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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF CALIFORNIA

ALTON JONES,

Plaintiff,

vs.

U.S. BORDER PATROL AGENT GERARDO HERNANDEZ, et al.

Defendants.

UNITED STATES OF AMERICA,

Counter-Claimant,

vs.

ALTON JONES,

Counter-Defendant.

Case No. 16-cv-1986-W (WVG)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO COMBINED MOTION FOR SUMMARY JUDGMENT BY THE INDIVIDUAL DEFENDANTS AND BY THE UNITED STATES AS DEFENDANT AND COUNTER-CLAIMANT

Date: July 16, 2018
Court: Hon. Thomas J. Whelan

[No oral argument; L.R. 7.1(d)(1)]

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I. INTRODUCTION

On the afternoon of August 9, 2014, Plaintiff Alton Jones—a U.S. citizen and former Navy SEAL—visited the Border Field State Park with his wife and their then-six-year-old son. What was intended as a fun family outing at the beach became something quite different at the hands of the Border Patrol.

After setting his family up on the beach, Jones decided to take a jog. On what appeared to him to be an unrestricted road in the park, Jones encountered two Border Patrol agents, Defendants Jodan Johnson and Gerardo Hernandez. Agent Hernandez knew that Jones was at the park with his family because he had instructed Jones where to park upon entry. Agent Hernandez swore at Jones, telling him to "turn the fuck around." Jones was taken aback and swore back at the agent, saying "what's your fucking problem?" Nevertheless, he turned around to jog back to the beach. At that point, the encounter should have been completely over.

But Jones's compliance wasn't enough. Even as Jones obeyed Agent Hernandez's directive, Agent Hernandez inexplicably called for backup. When Jones jogged into an area that is a *known blind spot* of the Border Patrol surveillance cameras, he was surrounded and tackled by four armed federal agents: Defendants Hernandez, Johnson, David Faatoalia, and Joseph Bowen. Out of camera view, these agents pummeled him, hit and kicked him, pointed a weapon at him, and handcuffed him. Agent Johnson also sustained injuries from the force of the agents' takedown.

After these agents assaulted and handcuffed Jones, Defendant John Kulakowski, placed him into a patrol vehicle and took him on an unnecessarily rough ride to the Imperial Beach Border Patrol station. There, Jones was searched and then detained overnight for sixteen hours without access to an attorney or medical care. As a result of this incident, Jones has suffered both physical injuries and severe mental trauma, including an exacerbation of his pre-existing post-traumatic stress disorder (PTSD).

Defendants attempt to paint Jones as a threat to national security. He was

not—as every Border Patrol agent involved knew on August 9, 2014. Defendants characterize the incident involving Jones as a major cross-border event implicating the Border Patrol's counterterrorism mission. It was not—as every agent involved knew. *Defendants*—not Jones—created an unnecessary and vindictive scenario as Border Patrol agents were unwilling to de-escalate a routine encounter with an American jogger on a road regularly used by recreational park guests. Putting oneself in Jones's shoes, no one would believe that what happened on this afternoon jog through the park was consistent with common decency or a free society.

Defendants now move for summary judgment on Jones's constitutional and tort claims—despite the numerous disputes of material facts that exist throughout the record before this Court, which Defendants' *own expert* acknowledges. Ex. L (Fonzi Depo. Tr.) at 167:5–11 ("there are disputes of fact here as to what force was used against Mr. Jones").[1] Even Defendants' Motion states that they "dispute" allegations that Jones was pummeled and tackled and whether the "All-Weather Road" on which the agents encountered Jones was visibly restricted. Defendants mislead this Court by claiming that there is "conclusive" video evidence; in actuality, the most critical events are *not* captured on camera because Agents Hernandez, Johnson, Faatoalia, and Bowen initiated their unlawful takedown of Jones at a *known blind spot*. Because all critical facts are disputed, summary judgment cannot be granted.

Defendants' Motion fails as to all claims. Jones's *Bivens* claims present a run-of-the-mill application of the *Bivens* doctrine in the law enforcement setting. Nevertheless, Defendants argue that the Border Patrol should be absolutely immune from liability for constitutional violations, no matter how severe, against U.S. citizens found near the international border. This extreme argument has no basis in

[1] Unless otherwise noted, all exhibits are to the Declaration of C. Hunter Hayes filed concurrently with this opposition.

law; the Ninth Circuit has already upheld *Bivens* liability against the Border Patrol's unconstitutional law enforcement activities near the border. Furthermore, material factual disputes preclude judgment on both qualified immunity and the merits of these claims. Likewise, material factual disputes preclude summary judgment as to Jones's tort claims.

The United States also moves for summary judgment on its affirmative counterclaim for negligence against Jones. This claim is the subject of a pending motion for summary judgment filed by Jones, which explains why the counterclaim is time barred and must be dismissed as a matter of law. The United States' summary judgment motion, thus, need not be addressed. Alternatively, the United States' summary judgment motion on the merits of the time-barred counterclaim must be denied, as it, too, turns on disputed facts.

II. FACTUAL BACKGROUND

A. Border Field State Park

Ex. 1; https://www.parks.ca.gov/?page_id=664

Border Field State Park is part of the Tijuana River National Estuarine Research Reserve, which "consists of the Tijuana Slough National Wildlife Refuge and Border Field State Park, Navy lands, San Diego County property, and San Diego City property." Ex. O (Jones 00002).

The reserve "is managed cooperatively by the U.S. Fish and Wildlife Service and the California Department of Parks and Recreation." *Id.* Rather than being "the most heavily fortified and surveilled part of the United States' international boundaries," Mot. at 1, 14, Border Field State Park in fact is open to recreational visitors who swim in the ocean and hike, bike, or jog throughout its scenic grounds.

Notably, the reserve is also the only point of access for Friendship Park, an area supervised by the Border Patrol adjacent to the U.S.-Mexico border fence where individuals standing in the United States may communicate with people standing in Mexico. *See* Friendship Park, http://www.friendshippark.org/visitus (last visited June 12, 2018) (instructing visitors to travel through Border Field State Park to reach Friendship Park); Ex. D (Faatoalia Depo. Tr.) at 92:22–93:13.

Ex. 2; http://www.friendshippark.org/visitus

The primary fence separating the United States and Mexico runs along the southern border of the reserve. To the north of this fence is a secondary fence. Immediately north of and adjacent and parallel to the secondary fence, on the United States side, is a paved road known by the Border Patrol as the All-Weather Road (referred to herein as the "paved road").

The U.S. Border Patrol's Imperial Beach station includes a zone of operations that encompasses the Border Field State Park. *See* Ex. I (Bowen Depo. Tr.) at 83:16–84:5, 87:10-21; Ex. D (Faatoalia Depo. Tr.) at 38:2–40:20, 50:6–51:19. On any given weekend, Border Patrol agents assigned to this zone regularly encounter park visitors walking, hiking, jogging, or riding bikes on the paved road. Ex. D (Faatoalia Depo. Tr.) at 94:25–95:7; Ex. I (Bowen Depo. Tr.) at 127:9–14; Ex. F (McFarlin Depo. Tr.) at 74:8–24; Ex. M (Matthews Depo. Tr.) at 71:5–8.

Border Patrol agents refer to such individuals as "local traffic" to indicate that they are not unlawful immigrants, people suspected of criminal activity, or people who pose any risk to agents. Ex. E (Hernandez Depo. Tr.) at 140:20–25; Ex. F (McFarlin Depo. Tr.) at 185:9–17; Ex. I (Bowen Depo. Tr.) at 216:12–217:4, 217:19–23; Ex. D (Faatoalia Depo. Tr.) at 157:10–12; Ex. G (Johnson Depo. Tr.) at

120:20–121:10. Before August 9, 2014, not a single person deemed to be "local traffic" had ever been arrested for being present on the paved road. Ex. D (Faatoalia Depo. Tr.) at 94:16–96:16, 156:19–157:21; Ex. I (Bowen Depo. Tr.) at 211:1–3; Ex. J (Hayes Depo. Tr.) at 38:14–39:5; Ex. F (McFarlin Depo. Tr.) at 78; Ex. C (Flores Depo. Tr.) at 47; Ex. M (Matthews Depo. Tr.) at 73–74; Ex. G (Johnson Depo. Tr.) at 122:20–123:7.

B. Jones Family's Arrival at Border Field State Park

In the early afternoon of August 9, 2014, the Jones family drove to Border Field State Park. Ex. A (Jones Depo. Tr.) at 29:21–30:4; Ex. B (Ana Jones Depo. Tr.) at 32:5–34:23. Upon arrival, Jones paid a $5 entrance fee and received a map of the park. Ex. P (Entrance Ticket) & Ex. O (Map); Ex. A (Jones Depo. Tr.) at 20:15–21:4. This map did not (1) indicate that any areas within the park are off limits to or otherwise restricted for visitors; (2) designate any paved road as a "border surveillance road" or "All Weather Road"; (3) designate any area as federal property; or (4) indicate that any area within the park is reserved for the U.S. Border Patrol's exclusive use. Ex. O; Ex. A (Jones Depo. Tr.) at 309:10–24.

Jones drove the family into the park and toward the beach. Ex. A (Jones Depo. Tr.) at 20:15–21:4. Before Jones had finished parking, a U.S. Border Patrol agent, Gerardo Hernandez, pulled up alongside the Jones's vehicle and directed them to move the car. Ex. E (Hernandez Depo. Tr.) at 149:15–150:10; 150:16–18. In doing so, Agent Hernandez saw that Jones was with a female passenger (his wife Ana). *Id.* at 155:3–5.

Jones asked Agent Hernandez for instructions on where to park instead, and then followed the agent's directions. Ex. A (Jones Depo. Tr.) at 22:5–23:15, 24:24–25:2; Ex. E (Hernandez Depo. Tr.) at 160:8–22. After parking, the Joneses carried a beach umbrella, towels, and their son's toys to a spot nearby on the beach. Ex. A (Jones Depo. Tr.) at 24:24–29:23; Ex. CC (park map).

