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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

American Civil Liberties Union of San  
Diego and Imperial Counties, American  
Civil Liberties Union of Southern  
California, Anne Lai and Sameer Ashar,

Plaintiffs,

v.

United States Department of Homeland  
Security, United States Customs and  
Border Protection,

Defendants.

Case No.: 8:15-cv-00229-JLS-RNB

**FIRST AMENDED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

## COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1           2.     This is an action under the Freedom of Information Act (“FOIA”), 5  
2     U.S.C. § 552, for declaratory, injunctive, and other appropriate relief, seeking the  
3     immediate processing and release of agency records unlawfully withheld by  
4     Defendants United States Department of Homeland Security (“DHS”) and United  
5     States Customs and Border Protection (“CBP”) in response to a FOIA request  
6     properly made by Plaintiffs American Civil Liberties Union of San Diego and  
7     Imperial Counties (“ACLU-SDIC”), American Civil Liberties Union of Southern  
8     California (“ACLU-SoCal”), and University of California, Irvine (“UCI”) School  
9     of Law Immigrant Rights Clinic (“IRC”) professors Anne Lai and Sameer Ashar.

10           2.     On July 3, 2014, Plaintiffs submitted a FOIA request to both DHS  
11     and CBP, seeking records related to U.S. Border Patrol’s “roving patrol”  
12     operations in the San Diego and El Centro Sectors, including relevant agency  
13     policies, stop data, and complaint records (“Request”).<sup>1</sup> A copy of the Request  
14     sent to DHS is attached hereto as Exhibit A. A copy of the Request sent to CBP is  
15     attached hereto as Exhibit B.

16           3.     Plaintiffs seek the requested records in order to shed light on Border  
17     Patrol’s extensive but largely opaque “roving patrol” operations. To date, and  
18     long past the statutory deadline to respond, Defendants have provided no legally  
19     adequate response to Plaintiffs’ Request.

20           4.     Plaintiffs now file suit under FOIA for declaratory and injunctive  
21     relief, seeking the immediate disclosure of the requested records.

22  
23  
24  
25     <sup>1</sup> U.S. Border Patrol’s San Diego Sector includes Imperial Beach Station, Brown  
26     Field Station, Campo Station, San Clemente Station, El Cajon Station, Theodore L.  
27     Newton, Jr. and George F. Azrak (Murrieta) Station, Chula Vista Station, and  
28     Boulevard Station. El Centro Sector includes El Centro Station, Calexico Station,  
   Riverside Station, and Indio Station. *See* U.S. Customs and Border Protection,  
   Border Patrol Sectors, <http://1.usa.gov/1lxpfAT> (last visited Feb. 8, 2015).

## JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over the FOIA claim and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and (a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

6. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e). Plaintiffs Lai and Ashar have their principal place of business in Irvine, California. Plaintiff ACLU-SoCal has its principal place of business in Los Angeles, California.

7. Because Defendants DHS and CBP both failed to provide a determination as to Plaintiffs' FOIA Request in the time allotted by statute, as required by 5 U.S.C. § 552(a)(6)(A)(i) and 6 C.F.R. § 5.6, Plaintiffs have constructively exhausted all administrative remedies and are entitled to file suit with this Court to enforce compliance with FOIA. *See* 5 U.S.C. § 552(a)(4)(B), (a)(6)(C).

## PARTIES

8. Plaintiffs ACLU-SDIC and ACLU-SoCal are local affiliates of the American Civil Liberties Union ("National ACLU"). Both the ACLU-SDIC and the ACLU-SoCal are non-profit, nonpartisan 26 U.S.C. § 501(c)(4) organizations dedicated to the constitutional principles of liberty and equality. The ACLU-SDIC is located in San Diego, California. The ACLU-SoCal has offices in Los Angeles, San Bernardino, and Santa Ana, and its principal place of business is in this district.

9. The ACLU is committed to ensuring that the American government complies with the Constitution and laws in matters that affect civil liberties and human rights. The ACLU is also committed to principles of transparency and

1 accountability in government, and seeks to ensure that the American public is  
2 informed about the conduct of its government in matters that affect civil liberties  
3 and human rights.

4 10. Dissemination of information to the public about actual or alleged  
5 government activity is a critical and substantial component of the ACLU's  
6 mission and work. Specifically, the ACLU publishes a continuously updated blog,  
7 newsletters, news briefings, "Know Your Rights" documents, and other  
8 educational and informational materials that are broadly disseminated to the  
9 public. Such material is widely available to everyone, including individuals, tax-  
10 exempt organizations, not-for-profit groups, law students, and faculty, for no cost  
11 or for a nominal fee through the ACLU's public education department and  
12 website. The websites of the national ACLU ([www.aclu.org](http://www.aclu.org)), ACLU-SDIC  
13 ([www.aclusandiego.org](http://www.aclusandiego.org)), and ACLU-SoCal ([www.aclusocal.org](http://www.aclusocal.org)) each address  
14 civil rights and civil liberties issues in depth, provide features on civil rights and  
15 civil liberties issues in the news, and contain many thousands of documents  
16 relating to the issues on which the ACLU is focused. These websites also include  
17 features highlighting information obtained through the FOIA process as well as  
18 analysis of that information. Content from each of these websites often appears on  
19 the others, and the websites often link to content shown on the others.

20 11. Professors Lai and Ashar are faculty at UCI School of Law, located  
21 in Orange County, California, where they teach and conduct scholarly research in  
22 the area of immigrant rights. Together, they also direct the Immigrant Rights  
23 Clinic. IRC provides pro bono legal services to clients on immigration,  
24 employment and civil rights matters. Students work under faculty supervisors  
25 who are licensed attorneys. IRC also engages in non-litigation advocacy work and  
26 community education to advance immigrants' rights. For example, IRC has  
27 produced research reports and commentary on immigrants' rights issues, which it  
28

1 makes available to the public at no cost on its website,  
2 [www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html](http://www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html).

3 12. Defendant DHS is a Department of the Executive Branch of the  
4 United States government and an “agency” within the meaning of 5 U.S.C.  
5 § 552(f)(1). DHS is headquartered in Washington, D.C.

6 13. Defendant CBP is a component of DHS and an “agency” within the  
7 meaning of 5 U.S.C. § 552(f)(1). It is headquartered in Washington, D.C. and has  
8 field offices throughout the country.

### 9 **FACTUAL BACKGROUND**

10 14. The incidence of civil rights violations associated with Border  
11 Patrol’s interior enforcement operations, which include interior checkpoints and  
12 “roving patrol” stops, is a matter of pressing public concern. Since 2006, CBP’s  
13 budget has more than doubled, from \$6 billion to \$12.9 billion in Fiscal Year  
14 2014. In the same time period, the U.S. Border Patrol—a sub-agency within  
15 CBP—has nearly doubled in size, from approximately 12,000 agents to over  
16 21,000 agents today.<sup>2</sup> Simultaneously, reports of Border Patrol abuses along the  
17 U.S.-Mexico border and throughout the interior of the United States have  
18 increased.

19 15. DHS oversight agencies have not kept pace with Border Patrol’s  
20 rapid growth and are ill-equipped to provide transparent and effective agency  
21 training, oversight, and accountability for rights violations by agents. That this is  
22 true is evident from these oversight agencies’ failure to respond to allegations of  
23 rights violations in any meaningful way. To cite just one example, the ACLU is  
24 still waiting for a substantive response to a civil rights complaint, filed on May 9,  
25

26 <sup>2</sup> The U.S. Border Patrol “is the mobile, uniformed law enforcement arm of U.S.  
27 Customs and Border Protection within the Department of Homeland Security  
28 responsible for securing U.S. borders between ports of entry.” *See* U.S. Customs  
and Border Protection, *Along U.S. Borders*, <http://1.usa.gov/UIaKFe> (last visited  
Feb. 8, 2015).

2012 with DHS’s Office of Inspector General (“OIG”) and DHS’s Office of Civil Rights and Civil Liberties (“CRCL”), on behalf of eleven individuals reporting various abuses by CBP officials at southern Ports of Entry.<sup>3</sup> Other organizations have reported similar problems.<sup>4</sup>

16. The scope of Border Patrol’s authority to conduct interior enforcement operations is defined by federal statute and regulations, as interpreted by the federal courts and bounded by the Constitution. Border Patrol has authority to conduct certain warrantless stops and seizures within “a reasonable distance” of the border. *See* 8 U.S.C. § 1357(a)(3). That distance is defined by decades-old regulations to be “100 air miles” from any external boundary, including coastal boundaries. *See* 8 C.F.R. § 287.1(b); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 882–83 (1975) (“The only formal 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.”). Today, this encompasses roughly two-thirds of the U.S. population; nine of our ten largest cities; and the entirety of several states.<sup>5</sup>

17. There is little publicly-available information regarding the extent or impact of Border Patrol roving patrol operations, or regarding Border Patrol

<sup>3</sup> *See* ACLU SOUTHERN BORDER AFFILIATES, COMPLAINT AND REQUEST FOR INVESTIGATION, May 9, 2012, *available at* <http://bit.ly/1ru8f49>.

<sup>4</sup> *See generally* AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), *available at* <http://bit.ly/SwNbye>.

