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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 THE ESTATE OF ALEX MARTIN,  
KAREN MARTIN, and CRAIG  
12 MARTIN,

13 Plaintiffs

14 v.

15 UNITED STATES OF AMERICA, ROY  
SALCEDO, and DOES 2-50

16 Defendants.  
17

Case No.: 13CV1386 LAB BGS

DEFENDANT UNITED STATES'  
NOTICE OF MOTIONS TO DISMISS  
THE NINTH CLAIM FOR RELIEF  
AND TO STRIKE AND/OR DISMISS  
THE PUNITIVE DAMAGES REQUEST  
FROM THE SEVENTH CLAIM FOR  
RELIEF

DATE: January 13, 2014

TIME: 11:15 a.m.

CTRM: 14A (Annex)

Hon. Larrv A. Burns

19  
20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on January 13, 2014, 2013 at 11:15 a.m., or as  
22 soon thereafter as counsel may be heard, in the Courtroom of the Honorable Larry A.  
23 Burns, Defendant United States of America, through its attorneys of record, Laura E.  
24 Duffy, United States Attorney, and Daniel E. Butcher, Assistant U.S. Attorney, will  
25 and hereby does move this Court to dismiss the ninth claim for relief in Plaintiff's  
26 Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and to  
27 strike and/or dismiss the punitive damages request from the seventh claim for relief in  
28 Plaintiff's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6)

1 and 12(f). A memorandum of points and authorities in support of this motion is  
2 attached.

3  
4 DATED: November 8, 2013

Respectfully submitted,

5 LAURA E. DUFFY  
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7 s/ Daniel E. Butcher  
8 DANIEL E. BUTCHER  
9 Assistant United States Attorney  
Attorneys for Defendant

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11 THE ESTATE OF ALEX MARTIN,  
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12 MARTIN,

13 Plaintiffs

14 v.

15 UNITED STATES OF AMERICA, ROY  
J. SALCEDO, and DOES 2-50,

16 Defendants.  
17

Case No.: 13CV1386 LAB BGS

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTIONS TO DISMISS THE NINTH  
CLAIM FOR RELIEF AND TO STRIKE  
AND/OR DISMISS THE PUNITIVE  
DAMAGE ALLEGATION FROM THE  
SEVENTH CLAIM FOR RELIEF

DATE: January 13, 2014

TIME: 11:15 a.m.

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Hon. Larrv A. Burns

19 I

20 INTRODUCTION

21 Plaintiffs are putative representatives of the Estate of Alex Martin (“Martin”).  
22 They have sued the United States for Martin’s death. Plaintiffs’ amended complaint  
23 names the United States in three of the nine claims for relief: (6) Wrongful Death,  
24 brought under the Federal Tort Claims Act (FTCA), (7) Assault and Battery, brought  
25 under the FTCA, and (8) Negligence, also brought under the FTCA. The United  
26 States assumes that Plaintiffs also intend to name the United States in the ninth claim  
27 for relief, which alleges a FTCA violation predicated upon California Civil Code 52.1.  
28

1 Plaintiffs' ninth claim for relief alleges a constitutional violation under the  
2 FTCA. Both the Supreme Court and the Ninth Circuit have held, however, that  
3 plaintiffs cannot bring constitutional tort claims under the FTCA. The Court therefore  
4 should dismiss this claim for relief without leave to amend.

5 Plaintiffs' seventh claim for relief (brought under the FTCA for assault and  
6 battery) requests punitive damages. The Court should strike and/or dismiss this  
7 allegation because punitive damages are not available under the FTCA.

## 8 II

### 9 STATEMENT OF FACTS

10 The United States proffers that the evidence in this case will establish that, on  
11 March 15, 2012, United States Border Patrol Agents observed a Ford Focus travelling  
12 the wrong way on Interstate 8 near Pine Valley Road.<sup>1</sup> The Focus made a U-turn and  
13 exited at Pine Valley Road. Pine Valley Road dead-ends 100 yards south of Interstate  
14 8, and is a known pick-up point for drugs and aliens smuggled into the United States.

