

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

Jesus Hernández, individually and as
the surviving father of Sergio Adrián
Hernández Güereca, and as
Successor-in-Interest to the Estate of
Sergio Adrián Hernández Güereca;
María Guadalupe Güereca Bentacour
individually and as the surviving mother
of Sergio Adrián Hernández Güereca,
and as Successor-in-Interest to the
Estate of Sergio Adrián Hernández
Güereca,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA;
Unknown Named Agents of the United
States Border Patrol; United States
Department of Homeland Security;
United States Bureau of Customs and
Border Protection; United States
Border Patrol; United States
Immigration and Customs Enforcement
Agency; United States Department of
Justice,

Defendants.

Civil Action No.
6:11-cv-00013

**PLAINTIFFS' ORIGINAL
COMPLAINT**

**Jury Trial Demanded
on all counts except FTCA**

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs, Jesus Hernández and María Guadalupe Güereca Bentacour
(hereinafter "Plaintiffs"), individually as the surviving parents of Sergio Adrián
Hernández Güereca (hereinafter "Decedent," "Sergio"), and as Successors-in-

Interest to the Estate of Sergio Adrián Hernández Güereca, complain and allege as follows:

PRELIMINARY STATEMENT AND NATURE OF THE CASE

1. Plaintiffs bring this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-2680; the Alien Tort Claims Act, 28 U.S.C. § 1350; and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Unknown Named Border Patrol Agent (hereinafter "Agent Doe"), employee of the United States of America, for violation of Plaintiff Decedent's individual constitutional rights guaranteed by the Fourth and Fifth Amendments of the United States Constitution, and the Laws of Nations and treaties of the United States, when Agent Doe, while acting within the course and scope of his employment used unlawful deadly force in shooting and killing Decedent on June 7, 2010, notwithstanding that Decedent was defenseless, was offering no resistance, had no weapon of any kind, and had not nor was threatening Agent Doe, or any third party, with harm, deadly or otherwise.

2. Defendant the United States of America has waived its sovereign immunity and has consented to be sued pursuant to the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. § 1346(b), 2671-2680, and the Alien Tort Claims Act (hereinafter "ATCA"), 28 U.S.C. § 1350.

3. Plaintiffs plead claims under the FTCA for "injury, loss of property, or personal injury or death caused by the wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable

to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). Plaintiffs plead that, at all times relevant hereto, Defendant Agent Doe was an employee of the United States of America and, while acting within the course and scope of his agency with the United States, Agent Doe maliciously, and/or wrongfully, and/or otherwise tortuously shot Decedent Sergio Adrián Hernández Güereca even though he showed no resistance to Agent Doe’s demands, thereby causing Sergio Adrián Hernández Güereca’s untimely death. Although the FTCA generally exempts from liability intentional torts, including assault and battery, that exception does not apply to actions arising out of the commission of such torts by “investigative or law enforcement officers of the United States Government.” 28 U.S.C. § 2680(h).

4. In the alternative, Plaintiffs plead under the FTCA that Agent Doe negligently shot Decedent Sergio Adrián Hernández Güereca even though he showed no resistance to Agent Doe’s demands, thereby causing Sergio Adrián Hernández Güereca’s untimely death. Agent Doe negligently, wrongfully, and tortuously caused the wrongful death of Decedent Sergio Adrián Hernández Güereca. This claim is for all forms of negligence and wrongful conduct in the broadest terms allowed for torts of an investigative or law enforcement officer of a United States agency in causing the death of another.

5. Plaintiffs also bring this FTCA claim against Defendant the United States of America for the negligence of its employees within the following United States Agencies: United States Department of Homeland Security; United States Border Patrol; United States Customs and Border Protection; and United States

Immigration and Customs Enforcement Agency; and any and all of its employees for negligently supervising, training, and retaining Agent Doe.

6. In the alternative, Plaintiffs bring this claim under the Alien Tort Claims Act, 28 U.S.C. § 1350, for the violation of Decedent's rights under the Laws of Nations and the treaties of the United States.

