No. 17-56610

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA DEL SOCORRO QUINTERO PEREZ; BRIANDA ARACELY YANEZ QUINTERO; CAMELIA ITZAYANA YANEZ QUINTERO; J.Y., a minor,

Plaintiffs-Appellants

v.

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

Defendants-Appellees

Appeal from the United States District Court
Southern District of California

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs allege (i) a tort committed by the United States in violation of the law of nations, (ii) torts committed by federal employees acting in the course and scope of employment in violation of California state law, and (iii) constitutional torts committed by federal employees in violation of the Fourth Amendment of the United States Constitution, for which the district court had subject matter jurisdiction under 28 U.S.C. §§ 1350, 1346(b), and 1331, respectively.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The appeal is timely because the clerk entered final judgment on September 22, 2017, and Plaintiffs filed their notice of appeal on October 19, 2017. *See* FRAP 4(a)(1)(B) (60-day time limit).

STATEMENT OF THE ISSUES

1. Where this Court has held that a State's violation of an international *jus cogens* norm "would not be entitled to the immunity afforded by international law," *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992); where "conventional principles governing state immunity" prohibit a State from asserting

immunity to such claims litigated against it in its own courts, *Belhaj et al. v. Straw et al.*, [2017] UKSC 3, at ¶ 30; and where the Alien Tort Statute, 28 U.S.C. § 1350, makes *jus cogens* norms "enforceable" as common law "without further statutory authority," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), is the United States entitled to sovereign immunity for a claim against it in its own courts that it violated the international *jus cogens* norm against extrajudicial killing?

2. Where subsequently-overturned law had prevented Plaintiffs from pursuing their claims under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), was the statute of limitations on those claims equitably tolled during the time before the law changed?

3. Where the Supreme Court emphasized that actions under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), remain available in the "common and recurrent sphere of law enforcement," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017), is a *Bivens* claim available against: (a) the Chief of Border Patrol who maintained a policy that agents could use lethal force when neither they nor any other person was in imminent peril of death or serious

injury; and (b) the agent who shot and killed Plaintiffs' husband and father when he did not pose any such peril?

4. Where the law has been clearly established for decades that law enforcement agents may not lawfully use lethal force absent imminent peril (*e.g.*, *Tennessee v. Garner,* 471 U.S. 1, 7 (1985)), is agent Diaz liable for using lethal force when a jury may reasonably conclude that there was no such peril?

PERTINENT STATUTORY PROVISIONS

Pursuant to Local Rule 28-2.7, all pertinent constitutional provisions, treaties, statutes, etc. are set forth in the addendum to this brief.

STATEMENT OF THE CASE

From 2005 through March 2014 U.S. Border Patrol agents killed more than 40 people along the nation's southern border.[1] Many of the victims were undocumented Mexican nationals who were shot by agents

[1] Rob O'Dell & Daniel González, Border Patrol Agent Pleads Not Guilty in Mexican Teen's 2012 Killing, Arizona Republic (Oct. 10, 2015), http://www.azcentral.com/story/news/local/arizona/breaking/2015/10/09/arizona-border-patrol-agent-mexican-teen-killing-court- plea/73552962/.

for allegedly throwing rocks at them.[2] These deaths resulted from a U.S. Border Patrol policy and practice that allowed field agents to use lethal force against rock-throwers regardless of whether the agent was in imminent danger of death or serious injury.

The "Rocking Policy" permitted agents to treat rock-throwing as deadly force regardless of the size of the rocks, the distance between the assailant and the agent, and the agent's ability to de-escalate the confrontation, take cover, or retreat. The policy thereby "justified" agents in responding to rock-throwing with lethal force of their own, regardless of whether a reasonable officer would have feared imminent death or serious injury to himself or another, *i.e.*, regardless of whether the "Imminent Peril" standard was met. The Policy also had the effect of encouraging agents to falsely claim, in order to justify unlawful use of deadly force, that they had been subjected to rock-throwing.[3]

Plaintiffs here are the widow and children of Jose Alfredo Yañez Reyes. Mr. Yañez was shot and killed by defendant Border Patrol agent

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[2] E.R.0276-77.

[3] E.R.0941-42.

Diaz along the border outside San Diego. The circumstances of the shooting are disputed, but a jury could reasonably conclude from an eyewitness account that Mr. Yañez posed no threat to defendant Diaz or anyone else when Diaz shot him. The other individual defendant is former Chief of Border Patrol Fisher, who maintained the unlawful Rocking Policy until forced by public pressure to end it in March 2014—years after it had led to Mr. Yañez's death.

The district court dismissed Plaintiffs' ATS claim that the United States' Rocking Policy violated the international *jus cogens* norm against extrajudicial killing. Plaintiffs argue that neither the United States nor any other State has immunity against a *jus cogens* claim litigated against it in its own courts. The district court dismissed Plaintiffs' FTCA claims based on the statute of limitations. Plaintiffs argue that the statute was equitably tolled because this Court's precedents at the time prevented Plaintiffs from filing the claims until the Supreme Court abrogated those precedents in *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1846 n.1 (2016). The district court granted summary judgment against Plaintiffs' *Bivens* claims on the ground that "national security" counsels against such claims and that

defendant Diaz was entitled to qualified immunity because *if a jury believed his version of the shooting* no clearly established law made the shooting unjustified. Plaintiffs argue that the Supreme Court made clear in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017), that *Bivens* actions remain available in the "common and recurrent sphere of law enforcement," and that a jury may reasonably reject agent Diaz's version of the shooting and therefore summary judgment on qualified immunity is precluded.

The rule of law requires that the judiciary place an appropriate check on domestic law enforcement officers' power to extinguish civilian human life. Mr. Yañez was killed pursuant to a U.S. Border Patrol policy that permitted field agents to shoot to kill alleged rock-throwers regardless of whether the agents were in Imminent Peril. That policy, and this death, are not beyond the ability of the federal judiciary to review.

I. Facts

A. The Border Patrol's Rocking Policy

It is exceedingly rare for thrown rocks to actually put a law enforcement officer in danger of imminent death or serious bodily

injury. The National Law Enforcement Officers Memorial Fund has tracked all deaths of police officers in the line of duty since the first U.S. patrolman was killed in 1792. In those 200-plus years, only one police officer (in 1942) was killed by a thrown rock.[4] Police departments typically teach their cadets that a hurled rock is not deadly in "virtually all" circumstances.[5] Officers who encounter thrown rocks are trained to simply retreat, take cover, or employ other defensive action, and "not escalate the encounter with gunfire."[6]

The policy and practice within the U.S. Border Patrol was different. An Inspector General's report concluded, for example, that in 2011 there were 339 reported rock assaults on Border Patrol agents, who responded with lethal force in 33 instances, i.e., *10 percent of the time*.[7] The same pattern occurred in 2012: Border Patrol agents used

[4] E.R.0942; E.R.0249.

[5] E.R.0205.

[6] E.R.0206.

[7] E.R.0247.

lethal force 22 times in response to 185 reported rock assaults, i.e., *12 percent of the time*.[8]

The Rocking Policy that resulted in this astronomically high incidence of lethal force was implemented and approved at the highest levels of U.S. Customs and Border Protection ("CBP").[9] The former Assistant Commissioner of CBP for Internal Affairs[10] testified that from at least 2006 to 2014 the Border Patrol had a Rocking Policy that permitted agents to use lethal force against rock-throwers regardless of imminent danger of death or serious injury.[11] He acknowledged that in "[s]ome part of every briefing on rocks being thrown, the term policy with regard to rocks being thrown or rocking policy would be used by [the Chief of Border Patrol] and/or other leadership from the Border

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[8] E.R.0247.

[9] CBP is a component of the Department of Homeland Security. The Office of Border Patrol, which is headed by the Chief of the Border Patrol, is a component of CBP and employs approximately 21,000 Border Patrol agents. E.R.0206-07.

[10] The Assistant Commissioner of CBP for Internal Affairs is a position coequal with that of Chief of the Border Patrol. E.R.0206-07.

[11] E.R.0217-19.

Patrol."[12] And the "policy … was to use lethal force in response to rocks being thrown."[13]

When fatal shootings of alleged rock-throwers were addressed at the CBP Commissioner's daily meeting with his staff, the killings were invariably described as "a good shoot."[14] Former Border Patrol Chief Fisher, a defendant here, told the media that "the agency's long-standing position [is] that rocks are lethal weapons."[15] The Internal Affairs Chief acknowledged that both internally and externally, "the mantra from Border Patrol management was that [a rock assault] is lethal force."[16]

The Rocking Policy manifested itself in many ways. Rock-throwing is the most common type of assault encountered by agents,[17] yet Border Patrol executives did not issue any written guidelines to

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[12] E.R.0218.

[13] E.R.0218.

[14] E.R.0218-19.

[15] E.R.0265-68.

[16] E.R.0218.

