

No. 15-16410

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

**ARACELI RODRIGUEZ, individually and as the surviving mother
and personal representative of J.A.,**

Plaintiff-Appellee

v.

**LONNIE SWARTZ, Agent of the U.S. Border Patrol,
*Defendant-Appellant***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

**AMICUS CURIAE BRIEF OF
COALICIÓN DE DERECHOS HUMANOS, THE SOUTHERN BORDER
COMMUNITIES COALITION, NO MORE DEATHS, THE NATIONAL
IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD,
THE KINO BORDER INITIATIVE AND THE AMERICAN
IMMIGRATION COUNCIL IN SUPPORT OF PLAINTIFF-APPELLEE
AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT**

Stanley Young
COVINGTON & BURLING LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065-1418
Telephone: (650) 632-4700
Facsimile: (650) 632-4800
syoun@cov.com

May 6, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that none of the *amici curiae* is a corporation that has any parent corporation or any publicly held corporation that owns 10% or more of its stock.

Dated: May 6, 2016

/s/ Stanley Young

Stanley Young
COVINGTON & BURLING LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065-1418
Telephone: (650) 632-4700
Facsimile: (650) 632-4800
syoun@cov.com

TABLE OF CONTENTS

	Page
INTRODUCTION	1
IDENTITY AND INTERESTS OF THE <i>AMICI CURIAE</i>	1
ARGUMENT	4
I. Border Patrol Agents Have Committed Many Unjustified Shootings And Have Falsified Their Accounts of Them in Order to Evade Responsibility	6
II. The Border Patrol Systematically Fails to Discipline Agents Who Use Excessive Deadly Force.....	10
III. The Border Patrol’s Whole Culture Is Hostile To Accountability, Reform, Compliance with the Constitution and Adherence to Best Practices on the Use of Deadly Force.....	15
IV. Given that Criminal Prosecution Is So Rare, The Ability of Victims to Sue Civilly Based on Constitutional Standards Will Provide Needed Deterrence Against Excessive Use of Deadly Force.....	20
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	1, 23
<i>Hernandez v. United States</i> , 785 F.3d 117 (5th Cir. 2015) (en banc)	10
Articles, Reports, and Other Authorities	
ACLU, <i>Record of Abuse</i> (Oct. 2015), available at http://www.acluaz.org/node/5415	14
American Immigration Council, <i>No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse</i> , May 4, 2014, available at http://www.immigrationpolicy.org/special- reports/no-action-taken-lack-cbp-accountability-responding- complaints-abuse	14
Andrew Becker, <i>2010 Border Patrol fatal shooting comes under renewed scrutiny</i> , Ctr. For Investigative Reporting, Aug. 1, 2014, available at https://beta.cironline.org/reports/border-patrol- shooting-under-scrutiny/	5, 16, 21
Andrew Becker, <i>Border Agency’s Former Watchdog Says Officials Impeded His Efforts</i> , WASHINGTON POST, Aug. 16, 2014, available at https://www.washingtonpost.com/politics/border- agencys-former-watchdog-says-officials-impeded-his- efforts/2014/08/16/ce143288-2304-11e4-8593- da634b334390_story.html	15, 16
Andrew Becker, <i>Scathing report deems fatal Border Patrol shooting ‘highly predictable,’</i> Ctr. For Investigative Reporting, March 4, 2016, available at https://www.revealnews.org/article/scathing- report-deems-fatal-border-patrol-shooting-highly-predictable/	15, 21

Andrew Becker and G.W. Schulz, *Homeland Security blacked out recommendation on Border Patrol restraint*, WASHINGTON POST, Jan. 28, 2014, available at http://www.washingtonpost.com/world/national-security/homeland-security-blacked-out-recommendation-on-border-patrol-restraint/2014/01/28/6cabe308-7c81-11e3-93c1-0e888170b723_story.html18

Anna Werner and Laura Strickler, “*Disturbing*” *sex abuse within agency that patrols U.S. border, says former top official*, CBS News, May 4, 2015, available at <http://www.cbsnews.com/news/u-s-border-patrol-has-a-sex-abuse-problem-says-whistleblower/>19

Anna Werner, *Border Patrol Killings Face Renewed Scrutiny*, CBS News, Aug. 18, 2014, available at <http://www.cbsnews.com/news/investigating-unresolved-deaths-on-the-border/>11

Bob Ortega, *Border Patrol scrutinized over teen’s shooting death*, AZ Republic, Oct. 18, 2012, available at <http://www.azcentral.com/news/articles/20121017border-patrol-scrutinized-teen-shooting-death.html>19, 22

Bob Ortega, *CBP: No action against border agents in deadly-force cases*, AZ Republic, June 8, 2015, available at <http://www.azcentral.com/story/news/politics/immigration/2015/06/08/cbp-action-agents-deadly-force-cases/28670843/>5, 12

Bob Ortega, *CBP: No agents disciplined for deadly force since 2004*, AZ Republic, Sept. 12, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/12/customs-border-agents-not-disciplined-investigations-continue/15527207/>5, 12

Bob Ortega, *Deadly force cases by Border Patrol raising questions*, AZ Republic, Sept. 13, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/14/border-patrol-deadly-force-questions/15617267/>7, 9, 10

Bob Ortega and Rob O’Dell, *Deadly border agents incidents cloaked in silence*, AZ Republic, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html>*passim*

Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, LOS ANGELES TIMES, June 15, 2015, available at <http://www.latimes.com/nation/la-na-border-patrol-shootings-20150615-story.html>5, 12

Brian Bennett, *Border Patrol sees little reform on agents’ use of force*, LOS ANGELES TIMES, Feb. 23, 2015, available at <http://www.latimes.com/nation/la-na-border-abuse-20150223-story.html>5

Brian Bennett, *Report finds little progress at curbing Border Patrol abuses*, Los Angeles Times, March 14, 2016, available at <http://www.latimes.com/world/mexico-americas/la-na-border-patrol-abuses-20160314-story.html> 14

Carmen Duarte, *Border agents at shooting scene 'angry' with investigators*, AZ DAILY STAR, July 23, 2014, available at http://tucson.com/news/local/article_cb683a81-c41d-5a1b-873b-2eba7a94df95.html17

Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion in Agency*, NPR, Aug. 28, 2014, available at <http://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency>16, 17