7. At all times relevant hereto, Defendant the United States of America, is a sovereign governmental entity, which has been engaged in, among other things, controlling access into its sovereign territory, and preventing entry of undocumented individuals. Defendant the United States of America, performs these activities by and through its agencies, Defendants the United States Border Patrol, the United States Department of Homeland Security, the United States Bureau of Customs and Border Protection, and/or the United States Department of Justice, an agency of the United States, acting within the course and scope of their employment with the United States of America. United States Border Patrol Agent, Agent Doe, is sued in his individual capacity for violations of Decedent's rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution.

8. Defendant Agent Doe was, and is, an investigative or law enforcement officer as defined in 28 U.S.C. § 2680(h) of Defendants United States Bureau of Customs and Border Protection, United States Border Patrol, and/or the United States Immigration and Customs Enforcement Service, a subdivision of the United States Department of Homeland Security, an agency of the United States, and was acting within the course and scope of his employment with the United

States of America and other Defendants. Defendant Agent Doe was an employee of Defendant the United States of America and the other Defendants.

9. Plaintiff will effectuate service of process on Defendants, pursuant to Fed. R. Civ. P. 4(i)(2), by sending a copy of this summons and Complaint via certified mail, return receipt requested, to the following persons and entities, which may be served by serving:

(1) The United States of America:

- (a) Vernell Everett
Civil Process Clerk
Office of the United States Attorney,
Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, Texas 78216-5597
- (b) United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C., 20530

(2) Unknown Named Agent of the United States of America:

- (a) Vernell Everett
Civil Process Clerk
Office of the United States Attorney,
Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, Texas 78216-5597
- (b) United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C., 20530
- (c) United States Customs and Border Protection
Office of the Chief Counsel
1300 Pennsylvania Avenue, N.W.
Washington, D.C., 20229

- (d) Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C., 20528
 - (e) Office of the Principal Legal Advisor
Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street S.W.
Washington, D.C., 20024
- (3) United States Department of Homeland Security:
- (a) Vernell Everett
Civil Process Clerk
Office of the United States Attorney,
Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, Texas 78216-5597
 - (b) United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C., 20530
 - (c) Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C., 20528
- (4) United States Bureau of Customs and Border Protection:
- (a) Vernell Everett
Civil Process Clerk
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Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, Texas 78216-5597
 - (b) United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
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 - (c) United States Customs and Border Protection
Office of the Chief Counsel

1300 Pennsylvania Avenue, N.W.
Washington, D.C., 20229

- (d) Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C., 20528

(5) United States Border Patrol:

- (a) Vernell Everett
Civil Process Clerk
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Western District of Texas
601 N.W. Loop 410
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- (b) United States Attorney General
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950 Pennsylvania Avenue, N.W.
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1300 Pennsylvania Avenue, N.W.
Washington, D.C., 20229
- (d) Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C., 20528

(6) United States Immigration and Customs Enforcement Agency

- (a) Vernell Everett
Civil Process Clerk
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- (b) United States Attorney General
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(c) Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C., 20528

(d) Office of the Principal Legal Advisor
Immigration and Customs Enforcement
U.S. Department of Homeland Security
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(7) United States Department of Justice

(a) Vernell Everett
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San Antonio, Texas 78216-5597

(b) United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C., 20530

JURISDICTION

10. The jurisdiction of this Court, as to the Plaintiffs' claim against Defendant the United States of America pursuant to the FTCA, is based upon 28 U.S.C. §§ 1436(b) and 2671-2680. Jesus Hernández and María Guadalupe Güereca Bentacour filed an administrative claim for damages against the United States Department of Homeland Security on behalf of Decedent on June 23, 2010. A copy of said claim is attached hereto as "Exhibit A." Defendant the United States of America denied Plaintiffs' claim on November 30, 2010. A copy of said denial is attached hereto as "Exhibit B." This Complaint, filed within six months of the United States' denial, is timely.

11. The jurisdiction of this Court, as to the Plaintiffs' claim against Defendant

the United States of America pursuant to the ATCA is based upon 28 U.S.C. § 1350. Plaintiffs have exhausted their administrative remedies and this Complaint is properly before this Court.

12. The jurisdiction of this Court, as to the Plaintiffs' claim against Agent Doe in his individual capacity for violation of Decedent's constitutional rights is based on 28 U.S.C. § 1331, 1332 and 1367(a), *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

VENUE

13. As more fully set forth herein, Plaintiffs contend that Agent Doe's acts occurred on the United States' side of the Rio Grande River in El Paso, Texas, in El Paso County, located on the border of the United States and Ciudad Juárez, Mexico. To the extent that the acts and occurrences forming the basis of this Complaint occurred in El Paso, Texas, jurisdiction is invoked by 28 U.S.C. §§ 1391(a)-(e); and 28 U.S.C. § 1402(b).

