). Murietta also  
 10 admitted in his sworn deposition to consuming approximately 7 beers, within 5 or 6 hours  
 11 of crawling through the hole from Mexico. (Ex. E, Kalish Depo, 105:8-16; 106:2-18).

12 As defense expert psychiatrist Mark Kalish, M.D. has testified, methamphetamine  
 13 likely made Yañez and Murietta more aggressive during the encounter, and less responsive  
 14 to the commands of the agents. (Ex. E, Kalish Depo, 60:25-61:15; 93:14-94:14; 94:24-  
 15 95:6; 99:1-19; 103:3-18; Ex. D, Kalish CV). The psychological effects of  
 16 methamphetamine also include paranoia, suspiciousness, and even psychotic behaviors.  
 17 *Id.* Furthermore, according to Dr. Kalish, the 7 beers that Murietta consumed just prior to  
 18 the Incident only further exacerbated the problem as alcohol would have also caused him  
 19 to be disinhibited, more aggressive, and less responsive to the commands of the agents.  
 20 (Ex. E, Kalish Depo, 107:1-3; 110:24-111:8).

21 **E. PLAINTIFFS’ ADMISSIONS THAT YAÑEZ DIED**  
 22 **IN MEXICO, AND THAT THEY HAVE NO**  
 23 **SUBSTANTIAL CONNECTIONS TO THE UNITED STATES**

24 On August 10, 2011, Plaintiffs’ counsel submitted an Administrative Claim to CBP  
 25 on behalf of Plaintiffs. (Ex. Q, Admin Claim; Flood Decl., ¶ 2-3). The Claimant certified  
 26 **while in his home country of Mexico.”** *Id.* Also attached to Plaintiffs’ Administrative  
 27 Claim were the birth certificates of Maria Del Socorro Quintero Perez and her children,  
 28 Brianda Aracely Yañez Quintero, Camelia Itzayana Yañez Quintero, and J.Y., a minor,

1 verifying that Plaintiffs were all Mexican citizens born in Mexico. *Id.*

2 In her sworn deposition, Plaintiff Maria Del Socorro Quintero Perez testified that  
3 she has no knowledge that her husband Yañez had ever entered or visited the United States.  
4 (Ex. C, Quintero Depo, 63:1-20). She further testified that neither herself, nor any of the  
5 three Plaintiff children, have ever entered the United States. (Ex. C, Quintero Depo, 63:1-  
6 20). Therefore, based on this testimony, it is undisputed that none of the Plaintiffs have  
7 any significant voluntary connections with the United States.

8 At the time he shot Yañez, there was no question in Agent Diaz's mind that this  
9 individual was not an American citizen. (Diaz Decl., ¶ 10) He was well aware that Yañez  
10 and Murietta had crawled through the hole in Stewart's Grate and came from Mexico, that  
11 Yañez had illegally entered the United States for a few minutes prior to returning through  
12 the hole to Mexico, and that under the circumstances there would be no reason to believe  
13 that Yañez had any voluntary or substantial connections to this country. (Diaz Decl., ¶ 10).

14 **F. EVIDENCE REGARDING LOCATION OF YAÑEZ'S DEATH**  
15 **SOUTH OF THE U.S./MEXICO PRIMARY BORDER FENCE**

16 In an attempt to show Yañez somehow had significant voluntary connections with  
17 the United States, it is anticipated that Plaintiffs will argue that at certain locations along  
18 the border, CBP's primary border fence is built a few inches north of the international  
19 boundary line and therefore, part of Yañez's body may have been located in the United  
20 States when he was shot. That argument fails because an alien's temporary presence in the  
21 United States illegally for a few minutes, and south of the primary border fence, does not  
22 constitute "significant voluntary connections" with this country by any means. And  
23 although it is true that Panel 472 was built inches north of the border line, Agent Diaz did  
24 not know that fact, and Border Patrol agents treat the primary border fence in that area as  
25 the actual border.

26 According to a border survey conducted by Reese Water & Land Surveying Services  
27 in 2013, two international monuments exist on either side of where Yañez was shot, and  
28



1 those monuments are three miles apart. (Ex. R, Reese Decl. and Reese Report, p. 1).<sup>4</sup> Mr.  
2 Reese used those two monuments, as well as sophisticated equipment, to determine exactly  
3 where the international border lies in relation to Yañez's body. According to the survey,  
4 Yañez's legs landed on U.S. soil when he died, and his upper body landed on Mexican soil.  
5 *Id.* More specifically, the international border line lies exactly 1 foot, 9 inches south of the  
6 border fence at Panel 472, and Yañez's legs landed in that 1'9" zone. *Id.*

7 But regardless of whether Yañez was standing in a tree south of the border fence (as  
8 Plaintiffs claim in their FAC, ¶¶ 37-38, 44, 51), or whether he had climbed the primary  
9 border fence next to it, Agent Diaz had no awareness that the international border line  
10 actually runs 1'9" south of the primary fence in that particular area. Agent Diaz did not  
11 have the benefit of Mr. Reese's border survey conducted over two years after the Incident.  
12 Agent Diaz, as well as other San Diego Sector agents, believe that the primary border fence  
13 in the area near Stewart's Grate constitutes the international border between the United  
14 States and Mexico because there is no actual line on the ground delineating where the  
15 border lies. (Villareal Decl., ¶¶ 4-5; Diaz Decl., ¶ 4-5). Since agents cannot see through  
16 the metal corrugated fencing which stands approximately 8-feet tall, there is no way for  
17 them to know where the border line lies at any given point on the south side. (Villareal  
18 Decl., ¶¶ 4-5; Diaz Decl., ¶ 4-5). For these reasons, Agent Diaz (and other agents) have  
19 always assumed that the primary border fence near Panel 472 east of Stewart's Grate is the  
20 actual border. (Villareal Decl., ¶¶ 4-5, 7; Diaz Decl., ¶ 4-5). He has never jumped over  
21 the primary border fence, he has never considered jumping over the fence, and he considers  
22 the south side of the metal corrugated fence to constitute Mexican territory. (Diaz Decl., ¶  
23 5). Based on the frequency within which Mexican nationals throw rocks and other objects