C. Jones's Attempted Jog

Jones then decided to go for a jog. Before leaving his family on the beach, he studied the park map he had received at the State Park entrance. Ex. A (Jones Depo. Tr.) at 309:10–24, 30:10–19. Jones wore a t-shirt, shorts, and a GPS watch, which he set before starting his jog. Ex. B (Ana Jones Depo. Tr.) at 35:5–7; Ex. A (Jones Depo. Tr.) at 30:20–31:3; *see generally* ECF No. 52-10 (Interview Video); ECF No. 52-2 at 001 (GPS printout). He also had his iPhone strapped to his arm and white earphones in his ears. Ex. A (Jones Depo. Tr.) at 36:23–38:10.

From the beach, Jones headed onto a sand path that took him to the paved road, parallel to and north of an area adjacent to Friendship Park and the U.S.-Mexico border fence. Ex. A (Jones Depo. Tr.) at 30:14–19; *id.* at 249:25–250:5; *id.* at 251:18–23; *id.* at 255:19–257:17; *id.* at 268:22–269:1; ECF No. 52-2 (GPS printout); Ex. T (USA Jones 000041). Jogging slowly (at about 11.5 minutes per mile), Jones ran up along this paved road. *Id.*; Ex. A (Jones Depo. Tr.) at 90:17–18.

From this direction, there were no barriers or visible signs clearly indicating that this paved road was restricted. Ex. A (Jones Depo. Tr.) at 249:18–24; *id.* at 251:13–16; *see also* Ex. G (Johnson Depo. Tr.) at 125:6-23 ("no trespassing" signs between the parking lot and the paved road would not be visible to someone on the road); Declaration of Alton Jones filed concurrently herewith ("Jones Decl.") ¶¶ 7–8.[2] The only signs visible to Jones were "No Trespassing" signs posted on front of the secondary fence. *Id.* ¶ 9.

Indeed, Jones lives across the street from the Imperial Beach Border Patrol station, and he has seen identical "No Trespassing" signs posted on that station's

[2] In their motion to dismiss, *see* ECF No. 56 at 3–4, Defendants claimed that a sign reading "USE TRAIL TO THE LEFT" would have been visible where the sand trail meets the paved road. Ex. S. Multiple defense witnesses testified that sign did not even exist, but was added after the Border Patrol's encounter with Jones. Ex. J (Hayes Depo. Tr.) at 65:2–23; Ex. EE (USA-Jones-000063); Ex. F at 82:18–83:11; Ex. H (Kulakowski Depo. Tr.) at 108:7–109:21; Ex. U (USA-Jones-000061).

perimeter fence about seventy yards from his home. Jones Decl. ¶ 12. He has always understood these signs to mean that the area *behind* the fence to which the "No Trespassing" signs are affixed is restricted. *Id.* ¶ 16–17. He has never understood that the area in *front* of the signed fence is restricted; in fact, Jones uses the road in front of the fence every day to access his own home, and many of his neighbors likewise regularly drive or walk on this road. *Id.* Border Patrol agents have testified that the identical "No Trespassing" signs near Jones's house plainly denote that the area *beyond* the signs is restricted, and that the "No Trespassing" signage is *not* intended to restrict public access to the road in *front* of the signs. *E.g.*, Ex. G (Johnson Depo. Tr.) at 124:6–24.

After Jones had jogged approximately half a mile, another Border Patrol agent—later identified as Agent Jodan Johnson—approached him. Facing west, Agent Johnson pulled his patrol vehicle alongside Jones. ECF No. 52-9 ("RVSS Video") at 15:18:59; Ex. G (Johnson Depo. Tr.) at 203:22–204:4; Ex. E (Hernandez Depo. Tr.) at 173:10–21. Jones removed one of his earphones and told Agent Johnson he intended only to run up a nearby hill before turning around and returning to the beach. Ex. A (Jones Depo. Tr.) at 64:13–16; *id.* at 120:22–25; 124:10–22; Ex. G (Johnson Depo. Tr.) at 134:11–14. Jones did not hear Agent Johnson say anything to him in response. Ex. A (Jones Depo. Tr.) at 64:8–12. Consequently, Jones continued jogging eastward along the paved road. *Id.* at 65:8–15; *id.* at 120:13–25.

Using his Border Patrol radio, Agent Johnson called out that Jones was a "local." Ex. G (Johnson Depo. Tr.) at 202:14–203:4, 207:14–23; Ex. E (Hernandez Depo. Tr.) at 262:2–8; *see also* RVSS Video at 15:19–41.[3] Other Border Patrol

[3] Agent Johnson says "your 105's gonna be 10-19 local." "105" refers to the number assigned to sensor Jones allegedly activated during his run. Ex. I (Bowen Depo. Tr.) at 229:17–25; Ex. G (Johnson Depo. Tr.) at 207:11–18. "10-19 local" means anyone "that has a legitimate purpose of being in that area." Ex. F (McFarlin Depo. Tr.) at 185:14–17.

agents on duty—including Agents Hernandez, Bowen, and Faatoalia, none of whom denied hearing Agent Johnson's call—thus knew that Jones had not unlawfully crossed the border and was not committing any crime. Ex. I (Bowen Depo. Tr.) at 217:19–23, 229:17–230:9; Ex. E (Hernandez Depo. Tr.) at 141:20–142:12; 178:11–14; Ex. D (Faatoalia Depo. Tr.) at 154–157, 183:23–184:6.

Shortly thereafter, Agent Hernandez drove up behind Jones. Ex. E (Hernandez Depo. Tr.) at 178:11–14, 188:13–15. Knowing Jones was a local from their prior parking encounter and from Agent Johnson's description, Agent Hernandez nevertheless passed Jones quickly on the right before swerving in front of him. Ex. A (Jones Depo. Tr.) at 66:11–24, *id.* at 67:4–68:1, *id.* at 69:19–70:1; Ex. E (Hernandez Depo. Tr.) at 185:23–186:1, 186:22–187:1; RVSS Video at 15:19:34–38. Startled and unsure what was happening, Jones continued jogging for a few more paces. Ex. A (Jones Depo. Tr.) at 67:10–12; *id.* at 69:23–70:8; *id.* at 74:24–75:23; RVSS Video at 15:18:42.

When Agent Hernandez pulled in front of Jones again, Jones stopped jogging. Ex. A (Jones Depo. Tr.) at 76:2–7; RVSS Video at 15:18:48. Agent Hernandez exited his vehicle and shouted at Jones to "turn the fuck around." Ex. A (Jones Depo. Tr.) at 76:11–21. Offended, Jones responded "What's your fucking problem?" *Id.*; TAC ¶ 30.[4] But, Jones promptly complied with Agent Hernandez's order, turning around and retracing his path westward toward the beach. Ex. A (Jones Depo. Tr.) at 78:10–21; RVSS Video at 15:20:02; Ex. E (Hernandez Depo. Tr.) at 195:5-10.

Had Jones been allowed to continue jogging westward, he would have shortly exited the paved road and reunited with his wife and son on the beach. Ex. A (Jones Depo. Tr.) at 76:11–21; *id.* at 78:10–21; RVSS Video at 15:20:02; Ex. E (Hernandez

[4] Defendants do not dispute that this allegation is true for purposes of this motion. Mot. at 3–4.

Depo. Tr.) at 206:21–24; Ex. D (Faatoalia Depo. Tr.) at 124:20–24; Ex. I (Bowen Depo. Tr.) at 163:1–12; Ex. G (Johnson Depo. Tr.) at 140:16–18. Retracing his steps was the only feasible option off the paved road, because there was brush, a chain link fence, and a guard rail along significant portions of the paved road, Ex. D (Faatoalia Depo Tr.) at 153:1–16, and Jones was not familiar with the terrain. Jones Decl. ¶ 6.

Rather than permit Jones to return to the beach, Agent Hernandez decided to escalate the situation. Unbeknownst to Jones, and *after* Jones had complied with his command to turn around, Agent Hernandez radioed for backup. Ex. E (Hernandez Depo. Tr.) at 195:5–10; 197:1–4, 197:12–19. He did so even though Jones neither touched nor threatened any Border Patrol agent as he jogged west. Ex. A (Jones Depo. Tr.) at 117:22–24, 126:18–19; RVSS Video at 15:20:02–15:21:04.

D. Defendants' Takedown of Jones

From his patrol vehicle, Agent Hernandez followed Jones westward. Agent Johnson, driving behind Agent Hernandez, also followed Jones. RVSS Video at 15:20:35; Ex. AA (USA-Jones-000018). Meanwhile, two additional agents who had responded to the backup call—Agents Bowen and Faatoalia—approached Jones from the west on quad bikes. Ex. A (Jones Depo. Tr.) at 84:22–25; *id.* at 86:20–87:23; *id.* at 98:11–23; *id.* at 100:2–18; *id.* at 129:13–16; Ex. AA (USA-Jones-000019–20). Agents Bowen and Faatoalia stopped their bikes west of Jones *in an area known to all involved Border Patrol agents as a blind spot* of the Border Patrol's RVSS camera. Ex. D (Faatoalia Depo. Tr.) at 211:10–18; Ex. E (Hernandez Depo Tr.) at 278:25–279:8; Ex. H (Kulakowski Depo. Tr.) at 202:23–203:11; Ex. I (Bowen Depo. Tr.) at 238:4–7; Ex. F (McFarlin Depo. Tr.) at 189:14–16.[5] Jones, still trying to leave the paved road, Ex. A (Jones Depo. Tr.) at 97:6-12, then entered

[5] The very existence of this blind spot undermines Defendants' claim that this area is "perhaps the most heavily fortified and surveilled part of the United States' international boundaries." Mot. at 1.

the blind spot. RVSS Video at 15:20:35.