15 Border Patrol agents saw the driver of the Focus – later identified as Martin –  
16 get out of his car, walk to a sign, return to the car, and then drive northbound on Pine  
17 Valley Road. Suspecting illegal activity, the agents attempted to stop Martin. He  
18 failed to yield and a pursuit resulted. At one point, Martin pulled over and stopped  
19 near the Sunrise Highway off ramp. But Martin sped away when Border Patrol agents  
20 got out of their car.

21 Martin fled toward the Highway 80 checkpoint. The agents notified the  
22 checkpoint that a vehicle pursuit was approaching. Agents at the checkpoint  
23 successfully deployed a tire deflation device. But Martin still did not pull over. He  
24 continued driving for another mile before finally stopping.

25  
26  
27 <sup>1</sup> This proffer is made to provide the Court with the factual background of  
28 this case. The proffered facts are based upon information presently available to the  
United States. The investigation and discovery process, of course, may uncover new  
or different facts.

1 Agents positioned their vehicles to prevent any further escape. They then  
2 approached Martin, who remained in his car. Agents yelled at Martin to get out of the  
3 car and show them his hands. He ignored their commands. Agents attempted to open  
4 the car doors, but they were locked.

5 Agents then saw Martin reach for something near the center console. An agent  
6 used a flashlight to break the passenger side window and used a Taser device to  
7 attempt to take Martin into custody. The car exploded. Agents could not rescue  
8 Martin due to the intensity of the fire and he died at the scene. The agent who  
9 deployed the taser was injured by the explosion.

10 This was not the first time that Martin resisted law enforcement. Just nine  
11 months prior, on June 4, 2011, a police officer in Texas attempted to stop Martin as he  
12 was fleeing a hit-and-run accident. Martin fled the officer at a high speed and did not  
13 stop until he crashed into a light pole. Martin came staggering out of his pick-up truck  
14 and was arrested. Officers found a .38 caliber pistol, several loose rounds of  
15 ammunition, and two speed loaders fully charged with ammunition in Martin's pick-  
16 up. Officers arrested Martin for evading arrest, bribery (for offering a bribe to the  
17 arresting officer), and driving while intoxicated. Martin subsequently pled no contest  
18 to driving while intoxicated.

19 As part of his sentence in the Texas case, Martin had an ignition interlock  
20 device installed on his vehicle. Martin was driving a rental car when Border Patrol  
21 attempted to stop him on March 15, 2012. He left his vehicle in the parking lot of the  
22 Dallas/Fort Worth airport where he rented the car.

### 23 III

#### 24 ARGUMENT

##### 25 A. The Court Should Dismiss Plaintiffs' Ninth Claim for Relief

26 The United States is specifically named in only three of the nine claims in  
27 Plaintiffs' amended complaint: (6) Wrongful Death, brought under the Federal Tort  
28

1 Claims Act (FTCA), (7) Assault and Battery, brought under the FTCA, and (8)  
2 Negligence, also brought under the FTCA. See Amended Complaint (ECF #11) at 9-  
3 11.

4 Plaintiffs' ninth claim for relief is also predicated upon the FTCA, but does not  
5 specifically name the United States. Id. at 11-12, ¶¶ 92-97. But, recognizing that the  
6 United States is the only proper FTCA defendant, Plaintiffs' amended complaint  
7 states an intent to name the United States as a defendant in all of the FTCA claims for  
8 relief (although it incorrectly cross-references the claim numbers). Id. at 9, ¶ 76. The  
9 United States therefore assumes that Plaintiffs intended to name the United States as a  
10 defendant in the ninth claim for relief.<sup>2</sup> This claim, which is predicated on Cal. Civil  
11 Code § 52.1, falls within the United States' sovereign immunity, however.

12 The FTCA "acts as a waiver of the United States' traditional sovereign  
13 immunity for certain torts committed by its employees." Delta Savings Bank v.  
14 United States, 265 F.3d 1017, 1024 (9th Cir. 2001). But this waiver does not extend  
15 to constitutional tort claims. Id. ("The [Supreme] Court held that 'the United States  
16 simply has not rendered itself liable under [the FTCA] for constitutional tort  
17 claims....'" (quoting FDIC v. Meyer, 510 U.S. 471, 478 (1994))).

