

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

JANET PADILLA, Individually and as  
Representative of the Estate of LUIS PADILLA,  
and on behalf of LUIS PADILLA, JR. (A Minor),  
JACQUELINE PADILLA (A Minor), JASMINE  
PADILLA (A Minor); ENRIQUE PADILLA;

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MARIA TERESA REYES, Individually and as  
Representative of the Estate of FERNANDO  
REYES; and on behalf of FERNANDO REYES,  
JR. (A Minor), MAYTE REYES, CLAUDIA  
REYES, TANIA REYES;

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BERTHA ORTIZ, Individually and as  
Representative of the Estate of RAMIRO ORTIZ,  
BERTHA SANCHEZ, ELIZABETH ORTIZ,  
DALIA ORTIZ;

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EP-05-CA-0478-FM

MAYRA RODRIGUEZ, Individually and as  
Representative of the Estate of OSCAR  
RODRIGUEZ,

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GRACE CASTRO, Individually and as  
Representative of the Estate of DAVID CASTRO,  
and on behalf of VICTORIA CASTRO (A  
Minor), DAVID B. CASTRO (A Minor), and  
CHRISTOPHER CASTRO (A Minor),  
MANUELLA CASTRO, Individually;

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CHRISTINA GUZMAN, Individually and as  
Representative of the Estate of Abraham  
Guzman, and on behalf of ABRAHAM GUZMAN  
JR. (A Minor), MANUELA CASTRO,  
Individually,

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CHRISTINA GUZMAN, Individually and as  
Representative of the Estate of ABRAHAM  
GUZMAN and on behalf of ABRAHAM  
GUZMAN JR. (A Minor), MANUEL GUZMAN,  
AND MARTHA GUZMAN,  
Plaintiffs,

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v.

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UNITED STATES OF AMERICA, GIOVANNI  
GAUDIOSO, PATRICIA KRAMER, JUANITA  
FIELDAN, MICHAEL GARCIA, CURTIS  
COMPTON, RAUL BENCOMO, AND  
GUILLERMO EDUARDO RAMIREZ PEYRO  
(A/K/A "LALO"),  
Defendants.

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**MEMORANDUM OPINION AND ORDER**

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**MEMORANDUM OPINION AND ORDER**

Before the Court are four motions contending Plaintiffs’ claims should be dismissed against the respective Defendants.

The first motion before the Court is Defendants Raul Bencomo (“Bencomo”), Curtis Compton (“Compton”), and Giovanni Gaudio’s (“Gaudio”) “Defendants’ Motion to Dismiss Or, In the Alternative, for Summary Judgment” (“Agents’ Motion”) [Rec. No. 113], filed on April 14, 2007, and accompanied by their “Appendix of Material and Undisputed Facts in Support of Defendants’ Motion to Dismiss Or, In the Alternative, for Summary Judgment” [Rec. No. 123]. In the Agents’ Motion, Gaudio, Bencomo, and Compton move the Court to dismiss Plaintiffs’ claims against them, arguing they are entitled to qualified immunity. Plaintiffs filed a “Response and Brief in Opposition to Defendants’ Motion to Dismiss and Opposition to Summary Judgment” (“Plaintiff’s Response to Agents’ Motions”) [Rec. No. 139], on May 10, 2007. The “Defendants’ Reply to Plaintiffs’ Response to Motion to Dismiss Or, In the Alternative, for Summary Judgment” (“Agents’ Reply”) [Rec. No. 141] followed on May 22, 2007. For the reasons discussed below, the Court finds it should grant Bencomo,

Compton, and Gaudio's Motion for Summary Judgment and dismiss those Defendants as parties to this action.

The second motion before the Court is Defendant United States of America's ("The Government") "Motion to Dismiss Or in the Alternative Motion for Summary Judgment" ("Government's Motion") [Rec. No. 116] accompanied by its "Appendix of Material and Disputed Facts in Support of United States' Motion to Dismiss Or, In the Alternative, Motion for Summary Judgment" [Rec. Nos. 117-120], filed on April 17, 2007. In its Motion, the Government moves to dismiss Plaintiffs' claims against it, claiming the Federal Tort Claim Act's foreign country and discretionary function exceptions bar Plaintiffs' claims.

Alternatively, the Government contends it is entitled to summary judgment dismissing Plaintiffs' negligence claims pursuant to Texas negligence law. Plaintiffs submitted their "Response and Brief in Opposition to Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment" ("Plaintiff's Response to Government's Motion") [Rec. No. 137] on May 10, 2007. The Government's "Reply to Plaintiffs' Opposition to the United States' Motion to Dismiss, Or in the Alternative, Motion for Summary Judgment" ("Government's Reply") [Rec. No. 149] followed on May 31, 2007. For the reasons discussed below, the Court finds it should grant the Government's Motion and dismiss the Government as a party to this action.

The third motion before the Court is Defendant Juanita Fielden's ("Fielden") "Motion to Dismiss, Or in the Alternative, for Summary Judgment and Memorandum in Support Thereof" ("Fielden's Motion") [Rec. No. 128], filed on April 17, 2007. Therein, Fielden moves the Court to dismiss Plaintiffs' claims against her, arguing she is entitled to qualified

immunity. Plaintiffs filed their “Plaintiffs’ Response and Brief in Opposition to Defendants’ Motion to Dismiss and Opposition to Summary Judgment” (“Plaintiff’s Response to Federal Agents’ Motions”) [Rec. No. 139] on May 10, 2007. For the reasons discussed below, the Court finds it should grant Fielden’s Motion and dismiss her as a party to this action.

The final motion before the Court is Defendant Patricia Kramer’s (“Kramer”) “Defendant Patricia Kramer’s Motion to Dismiss Plaintiffs’ Second Amended Complaint for Failure to State a Claim” (“Kramer’s Motion”) [Rec. No. 129], filed on April 17, 2007. Therein, Kramer moves the Court to dismiss Plaintiffs’ claims against her. Like other Defendants in this case, Kramer argues she is entitled to qualified immunity. Plaintiffs submitted their “Response in Opposition to Defendant Patricia Kramer’s Motion to Dismiss and Memorandum in Opposition” (“Plaintiffs’ Response to Kramer’s Motion”) [Rec. No. 136] on May 10, 2007. Kramer’s “Reply to Plaintiffs’ Response in Opposition to Defendant’s Motion to Dismiss Second Amended Complaint” (“Kramer’s Reply”) [Rec. No. 154] followed on June 12, 2007. Also before the Court are “Defendant Patricia Kramer’s Notice of Filing Supplemental Authority in Support of Motion to Dismiss” (“Kramer’s Supplemental Notice”) [Rec. No. 155] and “Defendant Patricia Kramer’s Renewed Objections and Motion to Strike Plaintiffs’ Affidavit of Phillip E. Jordan, DEA SAC, Retired” (“Kramer’s Motion to Strike”) [Rec. No. 151]. For the reasons discussed below, the Court finds it should grant Kramer’s Motion and dismiss Kramer as a party to this action.

## I. BACKGROUND

### A. Procedural Background

Through the “Plaintiffs’ Second Amended Complaint” [Rec. No. 111] (“Amended Complaint”), the above-named Plaintiffs<sup>1</sup> seek to hold several Department of Homeland Security, Immigration and Customs Enforcement agents and an assistant United States Attorney individually liable under *Bivens*<sup>2</sup> for the murders of cartel members and others which were allegedly directed by Mexican drug cartel leader Humberto Santillan-Tabares (“Santillan”). Plaintiffs additionally allege the Government is liable pursuant to the Federal Tort Claims Act for these same murders. Plaintiffs also seek attorneys’ fees and costs pursuant to 42 U.S.C. § 1988. Defendants are Fielden; Bencomo, Compton, Gaudio (collectively, “the Agents”); Kramer;<sup>3</sup> the Government; Michael Garcia (“Garcia”),<sup>4</sup> and Guillermo Eduardo Ramirez Peyro (“Ramirez”).<sup>5</sup>

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<sup>1</sup>Plaintiffs are the various relatives and representatives of the estates of the six decedents detailed in the Amended Complaint.

<sup>2</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>3</sup>Because Kramer, Fielden and the Agents move to dismiss Plaintiffs’ claims against them under similar grounds, the Court analyzes their respective motions together in section III.B. of this Order.

<sup>4</sup>Paragraph Two of the Amended Complaint refers to Garcia as a “federal agent” and also states Garcia has “filed an answer in this action.” Pls.’ Second Am. Compl., Rec. No. 111, at ¶ 2. However, to date, the record shows Garcia has not filed an answer in this cause.

<sup>5</sup>Ramirez, who is also referred to as “Lalo” and “SA-913-EP” throughout the pleadings, has not filed an answer in this cause.

*B. Plaintiffs' Factual Assertions*

While the Plaintiffs' lengthy Complaint is disjointed, the Court understands Plaintiffs' general rendition of the relevant events as follows.<sup>6</sup> From August 5, 2002 through August 25, 2004, agents Bencomo, Compton, Gaudio, and Kramer were employed with the United States Department of Homeland Security, Bureau of Immigration and Customs Enforcement ("ICE"), at its El Paso, Texas field office. Defendant Fielden was employed as an Assistant United States Attorney, assigned to the Organized Crime Drug Enforcement Task Force (OCDETF) in El Paso, Texas.

In early 2002, the Drug Enforcement Administration (DEA) initiated Operation Sky High, a multi-agency investigation conducted in cooperation with Mexican federal authorities. The investigation targeted the drug cartel operated by the Vicente Carillo Fuentes Organization ("VCFO"). The DEA, United States' Attorney's Office, Federal Bureau of Investigations ("FBI"), ICE, and Mexican federal officials agreed to work together to "do everything possible to disrupt and/or dismantle the VCFO on both sides of the border."<sup>7</sup> Defendant Ramirez<sup>8</sup> was a VCFO member acting as a paid confidential informant for ICE and

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<sup>6</sup>The Court here takes the unusual step of issuing the following admonishment to Plaintiffs' counsel Mr. Raul Loya ("Attorney Loya"). Throughout their filings, Plaintiffs make numerous factual allegations which are not supported by the documentary evidence claimed. In deciding the instant motions, the Court checked every single allegation against the documentary evidence and found numerous discrepancies. The Court cautions Plaintiffs' counsel that it will not tolerate misleading statements and sanctions will result for any further such conduct.

<sup>7</sup>Pls.' Second Am. Compl., Rec. No. 111, at ¶ 14.

<sup>8</sup> Ramirez remains in federal custody awaiting the final decision on his immigration appeal and awaits deportation and extradition to Mexico. On May 25, 2006, this Court authorized the videotaped deposition of Ramirez as Plaintiffs argued Ramirez's deposition was essential to the

the U.S. Attorney's Office in El Paso. Plaintiffs aver Ramirez was a double agent for Santillan Tabares ("Santillan"), a senior VCFO member. The instant lawsuit focuses on Ramirez's role in kidnappings and murders which occurred while he was under control of ICE agents and Fielden.

