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16 **In propria persona*

17
18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF ARIZONA**

20
21 Arizona Civil Liberties Union Foundation of) CASE NO.:
Arizona, Derek E. Bambauer and Jane Yakowitz)
22 Bambauer,) **COMPLAINT FOR**
23) **INJUNCTIVE RELIEF**
Plaintiffs,)
24)
v.)
25)
26 U.S. Department of Homeland Security,)
27 Defendant.)
28)

INTRODUCTION

1
2 1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C.
3 § 552, for injunctive and other appropriate relief, seeking the immediate processing and
4 release of agency records improperly withheld by Defendant United States Department of
5 Homeland Security (“DHS”) in response to FOIA requests properly made by Plaintiffs
6 American Civil Liberties Union of Arizona (“ACLU”), Derek E. Bambauer, and Jane
7 Yakowitz Bambauer (“Bambauers”).

8 2. On January 23, 2014, Plaintiffs submitted two FOIA requests to Defendants
9 seeking records related to U.S. Border Patrol’s interior enforcement operations in Tucson
10 and Yuma Sectors, including relevant agency policies, stop data, and complaint records. A
11 copy of each of those requests is attached hereto as Exhibits A and B. Plaintiffs seek the
12 requested records in order to shed light on Border Patrol’s extensive but largely opaque
13 interior enforcement operations. To date, and long past the statutory deadline to respond,
14 Defendant has provided no response to Plaintiffs’ requests.

15 3. On February 25, 2014, Plaintiffs appealed Defendant’s failure to respond to
16 Plaintiffs’ request. The deadline for Defendant to respond to Plaintiffs’ administrative
17 appeal has passed.

18 4. The incidence of civil rights violations associated with Border Patrol’s
19 interior enforcement operations, which include interior checkpoints and “roving patrol”
20 stops, is a matter of pressing public concern. Since 2006, the U.S. Border Patrol has nearly
21 doubled in size, from approximately 12,000 agents to over 21,000 today. The budget for
22 U.S. Customs and Border Protection (“CBP”), of which Border Patrol is a sub-agency, has
23 more than doubled from \$6 billion in Fiscal Year (“FY”) 2006 to \$12.9 billion in FY 2014.
24 As the agency has expanded, reports of Border Patrol abuses in the Arizona-Sonora region,
25 and throughout the nation, have increased.

26 5. In the past year, the ACLU has submitted multiple complaints to DHS Office
27 of Inspector General (“OIG”) and Office of Civil Rights and Civil Liberties (“CRCL”),
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1 requesting investigations on behalf of Arizona residents subjected to prolonged detentions,
2 interrogations, unlawful searches, and other mistreatment in the course of Border Patrol
3 interior enforcement operations, including at vehicle checkpoints¹ and in roving patrol
4 stops.²

5 6. DHS oversight agencies have not kept pace with Border Patrol’s rapid growth
6 and are ill-equipped to provide transparent and effective agency oversight and
7 accountability for rights violations by agents. The ACLU is still waiting for a substantive
8 response to a civil rights complaint filed with OIG and CRCL on May 9, 2012 on behalf of
9 eleven individuals reporting various abuses by CBP agents at southern Ports of Entry.³
10 Other organizations have reported similar problems.⁴

11 7. The scope of Border Patrol’s interior enforcement operations is defined by
12 federal statute and regulations, as interpreted by the federal courts. Border Patrol has
13 authority to conduct certain warrantless seizures within “a reasonable distance” of the
14 border. *See* 8 U.S.C. § 1357(a)(3). That distance is defined by decades-old regulations to be
15 “100 air miles” from any external boundary, 8 C.F.R. § 287.1(b), and thus encompasses
16 roughly two-thirds of the U.S. population, nine of our ten largest cities, and the entirety of
17 ten states.

19 ¹ *See* ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION, Jan. 15, 2014,
20 available at <http://bit.ly/1k73lqO>.

21 ² *See* ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION, Oct. 9, 2013,
22 available at <http://bit.ly/1oOBYEz>.

23 ³ *See* ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION, May 9, 2012,
24 available at <http://bit.ly/1ru8f49>.

25 ⁴ *See, e.g.*, NO MORE DEATHS, CULTURE OF CRUELTY, available at
26 <http://www.nomoredeaths.org/cultureofcruelty.html> (“[S]ince January 2010, Arizona
27 organizations—No More Deaths in Nogales, Frontera de Cristo in Agua Prieta, the
28 Migrant Resource Center and Shelter in Naco, and O’odham Rights on the Tohono
O’odham Nation—have filed more than *seventy-five* complaints of Border Patrol abuse
with the Department of Homeland Security’s Office of Civil Rights and Civil Liberties in
the Department of Homeland Security (CRCL). To our knowledge, DHS has taken no
action to redress the abuse detailed in these complaints.”).

1 8. In practice, Border Patrol often ignores the geographic and legal limitations
2 on its authority, roaming still further into the interior of the country.⁵ At least two federal
3 circuits, the Fifth and Tenth Circuit Courts of Appeals, condone Border Patrol operations
4 beyond the 100 mile limit⁶—federal regulations⁷ and Supreme Court precedent⁸
5 notwithstanding. Other jurists have expressed concern that interior operations result in
6 widespread rights violations.⁹

7
8 ⁵ See, e.g., David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving*
9 *Patrol Stops*, 14 SCHOLAR 553, 556–60 (2012) (describing numerous roving patrol stops
occurring more than 100 miles from the border).

10 ⁶ See, e.g., *United States v. Pacheco-Espinosa*, 121 Fed. Appx. 352, 356–57 (10th Cir. 2005)
11 (“Current regulations interpret ‘reasonable distance’ as 100 air miles from the border. The
12 Tenth Circuit has nevertheless held that the regulation does not foreclose searches beyond
13 that limit...this Court determines that the approximately 120-mile distance in which
14 Defendant was stopped was a reasonable distance from the border.”) (citations omitted);
15 *United States v. Orozco*, 191 F.3d 578, 584 (5th Cir. 1999) (Dennis, J., dissenting) (“As I
16 read *Brignoni-Ponce*, the Supreme Court’s authorization of roving Border Patrol stops on
17 the basis of reasonable suspicion is limited to such stops within the 100 mile border zone
created by 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1. It would be unreasonable to assume
that the Supreme Court meant to dilute the protections of the Fourth Amendment so as to
authorize the Border Patrol to make suspicion-based roving patrol stops anywhere in the
United States. The Court’s opinion indicates no such intention.”).