18 Plaintiffs' ninth claim for relief alleges a FTCA-based constitutional tort claim.  
19 Specifically, that claim alleges that defendants "violated Alex Martin's clearly  
20 established rights under the United States and California Constitutions...." Amended  
21

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22 <sup>2</sup> Regardless, this claim will be deemed to be brought against the United  
23 States (and the United States substituted as a party) once it is verified that the agents  
24 were acting within the scope of their official duties. See Adams v. United States, 420  
25 F.3d 1049, 1051 (9th Cir. 2005) ("The FTCA allows the United States to substitute  
26 itself for the government employee as the defendant 'upon certification by the  
27 Attorney General that the defendant employee was acting within the scope of his  
28 office or employment at the time of the incident out of which the claim arose.'"). See  
also Cortez v. E.E.O.C., 585 F. Supp. 2d 1273, 1289 (D.N.M. 2007) ("Cortez has not  
named the United States....Accordingly, Cortez' [FTCA] claims against the EEOC are  
facially invalid, and the Court will dismiss them under rule 12(b)(1)").

1 Complaint (ECF #11) at 11, ¶ 93; see also id. at ¶ 95 (“The Defendants interfered with  
2 Alex Martin’s rights under the Fourth Amendment of the United States Constitution  
3 and the equivalent provisions of the state Constitution by the use of force and  
4 intimidation alleged above.”). This claim (which is labeled “FTCA: Excessive  
5 Force”) is further predicated on California Civil Code § 52.1, which provides in  
6 pertinent part:

7 (b) Any individual whose exercise or enjoyment of rights  
8 secured by the Constitution or laws of the United States, or  
9 of rights secured by the laws of this state, has been  
10 interfered with ... may institute ... a civil action for  
damages....

11 Cal. Civ. Code § 52.1 (b).

12 But, although California Civil Code § 52.1 may allow for such claims as a  
13 matter of state law, only Congress can waive the sovereign immunity of the United  
14 States. And Congress has not done so, as both the Supreme Court and Ninth Circuit  
15 have held. See Meyer, 510 U.S. at 478 (“the United States has not rendered itself  
16 liable under [the FTCA] for constitutional tort claims.”); Delta Savings Bank, 265  
17 F.3d at 1025 (“Nor are we persuaded by the argument that . . . California Civil Code  
18 § 52.1 (the Unruh Act) incorporate[s] the Federal Civil Rights Acts and thereby  
19 support a finding that a cause of action exists against the federal government under the  
20 FTCA.”). See also Reynoso v. Prater et al., Case No. 13-CV-00718-AJB (S.D. Cal.  
21 November 4, 2013) (Document 14 at 4-6, Attached as Exhibit 1) (dismissing  
22 plaintiff’s FTCA claim pursuant to Cal. Civil Code § 52.1; “While California Civil  
23 Code § 52.1 allow for such claims as a matter of state law, this Federal District Court  
24 finds them improper as the Supreme Court has expressly denied the applicability of  
25 the FTCA to constitutional tort claims.”); Munyua v. United States, 2005 WL 43960,  
26 \*12 (N.D. Cal. Jan. 10, 2005) (“The Court is also wary of allowing Plaintiff to make  
27 [pursuant to California Civil Code § 52.1] what amounts to a claim based on federal  
28

1 constitutional violations that cannot be a basis of liability under the FTCA.”) (citing  
2 Meyer, 510 U.S. at 477-78).<sup>3</sup>

3 In sum, the United States has not waived its sovereign immunity for  
4 constitutional torts. This Court therefore lacks subject matter jurisdiction over  
5 Plaintiffs’ ninth claim for relief. That claim therefore should be dismissed without  
6 leave to amend.

7 B. The Court Should Strike and/or dismiss the Punitive Damages Claim from  
8 the Seventh Claim for Relief

9 Federal Rule of Civil Procedure 12(f) authorizes a court to strike “redundant,  
10 immaterial, impertinent, or scandalous matter” from a pleading. This rule authorizes  
11 courts to strike inappropriate claims for punitive damages. See, e.g., Sax v. World  
12 Wide Press, Inc., 809 F.2d 610, 612 (9th Cir. 1987) (“the district court struck Sax’s  
13 claim for . . . punitive damages under Fed. R. Civ. P. 12(f)”). Alternatively, the court  
14 can dismiss a claim for punitive damages pursuant to Fed. R. Civ. P. 12(b)(6). See,  
15 e.g., Hallstrom v. City of Garden City, 991 F.2d 1473, 1475 (9th Cir. 1993) (“The  
16 court initially denied the dismissal of the Garden City defendants, but did dismiss the  
17 punitive damages claim.”).