According to Plaintiffs, on or about August 5, 2003, Ramirez, while on the United States' payroll, participated in the murder of Fernando Reyes in Ciudad Juarez, Mexico ("Juarez"). Ramirez "was in fact a participant in the torture and murder of Fernando Reyes, as reflected in his debriefing report dated August 25, 2003, which clearly states that the CS supervised the murder."<sup>9</sup> In addition, Plaintiffs contend Ramirez recorded Reyes' killing.<sup>10</sup> Plaintiffs aver ICE agents subsequently obstructed the murder investigation in Juarez and Fielden ignored the DEA's recommendations to "take down the case," thereby allowing

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establishment of their claims. Rec. No. 22. Ramirez was subsequently deposed on August 17, 2006. At that deposition, he partially invoked his Fifth Amendment privilege against self incrimination and refused to answer specific questions relating to the allegations set forth in the Complaint. In their summary judgment evidence, Plaintiffs utilize various other documents containing Ramirez's testimony.

<sup>9</sup>Pls.' Second Am. Compl., Rec. No. 111, at ¶ 16. The DEA Memorandum states: "The participants in the murder were Alex GARCIA and two (2) Juarez Judicial Police Officers. SA-913-EP supervised the murder and had minimal participation in the act." *See* App. to Pls.' Suppl. Resp. and Brief in Opp'n to Defs.' Mot. to Dism. and Opp'n to Summ. J., Rec. No. 136, p. 36, Aug. 25, 2003 DEA Memo., p. 1.

<sup>10</sup>In regards to Ramirez's recording of the murder, Plaintiffs specifically allege the following: "Apparently, the ICE officials ordered Ramirez to turn on his cell phone so they could listen in on his activities from their El Paso offices. The ICE officials listened as Ramirez and his Mexican accomplices bound Reyes using duct tape, a rope and finally used a plastic bag and a shovel to kill the victim." Pls.' Second Am. Compl., Rec. No. 111, ¶ 55.

Ramirez to engage in a “killing spree” involving at least twelve other murders in Juarez.<sup>11</sup>

Plaintiffs claim the reason Defendants allowed Ramirez to continue operating as a confidential informant was to protect the Government’s drug case against Santillan and a cigarette smuggling case in which Ramirez was a witness.

The Plaintiffs next detail instances in which ICE agents possessed advance notice of murders in Juarez. Plaintiffs contend the ICE agents did nothing themselves to prevent the murders, nor did they inform Mexican law enforcement. Further, ICE agents and Fielden did not allow other United States law enforcement agencies access to Ramirez. Ramirez previously worked as a DEA informant, but was “deactivated” in June 2003 when he was caught in Las Cruces, New Mexico attempting to smuggle a load of marijuana across the border. According to Plaintiffs, the United States Attorney’s Office in El Paso worked to get the charges against Ramirez dropped in exchange for his cooperation as a confidential informant.

Plaintiffs submit Ramirez informed his handlers on several occasions of individuals targeted for murder. According to Plaintiffs’ version of the facts, ICE agents monitored phone calls, leaving no doubt violent crimes were to take place. However, Defendants “took no steps to protect those individuals who had been targeted for torture and death. On the contrary, the government sanctioned and supported the informant RAMirez [sic] who participated in at least eleven more murders. The government continued to support the informant paying him over

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<sup>11</sup>See Pls.’ Second Am. Compl., Rec. No. 111, ¶¶ 14, 22.

\$200,000.”<sup>12</sup> Further:

[a] senior official strongly recommended to both ICE and the prosecutor to arrest Santillan and shut down the operations in Juarez. These demands were ignored. Agent [sic] Fielden and ICE refused to make any arrests and instead continued the Ramirez operation. In January 2004, three more people were killed including Padilla, Ortiz, and Rodriguez.<sup>13</sup>

From the Plaintiffs’ point of view, the torture and killings would have continued if not for an incident in which two undercover DEA agents in Juarez were targeted for assassination. A victim of Ramirez’s torture apparently revealed the address of a house occupied by a businessman, located in a gated Juarez residential area which likely contained a large cache of illegal drugs. Ramirez and the cartel subsequently planned a siege of the house and a “barbeque”<sup>14</sup> of the occupants. On January 14, 2004, Ramirez discovered through his ICE contacts that the businessman was actually an DEA agent living in Mexico with his family. Ramirez reported the agent’s identity and Juarez address to the cartel. The cartel then initiated a plan to kidnap, torture, and kill the DEA agent and his family.

The agent, his family, and a second undercover DEA agent, faced several gunmen intent on killing them. The agent summoned help and was able to reach his Juarez diplomatic contacts “by sheer luck.”<sup>15</sup> Several state police officers in Juarez immediately appeared on the

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<sup>12</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 60.

<sup>13</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 74.

<sup>14</sup>Throughout the Amended Complaint, Plaintiffs refer to “carne asada” or “barbeque” for the tortures and murders orchestrated by the cartel in Juarez

<sup>15</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 72.

scene, preventing the killing. Plaintiffs submit the situation sent “shock waves throughout the law enforcement community” and “ICE and the Justice Department could no longer ignore the siege of mayhem and murder.”<sup>16</sup>

Plaintiffs argue Ramirez, as a confidential informant, should have been blacklisted<sup>17</sup> after the first murder pursuant to the United States Customs Service Handbook’s Chapter 41. However, despite Chapter 41’s requirements citation of policy, ICE continued to sponsor and support Ramirez in “an alleged attempt to track a corrupt customs informant.”<sup>18</sup>

Plaintiffs also claim ICE officials sent Ramirez, in his capacity as an informant, to meet with cartel members and pick up a pay-off at a Whataburger Restaurant in El Paso. Apparently suspecting that the arrangement was an ICE set-up designed to kill him, Ramirez sent his neighbor Abraham Guzman (“Guzman”) to make the pick-up. At the time Ramirez was to meet the cartel members, two gunman shouted the name “Lalo” and fired nine rounds in the back of Guzman’s head—apparently mistaking him for Ramirez. According to Plaintiff, “[t]hat fateful day in August, the ICE handlers counseled, commanded, induced, procured and caused the intentional killing of Guzman, in violation of Title 21, United States Code, Section

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<sup>16</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 73.

<sup>17</sup>The parties use the terms “blacklisted” and “blackballed” throughout their submitted papers to describe situations where a governmental official should terminate the use of an informant. For example, Chapter 41 of the United States Customs Service Enforcement Handbook states: “A Customs blackballed source of information will not be used by any Customs officer.” App. to Pls.’ Suppl. Resp. and Brief in Opp’n to Defs.’ Mot. to Dism. and Opp’n to Summ. J., Rec. No. 136, p.p. 73-75.

<sup>18</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 81.

848(e)(1)(A) and Title 18 United States Code, Section 2.”<sup>19</sup>

*C. Defendants’ Factual Assertions*

Each individual Defendant tenders a version of the facts differing significantly from Plaintiffs’ rendition. Accordingly, the Court will address the crucial discrepancies between the Defendants’ and Plaintiffs’ accounts when considering each of the pending motions to dismiss in section III. That said, the federal Defendants generally allege the following. “No Defendant was aware of any of the killings described in the Plaintiffs’ Complaint prior to the events taking place. Moreover, no one at ICE or the United States Department of Justice was aware that the murders would take place prior to their occurrence.”<sup>20</sup> In addition, Defendants generally contend that no Defendant monitored any communications during the alleged time of the Reyes murder and did not hear it occur via the telephone.

According to the Defendants, Plaintiffs’ allegations arise out of an apparent dispute between two United States law enforcement agencies. In general, the Defendants contend Plaintiffs simply reiterate the allegations of former DEA Special Agent in Charge Sandalio Gonzalez (“SAC Gonzalez”). SAC Gonzales was upset after the identities of his two DEA undercover agents in Juarez were disclosed and lives jeopardized when they were confronted by corrupt Mexican law enforcement working for the VCFO. SAC Gonzalez suspected that Ramirez had disclosed the agents’ identity while working for ICE. SAC Gonzales challenged

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<sup>19</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 81.

<sup>20</sup>Mot. to Dismiss or in the Alternative Mot. for Summ. J., Rec. No. 116, p. 4.

many of the Defendants when he learned ICE agents allegedly failed to share information with the DEA because of a mistrust of DEA officials. “With this backdrop, Gonzales (by all accounts a non-witness to the relevant facts of this Complaint) wrote of his understanding of the events which, in his personal opinion, led to the compromise of his agents’ identity and how that scenario could have been avoided.”<sup>21</sup> Defendants submit that SAC Gonzales’s unfounded conclusions supply the basis of the Plaintiffs’ baseless Amended Complaint.

According to Fielden, the ICE Acting SAC decided to continue using Ramirez as an informant pursuant to ICE’s department guidelines. The ICE SAC in El Paso, as well as ICE management in Washington, D.C., also authorized agents to proceed with the investigation after Reyes’s August 5, 2003 murder. Further, Fielden submits she did not have access to Ramirez at any time before January 14, 2004, when she met with Ramirez for the first time. Fielden asserts she never directly or indirectly supervised Ramirez. Describing her role with Ramirez, Fielden states:

ICE managers supervised the investigation. Ms. Fielden, as the Organized Crime Drug Enforcement Task Force (OCDETF) prosecutor, was consulted on various aspects of the investigation, supported the investigation by obtaining authorization for the wire interceptions, discussed options for prosecution, obtained the indictment and the [DOJ] portion of the lure approval.<sup>22</sup>

Further, Fielden avers she acted in conformity with the Department of Justice guidelines at all times.

As to the Guzman murder, Defendants submit no one at ICE or the United States

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<sup>21</sup>Mot. to Dismiss Or in the Alternative Mot. for Summ. J., Rec. No. 116, p. 2.

<sup>22</sup>Juanita Fielden’s Mot. To Dismiss, or in the Alternative, for Summ. J. and Memo. in Support Thereof, Rec. 128, p. 3.

Department of Justice knew that it was to take place; or that Ramirez was in the El Paso/Juarez area; or that Ramirez had any involvement with the deceased victim. Further, other than the Guzman murder, Defendants argue all of the events leading to the murders occurred in Mexico and no precursor events occurred in the United States which could have reasonably been said to have alerted them to the impending deaths.

On February 12, 2004, Ramirez provided a statement to Mexican law enforcement officials at the Mexican Consulate in Dallas, Texas.<sup>23</sup> In that statement, Ramirez asserted that, other than the Reyes murder, he had no involvement in the other murders. Further, Ramirez averred that, other than Reyes, he did not know any of the victims identified in the Amended Complaint. Ramirez contended the victims had been ordered murdered by the “criminal group headed by Luis Portillo, Sada, Santillan and Loya.”<sup>24</sup>

## II. RULES 12(b)(1), 12(b)(6) AND 56 STANDARD FOR DISMISSAL

### A. *Federal Rule of Civil Procedure 12(b)(1)*

Federal Rule of Civil Procedure 12(b)(1) (“Rule 12(b)(1)”) allows a party to move to dismiss an action for lack of subject matter jurisdiction. The Court must dismiss a cause for lack of subject matter jurisdiction “when the court lacks the statutory or constitutional power

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<sup>23</sup>See Mot. to Dismiss Or in the Alternative Mot. for Summ. J., Rec. No. 116, Ex. H, Spanish version and certified English translation of the Ramirez statement.

