

Before the

**INTER-AMERICAN COMMISSION
HUMAN RIGHTS**

Family Members of Anastasio Hernández Rojas,
Petitioners

— v. —

United States
Respondent.

Case No. 14.042

**ADDITIONAL OBSERVATIONS ON MERITS
January 27, 2021**

Submitted on Behalf of the Petitioners by

Roxanna Altholz, Co-Director
International Human Rights Law Clinic
University of California, Berkeley, School of Law
489 Simon Hall
Berkeley, California 94720-7200
Tel: (510) 643-8781
Fax: (510) 643-4625
E-Mail: raltholz@law.berkeley.edu

Andrea Guerrero, Executive Director
Alliance San Diego
P.O. Box 12266
San Diego, CA 92112
Tel: (619) 269-1823
E-Mail: andrea@alliancesd.org

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I. SUMMARY OF ARGUMENT

On May 28, 2010, Customs and Border Protection (“CBP”) agents detained Anastasio Hernandez Rojas, a long-time resident of San Diego and father of five. He was taken to a detention center where an agent kicked Mr. Hernandez and reinjured a previously broken ankle. CBP agents denied Mr. Hernandez medical attention and the right to file a complaint against the agent who assaulted him, and they decided to deport him immediately. He was taken to a secure area for removal to Mexico where more than a dozen CBP agents punched, kicked, dragged, Tased, hogtied, and kneeled on the neck and body of the unarmed and injured detainee. Autopsy reports confirmed that Mr. Hernandez suffered extensive injuries while in custody, including bruising and abrasions on his face and body, five broken ribs, and hemorrhaging of internal organs and neck muscles. Mr. Hernandez died after suffering a heart attack, cardiac arrest, and brain damage. His death was ruled a homicide.

The United States failed to prevent and legally condoned CBP agents for their excessive use of force against Mr. Hernandez. Contrary to the protections established by the American Declaration, U.S. law and policy permits law enforcement to use force that is disproportionate and unnecessary for illegitimate purposes. United States law and CBP use of force policy do not require state agents to use the minimum amount of force necessary to achieve a legitimate objective. Nor does applicable law and policy require that CBP agents use a type of force that is proportionate to the threat posed by the person against whom force is used. U.S. law and CBP policy do not require border agents to exhaust available, less-harmful force alternatives, impose strict limitations on the use of lethal force against persons in custody, or require clear warning before an officer uses lethal force. U.S. law and CBP policy also permit the use of Tasers, a weapon described by numerous international bodies as a lethal force device, in wide-ranging circumstances that involve no serious threat to life or safety.

Moreover, the process used to investigate killings by federal agents lacks impartiality and independence and fails to guarantee the rights accorded to victims and their families by the American Declaration of the Rights and Duties of Man (“American Declaration”). The U.S. Constitution requires federal prosecutors to convene a federal grand jury to charge an individual for a federal crime. Grand jury proceedings are secret investigations managed by the prosecutors that rarely indict law enforcement officers for acts of violence. During the grand jury investigation of Mr. Hernandez’s death—which spanned approximately three years—Mr. Hernandez’s family members were not allowed to participate or informed of what evidence the grand jury was presented with, how evidence was evaluated, the outcome of the grand jury investigation, and the reasons for that outcome. Prosecutors also have failed to release the transcripts of the proceedings.

In addition to these structural obstacles to justice, state agents undermined efforts to clarify the facts about the extrajudicial killing of Anastasio Hernandez Rojas. CBP agents failed to notify local police of the incident, and instead acted quickly to disperse eyewitnesses from the scene and destroyed recordings taken by witnesses. Police investigators did not initiate the criminal investigation or interview the agents who used force against Mr. Hernandez until the day after the beating. Once the police investigation was underway, U.S. Border Patrol (“BP”) agents inserted themselves into every aspect of the homicide case although BP agents were the subject of the criminal investigation and did not have legal authority to investigate an in-custody death. The police investigation embraced uncritically the version of the incident provided by the agents involved. Police investigators interviewed only three of the dozens of civilian eyewitnesses of the incident.

Four internal agencies conducted administrative/disciplinary investigations—the U.S. Border Patrol Critical Incident Investigative Team (“CIIT”), the Department of Homeland Security Office of Inspector General (“DHS OIG”), Customs and Border Protection Office of Internal Affairs (“CBP

OIA”), and CBP Use of Force Review Board—but refused to share information with criminal investigators or provide Petitioners with access to their reports, methods, or evidence. Federal prosecutors also refused to provide Petitioners with information about the criminal investigation and failed to identify or interview key witnesses until two years after Mr. Hernandez’s death. Based on a biased and incomplete police investigation and despite video and audio evidence of the beating, prosecutors closed the criminal investigation on November 6, 2015, without pursuing homicide (murder or manslaughter), civil rights violations, or obstruction of justice criminal charges against the agents.

