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12 **Pro hac vice application forthcoming*

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14 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
15 **SAN FRANCISCO DIVISION**

16
17 CENTER FOR GENDER AND REFUGEE STUDIES
and AL OTRO LADO, INC.,

18 Plaintiffs,

19 v.

20 U.S. CUSTOMS AND BORDER PROTECTION,

21 Defendant.

Case No.

**COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF**

INTRODUCTION

1
2 1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C.
3 § 552, *et seq.*, seeking to compel U.S. Customs and Border Protection (“CBP”), a component of
4 the U.S. Department of Homeland Security (“DHS”), to immediately release records requested
5 under FOIA relating to open-air “gathering sites” within CBP’s San Diego Sector.

6 2. Since at least May 2023, CBP has forced thousands of migrants to await
7 processing for asylum or other relief in dangerous and squalid outdoor spaces without reliable
8 access to food, water, shelter, warmth, sanitation, or medical care. CBP has used the term
9 “gathering sites” to refer to these open-air detention sites.¹ These sites are known to humanitarian
10 aid groups as 91X, Spooner’s Mesa, Whiskey Eight, and Whiskey Four, near the San Ysidro port
11 of entry; and Moon Valley, Tower 177, and Willows, near Jacumba, California.²



18 National Public Radio Photograph of a site in Jacumba, California³

19
20 ¹ Jacob Aere, *Hundreds of migrants still detained in poor conditions near Jacumba Hot Springs*, KPBS
21 (last visited Mar. 7, 2024, 6:00 PM), at 3, [https://www.kpbs.org/news/border-](https://www.kpbs.org/news/border-immigration/2023/10/06/hundreds-of-migrants-still-detained-in-poor-conditions-near-jacumba-hot-springs)
22 [immigration/2023/10/06/hundreds-of-migrants-still-detained-in-poor-conditions-near-jacumba-hot-](https://www.kpbs.org/news/border-immigration/2023/10/06/hundreds-of-migrants-still-detained-in-poor-conditions-near-jacumba-hot-springs)
23 [springs](https://www.kpbs.org/news/border-immigration/2023/10/06/hundreds-of-migrants-still-detained-in-poor-conditions-near-jacumba-hot-springs); John Mone, *Asian migrants seeking asylum at US border face different obstacles*, SCRIPPS NEWS
24 (last visited Mar. 7, 2024, 6:00 PM), [https://scrippsnews.com/stories/asian-migrants-seeking-asylum-at-](https://scrippsnews.com/stories/asian-migrants-seeking-asylum-at-us-border-face-different-obstacles/)
25 [us-border-face-different-obstacles/](https://scrippsnews.com/stories/asian-migrants-seeking-asylum-at-us-border-face-different-obstacles/).

26 ² See Pedro Rios, *Update: AFSC U.S.-Mexico Border Program staff responds to Border Patrol’s open-air*
27 *detention sites*, American Friends Service Committee (last visited Mar. 12, 2023, 8:56 AM),
28 [https://afsc.org/newsroom/update-afsc-us-mexico-border-program-staff-responds-border-patrols-open-air-](https://afsc.org/newsroom/update-afsc-us-mexico-border-program-staff-responds-border-patrols-open-air-detention)
29 [detention](https://afsc.org/newsroom/update-afsc-us-mexico-border-program-staff-responds-border-patrols-open-air-detention); Al Otro Lado et al., Dep’t of Homeland Security Civil Rights-Civil Liberties Complaint, *CBP*
30 *Violations of Custody Standards and Human Rights of Individuals Detained in Open-Air Detention Sites*
31 *in the San Diego Sector Require Immediate Attention to Save Lives*, Dec. 11, 2023, at 5, 12,
32 https://assets.nationbuilder.com/alliancesandiego/pages/3500/attachments/original/1702482964/OADS_C
33 [RCL_Complaint_Final_Combined_for_Submission_2023.12.11.pdf?emci=d79ad634-d999-ee11-bea1-](https://assets.nationbuilder.com/alliancesandiego/pages/3500/attachments/original/1702482964/OADS_C)
34 [002248223f36&emdi=9341f59d-f599-ee11-bea1-002248223f36&ceid=11038283](https://assets.nationbuilder.com/alliancesandiego/pages/3500/attachments/original/1702482964/OADS_C).

35 ³ Jasmine Garsd, *Border Patrol sending migrants to unofficial camps in California’s desert, locals say*,
36 NPR (last visited Mar. 7, 2024, 6:00 PM), [https://www.npr.org/2023/11/21/1213597119/border-patrol-](https://www.npr.org/2023/11/21/1213597119/border-patrol-migrants-unofficial-camps-jacumba-california-desert)
37 [migrants-unofficial-camps-jacumba-california-desert](https://www.npr.org/2023/11/21/1213597119/border-patrol-migrants-unofficial-camps-jacumba-california-desert).

1 3. Upon information and belief, CBP has recently set up at least two additional
2 “gathering sites” in the Otay Mountain Wilderness in San Diego County.



11 **Figure 1 Photo courtesy of Al Otro Lado, March 2024**

12 4. Currently, hundreds of people from different countries are stranded in the
13 California desert in the hope of seeking protection in the United States.

