

Before the
**INTER-AMERICAN COMMISSION ON
HUMAN RIGHTS**

Family Members of Sergio Adrián Hernández Güereca, Jorge Alfredo Solis Palma, Guillermo
Arévalo Pedraza, Jesus Alfredo Yañez Reyes, José Antonio Elena Rodríguez, and Juan Pablo
Pérez Santillán,
Petitioners

v.

United States,
Respondent.

COMPLAINT

September 30, 2020

Submitted on Behalf of Petitioners by

Steve D. Shadowen, Tina J. Miranda, Matthew C. Weiner, Nicholas W. Shadowen
Hilliard Shadowen LLP
1135 W. 6th St. Suite 125
Austin, TX 78704

Robert C. Hilliard, Marion M. Reilly
Hilliard Martinez Gonzalez LLP
719 Shoreline Blvd., Corpus Christi, TX 78401

Cristóbal M. Galindo
4151 Southwest Pkwy, Suite 602
Houston, TX 77027

Gerald Singleton, Brody McBride
Singleton Law Firm, APC
450 A St., 5th Floor
San Diego, CA 92101

Roberto C. Montiel
Roberto C. Montiel Office, PLLC
571 N. Grand Avenue
Nogales, Arizona 85621

Luis Fernando Parra, Esq.
Parra Law Offices, PLLC
571 North Grand Avenue
Nogales, Arizona 85621

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	3
II.	STATEMENT OF THE FACTS	9
A.	The United States’ Unlawful Rocking Policy.....	9
1.	Background: Economic Opportunism and Nativism	9
2.	Background: 9/11 and Militarization	11
3.	The United States’ Acknowledgements of the Rocking Policy.....	30
4.	The Pattern and Practice of Lethal Force Under the Rocking Policy.....	36
5.	International Outcry Against the Rocking Policy	51
6.	The PERF Report.....	59
7.	The Temporary Halt to the Rocking Policy	63
8.	Mr. Trump’s Renewal of the Rocking Policy	64
B.	“[I] Called It a Murder”: The United States’ Unlawful Killing of Sergio Adrián Hernández Güereca.....	71
C.	“I’ll Kill You, Mother*****”: The United States’ Unlawful Killing of Jesus Alfredo Yañez Reyes.....	80
D.	“Ayudame, ayudame”: The United States’ Unlawful Killing of Guillermo Arévalo Pedraza.....	88
E.	“His Hands and Arms Were Cradled In Front of Him”: The United States’ Unlawful Killing of Jorge Alfredo Solis Palma.....	98
F.	“Que Se Muera El Perro”: The United States’ Unlawful Killing of Juan Pablo Pérez Santillan	100
G.	“Shooting an Unarmed Boy”: The United States’ Unlawful Killing of José Antonio Elena Rodríguez	104
H.	The United States’ Unlawful Failure to Adequately Train Border Patrol Agents.....	107
I.	The United States’ Unlawful Failure to Discipline Border Patrol Agents.....	113
J.	The United States’ Unlawful Failure to Adequately and Timely Investigate Border Patrol Killings.....	115
K.	The United States’ Unlawful Failure to Provide a Judicial Remedy to Petitioners.....	117
III.	ADMISSIBILITY	125

A.	The Commission Has Jurisdiction to Hear This Petition.....	125
B.	The Petitioners Have Exhausted Domestic Remedies	127
C.	The Petition Has Been Submitted Within Six Months	128
D.	No Related Proceedings Are Pending Before International Tribunals	128
IV.	LEGAL ARGUMENT.....	128
A.	The Right to Life and the Imminent-Peril Standard Are Engaged.....	128
1.	The Right to Life Under the American Declaration and American Convention Is Engaged.	128
2.	The Right to Life Under Other International Law Is Engaged.....	131
3.	The Right to Life Requires Police Lethal Force to Meet the Imminent-Peril Standard.....	135
B.	The United States’ Rocking Policy Violates the Imminent- Peril Standard.....	139
C.	The United States’ Killing of the Petitioners’ Loved Ones Violated the Imminent-Peril Standard.	143
D.	The United States Violates the American Declaration by Failing to Provide a Judicial Remedy for the Border Patrol’s Unlawful Killings	158
E.	The United States Violates Other Fundamental International Law by Failing to Provide a Judicial Remedy for the Border Patrol’s Unlawful Killings.	165
V.	CONCLUSION AND PETITION	173

I. STATEMENT OF THE CASE

1. The Petitioners are the families of victims killed by United States Border Patrol agents along the nation's southern border.¹ The Petition seeks relief from two principal violations by the United States of the American Declaration on the Rights and Duties of Man ("American Declaration")² and of the fundamental principles elucidated in the American Convention on Human Rights ("American Convention").³

2. *First*, the United States adopted a policy that permitted its Border Patrol agents to shoot-to-kill civilians who allegedly threw rocks at the agents. By permitting agents to use lethal force regardless of whether the alleged rock-throwing put the agents or others in imminent peril of death or serious injury, the Rocking Policy and the killing of Petitioners' loved ones violated the Declaration's prohibition on the unlawful taking of life. *Second*, the United States has violated the Declaration by categorically precluding the victims' families, when the victim was killed in Mexico, from obtaining judicial remedies in U.S. courts. The American Declaration requires the United States to provide the victims and their families, among other protections, a fair trial and judicial protection. Thus, the United States violated the Declaration by unlawfully killing the Petitioners' loved ones and then refusing to provide judicial review of, and judicial remedies for, those unlawful killings and the Rocking Policy.

¹ The Petitioners are Jesus Librado Hernandez (father of Sergio Adrián Hernández Güereca), Luisa Palma (mother of Jorge Alfredo Solis Palma), Mario Del Socorro Quintero Perez (mother of the minor children of Jesus Alfredo Yañez Reyes), Nora Lam Gallegos (wife of Guillermo Arévalo Pedraza), Araceli Rodriguez (mother of José Antonio Elena Rodríguez), and Amada Carolina Martinez Morales (mother of the minor children of Juan Pablo Pérez Santillán).

² Final Act of the Ninth Int'l Conf. of Am. States (Pan American Union), Bogota, Colombia, Mar. 30–May 2, 1948.

³ OAS Treaty Series No. 36, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 ILM 99.

3. From 2005 through March 2014, United States Border Patrol agents killed at least 44 people along the nation's southern border.⁴ Many of the victims were Mexican nationals who were shot by agents for allegedly throwing rocks at them.⁵

4. These deaths resulted from a Border Patrol policy and practice that allowed field agents to use lethal force against rock-throwers regardless of whether the agent was in imminent danger of death or serious injury. This Rocking Policy permitted agents to treat rock-throwing as deadly force regardless of the particular circumstances, such as the size of the rocks, the distance between the assailant and the agent, and the agent's ability to de-escalate the confrontation, take cover, or retreat. The policy thereby "justified" agents in responding to rock-throwing with lethal force of their own, regardless of whether a reasonable officer would have feared imminent death or serious injury to himself or another. The policy received the imprimatur of the highest executives within U.S. Customs and Border Protection ("CBP").

5. The Rocking Policy and its contours were admitted under oath by CBP's former Assistant Commissioner for Internal Affairs. He testified that:

there was a policy within CBP that in response to rocking or alleged rocking, agents need not back up, need not take cover, and could treat the throwing of rocks at them as per se lethal force to which they could respond with lethal force of their own.⁶

⁴ Rob O'Dell & Daniel González, *Border Patrol Agent Pleads Not Guilty in Mexican Teen's 2012 Killing*, Arizona Republic (Oct. 10, 2015), <http://www.azcentral.com/story/news/local/arizona/breaking/2015/10/09/arizona-border-patrol-agent-mexican-teen-killing-court-plea/73552962/>. Appendix, Ex. 8. A chart identifying those killed is in the Appendix as Exhibit 211.

⁵ Police Executive Research Forum, *U.S. Customs & Border Protection—Use of Force Review: Cases and Policies*, 8–9 (2013) ["PERF Report"]. Appendix, Ex. 9.

⁶ Transcript of Deposition of James Tomsheck, *Perez v. United States*, No. 3:13-cv-01417-WQH-BGS (S.D. Cal.) ["Tomsheck Dep."], at 300–01. Appendix, Ex. 10.

6. The Internal Affairs Chief further testified that the highest-ranking CBP and Border Patrol officials routinely had “meetings, discussions, or other communications in which that policy . . . was discussed and affirmed.”⁷

7. His own review of the long string of killings revealed that many of them were not even arguably justified. Outside consultants hired by the CBP reached the same conclusion: “[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.”⁸ The records revealed that in some cases “frustration is a factor motivating agents to shoot at [alleged] rock throwers.”⁹

8. Responding to a Border Patrol killing of an alleged rock-thrower in July 2012, this Commission issued a statement declaring “that U.S. Border Patrol agents [have] used an excessive and disproportionate use of force on the Mexico-United States border.”¹⁰ The Commission viewed the “deaths of immigrants . . . through the use of excessive and disproportionate force as extremely serious.”¹¹

9. The United States’ Rocking Policy violated the prohibition on unlawful taking of human life. The American Declaration has long been held to prohibit police use of excessive, lethal force. That force is excessive when it does not meet the Imminent-Peril standard—when it is not necessary to prevent imminent death or serious injury to the agent or another person. Other

⁷ *Id.* at 301; *see also id.* at 192 (“There were many meetings regarding use of force where it was emphatically stated . . . that lethal force was the appropriate response to rocks being thrown”).

⁸ PERF Report, at 6. Appendix, Ex. 9.

⁹ *Id.* at 9. Appendix, Ex. 9.

¹⁰ Press Release, The Inter-American Comm’n on Human Rights, *IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents* (July 24, 2012), http://www.oas.org/en/iachr/media_center/preleases/2012/093.asp. Appendix, Ex. 11.

¹¹ *Id.*

fundamental international law binding on the United States, including numerous conventions and the jus cogens prohibition against extrajudicial killing, confirms the same standard.

10. *As a matter of policy*, the United States permitted agents to use lethal force against alleged rock-throwers in the absence of Imminent Peril. That policy violated international law. The United States itself, through eight U.S. administrations, has condemned twenty nations' use of lethal force against rock-throwers. This Commission, the Inter-American Court, and authorities throughout the world are in accord. And the tragic circumstances of the deaths of these six families' loved ones, set out in detail below, illustrate how senseless it is for security forces to shoot-to-kill alleged rock-throwers.

11. Under pressure from legislators, human rights organizations, the Government of Mexico, and private litigation, President Barack Obama's Secretary of Homeland Security eventually directed the termination of the unlawful Rocking Policy in March 2014. But the current chief executive has revived it, with an explicitly racist animus.

12. Responding to an encounter between migrants and Mexican police in 2018, Mr. Trump publicly announced that the U.S. policy was that if "[t]hey want to throw rocks at our military, our military is going to fight back."¹² Rejecting the constraint imposed by the Imminent-Peril standard, he directed that "[a]nybody throwing rocks ... we will consider that a firearm."¹³ He communicated the policy to military and other executives: "We're not going to put up with that. If they want to throw rocks at our military, our military fights back. We're going to

¹² Benjamin Siegel, *Trump claims crackdown coming on asylum seekers, says troops could fire on migrants if rocks thrown*, ABC NEWS (Nov.1, 2018), <https://abcnews.go.com/Politics/president-trump-address-immigration-crisis-white-house-remarks/story?id=58898094>. Appendix, Ex. 12.

¹³ *Id.*

consider -- and I told them, consider it a rifle. When they throw rocks like they did at the Mexico military and police, I say, consider it a rifle."¹⁴

13. Mr. Trump's racist motivation in reviving the unlawful Rocking Policy is beyond doubt. He refers to Mexico as "our enemy,"¹⁵ asserts that undocumented immigrants from Mexico, "aren't people [but] ... are animals,"¹⁶ contends that Mexico "send[s] criminals over our border,"¹⁷ says that "[w]hen Mexico sends its people... [t]hey're bringing drugs [t]hey're bringing crime [and] [t]hey're rapists,"¹⁸ consistently refers to undocumented immigration at the southern border as "an invasion,"¹⁹ and dehumanizes certain Latinx native-born U.S. citizens with the epithet "anchor babies."²⁰

14. The United States has compounded the unlawful Rocking Policy by categorically withholding from the victims' families any judicial review of, and remedies for, the unlawful killings. In defiance of the clear prohibition under the American Declaration and other applicable international law, the United States has successfully asserted that it has sovereign immunity—in the U.S.'s own courts—to the families' claims that the Rocking Policy and the killings pursuant

¹⁴ *Id.*

¹⁵ Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, Time (Aug. 31, 2016), https://time.com/4473972/donald-trump-mexico-meeting-insult/_Appendix, Ex. 13.

¹⁶ Gregory Korte and Alan Gomez, *Trump ramps up rhetoric on undocumented immigrants: 'These aren't people. These are animals.'* USA TODAY (May 16, 2008), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/>. Appendix, Ex. 14.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Anthony Rivas, *Trump's language about Mexican immigrants under scrutiny in wake of El Paso shooting*, ABC NEWS (August 4, 2019), <https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566>. Appendix, Ex. 123.

²⁰ Reena Flores, Donald Trump: "Anchor Babies" aren't American citizens, CBS News (Aug. 19, 2015) <https://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens/>. Appendix, Ex. 16.

to it are unlawful.²¹ The United States also successfully urged its Supreme Court to conclude that the families have no domestic-law claims, when the victim was killed in Mexico, against individual Border Patrol agents.²² With the decisive votes of Mr. Trump’s two appointees to the Supreme Court, Mr. Trump achieved his dream of having a free hand to deal with foreign nationals at the border “with no Judges or Court Cases.”²³

15. The United States’ refusal to provide “Judges or Court Cases” violated the American Declaration, the United States’ obligations under numerous international conventions and principles, and customary international law. Remarkably, the U.S. Supreme Court justified these violations by expressly turning its back on 75 years of international law. In refusing to allow the families to sue the agents, the Court concluded that it was of no moment that U.S. domestic law withheld *individual rights* from these families. It was sufficient, held the Court, that the United States *and Mexico* could resolve *through diplomacy* their differences over Border Patrol agents’ conduct.²⁴ But a founding principle of modern international law, and of the American Declaration, is that human rights inhere in individual human beings, not nations. The United States owes obligations not only to Mexico, but to these families.

16. The project of the founders of modern international law—prominently including delegates from the nations represented on this Commission—was to “[bring] to the fore the importance of giving the individual human being standing in international law.”²⁵ “[T]runcating

²¹ See, e.g., *Hernandez v. Mesa*, 785 F.3d 117 (5th Cir. 2015) (en banc).

²² *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

²³ Anthony Rivas, *Trump's language about Mexican immigrants under scrutiny in wake of El Paso shooting*, ABC NEWS (Aug. 4, 2019), <https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566>. Appendix, Ex. 123.

²⁴ *Hernandez v. Mesa*, 140 S. Ct. at 745.

²⁵ Jay Winter and Antoine Prost, *Rene Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge Univ. Press 2013), at 221.

the sovereignty of the state and advancing the right of individual petition against violations of rights in the state in which he or she lived – provided the core of [this] approach to human rights.”²⁶

17. The Commission should grant this Petition in order to uphold the individual rights to which these victims and their families are entitled under the American Declaration and other foundational international law. In providing elemental justice to these Petitioners, the Commission can also recall the United States to the better angels of its nature. The American people could not have foreseen in 2000 that in 2020 it would require an international legal proceeding to remind the United States that it cannot lawfully kill civilians absent imminent peril and that it must open its courts to families who want judicial review of those killings. In granting this Petition, the Commission can help start the United States on its long and difficult path to rejoin the community of nations.

II. STATEMENT OF THE FACTS

A. The United States’ Unlawful Rocking Policy

1. Background: Economic Opportunism and Nativism

18. To know the past is to understand the present. The precarious relationship between the United States and Mexican nationals far predates the creation of the U.S. Border Patrol and is marked by the United States’ mercurial stance on immigration—alternately embracing immigrants for economic gain and scapegoating them to satisfy nativist urges.

19. At some moments, the United States has seen Mexican nationals as the archetype of the dependable, hardworking laborer who has entered the nation seeking honest opportunity. The Mexican Revolution, U.S. labor shortages, World War I, and World War II all fueled the

²⁶ *Id.*

northward movement of Mexican immigrants to play a role in the United States' southwestern expansion. But at other moments—during economic hardship, the Great Depression, Ronald Reagan's War on Drugs, the terrorist attacks of September 11, 2001, and now Donald Trump's presidency—the United States has replaced that archetype with one of the illegal alien who brings crime and violence and threatens the United States' social fabric.

20. This tension has shaped the border as it exists today, a heavily fortified divide between one of the world's richest nations and its southern neighbor. While closing and opening the border at will, the United States promotes the false conception that migration is an independent force to which the United States and its populace react. The opposite is true. The United States creates and molds the flow of migration to suit its own needs and wants. The current political United States stance on the border and migration is yet another stage in this dynamic, a stage marked by fear, hatred, and violence towards Mexicans, migrants and citizens alike.

21. United States border policy from 1790 to 2000 oscillated between welcoming and facilitating informal immigration in order to provide railroad and agricultural workers, and, when economic times were hard and nativist sentiment was ascendant, deporting or hounding those workers and their families out of the country. A sketch of that troubled history is included as an Attachment at the end of this Petition.

2. Background: 9/11 and Militarization



CBP Detention Center

22. The U.S. reaction to the terrorist attacks on September 11, 2001 fundamentally reshaped the Border Patrol into the militarized agency that it is today. The United States' unlawful Rocking Policy and the string of unlawful killings resulted directly from two dramatic changes: (a) the enormous and undisciplined increase in the Border Patrol workforce; and (b) the purposeful militarization of what is, by law, a domestic law-enforcement agency.

23. Congress disbanded the Immigration and Naturalization Service, partly due to its incompetence in approving the visas of two of the 9/11 hijackers.²⁷ In its place, in 2003 Congress

²⁷ David Johnson, *A Nation Challenged: The Hijackers; 6 Months Late, I.N.S. Notifies Flight School of Hijackers' Visas*, The New York Times (Mar. 13, 2002), <https://www.nytimes.com/2002/03/13/us/nation-challenged-hijackers-6-months-late-ins-notifies-flight-school-hijackers.html>. Appendix, Ex. 26.

established the Department of Homeland Security (DHS) to address the nation's new focus on security. The newly created Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection, and Citizenship and Immigration Services (CIS) were all placed under the DHS umbrella.²⁸ The Border Patrol became an arm of the CBP, where it remains today.²⁹

24. Since this early-2000 transformation, the United States has invested more than \$100 billion in border and immigration control.³⁰ Much of that money bought a dramatically increased workforce. At the beginning of the Clinton presidency, the Border Patrol had fewer than 5,000 agents.³¹ At the time of the 9/11 terrorist attacks, the total number stood at just under 10,000.³² After 9/11 the Border Patrol more than doubled in size to over 21,000.³³

²⁸ Garrett M. Graff et al, *The Green Monster*, POLITICO Magazine. (Nov. 2014.) <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2>. Appendix, Ex. 27.

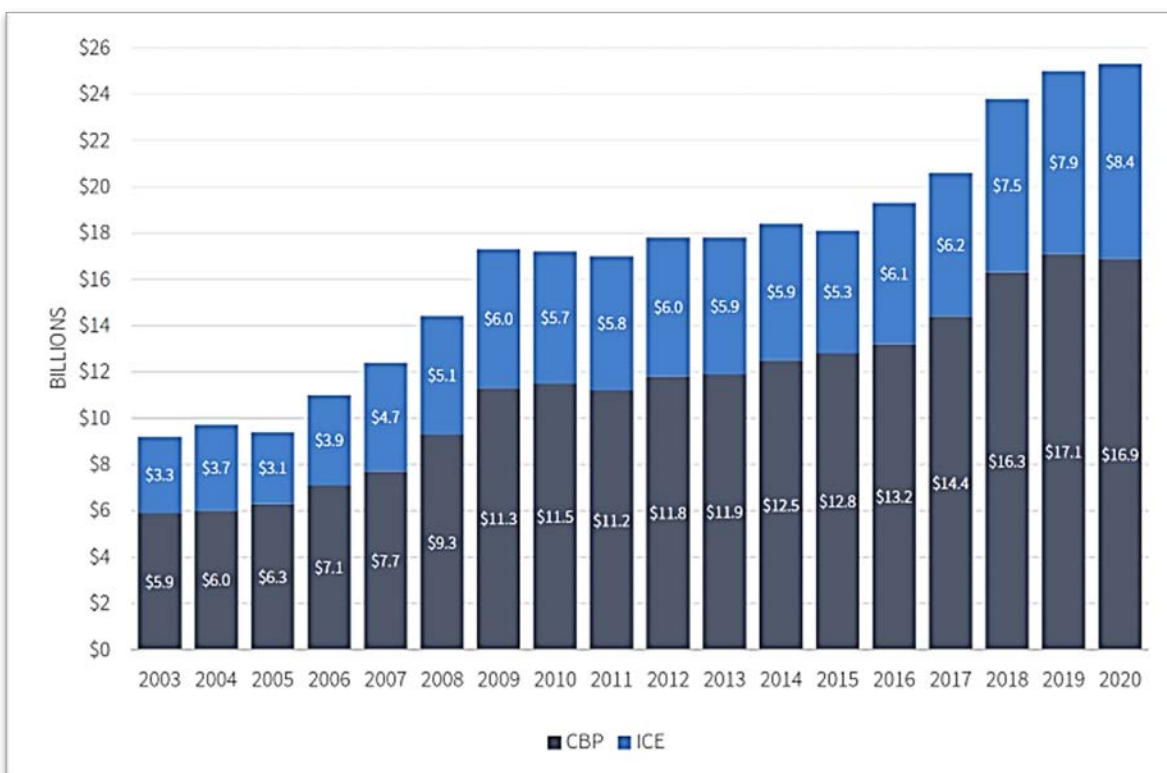
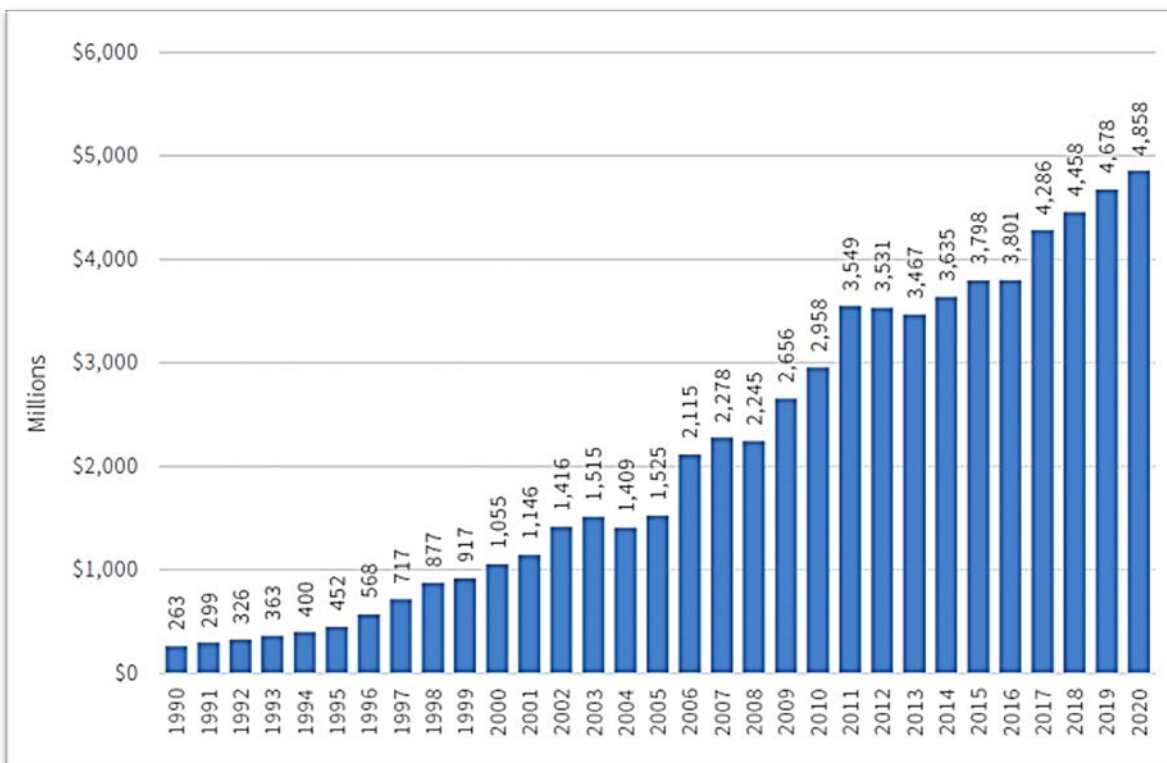
²⁹ See Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (March 15, 2016) ("*CBP Integrity Advisory Panel, Final Report*"), at 1, <http://tinyurl.com/CBPFinalReport>. Appendix, Ex. 66.

³⁰ Graff, *The Green Monster*, POLITICO Magazine. Appendix, Ex. 27.

³¹ Greg Moran, *Last Border Hiring Binge Had Some Bad Outcomes*. San Diego Tribune (Mar. 13, 2017), <http://www.sandiegouniontribune.com/news/immigration/sd-me-border-enforcement-20170302-story.html>. Appendix, Ex. 29.

³² *Id.*

³³ *See id.*



25. The CBP achieved this workforce growth by relaxing its hiring standards. It also regularly sent agents into the field without completing background checks, and it waived the requirement of a polygraph exam.³⁴ The hiring surge was mockingly referred to as the Bush “No Trainee Left Behind” program.³⁵

26. The unprecedented, but predictable, consequences of this uncontrolled hiring surge is the corruption and lack of discipline that exists in the Border Patrol to this day. The former CBP Assistant Commissioner of Internal Affairs admitted publicly that it is “conservative to estimate that 5 percent of the [Border Patrol] force” is corrupt.³⁶ The assistant director of the FBI’s criminal investigative division from 2012 to 2014 says that the 5% estimate is too low: the truth is closer to 10% - 20%.³⁷ Between 2004 and 2014, “roughly 170 CBP employees, including Border Patrol agents, [were] arrested or convicted on corruption-related charges,” such as smuggling, money laundering, and conspiracy.³⁸

27. The corruption is just one aspect of the Border Patrol’s failure to hire and train a high-quality law enforcement workforce. It is easier to become a Border Patrol agent than a state or local police officer. To join the Border Patrol, the applicant must simply be a U.S. citizen under the age of forty with a valid driver’s license, have lived in the U.S. for the last three of five

³⁴ *Id.*

³⁵ Tatiana Sanchez, *Border Patrol Union: CBP Report Is Flawed, Inaccurate*, San Diego Tribune (Aug. 22, 2016), <http://www.sandiegouniontribune.com/news/border-baja-california/sdut-cbp-border-patrol-report-response-2016mar16-story.html>. Appendix, Ex. 30.

³⁶ Alex Nowrasteh, *Disciplinary and Performance Problems Plague Border Patrol.*, Cato Institute (Nov. 24, 2017), <https://www.cato.org/publications/commentary/disciplinary-performance-problems-plague-border-patrol>. Appendix, Ex. 63.

³⁷ Graff, *The Green Monster*. Appendix, Ex. 27.

³⁸ Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, Washington Post (Aug. 16, 2014), <http://tinyurl.com/BeckerBorder>. Appendix, Ex. 237; Congressional Testimony of James Tomsheck. Appendix, Ex. 10.

years, and be eligible to carry a firearm.³⁹ Applicants are not required to have a high school diploma, GED, or any college credits.

28. Moreover, unlike most police departments nationwide, the CBP does not administer a psychological exam. In contrast, to become a police officer in San Antonio, Texas, applicants must pass the San Antonio Entry-Level Law Enforcement Exam, which “measures cognitive ability and behavior orientation,”⁴⁰ and must have worked as a probationary officer for a minimum of one year, obtained a GED or high school diploma with a minimum “C” average, have a clean criminal and driving record, and pass a psychological exam.⁴¹

29. To join the Houston, Texas police force, applicants need either five years’ experience as a police officer, eighteen months of active military duty, or forty-eight hours of college academic credit.⁴²

30. Despite its lower recruitment standards, the Border Patrol has difficulty attracting the recruits it desires. The 2011 CBP Workforce Integrity Study reveals that “[o]n average, it takes 52 applicants for the Border Patrol Agent position to get one candidate through the entire recruitment process and vetting process determined suitable for entry on duty (EOD).”⁴³ According to the study, 76% of applicants fail the polygraph test, 50% fail the written test, 25%

³⁹ *Border Patrol Agent Application Process*, U.S. Customs and Border Protection (January 18, 2018), <https://www.cbp.gov/careers/frontline-careers/bpa/app-proc>. Appendix, Ex. 67.

⁴⁰ “San Antonio Police Department Officer Requirements.” *Criminal Justice Degree Schools* (Apr. 24, 2018), <https://www.criminaljusticedegreeschools.com/criminal-justice-resources/police-departments-by-metro-area/san-antonio-police-department-officer-requirements/#requirements>. Appendix, Ex. 68.

⁴¹ *Id.*; “RULE VII Minimum Qualifications” SAPD, <https://sapdcareers.com/documents/FP-Rules-w-TOC-1-30-2017-Minimum-Qualifications.pdf>. Appendix, Ex. 69.

⁴² *Requirements*. 2017. <http://www.hpdcareer.com/requirements.html>. Appendix, Ex. 70.

⁴³ Department of Homeland Securities/U.S. Customs and Border Protection, *U.S. Customs and Border Protection (CBP) Workforce Integrity Study: Final Report* (Dec. 15, 2011). pg. 23, <https://assets.documentcloud.org/documents/1165309/workforce-integrity-study.pdf>. Appendix, Ex. 71.

fail the medical test, 15% fail the physical fitness test, and 56% fail the background check.⁴⁴ In contrast, among non-federal law enforcement agencies that use polygraph testing the average failure rate is 25%.⁴⁵

31. The Workforce Integrity Study noted that while traditional law-enforcement agencies have used psychological testing in their hiring procedures for decades, the CBP does not.⁴⁶ The CBP maintains that such evaluations are not possible due to the large number of applicants and resource constraints. Nevertheless, the Workforce Integrity Study urges the CBP to use psychological evaluations, noting that not doing so “could open an agency up to ‘negligent retention’ lawsuits.”⁴⁷

32. The unqualified and untrained Border Patrol workforce may not have been sufficient, on its own, to result in the unlawful Rocking Policy and unlawful deaths at issue in this Petition. That subpar workforce was combined with another lethal element—the militarization of the Border Patrol.

33. The statutes governing CBP make clear that it is a domestic law-enforcement agency.⁴⁸ Indeed, the military is prohibited from “execut[ing] the domestic laws of the United States,” including immigration laws, “except where expressly authorized by the Constitution or Congress.”⁴⁹

⁴⁴ *Id.* at p.24

⁴⁵ Handler, Mark, “Polygraph Frequently Asked Questions.” *American Polygraph Association*. 2010. <http://www.polygraph.org/polygraph-frequently-asked-questions>. Appendix, Ex. 74.

⁴⁶ *Id.* at 29.

⁴⁷ *Id.* at 30.

⁴⁸ 6 U.S.C. § 211(e)(3)(A) (2018) (Border Patrol shall “serve as the law enforcement office of U.S. Customs and Border Protection.”).

⁴⁹ R. Chuck Mason, *Securing America’s Borders: The Role of the Military*, Congressional Research Service (Feb. 25, 2013). Appendix, Ex. 255.

34. Many agents consider themselves the nation's first line of defense, with some likening their role to the U.S. Marine Corps and vowing to "never surrender a foot of U.S. soil."⁵⁰

35. High-level DHS officials have reinforced this mindset. In response to criminal organizations that had been "operating with near-impunity" at the border for years, "the strategy communicated [by former Secretary of Homeland Security, Michael Chertoff] to agents out in the field[] was clear: Fight back."⁵¹ The Border Patrol's "mentality is everyone they encounter is a bad guy, which is totally different from other law enforcement."⁵²

36. The CBP Internal Affairs Chief confirmed that the most senior executives purposefully "militarize[d] the Border Patrol—from the way Border Patrol agents are hired to the operational tactics Border Patrol agents were encouraged to take to the field."⁵³ He admitted that "[t]he Border Patrol has a self-identity of a paramilitary border security force and not that of a law enforcement agency."⁵⁴

37. The United States' ever-increasing militarization of the border is shown in some key facts:

- a. In 2006, Congress passed the Secure Fence Act. This legislation created the heavily fortified border zone that exists today.

⁵⁰ Mark Binelli, *10 Shots Across the Border*, The New York Times (Mar. 3, 2016), <http://tinyurl.com/Binelli>. Appendix, Ex. 209.

⁵¹ *Id.*

⁵² *Id.* (quoting W. Ralph Basham, CBP Commissioner from 2006 to 2009).

⁵³ Declaration of James F. Tomsheck in Support of Plaintiff's Motion to Compel Documents in Fisher's Possession at ¶ 12, *Perez v. United States* (S.D. Cal. 2015) (No. 3:13-cv-01417-WQH-BGS) ["Tomsheck Dec."]. Appendix, Ex. 28.

⁵⁴ Juan E. Gastelum, *Scathing Border Patrol Revelations From An Ousted Agency Chief*, BuzzFeed News (Aug. 14, 2014), <https://www.buzzfeednews.com/article/juangastelum/5-scathing-border-patrol-revelations-from-an-ousted-agency-c>. Appendix, Ex. 1.

- b. The CBP has the largest U.S. drone fleet outside the Department of Defense. This includes Predator B drones that were built for military use.⁵⁵
- c. In 2014 alone, CBP received nearly \$40 million in tactical gear from the Defense Department.⁵⁶
- d. The Border Patrol Tactical Units carry M4 rifles with silencers.⁵⁷
- e. The Border Patrol plans to do a lot of shooting. In October of 2019, CBP announced that it bought 33 million rounds of ammunition for its newly transitioned Glock handgun, and plans to buy another 300 million rounds over the next five years.⁵⁸
- f. “[I]t has become entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by... [and to] hear Predator B drones buzzing... [that] are equipped with the same kind of

⁵⁵ The Militarized Border, United We Dream, <https://unitedwedream.org/defund-militarism-invest-in-what-keeps-us-safe/week-3-the-militarized-border/>. Appendix, Ex. 256; see also U.S. Customs and Border Protection, *Unmanned Aircraft System MQ-9 Predator B*, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/air-marine-fact-sheet-uas-predator-b-2015.pdf>. Appendix, Ex. 257.

⁵⁶ Alex Horton, *Border Protection is preparing for the caravan — with weapons and gear designed for combat*, Washington Post, (November 6, 2018), <https://www.washingtonpost.com/national-security/2018/11/05/border-protection-is-preparing-caravan-with-weapons-gear-designed-combat/>. Appendix, Ex. 59.

⁵⁷ Daniel Brown, *US Border Patrol agents are carrying these weapons of war to stop the migrant caravan*, Business Insider (Nov 9, 2018) <https://www.businessinsider.com/the-war-weapons-border-patrol-carrying-to-stop-migrant-caravan>. Appendix, Ex. 229.

⁵⁸ Pete Norman, *U.S. Border Patrol Buys 33 Million Bullets for New Glock Handgun*, Bloomberg (Oct. 27, 2019), <https://www.bloomberg.com/news/articles/2019-10-27/u-s-border-patrol-buys-33-million-bullets-for-new-glock-handgun>. Appendix, Ex. 228.

‘man-hunting’ [radar] that flew over the Dashti Margo desert region in Afghanistan.”⁵⁹

- g. More than one-third of Border Patrol agents are former military personnel who served in Afghanistan and Iraq.⁶⁰

38. A rise in racial animus and chauvinistic attitudes among Border Patrol agents towards immigrants,⁶¹ coupled with the increasing number of agents on the ground, many of whom the United States hired under relaxed standards, are key ingredients in a recipe for abusive, unlawful Border Patrol conduct.

⁵⁹ Todd Miller, *War on the Border*, The New York Times (Aug. 17, 2013), available at <http://tinyurl.com/MillerWar>. Appendix, Ex. 238.

⁶⁰ *Id.* at Appendix, Ex. 238.

⁶¹ A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrantdeaths-post-sexist-memes>. Appendix, Ex. 24; Jeremy Raff, *The Border Patrol’s Corruption Problem*, The Atlantic (May 5, 2017), <https://www.theatlantic.com/politics/archive/2017/05/not-one-bad-apple/525327>. Appendix, Ex. 25.