[17] E.R.0218.

agents on how the Imminent Peril standard applied or how they might avoid the necessity of using lethal force.[18] Nor did management provide any training to agents on how to counteract the assaults that they were almost certain to encounter in the field.[19] Having refused to provide any specific written guidance or training, management rarely if ever disciplined an agent for using lethal force against alleged rock-throwers, regardless of the circumstances.[20]

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[18] The written DHS policy simply restated the United States constitutional standard that "[l]aw enforcement officers and agents of the Department of Homeland Security may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person," providing that each of its agencies "shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy." In turn, the 2010 CBP use-of-force Handbook merely reiterates the broad constitutional standard "while enabling CBP operational component leadership to address use of force related issues unique to their respective workplace environments and adopt more detailed operational guidance." E.R.0208-11. The "component leadership"—the Border Patrol management—refused to issue any such guidance for responding to rock-throwing, until forced to do so in 2014 (see below).

[19] E.R.0252-53.

[20] E.R.0213-14.

The statutes governing CBP make clear that it is a domestic law enforcement agency.[21] At an October 2012 meeting of senior CBP and Border Patrol brass,[22] however, CBP's top official told the assembled group that CBP was "now the premier paramilitary homeland security agency."[23] While making a presentation on the string of fatal shootings and the constitutional restraints applicable to all law enforcement officers, the Internal Affairs chief was interrupted and told that "we're not cops and we don't have to respond like they do."[24]

The Rocking Policy resulted in a staggering body count. The deaths of alleged rock-throwers included people shot in the back; shot by rifle from more than 50 yards away; shot while across the border in

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[21] 6 U.S.C. § 211(e)(3)(A) (Border Patrol shall "serve as the law enforcement office of U.S. Customs and Border Protection …").

[22] The meeting was attended by the CBP Commissioner, the Chief of the Border Patrol, the Chiefs of each Sector of the Border Patrol, and other leadership within CBP. E.R.0217-18.

[23] E.R.0218.

[24] E.R.0217-18. Regarding the attempt of defendant Fisher and others to turn the Border Patrol into a paramilitary organization, see Brief of *Amici Curiae* Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, *Hernandez v. Mesa*, No. 15-118 (U.S. S. Ct.).

Mexico; shot seven times; and shot from patrol boats that could easily have maneuvered away.[25]

The Border Patrol purportedly terminated the Rocking Policy in March 2014. For many years it had received intense criticism from national and international human-rights organizations,[26] the Government of Mexico,[27] the UN High Commissioner for Human Rights,[28] and the Inter-American Commission on Human Rights,[29] among many others.

This pressure finally forced the CBP to hire elite police-practices experts, the Police Executive Research Forum ("PERF"), to review the agency's files on rock-throwing incidents. PERF's scathing February

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[25] E.R.0219-40.

[26] *See, e.g.*, E.R.0224-25.

[27] E.R.0230-31.

[28] Highlights of Regular Briefing by the [UN] Information Service (May 29, 2012), Stephanie Nebehay, *U.S. uses excessive force along Mexican border: UN*, Reuters, Oct. 18, 2012, http://www.reuters.com/article/us-mexico-us-un-rights-idUSBRE89H13F20121018. *See generally* John Carlos Frey, *Over the Line*, Washington Monthly (May/July 2013).

[29] Press Release, *IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents* (July 24, 2012).

2013 report concluded that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force."[30] When Jeh Johnson became the new Secretary of Homeland Security in December 2013, he directed Chief Fisher to fix the problem of excessive force against rock-throwers.

In March 2014 Chief Fisher responded by issuing a Directive to all agents that:

> "Agents should continue (sic), whenever possible, to avoid placing themselves in positions where they have no alternative to using deadly force. Agents shall not discharge firearms in response to thrown or hurled projectiles unless the agent has a reasonable belief, based on the totality of the circumstances, to include the size and nature of the projectiles, that the subject of such force poses an imminent danger of death or serious injury. Agents should obtain a tactical advantage in these situations, such as seeking cover or

[30] E.R.0275. CBP originally tried to keep the damning report hidden, even refusing a demand to give a copy to Congress. But the report was leaked to the Los Angeles Times. The PERF Report had been preceded by a highly critical report by the DHS Inspector General and was succeeded by a similarly scathing report from the Homeland Security Advisory Council. *See* DHS, Office of Inspector General, *CBP Use of Force Training and Actions To Address Use of Force Incidents* (Sept. 2013); Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (March 15, 2016).

> distancing themselves from the immediate area of danger."[31]

The Directive was the first written guidance that CBP and Border Patrol executives had ever provided to agents on the most common threat that they faced in the field. It came three years too late to save Plaintiffs' husband and father.

B. The Shooting of Mr. Yañez

On June 21, 2011, U.S. Border Patrol agent Dorian Diaz fatally shot Mr. Yañez, a Mexican national. At around 7:00pm, Mr. Yañez and his friend Jose Ibarra Murietta ("Murietta"), looking to find work in the United States,[32] entered the country through a hole in a sewage gate near the San Ysidro port of entry.[33] Just after crossing, Mr. Yañez and Murietta were spotted by Diaz, who, suspecting an illegal entry, radioed

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[31] E.R.0291-92. The Directive also required that supervisors identify violence-prone areas; train agents in taking cover and knowing when to engage and disengage; plan for appropriate back-up; use new technology and less-than-lethal force; and use the new guidelines in planning field operations. E.R.0291-92.

[32] E.R.0521-22.

[33] E.R.0500; *see also* E.R.0818 (picture of sewage gate).

for assistance from another Border Patrol agent, Chad Nelson.[34] Nelson arrived on the scene a minute later and the two agents closed in on Mr. Yañez and Murietta.[35]

Neither Mr. Yañez nor Murietta was smuggling drugs or contraband into the country, and they were not armed.[36] Diaz testified that he had no reason to suspect otherwise.[37]

Upon noticing the agents, Mr. Yañez and Murietta attempted to flee back to Mexico.[38] Mr. Yañez succeeded, making his way through the same hole through which he and Murietta had come.[39] Murietta, however, was blocked by Nelson and Diaz, so he instead tried to climb a nearby pole, which leads to a catwalk from which one could jump back into Mexico.[40] Anticipating Murietta's escape path, Diaz ran up the

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[34] E.R.0421-22.

[35] E.R.0726-27.

[36] E.R.0509-10.

[37] E.R.0423.

[38] E.R.0500; E.R.0521-22.

[39] E.R.0726-27.

[40] E.R.0501-02.

catwalk via the stairway and positioned himself right above Murietta, who was still climbing below him.[41] Diaz then stepped on Murietta's hands, hit Murietta over the head, and threatened, "I'll kill you, motherfucker."[42]

Forced to lose his grip from the pipe, Murietta dropped to the ground and ran eastward along the border fence to find another way back to Mexico.[43] Nelson closely pursued on foot.[44] The chase ended when Murietta tripped, after which Nelson jumped on Murietta's back to arrest him.[45]

Murietta refused to give Nelson his hands to be cuffed, so Nelson began punching and striking Murietta to force compliance.[46] Noticing the ensuing struggle, Diaz descended from the catwalk and ran towards

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[41] E.R.0501-02.

[42] E.R.0501-02.

[43] E.R.0501-02.

[44] E.R.0473.

[45] E.R.0473; E.R.0817 (aerial photograph showing where chase began and ended).

[46] E.R.0507; E.R.0514; E.R.0486.

the two, radioing for both additional back up and support from video surveillance operators.[47]

From this point forward, the testimony of the agents and Murietta diverges sharply. Diaz claims that during his run towards Nelson, he saw Mr. Yañez pop his head over the eight-foot border fence and throw one or maybe two rocks in the direction of Nelson and Murietta, who he thinks were about 10-15 feet away from the fence.[48] In contrast, Murietta, who saw Mr. Yañez appear above the fence during the scuffle, testified that Mr. Yañez never threw any rocks.[49] In any event, Nelson and Murietta agree that Nelson at the time happened to have Murietta in a position that would have shielded Nelson had Mr. Yañez thrown anything at him; any rocks would have hit Murietta, not Nelson.[50] Murietta was never hit by a rock.[51] Neither was Nelson, who also never

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[47] E.R.0730-31.

[48] E.R.0731-32.

[49] E.R.0519.

[50] E.R.0480-81; E.R.0519.

[51] E.R.0519.

saw where these alleged rocks landed.[52] Murietta testified that, instead of throwing rocks, Mr. Yañez was threatening to use his cell phone to record the agents' beating of Murietta.[53] Murietta saw the cellphone in Mr. Yañez's hand.[54]

Next, Diaz claims that he yelled in Spanish for Mr. Yañez to get down from the fence and that he complied.[55] Murietta, a native Spanish speaker, testified that Diaz was yelling only at Murietta, not Mr. Yañez.[56]

Then, according to the agents, Mr. Yañez reappeared above the fence for a second time and threw a table leg, which "just glanced off [Nelson's] hat."[57] Nelson was not injured from this alleged table leg and continued to apprehend Murietta.[58] Murietta testified that he never

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[52] E.R.0480-81.