18 Plaintiffs’ seventh claim for relief is brought under the FTCA and alleges  
19 assault and battery. See Amended Complaint (ECF #11) at 10. That claim concludes  
20 by requesting punitive damages: “The conduct of Defendant Salcedo also amounts to  
21 oppression, fraud or malice under federal law and punitive damages should be  
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23 <sup>3</sup> Xue Lu v. Powell, 621 F.3d 944 (9th Cir. 2010), is not to the contrary. The issue  
24 there was whether and INS Asylum Officer was acting within the scope of his  
25 employment with the United States when he sexually molested two asylum applicants.  
26 Xue Lu did not consider the separate issue (resolved by Delta Savings) of whether  
27 Congress has waived the United States’ sovereign immunity for constitutional tort  
28 claims. Xue Lu is therefore of no precedential value on this issue. See Sakamoto v.  
Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9<sup>th</sup> Cir. 1985) (“unstated assumptions  
on non-litigated issues are not precedential holdings binding future cases”); Indian  
Oasis v. Kirk, 91 F.3d 1240, 1243 (9<sup>th</sup> Cir. 1996) (“We have similarly declined to give  
controlling weight to our own implicit holdings.”).



1 assessed against each defendant for the purpose of punishment and for the sake of  
2 example.” Id. at ¶ 86.

3 But punitive damages are not available under the FTCA. See 28 U.S.C. § 2674  
4 (“The United States . . . shall not be liable for interest prior to judgment or for punitive  
5 damages.”); see also Castaneda v. United States, 546 F.3d 682, 690 (9th Cir. 2008)  
6 (“FTCA damages remain recoverable only against the United States and . . . punitive  
7 damages remain unavailable.”), overruled on other grounds by Hui v. Castaneda, 559  
8 U.S. 799 (2010). The Court therefore should strike and/or dismiss paragraph 86 of  
9 Plaintiffs’ amended complaint.

10 IV

11 CONCLUSION

12 For the foregoing reasons, the Court should dismiss the ninth claim for relief in  
13 Plaintiffs’ amended complaint, and strike and/or dismiss the request for punitive  
14 damages from the seventh claim for relief.

15 DATED: November 8, 2013

Respectfully submitted,

17 LAURA E. DUFFY  
18 United States Attorney

19 s/ Daniel E. Butcher  
20 DANIEL E. BUTCHER  
21 Assistant United States Attorney  
22 Attorneys for Defendant  
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**EXHIBIT 1**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BLANCA REYNOSO,  Plaintiff,  v.  A. PRATER, an individual, UNITED STATES OF AMERICA, and DOES 1-25, inclusive,  Defendants.	}	Case No.13CV0718 AJB (RBB)  <b>ORDER GRANTING DEFENDANTS' MOTION TO DISMISS</b>  (Doc. No. 8)
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Before the Court is Defendants' Motion to Dismiss Plaintiff's Complaint, filed on June 13, 2013. (Doc. No. 8). Plaintiff has filed an Opposition and Defendants replied. (Doc. Nos. 10 and 11.) The Court has reviewed the papers filed in support and opposition and finds it appropriate to rule on the briefs without oral arguments pursuant to Civil Local Rule 7.1.d.1. For the following reasons the Court GRANTS Defendants' Motion.

**I. BACKGROUND**

The following facts and allegations are taken from Plaintiff's Complaint. (Doc. No. 1.) Plaintiff, Blanca Reynoso, is a 58-year old United States citizen. On March 2, 2012, Plaintiff traveled by mini-bus from Tijuana, Mexico, where she was vacationing, to San Diego, California. Plaintiff had a connecting bus in San Diego that would then take her to

1 San Fernando Valley where she resides. (*Id.* at 4.) Plaintiff's bus came to a stop at the United  
2 States border at the San Ysidro Port of Entry along with a dozen similar buses. According  
3 to Plaintiff, the bus waited for over an hour to cross the border. (*Id.*) Plaintiff feared that she  
4 would miss her connection in San Diego, when she could not find the bus driver, she left the  
5 bus to inquire about the delay. (*Id.*)