24 \_\_\_\_\_  
25 <sup>4</sup> This survey was conducted in relation to the companion *Nino* case pending before  
26 this court, wherein Yañez's girlfriend and children have sued the United States under the  
27 FTCA for Agent Diaz's actions. *See Nino v. United States*, No. 13-469 (S.D. Cal. 2013).  
28 Defendants have requested that the Court take judicial notice of Mr. Reese's survey and  
findings therein pursuant to Federal Rule of Evidence 201. (*See Request for Judicial  
Notice*).

1 at Border Patrol agents in that area, Agent Diaz (and other agents) believe it would be  
2 incredibly dangerous to climb over the fence and travel to the south side, especially while  
3 on duty. (Villareal Decl., ¶¶ 4-7; Diaz Decl., ¶ 5). In doing so, they would be at risk for  
4 physical attacks and rockings by Mexican citizens on the south side, with no back up or  
5 assistance from colleagues in the United States. (Villareal Decl., ¶ 7; Diaz Decl., ¶ 5).

6 Furthermore, it is illegal under Mexican law for any U.S. citizen, including Border  
7 Patrol agents, to enter Mexico with a firearm. (See Title III, Chapter III, Article 55 of the  
8 Federal Law of Firearms and Explosives; Villareal Decl., ¶ 6; Diaz Decl., ¶ 6). For this  
9 additional reason, agents (including Agent Diaz) do not travel to, or perform any official  
10 duties, south of Panel 472. (Villareal Decl., ¶¶ 4-7; Diaz Decl., ¶ 4-6).

### 11 III.

#### 12 LEGAL STANDARD ON SUMMARY JUDGMENT

13 A motion for summary judgment may be granted when the moving party  
14 demonstrates there is no genuine issue as to any material fact, and the moving party is  
15 entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477  
16 U.S. 317, 325 (1986). A defendant may carry his burden on summary judgment either by  
17 offering evidence to negate an essential element of plaintiffs' claim, or by simply pointing  
18 out that the plaintiffs' evidence is insufficient to establish an essential element of their  
19 claim. *Celotex*, 477 U.S. at 323-24, 331. Once the defendant carries his burden, the burden  
20 shifts to the plaintiff to produce evidentiary materials demonstrating the existence of a  
21 genuine issue of material fact. *Celotex*, 477 U.S. at 324; *Coverdell v. Dep't of Soc. &*  
22 *Health Services*, 834 F.2d 758, 769 (9th Cir. 1987). A plaintiff may carry his or her burden  
23 to show a genuine issue of material fact only by offering "significant probative evidence  
24 tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249  
25 (1986). "A mere scintilla of evidence will not do . . . ." *British Airways Bd. v. Boeing Co.*,  
26 585 F.2d 946, 952 (9th Cir. 1978).



## IV.

**YAÑEZ'S WIFE AND CHILDREN HAVE NO STANDING TO SUE UNDER THE FOURTH AMENDMENT BECAUSE THEY WERE NOT SUBJECT TO SEARCH OR SEIZURE**

Since the only surviving cause of action in this lawsuit is a Fourth Amendment excessive force claim, the only plaintiff that can attempt to bring it is Yañez's Estate. Yet, Yañez's wife and children have improperly alleged their own individual claims under the Fourth Amendment. (FAC, ¶¶ 1-4). The Fourth Amendment protects the "right of the people" to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *See* U.S. Const. Amend. IV. The named plaintiff in an excessive force claim under the Fourth Amendment is limited to the party who was the subject of the alleged excessive force, or his/her Estate. "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998) (*quoting Alderman v. United States*, 394 U.S. 165, 174 (1969)); *see also Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (it is proper to permit only [parties] whose Fourth Amendment rights have been violated to benefit from the rule's protections). The Fourth Amendment protects against the unreasonable seizure of a "person," not the person's family who were not even present during the Incident in question. *See* U.S. Const. Amend. IV; *Graham*, 490 U.S. at 395 n.10 ("A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen,'" *quoting Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

Here, Yañez's wife and children were never seized by Agent Diaz nor have they ever met this federal agent. They were not present at the scene of his death, and they were not subject to any physical force or show of authority by any federal agents. Accordingly, they cannot assert any individual rights under the Fourth Amendment. For this very basic reason, summary judgment must be granted in favor of Defendants with respect to any individual claims brought by Maria Del Socorro Quintero Perez, Brianda Aracely Yañez Quintero, Camelia Itzayana Yañez Quintero, and J.Y.

V.