Nearly every material fact after this point is disputed. Acting together, Agents Hernandez, Johnson, Bowen, and Faatoalia tackled Jones without warning or justification, pummeling him face first to the ground. Ex. G (Johnson Depo. Tr.) at 186:17–19 (everyone "dog piled" on top of Jones); Ex. E (Hernandez Depo. Tr.) at 205:1–22, 208:8–16; Ex. I (Bowen Depo. Tr.) at 197:2–24, 199:12–22; Ex. A (Jones Depo. Tr.) at 100:20–101:4; *id.* at 107:2–6; *id.* at 124:19–125:2; *id.* at 130:14–21; Ex. B (Ana Jones Depo. Tr.) at 45:16–46:17; *id* 104:5–23; *id.* at 108:8–109:13. Jones felt kicks and blows to his back and neck. Ex. A (Jones Depo. Tr.) at 100:10–15; *id.* at 101:2–4; *id.* at 130:14–131:2; *id.* at 142:15–144:24; Ex. B (Ana Jones Depo. Tr.) at 108:17–22. He also felt someone's knee on his spine. Ex. A (Jones Depo. Tr.) at 130:14–21; *id.* at 142:17–18; *id.* at 187:15–17; Ex. B (Ana Jones Depo. Tr.) at 108:23–109:16. Jones's arms were twisted up hard behind him, causing him severe pain and injuring his right shoulder. Ex. A (Jones Depo. Tr.) at 183:6–184:18; *id.* at 187:17–188:17; *id.* at 190:20–191:8; Ex. B (Ana Jones Depo. Tr.) at 114:16–118:10; Ex. K (Moser Depo. Tr.) at 56:10–21; 57:19–60:16; Ex. Q (inflammation and redness of right shoulder).

Although bewildered and frightened, Jones did not resist. Ex. A (Jones Depo. Tr.) at 101:13–17; Ex. I (Bowen Depo Tr.) at 192:7–11. Instead, he pleaded with the agents to stop hurting him. Ex. A (Jones Depo. Tr.) at 130:22–131:2. Nevertheless, at least one Border Patrol agent placed Jones in tight handcuffs which injured his wrists. *Id.* at 118:2–11; Ex. K (Moser Depo. Tr.) at 52:6–11; Ex. B (Ana Jones Depo. Tr.) at 112:9–11; *id.* at 114:16–115:7; *id.* at 119:16–20.

In the process of tackling Jones, "somehow, Agent Johnson got hurt." Ex. E (Hernandez Depo. Tr.) at 208:14–16. The agents' contemporaneous reports differ in many respects, but they generally agree that Agent Johnson was injured as the four agents worked together to take Jones to the ground. *E.g.*, Ex. AA at Jones-000018 (Johnson: "I grabbed his head and pulled him to the ground. As I was able to subdue

to the subject to the ground in order to affect the arrest, the individuals [sic] body weight and other agents weight came down onto my left leg"); 000019 (Faatoalia: "all of the Agents to include myself pulled the subject down"); 000020 (Bowen: "with the help of two other agents, [I] was able to place the subject on the ground"); 000021 (Hernandez: "we got a good hold of him and took him to the ground").

Although these four agents testified that they included all important events in their reports,[6] *none* of these reports state that Jones assaulted Agent Johnson, knocked him down, or otherwise caused his injury. Remarkably, Defendants now claim that it is *undisputed* that *Jones* knocked *Johnson* down, even though everyone involved at the time agreed that *Johnson* and the other agents took down *Jones*.[7] Contrary to Defendants' claims, Mot. at 2, 20, Jones has never "admitted" to assaulting Agent Johnson. Defendants misleadingly quote Jones's testimony in support of their version of the facts that "Jones knocked [Agent Johnson] to the ground." Mot. at 9. In fact, Jones said "some Border Patrol agent stepped in front of me okay and got knocked down and broke his ankle." ECF No. 52-10 (Jones Interview) at 8:26–8:31. Jones clarified that he is "not sure how [Johnson] broke his ankle," Ex. A (Jones Depo. Tr.) at 131:25, but he is sure of one thing: "I didn't knock anybody down," *Id.* at 133:19–24, 135:3–21; 136:3–7.

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[6] *See* Ex. D (Faatoalia Depo. Tr.) at 144:14–22; Ex. E (Hernandez Depo. Tr.) at 221:6–18; Ex. J (Hayes Depo. Tr.) at 106:5–107:7; Ex. G (Johnson Depo. Tr.) at 162:7–13, 196:12–14; Ex. I (Bowen Depo. Tr.) at 201:6–11.

[7] Underscoring these disputes of fact, Defense expert Robert Fonzi previously filed a declaration discussing the "takedown" maneuver Agents Hernandez, Johnson, Bowen, and Faatoalia used against Jones. ECF No. 52-8. In his deposition, however, Mr. Fonzi contradicted his prior sworn statement, suddenly refusing to recognize that *any takedown even occurred*. Ex. L (Fonzi Depo. Tr.) at 156:22–158:14; *see id.* at 119:14–16, 148:12–15. Whether Defendants executed a takedown maneuver against Jones is precisely the sort of factual dispute that cannot be resolved on summary judgment.

E. Defendants' Unlawful Seizure and Search of Jones

Jones was placed handcuffed in the backseat of a Border Patrol vehicle, and his attempts to explain that his wife and child were waiting for him back on the beach were ignored. Ex. A (Jones Depo. Tr.) at 146:4–9; *id.* at 146:24–147:14; *id.* at 148:5; *id.* at 145:21–22; *id.* at 148:11–16; *id.* at 148:23–149:5. Jones asked to speak with a supervisor, and after some minutes Agent James McFarlin arrived on the scene. *Id.* at 147:5–9. Again, Jones tried to explain that his wife and child were awaiting his return on the beach, and asked why he was being mistreated in this manner. *Id.* at 148:11–16. Agent McFarlin left Jones and conferred with the other Border Patrol agents at the scene, including the Defendants. *Id.* at 148:23–149:5. Agent McFarlin then came back to Jones and told him he was under arrest for assaulting a federal officer and read him his Miranda rights. *Id.*; *id.* at 150:20–151:3; Ex. F (McFarlin Depo. Tr.) at 106:10–16; *id.* at 116:6–10.

Jones was left in the patrol vehicle, with the windows up and the heater on, for some time. RVSS Video at 15:43:21; Ex. A (Jones Depo. Tr.) at 151:7–22. Agent Kulakowski subsequently transported Jones to the Imperial Beach Border Patrol station. As he pulled the vehicle away from the incident site, Agent Kulakowski turned up loud rap music and put on gloves. Jones Decl. ¶ 24. He then took Jones on an unauthorized "rough ride," which caused Jones to be jostled severely in the backseat. *Id.* ¶ 25. Jones, fearful that he was being taken somewhere to be beaten up, suffered acute anxiety during this car ride. Ex. A (Jones Depo. Tr.) at 146:14–23; ECF No. 52-10 (Interview Video) at 7:04; Ex. B (Ana Jones Depo. Tr.) at 121:10–17; Jones Decl. ¶ 28.

At approximately 4 p.m., Agent Kulakowski and Jones arrived at the Imperial Beach station. Ex. FF (USA-Jones-000086). Upon arrival, Agent Kulakowski subjected Jones to an unconsented search. Jones Decl. ¶ 29; Ex. H (Kulakowski Depo. Tr.) 141:24–142:6.

Jones was then detained overnight at the Imperial Beach station. Despite

multiple requests for access to an attorney, Jones was never provided with one. ECF No. 52-10 (Interview Video) at 4:19; Ex. A (Jones Depo. Tr.) at 237:11–21; Ex. B (Ana Jones Depo. Tr.) at 105:5–15. Moreover—although Jones had asked for an attorney—he was subjected to an uncounseled investigatory interview. ECF 52-10 (Interview Video). While detained, Jones was not provided with his medications and did not receive medical care. Ex. A (Jones Depo. Tr.) at 307:1–309:2; Ex. B (Ana Jones Depo. Tr.) at 122:20–123:2.

Jones repeatedly asked for an explanation for his continued detention and voiced concerns for his wife and child; in response, Jones received inconsistent and contradictory explanations from various Border Patrol agents. Ex. A (Jones Depo. Tr.) at 228:21–229:4. In response to Jones's questions, Border Patrol agents also threatened to retaliate against him by tying him up in "the chair" and placing a bag over his head. *Id.* at 236:23–237:21; *see* Ex. C (Flores Depo. Tr.) at 118:17–119:1 (explaining that the chair is a "restraint device for subjects that become violent"); Ex. M (Matthews Depo. Tr.) at 138:6–22 (confirming existence of "the chair" and "spit bag" at Imperial Beach station).

Finally, after a sleepless night, Jones was released around 8 a.m. on August 10, 2014. He was not given any documentation or other paperwork. Ex. A (Jones Depo. Tr.) at 240:9–12; *id.* at 241:1–244:11. No charges were ever filed against him. He walked home.

Jones has suffered both physical injury and acute mental suffering as a result of these events. The Border Patrol injured Jones's right shoulder, which required surgery. Ex. A (Jones Depo. Tr.) at 183:6–184:18; *id.* at 186:17–19; *id.* at 187:21–23. In addition, Jones's pre-existing PTSD has worsened significantly. Ex. A (Jones Depo. Tr.) at 97:2–5; *id.* at 180:21–181:8; Declaration of Colin Koransky, filed concurrently herewith, Ex. B (Dr. Koransky Expert Report) at 14–15. He has had to shutter his business, Ex. A (Jones Depo. Tr.) at 172:3–25, and continues to struggle with his inflamed PTSD, *id.* at 180:25–181:8; Ex. GG (Koransky Depo. Tr.) at

25:2–18, 102:19–103:11.

