

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, ET AL.,**

**Plaintiffs-Appellees,**

**v.**

**U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,**

**Defendants-Appellants.**

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**On Appeal from The United States District Court for the District of Arizona**

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**CONSENTED TO BRIEF OF AMERICAN IMMIGRATION COUNCIL AND  
BOSTON UNIVERSITY SCHOOL OF LAW AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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Emily Creighton  
American Immigration Council  
1331 G Street NW, Suite 200  
Washington, D.C. 20005  
(202) 507-7500

Sarah Sherman-Stokes\*  
Immigrants' Rights and  
Human Trafficking Program  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215; (617) 358-6272

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\* Not Admitted to the Ninth Circuit Bar. Counsel would like to acknowledge Boston University Law Students Stasie Levin, Maggie Loeffelholz, and Diego Menéndez-Estrada for their significant contributions to this amicus brief under the supervision of Sarah Sherman-Stokes.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), amici curiae certify that they have no parent corporations or any publicly held corporations owning 10% or more of its stock.

Dated: December 24, 2018

s/ Emily Creighton  
Emily Creighton  
AMERICAN IMMIGRATION COUNCIL  
1331 G St. NW Suite 200  
Washington, DC 20005  
(202) 507-7514  
ecreighton@immcouncil.org

s/ Sarah Sherman-Stokes  
Sarah Sherman-Stokes\*  
Immigrants' Rights and  
Human Trafficking Program  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 358-6272  
sstokes@bu.edu

*Counsel for Amici Curiae*

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\* Not Admitted to the Ninth Circuit Bar.

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## I. INTRODUCTION<sup>1</sup>

Amici curiae proffer this brief in support of Plaintiffs-Appellees to assist the Court in its review of this matter. This brief illuminates the culture of abuse and impunity within U.S. Customs and Border Patrol (CBP) and the inadequate oversight mechanisms that have allowed this culture to take root. Abuses perpetrated by CBP officials against adults and children are widespread and have included the withholding of food and water, physical abuse, and the deaths of both adults and children. Vulnerable victims such as children face significant challenges in reporting abuses. Even when a complaint is made, a confusing and labyrinthine complaint system prevents transparency regarding investigations into allegations of abuse. The public has learned through reporting and other Freedom of Information requests that investigations generally are not conducted or are incomplete and, in most cases, no action is taken against individual officials. CBP's pattern of misconduct and its inadequate oversight system makes the release of names of CBP officials even more urgent. As the District Court correctly determined, it is in

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<sup>1</sup> Amici state that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the amici curiae, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

the public interest to compel disclosure of the names of officials accused of abuse. Amici urge this Court to affirm the judgment below.

## **II. STATEMENT OF AMICI**

Amici curiae are the American Immigration Council and the Boston University School of Law Immigrants' Rights and Human Trafficking Program.

The American Immigration Council (the Council) is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to interpretation of the Immigration and Nationality Act and the Freedom of Information Act.

The Boston University School of Law Immigrants' Rights and Human Trafficking Program (the Clinic) advocates on behalf vulnerable immigrants in a broad range of complex legal proceedings before the immigration courts, state, local and federal courts and before immigration agencies. The Clinic also collaborates with local, state and national immigrants' rights and human rights groups to advance protections for vulnerable immigrants and survivors of human trafficking. Under the direction of law school professors and instructors who

practice and teach in the field of immigration and human trafficking law, the Clinic provides substantive legal and lawyering skills training to law students. Under the supervision of professors and instructors, law students represent children and adults seeking protection in the United States including survivors of torture and trauma, survivors of domestic violence, abandoned and abused children, and the mentally ill and incompetent, including representation of detained and non-detained individuals in removal proceedings. Many of the Program's clients have been in U.S. Department of Homeland Security (DHS) custody, including detention along the southwest border.

Both organizations have a direct interest in ensuring that the Freedom of Information Act be interpreted to provide meaningful transparency in instances involving abuse of children in DHS custody.

### **III. ARGUMENT**

CBP, an agency within DHS, is the largest federal law enforcement agency in the United States.<sup>2</sup> Patterns of abuse and misconduct by CBP officials, including physical and sexual abuse, are well documented. Further, CBP has historically failed to adequately investigate complaints and discipline officials. The public interest in the disclosure of the names of agents who are the subject of these

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<sup>2</sup> U.S. Customs and Border Prot., About CBP (last modified Nov. 21, 2016), <https://www.cbp.gov/about>.

complaints is particularly compelling in light of protracted patterns of abuse and a concurrent absence of oversight and discipline. In the absence of such disclosure, CBP officers and Border Patrol agents will continue well-established patterns of abuse with impunity.