Cindy Carcamo, *Mother suing Border Patrol in Mexico boy’s 2012 death wants answers*, LOS ANGELES TIMES, July 29, 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-ff-feds-sued-crossborder-fatal-shooting-teenager-20140729-story.html>22

Crossing the Line at the Border, April 20, 2012, available at <http://www.pbs.org/video/2225180660/>9

Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, NY TIMES, May 5, 2014, available at http://www.nytimes.com/2014/05/06/us/complaints-of-abuse-by-border-agents-often-ignored-records-show.html?_r=013

Dan Shearer, *BP agent won't face charges in Green Valley shooting*, GREEN VALLEY NEWS, Sept. 10, 2014, available at http://www.nogalesinternational.com/news/bp-agent-won-t-face-charges-in-green-valley-shooting/article_b24b2ad2-38ff-11e4-a6bb-001a4bcf887a.html22

Daniel González, Bob Ortega and Rob O'Dell, *Immigrant's death by border agents captured on video*, AZ Republic, December 15, 2013, available at <http://www.azcentral.com/news/arizona/articles/20131213border-agent-immigrant-death-video.html>8

David Schwartz, *Mother of slain Mexican teen sues U.S. Border Patrol agents*, Reuters, July 29, 2014, available at <http://www.reuters.com/article/us-usa-mexico-shooting-idUSKBN0FY1VX20140729>22

DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, *CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (Redacted) (Sept. 2013)*, available at https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf14, 18

Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas*, Nov. 6, 2015, available at <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.....9, 20

Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Carlos LaMadrid*, Aug. 9, 2013, available at <http://www.justice.gov/opa/pr/2013/August/13-crt-907.html>20

Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Ramses Barron-Torres*, Aug. 9, 2013, available at <http://www.justice.gov/opa/pr/2013/August/13-crt-908.html>7, 21

Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=0> (p.1)*passim*

HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, June 29, 2015, available at <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>*passim*

HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL, March 15, 2016, available at <http://southernborder.org/wp-content/uploads/2016/03/Report-on-U-S-Customs-and-Border-Protection.pdf> and also [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) 11, 14

Jason Buch, *Mexican Girl Clutched Her Dying Father*, SAN ANTONIO EXPRESS-NEWS, September 8, 2012, available at http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php 8

John Carlos Frey, *What’s going on with the Border Patrol?*, LOS ANGELES TIMES, April 20, 2012, available at <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420> 9

Mark Binelli, *10 Shots Across the Border*, THE NEW YORK TIMES MAGAZINE, March 3, 2016, available at http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html?_r=1 1

Mitra Ebadolahi, *Deadly Force on the Border, Without Transparency or Accountability*, ACLU Blog, available at <https://www.aclu.org/blog/immigrants-rights-national-security/deadly-force-border-without-transparency-or-accountability> 18

Molly Hennessy-Fiske, *Texas trooper won't be indicted in border helicopter shooting deaths*, LOS ANGELES TIMES, Sept. 11, 2013, available at <http://www.latimes.com/nation/la-na-0912-texas-helicopter-shooting-20130912,0,2483535.story>22

More Accounts Emerge Following Deadly Border Shooting, NOGALES INTERNATIONAL, Jan. 6, 2011, available at http://www.nogalesinternational.com/news/more-accounts-emerge-followingdeadly-border-shooting/article_998a4971-2351-5f03-a8f3-c43dd1d65cfe.html7

Samuel Walker, *Changing the Culture of the Customs and Border Protection Agency*, July 2014, available at <http://samuelwalker.net/wp-content/uploads/2013/02/Border.pdf>23

Southern Border Communities Coalition, *Border Patrol Abuses Since 2010*, available at <http://southernborder.org/border-patrol-brutality-since-2010/>5

Tim Steller, *Shootings by border agents: Cases drag on and on*, AZ Daily Star, March 20, 2013, available at http://azstarnet.com/news/local/border/tim-steller-shootings-by-border-agents-cases-drag-on-and/article_da6854ed-680b-5033-b7ff-445f7bfbb695.html20

U.S. CUSTOMS AND BORDER PROTECTION, *USE OF FORCE REVIEW: CASES AND POLICIES* (Feb. 2013), available at <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>6

INTRODUCTION

J.A., age 16, died on a street in Nogales, Mexico, shot multiple times in the back by U.S. Border Patrol Agent Lonnie Swartz.¹ The District Court acted correctly in deciding, under *Boumediene v. Bush*, 553 U.S. 723 (2008), that his mother Araceli Rodriguez should be able to assert a constitutional claim for her son's death.

The Border Patrol has flouted law enforcement best practices on the use of force, distorted facts in order to hide rather than investigate wrongdoing, and failed to exercise oversight and discipline over its agents. As past and present senior government officials acknowledge, the Border Patrol harbors a culture of disregard for human life and of contempt for the rule of law, a consequence in part of faulty hiring and a broken oversight system. The application of constitutional standards to Border Patrol shootings like this one will provide much needed deterrence against similar shootings in the future. The judgment below should be affirmed.

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici curiae are the following organizations:

Coalición de Derechos Humanos (<http://www.derechoshumanosaz.net/>)

("Derechos") is a non-profit organization that works to create social change in the

¹ Mark Binelli, *10 Shots Across the Border*, THE NEW YORK TIMES MAGAZINE, March 3, 2016, available at http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html?_r=1.

Southwest border region by mobilizing the community to oppose racial profiling, anti-immigrant sentiment, and border militarization. Derechos' work includes political education, human-rights trainings, and an initiative to support families in locating migrants missing in the desert and in detention. Derechos works with allies to bring justice to the borderlands and draw attention to critical human rights issues such as killings by U.S. Border Patrol agents, civil rights abuses resulting from Arizona's SB1070, and the mass deportation and criminal prosecution of migrants.

The Southern Border Communities Coalition (<http://southernborder.org/>) consists of 60 border region organizations from San Diego, California to Brownsville, Texas, all sharing the goal of ensuring that border enforcement policies and practices are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region. The coalition was formed in March 2011 as a response to a rash of Border Patrol-perpetrated violence against unarmed border residents.