III. SUIT AND COUNTERSUIT

On August 8, 2016, Jones filed suit. The operative complaint states claims against the Individual Defendants under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for unconstitutional detention and arrest, excessive use of force, and unconstitutional search in violation of the Fourth Amendment. TAC ¶¶ 87–100, ECF No. 72. Jones also brings tort claims against the United States under the Federal Tort Claims Act (FTCA), *id.* ¶¶ 101–21, and claims for injunctive relief against the U.S. Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *Id*. ¶¶ 122–25.

On April 7, 2017, the United States filed a counterclaim against Jones based on an alleged assault of Agent Johnson. ECF No. 17. On January 12, 2018, Jones moved for summary judgment as to the counterclaim because the claim was time-barred when Agent Johnson assigned it to the United States. ECF No. 82. Jones's FOIA claim is the subject of a separate motion. ECF No. 103.

IV. STANDARD OF REVIEW

Summary judgment is proper only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As the moving party, Defendants "initially bear[] the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). "Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* Where, however, the moving party fails to carry its initial burden, "the nonmoving party has no obligation to produce anything." *Id.*

"The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863

(2014). The Court must "view[] the evidence in the light most favorable to the non-moving party to determine if there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). Any ambiguities in the record must also be resolved in favor of the nonmoving party. *Genzler v. Longanbach*, 410 F.3d 630, 643 (9th Cir. 2005).

A single witness's sworn testimony is sufficient to create a dispute of fact, because the Court is not permitted to weigh the evidence or make credibility decisions on summary judgment. *McLaughlin v. Liu*, 849 F.2d 1205, 1207–08 (9th Cir. 1988) ("[Defendant's] sworn statements . . . are direct evidence of the central fact in dispute . . . [, which must] be taken as true."); *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1149 (9th Cir. 2002) ("[O]f course, it is for the trier-of-fact, not the court deciding whether to grant summary judgment, to determine issues of credibility."). Similarly, the Court may not reject sworn testimony and other direct evidence that supports the non-moving party's position on the ground that it considers the evidence implausible, or in conflict with other evidence. *McLaughlin*, 849 F.2d at 1207 (even "implausible" direct evidence must be taken as true).

V. MOTION FOR SUMMARY JUDGMENT ON JONES'S *BIVENS* CLAIMS SHOULD BE DENIED

Because nearly every critical event at issue in this case occurred in a known blind spot of the Border Patrol surveillance system, there are obvious disputes of fact surrounding Defendants' use of force, search, seizure, and detention of Jones. These material disputes preclude summary judgment, because if Jones's version of events is believed, Defendants violated Jones's clearly established rights. Perhaps recognizing that these material disputes of fact preclude summary judgment on the merits of Jones's constitutional claims, Defendants argue that there simply can be no *Bivens* remedy against Border Patrol agents performing law enforcement duties

against U.S. citizens near the international border. But the law is clear that such law enforcement activities are in fact the core context in which a *Bivens* remedy applies.

A. Jones's Claims Involve a Straightforward Application of *Bivens*

Bivens provides a damages remedy for victims of federal law enforcement officers' constitutional violations. *Bivens*, 403 U.S. at 410. Contrary to Defendants' argument, Jones does not seek any extension of *Bivens*. Rather, Jones raises the same quintessential Fourth Amendment claims recognized in *Bivens* and to which *Bivens* is regularly applied.

Courts analyzing whether to recognize a *Bivens* claim in a given case apply a two-step analysis: (1) whether the claim arises in a new context and, if so, (2) whether special factors counsel against implying a *Bivens* remedy in that new context. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017). Where a *Bivens* case does not arise in a new context, that ends the inquiry, and the Court need not proceed to determine whether there are any special factors counseling against a remedy. *Id.*

1. **Jones's Claims Do Not Arise in a "New Context"**

Fourth Amendment claims for excessive force and unlawful search and seizure in the "common and recurrent sphere of law enforcement" are the quintessential context in which a *Bivens* remedy arises, as the Supreme Court recently reaffirmed. *Abbasi*, 137 S. Ct. at 1857. Courts have consistently recognized a *Bivens* remedy against federal officers. *See, e.g.*, *Tekle v. United States*, 511 F.3d 839, 844–51 (9th Cir. 2007) (*Bivens* claims for excessive force and unlawful detention under Fourth Amendment); *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992) (*Bivens* claims for unlawful search under Fourth Amendment).

A case arises in a "new context" only where "the case is different in a meaningful way from previous *Bivens* cases." *Abbasi*, 137 S. Ct. at 1859. The *Abbasi* Court suggested various ways a case might be meaningfully different—the rank of the officers involved, the constitutional right at issue, the extent of judicial guidance as to how an officer should respond, the mandate under which the officer

was operating, and the risk of the judiciary's disruptive intrusion into the functioning of another branch of government—none of which are implicated in this case. *Id.* at 1860. As Defendants recognize, the Border Patrol agents named herein were acting under a *general* law enforcement authority, Mot. at 20. Jones's claims are against federal law enforcement officials who violated the constitution in the course of their ordinary law enforcement activities. *See* 8 U.S.C. § 1357; 8 C.F.R. § 287.5(b)–(f); *see also, e.g.*, *Michel v. United States*, No. 16-cv-277, 2017 WL 4922831 at *15 (S.D. Cal. Oct. 31, 2017) ("CBP is a law enforcement agency . . ."); *Campos v. United States*, 888 F.3d 724, 737 (5th Cir. 2018).

(a) *There Is No Border Patrol Exception to* Bivens

Defendants argue that there is no *Bivens* remedy in the context of claims against Border Patrol agents for their actions near the U.S. border. But the Ninth Circuit has already upheld a claim for liability against a Border Patrol agent for an alleged Fourth Amendment violation committed near the U.S.–Mexico border. *See Chavez v. United States*, 683 F.3d 1102, 1109 (9th Cir. 2012) (a Border Patrol agent "violates the Fourth Amendment if she stops a vehicle in the absence of an objectively 'reasonable suspicion' . . ."); *see also Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (recognizing Fourth Amendment *Bivens* claims against Border Patrol agent for excessive force and unreasonable arrest and detention). Defendants' fundamental point—that the activities of the Border Patrol cannot be subject to liability under *Bivens* because of the sensitivity of the border region—is foreclosed by binding Ninth Circuit authority.

(b) *There Is No Trespasser Exception to* Bivens

Defendants also argue that this case arises in a new context because Jones was a "defiant trespasser" who "brought upon himself the consequences he eventually faced." Mot. at 13. This argument is based entirely on Defendants' version of events, not undisputed facts. In any event, it is irrelevant. There is no authority even

suggesting that a *Bivens* remedy is unavailable where the plaintiff was a trespasser, or behaved "defiantly."

(c) *Defendants' Authority Is Distinguishable*

Finally, Defendants cite *Nassiri v. Tran*, 2018 WL 295974, at *5 (S.D. Cal. Jan. 3, 2018) to argue that Jones's claims arise in a new context because "the agents were 'acting pursuant to a program that is extensively regulated by Congress.'" Mot. at 13. But *Nassiri* is distinguishable on its own terms, because the claims arose "outside 'th[e] common and recurrent sphere of law enforcement'" in which a *Bivens* remedy is recognized. *Nassiri*, at *10. The claims in *Nassiri* were brought against Social Security Administration personnel who investigated whether the plaintiff beneficiaries were actually disabled and whether their attorneys followed agency regulations. This factual context bears no resemblance to this case.

Jones's claims are against traditional law enforcement officers. Such claims are routinely permitted against federal officers, irrespective of whether some aspect of the relevant federal agency is subject to congressional regulation. *See, e.g.*, *Chavez*, 683 F.3d at 1112 (*Bivens* claim against Border Patrol agents for repeatedly stopping vehicle without reasonable suspicion or probable cause); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (*Bivens* claim against ICE agent for wrongfully detaining U.S. citizen); *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006) (*Bivens* claim against federal prison officers for withholding detainee's medication).

2. **No Special Factors Are Present Here**

Even if the Court were to conclude this is a "new context," no special factors are present that counsel against implying a *Bivens* remedy. The "special factors" analysis focuses on "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857–58.

Defendants contend that Jones's claims implicate national security given that they arose from an incident that occurred near the border. But Defendants rest their

argument on generalizations about the nature of the border, unmoored from the facts of this case.[8] Although *some* events occurring near the border may implicate national security, this alone does not immunize federal officers from liability for constitutional violations—particularly violations against a U.S. citizen who is not suspected of any immigration violation or crime. As the Supreme Court recognized in *Abbasi*, "national-security concerns must not become a talisman used to ward off inconvenient claims." 137 S. Ct. at 1862. The Court recognized that this "danger of abuse" is particularly relevant in "domestic cases," like this case. *Id.*

Here, Border Patrol agents unconstitutionally detained, searched, and used excessive force against a U.S. citizen who was jogging in a state park before inadvertently entering unsigned federal property near the border. This incident did not occur in a highly secure, fortressed area, as Defendants contend, but rather on an open road adjacent to the park and beach, which are open to the public. Members of the public are invited to use the road to enter Friendship Park. Ex. I (Bowen Depo. Tr.) at 129:20–23. Recreational users inadvertently wander onto the paved road so often that Border Patrol agents have a label to refer to them: "local traffic."

If recognizing a *Bivens* remedy in this context implicates national security, it would effectively exempt Border Patrol agents from any suit for unconstitutional actions, no matter how severe. "To hold that a federal agency's status as a component of the 'national security apparatus' precludes a *Bivens* action against its agents would eviscerate the *Bivens* remedy" entirely. *Linlor v. Polson*, 263 F. Supp. 3d 613, 623 n.2 (E.D. Va. 2017).