**A. Misconduct and abuse by CBP officers and U.S. Border Patrol agents along the United States-Mexico border is pervasive.**

**1. The heightened influence and growing number of CBP officials along the border creates an environment prone to abuse and misconduct.**

Several significant factors, including hiring practices and agency-wide attitudes, have created an environment where CBP officials freely and frequently abuse individuals in their custody. United States policing of the southwest border has increased exponentially since September 11, 2001.<sup>3</sup> Today, CBP employs over 60,000 thousand people, including more than 19,000 Border Patrol agents, an increase of more than 10,000 since 2001.<sup>4</sup> This huge influx of officials at the border has not been supported by a rigorous hiring process. Inadequate screening and the failure to meet basic hiring requirements, such as background checks, has

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<sup>3</sup> Int'l Human Rights Clinic at the Univ. of Chicago L. Sch., Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs & Border Patrol 5, [https://www.dropbox.com/s/lplnnufjbcwci0xn/CBP%20Report%20ACLU\\_IHRC%205.23%20FINAL.pdf?dl=0](https://www.dropbox.com/s/lplnnufjbcwci0xn/CBP%20Report%20ACLU_IHRC%205.23%20FINAL.pdf?dl=0) (internal citation omitted) [hereinafter IHRC REP.].

<sup>4</sup> U.S. Customs and Border Protection, U.S. Border Patrol Fiscal Year Staffing Stat. (1992 - 2017) (last updated 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Staffing%20FY1992-FY2017.pdf>.

been widely documented.<sup>5</sup> In October 2018, CBP released reports showing that over five hundred employees of Border Patrol had been charged with drug trafficking, accepting bribes, and other crimes in 2016 and 2017.<sup>6</sup>

What is now CBP and the U.S. Border Patrol began as a small group of inspectors known as “Mounted Guards” in the early 20th Century.<sup>7</sup> But the loosening of the Posse Comitatus Act in the 1980s, coupled with the creation of DHS after September 11, 2001, has dramatically changed an agency once primarily concerned with vetting the entry and departure of noncitizens.<sup>8</sup> President Trump

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<sup>5</sup> See Greg Moran, *Last border hiring binge had some bad outcomes*, S.D. Union Tribune (Mar. 10, 2017), <https://www.sandiegouniontribune.com/news/immigration/sd-me-border-enforcement-20170302-story.html> (170 border law enforcement agents and officers “arrested, indicted or convicted in corruption cases since 2002”); Ron Nixon, *The Enemy Within: Bribes Bore a Hole in the U.S. Border*, N.Y. Times (Dec. 28, 2016), <https://www.nytimes.com/2016/12/28/us/homeland-security-border-bribes.html> (“James Tomsheck, the former head of internal affairs at Customs and Border Protection, said many of the problems the agency is facing with corrupt agents had to do with inadequate pre-hiring screening programs.”) [hereinafter Nixon, *The Enemy Within*].

<sup>6</sup> See Ron Nixon, *U.S. Border Agency Says Hundreds of Employees Have Been Arrested Over 2 Years*, N.Y. Times (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/us/politics/border-agency-employees-arrested.html>; Simon Romero & Manny Fernandez, *Border Patrol Agent Arrested in Connection with the Murders of 4 Women*, N.Y. Times (Sept. 15, 2018), <https://www.nytimes.com/2018/09/15/us/laredo-border-patrol-agent-arrested.html>.

<sup>7</sup> U.S. Customs and Border Prot., Border Patrol Hist. (last visited Dec. 20, 2018), <https://www.cbp.gov/border-security/along-us-borders/history>.

<sup>8</sup> Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 Wash. U. J.L. & Pol’y 99, 135 (2003) (describing the lessening influence, after September 11, 2001, of the Posse Comitatus Act, a law designed to uphold “. . . the principle that the military cannot enforce civilian law.”).

has embraced this trend, emphasizing enforcement along the southern border and requiring the Commissioner of U.S. Customs and Border Patrol to hire thousands of additional Border Patrol agents.<sup>9</sup>

CBP's presence on the border has become increasingly militarized. In addition to hiring former military personnel into its ranks at high rates,<sup>10</sup> massive spending on border security has transformed a highly interconnected set of bi-national border cities into a heavily patrolled border, with long wait times for crossing, and onerous, entry and exit requirements.<sup>11</sup>

There is a correlation between a massive influx of resources at the border and migrant deaths.<sup>12</sup> Deaths have increased exponentially since the early 2000s, especially in southern Arizona and South Texas—two regions where spending

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<sup>9</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>10</sup> Jeremy Slack, Daniel E. Martinez et al., *The Geography of Border Militarization, Violence, Death, and Health in Mexico and the United States*, in *The Shadow of the Wall* 98 (Univ. of Arizona Press ed., 2018) [hereinafter *The Shadow of the Wall*].