[53] E.R.0518.

[54] E.R.0518.

[55] E.R.0731-32.

[56] E.R.0518.

[57] E.R.0484-85; E.R.0435.

[58] E.R.0761.

saw a table leg that day and that Mr. Yañez never threw any piece of wood.[59]

The agents testified that it was around the time the table leg was allegedly thrown that Diaz caught up with Nelson.[60] Diaz drew his gun and aimed at Mr. Yañez, telling him to get down from the fence, which he did.[61] Diaz then turned to help Nelson apprehend Murietta, but only for a few seconds.[62]

Diaz says that, upon hearing a person trying to climb back up the fence, he disengaged from subduing Murietta.[63] Nelson pleaded for Diaz to return and help, but Diaz declined.[64] Diaz suspected Mr. Yañez might reappear again, but Diaz never believed that Mr. Yañez might jump back over the fence and re-enter the U.S., as doing so would have been

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[59] E.R.0508.

[60] E.R.0440; E.R.0485.

[61] E.R.0436-37.

[62] E.R.0763.

[63] E.R.0437.

[64] E.R.0436-37.

foolish.[65] Despite knowing that the fence was effectively preventing Mr. Yañez from getting any closer to the agents, Diaz chose not to back up, take cover, or otherwise help move Murietta further away from the fence. Instead, Diaz went on the offensive and moved closer to the fence and west so he could "surprise" the suspected fence climber.[66] After Mr. Yañez's face emerged above the fence, Diaz, without any warning, shot Mr. Yañez in the head and killed him.[67]

According to Murietta, Diaz had his gun drawn and aimed at the top of the fence for about one minute and shot Mr. Yañez as soon as his head reappeared.[68]

According to Diaz, Mr. Yañez had raised his hand as if to throw something.[69] Diaz concedes he did not see anything in Mr. Yañez's

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[65] E.R.0449.

[66] E.R.0437; E.R.0450-54; E.R.0390.

[67] E.R.0742; E.R.0821 (aerial photograph marking locations of Mr. Yañez, Nelson, and Diaz at time of shooting).

[68] E.R.0517-19.

[69] E.R.0733.

hand, which was in a fist.[70] He also testified that he had no time to yell a warning because Mr. Yañez had already begun his throwing motion.[71] But he says he still had enough time to draw his holstered weapon, aim it, and fire—all before Mr. Yañez could complete this alleged throwing motion.[72] He further says that Mr. Yañez's alleged throwing motion was aimed at Nelson, but that Mr. Yañez was looking not at Nelson but at Diaz, "as if he was surprised."[73] Diaz never considered using non-deadly weapons, such as his pepper spray or collapsible baton, which were readily available.[74]

As for Nelson, he claims he never saw Mr. Yañez make the threatening gesture described by Diaz because Nelson was more focused on Murietta.[75]

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[70] E.R.0742.

[71] E.R.0742-43.

[72] E.R.0733-34; E.R.0391.

[73] E.R.0733-34; E.R.0390.

[74] E.R.0738; E.R.0392.

[75] E.R.0763.

After the shooting, Diaz says that, on his own initiative, he picked up and moved the table leg—the "weapon" that allegedly justified his use of deadly force—north so that he could protect other officers arriving at the scene from getting hurt.[76] That general area on the U.S. side of the fence was littered with various debris, garbage, and sewage.[77]

It is undisputed that the primary border fence on which Mr. Yañez was perched at the moment Diaz shot him is situated in the United States, and that the actual international border between the United States and Mexico is situated some distance south of the primary border fence. As it happened, after Mr. Yañez was shot, he fell from the border fence and his body came to rest, according to the government's expert, mid-way across the international boundary line.[78]

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[76] E.R.0391.

[77] E.R.0757.

[78] E.R.0891.

II. Procedural History

On June 17, 2013, Plaintiffs filed suit in the Southern District of California. The original complaint sought relief against "Government Defendants,"[79] "Supervisor Defendants" as both individuals and officials,[80] and the "Agents" as individuals.[81] Following are the claims, by count number, as asserted in the original complaint:

> **1: Law of Nations** (against Government Defendants)
> **2: Fifth Amendment Due Process** (against Government Defendants and Supervisor Defendants)
> **3: Fifth Amendment Due Process** (against the Agents)
> **4: Fourth Amendment Unreasonable Seizure** (against Government Defendants and Supervisor Defendants)
> **5: Fourth Amendment Unreasonable Seizure** (against Agents)
> **6: Fifth Amendment Equal Protection** (Against Government Defendants and Supervisor Defendants)
> **7: Fifth Amendment Equal Protection** (Against Agents)
> **8: Declaratory Relief Regarding the Judgment Bar** (Against Supervisor Defendants and Agents)

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[79] The "Government Defendants" were the United States, DHS, CBP, and the Office of Border Patrol.

[80] The "Supervisor Defendants" were Janet Napolitano, Thomas S. Winkowski, David Aguilar, Alan Bersin, Kevin K. McAleenan, Michael J. Fisher, Paul A. Beeson, Richard Barlow, and Rodney S. Scott.

[81] The "Agents" were Dorian Diaz and Chad Michael Nelson.

On January 2, 2014, Plaintiffs amended their original complaint to delete its request for injunctive relief and include an additional allegation regarding defendant Fisher's then-recent public statements regarding the Rocking Policy.[82]

On February 18, 2014, defendants filed motions to dismiss all claims asserted against them except the Fourth Amendment claim pertaining to Defendant Diaz.[83]

On September 3, 2014, the district court denied in part and granted in part defendants' motions to dismiss.[84] The court held, among other things, that Plaintiffs stated a *Bivens* supervisor liability claim against Chief Fisher under the Fourth Amendment. The court dismissed Plaintiffs' ATS claims against the United States based on sovereign immunity.

After two more complaint amendments, additional rounds of motions to dismiss, and various voluntary dismissals, the case

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[82] E.R.1419

[83] E.R.0030

[84] E.R.0030-56.

proceeded against Diaz and Fisher under *Bivens* for their respective violations of the Fourth Amendment.

On June 30, 2016, Plaintiffs sought leave to amend the complaint in order to assert FTCA claims corresponding to their still-viable Fourth Amendment *Bivens* claims against defendants Diaz and Fisher. On September 21, 2016, the district court granted Plaintiffs' motion for leave to amend,[85] but on March 6, 2017, it granted the government's motion to dismiss the FTCA's claims as barred by the statute of limitations.[86]

On September 21, 2017, the district court granted defendants Diaz's and Fisher's motions for summary judgment on Plaintiffs' Fourth Amendment *Bivens* claims.

REVIEWABILITY AND STANDARD OF REVIEW

This appeal pertains to three district court Orders:

1. On September 3, 2014, the district court granted the United States' motion to dismiss Claim 1 of Plaintiffs' First Amended

[85] E.R.0980-83.

[86] E.R.0016-29.

Complaint under the Alien Tort Statute for lack of subject matter jurisdiction (sovereign immunity) and dismissed that claim with prejudice.[87] This Court reviews that dismissal de novo.[88]

2. On March 6, 2017, the district court granted the United States' motion to dismiss Claims 3 and 4 of Plaintiffs' Fourth Amended Complaint under the Federal Tort Claims Act as untimely,[89] which this Court reviews de novo.[90]

3. On September 21, 2017, the district court granted summary judgment pertaining to Claims 1 and 2 of Plaintiffs' Fourth Amended Complaint for violations of the Fourth Amendment.[91] This Court reviews de novo a grant of summary judgment, and "[t]he evidence of

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[87] E.R.0001-56.

[88] *D.L. by & through Junio v. Vassilev*, 858 F.3d 1242, 1245 (9th Cir. 2017).

[89] E.R.0016-29.

[90] *See Lehman v. United States*, 154 F.3d 1010, 1015 (9th Cir. 1998).

[91] E.R.0001-15.

the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[92]

SUMMARY OF THE ARGUMENT

International law prohibits States from asserting sovereign immunity to *jus cogens* claims against them in their own courts. This Court held in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992), that international law "does not recognize an act that violates *jus cogens* as a sovereign act," with the result that a State's violation of these norms "would not be entitled to the immunity afforded by international law."[93] The Court has reaffirmed that holding in a variety of contexts. *See, e.g., Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (en banc), *judgment vacated on other grounds,* 133 S. Ct. 1995 (2013); *In re Estate of Ferdinand E. Marcos Human Rights Litig.,* 978 F.2d 493 (9th Cir. 1992).

Similarly, multiple treaties, Declarations, and Principles to which the U.S. is party—most of which the U.S. sponsored and vigorously

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[92] *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (internal citations omitted).

[93] *Id.* at 718.

promoted—require States to provide effective remedies, through their own domestic court systems, for such violations even when (especially when) the unlawful conduct was taken on the State's behalf. These undertakings prohibit States from asserting sovereign immunity to *jus cogens* claims litigated against them in their own courts.