14. Alternatively, to the extent that the acts and occurrences forming the basis of this Complaint occurred in the Territory of Mexico, jurisdiction is invoked by 28 U.S.C. § 1350.

CONDITIONS PRECEDENT

15. All conditions precedent have been satisfied prior to filing this suit.

PARTIES

16. At all times relevant hereto, Plaintiff Jesus Hernández was, and now is, a citizen of the Republic of Mexico.

17. At all times relevant hereto, Plaintiff María Guadalupe Güereca Bentacour

was, and now is, a citizen of the Republic of Mexico.

18. At all times relevant hereto, Decedent Sergio Adrián Hernández Güereca was a citizen of the Republic of Mexico.

19. At all times relevant hereto, Plaintiff Jesus Hernández individually as the surviving father of Decedent, and as Successor-in-Interest to the Estate of Decedent, may maintain a Federal Wrongful Death and Survival Action and recover damages for the value of the Decedent's life and the Decedent's pain and suffering.

20. At all times relevant hereto, Plaintiff María Guadalupe Güereca Bentacour individually as the surviving mother of Decedent, and as Successor-in-Interest to the Estate of Decedent, may maintain a Federal Wrongful Death and Survival Action and recover damages for the value of the Decedent's life and the Decedent's pain and suffering.

21. At all times relevant hereto, Defendant Agent Doe was, and is, an investigative or law enforcement officer as defined in 28 U.S.C. § 2680(h) of the United States Customs and Border Protection, the United States Border Patrol, and/or the Immigration and Customs Enforcement Service, an agency of the United States, acting within the course and scope of his employment with the United States of America.

22. Plaintiffs believe and thereupon allege that, at all times relevant hereto, the United States Customs and Border Protection was, and is, a subdivision of the United States Department of Homeland Security—a United States Federal Governmental entity with headquarters in Washington, D.C., and various branch

offices throughout the country including this judicial district.

23. Plaintiffs believe and thereupon allege that, at all times relevant hereto, Agent Doe was acting within the course and scope of his employment with the Defendant the United States of America and other Defendants on June 7, 2010, when Decedent was wrongfully shot to death.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS FOR RELIEF

24. Monday, June 7, 2010 reached a high of 109 degrees in El Paso, Texas. Sergio Adrián Hernández Güereca was spending the last few minutes of the day together with his friends in the all-but-dry cement culvert separating the sister countries of Mexico and the United States. Similar to the Native American Indian game "counting coup," Sergio and his friends would physically run up and touch the barbed-wire United States high fence, and then scamper back down the incline. They had no interest in entering the United States. Rather, in a scene as old as time, a group of young boys were simply ending their day laughing and playing under the gathering clouds of a evening summer thunderstorm, before heading back home for dinner and bed.

25. Suddenly, a United States border agent emerged on his bicycle and detained one of the individuals, dragging the young boy along the concrete. Sergio retreated and stood still beneath the pillars of the Paso del Norte Bridge, observing the agent. The US border agent agent then stopped, pointed his weapon across the border, seemingly taking careful aim, and squeezed the trigger at least twice, fatally wounding Sergio with at least one gunshot wound to the face. Sergio, who had been standing safely and legally on his native soil of

Mexico, unarmed and unthreatening, lay dead on his back in his blue jeans and sneakers. He was fifteen years old.

26. More US border agents arrived on scene, the shooter picked up his bicycle, and then they all left. No one took any action to render emergency medical aid to Sergio, leaving him dead or dying beneath Paso del Norte Bridge in the Territory of Mexico. Shortly thereafter, Mexican police arrived on scene and pronounced Sergio dead.

27. Almost immediately, FBI spokeswoman Andrea Simmons, prior to discovering the existence of a disturbing video depicting much of the event, issued a false and reprehensible cover-up statement:

"This agent, who had the second subject detained on the ground, gave verbal commands to the remaining subjects to stop and retreat. However, the subjects surrounded the agent and continued to throw rocks at him. The agent then fired his service weapon several times, striking one subject who later died."