<sup>5</sup> States that lie entirely or almost entirely within this area include Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Nine of the ten largest metropolitan areas, as determined by the 2010 U.S. Census, also fall within this zone: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, and San Jose. *See* UNITED STATES CENSUS 2010, INTERACTIVE POPULATION MAP, <http://1.usa.gov/1qF0Wsx> (last visited Feb. 8, 2015); *see also* American Civil Liberties Union, *Know Your Rights: The Government’s 100-Mile “Border” Zone—Map*, <http://bit.ly/1fZZQ0h> (last visited Feb. 8, 2015).



agents' respect for these regulatory limitations on their authority.<sup>6</sup> In Southern California, Border Patrol agents are present throughout a number of both major metropolitan and rural areas a considerable distance from the U.S.-Mexico border. For example, Plaintiffs have received reports of Border Patrol agents stopping farm workers and local residents in Fallbrook, CA (seventy miles north of the U.S.-Mexico border) and in Laguna Beach, CA (almost ninety miles north of the U.S.-Mexico border).

18. For decades, federal judges have expressed concern that such interior operations result in widespread rights violations.<sup>7</sup> Indeed, available evidence suggests that Border Patrol is engaged in unlawful activities throughout the southwest border region and far into the U.S. interior. For example, the ACLU of

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<sup>6</sup> See, e.g., Lorne Matalon, *Texas Court Case Challenges Border Patrol on Roving, Racial Profiling*, KPBS, Nov. 13, 2014, available at <http://bit.ly/1vzDbXd> (“[A] veteran agent’s deposition showed the agent had pulled over work crews far from the border. But the agent said only half the people stopped were arrested. That implies that many U.S. citizens and others with the legal right to live and work in the United States were also stopped.”); Jeremy Schwartz, *Border Patrol Makes Many Arrests Deep in the Heart of Texas*, Austin American-Statesman, Nov. 1, 2014, available at <http://atxne.ws/1yOpDmf> (“In San Angelo, 130 miles from the border, roving patrols constituted the principal activity of agents, according to Border Patrol agent John Finney, whose 2012 deposition in a deportation court case provides a rare description of the agency’s otherwise hidden operations. . . . Finney estimated that ‘a little better than 50 percent’ of stops based on such reasonable suspicion were of undocumented immigrants and so resulted in arrests . . .”).

<sup>7</sup> See, e.g., *United States v. Soyland*, 3 F.3d 1312, 1316, 1320 (9th Cir. 1993) (Kozinski, J., dissenting) (“There’s reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of [*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)] and turns a legitimate administrative search into a massive violation of the Fourth Amendment . . . . Given the strong hints that the Constitution is being routinely violated at these checkpoints, we owe it to ourselves and the public we serve to look into the matter. Even without an order of this court or the district court, the Department of Justice would be 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 searches protects all our residents, whether middle-class and well-dressed or poor and disheveled, from arbitrary stop by governmental enforcement agents in our travel upon the highways of this nation.”).

1 Arizona filed a complaint in October 2013 on behalf of five Arizona residents,  
 2 each of whom was stopped and detained by Border Patrol a considerable distance  
 3 from the border.<sup>8</sup> In one of those cases, agents threatened to cut a woman out of  
 4 her seatbelt in front of her two young children after she questioned the basis for  
 5 the stop. The complaint documented several other instances where individuals  
 6 were removed forcibly from their vehicles and subjected to unauthorized searches.

7 19. Border Patrol does not release stop data or other information related  
 8 to roving patrol operations; what little is publicly known has been revealed  
 9 through litigation and FOIA requests. For example, in September 2013, the  
 10 ACLU of Washington settled a class action lawsuit challenging roving patrol  
 11 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  
 13 obligations under the Fourth Amendment and to share stop data with the ACLU.<sup>9</sup>  
 14 In January 2013, following extensive FOIA litigation, Families for Freedom and  
 15 New York University issued a report disclosing an “incentives program” for  
 16 Border Patrol agents and the agency’s widespread practice of arresting individuals  
 17 lawfully present in the United States.<sup>10</sup> A prior report based on the same FOIA  
 18 request examined thousands of Border Patrol stops aboard public transportation in  
 19

20 <sup>8</sup> See ACLU of Arizona, Administrative Complaint and Request for Investigation of  
 21 Unlawful Roving Patrol Stops by U.S. Border Patrol in Southern Arizona Including  
 22 Unlawful Search and Seizure, Racial Profiling, Trespassing, Excessive Force, and  
 Destruction of Personal Property 2–4 (Oct. 9, 2013), *available at*  
<http://bit.ly/1oOBYEz>.

23 <sup>9</sup> See Complaint, *Sanchez v. U.S. Office of Border Patrol* (W.D. Wa. Apr. 26, 2012)  
 24 (No. 2:12-cv-00735), *available at* <http://bit.ly/N7xtpO>; Settlement Agreement,  
 25 *Sanchez v. U.S. Border Patrol* (W.D. Wa. 2012) (No. 2:12-cv-00735), *available at*  
<http://bit.ly/1j9wUXP>; see also, e.g., 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://wapo.st/1oODDdp>.

26 <sup>10</sup> See FAMILIES FOR FREEDOM & NYU LAW IMMIGRANT RIGHTS CLINIC,  
 27 UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL  
 28 AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS (Jan. 2013),  
*available at* <http://bit.ly/1bjjh8h>.



upstate New York.<sup>11</sup> The vast majority of those stops occurred far from the actual 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.

20. The failure of DHS and CBP 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 roving patrol operations conducted by the largest law enforcement agency in the country.

### FOIA REQUEST

21. As noted, on July 3, 2014, Plaintiffs submitted a FOIA Request to both DHS and CBP, seeking records related to U.S. Border Patrol's "roving patrol" operations in the San Diego and El Centro Sectors, including relevant agency policies, stop data, and complaint records.

22. Plaintiffs sought expedited processing of their Request on the ground that there is a "compelling need" for release of the requested records, because the information therein is urgently needed by organizations primarily engaged in disseminating information to inform the public about actual or alleged federal government activity (that is, CBP's roving patrol policies and practices). *See* 5 U.S.C. § 552(a)(6)(E); *see also* 6 C.F.R. § 5.5(d)(1)(ii).

23. Plaintiffs also sought a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," and disclosure is "not primarily in the commercial interest of the requester." *See* 5 U.S.C. § 552(a)(4)(A)(iii); *see*

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<sup>11</sup> *See* NEW YORK CIVIL LIBERTIES UNION, NYU LAW IMMIGRANT RIGHTS CLINIC, & FAMILIES FOR FREEDOM, JUSTICE DERAILED (Nov. 2011), *available at* <http://bit.ly/N7A03q>.

1 *also* 6 C.F.R. § 5.11(k)(1). Plaintiffs further sought a waiver of search and review  
2 fees on the grounds that the ACLU qualifies as a “representative of the news  
3 media” and the requested records are not sought for commercial use. *See* 5 U.S.C.  
4 § 552(a)(4)(A)(ii); 6 C.F.R. § 5.11(d)(1). Finally, Plaintiffs sought a waiver of  
5 search and review fees on the grounds that Professors Lai and Ashar qualify as  
6 researchers at an educational institution. *See* 6 C.F.R. § 5.11(c)(1)(i), (d)(1); *see*  
7 *also* 6 C.F.R. § 5.11(b)(4) (defining “educational institution”).

8 24. On July 3, 2014, Plaintiffs submitted the Request to DHS via email at  
9 [foia@dhs.gov](mailto:foia@dhs.gov) and to CBP through the agency’s online FOIA request system.

10 25. Also on July 3, 2014, Plaintiffs mailed hard copies of the Request to  
11 DHS and CBP via certified U.S. mail. As noted, true and correct copies of these  
12 mailed requests are attached hereto as Exhibits A and B, and are thereby  
13 incorporated by reference. *See also* Exhibit C (true and correct copies of  
14 Plaintiffs’ certified mail receipts).

15 26. According to the U.S. Postal Service’s tracking system, DHS  
16 received the mailed copy of Plaintiffs’ Request on July 9, 2014. According to the  
17 U.S. Postal Service’s tracking system, CBP also received the mailed copy of  
18 Plaintiffs’ Request on July 9, 2014.

### 19 20 **PROCESSING OF PLAINTIFFS’ FOIA REQUEST**

21 27. On July 3, 2014, CBP sent ACLU-SDIC Staff Attorney Mitra  
22 Ebadolahi an email confirming “[a] request submission to the FOIAonline  
23 application.” The email communicated that CBP deemed the request submitted on  
24 that date, and that CBP had assigned tracking number CBP-2014-035512  
25 [hereinafter, “Tracking No. 1”] to the request. The description of the request  
26 included in the email read “[p]lease see attached FOIA request letter, which  
27  
28

1 includes a request for a fee waiver and for expedited processing,” but no letter was  
2 in fact attached to the email.

3 28. On July 11, 2014, CBP sent Ebadolahi another email confirming “[a]  
4 request submission to the FOIAonline application.” This email indicated that CBP  
5 deemed the request submitted on that date and assigned another tracking number,  
6 CBP-2014-036536 [hereinafter, “Tracking No. 2”], to the request. The description  
7 of the request included in this email read “[d]isclosure of records related to US  
8 Border Patrol’s roving patrol operations in Southern California.”

