



January 23, 2014

VIA ELECTRONIC AND CERTIFIED U.S. MAIL:

Karen Neuman
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive, SW, Building 410
Stop – 0665
Washington, DC 20528-0655
Email: foia@dhs.gov

Re: Freedom of Information Act Request/Expedited Processing Requested

Dear Ms. Neuman:

This is a request for records made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and the relevant implementing regulations, *see* 6 C.F.R. § 5 (Department of Homeland Security, Disclosure of Records and Information). The Request is submitted by the American Civil Liberties Union Foundation (“ACLU”) of Arizona¹ and University of Arizona James E. Rogers College of Law Professors Jane Bambauer and Derek Bambauer (collectively, “Requesters”).

Requesters seek the disclosure of records related to U.S. Border Patrol’s “roving patrol” operations, as detailed below under “Records Requested.”

BACKGROUND

Since 2006, the U.S. Border Patrol has nearly doubled in size, from approximately 12,000 agents to over 21,000 today. The budget for U.S. Customs and Border Protection (“CBP”) has more than doubled from \$6 billion in Fiscal Year 2006 to \$12.9 billion in FY 2014.² U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies – more than on all other federal law

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators.

² *See* DEP’T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), *available at* <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>.

enforcement combined.³ One result of these unprecedented expansions is an increase in reported Border Patrol abuses in the Arizona-Sonora region and nationally.⁴ Individuals frequently report being subjected to “roving patrol” stops by Border Patrol officials throughout the U.S. – including motorists, pedestrians, travelers on public transportation, and even landowners on private property.

CBP claims authority to conduct warrantless stops and seizures within a “reasonable distance” of the border.⁵ That distance is defined by outdated regulations to be “100 air miles”⁶ from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states.⁷ In practice, Border Patrol often ignores that limitation, roaming still further into the interior of the country.⁸

In October 2013, the ACLU of Arizona filed a complaint on behalf of five Arizona residents, each of whom was stopped and detained by Border Patrol far from the border.⁹ In one of those cases, agents threatened to cut a woman out of her seatbelt in front of her two young children after she questioned the basis for the stop. Others were forcibly removed from their vehicles and subjected to unauthorized searches. The complaint notes:

In addition to unlawful vehicle stops, the ACLU has documented cases in which Border Patrol agents have interrogated pedestrians on the streets of Yuma and Tucson as well as

³ See Meissner, Doris, *et al.*, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POLICY INSTITUTE, (Jan. 2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>

⁴ From 2004-2011, as the ranks of agents doubled to more than 21,000, complaints involving CBP received by the DHS Office of Civil Liberties and Civil Rights nearly tripled. See DEP’T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, “DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED,” available at <http://www.dhs.gov/department-wide-data-complaints-received>. Given the many problems with the DHS complaint system it is likely that incidents of abuse are substantially under-reported.

⁵ 8 U.S.C. § 1357(a)(3).

⁶ 8 C.F.R. § 287.1(b). The Justice Department published regulations defining “reasonable distance” as 100 miles in the Federal Register in 1957. See *Field Officers: Powers and Duties*, 22 FED. REG. 236, 9808–09 (Dec. 6, 1957) (to be codified at C.F.R. § 287). There is no other public history as to why the Justice Department chose 100 miles as the “reasonable distance” from the border. It may have been that 100 miles had historically been considered a “reasonable” distance regarding availability of witnesses for examination, responses to subpoenas, and other discovery issues under federal law. See, e.g., 10 U.S.C. § 849; FED. R. CRIM. P. 7; FED. R. CIV. P. 45.

⁷ Though immigration checkpoints are mostly confined to the southwest, Border Patrol has operated temporary checkpoints in northern states as well. A recent Freedom of Information Act (FOIA) request uncovered design plans for permanent checkpoints on southbound New England highways. See ACLU of Vermont, *Surveillance on the Northern Border*, 2013, available at http://www.acluvt.org/surveillance/northern_border_report.pdf

⁸ See, e.g., See Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&_r=0 (describing checkpoint stop of Senator Patrick Leahy 125 miles south of the border in New York state: “When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, ‘That’s all the authority I need.’”); Michelle Garcia, *Securing the Border Imposes a Toll on Life in Texas*, AL JAZEERA AMERICA, Sept. 25, 2013, available at http://america.aljazeera.com/articles/2013/9/25/living-under-thelawofbordersecurity.html#mainpar_adaptiveimage_0 (“[W]hen it was pointed out that [Alice, Texas] sits more than 100 miles from the border, [a Border Patrol spokesman] explained that ‘the law does not say that we cannot patrol. Our jurisdiction kinda changes.’”); see also *United States v. Venzor-Castillo*, 991 F.2d 634 (10th Cir. 1993) (finding Border Patrol lacked reasonable suspicion to stop and search vehicle approximately 235 miles from the border where agent had no knowledge regarding the origin of the vehicle).