On March 30, 2016, the family members of Anastasio Hernandez Rojas¹ (“Petitioners”) filed a petition against the United States (“Petition”) before the Inter-American Commission on Human Rights (“Commission” or “Inter-American Commission”) alleging multiple, grave violations of the American Declaration on the Rights and Duties of Man. The Petitioners provided extensive evidence of the violations, including audio and video recordings of the incident, a copy of the approximately 700-paged police investigation, and depositions of medical experts and border agents involved in the torture of Mr. Hernandez taken in the course of civil litigation. Based on this voluminous factual record and an analysis of relevant laws, policies, and practices, Petitioners argued in the Petition that the United States is responsible for the following violations of the American Declaration:

(1) The United States violated the prohibition against torture and failed to satisfy its legal obligation to investigate the crime of torture in accordance with Articles I, XXV, and XXVI of the American Declaration. Petitioners submitted extensive evidence, including videos and audio recordings of state agents, that state agents, acting in their official capacity, tortured Anastasio Hernandez Rojas, an unarmed detainee who posed no imminent threat to the agents’ lives or safety. The federal agents kicked, punched, struck with batons, hogtied, electrocuted several times with a Taser gun, and placed the victim into positions that they knew limited his ability to breathe. Under the American Declaration, Petitioners argued that the cumulative effect of these intentional acts of mistreatment and the severity of individual suffering constituted torture. Petitioners observed that the victim’s extensive physical injuries were further evidence of the torture. Petitioners also argued that the United States failed to uphold its international obligations to investigate and punish federal agents who tortured Anastasio Hernandez Rojas. Current U.S. federal law does not criminalize torture committed within the United States, and thus the federal investigation of Mr. Hernandez’s homicide did not include the crime of torture.

(2) The United States arbitrarily deprived Anastasio Hernandez Rojas of his life in violation of Articles I and XXV of the American Declaration. The Inter-American Commission has examined the use of force by state agents at three distinct moments to determine whether the force used was excessive: preventive actions taken before the incident, actions accompanying the incident, and actions subsequent to the incident. Petitioners argued that the United States failed to comply with Inter-American use of force standards at each of these three moments. First, the United States failed to prevent the excessive use of force. U.S. law and CBP policy did not adequately regulate the use of force, including deadly force, or provide specific guidance or training on the use of Tasers. Second, federal agents applied illegal, unnecessary, and disproportional force against Anastasio Hernandez Rojas. Petitioners argued that there was no clear, non-retributive goal for using force against Mr.

¹ Roxanna Altholz, Co-Director of Berkeley Law’s International Human Rights Law Clinic, and Andrea Guerrero, Executive Director of Alliance San Diego, represent Petitioners: María Puga (Mr. Hernandez’s partner), María de la Luz Rojas (deceased) and Porfirio Hernandez (deceased) (Mr. Hernandez’s parents), Bernardo Hernandez Rojas and Martín Hernandez Rojas (Mr. Hernandez’s brothers), and Yeimi Judith Hernandez, Daisy Alejandra Hernandez, Daniel Hernandez and Daniela Hernandez (Mr. Hernandez’s children).

Hernandez. He was unarmed, in state custody, and handcuffed during much of the incident. The prolonged, brutal acts of mistreatment were unnecessary to control him and the level and type of force used against Mr. Hernandez was disproportionate. Third, the United States failed to appropriately or effectively respond to the unlawful use of force. Petitioners are unaware of criminal, administrative, or disciplinary action taken against any of the agents involved. To Petitioners' knowledge, all of the agents involved remain on active duty.

(3) The United States failed to conduct an exhaustive, timely, independent, or impartial investigation of his death, prosecute and punish those responsible, and provide full reparations in violation of Articles I and XVIII of the American Declaration. In cases involving extrajudicial killings by state agents, there is a heightened duty to investigate, prosecute, and punish. To this end, the Commission has held that "if a person was detained in good health conditions and subsequently died, the State has the obligation to provide a satisfactory and convincing explanation of what happened."² Petitioners argued that the United States not only failed to provide a "satisfactory and convincing" explanation but acted to impede the clarification of the circumstances surrounding the death, what happened, and who was involved. Petitioners submitted documentary evidence and eyewitness statements that prove the United States' failed to preserve physical evidence and interview witnesses, to ensure the independence of investigators, and to carry out an investigation in a reasonable amount of time.

(4) The United States failed to provide "the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them" and blocked Petitioners' participation in criminal proceedings in violation of Article XXVI of the American Declaration. Petitioners demonstrated that the United States denied them access to information about the investigations and those under investigation (for example, the United States concealed the identities of agents involved for over three years), blocked Petitioners' efforts to participate and provide input in the investigations, and failed to provide Petitioners full reparations. Instead, the United States cast aspersions on Mr. Hernandez's character and blamed the victim for his own death. The first and only time federal prosecutors proactively communicated and met with family members to provide information about the criminal investigation was more than five years after Mr. Hernandez's death when prosecutors decided to close the investigation without pursuing charges.

(5) The United States subjected Petitioners to severe and long-term emotional, psychological, and economic impacts and stigma in violation of Articles I and XXVI of the American Declaration. Petitioners demonstrated that Inter-American case law recognizes a legal presumption that serious violations of human rights harm the mental and moral integrity of the immediate family of the victims. Additionally, Petitioners described the feelings of frustration, helplessness, and anxiety that resulted from the brutality of the victim's death and failure to hold those responsible accountable.