No More Deaths (No Mas Muertes) (<http://forms.nomoredeaths.org/en/>) is a humanitarian organization based in southern Arizona. It began in 2004 as a coalition of community and faith groups, dedicated to stepping up efforts to stop the deaths of migrants in the desert and to achieving the enactment of a set of

Faith-Based Principles for Immigration Reform. It is now an autonomous project and an official ministry of the Unitarian Universalist Church of Tucson.

The National Immigration Project of the National Lawyers Guild (<https://www.nationalimmigrationproject.org/>) is a national non-profit membership organization that advocates for government accountability for abuse and misconduct by immigration officials against noncitizens and individuals perceived to be noncitizens. It holds seminars, files amicus curiae briefs, provides technical assistance, and issues practice advisories. With other organizations, it also publishes information on accountability litigation against U.S. Customs and Border Protection (“CBP”) officers and agents through the website <https://holdcbpaccountable.org/>.

The Kino Border Initiative (aka Iniciativa Kino para la Frontera) (<https://www.kinoborderinitiative.org/>) is a binational non-profit organization located in Nogales, Arizona and Nogales, Sonora, Mexico. Its vision is to help make humane, just, workable migration between the U.S. and Mexico a reality through humanitarian aid to migrants, education, and research and advocacy.

The American Immigration Council (<http://www.americanimmigrationcouncil.org/>) is a Washington, D.C.-based non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws,

protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council undertakes administrative advocacy and litigation to expose U.S. Customs and Border Protection's (CBP) unlawful practices and promote policies that safeguard the civil liberties of all persons who cross our borders. With other organizations, the Immigration Council also publishes information on accountability litigation against CBP officers and agents through the website <https://holdcbpaccountable.org/>.

Amici curiae believe that the District Court's decision properly applies constitutional standards to cross-border Border Patrol shootings like that of J.A. An absence of accountability for such shootings would lead to even more unwarranted cross-border killings by Border Patrol agents, who could continue to use unnecessary deadly force with few, if any, consequences. *Amici curiae* therefore support affirmance of the judgment below.²

ARGUMENT

Between 2005 and 2013, "on-duty Border Patrol agents and Customs and Border Protection officers . . . killed at least 42 people, including at least 13

² Pursuant to Fed. R. App. P. 20, all parties to this appeal have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party, party's counsel or any other person (other than *amici curiae* and their counsel) contributed money that was intended to fund the preparation or submission of this brief.

Americans.”³ Border Patrol agents killed at least eight people who, like J.A., were standing on the other side of the U.S.-Mexico border.⁴ As set forth below, agents have shot people, many juveniles, who were unarmed and posed no danger to the agents or anyone else. But those agents have mostly escaped both internal agency discipline⁵ and criminal prosecution.⁶ The scope of the injustice is vast. With 44,000 law enforcement officers, “CBP is the largest law enforcement agency of the United States; larger than the New York Police Department with 34,500 sworn officers and larger than the FBI with 13,000 Special Agents.”⁷ The 21,000 Border

³ Bob Ortega and Rob O’Dell, *Deadly border agents incidents cloaked in silence*, AZ Republic, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html>; see also Southern Border Communities Coalition, *Border Patrol Abuses Since 2010*, available at <http://southernborder.org/border-patrol-brutality-since-2010/>.

⁴ Brian Bennett, *Border Patrol sees little reform on agents’ use of force*, LOS ANGELES TIMES, Feb. 23, 2015, available at <http://www.latimes.com/nation/la-na-border-abuse-20150223-story.html>

⁵ Bob Ortega, *CBP: No action against border agents in deadly-force cases*, AZ Republic, June 8, 2015, available at <http://www.azcentral.com/story/news/politics/immigration/2015/06/08/cbp-action-agents-deadly-force-cases/28670843/>; Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, LOS ANGELES TIMES, June 15, 2015, available at <http://www.latimes.com/nation/la-na-border-patrol-shootings-20150615-story.html>; Bob Ortega, *CBP: No agents disciplined for deadly force since 2004*, AZ Republic, Sept. 12, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/12/customs-border-agents-not-disciplined-investigations-continue/15527207/>.

⁶ Andrew Becker, *2010 Border Patrol fatal shooting comes under renewed scrutiny*, Ctr. For Investigative Reporting, Aug. 1, 2014, available at <https://beta.cironline.org/reports/border-patrol-shooting-under-scrutiny/> (“No Border Patrol agent . . . has been convicted or charged [as of 2014] in any of the nearly 30 deaths at the hands of U.S. Customs and Border Protection employees since 2010”).

⁷ HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, June 29, 2015 at page 5, available at <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf> (“CBP is a law enforcement agency, albeit one with a unique law enforcement mission to enforce the laws at and near the borders of the U.S. Of CBP’s 60,000 employees, 44,000 are armed law enforcement officers (LEOs) authorized to interrogate, conduct searches and make arrests. 21,000 of CBP’s LEOs are Border Patrol Agents (BPAs) assigned to CBP’s Border Patrol assigned between the nation’s ports of entry and 22,000 are CBP Officers (CBPOs) assigned to our nation’s 300+ ports of entry, along our land borders and at our seaports and international airports. CBPOs are under CBP’s Office of Field Operations.”).

Patrol agents within CBP should not be allowed to shoot freely into Mexico without effective consequence or deterrent.

I. Border Patrol Agents Have Committed Many Unjustified Shootings And Have Falsified Their Accounts of Them in Order to Evade Responsibility

Agent Swartz' shooting of J.A. joins a growing list of unwarranted deaths at the hands of Border Patrol agents. The Police Executive Research Forum ("PERF"), in a study commissioned by CBP after intense public and Congressional scrutiny, examined 67 case files involving the Border Patrol's use of deadly force over a 34-month period. PERF was well-qualified for this task. A non-profit founded in 1976, it "is a police research and policy organization and a provider of management services, technical assistance, and executive-level education to support law enforcement agencies;" its Board consists of law enforcement office heads.⁸ PERF concluded after its review of the 67 Border Patrol files that, "Too many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force," including because those shot were fleeing or were otherwise not in a position to harm the agents or others.⁹

⁸ See <http://www.policeforum.org/>; <http://www.policeforum.org/board-of-directors>.

⁹ U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE REVIEW: CASES AND POLICIES (Feb. 2013), at p. 6-9, available at <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>. The PERF study "included all CBP use of deadly force events from January 2010 through October 2012;" the case files "were sorted in general categories to include: firearm response to subjects armed with firearms; firearm response to rocks thrown on land; firearm response to rocks thrown on water; firearms use against vehicles; and other firearm cases." *Id.* at p. 2.