<sup>11</sup> U.S. Gov't Accountability Off., GAO-11-6, *DHS Needs to Strengthen Mgmt. and Oversight of its Prime Contractor* (October 18, 2010), <https://www.gao.gov/new.items/d116.pdf>; *see also* Migration Policy Institute, Sarah Pierce, *Far from a Retreat, the Trump Administration's Border Policies Advance its Enforcement Aims* (June 2018), <https://www.migrationpolicy.org/news/far-retreat-trump-border-policies-advance-enforcement-aims> (describing CBP's position that the agency lacks of resources to process asylum seekers who regularly are denied admission at ports of entry).

<sup>12</sup> Geoffrey A. Boyce, *The Rugged Border: Surveillance, Policing and the Dynamic Materiality of the US/Mexico Frontier*, 34(2) *Env't and Plan. D: Soc'y & Space* 245, 245–62 (2016).

efforts have run high.<sup>13</sup> These areas have experienced high death rates notwithstanding lower levels of apprehensions in recent years.<sup>14</sup>

By regulation, CBP is granted “extra-constitutional powers,” within one hundred miles of any external boundary of the United States, including the power to stop and search vehicles without a warrant but with probable cause.<sup>15</sup> In addition to stop and search authority, agents can enter a private property that is not a dwelling without a warrant, within twenty five miles of any border.<sup>16</sup> That area now encompasses roughly two-thirds of the population of the United States, including nine of the ten largest cities, exposing millions of Americans and noncitizen to warrantless searches by CBP officials.<sup>17</sup> This sweeping authority has only added to the agency’s vast influence and culture of impunity.

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<sup>13</sup> The Shadow of the Wall, *supra* note 10, at 98; Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 Berkeley La Raza L. J. 1 (2017); *See, e.g., Rodriguez v. Swartz*, 899 F.3d 719, 734 (9th Cir. 2018) (plaintiff’s estate entitled to bring *Bivens* action for CBO agent’s unreasonable use of deadly force in violation of the Fourth Amendment).

<sup>14</sup> The Shadow of the Wall, *supra* note 10, at 98.

<sup>15</sup> ACLU Wash. Legis. Off., Customs and Border Prot.’s (CBP’s) 100-Mile Rule (Aug. 2013), [https://www.aclu.org/sites/default/files/assets/14\\_9\\_15\\_cbp\\_100-mile\\_rule\\_final.pdf](https://www.aclu.org/sites/default/files/assets/14_9_15_cbp_100-mile_rule_final.pdf).

<sup>16</sup> *See* 8 C.F.R. § 287.1(b) (2012).

<sup>17</sup> *Id.*; *see also* Rachel Siegel, *As Border Patrol searches its buses, Greyhound is pulled into immigration uproar*, Wash. Post. (June 20, 2018), [https://www.washingtonpost.com/news/business/wp/2018/06/20/as-border-patrol-searches-its-buses-greyhound-is-pulled-into-immigration-uproar/?noredirect=on&utm\\_term=.99e08a7ada05](https://www.washingtonpost.com/news/business/wp/2018/06/20/as-border-patrol-searches-its-buses-greyhound-is-pulled-into-immigration-uproar/?noredirect=on&utm_term=.99e08a7ada05) (describing Border Patrol’s practice of searching customers on Greyhound buses without obtaining probable cause for a search).

CBP, and Border Patrol in particular, have long been accused of fostering a culture where bad behavior goes unpunished; where superiors overlook or, worse, conceal misconduct and abuse.<sup>18</sup> In 2014, James F. Tomscheck, former CBP head of internal affairs, blew the whistle on numerous CBP practices, pointing out that Border Patrol is “part of a broader culture of impunity . . . [and] sees itself as above reproach and ‘constitutional constraints’ and aims to shield agents’ misconduct and a massive corruption problem from outside scrutiny.”<sup>19</sup> Independent reporting has found that CBP officers and Border Patrol agents have engaged in coverups of corruption and abuse.<sup>20</sup> In an 2013 independent review of 67 cases resulting in 19 deaths, investigators found that agents “deliberately stepped in the path of cars apparently to justify shooting at the drivers and [] fired in frustration at people

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<sup>18</sup> See Stephen Engelberg & Deborah Sontag, *Blind Eye: How the Immigration System Handles Discipline – A Special Report; Behind One Agency’s Walls: Misbehaving and Moving Up*, N.Y. Times (Dec. 21, 1994), <https://www.nytimes.com/1994/12/21/us/blind-eye-immigration-system-handles-discipline-special-report-behind-one-agency.html?pagewanted=all>; see also ACLU of Ariz., *Rec. of Abuse: Lawlessness and Impunity in Border Patrol’s Interior Enft Operations 8* (2015), <http://bit.ly/2bg8BhF> [hereinafter CBP Rec. of Abuse]; Andrew Becker, *Ousted chief accuses border agency of shooting cover-ups, corruption*, Reveal (Aug. 14, 2014), <https://www.revealnews.org/article-legacy/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/>.