**AGENT DIAZ IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE NONE OF THE PLAINTIFFS HAD SUBSTANTIAL CONNECTIONS TO THE UNITED STATES**

**A. THE TWO-PART QUALIFIED IMMUNITY ANALYSIS**

The defense of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A court will grant a government actor qualified immunity if the actor's conduct satisfies either prong of the two-step test for qualified immunity outlined by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity will protect a government actor if (a) his or her conduct does not violate a federal constitutional right, or (b) the constitutional right was not clearly established on the date of the alleged violation. *Id.* This two-step sequence can be taken in any order at the discretion of the court. *Pearson v. Callahan*, 555 U.S. 223, 241 (2009).

**B. QUALIFIED IMMUNITY APPLIES BECAUSE YAÑEZ'S WIFE AND CHILDREN HAVE NO FOURTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION**

As explained in Section IV above, Yañez's wife and children have no standing to assert individual rights under the Fourth Amendment because they were not subjected to excessive force by federal agents. But in addition to that ground for summary judgment, Yañez's wife and children have no Fourth Amendment rights under the U.S. Constitution in any event because they have no substantial connections with the United States as required by Supreme Court law.

**1. The Supreme Court's Decision in *Verdugo-Urquidez***

The Supreme Court has a long history of denying constitutional rights to aliens abroad who attempt to sue civilly in the United States. *See*, for example, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (denying Fifth Amendment rights to aliens outside the U.S.). But protection under the Fourth Amendment has been specifically, and unequivocally, denied by the Supreme Court in *Verdugo-Urquidez*, 494 U.S. at 259.

1 In *Verdugo-Urquidez*, the plaintiff was a suspected drug smuggler who was detained  
2 in San Diego for three days while DEA agents searched his residences in Mexicali and San  
3 Felipe for narcotics. *Id.* at 262. *Verdugo-Urquidez* argued the search was unlawful since  
4 no warrant was secured, and therefore the evidence seized should be suppressed under the  
5 Fourth Amendment. The district court granted his motion to suppress due to the fact the  
6 government had failed to secure a warrant for the search. *Id.* at 263. A divided panel of the  
7 Court of Appeals for the Ninth Circuit affirmed. *Id.*

8 The Supreme Court reversed, holding that “aliens receive constitutional protections  
9 when they have come within the territory of the United States and developed substantial  
10 connections with the country,” finding that *Verdugo-Urquidez* “had no previous significant  
11 voluntary connection.” *Id.* at 271 (emphasis added). The Court’s opinion explained:

12 . . . even though the search took place in Mexico, it is nonetheless governed by  
13 the requirements of the Fourth Amendment because respondent was “lawfully  
14 present in the United States . . . even though he was brought and held here  
15 against his will.” *Post*, at 279. But this sort of presence -- lawful but involuntary  
16 -- is not of the sort to indicate any substantial connection with our country. The  
17 extent to which respondent might claim the protection of the Fourth  
18 Amendment if the duration of his stay in the United States were to be prolonged  
19 -- by a prison sentence, for example -- we need not decide. When the search of  
20 his house in Mexico took place, he had been present in the United States for  
21 only a matter of days. We do not think the applicability of the Fourth  
22 Amendment to the search of premises in Mexico should turn on the fortuitous  
23 circumstance of whether the custodian of its nonresident alien owner had or  
24 had not transported him to the United States at the time the search was made.

19 *Id.* at 271-72. In coming to its conclusion, the Court clarified that the Fourth Amendment’s  
20 definition of “the People,” as defined in the Preamble to the United States Constitution,  
21 means “the People of the United States,” and refers “to a class of persons who are a part of  
22 a national community or who have otherwise developed sufficient connection with this  
23 country to be considered part of that community.” *Id.* at 265. “The distinction between  
24 citizens and aliens follows from the undoubted proposition that the Constitution does not  
25 create, nor do general principles of law create, any juridical relation between our country  
26 and some undefined, limitless class of noncitizens who are beyond our territory.” *Id.* at 275  
27 (Kennedy, J., concurring).

28

1 The Court expressed concern over situations in which American interests were  
2 threatened by aliens abroad, and that in those circumstances government agents must be  
3 allowed to respond with force without restrictions on searches and seizures:

4 Some who violate our laws may live outside our borders under a regime quite  
5 different from that which obtains in this country. Situations threatening to  
6 important American interests may arise halfway around the globe, situations  
7 which in the view of the political branches of our Government require an  
8 American response with armed force. If there are to be restrictions on searches  
and seizures which occur incident to such American action, they must be  
imposed by the political branches through diplomatic understanding, treaty, or  
legislation.

9 *Id.* at 275. The Court therefore developed its “significant voluntary connections” test for  
10 constitutional protection afforded to aliens, elaborating on its earlier language in  
11 *Eisentrager* that an alien “is accorded a generous and ascending scale of rights as he  
12 increases his identity with our society.” *Verdugo-Urquidez*, 494 U.S. at 269.

13 Since the Supreme Court decided *Verdugo-Urquidez*, courts have consistently  
14 recognized that *Verdugo-Urquidez* governs the extraterritorial application of the Fourth  
15 Amendment, and courts have consistently applied the significant voluntary connections  
16 test. *See Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (holding Mexican  
17 national shot by Border Patrol agent south of the border was not entitled to Fourth  
18 Amendment protection because he had no substantial connections), cert. granted, 137 S.  
19 Ct. 291 (2016); *United States v. Barona*, 56 F.3d 1087, 1093-94 (9th Cir. 1995) (explaining  
20 that “with regard to foreign searches involving aliens with ‘no voluntary connection’ to the  
21 United States, the Fourth Amendment is simply inapplicable”); *United States v. Meza-*  
22 *Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (“*Verdugo-Urquidez* governs the  
23 applicability of the Fourth Amendment to noncitizens”), petition for cert. pending, No. 15-  
24 7017 (filed Nov. 16, 2015); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir.  
25 2009), cert. denied, 558 U.S. 1099 (2009) (holding that the Fourth Amendment does not  
26 protect a Bahamian citizen with no substantial connections to the United States).