⁹ Complaint available at

<http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>

patients in Tucson area hospitals. Last year, a Sunnyside High School student in Tucson was wrongfully handed over to Border Patrol agents by school officials for investigation of his immigration status. The picture that emerges from these incidents and years of litigation is of pervasive abuse and a systemic failure of oversight and accountability at all levels of CBP.

Earlier in the year, a New York Times Op-Ed profiled Arizona rancher Stuart Loew, who was detained on his ranch while agents demanded that he provide identification.¹⁰ Loew's neighbor Jim McManus stated in an interview with National Public Radio that "If you conduct business here, you live here, you're always being watched, you're always being stopped, and you're treated as if you're a criminal."¹¹

Unlawful roving patrol practices are not unique to the southwest border region. In September 2013, the ACLU of Washington settled a class action lawsuit challenging roving patrol practices on the Olympic Peninsula on behalf of several victims of racial profiling.¹² Pursuant to that settlement, Border Patrol agreed to re-train agents on their obligations under the Fourth Amendment and to share stop data with the ACLU.¹³ In January 2013, following extensive FOIA litigation, Families for Freedom and New York University (NYU) issued a report disclosing an "incentives program" for Border Patrol agents and the widespread practice of arresting lawfully present individuals (CBP denied the existence of documents responsive to plaintiffs' FOIA request for more than a year before finally producing them).¹⁴ The report notes:

The documents show that USBP agents act on the assumption that no matter where they operate within the United States, they may arrest any noncitizen—whether a tourist or a long-term legal resident with a driver's license—whenever that person is not carrying detailed documentation that provides proof of status. But USBP's records also show that the agents are not genuinely interested in what documents the law might require noncitizens to carry. Instead, USBP's demand for "papers" is universal, resulting in an enforcement culture that maximizes arrest rates.

¹⁰ Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&_r=0 (recounting checkpoint stop of Senator Patrick Leahy 125 miles south of the border in New York state: "When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, 'That's all the authority I need.'").

¹¹ Michel Marizco, *Living Life Under Federal Watch On The Border*, NPR, Aug. 5, 2013, available at <http://www.fronterasdesk.org/content/living-life-under-federal-watch-border>

¹² See *Sanchez v. U.S. Office of Border Patrol*, No. 2:12-cv-00735 (W.D.Wa. filed Apr. 26, 2012); Complaint available at <https://aclu-wa.org/cases/sanchez-v-homeland-security-0>; see also Manuel Valdes, *ACLU, Immigrant Groups to Keep an Eye on U.S. Border Patrol After Profiling-case Win*, WASH. POST, Sept. 24, 2013, available at http://www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profiling-case-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852_story.html

¹³ See *Settlement Agreement, Sanchez v. U.S. Border Patrol* No. 2:12-cv-00735 (W.D.Wa. 2012), available at <http://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf>

¹⁴ See FAMILIES FOR FREEDOM, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, (Jan. 2013), available at <http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf>. The report also noted, "Contrary to sworn statements submitted in the federal district court stating that the agency did not maintain an array of arrest statistics, including annual totals for the Rochester Station, the depositions ordered by the Court revealed that arrest statistics are the primary measure employed by local USBP stations and their Sector supervisors in the Buffalo Sector."

A prior report, *Justice Derailed*, issued with the New York Civil Liberties Union and based on the same FOIA request, examined thousands of Border Patrol stops aboard public transportation in upstate New York.¹⁵ The vast majority of those stops did not target recent border-crossers and occurred far from the border, with only 1% resulting in initiation of removal proceedings; many involved clear violations of agency arrest guidelines, including improper reliance on race as a basis for questioning passengers and arrests of lawfully present individuals.