The district court erroneously dismissed Plaintiffs' ATS claims based on the canon of statutory construction that the U.S. enjoys sovereign immunity absent an express waiver. But that canon is merely "a tool for interpreting the law and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). That canon is outweighed here by the canon of construction that requires the Court to construe U.S. law so as not to conflict with international law. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.).

If an express waiver were required here, the ATS provides it because that statute permits a tort claim for violation of a norm whose defining characteristic is that it binds the sovereign regardless of its consent. And both Congress and the Executive have repeatedly confirmed that waiver by signing and approving multiple international

accords that require the U.S. to provide effective remedies, in the nation's own courts, for violations of *jus cogens* norms.

The district court also erred in refusing to equitably toll the statute of limitations on Plaintiffs' FTCA claims. Plaintiffs were prevented from filing FTCA claims timely because this Court's precedent, including *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008), had provided that a judgment against a plaintiff's FTCA claim would also bar the plaintiff's *Bivens* claims arising from the same occurrence. Given the extraordinary location of Mr. Yañez's lifeless body—resting halfway across the international boundary—it was uncertain whether the FTCA's exclusion of claims for injuries occurring in a foreign country would trigger dismissal of an FTCA claim, thereby triggering judgment-bar dismissal of Plaintiffs' *Bivens* claims too. Under these circumstances, the only reasonable option for Plaintiffs was to forgo filing FTCA claims in order to avoid the risk of prejudicing their right to recover under the *Bivens* claims.

The Supreme Court subsequently abrogated this Court's jurisprudence on the FTCA's judgment bar, so that even if the FTCA's foreign-country exclusion were to apply, Plaintiffs' *Bivens* claims could

remain intact. *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016). After *Simmons*, Plaintiffs promptly amended their complaint to include FTCA claims. In these circumstances, the district court erred in concluding that the statute of limitations had not been equitably tolled until *Simmons* changed the law.

Regarding Plaintiffs' *Bivens* claims against defendants Fisher and Diaz, the district court erred in holding that "national security" concerns preclude such claims against Border Patrol agents. If upheld, that holding would undermine decades of jurisprudence in which this Court and others have routinely entertained such claims alleging use of excessive force, including by the Border Patrol. Nor could this proposed revocation of established case law be limited to claims brought by Mexican nationals or claims where the victim (allegedly) dies in Mexico. If "national security" justified the Executive's unreviewable killing of civilians along the border, it would justify those killings regardless of who the victims are—including U.S. citizens—and where they happen to die—including in the U.S. The proposition that "national security" requires abdication of judicial review of lethal force by domestic law enforcement officers is as unsupported as it is novel. Equally

unsupported is the district court's ruling that the Imminent Peril standard was not clearly established—that agent Diaz did not know that it was unlawful to kill a person who posed no threat to him or anyone else.

ARGUMENT

I. THE UNITED STATES HAS NO SOVEREIGN IMMUNITY TO *JUS COGENS* CLAIMS LITIGATED AGAINST IT IN ITS OWN COURTS.

The Alien Tort Statute ("ATS") empowers district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[94] While the ATS is "in terms only jurisdictional," Congress provided the jurisdiction to enable federal courts to enforce as common law those "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [that originally underlay the ATS]."[95]

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[94] 28 U.S.C. § 1350.

[95] *Sosa v. Alvarez Machain*, 542 U.S. 692, 725-26 (2004).

The international standards enforceable under the ATS include what are today known as *jus cogens* norms—norms that are "accepted and recognised by the international community of States as a whole as … norm[s] from which no derogation is permitted."[96] *Jus cogens* norms occupy the apex of the hierarchy of international rights and obligations and include, for example, the bans on torture, genocide, human trafficking, and extrajudicial killing.

For purposes of its motion to dismiss Plaintiffs' ATS claim, the United States did not dispute that: (1) the international proscription against extrajudicial killing, including police use of excessive lethal force, is a *jus cogens* norm[97]; (2) the norm encompasses a prohibition, absent highly unusual circumstances, on police use of lethal force

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[96] Vienna Convention on the Law of Treaties, 1969, United Nations, Treaty Series, vol. 1155, p. 331, art. 53. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

[97] For decades, the U.S. State Department has insisted that the *jus cogens* norm against extrajudicial killing includes "excessive use of lethal force by the police, security forces, or other agents of the State whether against criminal suspects, detainees, prisoners, or others." U.S. Dep't of State, Country Report on Human Rights Practices 1995, Appendix A: Notes on the Preparation of the Reports (March 1996).

against alleged rock-throwers[98]; and (3) the Complaint alleges that the Rocking Policy violated this norm.

On these facts, the district court erred in dismissing Plaintiffs' ATS claim on the ground of sovereign immunity.

A. This Court Has Consistently Held That States Have No Sovereign Immunity to *Jus Cogens* Claims.

This Court's decisions in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), and its progeny preclude the U.S.'s demands for sovereign immunity. *Siderman* considered an ATS claim that the government of Argentina violated the *jus cogens* norm against torture. This Court held:

> "[*J*]*us cogens* 'embraces customary laws considered binding on all nations,' [Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale J. Int'l L. 332, 350-51 (1988)], and 'is derived from values taken to be fundamental

[98] The U.S. State Department has consistently concluded that, in all but the most unusual circumstances, responding to rock-throwing with lethal force is excessive and therefore a violation of the *jus cogens* norm against extrajudicial killing. *See, e.g.*, 2002 Human Rights Report for Israel and the Occupied Territories (March 2003). The State Department pointedly noted that "IDF statistics state that no Israeli soldier has ever been killed by rock throwing." *Id.*

> by the international community, rather than from the fortuitous or self-interested choices of nations,' *id.* at 351. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II."[99]

The Court concluded that "what flows" from the nature of *jus cogens* norms is that a State that violates them is not entitled to sovereign immunity:

> "International law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture *therefore would not be entitled to the immunity afforded by international law*."[100]

Siderman nevertheless concluded that with respect to *foreign* sovereign immunity—the immunity *of Argentina* from claims against it *in U.S. courts*—Congress had expressly preserved such immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11

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[99] 965 F.2d at 715. The principle underlying the Nuremberg judgments is that "[i]nternational law operates as a restriction and limitation on the sovereignty of nations." *United States v. Van Lech et al.*, 10 CCL Trials and 11 CCL Trials (1948).

[100] *Id.* at 718 (emphasis added).

("FSIA").[101] This is consistent with international law, which also preserves *foreign* sovereign immunity—the immunity of one State for claims against it in another State's courts (including against *jus cogens* claims)—in order to avoid the specter of one sovereign sitting in judgment on another sovereign's conduct.[102] But international law clearly prohibits a State's assertion of sovereign immunity for *jus cogens* claims asserted against it in its own courts.[103] Nor has Congress provided for immunity for the U.S. against such claims in our own courts.[104] Having not been displaced by any such statute, *Siderman*'s rule prohibiting immunity for *jus cogens* claims fully applies here.

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[101] *See Siderman*, 965 F.2d at 718-19.

[102] *See, e.g.*, *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, [3 February 2012], I.C.J. Reports 2012.

[103] *See* Section IB below.

[104] In a recent decision, *Saleh v. Bush*, 848 F.3d 880, 892 (9th Cir. 2017), the Court considered the immunity afforded to U.S. *officials* against *jus cogens* claims in U.S. courts, finding that the Westfall Act unambiguously provides such immunity. The Court emphasized that it was contending "not only with customary international law, but with an affirmative Act of Congress." *Id*. at 893 (quoting *Siderman*, at 718). The Court expressly did not address the issue presented here—whether the U.S. itself has such immunity—because the *Saleh* plaintiffs had not exhausted their administrative remedies. *Id*. at 887. No such procedural defect exists here.

Siderman's progeny confirm that its rule applies in the absence of a displacing statute. In *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (en banc), *judgment vacated on other grounds,* 133 S. Ct. 1995 (2013), the Court rejected defendants' assertions that they were immune from ATS claims under the Act of State doctrine. The Court explained that "*jus cogens* norms are exempt from the doctrine, since they constitute norms from which no derogation is permitted."[105] Simply put, a "violation of a *jus cogens* norm is not a sovereign act."[106]

The Fourth Circuit agrees: "*jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity." *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012). Relying on this Court's *Siderman* line of cases, *Yousuf* reasoned that "as

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[105] 671 F.3d at 757.

[106] *Id.*; *see also In re Estate of Ferdinand E. Marcos Human Rights Litig.,* 978 F.2d 493, 502 (9th Cir. 1992) ("'no state claims a sovereign right to torture its own citizens'" and "therefore the district court did not err in founding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture") (quoting *Siderman*, 965 F.2d at 717).

a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign."[107]

B. International Law Prohibits Immunity From *Jus Cogens* Claims Against a Sovereign In Its Own Courts.

International law unequivocally prohibits the U.S.'s invocation of sovereign immunity to a *jus cogens* claim prosecuted against it in its own courts. The U.S. is party to numerous Conventions and other international instruments that bind it to provide a judicial remedy for its violations of fundamental norms.[108] The Universal Declaration of Human Rights ("UDHR")—the U.S.-engendered foundational human rights pact—obligates its signatories to provide an "effective remedy" in

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[107] 699 F.3d at 776; *see also Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting in part) ("officials receive no immunity for acts that violate international jus cogens human rights norms (which by definition are not legally authorized acts)").