6 Plaintiff approached a booth at the border, finding no one, she walked to a second  
7 booth where she saw an officer. Plaintiff approached the officer, whom she believes to be  
8 Defendant A. Prater, to ask him when the buses would be allowed to cross. According to  
9 Plaintiff, Officer Prater appeared angry and told her she was not allowed to be there. (*Id.* at  
10 5.) Plaintiff alleges that Officer Prater grabbed her while screaming she would be arrested  
11 and pushed her back towards the bus. Plaintiff further alleges that Officer Prater bent her  
12 arm backwards, threw her on the ground, and shoved his knee into her back. (*Id.*) Officer  
13 Prater handcuffed her in a way that caused Plaintiff "blinding pain," he then led her towards  
14 the Customs and Border Protection ("CPB") office. (*Id.* at 5-6.) Plaintiff requested to see a  
15 doctor several times during her hour long detention. (*Id.* at 6.) An ambulance was called and  
16 Plaintiff was transported to Sharp Hospital in Chula Vista where she was treated for multiple  
17 contusions, back and chest pain. Plaintiff also alleges she suffered from swelling and pain  
18 in her wrists, bruises on her face, tenderness on her ribs and left side, as well as two broken  
19 ribs. (*Id.* at 6-7.)

20 Plaintiff filed the instant action on March 25, 2013, against the individual officers and  
21 the Department of Homeland Security, a federal agency of the United States of America.  
22 Plaintiff's Complaint alleges nine (9) causes of action under *Bivens* and the Federal Tort  
23 Claims Act ("FTCA"): (1) *Bivens* - Excessive Force; (2) *Bivens* - Unlawful Detention; (3)  
24 *Bivens* - Extortion in violation of Fourth and Fifth Amendments; (4) FTCA - Excessive Force  
25 (Civil Code § 52.1); (5) FTCA - Unlawful Detention; (6) FTCA - False Imprisonment; (7)  
26 FTCA - Battery; (8) FTCA - Intentional Infliction of Emotional Distress; and (9) FTCA -  
27 Negligence. (*Id.* at 1.)  
28

1 Defendants move to dismiss some of Plaintiff's claims. (Doc. No. 8.) Defendants  
2 argue that (1) the state law claims against officer Prater should be dismissed based on the  
3 government's certification that he was acting within the scope of his federal employment  
4 (causes of action four through nine) and (2) the Fourth and Fifth causes of action for  
5 excessive force and unlawful detention should be dismissed for lack of subject matter  
6 jurisdiction as the United States has not waived sovereign immunity with respect to "Bivens  
7 type" constitutional tort claims. (*Id.* at 2.)

## 8 **II. DISCUSSION**

### 9 **A. Legal Standard**

10 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings  
11 and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state  
12 a claim upon which relief may be granted. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.  
13 2001). The court only reviews the contents of the complaint, accepting all factual allegations  
14 as true, and drawing all reasonable inferences in favor of the nonmoving party. *al-Kidd v.*  
15 *Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009) (citations omitted). Federal Rule of Civil  
16 Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader  
17 is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (U.S. 2007) (citations  
18 omitted). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual  
19 allegations, rather, it must plead "enough facts to state a claim to relief that is plausible on  
20 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial  
21 plausibility when the plaintiff pleads factual content that allows the court to draw the  
22 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*  
23 *Iqbal*, 556 U.S. 662, 678 (2009).

### 24 **B. Bivens Claims (Causes of Action One Through Three)**

25 The Supreme Court has created private damages action against federal officials for  
26 constitutional torts not covered by the FTCA. In *Bivens v. Six Unknown Named Agents of*  
27 *Fed. Bureau of Narcotics*, the Court held that the Fourth Amendment gives rise to a right of  
28 action against federal law enforcement officials for damages from an unlawful search and

1 seizure. 403 U.S. 388 (1970). *Bivens*, thus establishes an implied private right of action for  
2 tortious deprivation of constitutional rights against federal officials in their personal capacity.  
3 *Id.*

4 Defendants do not dispute the propriety of Plaintiff's *Bivens* claims brought against  
5 Officer Prater in his individual capacity and the unnamed Doe Defendants. As alleged,  
6 Plaintiff's *Bivens* claims stand.