Roving patrol abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within the Department of Homeland Security (DHS). Border Patrol lowered its training and admissions standards to take on a large number of new agents,¹⁶ and yet the agency consistently refuses to adopt reforms such as limitations on agents' use of force, contrary to the express recommendations of national law enforcement experts.¹⁷ Meanwhile, oversight bodies like the DHS Office of Inspector General (OIG) and Office for Civil Rights and Civil Liberties (CRCL) – lacking in both enforcement authority and internal transparency – have not kept pace with CBP's rapid growth.¹⁸ As a result, though reports of Border Patrol abuse are increasingly common, many questions remain regarding the full extent and impact of wide-ranging roving patrol operations conducted by the largest law enforcement agency in the country.

RECORDS REQUESTED¹⁹

As used herein, the term “records” includes all records or communications preserved in electronic or written form, including but not limited to: correspondence; documents; data; videotapes; audio tapes; emails; faxes; files; guidance; guidelines; evaluations; instructions; analysis;

¹⁵ See NYCLU, *JUSTICE DERAILED*, (Nov. 2011), available at

http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf

¹⁶ See Rob O'Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, available at <http://www.azcentral.com/news/arizona/articles/20131216border-agents-assisting-local-police.html>

(“During its hiring surge, the Border Patrol scaled back training and relaxed requirements — such as not requiring a high-school diploma. It sometimes skipped background checks, leading to problems with corruption and poorly trained agents.”)

¹⁷ See Michel Marizco, *Border Patrol Rejects Limits to Use of Deadly Force Policies*, NPR, Nov. 5, 2013, available at <http://www.fronterasdesk.org/content/9205/border-patrol-rejects-limits-use-deadly-force-policies>

¹⁸ While CBP's budget increased by 97 percent from FY 2004 to FY 2012, OIG's budget increased by only 70 percent during this same time period, while CRCL's budget increased only 56 percent. Overall, the combined budget of the OIG and CRCL accounted for less than .005 percent of the total DHS budget in FY 2011. See DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2004 ANNUAL PERFORMANCE PLAN 6 (2004), available at http://www.oig.dhs.gov/assets/OIG_APP_FY04.pdf; DEP'T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), available at

<http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>; DEP'T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2011 AND ANNUAL REPORT TO CONGRESS, 6 (June 2012), available at <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf>.

¹⁹ As used herein, the term “records” includes all records or communications preserved in electronic or written form, including but not limited to: correspondence; documents; data; videotapes; audio tapes; emails; faxes; files; guidance; guidelines; evaluations; instructions; analysis; memoranda; agreements; notes; orders; policies; procedures; protocols; reports; rules; manuals; specifications; and studies.

Should any responsive record contain the personal identifying information of any third party, Requesters ask that the agencies redact that information. This Request seeks aggregate stop data and records relevant to the Border Patrol roving patrol program, *not* any personal or identifying information about any specific individual(s).

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Requesters seek disclosure of U.S. Border Patrol records pertaining to “roving patrol” operations, as well as any related records held by CBP or other agencies within DHS, to include at least:

- 1.) From January 2011 to present, all records relating to Border Patrol “roving patrol” operations in Tucson and Yuma sectors, including but not limited to:
 - a. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials, and any other written policies or procedures pertaining to roving patrol operations generally;
 - b. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials, and any other written policies or procedures pertaining to all searches and seizures (including arrests) made pursuant to roving patrol operations;
 - c. Audits, reports, statistical data and analysis, quotas, targets, goals, and performance standards, measures, or reviews, and all documents related to any incentives or bonus programs relating to roving patrol operations in Tucson and Yuma sectors;
 - d. Organizational charts, diagrams, or schematics pertaining to roving patrol operations in Tucson and Yuma sectors;
 - e. Communications, agreements, or any other records related to local law enforcement involvement in roving patrol operations in Tucson and Yuma sectors;
 - f. Records regarding any individual stopped, questioned, searched, detained, and/or arrested in roving patrol operations in Tucson and Yuma sectors, including but not limited to:
 1. Forms I-247;
 2. Forms I-213;
 3. Forms I-286;
 4. Forms I-44;
 5. Forms I-862;
 6. Forms I-826; and
 7. Forms I-210.
 - g. Records – in particular, but not limited to, all documents listed in Request 1.g above – relating to the following specific topics and/or containing information sufficient to show:

1. The total number of roving patrol stops made by BP agents for each of the years 2011, 2012, and 2013;
 2. The total number of roving patrol stops resulting in arrest for each of the years 2011, 2012, and 2013;
 3. The citizenship of each individual stopped in the course of roving patrols for each of the years 2011, 2012, and 2013;
 4. The citizenship of each individual arrested following roving patrol stops for each of the years 2011, 2012, and 2013;
 5. The perceived race or ethnicity of each individual stopped for each of the years 2011, 2012, and 2013;
 6. The perceived race or ethnicity of each individual arrested following a roving patrol stop for each of the years 2011, 2012, and 2013;
 7. The location of each roving patrol stop for each of the years 2011, 2012, and 2013;
 8. The location of each roving patrol stop resulting in arrest for each of the years 2011, 2012, and 2013;
 9. The type of each roving patrol stop (e.g., entry onto private land, pedestrian encounter, vehicle stop, or public transportation stop (train or bus)) for each of the years 2011, 2012, and 2013;
 10. The type of each roving patrol stop resulting in arrest (e.g., entry onto private land, pedestrian encounter, vehicle stop, or public transportation stop (train or bus)) for each of the years 2011, 2012, and 2013;
 11. The date of each roving patrol stop for each of the years 2011, 2012, and 2013;
 12. The date of each roving patrol stop resulting in arrest for each of the years 2011, 2012, and 2013;
 13. The number of agents involved in each roving patrol stop for each of the years 2011, 2012, and 2013;
 14. The number of agents involved in each arrest following a roving patrol stop for each of the years 2011, 2012, and 2013;
 15. The basis for all stops resulting in arrest, including stops initiated by any local law enforcement agency, for each of the years 2011, 2012, and 2013;
 16. The basis for all stops not resulting in arrest, including stops initiated by any local law enforcement agency, for each of the years 2011, 2012, and 2013;
 17. All property seized pursuant to a roving patrol stop, the date seized, a description of the property seized, and the basis for the seizure, by month, for each of the years 2011, 2012, and 2013; and
 18. The names and badge numbers of the agent(s) involved in reviewing each arrest to determine whether reasonable suspicion or probable cause existed to justify each stop, and whether the reviewing agent(s) was or were the same as the agent(s) who initiated the stop under review, for each of the years 2011, 2012, and 2013;
- h. All complaints related to roving patrol operations in Tucson and Yuma sectors received by any Border Patrol, CBP, or DHS official from any person, organization, agency, tribal government, consular office, or any other entity, whether verbal or written, as well as all documents related or responding to any such complaints; and

- i. All disciplinary records resulting from any alleged agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules and regulations related to roving patrol operations in Tucson and Yuma sectors.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive documents be provided electronically in text-searchable, static-image format (PDF), in the best image quality in the agencies' possession. We further request that reasonable metadata be transmitted along with responsive documents, including but not limited to email attachments, author and recipient information, date and time stamps, and the like.

REQUESTERS

The ACLU is a nationwide, non-profit, non-partisan organization dedicated to protecting civil liberties and human rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states, and over 500,000 members. The ACLU of Arizona is the state affiliate organization with over 7,000 supporters. The ACLU works daily in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has a particular commitment to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status, and that government respects the civil and human rights of all people.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. These materials are widely available to everyone, including tax exempt organizations, non-profit groups, law students and faculty, for no cost. The ACLU also disseminates information through its websites, including www.aclu.org and www.acluaz.org. These websites address civil liberties issues in depth, provide features on civil liberties issues in the news, and contain hundreds of documents that relate to issues addressed by the ACLU, including documents obtained through the FOIA. The ACLU also publishes a widely read blog and electronic newsletter, which is distributed to subscribers by e-mail.

Derek Bambauer is Professor of Law at the University of Arizona James E. Rogers College of Law. An internationally-recognized scholar on Internet law, governmental transparency, and censorship, Professor Bambauer has written over two dozen academic articles, along with articles for popular media such as the Arizona Republic, Lifehacker.com, Arizona Attorney, and Legal Affairs Debate Club. Bambauer has appeared in television, Internet, and recorded radio media including Bloomberg Law television, BronxNet Community Television, Huffington Post Live, Surprisingly Free podcast, and the U.S. Department of State Webchat. Since 2006, Professor Bambauer has written for the information law blog Info/Law (<https://blogs.law.harvard.edu/infolaw/>), and has appeared as a guest blogger on the popular sites Prawfsblawg and Concurring Opinions. Professor Bambauer's research utilizes data from Freedom of Information Act requests to inform the public, legal scholars, and lawmakers about governmental transparency, Internet regulation, and the politics of intellectual property policy. *See, e.g.*, Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863 (2012); Derek E. Bambauer, *Chutzpah*, 6 J. NAT'L SEC. L. & POL'Y 549 (2013). Professor Bambauer's scholarly work is widely cited, and is the basis for his popular media writing.