<sup>24</sup>See Mot. to Dismiss Or in the Alternative Mot. for Summ. J., Rec. No. 117, Ex. H, Spanish version and certified English translation of the Ramirez statement. (English version). The Court notes the Loya referenced in this quotation is an individual residing in Juarez; and obviously not Raul Loya, counsel for Plaintiffs.

to adjudicate the case.” See *Home Builders Ass’n of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The Federal Rules provide that a defendant may submit a motion to dismiss for lack of subject matter jurisdiction before filing an answer. FED. R. CIV. P. 12(b). The burden of establishing subject matter jurisdiction is on the party seeking to invoke it. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In deciding a motion to dismiss pursuant to Rule 12(b)(1), the Court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts, plus the Court’s resolution of disputed facts. *Id.* A Rule 12(b)(1) motion to dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of her claims which would entitle her to relief. See *Home Builders Ass’n of Mississippi, Inc.*, 143 F.3d at 1010.

*B. Federal Rule of Civil Procedure 12(b)(6)*

Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) permits dismissal of all or part of a complaint “for failure to state a claim upon which relief can be granted.” A motion to dismiss for failure to state a claim under Rule 12(b)(6) is viewed with disfavor and is rarely granted. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). In considering a motion to dismiss for failure to state a claim, a court must accept as true the well pleaded factual allegations and any reasonable inferences to be drawn from them. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). Dismissal of a claim under Rule 12(b)(6) is not proper “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S.

41, 45-46 (1957). In ruling on such a motion, a Court may not look beyond the face of the pleadings. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). Finally, a court may dismiss a claim “if a successful affirmative defense appears clearly on the face of the pleadings.” *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986).

The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when viewed in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff’s favor. *Lowrey*, 117 F.3d at 247. A plaintiff, however, must plead specific facts, and not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

### *C. Federal Rule of Civil Procedure 56*

Summary judgment is only proper where the non-movant cannot demonstrate a genuine issue of material fact. FED. R. CIV. P. 56(c). A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether to grant a motion for summary judgment, a Court should view all evidence and the inferences to be drawn therefrom “in the light most favorable to the party opposing the motion.” *United States v. Diebold*, 369 U.S. 654, 655 (1962). In addition, a court should accept as true all evidence submitted by the non-movant. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Finally, courts should refrain from weighing evidence or making credibility determinations. *Id.* at 150-51.

### III. ANALYSIS

#### A. *The Government's Motion to Dismiss*

##### 1. The Government's Arguments, Generally

The Government moves to dismiss all of Plaintiffs' claims against it, arguing Plaintiffs have failed to establish any specific acts or omissions by any of the Defendants to establish liability on the Government's part.<sup>25</sup> The Guzman and Padilla Plaintiffs bring their claims against the Government pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 *et seq.*<sup>26</sup> The Government contends the Court lacks subject matter jurisdiction over the Padilla Plaintiffs' claims because those causes of action are barred by the FTCA's foreign country exception. In addition, the Government argues the Court lacks

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<sup>25</sup>The Court notes only the survivors of decedents Luis Padilla and Abraham Guzman allege claims against the Government under the FTCA. The Government introduces its Motion to Dismiss with the following: "Should the United States of America be held liable under the provisions of Texas tort law for monetary damages to the families of certain decedents/cartel members who were murdered by the Heriberto Santillan-Tabares drug cartel operating in Ciudad Juarez, Mexico?" Mot. to Dismiss or in the Alternative Mot. for Summ. J., Rec. No. 116, p. 1.

<sup>26</sup>28 U.S.C. § 1346(b) provides in pertinent part:  
the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . 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.

subject matter jurisdiction over both the Padilla and Guzman Plaintiffs' claims, as they are barred by the FTCA's discretionary function exception. The Government further submits it is entitled to summary judgment dismissing all of Plaintiffs' common law claims because it had no duty, under Texas tort law, to the alleged victims. Even assuming that such a duty existed, the Government asserts there is no causal link between any of the Defendants' alleged acts or omissions and the Juarez murders. According to the Government, the summary judgment evidence establishes that Defendants did not know decedents Padilla and Guzman, and they were unaware of their murders until after they occurred.

## 2. FTCA Foreign Country Exception

The Government argues the Court lacks subject matter jurisdiction over the Padilla Plaintiffs' claims because the claims are barred by the FTCA's foreign country exception.<sup>27</sup> The FTCA represents a limited waiver of the Government's sovereign immunity. *See Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994) ("Through the enactment of the FTCA, the Government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment."). The FTCA's waiver of sovereign immunity, however, does not extend to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

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<sup>27</sup>The Government notes its foreign country exception argument only pertains to the Padilla Plaintiffs' claims, as Guzman's death undisputedly occurred in El Paso.

a. Foreign Country Exception

Relying on *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Government argues the FTCA's foreign country exception bars all of the Padilla Plaintiffs' causes of action because the claims are based on injuries suffered in Juarez. In *Sosa*, the DEA had evidence that plaintiff Humberto Alvarez-Machain ("Alvarez"), a Mexican physician, had participated in the torture and execution of a DEA agent in Mexico. *Id.* at 697-99. Alvarez was indicted in the United States for that murder. *Id.* After failing to obtain Alvarez's extradition, the DEA hired Mexican nationals to abduct Alvarez, hold him in a Mexican motel, and then bring him by private plane to Texas where federal officers arrested him. *Id.* The Supreme Court found Alvarez's claims were barred because the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, even if the tort was instigated in the United States by American officials. *Id.* at 705-08.

The Supreme Court in *Sosa* laid down the basic rule that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.* at 711. Moreover, the Supreme Court found good reason to conclude that Congress meant the phrase "arising in a foreign country" to mean a claim for injury or harm occurring in a foreign country. *Id.* at 704. *Sosa* also addressed the "headquarters doctrine," which Plaintiffs typically involve when their inquiries or damage occur in another country as a result of planning by defendants in the United States. *Id.* at 703-04. *Sosa* rejected the headquarters doctrine, writing the doctrine "threatens to swallow the foreign country exception whole..." *Id.* at 703.

b. Court's Analysis

While not exactly clear from the Amended Complaint or the Response to the Government's Motion, the Court understands Plaintiffs to argue the foreign country exception does not apply even though Padilla was murdered in Juarez. Plaintiffs insist they seek relief only for Padilla's abduction from his home in El Paso and injuries resulting in the United States from that abduction.<sup>28</sup> In support of their abduction claim, Plaintiffs submit an affidavit by Padilla's widow. She states on the date her husband went missing in El Paso, she found his "car with the keys in the ignition and the door open."<sup>29</sup> Obviously, if the Padilla Plaintiffs' injury is one based on the alleged abduction, assault, and conspiracy that occurred in the United States, the foreign country exception is inapplicable.

However, even assuming the abduction argument in the Response to Government's Motion states a claim in the abstract, Plaintiffs' kidnaping theory conflicts with the factual assertions in their own Amended Complaint. Therein, Plaintiffs state:

Santillan ordered Ramirez to prepare a carne asada for the targeted courier or "mule." *But as usual, others were abducted along with the target. Making a day trip to Juarez, Luis Padilla, an El Paso resident, was also taken. A victim of the Ramirez hit squad, Padilla was never again seen by his family. ... His*

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<sup>28</sup>Plaintiffs' allegation that Padilla was kidnaped in the United States appears for the first time in the Response to Government's Motion. [Rec. No. 137]. To contrast, in the Amended Complaint, Plaintiffs allege Padilla was murdered "on a day trip to Juarez." Pls.' Second Am. Compl., Rec. No. 111, ¶ 68.

<sup>29</sup>See App. to Pls.' Supp. Resp. and Brief in Opp'n to Defs.' Mot. to Dism. and Opp'n to Summ. J., Rec. No. 136, p. 142.

mutilated body was eventually identified ... in Juarez.<sup>30</sup>

The Government notes Plaintiffs' contradiction and argues Plaintiffs' own Amended Complaint should control. It asserts Mrs. Padilla's affidavit is an improper vehicle with which to amend the Amended Complaint. Next, the Government avers the affidavit itself is insufficient to state a claim for a compensable injury. The Government submits the abduction claims are too speculative and uncertain to establish a compensable injury.

After careful consideration, the Court finds the Government's arguments well-founded and determines the Padilla Plaintiffs' claims against the Government should be dismissed because of the foreign country exception. Plaintiffs attempt, through an affidavit attached to their responses, to manufacture a factual issue precluding summary judgment by alleging a kidnaping in El Paso. However, this contention conflicts with their live pleading, in which Plaintiffs state Padilla was murdered "on a day trip to Juarez."<sup>31</sup> Plaintiffs' current Complaint claims fail to show any of Padilla's injuries occurred in the United States. As this Court must accept all facts in the complaint as true, it is under no obligation to accept facts submitted in affidavits that have been conclusively contradicted by the Plaintiffs themselves in their Amended Complaint. *See, e.g., Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 37 (1st Cir. 1987) ("We exempt, of course, those 'facts' which have since been

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<sup>30</sup>Pls.' Second Am. Compl., Rec. No. 111, ¶ 68 (emphasis added).

<sup>31</sup>Pls.' Second Am. Compl., Rec. No. 111, ¶ 68. In a similar context, "[a]lthough the court must resolve all factual inferences in favor of the non-movant, the non-movant cannot manufacture a disputed material fact where none exists." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984).

conclusively contradicted by plaintiffs' concessions or otherwise, and likewise eschew any reliance on bald assertions, unsupported conclusions, and 'opprobrious epithets.'").

Accordingly, viewing the facts in the light most favorable to the Plaintiffs, the Court finds the Padilla Plaintiffs' claims are barred by the foreign country exception, and therefore the Padilla Plaintiffs cannot maintain their FTCA action against the Government.

### 3. FTCA Discretionary Function Exception

Next, the Government argues this Court lacks subject matter jurisdiction over the Plaintiffs' claims against them because the challenged actions all fall within the FTCA's discretionary function exception.

#### a. Discretionary Function Exception

Pursuant to the FTCA, there is no subject matter jurisdiction for claims "based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals. *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). The reasoning behind this exception is the conclusion that imposing liability on the Government for its employees' discretionary acts "would seriously handicap efficient governmental operations." *Id.* at 814.

The Supreme Court set forth a method for the discretionary exception analysis in *United States v. Gaubert*, 499 U.S. 315 (1991). In *Gaubert*, the Supreme Court promulgated a two-part test to determine whether the FTCA's discretionary exception applies. 499 U.S. at 319-20. First, the exception applies when the challenged actions involved an element of judgment or choice. *Id.* "In other words, the conduct did not involve mandatory compliance with a particular federal statute, regulation or policy." *Crenshaw v. United States*, 959 F. Supp 399, 402 (S.D. Tex. 1997). Second, if the challenged actions involve the element of choice as described in the test's first prong, the court should make certain the conduct is "based on considerations of public policy" before applying the exception. *Gaubert*, 499 U.S. at 323. The latter inquiry must center "not on the agent's subjective intent in exercising the discretion ..., but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325.