9 29. At 8:11 a.m. on July 14, 2014, CBP sent Ebadolahi another email  
10 confirming “[a] request submission to the FOIAonline application.” This email  
11 indicated that CBP deemed the request submitted on July 11, 2014 and assigned  
12 another tracking number, CBP-2014-036615 [hereinafter, “Tracking No. 3”]. The  
13 description of the request included in this email read “request [for] records related  
14 to us [sic] border patrol roving patrol operations in south [sic] California as  
15 detailed below,” but no further details were included “below.”

16 30. In a separate email sent at 11:41 a.m. on July 14, 2014, CBP notified  
17 Ebadolahi that Tracking No. 2 had been changed from CBP-2014-036536 to CBP-  
18 OBP-2014-036536.

19 31. On July 16, 2014, CBP notified Ebadolahi via email that CBP-OBP-  
20 2014-036536 had been changed back to Tracking No. 2, that is, CBP-2014-  
21 036536.

22 32. On August 18, 2014, CBP notified Ebadolahi that the request  
23 associated with Tracking No. 1 “has been closed as it is a duplicate of an earlier  
24 FOIA request that you submitted. Your earlier FOIA request will be processed in  
25 the order it was received.” A letter indicating the same was attached as a PDF file  
26 to the email.  
27  
28

1           33. In a separate email on August 18, 2014, CBP notified Ebadolahi that  
2 “[y]our request for [a] Fee Waiver for the FOIA request” associated with Tracking  
3 No. 1 “has been determined to be not applicable as the request is not billable.”

4           34. In another separate email on August 18, 2014, CBP notified  
5 Ebadolahi that the “request for Expedited Processing for the FOIA request”  
6 associated with Tracking No. 1 “is denied because failure to obtain the requested  
7 records will not post an imminent threat to the life or physical safety of an  
8 individual / you are not primarily engaged in disseminating information / there is  
9 not urgency to inform the public about an actual or alleged federal government  
10 activity / you did not certify your request to be true and correct.”

11           35. CBP did not provide any additional information related to Plaintiffs’  
12 request for a fee waiver or Plaintiffs’ request for expedited processing.

13           36. To date, Plaintiffs have received no further correspondence from  
14 CBP pertaining to Tracking No. 2 or Tracking No. 3. In preparation for this  
15 litigation, Plaintiffs’ counsel entered these two tracking numbers into CBP’s  
16 online FOIA request system, and discovered that CBP had marked both “closed”  
17 as “duplicate” requests.

18           37. To date, Plaintiffs have not received any other correspondence from  
19 Defendants on the substance of their FOIA Request, nor have Plaintiffs received  
20 any documents responsive to their Request.

21           38. The twenty-day statutory period to respond to Plaintiffs’ Request  
22 elapsed with no response or determination from either DHS or CBP on whether  
23 they would withhold or disclose any or all of the requested documents in whole or  
24 in part. *See* 5 U.S.C. § 552(a)(6)(A)(i); 6 C.F.R. § 5.6.

25           39. DHS and CBP have neither released any of the requested records nor  
26 explained their failure to do so.  
27  
28

## CLAIMS FOR RELIEF

40. Plaintiffs re-allege and incorporate, as though fully set forth herein, each and every allegation contained in the above paragraphs.

41. Defendants' failure to make a reasonable effort to search for the requested records violates FOIA, 5 U.S.C. § 552(a)(3), and Defendants' corresponding regulations, *see* 6 C.F.R. § 5.4.

42. Defendants' failure to promptly make available the requested records violates FOIA, 5 U.S.C. § 552(a)(6)(A), and Defendants' corresponding regulations, *see* 6 C.F.R. § 5.6.

43. Defendants' failure to grant Plaintiffs' request for a waiver of search, review, and duplication fees as to the Request violates FOIA, 5 U.S.C. § 552(a)(4), and Defendants' corresponding regulations, *see* 6 C.F.R. §§ 5.6(c) and 5.11(k).

44. Defendants' failure to grant Plaintiffs' request for a limitation of fees as to the Request violates FOIA, 5 U.S.C. § 552(a)(4), and Defendants' corresponding regulations, *see* 6 C.F.R. §§ 5.6(c) and 5.11(d).

## REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that Defendants' failure to timely respond to Plaintiffs' FOIA Request; to conduct a reasonable search; to waive or limit search, review, and duplication fees; and/or to disclose the requested records is unlawful;

B. Issue an injunction ordering Defendants to immediately disclose the requested records and to make copies available to Plaintiffs at no charge;

C. Award Plaintiffs costs and reasonable attorneys' fees incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

D. Grant such other relief as the Court may deem just and proper.

1 DATED this 20<sup>th</sup> day of February, 2015.

2  
3 Respectfully submitted,

4  
5 ACLU FOUNDATION OF SAN DIEGO &  
6 IMPERIAL COUNTIES

7 By /s/ Mitra Ebadolahi  
8 Border Litigation Project  
9 Staff Attorney

10 ACLU FOUNDATION OF SOUTHERN  
11 CALIFORNIA

12 Adrienna Wong  
13 Staff Attorney

14 UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL  
15 OF LAW – IMMIGRANT RIGHTS CLINIC

16 Anne Lai  
17 Supervising Attorney

18 *Attorneys for Plaintiffs*  
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# EXHIBIT A

UNIVERSITY OF CALIFORNIA, IRVINE

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO



SANTA BARBARA • SANTACRUZ



*The ACLU's Border Litigation Project investigates, documents, and litigates civil and human rights violations in the U.S.-Mexico border region.*



July 3, 2014

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](mailto:foia@dhs.gov)

*via Email and Certified U.S. Mail*

**RE: Freedom of Information Act Request / Expedited Processing Requested**

To Whom It May Concern:

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and related Department of Homeland Security (“DHS”) implementing regulations, *see* 6 C.F.R. § 5 *et seq.* Requesters seek the disclosure of records related to U.S. Border Patrol’s “roving patrol” operations in Southern California, as detailed below.

**BACKGROUND**

Over the past eight years, 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 fiscal year 2014.<sup>1</sup> During the same period, the number of U.S. Border Patrol agents has ballooned from approximately 12,000 to over 21,000.<sup>2</sup> U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies—more than on all other federal law enforcement combined.<sup>3</sup>

<sup>1</sup> *See* DEP’T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), *available at* <http://1.usa.gov/1bjeofu>.

<sup>2</sup> The U.S. Border Patrol “is the mobile, uniformed law enforcement arm of U.S. Customs and Border Protection within the Department of Homeland Security responsible for securing U.S. borders between ports of entry.” *See* U.S. Customs and Border Protection, Along U.S. Borders, <http://1.usa.gov/UIaKFe> (last visited June 25, 2014).

<sup>3</sup> *See* Doris Meissner *et al.*, MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013), *available at* <http://bit.ly/1ltBfrp>.

One result of these unprecedented expansions has been a tremendous increase in reported Border Patrol abuses, both along the physical border and throughout the interior of the United States.<sup>4</sup> Many communities have reported Border Patrol “roving patrols,” whereby Border Patrol agents stop individual motorists, pedestrians, public transportation customers, and even landowners on private property, far from any actual border and without reasonable suspicion of unlawful activity.

CBP claims authority to conduct warrantless stops and seizures within a “reasonable distance” of the border.<sup>5</sup> Outdated regulations define that distance as “100 air miles” from any external boundary, including coastal boundaries.<sup>6</sup> Today, this encompasses roughly two-thirds of the U.S. population and the entirety of several states.<sup>7</sup> Border Patrol often ignores even this limitation, roaming still further into the interior of the country.<sup>8</sup> In Southern California, this means that Border Patrol agents are present throughout a number of metropolitan and densely populated areas a considerable distance from the U.S.-Mexico border.

Available evidence suggests that Border Patrol is engaged in widespread unlawful activities throughout the southwest border region and far into the U.S. interior. For example, the ACLU of Arizona filed a complaint in October 2013 on behalf of five Arizona residents, each of whom was stopped and detained by Border Patrol far from the border.<sup>9</sup> 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:

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<sup>4</sup> From 2004 through 2011, as the ranks of agents doubled to more than 21,000, the number of CBP-related complaints 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://1.usa.gov/1c1ASN8>. Given the many problems with the DHS complaint system, it is likely that incidents of abuse are substantially under-reported. *See, e.g.*, AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), *available at* <http://bit.ly/SwNbye>.

<sup>5</sup> 8 U.S.C. § 1357(a)(3).

<sup>6</sup> 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 public history as to why the Justice Department chose this figure.

<sup>7</sup> States that lie entirely or almost entirely within this area include Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Nine of the ten largest metropolitan areas, as determined by the 2010 U.S. Census, also fall within this zone: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, and San Jose. *See* United States Census 2010, Interactive Population Map, <http://1.usa.gov/1qF0Wsx> (last visited June 25, 2014); *see also* American Civil Liberties Union, Know Your Rights: “Constitution Free Zone”—Map, <http://bit.ly/1fZZQ0h> (last visited June 25, 2014).

<sup>8</sup> *See, e.g.*, Todd Miller, *War on the Border*, N.Y. TIMES, Aug. 18, 2013, *available at* <http://nyti.ms/1bjgk7R> (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://alj.am/1cWPDkz> (“[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.’”).