(6) The United States denied Petitioners their right to equality before the law and subjected them to discriminatory treatment in violation of Articles I and II of the American Declaration. Petitioners underscored that the prohibition against discrimination extends to policies and practices that have discriminatory effects. The Inter-American Commission has recognized that undocumented migrants like Mr. Hernandez are subjected to extreme violence and denied access to an effective remedy in the United States and merit heightened protection. Petitioners argued that Mr. Hernandez's death and the impunity that shielded those responsible from accountability constitutes discrimination. Petitioners asserted that the violence and impunity at issue in this case are the direct result of the

² Inter-American Commission on Human Rights, Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human rights Committed during the Regime of Jean-Claude Duvalier, available at www.oas.org/en/iachr/docs/other/Haiti2011.asp.

United States' failure to protect the lives of undocumented migrants through preventative measures, including laws and procedures that effectively regulate use of force and ensure accountability.

On September 12, 2017, the United States responded to the Petition and requested that the Inter-American Commission dismiss the case.³ The United States did not contest the facts Petitioners provided related to Mr. Hernandez's detention, mistreatment, beating, Taser, and killing by U.S. border agents.⁴ Instead, the United States justified federal agents' unnecessary and disproportionate use of force by relying on a version of the incident fabricated by U.S. immigration authorities and embraced by criminal investigators and prosecutors that depicted Mr. Hernandez as a violent, drug fueled aggressor. The United States also argued that Mr. Hernandez Rojas's family received "adequate and effective remedies for the actions surrounding [his] death, in the form of significant monetary compensation[.]"⁵ and claimed that Petitioners are barred from bringing a petition before the Inter-American Commission because the Hernandez family "have [] obligated themselves under U.S. law not to further pursue the claims in the Petition against the United States."⁶ Lastly, the United States asserted that it was not bound by the American Declaration and urged the Inter-American Commission to dismiss the case.

On July 29, 2020, Petitioners were notified that the Inter-American Commission had issued its admissibility decision. The Inter-American Commission's admissibility report rejected the United States' arguments and established that the Petitioners had demonstrated *prima facie* human rights violations linked to the torture and killing of Anastasio Hernandez Rojas and admitted the Petition in relations to Articles I, II, XVIII, XXV, and XXVI of the American Declaration. On November 23, 2020, Petitioners filed a request for an extension to file additional observations on the merits of the case.

In accordance with Article 37(1) of the Rules of Procedure of the Inter-American Commission, Petitioners submit this brief with additional observations on the merits of Case 14.042. As highlighted above, the Petition argued that the United States committed multiple violations of the American Declaration based on an extensive factual record. The aim of this submission is to further develop the arguments stated in the Petition, introduce additional evidence of the violations alleged, and identify the measures of reparations, including the measures of truth and justice, satisfaction, non-repetition, and monetary compensation, that the United States must implement in accordance with its obligations under the American Declaration.

This submission develops the following points:

- i. The United States impeded an exhaustive investigation of Mr. Hernandez's death. Petitioners will provide additional information about the shortcomings of the police investigation, efforts by border agents to interfere with the criminal investigations, and the failures of administrative authorities to adequately investigate the case and respond to agents' misconduct. In support of these arguments, Petitioners submit statements by three former or active senior federal officials: the former Assistant Inspector General for Investigations at the Department of Homeland Security Office of Inspector General and current Deputy Director of the U.S. Department of Energy Office of Enterprise Assessments, John Edward Dupuy; the former Assistant Commissioner of Customs and Border Protection Internal Affairs Office, James F. Tomscheck; and the former Deputy Assistant Commissioner

³ Anastasio Hernandez Rojas and Family v. United States, Petition 524-16, Response by the United States, 4 (Sept. 2, 2017) (hereinafter "U.S. Resp.>").

⁴ Anastasio Hernandez Rojas and Family v. United States, Petition 524-16, Inter-Am. Comm'n H.R., Report No. 198/20, OEA/Ser.L/V/II, doc. 212 ¶ 6 (2020) (stating that the U.S. response to the petitioner "does not contest the facts of Mr. Hernandez's detention, mistreatment, beating, taser, and killing by US agents....").

⁵ U.S. Resp. at 4.

⁶ *Id.*

of Customs and Border Protection Internal Affairs Office, James Wong. Each have direct knowledge of the investigation of Mr. Hernandez's death.

ii. The United States has fostered violence and impunity against undocumented migrants by failing to enact laws and policies that regulate the unnecessary, disproportionate, and illegitimate use of force. U.S. law condones as "objectively reasonable" force that amounts to torture or excessive use of force under international standards. The deficiencies of U.S. law and policy contributed to United States' failure to prevent the acts of violence against Mr. Hernandez and virtually ensured that the agents would be shielded from accountability.

iii. The United States fostered secrecy, blocked participation by victims and their families, and failed to ensure an impartial and independent investigation through secret grand jury proceedings. In accordance with U.S. law, the grand jury investigation of Mr. Hernandez's death is essentially an impenetrable black box. Federal prosecutors foreclosed participation by Petitioners or access to information about how or what conclusions were reached by the grand jurors.

iv. The United States has failed to provide full reparations to Petitioners. In accordance with Inter-American standards, reparations must include measures of truth and justice, satisfaction, non-repetition, rehabilitation, and compensation. Petitioners are entitled to "adequate, effective and prompt reparation" which should be "proportional to the gravity of the violations and the harm suffered." Based on interviews with family members, Petitioners will describe the harms suffered and identify the measures of reparations the United States must adopt to address the torture and death of Anastasio Hernandez Rojas, the persistence of impunity in this case, and the violations of his family rights.