14 5. Claiming that migrants detained at these sites are not in their custody, CBP
15 disclaims any responsibility to provide them with necessities beyond minimal amounts of water
16 and small snacks. However, CBP regularly patrols and monitors these sites and exercises
17 significant control over the movements and treatment of those waiting at the sites.⁴ In a May
18 2023 interview, a CBP agent stated that migrants who left the site would be apprehended; other
19 sources report that the agency is compelling migrants to wait at these sites. Migrants themselves
20 report that they are in detention.⁵

21 _____
22 ⁴ *People Seeking Asylum Confined Outside in Appalling Conditions: Findings and Recommendations*
23 *from a Monitoring Visit to San Diego*, WOMEN’S REFUGEE COMMISSION, Nov. 21, 2023,
24 <https://www.womensrefugeecommission.org/wp-content/uploads/2023/11/People-Seeking-Asylum-Confined-Outside-in-Appalling-Conditions-Final.pdf>; Kate Morrissey, *In letter to congressmembers, CBP denies holding migrants in custody between border fences in San Diego*, SAN DIEGO UNION-TRIBUNE (last visited Mar. 7, 2024, 6:00 PM),
25 <https://www.sandiegouniontribune.com/news/immigration/story/2023-07-12/letter-congressmembers-cbp-migrants-between-border-fences-san-diego#:~:text=The%20letter%20noted%20that%20those,restrooms%20and%20basic%20hygiene%20products.>

26
27 ⁵ Tom K. Wong, *Lives in Danger: Seeking Asylum Against the Backdrop of Increased Border Enforcement*, U.S. IMMIGRATION POLICY CENTER, May 16, 2023,
28 <https://usipc.ucsd.edu/publications/usipc-lives-in-danger.pdf?emci=4479c51d-9df3-ed11-907c-;> Melissa Gomez, *Migrants struggle against the elements in San Diego’s open-air desert camps*, LOS ANGELES

1 **INTRADISTRICT ASSIGNMENT**

2 14. Assignment of this action to the San Francisco Division of this Court is warranted
3 pursuant to Civil L.R. 3-2 because Plaintiff CGRS is headquartered in San Francisco, California.

4 **PARTIES**

5 15. Plaintiff CGRS is a nonpartisan organization based at the University of California
6 College of the Law, San Francisco, with its principal place of business at 200 McAllister Street,
7 San Francisco, CA 94102. Through litigation, scholarship, policy recommendations, and in-
8 depth training and technical assistance, CGRS defends the human rights of refugees seeking
9 asylum in the United States. Founded to advocate for women fleeing gender-based violence,
10 CGRS has grown into an internationally respected resource for asylum more generally,
11 renowned for its knowledge of the law and ability to combine sophisticated legal strategies with
12 policy advocacy and human rights interventions to address the underlying causes of forced
13 migration. CGRS participates as co-counsel or amicus curiae in impact litigation, produces an
14 extensive library of litigation support materials, maintains an unsurpassed database of asylum
15 records and decisions, and works in coalitions with immigrant, refugee, LGBTQ+, children’s,
16 and women’s rights networks. In addition, CGRS publishes practice advisories, reports, policy
17 analysis, and other educational materials that are widely disseminated, including through its
18 website. Many of these resources are publicly available, and litigation support materials are
19 accessible to registered users—including non-profit groups, lawyers, academics, law students,
20 refugees, and asylum seekers—free of charge. CGRS also publishes an electronic newsletter
21 distributed to subscribers via email, regularly conducts nationwide trainings and webinars, and
22 releases information via social media platforms. CGRS will make widely available to the public
23 information obtained through this FOIA request via its website and/or by other means discussed
24 above.

25 16. Plaintiff AOL is a non-profit, non-partisan, binational advocacy and legal
26 services organization incorporated in California. AOL’s mission is to uplift immigrant
27 communities by defending the rights of migrants against systemic injustices and fighting for all
28 families that have been torn apart by unjust immigration laws. AOL prioritizes providing holistic

1 legal and humanitarian support to refugees and other migrants through a multidisciplinary,
2 client-centered, harm reduction-based practice. AOL provides free legal services on both sides
3 of the U.S.-Mexico border and beyond. AOL’s Border Rights Project provides legal education,
4 representation, accompaniment, and human rights monitoring for thousands of asylum seekers
5 in Tijuana every year. AOL also documents human rights violations committed by U.S. and
6 Mexican government officials against refugees at the U.S.-Mexico border, which provide a basis
7 for advocacy with U.S. policy makers and international human rights bodies. AOL regularly
8 provides information and analysis to the media and the public, as well as to international human
9 rights advocacy organizations and human rights monitoring bodies. AOL actively shares and
10 publicly disseminates information about its work, as well as conditions on the U.S.-Mexico
11 border and in immigration detention, through its various social media accounts and website.
12 Disseminating information to the public is a critical component of AOL’s work, which AOL
13 does free of charge.

14 17. Defendant CBP is an agency within the meaning of 5 U.S.C. § 552(1)(f). CBP
15 has been delegated authority to administer certain provisions of the Immigration and Nationality
16 Act, including those relating to apprehension and processing of noncitizens who enter the United
17 States at or between ports of entry. CBP has possession, custody, and control of records
18 responsive to Plaintiffs’ FOIA requests.

19 FACTS

20 **A. BACKGROUND**

21 18. Prior to about May 2023, CBP took noncitizens apprehended at or near the U.S.-
22 Mexico border in California directly to holding facilities, where they were detained and
23 processed.

24 19. CBP’s National Standards on Transport, Escort, Detention, and Search (“TEDS
25 Standards”) require it to provide a clean, safe environment; regular meals; unrestricted access to
26 clean drinking water; restroom access (including toilet paper and menstrual products); basic
27 personal hygiene items; and emergency medical care, among other necessities, to those in its
28 custody. The TEDS Standards also require CBP to provide clean blankets to people in its custody

1 upon request, when available, and to make reasonable efforts to provide showers, clean towels,
2 and soap to those approaching 72 hours in custody. In addition, the TEDS Standards mandate
3 that CBP adopt additional safeguards in caring for children, pregnant people, and other at-risk
4 populations.⁸

5 20. Since at least May 2023, CBP has no longer taken most migrants apprehended in
6 certain areas of California directly to holding facilities. Instead, CBP requires migrants to wait,
7 sometimes for days at a time, in open-air “gathering sites” in San Diego County prior to
8 processing. In many cases, CBP transports apprehended migrants to one of these sites. On some
9 days, hundreds of people—including children, pregnant people, and other vulnerable people—
10 have been forced to await processing at these sites.⁹

11 21. Upon information and belief, CBP has issued some guidance to its officers with
12 respect to operations at the so-called “gathering sites.”