18 ⁷ 8 C.F.R. § 287.1(b).

19 ⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–883 (1975) (“The only formal
20 limitation on that discretion [to stop vehicles] appears to be the administrative regulation
defining the term ‘reasonable distance’...to mean within 100 air miles from the border.”).

21 ⁹ See, e.g., *United States v. Soyland*, F.3d 1312, 1316, 1318 (9th Cir. 1993) (Kozinski, J.,
22 dissenting) (“There’s reason to suspect the agents working these checkpoints are looking
23 for more than illegal aliens. If this is true, it subverts the rationale of *Martinez–Fuerte* and
24 turns a legitimate administrative search into a massive violation of the Fourth
25 Amendment...Given the strong hints that the Constitution is being routinely violated at
26 these checkpoints, we owe it to ourselves and the public we serve to look into the matter.
27 Even without an order of this court or the district court, the Department of Justice would be
28 well-advised to establish the bona fides of these checkpoints.”); *United States v. Garcia*,
732 F.2d 1221, 1229 (5th Cir. 1984) (Tate, J., dissenting) (“Quite unfortunately, we have
the opportunity only to review the successful guesses of these agents; we are never
presented with the unconstitutionally intrusive stops of Hispanic residents and citizens that
do not result in an arrest. Differentiating the United States from police states of past history
and the present, our Constitution in its Fourth Amendment prohibition against unreasonable

1 9. There is little publicly available information regarding the extent or impact of
2 Border Patrol interior enforcement operations. For example, over the past five years neither
3 Border Patrol nor DHS has disclosed the total number or location of Border Patrol interior
4 checkpoints.¹⁰ The Government Accountability Office (“GAO”) has described numerous
5 problems with Border Patrol’s internal monitoring of checkpoint operations, including
6 “information gaps and reporting issues [that] have hindered public accountability, and
7 inconsistent data collection and entry [that] have hindered management’s ability to monitor
8 the need for program improvement.”¹¹

9 10. Border Patrol does not release stop data or other information related to interior
10 enforcement operations; what little is publicly known has been revealed through FOIA
11 requests and litigation. For example, in 2012 the ACLU filed a class action lawsuit on behalf
12 of multiple individuals subjected to racial profiling in Border Patrol roving patrol operations
13 on the Olympic Peninsula in Washington State. Border Patrol settled the case in September
14 2013, agreeing to re-train agents on their obligations under the Fourth Amendment and to
15 share stop data with the ACLU. In January 2013, following extensive FOIA litigation,
16 Families for Freedom issued a report disclosing a Border Patrol “incentives program” and
17 widespread arrests of lawfully present individuals in interior enforcement operations.¹² A

18 _____
19 searches protects all our residents, whether middle-class and well-dressed or poor and
20 disheveled, from arbitrary stop by governmental enforcement agents in our travel upon the
21 highways of this nation.”).

21 ¹⁰ *The Arizona Republic* estimates there are now approximately 170 Border Patrol
22 checkpoints nationwide See Bob Ortega, *Some in Town to Monitor Border Patrol*
Checkpoint, AZ REPUBLIC, Feb. 26, 2014, available at <http://bit.ly/N3QTfu>.

23 ¹¹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL
24 REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S
25 MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT
26 COULD IMPROVE EFFECTIVENESS, GAO-09-824 at *28, (Aug. 2009) available at
<http://www.gao.gov/products/GAO-09-824>.

27 ¹² See FAMILIES FOR FREEDOM, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED
28 STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS,
(Jan. 2013), available at <http://bit.ly/1bjjh8h>. CBP denied the existence of documents
responsive to plaintiffs’ FOIA request for more than a year before finally producing them.

1 prior report, *Justice Derailed*, issued with the New York Civil Liberties Union (“NYCLU”) and based on the same FOIA request, disclosed data related to thousands of Border Patrol stops aboard public transportation in upstate New York.¹³ The vast majority of those stops occurred far from the border, with only one percent resulting in initiation of removal proceedings; many involved violations of agency guidelines, including improper reliance on race and arrests of lawfully present individuals.

7 11. The failure of DHS to produce the documents requested by Plaintiffs violates the FOIA and impedes Plaintiffs’ efforts to educate the public on the many questions that remain regarding the full extent and impact of wide-ranging interior enforcement operations conducted by the largest law enforcement agency in the country.

11 JURISDICTION AND VENUE

12 12. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

14 13. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

15 14. Plaintiffs have exhausted all administrative remedies in connection with this FOIA request.

17 PARTIES

18 15. Plaintiff ACLU is the state affiliate organization, with over 7,000 supporters in Arizona, of the national American Civil Liberties Union (“National ACLU”). National 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 works daily in courts, legislatures, and communities to defend and preserve the individual rights and

24 The report notes, “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.”

28 ¹³ See NYCLU, *JUSTICE DERAILED* (Nov. 2011), available at <http://bit.ly/N7A03q>.

1 liberties that the Constitution and laws of the United States guarantee everyone in this
2 country. The organization has a particular commitment to ensuring that fundamental
3 constitutional protections of due process and equal protection are extended to every person,
4 regardless of citizenship or immigration status, and that government respects the civil and
5 human rights of all people.

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

15 17. Plaintiff Derek E. Bambauer is Professor of Law at the University of Arizona
16 James E. Rogers College of Law. An internationally-recognized scholar on Internet law,
17 governmental transparency, and censorship, Professor Bambauer has written over two
18 dozen academic articles, along with articles for popular media such as the *Arizona Republic*,
19 *Lifehacker.com*, *Arizona Attorney*, and Legal Affairs Debate Club. Professor Bambauer has
20 appeared in television, Internet, and recorded radio media including Bloomberg Law
21 television, BronxNet Community Television, Huffington Post Live, Surprisingly Free
22 podcast, and the U.S. Department of State Webchat. Since 2006, Professor Bambauer has
23 written for the information law blog Info/Law (<https://blogs.law.harvard.edu/infolaw/>), and
24 has appeared as a guest blogger on the popular sites Prawfsblawg and Concurring Opinions.
25 Professor Bambauer's research utilizes data from Freedom of Information Act requests to
26 inform the public, legal scholars, and lawmakers about governmental transparency, Internet
27 regulation, and the politics of intellectual property policy. *See, e.g.*, Derek E. Bambauer,
28

1 *Orwell's Armchair*, 79 U. CHI. L. REV. 863 (2012), and Derek E. Bambauer, *Chutzpah*, 6 J.
2 NAT'L SEC. L. & POL'Y 549 (2013). Bambauer's scholarly work is widely cited, and is the
3 basis for his popular media writing.