28. This litigation arises from the acts and omissions of the named and unnamed Defendants acting in concert in their individual capacities, as appropriately pled herein.

29. Plaintiffs further contend that Defendants are individually, jointly, and severally liable for those violations of Decedent's constitutional rights, referenced above and below, in that Defendants have:

- (1) tolerated, condoned, and encouraged a pattern of brutality and use of excessive force by members of the United States Border Patrol, the United States Bureau of Customs and Border Protection, and/or the United States Immigration and Customs Enforcement Service

against citizens from Mexico and Central or South America;

- (2) systematically failed to properly and adequately monitor and investigate such incidents and to supervise and discipline the officers involved;
- (3) created an environment and culture in which officers and agents are encouraged to shield the misconduct of fellow officers, whereby officers and agents believe they can violate without legal consequence and with impunity the rights of persons such as Decedent;
- (4) inadequately trained officers and agents regarding the proper restraint and use of firearms as weapons; and
- (5) inadequately elected, trained, monitored, and supervised officers and agents.

FIRST CLAIM FOR RELIEF:
WRONGFUL DEATH/SURVIVAL PURSUANT TO THE FEDERAL TORT CLAIMS ACT
BASED ON BATTERY

30. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 30.

31. This claim for relief is brought on behalf of the Decedent, Sergio Adrián Hernández Güereca, when Agent Doe, while acting within the course and scope of his employment used unlawful, excessive deadly force in shooting and killing Decedent on June 7, 2010, notwithstanding that Decedent was defenseless, was offering no resistance, had no weapon of any kind, and had not nor was threatening Agent Doe, or any third party, with harm, deadly or otherwise.

32. Plaintiffs allege that, at all times relevant hereto, Defendant Agent Doe was acting under color of law as an employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service. In such capacity, Agent Doe used excessive deadly force and intentionally shot Decedent on June 7, 2010, while in the course and scope of his employment as an investigative and law enforcement officer acting within the course and scope of his employment with the Defendant the United States of America. Plaintiffs allege that Agent Doe, while acting under color of law during performance of his law enforcement functions, had a duty to refrain from the use of excessive force in attempting to effectuate the arrest of Decedent. In shooting Decedent under such circumstances, Agent Doe perpetuated a nonconsensual touching of Decedent's body, which resulted in Decedent's death.

33. As a direct and proximate result of the wrongful acts and omissions of Agent Doe, while in the course and scope of his employment with Defendant the United States of America, Decedent suffered fatal injuries for which Plaintiffs now complain. Plaintiffs allege that such acts and omissions fall within the purview of 28 U.S.C. § 2671, et. seq.

34. As a direct and proximate result of the actions of Defendant the United States of America's employee Agent Doe, Plaintiffs have suffered the loss of love, aid, comfort, and society of Decedent, who was a devoted son, funeral and burial expenses, and Decedent suffered conscious pain and suffering, loss of value of life to himself and any and all other damages allowed under the FTCA

for which Plaintiffs seek compensatory damages against Defendant the United States of America.

SECOND CLAIM FOR RELIEF:
WRONGFUL DEATH/SURVIVAL PURSUANT TO THE FEDERAL TORT CLAIMS ACT BASED
ON NEGLIGENCE

35. Plaintiffs repeat and incorporate above paragraphs 1 through 34 inclusive, as though fully set forth in this paragraph 35.

36. On June 7, 2010, Agent Doe had a duty, while acting within the course and scope of his employment with Defendant the United States of America, to not cause personal injury or death through his own wrongful or negligent act or omission. Agent Doe further had a duty to act with due care including, but not limited to, following appropriate policies and procedures and to not allow a situation to develop in which he would, through lack of due care, cause the death of another human being.

37. Agent Doe, negligently or otherwise, breached this duty of care on June 7, 2010 when he placed himself in a position such as to wrongly and unjustifiable use excessive deadly force and discharge a firearm at Decedent, resulting in Decedent's death. Agent Doe was negligent in causing the death of Decedent, and his negligence or other wrongful conduct of Agent Doe resulted in the death of Decedent and gives rise to a cause of action under the FTCA, 28 U.S.C. § 2671, et. seq. At all times relevant herein, Agent Doe should have maintained appropriate precautions such as to not discharge his firearm and cause the death of Decedent. Agent Doe breached these duties when he negligently or otherwise used excessive deadly force and wrongfully shot Decedent, causing Decedent's

untimely death.