1           **2. The Fifth Circuit’s Decision in *Hernandez v. Mesa***

2           The Fifth Circuit recently followed *Verdugo-Urquidez* in denying Fourth  
3 Amendment protection to a Mexican national shot by a Border Patrol agent in a case  
4 strikingly similar to the present case. *Hernandez*, 785 F.3d 117. In *Hernandez*, a Border  
5 Patrol agent standing in the United States shot and killed Sergio Hernandez, a Mexican  
6 citizen who was just across the border in Mexico, during an incident where Hernandez and  
7 his cohorts were throwing rocks at the agent. Hernandez’s parents sued the individual  
8 agents under the Fourth and Fifth Amendments, and sued the United States under the  
9 FTCA. Their counsel, the same counsel handling the present case on behalf of Yañez,  
10 argued that the Border Patrol agent supplied the necessary “connections” under *Verdugo-*  
11 *Urquidez* because he was standing on U.S. soil when he fired his shots. *Hernandez v.*  
12 *United States*, 802 F.Supp.2d 834, 842 (W.D. Tex. 2011). The district court rejected that  
13 argument holding that the location of the agent does not equate to a “voluntary connection  
14 to this country” on the part of the alien. (Memorandum Opinion and Order at 7, *Hernandez*  
15 *v. Mesa*, Case No. 3:11cv00331-DB (W.D. Tex. Feb. 17, 2012)). The court ruled the  
16 Border Patrol agent was subject to qualified immunity on Plaintiffs’ Fourth Amendment  
17 claim based on the fact Hernandez had no substantial connections to the United States, as  
18 required under the Supreme Court’s test in *Verdugo-Urquidez*.<sup>5</sup> *Id.*

19           On appeal, the Fifth Circuit en banc panel was unanimous in upholding application  
20 of qualified immunity, explaining that Hernandez had no significant voluntary connections  
21 to the United States and therefore his Fourth Amendment claim must be dismissed under  
22  
23

24 \_\_\_\_\_  
25           <sup>5</sup> The district court also dismissed the Fifth Amendment claims since, as the Court in  
26 the present case also found, excessive force claims must be brought under the Fourth  
27 Amendment. *Graham*, 490 U.S. at 395. The district court further dismissed Plaintiffs’  
28 FTCA claims against the United States based on the foreign country exception. *Hernandez*,  
757 F.3d 249, 256 (5th Cir. 2014).

1 *Verdugo-Urquidez. Hernandez*, 785 F.3d at 120.<sup>6</sup> Plaintiffs sought review of the Fifth  
 2 Circuit's decision in *Hernandez* in the Supreme Court, and the Court heard oral argument  
 3 on February 21, 2017. The Supreme Court has not yet rendered its decision.

4 As in *Verdugo-Urquidez* and *Hernandez*, neither Maria Del Socorro Quintero Perez,  
 5 Brianda Aracely Yañez Quintero, Camelia Itzayana Yañez Quintero, or J.Y. have  
 6 demonstrated any personal connections to the United States. They do not claim United  
 7 States citizenship, or that they have ever resided, worked or attended school in the United  
 8 States. They do not claim to conduct business or to own any property in the United States.  
 9 Quite the contrary, their sworn deposition testimony admits they have never even set foot  
 10 in this country. (Ex. C, Quintero Depo, 63:1-20). Therefore, Agent Diaz is entitled to  
 11 qualified immunity with respect to any individual claims brought by Yañez's wife and  
 12 children as the complete absence of any substantial connections to the United States  
 13 precludes their protection under the Fourth Amendment.

14 **C. QUALIFIED IMMUNITY APPLIES BECAUSE THE LAW**  
 15 **WAS NOT CLEARLY ESTABLISHED THAT YAÑEZ HAD A**  
 16 **FOURTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION**

17 Just like his wife and children, Yañez himself had no significant voluntary  
 18 connections to the United States at the time he illegally entered this country for a couple  
 19 of minutes, then ran back into Mexico, assaulting federal agents the entire time. According  
 20 to his wife's sworn testimony, Yañez had never been to the United States. (Ex. C, Quintero  
 21 Depo, 63:1-20). It is undisputed that Yañez was a Mexican citizen with no relatives here,  
 22 no business here, and no legal entry into this country. Therefore, he had no substantial  
 23 connections to the United States.

24 Despite Yañez's clear lack of connections to the United States, Defendants anticipate  
 25 Plaintiffs will argue Yañez should acquire constitutional protection because during a brief  
 26 portion of his encounter with the agents, he may have been physically located on the few

27 <sup>6</sup> The Court further applied the qualified immunity doctrine to Plaintiffs' Fifth  
 28 Amendment claims on the grounds the law was not clearly established at the time such that  
 it warned the agent that his conduct violated the Fifth Amendment. *Id.*



1 inches of U.S. soil which exists south of Panel 472. But even if he was located there,  
2 qualified immunity should still apply because the law was not clearly established at the  
3 time of this shooting that Yañez was entitled to Fourth Amendment protection while on a  
4 strip of land less than two feet wide south of the primary border fence -- an area which  
5 everyone, Mexican and American, believed to be Mexican territory. (FAC, ¶ 32, Ex. Q;  
6 Villareal Decl., ¶¶ 4-7; Diaz Decl., ¶ 4-6).