4 18. Jane Yakowitz Bambauer is Associate Professor of Law at the University of
5 Arizona James E. Rogers College of Law. Professor Bambauer has written ten academic
6 articles and several shorter pieces for the popular press on the topics of data privacy and
7 criminal procedure. Professor Bambauer has written articles for Huffington Post and
8 Forbes.com, and she has appeared on Huffington Post Live, the Surprisingly Free podcast,
9 and the O'Reilly Strata conference. Professor Bambauer has also written for the Info/Law
10 blog since 2011. Professor Bambauer has used data previously collected using public
11 records requests to study law school admissions practices and to analyze variance in
12 compliance with public records laws. *See, e.g.*, Jane Yakowitz, *Tragedy of the Data*
13 *Commons*, 25 HARV. J. L. & TECH. 1 (2011).

14 19. Defendant DHS is an Office of the Executive Branch of the United States
15 Government. DHS is an "agency" within the meaning of 5 U.S.C. § 552(f)(1). DHS includes
16 United States Customs & Border Protection, which includes as a sub-agency the Office of
17 Border Patrol. DHS has possession and control over the records sought by Plaintiffs.

18 **PLAINTIFFS' FOIA REQUEST**

19 20. By letters sent by e-mail and certified postal mail to Defendant DHS's FOIA
20 Officer Karen Neuman on January 23, 2014, Plaintiffs submitted one FOIA request for
21 records concerning Border Patrol checkpoint operations in Tucson and Yuma Sectors and
22 a second FOIA request for records concerning Border Patrol roving patrols in Tucson and
23 Yuma Sectors. A copy of each of those requests is attached hereto as Exhibits A and B,
24 respectively, and the requests are hereby incorporated by reference.

25 21. Plaintiffs requested Expedited Processing of both of the requests pursuant to
26 5 U.S.C. § 552(a)(6)(E)(i) and 5 U.S.C. § 552(a)(6)(E)(v). Plaintiffs also requested a Fee
27
28

1 Waiver for both of the requests pursuant to 6 C.F.R. § 5.11(b)(4) and (d)(1), and
2 alternatively, 6 C.F.R. § 5.11(k). *See* Exhibit A, Exhibit B.

3 22. On information and belief, Defendant received the requests described in ¶ 21
4 on January 23, 2014.

5 23. Defendant has not responded to Plaintiffs' requests as required by statute. 5
6 U.S.C. § 552(a)(6)(A)(i).

7 24. By letters sent by e-mail and certified postal mail to DHS's Associate General
8 Counsel and DHS's FOIA Officer dated February 25, 2014, Plaintiffs appealed Defendant's
9 failure to produce requested records concerning Border Patrol checkpoints and roving
10 patrols in Tucson and Yuma Sectors, as required by statute. 5 U.S.C. § 552(a)(6)(A)(i).
11 Those administrative appeals are attached to this Complaint as Exhibits C and D,
12 respectively, and are incorporated by reference.

13 25. On information and belief, Defendant received Plaintiffs' letters of appeal on
14 February 25, 2014.

15 26. To date, Defendant has not issued a determination in response to Plaintiffs'
16 administrative appeals under FOIA.

17 27. Defendant has violated the applicable statutory time limit for rendering
18 decisions on administrative appeals under the FOIA. 5 U.S.C. § 552(a)(6)(A)(ii).

19 28. Plaintiffs have exhausted the applicable administrative remedies. 5 U.S.C.
20 § 552(a)(6)(C)(i).

21 29. On information and belief, Defendant has failed to make reasonable efforts to
22 search for responsive records.

23 30. Defendant has wrongfully withheld requested records from Plaintiffs.

24 **CAUSES OF ACTION**

25 31. Plaintiffs repeat, re-allege, and incorporate the allegations in the foregoing
26 paragraphs as though fully set forth herein.

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1 DATED this 28th day of April, 2014.

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ACLU FOUNDATION OF ARIZONA

By /s/ James Duff Lyall
Daniel J. Pochoda
James Duff Lyall

Attorneys for Plaintiffs
and

By /s/ Derek E. Bambauer*

By /s/ Jane Yakowitz Bambauer*

**In propria persona*

EXHIBIT A



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 checkpoint 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 ACLU’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 These include frequent complaints the ACLU receives from residents subjected to extended detentions, interrogations, unlawful searches, and other mistreatment at Border Patrol checkpoints.

Neither CBP nor the Department of Homeland Security (“DHS”) have released any information in recent years about the total number of checkpoints in operation nationally. According to a 2009 U.S. Government Accountability Office (“GAO”) report,⁵ the Border Patrol operates approximately 71 permanent and tactical checkpoints across the southwest.⁶ These operations stem from Border Patrol’s authority to conduct warrantless seizures within “a reasonable distance” of the border.⁷ That distance is defined by outdated regulations to be “100 air miles”⁸ from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states.⁹ In practice, Border Patrol often ignores that limitation, roaming still further into the interior of the country.¹⁰ In Arizona, most checkpoints are located on

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/departments-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 U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824, (Aug. 2009) available at <http://www.gao.gov/assets/300/294548.pdf>.

⁶ *The Arizona Republic*, however, reports that as of Fiscal Year 2008 there were a total of 128 checkpoints nationwide. See Bob Ortega, *Interior Border Checks Spur Suit*, ARIZONA REPUBLIC, Jan. 16, 2014, available at <http://www.azcentral.com/news/politics/articles/20140115interior-border-checks-spur-suit.html>

⁷ 8 U.S.C. § 1357(a)(3).

⁸ 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.

⁹ 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, (Sept. 17, 2013), available at http://www.acluvt.org/surveillance/northern_border_report.pdf.

¹⁰ 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).

rural state highways between 25 and 50 miles north of the border, many of them in the vicinity of southern Arizona towns and cities.