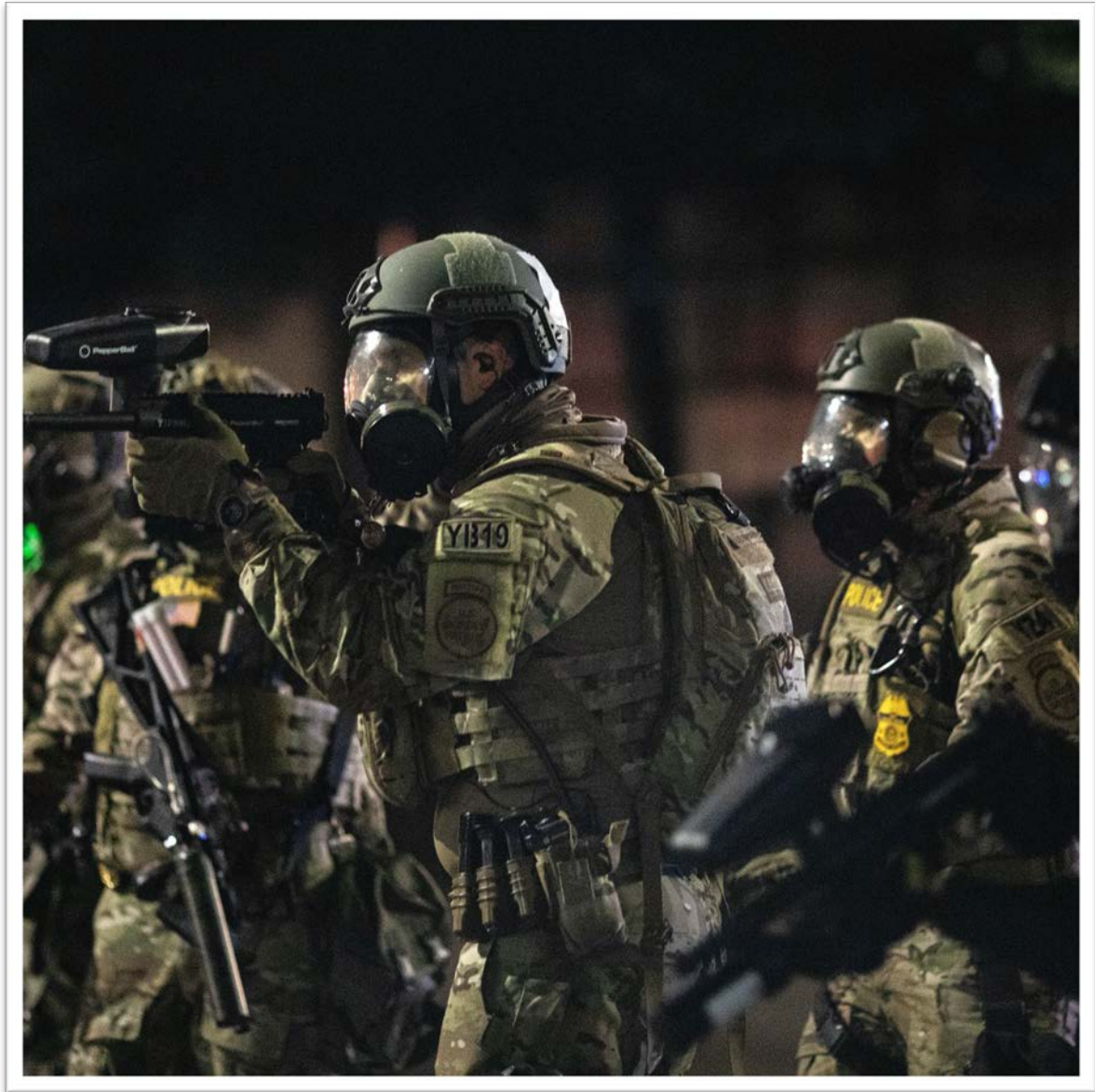
CBP UH-60 Black Hawk Helicopter



CBP Black Hawk helicopter in action



Armored Border Patrol Vehicle



Border Patrol Tactical Unit (BORTAC)



CBP MQ-9 Predator B Drone

Air and Marine Predator B

PROVEN FLIGHT SYSTEMS

- Predator family of aircraft flown by USAF more than 18 years and 2,000,000 hours
- More than 10,000 hours in border Security / Homeland Security role

MTS-B EO/IR IMAGE **LYNX SAR IMAGE**

PREDATOR

- Wing Span: 66 ft
- Length: 36 ft
- Max Takeoff Weight: 10,500 lb

PERFORMANCE

- Range: Up to 3200 nm
- Max Demonstrated Endurance: 21 hrs
- Air Speed Max / Transit / Loiter: 240+ / 180 / 110 kts

PAYLOADS:

- Multi-Spectral Targeting System (MTS-B) EO/IR
- Lynx Synthetic Aperture Radar (SAR)
- Law enforcement and civilian communications (UHF/VHF)
- Ku-band / Iridium satellite communications links

OPERATIONAL AIRCRAFT

- CBP 104, CBP 108, CBP 110, CBP 119, CBP 125

U.S. Customs and Border Protection

10



CBP MQ-9 Predator B Drones



CBP UH-60 Black Hawk Helicopter







Border Patrol ATV unit



A US Border Patrol agent wears a mask and the US Army's latest camouflage uniform on Nov. 5, 2018 in Hidalgo, Texas. *Getty Images*

3. The United States' Acknowledgements of the Rocking Policy

39. The United States justified killing dozens of people along the southern border on the ground that they had been throwing rocks at Border Patrol agents. It is exceedingly rare, however, for thrown rocks to place a law-enforcement officer in danger of imminent death or serious bodily injury. The National Law Enforcement Officers Memorial Fund has tracked all deaths of police officers in the line of duty since the killing of the first U.S. patrol officer in 1792.⁶² In those 200-plus years, only one police officer (in 1942) has been killed by a thrown

⁶² Fourth Amended Complaint, *Perez v. United States*, No. 3:13-cv-01417-WQH-BGS (S.D. Cal.), at ¶ 65. Appendix, Ex. 234.

rock.⁶³ Most police departments teach their cadets that a rock is not deadly beyond fifty feet.⁶⁴ Officers who encounter thrown rocks can simply retreat beyond that perimeter unless they are performing a particularly important mission, such as aiding a wounded colleague.

40. The policy and practice within the Border Patrol was different. An Inspector General's report concluded, for example, that in 2011 there were 339 reported rock assaults on Border Patrol agents, who responded with lethal force in 33 instances, i.e., *10% of the time*.⁶⁵ The same pattern occurred in 2012: Border Patrol agents used lethal force 22 times in response to 185 reported rock assaults, i.e., *12% of the time*.⁶⁶

41. The high incidence of lethal force against alleged rock-throwers is the result of a policy and practice implemented and approved at the highest levels of CBP. The CBP Internal Affairs Chief was examined in a deposition in a lawsuit challenging the policy.⁶⁷ The Assistant

⁶³ *Id.* at ¶ 65, citing NAT'L L. ENF'T OFFICERS MEM'L FUND, <http://www.nleomf.com> (last visited Apr. 25, 2018).

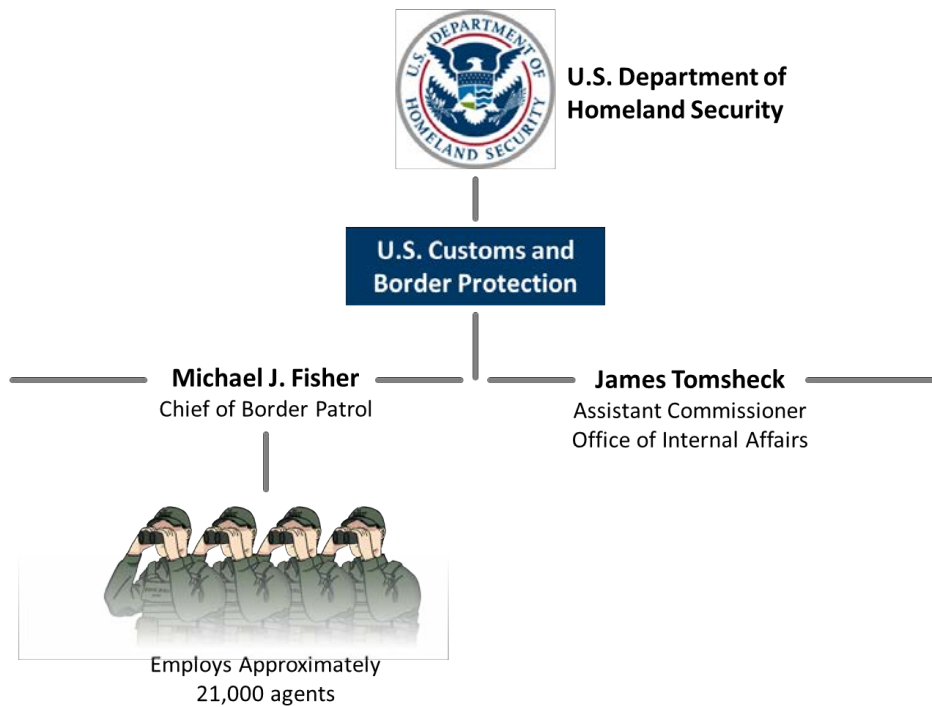
⁶⁴ Brian Palmer, Getting Stoned: *How many police officers have been killed by rocks?* Slate (June 9, 2010). Appendix, Ex. 258.

⁶⁵ Office of Inspector General/ U.S. Department of Homeland Security, OIG-13-114 (Revised), *CBP Use of Force Training and Actions to Address Use of Force Incidents*, (Sept. 2013), pg. 14.

⁶⁶ *Id.* at 14–15.

⁶⁷ CBP is a component of the Department of Homeland Security (DHS). The Office of Border Patrol, which is headed by the Chief of the Border Patrol, is a component of CBP and employs approximately 21,000 Border Patrol agents. The Office of Internal Affairs is a component of DHS and is headed by an Assistant Commissioner of CBP. That position is coequal with that of Chief of the Border Patrol. Report of Thomas Frazier, *Maria Del Socorro Quintero Perez, et al. v. United States of America, et al.* (S.D. Cal.) (No. 3:13-cv-01417) ["Frazier Report"], at ¶¶ 15–16. Appendix, Ex. 79. James F. Tomsheck served as the Assistant Commissioner of the CBP Office of Internal Affairs from June 2006 to June 2014. In that capacity, Tomsheck oversaw CBP's integrity departments, including offices that investigate instances of corruption, misconduct, and the use of lethal force by CBP agents and officers.

Commissioner for Internal Affairs is an exceedingly high-ranking position within the CBP. The position is co-equal with that of the Chief of Border Patrol.⁶⁸



42. The Internal Affairs Chief testified that from at least 2006 to 2014 the Border Patrol maintained a policy that allowed field agents to use lethal force against rock-throwers regardless of whether the agents were in imminent danger of death or serious injury.⁶⁹

43. Regardless of circumstances—the size of the rock, the distance away from the agent, the ability to seek cover, etc.—the policy deemed rock-throwing to be a per se deadly assault. The policy thereby authorized agents to use lethal force to repel alleged rock assaults even in the absence of imminent peril.

44. The Internal Affairs Chief, who was in office during most the relevant time, testified:

⁶⁸ Frazier Report at ¶¶ 15–16. Appendix, Ex. 79.

⁶⁹ Tomsheck Dep. at 16, 300–01. Appendix, Ex. 10.

“there was a policy within CBP that in response to rocking or alleged rocking, agents need not backup, need not take cover, and could treat the throwing of rocks at them as *per se* lethal force to which they could respond with lethal force of their own.”⁷⁰

45. The highest CBP and Border Patrol officials routinely had “meetings, discussions, or other communications in which that policy . . . was discussed and affirmed.”⁷¹ When fatal shootings of alleged rock-throwers were addressed at the CBP Commissioner’s daily meeting with his staff, the killings were invariably described as “a good shoot.”⁷²

46. Moreover, the Internal Affairs Chief directly tied this policy, and the unlawful killings that resulted from it, to the militarization of the Border Patrol. This militarization, and its role in permitting the use of lethal force against rock-throwers, is exemplified by an October 2012 meeting of senior CBP and Border Patrol brass in Harper’s Ferry, Virginia. The Internal Affairs Chief testified that the meeting was attended by the CBP Commissioner, the Chief of the Border Patrol, the Chiefs of each Sector of the Border Patrol, and other CBP leadership.⁷³

47. CBP’s top official told the assembled group that CBP was “now the premier paramilitary homeland security agency.”⁷⁴ The Internal Affairs Chief was making a presentation on the string of fatal shootings and the constitutional restraints applicable to all law-enforcement

⁷⁰ Tomsheck Dep. at 300–01. Appendix, Ex. 10.

⁷¹ *Id.* at 301; *see also id.* at 192 (“There were many meetings regarding use of force where it was emphatically stated . . . that lethal force was the appropriate response to rocks being thrown.”).

⁷² *Id.* at 150.

⁷³ *Id.* at 262.

⁷⁴ Tomsheck Dec. at ¶ 14 Appendix, Ex. 28; Tomsheck Dep. at 287. Appendix, Ex. 10.

officers. But he was interrupted and told that “*we’re not cops and we don’t have to respond like they do.*”⁷⁵

48. That was CBP officials’ own view, so they did not object when union representatives and other spokespersons for Border Patrol agents regularly and publicly stated that agents were justified in treating the throwing of rocks at them as per se lethal force.

49. For example, after Border Patrol agents killed Guillermo Martinez Rodriguez in 2005, claiming he was throwing rocks while simultaneously running away, an official spokesperson for the Border Patrol publicly justified the shooting, stating: “If I was put in the same shoes of this agent, that’s exactly what we’d have to do.”⁷⁶

50. On June 10, 2010, Lou Patch, another official spokesperson for the Border Patrol, appeared on primetime national television and made the following statement: “All along our river area, we’ve got rock throwing incidents. Unfortunately, when they escalate to using force or deadly force *in this case rocks or bricks, or things of that nature*, things change and the game is changed then from cat and mouse to *life and death.*”⁷⁷

51. The day before Lou Patch’s official statement from Border Patrol, the National Border Patrol Council of the American Federation of Government Employees (“NBPC”) issued a nationwide press release that succinctly stated the Rocking Policy. The NBPC represents more than 17,000 Border Patrol agents and support staff. The heading of the NBPC press release stated bluntly, “Rock Assaults are Deadly Force.” The statement continued, “Since biblical times rocks

⁷⁵ Tomsheck Dec. at ¶ 14 (emphasis added) Appendix, Ex. 28; Tomsheck Dep. at 305. Appendix, Ex. 10.

⁷⁶ Yanez Fourth Amend. Compl. at ¶ 23. (quoting *Shooting condemned by Mexico*, San Diego Union-Tribune (January 3, 2006).) Appendix, Ex. 234

⁷⁷ *Id.* at ¶ 81. Appendix, Ex. 234.

have been used as a crude but effective weapon to injure and kill humans.” The statement made unmistakably clear that the Rocking Policy treats rock-throwing as per se lethal force to which agents are justified in responding with lethal force: “Rocks are weapons and constitute deadly force. If an agent is confronted with deadly force they will respond in kind.”⁷⁸

52. CBP and Border Patrol management did not keep the policy secret, repeatedly telling the media in stark terms that shooting rock-throwers was justified by the agency’s long-standing position that rocks are lethal weapons. After an agent killed a 15-year-old boy who was on the Mexican side of the border, the agents’ union issued a press release asserting that “[r]ocks are weapons and constitute deadly force” and “[i]f an agent is confronted with deadly force they will respond in kind.”⁷⁹

53. Border Patrol officials never disavowed the union’s statement or many others like it. The Internal Affairs Chief testified that, both internally and externally, “the mantra from Border Patrol management was that [a rock assault] is lethal force.”⁸⁰

54. Another DHS official admitted that the Border Patrol had “developed a system where ‘If you throw rocks at us, we will shoot at you.’”⁸¹

55. This policy manifested itself in several ways. Rock-throwing is the most common type of assault encountered by agents,⁸² yet Border Patrol executives did not issue any written guidelines to agents on how the Imminent-Peril standard applied or how they might avoid the

⁷⁸ Frazier Report, at ¶ 73. Appendix, Ex. 79.

⁷⁹ *Id.*

⁸⁰ Tomsheck Dec. at ¶ 7. Appendix, Ex. 28.

⁸¹ *See* Graff, *The Green Monster*. Appendix, Ex. 27.

⁸² Frazier Report, at ¶ 40. Appendix, Ex. 79.

necessity of using lethal force.⁸³ Nor did management provide any training to agents on how to counteract the assaults that they were most likely to encounter in the field.⁸⁴ Having refused to provide any specific written guidance or training, management rarely, if ever, disciplined an agent for using lethal force against alleged rock-throwers, regardless of the circumstances.⁸⁵

4. The Pattern and Practice of Lethal Force Under the Rocking Policy

56. The Internal Affairs Chief's sworn testimony is confirmed by the pattern and practice of agents' use of lethal force against alleged rock-throwers in the field. The following incidents are culled from news articles and documents obtained from the CBP in litigation. The CBP had a protocol that required the filing of a Significant Incident Report after every encounter in which a Border Patrol agent used lethal force.

57. The Border Patrol's paramilitary culture and Rocking Policy resulted in a staggering body count. The deaths of alleged rock-throwers included people shot in the back;

⁸³ See Section IIA3 below. In 2004, DHS provided a use-of-force policy applicable to all DHS components. See U.S. Customs and Border Protection Use of Force Policy Handbook ("2010 Handbook"), at 65. Appendix, Ex. 80. The written DHS policy simply restated the U.S. constitutional standard that "[l]aw enforcement officers and agents of [DHS] may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." *Id.* The DHS policy provided that each of its agencies "shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy." *Id.* In turn, the CBP's 2010 Handbook merely reiterated the broad constitutional standard "while enabling CBP operational component leadership to *address use of force related issues unique to their respective workplace environments and adopt more detailed operational guidance.*" *Id.* The "component leadership"—the Border Patrol management—refused to issue any such guidance for responding to rock-throwing, until forced to do so in 2014.

⁸⁴ Frazier Report, at ¶ 125. Appendix, Ex. 79.

⁸⁵ *Id.* at ¶ 34. The stunning lack of disciplinary action, criminal prosecution, or successful civil actions is catalogued in IACHR Petition, Family Members of Anastasio Hernandez-Rojas at 11–14. Appendix, Ex. 236.

shot by rifle from more than 50 yards away; shot while across the border in Mexico; shot 10 times; and shot from patrol boats that could easily have maneuvered away.⁸⁶

58. The incidents involving Petitioners' loved ones are set out in detail further below. Among the *other* unlawful Border Patrol killings and shootings—just through Fall 2012—are these:

- a. In 2003, Border Patrol agents killed Ricardo Olivares Martinez by shooting him five times as he attempted to flee. Agents alleged he was throwing rocks.⁸⁷
- b. On or around December 30, 2005, a Border Patrol agent shot and killed Guillermo Martinez Rodriguez.⁸⁸ Guillermo, believed to be 18, was shot in the back as he was attempting to flee back across the border to Mexico.⁸⁹ According to a press release by local police, after the Border Patrol agent discovered Guillermo crossing the border, “[t]he agent ran toward the migrant, who retreated to the south and ‘scooped up what the agent believed to be several rocks. ... As the agent unholstered his duty weapon, the male cocked his arm and made a throwing motion toward the agent.”⁹⁰ The agent then shot Guillermo⁹¹ who continued back to Mexico

⁸⁶ Frazier Report at ¶¶ 48–86. Appendix, Ex. 79.

⁸⁷ *A look back at fatal border patrol shootings in Southern Arizona*, Arizona Daily Star (Oct. 22, 2018) https://tucson.com/laestrella/tucson/border-patrol-agent-in-cross-border-shooting-death-faces-retrial-this-week-in-tucson/article_6a8467da-d659-11e8-855e-5f6921d6669e.html. Appendix, Ex. 3.

⁸⁸ 01257-YANEZ-REYES. Appendix, Ex. 81.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2.

⁹¹ *Id.* at 1.

but died the next day.⁹² A Border Patrol spokesperson justified the killing, asserting to the media that “[i]f I was put in the same shoes of this agent, that’s exactly what we’d have to do. The possibility of a rock striking me or possibly killing me—it’s unfortunate situations have to come to this point.”⁹³

- c. On August 26, 2006, another agent shot and killed a man near the border in California.⁹⁴ A Border Patrol spokesperson told the New York Times that “the Agent killed a man who was throwing rocks from the Mexican side of the border.”⁹⁵
- d. In 2006, Border Patrol agents near the Andrade Port of Entry in California were apprehending a suspect who was swimming across the Colorado River when, they contend, a group of Mexican nationals began throwing rocks from the bank on the Mexican side of the river. The agents opened fire into the group, killing one man.⁹⁶
- e. On March 26, 2007, a Border Patrol agent shot and killed a man near Calexico, California.⁹⁷ A Border Patrol spokesperson said that “agents saw the man, along with a group of people, scale the international fence and use a raft to cross the nearby All-American Canal. ... [T]he man attempted to return into Mexico and was involved in a struggle with a Border Patrol

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 02041-Yanez-Reyes. Appendix, Ex. 82.

⁹⁵ Frazier Report, at ¶ 49. Appendix, Ex. 79.

⁹⁶ *Yanez* Fourth Amend. Compl. at ¶¶ 18-19. Appendix, Ex. 234

⁹⁷ 02020-Yanez-Reyes. Appendix, Ex. 83.

agent. After the struggle he grabbed a softball-sized rock and began walking toward the border fence ... and an agent with an M-4 assault rifle was approached by the man with the rock.”⁹⁸ The agent then shot the man with his rifle.⁹⁹ “Four of the men who climbed the fence began throwing rocks at agents on the north and south side of the All-American Canal and an agent fired a shotgun round in their direction.”¹⁰⁰ The four men then fled back into Mexico.¹⁰¹

- f. On June 30, 2007, “an agent shot at a group of suspected illegal immigrants throwing rocks in Calexico.”¹⁰²
- g. On July 16, 2007, Luis Cabrera, Consul General of Mexico, wrote to the Chief Patrol Agent of San Diego Sector, stating: “On Friday July 13th, we learned about an incident that took place on the same day around 6:30 p.m. at the border in the area of Smugglers’ Gulch by Imperial Bleach, in which apparently a group of persons from the Mexican side assaulted a Border Patrol agent throwing him rocks. According to the preliminary information we received, the BP Agent fired his gun.”¹⁰³ The Chief Patrol Agent’s response states that “[a]t the time of the incident agents had just apprehended four individuals out of approximately 30 that were observed

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Victor Morales, *Shots fired at the border*, Imperial Valley Press (Oct. 11, 2007). Appendix, Ex. 84.

¹⁰³ Letter Exchange Between Michael J. Fisher and Mexican Consulate in San Diego (July 2007). Appendix, Ex. 85.

fleeing back over the border to Mexico. Once across the border, numerous individuals began rocking the agents on the ground. In self defense, one of the officers fired one round from his weapon. ... Based on the information I have to date, this shooting appears to be within Agency guidelines.”¹⁰⁴

- h. On July 25, 2007, Mr. Cabrera again wrote to the Chief Patrol Agent of San Diego Sector, stating that “[o]n Monday July 23, 2007 we were informed by the U.S. Border Patrol (BP) of an incident that took place Saturday July 21st, 2007 around 11:30 p.m. in the area of Imperial Beach, California, in which a BP agent fired his hand gun several times in response to an aggression involving rock throwing.”¹⁰⁵
- i. In August 2007, a Border Patrol agent shot and killed Jose Alejandro Ortiz Castillo.¹⁰⁶ After the incident, a Border Patrol spokesperson told reporters that the “agent spotted Ortiz apparently leading two men and a woman through a hole in the border fence just east of downtown El Paso. Ortiz, who was carrying bolt cutters, picked up a rock as the agent was arresting the woman.”¹⁰⁷ “The agent fired several shots, hitting Ortiz ‘multiple times.’”¹⁰⁸

¹⁰⁴ *Id.* at Appendix, Ex. 85.

¹⁰⁵ Letter Exchange Between Michael J. Fisher and Mexican Consulate in San Diego (July/August 2007). Appendix, Ex. 86.

¹⁰⁶ 02063-Yanez-Reyes. Appendix, Ex. 87.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

- j. In October 2007 “U.S. Border Patrol agents fired on a group of Mexican nationals hurling rocks at them.”¹⁰⁹ An “unspecified number of Border Patrol agents was apprehending six to seven suspected illegal immigrants near the New River basin just west of the downtown Calexico Port of Entry when they were assaulted by rock throwers.”¹¹⁰ The Supervisory Border Patrol Agent told reporters that “[t]he agents fired an unspecified number of rounds ‘in defense of their personal safety,’” after which “the rock throwers fled south.”¹¹¹
- k. On August 11, 2008, a Border Patrol agent near San Ysidro, California, shot across the border and severely wounded Edgar Israel Ortega Chávez.¹¹² Agents “fired pepper balls and other chemical agents at a group of seven to 15 people to disperse them” after which most of the crowd ran away.¹¹³ A San Diego police detective told the media that “[h]owever, two of the suspects remained, still armed with rocks, and directed their attention toward the Border Patrol agents.”¹¹⁴ “From about 50 feet away, an agent fired two rounds from his rifle, striking a 23-year-old man who was standing on Mexican soil.”¹¹⁵ He acknowledged that “[n]o Border Patrol agents were injured during the incident.”¹¹⁶

¹⁰⁹ 02067-Yanez-Reyes. Appendix, Ex. 88.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 02069-Yanez-Reyes. Appendix Ex. 89.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

- l. On September 23, 2008 “[w]hile cutting sign on the border road, [an] agent was assaulted by five individuals, in Mexico, who threw rock projectiles that struck his Agency vehicle. The agent took cover behind his vehicle and as the assault continued the agent fired one round from his Agency issued weapon at the assaultive individuals.” The agent “was not injured and the damage to the Agency vehicle consisted of dents and broken windows.”¹¹⁷
- m. On September 29, 2009, “Border Patrol agents assigned to the McAllen, Texas Station reported that an agent fired his Service issued handgun at an unknown subject who was assaulting him with rocks near Penitas, TX. Agents were on boat patrol when several subjects on the Mexican side of the Rio Grande River threw rocks, striking the Service boat several time.”¹¹⁸
- n. On December 7, 2009, an agent from Nogales Station fired a pistol at a suspect and reported a rock assault.
- o. On December 21, 2009, “Border Patrol agents assigned to the Douglas, Arizona Station reported that an on-duty agent discharged a round from his Service handgun at an unidentified subject ... near Douglas, AZ. The agent attempted to apprehend three subjects, they began throwing rocks, the agent discharged one round and the subjects absconded to Mexico. No

¹¹⁷ Email re: SIR: 08SDCECJ-092408000147 (Sep. 24, 2008). Appendix, Ex. 90.

¹¹⁸ Email re: Initial Telephonic Report - Shots Fired - No Injuries - Penitas, TX (Sep. 29, 2009). Appendix, Ex. 91.

injuries or damages were reported and it is unknown if the subjects were struck.”¹¹⁹

- p. On January 18, 2010, “Border Patrol agents assigned to the El Paso, Texas Station reported that an agent fired one round at four individuals in Mexico who were throwing rocks at agents and had failed to disperse even after agents deployed less than lethal munitions. No injuries or damages were reported. The four individuals fled further south into Mexico.”¹²⁰
- q. On February 8, 2010, “Border Patrol agents assigned to the Mission, Texas Station reported that agents fired their service issued weapons at several subjects near Mission, TX. The agents were conducting boat patrol duties when several subjects began throwing rocks and bottles at them.”¹²¹
- r. On February 19, 2010, an agent fired a rifle at a suspect and reported a rock assault.¹²²
- s. On March 31, 2010, “Border Patrol agents assigned to the McAllen, Texas Station reported that an on duty agent discharged a Service issued M-4 rifle at an unidentified number of individuals who were throwing rocks at

¹¹⁹ Email re: Shot Fired by Agent - Initial Telephonic - Tucson Sector - Douglas Station (Dec. 22, 2009). Appendix, Ex. 93.

¹²⁰ Email re: Initial Telephonic - Shots Fired El Paso, TX (Jan. 18, 2010) Appendix, Ex. 95; *see also* Deft-1002 (UFRS). Appendix, Ex. 94.

¹²¹ Email re: Initial Telephonic Report - Shots Fired, Mission, Texas (Feb. 8, 2010) Appendix, Ex. 96; *see also* Deft-1003 (UFRS). Appendix, Ex. 97.

¹⁴⁸ Deft-1003 (UFRS). Appendix, Ex. 97.

¹²² *Id.*

the agent. At the time of the incident the agent was working narcotics traffic.”¹²³

- t. On May 4, 2010, “Border Patrol agents assigned to the Sonoita, Arizona Station reported that an agent discharged an unknown number of rounds from his Service issued sidearm in response to being rocked by an unknown number of subjects in Mexico near Naco, AZ. The assailants absconded farther into Mexico. No agents on scene were injured.”¹²⁴
- u. On May 21, 2010, in the Tucson, Casa Grande station “[t]hree agents responded to the MSS detection and upon their arrival, 3 subjects immediately absconded from the area. The subject who was shot remained and reportedly threatened the agent with rock in his hand. Agent [] discharged his service issued sidearm at the subject.”¹²⁵
- v. On May 31, 2010, “a Border Patrol agent assigned to the Rio Grande City, Texas Station fired two shots from his Service issued firearm after a group of suspected illegal aliens threw several rocks at him near Rio Grande City, TX. The agent was patrolling the border on foot about 2 miles north of the International Boundary when the incident occurred.”¹²⁶

¹²³ Email re: Shot Fired - Initial Telephonic - BP Rio Grande Valley Sector - McAllen Station (Apr. 1, 2010). Appendix, Ex. 98.

¹²⁴ Email re: INITIAL TELEPHONIC: Shots Fired by Employee - BP Tucson Sector - Sonoita Station (May 4, 2010). Appendix, Ex. 101; *see also* Deft-1005 (UFRS). Appendix, Ex. 100.

¹²⁵ Deft-1049-50. Appendix, Ex. 240; *see also* Fisher Email re: Tucson Sector Shooting Report (May 22, 2010) Appendix, Ex. 99; Deft-1006 (UFRS). Appendix, Ex. 102.

¹²⁶ Email re: INITIAL TELEPHONIC REPORT - Shots Fired By Agent (May 31, 2010). Appendix, Ex. 259.

- w. On June 18, 2010, “Border Patrol agents assigned to the Nogales, Arizona Station reported two on-duty agents discharged a combined three rounds from their Service handguns at rock throwers near Nogales, AZ. One agent was struck in the leg by a rock and declined medical attention. The rock throwers absconded back to Mexico and it is unknown at this time if anyone was injured.”¹²⁷
- x. On August 31, 2010, an “Agent [] was walking along a trail within Border Zone 26 when he came upon two subjects. These two subjects reportedly began throwing rocks and water bottles at Agent []. Agent [] who was reported to be uninjured in the incident, drew his service issued sidearm and discharged one round in the direction of the two subjects. Both subjects then absconded from the area running northeast. ... Agent [] was alone on the trail at the time of the incident, but other agents were within a few hundred yards.”¹²⁸
- y. On November 5, 2010, agents from Boulevard Station fired a rifle and a pistol and reported a rock assault.¹²⁹
- z. On November 8, 2010, an agent from Chula Vista Station fired a pistol and reported a rock assault.¹³⁰

¹²⁷ Email re: INITIAL TELEPHONIC- Shot Fired by Employees - Nogales, AZ (Jun 18, 2010). Appendix, Ex. 103.

¹²⁸ Deft-1045-46. Appendix, Ex. 104.

¹²⁹ See Deft-1010 (UFRS) (UFRS report# UFB20101105002) Appendix, Ex. 106; *see also* Deft-999. Appendix, Ex. 105.

¹³⁰ 02044-Yanez-Reyes. Appendix, Ex. 107.

- aa. On November 16, 2010, Border Patrol agent Abel Canales was on horseback when he intercepted Jesus Castro Romo leading a group of undocumented immigrants across the border near Walker Canyon, west of Nogales, Arizona. Castro ran away, and “ignored orders to return to the group, defied Canales verbally and physically, and threatened Canales with a rock before beginning a throwing motion which put Canales in fear for his physical safety.”¹³¹ Agent Canales then shot Castro, who was around three feet away, severely and permanently injuring him. A U.S. district court judge later found that “use of force was not justified because there was no situation that reasonably provoked such use.”¹³² The court first rejected Agent Canales’s testimony as not credible, and then held “even assuming that Canales’ testimony was true, his use of force was still not justified....”¹³³
- bb. On January 5, 2011, an agent from Nogales Station fired a semiautomatic rifle and reported a rock assault.¹³⁴ According to Department of Justice files,¹³⁵ the agent was standing 40 feet from the border fence¹³⁶ and 15 feet in front of another agent,¹³⁷ when he shot an M4 rifle through the border fence fatally wounding 17-year-old Mexican national Ramses Barron-

¹³¹ *Id.* at 1-2.

¹³² *Id.* at ¶11.

¹³³ *Id.* at ¶11-12.

¹³⁴ Deft-1012 (UFRS). Appendix, Ex. 108.

¹³⁵ 02004-Yanez-Reyes. Appendix, Ex. 109; *see also* Deft-1012 (UFRS). Appendix, Ex. 108.

¹³⁶ DOJ Report about the Investigation into the Death of Ramses Barron-Torres at 8. Appendix, Ex. 110.

¹³⁷ *Id.* at 6.

Torres.¹³⁸ The incident occurred around 3:00am after “[r]adio operators confirmed the presence of individuals who appeared to be carrying bundles of narcotics over the U.S. border into Mexico.”¹³⁹ “The [agent], driving a service vehicle, responded to the area and was immediately attacked with rocks that were being thrown from the Mexico side of the fence” while another individual with a bundle of narcotics “was running parallel to the fence on the U.S. side as if he was looking for a place to run south into Mexico.”¹⁴⁰ The agent “was forced to take protective cover due to the rocks being thrown” when the agent fired his rifle “through the slats in the fence.”¹⁴¹ A video shows Barron Torres “falling to the ground suddenly while he was in the midst of throwing a rock.”¹⁴²

¹³⁸ *Id.* at 1.

¹³⁹ *Id.* at 1-2.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 6, 8.

¹⁴² *Id.* at 2.



Zelma Barrón-Torres looks at a memorial photo of her son Ramsés in her home in Nogales, Mexico. Kelly Presnell/Arizona Daily Star.

- cc. On February 8, 2011, an agent from McAllen Station fired a pistol at a suspect and reported a rock assault.¹⁴³
- dd. On February 15, 2011, an agent from Nogales Station fired a pistol at a suspect and reported a rock assault.¹⁴⁴
- ee. On March 21, 2011, Border Patrol agent Lucas Tidwell shot and killed 19-year-old Carlos LaMadrid, who was trying to return to Mexico by climbing a ladder placed against the border fence.¹⁴⁵ Tidwell justified his

¹⁴³ Deft-1012 (UFRS). Appendix, Ex. 108.

¹⁴⁴ *Id.*

¹⁴⁵ 01224-YANEZ-REYES. Appendix, Ex. 111. *See also* 02000-Yanez-Reyes. Appendix, Ex. 92; Deft-1013 (UFRS). Appendix, Ex. 112.

use of lethal force by claiming that LaMadrid's accomplices were throwing rocks at the agent from atop the fence.

- ff. On May 1, 2011, "an agent discharged his Service issued M-4 rifle after illegal aliens threw rocks at an agent in Nogales, AZ."¹⁴⁶ One or more agents fired "6 to 8 shots ... towards rock throwers through fence ballards" as "agents were attempting to arrest an illegal alien."¹⁴⁷ "No known injuries at this time to either side."¹⁴⁸

¹⁴⁶ Deft-1096-99. Appendix, Ex. 241; *see also* Deft-1014 (UFRS). Appendix, Ex. 113.

¹⁴⁷ Deft-1096-99. Appendix, Ex. 241.

¹⁴⁸ *Id.*

NEWS

Border killings: 46 people killed, no agents disciplined

Bob Ortega The Republic | azcentral.com
Published 9:20 p.m. MT Sep. 13, 2014 | Updated 8:42 a.m. MT Sep.

Guillermo Martinez Rodriguez: Another Anonymous Border Assassination

The New York Times Magazine
FEATURE
10 Shots Across the Border

a Mexican 16-year-old raised
States Border Patrol.

U.S. & WORLD // BORDER & MEXICO

Mexican girl clutched her dying father

USA TODAY

Subscribe Sign In

7 times rock-throwing ended in deadly force by U.S. Border Patrol agents

OBSERVER

Courts: Police Can Shoot and Kill People As Long They Are Across the Border

Civil rights groups fear the courts a
judicial oversight necessary to rein
largest police forces.

Made by History • Perspective

The Supreme Court may have just made violence against immigrant children more likely

[US] OPINIONS • Politics

Five Conservative Justices Just Gave Border Patrol Agents an Unfettered License to Kill

Posted to
Jawetz

Courthouse News Service

Border Patrol Ran Over Immigrants, Suit Says

npr why donate

NATIONAL

Border Shooting Death Raises U.S.-Mexico Tensions

Sergio Adrian Hernandez Guereca Won't Be the Last to Die

Forbes

Border Agents Shouldn't Get Sued For Shooting Foreigners, Trump Administration Tells Supreme Court

SWI swissinfo.ch

Mother of Mexican teen shot at border fears for others after U.S. ruling

Father of girl killed by Border Patrol truck sues

Border Patrol killings of migrants raise questions on training, accountability

Reveal

Local

Scathing report deems fatal Border Patrol shooting 'highly predictable'

azcentral

Politics Nation / World Obituaries E-E

OC WEEKLY

ORANGE COUNTY'S LEADING SOURCE OF NEWS, CULTURE AND ENTERTAINMENT

HOW MUCH IS A DEAD MEXICAN WORTH? ACCORDING TO THE U.S. GOVERNMENT, LESS THAN A USED HYUNDAI

NEWS

Deadly force cases by Border Patrol raising questions

Los Angeles Times

Agent cleared in 2005 border shooting

The New York Times

Mexico Investigates Death of Man Shot in U.S. by Border Patrol Agent

My Plainview

Witness claims wrong person shot at border, lawyer says

Chronicle News

Mexico condemns killing of alien in Arizona

la Gente

Radio La Primavera 91.7 - 105.3 fm / 680 am

Home / Immigrant News

Relatives of Mexicans killed in the US hope for justice in vain

Newsweek

U.S. BORDER PATROL AGENT WHO SHOT AND KILLED MEXICAN TEENAGER THROUG...