<sup>19</sup> See Becker, *Ousted chief accuses border agency of shooting cover-ups, corruption*, *supra* note 18.

<sup>20</sup> Homeland Sec. Advisory Council, *Final Rep. of the CBP Integrity Advisory Panel* (Mar. 15, 2016), [https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP\\_Final%20Report\\_FINAL%20\(accessible\)\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20(accessible)_0.pdf) [hereinafter HSAC Rep.].

throwing rocks from the Mexican side of the border.” CBP commissioned the review but then tried to prevent it from being shared publicly.<sup>21</sup>

**2. Misconduct and abuse of even the most vulnerable individuals by CBP officials is widespread and egregious.**

CBP abuses along the United States-Mexico border are far from “isolated” cases.<sup>22</sup> In fact they are commonplace; over ten percent of undocumented migrants experience physical abuse while in CBP custody.<sup>23</sup> With officials apprehending over 400,000 people each year, that amounts to tens of thousands of individuals subject to physical abuse *annually*.<sup>24</sup> In addition to a high number of incidents involving physical force, officials routinely deny detained children medical care,<sup>25</sup> lose, destroy or steal detainees’ personal property,<sup>26</sup> and withhold food.<sup>27</sup>

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<sup>21</sup> Brian Bennett, *Border Patrol's use of deadly force criticized in report*, L.A. Times (Feb. 27, 2014), <https://www.latimes.com/nation/la-na-border-killings-20140227-story.html#page=2>.

<sup>22</sup> See generally IHRC Rep., *supra* note 3.

<sup>23</sup> See generally *id.*; see also Jeremy Slack, Daniel E. Martinez et al., *The Shadow of the Wall*, *supra* note 10, at 106.

<sup>24</sup> *Id.*

<sup>25</sup> See IHRC REP., *supra* note 3, at 21-22.

<sup>26</sup> According to data collected between August 2015 and August 2016 from the Binational Defense and Advocacy Program (PDIB), among 1,162 repatriated individuals, 731 (66.5 percent) reported that the authorities retained their belongings. See Walter Ewing & Guillermo Cantor, Am. Immigr. Council, *Deported with No Possession: The Mishandling of Migrants’ Personal Belongings by CBP and ICE* (Dec. 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/deported\\_with\\_no\\_possessions.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/deported_with_no_possessions.pdf).

<sup>27</sup> IHRC Rep., *supra* note 3, at 21-23.

A FOIA release of 2,178 complaints filed against CBP from January 2012 to October 2015 alleged a wide range of abuses: an agent ran over a noncitizen with an all-terrain vehicle; an agent placed a Taser in a U.S. citizen's mouth;<sup>28</sup> an agent struck a noncitizen on the back of the head with a shotgun; an agent beat, kicked, and made a noncitizen eat dirt while he was apprehended; an agent failed to provide food, milk, diapers, and medical care to detained mothers, children, and unaccompanied children; an agent made a young girl take her pants off then looked down her underwear; two agents raped a noncitizen; and an agent solicited sexual favors from noncitizens in exchange for entry into the U.S.<sup>29</sup>

Beyond abuse at apprehension, children are often held in overcrowded, unsanitary facilities commonly referred to as “hieleras,”<sup>30</sup> where they are subject to

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<sup>28</sup> Guillermo Cantor & Walter Ewing, Am. Immigr. Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* 8-9 (Aug. 2017), <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered> [hereinafter *Still no action taken*]; *see also* Joseph Tanfani, Brian Bennett & Matt Hansen, *How Tasers became instruments of excessive force for CBP*, L.A. Times (Oct. 30, 2015), [www.latimes.com/nation/la-na-taser-border-20151030-story.html](http://www.latimes.com/nation/la-na-taser-border-20151030-story.html).

<sup>29</sup> *See* *Still No Action Taken*, *supra* note 28, at 9.