Checkpoints have had profoundly negative impacts on border communities. Residents of the town of Arivaca, Arizona have petitioned for the removal of one of several local checkpoints, citing rights violations and harassment as well as harm to property values, tourism, and quality of life resulting from operation of the checkpoint.¹¹ On January 15, 2014, the ACLU submitted an administrative complaint to DHS on behalf of fifteen individuals detained without lawful basis at six southern Arizona checkpoints.¹² These individuals were variously subjected to interrogation not related to verifying citizenship, unwarranted searches, racial profiling, verbal harassment, and physical assault, among other abuses. Several reported Border Patrol service canines alerted to contraband when none was present. These accounts are representative of numerous other checkpoint-related complaints the ACLU receives on a regular basis.

The U.S. Supreme Court has upheld the constitutionality of immigration checkpoints only insofar as they involve a brief inquiry into residence status. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-60 (1976). In *Martinez-Fuerte*, the Court specified that neither vehicles nor occupants should be searched, and referrals to secondary inspection areas should involve “routine and limited inquiry into residence status” only. *Id.* at 560. The Court noted that local residents are “waved through the checkpoint without inquiry.” *Id.* at 550. Today, however, Border Patrol checkpoints often appear to be operated as general crime control checkpoints – which are unconstitutional¹³ – and not for the limited purpose of verifying residence status.¹⁴ Local residents are not “waved through,” but are often subjected to extended questioning and searches unrelated to verifying residence status. In practice, Border Patrol checkpoints bear little resemblance to those condoned by the Supreme Court almost 40 years ago in *Martinez-Fuerte*.

Checkpoint abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within DHS. The GAO has described numerous problems with Border Patrol’s internal monitoring of checkpoint operations, including “information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management’s ability to monitor the need for program improvement.”¹⁵ 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

¹¹ Arivaca Checkpoint Petition, available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-checkpoint-on-arivaca-rd-in-amado-az-quite-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

¹² Complaint available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

¹³ See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), discussed *infra*.

¹⁴ At a time when apprehensions of border crossers are at 40-year lows, CBP’s own figures indicate that most checkpoint drug arrests involve U.S. citizens. Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens*, Records Show, CENTER FOR INVESTIGATIVE REPORTING, Mar. 26, 2013, available at <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312> (noting four out of five checkpoint drug arrests involve a U.S. citizen, three times as many in 2011 as in 2005).

¹⁵ GAO-09-824, *infra* at *28. Those findings were made in 2009, the last time the federal government conducted a thorough review of Border Patrol checkpoint operations and their impact on border residents and local communities. GAO’s “community impact” analysis omitted Tucson sector checkpoints on the grounds that, at the time, they were considered “tactical” and not permanent checkpoints. *Id.* at *89.

internal transparency – have failed to keep pace with CBP’s rapid growth.¹⁶ As a result, though reports of Border Patrol abuse are increasingly common, many questions remain regarding checkpoint operations conducted by the largest law enforcement agency in the country.

RECORDS REQUESTED

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 Border Patrol checkpoint operations, *not* any personal or identifying information about any specific individual(s).

Requesters seek disclosure of U.S. Border Patrol records pertaining to all tactical and permanent vehicle checkpoint operations in the Tucson and Yuma sectors, as well as any related records held by CBP or other agencies within DHS, to include at least:

- 1.) All records relating to Border Patrol tactical and permanent vehicle checkpoint operations in Tucson and Yuma Sectors from January 2011 to present, 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 checkpoint operations in Tucson and Yuma sectors, including but not limited to:
 1. All documents related to application of U.S. law and agency guidelines at Border Patrol checkpoints, including but not limited to any legal limitations, or lack thereof, regarding checkpoint placement or location, and policies and procedures regarding questioning and detaining vehicle occupants, searching or entering the interior of vehicles, responding to motorists’ refusals to answer questions and/or consent to vehicle searches; and responding to motorists’ use of video and/or audio recording devices at checkpoints;
 2. All documents related to service canines, including all information related to training, certification, qualifications, and performance of service canines and service canine handlers, and any policies or procedures related to canines that falsely alert to the presence of contraband or concealed persons; and

¹⁶ 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>.

3. All documents related to citizen complaint procedures at checkpoints;
- b. Communications, agreements, or any other records related to collaboration or cooperation with, or the presence of, local law enforcement entities at checkpoints, including state and local police and sheriffs' departments;
 - 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 checkpoint operations in Tucson and Yuma sectors;
 - d. Inventories and records pertaining to all surveillance and inspection technologies and equipment, including non-intrusive inspection technologies, such as a VACIS or backscatter X-ray machines, in use at each tactical and permanent checkpoint in Tucson and Yuma sectors;
 - e. Organizational charts, diagrams, or schematics, including records sufficient to show:
 1. The number and geographic location of all permanent and tactical Border Patrol vehicle checkpoints in Tucson and Yuma sectors;
 2. The total monthly hours of operation of each permanent and tactical Border Patrol vehicle checkpoints, by month, in Tucson and Yuma sectors; and
 3. Any plans, designs, studies, or diagrams for any additional vehicle checkpoints not currently in operation in Tucson and Yuma sectors;
 - f. Records regarding any individual stopped, searched, detained, and/or arrested at Border Patrol checkpoints 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.f above – relating to the following specific topics and/or containing information sufficient to show:
 1. The total number of arrests at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
 2. The total number of U.S. citizens arrested at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
 3. The total number of undocumented individuals arrested at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
 4. The basis for each checkpoint arrest, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
 5. The basis for each checkpoint vehicle search resulting in arrest, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;

6. The total number of alerts by service canines that resulted in the discovery of contraband or concealed persons, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
 7. The total number of alerts by service canines that did not result in the discovery of contraband or concealed persons, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
 8. All property seized at each checkpoint, 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
 9. 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) were the same as those who made the stop under review, by month, for each of the years 2011, 2012, and 2013;
- h. All complaints related to Border Patrol checkpoint 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, and all documents related or responding to any such complaints; and
 - i. All disciplinary records resulting from agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules and regulations related to checkpoint operations in Tucson and Yuma sectors.
- 2.) Records sufficient to show the maximum number and geographic location of all U.S. Border Patrol checkpoints – permanent and tactical – in operation nationwide during each of the years 1976 to the present.

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. Professor 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). 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[s] 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 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 recounted above are part of a larger practice 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). From 2004-2011, as CBP doubled in size to more than 21,000 agents, complaints involving CBP nearly tripled, the majority involving excessive force and discrimination.¹⁷ In December 2013, a U.S. citizen died in Border Patrol custody at a checkpoint in California.¹⁸ Residents of Arivaca, Arizona are petitioning for the removal of one of three local checkpoints, citing ongoing rights violations and harassment as well as harm to property values,¹⁹ tourism, and quality of life resulting from checkpoint operations. The ACLU has also received increasing complaints related to Border Patrol checkpoints, including 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 checkpoint operations have attracted considerable media coverage and public attention in recent

¹⁷ See CRCL, "Department-wide Data on Complaints Received," *supra*.