<sup>9</sup> *See* ACLU of Arizona, Administrative Complaint and Request for Investigation of Unlawful Roving Patrol Stops by U.S. Border Patrol in Southern Arizona Including Unlawful Search and Seizure, Racial Profiling, Trespassing, Excessive Force, and Destruction of Personal Property (Oct. 9, 2013), *available at* <http://bit.ly/1oOBYEz>.

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 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.

*Id.* Earlier in 2013, a New York Times Op-Ed profiled Arizona rancher Stuart Loew, who was detained on his ranch while Border Patrol agents demanded identification.<sup>10</sup> 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."<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> In March 2014, the ACLU of Washington received the first batch of stop data, consisting of Field Contact Data Sheets ("FCDS") issued by Border Patrol agents. The data indicated a significant reduction in Border Patrol roving patrols on the Olympic Peninsula as a result of the ACLU's litigation.

In January 2013, following extensive FOIA litigation, Families for Freedom and New York University issued a report disclosing an "incentives program" for Border Patrol agents and the agency's widespread practice of arresting individuals lawfully present in the United States.<sup>14</sup> The report noted:

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

<sup>10</sup> Todd Miller, *War on the Border*, N.Y. TIMES, Aug. 18, 2013, available at <http://nyti.ms/1bjgk7R>.

<sup>11</sup> Michel Marizco, *Living Life Under Federal Watch On The Border*, NPR, Aug. 5, 2013, available at <http://bit.ly/1gfpGid>.

<sup>12</sup> See Complaint, *Sanchez v. U.S. Office of Border Patrol* (W.D. Wa. Apr. 26, 2012) (No. 2:12-cv-00735), available at <http://bit.ly/N7xtpO>; 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://wapo.st/1oODDdp>.

<sup>13</sup> See Settlement Agreement, *Sanchez v. U.S. Border Patrol* (W.D. Wa. 2012) (No. 2:12-cv-00735), available at <http://bit.ly/1j9wUXP>.

<sup>14</sup> See FAMILIES FOR FREEDOM & NYU LAW IMMIGRANT RIGHTS CLINIC, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED 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 those records. The report 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.

*Id.* at iv.

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.

*Id.* at v. A prior report based on the same FOIA request examined thousands of Border Patrol stops aboard public transportation in upstate New York.<sup>15</sup> The vast majority of those stops did not target recent border-crossers and occurred far from the border, with only one percent resulting in the 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.<sup>16</sup>

Roving patrol abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within DHS, CBP, and the U.S. Border Patrol itself. The Border Patrol lowered its training and admissions standards to take on a large number of new agents between 2005 and 2012.<sup>17</sup> 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.<sup>18</sup> Recently, the American Immigration Council released a damning report finding that, of 809 abuse complaints filed against Border Patrol agents between January 2009 and January 2012, ninety-seven percent resulted in "no action taken."<sup>19</sup> Thus, although 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 federal law enforcement agency in the country.

## REQUESTERS

The ACLU is a national, non-partisan organization of more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide. The ACLU is dedicated to the defense of civil rights and civil liberties and to holding the U.S. government

<sup>15</sup> See NEW YORK CIVIL LIBERTIES UNION, NYU LAW IMMIGRANT RIGHTS CLINIC, & FAMILIES FOR FREEDOM, JUSTICE DERAILED (Nov. 2011), available at <http://bit.ly/N7A03q>.

<sup>16</sup> See, e.g., *id.* at 1–3.

<sup>17</sup> See, e.g., Andrew Becker, *On Polygraph Tests, Would-Be Border Patrol Agents Confess to Crimes*, The Daily Beast, Apr. 4, 2013, <http://thebea.st/1yFZUPu> ("It took almost five years, however, for Customs and Border Protection to require all applicants to take a polygraph. In that time, the agency continued to hire potentially flawed candidates."); Rob O'Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, available at <http://bit.ly/1cnqDGg> ("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.").

<sup>18</sup> 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, and CRCL's budget increased only 56 percent. Overall, the combined budget of the OIG and CRCL accounted for less than 0.005 percent of the total DHS budget in FY 2011. See DEPT OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2004 ANNUAL PERFORMANCE PLAN 6 (2004), available at <http://1.usa.gov/1fwEEik>; DEPT OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF 6 (2013), available at <http://1.usa.gov/1bjeofu>; DEPT OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2011 AND ANNUAL REPORT TO CONGRESS 6 (June 2012), available at <http://1.usa.gov/1feQxNw>.

<sup>19</sup> See AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), available at <http://bit.ly/SwNbye>.



accountable to principles of due process and of the U.S. Constitution in general. The ACLU of San Diego & Imperial Counties ("ACLU-SDIC") is the ACLU's San Diego affiliate. The ACLU of Southern California ("ACLU-So Cal"), another ACLU affiliate, serves Los Angeles, Orange, San Bernardino and Riverside Counties.

Professors Annie Lai and Sameer Ashar teach at the University of California, Irvine School of Law. Together, they direct the Immigrant Rights Clinic ("IRC"). IRC provides pro bono legal services to clients on immigration, employment and civil rights matters. Students work under faculty supervisors who are licensed attorneys. IRC also engages in non-litigation advocacy work and community education to advance immigrants' rights. For example, IRC has produced reports and commentary on immigrants' rights issues, which it makes available to the public at no cost on its website, [www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html](http://www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html). Most recently, IRC published a report on the harms of probation officials' referral of juveniles to immigration authorities for deportation in Orange County, California and held a widely-attended news briefing on the issue.

### RECORDS REQUESTED

Requesters seek disclosure of U.S. Border Patrol records<sup>20</sup> pertaining to "roving patrol" operations in the San Diego Sector and El Centro Sector, construed to include any field operations involving roving vehicle or pedestrian stops by Border Patrol agents (including any allegedly consensual encounters), as well as any related records held by CBP or other agencies within DHS for these two Border Patrol sectors.<sup>21</sup> Requesters seek all records from January 2011 to the present, to include at least the following:

1. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures pertaining to roving patrol operations generally;
2. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures pertaining to all searches and seizures (including arrests) made pursuant to roving patrol operations;
3. 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 San Diego Sector and El Centro Sector;

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<sup>20</sup> 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/or studies.

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

<sup>21</sup> San Diego Sector includes Imperial Beach Station, Brown Field Station, Campo Station, San Clemente Station, El Cajon Station, Murrieta Station, Chula Vista Station, and Boulevard Station. El Centro Sector includes El Centro Station, Calexico Station, Riverside Station, and Indio Station. *See* U.S. Customs and Border Protection, Border Patrol Sectors, <http://1.usa.gov/1lxfAT> (last visited June 25, 2014).



4. Organizational charts, diagrams, or schematics pertaining to roving patrol operations in San Diego Sector and El Centro Sector, including charts reflecting agency leadership structures or individuals involved in decisionmaking related to roving patrol operations;
5. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures or other records pertaining to Border Patrol's authority to conduct roving patrol stops based on alleged or actual violations of local or state law, including traffic laws, in San Diego Sector and El Centro Sector;
6. Communications, agreements, or any other records related to state or local law enforcement involvement in roving patrol operations in San Diego Sector and El Centro Sector;
7. Records regarding any individual questioned, stopped, searched, detained, and/or arrested in roving patrol operations in San Diego Sector and El Centro Sector, including but not limited to:
  - a. Field Contact Data Sheets;
  - b. Forms I-247 (DHS "Immigration Detainer—Notice of Action");
  - c. Forms I-213 ("Record of Deportable Alien");
  - d. Forms I-286 ("Application for a Stay of Deportation or Removal");
  - e. Forms I-44 ("Report of Apprehension or Seizure");
  - f. Forms I-862 ("Notice to Appear");
  - g. Forms I-826 ("Notice of Rights and Request for Disposition"); and
  - h. Forms I-210 ("Voluntary Departure and Verification of Departure").
8. For each of the years 2011, 2012, 2013, and 2014, for both San Diego Sector and El Centro Sector, records relating to and/or containing information sufficient to show:
  - a. the total number of roving patrol **stops** made by U.S. Border Patrol agents;
  - b. the total number of roving patrol stops resulting in **searches**;
  - c. the total number of roving patrol stops resulting in **arrest**, as well as the disposition of each such arrest (*e.g.*, Notice to Appear; Voluntary Return; criminal charges and resolution thereof, etc.);
  - d. the citizenship of each individual **stopped** in the course of a roving patrol;
  - e. the citizenship of each individual **searched** in the course of a roving patrol;
  - f. the citizenship of each individual **arrested** in the course of a roving patrol;
  - g. the apparent race or ethnicity of each individual **stopped** in the course of a roving patrol;
  - h. the apparent race or ethnicity of each individual **searched** in the course of a roving patrol;
  - i. the apparent race or ethnicity of each individual **arrested** in the course of a roving patrol;
  - j. the location of each roving patrol **stop**,<sup>22</sup>
  - k. the location of each roving patrol stop resulting in a **search**;
  - l. the location of each roving patrol stop resulting in any **arrest**;
  - m. the type of each roving patrol **stop** (*e.g.*, entry onto private land, pedestrian encounter, vehicle stop, or public transportation stop (train, trolley, bus, etc.));
  - n. the type of each roving patrol stop resulting in a **search** (*e.g.*, entry onto private land, pedestrian encounter, vehicle stop, or public transportation stop (train, trolley, bus, etc.));

<sup>22</sup> To the extent materials exist that document such information in various formats (*e.g.*, databases or other compilations of information based on, for example, city, county, sector, and/or zip code), such materials are included in this Request.