U.S.

U.S. Border Patrol Agent Who Shot And Killed Mexican Teenager Through Fence Found Not Guilty Of Murder

5. International Outcry Against the Rocking Policy

59. The Government of Mexico and international human rights organizations have consistently protested against the Rocking Policy and urged the United States to end it.

60. In 2006, the Border Network for Human Rights reported to the United Nations that Border Patrol agents' killing of alleged rock-throwers constitutes "the use of excessive force by authorities which has arbitrarily taken the life of immigrants" in violation of binding international norms.¹⁴⁹

61. In response to the August 2007 killing of Jose Alejandro Ortiz Castillo, Mexico's Foreign Relations Department lodged with the United States "a firm protest against the use of lethal weapons in the face of situations that do not represent a proportionate risk."¹⁵⁰ In connection with the same incident, the Border Network for Human Rights stated to reporters that "[w]hen one incident happens, and it seems it's an isolated incident and the reasons are because ... there was a real threat against an agent, that seems reasonable... But when there is a series of events you start questioning things."¹⁵¹

¹⁴⁹ U.S./Mexico Border Report to the United Nations Human Rights Committee Regarding the United States' Compliance with the International Covenant on Civil and Political Rights, *Behind Every Abuse Is a Community* (June 2006), pg. 9, <http://www.bnhhr.org/wp-content/uploads/2010/01/BNHR-UN-Report3.pdf>. Appendix, Ex. 35.

¹⁵⁰ 02063-Yanez-Reyes. Appendix, Ex. 87.

¹⁵¹ Alicia Caldwell, *Border Agent Fatally Shoots Suspected Smuggler*, Houston Chronicle (Aug. 10, 2007) <https://www.chron.com/news/article/Border-agent-fatally-shoots-suspected-smuggler-1799352.php>. Appendix, Ex. 242.

62. In 2008, the executive director of the American Civil Liberties Union of San Diego similarly protested: “Simply put, it is not acceptable to use lethal force when confronted with rock throwers in ... border protection situations.”¹⁵²

63. That same year, the U.N. Committee on the Elimination of Racial Discrimination expressed concerns “about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border.”¹⁵³ The Committee recommended that the U.S. increase “significantly its efforts to eliminate police brutality and excessive use of force” against such persons “by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials.”¹⁵⁴

64. After the August 2008 shooting of Edgar Israel Ortega Chávez, the American Civil Liberties Union and other organizations wrote to Senator Kennedy and Representative Lofgren asking that their “subcommittees investigate the U.S. Border Patrol’s practice of shooting rock throwers” because the latest shooting is an example of “another instance of this disproportionate use of force....”¹⁵⁵ They wrote that “[t]he U.S. Border Patrol appears to fully

¹⁵² ACLU, *U.S. Border Patrol Should Stop Using Lethal Force Against Rock Throwers* (Aug. 2008), <http://www.aclusandiego.org/immigrants-rights/news-for-immigrants-rights/u-s-border-patrol-should-stop-using-lethal-force-against-rock-throwers-say-human-rights-groups-call-for-congressional-investigations-into-disproportionate-use-of-force-incidents-2/>. Appendix, Ex. 227.

¹⁵³ U.N. Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6 (May 2008). Appendix, Ex. 226.

¹⁵⁴ *Id.*

¹⁵⁵ 01209-YANEZ-REYES. Appendix, Ex. 116; *see also* 01189-YANEZ-REYES. Appendix, Ex. 115.

support the shooting of rock-throwers” and that Congress should have the then-DHS Secretary “make clear to his Border Patrol agents that it is not acceptable to use deadly force when confronted with rock throwers.”¹⁵⁶

65. In response to the killing of Sergio Hernández near El Paso, Texas in June 2010 (see Section IIB below), the United Nation’s Office of the High Commissioner for Human Rights noted that the Commissioner “had indeed received further allegations of excessive use of force by US Border Patrol agents while enforcing immigration laws” and that “OHCHR also urged the United States authorities to ensure that all the actions of the US Border Patrol were fully ascribed to the international standards applicable to officials responsible for enforcing the law.”¹⁵⁷

66. The High Commissioner later reiterated that “[t]here have been very many young people, teenagers, who have been killed at the border,” and that “[t]he reports reaching me are that there has been excessive use of force by the U.S. border patrols while they are enforcing the immigration laws.”¹⁵⁸

67. In June 2010, Mexico's Foreign Relations Department said specifically to DHS Secretary Napolitano that it “energetically condemn[ed]” the Border Patrol’s killing of Sergio

¹⁵⁶ *Id.*

¹⁵⁷ Yanez Fourth Amend Compl. at ¶ 29-30 (citing United Nations Office at Geneva “Highlights of Regular Briefing by the Information Service” (May 29, 2012)), Appendix, Ex. 234.

¹⁵⁸ Stephanie Nebehay, *U.S. uses excessive force along Mexican border: U.N.*, Reuters (Oct. 18, 2012), www.reuters.com/article/2012/10/18/us-mexico-us-un-rights-idUSBRE89H13F20121018. Appendix, Ex. 218.

Hernández, noting particularly that “according to international standards, lethal force must be used only when the lives of people are in immediate danger and not as a dissuasive measure.”¹⁵⁹

68. The Interior Secretary of Mexico, Fernando Gómez Mont, personally called DHS Secretary Napolitano, protesting the killing of Sergio Hernández as well as the killing of another Mexican man on the California-Mexico border two weeks before the Hernández killing. Gómez Mont emphasized that the “unjustified use of force against our population is unacceptable to the Government of Mexico.”¹⁶⁰

69. The Mexican Ambassador to the United States later wrote to Secretary Napolitano that Mexico “reiterates” its concerns about the Rocking Policy.¹⁶¹ “[T]he Government of Mexico is convinced that the use of lethal force by any authority to counter the throwing of rocks is clearly, by any standard, a disproportionate use of force.” It stated that it had “witnessed a worrisome and increased trend” of such incidents resulting in the death of its citizens and a “large majority of the investigations have not led to prosecution nor have adequate disciplinary measures nor have adequate disciplinary measures been adopted despite the seriousness of these tragic outcomes.”¹⁶²

70. That same month, Amnesty International issued a statement concluding that “[t]his shooting across the border appears to have been a grossly disproportionate response and

¹⁵⁹ Laura Carlsen, *Lethal Force on the Border*, Huffington Post (June 18, 2010) https://www.huffpost.com/entry/lethal-force-on-the-border_b_617065. Appendix, Ex. 60.

¹⁶⁰ 01196-YANEZ-REYES, at pg. 2. Appendix, Ex. 243.

¹⁶¹ Appendix, Ex. 118.

¹⁶² *Id.*

flies in the face of international standards that compel police to use firearms only as a last resort, in response to an immediate, deadly threat that cannot be contained through lesser means.”¹⁶³

71. In June 2010, Jose Miguel Vivanco, the Americas Director at Human Rights Watch warned that “[t]he increasing number of border patrol killings make it clear that an open and thorough US investigation is needed” and that “[a]ny border agents found responsible for using excessive force should be held accountable.”¹⁶⁴ Mr. Vivanco specifically noted that use of excessive, lethal force against alleged rock-throwers violates the United Nations’ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹⁶⁵

72. In December 2010, this Commission noted in its report on United States immigration detention “the terrible effects of certain immigration policies along the border and ... the abuses and excesses committed by officers charged with enforcing the law.”¹⁶⁶

73. In June 2011, 60 human rights organizations (including the American Civil Liberties Union of California, the American Friends Service Committee, and Amnesty

¹⁶³ *Mexican teenager shot dead by US border police* (June 10, 2013), <https://www.amnesty.org/en/latest/news/2010/06/mexican-teenager-shot-dead-us-border-police/> Appendix, Ex. 244; see also Amnesty International Annual Report 2011 – United States of America (May 13, 2011) (listing the killing of Sergio Hernandez under civil rights abuse of “excessive use of force”). Appendix, Ex. 245.

¹⁶⁴ See Human Rights Watch, *Deaths of Unarmed Migrants Show Need for Prompt, Thorough Inquiry*, (June 11, 2010), <http://www.hrw.org/news/2010/06/11/usmexico-investigate-border-killings>. Appendix, Ex. 207.

¹⁶⁵ *Id.*

¹⁶⁶ Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II, Doc. 78/10 (December 30, 2010), <http://cidh.org/countryrep/USImmigration/TOC.htm>. Appendix, Ex. 214.

International USA) yet again reiterated: “To shoot stone throwers is exceptionally disproportionate and inhumane.”¹⁶⁷

74. In May 2012, 16 members of Congress wrote specifically to Secretary Napolitano and requested an analysis of CBP's use of force policies in light of its national and international infamy.¹⁶⁸

75. In response to the death of Ramses Barron Torres in January 2011, the Government of Mexico wrote to the Secretary Napolitano, demanding that “prosecutorial and judicial measures should be enforced to deter the disproportionate use of force.”¹⁶⁹

76. On July 13, 2012, in response to the death of Juan Pablo Pérez Santillan (see below Section IIF), the Government of Mexico wrote to the Secretary Napolitano to “urge you once again to adopt all measures necessary to prevent the recurrent loss of lives” and to “reiterate[] its unwavering and emphatic appeal to the United States to abide by bilateral and international human rights standards.”¹⁷⁰ It stated that “investigations of cases similar to this one have not led to prosecution nor have adequate disciplinary measures been adopted despite the seriousness of these tragic outcomes.”¹⁷¹

77. In response to the September 2012 death of Guillermo Arévalo (see below Section IID), the Government of Mexico wrote yet again to Secretary Napolitano, stating that it “continues to observe what has become an alarming trend of incidents in which the excessive use

¹⁶⁷ Yanez Fourth Amended Complaint at ¶ 102 (citing Letter from American Civil Liberties Union of California, et al., to U.S. Senator Patrick Leahy and U.S. Representative Lamar Smith (June 2011)). Appendix, Ex. 233.

¹⁶⁸ DHS Office of Inspector General Report “CBP Use of Force Training and Actions To Address Use of Force Incidents” at 2. Appendix, Ex. 77.

¹⁶⁹ Appendix, Ex. 117.

¹⁷⁰ Appendix, Ex. 254.

¹⁷¹ *Id.*

of force by Border Patrol (BP) and Customs and Border Protection (CBP) agents has resulted in the death of Mexican nationals at the border.”¹⁷²

78. The Government of Mexico further noted that the Deputy Commissioner of CBP had responded “to a letter regarding a similar case” and simply “refer[ed] to the ‘Department of Homeland Security Policy on the Use of Deadly Force’ and CBP’s ‘Use of Force Policy Handbook’ that are used for training and operational purposes.”¹⁷³ But the Government of Mexico stated that those policies were the problem, not the answer: “the lack of prosecution or adequate disciplinary measures in similar cases with these tragic outcomes creates – albeit unwillingly – a tacit message of permissiveness and lack of accountability for those who engage in the use of excessive force. This pattern and every single incident of disproportionate use of force are unacceptable.”¹⁷⁴

79. In October 2012 a Border Patrol agent shot another unarmed teenager, José Antonio Elena Rodríguez (see below Section IIG) 10 times. The U.N. High Commissioner announced that “the reports reaching me are that there has been excessive use of force by the U.S. border patrols while they are enforcing the immigration laws,” and that such force is “unacceptable under any circumstances.”¹⁷⁵

¹⁷² Appendix, Ex. 120.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Stephanie Nebehay, *U.S. uses excessive force along Mexican border: U.N.*, Reuters (Oct. 18, 2012), www.reuters.com/article/2012/10/18/us-mexico-us-un-rights-idUSBRE89H13F20121018. Appendix, Ex. 218.

“We had a history of not addressing things as directly as we should.”

- Gil Kerlikowske, Head of Customs and Border Protection Under President Obama

“It was unconscionable that we didn’t have a robust, fully functioning internal affairs effort that could report directly to the commissioner. It’s a problem to this day. It’s still a bad, bad operational decision.”

- Jay Ahern, acting CBP Commissioner under President Obama

“They weren’t appreciated and weren’t viewed with respect, and that created this defensiveness and insularity within the Border Patrol.”

- Robert Bonner, first Head of Customs and Border Protection

“We made some mistakes... We found out later that we did, in fact, hire cartel members.”

W. Ralph Basham, former CBP Director

“People just wanted to give me unlimited amounts of money.”

- Tom Ridge, Head of Homeland Security under President George W. Bush

“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.”

- James Wong, now-retired senior CBP internal affairs official

“From an integrity issue, you can’t grow a law enforcement agency that quickly.”

- Robert Bonner, first Head of Customs and Border Protection

These statements were made to POLITICO Magazine in 2014. See Garrett M. Graff et al, *The Green Monster*, POLITICO Magazine. (Nov. 2014.)
<https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2>.
Appendix, Ex. 27.

6. The PERF Report

80. CBP eventually commissioned the Police Executive Research Forum (“PERF”) to conduct a review of agents’ use of force. PERF reviewed government-furnished information on 67 use-of-force incidents from January 2010 through October 2012—all of which involved agents¹⁷⁶—and CBP’s use-of-force policies, equipment, tactics, and training. PERF issued its report on February 2013. Of the 67 incidents, 25 “involved shots being fired by agents who had been the victim of rock attacks while on land”¹⁷⁷ and “[f]our cases involved rocks being thrown at agents who were in boats.”¹⁷⁸

81. The Report concludes that “[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.”¹⁷⁹

82. In the introduction, the Report states that “[t]wo policy and practice areas especially need significant change.”¹⁸⁰ “The case reviews raise a number of concerns, especially with regard to shots fired at vehicles and shots fired at subjects throwing rocks and other objects at agents. Improvements are also recommended in initial reporting, investigation, incident review, weapons, personal protective equipment, and training.”¹⁸¹

83. The Report concludes that reform was required because “officers/agents should be prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them. Officers/agents should be trained to specific situations and scenarios that involve subjects throwing such objects. The training should emphasize pre-

¹⁷⁶ Interim Report of the CBP Integrity Advisory Panel at 13 (“All 67 instances of use of force referenced in the PERF review involved Border Patrol Agents.”). Appendix, Ex. 65.

¹⁷⁷ PERF Report at 8. Appendix, Ex. 9.

¹⁷⁸ *Id.* at 7.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.*

deployment strategies, the use of cover and concealment, maintaining safe distances, equipping vehicles and boats with protective cages and/or screening, de-escalation strategies, and where reasonable the use of less-lethal devices.”¹⁸²

84. The Report states that “*these changes are significant departures from current practice*” and therefore “CBP will need to craft an implementation strategy for re-orientation and training before new policies go into effect.”¹⁸³

85. Regarding weapons, the Report states:

PERF’s review revealed that in most cases when agents used deadly force, specialized less lethal weapons were not ... readily available. In some cases, the use of such less lethal weapons may have reduced the risk to agents and prevented the need for deadly force. ... Each field vehicle and boat should be equipped with the best available less lethal weapons, and agents should be required to consider the use of less lethal weapons.¹⁸⁴

86. Regarding personal protective equipment, the Report states:

Agents assigned to marine patrol and agents assigned to patrol or who respond near the International Border Fence (IBF) are particularly vulnerable to rock attacks. All agents assigned to these high risk areas should be provided protective equipment to include a helmet with face shield....¹⁸⁵

87. With regard to training, the Report states:

Policy and skills training is essential to agent safety and appropriate deadly force decisions. ... Agents should receive regular retraining in deadly force policy, use of force decision making, tactical skills and shooting. Command level monitoring of training is particularly important when implementing policy changes where resistance is anticipated.¹⁸⁶

¹⁸² *Id.*

¹⁸³ *Id.* at 3 (emphasis added).

¹⁸⁴ *Id.* at 5.

¹⁸⁵ *Id.* at 6.

¹⁸⁶ *Id.* at 6.

88. With regard to “shooting at rock throwers” generally, the Report states:

Review of shooting cases involving rock throwers revealed that in some cases agents put themselves in harm’s way by remaining in close proximity to the rock throwers when moving out of range was a reasonable option. Too many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force. In cases where clear options to the use of deadly force exist and are not utilized in rock-throwing incidents, corrective actions should be taken. CBP should improve and refine tactics and policy that focus on operational safety, prioritization of essential activities near the border fence, and use of specialized less lethal weapons with regard to rock throwing incidents.¹⁸⁷

89. The Report concludes that “the state[d] CBP policy should be: **‘Officers/agents are prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them.’**”¹⁸⁸

90. PERF also concludes that the use-of-force policy handbook should be amended to clarify use of safe tactics and techniques in response to rock-throwing:

Thrown or hurled missiles aimed at officers/agents may represent a threat of imminent danger of death or serious physical injury. When sufficient time exists officers/agents should seek cover and/or move out of range. Such action may be especially viable when the attack is coming from the other side of the border. *Officers/agents are prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them.*¹⁸⁹

91. Regarding the four reviewed cases where agents in boats used firearms in response to rock-throwing, the Report concludes:

It is not clear that all shootings by agents on water to counter rock throwers meet the standard of objective reasonableness. The tactics and strategies that agents are using may unnecessarily put them in

¹⁸⁷ *Id.* at 6-7.

¹⁸⁸ *Id.* at 7 (emphasis in original).

¹⁸⁹ *Id.* at 12 (emphasis in original).

harm's way. Moving to a safer location when possible is preferable to using deadly force and such action should be considered as part of objective reasonableness.¹⁹⁰

92. Regarding the 25 reviewed cases where agents on land used firearms in response to rock-throwing, the Report concludes:

The more questionable cases generally involved shootings that took place through the IBF at subjects who were throwing rocks at agents from Mexico. In some cases, agents shot at suspects who were attempting to interfere with arrests on the U.S. side of the border fence. In at least one case, rocks were being thrown in an attempt to allow drugs to be taken back over the IBF. In other cases, agents shot at suspects who started throwing rocks over the fence at them after agents stopped when their CBP vehicles had been hit by rocks. As with vehicle shootings, some cases suggest that frustration is a factor motivating agents to shoot at rock throwers. Likewise, it is felt that some of the weapons discharges are actually intended as warning shots. Two or more shooting cases involving rock throwers on land were ruled by CBP as violations of policy.

It is clear that agents are unnecessarily putting themselves in positions that expose them to higher risk. While rock throwing can result in injuries or death, there must be clear justification to warrant the use of deadly force. CBP needs to train agents to de-escalate these encounters by taking cover, moving out of range and/or using less lethal weapons. Agents should not place themselves into positions where they have no alternative to using deadly force.¹⁹¹

¹⁹⁰ *Id.* at 8-9.

¹⁹¹ *Id.* at 9 (emphasis in the original).

7. The Temporary Halt to the Rocking Policy

93. On November 5, 2013, the Chief of Border Patrol announced that the agencies had decided to reject the expert, objective recommendations that CBP had commissioned PERF to provide. Instead, they reaffirmed yet again the unlawful Rocking Policy.¹⁹²

94. The Border Patrol had initially tried to keep the PERF Report secret, refusing even to give a copy to Congress. But it was leaked to the Los Angeles Times.¹⁹³

95. In December 2013, Jeh Johnson became the new Secretary of Homeland Security, and he directed the Chief of the Border Patrol to fix the problem of excessive force against rock-throwers.

96. In March 2014, the Chief of Border Patrol responded by issuing a Directive to all agents that provided:

Agents should continue [sic], whenever possible, to avoid placing themselves in positions where they have no alternative to using deadly force. Agents shall not discharge firearms in response to thrown or hurled projectiles unless the agent has a reasonable belief, based on the totality of the circumstances, to include the size and nature of the projectiles, that the subject of such force poses an imminent danger of death or serious injury. Agents should obtain a tactical advantage in these situations, such as seeking

¹⁹² See Elliot Spagat, *Associated Press Exclusive: Border Patrol Rejects Curbs on Force*, AP (Nov. 5, 2013), <http://bigstory.ap.org/article/ap-exclusive-border-patrol-rejects-curbs-force>. Appendix, Ex. 32.

¹⁹³ See Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, Los Angeles Times (June 15, 2015) <https://www.latimes.com/nation/la-na-border-patrol-shootings-20150615-story.html>. Appendix, Ex. 166. The PERF Report had been preceded by a highly critical report by the DHS Inspector General and was succeeded by a similarly scathing report from the Homeland Security Advisory Council. See U.S. Department of Homeland Security, Office of Inspector General, *CBP Use of Force Training and Actions to Address Use of Force Incidents* (Sept. 2013) Appendix, Ex. 77; Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (Mar. 15, 2016). Appendix, Ex. 66.

cover or distancing themselves from the immediate area of danger.¹⁹⁴

97. The Directive was the first written guidance that CBP and Border Patrol executives had ever provided to agents on the most prevalent threat that they faced in the field.

98. In May 2014 CBP finally revised its Use of Force Policy Handbook.¹⁹⁵ The Policy stated for the first time, among other things, that:

Authorized Officers/Agents shall not discharge their firearms in response to thrown or launched projectiles unless the officer/agent has a reasonable belief, based on the totality of circumstances (to include the size and nature of the projectiles), that the subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person.

Officers/agents may be able to obtain a tactical advantage in these situations, through measures such as seeking cover or distancing themselves from the immediate area of danger.¹⁹⁶

8. Mr. Trump's Renewal of the Rocking Policy

99. The May 2014 announced change in policy came too late to protect Petitioners from the wholly unnecessary loss of their loved ones. Moreover, it proved to be short-lived.

100. Responding to an encounter between migrants and Mexican police in 2018, the current U.S. chief executive, Mr. Trump, publicly announced that the U.S. policy was that if

¹⁹⁴ Memorandum from Michael J. Fisher, Chief, U.S. Border Patrol on Use of Safe Tactics and Techniques to U.S. Border Patrol Personnel (Mar. 7, 2014), <https://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf>). Appendix, Ex. 121. The Directive also required that supervisors identify violence-prone areas; train agents in taking cover and knowing when to engage and disengage; plan for appropriate backup; use new technology and less-than-lethal force; and use the new guidelines in planning field operations.

¹⁹⁵ See *CBP Use of Force Handbook 2014*, <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>. Appendix, Ex. 2.

¹⁹⁶ *Id.* at 6.

“[t]hey want to throw rocks at our military, our military is going to fight back.”¹⁹⁷ Rejecting the constraint imposed by the Imminent Peril standard, he directed that “[a]nybody throwing rocks ... we will consider that a firearm.”¹⁹⁸ He communicated the policy to military and other executives: “We’re not going to put up with that. If they want to throw rocks at our military, our military fights back. We’re going to consider -- and I told them, consider it a rifle. When they throw rocks like they did at the Mexico military and police, I say, consider it a rifle.”¹⁹⁹

101. There is no doubt of Mr. Trump’s racist motivation in reviving the unlawful Rocking Policy. His racism is well known and indisputable. Specifically with respect to the southern border, he

- a. refers to Mexico as “our enemy.”²⁰⁰
- b. asserts, regarding undocumented immigrants from Mexico, that “[y]ou wouldn’t believe how bad these people are... These aren’t people. These are animals.”²⁰¹

¹⁹⁷ Benjamin Siegel, *Trump claims crackdown coming on asylum seekers, says troops could fire on migrants if rocks thrown*, ABC NEWS (Nov. 1, 2018), <https://abcnews.go.com/Politics/president-trump-address-immigration-crisis-white-house-remarks/story?id=58898094>. Appendix, Ex. 12.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* The following day, Mr. Trump said that the renewed policy did not *require* officers to shoot-to-kill alleged rock-throwers. Makini Brice & Roberta Rampton, *Trump backtracks on suggestion U.S. troops could fire on migrants*, Reuters (Nov. 2, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-backtracks-on-suggestion-u-s-troops-could-fire-on-migrants-idUSKCN1N72B2> (“They won’t have to fire.”). Appendix, Ex. 58.

²⁰⁰ Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult/>. Appendix, Ex. 13.

²⁰¹ Gregory Korte and Alan Gomez, *Trump ramps up rhetoric on undocumented immigrants: ‘These aren’t people. These are animals.’* USA TODAY (May 16, 2008), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/>. Appendix, Ex. 14.

- c. falsely asserts that “the overwhelming amount of violent crime in our major cities is committed by blacks and Hispanics.”²⁰²
- d. falsely asserts that Mexico “send[s] criminals over our border.”²⁰³
- e. asserts that “I want nothing to do with Mexico other than to build an impenetrable WALL and stop them from ripping off U.S.”²⁰⁴
- f. falsely asserts that “[t]he border is wide open for cartels & terrorists.”²⁰⁵
- g. falsely asserts that “[w]hen Mexico sends its people, they’re not sending their best... . They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”²⁰⁶
- h. falsely asserts that “El Chapo and the Mexican drug cartels use the border unimpeded like it was a vacuum cleaner, sucking drugs and death right into the U.S.”²⁰⁷
- i. falsely asserts: “Humanitarian Crisis at our Southern Border. I just got back and it is a far worse situation than almost anyone would understand, an invasion! I have been there numerous times...”²⁰⁸

²⁰². Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult/>, Appendix, Ex. 13.

²⁰³. *Id.*

²⁰⁴. *Id.*

²⁰⁵. *Id.*

²⁰⁶. *Id.*

²⁰⁷. *Id.*

²⁰⁸. Anthony Rivas, *Trump's language about Mexican immigrants under scrutiny in wake of El Paso shooting*, ABC NEWS (Aug. 4, 2019), <https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566>, Appendix, Ex. 123.

- j. asserts that he is sending “[m]ore troops ... to the Southern Border to stop the attempted Invasion of Illegals, through large Caravans, into our Country.”²⁰⁹
- k. falsely asserts that “[t]he problem is that Mexico is an ‘abuser’ of the United States, taking but never giving. It has been this way for decades. Either they stop the invasion of our Country by Drug Dealers, Cartels, Human Traffickers....”²¹⁰
- l. asserts that “[w]e cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”²¹¹
- m. falsely asserts that a Hispanic judge is not capable of giving him a fair trial.²¹²
- n. falsely asserts that “[i]t’s like an invasion. They have violently overrun the Mexican border.”²¹³
- o. falsely asserts that due to illegal immigration “women are raped at levels that nobody's ever seen before.”²¹⁴

²⁰⁹. *Id.*

²¹⁰. *Id.*

²¹¹. *Id.*

²¹² Nina Totenberg, *Trump Presses Case That 'Mexican' Judge Curiel Is Biased Against Him*, NPR (June 4, 2016), <https://www.npr.org/2016/06/04/480714972/trump-presses-case-that-mexican-judge-curiel-is-biased-against-him>. Appendix, Ex. 124.

²¹³ The White House, *Remarks by President Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>. Appendix, Ex. 126.

²¹⁴ Michelle Mark, *Trump just referred to one of his most infamous campaign comments: calling Mexicans 'rapists'*, Business Insider (Apr. 5, 2018),

p. falsely asserts that “[t]remendous infectious disease is pouring across the border.”²¹⁵



Trump Rally

<https://www.businessinsider.com/trump-mexicans-rapists-remark-reference-2018-4>. Appendix, Ex. 127.

²¹⁵Andrea Gonzalez-Ramirez, *The Ever-Growing List of Trump's Most Racist Rants*, Medium (Oct. 11, 2019) <https://gen.medium.com/trump-keeps-saying-racist-things-heres-the-ever-growing-list-of-examples-21774f6749a4>. Appendix, Ex. 128.

102. It is also well known that the Border Patrol itself is plagued by racism. In 2019, for example, the CBP made headlines when a report uncovered that a private Facebook group—including over 9,500 current or former agents—was propagating hatred and violence towards Hispanic immigrants. The page read: “Post your pics. BP and AMO [Air and Marine Operations] related. Funny, serious and just work related. We are family, first and foremost. This is where the Green Line starts, with us. Start a chat or discussion, or use the group as a message board or Q and A session. We are here for each other. Remember you are never alone in this family.”²¹⁶ The following are posts taken from the now-closed page:

- a. One BP agent lamented his missed opportunity to kill a migrant while on the job, stating: “Bro im gonna go home alive to my family and stop the threat!!” “See it how you will. Ive been rocked before and missed my chance to pop a round before due to me falling to avoid the rock.. Fucker ran back to the river... But I learned for next time...”²¹⁷
- b. Another agent, whose personal page suggests a recent posting at the Border Patrol’s Carrizo Springs station, shared a meme that read, “YOU KNOW WHAT? I’M JUST GOING TO SAY IT [...] HONDURANS HAVE THE STUPIDEST NAMES EVER.”²¹⁸
- c. “None of these ignorant people can spell or write but somehow they think they deserve to be let in.”²¹⁹

²¹⁶ Appendix, Ex. 49.

²¹⁷ Appendix, Ex. 47.

²¹⁸ Appendix, Ex. 55.

²¹⁹ Ryan Devereaux, *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them*, The Intercept (July 5, 2019) <https://theintercept.com/2019/07/05/border-patrol-facebook-group/>. Appendix, Ex. 260.

- d. “They are like wild animals, stop feeding them and they wont hang around and shit on the street,” wrote Richard Tyler Jr., whose Facebook profile identified him as a former trainer for the Border Patrol, a former sheriff’s deputy, and a former sergeant in the U.S. Army.²²⁰
- e. In late May, a user shared a meme that said “HUNGARY LOCKS ILLEGAL IMMIGRANTS IN SHIPPING CONTAINERS TO STOP ILLEGAL BORDER CROSSINGS.” “Can we apply this here?”²²¹
- f. Another participant wrote, in a conversation about migrants on airplanes, “The wife flew out last week said people were pissed cus it smelled like shit.” A user whose personal page includes photos of himself in a CBP helicopter crew uniform, replied: “Smells like detention.”²²²
- g. Posting a picture of two dead migrants, an adult and a child, a group member wrote: “Ok, I’m gonna go ahead and ask...have ya’ll ever seen floaters this clean? I’m not trying be an a\$\$, but I HAVE NEVER SEEN FLOATERS LIKE THIS...”²²³
- h. “Let’s stock the river with gators,” John Tedford posted. Riley Glock replied, “This needs to be crowd funded. Can the river ecosystem support sharks?”²²⁴

²²⁰ *Id.*

²²¹ *Id.*

²²² *See* Appendix, Ex. 53.

²²³ *See* Appendix, Ex. 50.

²²⁴ *See* Appendix, Ex. 46.

- i. One member shared a photo of a migrant crossing a river, with what looks to be a child in a plastic bag. A member commented, “At least it’s already in a trash bag!”²²⁵
- j. One post discussed offering money to whoever threw a burrito at Congresswomen Escobar and Ocasio-Cortez, who were visiting a Border Patrol facility.²²⁶

B. “[I] Called It a Murder”: The United States’ Unlawful Killing of Sergio Adrián Hernández Güereca²²⁷



Sergio Adrián Hernández Güereca, 15, in a family photo. AP Photo

²²⁵ See Appendix, Ex. 54.

²²⁶ See Appendix, Ex. 45.

²²⁷ The bystander who reported the killing of Sergio Adrián Hernández Güereca to the 911 operator “called it a murder.” Interview of Bobbie James McDow, January 24, 2011 [“McDow Statement”], at p. 9. Appendix, Ex. 217.

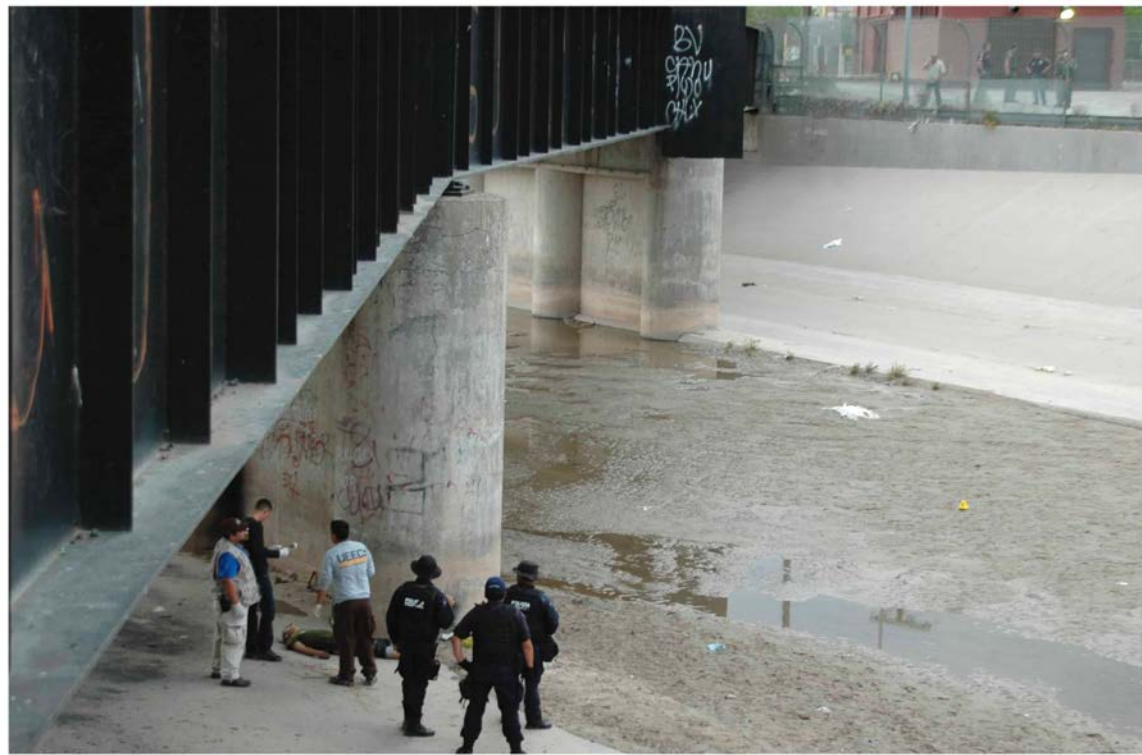
103. On a summer day in June 2010, 15-year-old Sergio Hernández was with three friends in the concrete culvert separating El Paso, Texas and Juarez, Mexico. The culvert splits the cities like a cement river, with the invisible borderline running through it. To one side, toward El Paso, is a banked incline that leads to an 18-foot fence built by the U.S. as “part of a 650-mile, \$2.8 billion border wall.”²²⁸ To the other side, toward Juarez, is another incline leading to a wall topped with a guardrail. In between is a concrete bank containing the then-dry 33-foot-wide Rio Grande.²²⁹ Overhead, a railroad bridge linking the two nations spans the culvert.²³⁰

104. While the boys were in the culvert, a U.S. border guard patrolling on bicycle seized one of them as they ran down the ramp. The other boys fled back into Mexico, with Sergio running past the agent, Jesus Mesa, toward a pillar beneath the bridge on the Mexican side of the culvert. Within seconds, Agent Mesa drew his firearm, aimed it at Sergio, and shot him in the head, next to his eye. Neither Agent Mesa nor any of the other Border Patrol agents who swarmed the scene offered the boy medical aid of any kind; instead, they got back on their bikes and left. Sergio died on the spot.

²²⁸ Andrew Rice, *Life on the Line*, The New York Times (July 28, 2011) <http://nyti.ms/1H7VvX9>. Appendix, Ex. 222.

²²⁹ Sherman & Torres, *Mexico teen killed by US Border Patrol, anger high*, The Associated Press (June 9, 2010) <http://bit.ly/1JJkCW9>. Appendix, Ex. 225.

²³⁰ *Id.*



Hernández Death Location



105. A mere 60 feet separated Sergio from Agent Mesa at the time of the shooting. But Sergio was formally in Mexican territory when he was killed, while Mesa was formally in the United States.

106. Sergio was a Mexican citizen who lived with his mother, brother, and two sisters in a three-room house in Juarez. He loved playing soccer and aspired to one day become a police officer. The United States' killing of Sergio marked "the second death of a Mexican at the hands of Border Patrol officers in less than two weeks."²³¹

107. The day after the shooting, United States officials began a public campaign of claiming that Agent Mesa shot Sergio in self-defense. The FBI's El Paso Division put out a press release entitled "Assault on Federal Officer Investigated."²³² The statement asserted that Mesa "responded to a group of suspected illegal aliens being smuggled into the U.S. from Mexico," and that Sergio "began to throw rocks" at Mesa from across the border.²³³ According to the FBI, Mesa fired his gun only after he "gave verbal commands" for Sergio to "stop and retreat," and Sergio and the other boys "surrounded the agent and continued to throw rocks at him."

**“ You didn’t see him throwing anything?
No. ”**

- Bobbi McDow, *Eyewitness*, Dep. Trans. at 5

²³¹ Sherman & Torres, *Mexico teen killed by US Border Patrol*. Appendix, Ex. 225.

²³² Arevalo "Unopposed Motion to Stay Proceedings and Set Consolidated Briefing Schedule" at 5. (quoting Press Release, FBI El Paso, June 8, 2010.), Appendix, Ex. 4

²³³ *Id.*

108. But two days later, a cellphone video surfaced that “show[ed] a different story.”²³⁴ The video shows that the agent was not surrounded by the boys, nor did Sergio throw any rocks at him.²³⁵ As CNN reported at the time, the video “contradicts [the FBI’s] account.”²³⁶ In another video, “some youths can clearly be seen making throwing motions. But [Sergio] 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.”²³⁷

109. Two other videotapes—one taken by the Border Patrol itself, and another by a nearby landowner—also later surfaced. Those videos conclusively show that the agent was not surrounded; the agent was not under attack from rocks or anything else; Sergio had not thrown and was not throwing any rocks; and the agent had many non-lethal alternatives available to him if he somehow felt threatened, including simply backing up further away from the border.