7 **C. State Law Claims Against Officer Prater (Causes of Action Four Through Nine)**

8 Plaintiff's FTCA claims are brought against all defendants. Defendants argue that  
9 because the United States certified Officer Prater as acting within the scope of his federal  
10 employment with respect to the allegations contained in the Complaint, the United States has  
11 effectively substituted Officer Prater as the proper defendant on the state law claims alleged.  
12 (Doc. No. 8 at 2.) Upon substitution, the claims were then deemed to be brought under the  
13 FTCA against the United States. (*Id.*)

14 The United States is the only proper party defendant in an FTCA action. *Kennedy v.*  
15 *U.S. Postal Service*, 145 F.3d 1077, 1077 (9th Cir. 1998). Moreover, the "FTCA is the  
16 exclusive remedy for tort actions against a federal agency, and this is so despite the statutory  
17 authority of any agency to sue or to be sued in its own name." *Id.* (Affirming the district  
18 court's dismissal of plaintiff's FTCA claim as improperly brought against a *person* and entity  
19 not subject to the FTCA) (emphasis added); *see also* *Lance v. U.S.*, 70 F.3d 1093, 1095 (9th  
20 Cir. 1995) ("The district court also properly dismissed Lance's action to the extent his  
21 complaint named Does 1 through 20 as additional defendants: the United States is the only  
22 proper defendant in an FTCA action.").

23 Accordingly, the FTCA claims as brought against Officer Prater and individual Doe  
24 defendants are DISMISSED with prejudice.

25 **D. FTCA Claims Pursuant to California Civil Code § 52.1 Against the United States**

26 Plaintiff's fourth and fifth causes of action are FTCA claims made pursuant to  
27 California Civil Code § 52.1. Defendants argue that these claims must be dismissed as the  
28

1 United States has not waived its sovereign immunity with respect to *Bivens* claims.<sup>1</sup>  
2 Specifically, Plaintiff's constitutional tort theories alleged under the United States  
3 Constitution are improper and that in essence, Plaintiff seeks to bring *Bivens* type actions  
4 against the United States itself. (Doc. No. 8 at 3-4.) Plaintiff argues that these causes of  
5 action are made pursuant to the FTCA, not *Bivens*. (Doc. No. 10 at 3.)

6 Absent a waiver, sovereign immunity shields the Federal Government and its agencies  
7 from suit. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996 (1994) (internal citations  
8 omitted). The FTCA waived the Federal Government's sovereign immunity for certain torts  
9 committed by federal employees. 28 U.S.C. § 1346. However, constitutional tort claims are  
10 not cognizable under § 1346(b) and thus not actionable. *Meyer*, 510 U.S. at 475. To be  
11 actionable under § 1346, a claim must allege, *inter alia*, that the United States "would be  
12 liable to the claimant" as "a private person" "in accordance with the law of the place where  
13 the act or omission occurred." *Id.* ("The United States simply has not rendered itself liable  
14 under § 1346(b) for constitutional tort claims.").

15 Section 52.1 provides that if a person interferes, or attempts to interfere, by threats,  
16 intimidation, or coercion with the exercise of enjoyment of the constitutional or statutory  
17 rights of any individual, the individual may sue for damages independently of any other  
18 action that is available. *See Xue Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010). Plaintiff  
19 claims her rights under the United States and California Constitution were violated by  
20 Defendants' actions, specifically she cites to:

- 21 1. Fourth Amendment of the United States Constitution and Article I, Section  
22 13 of the California Constitution - right to be free from unreasonable detentions,  
23 searches, and seizures;

24  
25  
26 <sup>1</sup>Defendant's Motion to Dismiss only argues about the Fourth cause of action  
27 (Excessive Force: FTCA claim pursuant to Cal. Civ. Code § 52.1). (Doc. No. 8 at 3.)  
28 However, Defendant's Reply to Plaintiff's Opposition makes the same argument for the  
Fifth caues of action (Unlawful Detention in violation of the Fourth Amendment: FTCA  
Claim pursuant to Cal. Civ. Code § 52.1). (Doc. No. 12 at 2). Accordingly, the Court  
will discuss the motion with respect to both the Fourth and Fifth cause of action.