- o. 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, trolley, bus, etc.));
  - p. the date of each roving patrol **stop**;
  - q. the date of each roving patrol stop resulting in a **search**;
  - r. the date of each roving patrol stop resulting in any **arrest**;
  - s. the number of agents involved in each roving patrol **stop**;
  - t. the number of agents involved in any **search** in the course of a roving patrol, and whether a search involved one or more canines;
  - u. the number of agents involved in any **arrest** in the course of a roving patrol;
  - v. the basis for all stops **resulting in arrest**, including stops initiated by any state or local law enforcement agency;
  - w. the basis for all stops **not resulting in arrest**, including stops initiated by any state or local law enforcement agency;
  - x. the Border Patrol agent(s) and/or CBP officer(s) involved in determining whether reasonable suspicion or probable cause existed to justify each stop, and whether the reviewing agent(s)/officer(s) was or were the same as the agent(s)/officer(s) who initiated the stop under review;
  - y. the date, time, and location of any roving patrol that was the subject of any complaint, internal or external investigation, civil litigation, and/or a motion to suppress; the basis of the complaint, investigation, or civil or criminal court proceedings; and the status and/or outcome of any such complaint, investigation, or civil or criminal court proceedings.
9. Any complaints received by any Border Patrol, CBP, or DHS official or agency from any person, organization, agency, tribal government, consular official, or any other entity, whether verbal or written, related to roving patrol operations in San Diego Sector and/or El Centro Sector, as well as any communications regarding and responses to any such complaints; AND
10. All disciplinary records resulting from any alleged agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules or regulations related to roving patrol operations in San Diego Sector and/or El Centro Sector.

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.

### **REQUEST FOR EXPEDITED PROCESSING**

Requesters seek expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d)(1)(ii) ("Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve: . . . (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.").

#### **A. The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.**

Dissemination of information to the public about actual or alleged government activity is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU

publishes a continuously updated blog, newsletters, news briefings, “Know Your Rights” documents, and other educational and informational materials that are broadly disseminated to the public.<sup>23</sup> Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through the ACLU’s public education department and website.

The ACLU’s national website ([www.aclu.org](http://www.aclu.org)) and the sites run by the ACLU-SDIC ([www.aclusandiego.org](http://www.aclusandiego.org)) and the ACLU-So Cal ([www.aclusocal.org](http://www.aclusocal.org)) address civil rights and civil liberties issues in depth, provide features on civil rights and civil liberties issues in the news, and contain many thousands of documents relating to the issues on which the ACLU is focused. These websites also include features highlighting information obtained through the FOIA process.<sup>24</sup>

In addition, the ACLU publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events; this publication is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements.”).

The ACLU also regularly publishes books, “Know Your Rights” publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties). The ACLU further disseminates information to the public via social media platforms such as Facebook and Twitter.

Depending on the results of this request, the ACLU plans to “disseminate the information” it receives “among the public” through these kinds of publications in these kinds of channels. The ACLU is therefore an organization “primarily engaged in disseminating information” within the meaning of the statute and the relevant regulations—as has been previously recognized in FOIA litigation between the ACLU and the Department of Justice. *See, e.g., ACLU v. Department of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that

<sup>23</sup> *See, e.g.*, Dan Gillmor, *In Praise of the Almost-Journalists*, Slate (Mar. 28, 2014, 12:29 PM), <http://slate.me/1jg5YXx> (describing ACLU’s efforts to broadly disseminate important civil rights-related news stories) (last visited July 2, 2014).

<sup>24</sup> *See, e.g.*, <http://www.thetorturedatabase.org>; <http://www.aclu.org/mappingthefbi>; *see also, e.g.*, Press Release, ACLU of San Diego & Imperial Counties, CBP Releases Report, New Training Handbook (May 22, 2014), <http://www.aclusandiego.org/radio-silence-border-patrol-use-force-policies-leads-lawsuit/> (last visited July 2, 2014).

“gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information”) (internal citation omitted).

**B. The records sought are urgently needed to inform the public about actual or alleged government activity.**

The records requested are urgently needed to inform the public about actual or alleged government activity, specifically, U.S. Border Patrol’s roving patrol policies and practices throughout Southern California. The public has and continues to manifest an abiding interest in Border Patrol’s conduct with respect to roving patrols, as well as in CBP’s overall accountability for misconduct and abuse and the transparency of internal agency investigations into alleged misconduct. Between 2004 and 2011, complaints involving CBP officers nearly tripled, with the majority of these grievances involving allegations of excessive force and discrimination.<sup>25</sup> 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. Likewise, Border Patrol roving patrol operations have attracted considerable media coverage and public attention in recent months.<sup>26</sup>

A delayed response to this Request would compromise a significant public interest because it would prevent the public from being able to engage in a timely, thoughtful debate about Border Patrol activities at a time when documented cases of Border Patrol abuses—including roving patrol abuses—are increasing. In light of the foregoing, expedited processing of this Request is warranted under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d)(ii).

**REQUEST FOR LIMITATION OR WAIVER OF SEARCH AND REVIEW FEES**

Requesters further seek a limitation or waiver of processing (search and review) fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . . .”); 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”). *See also* 6 C.F.R. § 5.11(d)(1) (search fees shall not be charged “for requests by educational institutions . . . or representatives of the news media”); § 5.11(k)(1) (“Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines,

<sup>25</sup> *See* DEP’T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED (2011–2012), *available at* <http://1.usa.gov/1c1ASN8>; DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED (2004–2010), *available at* <http://1.usa.gov/1mstOl6>.

<sup>26</sup> *See, e.g.*, Rob O’Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, *available at* <http://bit.ly/1cnqDGg>; Bob Ortega, *Border Patrol Hit With Abuse Complaints*, USA TODAY, Oct. 9, 2013, *available at* <http://bit.ly/1nccCN3>; Manuel Valdes, *U.S. Border Patrol Settles Racial Profiling Case, Will Share Stop Records*, WASHINGTON TIMES, Sept. 24, 2013, *available at* <http://bit.ly/1ig4pew>; Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, *available at* <http://nyti.ms/1lz83L6>; Michel Marizco, *Living Life Under Federal Watch On The Border*, FRONTERAS DESK, Aug. 5, 2013, *available at* <http://bit.ly/1gfpGid>; Perla Trevizo, *Hiker Wants Ariz. Park Ranger Fired Over Search*, ARIZONA DAILY STAR, May 20, 2013, *available at* <http://bit.ly/1smnr7h>; *see also* David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 Scholar 553 (2012), *available at* <http://bit.ly/1smmDPZ>.



based on all available information, that the requester has demonstrated that (i) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) disclosure of the information is not primarily in the commercial interest of the requester.”).

**A. Release of the requested records is in the public interest.**

The records requested will contribute significantly to public understanding of the government’s operations or activities. Under 6 C.F.R. § 5.11(k)(2), the following factors are to be considered in determining whether a disclosure is in the public interest: (i) whether the subject of the requested records concerns “the operations or activities of the government”; (ii) whether the disclosure is “likely to contribute” to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to “public understanding,” that is, “the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) whether disclosure is likely to contribute “significantly” to public understanding of government operations or activities. *See* 6 C.F.R. § 5.11(k)(2)(i)–(iv). Each of these considerations is satisfied here.

First, the records requested pertain directly to the operations and activities of the federal government (specifically, CBP and one of its subcomponents, the U.S. Border Patrol).

Second, this Request is “likely to contribute” to an understanding of government operations or activities, specifically by helping the public determine whether individuals encountered, apprehended, and/or detained by the U.S. Border Patrol are treated in a manner that comports with our Constitution and other federal laws, and whether CBP personnel are properly investigated and held accountable when they fail to respect those laws.

Third, disclosure of the requested information will contribute to “the understanding of a reasonably broad audience of persons interested in the subject” of U.S. Border Patrol roving patrols. Professors Lai and Ashar intend to rely on responsive documents in their teaching, research and/or advocacy as clinical law faculty, and the ACLU will publish responsive records and analyze specific documents to raise public awareness of roving patrols generally.

Finally, disclosure will contribute “significantly” to the public understanding of Border Patrol’s roving patrol operations. Roving patrol abuses have been the subject of substantial litigation and media attention, yet much remains unknown about these patrols and their impact on the public.

Requesters have thus established, “with reasonable specificity[,] that [their] request pertains to operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government.” *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 107–109 (D.D.C. 2006).

**B. Disclosure of the information requested is not in Requesters’ commercial interest.**

Disclosure of the information requested is not in the commercial interest of either the ACLU or IRC. Any information obtained as a result of this FOIA request will be made available to the public at no cost.