Based on the facts and arguments submitted in this brief, in addition to the allegations presented by the Petition and other pleadings, Petitioners respectfully request that the Inter-Commission on Human Rights find that the United States has violated Petitioners' rights enshrined in Articles I, II, XVIII, XXV, and XXVI of the American Declaration and instruct the United States to:

1. Conduct an exhaustive, timely, independent, and impartial investigation of Anastasio Hernandez Rojas's death and the obstruction of justice that followed;
2. Disclose publicly all official records related to prior investigations, including investigations conducted by the grand jury, the U.S. Border Patrol Critical Incident Investigative Team, the Department of Homeland Security Office of Inspector General, Customs and Border Protection Office of Internal Affairs, and CBP Use of Force Review Board;
3. Amend use of force laws and policies and relevant law enforcement trainings to conform to its obligations under the American Declaration;
4. Enact legislation to criminalize torture committed within the United States;
5. Enact legislation that prohibits U.S. Border Patrol from investigating incidents involving death or serious injury, creates a special prosecutorial unit within the Department of Justice to investigate criminal matters involving federal border agents, and eliminates Custom and Border Protection's statutory authority to investigate criminal matters;
6. Reform grand jury proceedings to allow participation by victims and their next-of-kin, require public disclosure of grand jury transcripts in cases involving law enforcement violence, and ensure the impartiality and independence of prosecutors;
7. Publicly acknowledge and apologize for its responsibility for violating Anastasio Hernandez and his family's human rights and affirm its commitment to respecting and protecting the rights of undocumented Mexican migrants;
8. Provide health and educational assistance to Petitioners;
9. Compensate Petitioners for moral damages inflicted by the state's violations; and

10. Compensate Petitioners for the damage to their life plans.

II. THE UNITED STATES SHIELDED STATE AGENTS FROM RESPONSIBILITY FOR THE KILLING OF ANASTASIO HERNANDEZ ROJAS BY DISREGARDING OR DESTROYING EVIDENCE AND CONDUCTING AN INEFFECTIVE INVESTIGATION.

This section examines the facts—the omissions and acts by state agents—that contributed to impunity in this case. The section discusses in detail the procedures and standards used by federal law enforcement agencies to investigate use of force incidents and how the investigation of Mr. Hernandez departed from that process. U.S. border agents tortured and killed Mr. Hernandez. Border agents worked quickly to fabricate an alternative narrative that depicted Mr. Hernandez as a drug fueled aggressor with superstrength and justified the violent response of border agents. Police, investigators, border agents, and prosecutors embraced and stuck to this false narrative for more than a decade.

The only independent judicial review of the case reached a very different conclusion. In 2011, Anastasio Hernandez Rojas’s children filed a civil suit in the United States District Court for the Southern District of California, alleging that federal agents caused Mr. Hernandez’s death in violation of his constitutional rights. In denying the federal agents’ argument that the civil suit brought by Mr. Hernandez’s children should be dismissed, the district court noted that “[t]he officers all allege that Anastasio was an out-of-control individual who was, at all times, violent and unresponsive to their commands[.]”⁷ The court concluded that witness testimony and the video recordings “strongly counter the officers’ testimony during the height of the altercation.”⁸ Moreover, the court asserted that “[t]he sheer number of officers available at the scene demonstrates rather strongly that there was no objectively reasonable threat to the safety of anyone other than Anastasio.”⁹

A. There is ample evidence that U.S. border agents tortured and killed Anastasio Hernandez Rojas.

Anastasio Hernandez Rojas was born in the city of San Luis Potosi, Mexico, and lived his entire adult life in San Diego, California.¹⁰ At twenty-one, Mr. Hernandez met Maria de Jesus Puga Moran in San Diego where each of his five children, Yeimi Judith (born March 20, 1990), Daisy Alejandra (born April 16, 1992), Fabian Anastasio (born September 19, 1998), and the twins Daniel and Daniela (born March 29, 2006), were also born.¹¹

On May 10, 2010, Mexican Mother’s Day, Mr. Hernandez was arrested for allegedly stealing grocery items for his family, detained, and later removed from the United States to Mexico.¹² On May 28, 2010, he attempted to rejoin his family in San Diego by re-entering the United States with his brother, Pedro Hernandez Rojas.¹³ CBP agents apprehended Mr. Hernandez and Pedro and transported them to the Chula Vista Border Patrol Facility and Detention Center (“Chula Vista”).¹⁴ At approximately 19:04,¹⁵ Anastasio Hernandez Rojas arrived at Chula Vista and Border Patrol (BP)

⁷ Estate of Hernandez-Rojas ex rel. Hernandez v. United States, 62 F. Supp. 3d 1169, 1182 (S.D. Cal. 2014) (Exh. A).