[108] *See* Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 Ga. J. Int'l & Comp. L. 191, 201-02 (1995/96) (identifying U.S.-signed pacts).

their national courts for human rights violations.[109] The principal human rights treaties spawned by the UDHR likewise require the U.S. and other signatories to provide effective judicial remedies. For example, the International Covenant on Civil and Political Rights ("ICCPR") prohibits extrajudicial killing[110] and requires States to provide "an effective remedy, *notwithstanding that the violation has been committed by persons acting in an official capacity*."[111] And the

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[109] Universal Declaration of Human Rights, art. 8, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), at art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed him by the constitution or law.").

[110] International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171, art. 6(1). The Senate ratified the ICCPR with the understanding that its provisions are not self-executing. 138 Cong. Rec. S4781–01, S4784, 1992 WL 65154 (April 2, 1992). As noted above, Congress provided in the ATS for federal courts to enforce these *jus cogen* norms.

[111] ICCPR, at art. 3(a) (emphasis added). *See generally* Christine Evans, The Right to Reparation in International Law for Victims of Armed Conflict (Cambridge Univ. Press 2012), at 34-35 (tracing development of international-law requirement that State provide adequate judicial remedy to individual victims).

ICCPR "requires that *State Parties make reparation to individuals* whose Covenant rights have been violated."[112]

Nations throughout the developed world have concluded that these principles prohibit a State from asserting sovereign immunity to *jus cogens* claims asserted against it in its own court or in competent regional or international tribunals. For example, Article 13 of the European Convention on Human Rights requires its signatory States to provide "an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[113] This requirement clearly prohibits "the interposition of governmental immunity in one form or another as a

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[112] UN Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.l/Add.13 (2004), at § 16.

[113] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, art. 13, Eur TS 5 (entered into force 3 September 1953).

defense to an action in domestic courts seeking redress for breach of the Convention."[114]

The U.S. joined with other UN member States in adopting the Principle that "a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law."[115] Unlawfully depriving a

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[114] Thomas Buergenthal, Comparison of the Jurisprudence of National Courts with that of the Organs of the Convention as Regards the Rights of the Individual in Court Proceedings, in A. H. Robertson (ed.), Human Rights in National and International Law (Manchester Univ. Press 1968)), at 194; *see also* Jurgen Brohmer, State Immunity and the Violation of Human Rights, at 173 (1997) ("judicial proceedings which are subject to the immunity defence cannot be considered effective in the sense of art. 13"). The same conclusion applies to 25 State Parties to the Inter-American Convention on Human Rights. American Convention on Human Rights, Nov. 22, 1969, art. 25(1), 1144 U.N.T.S. 123. *See* E.R.1161-1200 (*Blake v. Guatemala* (Reparations and Costs), IACtHR, 22 January 1999, Ser. C, No. 48, ¶ 33); Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights, at 188-89 (2003).

[115] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 15, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted by the General Assembly by consensus on 16 December 2005, UN Doc.A/RES/60/147.

person of his life, including specifically through unlawful police use of excessive force, is a "gross violation" to which this Principle applies.[116]

The case law similarly reflects the absence of sovereign immunity to *jus cogens* claims litigated against a State in its own courts. For example, in *Belhaj et al. v. Straw et al.*, [2017] UKSC 3**,** the Supreme Court of the United Kingdom considered foreign nationals' claims against the UK that it had conspired with the U.S. and Libya to unlawfully detain them. The UK argued that its courts should refuse to hear the claim against the UK on the ground that the litigation would require UK courts to consider the conduct of the U.S., which is entitled to sovereign immunity for claims against it in the UK's courts. In the course of rejecting that argument, the Justices expounded on the rule of non-immunity from *jus cogens* claims litigated against the State in its own courts:

> ▪ Neither the United States nor any other State is entitled to sovereign immunity from

[116] *See, e.g.*, International Commission of Jurists, The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner's Guide (2006), at 162-63 ("gross violations" include extrajudicial killing and "disproportionate use of force by law enforcement personnel").

jus cogens claims litigated against them in their own courts: "Each such other state would, on conventional principles governing state immunity, be capable of being pursued in its own courts in respect of the particular conduct complained of in [this] case."[117]

- The UK and its agencies "accept that state immunity is not available to them" for claims against them in their own courts.[118]

- The fact that States enjoy immunity against *jus cogens* claims litigated against them in

[117] *Id*. at ¶ 30.

[118] *Id*. at ¶ 184 (Lord Sumpton, with whom Lord Hughes agrees).

> other nations' courts[119] makes all the more important the prohibition on sovereign immunity in the State's own courts: the UK and its agencies "have no right of their own to claim immunity in English legal proceedings…. On the other hand, they would be protected by state immunity in any other jurisdiction, with the result that unless answerable here they would be in the unique position of being immune everywhere in the world."[120]

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[119] Like this Court in *Siderman*, the *Belhaj* Court and others have concluded that the doctrine of (what we in the U.S. call) *foreign* sovereign immunity prevents the courts of one sovereign from adjudicating claims against another sovereign. *Belhaj*, [2017] UKSC at ¶ 25; *see also Jones v. Kingdom of Saudi Arabia*, [2006] UKHL 26 (June 14, 2006), at ¶ 24. These courts have made clear, however, that this doctrine merely functions to allocate jurisdiction among courts and leaves unaffected the rule that no sovereign may assert immunity from *jus cogens* claims against it in its own courts. Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Destroying Sovereignty*, 18 European J. Int'l L. 903, 907 (2008) (*Jones* and similar cases "framed [foreign sovereign] immunity as a procedural bar which only acts to determine the forum in which the claim is heard but which does not remove the petitioner's underlying substantive right or the defendant's underlying (alleged) responsibility."). In analyzing foreign decisions on the issue of sovereign immunity this Court should be cognizant that they often use the term "sovereign immunity" to mean one State's immunity from a claim litigated against it in the courts of another State (what we call "foreign sovereign immunity").

[120] [2017] UKSC 3, at ¶ 262 (Lord Sumpton, with whom Lord Hughes agrees).

Some of the Justices in *Belhaj* characterized their analyses as direct applications of the international law of *jus cogens*[121]; others as interpretations of UK law that take international law into account.[122] But they were unanimous in concluding that the UK and other States have no sovereign immunity to claims for violation of fundamental human rights litigated against them in their own courts.

[121] *Id.*

[122] *Id.* at ¶ 107 (majority opinion) (tying the absence of immunity to "individual rights recognised as fundamental by English statute and common law, rather than [tying] them too closely to the concept of *jus cogens*").

Other national courts reach the same conclusion.[123] So do international tribunals when they have subject-matter jurisdiction over

[123] *See, e.g.*, *Netherlands v. Mustafic-Mujic*, [Netherlands Supreme Court] September 6, 2013, First Chamber 12/03329, at ¶ 3.18.3 (no immunity for or judicial abstention from claim for damages against Netherlands by family of victim killed as a result of Dutch troops' actions in Srebrenica); *Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany)*, [German Federal Supreme Court] [June 26, 2003], 42 ILM 1030 (2003) (Germany had sovereign immunity in courts of Greece against claims that SS troops had massacred Greek civilians, but Court did not recognize sovereign immunity of Germany, in its own courts, against the claims). In proceedings before the International Court of Justice, Germany repeatedly acknowledged that neither it nor any other State has immunity in its own courts from *jus cogens* claims. *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, [3 February 2012], I.C.J. Reports 2012, Reply of the Federal Republic of Germany, at ¶¶1, 34, 56. Ironically, in a concurring opinion in *Hernandez v. Mesa*, 785 F.3d 117, 130 (5th Cir. 2015) (Jones, J., Concurring), Judge Jones stated that prohibiting the U.S. from asserting immunity to *jus cogens* claims against it in its own courts "would expose the United States, alone among the nations of the world, to liability in federal courts under the ATS without the protection of sovereign immunity." Yes, other nations (generally) have sovereign immunity for such claims against them "in federal [U.S.] courts," but they do not have immunity in their own courts. Granting the U.S. immunity for such claims against it in its own courts would make it "alone among the [developed] nations of the world."

the dispute.[124] International legal scholars concur: the Conventions and Declarations to which the United States is a signatory "lay down an obligation for contracting states to provide for reparation within their domestic legal systems to individuals who are victims,"[125] and international law renders State immunities "inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity."[126]

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[124] *See, e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, ICGJ 203 (ICJ 2004), 9th July 2004**,** at ¶ 152 (a State that violates international human rights law "has the obligation to make reparation for the damage caused to all the natural or legal persons concerned").