13 22. Multiple CBP statements and media reports indicate that CBP directs, transports,
14 and assumes at least some responsibility for migrants at these sites. For example, CBP has
15 reportedly distributed wristbands to migrants indicating their date of arrival at the sites.¹⁰ CBP
16 also reportedly operates a triage system through which it prioritizes certain migrants for
17 processing.¹¹

18 23. A May 2023 study from the U.S. Immigration Policy Center at University of
19 California, San Diego found that ninety-three percent of migrants interviewed at the Jacumba
20 sites believed that Border Patrol would arrest and detain them if they tried to leave the
21 encampment, and all of them felt they were in detention.¹²

23 ⁸ See U.S. CUSTOMS & BORDER PROTECTION, NATIONAL STANDARDS ON TRANSPORT, ESCORT,
24 DETENTION, AND SEARCH, (2015), [https://www.cbp.gov/sites/default/files/assets/documents/2020-
Feb/cbp-teds-policy-october2015.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf).

25 ⁹ See Gomez, *supra* note 5 (“Volunteers say an average of 500 migrants are now living in three camps in
26 the area on any given day”); Maura Fox, *Second complaint filed over conditions for migrants at open-air
detention sites in San Diego desert*, SAN DIEGO UNION-TRIBUNE (last visited Mar. 12, 2024, 9:12 AM),
27 [https://www.sandiegouniontribune.com/news/immigration/story/2023-12-15/complaint-conditions-
migrants-open-air-detention-sites](https://www.sandiegouniontribune.com/news/immigration/story/2023-12-15/complaint-conditions-migrants-open-air-detention-sites).

¹⁰ See Villarreal, *supra* note 6; Gomez, *supra* note 5.

28 ¹¹ Villarreal, *supra* note 6; *see also* Rios, *supra* note 2.

¹² Wong, *supra* note 5.

1 24. While CBP claims that smugglers or cartels are responsible for bringing migrants
2 to these sites, aid workers have reported seeing CBP officers dropping off migrants at the sites
3 multiple times per week.¹³ One CBP officer interviewed in connection with the U.S. Immigration
4 Policy Center study described the migrants in Jacumba as not free to leave, but also not
5 detained.¹⁴

6 25. CBP denies that the waiting migrants are in its custody and therefore disclaims
7 any obligation to provide them with necessities beyond minimal water and snacks.¹⁵

8 26. At four of the seven identified sites, Plaintiff AOL and other local humanitarian
9 aid groups such as Universidad Popular, Friends of Friendship Park, American Friends Service
10 Committee, and other groups, struggle to provide the food, tents, clothing and medical aid
11 necessary for the migrants to survive.¹⁶

12 27. Following discussions with the aid groups, CBP agreed to provide some portable
13 toilets, to distribute food cooked by volunteers, and to allow volunteers access to some of the
14 sites.¹⁷ CBP also allows ambulances to pick up seriously injured or ill migrants, but generally
15 instructs the ambulances to wait down the road from the sites.¹⁸

16 28. CBP’s public statements indicate that the agency has protocols and policies in
17 place regarding conditions at the sites, but they are inadequate to protect migrants’ health and
18 safety. San Diego Sector Border Patrol Chief, Patricia McGurk-Daniel, has publicly discussed
19 CBP’s operations at the sites, where they use off-road vehicles, order supplies, and plan
20 responses to cold and wet weather.¹⁹ CBP also claims that it provides “appropriate medical care
21

22 ¹³ Ciara Encinas, *San Diego Border Patrol Chief addresses migrants camping out near San Ysidro*, 10
23 NEWS SAN DIEGO (last visited Mar. 7, 2024, 6:00 PM), [https://www.10news.com/news/local-news/san-
24 diego-border-patrol-chief-addresses-migrants-camping-out-near-san-ysidro](https://www.10news.com/news/local-news/san-diego-border-patrol-chief-addresses-migrants-camping-out-near-san-ysidro); Women’s Refugee
Committee at 3, *supra* note 4.

¹⁴ *See Wong, supra* note 5.

¹⁵ *See Villarreal, supra* note 6; Rios, *supra*, note 2.

¹⁶ *See Gomez, supra* note 5; Rios, *supra* note 2.

¹⁷ *See Rios, supra* note 2.

¹⁸ *CBP Violations of Custody Standards, supra* note 2, at 17–18.

¹⁹ Encinas, *supra* note 13; Ciara Encinas, *Wet and cold weather presents new danger for migrants
27 crossing into San Diego County*, 10 NEWS SAN DIEGO (last visited Mar. 7, 2024, 6:00 PM),
28 [https://www.10news.com/news/local-news/wet-and-cold-weather-presents-new-danger-for-migrants-
crossing-into-san-diego-county](https://www.10news.com/news/local-news/wet-and-cold-weather-presents-new-danger-for-migrants-crossing-into-san-diego-county).

1 and humanitarian assistance as needed” and coordinates “with emergency medical services to
2 assist individuals in need” at the sites.²⁰

3 29. The aid groups are quickly running out of money for supplies for migrants forced
4 to wait at the sites.²¹ Over the winter, temperatures have dropped below 40 degrees, and some
5 migrants report that they do not even have tents for shelter.²²

6 30. As a result of these dire circumstances, thousands of migrants at or near the U.S.-
7 Mexico border, and the organizations that serve them, urgently need information about CBP’s
8 operation of the open-air “gathering sites.” Such information will be critical to enabling aid
9 groups, including AOL, to plan for and respond to the needs of migrants at the border.