¹⁸ See Massound Hayoun, *U.S. Nationals 'Under Siege' Amid Border Patrol Checkpoint Death*, AL JAZEERA AMERICA, Dec. 29, 2013, available at <http://america.aljazeera.com/articles/2013/12/29/us-nationals-undersiegeamidssuspiciousborderpatrolcheckpointdeath.html>; see also Rob O'Dell & Bob Ortega, *Deadly Border Agents Incidents Cloaked in Silence*, ARIZONA REPUBLIC, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html> (Noting that 42 individuals have been killed by Border Patrol agents since 2005 and, "In none of the 42 deaths is any agent or officer publicly known to have faced consequences — not from the Border Patrol, not from Customs and Border Protection or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts.")

¹⁹ See, e.g., Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT'L, Dec. 24, 2012, available at http://www.nogalesinternational.com/news/study-correlates-checkpoint-with-home-value-drop/article_b158bc24-4de3-11e2-956a-0019bb2963f4.html

months. *See, e.g.*, Massound Hayoun, *U.S. Nationals ‘Under Siege’ Amid Border Patrol Checkpoint Death*, AL JAZEERA AMERICA, Dec. 29, 2013; Wes Kimball, *America’s Internal Checkpoints*, REASON, Dec. 28, 2013; Dan Shearer, *Protesters Demand Removal of Border Patrol Checkpoint Near Amado*, NOGALES INT’L, Dec. 6, 2013; Curt Prendergast, *Woman Challenges Border Patrol Checkpoint, and Wins*, GREEN VALLEY NEWS AND SUN, Oct. 12, 2013; Mark Davis, *Leahy: No Internal Border Patrol Checkpoints*, VALLEY NEWS, Oct. 1, 2013; Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens, Records Show*, CENTER FOR INVESTIGATIVE REPORTING, March 26, 2013; Cindy Cesares, *Border Patrol Takes ‘No’ For An Answer at Internal Checkpoints*, TEXAS OBSERVER, Mar. 7, 2013; Gary Brasher, *Ineffective, Harmful I-19 Checkpoint Needs to Go*, ARIZONA DAILY STAR, Jan. 1, 2013; Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT’L, Dec. 24, 2012; Jeff Biggers, *Not the First Time Arizona Governor Stopped*, SALON, July 5, 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 operations of the nation’s largest law enforcement agency at a time when documented cases of Border Patrol abuse – including checkpoint abuses – are increasing, and when Congress is considering 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, 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 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 checkpoint operations. As discussed, checkpoint abuses are the subject of great public interest, and complaints of abuse are on the rise; nonetheless, there is still much that is unknown about Border Patrol checkpoint 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

EXHIBIT B



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).

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).

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, Liferhacker.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

EXHIBIT C



February 25, 2014

VIA ELECTRONIC AND CERTIFIED U.S. MAIL:

Associate General Counsel (General Law)
Department of Homeland Security
FOIA Appeals
Washington DC, 20528

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: Appeal of Constructive Denial of Freedom of Information Act (FOIA) Request

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to U.S. Department of Homeland Security (“DHS”) 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”).

On January 23, 2014, Requesters submitted to DHS via e-mail and certified mail a request for documents related to U.S. Border Patrol checkpoint operations, including a request for expedited processing, as described in the letter attached as Appendix 1 (“FOIA request”). As of the date of this letter, DHS has not responded to the FOIA request, including the request for expedited processing.

The FOIA requires that all federal agencies respond to any request for records within 20 business days. U.S.C. § 552(a)(6)(A)(i). Therefore, CBP’s response to the FOIA request was due by February 20, 2014. The FOIA further provides that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request. 5 U.S.C. § 552(a)(6)(E)(ii)(I). To date, DHS has not communicated to Requesters any determination regarding expedited processing or in any way responded to the FOIA request. This failure to respond can be construed as a constructive denial. 5 U.S.C. § 552(a)(6)(A). Requesters hereby appeal DHS’s failure to make a timely determination regarding the FOIA request.

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 ACLU’s members to lobby their legislators.

Requesters' FOIA request relates to U.S. Border Patrol checkpoint operations in U.S. Customs and Border Protection ("CBP") Tucson and Yuma Sectors. Little is known about the policies and procedures related to Border Patrol checkpoint operations, or the impact of those operations on motorists and local communities. Even the number and location of checkpoints currently in operation is unknown. According to a U.S. Government Accountability Office ("GAO") report,² the Border Patrol operated approximately 71 permanent and tactical checkpoints across the southwest in 2009.³ Although immigration checkpoints are mostly confined to the southwest, Border Patrol operates checkpoints in northern states as well, and a recent FOIA request uncovered design plans for permanent checkpoints on southbound New England highways.⁴

Checkpoints have had profoundly negative impacts on border communities. For example, on January 15, 2014, the ACLU submitted an administrative complaint to DHS on behalf of fifteen individuals detained without lawful basis at six southern Arizona checkpoints.⁵ These individuals were variously subjected to interrogation not related to verifying citizenship, unwarranted searches, racial profiling, verbal harassment, and physical assault, among other abuses. In more than half of the incidents documented, Border Patrol service canines alerted to contraband when none was present.⁶ These accounts are representative of numerous other checkpoint-related complaints the ACLU receives on a regular basis.

Border Patrol checkpoints often appear to be operated as general crime control checkpoints – which are unconstitutional⁷ – and not for the limited purpose of verifying residence status, and now bear little resemblance to those condoned by the Supreme Court almost 40 years ago.⁸ These problems are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within DHS. The GAO has described numerous problems with Border Patrol oversight of checkpoint operations, including “information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management’s ability to monitor the need for program improvement.”⁹ Though reports of Border Patrol abuse are increasingly common, many questions remain regarding widespread checkpoint operations conducted by the largest law enforcement agency in the country.

² U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824, (Aug. 2009) *available at* <http://www.gao.gov/assets/300/294548.pdf>.