7 A central purpose of qualified immunity is to ensure that officers are given “fair and  
8 clear warning of what the Constitution requires” and are not held liable for failing to  
9 anticipate evolving constitutional principles. *See City and Cnty. of San Francisco v.*  
10 *Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 746  
11 (2011)). “We have repeatedly told courts – and the Ninth Circuit in particular – not to  
12 define clearly established law at a high level of generality.” *Id.*; *See also Taylor v. Barkes*,  
13 135 S. Ct. 2042, 2044 (2015). The right must be “established, not as a broad general  
14 proposition, but in a particularized sense so that the contours of the right are clear” in regard  
15 to the actual circumstances faced by the officer at the time. *Reichle v. Howards*, 566 U.S.  
16 658, 665 (2012). A right is clearly established only where “it would be clear to a reasonable  
17 officer that his conduct was unlawful in the situation he confronted.” *Brosseau v. Haugen*,  
18 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 202).

19 Just two months ago, the Supreme Court once again underscored the necessity of  
20 parallel factual precedent by stressing that relevant case law for qualified immunity  
21 purposes must be particularized to the facts of the case at hand:

22 In the last five years, this Court has issued a number of opinions reversing  
23 federal courts in qualified immunity cases. (Citations omitted). The Court  
24 has found this necessary both because qualified immunity is important to  
25 “society as a whole,” *ibid.*, and because as “an immunity from suit,” qualified  
26 immunity “is effectively lost if a case is erroneously permitted to go to trial.”  
27 (Citations omitted). Today, it is again necessary to reiterate the longstanding  
28 principle that “clearly established law” should not be defined “at a high level  
of generality.” (Citations omitted). As this Court explained decades ago, the  
clearly established law must be “particularized” to the facts of the case.  
(Citations omitted). Otherwise, “[p]laintiffs would be able to convert the rule  
of qualified immunity . . . into a rule of virtually unqualified liability simply  
by alleging violation of extremely abstract rights.” (Citation omitted).

1 *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017). *See also Plumhoff v. Rickard*, 134 S. Ct.  
2 2012, 2023 (2014); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (“Such specificity is especially  
3 important in the Fourth Amendment context, where the Court has recognized that “[i]t is  
4 sometimes difficult for an officer to determine how the relevant legal doctrine, here  
5 excessive force, will apply to the factual situation the officer confronts.”). *Id.* at 308,  
6 quoting *Saucier*, 533 U.S. at 205.

7 The Ninth Circuit has also recently confirmed that for qualified immunity purposes,  
8 prior precedent must be particularized to the same factual pattern. *See Thomas v. Dillard*,  
9 818 F.3d 864, 886 (9th Cir. 2016) (the right must be clearly established in “the specific  
10 context of the case” at the time of the events in question); *Mattos v. Agarano*, 661 F.3d  
11 443, 440 (9th Cir. 2011) (en banc); *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008)  
12 (“[T]here must be some parallel or comparable factual pattern to alert an officer that a  
13 series of actions would violate an existing constitutional right”).

14 The ultimate burden rests on the Plaintiffs to plead and prove a clearly established  
15 constitutional claim. *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011); *Clairmont v.*  
16 *Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011). In assessing an officer’s  
17 entitlement to qualified immunity, all reasonable doubt concerning the scope of the law is  
18 resolved in favor of the defendant. “[E]xisting precedent must have placed the ...  
19 constitutional question beyond debate.” *Reichle*, 566 U.S. at 664 (quoting *al-Kidd*, 563  
20 U.S. at 741). “This exacting standard ‘gives government officials breathing room to make  
21 reasonable but mistaken judgments’ by ‘protect[ing] all but the plainly incompetent or  
22 those who knowingly violate the law.’” *Sheehan*, 135 S. Ct. at 1774 (quoting *al-Kidd*, 563  
23 U.S. at 743); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) (“If officers of reasonable  
24 competence could disagree on [the] issue, immunity should be recognized”); *Estate of Ford*  
25 *v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002) (the immunity inquiry  
26 acknowledges that reasonable mistakes can be made by officials).

27 Plaintiffs will be unable to cite any case which constitutes a “parallel factual  
28 precedent” to Agent Diaz’s scenario, or any existing precedent which “placed this