10 31. Disclosure of the requested information will fulfill the transparency and
11 accountability goals of the FOIA and will aid the public, advocates, and migrants in
12 comprehending how the U.S. government is treating those who seek refuge in this country.

13 **B. PLAINTIFFS’ REQUESTS**

14 32. On October 5, 2023, Plaintiff AOL submitted a FOIA request to CBP, notifying
15 the agency that it must post any final opinions, policies, interpretations, and administrative staff
16 manuals and instructions regarding the Jacumba sites on its online reading room pursuant to 5
17 U.S.C § 552(a)(2)(A)-(C) (“First FOIA Request”).²³

18 33. CBP confirmed receipt of the First FOIA Request and assigned it tracking number
19 CBP FOIA-CBP-FO-2024-002267.

20 34. To date, CBP has not posted any of the requested records to its online FOIA
21 reading room.

22 35. On December 14, 2023, Plaintiffs AOL and CGRS submitted a new FOIA request
23 to CBP (“Second FOIA Request”) seeking the following records pursuant to 5 U.S.C § 552(a)(3):
24

25 ²⁰ See Garsd, *supra* note 3 (quoting from an email statement submitted to NPR by the agency).

26 ²¹ Paulina Velasco, *Detained in the desert: migrants stuck in camps in the extreme climate of the US-*
27 *Mexico border*, THE GUARDIAN (last visited Mar. 7, 2024, 6:00 PM), [https://www.theguardian.com/us-](https://www.theguardian.com/us-news/2023/nov/27/us-mexico-border-asylum-open-air-detention-center-california)
28 news/2023/nov/27/us-mexico-border-asylum-open-air-detention-center-california (One aid worker stated that “[p]rograms that were already providing life-sustaining support along the border are now involved in providing life-sustaining support in OADs. We’re so incredibly strained, and someone’s going to die.”).

²² See Gomez, *supra* note 5.

²³ See Exhibit 1.

- 1 1. All communications sent or received by CBP San Diego Sector employees
2 concerning activities at “gathering sites” within the San Diego Sector’s area of
3 responsibility. CBP may limit its search to communications sent or received
4 between May 11, 2023 and the date that it conducts its search.
- 5 2. All “daily updates” or “daily reports” for any “gathering site” in the San Diego
6 Sector’s area of responsibility.
- 7 3. All communications sent or received by CBP’s Office of Congressional Affairs
8 between May 1, 2023 and the date of the instant search concerning any “gathering
9 site” in San Diego Sector’s area of responsibility. The response should include
10 any correspondence with the staff of U.S. Representatives Juan Vargas, Robert
11 Garcia or Delia Ramirez concerning the “gathering sites.”
- 12 4. All communications sent or received by CBP San Diego Sector employees
13 concerning a December 13, 2023 visit by DHS Office of Civil Rights and Civil
14 Liberties investigators to CBP “gathering sites” within the San Diego Sector’s
15 area of responsibility
- 16 5. All CBP policies, memoranda, procedures, musters, standards, operations orders,
17 reports, training material, or other documents concerning any “gathering site” in
18 the San Diego Sector’s area of responsibility.²⁴

19 36. Plaintiffs AOL and CGRS sought expedited processing of the Second FOIA
20 Request on the ground that it concerns “[a] matter of widespread and exceptional media interest
21 in which there exist possible questions about the government’s integrity which affect public
22 confidence.” 6 C.F.R. § 5.5(e)(1)(iv). In support of this assertion, Plaintiffs cited seventeen news
23 articles and reports about CBP’s “gathering sites.” Plaintiffs also referenced media reports
24 regarding concerns raised by community groups, state and local officials, and U.S.
25 Representatives Juan Vargas, Robert Garcia, and Delia Ramirez concerning the lack of
26 humanitarian aid and transparency at the sites.

27 37. Finally, Plaintiffs explained that the media has shown considerable interest in
28 both a proposed supplemental funding bill that would increase CBP funding and former
President Trump’s plans to use “giant camps” as part of his immigration policy if re-elected.
Plaintiffs emphasized that the controversy over the sites arose in the context of broader debates
regarding whether increased CBP funding is warranted given Border Patrol’s track record of
abuses and the potential future course of U.S. border policy.²⁵

²⁴ See Exhibit 2.

²⁵ See *id.*

1 38. CBP confirmed receipt of the Second FOIA Request and assigned it tracking
2 number CBP-FO-2024-032860.

3 39. To date, 60 business days have passed since CBP received the Second FOIA
4 Request, and CBP has yet to issue a determination with respect to that request.

5 40. CBP has not produced records responsive to the Second FOIA Request.

6 41. Defendant failed to provide Plaintiffs with the required response to the Second
7 FOIA Request within the times prescribed by the FOIA. *See* 5 U.S.C. § 552(a)(6)(A). Plaintiffs'
8 request remains pending.

9 42. Defendants' conduct violates the requirements of the FOIA and deprives
10 Plaintiffs of the opportunity to timely inform the public, humanitarian aid groups that provide
11 assistance at the sites, and directly impacted migrants about the federal government's current
12 treatment of noncitizens apprehended at or near the southern border.

13 **CLAIMS FOR RELIEF**

14 **COUNT I: Violation of 5 U.S.C. § 552(a)(2)**
15 **Failure to Make Records Available for Public Inspection**
(On Behalf of Plaintiff AOL)

16 43. Plaintiff AOL re-alleges and incorporates by reference all allegations in the
17 foregoing paragraphs as if fully set forth herein.