[125] Riccardo Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law & Human Rights: An Overview*, 1 J. Int'l Crim. Justice 339, 340 (2003); *see also* Evans, The Right to Reparation, at 17.

[126] Bassiouni, *International Recognition of Victims' Rights*, 6 Human Rights L. Rev. 2, 214 (2006) ("This limitation is fundamental to ensuring that human rights and international humanitarian law violations are remedied, since these acts are often committed only by States.").

C. *Sosa v. Alvarez Machain* Confirms *Siderman* and International Law.

The Supreme Court's decision in *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), pointedly confirms the conclusion in *Siderman* and in international law that the U.S. has no sovereign immunity to a *jus cogens* claim asserted against it in its own courts. In *Sosa* the U.S. Drug Enforcement Agency hired Sosa to detain Alvarez in Mexico and bring him to the United States for trial.[127] The Court rejected the analysis of some lower courts that had held that the ATS was in effect "stillborn" because it provided only jurisdiction without also providing an enforceable cause of action.[128] Sosa's claim of "arbitrary detention" failed on the merits because it lacked the international condemnation and definiteness necessary to state a claim under the law of nations.[129] The Court's opinion is nevertheless highly instructive on the issue of U.S. sovereign immunity against *jus cogens* claims in its own courts.

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[127] 542 U.S. at 698.

[128] *Id*. at 694.

[129] *Id*. at 736-38.

First, the Court adopted this Court's holding that the international norms that are actionable under the ATS are those that are "specific, universal, and *obligatory*."[130] The definition of an "obligatory" norm is one that "confers fundamental rights upon all people *vis-a-vis* their own governments."[131] *Sosa* thus confirms that Congress enacted the ATS in order to permit non-U.S. citizens to pursue tort claims to enforce norms whose fundamental characteristic is that they that are *binding against governments regardless of their consent*.[132]

Second, the Court concluded that one of Congress' specific purposes in enacting the ATS was to allow non-U.S. citizens to bring tort claims under the law of nations against officials in the U.S. acting

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[130] *Id*. at 732 (quoting *In re Estate of Ferdinand E. Marcos Human Rights Litig.,* 25 F.3d 1467, 1475 (9th Cir. 1994)) (emphasis added).

[131] *Estate of Marcos*, 25 F.3d at 1475 (quoting *Filartiga v. Pena–Irala,* 630 F.2d 876, 885 (2d Cir. 1980)).

[132] The *Sosa* majority and dissent both refer to the ATS's applicability to U.S. governments and officials. *See, e.g*, 542 U.S. at 736-37 (2004) (assuming ATS applies to U.S. state and federal officials); *id*. at 737 (acknowledging Restatement principle that a "state violates international law if, as a matter of state policy" it engages in arbitrary detention); *id*. at 749-50 (Scalia, J., concurring) (giving example of ATS applying to Texas and its officials).

within the scope of their actual authority. One of the events that precipitated the statute occurred when a New York constable entered the Dutch Ambassador's residence to arrest his servant, thus violating international law.[133] Secretary of Foreign Affairs John Jay lamented to Congress that "'the federal government does not appear ... to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.'"[134] Congress therefore enacted the ATS to allow non-U.S. citizens a tort claim to recover damages for such official conduct.

Third, Congress enacted the ATS to "assure the world that the new Republic would observe the law of nations."[135] The statute would hardly have achieved its objective if Congress had silently exempted the U.S. from the norms that it purported to make enforceable.

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[133] *Id.* at 717. The constable was later tried and convicted under the common law in New York state courts—with no immunity. *See* E.R.1330-93 (Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L.Rev. 467, 494 (1986)).

[134] 542 U.S. at 717 (quoting Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L.Rev. 467, 494 & n. 152 (1986)).

[135] *Id.* at 723 n. 15.

Fourth, Congress intended the ATS "to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law *enforceable without further statutory authority*."[136] The ATS "was intended to have practical effect the moment it became law."[137] Indeed, "[i]t would have been passing strange for Ellsworth [the principal draftsman] and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action."[138] Clearly, no additional Congressional waiver of sovereign immunity was required.

Fifth, the Court identified other possible "principle[s] limiting the availability of relief in the federal courts for violations of customary international law."[139] The "possible limitations" include failure to exhaust administrative remedies, the political question doctrine, and

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[136] *Id*. at 729 (emphasis added).

[137] *Id*. at 724.

[138] *Id*. at 719.

[139] *Id*. at 733 n. 21.

"case-specific deference to the political branches."[140] Conspicuously absent from the list is any mention of sovereign immunity, even though Sosa himself "was acting on behalf of a government."[141]

Every aspect of the ATS as elucidated in *Sosa* is incompatible with the U.S.'s assertion that Congress silently reserved the defense of sovereign immunity for the State conduct that the statute made actionable.

D. The District Court Erroneously Applied a Presumption of Immunity.

In light of *Siderman* and its progeny, the clear international law, and *Sosa*, the district court erroneously applied the canon of statutory construction that the United States is presumed to be entitled to sovereign immunity.[142] That canon of construction is outweighed here by the *Charming Betsy* canon—the requirement that courts construe domestic law in harmony with international law.

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[140] *Id*.

[141] *Id*. at 737.

[142] E.R.0037-39.

The presumption of immunity on which the district court relied is merely "a tool for interpreting the law and [the Supreme Court has] never held that it displaces the other traditional tools of statutory construction."[143] When that particular canon conflicts with others, courts will give the disputed statute a neutral, most-reasonable reading.[144] A court is then "free to adopt the more persuasive of the possible statutory interpretations."[145]

Here the offsetting canon is clear and fundamental. The *Charming Betsy* canon, articulated by Chief Justice Marshall in 1804, provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[146] A

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[143] *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008); *see also F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012).

[144] *See, e.g.*, *Richard v. United States*, 677 F.3d 1141, 1153 (Fed. Cir. 2012) (immunity canon offset by canon of construing statutes in favor of Indian tribes); *Weldon v. United States,* 70 F.3d 1, 5 (2d Cir 1995) (immunity canon offset by need to prevent fraud on the court); *Burch v. Secretary of Health & Human Servs.*, 2010 WL 1676767, *9 (Ct. Fed. Cl. 2010) (immunity canon offset by canon of construing remedial legislation liberally).

[145] *Burch*, 2010 WL 1676767, at *9.

[146] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.).

Court should not construe domestic law, whether statutory or common law,[147] to conflict with international law absent an "affirmative expression of congressional intent."[148]

Moreover, the canon of construction that requires a clear waiver of sovereign immunity is anachronistic here because Congress enacted the ATS against a background of no immunity for official conduct. The modern conferring of immunity for official conduct simply did not exist when Congress enacted the ATS. That doctrine did not coalesce until 160 years later—in 1949.[149] Until then, courts applying domestic law routinely recognized tort claims—with no immunity—for unlawful State

[147] *See, e.g.*, *F. Hoffman- La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (antitrust law).

[148] *Heong v. United States*, 112 U.S. 536, 540 (1884).

[149] *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

conduct.[150] Congress in 1789 can hardly be faulted for not providing a more express waiver of sovereign immunity than it did in order to satisfy a canon of construction that did not debut until more than a century later.

Even if a clear waiver of immunity were required, the district court erroneously failed to find one. The ATS itself provides a waiver, and so do Congress's and the Executive's repeated agreements in international accords to provide effective remedies in U.S. courts even (and especially) when the harm results from official conduct.

The district court relied on *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011), which held that the ATS did not waive U.S.

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[150] *See*, *e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (award of damages against U.S. naval officer for interdicting a vessel pursuant to a presidential order); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) (affirming monetary judgment against U.S. military officer for wrongfully confiscating plaintiff's goods); *United States v. Lee*, 106 U.S. 196 (1882) (no immunity for federal officials because "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."). *See generally* William R. Casto, *Notes on Official Immunity in ATS Litigation*, 80 Fordham L. Rev. 573, 582 (2011); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Intl. L. Rev. 521, 524 (2003).

immunity to a claim that it violated a commercial treaty.[151] But international law provides that violating a treaty does *not* abrogate sovereign immunity[152]—the *exact opposite* of the rule that applies to violating a *jus cogens* norm. That is why *Tobar* did not even cite, let alone address, the dispositive holdings in *Siderman* and its progeny.

The district court also gave no weight to the *Charming Betsy* canon on the ground that the Executive in this lawsuit has asserted immunity and has presumably "evaluated the foreign policy consequences" of doing so.[153] Whatever weight such a case-specific Executive decision may have in other circumstances, it has none here because the Executive Branch has repeatedly and unequivocally committed to provide effective remedies in our courts for *jus cogens*

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[151] E.R.0037-38.

[152] *See, e.g.*, Restatement (Third) of Foreign Relations § 907, comment c (1987).