<sup>30</sup> Am. Immigr. Council, *Border Patrol “Hieleras” – Background and Legal Action* (June 15, 2015), [https://www.americanimmigrationcouncil.org/sites/default/files/other\\_litigation\\_documents/border\\_patrol\\_hieleras\\_-\\_background\\_and\\_legal\\_action.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/border_patrol_hieleras_-_background_and_legal_action.pdf). Surveillance footage turned over by the U.S. government in *Doe v. Johnson*, a lawsuit brought against the Tucson Sector Border Patrol show overcrowded and unsanitary conditions in cells where adults and children are detained. Am. Immigr. Council, *Photo Exhibits in Doe v. Johnson* (Aug. 16, 2016),

inhumane conditions. In December of 2018, a seven-year-old girl, Jackeline Caal, died from dehydration, shock and liver failure in a “hielera” in CBP custody.<sup>31</sup> Reports state that she had not had anything to eat or drink, despite being in CBP custody for more than eight hours.<sup>32</sup> The apparent denial of food and water to Jackeline Caal is not an isolated incident. Officials have repeatedly denied children drinking water and food for days.<sup>33</sup> Hieleras, in particular, have been sites of ongoing and devastating abuses.<sup>34</sup>

**B. CBP’s response to abuse and misconduct is inadequate and fails to properly hold perpetrators accountable.**

CBP oversight agencies have consistently failed to act on complaints of mistreatment by CBP officials. Following the reorganization of immigration and

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<https://www.americanimmigrationcouncil.org/content/photo-exhibits-doe-v-johnson>.

<sup>31</sup> Colleen Long, Astrid Galvan & Sonia Perez D., *US says 7-year-old who died in custody had not appeared ill*, Wash. Post (Dec. 14, 2018), [https://www.washingtonpost.com/national/7-year-old-immigrant-girl-dies-after-border-patrol-arrest/2018/12/13/3b7b2062-ff46-11e8-a17e-162b712e8fc2\\_story.html?utm\\_term=.2cdad4597d69](https://www.washingtonpost.com/national/7-year-old-immigrant-girl-dies-after-border-patrol-arrest/2018/12/13/3b7b2062-ff46-11e8-a17e-162b712e8fc2_story.html?utm_term=.2cdad4597d69).

<sup>32</sup> Michael Zennie, *Death of 7-year-old girl in DHS custody ‘preventable,’ says pediatrics group president*, Time (Dec. 14, 2018), <http://time.com/5480503/jackeline-caal-death-dhs/>.

<sup>33</sup> *See id.*

<sup>34</sup> Andrew Gumbel, *‘They were laughing at us’: immigrants tell of cruelty, illness and filth in US detention*, Guardian (Sept. 12, 2018), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities>; Miriam Jordan, *Whistle-Blowers Say Detaining Migrant Families ‘Poses High Risk of Harm’*, N.Y. Times (July 18, 2018), <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>.

border security operations and the establishment of DHS,<sup>35</sup> CBP came under the oversight of the DHS Office of the Inspector General (“OIG”) and the DHS Office of Civil Rights and Civil Liberties (“CRCL”). OIG “is an independent and objective audit, inspection, and investigative body,” that “performs oversight of the DHS components by conducting audits, investigations, inspections, and other reviews.”<sup>36</sup> CRCL is tasked with assessing abuses of “civil rights, civil liberties and profiling,” and investigating “complaints and information indicating possible abuses of civil rights or civil liberties.”<sup>37</sup>

In addition to independent oversight of OIG and CRCL, CBP maintains the Office of Professional Responsibility (“OPR”). With a mission to “promote the integrity and security of the CBP workforce,” OPR “screens potential CBP employees for suitability; conducts polygraph examinations for law enforcement positions; educates employees concerning ethical standards and integrity responsibilities; investigates allegations of employee corruption and serious

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<sup>35</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 *et seq.*).

<sup>36</sup> [Dep’t of Homeland Sec.] Off. of the Inspector Gen., FAQ – What is the Inspector Gen.’s mission? (2018), <https://www.oig.dhs.gov/about/faqs> (citing Inspector General Act of 1978, Pub. L No. 95-452, 92 Stat. 1101 (codified as amended at 6 U.S.C. App. 3)).