The death toll resulting from Border Patrol shootings includes:

- Ramses Barron Torres, a 17-year-old who died after being shot, according to one account, by an agent aiming through the border fence, while he was in Nogales, Mexico, on January 5, 2011¹⁰;
- Jose Alfredo Yanez Reyes, shot to death in Tijuana, Mexico on June 21, 2011 by Border Patrol agents who were trying to arrest other people at the end of a sewer pipe in the U.S.¹¹; and
- Juan Pablo Perez Santillan, a 30-year-old who was on the Mexican bank of the Rio Grande near Matamoros, Mexico and shot by a Border Patrol agent with an M-4 rifle from the U.S. bank of that river.¹²

Border Patrol agents have fabricated their accounts of such shootings.

According to the Arizona Republic in late 2013, “. . . in nine of the 24 use-of-force deaths since 2010, agents’ accounts were contradicted by other witnesses or by

¹⁰ *More Accounts Emerge Following Deadly Border Shooting*, NOGALES INTERNATIONAL, Jan. 6, 2011, available at http://www.nogalesinternational.com/news/more-accounts-emerge-followingdeadly-border-shooting/article_998a4971-2351-5f03-a8f3-c43dd1d65cfe.html; see also Bob Ortega and Rob O’Dell, *supra*, n. 3. The Department of Justice decided not to prosecute the agent. Department of Justice Press Release, Federal Officials Close the Investigation into the Death of Ramses Barron-Torres, Aug. 9, 2013, available at <http://www.justice.gov/opa/pr/2013/August/13-crt-908.html>.

¹¹ Bob Ortega, *Deadly force cases by Border Patrol raising questions*, AZ Republic, Sept. 13, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/14/border-patrol-deadly-force-questions/15617267/>.

¹² See Bob Ortega and Rob O’Dell, *Deadly border agents incidents cloaked in silence*, AZ Republic, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html>.

other law enforcement officers. In three cases, video recordings surfaced to refute Border Patrol agents' earlier reports of what had happened"¹³:

- Guillermo Arévalo Pedraza was a 36-year-old celebrating a birthday with his wife and nine- and ten-year-old daughters on the Mexican bank of the Rio Grande near Nuevo Laredo, when he was shot to death on September 3, 2012 by a Border Patrol agent who was riding in a boat on the river.¹⁴ The Border Patrol alleged that its agents had come under attack from the Mexican bank. But the video contradicts that account and instead “shows a Border Patrol air boat cruising slowly along the U.S. side of the Rio Grande while on the Mexican bank children play and adults gawk at the agents. [¶] The camera turns away as the shooting starts, then returns to show Arevalo on the ground, a crowd gathered around him. People on the Mexican bank scream and gesture angrily at the boat, which speeds off.”¹⁵

¹³ *Id.*

¹⁴ Jason Buch, *Mexican Girl Clutched Her Dying Father*, SAN ANTONIO EXPRESS-NEWS, September 8, 2012, available at http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php (including videos); see also Bob Ortega and Rob O'Dell, *supra*, n. 3; Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 5, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=4>. Graff's article links to this video of the picnic site and the boat on the river: <https://www.youtube.com/watch?v=sW68x20i4hM>.

¹⁵ Jason Buch, *Mexican Girl Clutched Her Dying Father*, SAN ANTONIO EXPRESS-NEWS, September 8, 2012, available at http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php.

- Anastasio Hernandez Rojas died after a 30-minute beating on May 28, 2010 at the San Ysidro, California border crossing. Border Patrol agents had punched him and hit him with batons and then shocked him repeatedly with a stun gun while he was lying face down with his hand and ankles bound. PBS broadcast the video of this attack.¹⁶ The “[a]gents said he was combative and violent. But a cellphone video showed he was face down, his hands cuffed behind his back, as agents kicked and shocked him.”¹⁷ The San Diego coroner classified his death as a homicide.¹⁸
- Sergio Adrian Hernandez Güereca, a 15-year-old , was on the Mexican side of the Rio Grande near Ciudad Juarez when he was shot to death on June 10, 2010 by Border Patrol Agent Jesus Mesa Jr., who was standing on the U.S.

¹⁶ The video appears at PBS, *Crossing the Line at the Border*, April 20, 2012, available at <http://www.pbs.org/video/2225180660/>; see also Bob Ortega and Rob O’Dell, *supra*, n. 3. This video is shocking, and its broadcast by PBS led Members of Congress to demand investigation. See also Daniel González, Bob Ortega and Rob O’Dell, *Immigrant’s death by border agents captured on video*, AZ Republic, December 15, 2013, available at <http://www.azcentral.com/news/arizona/articles/20131213border-agent-immigrant-death-video.html>; John Carlos Frey, *What’s going on with the Border Patrol?*, LOS ANGELES TIMES, April 20, 2012, available at <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>.

¹⁷ Bob Ortega, *Deadly force cases by Border Patrol raising questions*, AZ Republic, Sept. 13, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/14/border-patrol-deadly-force-questions/15617267/>.

¹⁸ John Carlos Frey, *What’s going on with the Border Patrol?*, LOS ANGELES TIMES, April 20, 2012, available at <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>. After five years of investigation, the Department of Justice ultimately decided that there was insufficient evidence to prosecute criminally any of the agents involved. Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas*, Nov. 6, 2015, available at <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

side.¹⁹ Agent Mesa said that he was “surrounded by rock-throwers” when he shot and killed 15-year-old Sergio Adrian Hernandez Guereca. But the video contradicts his story. Watched more than 1.6 million times on YouTube, it shows Agent Mesa firing across the wide concrete bed of the Rio Grande between El Paso and Juárez.²⁰

II. The Border Patrol Systematically Fails to Discipline Agents Who Use Excessive Deadly Force

A law enforcement agency should have internal affairs and disciplinary processes to investigate and address incidents like those listed above.²¹ But, no

¹⁹ See Bob Ortega and Rob O’Dell, *supra*, n. 3; this shooting is the subject of the Fifth Circuit’s decision in *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc), in which a petition for certiorari is currently pending.