[153] E.R.0039-40 (quoting *ARC Ecology v. U.S. Dept of Air Force*, 411 F.3d 1092, 1102 (9th Cir. 2005)). The district court's assertion that the Supreme Court had never applied the *Charming Betsy* canon against the United States is factually wrong, and so is its implication that other Courts of Appeals have not done so. *See* Ingrid Brunk Wuerty, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 Boston College L. Rev. 293 (2005).

violations notwithstanding that they were committed on behalf of the Untied States. Those international commitments and the canons of construction that accompany them are not undone by the Executive's decision to take a contrary position in this lawsuit.

* * * * *

The Supreme Court in *Sosa* said that Congress enacted the ATS to "assure the world that the new Republic would observe the law of nations."[154] This Court should make good on Congress' assurance by rejecting the proposition that the U.S. may invoke sovereign immunity to prevent the litigation against it, in its own courts, of claims that it failed to observe a basic precept of international law—that the Executive may not extinguish civilian life free from judicial review.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' FTCA CLAIMS.

Within two months of Mr. Yañez's death, Plaintiffs presented their administrative claim to the U.S., meeting the two-year presentment deadline under the FTCA.[155] The U.S. denied the claim in

[154] *Sosa,* 542 U.S. at 723 n.15.

[155] 28 U.S.C. § 2401(b).

May 2012,[156] which triggered the running of a six-month deadline for Plaintiffs to file their FTCA claims in court.[157] Extraordinary circumstances, however, prevented Plaintiffs' from filing in court to meet that deadline. The district court erred in holding that the statute of limitations was not equitably tolled during that time.

A. Plaintiffs' Circumstances Required Them to Forgo FTCA Claims.

The FTCA provides a waiver to the U.S.'s sovereign immunity so as "to render the government liable in tort as a private individual would be under like circumstances."[158] But an "exception" in the statute preserves immunity to "[a]ny claim arising in a foreign country."[159] Under "the straightforward language of the foreign country exception," a claimant cannot recover for any injuries that occurred outside the United States.[160]

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[156] E.R.0934.

[157] 28 U.S.C. § 2401(b).

[158] 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b).

[159] 28 U.S.C. § 2680(k).

[160] *See Sosa*, 542 U.S. at 701.

Here, Plaintiffs faced the real prospect that a jury might conclude that Mr. Yañez died in Mexico—his lifeless body came to rest literally halfway across the international boundary. Indeed, the U.S. cited the FTCA's foreign-country exception as a basis for denying Plaintiffs' administrative claim.[161]

Dispositively here, this Court had held that under the FTCA's "judgment bar" provision,[162] a judgment against an FTCA plaintiff on any ground—including a non-merits dismissal such as one based on the "foreign country" exception—would extinguish any related *Bivens* claim against a federal employee based on the same underlying facts.[163]

Thus, under this Court's precedents at the time, Plaintiffs' losing an FTCA claim based on a jury finding that the injury occurred in Mexico would extinguish Plaintiffs' *Bivens* claims against the individual agents, even though Plaintiffs' *Bivens* claims might otherwise be

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[161] E.R.0934.

[162] 28 U.S.C. § 2676.

[163] *See, e.g.*, *Pesnell v. Arsenault*, 543 F.3d 1038, 1042 (9th Cir. 2008).

perfectly viable even if Mr. Yañez died in Mexico.[164] In these circumstances, Plaintiffs chose, in the exercise of reasonable diligence, to forgo those FTCA claims.

On June 6, 2016 the Supreme Court held in *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1846 & n.1 (2016), that this Court's decision in *Pesnell* and others like it were wrong—a judgment against a plaintiff on an FTCA claim does *not* extinguish a related *Bivens* claim against the individual federal official. Less than a month later, on June 30, 2016, Plaintiffs sought leave to amend their complaint in order to assert FTCA claims arising from the unlawful killing of Mr. Yañez. The district court granted leave to amend, but then dismissed the claims as untimely. That was error.

B. Plaintiffs' Circumstances Warrant Equitable Tolling.

Equitable tolling is warranted here because the circumstances demonstrate that Plaintiffs were "pursuing [their] rights diligently" and "extraordinary circumstance stood in [their] way and prevented timely

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[164] *See, e.g.*, *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1037-38 (D. Ariz. 2015).

filing."[165] Nor is there any "demonstrated prejudice to the government."[166]

The law of equitable tolling fully supports the common-sense conclusion that Plaintiffs reasonably declined to file an FTCA claim when the then-extant (erroneous) case law would have imperiled their otherwise viable *Bivens* claims.[167] The district court ruled that the case law had not imperiled Plaintiffs' FTCA claims because courts had applied the FTCA "judgment bar" only in cases where the plaintiff had pursued the FTCA claim in a separate lawsuit from the *Bivens* claims—not, as here, where the plaintiff pursued both claims in the same

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[165] *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016); *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015).

[166] *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 863 (9th Cir. 1995).

[167] *See, e.g.*, *Harris v. Carter*, 515 F.3d 1051, 1056 (9th Cir. 2008) (reliance on subsequently overturned precedent justified tolling); *Capital Tracing, Inc., v. United States*, 63 F.3d 859, 862 (9th Cir. 1995) ("the lack of clarity in the law" justified tolling); *cf. Menominee Indian Tribe of Wisconsin*, 136 S. Ct. at 757 (no tolling where plaintiffs' reliance was not "on *actually binding* precedent"); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (no tolling where "the state of the law at the relevant time" was clear that filing should have occurred earlier).

lawsuit.[168] But such hair-splitting does not prevent equitable tolling. Nor is the district court right about the then-state of the law.

For example, in *Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1150 (E.D. Cal. 2010), the court held that under Ninth Circuit law, "a judgment on an FTCA claim bars recovery on a *Bivens* claim in the same action." And the U.S. pressed that position in a border-shooting case like this one, up through appeal and to the Supreme Court.[169] Plaintiffs' understanding of then-existing law was also validated by a leading treatise, which counseled against bringing FTCA and *Bivens* claims "in a single lawsuit (or as separate actions)."[170]

It would be manifestly unjust for the U.S. to rely on the now-overturned law's deleterious effects to bar Plaintiffs' FTCA claims as untimely. "Looking at the totality of these circumstances … [this] case constitutes that rare situation where equitable tolling is demanded by

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[168] E.R.0028.

[169] *See Hernandez et al. v. Mesa et al.*, No. 15-118, Br. for United States in Opposition, at 21-22 (Feb. 2016).

[170] Avery et. al., Police Misconduct: Law and Litigation § 5:2 *Bivens* cause of action (Nov. 2015).

sound legal principles as well as the interests of justice."[171] Especially because the U.S. can point to no undue prejudice, the district court erred in concluding that Plaintiffs' FTCA claim—filed immediately after the Supreme Court overturned this Court's contrary precedents—was untimely.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFFS' FOURTH AMENDMENT CLAIMS.

The district court granted summary judgment in favor of Chief Fisher and agent Diaz on Plaintiffs' claims that they violated the Fourth Amendment. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs asserted that their *Bivens* claims were viable regardless of whether the jury found that Mr. Yañez died in the United States or in Mexico, because the Fourth Amendment, on the facts here, applies both in the United States and extraterritorially.[172] Without reaching the extraterritoriality issue, the district court dismissed the claims against

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[171] *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996).

[172] *See Boumedienne v. Bush*, 553 U.S. 723 (2008).

both defendants on three grounds: (1) "national security" is a "special factor" that counsels against recognizing a *Bivens* claim here; (2) Plaintiffs have an adequate alternative remedy, *i.e.*, a claim under the FTCA; and (3) the law was not clearly established that using lethal force against a person in these circumstances was excessive.[173]

The district court erred on all three grounds.

A. A *Bivens* Claim Here Does Not Impair National Security.

Implied causes of action under *Bivens* are an integral part of our constitutional structure, which promises that grievous harms resulting from constitutional wrongs will be remedied, and that the Constitution, together with the rule of law, will remain supreme. Where, as here, no other remedies exist, a *Bivens* action is the only means to ensure "the vindication of constitutional interests such as those embraced by the Fourth Amendment."[174]

The Fourth Amendment's Imminent Peril standard provides a vital check on the Executive's most immense power—the power to take

[173] E.R.0012-13, E.R.0014-15.

[174] *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment).

civilian life. In the 45 years since *Bivens* the federal courts have *routinely* used the combination of the Fourth Amendment and *Bivens* claims to review the Executive's use of force against civilians, regardless of whether the bullet was aimed east, west, north, or south. From 1971 through December 2016, Border Patrol agents were defendants in 242 *Bivens* cases. Through 45 years and 12 Administrations, *never* did the Executive claim in any of those cases—until two years ago in the *Rodriguez* civil case—that national security weighed against allowing a *Bivens* action.[175]

Although the Supreme Court recently declined to imply a *Bivens* claim in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Court emphasized that it in no way

> "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance

[175] Westlaw search: adv: "Border Patrol" & Bivens yields 242 cases. The *Rodriguez* civil case, which involves *Bivens* issues similar to those at issue here, is now pending in this Court. *See Rodriguez v. Swartz*, 15-16410. This Court may wish to consult the parties' briefs and supplemental briefs, and the various amicus briefs, on the *Bivens* issues in that case.