110. The CBP Internal Affairs Chief saw all of the videos, and he testified that they “became available to us early on [and] clearly demonstrated Sergio Hernandez was not throwing rocks at the time he was shot.”²³⁸ He further testified that this is one of nine “highly suspect” fatal incidents since 2010 that he can recall.²³⁹ He identified this killing as an example of a case

²³⁴ Bob Ortega & Rob O’Dell, *Deadly border agent incidents cloaked in silence*, Arizona Republic (Dec. 16, 2013), <http://bit.ly/1bHMq6p>. Appendix, Ex. 164; see CNN, *Youth fatally shot by border agent had smuggling ties, official says (June 10, 2010)* <http://cnn.it/1gjK1t4>.

Appendix, Ex. 235

²³⁵ The video is here: <https://vimeo.com/462843104>. Password: iachrHERNANDEZ

²³⁶ *Youth fatally shot by border agent*, CNN. Appendix, Ex. 235.

²³⁷ Ortega & O’Dell, *Deadly border agent incidents cloaked in silence*. Appendix, Ex. 164.

²³⁸ The video taken by the Border Patrol and the landowner are not in Petitioners’ possession, but they were reviewed by undersigned counsel.

²³⁹ Tomscheck Dep. at 305. Appendix, Ex. 10.

where Border Patrol distorted the facts regarding the shooting in an attempt to justify the agents' conduct to the public.²⁴⁰

“ Well, the agent had his gun pulled and he—he was—he had in the individual in his left hand and the individual wasn’t resisting him, and he was basically flinging him around. He at one point even threw him down on the ground. I believe he had his knee in his back and he started firing into Mexico. I really couldn’t believe he started firing into Mexico. I was shocked that he did that and then there was a series of gunshots and then there was a pause and then there was more gunshots. ”

- Bobbi McDow, Eyewitness, Dep. Trans. at 5

111. The witness statement of Bobbie McDow, the witness who called the killing in to the 911 operator is to the same effect:

Q: -- from your recollection, can you tell me if – if Sergio was throwing rocks at the agent?

A: No, he was not.

Q: At any given time?

A: Not to my recollection, not to –

Q: You didn’t see him throwing anything?

A: No.

²⁴⁰ Tomscheck Dep. at 146. Appendix, Ex. 10.

Q: Because that's what the U.S. government claims that he did and that is, you know, enough justification for them to say that the agent did the right thing.

A: Yeah, I did read the reports of what the FBI said happened and I – I strongly disagree that he was surrounded and being pelted by rocks.

Q: Just from your perspective, do you think that the agent was in any kind of danger at that time?

A: I – I don't believe that he was in danger.

Q: You don't believe he was in danger?

A: No.

Q: Okay. And so then you did mention that there was another individual that – that might have had the intention of throwing something?

A: Yes.

Q: What did you see?

A: He was to the – to the west of the agent underneath the – the railroad black bridge, and he did have – he had a fist and he made a throwing motion, but he was quite some distance from the agent. I don't believe anything hit the agent or even came near him. That was the only thing that I observed that may have been –

Q: Okay. So just based on what you saw, do you think that the agent had justification to shoot his gun?

A: No, I – no, I do not, sir.

Q: You don't, you do not?

A: No.

Q: And you decided to tell your story because you feel that this – there was an injustice?

A: Yes, well, that's why I called 911. I didn't feel that that situation should have taken place. I strongly disagree with it.

Q: So you did – you called 911 and you –

A: I did –

Q: -- reported what you saw?

A: I did. I wasn't sure who to call because, as I said, that was law enforcement that had just killed someone and I was a little confused, who do you report law enforcement to, but I decided to call 911.

“
I wasn't sure who to call because, as I said, that was law enforcement that had just killed someone and I was a little confused, who do you report law enforcement to, but I decided to call 911.”

- Bobbi McDow, *Eyewitness*, Dep. Trans. at 7

....

Q: Okay. And finally, the – the Mexican government says that in one of their reports I just read this morning, that they – you know, they finished their investigation and they are calling it a murder. Do you agree with the Mexican government?

A: I – I do, and I believe that I did use that word on the 911 -- on the tape.

Q: You also called it a murder?

A: I believe that I did.²⁴¹

²⁴¹ McDow Statement, at 5-7, 9. Appendix, Ex. 217.

112. Even before the videos came to light, the shooting sparked outrage on both sides of the border. In Mexico, the government condemned it as unjustified. “The growing frequency of this kind of event,” Mexico’s Foreign Ministry lamented, “reflects a troubling trend in the use of excessive force by some border authorities.”²⁴² The Ministry cited records showing that “the number of Mexicans who ha[d] been killed or wounded by U.S. border authorities ha[d] increased from five in 2008 to 12 in 2009,” and then to 17 in the first half of 2010.²⁴³

113. Mexican prosecutors, though they had jurisdiction to prosecute Mesa as a formal matter, could not do so in practice. Mexican authorities charged Mesa with murder, but the U.S. refused a request for extradition.²⁴⁴

114. The U.S. Department of Justice conducted an investigation but declined to pursue criminal charges against the agent.²⁴⁵

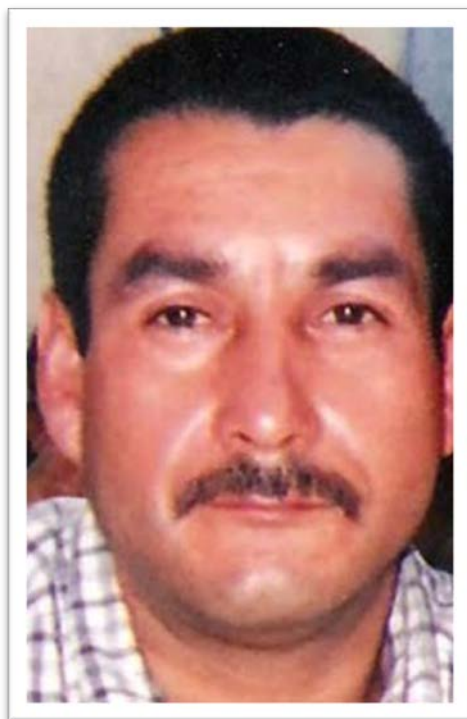
²⁴² Tim Padgett, *After Teen’s Death, a Border Intifadeh*, TIME (June 10, 2010), <http://ti.me/1CmTbiz>. Appendix, Ex. 220.

²⁴³ CNN, *Youth fatally shot by border agent had smuggling ties, official says* (June 10, 2010). Appendix, Ex. 235.

²⁴⁴ Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, The New York Times (Oct. 17, 2016), <http://nyti.ms/2eaxeMc>. Appendix, Ex. 216.

²⁴⁵ Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, U.S. Department of Justice, (Apr. 27, 2012). Appendix, Ex. 5.

C. “I’ll Kill You, Mother***”: The United States’ Unlawful Killing of Jesus Alfredo Yañez Reyes²⁴⁶**



Jesus Alfredo Yañez Reyes

115. On June 21, 2011, U.S. Border Patrol agent Dorian Diaz fatally shot Jesus Alfredo Yañez Reyes, a Mexican national. This incident is the only one in which U.S. courts permitted any of the Petitioners’ claims to proceed into discovery, so some of the details of this incident are known.

116. At around 7:00pm on June 21, 2011 Mr. Yañez and his friend Jose Ibarra Murietta (“Murietta”), looking to find work in the United States,²⁴⁷ entered the country through a hole in a

²⁴⁶ Border Patrol agent Diaz made this threat to Mr. Yañez’s friend during this incident, as detailed below.

²⁴⁷ E.R.0521-22. Appendix, Ex. 129.

sewage gate near the San Ysidro port of entry.²⁴⁸ Just after crossing, Mr. Yañez and Murietta were spotted by Diaz, who, suspecting an illegal entry, radioed for assistance from another Border Patrol agent, Chad Nelson.²⁴⁹ Nelson arrived on the scene a minute later and the two agents closed in on Mr. Yañez and Murietta.²⁵⁰

117. Neither Mr. Yañez nor Murietta was smuggling drugs or contraband into the country, and they were not armed.²⁵¹ Diaz testified that he had no reason to suspect otherwise.²⁵²

118. Upon noticing the agents, Mr. Yañez and Murietta attempted to flee back to Mexico.²⁵³ Mr. Yañez succeeded, making his way through the same hole through which he and Murietta had come.²⁵⁴ Murietta, however, was blocked by Nelson and Diaz, so he instead tried to climb a nearby pole, which leads to a catwalk from which one could jump back into Mexico.²⁵⁵ Anticipating Murietta's escape path, Diaz ran up the catwalk via the stairway and positioned himself right above Murietta, who was still climbing below him.²⁵⁶ Diaz then stepped on Murietta's hands, hit Murietta over the head, and threatened, "I'll kill you, motherfucker."²⁵⁷

119. Forced to lose his grip from the pipe, Murietta dropped to the ground and ran eastward along the border fence to find another way back to Mexico.²⁵⁸ Nelson closely pursued

²⁴⁸. E.R.0500. Appendix, Ex. 130; *see also* E.R.0818 (picture of sewage gate) Appendix, Ex. 131.

²⁴⁹. E.R.0421-22. Appendix, Ex. 132.

²⁵⁰. E.R.0726-27. Appendix, Ex. 133.

²⁵¹. E.R.0509-10. Appendix, Ex. 134.

²⁵². E.R.0423. Appendix, Ex. 135.

²⁵³. E.R.0500 Appendix, Ex. 130; E.R.0521-22. Appendix, Ex. 129.

²⁵⁴. E.R.0726-27. Appendix, Ex. 133.

²⁵⁵. E.R.0501-02. Appendix, Ex. 136.

²⁵⁶. *Id.*

²⁵⁷. *Id.*

²⁵⁸. *Id.*

on foot.²⁵⁹ The chase ended when Murietta tripped, after which Nelson jumped on Murietta's back to arrest him.²⁶⁰

120. Murietta refused to give Nelson his hands to be cuffed, so Nelson began punching and striking Murietta to force compliance.²⁶¹ Noticing the ensuing struggle, Diaz descended from the catwalk and ran towards the two, radioing for both additional back up and support from video surveillance operators.²⁶²

121. From this point forward, the testimony of the agents and Murietta diverges sharply. Diaz claims that during his run towards Nelson, he saw Mr. Yañez pop his head over the eight-foot border fence and throw one or maybe two rocks in the direction of Nelson and Murietta, who he thinks were about 10-15 feet away from the fence.²⁶³ In contrast, Murietta, who saw Mr. Yañez appear above the fence during the scuffle, testified that Mr. Yañez never threw any rocks.²⁶⁴

122. In any event, Nelson and Murietta agree that Nelson had Murietta in a position that would have shielded Nelson had Mr. Yañez thrown anything at him; any rocks would have hit Murietta, not Nelson.²⁶⁵ Murietta was never hit by a rock.²⁶⁶ Neither was Nelson, who also never saw where these alleged rocks landed.²⁶⁷ Murietta testified that, instead of throwing rocks,

²⁵⁹ E.R.0473. Appendix, Ex. 137.

²⁶⁰ *Id.*; E.R.0817 (aerial photograph showing where chase began and ended). Appendix, Ex. 138.

²⁶¹ E.R.0507. Appendix, Ex. 140; E.R.0514. Appendix, Ex. 141; E.R.0486. Appendix, Ex. 139.

²⁶² E.R.0730-31. Appendix, Ex. 142.

²⁶³ E.R.0731-32. Appendix, Ex. 143.

²⁶⁴ E.R.0519. Appendix, Ex. 151.

²⁶⁵ E.R.0480-81. Appendix, Ex. 144; E.R.0519. Appendix, Ex. 151.

²⁶⁶ E.R.0519. Appendix, Ex. 151.

²⁶⁷ E.R.0480-81. Appendix, Ex. 144.

Mr. Yañez was threatening to use his cellphone to record the agents' beating of Murietta.²⁶⁸

Murietta saw the cellphone in Mr. Yañez's hand.²⁶⁹

123. Next, Diaz claims that he yelled in Spanish for Mr. Yañez to get down from the fence and that he complied.²⁷⁰ Murietta, a native Spanish speaker, testified that Diaz was yelling only at Murietta, not Mr. Yañez.²⁷¹

124. Next, according to the agents, Mr. Yañez reappeared above the fence for a second time and threw a table leg, which "just glanced off [Nelson's] hat."²⁷² Nelson was not injured from this alleged table leg and continued to apprehend Murietta.²⁷³ Murietta testified that he never saw a table leg that day and that Mr. Yañez never threw any piece of wood.²⁷⁴

125. The agents testified that it was around the time the table leg was allegedly thrown that Diaz caught up with Nelson.²⁷⁵ Diaz drew his gun and aimed at Mr. Yañez, telling him to get down from the fence, which he did.²⁷⁶ Diaz then joined Nelson in punching Murietta and trying to cuff him.²⁷⁷

126. Diaz says that, upon hearing a person trying to climb back up the fence, he disengaged from subduing Murietta.²⁷⁸ Nelson pleaded for Diaz to return and help, but Diaz declined.²⁷⁹ Although he suspected Mr. Yañez might be climbing to the top of the fence, he was

²⁶⁸. E.R.0518. Appendix, Ex. 151.

²⁶⁹. E.R.0518. Appendix, Ex. 151.

²⁷⁰. E.R.0731-32. Appendix, Ex. 143.

²⁷¹. E.R.0518. Appendix, Ex. 151.

²⁷². Yanez Fourth Amend. Compl. at ¶39. Appendix, Ex. 234; E.R.0435. Appendix, Ex. 145.

²⁷³. E.R.0761. Appendix, Ex. 146.

²⁷⁴. E.R.0508. Appendix, Ex. 147.

²⁷⁵. E.R.0440 Appendix, Ex. 148; Yanez Fourth Amend. Compl. at ¶39. Appendix, Ex. 234.

²⁷⁶. E.R.0436-37. Appendix, Ex. 149.

²⁷⁷. E.R.0436-37. Appendix, Ex. 149.

²⁷⁸. E.R.0437. Appendix, Ex. 149.

²⁷⁹. E.R.0436-37. Appendix, Ex. 149.

not concerned that Mr. Yañez would jump to the other side and re-enter the U.S.²⁸⁰ Rather than taking cover or helping move Murietta away from the fence, Diaz moved west and closer to the border so he could “surprise” the suspected fence climber.²⁸¹ After Mr. Yañez’s face emerged, Diaz, without any warning, shot Mr. Yañez in the head and killed him.²⁸²

127. According to Murietta, Diaz had his gun drawn and aimed at the top of the fence for about one minute and shot Mr. Yañez as soon as his head reappeared.²⁸³

128. According to Diaz, Mr. Yañez had raised his hand as if to throw something.²⁸⁴ Diaz concedes he did not see anything in Mr. Yañez’s hand, which was in a fist.²⁸⁵ He also testified that he had no time to yell a warning because Mr. Yañez had already begun his throwing motion.²⁸⁶ But he says he still had enough time to draw his holstered weapon, aim it, and fire—all before Mr. Yañez could complete this alleged throwing motion.²⁸⁷ He further says that Mr. Yañez’s alleged throwing motion was aimed at Nelson, but that Mr. Yañez was looking not at Nelson but at Diaz, “as if he was surprised.”²⁸⁸ Diaz never considered using non-deadly weapons, such as his pepper spray or collapsible baton, which were readily available.²⁸⁹

129. As for Nelson, he claims he never saw Mr. Yañez at the time of the shooting because he was focused on Murietta.²⁹⁰

²⁸⁰. E.R.0449. Appendix, Ex. 150.

²⁸¹. E.R.0437. Appendix, Ex. 149.

²⁸². E.R.0742 Appendix, Ex. 153; E.R.0821 (aerial photograph marking locations of Yañez and Diaz at time of shooting). Appendix, Ex. 152.

²⁸³. E.R.0517-19. Appendix, Ex. 151.

²⁸⁴. E.R.0733. Appendix, Ex. 154.

²⁸⁵. E.R.0742. Appendix, Ex. 153.

²⁸⁶. E.R.0742-43. Appendix, Ex. 153.

²⁸⁷. E.R.0733-34 Appendix, Ex. 154; E.R.0391. Appendix, Ex. 158.

²⁸⁸. E.R.0733-34 Appendix, Ex. 154; E.R.0390. Appendix, Ex. 155.

²⁸⁹. E.R.0738 Appendix, Ex. 156.

²⁹⁰. E.R.0763. Appendix, Ex. 157.

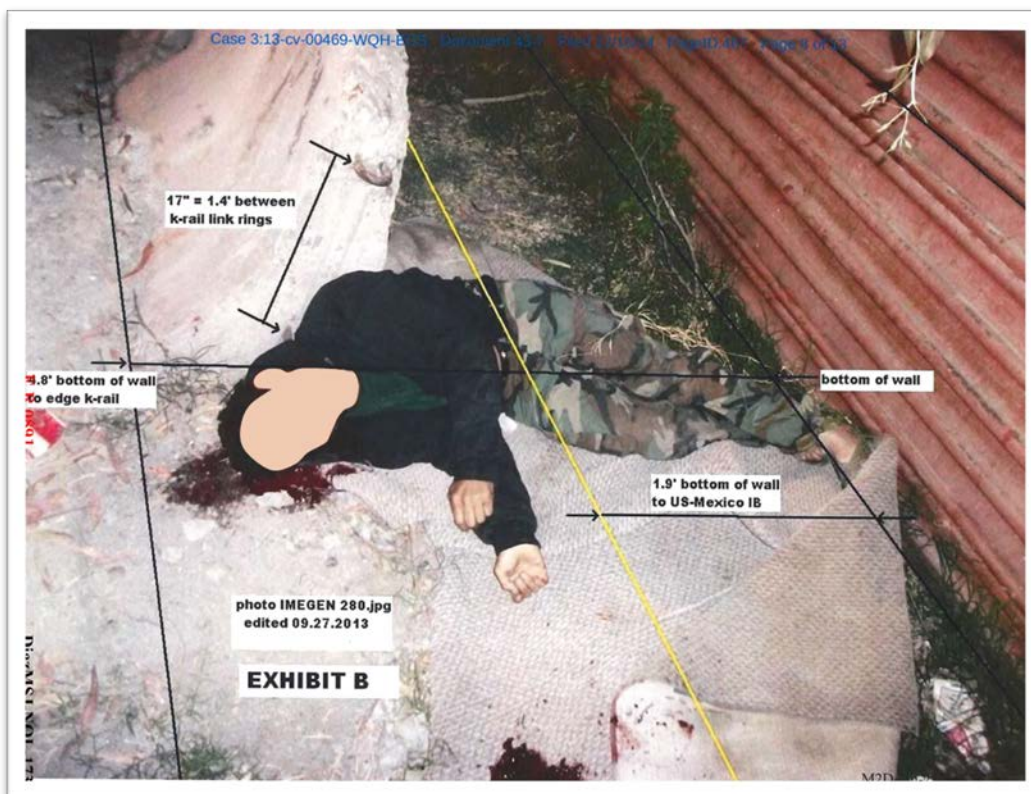
130. After the shooting, Diaz said that, on his own initiative, he picked up and moved the table leg—the “weapon” that allegedly justified his use of deadly force—north so that he could protect other officers arriving at the scene from getting hurt.²⁹¹

131. It is undisputed that the primary border fence on which Mr. Yañez was perched at the moment Diaz shot him is situated in the United States, and that the actual international border between the United States and Mexico is situated some distance south of the primary border fence. As it happened, after Mr. Yañez was shot he fell from the border fence and his body came to rest, according to the government’s expert, mid-way across the international boundary line.²⁹²

132. The local San Diego police “investigated” the incident but declined to bring any charges against the agents. They never took fingerprints or DNA from the table leg—the alleged weapon allegedly thrown by Mr. Yañez that purportedly justified agent Diaz in killing him.

²⁹¹. E.R.0391. Appendix, Ex. 158.

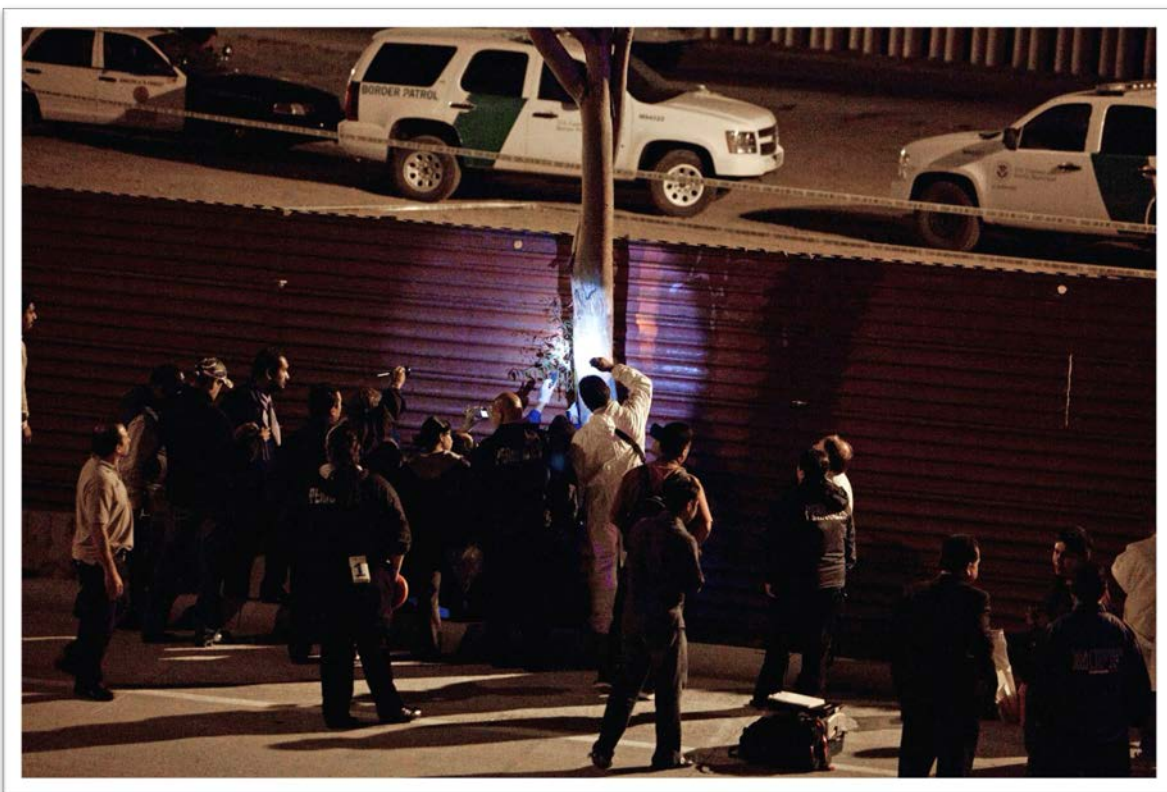
²⁹². E.R.0891. Appendix, Ex. 159.



An exhibit prepared by an expert for the United States Attorney for the Southern District of California in case 13-cv-469 shows the body of José Alfredo Yañez Reyes near the U.S.-Mexico border. *(graphic content obscured)*



Yañez Memorial



Yañez location of death.

D. “Ayudame, ayudame”: The United States’ Unlawful Killing of Guillermo Arévalo Pedraza²⁹³

133. During the afternoon of September 3, 2012, Guillermo Arévalo Pedraza, his wife, Nora, and two daughters, were enjoying a quiet family picnic at Los Patinaderos Park in Nuevo Laredo, Mexico near the bank of the Rio Grande. The family had gathered to celebrate the birthdays of Nora and their daughters. That day, once a joyous family occasion, soon changed from celebratory to catastrophic. As the family laughed, played, and cooked with others alongside the river, the two Border Patrol agents, without warning or provocation, opened fire on the crowd. Two bullets struck Mr. Arévalo—one in the abdomen and one in the leg.

²⁹³ Guillermo Arévalo Pedraza’s words (“help me, help me”) as he lay dying in the park where he had gone to spend the day with his wife and daughters. See below.

134. The agents who gunned down Mr. Arévalo were in a Border Patrol airboat on the United States' side of the river. After Mr. Arévalo fell to the ground, covered in blood, his wife began to scream, "They killed him, they killed him, they have killed him." The agents in the airboat quickly fled the scene of their crime, rendering no assistance to Mr. Arévalo. Instead, the agents left him dying from the gunshot wounds in the arms of his 9-year-old daughter, with his wife and older daughter standing only feet away.



Guillermo Arévalo Pedraza sits with his daughters, Priscila, left, and Mariana (Nora Lam Galle).

135. More than two dozen people, including children, witnessed the agents' killing of Mr. Arévalo. The majority of these witnesses are Mexican nationals who, much like Mr. Arévalo, were picnicking with their families in Los Patinaderos Park.



“
And then, all of a sudden, I started hearing shots.
I don’t know how many, about three or so.
And I would only—I could only hear people
screaming on this side, yelling at them.
I could hear a lot of screaming.”

- Mariano Briones, Eyewitness, Dep. Trans. at 8

136. Before opening fire on the crowd, the agents had attempted to apprehend a person who was trying to swim from the United States side of the territorial border to the Mexico side. The swimmer was not affiliated with Mr. Arévalo or even known to him. The swimmer had already crossed the river from Mexico to the United States and was out of the water on the

riverbank when he heard the sound of a boat. Fearing that the boat contained immigration officers who would detain him, the swimmer jumped back into the Rio Grande and began to swim back to the Mexican side of the river.

137. The approaching boat was a Riverine Class 16-Foot Diamondback airboat specifically designed for speed, maneuverability, and durability, and to be used by the CBP to patrol the waters of Rio Grande. The boat is as nimble as it is powerful, equipped with an above-hull propeller and rudder system that allows for easy maneuvering. At the center of the hull is a windshield that stands upright in front of two seats, protecting the occupants from any projectiles.

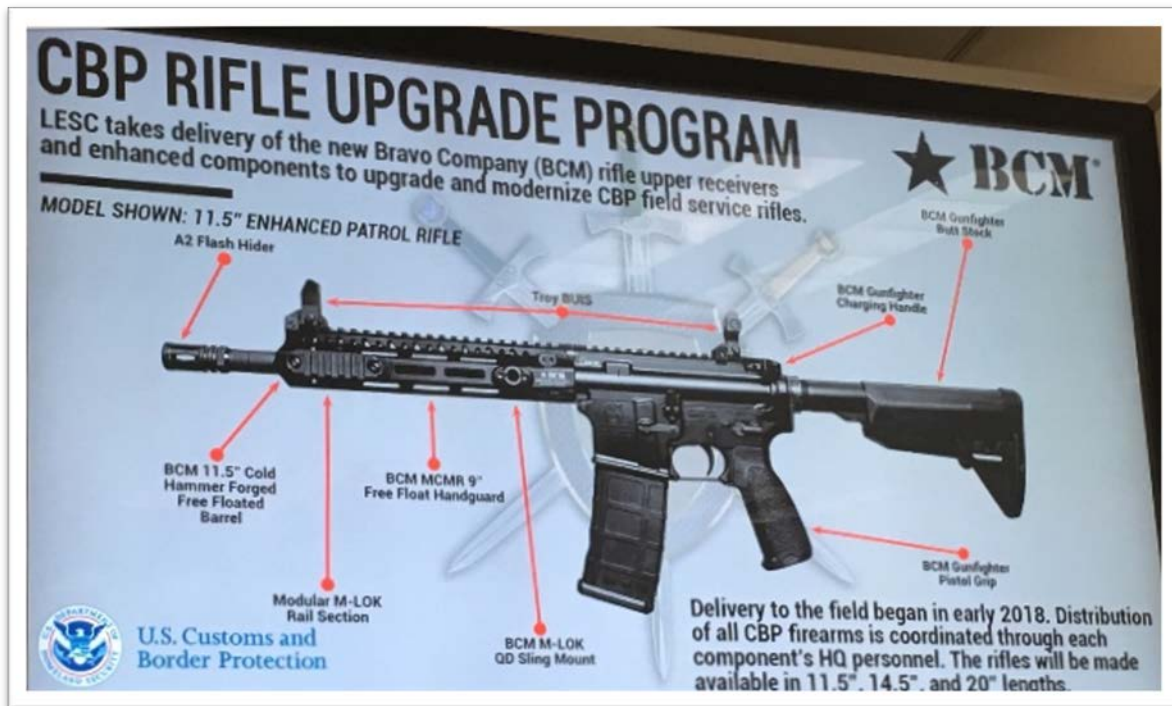




138. The agents on the airboat were equipped with assault rifles capable of firing in 3-round burst, semiautomatic, or fully automatic modes, and with semiautomatic .40 pistols as side arms. Both of them were wearing bullet-proof vests.

An M4 Rifle, the assault weapon that Border Patrol used to killed Mr. Arévalo





139. When the swimmer began trying to make his way back to Mexico, the agents quickly cut him off. The agents began to harass the visibly exhausted swimmer near the bank on the United States side of the river. They hit him with their boat hooks and blasted him with bursts of water from the vessel's propeller. The swimmer was clearly having trouble coping with the fast-moving current and the waves from the airboat. Watching him struggle for air, the families on the Mexican side of the river began to shout at the agents to stop before they killed the man.

“ **We got close, because the people that were closer to the river started yelling and screaming**
And what were they yelling?
To let go of the guy, because that boat was drowning the guy. ”

- *Edgar Camaro, Eyewitness, Dep. Trans. at 5*

“ **Then we started telling them to leave him alone. Right? And they kept going around him. So then one of the officers sat down on the boat, he knelt down like this, and that’s when he took a shot.** ”

- *Javier Cervantes-Sanchez, Eyewitness, Dep. Trans. at 5*

“ **All of a sudden, we heard the gunshots. Maybe they were upset because—I imagine people were cussing at them, I think, because they were trying to drown the young man.** ”

- *Victor Salvador Flores-Rojas, Eyewitness, Dep. Trans. at 8*

140. Without warning or provocation, one of the agents opened fire on the Mexican families, spraying rounds across the river, over the border, and into Mexico. Border Patrol agent Boatwright fired the two rounds that struck and killed Mr. Arévalo. Border Patrol agent Lambrecht was commanding the vessel.

141. As the Border Patrol's own internal records later revealed, the agent dropped to one knee, aimed and fired seven to ten shots from his M4 carbine. "Good lighting," the agents' report states. "Subject silhouetted."²⁹⁴

142. Guillermo lay bleeding in the park, and before dying he reached out his hand and whispered "ayudame, ayudame."²⁹⁵

143. In the aftermath of the killing, the Border Patrol issued a statement asserting that the agents had been subjected to rocks thrown from the Mexico side of the border. That account of events is contradicted by numerous witnesses who were present in the Park, who insist that no one threw any rocks at the agents.

**“ Now, when this was going on, at any time did you or anyone else around you throw rocks at the boat?
Nobody threw rocks. ”**

- Edgar Camaro, Eyewitness, Dep. Trans. at 10

144. Even if someone had thrown rocks at the agents, their response was grossly excessive. Not even the statement issued by the Border Patrol asserts that the alleged rocks posed a risk of death or seriously bodily injury to the agents or anyone else. Any such assertion would have been preposterous. The witness statements and a cellphone video of the incident demonstrate that when the agents opened fire they were far beyond the distance at which any thrown rock could pose such a risk.

²⁹⁴ Brian Bennett & Joseph Tanfani, *A family outing, then a deadly Border Patrol shooting*, Los Angeles Times (Oct. 18, 2014). Appendix, Ex. 33.

²⁹⁵ *Id.*

145. Moreover, none of the witnesses asserts that Mr. Arévalo had thrown any rock or was in the process of throwing any rock when the agents killed him. He was in the park for a picnic with his family.

146. And if Mr. Arévalo had thrown any rock at the agents or was in the process of throwing a rock—which he emphatically was not—the agents could have maneuvered the boat to shield themselves from any alleged rock-throwing or simply moved the boat out of range.

147. Notably, the agents would not have been justified in shooting Mr. Arévalo or anyone else even if doing so had been necessary to apprehend the swimmer—which it was not. The agents well knew that law enforcement officers are not justified in using deadly force to apprehend a fleeing suspect. And in fact the agents did not fire into the crowd of families in an effort to apprehend the swimmer. Having fatally shot Mr. Arévalo, the agents sped away in the boat without further effort to apprehend the swimmer (who in fact made his way back to Mexico).

148. A confidential law-enforcement source “has deep familiarity with the Arevalo case, including professional ties to members of the boat patrol.” He told a reporter:

“Knowing the details — seven rounds, that distance, with no justifiable cause — it’s intent.” ... “Even if he could’ve hurled that rock at that distance, for the agent to say he feared imminent bodily injury? If he did, he could have done something very simple: sat down.” Guillermo “was executed.”²⁹⁶

149. The U.S. Department of Justice failed to timely investigate the shooting. It did not issue its decision whether to prosecute the agents until October 3, 2019—more than seven years

²⁹⁶ Mark Binelli, *10 Shots Across the Border*. Appendix, Ex. 209.

after the killing. And it is clear that even that inexcusably delayed decision was prompted by the embarrassment caused by a national radio story regarding the delay.²⁹⁷

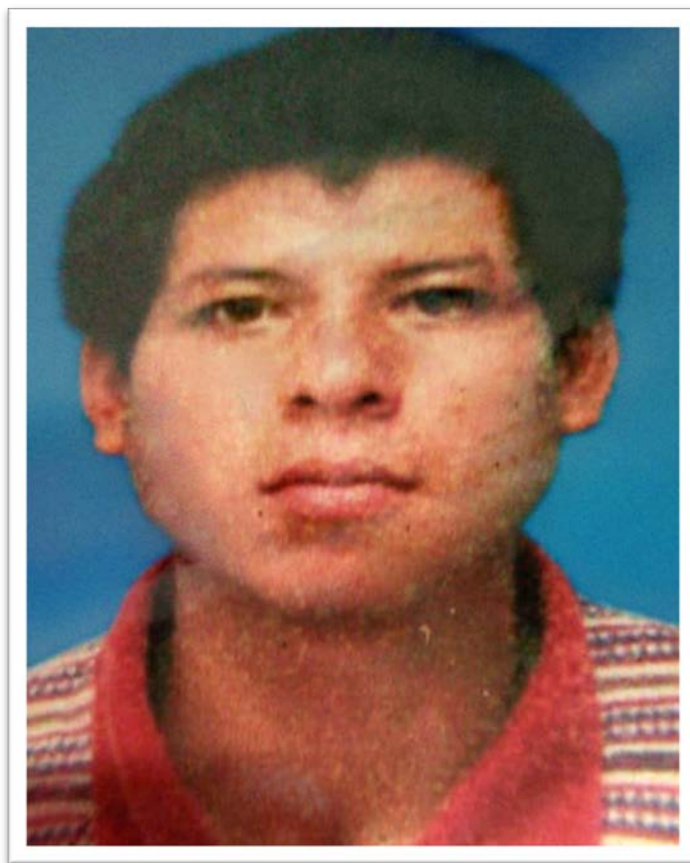
150. The DOJ's perfunctory letter states that it declined to prosecute the agents because it was unable to meet the "high hurdle" of proving that they acted "willfully," which, according to the DOJ, requires that the agent "knew that his or her acts were unlawful, and committed those acts in open defiance of the law."²⁹⁸ The DOJ asserts that it "conducted dozens of interviews, reviewed hundreds of documents, conducted site visits, and consulted experts as part of the investigation of this matter."²⁹⁹ Notably, the DOJ letter does *not* assert that it uncovered any evidence that Mr. Arévalo or anyone else on the riverbank was throwing rocks at the agents, or that they were in any way justified in spraying gunfire into the families or using lethal force against Mr. Arévalo.

²⁹⁷ The National Public Radio news story on the delayed investigation, *7-Year Delay In Border Patrol Use-Of-Force Case Is Emblematic Of A Larger Problem*, is here: <https://www.npr.org/2019/09/06/758426661/7-year-delay-in-border-patrol-use-of-force-case-is-emblematic-of-a-larger-proble>. Appendix, Ex. 160.

²⁹⁸ The DOJ letter is in the Appendix, Ex. 208.

²⁹⁹ *Id.*

E. “His Hands and Arms Were Cradled In Front of Him”: The United States’ Unlawful Killing of Jorge Alfredo Solis Palma³⁰⁰



Jorge Alfredo Solis Palma, as a boy

151. On January 4, 2010, Border Patrol Agent Miguel Torres-Vasquez shot and killed Jorge Alfredo Solis Palma in Douglas, Arizona.

152. Border Patrol officials stated that the agents had been “tracking” three suspects when they found Mr. Solis hiding behind a tree. They claim that when ordered to come out, Mr. Solis fled and began to throw rocks at the pursuing Border Patrol agents and their agency K-9.

³⁰⁰ A Border Patrol agent who witnessed the shooting conceded that Mr. Solis was not throwing any rocks when another agent shot and killed him, but had his arms cradled in front of him. See below.

153. A Cochise County Sheriff's report states that the agent chased Mr. Solis for 600 yards, then shot him.³⁰¹ Agent Miguel Torres-Vasquez fired two shots, killing the 28-year-old Mr. Solis.

154. Initially, Omar Candelaria, a special operations supervisor for the Border Patrol Tucson Sector, claimed that a report of the incident "doesn't indicate that anything was captured on camera."³⁰²

155. In fact, however, the incident was captured by Border Patrol surveillance cameras, and footage was later shown, but not released, to the Cochise County Sheriff's Office.³⁰³

156. This video was never released to the public and the only document describing the camera footage is a report from Detective John Gjerde of the Cochise County Sheriff's Office. He makes no mention of seeing Mr. Solis throwing rocks, only that it appeared at one point that Mr. Solis had bent over to "pick something up" and that "due to dust coming up it is hard to see what happens" and that through the dust it appears Mr. Solis made a "throwing motion."³⁰⁴

157. And yet when it comes to the shooting itself, Gjerde claims that "this did not get captured on video" because "there was a lot of dust, which washed out the view of the camera." Nevertheless, Gjerde concludes his report by stating that the video footage was "consistent with" the Border Patrol agent's version of events.³⁰⁵

158. Moreover, Cochise County detectives interviewed two other Border Patrol witnesses. One said he saw Mr. Solis raise his hand. The other, however, was nearer to the

³⁰¹ Ortega & O'Dell, *Deadly border agent incidents cloaked in silence*. Appendix, Ex. 164.