The Fifth Circuit has held "a governmental decision that entails balancing considerations of social, economic, or political policy is discretionary within the meaning of § 2680(a)." *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987). In addition, "law enforcement decisions by United States Attorneys on when, where, and how to investigate, and whether to prosecute, fall within the ambit of the discretionary function exception." *Id.* (citing to *Smith v. United States*, 375 F.2d 243, 247-48 (5th Cir. 1967)); see also *Mesa v. United States*, 837 F. Supp. 1210, 1213 (S.D. Fla. 1993) ("The overwhelming consensus of federal case law establishes that criminal law enforcement decisions--investigative and prosecutorial alike--are discretionary in nature and, therefore, by Congressional mandate,

immune from judicial review.”).

b. The Parties’ Arguments

The Government argues “[t]he decisions of a law enforcement agency regarding the method and degree of supervising and/or controlling an informant are protected by the discretionary function exception.”<sup>32</sup> Moreover, the Government contends Plaintiffs fail to identify any specific policies or directives any of the Defendants purportedly violated. The Government notes that, in the one instance where ICE was required to follow a certain policy, it did follow the mandatory policy. This occurred when the agents and prosecutor obtained the Special Agent in Charge’s approval to continue using Ramirez as a confidential source following Ramirez’s June, 2003 marijuana arrest.

In its Response to the Government’ Motion, the Plaintiffs allege the discretionary function does not apply because the Defendants engaged in a number of violations of mandatory regulations.<sup>33</sup> First, Plaintiff argues the Government Customs Service Enforcement Handbook strictly prohibits an informant from committing crimes and participating in any acts of violence. Second, citing the “Confidential Informant Policy Addendum” dated May 27, 2004, Plaintiffs aver that ICE policy dictates “[t]he use of the CI should be immediately

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<sup>32</sup>Mot. to Dismiss or in the Alternative Mot. for Summ. J., Rec. No. 116, p. 20.

<sup>33</sup>While the Response to the Government’ Motion is confusing and difficult to follow, the Court attempts to decipher the Plaintiffs’ arguments.

suspended” if an informant’s participation in unlawful conduct is uncovered.<sup>34</sup> In addition, Plaintiff writes “[a]t the very least, an informant must discourage criminal acts or such plans and promptly notify the USCS. ICE failed to comply with the Title 21 Cross Designation Agreement with DEA mandated in the guidelines.”<sup>35</sup> Finally, Plaintiffs argue Defendant Fielden violated the Attorney General Mandates regarding the use of confidential informants under 28 U.S.C. §§ 509, 510, and 513.

Through the Government’s Reply, the Government addresses each of the claimed mandatory violations of regulations. Responding to the Plaintiffs’ allegations regarding the United States Customs Service Enforcement Handbook, the Government argues an examination of the referenced pages of the Enforcement Handbook fails to support the Plaintiffs’ contention that an informant must be immediately terminated as an informant after having participated in a crime or other act of violence. Moreover, according to the Government, the Handbook states that whether a source should be blackballed depends on the degree of gravity of several factors. Instead of suggesting mandatory action by the agency, “the Handbook itself casts the decision to blackball a tainted source in *discretionary* terms.”<sup>36</sup>

As to the Confidential Informant Policy Memorandum dated May 27, 2004, the Government contends all of the murders, save for Guzman’s, had already been committed by

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<sup>34</sup>Pl.s’ Resp. and Brief in Opposition to Def. U.S.A.’s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, p. 10.

<sup>35</sup>Pl.s’ Resp. and Brief in Opposition to Def. U.S.A.’s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, p. 11.

<sup>36</sup>U.S.’ Reply to Pl.s’ Opposition to the U.S.A.’s Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., p. 6.

the time the memorandum was issued. Further, Ramirez had been deactivated before the Confidential Informant Policy Addendum's issuance. Moreover, according to the Government, the Confidential Informant Policy, by its very terms, does not mandate the termination of the confidential informant. Rather, it directs agents to consult with the appropriate Principle Field Officer and others.

Finally, the Government argues Plaintiffs' contention that Fielden violated Justice Department mandates is simply erroneous. The Government avers a review of the Guidelines at issue reveals that the revocation of a confidential informant's authorization belongs to Department of Justice law enforcement agencies ("JLEAs"). Defendants submit ICE is not a DOJ component and therefore Plaintiffs cannot rely on the Guidelines to establish that the ICE agents violated a rule, regulation or policy that was mandatory as to them. Because Fielden is not classified as a JLEA, the deactivation requirements of the Guidelines also do not apply to her.

c. Court's Analysis

Here, viewing the facts in the light most favorable to the Plaintiffs and resolving all reasonable doubts in their favor, the Court finds the Government is entitled to dismissal of Plaintiffs claims against it pursuant to the FTCA's discretionary exception. As previously stated, the Plaintiffs' main theory of the case is that Defendants could have prevented the murders after August of 2003 and should have terminated the Ramirez informant operation. However, all of the complained-of actions involve criminal law enforcement decisions,

investigative and prosecutorial alike, which are discretionary in nature and therefore immune from judicial review under the FTCA. The discretionary nature of the conduct at issue, combined with the Defendants' decision to allow Ramirez to operate as an informant, requires the Court to find the Plaintiffs' allegations all involve an element of judgment or choice. That being the case, the discretionary function exception applies and precludes Plaintiffs' claims. In addition, the Government has soundly rebutted and disproved all of Plaintiffs' arguments, to the effect that Defendants' purported actions did not comply with relevant, mandatory federal statutes, regulations, or policies. As stated, the Court determines Defendants' complained-of actions were based on public policy considerations.

The discretionary function exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. Decisions to investigate, judgment calls regarding the use of an informant, and whether to terminate a confidential informant's work form the core of law enforcement activity. Thus, the Court finds the challenged actions are exactly the type of policy-based decision the discretionary function was designed to safeguard. Defendants may only achieve their law enforcement objectives if their judgment calls, like those alleged in this case, are protected. Accordingly, the Padilla and Guzman Plaintiffs' claims are barred by the discretionary function exception to the FTCA. Plaintiffs thus cannot maintain their action under the FTCA against the Government.

#### 4. Negligence Claims

##### a. Negligence, Generally

Assuming *arguendo* that this Court would not dismiss Plaintiffs' FTCA claims pursuant to the discretionary exception, the Court concludes it should dismiss the Plaintiffs' claims pursuant to Texas negligence principles. Under the FTCA, the Government's liability is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Plaintiffs allege the acts and omissions giving rise to their claims occurred in El Paso, Texas. Accordingly, Texas negligence principles apply here to determine the Government's liability, if any. The Government moves to dismiss the entirety of Plaintiffs' claims arguing Plaintiffs fail to establish the Government or its employees owed a duty to the decedents and, even assuming such a duty existed, that the employees' actions breached that duty.

##### b. Texas Negligence Authorities

In order to state a cause of action for negligence under Texas law, a plaintiff must satisfy three elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damages proximately caused by such breach. *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998). "The threshold inquiry in a negligence case is duty." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Whether a duty exists in a particular case is a question of law for the trial court to decide. *Id.* "In determining whether the defendant was under a duty, the court will consider several interrelated factors, including

the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.” *Id.* at 309. The Texas Supreme Court has also held the risk’s foreseeability is “the foremost and dominant consideration.” *Id.* (quoting *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)).

Generally, there is no duty to control the conduct of third persons. *Otis*, 668 S.W.2d at 309; Restatement (Second) of Torts § 315 (1965). “This general rule does not apply when a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct.” *Greater Houston Transp. Co.*, 801 S.W.2d at 525. Texas follows section 448 of the Restatement (Second) of Torts concerning criminal conduct of a third party:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

*Boggs v. Bottomless Pit Cooking Team*, 25 S.W.3d 818, 824 (Tex. App.-Houston [14 Dist.] 2000, no pet.) citing *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985).

Whether criminal conduct is foreseeable requires “more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the Defendant’s conduct brings about the injury.” *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W. 2d 472 (Tex. 1995).

c. The Parties' Arguments

According to the Government, the Plaintiffs have pleaded their way out of a viable claim, as Plaintiffs concede the decedents died at the hands of Santillan and others acting on his behalf in support of the cartel's operations. The Government claims:

Based upon the foregoing, it is clear that Defendants did not owe a duty to the victims. Given the nature of the circumstances of the victims' deaths, it cannot be said, within reason, that their deaths were a known risk and were foreseeable. As the Defendants' declarations establish, no employees of ICE or the Department of Justice were aware of any impending murders. They were totally unforeseeable. The likelihood of injury was unknown, and while the loss of life which forms the basis of this complaint is regrettable, the consequences of placing responsibility for the same on the United States would have a crippling effect upon the efforts of law enforcement agencies within the United States to stem the flow of drugs into our borders.<sup>37</sup>

The Government argues that, even assuming the existence of a duty, there is no link between the alleged negligence of any Government employee and the victims' deaths. The criminal conduct of others broke the putative chain of causation, and thus there is no "cause in fact" between the alleged negligence of the Defendants and the deaths of Guzman or Padilla.<sup>38</sup>

In the Plaintiffs' Response to the Government's Motion, the Plaintiffs rely on Texas agency law to contend "the informant was acting as an agent of the U.S. government when he

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<sup>37</sup>Mot. to Dismiss or in the Alternative Mot. for Summ. J., Rec. No. 116, p. 26-27.

<sup>38</sup>"Cause in fact is 'but for cause,' meaning the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred." *Gutierrez v. Excel Corp.*, 106 F.3d 683, 687 (5th Cir. 1997) (citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex.1987)). "Cause in fact is not shown if the defendant's negligence did no more than furnish a condition that made the injury possible." *Rodriguez v. Moerbe*, 963 S.W.2d 808, 818 (Tex.App. – San Antonio 1998, no pet.).

abducted, tortured, and killed people at will.”<sup>39</sup> Further, Plaintiffs argue that deaths at the hands of the informant were clearly foreseeable: “The informant had recorded his participation in one murder. The officials monitored the telephones announcing the next ‘carne asada.’ Afterwards, the informant debriefed with ICE regarding the bodies that were ‘piling up.’ ICE chose to ignore this.”<sup>40</sup> The Court now turns to the merits of the Parties’ arguments.

### c. Court’s Analysis

After careful consideration, the Court finds the Government also deserves dismissal of Plaintiffs’ common law negligence claims against it. Plaintiffs’ lawsuit is set against the backdrop of a complicated international investigation, involving several law enforcement outfits in the United States and Mexico targeting one of the most powerful and violent Mexican drug cartels. The record reflects the often-cited carne asadas were gruesome murder “parties” conducted by vicious men and women. Considering the record as a whole, this Court concludes that, with or without Ramirez’s involvement, this is how these types of groups operate. As fully discussed in section III.B.1., very few of Plaintiffs’ factual allegations are well-pleaded when compared to the accompanying summary judgment evidence.<sup>41</sup> Further,

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<sup>39</sup>Pl.s’ Resp. and Brief in Opposition to Def. U.S.A.’s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, p. 22.

<sup>40</sup>Pl.s’ Resp. and Brief in Opposition to Def. U.S.A.’s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, p. 23.

<sup>41</sup>Even assuming the Defendants had foreknowledge of the murders occurring in Mexico, the Court concludes the only arguable duty, if any, on their part would have been to notify Mexican law enforcement. However, the Court concludes the evidence fails to show how any of the Defendants played a part in creating the circumstances leading to the murders or did anything

taking into account this background and viewing all evidence and the inferences to be drawn therefrom in the light most favorable to the Plaintiffs, the Court finds it should dismiss Plaintiffs' common law negligence claims against the Government.