²⁰ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 5, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=4>. The video is here: <https://www.youtube.com/watch?v=7wI2Q1XikLw>. See also Bob Ortega and Rob O’Dell, *Deadly border agents incidents cloaked in silence*, AZ Republic, Dec. 16, 2013, available at <http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html> (“Sergio and other youths had been running back and forth across the dry bed of the Rio Grande to the metal fence on the U.S. side. The FBI and CBP, without naming [agent] Mesa, said an agent fired in self-defense after he was surrounded by rock throwers. [¶] But several cellphone videos taken from the nearby bridge later surfaced. They appear to show a different story. [¶] [Agent] Mesa wasn’t surrounded. He had tried to intercept four youths running back to Mexico across the river bed, grabbing one as the others fled. In one video, some youths can clearly be seen making throwing motions. But Guereca isn’t among them. He’s visible, peeping out from behind a pillar beneath a train trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead.”); Bob Ortega, *Deadly force cases by Border Patrol raising questions*, AZ Republic, Sept. 13, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/14/border-patrol-deadly-force-questions/15617267/>.

²¹ See generally HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, June 29, 2015, available at <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>; HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY (continued...)

matter how excessive their use of force, and no matter how greatly other witnesses and video evidence contradict their stories, Border Patrol agents rarely need to fear that their agency will discipline them. As the CBP Integrity Advisory Panel, composed of nationally prominent law enforcement officials, recently found, “The CBP discipline system is broken.”²² James Tomsheck, who was the head of internal affairs at CBP, confirms that there have been “many cases where border patrol agents or certainly CBP officers engaged in excessive use of force or abuse of migrants at the border that should have resulted in discipline where it did not.”²³ Indeed, CBP announced that it “will not take any disciplinary or legal action against Border Patrol agents or CBP officers involved in 67 deadly-force incidents

PANEL, March 15, 2016, available at <http://southernborder.org/wp-content/uploads/2016/03/Report-on-U-S-Customs-and-Border-Protection.pdf> and also [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).

²² *Id.* at 21 (March 15, 2016 Final Report) available at [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). “Created as a subcommittee of the [Homeland Security Advisory Council], the CBP Integrity Advisory Panel. . . , established in March 2015, was charged by the Secretary [of Homeland Security] to make findings and recommendations based on law enforcement best practices regarding use of force, preventing corruption, investigative capabilities needed to address criminal and serious misconduct within CBP, engagement in interagency task forces such as the Border Corruption Task Force, using intelligence driven approaches proactively to identify corruption and other misconduct, and addressing transparency issues pertaining to incident response, discipline and stakeholder outreach.” *Id.* at 1. The Panel’s members include the Police Commissioner William Bratton of the City of New York; Karen Tandy, a former head of the U.S. Drug Enforcement Administration; Robert Bonner, former CPB Commissioner, federal judge and U.S. attorney; Rick Fuentes, a former superintendent of the New Jersey State Police; Roberto Villaseñor, a former Chief of Police for the Tucson Police Department; and William Webster, who headed both the CIA and the FBI and who was also a federal judge. *Id.* at 35-38.

²³ Anna Werner, *Border Patrol Killings Face Renewed Scrutiny*, CBS News, Aug. 18, 2014, available at <http://www.cbsnews.com/news/investigating-unresolved-deaths-on-the-border/>.

that had been under internal review [and were] identified in 2013 in [the] scathing report on CBP's use-of-force practices by [PERF].”²⁴

Even if it wanted to, the agency lacks the capability to solve its discipline problem. As of June 2015, an interim report of the CBP Integrity Advisory Panel found that, despite “[r]ecent articles [that] have severely criticized CBP for failing to adequately investigate the uses of force. . . .CBP did not have sufficient IA [internal affairs] investigators to investigate these incidents, nor until recently did its IA investigators have authority to conduct investigations involving potential criminal misconduct in the exercise of use of force by CBP’s [law enforcement officers].”²⁵ CBP “does not have an adequately staffed internal affairs and has not had one since the creation of CBP in March 2003.”²⁶

Moreover, the Panel found, “there is a serious structural problem created by the current relationship between the [Department of Homeland Security Office of

²⁴ Bob Ortega, *CBP: No action against border agents in deadly-force cases*, AZ Republic, June 8, 2015, available at <http://www.azcentral.com/story/news/politics/immigration/2015/06/08/cbp-action-agents-deadly-force-cases/28670843/>. See also Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, LOS ANGELES TIMES, June 15, 2015, available at <http://www.latimes.com/nation/la-na-border-patrol-shootings-20150615-story.html>; Bob Ortega, *CBP: No agents disciplined for deadly force since 2004*, AZ Republic, Sept. 12, 2014, available at <http://www.azcentral.com/story/news/arizona/investigations/2014/09/12/customs-border-agents-not-disciplined-investigations-continue/15527207/>. While the agency could change its mind at any point as to discipline in any particular case, its history does not give rise to optimism that it will discipline any of its agents for their use of deadly force.

²⁵ HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, June 29, 2015 at page 14 n. 19, available at <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>.

²⁶ *Id.* at p. 6.

Inspector General] and CBP’s [Office of Internal Affairs], a problem that has existed since the very creation of DHS”; “the OIG relationship with CBP’s Internal Affairs is broken. . . . [T]his relationship has ‘proven to be largely ineffective’ and was contrary to the ‘conventional federal law enforcement model for internal affairs’ . . . ‘[which] . . . calls for the placement of the internal investigative function within the agency which bears the strongest institutional interest in deterring and detecting corrupt behavior.’”²⁷ Put more succinctly, a “bureaucratic turf war [has] effectively paralyzed CBP’s ability to address rising misconduct concerns.”²⁸

This dysfunction impairs the agency’s ability to redress all kinds of abuse. “Of 809 abuse complaints against agents within 100 miles of the Southwest border from January 2009 to January 2012, only 13 led to disciplinary action, and typically that meant counseling, internal affairs records showed [I]n 40 percent of the cases with internal affairs, no decision had been made or reported, in some cases for more than three years after complaints were filed. And in the other 60 percent where a conclusion had been reached, ‘no action’ was the end result 97 percent of the time.”²⁹

²⁷ *Id.* at p. 6.

²⁸ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 4, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=3>.

²⁹ Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, NY TIMES, May 5, 2014, available at <http://www.nytimes.com/2014/05/06/us/complaints-of-abuse-by-border-agents-often-ignored-records-> (continued...)