⁸ *Id.*

⁹ *Id.*

¹⁰ Third Amended Complaint (2012), Petition, Exh. 1 at 5.

¹¹ *Id.*

¹² San Diego Regional Arrest Report (2010), Petition, Exh. 2 at 5.

¹³ Motion for Summary Judgment by Customs and Border Protection Officer S (2013), Petition, Exh. 3 at 11.

¹⁴ Declaration of Border Patrol Agent Jose Galvan (2013), Petition, Exh. 4.

¹⁵ Chula Vista Camera Video (2010), Petition, Exh. 8; Chula Vista Camera Video with Outline of Ducoing (2010), Petition,

agent Gabriel Ducoing directed Mr. Hernandez to put the water he was carrying into a trashcan.¹⁶ When Mr. Hernandez poured the water out of the jug into the trashcan, Ducoing became angry.¹⁷ He slapped the water jug out of Mr. Hernandez's hands, pushed Anastasio against a wall, and repeatedly kicked his ankles apart, reinjuring Mr. Hernandez's right ankle which had been broken years before and was held together by a metal screw.¹⁸ Mr. Hernandez cried out in pain and asked, "Why are you doing this to us? Why are you hitting us? We haven't done anything wrong."¹⁹ Ducoing retorted, "You don't want to be beaten?"²⁰ Based on video recordings and sworn depositions by officers, agents ignored Mr. Hernandez's repeated requests for medical care.²¹

Almost two hours later, the Facility Supervisor BP Agent Ismael Finn arranged for Mr. Hernandez to be transported to Mexico immediately because according to agents, he was not behaving like a "typical alien," but was "vocal and argumentative," looked directly at the agents, and complained about the agents' mistreatment.²² According to video footage, at approximately 20:30,²³ on May 28, 2010, Finn instructed BP agent Ducoing, the same agent Mr. Hernandez had complained about for injuring his ankle, and CBP Agent Philip Krasielwicz to transport Mr. Hernandez in handcuffs to the Whiskey 2 area, an enclosed and secured area at the San Ysidro Port of Entry, for removal to Mexico.²⁴ Video footage shows the agents handcuffed Mr. Hernandez who limped as he walked toward a hallway.²⁵ Mr. Hernandez's brother Pedro, with whom he was detained, was not transported to the border and remained at Chula Vista.

Once at Whiskey 2, at least eight agents²⁶ from three different agencies—U.S. Border Patrol, Customs and Border Protection, and Immigration and Customs Enforcement (ICE)—deployed force against Mr. Hernandez, severely beating him and Tasing him several times as at least nine additional agents watched.²⁷ At least ten agents acted to conceal or destroy evidence by dispersing civilian eyewitnesses and erasing images and video recordings.²⁸

¹⁶ Transcript of Interview of Pedro Hernandez (2010), Petition, Exh. 7 at 15.

¹⁷ *Id.* Chula Vista Camera Video (2010), Petition, Exh. 8; Chula Vista Camera Video with Outline of Ducoing (2010), Petition, Exh. 9.

¹⁸ Third Amended Complaint (2012), Petition, Exh. 1 at 7.

¹⁹ Transcript of Interview of Pedro Hernandez (2010), Petition, Exh. 7 at 15.

²⁰ *Id.*

²¹ Third Amended Complaint (2012), Petition, Exh. 1 at 8.

²² Declaration of Border Patrol Agent Jose Galvan (2013), Petition, Exh. 4 at ¶¶ 6-8; Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment (2013), Petition, Exh. 10 at 18, 90; Transcript of Sandra Cardenas SDPD Audio Interview (2010), Petition, Exh. 11 at 11-12.

²³ Chula Vista Camera Video, Petition, Exh. 8.

²⁴ Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment (2013), Petition, Exh. 10 at 30.

²⁵ Chula Vista Camera Video, Petition, Exh. 8.

²⁶ The following agents admitted to police detectives that they used physical force against Anastasio Hernandez Rojas on May 28, 2010: Border Patrol (BP) Agent Gabriel Ducoing, BP Agent Philip Krasielwicz, BP Agent Derrick Llewellyn, Immigration and Customs Enforcement (ICE) Agent Andre T. Piligino, ICE Agent Harinzo Narainesingh, Customs and Border Protection (CBP) Officer Alan Robert Boutwell, CBP Officer Kurt R. Sauer, and CBO Officer Jerry Vales. *See* San Diego Police Department Investigation (2010), Petition, Exh. 43 at 139-41 (Vales), 185-87 (Boutwell), 219-22 (Ducoing), 261-67 (Krasielwicz), 269-71 (Llewellyn), 285-90 (Narainesingh), 305-08 (Piligino), 322-25 (Sauer).

²⁷ The following agents, including four supervisors, admitted to police detectives that they were present while Anastasio Hernandez Rojas was tortured: Supervisory BP Agent Edward C. Caliri, Supervisory BP Agent Guillermo Avila, Supervisory BP Agent Ramon DeJesus, CBP Supervisor Robert Petrin, BP Agent Scott Carlson, CBP Officer Joseph Arcia, CBP Officer Benjamin Michael Brown, CBP Officer Paula Sable, and CBP Officer Ernest Kalnas. *See id.* at 167-68 (Arcia), 189 (Brown), 192-94 (Caliri), 173-75 (Avila), 199-204 (Carlson), 212-15 (DeJesus), 254-57 (Kalnas), 302-04 (Petrin), 199-204 (Carlson), 317-19 (Sable).