First, the Court holds none of the Defendants owed any of the Plaintiffs a duty of care. The Court is hesitant to place a duty on the part of law enforcement towards unidentified and unpredictable victims. As succinctly put by the Government, "Texas law does not require a private individual to prevent the illegal conduct of a third person. [The Amended] Complaint, and the affidavits of the Defendants, firmly establish that the deaths at issue were committed by the cartel for the sake of the cartel."<sup>42</sup> The Court finds the Government did not owe these Plaintiffs a duty of care under Texas law.

Even assuming a duty existed, the Court finds no causal link between the Government's alleged negligence and the victims' deaths. The criminal conduct, which undisputedly occurred at the hands of the cartel, breaks the chain of causation under Texas law. No actions by the Government Defendants placed the victims in the predicament leading to their demise. The facts of this case depict a scenario familiar to this Court—a horrible death can befall persons who find themselves on the path or associated with this type of organization. Thus, there is no cause in fact between any of the Defendants' alleged negligence and the deaths of Padilla and Guzman. Further, the summary judgment evidence shows the deaths were not foreseeable, as Defendants could not have reasonably anticipated the consequences of their acts on

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to render the Plaintiffs more vulnerable to such circumstances. *See DeShaney*, 489 U.S. at 201.

<sup>42</sup>Mot. to Dismiss or in the Alternative Mot. for Summ. J., Rec. No. 116, p. 27.

indeterminate victims. Accordingly, Plaintiffs' claims against the Government should be dismissed as Plaintiffs cannot demonstrate a genuine issue of material fact under Texas negligence law.

*B. Fielden, Kramer, and Agents' Motions to Dismiss*

1. Allegations against Individual Defendants, Generally

Plaintiffs bring their Fourth, Fifth, Eighth and Fourteenth Amendment claims against the individual Defendants pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See also Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999) ("Under *Bivens*, a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights."). Plaintiffs' vague allegations are all predicated upon the same unsubstantiated allegations discussed previously in this Order. Additionally, Plaintiffs do not distinguish the elements for each *Bivens* claim and the alleged unconstitutional conduct on the part of the individual Defendants.<sup>43</sup> One sentence from their Amended Complaint encompasses their entire case:

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<sup>43</sup>The Court further notes that all of the individual Defendants also move to dismiss the allegations by all Plaintiffs except the Guzman Plaintiffs on the basis of the Constitution's extraterritorial application. The basis for the argued dismissal is that foreign citizens have no right to invoke a claims of constitutional rights unless they are within the territorial United States or have substantial connections to the United States. Plaintiffs counter that the "individual victims were legal residents and Manuel Guzman was a U.S. Citizen. In addition, the survivors are legal residents and citizens of the United States." Pls.' Supp. Resp. and Brief in Opp'n to Defs.' Mot. to Dismiss and Opp'n to Summ. J., Rec. No. 136, p. 18. All of the Defendants rely on *United States v. Verdugo-Urquidez*, which held "those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. 259, 271 (1990) (citing *Plyler v. Doe*, 457 U.S. 202, 212 (1982));

“The defendants took no steps to protect those individuals who had been targeted for torture and death” after Ramirez purportedly told his “handlers” that Santillan planned certain murders.<sup>44</sup> Thus, Plaintiffs seek to impose constitutional liability based on the criminal acts of third parties, namely Santillan and other unidentified members of the cartel in Juarez. Through their Responses, Plaintiffs generally allege: 1) the individual Defendants had constitutional obligations to protect them from private violence by the Juarez drug cartel; 2) Defendants failed to terminate Ramirez as a confidential informant, in contravention of mandatory directives, which amounted to constitutional violations because the ICE agents had previous knowledge of murders; and 3) the individual Defendants had a constitutional duty to arrest or prosecute Santillan.

As discussed throughout this Order, Plaintiffs’ Amended Complaint and responses to the pending motions to dismiss are replete with contradictions and misstatements of facts.<sup>45</sup>

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*see also Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (examining *Verdugo-Urquidez* and allowing plaintiffs to proceed with a *Bivens* claim for unlawful arrest and the excessive use of force under the Fourth Amendment after examining the nature and duration of the plaintiff’s contacts with the United States). After careful review, the Court chooses not to address the Defendants’ arguments regarding the Constitution’s extraterritorial application because there is not enough evidence before the Court to render a decision on this issue. Regardless, the Court finds it should dismiss Plaintiffs’ claims on several other grounds.

<sup>44</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 60.

<sup>45</sup>The Government presents one such instance: “A prime example of the misleading nature of the Plaintiffs’ claims is the quotation by Ramirez at his court-ordered deposition that ‘[m]y situation is very clear... Everything I did, I did it under the supervision, direction, and surveillance of the U.S. Government, yeah.’ Plaintiffs’ Response in Opposition, pg. 4, fn. 7 (quoting Appendix 63, Ramirez Deposition, August 17, 2006, pg. 47). This quotation is the cornerstone for nearly all of Plaintiffs’ legal contentions. Regrettably, counsel for Plaintiffs failed to identify the true and complete context of the Ramirez quotation. One, Ramirez’ statement was not responsive to any question by any counsel; it was spontaneously

One cornerstone of Plaintiffs' case is that the Defendants knew about impending murders. According to Plaintiffs, "[o]n September 11<sup>th</sup>, 2003, in November 2003, January 8<sup>th</sup>, 2004, January 13<sup>th</sup>, 2004 the informant and ICE receive specific notice of a 'carne asada.'"<sup>46</sup> The accompanying footnote purports to cite to "App. Pg. 67, 68 Ramirez sworn deposition exhibit." However, pages 67-68 of the Appendix do not contain Ramirez's sworn testimony to the effect that any of the Defendants had prior notice of any murders. In fact, Ramirez seems to negate the foundation of Plaintiffs' theory of the case in one statement where he indicates that the agents could do nothing to prevent the cartel's violence:

**Attorney Loya:** Are you — are you aware that the agents and the handlers and the people, maybe even all up to Washington, they may have violated federal law just in what they did in the directions?

**Ramirez:** Well, that's — that's a possibility, all right?

**Attorney Loya:** Is that what they're afraid of?

**Ramirez:** But why they don't explain, yea, like I'm explaining to you, why the

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volunteered by Ramirez. Two, the statement by Ramirez was objected to by counsel as being unresponsive. Third, the statement by the witness occurred during a discussion between counsel and the witness as to whether the witness was competent to understand the Fifth Amendment and the consequences of the deposition going forward without the presence of his counsel, Jodi Goodwin. Fourth, it is also evident that the statement is conclusory and contains no specifics. ... Lastly, this statement was incapable of being subjected to cross-examination because the witness invoked the Fifth Amendment." United States' Reply to Pl.s' Opp'n to the United States' Mot. to Dismiss, Or in the Alternative, Mot. for Summ. J., Rec. No. 149, pp. 3-4.

In addition, Plaintiffs allege that the cartel's cellular phones were monitored by ICE officials in order to show advance notice of the Plaintiffs' murders. However, having scoured the record, the Court cannot find any competent summary judgment evidence supporting this contention.

<sup>46</sup>Pl.s' Resp. and Brief in Opposition to Def. U.S.A.'s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, p. 11.

way they act, yea? I — I don't see there's a — there's a crime in that, yea. I – I agree, if here in the United States they're going to kill someone, they can do something about it. They have to do something about it. But what can they do when this situation was in another country, and the police – the government were the ones who were doing this? What – what are you going to do. Not even the mobster. The police, the agents. They are the ones who – who physically killed these people. What – what can we do?<sup>47</sup>

Another example of Plaintiffs' unsupported allegations is their assertion that ICE intended to kill Ramirez in El Paso at the Whataburger incident. According to Plaintiffs, suspecting the Whataburger meeting was a set-up, Ramirez directed Guzman to appear at the Whataburger restaurant where Guzman was killed by unknown assailants. However, Plaintiffs fail to identify specific facts supporting the bold assertion that Defendants had knowledge of the planned murder. Further, Plaintiffs allege no personal involvement by any of the Defendants. Even more alarming, Plaintiffs' own summary judgment evidence contradicts the argument:

**Attorney Loya:** did you know when you sent him to, I guess, pick up –was it

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<sup>47</sup>Pl.s' Resp. and Brief in Opposition to Def. U.S.A.'s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, Appendix, p. 30-31. Another example of Ramirez's belief that does not comport with Plaintiff's theory of the case is the following:

**Attorney Loya:** Did any of the agents tell you that they were concerned that these people are dying in Juarez? Did they say, hey, there – we were concerned we don't want to –

**Ramirez:** All of us were concerned, but I – I repeat to you. In the first place, they – they were not dying because of what we were doing; they were dying because their – their connections, yeah, with the mafia, they way of life the choose, yeah? That why they were dying. And, second, *there's nothing we can do.*”

Pl.s' Resp. and Brief in Opp'n to Def.s' Mot. to Dismiss and Opp'n to Summ. J., Rec. No. 139, Appendix, p. 30.

money – there was a danger he could get killed?

**Ramirez:** No. If I know, I don't do it like that way. If I know, I don't do it.<sup>48</sup>

Further, as stated by Kramer, “[i]gnoring the obvious fantasy inherent in these allegations—as well as the fact that Plaintiffs’ previous filings contradict these particular assertions—Plaintiffs still have not stated a claim.”<sup>49</sup>

Yet another example of Plaintiffs’ mischaracterization of Ramirez’s testimony occurs when Plaintiffs allege ICE instructed Ramirez “to continue the operation, but directed [him] not to record any further murders.”<sup>50</sup> The source of that allegation is a news reporter’s cumbersome compound question:

**Smith:** Just so I’m clear, ... after the situation on August 5<sup>th</sup>, the Reyes situation, Fernando Reyes, who you didn’t know the name of, you said, but after his death, you have literally – you had tapes – or digital tape – I don’t know – cell phone – I don’t know how you did it, but you had a — a tape of that situation. They told you afterwards – they praised you when you got back for your work. But what did they say? Did they tell you distinctively, no more – what? We don’t want any sound of death in tapes or what? I mean, what did they tell you?

**Ramirez:** No, they told me, try to keep out of that situations, like if I got a choice. And I explained to them, hey, I – I don’t – I don’t have a choice, yeah? I don’t got an excuse....<sup>51</sup>

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<sup>48</sup>Pl.s’ Resp. and Brief in Opposition to Def. U.S.A.’s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, App., p. 28.

<sup>49</sup>Def. Patricia Kramer’s Mot. to Dismiss Pl.s’ Second Am. Compl. For Failure to State a Claim, Rec. No. 129, p. 16.

<sup>50</sup>Pl.s’ Second Am. Compl., Rec. No. 111, ¶ 46.

<sup>51</sup>Pl.s’ Resp. and Brief in Opposition to Def. U.S.A.’s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, Appendix, p. 32.

Kramer, Fielden and the Agents move for dismissal of Plaintiffs' claims for failure to state a claim under Rule 12(b)(6), arguing Plaintiffs cannot show any actions or omissions by any of the individual Defendants to support a *Bivens* claim. In the alternative, should the Court need to rely on their motions' attached exhibits, Fielden, Kramer, and the Agents submit there exists no genuine issue of material fact and summary judgment is therefore proper.<sup>52</sup> For the reasons discussed below, the Court finds Plaintiffs have only produced unsupported allegations of constitutional liability coupled with conclusory assertions that should be dismissed in the face of Supreme Court and Fifth Circuit precedent.