18 44. FOIA requires mandatory publication of certain agency records, including all
19 final agency opinions and orders, policies and interpretations not otherwise published in the
20 Federal Register, and administrative staff manuals and instructions. 5 U.S.C. § 552(a)(2)(A)-(C).

21 45. CBP has violated its obligation under the FOIA by failing to publish any agency
22 opinions, orders, policies, interpretations, administrative staff manuals, or instructions regarding
23 its operations at the "gathering sites" in its online FOIA reading room.

24 **COUNT II: Violation of 5 U.S.C. § 552(a)(6)(A)(i)**
25 **Failure to Make and Communicate Timely Determination**
(On Behalf of Plaintiffs AOL and CGRS)

26 46. Plaintiffs re-allege and incorporate by reference all allegations in the foregoing
27 paragraphs as if fully set forth herein.

1 47. Under the FOIA, CBP was required to notify Plaintiffs of its determination
2 whether to comply with the Second FOIA Request within twenty working days after receiving
3 the request. 5 U.S.C. § 552(a)(6)(A)(i).

4 48. CBP has violated its obligation under the FOIA by failing to make the required
5 determination and to communicate that determination to Plaintiffs within the designated
6 timeframe.

7 **COUNT III: Violation of 5 U.S.C. § 552(a)(3)(C)**
8 **Failure to Conduct Adequate Search**
 (On Behalf of Plaintiffs AOL and CGRS)

9 49. Plaintiffs re-allege and incorporate by reference all allegations in the foregoing
10 paragraphs as if fully set forth herein.

11 50. Under the FOIA, CBP is required to respond to a FOIA request by making
12 reasonable efforts to search for the records requested. 5 U.S.C. § 552(a)(3)(C).

13 51. CBP has violated its obligation under FOIA by failing to conduct an adequate
14 search for records responsive to the Second FOIA Request.

15 **COUNT IV: Violation of 5 U.S.C. § 552(a)(4)(B)**
16 **Unlawful Withholding of Agency Records**
 (On Behalf of Plaintiffs AOL and CGRS)

17 52. Plaintiffs re-allege and incorporate by reference all allegations in the foregoing
18 paragraphs as if fully set forth herein.

19 53. Under the FOIA, CBP may withhold records only under the exemptions
20 specifically enumerated in the FOIA. 5 U.S.C. § 552(a)(3)(C).

21 54. CBP has violated its obligation under FOIA by unlawfully withholding records
22 responsive to the Second FOIA Request other than those that FOIA has exempted.

23 **COUNT V: Violation of 5 U.S.C. § 552(a)(3)(A)**
24 **Failure to Make Records Promptly Available**
 (On Behalf of Plaintiffs AOL and CGRS)

25 55. Plaintiffs re-allege and incorporate by reference all allegations in the foregoing
26 paragraphs as if fully set forth herein.

27 56. CBP was obligated under 5 U.S.C. § 552(a)(3)(A) to promptly produce records
28 responsive to the Second FOIA Request.

1 57. Plaintiffs have a legal right to obtain such records, and no legal basis exists for
2 CBP's failure to disclose them.

3 58. CBP has violated its statutory obligation by failing to produce any records
4 responsive to the Second FOIA request.

5 **COUNT VI: Violation of 5 U.S.C. § 552(a)(6)(E)**
6 **Failure to Make Expedited Processing Determination**
(On Behalf of Plaintiffs AOL and CGRS)

7 59. Plaintiffs re-allege and incorporate by reference all allegations in the foregoing
8 paragraphs as if fully set forth herein.

9 60. CBP was required to make a determination regarding whether to provide
10 expedited processing within ten days after the date of the Second FOIA Request. 5 U.S.C. §
11 552(a)(6)(E)(ii)(I), (iii).

12 61. CBP violated its obligation under FOIA by failing to issue a timely determination
13 in response to Plaintiffs' request for expedited processing of the Second FOIA Request.

14 **REQUEST FOR RELIEF**

15 WHEREFORE, Plaintiffs respectfully request that this Court:

- 16 1. Assume jurisdiction over the matter;
- 17 2. Declare that CBP's failure to publish final agency opinions and orders, policies
18 and interpretations not otherwise published in the Federal Register, and administrative staff
19 manuals and instructions in response to the First FOIA Request violates FOIA. 5 U.S.C. §
20 552(a)(2)(A)-(C);
- 21 3. Order CBP to publish, in response to the First FOIA Request, final agency
22 opinions and orders, policies and interpretations not otherwise published in the Federal Register,
23 and administrative staff manuals and instructions concerning its operations at its "gathering
24 sites";
- 25 4. Order CBP to conduct a prompt and adequate search for all records responsive
26 to the Second FOIA Request in accordance with 5 U.S.C. § 552(a)(3)(C);
- 27 5. Declare that CBP's failure to timely produce the required determination
28 applicable to the Second FOIA Request violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i);

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Attorneys for Plaintiffs

**Pro hac vice application forthcoming*

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Exhibit 1

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October 5, 2023

FOIA request for ICE and CBP reading room records pertaining to outdoor immigrant detentions or holds

Dear Record Custodian,

Al Otro Lado is a binational nonprofit dedicated to providing legal services to immigrants. As part of its mission, AOL also seeks to encourage government transparency and accountability.

AOL seeks any and all non-exempt 5 U.S.C § 552(a)(2)(A)-(C) records explaining or describing ICE and CBP's practice of having immigrants remain outside without timely commencing or concluding immigration processing.