²⁸ Several agents admitted to police detectives that they acted to disperse civil eyewitnesses or erased images and video recordings. A group of Paragon security officers who are assigned to assist U.S. Border Patrol and Customs and Border Protection Officers with pedestrian security at the border, responded to a radio call from a CBP officer to clear the bridge. These Paragon security officers include Edgar Tamayo Asuncion, Rhic Roberto Minas, Mitchel Falcon, and Stephen Robinson Guevara. In addition, Supervisory BP Agent Ramon DeJesus, CBP Supervisor Robert Petrin, CBP Officer Shawn R. Alves, CBP Officer Victoria Guzman, CBP Officer Heather Ramos, and CBP Officer Ernest Kalnas dispersed witnesses and/or destroyed evidence. *See id.* at 160-161 (Alves), 164-165

In reviewing the statements made by agents to the police and during depositions, the video and audio evidence, and statements by Mexican officials and civilian eyewitnesses, the following timeline emerges:

(1) BP agent Ducoing and CBP Agent Krasielwicz transported Mr. Hernandez in an unmarked vehicle from Chula Vista to Whiskey 2, a secure and restricted area.²⁹ Once at Whiskey 2, federal agents escalated their violent assault on Mr. Hernandez. They claimed that Mr. Hernandez became “antsy,” “nervous” and “combative” when they removed his handcuffs and began to walk him toward the gate into Mexico.³⁰ According to the agents’ statements, ICE agents Andre Piligrino and Harinzo Narainesingh observed the situation and used retractable steel batons to strike Mr. Hernandez. The four agents pinned Mr. Hernandez to the ground and handcuffed him.³¹ BP Agent Derrick Llewellyn then joined the officers.³² Five agents immobilized Mr. Hernandez by pressing him facedown into the pavement, holding him by the legs, the waist, and the side.³³

Mr. Hernandez’s cries drew the attention of passersby and a group of witnesses who gathered on a pedestrian bridge that overlooked the Whiskey 2 area. From this vantage point, witnesses used cameras and cell phones to record the incident.³⁴ At 21:04, a witness alerted a Mexican consulate official working nearby that border agents were “hitting a person who is Latino.”³⁵ At 21:05, BP Agent Llewellyn requested that Supervisory BP Agent Guillermo Avila come to Whiskey 2.³⁶

A civilian eyewitness walking across the pedestrian bridge that overlooked Whiskey 2 told police investigators that he first heard Mr. Hernandez yelling for help and then saw “three officials and the person on the ground ... handcuffed and faced down. One official [had] his knee on his neck. Another official [had] his knee on his back and [was] hitting him hard enough to break his ribs so he was yelling for help.”³⁷

The same witness explained that from his vantage point he “could see clearly when an officer kicked [Mr. Hernandez], when they had his neck, and when they hit him in the back. They probably hit him about 10 times. It was three officers that were hitting him.”³⁸ The witness stated that officers punched, hit, and kicked Mr. Hernandez while other officers tried to block the view of passing witnesses.³⁹

A second civilian eyewitness heard Mr. Hernandez yelling for help and observed the victim laying facedown.⁴⁰ He witnessed two civilian agents in plainclothes (BP agents Ducoing and Krasielwicz) and three agents in uniform (Pilgrino, Narainesingh, and Llewellyn).⁴¹ According to this witness, Mr. Hernandez “was on the ground and one of the three agents in uniform had his knee on

(Tamayo Asuncion), 212-215 (DeJesus), 223-224 (Falcon), 241-242 (Guevara), 243-245 (Guzman), 254-257 (Kaldas), 281-282 (Minas), 302-304 (Petrin), 312-314 (Ramon).

²⁹ Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment (2013), Petition, Exh. 10 at 30.

³⁰ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 16.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 17; Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment (2013), Petition, Exh. 10 at 6, 146.

³⁴ Photograph of Whiskey 2 area (2011), Petition, Exh. 15.

³⁵ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 181.

³⁶ *Id.* at 16, 489.

³⁷ *Id.* at 238.

³⁸ *Id.* at 239.

³⁹ *Id.*

⁴⁰ *Id.* at 293.

⁴¹ *Id.* at 296-97.