³⁰² Jonathon Shacat, *Border Patrol cameras capture parts of incident*, Herald Review (Mar. 22, 2010) https://www.myheraldreview.com/news/border-patrol-cameras-capture-parts-of-incident/article_5e69fef4-78b6-5a4c-b257-41ccaf1b6575.html. Appendix, Ex. 6.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

incident, and he said that Mr. Solis had his hands and arms cradled in front of him, as though he were holding rocks, but he was not making a throwing motion and had not raised his hands when Torres Vasquez shot him.³⁰⁶

159. Oscar Antonio de la Torre Amezcua of the Mexican consulate in Douglas, Arizona issued a statement expressing concern over the deadly shooting: “The Government of Mexico is gravely concerned with a growing trend of immigration related incidents that involve the use of public force by U.S. authorities on our common border. Mexico reiterates the need to find means of bilateral cooperation that will prevent the occurrence of undue or disproportionate use of force.”³⁰⁷ Mexico’s foreign ministry concurred that the killing of Mr. Solis was a cause for “profound concern.”³⁰⁸

160. The Cochise County Attorney's Office, the FBI, and the Border Patrol allegedly launched investigations into the shooting. None of those investigations resulted in any charges or disciplinary action against the agents involved.³⁰⁹

F. “Que Se Muera El Perro”: The United States’ Unlawful Killing of Juan Pablo Pérez Santillan³¹⁰

³⁰⁶ Ortga & O’Dell, *Deadly border agent incidents cloaked in silence*. Appendix, Ex. 164.

³⁰⁷ Jonathon Shacat, *Records: DP agent fired in defense of fellow agent, dog*, Nogales International (Mar. 22, 2010), https://www.nogalesinternational.com/news/records-bp-agent-fired-in-defense-of-fellow-agent-dog/article_b79bcbe1-eb07-516c-80e0-3288dedcd9a9.html. Appendix, Ex. 114.

³⁰⁸ The Associated Press, *Mexico expresses “deep concern” at migrant death*, The San Diego Union-Tribune (Jan. 5, 2010), <https://www.sandiegouniontribune.com/sdut-mexico-expresses-deep-concern-at-migrant-death-2010jan05-story.html>. Appendix, Ex. 122.

³⁰⁹ Arizona Daily Star, *A look back at fatal border patrol shootings in Southern Arizona* (Oct. 22, 2018), https://tucson.com/news/local/a-look-back-at-fatal-border-patrol-shootings-in-southern-arizona/collection_a18e20fc-d192-11e8-aea2-0338e6b27f67.html#16. Appendix, Ex. 3

³¹⁰ The Border Patrol agent responded “let the dog die” when Mr. Pérez’s brother asked for help after the agent had shot Mr. Pérez. See below.



Juan Pablo Pérez Santillan

161. On July 7, 2012, Juan Pablo Pérez Santillan, at approximately 7:00 a.m., was giving directions to a group of people on how to swim across the Rio Grande at Brownsville, Texas. On this morning, Mr. Pérez instructed that they would be swimming across the river in groups of five when he gave them the signal.

162. The first group was already in United States territory when Mr. Pérez instructed the second group to start swimming across the river. Mr. Pérez's brother was in the second group. When the second group reached the bank of the Rio Grande, in the United States, Mr. Pérez started yelling and waving his hands in the air at the second group in order to warn them that the Border Patrol was approaching. The second group immediately went back into the Rio Grande in order to cross back into Mexico.

163. Suddenly, a Border Patrol agent aimed his long-range rifle at Mr. Pérez, using a high-power scope to sight Mr. Pérez, and fired the rifle at least five times, fatally wounding Mr. Pérez with at least one gunshot wound to the chest. Mr. Pérez, who had been standing on his

native soil in Mexico, unarmed and unthreatening, was fatally wounded. Mr. Pérez was 30 years old at the time of his death.

164. Once Mr. Pérez's brother arrived back on the Mexican shore, he saw that his brother was lying in a pool of blood from the gunshot wound to the chest. He yelled to the Border Patrol agents for help, and one of them responded "que se muera el perro" ("let the dog die").

165. Mr. Pérez's brother, along with two others, carried Mr. Pérez to his truck and drove him to the hospital where he died.

166. The Border Patrol agent's report says that Mr. Pérez had a gun in his hand at the time of the incident.³¹¹ "But Mexican officials, and the five neighbors and family members [a reporter] spoke with, all told [him] unequivocally that Juan Pablo did not have a gun that day and had never even owned one. According to an investigation conducted by Mexican police, a gun was not found on his body or at the scene."³¹² Other witnesses concur.³¹³

167. A spokesman for the Border Patrol's Rio Grande Valley sector apparently got confused as to whether the agent said that Mr. Pérez had a gun in his hand, or a rock. The spokesman released a statement stating that "[a] rock could be considered a lethal weapon and we are going to respond. Agents have been very badly injured by rock attacks" "Our agents are

³¹¹ John Carlos Frey, *Over the Line*, The Washington Monthly (May/June 2013). Appendix, Ex. 165.

³¹² *Id.*

³¹³ Melissa del Bosque, *U.S. Border Patrol Agent Fatally Shoots Man Across border*, Texas Observer (Aug. 30, 2012), <http://www.texasobserver.org/us-border-patrol-agent-fatally-shoots-man-across-border/>. Appendix, Ex. 175.

highly trained and regardless of where the threat is coming from, our agent is going to respond to neutralize it.”³¹⁴

168. In fact, at the time of this incident Mr. Pérez was not doing or saying anything that constituted or could reasonably be perceived as a danger to anyone.

169. Mexico’s Foreign Ministry released a statement condemning the shooting and calling for a proper investigation. “The Mexican government has reiterated that the disproportionate use of lethal force in immigration control is unacceptable under any circumstances,” it said. “Protocols of the federal forces in both countries have to be respectful of human rights.”³¹⁵

170. This Commission released a statement on July 24, 2012, stating “the IACHR urges the United States to open a serious, independent, impartial and effective investigation on this death and any other deaths that have occurred under similar circumstances, as well as on allegations of disproportionate use of force and any other kind of abuse taken by its agents, with the objective of clarifying these facts and punishing all human rights violations in accordance to” the Inter-American standards on the use of force.³¹⁶

171. No Border Patrol agents were disciplined, sanctioned, or charged in connection with this killing.

³¹⁴ Reuters Staff, *FBI probes fatal shooting over U.S. border into Mexico*, Reuters (July 9, 2012), <https://www.reuters.com/article/us-mexico-border-idUSBRE86816I20120709>. Appendix, Ex. 7.

³¹⁵ *Id.*

³¹⁶ Press Release, *IACHR condemns the recent death of Mexican National by U.S. Border Patrol Agents*, IACHR (July 24, 2012), https://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp. Appendix, Ex. 11.

G. “Shooting an Unarmed Boy”: The United States’ Unlawful Killing of José Antonio Elena Rodríguez³¹⁷

172. On October 10, 2012, near the border fence in Nogales, Arizona, Border Patrol agent Lonnie Swartz shot 16-year-old José Antonio Elena Rodríguez 10 times, killing him.

173. Local police had received a report of likely marijuana-smugglers scaling the border fence into the United States. They called for backup, and Border Patrol agents arrived on the scene.

174. The officers and agents saw two men, who were not in fact carrying any marijuana packs, climbing the fence back into Mexico. José Antonio was not one of those men. The agents commanded the men to climb back down, but they ignored the command and made it safely back to Mexico.

175. The agents claim that during this encounter rocks were thrown at them from the Mexican side of the border fence. The border fence where this incident occurred is 20 feet high, constructed of slatted corrugated steel. The slats are only 3.5 inches wide. As the Internal Affairs Chief later concluded, no one could throw a rock from the Mexican side and cause injury to anyone on the U.S. side, “not even if he were a major-league baseball pitcher.”³¹⁸ And the agents could easily have avoided any rocks that were thrown at them. At worst, they could have simply backed up away from fence out of any harm’s way.

176. In fact, none of the other police or Border Patrol agents on the scene fired or even drew their weapons. Agent Swartz decided otherwise.

³¹⁷ The CBP Internal Affairs Chief said the killing of José Antonio was not justified; it was just “shooting an unarmed boy.” See below.

³¹⁸ Mark Binelli, *10 Shots Across the Border*, New York Times Magazine (March 3, 2016). Appendix, Ex. 209.

177. After the two men were already back in Mexico, Agent Swartz went directly up to the fence and, through the slats, fired 3 bursts, totaling 16 shots, into the adjoining street in Mexico.³¹⁹ He fired an initial burst of 3 shots, then moved west along the fence and fired another burst of 10 shots. He then reloaded the semiautomatic pistol and fired another burst of 3 shots.³²⁰

178. Two Border Patrol video cameras captured what happened. One of the cameras was right near the scene of the murder; the other was about 2,500 feet away.

179. The composite of the two videotapes does not show José Antonio throwing any rocks. Instead, it shows two men—likely the men who had climbed over the fence back into Mexico—making throwing motions. It shows José Antonio walking toward the two men, in the street, before Agent Swartz begins shooting.³²¹

180. When the shots were fired, the two men ran for cover behind a nearby building. But José Antonio was shot and fell to the street. Expert testimony suggests that one of the rounds from the initial burst hit José Antonio in the back and that all or most of the other 9 bullets hit him after he was lying facedown in the street. Those bullets hit him in the head, back, and arms. He was unthreatening and unarmed, carrying only a cellphone.³²²

181. The Internal Affairs Chief heard internal reports of the incident the next day, which characterized the shooting as self-defense.³²³ He was “immediately suspicious” because Border Patrol leadership had “a well-established history of intentional misinformation. Having

³¹⁹ Rob O’Dell, Video of teen killed by Border Patrol agents shows he was down on the ground when shots fired, Arizona Republic (June 19, 2017). Appendix, Ex. 223.

³²⁰ *Id.*

³²¹ *Id.*

³²² Mark Binelli, *10 Shots Across the Border*, New York Times Magazine (March 3, 2016). Appendix, Ex. 209.

³²³ *Id.*

sat through these meetings for years, after every one of these shootings, there's an effort to spin and distort facts and obscure a clear understanding of what actually occurred.”³²⁴

182. The Border Patrol videotapes show not only the two men and José Antonio, but also the police and Border Patrol agents. The Internal Affairs Chief reports:

“They do not appear to be displaying any concern for their safety whatsoever. . . . There are no weapons drawn. People have their hands on their hips, standing there watching. If you were to give a title to the video up to that point, it would be: ‘It’s Another Day at the Border.’”³²⁵

183. Moreover, Agent Swartz arrived on the scene after the other police and Border Patrol agents. The videotapes show that upon arriving he did not interact with the other officers, but instead walked directly up to the border fence and began shooting.³²⁶

184. The Internal Affairs Chief reports that the videotapes “‘demonstrated that José Antonio was certainly not throwing rocks at the time he was shot;” the videos instead are “evidence of a Border Patrol agent shooting an unarmed boy.”³²⁷

185. Until 2015 the United States had never criminally prosecuted any Border Patrol agent for using lethal force against a victim in Mexico. On July 23, 2015, the family of Sergio Hernández filed a petition in the U.S. Supreme Court asking the Court to grant review of the dismissal of their civil case and to conclude that the families of victims of cross-border killings could get review of those killings in U.S. courts.

186. Less than three months later, in October 2015, the United States indicted Agent Swartz for second-degree murder.³²⁸ Citing that indictment, the United States argued to its

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

Supreme Court in the *Hernandez* case that the possibility of a criminal prosecution means that the families are not entitled to judicial review or remedies under domestic civil law.³²⁹

187. After several deadlocks, juries eventually acquitted Agent Swartz on the criminal charges against him.

H. The United States' Unlawful Failure to Adequately Train Border Patrol Agents

188. The United States knowingly failed to adequately train Border Patrol agents concerning the proper use of force. Most fundamentally, the United States failed to ensure that agents knew that the Rocking Policy was unlawful and that Border Patrol agents have a duty to refrain from using lethal force in response to rock-throwing except when the circumstances meet the Imminent-Peril standard. Having not required agents to avoid using lethal force in response to rock-throwing, the United States failed to train the agents *how* to avoid using that force.

189. A former Chief of Police, high-ranking Department of Justice executive, and policing expert reviewed the United States' training policies with respect to rock-throwing and found them woefully deficient.

190. Thomas Frazier has more than more than 47 years of combined active law enforcement service and consulting experience. He served as a police officer for more than 25 year with the San Jose Police Department, rising to the rank of Deputy Chief of Police. He then served for 5 years as Police Commissioner of the Baltimore Police Department, then for 2 years as the Director of the Department of Justice's Office of Community Oriented Policing Services, then for 8 years as a Deputy Monitor on the Consent Decree Monitor Team of the Los Angeles

³²⁸ *United States v. Swartz*, No. 15-CR-1723, Dkt. 1 (D. Ariz. Sept. 23, 2015).

³²⁹ See Brief for the United States in Opposition, *Hernandez v. Mesa*, No. 15-118 (S. Ct.), filed February 29, 2016, at 12. Appendix, Ex. 261.

Police Department, 3 years on the Monitor Team of the Detroit Police Department, then as Compliance Director for the City of Oakland and the Oakland Police Department.³³⁰

191. His efforts in reforming those (and many other) police departments focused on their use-of-force policies and training.³³¹ He reviewed the Border Patrol training programs. In summary, he concluded that the United States failed to, among other things:

- a. Train new agents at CBP's basic academies on all less-lethal options in response to rock-throwing;³³²
- b. Train agents in tactics to de-escalate rock-throwing situations in order to prevent them from becoming deadly-force incidents;³³³
- c. Provide scenario-based training to give agents the opportunity to practice real-life situations involving rock-throwing;³³⁴
- d. Give written tests regarding rock-throwing in less-lethal-force recertification training.³³⁵

192. Specifically, the Border Patrol had a substantial surge in its workforce over a relatively short period of time,³³⁶ growing from 12,349 agents in 2006 to 20,119 in 2009, with more than 85% of them operating in the Southwest border sectors.³³⁷ Moreover, DHS completed more than 600 miles of fencing along the Southwest border and installed surveillance

³³⁰ Frazier Report at ¶¶ 2-7. Appendix, Ex. 79.

³³¹ *Id.* at ¶ 7.

³³² *Id.* at ¶ 11.

³³³ *Id.* at ¶ 105.

³³⁴ *Id.* at ¶ 125.

³³⁵ *Id.* at ¶ 24.

³³⁶ DHS OIG Report at 3. Appendix, Ex. 79.

³³⁷ Staffing Report at 2. Appendix, Ex. 79.

technology, narrowing the areas where people can try to enter the country unlawfully.³³⁸ The surge in workforce, coupled with the additional infrastructure, increased the chance that any suspect attempting to cross the border illegally will be intercepted by Border Patrol.³³⁹

193. According to DHS, “rock attacks were the most frequent type of assault on agents in 2011 and the second most frequent type of assault in 2012.”³⁴⁰ The Chief of Border Patrol acknowledged that it is common that Border Patrol agents get rocks thrown at them, and that, depending on where the agent is stationed, it is something that the agent could expect to happen to him or her. For a three-year period from 2008 to 2011, there were 2958 reported rock assaults on agents.³⁴¹ The next most frequent type of assault (physical assault) occurred only 430 times.³⁴²

194. Despite the frequency of rock assaults, the United States provided no training or guidance to Border Patrol agents on how to respond to them appropriately.³⁴³ Border Patrol agents receive use-of-force training in basic academies,³⁴⁴ must qualify quarterly with their firearms and recertify annually with any less-lethal devices (e.g., baton, pepper spray, or

³³⁸ Frazier Report, at ¶38. Appendix, Ex. 79.

³³⁹ *Id.* at ¶ 38.

³⁴⁰ *Id.* at ¶ 42.

³⁴¹ *Id.* at ¶ 40.

³⁴² *Id.* at ¶ 40.

³⁴³ The 2010 Handbook identifies the Chief of Border Patrol, Chief Patrol Agents, and the Assistant Commissioners for OFO, OAM, IA, and OTD, as well as their respective directors, as Responsible Officials (“RO”). 2010 Handbook at 10. Appendix, Ex. 80. It then provides that “[a] RO is responsible for all aspects of the CBP use of force program as it relates to the offices and personnel under his or her supervision, and for ensuring compliance with the CBP Use of Force Policy by all officers/agents within his or her area of responsibility.” *Id.*

³⁴⁴ DHS OIG Report at 9. Appendix, Ex. 79

taser),³⁴⁵ receive classroom instruction and take exams,³⁴⁶ and demonstrate appropriate judgment in scenario-based training.³⁴⁷

195. Yet none of this training included any instruction on how to respond to rocking.³⁴⁸ Emblematic of this failure is the fact that the CBP's use-of-force 2010 Handbook *did not address rock throwing and did not provide guidance on safe tactics and techniques to be used when a suspect throws rocks or other projectiles.*³⁴⁹ Nor was there any relevant guidance in the use-of-force training materials.³⁵⁰ And responding appropriately to rock-throwing was not a part of Border-Patrol agents' scenario-based training.³⁵¹

196. Mr. Frazier found this lack of training “not explainable.”³⁵² He concluded “[i]n my experience I have never heard of, and do not know of, any law enforcement agency [other than CBP] that considers a thrown projectile as per se ‘Deadly Force.’ ... *Virtually all thrown objects fail to meet the ‘Imminent Peril’ standard.*”³⁵³

197. Moreover, proper training would instruct agents to respond to “assault by rock or bottle throwing depend[ing] on the location, distance, and weaponry of the antagonist(s). If the confrontation is unexpected, officers are trained to seek distance, cover, and await backup.”³⁵⁴ Moreover, “[l]ess lethal weapons may be deployed depending on the circumstances. Response tactics are determined by the number of persons involved, reason for the confrontation, type of

³⁴⁵ Frazier Report, at ¶11. Appendix, Ex. 79.

³⁴⁶ *Id.* at ¶ 24.

³⁴⁷ *Id.* at ¶ 125.

³⁴⁸ *Id.* at ¶ 24.

³⁴⁹ *Id.* at ¶ 25.

³⁵⁰ *Id.* at ¶ 25.

³⁵¹ *Id.* at ¶ 25.

³⁵² *Id.* at ¶ 123.

³⁵³ *Id.* at ¶ 113 (emphasis added).

³⁵⁴ *Id.* at ¶ 117.

objects thrown, availability of cover and concealment options, and arrival of backup resources, to name a few.”³⁵⁵ The specific response inevitably depends on the circumstances. “But *to rely on use of deadly force is virtually unheard of.*”³⁵⁶

198. Among the United States’ many failings with respect to training Border Patrol agents were that it:

- failed to “recognize[] a serious need for correction in practice and training.”³⁵⁷
- “failed to deal with the increasingly obvious and more frequent application of deadly force by [its] subordinates” and “failed to properly address the string of highly suspect, and often fatal shootings.”³⁵⁸
- “should have modified or clarified policy to ensure agents were evaluating their options in light of proper escalation/de-escalation and imminent peril use of force considerations. These evaluations include seeking cover, and increasing the distance between the agent and the threat.”³⁵⁹
- “should have ensured that all agents had proper and sufficient equipment. If that equipment did not currently exist, ensure that it was developed (protective head gear with face shields and communications capability, adequate less lethal capability).”³⁶⁰
- “should have developed adequate training, especially scenario-based training to address rock attacks. [It] should have confronted and countermanded the labor

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.* at ¶ 118.

³⁵⁸ *Id.* at ¶ 124.

³⁵⁹ *Id.* at ¶ 125.

³⁶⁰ *Id.*

organization's assertions that all "rocking" incidents were deadly force and would be responded to as such. [It] should have created a disciplinary system that ensured adequate and timely discipline."³⁶¹

- "perpetuated the pattern and practice where unprincipled agents may believe that they may violate the constitutional rights of others with impunity or where poorly trained agents may unwittingly follow in those agents footsteps."³⁶²
- "perpetuated [through its failure to provide proper training] the problem of hyper-aggressive, provocative, and intense policing."³⁶³
- failed to "realize that lethal force against a rock thrower is inherently suspect. A leader must recognize if a less-lethal option was appropriate, available, and could have been utilized. These options include taking cover, increasing distance, or release of the subject."³⁶⁴
- failed to provide the "training and direction that a reasonable [police force] would have provided in these circumstances."³⁶⁵

199. In short, there was "a serious need for correction in practice and training."³⁶⁶ And "[i]t is no surprise that [agents] justified [their] use of deadly force by claiming a rock was thrown, when [they] could and should have employed de-escalation techniques and considered the proper imminent peril standard."³⁶⁷

³⁶¹ *Id.*

³⁶² *Id.* at ¶ 126.

³⁶³ *Id.* at ¶ 127.

³⁶⁴ *Id.* at ¶ 129.

³⁶⁵ *Id.* at ¶ 130.

³⁶⁶ *Id.* at ¶ 118.

³⁶⁷ *Id.* at ¶ 130.

I. The United States' Unlawful Failure to Discipline Border Patrol Agents

200. Between January 2010 to October 2012 alone, border patrol agents responded to an alleged thrown rock with deadly force at least 29 times. Not a single one of those agents was ever disciplined by the United States; nor was there ever an attempt by the United States to respond to the concerns of the Government of Mexico by bringing the unlawful Rocking Policy into compliance with the law.

201. The United States never publicly reprimanded or disciplined any Border Patrol agent for shooting at a Mexican national so long as the agent alleged a rock was thrown. Accordingly, Border Patrol agents knew that the existing use-of-force policy would allow them to continue to use lethal force in such situations.

202. Indeed, “[i]n none of the 42 deaths from 2005 to 2014 is any agent or officer publicly known to have faced consequences—not from the Border Patrol, not from [CBP] or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts.”³⁶⁸ “Internal discipline,” moreover, “is a black hole.”³⁶⁹ “If an investigation is undertaken internally, it is not made public. If an agent is disciplined, that is not made public either. If CBP refers a case to the Justice Department for a potential criminal investigation, that, too, is kept from the public.”³⁷⁰

203. After the PERF Report was issued in 2013, the CBP began its own internal review of the same 67 shootings that PERF had examined. In 2015 CBP “absolved agents of misconduct

³⁶⁸ Ortega & O’Dell, *Deadly border agent incidents cloaked in silence*. Appendix, Ex. 164.

³⁶⁹ *Id.*

³⁷⁰ Frey, *Over the Line* (“Of the nineteen cases we have uncovered over the past two years in which people died at the hands of Border Patrol agents—six on Mexican soil—no agents have yet been prosecuted. If any of the agents involved have been relieved of their duties because of their role in the incidents, that information has not been made available to the public.”). Appendix, Ex. 165.

in all but three cases, which [were] still pending.”³⁷¹ Keeping to “its tradition of closing ranks around its paramilitary culture,” the CBP disciplined only two agents for these shootings—and “[b]oth received oral reprimands.”³⁷²

204. The Internal Affairs Chief explained that the United States intentionally structured the disciplinary mechanisms to ensure the impunity that in fact resulted. The Chief of Border Patrol had disciplinary authority, but he delegated it to “the sector headquarters.”³⁷³ That is, national Border Patrol executives delegated to *local section chiefs* the authority to discipline—or not—*agents under their immediate command* who used lethal force in response to alleged rock-throwing.

205. As admitted under oath by the former Internal Affairs Chief, this delegation of disciplinary authority to sector chiefs ensured that no meaningful discipline was ever issued.³⁷⁴ And the Border Patrol fought hard, and successfully, to ensure that discipline decisions remained within the Border Patrol.³⁷⁵

206. Rather than respond to the shootings appropriately, Border Patrol officials intentionally thwarted the internal affairs agency’s investigation. “In nearly every instance, there

³⁷¹ See Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, Los Angeles Times (June 15, 2015), <https://www.latimes.com/nation/la-na-border-patrol-shootings-20150615-story.html>. Appendix, Ex. 166.

³⁷² *Id.*

³⁷³ Deposition of Michael Fisher, *Perez v. United States*, No. 3:13-cv-01417-WQH-BGS (S.D. Cal.) [Fisher Dep. Tr.], at p.80. Appendix, Ex. 167.

³⁷⁴ Tomsheck Dep. Tr. 136, 141. Appendix, Ex. 10.

³⁷⁵ *Id.* at 135-36.

was an effort by Border Patrol leadership to make a case to justify the shooting versus during a genuine, appropriate review of the information and the facts at hand.”³⁷⁶

207. Top officials at DHS and CBP intentionally turned a blind eye to the consistent pattern of unjustified killings. “There were certainly 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.”³⁷⁷

J. The United States’ Unlawful Failure to Adequately and Timely Investigate Border Patrol Killings.

208. The Office of Inspector General of DHS had the option to investigate or decline to investigate an allegation of excessive force.³⁷⁸ If DHS OIG declined, the Immigration Customs and Enforcement (“ICE”) Office of Professional Responsibility (“OPR”) and then CBP Internal Affairs, respectively, decided whether to investigate. OIG would investigate all or nearly all incidents involving the use of deadly force that resulted in a death.³⁷⁹ After its investigation into a fatal use-of-force incident, DHS OIG provided its investigative report to OPR for a determination of whether the conduct violated policy.³⁸⁰

209. The Internal Affairs Chief admitted that these investigations were pro forma and designed to exonerate the agents.³⁸¹ Rather than respond to the shootings appropriately, Border

³⁷⁶. Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, Washington Post (Aug. 16, 2014), available at <http://tinyurl.com/BeckerBorder>. Appendix, Ex. 237.

³⁷⁷. See Anna Werner, *Border Patrol Killings Face Renewed Scrutiny* (quoting Mr. Tomsheck). Appendix, Ex. 163.

³⁷⁸. Fisher Dep. Tr. 86. Appendix, Ex. 167.

³⁷⁹. Tomsheck Dep. Tr. 72. Appendix, Ex. 10.

³⁸⁰ Fisher Dep. Tr. 35. Appendix, Ex. 167.

³⁸¹ Tomsheck Dep. Tr. 135-36. Appendix, Ex. 10.

Patrol officials intentionally thwarted the investigations.³⁸² He acknowledged to the media that “senior officials at Customs and Border Protection and elsewhere in the Department of Homeland Security interfered with, delayed or hindered his office from being more aggressive in rooting out corruption, abuse and other misconduct, including civil rights violations, by telling internal affairs to stand down or back off.”³⁸³ With respect to use of excessive force, “[a]llegations of wrongdoing he believed needed to be investigated instead would go to Border Patrol management for review and discipline. Those inquiries went nowhere or were inadequate.”³⁸⁴ The Internal Affairs Chief and other internal affairs investigators were then required to “fall in line” behind the Border-Patrol-directed conclusions.³⁸⁵

210. The Internal Affairs Chief further confirmed that United States officials actively and consistently distorted the public narratives around fatal shootings in order to cover up Border Patrol agents’ wrongdoing.³⁸⁶ As noted in detail above, for example, in the aftermath of the killing of Sergio Hernández, United States officials put out a press release falsely asserting that the group of boys had “surrounded” the agent and that Sergio “began to throw rocks” at him. But two days later several cellphone videos surfaced that show that the agent was not surrounded and that Sergio did not throw any rocks.

³⁸² Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, Washington Post (Aug. 16, 2014), available at <http://tinyurl.com/BeckerBorder>. Appendix, Ex. 237.

³⁸³ Andrew Becker, *Ousted Chief Accuses Border Agency of Shooting Cover-Ups, Corruption*, Los Angeles Times (Aug. 14, 2014), https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/?utm_source=CIR&utm_medium=social_media&utm_campaign=twitter. Appendix, Ex. 162.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, Washington Post (Aug. 16, 2014), available at <http://tinyurl.com/BeckerBorder>. Appendix, Ex. 237.

211. Similarly, as noted in detail above, in the aftermath of the killing of Mr. Arévalo the Border Patrol issued a statement asserting that the agents had been subjected to rocks thrown from the Mexico side of the border. Again, cellphone video and numerous witnesses flatly contradict that account.

212. The United States' sham investigations and its campaigns of public misinformation are matched by its delay in informing the families of the status of the phoney investigations. For example, with respect to the killing of Mr. Arévalo the United States asked for assistance from his family's lawyers in identifying and contacting witnesses, and the family promptly complied with every request. That was in 2012. As noted in detail above, however, the United States did not inform the family of the outcome of its "investigation" until seven years later. The United States did not provide even that delayed response until a National Public Radio investigation shamed them into it.

K. The United States' Unlawful Failure to Provide a Judicial Remedy to Petitioners

213. The United States has categorically refused to permit Petitioners to obtain judicial review of, and judicial remedies for, the killing of their loved ones.

214. When a Border Patrol agent is standing on U.S. soil and kills a person who is also standing on U.S. soil, the killing is subject to judicial review and remedies under the Federal Tort Claims Act.³⁸⁷ ("FTCA"). Where federal officials were acting within the course and scope of their employment, the FTCA provides that the United States shall be substituted as the defendant in the lawsuit, and the United States waives any sovereign immunity that it has to the claim.³⁸⁸

³⁸⁷ 28 U.S.C. §§ 2671 et seq.

³⁸⁸ *Id.* § 2674.

But the FTCA and its waiver of immunity do not apply to “[a]ny claim arising in a foreign country.”³⁸⁹ Under the FTCA, a claim “arises in” the nation where the injury occurred.³⁹⁰ So families of persons killed by Border Patrol agents in Mexico cannot proceed under the FTCA.

215. With no FTCA claim available, such families could attempt two other avenues of potential judicial redress. The families could try to sue the culpable individual agent under state or federal law, or try to sue the United States directly. The United States has categorically foreclosed both potential avenues.

216. With respect to claims against individual agents, the Westfall Act,³⁹¹ generally precludes tort claims against federal officials and agents, including those based on state tort law and the Alien Tort Statute.³⁹² The statute provides an exception (allows claims) for claims against federal employees “for a violation of the Constitution of the United States,” i.e., for claims brought under authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.³⁹³ But the Supreme Court denied a *Bivens* remedy to the Hernández family in *Hernandez v. Mesa*.³⁹⁴ The Court held that it would not imply a private right of action under the U.S. Constitution in these circumstances due to the potential interference with the United States’ foreign relations and national security.

³⁸⁹ *Id.* § 2680(k).

³⁹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

³⁹¹ 28 U.S.C. § 2679(b). Formally, the Federal Employees Liability Reform and Tort Compensation Act of 1988.

³⁹² 28 U.S.C. § 2679(b)(1) (the FTCA claim is “is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee”).

³⁹³ 403 U.S. 388 (1971). The statute also preserves claims “brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.” 28 U.S.C. § 2679(b)(2)(B). But courts have held that claims under the Alien Tort Statute are not “brought for a violation of a [federal] statute,” but, rather, are brought for a violation of the law of nations.

³⁹⁴ 140 S. Ct. 735 (2020).

217. Regarding foreign relations, the Court took note of the United States’ obligation to provide a judicial remedy under international law, but held that this was counterbalanced by the United States’ interest in “not undermin[ing] the agents' effectiveness and morale.”³⁹⁵ Thus “both the United States and Mexico have legitimate and important interests” and the Court cannot “arbitrate between them.”³⁹⁶

218. Notably—and unlawfully—the Court treated the question of providing a judicial remedy as merely an *issue of diplomacy as between the United States and Mexico*.³⁹⁷ The two nations have “attempt[ed] to reconcile their interests through diplomacy,” and “[t]he broad issue of violence along the border, the occurrence of cross-border shootings, and this particular matter have been addressed through diplomatic channels.”³⁹⁸ The proper issue, however, was not the relations between two nations, but the obligation owed by the United States to individual persons—to the Petitioners and their loved ones.

219. The Court’s improper—and unlawful—focus is encapsulated in its truncated and erroneous reference to international law. The Court referred to the argument that Article 6(1) of the International Covenant on Civil and Political Rights³⁹⁹ imposes “an obligation under international law ... to provide a remedy for the shooting in this case.”⁴⁰⁰ The Court failed to note to whom the obligation is owed. Under international law the United States owes *a duty to the Petitioners*—not only to Mexico—to provide a judicial remedy. Human rights inhere in persons, not nations. The Supreme Court is 75 years too late to argue that the international

³⁹⁵ *Id.* at 745.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ S. Treaty Doc. No. 95–20, Dec. 19, 1966, 999 U. N. T. S. 174.

⁴⁰⁰ 140 S. Ct. at 745.

human rights of persons—including the right to judicial remedies for violations of substantive human rights—can be left to the tender mercies of diplomacy between the United States and any other nation. Succinctly put:

“Just as the French Revolution ended the divine rights of kings, the human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subjects of international law, to concede that individuals are no longer mere objects, mere pawns in the hands of states.”⁴⁰¹

220. The Inter-American Court concurs, affirming that “modern human rights treaties . . . are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States.”⁴⁰²

221. With respect to alleged “national security” concerns, the Supreme Court denied judicial review because the United States has an interest in “regulating the conduct of agents at the border.”⁴⁰³ But for 45 years, under 12 Administrations—from 1971 through 2016—never once had the United States asserted that “national security” concerns prevented a *Bivens* claim against Border Patrol agents.⁴⁰⁴

⁴⁰¹ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 Am. U. L. Rev. 1, 1 (1982). Appendix, Ex. XX.

⁴⁰² Advisory Opinion OC-2/82, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights* (Arts. 74 and 75), Inter-Am. Ct. H.R. (ser. A) ¶ 29 (Sept. 24, 1982); *see also* Cancado Trindade, Antônio Augusto: *The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*, Human rights, democracy and the rule of law (2007), p. 156 (“Earlier attempts to deny to individuals the condition of being a subject of international law on the ground that individuals lack some of the capacities which States have (such as, e.g. that of treaty-making), are definitively devoid of any meaning.”).

⁴⁰³ *Hernandez v. Mesa*, 140 S. Ct. at 747.

⁴⁰⁴ Westlaw search: adv: “Border Patrol” & *Bivens* yielded 242 cases.

222. The United States has further undermined the reality of any “national security” interest by acknowledging that a *Bivens* remedy is available when the victim—whether or not a U.S. citizen—is shot on U.S. soil. The Supreme Court painstakingly limited its holding to “cross-border” shootings.⁴⁰⁵ The United States’ brief to the Court was similarly limited, advising the Court that “the defining characteristic of this case is that it is *not* domestic,”⁴⁰⁶ and that the “class of cases involving aliens injured *abroad* by Border Patrol agents by definition targets border-security activities distinct from the ordinary domestic activities performed by law enforcement (including Border Patrol agents) in the United States.”⁴⁰⁷ In a prior trip to the Supreme Court in the same case, the United States expressly admitted that *Bivens* *does* provide a remedy where the victim, regardless of citizenship, is shot on U.S. soil.⁴⁰⁸ Neither the United States nor its Supreme Court explained how any *legitimate* “national security” interest could appear or evaporate depending on whether a civilian victim was standing five feet on one side or another of the international boundary.

223. Nevertheless, the Supreme Court altogether precluded the Hernández family and others similarly situated from pursuing *Bivens* claims against individual Border Patrol agents.

224. The other potential avenue of judicial review for Petitioners and others in their position is a claim against the United States itself. In the *Hernandez* litigation, the full Court of Appeals for the Fifth Circuit, sitting en banc, held that the United States has sovereign immunity

⁴⁰⁵ *Every sentence* of the first paragraph of the decision emphasizes that it applies only to cross-border shootings. 140 S. Ct. at 739. The Court then pins its analysis to the cross-border nature of the shooting an additional dozen times throughout the opinion.

⁴⁰⁶ Brief for the United States as Amicus Curiae Supporting Respondent, *Hernandez v. Mesa*, No. 17-1678, filed Sept. 30, 2019, at 15 (emphasis in original). Appendix, Ex. 170.

⁴⁰⁷ *Id.* at 22 (emphasis in original).

⁴⁰⁸ *Hernandez v. Mesa*, No. 15-118 (S. Ct.), Arg. Tr. Feb. 21, 2017, at 32, 40.

to such claims.⁴⁰⁹ The Court adopted the opinion of the 3-judge panel, which held that the United States has such immunity even as to *jus cogens* claims, alleging unlawful extrajudicial killings, litigated against it in its own courts. According to the Court, the United States has sovereign immunity against such claims unless “Congress intended to waive the United States' sovereign immunity.”⁴¹⁰ That is, Congress must have explicitly “consented to suit.”⁴¹¹ The Court found no such consent in international conventions, treaties, or elsewhere.⁴¹²

225. Of course, that decision flies in the face of the American Declaration, numerous other international accords to which the United States is a party, and customary international law.⁴¹³ That applicable law requires the United States to provide a judicial remedy in its domestic courts notwithstanding that the conduct was committed by persons acting in an official capacity, i.e., despite any otherwise applicable state immunity. Some of the judges tried to justify this rejection of international law on the ground that, under international law, *other nations* generally retain state immunity *when sued in U.S. courts*.⁴¹⁴ That argument ignores the obvious fact that it is the principle of comity that generally prohibits foreign nations from being subject to suit in the

⁴⁰⁹ *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc), *reinstating Hernandez v. United States*, 757 F.3d 249, 255–57 (5th Cir. 2014); *see also Hernandez v. United States*, 785 F.3d at 128-132 (Jones, J., concurring).