Under this recently adopted practice, CBP and ICE require recent immigrants to the United States to wait outside for immigration processing, sometimes for days at a times, without providing shelter or adequate food. For example, ICE and CBP are reported to be holding hundreds of immigrants at Jacumba Hot Springs, in California.¹ The immigrants are forced to live outside, relying on volunteer groups to provide food, shelter, and other necessities. After an indeterminate period of time, CBP and ICE take immigrants for immigration processing.

AOL seeks the policies underlying these practices.

5 U.S.C § 552(a)(2) requires CBP to make certain categories of public records available in its online reading room. These categories include:

(A) any “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.” 5 U.S.C § 552(a)(2).

(B) any “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;” *Id.*

¹ <https://www.kpbs.org/news/border-immigration/2023/09/19/customs-and-border-protection-holding-hundreds-of-migrants-unsheltered-near-jacumba-hot-springs>

(C) any “administrative staff manuals and instructions to staff that affect a member of the public.” *Id.*

Accordingly, under DHS regulatory rules, CBP “is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. . . . on an ongoing basis.” 6 CFR § 5.2.

At this time, neither CBP² nor ICE’s FOIA reading room contains records pertaining to the practices described above.³

As stated above, AOL seeks any and all non-exempt 5 U.S.C § 552(a)(2)(A)-(C) records explaining or describing ICE and CBP’s practice of having immigrants remain outside without timely commencing or concluding immigration processing.

This FOIA request may be satisfied either by timely making the records directly available to AOL, publicly posting the records as required by 5 U.S.C § 552(a)(2), or directing AOL to the relevant reading room records.

A failure to answer this letter will be understood as an admission that neither ICE nor CBP have any policies authorizing or explaining the above-described practices.

As (a)(2) requires these records be made public, no fee may be charged for producing these records, nor are they subject to the limitations incumbent upon an (a)(3) FOIA request.

Because this inquiry seeks (a)(2) records, typical FOIA reply times do not apply: the records sought must already be disclosed in the CBP reading room.

Sincerely,

Andrew Fels, Esq.

Attorney,

Al Otro Lado

² <https://www.cbp.gov/site-policy-notices/foia/reading-room>

³ <https://www.ice.gov/foia/library>

Exhibit 2



December 14, 2023

Via SecureRelease Portal
U.S. Customs and Border Protection
Freedom of Information Act Office

Re: FOIA Request Regarding CBP “Gathering Sites”

Al Otro Lado (“AOL”) and the Center for Gender and Refugee Studies (“CGRS”) submit this request for records to U.S. Customs and Border Protection (“CBP”) pursuant to the Freedom of Information Act (“FOIA”).

I. REQUEST

AOL and CGRS requests the following records:

1. All communications¹ sent or received by CBP² San Diego Sector employees concerning activities at “gathering sites”³ within the San Diego Sector’s area of responsibility. CBP may limit its search to communications sent or received between May 11, 2023 and the date that it conducts its search. It should search keywords, including but not limited to, “Jacumba”, “gathering site”, “gathering sites”, “waiting site”, “staging area”, “open-air detention”, “open air detention”, “wrist bands”, “wristbands”, “bracelets”, “AIS”, “Whiskey”, “Spooners Mesa”, “91x”, “O’Neill”, “Moon Valley”, “Willows”, “T177” and “Tower 177.” Suggested custodians include Mariza Marin, Patricia McGurk-Daniel, Kurtis Woods, Rjay Rippel, Joseph Filippi, Colin Lane and any other CBP San Diego Sector leadership.
2. All “daily updates” or “daily reports” for any “gathering site” in the San Diego Sector’s area of responsibility.

¹ The term “communications” means any written message sent or received on any platform including email, text message, Microsoft Outlook, WhatsApp, Signal, Wickr, or Skype. CBP should search both government issued and personal (do we mean “personal”?) devices of relevant custodians.

² The term “CBP” means CBP and its components including U.S. Border Patrol, Office of Field Operations, and Office of Congressional Affairs.

³ The term “gathering sites” refers to the areas in which migrants are directed to wait for CBP processing as CBP uses the term in media reports. See Jacob Aere, *Hundreds of migrants still detained in poor conditions near Jacumba Hot Springs*, KBPS Dec. 6, 2023, <https://www.kpbs.org/news/border-immigration/2023/10/06/hundreds-of-migrants-still-detained-in-poor-conditions-near-jacumba-hot-springs>; John Mone, *Asian migrants seeking asylum at US border face different obstacles*, Scripps News, Nov. 29, 2023, <https://scrippsnews.com/stories/asian-migrants-seeking-asylum-at-us-border-face-different-obstacles/>.

3. All communications sent or received by CBP’s Office of Congressional Affairs between May 1, 2023 and the date of the instant search concerning any “gathering site” in San Diego Sector’s area of responsibility. The response should include any correspondence with the staff of U.S. Representatives Juan Vargas, Robert Garcia or Delia Ramirez concerning the “gathering sites.”
4. All communications⁴ sent or received by CBP⁵ San Diego Sector employees concerning a December 13, 2023 visit by DHS Office of Civil Rights and Civil Liberties investigators to CBP “gathering sites”⁶ within the San Diego Sector’s area of responsibility. CBP may limit its search to communications sent or received between December 1, 2023 and December 22, 2023. It should search keywords, including but not limited to “rapid response team”, “CRCL”, “inspection”, “visit”, “Erika Pinheiro”,⁷ and “Eric Funn” Suggested custodians include Mariza Marin, Patricia McGurk-Daniel, and any other CBP employees working at the San Diego Border Patrol Campo and Boulevard stations on December 13, 2023.
5. All CBP policies, memoranda, procedures, musters, standards, operations orders, reports, training material, or other documents concerning any “gathering site” in the San Diego Sector’s area of responsibility.