[Mr. Hernandez's] back and the other had his knee on his neck."⁴² The witness stated:

three law enforcement guys on him and then one of them started punching [Mr. Hernandez] repeatedly in the ribs. There would be 10 to 15 seconds of punching, they would stop, and then they would start again. More than one person punched [Mr. Hernandez] in the ribs. I could see that [Mr. Hernandez] was handcuffed behind his back while they were hitting and sitting on him.⁴³

The witness also noticed that Mr. Hernandez "was in handcuffs lying down. He wasn't resisting and wasn't fighting at all."⁴⁴ The same witness then began to video record Mr. Hernandez's cries for help as he was beaten:

[Mr. Hernandez] "Que les hago?" (What did I do?)
[Mr. Hernandez] "Ayudenme." (Help me)
[Mr. Hernandez] "Ah. No! No! Ayuda! Ayúdenme! Ya! Por favor! Señores ayúdenme! Ay, ay, ay." (Ah. No! No! Help! Help me! Please! People help me! Ay, ay, ay.)
[Male's voice] "Stop resisting"
[Mr. Hernandez] "Ayuden me por favor!" (Help me please!)
[Mr. Hernandez] "Me tratan como un animal" "Ah, ah, ah. No. Ayuda. No! Ay ay." ("You're treating me like an animal") ("Ah, ah, ah. No. Help. No! Ay ay.")
[Female voice] "Ya dejenlo!" (Leave him alone!)
[Mr. Hernandez] "No!"
[Female voice] "Hay, esta madre!" (Damn, this shit!)
[Mr. Hernandez] "No. No. No. Ay! No. No! Quitenmelo! Mama! Ay! No!" (No. No. No. Oh! No. No! Take him off me! Mother! Ay! No! ").⁴⁵

On the same video recording, at least one witness can be heard yelling at the officers "Why are you guys using excessive force on him? He is not resisting!"⁴⁶

(2) Supervisory BP Agent Avila then arrived to the scene with a marked Border Patrol vehicle equipped with a cage for detainee transport. Supervisory BP Agent Edward C. Caliri and BP Agent Scott Carlson also arrived on the scene in all-terrain vehicles at approximately the same time.⁴⁷ There are now eight agents present. Mr. Hernandez is handcuffed in the prone position on the ground with several agents on top of him.⁴⁸ According to ICE officer Piligrino:

all agents assisted Mr. Rojas-Hernandez to his feet; however, Mr. Rojas-Hernandez still continued fighting. Once all agents escorted Mr. Rojas-Hernandez to the caged Border Patrol vehicle, all agents attempted to place Mr. Rojas-Hernandez in the caged section of the vehicle; however Mr. Rojas Hernandez struck the vehicle's back passenger window with his head and kicked the door nullifying our attempt[] to place him in the

⁴² *Id.* at 297.

⁴³ *Id.* at 293.

⁴⁴ *Id.* at 297.

⁴⁵ Transcripts of Humberto Navarrete's Videos (2010), Petition, Ex. 21.

⁴⁶ *Id.* See also Navarrete's Videos, Petition Exh. 22.

⁴⁷ San Diego Police Department Investigation (2010), Petition Exh. 43 at 199-200.

⁴⁸ *Id.* at 192, 201.

vehicle; it was at this moment all restraining agents took Mr. Rojas-Hernandez to the ground and put him in the prone position.⁴⁹

A civilian eyewitness saw “a plainclothes officer” who “was wearing light colored jeans.”⁵⁰ CBP Agent Krasielwicz was wearing light colored jeans the day of the incident. According to this witness, the agent “went directly over to [Mr. Hernandez] and kicked him. He kicked [Mr. Hernandez] twice on his right side around his upper torso area. The kick was hard, like a soccer kick.”⁵¹

The witness stated that the agents noticed him filming and picked up and moved Mr. Hernandez to “behind one of their cars in a darker area. I think they moved him so we couldn’t see what was going on.”⁵²

Similarly, a Mexican consulate official told police investigators that agents “kept hitting” Mr. Hernandez and “kept hitting his upper body,” and Mr. Hernandez “was being kicked” by three officers.⁵³

According to the agents’ statements, the agents held Mr. Hernandez on the ground in the prone position for approximately 20 minutes. None of the agents said they hit or kicked Mr. Hernandez, except twice with a baton.⁵⁴ The agents claimed that Mr. Hernandez attempted to injure himself by rubbing his face on the concrete and hitting his head against the glass of the vehicle.⁵⁵ An autopsy of Mr. Hernandez, however, found several fractures of his ribs⁵⁶ and “extensive hemorrhage extending deep into the muscle layer” of his upper back and also hemorrhaging of his neck muscles.⁵⁷

(3) CBP officers Jerry Vales, Joseph Arcia, Benjamin Michael Brown, and Paula Sable arrived at the scene.⁵⁸ CBP Officer Vales deployed his Taser against Mr. Hernandez, who is handcuffed on his stomach on the ground, four times in quick succession, waiting as little as one and a maximum of ten seconds between shocks. At 21:18:31, CBP officer Vales shocked Mr. Hernandez with the Taser for the first time (duration 5 seconds).⁵⁹ After the first Taser shock, CBP Agents Alan Boutwell, Kurt Sauer, and Ernest Kalnas arrived on the scene.⁶⁰ At 21:18:41, CBP officer Vales shocked Mr. Hernandez a second time (duration 5 seconds); at 21:18:56, he shocked Mr. Hernandez a third time (duration 13 seconds); and at 21:19:10, he shocked Mr. Hernandez for a fourth time.⁶¹ For the final shock, the agent set the Taser X26 to “drive stun” mode and applied it directly to Mr. Hernandez’s chest, rather than through the darts, which caused Mr. Hernandez to convulse until the Taser was removed.⁶² Border Patrol Agent Krasielwicz then removed Mr. Hernandez’s pants.⁶³ CBP officer Boutwell then grabbed, crossed, and placed Mr. Hernandez’s legs in restraints and zip-tied his

⁴⁹ *Id.* at 554-55.