³ *The Arizona Republic*, however, reports that as of Fiscal Year 2008 there were a total of 128 checkpoints nationwide. See Bob Ortega, *Interior Border Checks Spur Suit*, ARIZONA REPUBLIC, Jan. 16, 2014, *available at* <http://www.azcentral.com/news/politics/articles/20140115interior-border-checks-spur-suit.html>

⁴ See ACLU OF VERMONT, SURVEILLANCE ON THE NORTHERN BORDER, (Sept. 17, 2013), *available at* http://www.acluvt.org/surveillance/northern_border_report.pdf

⁵ Complaint *available at*

<http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

⁶ The ACLU recently filed a lawsuit on behalf of a U.S. citizen subjected to a strip search, multiple genital and cavity searches, a forced bowel movement, an X-ray, and a CT scan following a similar false alert by a U.S. Customs and Border Protection service canine. See *Jane Doe v. El Paso County Hospital District, et al.*, No. 3:13-CV-00406-DB (W.D. Tex. filed Dec. 18, 2013); Complaint *available at* <http://www.aclu-nm.org/wp-content/uploads/2013/12/Complaint-Jane-Doe-v-Various-Defendants-12-18-13.pdf>

⁷ See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), discussed *infra*.

⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-60 (1976).

⁹ GAO-09-824, *infra* at *28. Those findings were made in 2009, the last time the federal government conducted a thorough review of Border Patrol checkpoint operations and their impact on border residents and local communities. GAO’s “community impact” analysis omitted Tucson sector checkpoints on the grounds that, at the time, they were considered “tactical” and not permanent checkpoints. *Id.* at *89.

For the foregoing reasons, there exists compelling need to disclose the requested documents. 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 recounted above are part of a larger practice 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). From 2004-2011, as CBP doubled in size to more than 21,000 agents, complaints involving CBP nearly tripled, the majority involving excessive force and discrimination.¹⁰ Residents of Arivaca, Arizona are petitioning for the removal of one of three local checkpoints,¹¹ citing ongoing rights violations and harassment as well as harm to property values,¹² tourism, and quality of life resulting from checkpoint operations. The ACLU has also received numerous complaints related to Border Patrol checkpoints, including unlawful searches, and prolonged detention; several individuals have reported being assaulted and/or threatened with weapons by agents at checkpoints. Thus, there is a “compelling need” for the information requested.

There is additionally clear urgency to inform the public concerning Border Patrol checkpoint operations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5 (d)(1)(ii). As noted in the FOIA request, Border Patrol checkpoint operations have attracted considerable public attention in recent months. *See, e.g.,* Paul Ingram, *Border Residents Demand End to Arivaca Checkpoint*, Tucson Sentinel, Jan. 23, 2014, available at http://www.tucson sentinel.com/local/report/012214_arivaca_checkpoint_protest/border-residents-demand-end-arivaca-checkpoint/. Requesters FOIA request includes a request for expedited processing and Requesters have demonstrated a “compelling need” for the information. 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II) (2007).

We respectfully request that CBP respond to the FOIA request, including the request for expedited processing, by contacting us either 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). If we do not receive your response within 20 business days, we expect to pursue legal action against DHS. 5 U.S.C. § 552 (a)(4)(B); 5 U.S.C. § 552(a)(6)(A)(ii).

Thank you for your prompt response to this appeal.

Sincerely,



James Lyall
Staff Attorney
ACLU of Arizona

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

¹⁰ *See* CRCL, “Department-wide Data on Complaints Received,” *supra*.

¹¹ Arivaca Checkpoint Petition, available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-checkpoint-on-arivaca-rd-in-amado-az-quite-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

¹² *See, e.g.,* Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT’L, Dec. 24, 2012, available at http://www.nogalesinternational.com/news/study-correlates-checkpoint-with-home-value-drop/article_b158bc24-4de3-11e2-956a-0019bb2963f4.html

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

APPENDIX 1



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 checkpoint 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 ACLU’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 These include frequent complaints the ACLU receives from residents subjected to extended detentions, interrogations, unlawful searches, and other mistreatment at Border Patrol checkpoints.

Neither CBP nor the Department of Homeland Security (“DHS”) have released any information in recent years about the total number of checkpoints in operation nationally. According to a 2009 U.S. Government Accountability Office (“GAO”) report,⁵ the Border Patrol operates approximately 71 permanent and tactical checkpoints across the southwest.⁶ These operations stem from Border Patrol’s authority to conduct warrantless seizures within “a reasonable distance” of the border.⁷ That distance is defined by outdated regulations to be “100 air miles”⁸ from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states.⁹ In practice, Border Patrol often ignores that limitation, roaming still further into the interior of the country.¹⁰ In Arizona, most checkpoints are located on

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/departments-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 U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824, (Aug. 2009) available at <http://www.gao.gov/assets/300/294548.pdf>.

⁶ *The Arizona Republic*, however, reports that as of Fiscal Year 2008 there were a total of 128 checkpoints nationwide. See Bob Ortega, *Interior Border Checks Spur Suit*, ARIZONA REPUBLIC, Jan. 16, 2014, available at <http://www.azcentral.com/news/politics/articles/20140115interior-border-checks-spur-suit.html>

⁷ 8 U.S.C. § 1357(a)(3).

⁸ 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.

⁹ 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, (Sept. 17, 2013), available at http://www.acluvt.org/surveillance/northern_border_report.pdf.

¹⁰ 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).

rural state highways between 25 and 50 miles north of the border, many of them in the vicinity of southern Arizona towns and cities.

Checkpoints have had profoundly negative impacts on border communities. Residents of the town of Arivaca, Arizona have petitioned for the removal of one of several local checkpoints, citing rights violations and harassment as well as harm to property values, tourism, and quality of life resulting from operation of the checkpoint.¹¹ On January 15, 2014, the ACLU submitted an administrative complaint to DHS on behalf of fifteen individuals detained without lawful basis at six southern Arizona checkpoints.¹² These individuals were variously subjected to interrogation not related to verifying citizenship, unwarranted searches, racial profiling, verbal harassment, and physical assault, among other abuses. Several reported Border Patrol service canines alerted to contraband when none was present. These accounts are representative of numerous other checkpoint-related complaints the ACLU receives on a regular basis.