1 2. Fourteenth Amendment of the United States Constitution and Article I,  
2 Section 7 of the California Constitution - right to due process and equal  
3 protection of the laws; and

4 3. California Civil Code Section 43 - right of protection from bodily restraint  
5 or harm, from personal insult and from defamation.

(Doc. No. 1 at 11-12.)

6 Plaintiff's fourth and fifth claim made pursuant to § 52.1, to the extent premised upon  
7 violations of the United States Constitution, are improper. The FTCA only subjects the  
8 United States to liability as a "private person" would. *Meyer*, 510 U.S. at 475. "A wrongful  
9 search or seizure by a private party does not violate the fourth amendment."<sup>2</sup> *U.S. v. Walther*,  
10 652 F.2d 788, 791 (9th Cir. 1981). "With a few exceptions, such as the provisions of the  
11 Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection  
12 do not apply to the actions of private entities." *Edmonson v. Leesville Concrete Co., Inc.*, 500  
13 U.S. 614, 619, 111 S.Ct. 2077 (1991). What Plaintiff seeks basically amounts to a claim  
14 based on federal constitutional violations, that in the first place, cannot be the basis of  
15 liability under the FTCA. *See Munyua v. U.S.*, No.C-03-04538 EDL, 2005 WL 43960, at \*12  
16 (N.D. Cal. Jan. 10, 2005) (granting defendant United States' summary judgment on plaintiff's  
17 claims made under California Civil Code § 52.1 and stating "[t]he Court is also wary of  
18 allowing Plaintiff to make what amounts to a claim based on federal constitutional violations  
19 that cannot be a basis of liability under the FTCA."). While California Civil Code § 52.1  
20 allow for such claims as a matter of state law, this Federal District Court finds them improper  
21 as the Supreme Court has expressly denied the applicability of the FTCA to constitutional  
22 tort claims.

23 Accordingly, to the extent Plaintiff's FTCA claims are premised upon alleged  
24 violations of the United States Constitution, they are DISMISSED with prejudice.

25  
26  
27 <sup>2</sup> The exception being when the private party acts as an "instrument or agent" of  
28 the state. *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022 (1971).  
However, this is irrelevant to the Court's analysis of the FTCA's requirements.



1 **III. CONCLUSION**

2 The Court GRANTS the entirety of Defendant’s Motion to Dismiss. Plaintiff’s FTCA  
3 claims brought against individual officers and FTCA claims, to the extent premised upon  
4 United States constitutional tort theories, against the United States are DISMISSED with  
5 prejudice. The Court finds that further amendment would be futile as no set of facts can  
6 render the claims valid. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991); *see also*  
7 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

8 Plaintiff’s *Bivens* and FTCA claims, premised on state law, may proceed.  
9 IT IS SO ORDERED.

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11 DATED: November 4, 2013

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14 Hon. Anthony J. Battaglia  
15 U.S. District Judge  
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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA  
3

4 THE ESTATE OF ALEX MARTIN,  
5 KAREN MARTIN, and CRAIG  
6 MARTIN,

7 Plaintiffs

8 v.

9 UNITED STATES OF AMERICA, ROY  
10 J. SALCEDO, and DOES 2-50

11 Defendants.

Case No.: 13CV1386 LAB BGS  
PROOF OF SERVICE

12 I, Daniel E. Butcher, am a citizen of the United States and am at least eighteen  
13 years of age. My business address is 880 Front Street, Room 6293, San Diego, CA.  
14 92101-8893.

15 I am not a party to the above-entitled action. I have caused service of  
16 Notice of Motion and Motion to Dismiss Amended Complaint; and  
17 Memorandum of Points and Authorities in Support of Motion to Dismiss  
18 Amended Complaint

19 on the following parties by:

20 ■ ECF--Electronic Notice/Service :

21 Eugene G. Iredale, Esq.  
22 Julia Yoo, Esq.

23 I declare under penalty of perjury that the foregoing is true and correct.

24 DATED: November 8, 2013 /s Daniel E. Butcher  
25 Daniel E. Butcher  
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