<sup>37</sup> 6 U.S.C. § 345(a)(1), (6) (2018); *see also* Off. for Civ. Rights and Civ. Liberties, Dep’t of Homeland Sec. (2018), <https://www.dhs.gov/topic/civil-rights-and-civil-liberties>.

misconduct, and evaluates security threats to CBP employees, facilities, and sensitive information.”<sup>38</sup>

**1. CBP’s complaint system is unreliable and an incomplete measure of the pervasiveness of abuse and misconduct by CBP officers and Border Patrol agents.**

Current independent and internal reporting of abuse against individuals in CBP custody relies largely on complaints initiated by victims. CBP does not have a unified system through which the agency receives its complaints. Instead, individuals must attempt to access a confusing and convoluted process for submitting, managing, and tracking complaints. They can submit a complaint directly to a CBP oversight agency or to the Joint Intake Center (“JIC”).<sup>39</sup> OIG has the right of first refusal for these complaints, but if OIG declines to investigate, the complaint is returned to its originating office, or sent to CRCL or JIC for referral to OPR.<sup>40</sup> An independent report noted that within CBP, cases are handled in “incongruent processes and sub-processes across multiple offices and in multiple geographic locations,” making it that much harder for the public to understand the

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<sup>38</sup> U.S. Customs and Border Prot., Off. of Prof’l Responsibility – Prof’l Responsibility (last modified July 13, 2017), <https://www.cbp.gov/about/leadership-organization/professional-responsibility>.

<sup>39</sup> Still No Action Taken, *supra* note 28, at 5.

<sup>40</sup> U.S. Dep’t of Homeland Sec. – Office for Civ. Rights & Civ. Liberties, How to File a Complaint with the Dep’t of Homeland Sec. (Oct. 3, 2012), [https://www.dhs.gov/sites/default/files/publications/dhs-complaint-avenues-guide\\_10-03-12\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/dhs-complaint-avenues-guide_10-03-12_0.pdf).

status of complaints.<sup>41</sup> In addition, access to such information may be based in relationships, rather than through a uniform process of disclosure which would allow members of the public and complainants to be informed about the status of a complaint.<sup>42</sup> “[O]btaining accurate information about the status of any given complaint is one of the difficulties resulting, predictably, from this confusing process.”<sup>43</sup>

Advocacy organizations have consistently noted CBP’s failure to acknowledge receipt of complaints and follow up with members of the public regarding action taken to address complaints.<sup>44</sup> Unlike other law enforcement agencies, CBP does not release regular reports on case resolution.<sup>45</sup> Instead this

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<sup>41</sup> See Pivotal Practices Consulting LLC, U.S. Customs and Border Prot. Complaint and Discipline Systems Rev.: Pub. Rep. of Findings and Recommendations at 34 (Nov. 23, 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2016-Mar/cbp-complaint-discipline-system-review.pdf> (stating that the “multitude of gateways makes the process for filing a complaint confusing”) [hereinafter Pivotal Rep.].

<sup>42</sup> *Id.* at 45.

<sup>43</sup> See Still No Action Taken, *supra* note 28, at 5.

<sup>44</sup> See HSAC Rep., *supra* note 20, at 23; Kino Border Initiative, Intake Without Oversight: Firsthand Experiences with the Customs and Border Prot. Complaints Process 2-4 (July 2017), [http://jesuits.org/Assets/Publications/File/IntakeWithoutOversight\\_v06.pdf](http://jesuits.org/Assets/Publications/File/IntakeWithoutOversight_v06.pdf) [hereinafter Intake Without Oversight]; Brian Bennett, *Border agency removes its own chief of internal affairs*, L.A. Times (June 9, 2014), <http://www.latimes.com/nation/la-na-border-patrol-20140610-story.html>.

<sup>45</sup> See *id.* at 34 & 45; Pivotal Rep., *supra* note 41, at 12 (recommending that CBP issue regular reports on case resolutions similar to the reports issued by the FBI’s Office of Professional Responsibility).

information is only released through personal complaint experiences, or through time-intensive analysis of Freedom of Information Act (“FOIA”) disclosures which are often delayed, incomplete, heavily redacted, and made available only after extensive litigation.<sup>46</sup>

In addition to barriers created by the complicated complaint system, multiple factors may prevent a victim from submitting or attempting to submit a complaint in the first place. Many victims are not aware of their right to file a complaint or believe that filing a complaint will not have any effect on CBP or their individual situation.<sup>47</sup> CBP only made its complaint form available in Spanish in 2015, and took eight months to announce processing of Spanish-language complaints.<sup>48</sup> The CBP website and complaint form are not navigable in other languages.<sup>49</sup> In addition, noncitizens may be deterred from submitted a complaint out of fear that

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<sup>46</sup> See Intake Without Oversight, *supra* note 44, at 1 (Report based on Kino Border Initiative’s experience assisting migrants deported to Nogales, Sonora, Mexico in filing complaints for abuse by CBP officials); “Hold CBP Accountable,” FOIA Litig. (last visited Dec. 20, 2018), <https://holdcbpaccountable.org/foia-litigation/> (listing FOIA litigation against CBP); *see also* U.S. Dep’t of Homeland Sec., 2017 Freedom of Inf. Act Rep. to the Att’y Gen. of the U.S. & the Dir. Of the Off. Of Gov’t Info. Servs. (Feb. 2018), <https://www.dhs.gov/sites/default/files/publications/FY%202017%20DHS%20FOIA%20Annual%20Report.pdf> (DHS yearly report on FOIA requests, documenting an extensive backlog of 7,472 pending requests to CBP at the end of FY 2017); The FOIA Proj., Data Tools (last visited Dec. 20, 2018).

