

1 KEITH H. RUTMAN (CSB #144175)
2 402 West Broadway, Suite 2010
3 San Diego, California 92101-8516
4 Telephone: (619) 237-9072
5 Facsimile: (760) 454-4372
6 email: krutman@krutmanlaw.com

7 Attorney for Plaintiffs

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 SILVESTRE ESTRADA, a minor, by and
11 through his proposed guardian ad litem
12 EMILY PRIETO; OLGA TOVAR;
13 FRANCISCO MADARIAGA; and
14 JAIME MADARIAGA-GONZALEZ,

15 Plaintiffs,

16 v.

17 UNITED STATES OF AMERICA and
18 DOES 1-10

19 Defendants.

20 Case No. **'22CV373 AJB BGS**
21 COMPLAINT FOR DAMAGES
22 DEMAND FOR JURY TRIAL

23 COME NOW Plaintiffs, by and through their attorney of record, and hereby
24 allege:

25 This lawsuit for money damages is brought pursuant to the provisions of the
26 Federal Tort Claims Act (28 U.S.C. §§ 2671-80) and alternatively under the Fourth
27 Amendment of the Federal Constitution pursuant to the provisions of Bivens v. Six
28 Unknown Named Agents of the FBI, 403 U.S. 388 (1971).

JURISDICTION

1. Federal jurisdiction is founded upon the existence of a federal question. Some of
the claims for relief arise under the provisions of the Federal Tort Claims Act
("FTCA"), over which this Court has jurisdiction under 28 U.S.C. § 1346(b)(1).
Other claims for relief arise under the Fourth Amendment to the U.S.
Constitution, as interpreted by the U.S. Supreme Court in Bivens v. Six
Unknown Named Agents of the FBI, 403 U.S. 388 (1971).

VENUE

- 1
2 2. Venue in the Southern District of California is proper under 28 U.S.C. § 1391(e).
3 All the events complained of occurred in this district.

4 **PARTIES**

- 5 3. This action arises from the shooting death of SILVESTRE-VARGAS as outlined
6 below. There are 5 Plaintiffs:
- 7 a. The death of SILVESTRE ESTRADA VARGAS as set forth in this
8 Complaint resulted in the creation of the ESTATE OF SILVESTRE
9 ESTRADA VARGAS which brings suit by his successor in interest, his
10 minor son, SILVESTRE ESTRADA (DOB 8/30/2013) , in accordance
11 with California Code of Civil Procedure § 377.30.
 - 12 i. Simultaneous to the filing of this action, SILVESTRE ESTRADA
13 has petitioned the court for the appointment of his mother, EMILY
14 PRIETO, as his Guardian ad Litem. He seeks all damages
15 authorized by law.
 - 16 b. Decedent's mother, OLGA TOVAR, brings suit for a substantive due
17 process claim for being deprived of a recognized liberty interest (right to
18 family association) through official conduct. *Wilkinson v. Torres*, 610
19 F.3d 546, 554 (9th Cir. 2010) She seeks all damages authorized by law. At
20 all material times mentioned herein she was a U.S. citizen.
 - 21 c. FRANCISCO MADARIAGA and JAIME MADARIAGA-GONZALEZ
22 bring suit for assault and battery. They each seek all damages authorized
23 by law. At all times mentioned herein they were both Mexican citizens
24 present in the United States.
 - 25 d. Each Plaintiff also brings claims under *Bivens*.
- 26 4. Defendant UNITED STATES OF AMERICA (hereinafter “UNITED STATES”)
27 is a sovereign entity which has waived sovereign immunity in certain cases as set
28 forth in the Federal Tort Claims Act (28 U.S.C. §§ 1346, 2671-80)

1 5. At all material times mentioned herein, DOES 1-10 were employed by the
2 United States Department of Homeland Security, U.S. Customs and Border
3 Protection (“CBP”), and as such were duly constituted federal law enforcement
4 officers charged with enforcing the laws of the United States of America and in
5 doing the acts hereinafter described acted within the course and scope of their
6 employment. Their acts were done under the color and pretense of the statutes,
7 ordinances, regulations, customs and usages of the United States.