The U.S. Supreme Court has upheld the constitutionality of immigration checkpoints only insofar as they involve a brief inquiry into residence status. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-60 (1976). In *Martinez-Fuerte*, the Court specified that neither vehicles nor occupants should be searched, and referrals to secondary inspection areas should involve “routine and limited inquiry into residence status” only. *Id.* at 560. The Court noted that local residents are “waved through the checkpoint without inquiry.” *Id.* at 550. Today, however, Border Patrol checkpoints often appear to be operated as general crime control checkpoints – which are unconstitutional¹³ – and not for the limited purpose of verifying residence status.¹⁴ Local residents are not “waved through,” but are often subjected to extended questioning and searches unrelated to verifying residence status. In practice, Border Patrol checkpoints bear little resemblance to those condoned by the Supreme Court almost 40 years ago in *Martinez-Fuerte*.

Checkpoint abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within DHS. The GAO has described numerous problems with Border Patrol’s internal monitoring of checkpoint operations, including “information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management’s ability to monitor the need for program improvement.”¹⁵ 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

¹¹ Arivaca Checkpoint Petition, available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-checkpoint-on-arivaca-rd-in-amado-az-quite-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

¹² Complaint available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

¹³ See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), discussed *infra*.

¹⁴ At a time when apprehensions of border crossers are at 40-year lows, CBP’s own figures indicate that most checkpoint drug arrests involve U.S. citizens. Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens*, Records Show, CENTER FOR INVESTIGATIVE REPORTING, Mar. 26, 2013, available at <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312> (noting four out of five checkpoint drug arrests involve a U.S. citizen, three times as many in 2011 as in 2005).

¹⁵ GAO-09-824, *infra* at *28. Those findings were made in 2009, the last time the federal government conducted a thorough review of Border Patrol checkpoint operations and their impact on border residents and local communities. GAO’s “community impact” analysis omitted Tucson sector checkpoints on the grounds that, at the time, they were considered “tactical” and not permanent checkpoints. *Id.* at *89.

internal transparency – have failed to keep pace with CBP’s rapid growth.¹⁶ As a result, though reports of Border Patrol abuse are increasingly common, many questions remain regarding checkpoint operations conducted by the largest law enforcement agency in the country.

RECORDS REQUESTED

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 Border Patrol checkpoint operations, *not* any personal or identifying information about any specific individual(s).

Requesters seek disclosure of U.S. Border Patrol records pertaining to all tactical and permanent vehicle checkpoint operations in the Tucson and Yuma sectors, as well as any related records held by CBP or other agencies within DHS, to include at least:

- 1.) All records relating to Border Patrol tactical and permanent vehicle checkpoint operations in Tucson and Yuma Sectors from January 2011 to present, 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 checkpoint operations in Tucson and Yuma sectors, including but not limited to:
 1. All documents related to application of U.S. law and agency guidelines at Border Patrol checkpoints, including but not limited to any legal limitations, or lack thereof, regarding checkpoint placement or location, and policies and procedures regarding questioning and detaining vehicle occupants, searching or entering the interior of vehicles, responding to motorists’ refusals to answer questions and/or consent to vehicle searches; and responding to motorists’ use of video and/or audio recording devices at checkpoints;
 2. All documents related to service canines, including all information related to training, certification, qualifications, and performance of service canines and service canine handlers, and any policies or procedures related to canines that falsely alert to the presence of contraband or concealed persons; and

¹⁶ 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>.

3. All documents related to citizen complaint procedures at checkpoints;
- b. Communications, agreements, or any other records related to collaboration or cooperation with, or the presence of, local law enforcement entities at checkpoints, including state and local police and sheriffs' departments;
 - 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 checkpoint operations in Tucson and Yuma sectors;
 - d. Inventories and records pertaining to all surveillance and inspection technologies and equipment, including non-intrusive inspection technologies, such as a VACIS or backscatter X-ray machines, in use at each tactical and permanent checkpoint in Tucson and Yuma sectors;
 - e. Organizational charts, diagrams, or schematics, including records sufficient to show:
 1. The number and geographic location of all permanent and tactical Border Patrol vehicle checkpoints in Tucson and Yuma sectors;
 2. The total monthly hours of operation of each permanent and tactical Border Patrol vehicle checkpoints, by month, in Tucson and Yuma sectors; and
 3. Any plans, designs, studies, or diagrams for any additional vehicle checkpoints not currently in operation in Tucson and Yuma sectors;
 - f. Records regarding any individual stopped, searched, detained, and/or arrested at Border Patrol checkpoints 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.f above – relating to the following specific topics and/or containing information sufficient to show:
 1. The total number of arrests at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
 2. The total number of U.S. citizens arrested at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
 3. The total number of undocumented individuals arrested at each checkpoint, by month, for each of the years 2011, 2012, and 2013;
 4. The basis for each checkpoint arrest, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
 5. The basis for each checkpoint vehicle search resulting in arrest, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;

6. The total number of alerts by service canines that resulted in the discovery of contraband or concealed persons, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
 7. The total number of alerts by service canines that did not result in the discovery of contraband or concealed persons, by month, for each of the years 2011, 2012, and 2013, including information recorded in Forms I-247, I-213, I-286, I-44, I-862, I-826, and I-210;
 8. All property seized at each checkpoint, 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
 9. 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) were the same as those who made the stop under review, by month, for each of the years 2011, 2012, and 2013;
- h. All complaints related to Border Patrol checkpoint 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, and all documents related or responding to any such complaints; and
 - i. All disciplinary records resulting from agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules and regulations related to checkpoint operations in Tucson and Yuma sectors.
- 2.) Records sufficient to show the maximum number and geographic location of all U.S. Border Patrol checkpoints – permanent and tactical – in operation nationwide during each of the years 1976 to the present.

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. Professor 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). 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[s] 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 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 recounted above are part of a larger practice 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). From 2004-2011, as CBP doubled in size to more than 21,000 agents, complaints involving CBP nearly tripled, the majority involving excessive force and discrimination.¹⁷ In December 2013, a U.S. citizen died in Border Patrol custody at a checkpoint in California.¹⁸ Residents of Arivaca, Arizona are petitioning for the removal of one of three local checkpoints, citing ongoing rights violations and harassment as well as harm to property values,¹⁹ tourism, and quality of life resulting from checkpoint operations. The ACLU has also received increasing complaints related to Border Patrol checkpoints, including 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 checkpoint operations have attracted considerable media coverage and public attention in recent

¹⁷ See CRCL, "Department-wide Data on Complaints Received," *supra*.