Very recently, the CBP Integrity Advisory Panel’s March 15, 2016 Final Report, in finding that the agency’s discipline system was “broken,” noted that the needed “realigning [of] investigative authority from the Office of the Inspector General to CBP Internal Affairs as it relates to . . . misuse of force” had “not been completed”³⁰ CBP “has never developed a truly CBP-wide process for receiving, tracking and responding to public complaints. Its disciplinary process takes far too long to be an effective deterrent.”³¹ As one report on the Panel’s conclusion summarized it, the “system for disciplining abusive or corrupt Border Patrol agents and officers is so flawed that it hardly acts to deter criminal misconduct in the nation's largest law enforcement agency. . . .”³²

[show.html?_r=0](#). See also American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, May 4, 2014, available at <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>; ACLU, *Record of Abuse* (Oct. 2015), available at <http://www.acluaz.org/node/5415>. To top it off, a report on CBP use of force by the Inspector General for the Department of Homeland Security, in the aftermath of Mr. Hernandez Rojas’ death (*see n. 16 supra*), contained the startling revelation that “[a]llegations entered into DHS case management systems are assigned one of several case allegation types; however, there is no primary use of force designation. As a result, we were unable to identify the total number of excessive use of force allegations and investigations involving CBP employees.” DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, *CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (Redacted)* (Sept. 2013) at p. 5, available at https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf.

³⁰ HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL, March 15, 2016, at 21, 2, available at <http://southernborder.org/wp-content/uploads/2016/03/Report-on-U-S-Customs-and-Border-Protection.pdf> and also [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).

³¹ *Id.* at 1.

³² Brian Bennett, *Report finds little progress at curbing Border Patrol abuses*, LOS ANGELES TIMES, March 14, 2016, available at <http://www.latimes.com/world/mexico-americas/la-na-border-patrol-abuses-20160314-story.html>.

Retired top FBI official Ronald Hosko noted in a press interview that, if the Border Patrol were a municipal police department, its use of excessive deadly force and its lack of internal discipline would make it a logical candidate for federal receivership: “I think if a small police department had, or a midsized or a large police department had as many questionable use-of-force cases as (Customs and Border Protection) has, that (the Department of Justice) would be all over that.”³³ Unfortunately, that has not happened.

III. The Border Patrol’s Whole Culture Is Hostile To Accountability, Reform, Compliance with the Constitution and Adherence to Best Practices on the Use of Deadly Force

The false accounts told in the cases of Guillermo Arévalo Pedraza, Anastacio Hernandez Rojas and Sergio Adrian Hernandez Guereca (*supra* at 8-10) are part of a larger pattern in the agency. Mr. Tomscheck, CBP’s former head of internal affairs, says, “In nearly every instance, there was an effort by Border Patrol leadership to make a case to justify the shooting versus doing a genuine, appropriate review of the information and the facts.”³⁴ He “believe[s] the system

³³ Andrew Becker, *Scathing report deems fatal Border Patrol shooting ‘highly predictable,’* Ctr. For Investigative Reporting, March 4, 2016, available at <https://www.revealnews.org/article/scathing-report-deems-fatal-border-patrol-shooting-highly-predictable/>.

³⁴ Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, WASHINGTON POST, Aug. 16, 2014, available at https://www.washingtonpost.com/politics/border-agencys-former-watchdog-says-officials-impeded-his-efforts/2014/08/16/ce143288-2304-11e4-8593-da634b334390_story.html (“[a]t least a quarter of the 28 fatalities at the hands of U.S. Customs and Border Protection agents and officers since 2010 were ‘highly suspect’ and officials have distorted facts to try to hide any missteps”). Mr. Tomscheck has filed a whistleblower retaliation claim after being removed from his position as internal affairs chief for CBP, allegedly for “not doing (continued...)”)

was clearly engineered to interfere with our efforts to hold the Border Patrol accountable Some persons in leadership positions in the Border Patrol were either fabricating or distorting information to give the outward appearance that it was an appropriate use of lethal force when in fact it was not.”³⁵ James Wong, who was the second-in-command official within the CBP internal affairs unit, confirms that, “almost the stock response to any Border Patrol shooting” is that “it was a good shoot,”³⁶ i.e., one warranting no punishment.

More generally, the Border Patrol encourages its agents to feel that they are unconstrained by the Constitution. Mr. Tomscheck states that, “The Border Patrol has a self-identity of a paramilitary border security force and not that of a law-enforcement organization”³⁷, and that this “has caused them to believe that they are separate and distinct from the federal law enforcement community [a]nd not

enough to investigate abuse and corruption”; he states, “I think there’s every indication that my removal from the position . . . was an effort to identify a scapegoat.” Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion in Agency*, NPR, Aug. 28, 2014, available at <http://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency>.

³⁵ *Id.* (Carrie Johnson).

³⁶ Andrew Becker, *2010 Border Patrol fatal shooting comes under renewed scrutiny*, Ctr. For Investigative Reporting, Aug. 1, 2014, available at <https://beta.cironline.org/reports/border-patrol-shooting-under-scrutiny/>.

³⁷ Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, WASHINGTON POST, Aug. 16, 2014, available at https://www.washingtonpost.com/politics/border-agencys-former-watchdog-says-officials-impeded-his-efforts/2014/08/16/ce143288-2304-11e4-8593-da634b334390_story.html.

bound by the same constitutional restraints regarding use of force.”³⁸ Indeed, after a Border Patrol shooting of an unarmed man, Jose Luis Arambala, in May 2014, the agents involved expressed anger at the fact that they were being investigated for the shooting.³⁹

The Border Patrol’s worldview is evident in its unwillingness even to acknowledge the existence of the problem of abusive agents, to either the public or even to legislators. CBP initially resisted the release of the PERF report which CBP itself had commissioned, and “for a year[] refus[ed] even to provide Congress with more than a summary.”⁴⁰

One high-level internal struggle exemplifies starkly the obstructionism within CBP. In March 2014, Border Patrol Agent Esteban Manzanares kidnapped and raped a Honduran mother and daughter, slit the mother’s wrists, tried to break the daughter’s neck, and left both for dead in the borderland brush. He committed suicide while he was holding at his apartment a third Honduran woman whom he had also kidnapped, stripped, bound with duct tape and raped. The new CBP

³⁸ Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion in Agency*, NPR, Aug. 28, 2014, available at <http://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency>.