**C. The ACLU qualifies as a representative of the news media.**

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “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. § 552(a)(4)(A)(ii)(II); *see also National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. American Civil Liberties Union v. Department 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”). The ACLU is a “representative of the news media” for the same reasons that it is “primarily engaged in the dissemination of information.” *See Electronic Privacy Information Center*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for FOIA purposes).<sup>27</sup> Various federal courts have held that the ACLU is a “representative of the news media.” *See, e.g., Serv. Women’s Action Network v. Department of Defense*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at \*3 (D. Conn. May 14, 2012); *American Civil Liberties Union of Washington v. Department of Justice*, No. C09–0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

**D. Professors Lai and Ashar are researchers at an educational institution.**

Both Professors Lai and Ashar qualify as researchers at an educational institution as that phrase is defined under the Freedom of Information Act and its implementing regulations. *See* 6 C.F.R. § 5.11(c)(1)(i), (d)(1); *see also* § 5.11(b)(4) (defining educational institution to include “an institution of professional education . . . that operates a program of scholarly research”). Professors Lai and Ashar are faculty at UCI School of Law and teach and conduct research in the area of immigrant rights. They seek the requested records not for any commercial use but rather to further the institution’s scholarly research goals. *See* 6 C.F.R. § 5.11(b)(4); *see also Sack v. Department of Defense*, 12-CV-1754 (RLW), 2013 WL 6640776, at \*10 (D.D.C. Dec. 13, 2013) (“[A] request from a professor of geology at a State university for records relating to soil erosion, written on letterhead of the Department of Geology, could be presumed to be from an educational institution.” (quoting

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<sup>27</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.



OMB Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,014 (Mar. 27, 1987))).

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For the foregoing reasons, a fee waiver or limitation should be granted. A fee waiver would also fulfill Congress's legislative intent in amending FOIA, namely to ensure that the Act is liberally construed in favor of granting waivers for noncommercial requesters and to effectuate disclosure of documents of public importance. 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." (internal quotation marks and citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that "disclosure, not secrecy, is the dominant objective of the Act," quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1992)).

Should a total waiver be denied, fees should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II). In the event a fee waiver or reduction of costs is denied, please notify us in advance if the anticipated costs associated with this Request exceed \$100.00.

### CONCLUSION

Pursuant to the applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4).

We further expect your reply to the Request itself within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i). If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material.

We reserve the right to appeal a decision to withhold any information, or to deny expedited processing or a waiver of fees.

Please furnish the requested records to:  
ACLU of San Diego & Imperial Counties  
**c/o Mitra Ebadolahi**  
P.O. Box 87131  
San Diego, CA 92138  
mcbadolahi@aclusandiego.org

I hereby certify that the foregoing is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(d)(3). Thank you for your prompt attention to this matter.

Sincerely,



Mitra Ebadolahi  
Staff Attorney  
ACLU-SDIC

Lucero Chavez  
Immigrant Rights Attorney  
ACLU-So Cal (Orange County)

Annie Lai  
Assistant Clinical Professor of Law  
UC Irvine School of Law

Sameer Ashar  
Clinical Professor of Law  
UC Irvine School of Law

# EXHIBIT B



July 3, 2014

U.S. Customs & Border Protection  
FOIA Officer/Public Liaison  
Sabrina Burroughs  
90 K Street NE, 9th Floor  
Washington, D.C. 20229-1181  
Phone: 202-325-0150  
Fax: 202-325-0230

*via Certified U.S. Mail and FOIA Online*

**RE: Freedom of Information Act Request / Expedited Processing Requested**

To Whom It May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and related Department of Homeland Security ("DHS") implementing regulations, *see* 6 C.F.R. § 5 *et seq.* Requesters seek the disclosure of records related to U.S. Border Patrol's "roving patrol" operations in Southern California, as detailed below.

**BACKGROUND**

Over the past eight years, 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 fiscal year 2014.<sup>1</sup> During the same period, the number of U.S. Border Patrol agents has ballooned from approximately 12,000 to over 21,000.<sup>2</sup> U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies—more than on all other federal law enforcement combined.<sup>3</sup>

One result of these unprecedented expansions has been a tremendous increase in reported Border Patrol abuses, both along the physical border and throughout the interior of the United

<sup>1</sup> *See* DEP'T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), *available at* <http://1.usa.gov/1bjeofu>.

<sup>2</sup> The U.S. Border Patrol "is the mobile, uniformed law enforcement arm of U.S. Customs and Border Protection within the Department of Homeland Security responsible for securing U.S. borders between ports of entry." *See* U.S. Customs and Border Protection, Along U.S. Borders, <http://1.usa.gov/UIaKFe> (last visited June 25, 2014).

<sup>3</sup> *See* Doris Meissner *et al.*, MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013), *available at* <http://bit.ly/1tBfrp>.

States.<sup>4</sup> Many communities have reported Border Patrol “roving patrols,” whereby Border Patrol agents stop individual motorists, pedestrians, public transportation customers, and even landowners on private property, far from any actual border and without reasonable suspicion of unlawful activity.

CBP claims authority to conduct warrantless stops and seizures within a “reasonable distance” of the border.<sup>5</sup> Outdated regulations define that distance as “100 air miles” from any external boundary, including coastal boundaries.<sup>6</sup> Today, this encompasses roughly two-thirds of the U.S. population and the entirety of several states.<sup>7</sup> Border Patrol often ignores even this limitation, roaming still further into the interior of the country.<sup>8</sup> In Southern California, this means that Border Patrol agents are present throughout a number of metropolitan and densely populated areas a considerable distance from the U.S.-Mexico border.

Available evidence suggests that Border Patrol is engaged in widespread unlawful activities throughout the southwest border region and far into the U.S. interior. For example, the ACLU of Arizona filed a complaint in October 2013 on behalf of five Arizona residents, each of whom was stopped and detained by Border Patrol far from the border.<sup>9</sup> 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

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<sup>4</sup> From 2004 through 2011, as the ranks of agents doubled to more than 21,000, the number of CBP-related complaints 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://1.usa.gov/1c1ASN8>. Given the many problems with the DHS complaint system, it is likely that incidents of abuse are substantially under-reported. *See, e.g.*, AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), *available at* <http://bit.ly/SwNbye>.

<sup>5</sup> 8 U.S.C. § 1357(a)(3).

<sup>6</sup> 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 public history as to why the Justice Department chose this figure.

<sup>7</sup> States that lie entirely or almost entirely within this area include Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Nine of the ten largest metropolitan areas, as determined by the 2010 U.S. Census, also fall within this zone: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, and San Jose. *See* United States Census 2010, Interactive Population Map, <http://1.usa.gov/1qF0Wsx> (last visited June 25, 2014); *see also* American Civil Liberties Union, Know Your Rights: “Constitution Free Zone”—Map, <http://bit.ly/1fZZQ0h> (last visited June 25, 2014).

<sup>8</sup> *See, e.g.*, Todd Miller, *War on the Border*, N.Y. TIMES, Aug. 18, 2013, *available at* <http://nyti.ms/1bjgk7R> (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://alj.am/1cWPDkz> (“[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.’”).

<sup>9</sup> *See* ACLU of Arizona, Administrative Complaint and Request for Investigation of Unlawful Roving Patrol Stops by U.S. Border Patrol in Southern Arizona Including Unlawful Search and Seizure, Racial Profiling, Trespassing, Excessive Force, and Destruction of Personal Property (Oct. 9, 2013), *available at* <http://bit.ly/1oOBYEz>.

Tucson as well as 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.

*Id.* Earlier in 2013, a New York Times Op-Ed profiled Arizona rancher Stuart Loew, who was detained on his ranch while Border Patrol agents demanded identification.<sup>10</sup> 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."<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> In March 2014, the ACLU of Washington received the first batch of stop data, consisting of Field Contact Data Sheets ("FCDS") issued by Border Patrol agents. The data indicated a significant reduction in Border Patrol roving patrols on the Olympic Peninsula as a result of the ACLU's litigation.

In January 2013, following extensive FOIA litigation, Families for Freedom and New York University issued a report disclosing an "incentives program" for Border Patrol agents and the agency's widespread practice of arresting individuals lawfully present in the United States.<sup>14</sup> The report noted:

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

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<sup>10</sup> Todd Miller, *War on the Border*, N.Y. TIMES, Aug. 18, 2013, available at <http://nyti.ms/1bjgk7R>.

<sup>11</sup> Michel Marizco, *Living Life Under Federal Watch On The Border*, NPR, Aug. 5, 2013, available at <http://bit.ly/1gfpGid>.

<sup>12</sup> See Complaint, *Sanchez v. U.S. Office of Border Patrol* (W.D. Wa. Apr. 26, 2012) (No. 2:12-cv-00735), available at <http://bit.ly/N7xtpO>; 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://wapo.st/1oODDdp>.

<sup>13</sup> See Settlement Agreement, *Sanchez v. U.S. Border Patrol* (W.D. Wa. 2012) (No. 2:12-cv-00735), available at <http://bit.ly/1j9wUXP>.

<sup>14</sup> See FAMILIES FOR FREEDOM & NYU LAW IMMIGRANT RIGHTS CLINIC, UNCOVERING USBP: INCENTIVES PROGRAMS FOR UNITED 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 those records. The report 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.

*Id.* at iv.



law might require noncitizens to carry. Instead, USBP's demand for "papers" is universal, resulting in an enforcement culture that maximizes arrest rates.

*Id.* at v. A prior report based on the same FOIA request examined thousands of Border Patrol stops aboard public transportation in upstate New York.<sup>15</sup> The vast majority of those stops did not target recent border-crossers and occurred far from the border, with only one percent resulting in the 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.<sup>16</sup>

Roving patrol abuses are exacerbated by inadequate training, oversight, and accountability mechanisms, as well as a persistent lack of transparency within DHS, CBP, and the U.S. Border Patrol itself. The Border Patrol lowered its training and admissions standards to take on a large number of new agents between 2005 and 2012.<sup>17</sup> 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.<sup>18</sup> Recently, the American Immigration Council released a damning report finding that, of 809 abuse complaints filed against Border Patrol agents between January 2009 and January 2012, ninety-seven percent resulted in "no action taken."<sup>19</sup> Thus, although 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 federal law enforcement agency in the country.