8 6. Plaintiffs are informed and believe and therefore allege that at all times
9 mentioned herein DOES 1-10 were the agents, servants, and/or employees of the
10 UNITED STATES and was, in doing the acts herein alleged, acting within the
11 course and scope of this agency and/or employment, and with the permission,
12 consent and authority of the UNITED STATES, and that each is responsible in
13 some manner for the occurrences hereinafter alleged; and that Plaintiffs’ injuries
14 were proximately caused by the actions of each.

15 7. The filing of an administrative claim is a prerequisite to filing any claims under
16 the Federal Tort Claims Act. Plaintiffs timely submitted claims on the
17 designated form to the appropriate federal agency (CBP) and said claims were
18 timely denied in writing on February 2, 2022 prior to the filing of this action.
19 The Bivens claims are not subject to an administrative claim requirement.

20 **GENERAL ALLEGATIONS**

21 8. On May 14, 2021, at approximately 10:15 PM, in Campo, California, a Border
22 Patrol agent assigned to the El Cajon Sector Station attempted to stop a vehicle
23 suspected of being involved in migrant smuggling. The driver of the vehicle,
24 SILVESTRE ESTRADA VARGAS, DOB 6/30/94 (“Decedent”), failed to yield,
25 and after a brief pursuit, the vehicle stopped in a Circle-K gas station parking lot
26 at the intersection of State Route 94 and Buckman Springs Road in Campo.
27 Present in the vehicle from the outset were cousins FRANCISCO
28 MADARIAGA and JAIME MADARIAGA-GONZALEZ.

- 1 9. Without any legal justification or threat to their safety, an unknown number of
2 Border Patrol agents (DOES 1-10) discharged their firearms at the vehicle from
3 a flanking position. The vehicle was stationary, and did not attempt to run down
4 the agents. The vehicle's egress was blocked. The Decedent, who was unarmed
5 and had one hand of the steering wheel and the other hand holding a telephone
6 up to his ear, was struck by an unknown number of bullets, and was
7 subsequently transported to a local hospital where he was pronounced dead
8 shortly after arrival. FRANCISCO MADARIAGA and JAIME MADARIAGA-
9 GONZALEZ were in the direct line of fire and fortunately were uninjured.
- 10 10. Decedent presented no threat to Defendants. He was not driving in a threatening
11 manner.
- 12 11. The San Diego County Sheriff's Department Homicide Division, the Federal
13 Bureau of Investigation (FBI), the San Diego County Medical Examiner's
14 Office, the Department of Homeland Security Office of Inspector General, and
15 CBP's Office of Professional Responsibility (CBP OPR) all responded to the
16 scene and began an investigation.
- 17 12. One of the responding agencies seized a videotape from the Circle-K
18 surveillance system. When an investigator for the Plaintiffs spoke to the gas
19 station manager, he was told that the videotape had been seized by one of the
20 responding agencies and that the manager had been advised not to speak to
21 anyone about the incident.

22 **FIRST CLAIM FOR RELIEF**
23 **WRONGFUL DEATH**
24 **(FTCA - SILVESTRE ESTRADA, AS SUCCESSOR IN INTEREST TO**
SILVESTRE ESTRADA VARGAS AGAINST UNITED STATES ONLY)

- 25 13. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as
26 though fully set forth herein.
- 27 14. SILVESTRE ESTRADA VARGAS' death was caused, in whole or in part, by
28 the conduct of the agents of the UNITED STATES.

1 15. Defendants were negligent or deliberately indifferent in causing SILVESTRE
2 ESTRADA VARGAS' death.

3 16. As a direct and proximate result of the negligence, carelessness, recklessness,
4 wantonness and unlawfulness of the Defendants, and each of them, and the
5 resulting death, as aforesaid, Plaintiff SILVESTRE ESTRADA has sustained
6 severe and serious injury to his person, all to his damage in a sum within the
7 jurisdiction of this Court and to be shown according to proof.