³⁹ Carmen Duarte, *Border agents at shooting scene 'angry' with investigators*, AZ DAILY STAR, July 23, 2014, available at http://tucson.com/news/local/article_cb683a81-c41d-5a1b-873b-2eba7a94df95.html.

⁴⁰ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 6, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=5>.

Commissioner Gil Kerlikowske wanted to issue a public statement acknowledging this horrible crime. “. . . [B]ut CBP officials blocked their own new commissioner. They were nervous about admitting fault so quickly. CBP’s longstanding policy had been to hold off for days, weeks, months and even years before addressing publicly any misconduct incident.”⁴¹ Not until Commissioner Kerlikowske appealed to the Secretary of Homeland Security and the Department’s general counsel could he even get past his own subordinates to tell the public about Manzanares’ wrongdoing.⁴²

The Border Patrol’s reluctance to undergo public examination shields the numerous problematic agents who came into the agency during a massive hiring splurge that helped produce its culture of unaccountable violence. Between 2005

⁴¹ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 1, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=0>.

⁴² *Id.* Further evidence of CBP’s unwillingness to subject itself to public scrutiny is the treatment of a report on CBP’s use of force by the Inspector General for the Department of Homeland Security (DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (Redacted) (Sept. 2013), available at https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf), which was prepared in the aftermath of Mr. Hernandez Rojas’ death (*see n. 16 supra*). “While the report has a small number of commendable recommendations regarding record-keeping and training, it is disappointing insofar as it fails to answer many of the public’s most pressing questions,” including because of significant redactions. Mitra Ebadolahi, *Deadly Force on the Border, Without Transparency or Accountability*, ACLU Blog, available at <https://www.aclu.org/blog/immigrants-rights-national-security/deadly-force-border-without-transparency-or-accountability>. “The redacted report highlights how the Department of Homeland Security has attempted to mute the debate surrounding a spate of agent-involved shootings that have killed more than 20 people since 2010, critics say.” Andrew Becker and G.W. Schulz, *Homeland Security blacked out recommendation on Border Patrol restraint*, WASHINGTON POST, Jan. 28, 2014, available at http://www.washingtonpost.com/world/national-security/homeland-security-blacked-out-recommendation-on-border-patrol-restraint/2014/01/28/6cabe308-7c81-11e3-93c1-0e888170b723_story.html.

and the end of the Bush Administration in 2009, the number of Border Patrol agents increased from 9,200 to about 18,000, and then grew to 21,000 by the end of the first Obama administration in 2013.⁴³ “To recruit and quickly hire that many new agents, the Border Patrol reduced requirements, deferred background checks and omitted lie-detector tests that had been standard, and shortened training that officers receive”⁴⁴ Mr. Tomsheck opines that “there are many persons in the organization today that if subjected to periodic polygraph screening would be found to be unsuitable.”⁴⁵ Mr. Wong, who helped oversee the hiring, confirms that, “At some point, it became more important to have people in seats than it was to have qualified people in the seats Was I concerned about the quality of the people we were bringing on? Yes.”⁴⁶

It is therefore no wonder that CBP Commissioner Kerlikowske sees his job as in part “to weed out what he calls ‘bad apples’ like Manzanares who should

⁴³ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 3, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2>.

⁴⁴ Bob Ortega, *Border Patrol scrutinized over teen’s shooting death*, AZ Republic, Oct. 18, 2012, available at <http://www.azcentral.com/news/articles/20121017border-patrol-scrutinized-teen-shooting-death.html>.

⁴⁵ Anna Werner and Laura Strickler, “Disturbing” sex abuse within agency that patrols U.S. border, says former top official, CBS News, May 4, 2015, available at <http://www.cbsnews.com/news/u-s-border-patrol-has-a-sex-abuse-problem-says-whistleblower/>.

⁴⁶ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014 (emphasis added), at page 3, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2>.

have never been hired in the first place—a problem, CBP officials admitted during an internal meeting this past spring, that *might take a generation to fix*.”⁴⁷

During that generation, more people, both children and parents, will die needlessly unless something changes to make Border Patrol agents think more carefully before they pull the trigger. The simple application of constitutional standards to U.S. Border Patrol agents, when their bullets fired in the U.S. hit people on the other side of the border fence or river, will provide a needed deterrent against agents’ excessive and lethal uses of force, which the agency itself is unable or unwilling to address.

IV. Given that Criminal Prosecution Is So Rare, The Ability of Victims to Sue Civilly Based on Constitutional Standards Will Provide Needed Deterrence Against Excessive Use of Deadly Force

The criminal law does not provide a sufficient remedy for the Border Patrol’s crisis of deadly abuse. Criminal investigations, including of several of the killings listed above, have dragged on for many years, only to conclude in no prosecution.⁴⁸ For example, on October 5, 2010, Border Patrol Agent Taylor

⁴⁷ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, Politico, Nov./Dec. 2014, at page 2, available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=1> (emphasis added).

⁴⁸ Tim Steller, *Shootings by border agents: Cases drag on and on*, AZ Daily Star, March 20, 2013, available at http://azstarnet.com/news/local/border/tim-steller-shootings-by-border-agents-cases-drag-on-and/article_da6854ed-680b-5033-b7ff-445f7bfbb695.html. See, e.g., Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas*, Nov. 6, 2015, available at <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>; Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Carlos LaMadrid*, Aug. 9, 2013, (continued...)

Poitevent shot and killed Juan Mendez Jr., an 18-year-old U.S. citizen, after a struggle in Eagle Pass, Texas. “As Mendez lay dying a few feet away, Poitevent, then a two-year veteran of the agency, cried out, ‘They’re going to convict me,’ according to witness accounts. . . .That never happened.”⁴⁹ In fact, as of August 2014, neither Poitevent nor any other Border Patrol agent had ever been even charged, let alone convicted, for any of the dozens of deaths attributable to CBP since 2010.⁵⁰ Indeed, suspicion arose that another Border Patrol agent coached Poitevent on what Poitevent should say in an official interview in order to avoid being prosecuted.⁵¹

Seeking remedies for Border Patrol shootings should not be the prerogative solely of federal and state criminal prosecutors. Our justice system will not work if all redress relies on such prosecutors alone. Defendant Agent Swartz is the *only* Border Patrol agent known to have been the subject of federal criminal charges for a cross-border shooting, and the decision to prosecute him came only after

available at <http://www.justice.gov/opa/pr/2013/August/13-crt-907.html>; Department of Justice Press Release, *Federal Officials Close the Investigation into the Death of Ramses Barron-Torres*, Aug. 9, 2013, available at <http://www.justice.gov/opa/pr/2013/August/13-crt-908.html>.