## 2. Qualified Immunity

### a. Qualified Immunity Standard

Public officials performing discretionary functions are generally shielded from suit unless a plaintiff shows by specific allegations that the officials violated clearly established statutory or constitutional rights of which reasonable individuals would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982); *Schultea v. Wood*, 47 F.3d 1427, 1431 (5th Cir. 1995);

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<sup>52</sup>Kramer moves to dismiss only pursuant to Rule 12(b)(6). Because Plaintiffs relied on a great deal of evidence in opposing Kramer's Motion, the Court chooses to convert Kramer's motion into a Rule 56 motion in part and reach its conclusions along with the other pending motions to dismiss and summary judgment motions. "When matters outside the pleadings are presented to and not excluded by the district court, the district court must convert a motion to dismiss into a motion for summary judgment." *Burns v. Harris County Bail Bond Bd.*, 139 F.3d 513, 517 (5th Cir. 1998). As discussed in more detail below, almost every one of Plaintiffs' bold assertions are actually negated by the very documents Plaintiffs cite to support them. Additionally, the Court notes Plaintiffs do not argue more discovery is necessary before the Court rules on the instant motions.

*Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987). When defendants claim qualified immunity, a court must conduct the following two pronged inquiry: “First, the court must determine whether the plaintiff has alleged a violation of a clearly established federal constitutional or statutory right. Second, the court must determine whether the official’s conduct was objectively reasonable in light of the clearly established legal rules at the time of the alleged violation.” *Beltran v. City of El Paso*, 367 F.3d 299, 303 (5th Cir. 2004) (citations omitted). “If no constitutional right has been violated, the inquiry ends and the defendants are entitled to qualified immunity.” *Linbrugger v. Abercia*, 363 F.3d 537, 540 (5th Cir. 2004).

Qualified immunity is designed to avoid the “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Harlow*, 457 U.S. at 816; *Lion Boulos*, 834 F.2d at 507. This limited form of immunity applies only to claims seeking “to impose individual liability upon a government officer for actions taken under color of state law.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Thus, if successfully established, the defense of qualified immunity requires a court to dismiss the pertinent claims against officials in their individual capacity. *Id.*

“When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense.” *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). Because the defense is intended to give government officials a right to avoid standing trial and avoid the burdens of pretrial matters, adjudication of qualified immunity claims should occur “at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Additionally, “the legally relevant factors bearing upon the *Harlow*

question will be different on summary judgment than on an earlier motion to dismiss.” *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). At the earlier stage, “it is the defendant’s conduct as alleged in the complaint that is scrutinized for ‘objective legal reasonableness.’” *Id.* “On summary judgment, however, the plaintiff can no longer rest on the pleadings ... and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry.” *Id.* The Fifth Circuit has recognized that “the qualified immunity standard ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’” *Mangieri v. Clifton*, 29 F.3d 1012, 1017 (5th Cir. 1994) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)).

b. Qualified Immunity Analysis

Viewing the summary judgment evidence in the light most favorable to the Plaintiffs and resolving every doubt in their favor, the Court finds it should dismiss Plaintiffs’ claims against all of the individual Defendants because they are entitled to qualified immunity. First, Plaintiffs fail the first prong of the qualified immunity framework, for they fail to sufficiently allege Defendants violated an actual constitutional right. Even if the Court were to find Plaintiffs sufficiently demonstrated a constitutional deprivation, the Court nonetheless finds Plaintiffs fail prong two of the qualified immunity analysis because Plaintiffs do not sufficiently allege any constitutional violations that were clearly established law at the time of the actions at issue.

i. Prong One: Constitutional Deprivation

1. Constitutional Deprivation, Generally

The Court's first inquiry is to determine whether the facts alleged, taken in the light most favorable to the Plaintiffs, demonstrate a constitutional deprivation. *See, e.g., Saucedo v. Katz*, 533 U.S. 194, 201 (2001). In response to the Defendants' qualified immunity claims, Plaintiffs put forth a number of alleged constitutional violations.<sup>53</sup> Primarily, Plaintiffs argue the individual Defendants violated the Plaintiffs' "right to life," based on the Fifth Amendment. Plaintiffs also contend the individual Defendants did not abide by the mandatory and non-discretionary United States Customs Service Handbook regarding the use of confidential informants. However, the Court notes the latter argument is foreclosed because a constitutional deprivation, rather than failure to abide by internal regulations, is the sole basis for a *Bivens* claim. *See, e.g., Rogan v. Lewis*, 975 F. Supp. 956, 964 n.10 (S.D. Tex. 1997) ("The failure of a state agency to comply with its internal regulations is insufficient as a matter of law to establish a violation of Due Process, because constitutional minima nevertheless may have been met."). The Court next examines each of Plaintiffs' purported constitutional claims and finds all should be dismissed for the reasons that follow.

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<sup>53</sup>None of Plaintiffs' Responses to any of the motions to dismiss address their Fourth, Eighth, or Fourteenth Amendment claims. Plaintiffs' sole rebuttal deals with their Fifth Amendment "right to life" contentions. As pointed out by Kramer, her previous motion to dismiss explained the inapplicability of the Fourth, Eighth, and Fourteenth Amendments to Plaintiffs' Original Complaint. Despite this notice, the Amended Complaint still maintains these erroneous constitutional violations. Thus, it is safe to assume Plaintiffs have pleaded their best case.

## 2. Failure to State a Claim, Generally

As previously discussed, the Court understands Plaintiffs to seek to impose liability on some of the Defendants due to their purported knowledge of certain events and their supervisory roles rather than any personal involvement. As to the latter theory of liability, the Court notes there can be no respondeat superior for any *Bivens* claims. See *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir. 1998) (holding supervisory officials may be held liable only with a showing of: 1) personal involvement in the acts causing the deprivation of a person's constitutional rights; and 2) if the supervisor "implements a policy so deficient that the policy itself acts as a deprivation of constitutional rights."<sup>54</sup>

Because Plaintiffs rely on conclusory statements which are in turn based upon suppositions clearly contradicted by undisputed facts, Plaintiffs' Amended Complaint does not contain sufficient factual allegations detailing the individual Defendants' personal

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<sup>54</sup>The Court also notes Plaintiffs seem to seek attorneys' fees pursuant to 42 U.S.C. § 1988. However, 42 U.S.C. § 1988 does not apply to *Bivens* claims:

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C.A. § 1988(b).

involvement.<sup>55</sup> As argued by Kramer, the Amended Complaint:

is a mishmash of vague and conclusory allegations generally complaining that “ICE,” “ICE officials,” “ICE contacts,” “BICE,” the government,” “handlers,” “agents,” “federal agents,” or the “agency” committed certain acts or failed to act, or that these unidentified federal employees were aware of certain information that, according to Plaintiffs, compelled them to act.<sup>56</sup>

The Court agrees and finds the Amended Complaint’s vague and all-encompassing designations do not meet minimum pleading requirements. None of Plaintiffs’ allegations, even if true, sufficiently establish constitutional liability on the part of any of the individual Defendants.<sup>57</sup> As stated by Kramer, “Plaintiffs again expect the Court to believe that each individual Defendant simultaneously and concurrently performed each act or omission globally alleged.”<sup>58</sup>

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<sup>55</sup>As succinctly, and accurately, stated by Kramer, Plaintiffs’ Amended Complaint is replete with “global allegations of fault.”

<sup>56</sup>Def. Patricia Kramer’s Mot. to Dismiss Pl.s’ Second Am. Compl. for Failure to State a Claim, Rec. No. 129, p. 6.

<sup>57</sup>“For example, with regard to Defendants Compton and Bencomo, Plaintiffs identify them specifically in only two factual paragraphs, alleging that they generally knew about the murders prior to them occurring. Complaint, at ¶¶ 32, 58. With regard to Defendant Gaudioso, in addition to the statements about knowledge, the only additional specific facts they allege relate to Gaudioso’s alleged failure to cooperate with a DEA investigation after the Juarez murders took place. Complaint, at ¶¶ 23, 26-28, 31, 32, 35, 36, and 58. Plaintiffs have not set forth any facts sufficient to show that these events proximately caused the murders of the unknown victims who were murdered by Santillan and his associates.” Def.s’ Mot. to Dismiss or In the Alternative, for Summ. J., Rec. No. 113, pp. 6-7.

<sup>58</sup>Def. Patricia Kramer’s Reply to Pl.s’ Resp. in Opposition to Def.’s Mot. to Dismiss Second Am. Compl., Rec. No. 154, p. 4.

### 3. Fourth Amendment

The Court finds the Amended Complaint fails to state a violation of a Fourth Amendment Constitutional right. The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. CONST. amend. IV. “The United States Constitution’s prohibition against unconstitutional search and seizure applies only to government agents. Conversely, a private citizen’s actions, even if wrongful, do not fall under the ambit of the Fourth Amendment” *United States v. Sealed Juvenile I*, 255 F.3d 213, 216 (5th Cir. 2001). The Amended Complaint does not address any searches or seizures conducted by any of the Defendants. Plaintiffs fail to state a claim to the extent Plaintiffs are alleging a search or seizure by Ramirez, because Ramirez was not a government agent.<sup>59</sup> Accordingly, Plaintiffs fail to state a viable Fourth Amendment claim.

### 4. Eighth Amendment

Plaintiffs similarly fail to allege a cognizable Eighth Amendment violation. Plaintiffs’

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<sup>59</sup>Plaintiffs’ filings in response to the respective motions to dismiss wholly fail to address their Fourth Amendment claims. Regardless, giving Plaintiffs the benefit of the doubt and in light of all the circumstances, the Court finds Plaintiffs did not allege facts to support a finding that Ramirez should be deemed an agent or instrument of the Government for *Bivens* liability. To be considered a government agent for Fourth Amendment purposes, there are two critical factors: 1) whether the Government knew or acquiesced in the intrusive conduct; and (2) whether the private party intended to assist law enforcement efforts or to further his own ends. *United States v. Blocker*, 104 F.3d 720, 725 (5th Cir. 1997). “Other considerations are whether the informant performed the search at the request of the government and whether the government offered a reward.” *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir.1990) (citations omitted); *see also United States v. Smythe*, 84 F.3d 1240, 1242-43 (10th Cir.1996) (“[K]nowledge and acquiescence ... encompass the requirement that the government must also affirmatively encourage, initiate or instigate the private action”)

Eighth Amendment claims are frivolous, as no allegations stem from the incarceration following the conviction of a crime by any decedent or a named Plaintiff. *See Johnson v. City of Dallas*, 61 F.3d 442, 444 n.5 (5th Cir. 1995) (“It is equally evident that the state does not incur Eighth Amendment liability even where injury occurs as the result of official conduct, unless the individual was being held in custody after criminal conviction.”). Again, Plaintiffs’ responses do not address their Eighth Amendment claims whatsoever.