## REQUESTERS

The ACLU is a national, non-partisan organization of more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide. The ACLU is dedicated to the defense of civil rights and civil liberties and to holding the U.S. government accountable to principles of due process and of the U.S. Constitution in general. The ACLU of San Diego & Imperial Counties ("ACLU-SDIC") is the ACLU's San Diego affiliate. The ACLU of

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<sup>15</sup> See NEW YORK CIVIL LIBERTIES UNION, NYU LAW IMMIGRANT RIGHTS CLINIC, & FAMILIES FOR FREEDOM, JUSTICE DERAILED (Nov. 2011), available at <http://bit.ly/N7A03q>.

<sup>16</sup> See, e.g., *id.* at 1–3.

<sup>17</sup> See, e.g., Andrew Becker, *On Polygraph Tests, Would-Be Border Patrol Agents Confess to Crimes*, The Daily Beast, Apr. 4, 2013, <http://thebea.st/1yFZUPu> ("It took almost five years, however, for Customs and Border Protection to require all applicants to take a polygraph. In that time, the agency continued to hire potentially flawed candidates."); Rob O'Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, available at <http://bit.ly/1cnqDGg> ("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.").

<sup>18</sup> 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, and CRCL's budget increased only 56 percent. Overall, the combined budget of the OIG and CRCL accounted for less than 0.005 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://1.usa.gov/1fwEEik>; DEP'T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF 6 (2013), available at <http://1.usa.gov/1bjeofu>; 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://1.usa.gov/1feQxNw>.

<sup>19</sup> See AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), available at <http://bit.ly/SwNbye>.

Southern California (“ACLU-So Cal”), another ACLU affiliate, serves Los Angeles, Orange, San Bernardino and Riverside Counties.

Professors Annie Lai and Sameer Ashar teach at the University of California, Irvine School of Law. Together, they direct the Immigrant Rights Clinic (“IRC”). IRC provides pro bono legal services to clients on immigration, employment and civil rights matters. Students work under faculty supervisors who are licensed attorneys. IRC also engages in non-litigation advocacy work and community education to advance immigrants’ rights. For example, IRC has produced reports and commentary on immigrants’ rights issues, which it makes available to the public at no cost on its website, [www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html](http://www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html). Most recently, IRC published a report on the harms of probation officials’ referral of juveniles to immigration authorities for deportation in Orange County, California and held a widely-attended news briefing on the issue.

### RECORDS REQUESTED

Requesters seek disclosure of U.S. Border Patrol records<sup>20</sup> pertaining to “roving patrol” operations in the San Diego Sector and El Centro Sector, construed to include any field operations involving roving vehicle or pedestrian stops by Border Patrol agents (including any allegedly consensual encounters), as well as any related records held by CBP or other agencies within DHS for these two Border Patrol sectors.<sup>21</sup> Requesters seek all records from January 2011 to the present, to include at least the following:

1. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures pertaining to roving patrol operations generally;
2. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures pertaining to all searches and seizures (including arrests) made pursuant to roving patrol operations;
3. 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 San Diego Sector and El Centro Sector;
4. Organizational charts, diagrams, or schematics pertaining to roving patrol operations in San Diego Sector and El Centro Sector, including charts reflecting agency leadership structures or individuals involved in decisionmaking related to roving patrol operations;

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<sup>20</sup> 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/or studies.

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

<sup>21</sup> San Diego Sector includes Imperial Beach Station, Brown Field Station, Campo Station, San Clemente Station, El Cajon Station, Murrieta Station, Chula Vista Station, and Boulevard Station. El Centro Sector includes El Centro Station, Calexico Station, Riverside Station, and Indio Station. See U.S. Customs and Border Protection, Border Patrol Sectors, <http://1.usa.gov/1lxpfAT> (last visited June 25, 2014).

5. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials and presentations, and any other written policies or procedures or other records pertaining to Border Patrol's authority to conduct roving patrol stops based on alleged or actual violations of local or state law, including traffic laws, in San Diego Sector and El Centro Sector;
6. Communications, agreements, or any other records related to state or local law enforcement involvement in roving patrol operations in San Diego Sector and El Centro Sector;
7. Records regarding any individual questioned, stopped, searched, detained, and/or arrested in roving patrol operations in San Diego Sector and El Centro Sector, including but not limited to:
  - a. Field Contact Data Sheets;
  - b. Forms I-247 (DHS "Immigration Detainer—Notice of Action");
  - c. Forms I-213 ("Record of Deportable Alien");
  - d. Forms I-286 ("Application for a Stay of Deportation or Removal");
  - e. Forms I-44 ("Report of Apprehension or Seizure");
  - f. Forms I-862 ("Notice to Appear");
  - g. Forms I-826 ("Notice of Rights and Request for Disposition"); and
  - h. Forms I-210 ("Voluntary Departure and Verification of Departure").
8. For each of the years 2011, 2012, 2013, and 2014, for both San Diego Sector and El Centro Sector, records relating to and/or containing information sufficient to show:
  - a. the total number of roving patrol **stops** made by U.S. Border Patrol agents;
  - b. the total number of roving patrol stops resulting in **searches**;
  - c. the total number of roving patrol stops resulting in **arrest**, as well as the disposition of each such arrest (*e.g.*, Notice to Appear; Voluntary Return; criminal charges and resolution thereof, etc.);
  - d. the citizenship of each individual **stopped** in the course of a roving patrol;
  - e. the citizenship of each individual **searched** in the course of a roving patrol;
  - f. the citizenship of each individual **arrested** in the course of a roving patrol;
  - g. the apparent race or ethnicity of each individual **stopped** in the course of a roving patrol;
  - h. the apparent race or ethnicity of each individual **searched** in the course of a roving patrol;
  - i. the apparent race or ethnicity of each individual **arrested** in the course of a roving patrol;
  - j. the location of each roving patrol **stop**;<sup>22</sup>
  - k. the location of each roving patrol stop resulting in a **search**;
  - l. the location of each roving patrol stop resulting in any **arrest**;
  - m. the type of each roving patrol **stop** (*e.g.*, entry onto private land, pedestrian encounter, vehicle stop, or public transportation stop (train, trolley, bus, etc.));
  - n. the type of each roving patrol stop resulting in a **search** (*e.g.*, entry onto private land, pedestrian encounter, vehicle stop, or public transportation stop (train, trolley, bus, etc.));
  - o. 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, trolley, bus, etc.));
  - p. the date of each roving patrol **stop**;
  - q. the date of each roving patrol stop resulting in a **search**;

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<sup>22</sup> To the extent materials exist that document such information in various formats (*e.g.*, databases or other compilations of information based on, for example, city, county, sector, and/or zip code), such materials are included in this Request.

- r. the date of each roving patrol stop resulting in any **arrest**;
  - s. the number of agents involved in each roving patrol **stop**;
  - t. the number of agents involved in any **search** in the course of a roving patrol, and whether a search involved one or more canines;
  - u. the number of agents involved in any **arrest** in the course of a roving patrol;
  - v. the basis for all stops **resulting in arrest**, including stops initiated by any state or local law enforcement agency;
  - w. the basis for all stops **not resulting in arrest**, including stops initiated by any state or local law enforcement agency;
  - x. the Border Patrol agent(s) and/or CBP officer(s) involved in determining whether reasonable suspicion or probable cause existed to justify each stop, and whether the reviewing agent(s)/officer(s) was or were the same as the agent(s)/officer(s) who initiated the stop under review;
  - y. the date, time, and location of any roving patrol that was the subject of any complaint, internal or external investigation, civil litigation, and/or a motion to suppress; the basis of the complaint, investigation, or civil or criminal court proceedings; and the status and/or outcome of any such complaint, investigation, or civil or criminal court proceedings.
9. Any complaints received by any Border Patrol, CBP, or DHS official or agency from any person, organization, agency, tribal government, consular official, or any other entity, whether verbal or written, related to roving patrol operations in San Diego Sector and/or El Centro Sector, as well as any communications regarding and responses to any such complaints; AND
10. All disciplinary records resulting from any alleged agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules or regulations related to roving patrol operations in San Diego Sector and/or El Centro Sector.

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.

### **REQUEST FOR EXPEDITED PROCESSING**

Requesters seek expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d)(1)(ii) ("Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve: . . . (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.").

#### **A. The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.**

Dissemination of information to the public about actual or alleged government activity is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes a continuously updated blog, newsletters, news briefings, "Know Your Rights" documents, and other educational and informational materials that are broadly disseminated to the



public.<sup>23</sup> Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through the ACLU's public education department and website.

The ACLU's national website ([www.aclu.org](http://www.aclu.org)) and the sites run by the ACLU-SDIC ([www.aclusandiego.org](http://www.aclusandiego.org)) and the ACLU-So Cal ([www.aclusocal.org](http://www.aclusocal.org)) address civil rights and civil liberties issues in depth, provide features on civil rights and civil liberties issues in the news, and contain many thousands of documents relating to the issues on which the ACLU is focused. These websites also include features highlighting information obtained through the FOIA process.<sup>24</sup>

In addition, the ACLU publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events; this publication is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements.”).