Jane Yakowitz Bambauer is Associate Professor of Law at the University of Arizona James E. Rogers College of Law. Professor Bambauer has written ten academic articles and several shorter pieces for the popular press on the topics of data privacy and criminal procedure. Professor

Bambauer has written articles for Huffington Post and Forbes.com, and she has appeared on Huffington Post Live, the Surprisingly Free podcast, and the O'Reilly Strata conference. Professor Bambauer has also written for the Info/Law blog since 2011. Professor Bambauer has used data previously collected using public records requests to study law school admissions practices and to analyze variance in compliance with public records laws. *See, e.g.,* Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J. L. & TECH. 1 (2011).

Both Derek Bambauer and Jane Bambauer qualify as researchers at an educational institution under the Freedom of Information Act and its implementing regulations. *See* 28 C.F.R. § 16.11(b)(4). Thus, they should not be charged search or review fees for this Request. *Id.*

The Requesters qualify as “representative of the news media.” Each requester is a person or entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. 522(a)(4)(A)(ii); 6 C.F.R. § 5.11 (b)(6); *see also Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that “gathers information from a variety of sources,” exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). Courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the Requesters’ to be “representatives of the news media.” *See, e.g., Elec. Privacy Info. Center v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA); *Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).

REQUEST FOR EXPEDITED PROCESSING

We request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E)(i) because there is a “compelling need.” 5 U.S.C. § 552(a)(6)(E)(i); *see ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 27–28. The lack of expedited disclosure of these records could “reasonably be expected to pose an imminent threat to the life or physical safety of an individual,” particularly if the incidents referenced herein are part of a larger pattern of abuse of authority by agents in the Customs & Border Protection sectors in the southwest border region or nationally. *See* 5 U.S.C. § 552(a)(6)(E)(v)(I); 6 C.F.R. § 5.5(d)(1)(i). Formal complaints filed with CRCL alleging civil rights abuses by CBP personnel have nearly doubled since 2004. The ACLU has also documented an increasing number of Border Patrol abuses in recent years, including frequent reports of unlawful roving patrol operations conducted far into the interior; many of these stops include unlawful searches, prolonged detention, and verbal and physical abuse. Thus, there is a “compelling need” for the information requested.

A compelling need can also be demonstrated, “with respect to a request made by a person primarily engaged in disseminating information,” by an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). Whether there is an “urgency to inform” depends on “(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a

response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 29.

As previously explained, Requesters are “primarily engaged in disseminating information.” This request concerns federal government activity and a matter of current exigency. Border Patrol roving patrol operations have attracted considerable media coverage and public attention in recent months. *See, e.g.*, Rob O’Dell & Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013; Bob Ortega, *Border Patrol Hit With Abuse Complaints*, USA TODAY, Oct. 9, 2013; Manuel Valdes, *U.S. Border Patrol Settles Racial Profiling Case, Will Share Stop Records*, WASH. TIMES, Sept. 24, 2013; Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013; Michel Marizco, *Living Life Under Federal Watch On The Border*, NPR, Aug. 5, 2013; Perla Trevizo, *Hiker Wants Ariz. Park Ranger Fired Over Search*, ARIZONA DAILY STAR, May 20, 2013; *see also* David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553 (2012). A delayed response would compromise a significant interest because it would prevent the public from being able to engage in a timely, thoughtful debate regarding the far-ranging operations of the nation’s largest law enforcement agency at a time when documented cases of Border Patrol abuse – including roving patrol abuses – are increasing, and when Congress is considering providing additional agency resources as part of a comprehensive immigration reform package. *See, e.g.*, Daniel Newhauser, *GOP Insider: No Immigration Overhaul This Year*, ROLL CALL, Jan. 13, 2014; Ashley Parker, *House Democrats Crafting Immigration Proposal*, NY TIMES, Sept. 24, 2013; Gavin Aronsen, *Will the House Immigration Bill Scale Back on Border Militarization?* MOTHER JONES, July 25, 2013; Jerry Seper, *Former Border Patrol Agents Call Senate’s Immigration Plan ‘A Huge Waste of Resources,’* WASH. TIMES, July 11, 2013. Requesters have demonstrated a compelling need for the requested documents and expedited processing is warranted.