38. As a direct and proximate result of the actions of Agent Doe, Plaintiffs have suffered the loss of love, aid, comfort, and society of Decedent, who was a devoted son, funeral and burial expenses, and Decedent himself suffered conscious pain and suffering, loss of value of life to himself and any and all other damages allowed under the FTCA for which Plaintiffs seek compensatory damages against Defendant the United States of America.

THIRD CLAIM FOR RELIEF:
VIOLATION OF FEDERAL TORT CLAIMS ACT BY DEFENDANT AGENT DOE

39. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 39.

40. Plaintiffs allege that, at all times relevant hereto, Defendant Agent Doe was acting under color of law as an employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service. In such capacity, Defendant Agent Doe shot Decedent while attempting to arrest him in El Paso for suspected illegal entry into the United States.

41. Plaintiffs allege that, while acting under color of law during the performance of his law enforcement functions, Defendant Agent Doe had a duty to refrain from the use of excessive force, including but not limited to deadly force, in effecting the arrest of Plaintiff. In breach of that duty, Defendant Agent Doe shot Decedent.

42. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for

which Plaintiffs now complain. Plaintiffs allege that such acts and omissions by Defendant Agent Doe fall within the purview of 28 U.S.C. § 2671, et. seq.

FOURTH CLAIM FOR RELIEF:
VIOLATION OF FEDERAL TORT CLAIMS ACT BY OTHER DEFENDANTS ACTING IN THEIR
OFFICIAL CAPACITIES BY THEIR NEGLIGENT ADOPTION OF POLICIES VIOLATING
DECEDENT'S CONSTITUTIONAL RIGHTS

43. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 43.

44. Plaintiffs allege that, at all times relevant hereto, the United States of America and Unknown Named Defendants, while acting in their respective official capacities, exercised supervision and control over Defendant Agent Doe. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

45. Plaintiffs allege that Defendant Agent Doe, while acting under color of law as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service, shot Decedent on June 7, 2010. In shooting Decedent, Defendant Agent Doe violated the prohibitions against the use of excessive force found in the Fourth and Fifth Amendments of the United States Constitution.

46. Plaintiffs allege that the aforesaid supervisory Defendants had a duty to train, supervise, and control Defendant Agent Doe in the performance of his law enforcement duties as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service. Said

Defendants breached their duty of care by negligently establishing, promulgating, and enforcing policies and procedures, rules, and regulations regarding the use of deadly force which they knew, or should have known, were unconstitutional and discriminatory. In turn, those policies, procedures, rules, and regulations, directly and proximately resulted in Defendant Agent Doe being armed with a firearm and authorizing him to use such firearm against Decedent in a discriminatory and unconstitutional manner on June 7, 2010.

47. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain. Plaintiffs allege that such acts and omissions by Defendant Agent Doe fall within the purview of 28 U.S.C. § 2671, et. seq.

FIFTH CLAIM FOR RELIEF:
VIOLATION OF FEDERAL TORT CLAIMS ACT BY THE UNITED STATES OF AMERICA AND
OTHER DEFENDANTS ACTING IN THEIR OFFICIAL CAPACITIES BY THEIR NEGLIGENT
FAILURE TO ADOPT POLICIES TO PROTECT DECEDENT'S CONSTITUTIONAL RIGHTS

48. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 48.

49. Plaintiffs allege that, at all times relevant hereto, the United States of America and Unknown Named Defendants, while acting in their respective official capacities, exercised supervision and control over Defendant Agent Doe. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

50. Plaintiffs allege that Defendant Agent Doe, while acting under color of law as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States

Customs and Immigration Enforcement Service, shot Decedent on June 7, 2010. In shooting Decedent, Defendant Agent Doe violated the prohibitions against the use of excessive force found in the Fourth and Fifth Amendments of the United States Constitution.

51. Plaintiffs allege that the aforesaid supervisory Defendants had a duty of care to train, supervise, and control Defendant Agent Doe in the performance of his law enforcement duties as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service. Said Defendants breached their duty of care by negligently failing to establish, promulgate, and enforce constitutional and nondiscriminatory policies, procedures, rules, and regulations regarding the use of deadly force. In turn, the absence of such policies, procedures, rules, and regulations, directly and proximately resulted in Defendant Agent Doe being armed with a firearm and authorizing him to use such firearm against Decedent in a discriminatory and unconstitutional manner on June 7, 2010.

52. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain. Plaintiffs allege that such acts and omissions by Defendant Agent Doe fall within the purview of 28 U.S.C. § 2671, et. seq.

SIXTH CLAIM FOR RELIEF:
VIOLATION OF FEDERAL TORT CLAIMS ACT BY THE UNITED STATES OF AMERICA AND
OTHER DEFENDANTS ACTING IN THEIR OFFICIAL CAPACITIES BY THEIR INTENTIONAL
ADOPTING OF POLICIES VIOLATING DECEDENT'S CONSTITUTIONAL RIGHTS

53. Plaintiffs repeat and incorporate above paragraphs 1 through 29,

inclusive, as though fully set forth in this paragraph 53.

54. Plaintiffs allege that, at all times relevant hereto, the United States of America and Unknown Named Defendants, while acting in their respective official capacities, exercised supervision and control over Defendant Agent Doe. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

55. Plaintiffs allege that Defendant Agent Doe, while acting under color of law as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service, shot Decedent on June 7, 2010. In shooting Decedent, Defendant Agent Doe violated the prohibitions against the use of excessive force found in the Fourth and Fifth Amendments of the United States Constitution.

56. Plaintiffs allege that the aforesaid supervisory Defendants had a duty of care to train, supervise, and control Defendant Agent Doe in the performance of his law enforcement duties as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service. Said Defendants breached their duty of care by intentionally establishing, promulgating, and enforcing policies, procedures, rules, and regulations regarding the use of deadly force which they knew, or should have known, were unconstitutional and discriminatory. In turn, those policies, procedures, rules, and regulations, directly and proximately resulted in Defendant Agent Doe being

armed with a firearm and authorizing him to use such firearm against Decedent in a discriminatory and unconstitutional manner on June 7, 2010.

57. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain. Plaintiffs allege that such acts and omissions by Defendant Agent Doe fall within the purview of 28 U.S.C. § 2671, et. seq.

SEVENTH CLAIM FOR RELIEF:

VIOLATION OF FEDERAL TORT CLAIMS ACT BY THE UNITED STATES OF AMERICA AND OTHER DEFENDANTS ACTING IN THEIR OFFICIAL CAPACITIES BY THEIR INTENTIONAL FAILURE TO ADOPT POLICIES TO PROTECT DECEDENT'S CONSTITUTIONAL RIGHTS

58. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 58.

59. Plaintiffs allege that, at all times relevant hereto, the United States of America and Unknown Named Defendants, while acting in their respective official capacities, exercised supervision and control over Defendant Agent Doe. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

60. Plaintiffs allege that Defendant Agent Doe, while acting under color of law as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service, shot Decedent on June 7, 2010. In shooting Decedent, Defendant Agent Doe violated the prohibitions against the use of excessive force found in the Fourth and Fifth Amendments of the United States Constitution.

61. Plaintiffs allege that the aforesaid supervisory Defendants had a duty of

care to train, supervise, and control Defendant Agent Doe in the performance of his law enforcement duties as an agent or employee of the United States Border Protection, the United States Bureau of Customs and Border Protection, and/or the United States Customs and Immigration Enforcement Service. Said Defendants breached their duty of care by intentionally failing to establish, promulgate, and enforce policies, procedures, rules, and regulations regarding the use of deadly force. In turn, the absence of such policies, procedures, rules, and regulations, directly and proximately resulted in Defendant Agent Doe being armed with a firearm and authorizing him to use such firearm against Decedent in a discriminatory and unconstitutional manner on June 7, 2010.

62. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain. Plaintiffs allege that such acts and omissions by Defendant Agent Doe fall within the purview of 28 U.S.C. § 2671, et. seq.

EIGHTH CLAIM FOR RELIEF:
ADOPTION OF POLICIES THAT VIOLATED DECEDENT'S FOURTH AND FIFTH AMENDMENT
RIGHTS

63. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 63.