Linlor is instructive. There, the district court recognized a *Bivens* claim for excessive force by a Transportation Security Administration officer during an

[8] The two cases Defendants cite regarding sovereign authority to protect the border are not even *Bivens* cases. They are criminal cases regarding the lawfulness of border searches of international travelers. *See Torres v. Com. of Puerto Rico*, 442 U.S. 465, 473 (1979); *United States v. Kim*, 103 F. Supp. 3d 32, 55 (D.D.C. 2015).

airport screening. *Linlor*, 263 F. Supp. 3d at 623–24. The court rejected the argument that the "national security" concerns in the airport setting preclude a *Bivens* remedy, because that argument rested "primarily upon generalizations about the *sui generis* nature of the airport setting"—the same arguments Defendants make about the border here. *Id.* Furthermore, the plaintiff's claims were against an individual agent who violated "TSA's avowed policy" against the use of excessive force, which did not require judicial "second-guessing [of] executive policy" in "sensitive matters of national security." *Id.* This is equally true in this case, where Jones's claims do not implicate any executive policies, and the Border Patrol's *own* policies prohibit the unconstitutional actions alleged in Jones's claims. *See* CBP Use of Force Policy;[9] *see also Loumiet v. United States*, 2017 WL 5900533, at *6 (D.D.C. Nov. 28, 2017) (allowing *Bivens* action to proceed where it was "properly focused on specific activities of individual officers"); *McLean v. Gutierrez*, 2017 WL 6887309, at *17, *19 (C.D. Cal. Sept. 28, 2017) (permitting "excessive force claim" against prison officials to proceed where plaintiff challenged "individual instance of . . . law enforcement overreach," rather than "high level policies," and specifically finding that the claim survived *Abbasi*, 137 S. Ct. 1843).

Defendants ignore these critical factors, and instead cite *Abassi* and *El Badrawi*, which are entirely distinguishable. Both cases were brought by foreign national plaintiffs seeking judicial intervention in matters of national security and executive discretion, not a U.S. citizen asserting claims for constitutional violations.

In *Abbasi*, a class of aliens detained for immigration violations alleged that the harsh conditions of their detention and government policies authorizing it violated their Fourth and Fifth Amendment rights. *Id.* at 1853–54. After concluding that the case presented a new *Bivens* context, the Court determined multiple special

[9] *Available at* https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf.

factors counseled hesitation in implying a *Bivens* remedy against the defendants. *Id.* In particular, the Court was concerned that the plaintiffs' claims were against high-level government officials and challenged a broad governmental policy related to the response to the September 11 attacks, as opposed to claims challenging "standard 'law enforcement operations.'" *Abbasi*, 137 S. Ct. at 1861–62 (citation omitted). The *Abbasi* Court explicitly distinguished the case from straightforward cases of "law enforcement overreach," such as the instant case. *Id.* at 1862.

Similarly, in *El Badrawi v. Dep't of Homeland Security*, the court declined to permit a *Bivens* remedy where a foreign national claimed federal immigration officials violated his constitutional rights, because the plaintiff's claims challenged executive policies and thus would require the court "to intrude on the executive's authority to make determinations relating to national security." 579 F. Supp. 2d 249, 263 (D. Conn. 2008). The plaintiff did not challenge ordinary law enforcement activity, but rather "a secretive ICE program that 'targeted potential immigration violators claimed to be threats to national security.'" *Id. El Badrawi* is clearly distinguishable because no such intrusion on executive policies is present here, nor are there similar foreign affairs or immigration policy concerns raised by the claims of a U.S. citizen for violations of his constitutional rights.

This case is also unlike *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018), in which the Fifth Circuit recently held that *Mexican citizens* could not pursue Fourth and Fifth Amendment claims against a Border Patrol agent who shot and killed their son across the international border. In *Hernandez*, the court held that a "new context" was present because of the "cross-border" nature of the shooting of a non-U.S. citizen on Mexican soil. *Id.* at 816–17. Notably, the court did not even countenance the argument Defendants are making here—that the mere fact that the claims arose near the border precluded a *Bivens* remedy entirely. Instead, the court noted that it did not "repudiate *Bivens* claims where constitutional violations by the Border Patrol are wholly domestic." *Id.* at 819 n.14.

B. Defendants Are Not Entitled to Qualified Immunity

On a Rule 56 motion, Defendants are entitled to qualified immunity "only if the facts alleged and evidence submitted, resolved in [the nonmoving party's] favor and viewed in the light most favorable to him, show that their conduct did not violate a federal right; or, if it did, the scope of that right was not clearly established at the time." *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir. 2007) (citation omitted). Defendants here fail to apply this standard faithfully, and material disputes of fact preclude a finding of qualified immunity.

1. Defendants Violated Jones's Fourth Amendment Rights

(a) *Defendants' Arrest and Detention of Jones Was Unconstitutional*

Agents Hernandez, Johnson, Bowen, Faatoalia, and Kulakowski violated Jones's Fourth Amendment right to be free from an unlawful seizure. A warrantless seizure is permissible under the Fourth Amendment in only two circumstances: (1) an officer may make a brief investigative stop if he has reasonable suspicion that a person stopped has committed, or is about to commit, a crime, *Terry v. Ohio*, 392 U.S. 1, 16 (1968); or (2) an officer may make an arrest if he has probable cause to believe the person arrested has committed a crime. *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007).

Reasonable suspicion for an investigative stop exists when officers have an "articulable suspicion that criminal activity is afoot," beyond an "inchoate and unparticularized suspicion or 'hunch.'" *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (citation omitted). "Probable cause to arrest exists when officers have knowledge of reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." *Lopez*, 482 F.3d at 1072.

(i) *Reasonable Suspicion Is Required for an Investigatory Stop on Federal Land*

Surprisingly, Defendants claim they did not need reasonable suspicion to stop Jones. Instead, they assert blanket authority to stop any person found on federal land. Mot. at 18–19. The Ninth Circuit has explicitly rejected this proposition. *United States v. Faulkner*, 450 F.3d 466, 470 (9th Cir. 2006) (federal officers who stop park visitors on federal land must satisfy Fourth Amendment standards); *United States v. Munoz*, 701 F.2d 1293, 1300 (9th Cir. 1983) (same).

Neither of the cases on which Defendants rely support their contention that reasonable suspicion is not required on federal land—a position which, taken to its logical conclusion, would eviscerate the Fourth Amendment. The cases are factually distinguishable and rest explicitly on the fact that *probable cause to arrest* existed. *See Trenouth v. United States*, 764 F.2d 1305, 1308 (9th Cir. 1985) (discussing First Amendment issues); *Murray v. City of Carlsbad*, 2010 WL 2839477, at *6 (S.D. Cal. July 19, 2010) (private citizen's use of force at a private residence).

(ii) *Defendants Had No Reasonable Suspicion to Detain Jones*

Defendants alternatively claim that reasonable suspicion existed to detain Jones after "he tripped the sensor near the All-Weather Road" and after Agent Hernandez called for backup. Mot. at 2. Neither of these facts establish reasonable suspicion that Jones was engaged in criminal activity. Mot. at 19.

Tripping a sensor is not reasonable suspicion of any crime, including trespass, because as discussed below, trespass requires more than simple presence on private land. Moreover, Agent Johnson "cleared" that sensor by informing all other agents over the radio that Jones was "local traffic," a moniker used only to identify individuals who are *not* suspected of any crime. Ex. G (Johnson Depo. Tr.) at 131:1–5; 176:11–13; Ex. F (McFarlin Depo. Tr.) at 183:22–24; Ex. I (Bowen Depo. Tr.) at 217:19–23.

For these reasons, all reasonable suspicion that Jones was engaged in criminal activity had dissipated entirely before Agent Hernandez called for backup. Agent Hernandez knew from his earlier encounter with Jones that Jones was visiting the beach with his family, and could see that Jones was wearing jogging clothes and earbuds. When Agent Hernandez told Jones to "turn around," Jones obeyed the order and began jogging back to his family on the beach. There was absolutely no reason to suspect Jones of any wrongdoing.

(iii) *Defendants Had No Probable Cause to Arrest Jones*

Finally, Defendants contend that they had probable cause to arrest Jones. This argument, however, rests on a serious mischaracterization of the record. Defendants claim that there is "conclusive evidence" that Jones committed two state crimes[10] and one federal crime: (1) criminal trespass under California Penal Code § 602(o); (2) resisting, delaying, or obstructing a public officer under California Penal Code § 148(a)(1); and (3) assaulting a federal officer under 18 U.S.C. § 111. But no such conclusive evidence exists.

First, the RVSS video does not provide "conclusive" evidence that Jones violated § 602(o). Defendants simply ask this Court to interpret this grainy, unclear

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[10] Importantly, the Border Patrol has not even established that it has authority to arrest for purely state law offenses, which are not "offenses against the United States," 8 U.S.C. § 1357(a)(5)(A), and are presumptively outside the Border Patrol's limited jurisdiction. *See U.S. v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009) "To hold otherwise would grant Border Patrol agents unfettered discretion to investigate suspected violations of any and all cognizable criminal laws . . . ; it would, in effect, give to the Border Patrol the general police power that the Constitution reserves to the States." *Id.* (citation omitted).

Defendants cite the Assimilative Crimes Act, but that Act applies only on land that 1) falls within the "exclusive or concurrent jurisdiction of the United States, or 2) is acquired "by consent of the [state's] legislature." 18 U.S.C. §§ 13(a), 7(3). Defendants have not established that either prong has been met. *See generally* 40 U.S.C. § 3112 (procedure to obtain jurisdiction of the United States); Cal. Gov't Code § 126 (procedure for obtaining State consent to jurisdiction).

video in the light most favorable to *them*, which is inappropriate on summary judgment. Defendants suggest that the video shows Jones trespassing, but it shows no such thing. Trespass requires establishing both (a) willful, as opposed to inadvertent, presence on private land and (b) that the individual refused to leave private property after being asked to do so by a peace officer at the owner's request. *People v. Irizarry*, 37 Cal. App. 4th 967, 975 (1995). The video shows nothing more than a jogger who turned around after a brief exchange with two agents. It shows neither willful presence nor a request to leave the premises. In fact, the footage is entirely consistent with Jones's testimony that he was not aware that the land was restricted, that he was told to turn around, and that he complied with that order and began jogging westbound back to his family.