> to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere."[176]

This case, involving law enforcement use of excessive force on U.S. soil, is the epitome of the cases on which *Abbasi* did not "cast doubt." *Bivens* itself involved a claim under the Fourth Amendment for federal officers' use of excessive force.[177] *Abbasi* reaffirmed the availability of *Bivens* claims in this "common and recurrent sphere of law

[176] 137 S. Ct. at 1856-57.

[177] 403 U.S. at 389.

enforcement," so the district court erred in even examining whether "special factors" counsel against recognizing a *Bivens* claim.[178]

Moreover, Defendants' invocation of "national security" here is exactly what the Supreme Court warned against in *Abassi*: "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.' ... This 'danger of abuse' is even more heightened given 'the difficulty of defining' the 'security interest' in domestic cases."[179]

Defendants' invocation here of "national security" is entirely talismanic. They have never submitted a declaration from any national

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[178] *Abbasi,* 137 S. Ct. at 1860. The district court appeared to believe that Plaintiffs were trying to hold Chief Fisher vicariously liable for agent Diaz's conduct. E.R.0012. Not so. Chief Fisher is liable for *his own conduct* in condoning and promoting the unlawful Rocking Policy. He had "authority as chief of the border patrol for those agents, [Chief Patrol Agents] and supervisors under [his] authority" to "assess the need for any changes in policies, tactics, training, equipment as it related to use of force." E.R.0088; E.R.0091; E.R.0095. Specifically, he had "authority from at least October 2010 through November 2015 to clarify CBP use of force policy to tailor it to the rocking incidents that were a daily occurrence for agents under [his] authority." E.R.0090. But he chose not to chose not to do so, until he issued the March 2014 Directive that finally changed the policy.

[179] *Abbasi,* 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 523 (1985)).

security officer to substantiate any assertion that this case would—somehow—harm "national security." Nor have defendants ever pointed to specific policies, priorities, or threats that would be compromised by enforcing the Fourth Amendment's bar on excessive force.

No such declaration would be remotely credible. The Border Patrol's own regulations required agents to adhere to the Imminent Peril standard, without reference to the victim's location.[180] And Chief Fisher himself issued the March 2014 Directive requiring agents to retreat or take cover, when feasible, in response to rock-throwing. That Directive, too, applies regardless of the rock-thrower's location.[181] *Abbasi* emphasized that a *Bivens* remedy should be available where, as

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[180] 8 C.F.R. § 287.8 (a)(2)(ii) ("Deadly force may be used only when a designated immigration officer ... has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury.").

[181] Chief Fisher acknowledged, moreover, that no special circumstances affect the Border Patrol's use of force: "we don't operate outside of other law enforcement just because we're on the border. The manner in which we use and trained and within the Constitution and within all the -- the use of force for us is no different." E.R.0096.

Fisher admits is the case here, Plaintiffs "challenge [no] more than standard 'law enforcement operations.'"[182]

If credited, the alleged "national security" interest would be unmoored and unbounded. If national security concerns were to preclude a *Bivens* claim for excessive force at the border, that concern—and that preclusion—would apply to claims brought by victims of any nationality *including U.S. citizens* and on either side of the border *including on U.S. soil*. Such a ruling would be an affront to the fundamental freedoms of U.S. citizens, to the rule of law, and to the well-established precedent in this Circuit.[183]

B. Plaintiffs Have No Alternative Remedy.

Failing to provide a *Bivens* remedy to Plaintiffs would, for the first time in 45 years, leave a nonservice member's family with *no* recourse for a serious constitutional wrong. The Supreme Court has *never*, outside of the unique military context, left an aggrieved family with no

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[182] 137 S. Ct. at 1861 (citation omitted).

[183] *See Chavez v. United States*, 683 F.3d 1102, 1112 (9th Cir. 2012) (denying qualified immunity in *Bivens* claim against Border Patrol agent arising from roving patrols near the border).

means of obtaining judicial review of federal officials' conduct or redressing a serious constitutional wrong.

The Court in *Abassi* emphasized that it was "of central importance" that the plaintiffs there could have challenged their conditions of confinement by means of a claim for injunctive relief or for habeas corpus relief.[184] Plaintiffs here, in contrast, had neither standing to challenge the unlawful Rocking Policy in advance nor an ability to get an injunction to prevent agent Diaz from pulling the trigger. For Plaintiffs, as for the plaintiff in *Bivens* itself, "it is damages or nothing."[185]

The district court held that Plaintiffs had an adequate alternative remedy via an FTCA claim.[186] That conclusion was erroneous because it is "crystal clear that Congress views FTCA and *Bivens* as parallel,

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[184] 137 S. Ct. at 1862-63.

[185] *Bivens,* 403 U.S. at 409-10 (Harlan, J., concurring in the judgment); *see also White v. Lee*, 227 F.3d 1214, 1239 (9th Cir. 2000) ("*Bivens* suits against individual officials are often the only available means by which citizens may obtain remedies when the federal government violates their constitutional rights.").

[186] E.R.0012.

complementary causes of action."[187] Thus, a state-court claim under the FTCA—even if one were available here—is not an alternative remedy in the *Bivens* analysis.[188]

Moreover, an FTCA claim is not available here if the jury concludes that Mr. Yañez died in Mexico. The FTCA does not waive the U.S.'s sovereign immunity from "[a]ny claim arising in a foreign country."[189]

C. Qualified Immunity Does Not Shield Agent Diaz's Unlawful Conduct.

Qualified immunity shields only those actions that an officer could reasonably have believed were lawful.[190] And "qualified immunity is an

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[187] *Carlson v. Green*, 446 U.S. 14, 19-20 (1980).

[188] *Id.*; *see also* E.R.0067-68.

[189] 28 U.S.C. § 2680(k); *see Sosa,* 542 U.S. at 704-05 (FTCA's foreign-country exemption bars claims "for injury or harm occurring in a foreign country," even if the harms resulted from a constitutional violation committed in the United States).

[190] *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017).

affirmative defense" that must be pleaded and proved by "the defendant."[191]

The district held that agent Diaz was entitled to qualified immunity because Plaintiffs identified no case that imposed liability on an officer who used lethal force against someone who was *in the act of throwing a rock*.[192] But the jury can reasonably conclude that those are not the facts.

A plethora of cases show that it was clearly established at the time of this incident that officers could not lawfully (as the jury here can reasonably conclude) use lethal force against a victim who was *not* throwing a rock or otherwise presenting a danger to the officer when he fired his weapon.[193] The district court erred in granting summary

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[191] *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998).

[192] E.R.0015.

[193] *See, e.g.*, *Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 533 (9th Cir. 2010); *DeSantis v. City of Santa Rosa*, 377 F. App'x 690, 691 (9th Cir. 2010).

judgment "because a key fact is disputed" regarding the circumstances that agent Diaz faced.[194]

Indeed, law enforcement officers may not lawfully kill a person for no valid reason. That prohibition is "obvious" and an officer does not need any factually similar case to provide him notice of it.[195] "The easiest cases don't even arise. There has never been [a] case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune."[196]

The jury may reasonably conclude from the testimony described in detail above in the Statement of the Case that Mr. Yañez posed no threat to anyone when agent Diaz shot and killed him. That disputed

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[194] *Bryan v. Las Vegas Metro. Police Dep't*, 349 F. App'x 132, 135 (9th Cir. 2009); *see also Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998, 1012 (9th Cir. 2017) (upholding denial of summary judgment where only evidence of harrowing gesture was the officers' self-serving testimony); *Cruz v. City of Anaheim*, 765 F.3d 1076, 1080 (9th Cir. 2014) (denial of summary judgment warranted where "the jury could … reasonably conclude that the officers lied.").

[195] *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) ("obvious cruelty inherent in this practice" provided notice to official).

[196] *United States v. Lanier*, 520 U.S. 259, 271 (1997); *see also Souza v. Pina*, 53 F.3d 423, 426 (1st Cir. 1995) ("[A] state actor cannot murder a citizen.").

issue of fact precluded summary judgment on Diaz's defense of qualified immunity.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Dated: January 29, 2018

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Plaintiffs know of no related cases pending in this Court.

ADDENDUM

ADDENDUM TABLE OF CONTENTS

1. U.S. Constitution, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 28 U.S.C. § 1350, Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

3. 28 U.S.C. § 1346(b), United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or 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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

4. 28 U.S.C. § 2401(b), Time for commencing action against United States

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

5. 28 U.S.C. 2674, Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

6. 28 U.S.C. § 2676, Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

7. 28 U.S.C. § 2679, Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an

attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure1. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by

the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

8. 28 U.S.C. § 2680, Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..1

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

9. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679, Treaties Conflicting with a Peremptory Norm of General International Law ("Jus Cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

9th Circuit Case Number(s) No. 17-56610

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Signature of Attorney or Unrepresented Litigant [/s Steve D. Shadowen] Date [January 29, 2018]

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