<sup>47</sup> See Intake Without Oversight, *supra* note 44, at 1.

<sup>48</sup> See Still No Action Taken, *supra* note 28, at 5.

<sup>49</sup> See Pivotal Rep., *supra* note 41, at 3.

they or their families will be targeted by immigration enforcement, or out of the need to distance themselves from the trauma of past abuse.<sup>50</sup> Children are even less likely to report abuse and trigger the complaint process.<sup>51</sup>

Because of the barriers to filing a complaint, using the number of complaints filed to gauge the prevalence of abuse is unreliable. Disclosures have been particularly difficult to aggregate into any comprehensible picture of patterns of abuse because information is redacted. In addition, instead of a system capable of tracking patterns of abuse, CBP tracks only individualized complaints.<sup>52</sup> In a climate of public outcry about misconduct and impunity within CBP, CBP and DHS have commissioned reports from independent organizations and from the Homeland Security Advisory Council on CBP's response to employee misconduct as well as the use of force by CBP officers and agents.<sup>53</sup> Although some changes have been made in response to such reports, most of the recommendations have not

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<sup>50</sup> Laura Gottesdiener, Malav Kanuga & Cinthya Santos Briones, *A Border Patrol Agent Abused Me*, Nation (Apr. 2, 2018), <https://www.thenation.com/article/im-never-going-to-let-what-happened-to-me-happen-to-my-daughter/>.

<sup>51</sup> See e.g., Kamala London et. al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?*, 11 Psych., Pub. Policy, & L. 194, 195 (2005) (“[A] major problem with relying on children’s statements in forensic investigations is that many sexually abused children remain silent about abuse; they may deny that abuse ever occurred, or they may produce a series of disclosures of abuse followed by recantations of these disclosures.”).

<sup>52</sup> See generally Intake Without Oversight, *supra* note 44.

<sup>53</sup> See Pivotal Rep., *supra* note 41, at 1; The Police Exec. Res. Forum, Use of Force Rev.: Cases and Policies (Feb. 2013), <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

been implemented.<sup>54</sup> Additionally, CBP attempted to prevent the review of its use of force cases and policies from coming to light.<sup>55</sup>

## **2. CBP’s present investigation of and response to misconduct and abuse allegations is wholly inadequate**

Even when a complaint of abuse or misconduct is made, CBP’s response is flawed and incomplete.<sup>56</sup> In a brief report released in October 2018, CBP reported high numbers of misconduct allegations against CBP officials during 2016 and 2017, but it remains difficult for the public to get an accurate picture of any improvements to serious investigatory and disciplinary deficiencies.<sup>57</sup> CBP’s October 2018 report does not specify the types of misconduct alleged and uses inconsistent labels for the final disposition of a case, making it difficult to compare to previous FOIA-released data.<sup>58</sup> Increased attention to CBP abuse and high-

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<sup>54</sup> See Still No Action Taken, *supra* note 28, at 5; HSAC Rep., *supra* note 20, at 11-13. CBP has not taken the Homeland Security Advisory Council’s recommendations to reduce “dysfunction created by the fragmentation of responsibility for investigating allegations of serious misconduct by CBP personnel” through giving the CBP Commissioner “sufficient investigative resources, visibility and authority.” *Id.*

<sup>55</sup> Brian Bennett, *Border Patrol’s use of deadly force criticized in report*, L.A. Times (Feb. 27, 2014), <https://www.latimes.com/nation/la-na-border-killings-20140227-story.html#page=2>.

<sup>56</sup> See generally IHRC Rep., *supra* note 3.

<sup>57</sup> See Pivotal Rep., *supra* note 41, at 4-5; Off. of Human Res. Mgmt., U.S. Customs and Border Prot. Discipline Overview (2016-17), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Oct/CBP-FY16-17-Public-Discipline-Report-508.pdf>.

<sup>58</sup> [U.S. Customs and Border Prot.] Off. of Human Res. Mgmt., Discipline Overview - Fiscal Years 2016-2017 3-4 (last accessed Dec. 20, 2018),

profile cases of excessive use of force have prompted review of CBP's response to complaints, including investigatory and disciplinary practices.<sup>59</sup> Such reports, in addition to observations by advocacy organizations, show the clear inadequacy of the CBP complaint system, investigatory practices, and discipline outcomes.