64. Plaintiffs allege that, at all times relevant hereto, the United States of America and Unknown Named Defendants, while acting in their respective official capacities, exercised supervision and control over Defendant Agent Doe. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

65. Plaintiffs allege that such supervisory Defendants, acting in their respective individual capacities, were authorized final policy-makers. In such capacities, they adopted, acquiesced to, or ratified official customs, policies, procedures, and decisions, including training programs, which they knew, or should have known, were inadequate regarding the use of deadly force. The inadequacy of such official customs, policies, procedures, and decisions, including training programs, directly and proximately caused Defendant Agent Doe to use unreasonable, unconstitutional, and excessive force, i.e. deadly force, in effecting the arrest of Decedent. The use of such force deprived Decedent of his Fourth and Fifth Amendment rights to be free from unreasonable search and seizure. The inadequacy of such customs, policies, procedures, and decisions, including training programs, manifested a deliberate indifference to the protection of Decedent's constitutional rights and was the moving force, which resulted in the deprivation of Decedent's constitutional rights.

66. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

NINTH CLAIM FOR RELIEF:
FAILURE TO ADOPT POLICIES THAT RESULTED IN THE VIOLATION OF DECEDENT'S
FOURTH AND FIFTH AMENDMENT RIGHTS

67. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 67.

68. Plaintiffs allege that, at all times relevant hereto, the United States of America and Unknown Named Defendants, while acting in their respective official

capacities, exercised supervision and control over Defendant Agent Doe. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

69. Plaintiffs allege that such supervisory Defendants, acting in their respective individual capacities, were authorized final policy-makers who failed to adopt or ratify official customs, policies, procedures, and decisions, including training programs, regarding the use of reasonable force in effecting arrests. Such failure directly and proximately caused Defendant Agent Doe to use unreasonable, unconstitutional, and excessive force, i.e. deadly force, in effecting the arrest of Decedent. The use of such force deprived Decedent of his Fourth and Fifth Amendment rights to be free from unreasonable search and seizure. The failure to adopt such customs, policies, procedures, and decisions, including training programs, directly and proximately resulted in Decedent being shot by Defendant Agent Doe. The failure to adopt such customs, policies, procedures, and decisions, including training programs, manifested a deliberate indifference to the protection of Decedent's constitutional rights and was the moving force, which resulted in the deprivation of Decedent's constitutional rights.

70. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

TENTH CLAIM FOR RELIEF:
VIOLATION OF FOURTH AND FIFTH AMENDMENT RIGHTS BY
UNNAMED AGENT DOE

71. Plaintiffs repeat and incorporate above paragraphs 1 through 29,

inclusive, as though fully set forth in this paragraph 71.

72. Plaintiffs allege that Defendant Agent Doe shot Decedent on June 7, 2010, while acting individually under color of law as an employee of the United States Border Patrol, the United States Bureau of Customs and Border Protection, and/or the United States Immigration and Customs Enforcement Service while attempting to apprehend him in El Paso, Texas on suspicion of illegal entry into the United States.

73. Plaintiffs allege that in shooting Decedent, Defendant Agent Doe acted unreasonably by using excessive, deadly force against Decedent in violation of the Fourth and Fifth Amendments of the United States Constitution. At the time of the shooting, Decedent was unarmed and presented no physical threat to Defendant Agent Doe.

74. Plaintiffs allege that Defendant Agent Doe's shooting of Decedent evidences Defendant Agent Doe's callous disregard for, and deliberate indifference to, Decedent's constitutional rights.

75. As a direct and proximate result of the acts or omissions of Defendant Agent Doe, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

ELEVENTH CLAIM FOR RELIEF:
VIOLATION OF THE ALIEN TORT CLAIMS ACT BY ALL DEFENDANTS ACTING IN THEIR
OFFICIAL CAPACITIES

76. Plaintiffs repeat and incorporate above paragraphs 1 through 29, inclusive, as though fully set forth in this paragraph 76.

77. Plaintiffs allege that the acts and omissions of Defendants violate the Alien

Tort Claims Act, 28 U.S.C. § 1350 in that Plaintiff was shot in contravention of international treaties, conventions and the Laws of Nations, including but not limited to, the United Nations Charter; the Treaty of Amity, Commerce, and Navigation; the Treaty of Guadalupe Hidalgo of 1848; the Gadsden Treaty Relating to the Boundaries of 1853; the Inter-American Convention on the Rights and Duties of States; and the Inter-American Convention on the Status of Aliens; and those treaties relating to the friendship, peace, and respect for the Civil Rights of a State's citizens, and the boundaries and the sovereignty between the United States and Mexico.