1 constitutional question beyond debate.” *Mullenix*, 136 S. Ct. at 309-10; *Reichle*, 566 U.S.  
2 at 664 (*quoting al-Kidd*, 563 U.S. at 741). When this shooting occurred, no case law  
3 reasonably warned Agent Diaz that the prohibition on excessive force applied to an alien  
4 attacking him and his partner from the south side of Panel 472, which both Mexicans and  
5 Americans considered to be Mexican territory. (FAC, ¶ 32, Ex. Q, Admin Claim; Villareal  
6 Decl., ¶¶ 4-7; Diaz Decl., ¶ 4-6). Agent Diaz believed it to be illegal for him to jump the  
7 fence in that area, and he reasonably believed he could not scale over the fence, enter the  
8 south side, and attempt to apprehend Yañez. (Diaz Decl., ¶ 6). Yañez’s conduct spanned  
9 the course of several minutes starting with his attack with the nail-studded board from the  
10 south side of Stewart’s Grate (an area undisputedly within Mexican territory), and  
11 continuing south of Panel 472 where he attacked the agents with the same board in addition  
12 to rocks. Agent Diaz had no idea at the time that Yañez may have been physically located  
13 on a few inches of U.S. soil south of the fence, as he (and other agents) reasonably believed  
14 the fence itself was the border, without the benefit of any border surveys. (Diaz Decl., ¶  
15 4-6; Villareal Decl., ¶¶ 4-7). Based on the complete uncertainty of where Yañez was  
16 located while throwing each object at the agents from south of the border, as well as the  
17 uncertainty of whether he was on Mexican or U.S. soil when shot, the law was not clearly  
18 established that Yañez was “within the sovereign territory of the United States” such that  
19 he should be entitled to Fourth Amendment protection. And, even to the extent Yañez may  
20 have been located on a few inches of U.S. soil south of Panel 472, that fact alone does not  
21 provide him with substantial connections to the United States. It was not clearly  
22 established in 2011 that an alien who lacked such a connection and who had only a fleeting,  
23 unlawful presence a few inches inside the border and south of the border fence was entitled  
24 to Fourth Amendment protection.

25 It is Plaintiffs’ burden to prove the law was clearly established for Agent Diaz in  
26 June 2011, not his. *Alston*, 663 F.3d at 1098. They will be unable to do so as the facts here  
27 present a case of first impression. For these reasons, Agent Diaz is entitled to qualified  
28 immunity as to the Fourth Amendment claim brought by Yañez’s Estate, as the law was

1 not clearly established in June 2011 that the agents' assailant from south of the  
2 U.S./Mexico border fence should be covered under our Constitution.

3 **D. THE FEW CASES WHICH HAVE RECOGNIZED CONSTITUTIONAL**  
4 **RIGHTS ON BEHALF OF ALIENS ARE DISTINGUISHABLE**

5 Based on Plaintiffs' counsel's briefing in the *Hernandez* case, Defendants anticipate  
6 Plaintiffs will rely on a few cases wherein courts have recognized the constitutional rights  
7 of aliens abroad. However, those cases are completely distinguishable because they either  
8 do not involve the Fourth Amendment, or the courts there found the requisite connections  
9 under *Verdugo-Urquidez* that are completely lacking here.

10 **1. *Boumediene v. Bush***

11 In *Boumediene v. Bush*, 553 U.S. 723 (2008), aliens designated as enemy combatants  
12 and detained at the United States Naval Station at Guantanamo Bay sued the federal  
13 government arguing they had a constitutional privilege of habeas corpus, a privilege not to  
14 be denied except in conformance with the Suspension Clause of the U.S. Constitution, Art.  
15 I, § 9, cl. 2. Although Guantanamo Bay was located in Cuba and in territory over which  
16 the United States did not have de jure sovereignty, Supreme Court upheld the right of  
17 habeas corpus in that case due to the fact "the United States has maintained complete and  
18 uninterrupted control of the bay for over 100 years," and in "every practical sense  
19 Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Id.*  
20 at 764, 769. The Court explained that three factors were relevant in determining the reach  
21 of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy  
22 of the process through which that status determination was made; (2) the nature of the sites  
23 where apprehension and then detention took place; and (3) the practical obstacles inherent  
24 in resolving the prisoner's entitlement to the writ. *Id.* at 766.

25 Plaintiffs' counsel in the present case attempted to argue in their *Hernandez* case  
26 that *Boumediene*, decided in 2008, somehow overruled *Verdugo-Urquidez*. The district  
27 court in *Hernandez* rejected that argument in holding that *Boumediene* expressly limited  
28 its holding to the facts before it. *Hernandez*, 785 F.3d at 120-21, quoting *Boumediene*, 553

1 U.S. at 795 (“Our decision today holds only that petitioners before us are entitled to seek  
2 the [habeas] writ”). Other courts have confirmed that the *Boumediene* decision was  
3 explicitly confined only to the extraterritorial reach of the Suspension Clause. *Ali v.*  
4 *Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011) (quoting *Rasul v. Myers*, 563 F.3d 527, 529  
5 (D.C. Cir. 2009)). The *Boumediene* Court’s opinion never addressed the application of the  
6 Fourth Amendment, let alone establish that Fourth Amendment protection should extend  
7 to anyone extraterritorially, and the Court even cited to its earlier decision in *Verdugo-*  
8 *Urquidez* without any indication that the holdings in that case were no longer law.  
9 *Boumediene*, 553 U.S. at 759-60, 762-63. And the factual circumstances addressed in  
10 *Boumediene* were dramatically different from those at issue here. *Boumediene* thus cannot  
11 be said to have clearly established that an alien in Yañez’s position was protected by the  
12 Fourth Amendment.

### 13 **2. *Martinez-Aguero v. Gonzalez***

14 Although not binding precedent, there is one other case prior to Yañez’s shooting  
15 which analyzed the application of the Fourth Amendment to a Mexican national near the  
16 U.S. border. See *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006). However,  
17 that case is completely distinguishable to the present one because at the time of *Martinez-*  
18 *Aguero*’s altercation with the Border Patrol, she was physically present within U.S. territory  
19 at the port of entry, she possessed a valid border crossing card, and she had legally entered  
20 the United States on a monthly basis to take her aunt to the Social Security office in Texas.  
21 *Id.* at 621. In analyzing *Verdugo-Urquidez*’s substantial connections test, the Fifth Circuit  
22 found that *Martinez-Aguero* had substantial connections with the United States because she  
23 had acquiesced in the U.S. system of immigration and had undertaken voluntary acceptance  
24 of societal obligations in this country. *Id.* at 625.