The ACLU also regularly publishes books, “Know Your Rights” publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties). The ACLU further disseminates information to the public via social media platforms such as Facebook and Twitter.

Depending on the results of this request, the ACLU plans to “disseminate the information” it receives “among the public” through these kinds of publications in these kinds of channels. The ACLU is therefore an organization “primarily engaged in disseminating information” within the meaning of the statute and the relevant regulations—as has been previously recognized in FOIA litigation between the ACLU and the Department of Justice. *See, e.g., ACLU v. Department of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn

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<sup>23</sup> *See, e.g.,* Dan Gillmor, *In Praise of the Almost-Journalists*, Slate (Mar. 28, 2014, 12:29 PM), <http://slate.me/1jg5YXx> (describing ACLU's efforts to broadly disseminate important civil rights-related news stories) (last visited July 2, 2014).

<sup>24</sup> *See, e.g.,* <http://www.thetorturedatabase.org>; <http://www.aclu.org/mappingthefbi>; *see also, e.g.,* Press Release, ACLU of San Diego & Imperial Counties, CBP Releases Report, New Training Handbook (May 22, 2014), <http://www.aclusandiego.org/radio-silence-border-patrol-use-force-policies-leads-lawsuit/> (last visited July 2, 2014).

the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information”) (internal citation omitted).

**B. The records sought are urgently needed to inform the public about actual or alleged government activity.**

The records requested are urgently needed to inform the public about actual or alleged government activity, specifically, U.S. Border Patrol’s roving patrol policies and practices throughout Southern California. The public has and continues to manifest an abiding interest in Border Patrol’s conduct with respect to roving patrols, as well as in CBP’s overall accountability for misconduct and abuse and the transparency of internal agency investigations into alleged misconduct. Between 2004 and 2011, complaints involving CBP officers nearly tripled, with the majority of these grievances involving allegations of excessive force and discrimination.<sup>25</sup> 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. Likewise, Border Patrol roving patrol operations have attracted considerable media coverage and public attention in recent months.<sup>26</sup>

A delayed response to this Request would compromise a significant public interest because it would prevent the public from being able to engage in a timely, thoughtful debate about Border Patrol activities at a time when documented cases of Border Patrol abuses—including roving patrol abuses—are increasing. In light of the foregoing, expedited processing of this Request is warranted under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d)(ii).

**REQUEST FOR LIMITATION OR WAIVER OF SEARCH AND REVIEW FEES**

Requesters further seek a limitation or waiver of processing (search and review) fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .”); 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”). *See also* 6 C.F.R. § 5.11(d)(1) (search fees shall not be charged “for requests by educational institutions . . . or representatives of the news media”); § 5.11(k)(1) (“Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that (i) disclosure of the

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<sup>25</sup> *See* DEP’T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED (2011–2012), *available at* <http://1.usa.gov/1c1ASN8>; DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED (2004–2010), *available at* <http://1.usa.gov/1mstOl6>.

<sup>26</sup> *See, e.g.*, Rob O’Dell and Bob Ortega, *More Border Agents Assisting Local Police*, ARIZONA REPUBLIC, Dec. 17, 2013, *available at* <http://bit.ly/1cnqDGg>; Bob Ortega, *Border Patrol Hit With Abuse Complaints*, USA TODAY, Oct. 9, 2013, *available at* <http://bit.ly/1nccCN3>; Manuel Valdes, *U.S. Border Patrol Settles Racial Profiling Case, Will Share Stop Records*, WASHINGTON TIMES, Sept. 24, 2013, *available at* <http://bit.ly/1ig4pew>; Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, *available at* <http://nyti.ms/1lz83L6>; Michel Marizco, *Living Life Under Federal Watch On The Border*, FRONTERAS DESK, Aug. 5, 2013, *available at* <http://bit.ly/1gfpGid>; Perla Trevizo, *Hiker Wants Ariz. Park Ranger Fired Over Search*, ARIZONA DAILY STAR, May 20, 2013, *available at* <http://bit.ly/1smnr7h>; *see also* David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 Scholar 553 (2012), *available at* <http://bit.ly/1smdpZ>.

requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) disclosure of the information is not primarily in the commercial interest of the requester.”).

**A. Release of the requested records is in the public interest.**

The records requested will contribute significantly to public understanding of the government’s operations or activities. Under 6 C.F.R. § 5.11(k)(2), the following factors are to be considered in determining whether a disclosure is in the public interest: (i) whether the subject of the requested records concerns “the operations or activities of the government”; (ii) whether the disclosure is “likely to contribute” to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to “public understanding,” that is, “the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) whether disclosure is likely to contribute “significantly” to public understanding of government operations or activities. *See* 6 C.F.R. § 5.11(k)(2)(i)–(iv). Each of these considerations is satisfied here.

First, the records requested pertain directly to the operations and activities of the federal government (specifically, CBP and one of its subcomponents, the U.S. Border Patrol).

Second, this Request is “likely to contribute” to an understanding of government operations or activities, specifically by helping the public determine whether individuals encountered, apprehended, and/or detained by the U.S. Border Patrol are treated in a manner that comports with our Constitution and other federal laws, and whether CBP personnel are properly investigated and held accountable when they fail to respect those laws.

Third, disclosure of the requested information will contribute to “the understanding of a reasonably broad audience of persons interested in the subject” of U.S. Border Patrol roving patrols. Professors Lai and Ashar intend to rely on responsive documents in their teaching, research and/or advocacy as clinical law faculty, and the ACLU will publish responsive records and analyze specific documents to raise public awareness of roving patrols generally.

Finally, disclosure will contribute “significantly” to the public understanding of Border Patrol’s roving patrol operations. Roving patrol abuses have been the subject of substantial litigation and media attention, yet much remains unknown about these patrols and their impact on the public.

Requesters have thus established, “with reasonable specificity[,] that [their] request pertains to operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government.” *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 107–109 (D.D.C. 2006).

**B. Disclosure of the information requested is not in Requesters’ commercial interest.**

Disclosure of the information requested is not in the commercial interest of either the ACLU or IRC. Any information obtained as a result of this FOIA request will be made available to the public at no cost.



**C. The ACLU qualifies as a representative of the news media.**

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “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. § 552(a)(4)(A)(ii)(II); *see also National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. American Civil Liberties Union v. Department 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”). The ACLU is a “representative of the news media” for the same reasons that it is “primarily engaged in the dissemination of information.” *See Electronic Privacy Information Center*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for FOIA purposes).<sup>27</sup> Various federal courts have held that the ACLU is a “representative of the news media.” *See, e.g., Serv. Women’s Action Network v. Department of Defense*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at \*3 (D. Conn. May 14, 2012); *American Civil Liberties Union of Washington v. Department of Justice*, No. C09–0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

**D. Professors Lai and Ashar are researchers at an educational institution.**

Both Professors Lai and Ashar qualify as researchers at an educational institution as that phrase is defined under the Freedom of Information Act and its implementing regulations. *See* 6 C.F.R. § 5.11(c)(1)(i), (d)(1); *see also* § 5.11(b)(4) (defining educational institution to include “an institution of professional education . . . that operates a program of scholarly research”). Professors Lai and Ashar are faculty at UCI School of Law and teach and conduct research in the area of immigrant rights. They seek the requested records not for any commercial use but rather to further the institution’s scholarly research goals. *See* 6 C.F.R. § 5.11(b)(4); *see also Sack v. Department of Defense*, 12-CV-1754 (RLW), 2013 WL 6640776, at \*10 (D.D.C. Dec. 13, 2013) (“[A] request from a professor of geology at a State university for records relating to soil erosion, written on letterhead of the Department of Geology, could be presumed to be from an educational institution.” (quoting

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<sup>27</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

OMB Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,014 (Mar. 27, 1987))).

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For the foregoing reasons, a fee waiver or limitation should be granted. A fee waiver would also fulfill Congress's legislative intent in amending FOIA, namely to ensure that the Act is liberally construed in favor of granting waivers for noncommercial requesters and to effectuate disclosure of documents of public importance. *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." (internal quotation marks and citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that "disclosure, not secrecy, is the dominant objective of the Act," quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1992)).

Should a total waiver be denied, fees should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II). In the event a fee waiver or reduction of costs is denied, please notify us in advance if the anticipated costs associated with this Request exceed \$100.00.

### CONCLUSION

Pursuant to the applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4).

We further expect your reply to the Request itself within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i). If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material.

We reserve the right to appeal a decision to withhold any information, or to deny expedited processing or a waiver of fees.

Please furnish the requested records to:  
ACLU of San Diego & Imperial Counties  
**c/o Mitra Ebadolahi**  
P.O. Box 87131  
San Diego, CA 92138  
mebadolahi@aclusandiego.org

I hereby certify that the foregoing is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(d)(3). Thank you for your prompt attention to this matter.

Sincerely,



Mitra Ebadolahi  
Staff Attorney  
ACLU-SDIC

Lucero Chavez  
Immigrant Rights Attorney  
ACLU-So Cal (Orange County)

Annie Lai  
Assistant Clinical Professor of Law  
UC Irvine School of Law

Sameer Ashar  
Clinical Professor of Law  
UC Irvine School of Law

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