Second, the RVSS video does not provide conclusive evidence that Jones violated § 148(a)(1), which provides that it is a crime to "willfully resist[], delay[], or obstruct[] any public officer [or] peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment." The video does not show that Jones was willfully resisting or fleeing from the Border Patrol agents. Rather, the video is consistent with Jones's testimony that he obeyed Agent Hernandez's command to turn around and head back to his family, yet was pursued nevertheless by Border Patrol agents. On summary judgment, Jones's compliance cannot be recast as "resistance" simply because Jones was jogging.

Third, there are material disputes as to whether Jones violated 18 U.S.C. § 111 by "assaulting" an agent. Defendants cannot seriously argue that there are no disputed facts regarding this purported assault because all relevant events occurred in a known blind spot of the RVSS camera, so there is no contemporaneous video evidence of what actually happened. Even Defendants' expert agrees that the facts occurring in the blind spot are disputed. Ex. L (Fonzi Depo. Tr.) at 167:5–11.

Defendants contend that in the interview video and Jones's deposition testimony, Jones stated that he "knocked Agent Johnson to the ground." Mot. at 24.

This is a false characterization of the record. In the interview video, Jones states that Agent Johnson "got knocked down and broke his ankle." He *never* states that *he* knocked Agent Johnson down. ECF No. 52-10 (Interview Video) at 8:26–8:31, 11:00. In fact, Jones stated the exact opposite: "I didn't knock anyone to the ground." Ex. A (Jones. Depo. Tr.) at 135:8–16. This is consistent with the contemporaneous reports of the agents involved, which all agree that Jones did *not* knock Agent Johnson down, but rather Agent Johnson injured himself while participating in a takedown maneuver. Ex. AA at Jones-000018 (describing the weight of the agents and Jones coming down on his leg); *see also* p. 12, *supra*.

According to Jones, he only came into physical contact with the Border Patrol agents *after* they tackled him without justification. Ex. A (Jones. Depo. Tr.) at 135:8–16. A law enforcement official cannot unlawfully seize an individual and thereafter claim that the seizure was justified by probable cause that arose after the unlawful seizure. *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964) (validity of arrest depends on "whether, at the moment the arrest was made, the officers had probable cause to make it"). Any contact between Jones and Agent Johnson was not the result of an "intentional use of force," *see* 18 U.S.C. § 111, but rather Defendants' unlawful takedown of Jones.[11] These disputed facts preclude summary judgment on the lawfulness of Jones's detention and arrest.

(b) *Agents Hernandez, Johnson, Bowen, and Faatoalia's Use of Force Was Unconstitutional*

Use of force is contrary to the Fourth Amendment if it is excessive under an objective standard of reasonableness. *Tekle*, 511 F.3d at 844. This objective standard

[11] Agent Kulakowski participated in the unlawful seizure by placing Jones into the back seat of a heated patrol car for at least fifteen minutes and then transporting Jones to the Imperial Beach Border Patrol station—without either reasonable suspicion or probable cause. *Hayes v. Florida*, 470 U.S. 811, 815–16 (1985). Defendants do not separately dispute the unlawful arrest claim against Agent Kulakowski.

balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also Blankenhorn*, 485 F.3d at 477. Summary judgment is rarely appropriate on excessive force claims because the "inquiry nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005); *see also Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

(i) *The Quantum of Force Used Is Disputed*

Here, the facts surrounding the force used against Jones remain highly disputed. Defendants' own expert admits that there are disputes of fact as to what force was used against Jones, Ex. L (Fonzi Depo. Tr.) at 166:4–167:11, and it is therefore puzzling that Defendants ask this Court to conclude as a matter of law that the force used was reasonable. And, while the facts themselves are disputed, the reason for the disputes is not: Four federal agents led Jones to a known blind spot of the Border Patrol's surveillance system, ensuring that their actions would not be captured on video. As such, the video evidence produced in this case shows none of the critical, disputed events underpinning this lawsuit.

(ii) *The Reasonableness of the Force Is Disputed*

In evaluating a use of force, the Court must consider the "*Graham* factors": "(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest or attempted to escape." *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016) (citing *Graham*, 490 U.S. at 396).

None of the *Graham* factors justified any use of force at all, much less this excessive display of aggression. Regardless, the reasonableness of the force is the subject of competing expert reports, which may not be disregarded on summary judgment. *See* Defoe Decl. Ex. B; Declaration of Tommy Burns filed concurrently herewith, Ex. A.

1. Severity of the crime. Although Jones did not resist arrest or commit any crime, even if he had committed the crimes Defendants suggest, a "violation of Penal Code Section 148(a)(1) . . . and related federal provisions . . . does not constitute a serious crime" under the *Graham* factors. *Hesterberg v. United States*, 71 F. Supp. 3d 1018, 1029 (N.D. Cal. 2014) (officer's use of Taser against a subject who continued jogging after being told to stop was unreasonable).

2. Threat to the safety of the officers. Furthermore, Jones posed no risk to the agents whatsoever, and there is no evidence to the contrary. Defendants were aware that Jones was a park guest identified over the Border Patrol radio as "local traffic," wearing jogging clothes and earbuds. Jones was attempting to comply with Agent Hernandez's order to "turn the fuck around" when he was taken down without warning or justification by four armed federal agents. This factor, the "most important" factor under *Graham*, weighs heavily against the use of force. *Id.*

3. Resisting arrest or escaping. Finally, under the facts taken in the light most favorable to Jones, Jones did not resist arrest at all; rather, he simply complied with an order to turn around and jog back to his family on the beach, when Agents Hernandez, Johnson, Bowen, and Faatoalia pummeled him to the ground, hit him, and kicked him. A reasonable factfinder could find this force unreasonable.

(iii) *The Extent of Jones's Injury Is Disputed*

Evidently recognizing the import of these disputes of fact, Defendants suggest that Jones's physical injuries are insufficient to sustain an excessive force claim. This argument ignores both Plaintiff's serious shoulder injury and his ongoing mental injuries. "Physical injury is not one of the elements" of an excessive force claim. *Halbert v. Cty. of San Diego*, 2010 WL 1292163, at *12 (S.D. Cal. Mar. 30, 2010); *Tortu v. L.V. Metro. Police Dep't*, 556 F.3d 1075, 1086 (9th Cir. 2009) ("[D]amages may be awarded . . . whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms."). Jones may also recover damages for "personal humiliation[] and mental anguish and suffering." *Memphis Cmty. Sch.*

Dist. v. Stachura, 477 U.S. 299, 307 (1986). Regardless, Jones *was* seriously harmed by Defendants' use of excessive force, suffering both physical injury to his shoulder,[12] and exacerbation of his pre-existing mental health condition.

Defendants next argue that Jones's version of events is consistent with "normal handcuffing procedure." Mot. at 24. This argument ignores Jones's factual claims that he was pummeled, hit, and kicked—actions extending well beyond the bounds of normal handcuffing procedure. Competing expert opinions dispute the reasonableness of the handcuffing procedure performed on Jones.[13] Declaration of Scott A. DeFoe filed concurrently herewith, ¶¶ 6–14; *see LaLonde v. Cty. of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000) ("The issue of tight handcuffing is usually fact-specific and is likely to turn on the credibility of the witnesses."); *Dewey v. Adams*, 2014 WL 3420801, at *10–11 (C.D. Cal. July 9, 2014).

In a last-ditch effort to avoid consequences for their unlawful actions, Defendants argue that Jones's testimony should be ignored because his account of his ordeal was not, in Defendants' view, sufficiently specific in the days immediately following the incident. Mot. at 25–26. This argument fails on its own terms: Jones reported the physical abuse he experienced to several third parties immediately following his release on August 10, 2014. Ex. A (Jones Depo. Tr.) at 208:7–11; Ex. K (Moser Depo. Tr.) at 54:20–22; Ex. B (Ana Jones Depo. Tr.) at 102:16–103:23; Ex. N (Wintz Depo. Tr.) at 26:9–18; ECF No. 68-2. Furthermore, this is precisely the sort of argument that is precluded on summary judgment. Defendants cite no authority for the proposition that this Court may ignore Jones's

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[12] Defendants make a passing reference to the fact that Jones had a preexisting right shoulder condition, Mot. at 25, but do not explain how this is relevant on summary judgment. The extent and cause of Jones's injuries are questions of disputed fact.

[13] Defendants curiously suggest that Jones conceded that the he was subjected to ordinary handcuffing procedure. Mot. at 24 n. 38. Jones testified to no such thing, *see* Ex. A (Jones Depo. Tr.) at 187:24–188:22, and in any event, Jones is not an expert qualified to opine on proper handcuffing procedure.

testimony regarding the physical abuse he suffered at the hands of the Border Patrol because he chose to highlight other facts in his early communications. These arguments go solely to the weight of Jones's testimony, which must be evaluated by a factfinder, not on summary judgment.

2. **Agent Kulakowski's Search of Jones Was Unconstitutional**

Defendants acknowledge that Agent Kulakowski's search of Jones at the Border Patrol station must be evaluated as a search incident to arrest. Mot. at 26. Because material disputes of fact exist as to whether Jones's arrest was supported by probable cause, summary judgment may not be granted on this claim. *United States v. Potter*, 895 F.2d 1231, 1234 (9th Cir. 1990) ("Probable cause to arrest must exist before an officer undertakes a search incident to arrest.").