Requesters certify that their statements concerning the need for expedited processing are true and correct to the best of their knowledge and belief.

REQUEST FOR FEE WAIVER

We request that the all fees associated with this request be waived pursuant to 6 C.F.R. § 5.11(b)(4) and (d)(1) (“No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.”) Requesters qualify as representatives of the news media, *see supra*. In addition, Professors Derek Bambauer and Jane Bambauer are employed by, and perform research as part of their scholarly work for, the University of Arizona James E. Rogers College of Law, which is an educational institution. Requesters meet the statutory and regulatory definitions entitling them to a fee waiver.

In the alternative, fees associated with this request should be waived pursuant to 6 C.F.R. § 5.11(k). Under § 5.11 (k), fees should be waived or reduced if disclosure is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and (2) not primarily in the commercial interest of the requester. Because Requesters have no commercial interest in disclosure, and because it will contribute significantly to public understanding of Border Patrol operations and activities, a fee waiver e in this case satisfies the regulations, as well as Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”).

Pursuant to 6 C.F.R. § 5.11 (k)(2), the factors to consider in determining whether disclosure is in the public interest are: (i) “whether the subject of the requested records concerns the operations or activities of the government”; (ii) “whether disclosure of the records is likely to contribute to an understanding of government operations or activities”, where “disclosable portions are meaningfully informative” and “likely to contribute to an increased public understanding of those [government] operations or activities”; (iii) whether the disclosure contributes “to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requestor”; and (iv) “whether the disclosure is likely to contribute significantly to public understanding.”

Disclosure pursuant to this request is in the public interest. First, the records pertain directly to the operations and activities of the federal government (of which CBP is an agency). Second, this request seeks to further public understanding of government conduct, and specifically to help the public determine whether individuals encountered, apprehended, and/or detained for civil immigration matters by the U.S. Border Patrol are treated in a manner that comports with our nation’s laws, and whether CBP personnel are properly investigated and held accountable when they fail to uphold those laws. Third, the Requesters, as discussed *supra*, qualify as representative of the news media and the records are sought to further scholarly research and disseminate that research to a broad audience. Finally, disclosure will contribute significantly to the public understanding of Border Patrol’s roving patrol operations. As discussed, roving patrol abuses are the subject of extensive litigation and media attention, and complaints of abuse are on the rise; nonetheless, there is still much that is unknown about these policies and practices and their impact on the public.

Requestors are therefore entitled to a total waiver of fees associated with this request. Should a total waiver be denied, fees should thus be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Please notify us in advance if the costs for document duplication exceed \$100.00.

If this request is denied in whole or part, Requestors ask that you justify all deletions by reference to specific exemptions to the FOIA. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information, or to deny a waiver of fees.

Please furnish all responsive records to Professor Derek Bambauer by e-mail at derekbambauer@email.arizona.edu or by physical delivery at 1201 E. Speedway, Tucson, AZ, 85701; to Professor Jane Bambauer by e-mail at janebambauer@email.arizona.edu or by physical delivery at 1201 E. Speedway, Tucson, AZ, 85701; and to James Lyall by e-mail at jlyall@acluaz.org or by physical delivery at P.O Box 17148, Phoenix, AZ, 85011.

We look forward to your reply to the request for expedited processing within ten business days as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding your decision on the matter of expedited processing, we look forward to your reply to the records request within twenty business days, as required by 5 U.S.C. § 552(a)(6)(A)(I).

Should you need to communicate with us regarding this request, please contact us by e-mail at the addresses above, or by telephone: 734.748.3535 (D. Bambauer), 520.626.6004 (J. Bambauer), or 520.344.7857 (J. Lyall).

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

James Lyall
Staff Attorney
ACLU of Arizona

Derek E. Bambauer
Professor of Law
University of Arizona
James E. Rogers College of Law

Jane Bambauer
Associate Professor of Law
University of Arizona
James E. Rogers College of Law