78. Specifically, in shooting and killing Decedent while in Mexico, Defendant Agent Doe, acting within the course and scope of his employment as an agent and employee of Defendant the United States of America, violated the Treaty of Amity, Commerce, and Navigation of 1832, between the United States and Mexico, which provides that:

“There shall be a firm, inviolable and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States in all the extent of their possessions and Territories and between their people and citizens respectively without distinction of persons or places.”

79. In addition, in shooting and killing a Mexican citizen, while that citizen stood on Mexican soil, posing no threat of harm, Defendant Agent Doe, acting within the course and scope of his employment as an agent and employee of Defendant the United States of America, violated the treaties of Peace, Friendship, Limits and Settlement of 1848 (hereinafter “Guadalupe Hidalgo”), the Treaty of Suspension of Hostilities of 1848, and the Gadsden Treaty of 1853,

relating to the friendship, peace and respect for the Civil Rights of their citizens; the establishment of the present national boundaries; the cessation of hostilities; and the respect for sovereignty between the United States and Mexico.

80. In addition, in shooting and killing a Mexican citizen, while that citizen stood on Mexican soil, posing no threat of harm, Defendant Agent Doe, acting within the course and scope of his employment as an agent and employee of Defendant the United States of America, violated the Inter-American Convention of the Rights and Duties of States of 26 December 1933 (hereinafter "Inter-American Convention"). The Inter-American Convention, to which the United States and Mexico are parties, sets forth the principles governing Member States' respect for the rights of its citizens, the rights of independent States, and the respect and sovereignty of the signatory nations.

- (a) Article Two provides: "The federal state shall constitute a sole person in the eyes of international law."
- (b) Article Three provides: "The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence"
- (c) Article Four provides: "States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law."

- (d) Article Nine provides: "The jurisdiction of states within the limits of national territory applies to all the inhabitants"
- (e) Article Eleven provides: "The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily."

81. In addition, the United States and the State of Texas have an obligation to provide Decedent equal protection of the laws under the United States Constitution and conventions with Mexico. The United States has an independent obligation to treat aliens who come to seek redress in Texas courts as United States citizens are treated. The Convention of American Republics, signed on 20 February 1928, sets forth certain agreed principles between the United States and Mexico. Article Five of this Convention provides:

"States should extend to foreigners, domiciled or in transit through their territory, all individual guarantees extended to their own nationals, in the enjoyment of essential civil rights without detriments, as regard to foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guarantees."


Article Nine of the Convention on the Rights and Duties of States, executed on 26 December 1933, between the United States of America and other American republics, including Mexico, provides: "Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals."

WHEREFORE, Plaintiffs pray for judgment against all named and unnamed Defendants as follows:

- A. Damages as allowed on each Claim for Relief in an amount according to proof at the time of trial;
- B. All together with any interest, pre-and-post judgment, costs and disbursements; and
- C. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

By:



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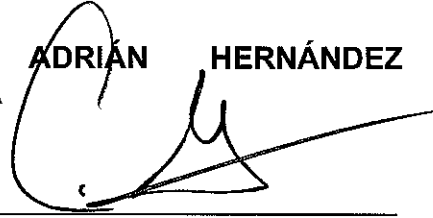
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**ATTORNEY IN CHARGE FOR
PLAINTIFFS, JESUS HERNÁNDEZ,
INDIVIDUALLY AND AS THE
SURVIVING FATHER OF SERGIO
ADRIÁN HERNÁNDEZ GÜERECA,
AND AS SUCCESSOR-IN-INTEREST
TO THE ESTATE OF SERGIO ADRIAN
HERNÁNDEZ GÜERECA; MARÍA
GUADALUPE GÜERECA
BENTACOUR INDIVIDUALLY AND AS
THE SURVIVING MOTHER OF
SERGIO ADRIÁN HERNÁNDEZ
GÜERECA, AND AS SUCCESSOR-IN-
INTEREST TO THE ESTATE OF**

**SERGIO
GÜERECA**

ADRIÁN

HERNÁNDEZ

A handwritten signature in black ink, appearing to be 'Sergio Güereca', written over a horizontal line. The signature is stylized with a large initial 'S' and a long horizontal stroke extending to the right.

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