II. REQUEST FOR EXPEDITED PROCESSING

This request qualifies for CBP’s expedited processing track as it seeks records concerning “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 6 C.F.R. § 5.5(e)(1)(iv). The public, the media, and Congress have shown a “widespread and exceptional” interest in CBP’s treatment of asylum seekers in San Diego County and the debate over whether CBP should receive funding increases at public expense.

For the past six months, community groups have raised concerns about the integrity of CBP’s treatment of asylum seekers at so-called “gathering sites” in San Diego County, and media outlets have repeatedly reported on those concerns.⁸ At least two asylum seekers have

⁴ The term “communications” means any written message sent or received on any platform including email, text message, Microsoft Outlook, WhatsApp, Signal, Wickr, or Skype. CBP should search both government issued and personal (do we mean “personal”?) devices of relevant custodians.

⁵ The term “CBP” means CBP and its components including U.S. Border Patrol, Office of Field Operations, and Office of Congressional Affairs.

⁶ The term “gathering sites” refers to the areas in which migrants are directed to wait for CBP processing as CBP uses the term in media reports. See Jacob Aere, *Hundreds of migrants still detained in poor conditions near Jacumba Hot Springs*, KBPS Dec. 6, 2023, <https://www.kpbs.org/news/border-immigration/2023/10/06/hundreds-of-migrants-still-detained-in-poor-conditions-near-jacumba-hot-springs>; John Mone, *Asian migrants seeking asylum at US border face different obstacles*, Scripps News, Nov. 29, 2023, <https://scrippsnews.com/stories/asian-migrants-seeking-asylum-at-us-border-face-different-obstacles/>.

⁷ Erika Pinheiro is the executive director of Al Otro Lado and was present for the December 13 CRCL visit.

⁸ See e.g. Jasmine Garsd, *Border Patrol sending migrants to unofficial camps in California’s desert, locals say*, NPR, Nov. 21, 2023, <https://www.npr.org/2023/11/21/1213597119/border-patrol-migrants-unofficial-camps-jacumba-california-desert>;

died at these sites.⁹ Asylum seekers and community groups describe a humanitarian disaster in which those at the sites are left without food, water, and shelter in frigid winter conditions and CBP agents tell asylum seekers that they will be deported if they attempt to leave.¹⁰ CBP, for its part, disclaims responsibility and claims that the asylum seekers are only at the sites because criminal organizations are putting them there.¹¹ Confusingly, one CBP officer described the asylum seekers at the Jacumba site as both not detained and not free to leave.¹² In response to widespread reporting, U.S. Representatives Juan Vargas, Robert Garcia, and Delia Ramirez have expressed their concern about the sites and continue to seek information from CBP about its operations there.¹³ State and local elected officials have also criticized the federal government for its treatment of asylum seekers in San Diego County and the lack of humanitarian aid at the Jacumba site.¹⁴

The media has also shown exceptional interest in the public debate over CBP funding levels. Immigrant rights advocates argue that increased CBP funding is unwarranted given the “long-standing history of impunity for abuses carried out by U.S. Border Patrol.”¹⁵ Congress is

Melissa Gomez, *Migrants struggle against the elements in San Diego’s open-air desert camps*, Los Angeles Times, Nov. 28, 2023,

<https://www.latimes.com/california/story/2023-11-28/migrants-struggle-against-elements-san-diego-desert-camp>;

Ciara Encinas, *San Diego Border Patrol Chief addresses migrants camping out near San Ysidro*, 10 News San Diego, Nov. 8, 2023,

<https://www.10news.com/news/local-news/san-diego-border-patrol-chief-addresses-migrants-camping-out-near-san-ysidro>; Pedro Rios, *UPDATE: AFSC U.S.-Mexico Border Program staff responds to Border Patrol’s open-air detention sites*, American Friends Service Committee, Oct. 2, 2023,

<https://afsc.org/newsroom/update-afsc-us-mexico-border-program-staff-responds-border-patrols-open-air-detention>

⁹ Dan Gooding, *Young Teen Migrant Dies Shortly After Crossing Southern US Border From Mexico*, The Messenger, Dec. 4, 2023,

<https://themessenger.com/news/young-teen-migrant-dies-shortly-after-crossing-southern-us-border-from-mexico>;

Gustavo Solis, *After migrant woman died in San Ysidro, aid workers say nothing has changed*, KBPS, Oct. 23, 2023,

<https://www.kpbs.org/news/border-immigration/2023/10/23/migrant-woman-died-san-ysidro-aid-workers-nothing-changed>.

¹⁰ See *supra* note 5.

¹¹ *Id.*; Women’s Refugee Commission, *People Seeking Asylum Confined Outside in Appalling Conditions: Findings and Recommendations from a Monitoring Visit to San Diego*, Nov. 21, 2023,

<https://www.womensrefugeecommission.org/research-resources/people-seeking-asylum-confined-outside-in-appalling-conditions-findings-and-recommendations-from-a-monitoring-visit-to-san-diego/>;

Kate Morrissey, *In letter to congressmembers, CBP denies holding migrants in custody between border fences in San Diego*, San Diego Tribune, Jul. 12, 2023,

<https://www.sandiegouniontribune.com/news/immigration/story/2023-07-12/letter-congressmembers-cbp-migrants-between-border-fences-san-diego>.

¹² See Tom K. Wong, *Lives in Danger: Seeking Asylum Against the Backdrop of Increased Border Enforcement*, U.S. Immigration Policy Center, May 16, 2023,

<https://usipc.ucsd.edu/publications/usipc-lives-in-danger.pdf?emci=4479c51d-9df3-ed11-907c-00224832eb73&emdi=29562f91-e9f3-ed11-907c-00224832eb73&ceid=8213949>.