8 17. As a direct and proximate result of the conduct of the Defendants, and each of
9 them, in causing the death of his father, SILVESTRE ESTRADA VARGAS, has
10 been deprived of the society and comfort of his father and has been caused the
11 loss of future services, earnings and protection of said parent, to his great loss
12 and damage in an amount to be shown according to proof.

13 18. The actions described herein legally, proximately, foreseeably and actually
14 caused Plaintiff to suffer damages in the form of emotional distress, pain and
15 suffering, and further damages according to proof to the extent allowed by
16 California Code of Civil Procedure § 377.34.

17 **SECOND CLAIM FOR RELIEF**
18 **SURVIVAL ACTION FOR ASSAULT/BATTERY**
19 **(FTCA - SILVESTRE ESTRADA against UNITED STATES only)**

20 19. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as
21 though fully set forth herein.

22 20. The unknown CBP agents sued herein as DOES 1-10 assaulted SILVESTRE
23 ESTRADA VARGAS by brandishing and pointing weapons at him and then
24 shooting him an unknown number of times, resulting in his death. These
25 officers intended and caused harmful or offensive contact to occur.

26 21. The harmful or offensive contact was not privileged nor consented to and was
27 excessive, unreasonable and done with deliberate indifference to the rights and
28 safety of SILVESTRE ESTRADA VARGAS and was done with the intent to
inflict punishment, above and beyond the reason for using the force in the first

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

place.

22. The actions described herein legally, proximately, foreseeably and actually caused Decedent, acting though his next of kin, to suffer damages in the form of emotional distress, pain and suffering, and further damages according to proof.

**THIRD CLAIM FOR RELIEF
ASSAULT/BATTERY
(FTCA - FRANCISCO MADARIAGA and JAIME MADARIAGA-GONZALEZ Against UNITED STATES only)**

23. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as though fully set forth herein.

24. The unknown CBP agents sued herein as DOES 1-10 assaulted FRANCISCO MADARIAGA and JAIME MADARIAGA-GONZALEZ by brandishing and pointing and discharging firearms at them. These officers intended and caused harmful or offensive contact to occur. Whilst SILVESTRE ESTRADA VARGAS was shot an unknown number of times and killed, FRANCISCO MADARIAGA and JAIME MADARIAGA-GONZALEZ saw and heard bullets whizzing by them and were afraid they would be shot and killed. These officers intended and caused harmful or offensive contact to occur.

25. The harmful or offensive contact was not privileged nor consented to and was excessive, unreasonable and done with deliberate indifference to the rights and safety of FRANCISCO MADARIAGA and JAIME MADARIAGA-GONZALEZ and was done with the intent to inflict punishment, above and beyond the reason for using the force in the first place.

26. The actions described herein legally, proximately, foreseeably and actually caused Decedent, FRANCISCO MADARIAGA and JAIME MADARIAGA-GONZALEZ to suffer damages in the form of emotional distress, pain and suffering, and further damages according to proof.

**FOURTH CAUSE OF ACTION
NEGLIGENCE
(FTCA - SILVESTRE ESTRADA, AS SUCCESSOR IN INTEREST TO SILVESTRE ESTRADA VARGAS, FRANCISCO MADARIAGA**

1 **and JAIME MADARIAGA-GONZALEZ Against UNITED STATES**
2 **only)**

- 3 27. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as
4 though fully set forth herein.
- 5 28. In doing the acts alleged herein, Defendant UNITED STATES, as a result of the
6 actions of its officers and investigative agents, DOES 1-10, acted negligently
7 and breached its duty of due care to Plaintiffs with foreseeably injurious
8 consequences.
- 9 29. A reasonably prudent law enforcement officer would have known, or in the
10 exercise of reasonable diligence should have known, that the Decedent and
11 Plaintiffs were not subject to the use of excessive force to effectuate any
12 detention or arrest, and that the use of such deadly force was completely
13 unwarranted and unlawful.
- 14 30. The actions described herein legally, proximately, foreseeably and actually
15 caused Decedent, acting though his next of kin, FRANCISCO MADARIAGA
16 and JAIME MADARIAGA-GONZALEZ to suffer damages in the form of
17 emotional distress, pain and suffering, and further damages according to proof.