⁴¹⁰ *Hernandez v. United States*, 757 F.3d at 259.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ See below in Section IV D & E.

⁴¹⁴ See, e.g., *Hernandez v. United States*, 785 F.3d at 130 (Jones, J., concurring) (arguing that to withhold sovereign immunity “would expose the United States, alone among the nations of the world, to liability in federal courts under the ATS without the protection of sovereign immunity”).

forum nation's courts.⁴¹⁵ That principle has nothing to do with the forum nation's liability to suit in *its own courts*.

226. Thus, the United States has foreclosed Petitioners from obtaining judicial review of, and judicial remedies for, these killings in U.S. courts.⁴¹⁶ It is worth noting that the Supreme Court and the Fifth Circuit cast their decisions principally in terms of domestic issues of separation-of-powers among the branches of the U.S. government. The Supreme Court held that various considerations driving its decision to withhold judicial review “can all be condensed to one concern—respect for the separation of powers.”⁴¹⁷ Those intramural domestic considerations are irrelevant here. The *United States* has the international obligation to provide judicial redress to these families. Regardless of how the United States wants to arrange its internal decision-making with respect to that obligation, the obligation remains.

227. In both of the trips to the Supreme Court in the *Hernandez* litigation, defense counsel and the Government expressly acknowledged that the victim's family would have a *Bivens* remedy if he had been injured within the United States:

Justice Ginsburg: Would you recognize that -- let's say it was the -- the boy that the Border Patrol grabbed and then shot him, so the -- the -- so the death would have occurred in the United States, *Bivens* claim?

⁴¹⁵ See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, [3 February 2012], I.C.J. Reports 2012; Hazel Fox QC, *The Law of State Immunity* 525 (2002) (“State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement.”); *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007], at ¶ 44 (quoting Hazel Fox).

⁴¹⁶ See Section IIIB below for currently pending litigation on these issues.

⁴¹⁷ *Hernandez v. Mesa*, 140 S. Ct. at 749; see also *Hernandez v. United States*, 757 F.3d at 259 (“Congress's waiver of [immunity] must be unequivocally expressed”) (citation omitted).

[Defense Counsel]: Well, absolutely. Then he would be in the territory of the United States, and all constitutional protections would apply.⁴¹⁸

....

Justice Ginsburg: And then if it were, if it were the young man who was grabbed by the Border Patrol guard and shot on the U.S. side, Bivens?

[Assistant Solicitor General]: Yes, there would be.⁴¹⁹

228. Defense counsel reiterated this position in the second trip to the Supreme Court:

Justice Sotomayor: So why -- what you're basically saying is Bivens shouldn't apply ever against a border -- a rogue border patrol who just stands there shooting people both on the U.S. side, indiscriminately, takes a gun and just sweeps both sides of the border?

[Defense Counsel]: Well, it would apply to those standing on the United States side certainly.⁴²⁰

229. This formalistic rule runs counter to the United States' obligations under international law to provide a remedy for gross violations of human rights, including as in this case, extrajudicial killing. The Supreme Court's Constitutional interpretations cannot override the U.S.'s treaty obligations or jus cogens norms.

230. In addition, the distinction that the United States draws between victims killed on U.S. soil and those killed in Mexico inevitably has a disparate effect based on the victim's

⁴¹⁸ Hernandez I, Transcript of Argument, Feb. 21, 2017, at 32.

⁴¹⁹ *Id.* at 40.

⁴²⁰ Transcript of Argument, Nov. 12, 2019, *Hernandez v. Mesa*, No. 17-1678 (S. Ct.), at 29. The Assistant Solicitor General during this second argument seemed to try to backtrack on this issue. *See id.* at 46.

nationality. Those killed in Mexico are more likely not to be U.S. citizens. In fact, every victim of a Border Patrol cross-border killing has been a Mexican national.

231. Unsurprisingly, the Supreme Court's ruling drew intense criticism both nationally and internationally. The Washington Post published an article titled: "The Supreme Court may have just made violence against immigrant children more likely."⁴²¹ Congressman Joaquin Castro of Texas, the chairman of the Congressional Hispanic Caucus, called the Court's ruling "an assault on basic civil and human rights" that has "legalized murder without cause in cases where a U.S. border patrol agent shoots a Mexican national standing on the Mexican side of the border."⁴²² The government of Mexico expressed "deep concerns about the effects this decision will have on other similar cases, in which Mexican citizens have died from gunshots fired by US agents towards the Mexican side."⁴²³

III. ADMISSIBILITY

A. The Commission Has Jurisdiction to Hear This Petition

232. The United States is a member of the Organization of American States.⁴²⁴ It is bound by the American Declaration.⁴²⁵ And the Commission has considered the American

⁴²¹ Ivón Padilla-Rodríguez, *The Supreme Court may have just made violence against children more likely*, Washington Post (Feb. 28, 2020), <https://www.washingtonpost.com/outlook/2020/02/28/supreme-court-may-have-just-made-violence-against-immigrant-children-more-likely/>. Appendix, Ex. 173.

⁴²² David G. Savage, *Supreme Court's conservatives shield border agent in killing of unarmed teen in Mexico*, Los Angeles Times (Feb. 25, 2020), <https://www.latimes.com/politics/story/2020-02-25/supreme-court-says-border-agents-may-not-be-sued-for-shooting-teenager-in-mexico>. Appendix, Ex. 180.

⁴²³ BBC News, *Mexico worried by US ruling over boy's border killing* (Feb. 26, 2020), <https://www.bbc.com/news/world-latin-america-51643636>. Appendix, Ex. 174.

⁴²⁴ Organization of American States (OAS), Charter of the Organization of American States, Apr. 30, 1948, ratified by the United States, Dec. 13, 1951, T.I.A.S. No. 2361, 119 U.N. T.S. 3.

Convention “to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”⁴²⁶ The United States has responsibility, under the American Declaration, the American Convention, and applicable international-law principles, for its policies and for the conduct of its employees and agents acting within the scope of their duties.⁴²⁷

233. The Commission has subject matter jurisdiction to hear this Petition based on the violation of human rights enshrined in the American Declaration and the American Convention. The extrajudicial killings of Mexican nationals by U.S. Border Patrol agents for allegedly throwing rocks and the CBP policy permitting these killings, violating the victims’ Right to Life and Right to Humane Treatment. Moreover, the United States’ refusal to provide judicial review and judicial remedies to the families violates the Right to Juridical Personality, the Right to a Fair Trial, the Right to Equal Protection, and the Right to Judicial Protection.

⁴²⁵ See, e.g., *See, e.g., Roach v. United States*, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶ 46 (1987); *Smith v. United States*, Petition 8-03, Inter-Am. Comm’n H.R., Report No. 56/06, OEA/Ser.L/VII.127, doc. 4 rev. 1, ¶¶ 32-33 (2006).

⁴²⁶ See, e.g., *Solidarity Statehood Comm. v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 ¶ 87 n.79 (2003) (citing *Juan Raúl Garza v. United States*, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255 ¶¶ 88-89 (2000)); see also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000).

⁴²⁷ See *Case of Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶80 (Oct. 24, 2012) (citing *Case of Montero Aranguren et al. (Reten de Catia) v. Venezuela*, Merits, reparations and costs. Judgment of July 5, 2006. Series C No. 150, ¶ 66); *Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶¶ 166, 174 (July 29, 1988); see also ILC, *Responsibility of States for Internationally Wrongful Acts*, art. 4 (“[t]he conduct of any State organ shall be considered an act of that State under international law”); *id.* at art. 7 (State is responsible even if its agency “exceeds its authority or contravenes instructions”); *id.* at art. 8 (State is responsible if the agency “is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*) (Feb. 26, 2007), ¶¶ 469, 471; *A v. United Kingdom* 1988, ECtHR, No.25599/94 (1998), ¶¶ 22–24; Thomas Weatherall, *Jus Cogens: International Law And Social Contract* (Cambridge Univ. Press 2015); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & Contemp. Probs. 63, 69 (1996).

B. The Petitioners Have Exhausted Domestic Remedies

234. The requirement that petitioners exhaust domestic remedies is “for the benefit of the State” so that the State need not appear before the IACHR “before it has had the opportunity to remedy [violations] by internal means.”⁴²⁸ The United States has steadfastly refused to provide any civil remedies through its own judicial, legislative, or executive branches.

235. As noted above in Section IIK, in cross-border shootings, the United States precludes claims against both the Border Patrol agent and the United States itself.⁴²⁹ The Supreme Court in *Hernandez v. Mesa* precluded the former. The Court of Appeals for the Fifth Circuit, sitting en banc, precluded the latter.⁴³⁰

⁴²⁸ Organization of American States (OAS) Report No. 30/99, Case 11.026, Cesar Chaparro Nivia and Vladimir Hincapie Galeano, Colombia, March 11, 1999.

⁴²⁹ In addition, the United States refused to pursue criminal proceedings against the DHS executives, or anyone, for unlawfully devising and implementing the Rocking Policy. Likewise, in all of these individual incidents except the case involving José Antonio Elena Rodríguez, the United States refused to pursue criminal proceedings against the individual Border Patrol agents. Even as to the Elena Rodríguez incident, the United States has failed to provide the required civil judicial review and remedies.

⁴³⁰ In the wake of the decision in *Hernandez v. Mesa*, the family of José Antonio Elena Rodríguez dismissed their appeal in the Ninth Circuit on July 9, 2020. *Rodriguez v. Swartz*, No. 15-16410 (9th Cir.). The family of Guillermo Arévalo Pedraza dismissed their *Bivens* claim, but continue to pursue their claim against the United States. The United States moved to dismiss that claim based on sovereign immunity, and the motion is pending. *Gallegos v. United States*, No. 5:14-CV-00136 (S.D. Tex.). The district court in the case filed by the family of Jesus Alfredo Yañez Reyes dismissed both the *Bivens* claim and the claim against the United States. The appeal of that decision is pending in the Ninth Circuit, and the parties have filed supplemental briefs regarding the *Hernandez* decision and the sovereign-immunity issue. *Perez v. United States*, No. 17-56610 (9th Cir.). The family of Juan Pablo Pérez Santillán voluntarily dismissed their case on January 6, 2014. *Santillan v. United States*, No. 1:12-cv-00213 (S.D. Tex.). The family of Jorge Alfredo Solis Palma did not file any lawsuit in the United States (or elsewhere).

C. The Petition Has Been Submitted Within Six Months

236. The applicable rules require the filing of a Petition within six months of notification of a final decision that exhausts domestic remedies.⁴³¹ After decision by the Supreme Court and remand to the Court of Appeals, the latter court entered final judgment in the *Hernandez* case on April 24, 2020.⁴³² This Petition is timely filed within six months of that final judgment.

D. No Related Proceedings Are Pending Before International Tribunals

237. There are currently no proceedings seeking a remedy for the families of these shooting victims, or raising these issues, in any other international tribunal.

IV. LEGAL ARGUMENT

A. The Right to Life and the Imminent-Peril Standard Are Engaged.

1. The Right to Life Under the American Declaration and American Convention Is Engaged.

238. Examining police use of lethal force begins with the fundamental premise that human life is an ultimate good. The American Declaration provides that “[e]very human being has the right to life.”⁴³³ The American Convention similarly provides that “[e]very person has the right to have his life respected,”⁴³⁴ and that “[n]o one shall be arbitrarily deprived of his life.”⁴³⁵

⁴³¹ Inter-Am. Comm. H.R. R. P. 32(1).

⁴³² *Hernandez v. Mesa*, Nos. 12-50217, 12-50301 (5th Cir.), ECF XXX.

⁴³³ American Declaration, art. I.

⁴³⁴ American Convention, art. 4; *see generally* Restrictions to the Death Penalty (American Convention arts. 4(2) and 4(4)), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶53 (Sept. 8, 1983).

⁴³⁵ American Convention, art. 4.

239. The Commission describes the right to life as “the supreme right of the human being, respect for which the enjoyment of all other rights depends.”⁴³⁶

240. The American Declaration and the American Convention are engaged. In all six of the killings at issue, the U.S. border patrol agent fired the fatal shots from U.S. territory. In four of the six killings, the victim was in Mexican territory; in one the victim’s dead body was partially in U.S. territory and partially in Mexican territory; and in one the victim was in U.S. territory. The American Declaration and the American Convention are engaged, including in those instances in which the victims were wholly or partially in Mexican territory.

241. The American Convention provides that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons subject to their jurisdiction* the free and full exercise of [the Convention’s] rights and freedoms...”⁴³⁷ The term “subject to their jurisdiction” includes *either* a person’s presence within the State’s territory *or* the State’s practical control over or substantial effect on a person outside the State’s territory.

242. For example, in the *Environment and Human Rights* case⁴³⁸ the Court held that persons were “subject to [the State’s] jurisdiction” where the State’s pollution-generating

⁴³⁶ Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 112 (2011); Gary T. Graham (Shaka Sankofa) v. United States, Case 11.193, Inter-Am. Comm’n H.R., Report 97/03, ¶ 26 (2003); Michael Domingues v. United States, Case 12.285, Inter-Am. Comm’n H.R. Report 62/02, ¶ 38 (2002); *see also* Inter-American Comm’n on Human Rights, *Report on Terrorism and Human Rights* ¶ 81, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, <http://hrlibrary.umn.edu/iachr/terrorism-index.html> (“Report on Terrorism And Human Rights”).

⁴³⁷ American Convention, art. 1(1) (emphasis added).

⁴³⁸ The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017).

conduct within its territory caused injury to persons outside its territory.⁴³⁹ The substantive guarantees are engaged when a State's activities within its territory cause cross-border *effects*.⁴⁴⁰ There need be only a "causal relationship" between the State's domestic activities and the cross-border effect on rights that the Convention guarantees.⁴⁴¹ The test is whether the State has *effective control over the conduct* and thus is in a position to prevent adverse effects on the person.⁴⁴²

243. Similarly, in *Alejandro v. Cuba*,⁴⁴³ where the Cuban Air Force shot down two unarmed civilian airplanes in international airspace between South Florida and Cuba, the Commission found that the facts provided "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority."⁴⁴⁴ The governing principle is straightforward: "when agents of a state, whether military or civilian, exercise power and authority over persons outside the

⁴³⁹ *Id.* at ¶ 81.

⁴⁴⁰ *Id.* at ¶¶ 81, 95, 101.

⁴⁴¹ *Id.* at ¶ 101.

⁴⁴² *Id.* at ¶ 102.

⁴⁴³ *Alejandro v. Cuba*, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, (1999); See also, e.g., *Aisalla Molina Case (Ecuador v. Colombia)*, Inter-Am. Comm'n. H.R., Report No. 112/10, ¶90 (2010) ("...the range of protection for the rights recognized in the American Convention was widened, to the extent that the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory, but also for those acts and omissions committed wherever they exercise jurisdiction."); Report No. 38/99, Victor Saldaño, (Argentina) March 11, 1999, ¶ 17 ("a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory"); Report No. 51/96, Case No. 10.675, United States, March 13, 1997; Report No. 8699 (U.S. responsible for unlawful interdictions on the high seas); Report No. 109/99, Case No. 10.951, United States, September 29, 1999, ¶ 37 ("the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control").

⁴⁴⁴ *Alejandro v. Cuba*, at ¶ 25.

national territory, the state's obligation to respect human rights continue—in this case the rights enshrined in the American Declaration.”⁴⁴⁵

2. The Right to Life Under Other International Law Is Engaged.

244. Major human rights declarations and treaties—including those signed by the United States—establish every person's right to life and require every nation to refrain from arbitrarily taking human life.⁴⁴⁶ For example, the ICCPR provides that “[e]very human being has the inherent right to life,” and that “[n]o one shall be arbitrarily deprived of his life.”⁴⁴⁷

245. These obligations, including those under the ICCPR, are engaged, including with respect to victims whom the United States killed outside its territory.

246. Article 2(1) of the ICCPR requires each party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR].” This provision applies disjunctively to “all individuals within [the state's] territory” and “all individuals ... subject to [the state's] jurisdiction.”⁴⁴⁸ In keeping with the intent of the

⁴⁴⁵ *Id.*

⁴⁴⁶ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, art. 6 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty No. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992) (“ICCPR”); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, ratified by the U.S. Nov. 20, 1994, 660 U.N.T.S. 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, ratified by the U.S. Nov. 20, 1994, 1465 U.N.T.S. 85; African Charter on Human and Peoples' Rights art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, reprinted at (1982) 21 I.L.M. 58; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 1950, 213 U.N.T.S. 222, 232 entered into force Sept. 8, 1953.

⁴⁴⁷ ICCPR, at art. 6(1).

⁴⁴⁸ See *Celiberti de Casariego v. Uruguay*, Comm'n No. 56/ 1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1-10.3 (July 29, 1981); *Munaf v. Romania*, Comm'n No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/ 2006, ¶ 14.2 (Aug. 21, 2009); *Kindler v. Canada*, Comm'n No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993); Dominic McGoldrick, *The International*

ICCPR to protect individual human rights, “jurisdiction” has been given a flexible reading, turning on the State’s effective exercise of control rather than on legal technicalities. The United Nations Human Rights Committee—the body charged with interpreting the ICCPR—has observed that:

“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”⁴⁴⁹

247. Authorities have recognized the extraterritorial reach of the ICCPR where States did not fully control the territory where violations occurred. For example, the U.N. Human Rights Committee opined in *Burgos/Lopez v. Uruguay* that Uruguayan security officials’ secret detention and torture of a trade-union activist in Argentina violated the ICCPR.⁴⁵⁰ The Committee reached a similar result in *Casariago v. Uruguay*.⁴⁵¹ In both cases, the Committee observed that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”⁴⁵² Similarly, the International Court of Justice has repeatedly recognized that the ICCPR applies in occupied

Covenant on Civil and Political Rights, Extraterritorial Application of Human Rights Treaties § 4.3 (Fons Coomans & Menno T. Kamminga eds. 2004).

⁴⁴⁹ U.N. Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/ C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

⁴⁵⁰ *Burgos/Lopez v. Uruguay*, Comm’n No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), ¶ 13.

⁴⁵¹ *Lilian Celiberti de Casariago v. Uruguay*, CCPR/C/13/D/56/1979, UN Human Rights Committee (HRC), 29 July 1981.

⁴⁵² *Id.*, at ¶ 10.3; *Lopez/Burgos v. Uruguay*, at ¶ 12.3.

territory under a State's control, even though that territory is not technically part of the State's sovereign territory.⁴⁵³

248. This Commission recognized in the *Saldaño* case that European authorities had rejected the proposition that under their Convention “the term ‘jurisdiction’ ... is limited to or merely coextensive with national territory.”⁴⁵⁴ The Commission concluded that these cases established that “...jurisdiction—and therefore responsibility for compliance with international obligations” was “linked to authority and effective control, and not merely territorial boundaries.”⁴⁵⁵

249. It is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction. For example, in *Andreou v. Turkey*,⁴⁵⁶ the European Court of Human Rights held that Turkish troops' shooting a civilian across the cease-fire line in Cyprus engaged Turkey's obligations under the European Human Rights Convention. The Court reasoned that “even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as ‘within the jurisdiction’ of Turkey.”⁴⁵⁷

⁴⁵³ See, e.g., *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 109-111 (July 9).

⁴⁵⁴ *Saldaño*, at ¶ 17-18 (citing *European Court H.R. Cyprus v. Turkey*, 25781/94, May 10, 2001; *Loizidou v Turkey* A 310 ¶¶ 56-64 (1995). *European Commission HR X v. UK* No. 7547/76. 12 DR73 (1977); *Bertrand Russel Peace Foundation Ltd. v. UK* No. 7597/76, 14DR 117 at 124 (1978); *Mrs. W v. UK* No. 9348/81, 32 DR 190 (1983).

⁴⁵⁵ *Id.*, at ¶ 18.

⁴⁵⁶ *Eur. Ct. H.R.*, App. No. 45653/99 (Oct. 27, 2009).

⁴⁵⁷ *Andreou*, at ¶ 25.

250. Moreover, the Commission has concluded that the right to life “undoubtedly [has] attained the status of customary international law.”⁴⁵⁸ The United States is therefore bound to respect that right in all places on earth, regardless of the juridical reach of any particular convention or treaty.

251. Jus cogens norms are universal and obligatory, binding all nations regardless of their consent. Jus cogens norms are “derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.”⁴⁵⁹ These “fundamental and universal norms constituting jus cogens transcend [nations’] consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.”⁴⁶⁰

252. The prohibition against extrajudicial killing is a peremptory, jus cogens norm.⁴⁶¹ It is “a norm of international law so fundamental that it is binding on all members of the world community.”⁴⁶² U.S. courts consistently so hold.⁴⁶³

⁴⁵⁸ Jessica Lenahan (Gonzales), at ¶112.

⁴⁵⁹ *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 715 (9th Cir. 1992); *see also id.* at 715 (“Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting jus cogens transcend such consent.”).

⁴⁶⁰ *Id.*; *see* Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms, The Role Of Ethics In International Law*, 78, 83 (Donald Earl Childress III ed., 2012) (Jus cogens norms are “not derived from the three primary sources of international law . . . [they] are understood as superior to the rule derived from the primary sources because [they] can void positive law rules, but positive law rules cannot void or modify jus cogens.”).

⁴⁶¹ *Gonzalez v. Mexico*, Cases 12.496-12.498, Inter-Am. Comm’n H.R., Report No. 28/07, ¶¶ 251–52 (2007). *See generally* Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* 214 (1997); Gerald L. Neuman, *Understanding Global Due Process*, 23 *Geo. Immigr. L.J.* 365, 395–96 (2009).

⁴⁶² *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1239 (S.D. Fla. 1997); *see also* Rome Statute, War Crimes, at art. 8, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁴⁶³ *See, e.g., Yousuf v. Samantar*, 699 F.3d 763, 778 (4th Cir. 2012); *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1091 (9th Cir. 2006) (en

3. The Right to Life Requires Police Lethal Force to Meet the Imminent-Peril Standard.

253. The “Imminent Peril” standard prohibits State security and law-enforcement personnel from using lethal force unless strictly necessary to prevent death or serious bodily injury to the officer or another person.⁴⁶⁴

banc); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-1158 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n. 20 (D.C.Cir. 1984) (Edwards, J., concurring); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 305-06 (S.D.N.Y. 2003); *Rodriguez v. Estate of Drummond*, 256 F.3d 1250, 1262 (N.D. Ala. 2003); *Abiola v. Abubakar*, No. 02-C-6093, 2005 WL 3050607, at 2-3 (N.D. Ill. Nov. 8, 2005); *Xuncax v. Gramajo*, 886 F. Supp. 162, 172 (D. Mass. 1995); *Denegri v. Chile*, No. 86-3085, 1992 WL 91914, at 4 (D.D.C. Apr. 6, 1992); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), amended, 694 F. Supp. 707, 710-11 (N.D. Cal. 1989).

⁴⁶⁴ See, e.g., Basic Principles on the Use of Force and Firearms by Law-Enforcement Officials, Eighth United Nations Cong. on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27–Sept. 7 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) (“Basic Principles on Use of Force”); Code of Conduct for Law-Enforcement Officials, G.A. Res. 34/169, U.N. Doc. A/RES/34/169, Annex I, art. 3 (Dec. 17, 1979) (“Code of Conduct for Law-Enforcement Officials”); U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982); Principles on the Prevention of Human Rights Violations Committed with Small Arms, Sub-Com. Res. 2006/22, Annex, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 at ¶ 8 (Aug. 24, 2006); Philip Aston (Special Rapporteur on Extrajudicial and Summary Executions) Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions, ¶ 35 U.N. Doc. A/61/311 (2006); *Report on Terrorism and Human Rights* ¶ 87; Report (Part One) of The Public Comm’ to Examine the Maritime Incident of 31 May 2010, January 2011, <http://www.turkel-committee.gov.il/les/wordocs/8707200211english.pdf>, at ¶ 226; Restatement (Third) of Foreign Relations Law § 702 comment f (Am. Law Inst. 1987); *McCann and Others v. The United Kingdom*, Eur. Ct. H.R. (ser. A) No. 324 (1995); *Suárez de Guerrero v. Colombia*, U.N. Human Rights Comm., R.11/45 (1982), ¶ 13.2; Amnesty International, *Basic Human Rights Standards for Law Enforcement Officials*, Dec. 1998; Amnesty International, *Use of Force: Guidelines for the Implementation of the U.N. Basic Principles on the Use of Force of Force and Firearms by Law Enforcement Officials*, Amnesty International Dutch Section: Amsterdam (2015), at 23; Cees de Rover & Anja Bienert, *To Serve and Protect: Human Rights and Humanitarian Law for Police and Security* 247 (2d ed. 2014); ICRC, *International Rules And Standards For Policing* (Mar. 10, 2014) 18; ICRC Advisory Service On International Humanitarian Law, *The use of force in law enforcement operations* (Sept. 23, 2015), <https://www.icrc.org/en/document/use-force-law-enforcement-operations>.

254. The Inter-American Court has held that police killing not justified by Imminent Peril “would amount to an extrajudicial execution.”⁴⁶⁵ Likewise, the Commission consistently applies the right-to-life protections in the context of the use of force by State law-enforcement agents.⁴⁶⁶ The use of force “must be grounded on the existence of exceptional circumstances”⁴⁶⁷ in which it is “strictly unavoidable to protect [law enforcement] or other persons from imminent threat of death or serious injury.”⁴⁶⁸

255. State agents “must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat”⁴⁶⁹ Law enforcement’s use of lethal force that does not meet the Imminent Peril standard and causes death is unlawful under the American Declaration.⁴⁷⁰

256. The Imminent Peril standard also applies under the ICCPR and other foundational international law. Those provisions mandate that State security or law-enforcement personnel may use lethal force only “when strictly unavoidable to protect life.”⁴⁷¹ Law-enforcement agents must

⁴⁶⁵ *Zambrano Velez et al. v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 166, ¶ 108 (July 4, 2007); see also Dorzema v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, at ¶¶ 85(i), 100 (Oct. 24, 2012).*

⁴⁶⁶ *See, e.g., Sanchez v. Colombia, Case 12.009, Inter-Am. Comm’n H.R., Report No. 38/08, ¶¶ 54–59 (2008).*

⁴⁶⁷ Press Release, *IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents*, IACHR, July 24, 2012, http://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp. Appendix Exhibit 11.

⁴⁶⁸ *Report on Terrorism and Human Rights* ¶ 87 (citing Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

⁴⁶⁹ *Gabriela Perozo, Aloys Marin et al. v. Venezuela, Case 487/03, Report No. 7/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 545 (2004), at ¶ 166.*

⁴⁷⁰ *Report on Terrorism and Human Rights*, at ¶ 92.

⁴⁷¹ Basic Principles on the Use of Force, at ¶ 112.

hold sacred the value of human life and uphold the human rights of all persons, including the rights to life, security, and personal integrity.⁴⁷²

257. For example, the U.N.’s Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that police may use lethal force only in “self-defense or defense of others against the imminent threat of death or serious injury,” and “when strictly unavoidable in order to protect life.”⁴⁷³ Likewise, the U.N.’s Code of Conduct for Law Enforcement Officials mandates that “[i]n general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”⁴⁷⁴

258. In short, police and security forces may use lethal force only “when an individual poses an imminent threat to the life of another, and where the use of lethal force is strictly unavoidable to protect life.”⁴⁷⁵

259. The binding Imminent-Peril standard is incorporated into policing standards and training manuals around the world. Even in exceedingly difficult hot spots, such as the Occupied Territories, security forces “shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury.”⁴⁷⁶

⁴⁷² *Id.*

⁴⁷³ *Id.* at ¶ 9.

⁴⁷⁴ Code of Conduct for Law-Enforcement Officials, art. 3(c).

⁴⁷⁵ Flavia Pansieri, U.N. Deputy High Comm’r for Human Rights, Opening Statement at the Human Rights Council’s Interactive Panel Discussion on the Use of Remotely Piloted Aircraft or Armed Drones in Compliance With International Law, (Sept. 2, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15113&LangID=E>. Appendix, Ex. 204.

⁴⁷⁶ LAW – The Palestinian Society for the Protection of Human Rights and the Environment, *Violating the Right to Life and Security of Person* (Feb. 19, 2001) (quoting the guidelines issued to Israeli troops for opening fire in the Occupied Territories), http://www.pac-usa.org/law_violating.htm. Every British soldier in Iraq was issued a card summarizing the rules

260. Police use of excessive, lethal force is one of the core forms of “extrajudicial killing” defined by international law. For example, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions concluded that the Imminent-Peril standard, as embodied in the Code of Conduct and the Basic Principles, “reflects binding international law.”⁴⁷⁷ Consequently, “[f]or [deliberate] lethal force to be considered to be lawful it must be used in a situation in which it is necessary for self-defense or the defense of another’s life.”⁴⁷⁸

261. That conclusion is echoed by the U.N. Special Rapporteur on the Use of Small Arms, who determined that police and security forces may use lethal force “defensively only in the most extreme circumstances, expressly, where the right to life is already threatened or unjustifiably impinged” due to “the jus cogens human rights obligations imposed upon all states and individuals to respect the right to life.”⁴⁷⁹

of engagement, which provided that “[y]ou may only open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.” *Al-Swadoon et al. v. Secretary of State for Defence*, [2016] EWHC 773 (Admin), No. CO/5608/2008, at ¶ 89 (quoting card). *See generally* *McCann v. United Kingdom*, ECtHR Appl. No. 18984/91, Judgment of 27 September 1995, at ¶¶ 212-213 (State’s failure to appropriately plan operation led to “the killing of the three terrorists [and] constituted the use of force which was ... more than absolutely necessary in defence of persons from unlawful violence”).

⁴⁷⁷ G.A. Res. A/61/311, ¶ 35 Extrajudicial, Summary or Arbitrary Executions (Sept. 5, 2005).

⁴⁷⁸ Phillip Alston (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 48, U.N. Doc. E/CN.4/2006/53 (Mar. 8, 2006).

⁴⁷⁹ Barbara Frey (Special Rapporteur in accordance with Sub-Commission resolution 2002/25), *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, ¶ 27, U.N. Doc. A/HRC/Sub.1/58/27 (Aug. 8, 2006); *see also* Christof Heyns (U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions), ¶¶ 60–61, U.N. Doc. A/HRC/17/28 (May 23, 2011); ICRC, *Human Rights and Humanitarian Law for Police and Security Forces*, 263 (Mar. 31, 2017); *Comment by the Spokesperson for the U.N. High Commissioner for Human Rights, Rupert Colville, on the killing of a Palestinian man in Hebron*, ohchr.org (Mar. 30, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18540&LangID=>

262. For decades, the U.S. Department of State agreed—insisted—that the jus cogens norm against extrajudicial killing includes “excessive use of lethal force by the police, security forces, or other agents of the State whether against criminal suspects, detainees, prisoners, or others.”⁴⁸⁰ The State Department’s annual Human Rights Reports for Congress, reviewing the human-rights records of more than 200 nations, provided that “lethal use of excessive force by security forces [is] defined as a form of extrajudicial killing.”⁴⁸¹

B. The United States’ Rocking Policy Violates the Imminent-Peril Standard.

263. The Commission and Court examine the use of force by State agents at three distinct moments to determine whether the force used was excessive: (1) preventive actions taken before the incident; (2) actions accompanying the incident; and (3) actions subsequent to the incident.⁴⁸² A failure to comply with the governing standards in *any* of these three moments

U.N.; Sarah Joseph, *Denouement of the Deaths on the Rock: The Right to Life of Terrorists*, 14 *Neth. Q. Of Hum. Rts.* 5, 20 (1996). The Imminent Peril standard also applies under the U.S. Constitution’s Fourth Amendment. Under that provision, deadly force is permissible only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” Accordingly, “[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.” *Tennessee v. Garner*, 471 U.S. 1, 3, 11 (1985).

⁴⁸⁰ U.S. Department of State, *Country Report on Human Rights Practices 1995*, app. A: Notes on the Preparation of the Reports (Mar. 1996), http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_appenda.html; *see also* U.S. Department of State, *Country Report on Human Rights Practices 1997—Papua New Guinea* (Jan. 30, 1997), <http://www.refworld.org/docid/3ae6aa278.html> (police’s unreasonable killing of innocent bystander is extrajudicial killing); U.S. Department of State, *Country Report on Human Rights Practices 2000*, app. A: Notes on the Preparation of the Reports (Feb. 23, 2001), <https://www.state.gov/j/drl/rls/hrrpt/2000/app/650.htm> (excessive use of lethal force by state agents is extrajudicial killing).

⁴⁸¹ *Id.*

⁴⁸² Dorzema, at ¶78, 96.

violates the State's obligation to guarantee the rights to life and personal integrity codified in Articles 1 and 25 of the Declaration.⁴⁸³

264. Before the incident, States must provide proper regulations to their agents and properly plan their operations.⁴⁸⁴ The United States did neither. Instead, *as a matter of policy* it permitted Border Patrol agents to treat the alleged throwing of rocks at them as per se lethal force to which the agents could respond with lethal force *regardless of the Imminent-Peril standard*. And since the policy did not require adherence to the Imminent-Peril standard, the United States did not provide the agents with the training or equipment to facilitate compliance with it.

265. A State violates the American Declaration by failing to provide a lawful regulatory framework to govern the use of lethal force.⁴⁸⁵ A regulatory framework must not only exist, but must also provide adequate guidance to law enforcement. In *Montero Aranguen*, the Court found that the State failed to provide its agents "the minimum specifications it should have included" in use-of-force policies.⁴⁸⁶

266. The Commission and the Court have noted that the U.N. Principles on Use of Force require this same basic, minimum standard.⁴⁸⁷

267. The United States' Rocking Policy undoubtedly failed to meet this standard. As noted in detail above (Section IIA3-8) the policy openly permitted Border Patrol agents to use lethal force against rock-throwers regardless of the Imminent-Peril standard.

⁴⁸³ See, e.g., *id.* at ¶81.

⁴⁸⁴ *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm'n. H.R., Report No. XX/14, ¶178 (2014).

⁴⁸⁵ *Dorzema*, at ¶¶ 85(i), 100; *Hinojosa*, at ¶193.

⁴⁸⁶ *Detention Center of Catia v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, IACHR Series C No 150, ¶76 (2006).

⁴⁸⁷ *Detention Center of Catia*, at ¶75; *Dorzema*, at ¶79.

268. The CBP Internal Affairs Chief testified:

there was a policy within CBP that in response to rocking or alleged rocking, agents need not backup, need not take cover, and could treat the throwing of rocks at them as per se lethal force to which they could respond with lethal force of their own.⁴⁸⁸

269. Top CBP and Border Patrol officials knew of and acquiesced in repeated and notorious use of lethal force when the Imminent-Peril standard was not met. They communicated to Sector Chiefs and line officers that rock-throwing was per se deadly force that could be met with lethal force regardless of the circumstances.

270. They did not even attempt to enact a policy that met the Imminent Peril standard. Instead, they justified their refusal to adopt a lawful policy on the ground that “we’re not cops and we don’t have to respond like they do.”⁴⁸⁹

271. The United States compounded the lack of a lawful policy by failing to provide the training and equipment that would have been necessary for agents to comply with a lawful policy had one existed. A lawful regulatory framework is not an effective preventative measure unless law enforcement also receives training that is consistent with “the principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officers is subject.”⁴⁹⁰ The State must train agents so that they will “have the elements of judgment necessary” when deciding whether to use lethal force.⁴⁹¹

⁴⁸⁸ Tomsheck Dep., at 300–01. Appendix, Ex. 10.

⁴⁸⁹ Tomsheck Dec., at ¶ 14. Appendix, Ex. 28.

⁴⁹⁰ Detention Center of Catia, at ¶77.

⁴⁹¹ Detention Center of, at ¶78; Dorzema, at ¶¶ 79–92; *see also* McCann, at ¶151; Case of Kakoulli v. Turkey, App. No. 38595/97, Eur. Ct. H.R. ¶¶109, 110 (2005).

272. Beyond proper policies and training, a State must provide non-lethal and protective equipment to agents to allow them to restrict as much as possible their use of lethal weapons.⁴⁹²

273. United States policy also violated the right to life in failing to provide the necessary training and equipment. As noted in detail above (Sections II H and II I), Chief Frazier concluded that the United States knowingly failed to adequately train Border Patrol agents concerning the proper use of force. Most fundamentally, the United States failed to ensure that agents knew that the Rocking Policy was unlawful and that Border Patrol agents have a duty to refrain from using lethal force in response to rock-throwing except when the circumstances meet the Imminent-Peril standard. Having not required agents to avoid using lethal force in response to rock-throwing, the United States failed to train the agents *how* to avoid using that force.

274. Chief Frazier concluded that, despite the frequency of rock assaults, the United States provided no training or guidance to Border Patrol agents on how to respond to them appropriately. In summary, he concluded that the United States failed to, among other things:

- a. Train new agents at CBP's basic academies on all less-lethal options in response to rock-throwing;⁴⁹³
- b. Train agents in tactics to de-escalate rock-throwing situations in order to prevent them from becoming deadly-force incidents;⁴⁹⁴
- c. Provide scenario-based training to give agents the opportunity to practice real-life situations involving rock-throwing;⁴⁹⁵

⁴⁹² Dorzema, at ¶80.

⁴⁹³ Frazier Report, at ¶ 11. Appendix, Ex. 79.

⁴⁹⁴ *Id.* at ¶ 105.

⁴⁹⁵ *Id.* at ¶ 125.