Complaints submitted to CRCL are often referred back to CBP to investigate, or CRCL recommends closure of complaints that cannot be verified by CBP's own records or personnel accounts.<sup>60</sup> Records obtained from CBP indicate that investigatory responsibilities of complaints are often delegated to the local Border Patrol Station from which the abuse complaints originate.<sup>61</sup> In addition, CBP fails to timely respond to the oversight agency's requests for additional information about specific complaints.<sup>62</sup> An advocacy organization tracking complaints has noted that CBP has found complaints unsubstantiated based on evidence found in Border Patrol station logs and records, but that these records were clearly inadequate. In one case a woman eight-months pregnant complained of inadequate medical attention, and station logs contained no record of her

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<https://www.cbp.gov/sites/default/files/assets/documents/2018-Oct/CBP-FY16-17-Public-Discipline-Report-508.pdf>.

<sup>59</sup> See Pivotal Rep., *supra* note 41, at 1; HSAC REP., *supra* note 20, at 1; Still No Action Taken, *supra* note 28, at 5.

<sup>60</sup> See IHRC Rep., *supra* note 3, at 34.

<sup>61</sup> See CBP Rec. of Abuse, *supra* note 18, at 8; Intake Without Oversight, *supra* note 44, at 2.

<sup>62</sup> See IHRC Rep., *supra* note 3, at 35.

pregnancy.<sup>63</sup> These practices raise serious concerns about independence and proper oversight.

As aforementioned, a report on the CBP complaint and discipline system released in November 2015 by an independent consulting agency expressed concern about the quality of investigations into employee misconduct. The report noted lengthy case processing delays even for less serious complaints, concerns about rote questioning, and failure to follow up with answers from an interviewee.<sup>64</sup>

In addition to flawed investigations, CBP has failed to take action against officers or agents for even serious complaints of abuse. Information released by CBP to the American Immigration Council (“Council”) through a FOIA request showed that 96 percent of outcomes of complaints filed against Border Patrol agents between January 2012 and October 2015 in which a formal decision was made, resulted in no action against the agent.<sup>65</sup> The official designation “No Action Taken” was given in hundreds of complaints of appalling misconduct and abuse, including acts such as severe physical abuse, threats of death and rape, neglect of

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<sup>63</sup> See *Intake Without Oversight*, *supra* note 44, at 3.

<sup>64</sup> See *Pivotal Rep.*, *supra* note 41, at 34-38.

<sup>65</sup> *Still No Action Taken*, *supra* note 28, at 15. Of 2,178 formal complaints, 1,255 formal decisions were made. ‘No Action’ represented nearly 96 percent of all outcomes.” *Id.*

detainees in need of medical attention, sexual abuse, and coercion into signing English-language paperwork.<sup>66</sup>

Patterns of abuse within the agency are longstanding and widespread. CBP's failure to provide adequate access to complaint procedures, to investigate alleged misconduct, and to consistently and satisfactorily discipline officials has fostered a culture of unchecked impunity. The public has a significant and compelling interest in learning the names of alleged perpetrators of abuse and this Court should affirm the District Court order mandating such disclosure.

#### IV. CONCLUSION

For the forgoing reasons, amici urge this Court to affirm the District Court's order to disclose the names of officials included in the FOIA request, as it serves the public interest.

Respectfully submitted,

s/ Emily Creighton  
Emily Creighton  
AMERICAN IMMIGRATION COUNCIL  
1331 G St. NW Suite 200  
Washington, DC 20005  
(202) 507-7514  
ecreighton@immcouncil.org

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<sup>66</sup> *Id.* at 8-10.

s/ Sarah Sherman-Stokes  
Sarah Sherman-Stokes\*  
Immigrants' Rights and  
Human Trafficking Program  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 358-6272  
sstokes@bu.edu

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\* Not Admitted to the Ninth Circuit.

## **CERTIFICATION OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and 29(a)(5) and Circuit Rule 32-1(a), because it contains 6,538 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

s/ Emily Creighton \_\_\_\_\_  
Emily Creighton  
AMERICAN IMMIGRATION COUNCIL  
1331 G St. NW Suite 200  
Washington, DC 20005  
(202) 507-7514  
ecreighton@immcouncil.org

Dated: December 24, 2018

## **CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Emily Creighton  
\_\_\_\_\_  
Emily Creighton  
AMERICAN IMMIGRATION COUNCIL  
1331 G St. NW Suite 200  
Washington, DC 20005  
(202) 507-7514  
ecreighton@immcouncil.org

Dated: December 24, 2018