3. **Jones's Fourth Amendment Rights Were Clearly Established**

Defendants are not entitled to qualified immunity because Jones's rights to be free from their unlawful seizure, excessive force, and unlawful search were clearly established. The question whether a right is clearly established turns on the objective state of the law at the time of the incident. *Pearson v. Callahan*, 555 U.S. 223, 244 (2009). A case directly on point is not required for a right to be clearly established. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). Rather, the "relevant question is whether the state of the law at the time gives officials fair warning that their conduct is unconstitutional." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (quotations omitted).

There can be no doubt that tackling, pummeling, hitting, and kicking a non-resistant, non-threatening subject is contrary to this Circuit's clearly established law on excessive force. In *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), the Ninth Circuit held it was "clearly established" that "grab[bing] [a plaintiff] by the arms, throw[ing] her to the ground, and twist[ing] her arms while handcuffing her" was excessive, even as she resisted arrest for a felony, because she posed no immediate risk. *Id.* at 1061. Similarly, in *Blankenhorn*, the Ninth Circuit held that it was clearly

established that "gang-tackling without first attempting a less violent means of arresting a relatively calm trespass suspect" was excessive. 485 F.3d at 481; *see also Raiche v. Pietroski*, 623 F.3d 30 (1st Cir. 2010) (tackling a stationary individual who posed no threat to officer clearly violated established law); *Smith v. Ray*, 781 F.3d 95, 104–06 (4th Cir. 2015) ("any reasonable officer would have realized that the force employed was excessive" where officer threw plaintiff to the ground, slammed her in the back with a knee, and wrenched her arm behind her back as she attempted to retreat home).

A reasonable officer "would not have needed prior case law on point" to know that the facts Jones alleges—including tackling, pummeling, hitting, and kicking—are unlawful, pursuant to clearly established law, where the subject poses no resistance nor threat of physical harm. *Raiche*, 623 F.3d at 38-39. Likewise, as explained in detail above, seizing an individual without reasonable suspicion or probable cause is contrary to clearly established Fourth Amendment principles.

Defendants argue that they were entitled to tackle and detain Jones without reasonable suspicion of a crime if he did not stop when they asked him to, or, in the alternative, that they had probable cause to believe Jones committed one of three crimes. Mot. at 28. Yet the evidence before this Court reflects numerous factual disputes regarding these justifications. On summary judgment, viewing the record in the light most favorable to Jones, *Tolan*, 134 S. Ct. at 1866, Defendants had *no* basis for a warrantless seizure of Jones. Jones complied with Agent Hernandez's order to "turn around," and the agents all knew he was "local traffic." On these facts, Defendants did not have reasonable suspicion, much less probable cause, to seize Jones. That they did so anyway violated Jones's clearly-established Fourth Amendment rights. *See Green v. City & Cty. of San Francisco*, 751 F.3d 1039, 1052 (9th Cir. 2014) (it was established *in 2009* "that individuals may not be subjected to seizure or arrest without reasonable suspicion or probable cause").

In support of their argument for qualified immunity, Defendants rely on just one unpublished case, *Saetrum v. Vogt*, 673 F. App'x 688 (9th Cir. 2016), which is factually distinguishable, involved no material disputes of fact, and, because it is unpublished, is not a statement of law. Here, by contrast, there are disputed material facts as to the circumstances surrounding the agents' use of force, the amount of force used against Jones, and whether reasonable suspicion or probable cause existed to detain Jones at all.

Finally, Agent Kulakowski is not entitled to qualified immunity on Jones's unlawful search claim because, as Defendants apparently admit, it was clearly established at the time that a search incident to arrest must be supported by probable cause. *See Potter*, 895 F.2d at 1234; *Oelke v. United States*, 389 F.2d 668, 672 (9th Cir. 1967). Construing the facts in the light most favorable to Jones, Defendants are not entitled to summary judgment on qualified immunity.

VI. THE MOTION SHOULD BE DENIED AS TO JONES'S FTCA CLAIMS

Defendants move for summary judgment on Jones's FTCA claims. FTCA claims are not subject to qualified immunity. On the merits, Defendants are not entitled to summary judgment on Jones's tort claims in light of the multitude of disputed material facts present on the record before this Court.

A. False Arrest and False Imprisonment

Defendants argue that the United States is entitled to summary judgment on Jones's false arrest claim because Defendants had probable cause to arrest Jones for criminal trespass or for resisting a public officer. Mot. at 31. This argument fails on account of numerous disputes of material fact. In addition, the United States fails to address the second facet of Jones's false imprisonment claim—*i.e.*, even assuming probable cause existed initially, the Border Patrol's continued imprisonment of Jones after probable cause had dissipated, and without charging Jones with any crime, was unlawful.

Under California law, the tort of false arrest is established when one is arrested without probable cause. *Collins v. City & Cty. of San Francisco*, 50 Cal. App. 3d 671, 674 (1975). False arrest is "but one way of committing false imprisonment," *id.*, and false imprisonment may *also* be committed where the defendant "ha[s] actual knowledge that the imprisonment of the plaintiff is unlawful or alternatively that he ha[s] some notice sufficient to put him, as a reasonable man, under a duty to investigate the validity of the incarceration." *Sullivan v. Cty. of Los Angeles*, 12 Cal. 3d 710, 719 (1974). This latter tort is established when the "probable cause [to imprison] ha[s] dissipated." *Alvarado v. United States*, 2015 WL 1279262, at *5 (D. Ariz. Mar. 20, 2015).

1. **The Initial Arrest Lacked Probable Cause**

As discussed above, Section V.B.1.a.iii *supra*, there was no probable cause for the arrest when the record evidence is viewed in the light most favorable to Jones. At a minimum, there are disputed facts precluding summary judgment.

2. **The Ongoing Detention Was Unlawful**

Furthermore, it is undisputed that Jones was *not* in fact detained on suspicion of trespass or resisting a public officer. Rather, he was detained overnight for a different purported crime: *assaulting* an agent in violation of 18 U.S.C. § 111. Ex. C (Flores Depo. Tr.) at 131:13–22. Even Defendants' expert agrees the facts underlying the purported assault are disputed. *See* Ex. L (Fonzi Depo. Tr.) at 166:4–167:11. There is both direct and circumstantial record evidence that no assault occurred, and that the charges were fabricated. *See* Ex. A (Jones Depo. Tr.) at 130:7–21; Ex. AA at 000018–21 (contemporaneous reports do not mention assault).

Thus, even assuming *arguendo* that Jones could have been detained for trespass or resistance, the overnight detention for *assault* was improper. *Alvarado v. United States*, 2015 WL 1279262, at *3 (D. Ariz. Mar. 20, 2015) (detention improper after probable cause dissipates). The United States cites no authority for its claim that a prisoner may be held indefinitely even after probable cause for the

actual arresting offense has dissipated, solely because there was theoretical probable cause to have arrested the person for a *different* crime.

Furthermore, there is evidence on which a jury could conclude that the length of Jones's detention was unreasonable, even if the initial arrest was lawful. *See City of Newport Beach v. Sasse*, 9 Cal. App. 3d 803, 810 (1970) ("In California a cause of action for false imprisonment will lie . . . where the arrest is lawful but an unreasonable delay has occurred. . . ."). Jones was held more than 16 hours without charges, when he lived nearby and was admittedly not a flight risk. Ex. C (Flores Depo. Tr.) at 89:7–10 (supervisor testified that he was unaware of any other instance in which a U.S. citizen had been held for ten or more hours at the Imperial Beach Border Patrol station); Ex. M (Matthews Depo. Tr.) at 109:7–9 (Jones not a flight risk). A factfinder could reasonably conclude that, under the specific facts of this case, the length of Jones's detention was unreasonable.

B. Battery

Jones's battery claim flows from the same set of facts as his claim for excessive force. A battery plaintiff must prove (a) an intentional act, (b) resulting in unconsented (c) harmful or offensive contact with his person (d) causing injury, damage, loss, or harm. *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 526–27 (2009). Unreasonable police action may support a battery claim. *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272 (1998).

The United States suggests that it is entitled to summary judgment because the Border Patrol was authorized to use reasonable force to remove a trespasser from federal land. Mot. at 32. This argument makes no sense. First, as discussed above, even Defendants' own expert admits that there are disputes of fact regarding the level of force that was used—and, thus, whether such force was reasonable. Second, no one could seriously contend that the reason for the Border Patrol's use of force was to remove Jones from federal land. Defendants' actions in tackling, pummeling, hitting, kicking, and detaining Jones—who had complied with the order

to turn around and could not leave federal property any other way—were not reasonably necessary to "prevent imminent damage to the property." *See People v. Corlett*, 67 Cal. App. 2d 33, 53 (1944) ("But for the protection of neither the habitation nor the curtilage may the owner use more force than is reasonably necessary to prevent imminent damage to the property, even though that person is in fact a trespasser."), *disapproved on other grounds by People v. Carmen*, 36 Cal. 2d 768 (1951).

C. Assault

As to Jones's assault claim, the United States focuses solely on the Border Patrol's unlawful threat that Jones would be placed in "the chair" with his head covered with a "spit bag" unless he stopped asking about his detention and requesting medical care. Mot. at 33. Jones's assault claim in fact focuses on three facets of Defendants' misconduct: the agents' unlawful use of force, the unlawful arrest, and unlawful physical threats during Jones's detention.

First, the agents' tackling, beating, hitting, and kicking Jones was assault, because it caused him severe apprehension of ongoing battery. *See Olvera v. City of Modesto*, 38 F. Supp. 3d 1162, 1181 (E.D. Cal. 2014) (a plaintiff subjected to an ongoing battery also has a claim for assault due to apprehension of the ongoing battery); *see also Booke v. Cty. of Fresno*, 98 F. Supp. 3d 1103, 1130 (E.D. Cal. 2015) (assault cognizable where plaintiff was subject to unlawful touching without warning). The United States does not dispute this point in its Motion.