- d. Give written tests regarding rock-throwing in less-lethal-force recertification training;⁴⁹⁶
- e. “[E]nsure[] that all agents had proper and sufficient equipment. If that equipment did not currently exist, ensure that it was developed (protective head gear with face shields and communications capability, adequate less lethal capability);”⁴⁹⁷
- f. “[C]onfront[] and countermand[] the labor organization’s assertions that all ‘rocking’ incidents were deadly force and would be responded to as such.”⁴⁹⁸

275. He found this lack of training and equipment “not explainable.”⁴⁹⁹

276. In short, there was “a serious need for correction in practice and training.”⁵⁰⁰ And “[i]t is no surprise that [agents] justified [their] use of deadly force by claiming a rock was thrown, when [they] could and should have employed de-escalation techniques and considered the proper imminent peril standard.”⁵⁰¹

C. The United States’ Killing of the Petitioners’ Loved Ones Violated the Imminent-Peril Standard.

277. Under *Dorzema*, the second discrete “moment” for considering the Imminent Peril is the actual killing at issue. The Commission examines the use of lethal force under the

⁴⁹⁶ *Id.* at ¶ 24.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at ¶ 123. Chief Frazier’s report specifically addresses the failures of the Chief of Border Patrol; the United States is responsible for those failures.

⁵⁰⁰ *Id.* at ¶ 118.

⁵⁰¹ *Id.* at ¶ 130.

principles of legality, necessity, and proportionality.⁵⁰² Legality requires that domestic law establish the exceptional circumstances in which force is lawful and define the purpose for which it is legitimate (e.g. legal). The legality standard also requires State agents to interpret use of force laws restrictively.⁵⁰³ The principle of absolute necessity requires that all other means of control must have been exhausted and failed, meaning that absolutely no “other means are available to protect the life and safety of the person or situation that [the use of force] is sought to protect.”⁵⁰⁴ Proportionality requires that “the level of force used must be in keeping with the level of resistance offered . . . agents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.”⁵⁰⁵

278. *Dorzema*, for example, considered the use of lethal force against unarmed migrants who were trying to flee from law-enforcement agents. The Court held that “even when abstaining from the use of force would have allowed the individuals that were the subject of the State’s action to escape, the agents should not have used lethal force against people who did not

⁵⁰² *Id.* ¶¶82–83.

⁵⁰³ Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶49 (Nov. 24, 2011). The principle of legality is also discussed in *Dorzema*. See *Dorzema* at, ¶100.

⁵⁰⁴ *Dorzema*, at ¶85(ii); see also Case of Barrios Family, at ¶49.

⁵⁰⁵ *Dorzema*, at ¶¶85(iii), 100; see also, Case of Barrios Family, at ¶49; see also Case of Zambrano Velez et al. v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 166, ¶108 (July 4, 2007) (“the use of lethal force by state agents against individuals who no longer represent a threat, such as individuals under custody of the authorities, would amount to an extrajudicial execution”).

represent a threat or a real or imminent danger to the agents or third parties . . . this event did not constitute a situation of absolute necessity.”⁵⁰⁶

279. Similarly, in *Carandiru v. Brazil* the Commission held that the use of lethal force against unarmed prisoners during a prison riot did not amount to self-defense,⁵⁰⁷ and found that the police had used lethal force in “absolute disregard for the life of the inmates, demonstrating a retaliatory and punitive attitude, wholly at variance with the guarantees that the police should offer.”⁵⁰⁸ The killing of unarmed inmates was a “deliberate and systematic infringement[] of their rights to life and integrity in violation of Articles 4(1) and 5 of the Convention.”⁵⁰⁹

280. It is clear that, except in the most unusual circumstances, using lethal force against alleged rock-throwers will not meet the Imminent-Peril standard. As noted in detail above, in more than 100 years only one police officer in the U.S. was killed by a thrown rock.⁵¹⁰ Based on vast experience and more than 47 years in law enforcement, Chief Frazier concluded that “[i]n my experience I have never heard of, and do not know of, any law enforcement agency [other than CBP] that considers a thrown projectile as per se ‘Deadly Force.’ ... *Virtually all thrown objects fail to meet the ‘Imminent Peril’ standard.*”⁵¹¹

281. The United States itself has consistently condemned other nations for permitting police or security officials to use deadly force against alleged rock-throwers. The State Department has concluded that, in all but the most unusual circumstances, responding to rock-throwing with lethal force is excessive and therefore a violation of the jus cogens norm against

⁵⁰⁶ Dorzema, at ¶85(ii), 100.

⁵⁰⁷ *Carandiru v. Brazil*, Case 11.291, Inter-Am. C.H.R., Report No. 34/00 ¶88.

⁵⁰⁸ *Id.* at ¶63.

⁵⁰⁹ *Id.* at ¶88.

⁵¹⁰ See Section IA3 above.

⁵¹¹ Frazier Report, at ¶113 (emphasis added). Appendix, Ex. 79.

extrajudicial killing. The issue often arises when police or security forces use live ammunition against rock-throwing protesters. For example, the 2010 Human Rights Report for India concluded that “protesters threw stones and rocks at security forces, and security forces retaliated with excessive or deadly force.”⁵¹²

⁵¹² U.S. Department of State, *Country Report on Human Rights Practices—India*, (Apr. 8, 2011), <https://www.state.gov/j/drl/rls/hrrpt/2010/sca/154480.htm>. Appendix, Ex. 183. *See also* U.S. Department of State, *Country Report on Human Rights Practices—Burundi* (Feb. 23, 2001), <https://www.state.gov/j/drl/rls/hrrpt/2000/af/703.htm>. Appendix, Ex. 182.

Country Reports on Human Rights Practices for the following years and countries: 1986 Israel; 1988 Israel; 1989 Yugoslavia/Serbia; 1990 Madagascar; 1991 Tunisia; 1991 Madagascar; 1992 Cameroon; 1992 Kenya; 1992 New Guinea; 1993 Chile; 1995 Nicaragua; U.S. Department of State, *Country Report on Human Rights Practices—Ethiopia* (Mar. 31, 2003), <https://www.state.gov/j/drl/rls/hrrpt/2002/18203.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2002—Tanzania* (Mar. 31, 2003), <https://www.state.gov/j/drl/rls/hrrpt/2002/18230.htm>; U.S. Department of State, *Country Report on Human Rights Practices—Ethiopia* (Mar. 8, 2006), <https://www.state.gov/j/drl/rls/hrrpt/2005/61569.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2011—Egypt*, <https://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm?dlid=186423#wrapper>; U.S. Department of State, *Country Report on Human Rights Practice s2011—Djibouti* <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186190>; U.S. Department of State, *Country Report on Human Rights Practices 2011—Madagascar* (May 24, 2012) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186213>; U.S. Department of State, *Country Report on Human Rights Practices 2012—Saudi Arabia* (April 19, 2013) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dlid=204381>; U.S. Department of State, *Country Report on Human Rights Practices 2016—Nepal* (Mar. 3 2017) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265544>; U.S. Department of State, *Country Report on Human Rights Practices 2011—Israel and the Occupied Territories* (May 24, 2012) <https://www.state.gov/j/drl/rls/hrrpt/2011/nea/186429.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2012—Israel and the Occupied Territories* (April 19, 2013) <https://www.state.gov/j/drl/rls/hrrpt/2012/nea/204363.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2013—Israel and the Occupied Territories* (Feb. 27, 2014) <https://www.state.gov/j/drl/rls/hrrpt/2013/nea/220356.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2014—Israel and the Occupied Territories* (June 25, 2015) <https://www.state.gov/j/drl/rls/hrrpt/2014/nea/236602.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2015—Israel and the Occupied Territories* (Apr. 13, 2016) <https://www.state.gov/j/drl/rls/hrrpt/2015/nea/252927.htm>; U.S. Department of State, *Country Report on Human Rights Practices 2016—Israel and the Occupied Territories* (Mar. 3 2017) <https://www.state.gov/j/drl/rls/hrrpt/2016/nea/265500.htm>.

282. In 2011, Secretary of State Hillary Clinton condemned Egyptian soldiers' "excessive" use of lethal force against stone-throwing protesters in Tahrir Square. She implored then-President Mubarak's forces "to respect and protect the universal rights of all Egyptians."⁵¹³

283. The United States condemnations are not limited to the use of lethal force against rock-throwers in large demonstrations or protests. For example, in the 2002 Human Rights Report for Israel and the Occupied Territories, the State Department condemned the human-rights violation when "[Israel Defense Forces] soldiers shot and killed a ten-year old Palestinian boy in the Balata Refugee Camp in Nablus. The boy was among a group of youths who were throwing rocks at Israeli soldiers. The use of lethal force against a rock-thrower, in this instance and in many others like it, was excessive."⁵¹⁴ The State Department pointedly noted that "IDF statistics state that no Israeli soldier has ever been killed by rock-throwing."⁵¹⁵

⁵¹³ Marwa Awad & Edmund Blair, *Egypt clashes move into 4th day, US worried*, Reuters (Dec. 18, 2011), <https://www.reuters.com/article/us-egypt/egypt-clashes-move-into-4th-day-u-s-worried-idUSL6E7NH03C20111219>. Appendix, Ex. 189.

⁵¹⁴ U.S. Department of State, *Country Report on Human Rights Practices 2002—Israel and the Occupied Territories* (Mar. 31, 2003), <https://www.state.gov/j/drl/rls/hrrpt/2002/18278.htm>; see also U.S. Department of State, *Country Report on Human Rights Practices 2052—Turkey* (Apr. 13, 2016), <https://www.state.gov/documents/organization/253121.pdf> (12-year-old boy was killed when "a military officer opened fire when a group of boys began to throw stones."); *United States v. Acosta Sierra*, 690 F.3d 1111, 1122 (9th Cir. 2012) (imminent-peril standard not met because the officer's "general feeling of fear or unease is not the same as apprehension of an imminent battery due to Acosta Sierra's throwing of the rock" and the assailant had no "apparent present ability to immediately cause harm to Officer Lopez."); *Mann v. Wash. Metro. Area Transit Auth.*, 168 F. Supp. 3d 71, 82 (D.D.C. 2016), aff'd, 16-7031, 2017 WL 2859562 (D.C. Cir. 2017) ("[n]o reasonable jury could conclude that Defendant did not honestly believe that Plaintiff's use of force was excessive" where plaintiff beat and pepper-sprayed assailant who had been throwing rocks at subway ticket booth); *White v. Cty. of San Diego*, 13-cv-1166, 2014 WL 9859196, at 5–6 (S.D. Cal. 2014) (denying summary judgment on qualified immunity where officer shot suspect who had thrown cinderblock and rocks and was wielding stick); *United States v. Behenna*, 71 M.J. 228 (2011) (lethal force was excessive when used against a detainee who threw concrete at soldier and lunged for his gun); *In re S. Afr. Apartheid Litig.*, 617 Supp. 2d 228, 243 (S.D.N.Y. 2009) (security forces guilty of extrajudicial killing when they opened fire on group of rock-throwing demonstrators); *Otioti v. Arizona*, 07-cv-443, 2008 WL 7069009, at 2–5

284. The United Nations concurs that lethal force against rock-throwers is excessive and therefore a *jus cogens* violation. The U.N.’s training manual for its own peacekeeping forces describes a scenario in which rock-throwers assaulted peacekeepers. The manual concludes that lethal force “could have only been justified in response to a serious threat to the life of a person. The scenario does not give any indication that this was the case. Therefore the use of firearms was not justified.”⁵¹⁶ The Israeli-Palestinian conflict generates many similar conclusions by human rights organizations in the context of rock-throwing protesters.⁵¹⁷

285. Courts throughout the world have reached the same conclusion. For example, in *Aydan v. Turkey*,⁵¹⁸ the European Court of Human Rights concluded that Turkey violated its

(D. Ariz. 2008) (denying summary judgment on qualified immunity where officer shot suspect who had thrown rocks).

⁵¹⁵ U.S. Department of State, *Country Report on Human Rights Practices 2002—Israel and the Occupied Territories*.

⁵¹⁶ Human Rights Standards in the Use of Force, *U.N. Peacekeeping PDT Standards, Specialized Training Material for Police* 23 (1st ed. 2009), <http://repository.un.org/bitstream/handle/11176/387368/STM%20Human%20Rights%20Standards%20in%20the%20Use%20of%20Force%20and%20Firearms.pdf?sequence=7&isAllowed=y>; see also UN, Office of the High Commissioner for Human Rights in Nepal, *The April Protests—Democratic Rights and the Excessive Use of Force* 16–17 (Sept. 2006); University of Cambridge Centre of Governance & Human Rights, *Unlawful Killings in Africa: a study prepared for the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions* (June 2014).

⁵¹⁷ See, e.g., Amnesty Int’l, *Lethal Force and Accountability for Unlawful Killings By Israeli Forces in Israel and the Occupied Palestinian Territories* (Sept. 28, 2016); Amnesty USA, *Trigger-Happy: Israel’s Use of Excessive Force in the West Bank* (Feb. 2014); Al-Haq, *Unlawful killing of Palestinians by Israeli Occupying forces* (31 Oct. 2015); Emily Schaeffer Omer-Man, *Extrajudicial Killing With Near Impunity: Excessive force by Israeli Law Enforcement Against Palestinians*, 35 Boston U. Intl. L. J. 115 (2017). Human rights organizations condemn other nations for the same type of conduct. See, e.g., Human Rights Watch, *World Report 2012: Yemen*; Human Rights Watch, <https://www.hrw.org/news/2017/03/09/nepal-use-proportionate-force-while-policing-protests>; Human Rights Watch, <https://www.hrw.org/report/2013/08/01/blood-streets/use-excessive-force-during-bangladesh-protests>.

⁵¹⁸ *Affaire Aydan c. Turquie*, ECtHR Appl. No. 16281/10, Judgment of 12 Mar. 2013. The quotations in the text are translations of the French-language decision. See also *Aydan v. Turkey*,

obligation to safeguard human rights when its criminal courts failed to convict a security officer who used lethal force against a rock-thrower. The officer fired a burst from an automatic weapon into a group of protesters who had thrown rocks at the jeep in which he was riding, killing one of the protesters. The Court concluded that the use of lethal force against rock-throwers was patently excessive. Turkey could not excuse the officer's conduct on the ground that he operated in an area of high tensions and frequent violence. Turkey was obligated to ensure that its "law-enforcement officials . . . possess the appropriate moral, physical and psychological qualities for the effective exercise of their functions."⁵¹⁹ Failure to discipline the officer would "give carte blanche to the members of the security forces operating in that region, who had a duty to ensure that such weapons were used only in the appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm."⁵²⁰

ECtHR Appl. No. 16281/10, Judgment of 12 Mar. 2013, Information Note on the Court's case-law No. 161.

⁵¹⁹ *Id.* at ¶ 47 (quoting Basic Principles on Use of Force, at ¶ 18).

⁵²⁰ *Id.* at ¶ 100; *see also* Abdullah Yasa et al. v. Turkey, ECtHR, Appl. No. 44827/08, Judgment of 16 July 2013, ¶ 50 (police firing of tear-gas canister at rock-throwing demonstrator was excessive); Solomou et al. v. Turkey, ECtHR, Appl. No. 36832/97, Judgment of 24 June 2008, ¶¶ 78–79 (security forces' use of lethal force against man who was not among stone-throwing protesters, but who crossed into U.N. buffer zone, was excessive); Ciorcan et al. v. Romania, ECtHR, Appl. Nos. 29414/09 and 44841/09, Judgment of 27 January 2015, ¶¶ 116–117 (police used excessive force in firing live rounds into crowd of Roma who allegedly were throwing rocks and other items); Ataykaya v. Turkey, ECtHR, Appl. No. 50275/08, Judgment of 22 July 2014, ¶ 58 (State violated right to life by failing to adequately investigate and prosecute security forces who used lethal force against rock-throwers and "the Government have not shown satisfactorily that the use of lethal force against the applicant's son was absolutely necessary and proportionate"); Andreou v. Turkey, ECtHR, Appl. No. 45653/99, Judgment of 27 October 2009, ¶ 54 (use of lethal force against stone-throwing crowd was "totally unwarranted"); Nagmetov v. Russia, ECtHR, Appl. No. 35589/08, Judgment of 30 Mar. 2017, ¶¶ 46–47 (State violated right to life by failing to adequately investigate and prosecute security forces who used lethal force against rock-throwers); Forrester v. Leckey, [2005] NICA 26, No. NICC5282, ¶ 20 (requiring criminal retrial to determine whether police officer who drove vehicle toward rock-throwing crowd had "good cause to fear that death or serious physical injury would result if he did not take the action that he did"); Güler and Öngel v. Turkey, ECtHR Appl. No. 29612/05

286. None of the killings at issue here comes anywhere near meeting the extraordinarily rare circumstances that might justify the use of lethal force against an alleged rock-thrower. United States representatives eventually admitted privately to the family that Sergio Hernández was not throwing any rocks when the agent gunned him down in cold blood. A senior DHS executive later confirmed under oath that the three videos of the killing show that Sergio was not throwing any rocks. Those same videos also flatly contradict the United States’ public-relations position that the agent had been “surrounded” by rock-throwers. No one was anywhere near him. The spontaneous declaration by the witness who dialed 911 was exactly right: “[I] called it a murder.”

287. According to one eyewitness account, the Border Patrol agent killed Mr. Yañez because he was going to record the agents’ beating of a detainee. But even accepting the agents’ story, their own sworn testimony precludes a finding of Imminent Peril. They acknowledge that Mr. Yañez had nothing in his hand when the agent killed him. The other agent never saw any rock or anything else being thrown. Unbelievably, the agent says that he moved the alleged table leg from where it allegedly landed after Mr. Yañez allegedly threw it. Conveniently, the agent allegedly moved it to where there was a pile of other debris. Also conveniently, the “investigating” authorities did not take any fingerprints or DNA from the table leg—the weapon that allegedly justified the agent in killing a person.

30668/05, Judgment of 4 October 2011, ¶ 29 (police were not justified in using any force against demonstrators who were not themselves throwing rocks); *X v. Belgium*, ECommHR, Appl. No. 2758/66, Decision of 21 May 1969 (officer used excessive force in shooting a demonstrator who was beating him with a stick). On rare occasions courts have accepted use of lethal force in particular circumstances. *See, e.g.,* *Giuliani and Gaggio v. Italy*, ECtHR Appl. No. 23458/02, Judgment of 25 August 2009, ¶¶ 220, 225 (lethal force not excessive where demonstrators had surrounded police officers in their car, smashed the windows, beat them with stones, and were preparing to smash them with a fire extinguisher).

288. Regardless, the circumstances make overwhelmingly clear that, even if Mr. Yañez had been throwing any rocks, the agents could have moved the detainee and themselves further away from Mr. Yañez. Mr. Yañez had fled back into Mexico and was on the southern side of the border fence. At worst, the agents could have left the detainee where he was and retreated beyond the range of the alleged harm. Even crediting the agents' story, what exactly was so important that it required the taking of another human being's life?

289. Mr. Arévalo was on a picnic with his family. The families in Los Patinaderos Park were decrying the agents' endangering of a young man who was in the river. Witnesses deny that any rocks were being thrown. The agents say they were. But the agents also say that they were near the Mexican riverbank, in harm's way. Again, cellphone video proved them to be mistaken in their minds; they were near the U.S. riverbank, far away from where Mr. Arévalo was shot. And they were *in a boat*. As the PERF Report later concluded, a boat's maneuverability and speed would easily allow any agents who really were in any danger to quickly move out of range of any rocks. Instead, as the United States' own investigation later revealed, the agent knelt on the boat's deck, aimed his M4 semiautomatic rifle, and *shot seven to ten rounds into a crowd of family picnickers*.

290. The agent who killed Mr. Solis initially said that he was throwing rocks at the agent and that there was no video of the incident. Yet again, the video surfaced (for a short period of time) and contradicted that account. It showed no rocks, no throwing motion. It showed a cloud of dust. The U.S. authorities concluded that the cloud of dust was somehow "consistent with" the possible throwing of a rock. Even if that were true, no evidence has been presented that, rock or no rock, the agent was in Imminent Peril. The agent was chasing Mr. Solis, not the

other way round. And another Border Patrol agent who witnessed the killing said that Mr. Solis had his arms cradled in front of him, not throwing any rock.

291. The facts indisputably disprove any Imminent Peril in the killing of Mr. Pérez. He was far across the Rio Grande with nothing in his hand but a rag. Witnesses confirm that he was not making any throwing motion and did not in any way pose a danger to the agent or anyone else. Far from being in imminent danger of death or serious injury, the agent calmly raised his rifle, *sighted Mr. Pérez in the scope*, and shot him dead. Not an accident, an execution. Had there been any doubt about that, the agents erased it: “que se muera el perro.”

292. Lastly, the tragic death of José Antonio Elena Rodríguez. Shot 10 times, at least 7 times after he had already been hit and was lying facedown in the street. No one on the Mexican side of the slatted border fence—the slats 3.5 inches apart—could harm anyone on the U.S. side with rocks. The other police and Border Patrol agents were standing around chatting, with their hands on their hips. Agent Swartz arrived and, without speaking with any of his colleagues, walked directly up to the fence and began firing. Then he reloaded and fired some more. The videotapes later showed that two men may have been throwing rocks. José Antonio was not one of them. The Internal Affairs Chief confirmed that the videotapes disprove that José Antonio threw any rocks. As he later said, with sadness and disgust, the Border Patrol “shot an unarmed boy.”

293. As Chief Frazier concluded, “[v]irtually all thrown objects fail to meet the ‘Imminent Peril’ standard”⁵²¹ and “to rely on use of deadly force [in these circumstances] is virtually unheard of.”⁵²²

⁵²¹ Frazier Report at ¶ 113 (emphasis added).

⁵²² *Id.* at ¶ 117.

294. Public pressure ultimately required the United States to hire expert police-procedure specialists to review the files of these and other killings by Border Patrol agents. As noted in detail above (Section IA6), the PERF Report concluded:

“**Too many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.**”

- PERF Report

- “Review of shooting cases involving rock throwers revealed that in some cases agents put themselves in harm’s way by remaining in close proximity to the rock throwers when moving out of range was a reasonable option. *Too many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force. In cases where clear options to the use of deadly force exist and are not utilized in rock-throwing incidents, corrective actions should be taken.*”⁵²³
- “The state[d] CBP policy should be: ‘Officers/agents are prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them.’”⁵²⁴
- “When sufficient time exists officers/agents should seek cover and/or move out of range. Such action may be especially viable when the attack is coming from the other side of the border. *Officers/agents are prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them.*”⁵²⁵

⁵²³ *Id.* at 6-7 (emphasis added).

⁵²⁴ *Id.* at 7 (emphasis in original).

⁵²⁵ *Id.* at 12 (emphasis in original).

- “The more questionable cases generally involved shootings that took place through the [international border] at subjects who were throwing rocks at agents from Mexico.”⁵²⁶
- [S]ome cases suggest that frustration is a factor motivating agents to shoot at rock throwers.”⁵²⁷

“**It is clear that agents are unnecessarily putting themselves in positions that expose them to higher risk.**”

- *PERF Report*

- “It is clear that agents are unnecessarily putting themselves in positions that expose them to higher risk. While rock throwing can result in injuries or death, there must be clear justification to warrant the use of deadly force. CBP needs to train agents to de-escalate these encounters by taking cover, moving out of range and/or using less lethal weapons.”⁵²⁸

295. Tellingly, the Report noted that the extensive changes it recommended were “*significant departures from current practice.*”⁵²⁹

296. The United States exacerbated these violations of international law by systematically failing to adequately investigate the killings.

297. A prompt investigation is necessary to “protect the interests of the victims, preserve the evidence, and safeguard the rights of anyone considered a suspect in the context of

⁵²⁶ *Id.* at 8.

⁵²⁷ *Id.* at 9.

⁵²⁸ *Id.* at 9.

⁵²⁹ *Id.* at 3.

the investigation.”⁵³⁰ The State should initiate the investigation immediately after the killing⁵³¹ and complete the investigation without undue delay.⁵³²

298. “The general prohibition to arbitrarily deprive someone of his life, which state officials must observe, would be ineffective without proceedings to verify the legality of the lethal use of force.”⁵³³ The State obligation to conduct a rigorous, impartial and effective investigation is particularly important in cases involving extrajudicial killings by State agents.⁵³⁴

299. The Court has found a violation of the promptness standard when an investigation involved “long periods of procedural inactivity” that were not justified.⁵³⁵

300. Investigators must promptly interview witnesses to protect their safety and ensure the accuracy of their statements.⁵³⁶ A delay in the investigation will undermine “the timely preservation and gathering of evidence and the identification of eyewitnesses.”⁵³⁷ In *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, the Commission condemned the “delay

⁵³⁰ Case of the Santo Domingo Massacre v. Colombia, Case 12.416, Inter-Am. Comm’n H.R., Report No. 31/55, ¶153 (2011). The Commission has interpreted Article XVIII in light of Articles 8 and 25 of the American Convention on Human Rights. See, e.g., Jessica Lenahan (Gonzales), at ¶172.

⁵³¹ See, e.g., Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149 ¶ 163 (July 4, 2006); Gayle v. Jamaica, Case 12.418, Inter-Am. Comm’n H.R. Report No. 92/05, ¶89. (2005).

⁵³² See, e.g., Ximenes-Lopez, at ¶203; Jessica Lenahan (Gonzales), at ¶ 181.

⁵³³ *Id.* at ¶ 88.

⁵³⁴ *Id.*

⁵³⁵ Case of the Moiwana Community v. Suriname, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶182 (June 15, 2005).

⁵³⁶ Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Inter-Am. Comm. H.R., Report 37/00, ¶ 91, 116 (1999). See also Michael, at ¶89; and Ximenes-Lopez, at ¶ 163; Case of the Barrios Family, at ¶ 234.

⁵³⁷ Ximenes-Lopez, at ¶ 188; see also Case of the Barrios, at ¶ 234 (finding that Venezuela had failed to effectively investigate the deaths of several members of the Barrios family, thereby violating their family’s right to judicial protection, in part because “there was [a] failure to immediately photograph the sites of the incidents, the evidence found, the bodies of the deceased victims, and the property affected” and because there were no forensic inspections at the onset of the investigations).

and deficiency” of an investigation when a key witness was not called to testify until two years and eight months after the killing.⁵³⁸

301. The United States has consistently fallen well short of these standards, on both substance and timing. The former Internal Affairs Chief admitted that these investigations were pro forma and designed to exonerate the agents.⁵³⁹ Rather than respond to the shootings appropriately, Border Patrol officials intentionally thwarted the investigations: “[i]n 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 at hand.”⁵⁴⁰

302. He acknowledged to the media that “senior officials at Customs and Border Protection and elsewhere in the Department of Homeland Security interfered with, delayed or hindered his office from being more aggressive in rooting out corruption, abuse and other misconduct, including civil rights violations, by telling internal affairs to stand down or back off.”⁵⁴¹ With respect to use of excessive force, “[a]llegations of wrongdoing he believed needed to be investigated instead would go to Border Patrol management for review and discipline. Those inquiries went nowhere or were inadequate.”⁵⁴² The Internal Affairs Chief and other

⁵³⁸ Monsenor Oscar Arnulfo Romero and Galdamez, at ¶ 116.

⁵³⁹ Tomsheck Dep. Tr. 135-36. Appendix, Ex. 10.

⁵⁴⁰ Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, Washington Post (Aug. 16, 2014) available at <http://tinyurl.com/BeckerBorder>. Appendix, Ex. 237.

⁵⁴¹ Andrew Becker, *Ousted Chief Accuses Border Agency of Shooting Cover-Ups, Corruption*, Reveal (Aug. 14, 2014), https://beta.cironline.org/reports/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/?utm_source=CIR&utm_medium=social_media&utm_campaign=twitter. Appendix, Ex. 162.

⁵⁴² *Id.*

internal affairs investigators were then required to “fall in line” behind the Border-Patrol-directed conclusions.⁵⁴³

303. The Internal Affairs Chief further confirmed that United States officials actively and consistently distorted the public narratives around fatal shootings in order to cover up Border Patrol agents’ wrongdoing.⁵⁴⁴ As noted in detail above, for example, in the aftermath of the killing of Sergio Hernández, United States officials put out a press release asserting that the group of boys had “surrounded” the agent and that Sergio “began to throw rocks” at him. But two days later a cellphone video surfaced that showed that the agent was not surrounded and that Sergio did not throw any rocks. Two other videos later confirmed the same thing.

304. Similarly, as noted in detail above, in the aftermath of the killing of Mr. Arévalo the Border Patrol issued a statement asserting that the agents had been subjected to rocks thrown from the Mexico side of the border. Again, cellphone video and numerous witnesses flatly contradict that account.

305. With respect to Mr. Yañez, the agent who killed him moved the table leg—the alleged deadly weapon allegedly thrown by Mr. Yañez. He moved it away from where it had allegedly landed near an agent, to a nearby pile of debris. Investigators took no fingerprints or DNA from the table leg, despite its allegedly being a key piece of evidence in the case.

306. Investigators failed to take witness statements from at least XX key witnesses in the killing of Mr. Arevalo.

⁵⁴³ *Id.*

⁵⁴⁴ Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, Washington Post (Aug. 16, 2014), available at <http://tinyurl.com/BeckerBorder>. Appendix, Ex. 237.

307. With respect to timing, delays and failure to communicate with the families are endemic. The United States killed Mr. Arévalo in 2012, but did not conclude its “investigation” or inform the family of it until seven years later. And even that delayed response was prompted by a National Public Radio investigation.

D. The United States Violates the American Declaration by Failing to Provide a Judicial Remedy for the Border Patrol’s Unlawful Killings

“It is a basic maxim of law that harms should be remedied.”⁵⁴⁵

“Rights without remedies are ineffectual, rendering illusory the government's duty to respect such rights.”⁵⁴⁶

“To take away all remedy for the enforcement of a right is to take away the right itself.”⁵⁴⁷

308. As noted in detail above, where the United States has killed victims located in Mexico, it has refused to provide a judicial remedy against either the Border Patrol agent or the United States itself. The United States has concluded that the families have no claim against the agents and that the United States itself has sovereign immunity to the families’ claims—even to claims of a violation of a jus cogens norm litigated against the United States in its own courts.

309. The United States’ failure to provide a judicial remedy is patently, defiantly unlawful.

310. A violation of the American Declaration gives rise to a duty by the State to provide the victim with full reparations.⁵⁴⁸ Indeed, “the absence of an effective remedy to

⁵⁴⁵ Naomi Rohrt-Arriaza, *Reparations Decisions and Dilemmas*, 27 Hastings Int’l & Comp. L. Rev. 157, 157 (2004). Appendix, Ex. 189.

⁵⁴⁶ Dinah Shelton, *Remedies in International Human rights Law* (2d ed. 2005).

⁵⁴⁷ *Virginia Coupon Cases*, 114 U.S. 270, 303 (1884).

⁵⁴⁸ Jessica Lenahan (Gonzales), at ¶ 172.

violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking.”⁵⁴⁹

311. “The reparation of the damage caused by the infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the return to the state of affairs prior to the infringement.”⁵⁵⁰ In cases of serious violations of human rights, such as extrajudicial killings, where it is impossible to restore victims to their original situation, States must implement a range of measures. This includes “monetary compensation and public actions or works the effect of which, among others, [are] to acknowledge the victim’s dignity and to avoid new violations.”⁵⁵¹ Preventative measures often require legal and policy reforms to ensure that similar violations are not repeated.⁵⁵² In acknowledgement of the victims’ dignity, the Commission has also required States to issue a public apology.⁵⁵³

312. The State must provide a judicial forum for anyone who alleges violations of their fundamental rights, and that forum *must be capable of granting a remedy that effectively and adequately addresses violation of the right alleged*.⁵⁵⁴

313. The right to a remedy requires that States do more than simply ensure that the doors of the courthouse are formally open to aggrieved individuals; rather, it must ensure that available remedies are “effective” in affording the individual whose rights have been violated

⁵⁴⁹ See *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987).

⁵⁵⁰ *Detention Center of Catia*, at ¶ 117.

⁵⁵¹ *Id.* at ¶¶ 118, 130.

⁵⁵² *Michael Gayle*, at ¶ 114.

⁵⁵³ *Id.*

⁵⁵⁴ See, e.g., *Velásquez-Rodríguez*, at ¶ 64.

adequate redress for the harm.⁵⁵⁵ The Court explained that “the Court has established that for such an effective remedy to exist, it is not enough that it be provided by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy that proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.”⁵⁵⁶

314. Thus, the United States cannot lawfully assert a defense of sovereign immunity to such claims litigated against it in its own domestic courts. The American Convention makes this clear by providing that the State must provide these remedies notwithstanding that agents committed the violation while acting on behalf of the State.⁵⁵⁷

315. In cases involving serious violations such as extrajudicial killings, immunities are not permissible. The State is obliged to “remove all factual and legal obstacles” to redress.⁵⁵⁸ In cases of extrajudicial killing the Court has refused to recognize amnesty laws and other barriers to litigation.⁵⁵⁹

⁵⁵⁵ See, e.g., *Mayagna Awas Tingni Community v. Nicaragua*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 113-114 (Feb. 1, 2000); *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 74, ¶¶ 136-137 (Feb. 6, 2001).

⁵⁵⁶ *Mejia Idrovo v. Ecuador*, 2011; see also *Durand & Ugarte v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 68, at 118, ¶ 62 (Aug. 16, 2001); *Cantoral-Benavides v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 164 (Dec. 3, 2001).

⁵⁵⁷ American Convention, at art. 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”).

⁵⁵⁸ *Id.*

⁵⁵⁹ *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 111 (Sept. 26, 2006); *Gomes-Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, at ¶ 149; see generally *Jo M.*

316. For example, in *Barrios-Altos v. Peru* the Court held that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations,”⁵⁶⁰ and thus violate a victim’s “right to judicial protection embodied in Article 25.”⁵⁶¹ The Court held that the American Convention applies to State officials regardless of amnesty provisions; amnesty or other immunity provisions violate the Convention because they prevent victims from accessing the judiciary and “knowing the truth and receiving the corresponding reparation.”⁵⁶²

317. Likewise, during El Salvador’s civil war, the Court concluded that El Salvador’s amnesty law that eliminated liability for individuals committing human rights violations violated the American Convention not only because it provided amnesty for potential human rights violations but because it “eliminate[d] any possibility of obtaining adequate pecuniary compensation . . . for victims.”⁵⁶³

318. So too for politically related amnesties. In *Carranza v. Argentina*,⁵⁶⁴ the Commission unequivocally rejected the State’s argument that a “political question” excused its responsibility to provide an effective judicial remedy. In that case, an Argentine judge challenged his dismissal from office in the domestic courts. The courts ruled that they lacked jurisdiction to hear the case, because they “were not competent to rule on the fairness, wisdom or

Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, at 188-89 (2003).

⁵⁶⁰ *Barrios-Altos v. Peru* Inter-Am. Ct. of H.R. ¶ 41 – 44 (March 14, 2001).

⁵⁶¹ *Id.*

⁵⁶² *Id.* at ¶ 43.

⁵⁶³ Int.-Am. Comm. H.R., Report on the Situation of Human Rights in El Salvador, ch. II (Feb. 11, 1994).

⁵⁶⁴ *Carranza v. Argentina*, Case 10.087, Inter-Am. Comm’n H.R Report No. 30/97 (1998).

efficacy of the measures ordering the removal of magistrates . . . as these were eminently political acts of a *de facto* government.”⁵⁶⁵ When the plaintiff brought his case to the Commission, arguing (among other things) that the courts’ denial of jurisdiction violated his right to a remedy, the State countered that there was no violation, because the political question doctrine, as developed and applied in the United States, barred the domestic courts from hearing the case.⁵⁶⁶

319. The Commission concluded that the State violated the plaintiff’s right to a remedy because the case did not raise a political question, and the domestic courts declined jurisdiction in error.⁵⁶⁷ But the Commission went on to say that the State’s position (that the domestic courts’ denial of jurisdiction based on the political-question doctrine did not violate the plaintiff’s right to a remedy) “made it impossible for the petitioner to have an effective judicial remedy that would protect him against alleged violations of his right.”⁵⁶⁸ “If there is no legal jurisdiction and if it is not appropriate to decide, then there can be no protection. Consequently there is no effective legal remedy under the terms of Article 25 of the American Convention.”⁵⁶⁹ The Commission concluded that the State, through its domestic courts’ application of the political question doctrine, violated the petitioner’s right to an effective judicial remedy.⁵⁷⁰

320. The United States’ denial of a remedy based on the location of the victim is unlawful also because it discriminates against foreign nationals. Those killed outside U.S. territory are more likely to be non-U.S. citizens, and withholding a judicial remedy based on

⁵⁶⁵ *Id.* at ¶ 3.

⁵⁶⁶ *Id.* at ¶¶ 44 – 59.

⁵⁶⁷ *Id.* at ¶ 59.

⁵⁶⁸ *Id.* at ¶ 72.

⁵⁶⁹ *Id.* at ¶ 75.

⁵⁷⁰ *Id.* at ¶ 83.

their location has a clear disparate impact on that category of persons. In fact, every known victim in a Border Patrol cross-border killing has not been a U.S. citizen. A remedy for violation of a fundamental right such as the right to life cannot lawfully depend on that classification.