#### 5. Fourteenth Amendment

Insofar as Plaintiffs assert a violation of their Fourteenth Amendment right to “due process of law,”<sup>60</sup> the Court finds that Plaintiffs also fail to state a claim. The Due Process Clause of the Fourteenth Amendment provides that “[n]o *State* shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. Amend XIV (emphasis added). As none of the Defendants are state actors, Plaintiffs’ claims only arise under the Fifth Amendment. Again, Plaintiffs’ responses wholly fail to address their Fourteenth Amendment claims.

#### 6. Fifth Amendment, State Created Danger Doctrine

##### (A) State Created Danger Doctrine Authority

The Supreme Court has recognized a substantive due process right to bodily integrity. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Planned Parenthood v. Casey*, 505 U.S.

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<sup>60</sup>Pls.’ Second Am. Compl., Rec. No. 111, ¶ 107.

833 (1992); *Washington v. Harper*, 494 U.S. 210 (1990). However, “as a general matter ... a state’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989) (holding there was no violation of the plaintiff’s substantive due process rights in a case where the state had been aware of a child’s physical abuse by his father yet failed to remove the child from his father’s custody.).<sup>61</sup> The Due Process Clause does not require “the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” *Id.* at 195. The Due Process Clause is intended to “protect the People from the State, not to ensure that the State protect[s] them from each other.” *Id.* at 196.

The *DeShaney* Court held “in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.” *Id.* at 198. Further, the court recognized two possible exceptions to its general rule that a

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<sup>61</sup>The Court notes its analysis interchangeably discusses Fifth Amendment due process rights involving federal actors and Fourteenth Amendment due process rights with state actors. The two clauses contain identical language and due process cases arising under the Fourteenth Amendment apply fully to cases arising under the Fifth Amendment. *See, e.g., Abreu-Guzman v. Ford*, 241 F.3d 69, 73 (1st Cir. 2001) (“The analysis of a qualified immunity defense is identical for actions brought under § 1983 and *Bivens*.”); *see also Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (“The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without ‘due process of law.’ ”); *see also Smith v. United States*, 277, F.Supp.2d 100, 106 (D.D.C. 2003) (“Because Fifth and Fourteenth Amendment due-process analyses mirror one another...”); *see also Carhart v. Gonzales*, 413 F.3d 791, 795 n.2 (8th Cir. 2005) (“the Due Process Clause of the Fifth Amendment is textually identical to the Due Process Clause of the Fourteenth Amendment, and both proscribe virtually identical governmental conduct.”) (reversed on other grounds).

state's failure to protect an individual does not constitute a due process violation. *Id.* at 199-200. The first exception, often referred to as the "special relationship doctrine," arises when the state "takes a person into its custody and holds him there against his will," thereby depriving him of liberty. *Id.* As to the second exception, the following language suggests officials have a duty to protect individuals from harm when the officials' actions created or exacerbated a danger to the individual: "While the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creations, nor did it do anything to render him more vulnerable to them." *Id.* at 201. Our Circuit now recognizes the second exception, commonly referred to as the "state-created danger" doctrine, as a valid theory of recovery. *See Breen v. Texas A&M University*, 485 F.3d 325, 338 (5th Cir. 2007).

In *Breen*, a Fifth Circuit panel acknowledged conclusively the state-created danger theory constitutes a basis for constitutional liability. *Id.* To recover on a state-created danger theory, "the plaintiff must show that the harm to the plaintiff resulted because (1) the defendant's actions created or increased the danger to the plaintiff; and (2) the defendant acted with deliberate indifference toward the plaintiff." *Id.* at 334-35. The *Breen* Court stipulated, however, "the state-created danger theory requires an identifiable victim." *Id.* at 335.

In *Butera v. District of Columbia*, the D.C. Circuit Court of Appeals examined for the first time the state-created danger doctrine. 235 F.3d 637, 650 (D.C. Cir. 2001). The *Butera* decision, cited by the *Breen* Court, emphasized that in order for the court to impose liability under the state-created danger theory, there must have been *affirmative* conduct by the State which endangered the plaintiff:

Regardless of the conduct at issue ..., a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual. No constitutional liability exists where the State actors “had no hand in creating a danger but [simply] stood by and did nothing when suspicious circumstances dictated a more active role for them.

*Id.* (internal citations omitted). However, constitutional liability may lie where state officials

create a dangerous situation or render individuals more vulnerable to a dangerous situation.

*See id.* at 649. Further, in order to assert a substantive due process violation under the state-created danger doctrine, a plaintiff must also demonstrate that the defendant’s alleged conduct “was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 651.

#### (B) State-Created Danger Doctrine Analysis

The Court finds the Plaintiffs’ factual allegations, taken in the light most favorable to them, fail to state a claim for a constitutional deprivation on the basis of the state-created danger doctrine. As a preliminary matter, the Court notes Plaintiffs’ own Response to Kramer’s Motion states: “The Defendants also posit the ‘state created danger’ defense. The ‘state created danger theory,’ is not a valid defense and has never been alleged by the Plaintiffs. The *DeShaney* argument is not applicable.”<sup>62</sup> Even though Plaintiffs filed their response two weeks after the Fifth Circuit’s *Breen* decision sanctioned the state-created danger doctrine theory of recovery and Plaintiffs unequivocally proclaim they do not base their case upon that

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<sup>62</sup>Pls.’ Supp. Resp. and Brief in Opp’n to Defs.’ Mot. to Dismiss and Opp’n to Summ. J., Rec. No. 136, p. 17.

theory, the Court will give Plaintiffs the benefit of the doubt and consider their allegations under the state-created danger theory. Having done so, however, the Court finds the federal law enforcement officials' alleged failure to protect unidentifiable individuals from private violence in Mexico does not rise to the level of a constitutional violation under the facts at bar.

Plaintiffs generally assert Ramirez informed unidentified ICE agents of the identities of Santillan and the cartel's intended targets for murder in Juarez. Thus, according to Plaintiffs, the Defendants, as American law enforcement officials, had a duty to terminate the informant's duties or prevent the murders in some fashion. However, Plaintiffs' own evidence refutes their contention that Defendants had advance warning of the murders. Ramirez's own testimony indicates he did not know the identity of the cartel's targets, nor did he know the identity of the first victim, Reyes.<sup>63</sup> Further, Ramirez seems to indicate that nobody knew the identities of the victims killed by Santillan and the cartel until after the subsequent investigations in Juarez.<sup>64</sup> Plaintiffs fail to produce sufficient evidence suggesting that Ramirez provided any of the Defendants with the victims' names before the deaths or with any information with which they should or could have taken action to prevent the murders. Plaintiffs do not present any evidence showing any of the Defendants affirmatively acted to increase or create the danger that ultimately resulted in the Plaintiffs' claims. The Court finds Plaintiffs have failed to produce sufficient evidence that the individual Defendants acted *affirmatively* to create or

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<sup>63</sup>Pl.s' Resp. and Brief in Opposition to Def. U.S.A.'s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, Appendix, p. 25.

<sup>64</sup>Pl.s' Resp. and Brief in Opposition to Def. U.S.A.'s Mot. to Dismiss and Mot. for Summ. J., Rec. No. 137, Appendix, p. 25.

enhance a dangerous situation that caused the victim's murders. The uncontroverted summary judgment evidence shows that even Ramirez did not know about the murders until after the fact.

When applying the *DeShaney* special relationship exception and the state-created danger theory, courts

have generally required plaintiffs to demonstrate (or, at the motion-to-dismiss stage, to allege) that the defendant state official *at a minimum* acted with deliberate indifference toward the plaintiff. To act with deliberate indifference, a state actor must know of and disregard an excessive risk to the victim's health or safety.

*McClendon v. City of Columbia*, 305 F.3d 314, 326 (5th Cir. 2002) (internal citations and quotations omitted). The Court's lengthy examination of the summary judgment record reveals Plaintiffs have not adduced competent evidence suggesting that any of the individual Defendants knew of any of the murders before they took place. The Court further finds none of the individual Defendants acted with deliberate indifference toward any of the Plaintiffs.

Moreover, Plaintiffs cannot demonstrate any competent evidence showing any Defendants' specific knowledge of a potential harm to any known victims. *See Lester v. City of College Station*, 103 Fed. Appx. 814 (5th Cir. 2004) ("even if it is assumed that the state-created danger theory applies, liability exists only if the state actor is aware of an immediate danger facing a known victim" and does *not* extend to "all foreseeable victims").

Accordingly, this Court finds as a matter of law all of the Defendants are immune from liability under the doctrine of qualified immunity as Plaintiffs failed to allege a cognizable constitutional violation under the state-created danger doctrine.

## 7. Fifth Amendment, Right to Life

As to Plaintiffs' Fifth Amendment "right to life" claim, the Court also finds Plaintiffs have failed to adequately state a violation of a compensable constitutional right. Plaintiffs' Responses once again do nothing to assist their case. In response to the motions to dismiss, Plaintiffs simply argue they "have identified and pleaded the Constitution's Fifth Amendment Right to Life."<sup>65</sup> In support of their "right to life" claims, Plaintiffs rely on only two cases: *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981) and *Palmer v. Lares*, 42 F.3d 975 (5th Cir. 1995). In *Shillingford*, a police officer intentionally struck a tourist because he was photographing the police officers apprehending a person during a Mardi Gras parade. *Shillingford*, 634 F.2d at 265. The Fifth Circuit found that the physical abuse was sufficiently severe and disproportionate to the need presented that it transcended the bounds of ordinary tort law and constituted a deprivation of substantive due process constitutional rights. *Id.* at 266. However, the Supreme Court later held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a substantive due process approach." *Graham v. Connor*, 490 U.S. 386, 386 (1989). The *Palmer* case applied the *Shillingford* holding in a civil rights suit against prison guards for violating the prohibition against cruel and unusual punishment by using excessive force. *Palmer*, 42 F.3d at 977-78.

Neither opinion discusses Plaintiffs' alleged "right to life," involves remotely similar

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<sup>65</sup>See App. to Pls.' Supp. Resp. and Brief in Opp'n to Defs.' Mot. to Dism. and Opp'n to Summ. J., Rec. No. 136, p. 9.

facts to the case at bar, or reach a holding that can arguably be said to relate to the instant suit. Plaintiffs simply fail to show any case law furnishing a Fifth Amendment “right to life.” In addition, the Court on its own found no authority supporting a proposition that a government agent’s continued use of a confidential informant, after the informant participates in a crime, renders the agent constitutionally liable to anyone subsequently harmed by private violence associated with the confidential informant.

This Court undertakes the task of evaluating Plaintiffs’ right to life claims separate from the state-created danger doctrine because of Plaintiffs’ explicit language. In *Butera*, the D.C. Court of Appeals examined a claim where the district court denied summary judgment where Plaintiff claimed a “constitutional right to ‘life,’ and that [Plaintiff] had a ‘constitutionally protected liberty interest’ in the companionship of her son.” *Butera v. District of Columbia*, 235 F.3d 637, 647 (D.C. Cir. 2001). The *Butera* Court found the district court erred by framing the constitutional rights as the plaintiff’s right to life, bodily integrity, personal security, and personal privacy, and as Plaintiff’s mother’s “liberty interest” in the companionship of her son. *Id.* The Court found, as the qualified immunity defense was asserted, the district court was overly broad in its framing of the issues. *Id.* The *Butera* Court held:

the relevant inquiries are (1) whether [plaintiff] has a constitutional right to protection by the District of Columbia from danger that it created or enhanced that resulted in harm by third parties, and (2) whether [plaintiff’s mother] has a liberty interest in the society and companionship of her independent adult child. This narrower definition of the rights allows a reasonable police officer to anticipate whether his actions amount to a constitutional violation.