Next, after Jones was handcuffed, he was subjected to an unnecessary rough ride to the Border Patrol station, which a factfinder could conclude was intended for the purpose of causing him distress. Jones was placed in the back of a patrol vehicle—in which Agent Kulakowski inexplicably ran the heater on a hot August afternoon, for 15 to 20 minutes. Ex. A (Jones Depo. Tr.) 151:7–22. Upon departing from the scene, Agent Kulakowski turned up the music, put on leather gloves, and took Jones on a bumpy drive off the main roads, causing Jones to reasonably fear

that Agent Kulakowski was taking him to a remote area to inflict further harm on him. Jones Decl. ¶ 28; Ex. A (Jones Depo. Tr.) at 146:20–23.

Finally, during Jones's overnight detention, he was assaulted when unnamed Border Patrol agents (whom the government still has not identified) threatened to strap him to a chair and place a spit bag over his head unless he stopped protesting his unlawful detention. Ex. A (Jones Depo. Tr.) at 236:23–237:21. The United States contends that these actions did not amount to assault because they were, at most, "mere words." Mot. at 33–34. To the contrary, when Border Patrol agents threatened Jones, they had complete physical control over him and "proceed[ed] as far as necessary"—*i.e.*, had done everything short of strapping him to the chair—to ensure his compliance with their unlawful threat. California courts recognize these sorts of "conditional threats" as assault. *See People v. Stanfield*, 32 Cal. App. 4th 1152, 1161 (1995). Defendants' case, in which a process server served papers "angrily" without any threat of violence, is inapposite. *Steel v. City of San Diego*, 726 F. Supp. 2d 1172, 1178 (S.D. Cal. 2010).

Furthermore, Defendants' suggestion that such a threat was appropriate to reduce noise in prison, *see* Mot. at 36 & n.45, is astounding and unsupported by law. The United States cites cases stating no more than the reasonable proposition that rules restricting yelling and other disturbances may be constitutionally imposed in jails, *e.g.*, *Bailey v. Cty. of Kittson*, 2008 WL 906349, at *14 (D. Minn. Mar. 31, 2008); it cites no authority, however, for its novel suggestion that the threat of restraints and corporal punishment may be used to quell undesired inmate speech regarding the conditions of detention.

D. Negligence

The United States makes no independent arguments relating to Jones's negligence claim; rather, it argues that "negligence is measured by the same standard as battery." Mot. at 34. This is wrong as a matter of law, because

negligence, unlike battery, requires no intentionality on the part of the tortfeasor. *Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1100–01 (2004).

That distinction is important here. Although Jones believes the Border Patrol's actions against him were intentional, a jury may also or alternatively find for him on his negligence claim—*i.e.*, a jury may conclude that the Border Patrol agents acted negligently in escalating their encounter with Jones and in detaining him overnight without any legitimate purpose.[14]

E. Intentional Infliction of Emotional Distress

As to Jones's claim for intentional infliction of emotional distress (IIED), the United States ignores the factual record entirely. Instead, it argues that the operative complaint does not allege extreme or outrageous conduct. Mot. at 34–35. To the contrary: the complaint alleges that Defendants acted with the "intention of causing, or reckless disregard of the probability of causing [Jones] emotional distress." TAC ¶ 118–119. "[I]ntent . . . may be alleged generally." Fed. R. Civ. P. 9(b).

Whether conduct is "extreme and outrageous" is a question of fact for a jury to resolve, unless reasonable minds could not differ on the issue. *Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1123, *as modified on denial of reh'g* (Dec. 1, 1988).

Furthermore, the evidence supports Jones's claim that Defendants' actions were extreme, outrageous, and well beyond that usually tolerated in a civilized society. First, as discussed above, Agent Kulakowski's actions while driving Jones to the station—leaving Jones handcuffed with the heater on, turning up the music, putting on leather gloves, taking bumpy roads—were extremely distressing to Jones and far outside the bounds of acceptable police behavior.

[14] The case Defendants cite, *Kong Meng Xiong v. City of Merced*, 2013 WL 5493388, at *6 (E.D. Cal. Oct. 1, 2013), stated that battery and negligence plaintiffs alleging wrongful police action must both prove *unreasonableness*. That does not mean that battery and negligence are subject to the same overall legal standard.

Second, when Jones was detained, he was falsely told that the Border Patrol would call a lawyer to see him. ECF No. 52-10 (Interview Video) at 05:46. He was denied medical treatment despite repeated requests; in fact, he was falsely told that he would be released if he declined medical treatment. Ex. A (Jones Depo. Tr.) at 228:17–229:15. But, even after signing a release, Jones was placed back in his cell and held for several more hours. *Id.* at 240:4–12. He was repeatedly ridiculed by Border Patrol agents, who laughed at him and said, "He says he's a fucking American." *Id.* at 70:15–23; 215:1–17. And finally, when the agents tired of hearing his pleas, they threatened to strap him to a chair and place a spit bag over his head. *Id.* at 234:18–235:2; 237:11–21. A reasonable jury could conclude that these were extreme and outrageous actions taken with the intent of inflicting emotional distress.

F. Bane Act

The United States' suggestion that this Court lacks jurisdiction over Jones's Bane Act claim is wrong, as this Court recognized just one year ago, in *Anonymous v. United States*, 2017 WL 1479233, at *4–5 (S.D. Cal. Apr. 25, 2017). This Court rejected essentially the same argument Defendants make here, recognizing that the Bane Act is not a constitutional tort claim, but rather a "claims premised on state civil rights *statutes*," within the scope of the FTCA's waiver of sovereign immunity. *Id.* at *5 (emphasis added). There is no reason for the Court to change course.

The Bane Act provides damages where any individual has interfered with the civil rights of another "by threat, intimidation, or coercion." Cal. Civ. Code § 52.1. The statute protects, among other rights, the right to vocally criticize law enforcement officers without retaliation. *See Holland v. City of San Francisco*, 2013 WL968295, at *10 (N.D. Cal. Mar. 12, 2013). Jones and Agent Hernandez exchanged expletives before Jones ultimately obeyed Agent Hernandez's order to turn around. A reasonable factfinder could conclude that Agent Hernandez's response—to call for backup, lead Jones to a blind spot of the RVSS camera system, tackle and detain him, and lie about an assault on an officer—had no reasonable

purpose, and was instead intended to threaten, intimidate, and coerce Jones after Jones exercised his constitutionally protected right to use coarse language when addressing Border Patrol agents. And these threats and intimidation continued when, as discussed above, agents threatened to strap Jones down and place a bag over his head for seeking their attention and exercising protected First Amendment rights. Ex. A (Jones Depo. Tr.) at 234:18–235:2.

The United States misleadingly cites *Shoyoye v. Cty. of Los Angeles*, 137 Cal. Rptr. 3d 839, 849 (2012), for the proposition that a Bane Act plaintiff who was falsely arrested and imprisoned must allege "coercion independent from the coercion inherent in the wrongful detention itself." Mot. at 36–37. The United States fails to mention that more recent authority confirms that "[m]uch of what law enforcement officers do in settings that test the limits of their authority is 'inherently coercive,'" but nevertheless may be the subject of a Bane Act claim. *Cornell v. City & Cty. of San Francisco*, 17 Cal. App. 5th 766 (2017), *as modified* (Nov. 17, 2017).

VII. THE MOTION SHOULD BE DENIED AS TO THE UNITED STATES' COUNTERCLAIM

The United States argues that it is entitled to summary judgment on its counterclaim for negligence under the negligence per se doctrine. Again, the United States asks the Court to accept its version of disputed facts, and thus the Motion must be denied for that reason. Furthermore, its position is legally wrong.

First and foremost, as discussed above, there was no violation of Penal Code § 148(a)(1) when the facts are taken in the light most favorable to Jones. Jones was not willfully fleeing. Rather, he was obeying Agent Hernandez's command to turn around, when he was assaulted.

Second, the United States has again mischaracterized the video evidence as "conclusive evidence" of statutory violations, but it is not. *See supra*.

Third, because all of the critical allegations of the counterclaim occur after Jones was taken to the camera system's blind spot, the United States cannot show

that any statutory violation *caused* Agent Johnson's injury as a matter of law. Cal. Evid. Code § 669(a)(2) (violation must have "proximately caused" the injury). Defendants rely heavily on the video of Jones jogging toward the beach, but that video shows *no* injury to Agent Johnson, much less an injury caused by Jones's actions. Jones's facts, which must be accepted as true, are that he did not resist in any way before or after being taken down. It is thus impossible to conclude as a matter of law that any violation of § 148(a)(1) occurred in the blind spot, much less that any violation proximately caused injury to Agent Johnson.

Fourth, at the time he was injured, Agent Johnson was not among the class of individuals whom the statute protects, for the simple reason that he was acting unlawfully. *See* Cal. Evid. Code § 669(a)(4) (negligence per se may apply only if the "person suffering . . . the injury . . . was one of the class of persons for whose protection the statute . . . was adopted"). Under the factual record taken in the light most favorable to Jones, Agent Johnson was injured when he engaged in an unreasonable and unlawful use of force against Jones. The Legislature did not enact § 148(a)(1) in order to protect such activity.

Fifth, the United States fails to even mention the fact that the negligence per se doctrine raises nothing more than a *rebuttable* presumption of negligence. That presumption may be rebutted by, inter alia, proof that Jones "did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." Cal. Evid. Code § 669(b)(1). A reasonable person under the circumstances confronting Jones would have complied with the command to turn around and tried to return to his family, as Jones did. The factual background is hotly disputed, and a reasonable jury could conclude that Jones acted reasonably under the circumstances.

VIII. CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied.

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Respectfully submitted,

By: /s/ *Tamerlin J. Godley*
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