### 25 **3. *Ibrahim v. Department of Homeland Security***

26 In *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012), the plaintiff, a  
27 citizen of Malaysia, was legally in the United States from 2001 to 2005 obtaining her Ph.D.  
28 at Stanford. *Id.* at 986. She left the United States briefly to attend a conference sponsored

1 by Stanford in Malaysia, where she was to present her academic research. She expected to  
2 return to Stanford after the conference, but was denied re-entry into the U.S. after she was  
3 inexplicably placed on a “no-fly list.” *Id.* at 987. She sought injunctive relief under the  
4 First Amendment (freedom of association) and Fifth Amendment (equal protection), and  
5 the Ninth Circuit held the plaintiff’s attendance at Stanford pursuing her Ph.D. for four  
6 years created substantial and voluntary connections with the United States such that she  
7 was entitled to protection under our Constitution. *Id.* at 996. But the Court was careful  
8 not to extend constitutional protections beyond the facts of Ibrahim’s case, and specifically  
9 ruled: “[n]or do we hold that Congress is without authority to exclude undesirable aliens  
10 from the United States and to prescribe terms and conditions for entry and re-entry of  
11 aliens. . . . We hold only that Ibrahim has established ‘significant voluntary connection’  
12 with the United States such that she has the right to assert claims under the First and Fifth  
13 Amendments.” *Id.* at 997. In addition, *Ibrahim* was decided in 2012 and thus would not  
14 be relevant to the question whether the law was clearly established at the time of the  
15 incident at issue here in any event.

#### 16 4. *Rodriguez v. Swartz*

17 *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015), appeal pending, No.  
18 1546410 (9th Cir.), involves a non-binding district court decision on a motion to dismiss  
19 issued **four years after Yañez’s shooting**. The district court in *Rodriguez*, bound by the  
20 facts alleged in the complaint, applied both the Supreme Court’s substantial connections  
21 test in *Verdugo-Urquidez*, and the three-part “functional approach” articulated in  
22 *Boumediene* when analyzing the viability of the decedent’s Fourth Amendment claim  
23 resulting from a Border Patrol agent’s shooting of a Mexican national who was in Mexico.  
24 *Id.* at 1035-38. The court found substantial connections with the United States existed  
25 because the decedent’s grandparents lived in Arizona, they were lawful permanent  
26 residents (and now U.S. citizens), and they often visited Nogales, Mexico to care for the  
27 decedent. *Id.* at 1029. As for *Boumediene*’s “functional approach,” the court reached to  
28 find those factors should weigh in favor of the decedent because unlike in the present case,

1 there the decedent was not “engaged in an act of war or any act that would threaten the  
 2 national security of the United States,” he “was visible and not hiding,” he “was peacefully  
 3 walking down the street,” and “he was not committing a crime, nor was he throwing rocks,  
 4 using a weapon, or in any way threatening U.S. Border Patrol agents or anyone else.” *Id.*  
 5 at 1036. The agent who shot the decedent, Lonnie Swartz, has been indicted and is  
 6 currently being prosecuted by the United States for murder related to that shooting.

7 The district court’s decision in *Rodriguez* regarding the application of the Fourth  
 8 Amendment was appealed by both Agent Swartz’s personal counsel and the government,  
 9 and that appeal is currently pending before the Ninth Circuit. Although the Ninth Circuit  
 10 held oral argument on the appeal on October 21, 2016, the Court has stated it will not issue  
 11 a ruling until the Supreme Court renders its decision in the *Hernandez* case.<sup>7</sup>  
 12 Notwithstanding, the facts of the *Rodriguez* case are so distinguishable from the shooting  
 13 of Yañez that even if it were binding precedent, and even if it were decided before Agent  
 14 Diaz’s shooting of Yañez in 2011, it would in no way constitute clearly established  
 15 precedent putting Agent Diaz on notice that Yañez had Fourth Amendment rights.

## 16 VI.

### 17 **AGENT DIAZ IS ENTITLED TO QUALIFIED** 18 **IMMUNITY BASED ON THE FACT HIS ACTIONS WERE** 19 **REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES**

20 When analyzing whether an officer is entitled to qualified immunity under the Fourth  
 21 Amendment, the court must stand in the shoes of the “reasonable officer” and decide  
 22 whether the severity of force applied was balanced by the need for such force considering  
 23 the totality of the circumstances confronting the officer at the time. *Graham*, 490 U.S. at  
 24 396-397. The analysis involves three steps. First, the court must assess the severity of the  
 25 intrusion on the individual’s Fourth Amendment rights by evaluating the type and amount  
 26 of force inflicted. *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011). Second,  
 the court must evaluate the government’s interest in the use of force. *Id.* This evaluation

27 <sup>7</sup> See Oral Argument, *Rodriguez v. Swartz*, Case No. 15-16410 (9th Cir. 2016) at:  
 28 [http://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000010434](http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010434)

1 of the government's interest takes into account (1) whether the suspect poses an immediate  
2 threat to the safety of the officers or others, (2) the severity of the crime at issue, and (3)  
3 whether the suspect is actively resisting arrest or attempting to evade arrest by flight.  
4 *Glenn*, 673 F.3d at 872, quoting *Graham*, 490 U.S. at 396. The third step in the analysis is  
5 to "balance the gravity of the intrusion on the individual against the government's need for  
6 that intrusion." *Glenn*, 673 F.3d at 871. The "reasonableness" of a particular use of force  
7 must be judged from the perspective of a reasonable officer on the scene, rather than with  
8 the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Likewise, the "calculus of  
9 reasonableness must embody allowance for the fact that [law enforcement] officers are  
10 often forced to make split-second judgments -- in circumstances that are tense, uncertain,  
11 and rapidly evolving -- about the amount of force that is necessary." *Id.* at 396-97.