⁴⁹ Andrew Becker, *2010 Border Patrol fatal shooting comes under renewed scrutiny*, Ctr. For Investigative Reporting, Aug. 1, 2014, available at <https://beta.cironline.org/reports/border-patrol-shooting-under-scrutiny/>.

⁵⁰ *Id.*

⁵¹ Andrew Becker, *Scathing report deems fatal Border Patrol shooting ‘highly predictable,’* Ctr. For Investigative Reporting, March 4, 2016, available at <https://www.revealnews.org/article/scathing-report-deems-fatal-border-patrol-shooting-highly-predictable/>; Andrew Becker, *2010 Border Patrol fatal shooting comes under renewed scrutiny*, Ctr. For Investigative Reporting, Aug. 1, 2014, available at <https://beta.cironline.org/reports/border-patrol-shooting-under-scrutiny/>.

tremendous public pressure, including the filing of the present civil lawsuit.⁵² The great unlikelihood of prosecution⁵³, let alone conviction, means that the criminal law, by itself, does not provide sufficient deterrence against Border Patrol agents' use of excessive deadly force. A civil lawsuit for constitutional violations will therefore often be the only way to impose any consequences for past abuses and to deter future abuses.

Dispelling the view within the Border Patrol that the Constitution does not apply to its agents will benefit the agency and its operations. As the CBP Integrity Advisory Panel stated in reaffirming the relevance of constitutional guarantees, “. . . [A]s is true of all law enforcement agencies, and CBP is no exception, the exercise of force must be consistent with the U.S. Constitution and laws and in compliance with sound policy based on a model of law enforcement best practices, primarily developed and implemented by large urban police departments within the

⁵² Cindy Carcamo, *Mother suing Border Patrol in Mexico boy's 2012 death wants answers*, LOS ANGELES TIMES, July 29, 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-ff-feds-sued-crossborder-fatal-shooting-teenager-20140729-story.html>; David Schwartz, *Mother of slain Mexican teen sues U.S. Border Patrol agents*, Reuters, July 29, 2014, available at <http://www.reuters.com/article/us-usa-mexico-shooting-idUSKBN0FY1VX20140729>; Bob Ortega, *Border Patrol scrutinized over teen's shooting death*, AZ Republic, Oct. 18, 2012, available at <http://www.azcentral.com/news/articles/20121017border-patrol-scrutinized-teen-shooting-death.html>.

⁵³ See, e.g., Dan Shearer, *BP agent won't face charges in Green Valley shooting*, GREEN VALLEY NEWS, Sept. 10, 2014, available at http://www.nogalesinternational.com/news/bp-agent-won-t-face-charges-in-green-valley-shooting/article_b24b2ad2-38ff-11e4-a6bb-001a4bcf887a.html (fatal shooting of unarmed Jose Luis Arambala resulted in no charges); Molly Hennessy-Fiske, *Texas trooper won't be indicted in border helicopter shooting deaths*, LOS ANGELES TIMES, Sept. 11, 2013, available at <http://www.latimes.com/nation/la-na-0912-texas-helicopter-shooting-20130912,0,2483535.story> (no prosecution of a Texas trooper who fired from a helicopter at a pickup, killing two immigrants).

U.S., e.g., the NYPD.”⁵⁴ The “model practice [that] should be used to develop use of force policy within law enforcement agencies, regardless of their specific mission and areas of responsibility” is that

[t]he use of force by law enforcement officers *must at all times be consistent with federal constitutional requirements*. This is the minimum standard that applies to all applications of force. Many law enforcement agencies have established standards for the use of force that exceed the constitutional requirements. It is the collective experience of these agencies that raising the standard within the agency has resulted in a decrease in the use of deadly force without compromising officer safety.⁵⁵

But the Border Patrol has not elevated its standards in this way. Indeed, the issue in this case is whether constitutionally minimal standards should even apply at all to cross-border shootings. The failures of internal agency and prosecutorial oversight described above make it essential that victims have access to the federal judiciary to assert their claims for justice. *Boumediene* does not counsel leaving Border Patrol agents constitutionally unconstrained in a whole class of cases where the target of a shot fired in the U.S. turns out to be a non-U.S. citizen who is on the

⁵⁴ HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, June 29, 2015 at page 13, available at <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>. On the needed change within the agency, see Samuel Walker, *Changing the Culture of the Customs and Border Protection Agency*, July 2014, available at <http://samuelwalker.net/wp-content/uploads/2013/02/Border.pdf>.

⁵⁵ HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, June 29, 2015 at page 14 (emphasis added), available at <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>.

other side of the border, when their agency has shown neither the willingness nor the ability to prevent unjustified killings.

CONCLUSION

The District Court correctly applied the relevant Supreme Court authority. Any contrary decision would eliminate the access to judicial remedy that is needed to deter unwarranted cross-border shootings. The judgment below should be affirmed.

Dated: May 6, 2016

By /s/ Stanley Young
Stanley Young
syong@cov.com
COVINGTON & BURLING LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065-1418
Telephone: (650) 632-4700
Facsimile: (650) 632-4800

ATTORNEYS FOR *AMICI CURIAE*
COALICIÓN DE DERECHOS
HUMANOS, THE SOUTHERN
BORDER COMMUNITIES
COALITION, NO MORE DEATHS,
THE NATIONAL IMMIGRATION
PROJECT OF THE NATIONAL
LAWYERS GUILD, THE KINO
BORDER INITIATIVE AND THE
AMERICAN IMMIGRATION
COUNCIL

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that this brief complies with the type-volume limitation. Based on the word count function of the word-processing system used to prepare the brief, this brief contains 6,369 words, excluding the caption, tables, signature blocks, and certificates.

Date: May 6, 2016


/s/ Julie Romanow - Senior Paralegal

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, 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 appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 6, 2016


/s/ Julie Romanow - Senior Paralegal