*Id.* The Court recognized the first inquiry in its recognition of the state-created danger doctrine, but held the right to the companionship of an adult child constitutional right doesn't exist. *Id.* at 653-55.

Even assuming Plaintiffs' "right to life" claims state a cognizable constitutional violation, the Court finds Plaintiffs fail to demonstrate how Defendants actually violated this right to life. As discussed, Plaintiffs do not allege any specifics regarding how Defendants actually participated in any of the alleged murders; rather, Plaintiffs merely make global allegations of generalized fault. The Court finds Plaintiffs fail to state a Fifth Amendment due process claim for a violation of their "right to life."

"[A] State's failure to protect an individual against private violence does not violate the Due Process Clause." *DeShaney*, 489 U.S. at 197. The Court accordingly declines to extend *Bivens* remedies to the case at bar where Plaintiffs allege Defendants failed to protect them from violence at the hands of the drug cartel. *See Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1991) (holding the Supreme Court "has always been reluctant to expand the concept of substantive due process."). Further, Plaintiffs' right to life accusations do not trigger *DeShaney's* exceptions to the general rule that a governmental actor has no constitutional duty to protect an individual from private violence.

Viewing the summary judgment evidence in the light most favorable to Plaintiffs, the Court finds no issue of material fact exists as to whether the Defendants violated Plaintiffs' Fifth Amendment "right to life." Plaintiffs have therefore not established that Defendants violated an actual constitutional right. Accordingly, Defendants are all entitled to qualified

immunity and Plaintiffs claims against them should be dismissed on these grounds.

ii. Prong Two: Objectively Reasonable in Light of Clearly Established Law

Even assuming, *arguendo*, that Plaintiff was able to demonstrate a constitutional violation, the Court nevertheless finds Defendants' conduct was not objectively unreasonable in light of clearly established law at the time of the actions at issue. Thus, Defendants are entitled to qualified immunity and the claims against them should be dismissed.

1. Prong Two Authorities

The qualified immunity analysis's second prong is intended to "provide government officials with the ability 'reasonably to anticipate when their conduct may give rise to liability for damages.'" *Anderson*, 483 U.S. at 646 (internal citations omitted). If the law at the time was not clearly established, an official cannot "reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. Courts must have defined the Plaintiffs' constitutional right in question to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages," thus preserving "the balance that [Supreme Court] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson v.*

*Creighton*, 483 U.S. 635, 639 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

“In the qualified immunity context, a constitutional right is clearly established only if, at the time of an official’s challenged conduct, the contours of the right in question are sufficiently clear that a reasonable official would understand that what he is doing violates that right.”

*Breen*, 485 F.3d at 338. According to the Supreme Court in *Anderson*, “[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.” 483 U.S. at 640 (internal citations omitted).

## 2. Prong Two Analysis

After due consideration, the Court finds Plaintiffs do not sufficiently allege the violation of any of Plaintiffs’ constitutional rights clearly established law at the time of the facts at issue. The Court is again guided by the recent *Breen* opinion, in which the Fifth Circuit decided whether the state-created danger theory was clearly established on or before November 18, 1999, the date of the Texas A&M bonfire collapse. *Breen*, 485 F.3d at 340. The Fifth Circuit concluded:

In light of this court’s historical reticence towards adopting the state-created danger theory, however, neither this court’s discussions of the theory nor our sister circuits’ adoption of it convinces us that a reasonable official in any of the defendants’ shoes would have had fair notice on or before November 18, 1999 that his conduct with respect to the danger created by the Texas A&M bonfire stack could violate the students’ constitutional rights.

*Id.*

Here, as in *Breen*, the Court finds the state-created danger theory was not clearly established law at the time of Defendants' challenged conduct. Even though the Fifth Circuit in *Breen* concluded it first recognized the state-created danger theory in *Scanlan v. Texas A&M University*, 343 F.3d 533 (5th Cir. 2003), as articulated by Kramer: "this 'recognition' apparently escaped the notice of various Circuit Court Judges, as well as a host of District Court Judges."<sup>66</sup> Kramer goes on to cite four occasions since the *Scanlan* opinion in 2003 where the Fifth Circuit expressly declined to adopt the state-created danger theory. *See, e.g., Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory."); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006) ("neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof."). Judge Parker's dissent in *McClendon* succinctly captures the state-created danger doctrine's status at that point in time:

IS THE STATE-CREATED DANGER THEORY A VIABLE THEORY IN THIS CIRCUIT? The majority's Achilles' heel is its unwillingness to either adopt or reject the state-created danger theory as the law of the Circuit. Over the last ten years, at least seven state-created danger cases have arrived in our Circuit, but we have never taken a position on whether the state-created danger theory is a valid one, choosing instead to duck the issue. We simply stated in each case (without explicitly adopting or rejecting the theory) that the evidence is insufficient to raise a genuine issue of material fact concerning one or more of the elements that comprise the theory. Our methodological approach-- assuming *arguendo* for the purposes of each case that the state-created danger theory is a valid one but never explicitly rejecting or adopting it--cannot be defended and leaves this area of circuit law in a perpetual state of confusion.

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<sup>66</sup>Def. Patricia Kramer's Reply to Pl.s' Resp. in Opposition to Def.'s Mot. to Dismiss Second Am. Compl., Rec. No. 154, p. 13.

*McClendon v. City of Columbia*, 305 F.3d 314, 334 (5th Cir. 2002) (Parker, J., dissenting) (emphasis in original). Even if the state-created danger theory is a basis for constitutional liability now, the Court finds the theory was not clearly established from August 2003 through August 2004.<sup>67</sup> Plaintiffs fail to meet their burden as to the second prong of the state-created danger analysis. Defendants are accordingly entitled to qualified immunity.

Plaintiffs contend they are entitled to constitutional redress on their general “right to life” theory. Plaintiffs argue, without sufficient authorities, this “right to life” is a clearly established constitutional theory of recovery. An official will not be entitled to qualified immunity when “at the time the challenged action occurred the federal law proscribing it must have been clearly established not only as an abstract matter but also ‘in a more particularized ... sense’ such that ‘[t]he contours of the right’ are ‘sufficiently clear that a reasonable official would understand that what he is doing violates that right.’” *Pierce v. Smith*, 117 F.3d 866, 871 (5th Cir. 1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 637-642 (1987)). Put another way, the question “is not whether the law was settled, viewed abstractly, but whether, measured by an objective standard, a reasonable officer would know that his action was

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<sup>67</sup>When determining whether a principle of law was clearly established at the relevant time, this Court has been mindful not to limit itself to only Fifth Circuit and Supreme Court precedent. See *Melear v. Spears*, 862 F.2d 1177, 1184 n. 8 (5th Cir. 1989) (“As a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries.”) (internal citation omitted). However, the state-created danger doctrine’s uncertain status at the Fifth Circuit played a large factor in this Court’s conclusion that the right to life and state-created danger doctrines were not clearly established at the time of the Plaintiffs’ alleged injuries.

illegal.” *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992).

The Court finds Plaintiffs’ “right to life” claims were not clearly established at the time of the allegations at issue. Additionally, even if Plaintiffs’ constitutional violations of ICE regulations or failure to prosecute or arrest theories of recovery could state a claim for a constitutional violation, the Court similarly finds those theories were not clearly established in August 2003 through August 2004. Plaintiffs’ abstract allegations fail to show conduct that the Defendants should have known would give rise to tort liability. Moreover, Plaintiffs failed to cite to a single case with even remotely analogous facts showing that their “right to life” constitutional claims were “clearly established” from August 2003 to April 2004. For the reasons previously discussed, the only two cases Plaintiffs rely on are not applicable to the case at bar and do not show a constitutionally-protected “right to life” is clearly established. The Court could find no case law where law enforcement officers and prosecuting attorneys supervising a confidential informant were held constitutionally liable for violence at the hands of individuals not under their control but only associated with the confidential informant. Thus, it would not be sufficiently clear that the Defendants would understand that their actions involving Ramirez as a confidential informant would violate any constitutional rights of the Plaintiffs. Moreover, Plaintiffs’ “right to life” claims are too abstract to constitute violations of “clearly established” law. Accordingly, Plaintiffs’ allegations regarding the “right to life” cannot establish the violation of a clearly established constitutional right; thus entitling Defendants to qualified immunity.

For these reasons, this Court finds as a matter of law all of the individual Defendants

are immune from liability under the doctrine of qualified immunity as the Defendants' conduct was not objectively unreasonable in light of clearly established law at the time of the actions at issue.

#### **IV. CONCLUSION AND ORDERS**

For the reasons it has discussed, the Court finds it lacks subject matter jurisdiction over Plaintiffs' claims against the Government because of the FTCA's foreign country and discretionary function exceptions. The Government is also entitled to summary judgment regarding Plaintiffs' common law negligence claims under Texas tort law. Further, Bencomo, Compton, Gaudioso, Kramer, and Fielden are entitled to dismissal of the claims against them pursuant to doctrine of qualified immunity.

Thus, the only remaining Defendants in the cause are Michael Garcia and Guillermo Eduardo Ramirez Peyro. To date, Ramirez and Garcia have not entered an appearance in this case. The Plaintiffs, however, have not yet moved for a default judgment against either Defendant. If the Plaintiffs intend to so move, they must do so within twenty days of the date of this Order. If the Plaintiffs do not timely move for a default judgment against these Defendants, the Court concludes Plaintiffs should show cause why this Court should not dismiss all of the Plaintiffs' claims against Ramirez and Garcia for failure to prosecute.

The Court accordingly enters the following orders:

**IT IS THEREFORE ORDERED** that Bencomo, Compton, and Gaudioso's

“Defendants’ Motion to Dismiss Or, In the Alternative, for Summary Judgment” [Rec. No. 113] is **GRANTED**.

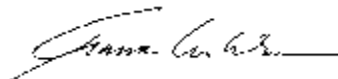
**IT IS FURTHER ORDERED** that the Government’s “Motion to Dismiss Or in the Alternative Motion for Summary Judgment” [Rec. No. 116] is **GRANTED**.

**IT IS FURTHER ORDERED** that “Juanita Fielden’s Motion to Dismiss, Or in the Alternative, for Summary Judgment and Memorandum in Support Thereof” [Rec. No. 128] is **GRANTED**.

**IT IS FURTHER ORDERED** that “Defendant Patricia Kramer’s Motion to Dismiss Plaintiffs’ Second Amended Complaint for Failure to State a Claim” (“Kramer’s Motion”) [Rec. No. 129] is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiffs are to move for default judgement against Defendants Ramirez and Garcia within twenty days of the date of this Order. If Plaintiffs do not move for default judgment against these Defendants, the Court **ORDERS** Plaintiffs to **SHOW CAUSE** within twenty days why their claims against Ramirez and Garcia should not be dismissed for failure to prosecute.

**SIGNED** this 20th day of August, 2007.



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**FRANK MONTALVO**  
**UNITED STATES DISTRICT JUDGE**