18 **FIFTH CLAIM FOR RELIEF**
19 **BANE ACT: CALIFORNIA CIVIL CODE § 52.1**
20 **(FTCA - All Plaintiffs Against UNITED STATES only)**

- 21 31. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as
22 though fully set forth herein.
- 23 32. The California Legislature declared that it violates our state civil rights for any
24 person to interfere with the exercise or enjoyment by an individual of his/her
25 rights secured by the United States Constitution or state or federal law. This
26 includes any interference of these rights by threats, intimidation, coercion, or
27 attempted threats, intimidation, or coercion.
- 28 a. SILVESTRE ESTRADA VARGAS, FRANCISCO MADARIAGA and
JAIME MADARIAGA-GONZALEZ have the right to be free from

1 excessive force under the California and Federal Constitutions.

2 b. Plaintiffs SILVESTRE ESTRADA and OLGA TOVAR have the right to
3 the familial love, society and companionship of SILVESTRE ESTRADA
4 VARGAS which is protected by the substantive due process clause of the
5 Fifth Amendment and the First Amendment right to freedom of
6 association.

7 33. DOES 1-10 interfered with Plaintiffs' and Decedent's rights by the intentional
8 use of deadly force as alleged above.

9 34. This interference with Plaintiffs' and Decedent's rights was perpetrated in
10 violation of California Civil Code § 52.1, and the Fourth Amendment to the U.S.
11 Constitution and corresponding provision of the California Constitution.

12 35. Defendant UNITED STATES is liable for the conduct of DOES 1-10 under the
13 Federal Torts Claim Act.

14 36. The actions described herein legally, proximately, foreseeably and actually
15 caused Plaintiffs ESTRADA and TOVAR to suffer damages in the form of the
16 loss of familial love, society, companionship, moral and financial support,
17 emotional distress, pain and suffering, and further damages according to proof.

18 37. The actions described herein legally, proximately, foreseeably and actually
19 caused Plaintiffs FRANCISCO MADARIAGA and JAIME MADARIAGA-
20 GONZALEZ to suffer damages in the form of emotional distress, pain and
21 suffering, and further damages according to proof.

22 38. Plaintiffs and Decedents are also entitled to the statutory civil penalties set forth
23 in California Civil Code § 52.1, attorney's fees and costs of the suit incurred
24 herein.

25 **SIXTH CLAIM FOR RELIEF**
26 **(Bivens v. Six Unknown Named Agents of the FBI:**
27 **SILVESTRE ESTRADA, AS SUCCESSOR IN INTEREST TO**
28 **SILVESTRE ESTRADA VARGAS, FRANCISCO MADARIAGA**
and JAIME MADARIAGA-GONZALEZ Against DOES 1-10 only)
EXCESSIVE FORCE