12 In the present case, Agent Diaz's actions were objectively reasonable taking into  
13 account the totality of the circumstances. Both Yañez and Murietta posed an immediate  
14 threat to the safety of both agents, especially Agent Nelson who – because he was engaged  
15 in a struggle with Murietta on the ground – was a defenseless target for Yañez who already  
16 had hit him in the head with a nail-studded table leg. Yañez also had attempted to inflict a  
17 severe and potentially lethal injury on Agent Nelson when he threw rocks at him from close  
18 range. The desire of both Murietta and Yañez to do serious harm to both agents was clearly  
19 conveyed through their acts of fighting, resisting, biting, hitting, blinding with dirt, and  
20 hurling projectiles at them. Under the circumstances, Agent Diaz's use of deadly force  
21 was objectively reasonable. Moreover, there is no dispute that Agent Diaz warned both  
22 Yañez and Murietta, and in fact, Yañez did retreat behind the border fence the first time  
23 Agent Diaz drew his firearm. If an officer gives a warning before the use of force, "the  
24 government has an increased interest in the use of force." *Marquez v. City of Phoenix*, 693  
25 F.3d 1167, 1175 (9th Cir. 2012).

26 The objectively reasonable officer would not have just stood by, doing nothing to  
27 stop the threat posed by Yañez on the south side of the fence, while his colleague was being  
28 assaulted with objects that potentially could result in serious bodily injury or even death.



1 Once Yañez raised his arm in a throwing motion, deadly force was justified. The  
2 objectively reasonable officer would not have been able to use his OC spray to stop the  
3 threat of Yañez because (a) the officer would have to get closer to the border fence thereby  
4 risking injury from the objects thrown by Yañez, and (b) the officer would have risked  
5 spraying himself with pepper spray were he to attempt to spray it above his head,  
6 considering the fence or tree which Yañez climbed was at least 8 feet tall. The objectively  
7 reasonable officer would not have been able to use his baton to stop Yañez, as he would  
8 not have been able to effectively reach the threat above the 8-foot fence, and he would be  
9 putting himself at greater risk by getting closer to the fence. The objectively reasonable  
10 officer would have considered that there could have been additional threats on the south  
11 side of the border fence and that Yañez could have had additional colleagues assisting him  
12 from Mexico. Considering the totality of the circumstances, including the fact that Agent  
13 Nelson was exhausted and Murietta had easy access to his firearm and loose handcuff,  
14 Agent Diaz had no choice but to utilize his firearm to stop Yañez from either killing or  
15 seriously injuring Agent Nelson. The government's interest in stopping the threat of Yañez  
16 to save Agent Nelson was significant.

17 Agent Diaz had to make a split-second decision, the encounter with Yañez and  
18 Murietta was rapidly evolving, and he did not have the benefit of the 20/20 vision of  
19 hindsight. Any reasonable officer in his position would have been justified in taking the  
20 same action. In the event the Court finds the law in June 2011 was somehow clearly  
21 established that Yañez should be protected by the Fourth Amendment, Agent Diaz  
22 respectfully requests the Court grant summary judgment based on the alternative ground  
23 that Agent Diaz's actions were reasonable under the totality of the circumstances and he is  
24 therefore entitled to qualified immunity in any event.

## 25 VII.

### 26 CONCLUSION

27 For the reasons discussed herein, Yañez wife and children have not (and cannot)  
28 demonstrate they are entitled to Fourth Amendment rights under the U.S. Constitution

1 because (a) they were not the subjects of excessive force by federal agents and therefore  
2 have no standing to sue, and (b) they have no significant voluntary connections to the  
3 United States. Yañez’s Estate similarly cannot demonstrate that he had any clearly  
4 established constitutional right under the Fourth Amendment in June 2011 because his brief  
5 and violent illegal entry into this county for a couple minutes, all the while assaulting  
6 federal agents, cannot equate to substantial connections with the United States as  
7 contemplated by the Supreme Court in *Verdugo-Urquidez*. Additionally, the facts of his  
8 particular involvement with the U.S./Mexico border on June 21, 2011 certainly cannot  
9 satisfy the “functional approach” which the Supreme Court envisioned when rendering its  
10 decision in *Boumediene*. And finally, even if Yañez were entitled to Fourth Amendment  
11 protection, Agent Diaz is entitled to qualified immunity based on his actions in self-defense  
12 of himself and his partner under the totality of the circumstances. Federal agents have to  
13 be able to defend our borders from illegal activity, and defend their colleagues and other  
14 U.S. citizens from dangerous assailants such as Yañez and Murietta. Agent Diaz therefore  
15 respectfully requests the Court grant him qualified immunity, and decline to expand our  
16 Constitution’s protections beyond what the Supreme Court has already allowed.

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Respectfully submitted,

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