321. The Commission describes the right to equal protection before the law and the prohibition against discrimination as a “fundamental principle of the Inter-American system of human rights.”⁵⁷¹ Under Article II of the American Declaration, “[a]ll persons are equal before the law and have the rights and duties established in th[e] Declaration, without distinction as to race. . . or any other factor.”⁵⁷² The Inter-American Court recognizes the prohibition of discrimination as *jus cogens* and binding on all Member States of the Organization of American States.⁵⁷³

322. The American Declaration prohibits both *de jure*⁵⁷⁴ and *de facto*⁵⁷⁵ discrimination. This prohibition extends to policies and practice that are deliberately discriminatory in nature and to those that have a discriminatory effect.⁵⁷⁶ The Inter-American Court similarly defines discrimination as any measure adopted by a State that intentionally disadvantages an individual or group or that has a disparate impact on such a group.⁵⁷⁷

⁵⁷¹. Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, at ¶107.

⁵⁷². American Declaration, at art. II.

⁵⁷³. *See e.g.*, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶101 (Sept. 17, 2003).

⁵⁷⁴. *See* Oscar Elias Bicer et al. v. Cuba, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, ¶¶ 228–31 (2006).

⁵⁷⁵. *See* Maya Indigenous Communities of the Toledo District v. Belize, Report No. 40/04, at ¶171.

⁵⁷⁶. Inter-Am. Comm’n H.R., Report on Immigration in the United States: Detention and Due Process ¶95 (2010); *see also* Nadege Dorzema et al. v. Dominican Republic, Case 12.688, Inter-Am. Comm’n H.R., Report No. 174/10, ¶ 209 (2010), <http://www.oas.org/en/iachr/decisions/court/12688FondoEn.pdf>.

⁵⁷⁷. *See* Case of Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (Ser. C) No. 130, ¶ 141 (Sept. 8, 2005) (emphasis added); *see also* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, at ¶ 103 (“[S]tates must abstain from carrying out any action that,

323. Other human rights treaties reflect a similar understanding of the right to equality before the law and non-discrimination.⁵⁷⁸ The Convention on the Elimination of All Forms of Racial Discrimination defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁵⁷⁹ The Human Rights Committee has interpreted the ICCPR to prohibit both de jure and de facto discrimination.⁵⁸⁰

324. The Court and this Commission have precluded the use of nationality and undocumented status as legitimate categories for denying basic human rights.⁵⁸¹ The Commission has emphasized the close links between discrimination, violence, and impunity in recognizing the special vulnerability of these groups.⁵⁸²

in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination.”).

⁵⁷⁸ *Maya Indigenous Communities of the Toledo District v. Belize*, Report No. 40/04, at ¶ 87 (Interpreting and applying pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by the American Convention on Human Rights and other treaties).

⁵⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, Mar. 7, 1966, 660 U.N.T.S. 195.

⁵⁸⁰ Human Rights Committee, General Comment No. 18 on Non-Discrimination ¶ 7, UN Doc. HRI/GEN/1/Rev.7 (1989).

⁵⁸¹ *See, e.g.,* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18) ¶ 112–13 (Sept. 17, 2003; Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, at ¶ 208. *See generally* Inter-Am. Comm’n H.R., Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico Å 80 (2013) [“Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico”]; *see generally* Inter-Am. Comm’n H.R., Refugees and Migrants in the United States: Families and Unaccompanied Children (2015) (discussing the vulnerability of undocumented migrant children who flee violence and poverty in their countries and travel to the United States).

⁵⁸² *Nadege Dorzema et al. v. Dominican Republic*, Report No. 174/10, at ¶ 204.

E. The United States Violates Other Fundamental International Law by Failing to Provide a Judicial Remedy for the Border Patrol's Unlawful Killings.

325. The United States' invocation of sovereign immunity to an extrajudicial-killing claim litigated against it in its own courts also violates other fundamental international law.

326. Article 8 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."⁵⁸³

327. Each signatory nation to the ICCPR, including the United States, promises to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, *notwithstanding that the violation has been committed by persons acting in an official capacity*."⁵⁸⁴ And the ICCPR "requires that *State Parties make reparation to individuals* whose Covenant rights have been violated."⁵⁸⁵ That language, by its terms, precludes a sovereign-immunity defense.

328. The "effective remedy" requirement, codified in nearly all international human rights treaties,⁵⁸⁶ is "generally understood to encompass both the procedural right of access to a

⁵⁸³ Universal Declaration of Human Rights, G.A. Res. 217A, at art. 8, U.N. Doc. A/810 (Dec. 10, 1948).

⁵⁸⁴ ICCPR, at art. 2(3)(a) (emphasis added).

⁵⁸⁵ UN Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at § 16. *See generally* Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge Univ. Press 2012), at 34-35 (tracing development of international-law requirement that State provide adequate judicial remedy to individual victims).

⁵⁸⁶ *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to an effective remedy ... for acts violating the fundamental rights granted him"); International Covenant on Civil and Political Rights arts. 2(3), 9(5), 14(6), Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (ensuring remedies and compensation for wrongful convictions and imprisonment); Convention on Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 ("State Parties shall assure to everyone within their jurisdiction effective protection and remedies.");

hearing before an impartial decisionmaker and the substantive right to receive relief.”⁵⁸⁷ Of course, to obtain an “effective remedy,” the individual must have access to the judicial system. Therefore, “[i]mplicit in the obligation to provide a remedy is the obligation to ensure that any person who raises a non-frivolous allegation that his treaty rights have been violated obtains an individual hearing *before an impartial tribunal that is authorized to adjudicate the merits of the claim*.”⁵⁸⁸ And “[t]o discharge the duty to provide an effective remedy, there is a clear preference for judicial remedies, and purely political or administrative remedies will not suffice.”⁵⁸⁹

329. Recognizing this, the UN Human Rights Committee (“HRC”) has concluded that the “rules concerning the basic rights of the human person,” which include the right to an effective remedy, are *erga omnes* obligations, i.e., they are not ordinary rules of international law, but obligations that are owed to the international community as a whole.⁵⁹⁰

330. In *Goiburú, et al. v. Paraguay*, the Court confirmed that the requirement of access to justice had obtained jus cogens status: “[t]he access to justice constitutes an imperative norm

Convention on Elimination of All Forms of Discrimination Against Women art. 2(c), Dec. 18, 1979, S. Exec. Doc. R, 96-2 (1980), 1249 U.N.T.S. 13 (establishing legal protection of women's rights against any act of discrimination); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (“Each State Party shall ensure in its legal system that the victim ... obtains redress and has an enforceable right to fair and adequate compensation”); Int'l Comm'n of Jurists, Written Statement to Ad-Hoc Committee on Disability Rights Convention, Need for an Effective Domestic Remedy in the Disability Rights Convention, Jan. 2005, available at <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5icj.rtf> (“The right to an effective remedy is so firmly enshrined ... that any credible modern human rights treaty has to incorporate it.”).

⁵⁸⁷ Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. Rev. 693, 700–01 (2008).

⁵⁸⁸ David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 142 (1999) (emphasis added).

⁵⁸⁹ Rjie Ernie Gao, *Between A Rock and A Hard Place: Tensions Between the U.S.-Rok Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR*, 33 FORDHAM INT'L L.J. 585, 607 (2010).

⁵⁹⁰ 12 HRC General Comment 31 at ¶ 2.

of International Law, and, as such, it generates obligations *erga omnes* for the States to adopt the measures which are necessary not to leave in impunity those violations.”⁵⁹¹ In *La Cantuta v. Peru*, the Court reiterated this assertion: “Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.”⁵⁹²

331. As Judge Cançado Trindade explained in his Separate Judgment in *Masacre of Pueblo Bello*:

The interrelatedness...between Articles 25 and 8 of the American Convention (...) leads to characterize as belonging to the domain of *jus cogens* the access to justice understood as the *full realization* of this latter, that is, as belonging to the domain of *jus cogens* the intangibility of all judicial guarantees in the sense of Articles 25 and 8 taken *jointly*. There can be no doubt that fundamental guarantees, common to the International Law of Human Rights and to International Humanitarian Law, have a universal vocation in being applicable in all and any circumstances, conforming an imperative law (belonging to *jus cogens*), and bringing about obligations *erga omnes* of protection.⁵⁹³

332. If the right to a remedy for a *jus cogens* violation were not itself a peremptory norm, States could “derogate from a peremptory norm by breaching it and not enforcing the respective consequences[,] an outcome [that] is conceptually incompatible with the very concept

⁵⁹¹ Case of Goiburú et al. v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶131 (Sept. 22, 2006).

⁵⁹² *La Cantuta v. Peru*, Judgement, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 160 (Nov. 29, 2006).

⁵⁹³ *Pueblo Bello Massacre v. Colombia*, Merits, Reparations, and Costs, Separate Opinion of Judge A.A. Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 1 (Jan. 31, 2006).

of *jus cogens*.”⁵⁹⁴ Jus cogens law, without procedural enforcement of an equal stature, does not and cannot exist.⁵⁹⁵ To fail to provide an effective remedy for a jus cogens violation is itself a jus cogens violation by omission.⁵⁹⁶

333. This remedial obligation was highlighted by the Permanent Court of International Justice in the *Chorzów Factory* case. The Permanent Court held that it is “a principle of international law that the violation of an engagement involves an obligation to make reparation in an adequate form.”⁵⁹⁷ This maxim has been followed globally, as the Special Tribunal for Lebanon, in *El Sayed*, determined that the right to access to justice has “acquired the status of a peremptory norm (*jus cogens*)” based on the jurisprudence of both national and international courts.⁵⁹⁸

⁵⁹⁴ Alexander Orakhelashvili, *Peremptory Norms and Reparation for Internationally Wrongful Acts*, 3 BALTIC Y.B. INT’L L. 19, 28 (2003); Derrick Howard, *Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 ALA. C.R. & C.L.L. REV. 121, Footnote 145 (2012)(“The failure to mitigate jus cogens violations, in and of itself, amounts to a breach of a jus cogens.”).

⁵⁹⁵ Kerstin Bartsch and Björn Elberling, *Jus Cogens vs State Immunity, Round Two: The Decision of the European Court of Human Rights in Kalogeropoulou et al. v. Greece and Germany Decision*, 4(5) German L. J. 20 (2003)(“every jus cogens rule contains or presupposes a procedural rule which guarantees its judicial enforcement”).

⁵⁹⁶ M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & Contemp. Probs 63, 69 (1996) (“Thus, essentially, a *jus cogens* crime is characterized explicitly or implicitly by state policy or conduct, irrespective of whether it is manifested by commission or omission.”); Thomas Weatherall, *Jus Cogens: International Law and Social Contract* 384 (2015)(“The states is internationally responsible for a breach of obligations *erga omnes* arising from peremptory norms. This aspect of responsibility arises where the apparatus of the state has failed, through will or negligence, to prevent the violation of a peremptory norm, through preemption or suppression, or to punish such a violation, through extradition or prosecution.”).

⁵⁹⁷ Permanent Court of International Justice, *Chorzów Factory Case* (Germany v. Poland), 1928, Ser. A, No. 17, 29.

⁵⁹⁸ *El Sayed*, Case No. CH/PRES/2010/01, Order of 15 April 2010 assigning Matter to Pre-Trial Judge, President of the Special Tribunal of Lebanon, ¶ 29.

334. The requirement to provide a judicial remedy means that there is no sovereign immunity to a *jus cogens* claim litigated against a State in its own domestic courts.

335. The U.S. Court of Appeals in *Siderman de Blake v. Republic of Argentina*⁵⁹⁹ held that international law “does not recognize an act that violates *jus cogens* as a sovereign act,” with the result that a State’s violation of these norms “would not be entitled to the immunity afforded by international law.”⁶⁰⁰ On the same ground, another U.S. Appeals Court has concluded that foreign officials are subject to civil liability in *U.S. courts*: “*jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity.”⁶⁰¹ Relying on the *Siderman* line of cases, the Court reasoned that “as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.”⁶⁰²

336. Nations throughout the world have concluded that these principles prohibit a State from asserting sovereign immunity to *jus cogens* claims asserted against it in its own court or in competent regional or international tribunals. For example, Article 13 of the European Convention on Human Rights requires its signatory States to provide “an effective remedy before a national authority notwithstanding that the violation has been committed by persons

⁵⁹⁹ 965 F.2d 699, 718 (9th Cir. 1992).

⁶⁰⁰ *Id.* at 718. *Siderman* nevertheless concluded that with respect to *foreign* sovereign immunity – the immunity of *Argentina* from claims against it in *U.S. courts* – Congress had expressly preserved such immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11 (“FSIA”). See *Siderman*, 965 F.2d at 718-19. This is consistent with international law, which also preserves *foreign* sovereign immunity – the immunity of one State for claims against it in another State’s courts (including against *jus cogens* claims) – in order to avoid the specter of one sovereign sitting in judgment on another sovereign’s conduct.

⁶⁰¹ *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012).

⁶⁰² 699 F.3d at 776; see also *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting in part) (“officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)”).

acting in an official capacity.”⁶⁰³ This requirement clearly prohibits “the interposition of governmental immunity in one form or another as a defense to an action in domestic courts seeking redress for breach of the Convention.”⁶⁰⁴

337. The U.S. joined with other UN member States in adopting the Principle that “a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law.”⁶⁰⁵ Unlawfully depriving a person of his life, including specifically through unlawful police use of excessive force, is a “gross violation” to which this Principle applies.⁶⁰⁶

338. The case law similarly reflects the absence of sovereign immunity to *jus cogens* claims litigated against a State in its own courts. For example, in *Belhaj et al. v. Straw et al.*⁶⁰⁷ the Supreme Court of the United Kingdom considered foreign nationals’ claims that the UK conspired with the U.S. and Libya to unlawfully detain them. The UK argued that its courts should refuse to hear the claim against the UK on the ground that the litigation would require UK courts to consider the conduct of the U.S., which is entitled to sovereign immunity for claims

⁶⁰³ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, art. 13, Eur TS 5 (entered into force 3 September 1953).

⁶⁰⁴ Thomas Buergenthal, *Comparison of the Jurisprudence of National Courts with that of the Organs of the Convention as Regards the Rights of the Individual in Court Proceedings*, in A. H. Robertson (ed.), *Human Rights in National and International Law* (Manchester Univ. Press 1968), at 194; *see also* Jurgen Brohmer, *State Immunity and the Violation of Human Rights* 173 (1997) (“judicial proceedings which are subject to the immunity defence cannot be considered effective in the sense of art. 13”).

⁶⁰⁵ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 15, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted by the General Assembly by consensus on 16 December 2005, UN Doc.A/RES/60/147.

⁶⁰⁶ *See, e.g.*, International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner’s Guide* (2006), at 162-63 (“gross violations” include extrajudicial killing and “disproportionate use of force by law enforcement personnel”).

⁶⁰⁷ [2017] UKSC 3.

against it in the UK's courts. In the course of rejecting that argument, the Justices expounded on the rule of non-immunity from *jus cogens* claims litigated against the State in its own courts:

- Neither the United States nor any other State is entitled to sovereign immunity from *jus cogens* claims litigated against them in their own courts: “Each such other state would, on conventional principles governing state immunity, be capable of being pursued in its own courts in respect of the particular conduct complained of in [this] case.”⁶⁰⁸
- The UK and its agencies “accept that state immunity is not available to them” for claims against them in their own courts.⁶⁰⁹
- The fact that States enjoy immunity against *jus cogens* claims litigated against them in other nations’ courts⁶¹⁰ makes all the more important the prohibition on sovereign immunity in the State’s own courts: the UK and its agents “have no right of their own to claim immunity in English legal proceedings.... On the other hand, they would be protected by state immunity in any other jurisdiction, with

⁶⁰⁸ *Id.* at ¶ 30.

⁶⁰⁹ *Id.* at ¶ 184 (Lord Sumpton, with whom Lord Hughes agrees).

⁶¹⁰ The *Belhaj* Court and others have concluded that the doctrine of *foreign* sovereign immunity prevents the courts of one sovereign from adjudicating claims against another sovereign. *Id.* at ¶ 25; *see also Jones v. Kingdom of Saudi Arabia*, [2006] UKHL 26 (June 14, 2006), at ¶ 24. These courts have made clear, however, that this doctrine merely functions to allocate jurisdiction among courts and leaves unaffected the rule that no sovereign may assert immunity from *jus cogens* claims against it in its own courts. Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Destroying Sovereignty*, 18 *European J. Int’l L.* 903, 907 (2008) (*Jones* and similar cases “framed [foreign sovereign] immunity as a procedural bar which only acts to determine the forum in which the claim is heard but which does not remove the petitioner’s underlying substantive right or the defendant’s underlying (alleged) responsibility.”).

the result that unless answerable here they would be in the unique position of being immune everywhere in the world.”⁶¹¹

339. Some of the Justices in *Belhaj* characterized their analyses as direct applications of the international law of jus cogens⁶¹²; others as interpretations of UK law that take international law into account.⁶¹³ But they were unanimous in concluding that the UK and other States have no sovereign immunity to claims for violation of fundamental human rights litigated against them in their own courts.⁶¹⁴

340. Other national courts reach the same conclusion.⁶¹⁵ So do international tribunals when they have subject-matter jurisdiction over the dispute.⁶¹⁶ International legal scholars

⁶¹¹ [2017] UKSC 3, at ¶ 262 (Lord Sumpton, with whom Lord Hughes agrees).

⁶¹² *Id.*

⁶¹³ *Id.* at ¶ 107 (majority opinion) (tying the absence of immunity to “individual rights recognised as fundamental by English statute and common law, rather than [tying] them too closely to the concept of *jus cogens*”).

⁶¹⁴ See also *Rahmatullah v. Ministry of Defence*, [2017] UKSC 1, at ¶ 36 (Lady Hale) (Act of State doctrine does not shield torture because “such acts are not inherently governmental”); *id.* ¶ 77 (Lord Mance) (same); *id.* ¶ 96 (Lord Sumpton) (“a decision by the United Kingdom government to authorise or ratify torture or maltreatment” would be beyond its authority and “could not therefore be an act of state”).

⁶¹⁵ See, e.g., *Netherlands v. Mustafic-Mujic*, [Netherlands Supreme Court] September 6, 2013, First Chamber 12/03329, at ¶ 3.18.3 (no immunity for or judicial abstention from claim for damages against Netherlands by family of victim killed as a result of Dutch troops’ actions in Srebrenica); *Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany)*, [German Federal Supreme Court] [June 26, 2003], 42 ILM 1030 (2003) (Germany had sovereign immunity in courts of Greece against claims that SS troops had massacred Greek civilians, but Court did not recognize sovereign immunity of Germany, in its own courts, against the claims). In proceedings before the International Court of Justice, Germany repeatedly acknowledged that neither it nor any other State has immunity in its own courts from jus cogens claims. *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, [3 February 2012], I.C.J. Reports 2012, Reply of the Federal Republic of Germany, at ¶¶ 1, 34, 56. Ironically, in a concurring opinion in *Hernandez v. Mesa*, 785 F.3d 117, 130 (5th Cir. 2015) (Jones, J., Concurring), Judge Jones stated that prohibiting the U.S. from asserting immunity to jus cogens claims against it in its own courts “would expose the United States, alone among the nations of the world, to liability in federal courts under the ATS without the protection of sovereign immunity.” Yes, other nations (generally) have sovereign immunity for such claims against them

concur: the Conventions and Declarations to which the United States is a signatory “lay down an obligation for contracting states to provide for reparation within their domestic legal systems to individuals who are victims,”⁶¹⁷ and international law renders State immunities “inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity.”⁶¹⁸

V. CONCLUSION AND PETITION

341. The facts alleged in this Petition establish that the United States of America is responsible for the violation of the rights guaranteed under Articles I, II, XVIII, XXV, and XXVI of the American Declaration. Petitioners respectfully request that the Commission:

- a. Expedite the initial processing of this Petition in accordance with Article 29(2) of the Rules of Procedure of the Inter-American Commission on Human Rights;
- b. Declare this Petition admissible;
- c. Investigate, with hearings and witnesses as necessary, the facts alleged in this Petition;

“in federal [U.S.] courts,” but they do not have immunity in their own courts. Granting the U.S. immunity for such claims against it in its own courts would make it “alone among the nations of the world.”

⁶¹⁶ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, ICGJ 203 (ICJ 2004), 9th July 2004, at ¶ 152 (a State that violates international human rights law “has the obligation to make reparation for the damage caused to all the natural or legal persons concerned”).

⁶¹⁷ Riccardo Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law & Human Rights: An Overview*, 1 J. Int’l Crim. Justice 339, 340 (2003); see also Evans, *The Right to Reparation*, at 17.

⁶¹⁸ Bassiouni, *International Recognition of Victims’ Rights*, 6 Human Rights L. Rev. 2, 214 (2006) (“This limitation is fundamental to ensuring that human rights and international humanitarian law violations are remedied, since these acts are often committed only by States.”).

- d. Declare that the United States is responsible for the violation of the rights of the Petitioners and their loved ones under the American Declaration, including, *inter alia*, their rights to life and to equal protection under the law, as well as their rights to truth and to a judicial remedy;
- e. Recommend such other remedies as the Commission considers adequate and effective for addressing the violations of the Petitioners' fundamental human rights, including, *inter alia*, requesting that the United States publicly acknowledge responsibility and publicly apologize to the Petitioners for the violation of their rights and adopt the structural, legal, and policy reforms necessary to ensure non-repetition of the violations.



Dated: September 30, 2020

Respectfully submitted,

/s/ Steve D. Shadowen

Steve D. Shadowen

ATTACHMENT

U.S. Border Policy: 1792 - 2000

1. The United States' first immigration policy was codified in the Naturalization Act of 1790. As a fledgling nation, the United States opened its borders to the world and welcomed all white persons who wished to aid in its development. The Act allowed for almost immediate citizenship, providing that "[a]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen ... and the children of such persons ... shall also be considered as citizens of the United States."⁶¹⁹
2. In the early 1800s, the United States was a vast, largely unoccupied territory. People living in the southwest, far from discouraging immigration, were themselves attempting to migrate south to Mexico. Mexico sought to deter U.S. migrants and in its Decree of April 3, 1830, Mexico outlawed immigration from the United States and even stationed garrisons along its northern border.⁶²⁰ The Mexican- American War in general, and the Battle of the Alamo in particular, exemplifies Mexico's attempt to protect its sovereignty from settlers encroaching from the north.
3. The United States' victory in that war resulted in over 125,000 Mexicans⁶²¹ finding themselves—without having moved from their own homes—foreigners in a new nation. And though the war had ended, Mexico's economic relationship with the United States

⁶¹⁹ Act of Mar. 26, 1790, Ch.3, 1 Stat. 103, 103.

⁶²⁰ Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide* (2000) [E-book] at Location 781-784.

⁶²¹ *Id.* at Location 781-784.

was only beginning. To profit from the ensuing political turmoil and social unrest in Mexico, Texan smugglers and even the U.S. government itself began exporting illegal arms southward.

4. Employers in the United States began recruiting Mexicans to work in the southwest, usually in agricultural jobs. Although U.S. citizenship was formally required, this was widely overlooked. For Mexican citizens, illegal northern migration was quick, easy, and relatively safe.

5. At the turn of the century, westward U.S. expansion began in earnest. By 1909, western railroads employed six thousand laborers, an estimated 98% of whom were Mexican migrants.⁶²² The commissioner-general of immigration declared that “The Peon makes a satisfactory track hand, for the reason that he is docile, ignorant, and non clannish to an extent which makes it possible that one or more men shall quit or be discharged and others remain at work; moreover, he is willing to work for a low wage.”⁶²³ U.S. President Woodrow Wilson, later concurred: “personally, I believe that Mexican laborers are the solution to our common labor problem, this was once part of their country, they can and they will do the work.”⁶²⁴

6. U.S. immigration law was increasingly crafted in deference to U.S. employers, particularly agricultural growers, to allow labor to be imported from poorer nations but on the grower’s terms. Because union organizing was a threat to U.S. capitalism, the Immigration Act of 1917 specifically excluded “political radicals” and immigrants who sought to take advantage of the guest-worker programs. The Act prohibited them from joining or forming unions and

⁶²² Justin Akers Chacón, et al., *No One is Illegal: Fighting Violence and State Repression on the U.S.-Mexico Border* (2006) [E-book] at Location 1278-1281.

⁶²³ *Id.*

⁶²⁴ *Id.* at Location 1265-1266.

denied them a path to citizenship. Congress attempted via the Act to control immigration by imposing restrictions on immigrants such as head taxes and literacy tests, but Mexican immigrants were so welcomed that they were exempted from these requirements.⁶²⁵

7. But not only were U.S. business interests reeling in cheap and politically helpless labor from Mexico, they were also reaching into Mexico for profit. In fact, “By the 1920s, U.S. interests controlled 80 percent of Mexican railroads, 81 percent of the mining industry's total capital, and 61 percent of total investment in the oil fields.”⁶²⁶ Railroads were connecting U.S. company towns to Mexican labor markets, encouraging not only the northward flow of Mexican capital and goods but also the northward flow of its labor force.

8. Congress created the Border Patrol in 1924. Illegal immigration had not yet become a political topic, and the Border Patrol’s job in the southwest was essentially to play the role of the U.S. growers’ overseers. As one Salinas, California agent pointed out, their job was to “keep a presence in the fields.”⁶²⁷

9. Another Border Patrol’s priority was to deter alcohol smugglers during Prohibition. Its targets for removal were Asian and European immigrants, who, barred from entering America by immigration policies of the early 1920s, were using Mexico as a conduit for illegal entry.⁶²⁸ In contrast to European and Asian workers, the Mexican workers was viewed as compliant, docile, and, perhaps most importantly, a seasonal worker who would not overstay his

⁶²⁵ Douglas Massey, *Beyond Smoke and Mirrors* (2002) [E-book] at Location 712-714.

⁶²⁶ Justin Akers Chacón, et al., *No One is Illegal: Fighting Violence and State Repression on the U.S.-Mexico Border* (2006) [E-book] at Location 1058-1061.

⁶²⁷ *Id.* at Location 1348-1350.

⁶²⁸ Peter Andreas, *Border Games Policing the U.S.-Mexico Divide* (2000) [E-book] at Location 797-800.

welcome. Migrants were expected to come to America to fulfill the growers' work needs when they arose, and, when no longer needed, return home.

10. During the 1930s, however, preoccupation with race and eugenics had taken hold not only in Nazi Germany, but also within the U.S. government. In the House Committee on Immigration and Naturalization hearings in 1930, it became evident there was tension between two powerful camps on the question of immigration: the agricultural and capitalist interests versus the nativists. A doctor appeared to testify on behalf of the agriculturalists, assuring the nativist congressmen that "[t]he Mexican is a quiet, inoffensive necessity in that he performs the big majority of our rough work, agriculture, building and street labor. They have no effect on the American standard of living because they are not much more than a group of fairly intelligent collie dogs."⁶²⁹

11. On the other hand, the full force of the Great Depression was affecting the U.S. economy. Mexican immigrants became scapegoats, as unemployed U.S. workers pointed to them as the cause of joblessness, blaming them paradoxically for both taking away jobs and living off the government.⁶³⁰

12. Texas congressman John Box, speaking on the floor of the House of Representatives, set forth his case for the deportation of Mexican workers: "every reason which calls for the exclusion of the most wretched, ignorant, dirty, diseased, and degraded people of

⁶²⁹ Justin Akers Chacón, et al., *No One is Illegal: Fighting Violence and State Repression on the U.S.-Mexico Border* (2006) [E-book] at Location 1978-1981.

⁶³⁰ Douglas Massey, *Beyond Smoke and Mirrors* (2002) [E-book] at Location 796-798.

Europe or Asia demands that the illiterate, unclean, peonized masses moving this way from Mexico be stopped at the border.”⁶³¹

13. Congress adopted this view and the Border Patrol herded and deported Mexican immigrants across the nation and otherwise made them feel so unsafe that they voluntarily left. From 1929 to 1935, more than half a million people were deported, or voluntarily returned, to Mexico.⁶³²

14. But the seesaw soon took another dip. The U.S. economy began to recover in the 1940s, and politicians understood that World War II had depleted the nation’s labor force. The United States once again welcomed Mexican workers with open arms.

15. The United States created the Bracero Program, Bracero meaning “one who works with their arms,”⁶³³ a guest worker program that would last until 1964. The Bracero Program simultaneously curbed illegal immigration while ensuring a steady flow of cheap labor to fuel southwestern agriculture—to the tune of over 4.5 million temporary labor employment contracts.⁶³⁴ The program exploited immigrant labor without providing a path to citizenship or integration into U.S. society. As the American Farm Bureau put it: “Mexican workers [braceros] unaccompanied by wives and families ... can fill our seasonal peaks and return home ... without creating difficult social problems.”⁶³⁵ But word was out that the United States was once again open for business, so migrants moved north to take advantage of the employment opportunities.

⁶³¹ Justin Akers Chacón, et al., *No One is Illegal: Fighting Violence and State Repression on the U.S.-Mexico Border* (2006) [E-book] at Location 1981-1984.

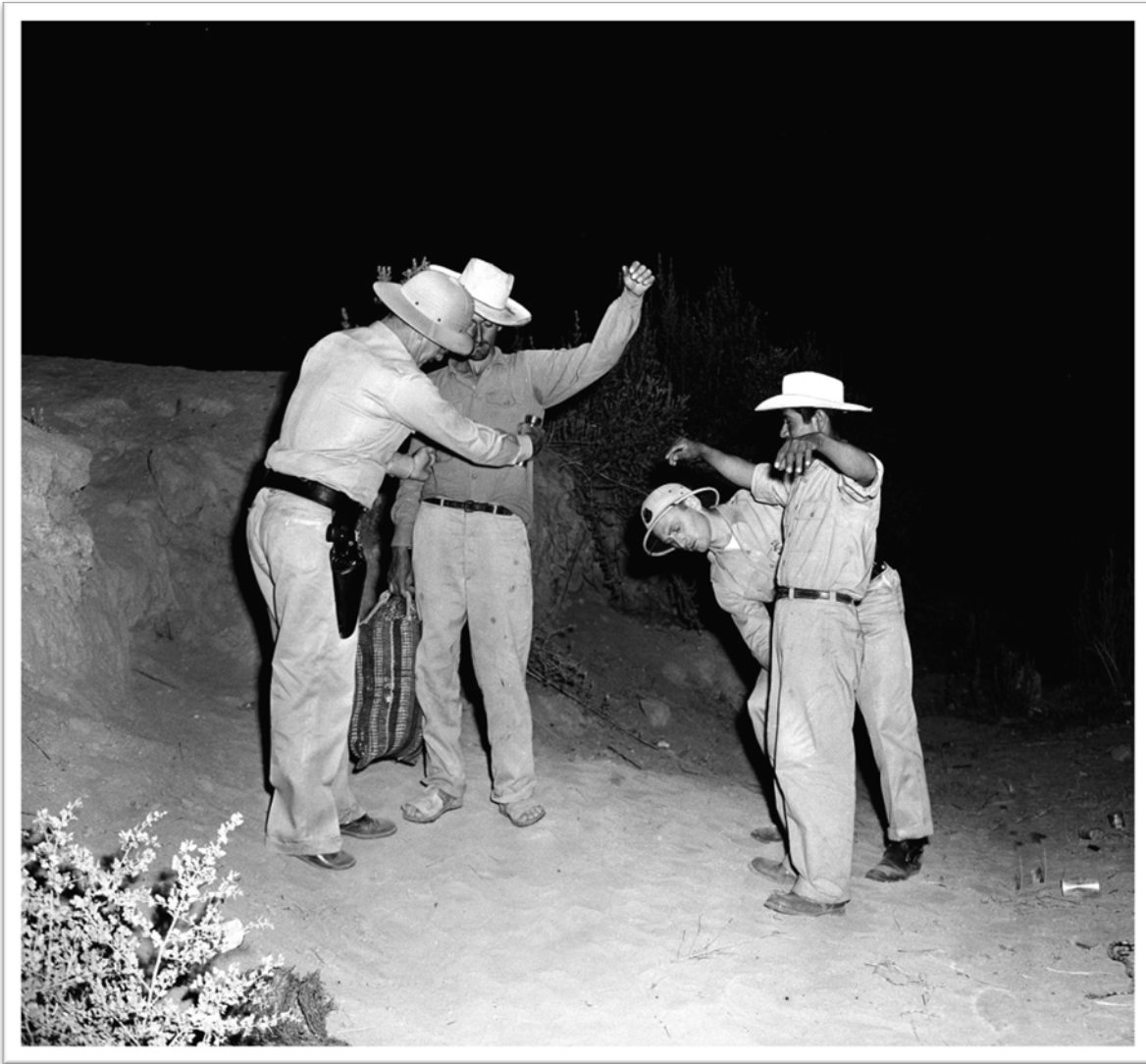
⁶³² *Id.* at Location 1984-1987.

⁶³³ *Id.* at Location 1401-1403.

⁶³⁴ *Id.*

⁶³⁵ *Id.*

Border Patrol apprehensions rose from 182,000 in 1947 to more than 850,000 by the end of 1953.⁶³⁶



16. To push back against this tide of immigration, President Eisenhower enacted Operation Wetback, which ultimately led to the deportation of over 1 million unauthorized

⁶³⁶ Peter Andreas, *Border Games Policing the U.S.-Mexico Divide* (2000) [E-book] at Location 816-819.

workers.⁶³⁷ “Wetback,” of course, was and still is a derogatory term for undocumented workers who reached the United States by presumably swimming across the Rio Grande. The operation was as crude in its implementation as in its name. It resulted in the first large-scale deportation of immigrants, with the INS reporting that the Border Patrol apprehended more than a million persons in 1954 alone.⁶³⁸

17. To continue to exploit the cheap labor, the United States still promoted the Bracero Program while simultaneously conducting the mass deportations. “Illegal immigrants, or ‘wetbacks,’ were often ‘dried out’ by the INS Border Patrol, who escorted them to the Mexican border, had them step to the Mexican side, and brought them back as legal braceros” and in some cases, “the Border Patrol ‘paroled’ illegal immigrants directly to employers.”⁶³⁹

18. Soon, however, U.S. employers realized that they actually preferred illegal labor to the labor provided by the Bracero Program. Under the program, the U.S. government maintained legal oversight of the labor. Employers realized that, without that oversight, they could pay the laborers even lower wages. Without an institutional structure, the laborers were even more helpless and compliant. They had no recourse to any institutions or organizations to report poor working conditions or employer misconduct.

19. The tumult of the 1960s included efforts by agricultural workers to unionize. The Border Patrol played a role as strikebreakers. As one striker explained: “as long as we were quiet

⁶³⁷ C.J. Alvarez, *Border Land, Border Water* (2019) [E-book] at Location 2201-2208; See generally Juan Ramon Garcia, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954* (1980).

⁶³⁸ U.S. Immigration and Naturalization Service, *Annual Report of the Immigration and Naturalization Service for Fiscal Year Ending June 30, 1954* (1965), pg. 71.

⁶³⁹ Peter Andreas, *Border Games Policing the U.S.-Mexico Divide* (2000) [E-book] at Location 820-827.

and worked for nothing, the Border Patrol did nothing. Now that we are on strike they show up at picket lines and threaten us...."⁶⁴⁰

20. Despite the employers' "success" in getting docile and cheap labor, the nativist backlash inevitably arrived. In the 1970s, the Ford and Carter administrations began constructing the border wall. In 1976, INS commissioner Leonard Chapman believed there to be a "a vast and silent invasion of illegal aliens."⁶⁴¹ William Colby, former CIA director, concurred that "[t]he most obvious threat is the fact that there are going to be 120 million Mexicans by the turn of the century...[The Border Patrol] will not have enough bullets to stop them."⁶⁴²

21. In 1986 Congress passed the Immigration Reform and Control Act, for the first time mandating legal sanctions against employers that unlawfully employed immigrants. The Act also granted legal status to around two million workers already in the United States.

22. Then came Ronald Reagan's 1986 proclamation of the War on Drugs, for the first time classifying narcotics as a national security threat. During the Reagan administration, Border Patrol funding increased 130% and the number of Border Patrol agents increased by 82%.⁶⁴³ The United States erected checkpoints and built detention centers. Its border strategy shifted from apprehending individuals to trying to prevent anyone from trying to enter the country unlawfully. The Border Patrol extended its focus past the border into Mexican territory.⁶⁴⁴ With this strategy

⁶⁴⁰ Justin Akers Chacón, et al., *No One is Illegal: Fighting Violence and State Repression on the U.S.-Mexico Border* (2006) [E-book] at Location 2010-2011.

⁶⁴¹ *Id.* at Location 2064-2066.

⁶⁴² *Id.*

⁶⁴³ *Id.* at Location 2075-2077.

⁶⁴⁴ See Latin America Working Group, *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody, No More Deaths* (2011), pg. 42, <https://archive.org/details/pdfy-y1yNVbQxW6lEOI2B>. Appendix, Ex. 18.

of deterrence came a series of aggressive immigration interdiction programs such as Operations Gatekeeper, Safeguard, Rio Grande, and Hold the Line.⁶⁴⁵

23. Operation Hold the Line included a buildup of agents along “weak” parts of the border. “Agents assumed positions along the border, visible to both would-be crossers and to each other. This deployment effectively stopped numerous day-crossers, resulting in a 70 percent drop in El Paso Sector apprehensions.”⁶⁴⁶ Due to this success, the Border Patrol conducted a similar operation the following year, Operation Gatekeeper, in San Diego, California.

⁶⁴⁵ Timothy J. Dunn, & José Palafox (2005), “Militarization of the Border,” The Oxford Encyclopedia of Latinos and Latinas in the United States (2005).

⁶⁴⁶ U.S. Department of Justice/Office of Inspector General, *Operation Gatekeeper: An Investigation Into Allegations of Fraud and Misconduct* (July 1, 1998); <https://oig.justice.gov/reports/operation-gatekeeper-investigation-allegations-fraud-and-misconduct>. Appendix, Ex. 20.