- 1 39. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as
2 though fully set forth herein.
- 3 40. In committing the acts alleged herein, DOES 1-10 violated, without probable
4 cause, consent, exigent circumstances or other defense, Plaintiffs' constitutional
5 rights under the Fourth Amendment to the United States Constitution to be
6 secure in his person from unreasonable government intrusion, to wit, excessive
7 or deadly force. For these reasons, Plaintiffs are entitled to seek damages
8 pursuant to Bivens v. Six Unknown Named Agents of the FBI, 403 U.S. 388
9 (1971).
- 10 41. A reasonably prudent officer would have known that the Plaintiffs
11 MADARIAGA and MADARIAGA-GONZALEZ and Decedent were not
12 subject to the use of excessive or deadly force.
- 13 42. In committing the acts alleged herein, Defendant DOES 1-10, violated, without
14 probable cause, consent, exigent circumstances or other defense, Plaintiffs
15 MADARIAGA and MADARIAGA-GONZALEZ and Decedent's constitutional
16 rights under the Fourth Amendment to the United States Constitution to be
17 secure in their persons from unreasonable government intrusion, specifically, the
18 use of unreasonable and excessive force, in that the deadly force applied to
19 Decedent and Plaintiffs MADARIAGA and MADARIAGA-GONZALEZ was in
20 contravention of statutory duty, was in excess of any force required to address
21 the circumstances, was grossly out of proportion to any need for force, was not
22 employed in good faith, and was intended and substantially certain to cause
23 serious bodily injury.
- 24 43. The actions described herein legally, proximately, foreseeably and actually
25 caused Plaintiffs FRANCISCO MADARIAGA and JAIME MADARIAGA-
26 GONZALEZ to suffer damages in the form of emotional distress, pain and
27 suffering, and further damages according to proof.
- 28 44. In doing the acts alleged herein Defednants DOES 1-10 acted maliciously and

1 with reckless and callous disregard for the rights and feelings of Plaintiffs
2 MADARIAGA and MADARIAGA-GONZALEZ and Decedent and by reason
3 thereof Plaintiffs MADARIAGA and MADARIAGA-GONZALEZ and
4 Decedent demand exemplary and punitive damages in an amount to be proven at
5 trial.

6 **SEVENTH CLAIM FOR RELIEF**
7 **(Bivens v. Six Unknown Named Agents of the FBI:**
8 **SILVESTRE ESTRADA AND OLGA TOVAR**
9 **Against DOES 1-10 only)**
10 **RIGHT OF ASSOCIATION**

- 11 45. Plaintiffs refer to and incorporate by reference Paragraphs 1 through 12 as
12 though fully set forth herein.
- 13 46. Parents and children may assert a Fifth or Fourteenth Amendment substantive
14 due process claims if they are deprived of their liberty interest in the
15 companionship and society of their child or parent through official conduct.
16 *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)
- 17 47. Defendants, acting under color of law and in concert with each other, breached
18 their duty(ies) under the Fourth and Fifth Amendments to the U.S. Constitution
19 to refrain from the use of excessive force.
- 20 48. At the time of Defendants constitutional deprivations to SILVESTRE
21 ESTRADA VARGAS, Plaintiffs SILVESTRE ESTRADA and OLGA TOVAR
22 had a substantive due process right to the familial love, society and
23 companionship of their father and son, respectively, SILVESTRE ESTRADA
24 VARGAS which is guaranteed by the Fifth Amendment.
- 25 49. The actions described herein legally, proximately, foreseeably and actually
26 caused Plaintiffs ESTRADA and TOVAR to suffer damages in the form of the
27 loss of familial love, society, companionship, moral and financial support,
28 emotional distress, pain and suffering, and further damages according to proof.
50. In doing the acts alleged herein Defendants DOES 1-10 acted maliciously and
with reckless and callous disregard for the rights and feelings of Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SILVESTRE ESTRADA and OLGA TOVAR and by reason thereof Plaintiffs
SILVESTRE ESTRADA and OLGA TOVAR demand exemplary and punitive
damages in an amount to be proven at trial.

DEMAND FOR JURY TRIAL

51. Plaintiffs hereby demand a jury trial to the extent allowed by law, specifically, as
to the Bivens claims asserted against DOES 1-10.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and Decedent pray for judgment against Defendants as
follows:

1. For general and compensatory damages against Defendants in an amount to be
proven at trial to the extent allowed by applicable law;
2. For punitive damages against Defendant DOES 1-10;
3. To the extent allowed by law, for the statutory civil penalties set forth in
California Civil Code § 52.1;
4. For costs of suit herein, including reasonable attorneys fees to the extent allowed
by law; and
5. For such other and further relief as the Court deems proper.

Respectfully Submitted,
s/Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiffs
Email: krutman@krutmanlaw.com

Dated: March 21, 2022