¹³ *Id.*

¹⁴ See Solis, *supra* note 5; Justo Robles, Alejandra Reyes-Velarde and Wendy Fry, *Border Patrol dropped 42,000 migrants on San Diego streets. Now county, groups are seeking help*, California Divide, Dec. 4, 2023,

<https://calmatters.org/california-divide/2023/12/immigration-california-street-releases/>.

¹⁵ See Jesse Franzblau, *Analysis White House October 2023 Supplemental Funding Request*, National Immigrant Justice Center, Oct. 24, 2023,

<https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-10/NIJC%20Analysis-White-House-October-2023-Supplemental-Funding-Request.pdf>; see also Robert Moore, *Biden seeks \$14*

now debating whether to pass a supplemental funding bill that would fund an additional 1,600 Border Patrol employees and give raises to existing employees.¹⁶ Media coverage has intimately linked CBP activities in the camps to the ongoing debate over the supplemental funding bill.¹⁷

Finally, the media has shown considerable interest in the camps given former President Trump's plans to use "giant camps" as part of his immigration policy in the event of his reelection.¹⁸ As such, the public has raised significant concerns regarding the integrity of CBP operations. Prompt disclosure of the records sought in this request is vital to the public debate over CBP's treatment of asylum seekers, CBP funding levels, and future U.S. border policy.

III. REQUEST FOR FEE WAIVER

AOL requests that the agency waive all fees associated with this request as the records requested are "likely to contribute significantly to public understanding of the operations or activities of the government and [are] not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). As discussed in section II, the requested records will contribute significantly to the public's understanding of CBP activities at the "gathering sites."

AOL and CGRS do not seek these records for commercial reasons. AOL is a 501(c)(3) non-profit organization established to advocate for indigent refugees, migrants, and deportees in the U.S. and Mexico. AOL regularly provides information and analysis free of charge to the media, the general public, and international human rights monitoring bodies. Additionally, AOL staff regularly lectures at professional and academic conferences, and universities. AOL actively disseminates information about conditions on the U.S.-Mexico border through its various social media accounts, which have thousands of followers including many immigration reporters. AOL will analyze and share the information obtained through this FOIA request via its social media accounts and other publicly accessible fora at no cost to the public.

CGRS housed at the University of California Hastings College of the Law in San

billion in additional border, immigration funding, El Paso Matters, Oct. 20, 2023,

<https://elpasomatters.org/2023/10/20/biden-administration-supplemental-border-funding-request/>.

¹⁶See Ariana Figueroa, *Congress is haggling over border security: Where does it stand?*, Missouri Independent, Dec. 4, 2023,

<https://missouriindependent.com/2023/12/04/congress-is-haggling-over-border-security-where-does-it-stand/>; see

also Alexander Bolton, *Vulnerable Senate Democrats caught in crossfire over border security* The Hill, Nov. 3, 2023, <https://thehill.com/homenews/senate/4291081-vulnerable-senate-democrats-border-security/>.

¹⁷ See Mireya Villarreal, *et. al*, *Migrant encampments surging at border in Jacumba Hot Springs: Reporter's Notebook*, ABC News, Dec. 7, 2023,

[https://abcnews.go.com/US/migrant-encampments-surging-border-jacumba-hot-springs-reporters/story?id=1054248](https://abcnews.go.com/US/migrant-encampments-surging-border-jacumba-hot-springs-reporters/story?id=105424839)

39; Sarah Smith, *A crisis at the Mexico border felt in Ukraine*, BBC, Dec. 8, 2023,

<https://www.bbc.com/news/world-us-canada-67663844>.

¹⁸ See Charlie Savage, Maggie Haberman and Jonathan Swan, *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump's 2025 Immigration Plans*, The New York Times, Nov. 11, 2023,

<https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html>; Anita Snow, *Smugglers are*

bringing migrants to a remote Arizona border crossing, overwhelming US agents, The Associated Press, Dec. 10, 2023, <https://apnews.com/article/lukeville-arizona-border-crossing-closed-ae04e8c861a95e98dbfc8d49244cf092>;

Paula Ramon, *'A new normal': Migrants huddle in open-air camps on US border*, NBC News, Dec. 9, 2023,

https://www.nbcrightnow.com/national/a-new-normal-migrants-huddle-in-open-air-camps-on-us-border/article_d81a4354-7ef8-54c3-b259-f194d14ffcef.html.

Francisco, California, is dedicated to protecting the fundamental human rights of refugee women, children, LGBT individuals, and others who flee persecution in their home countries through the provision of expert technical assistance, training, impact litigation, policy development, research, and in-country fact-finding. Through its technical assistance program, CGRS each year advises hundreds of attorneys about asylum law and procedure and provides case materials such as country conditions evidence, expert declarations, sample briefs, and unpublished immigration decisions that CGRS collects, analyzes, and shares. In addition to providing technical assistance and mentorship that is tailored to individual cases at all levels, CGRS disseminates broadly applicable information on asylum topics through its website, <http://cgrs.uchastings.edu>, and social media, as well as other sources such as reports and practice advisories and through webinars and in-person trainings.

We appreciate your prompt attention to this request. In accordance with DHS regulations, we expect to receive a decision on our request for expedited processing within ten calendar days and a written determination as to our FOIA request within twenty business days. If you have any questions, do not hesitate to contact the undersigned counsel who represents AOL and CGRS for the purpose of this request.

Sincerely,

A handwritten signature in black ink, appearing to be 'Jeremy Jong', written over a horizontal line.

Jeremy Jong¹⁹
Staff Attorney
Al Otro Lado
(504) 475-6728
jeremy@alotrolado.org

¹⁹ Pursuant to 5 U.S.C. § 552(a)(6)(E)(6), I certify that the expedited processing information in section II, *supra*, is true and correct to the best of my knowledge and belief.