¹⁸ See Massound Hayoun, *U.S. Nationals 'Under Siege' Amid Border Patrol Checkpoint Death*, AL JAZEERA AMERICA, Dec. 29, 2013, available at <http://america.aljazeera.com/articles/2013/12/29/us-nationals-undersiegeamidssuspiciousborderpatrolcheckpointdeath.html>; see also Rob O'Dell & Bob Ortega, *Deadly Border Agents Incidents Cloaked in Silence*, ARIZONA REPUBLIC, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html> (Noting that 42 individuals have been killed by Border Patrol agents since 2005 and, "In none of the 42 deaths is any agent or officer publicly known to have faced consequences — not from the Border Patrol, not from Customs and Border Protection or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts.")

¹⁹ See, e.g., Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT'L, Dec. 24, 2012, available at http://www.nogalesinternational.com/news/study-correlates-checkpoint-with-home-value-drop/article_b158bc24-4de3-11e2-956a-0019bb2963f4.html

months. *See, e.g.*, Massound Hayoun, *U.S. Nationals ‘Under Siege’ Amid Border Patrol Checkpoint Death*, AL JAZEERA AMERICA, Dec. 29, 2013; Wes Kimball, *America’s Internal Checkpoints*, REASON, Dec. 28, 2013; Dan Shearer, *Protesters Demand Removal of Border Patrol Checkpoint Near Amado*, NOGALES INT’L, Dec. 6, 2013; Curt Prendergast, *Woman Challenges Border Patrol Checkpoint, and Wins*, GREEN VALLEY NEWS AND SUN, Oct. 12, 2013; Mark Davis, *Leahy: No Internal Border Patrol Checkpoints*, VALLEY NEWS, Oct. 1, 2013; Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens, Records Show*, CENTER FOR INVESTIGATIVE REPORTING, March 26, 2013; Cindy Cesares, *Border Patrol Takes ‘No’ For An Answer at Internal Checkpoints*, TEXAS OBSERVER, Mar. 7, 2013; Gary Brasher, *Ineffective, Harmful I-19 Checkpoint Needs to Go*, ARIZONA DAILY STAR, Jan. 1, 2013; Philip Franchine, *Study Correlates Checkpoint with Home Value Drop*, NOGALES INT’L, Dec. 24, 2012; Jeff Biggers, *Not the First Time Arizona Governor Stopped*, SALON, July 5, 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 operations of the nation’s largest law enforcement agency at a time when documented cases of Border Patrol abuse – including checkpoint abuses – are increasing, and when Congress is considering 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, 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 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 checkpoint operations. As discussed, checkpoint abuses are the subject of great public interest, and complaints of abuse are on the rise; nonetheless, there is still much that is unknown about Border Patrol checkpoint 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

EXHIBIT D



February 25, 2014

VIA ELECTRONIC AND CERTIFIED U.S. MAIL:

Associate General Counsel (General Law)
Department of Homeland Security
FOIA Appeals
Washington DC, 20528

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: Appeal of Constructive Denial of Freedom of Information Act (FOIA) Request

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to U.S. Department of Homeland Security (“DHS”) 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”).

On January 23, 2014, Requesters submitted to DHS via e-mail and certified mail a request for documents related to U.S. Border Patrol “roving patrol” operations, including a request for expedited processing, as described in the letter attached as Appendix 1 (“FOIA request”). As of the date of this letter, DHS has not responded to the FOIA request, including the request for expedited processing.

The FOIA requires that all federal agencies respond to any request for records within 20 business days. U.S.C. § 552(a)(6)(A)(i). Therefore, CBP’s response to the FOIA request was due by February 20, 2014. The FOIA further provides that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request. 5 U.S.C. § 552(a)(6)(E)(ii)(I). To date, DHS has not communicated to Requesters any determination regarding expedited processing or in any way responded to the FOIA request. This failure to respond can be construed as a constructive denial. 5 U.S.C. § 552(a)(6)(A). Requesters hereby appeal DHS’s failure to make a timely determination regarding the FOIA request.

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 ACLU’s members to lobby their legislators.

Requesters' FOIA request relates to U.S. Border Patrol roving patrol operations in U.S. Customs and Border Protection ("CBP") Tucson and Yuma Sectors. Little is known about the policies and procedures related to Border Patrol roving patrol operations, or the impact of those operations on motorists and local communities. CBP has statutory authority to conduct warrantless stops and seizures within a "reasonable distance" of the border.² That distance is defined by outdated regulations to be "100 air miles"³ from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states. In practice, Border Patrol often ignores that limitation, roaming still further into the interior of the country.⁴

A previous ACLU FOIA request, related to roving patrol stops in New York, revealed that the vast majority of roving patrol stops occurred far from the border, with only 1% resulting in initiation of removal proceedings; many involved clear violations of agency guidelines, including improper reliance on race and arrests of lawfully present individuals.⁵ In September 2013, CBP settled an ACLU lawsuit arising out of unlawful roving patrol stops on the Olympic Peninsula, in which the agency agreed to retrain agents on the Fourth Amendment and provide stop data to the ACLU.⁶ 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.⁷ 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.

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

² 8 U.S.C. § 1357(a)(3).

³ 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.

⁴ *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#mainparadaptiveimage_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).

⁵ *See* NYCLU, JUSTICE DERAILED, (Nov. 2011), available at http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf

⁶ *See* 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

⁷ Complaint available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>

agents,⁸ 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.⁹ 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.¹⁰ 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.

For the foregoing reasons, there exists compelling need to disclose the requested documents. 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 recounted above are part of a larger practice 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). From 2004-2011, as CBP doubled in size to more than 21,000 agents, complaints involving CBP nearly tripled, the majority involving excessive force and discrimination.¹¹ 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.

There is additionally clear urgency to inform the public concerning Border Patrol checkpoint operations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5 (d)(1)(ii). As noted in the FOIA request, Border Patrol roving patrol operations have attracted considerable public attention in recent months. *See, e.g.*, 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. Requesters FOIA request includes a request for expedited processing and Requesters have demonstrated a “compelling need” for the information. 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II) (2007).

We respectfully request that CBP respond to the FOIA request, including the request for expedited processing, by contacting us either 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). If we do not receive your response within 20 business days, we expect to pursue legal action against DHS. 5 U.S.C. § 552 (a)(4)(B); 5 U.S.C. § 552(a)(6)(A)(ii).

⁸ *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.”)

⁹ *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>

¹⁰ 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>.

¹¹ *See* CRCL, “Department-wide Data on Complaints Received,” *supra*.

Thank you for your prompt response to this appeal.

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

APPENDIX 1



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).

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).

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, Liferhacker.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