⁵⁰ *Id.* at 293.

⁵¹ *Id.* at 298. *See* Navarrete’s Videos, Petition, Exh. 22 at 2:12-2:20.

⁵² San Diego Police Department Investigation (2010), Petition, Exh. 43 at 293.

⁵³ *Id.* at 181.

⁵⁴ *See e.g., id.* at 220, 265.

⁵⁵ *Id.* at 307.

⁵⁶ Marvin Pietruska Autopsy (2010), Petition, Exh. 27 at 2.

⁵⁷ *Id.* at 13.

⁵⁸ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 140, 167, 189, 318, 323.

⁵⁹ *Id.* at 69.

⁶⁰ *Id.* at 186, 255, 323.

⁶¹ *Id.* at 69.

⁶² Transcript of Videotaped Deposition of Guillermo Avila (2013), Petition, Exh. 19 at 40:1-25; San Diego Police Department Investigation (2010), Petition Exh. 43 at 167.

⁶³ Enhanced Videos Taken by Ashley Young, Exh. B.

legs to his already handcuffed hands.⁶⁴ Still face down in the prone position, now handcuffed and bound, Mr. Hernandez became motionless.⁶⁵

(4) While Mr. Hernandez was Tased, there were at least seventeen agents present, including four supervisors.⁶⁶ In their statements to police, agents claimed that Mr. Hernandez Rojas rolled around and tried to kick CBP officer Vales several times.⁶⁷ Three BP agents, Ducoing, Krasielwicz, and Llewellyn, claimed that Mr. Hernandez tried to stand up after he was Tased.⁶⁸

A video recording by an eyewitness tells a very different story. A video recorded Mr. Hernandez screaming in pain before CBP officer Vales shocked Mr. Hernandez multiple times with a Taser.⁶⁹ He was laying in the fetal position with his hands handcuffed behind his back and not moving encircled by more than a dozen agents.⁷⁰ Nevertheless, CBP officer Vales yelled, “Quit resisting! Quit resisting!” and then administered multiple Taser X26 shocks.⁷¹ The video also recorded agents screaming at civilian eyewitnesses to “keep on walking.”⁷² At no point in the video, does Mr. Hernandez kick or strike Agent Vales or attempt to stand up.

None of the agents, including CBP Officer Vales who claimed to have been kicked several times by Mr. Hernandez, had any physical sign of injury.

A civilian eyewitness stated that at this point “20 officers” were on scene. “I can see very well. [Mr. Hernandez] started rolling and all of them began circling and hitting him.”⁷³ An autopsy of Mr. Hernandez noted that the extensive injuries to his ribs and back “would cause significant pain and restriction of muscle movement and would restrict respirations. It reflects a severe degree of trauma....”⁷⁴

(5) After the final administration of the Taser, officers swarmed Mr. Hernandez and again pressed him facedown with knees on his head and in his back.⁷⁵ A CBP Supervisor instructed border agents “to stand around and create a wall,” blocking civilian eyewitnesses’ view.⁷⁶ Video shows a flashlight illuminating the scene with Mr. Hernandez on the ground facedown and the legs of an officer kneeling on his head and neck.⁷⁷ Officers nudged him with their feet but Mr. Hernandez did not move.⁷⁸ Officers waited approximately seven minutes after calling 911 before beginning CPR.⁷⁹ An ambulance arrived at the scene at approximately 21:35.⁸⁰

⁶⁴ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 17; Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment, Petition, Exh. 10 at 51.

⁶⁵ San Diego Police Department Investigation (2010), Petition Exh. 43 at 167 (Arcia), 318-19 (Sable).

⁶⁶ The four supervisors who told police detectives that they were present while Anastasio Hernandez Rojas was tortured, include Supervisory BP Agent Edward C. Caliri, Supervisory BP Agent Guillermo Avila, Supervisory BP Agent Ramon DeJesus, and CBP Supervisor Robert Petrin. *See id.* at 192-94 (Caliri), 173-75 (Avila), 199-204 (Carlson), 212-15 (DeJesus), and 302-04 (Petrin).

⁶⁷ *See e.g., id.* at 167 (Arcia), 174-175 (Avila), 186 (Boutwell).

⁶⁸ *Id.* at 221 (Ducoing), 266 (Krasielwicz), 272 (Llewellyn).

⁶⁹ Navarrete’s Videos, Petition, Exh. 22.

⁷⁰ Videos Taken by Ashley Young, Petition, Exh. 17; Enhanced Videos Taken by Ashley Young, Exh. B.

⁷¹ *Id.*

⁷² Videos Taken by Ashley Young, Petition, Exh. 17.

⁷³ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 239.

⁷⁴ Marvin Pietruska Autopsy (2010), Petition, Exh. 27 at 13.

⁷⁵ Transcript of Videotaped Deposition of Alan R. Boutwell (2012), Petition, Exh. 23 at 81:24-87:25; Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment (2013), Petition, Exh. 10 at 9.

⁷⁶ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 303.

⁷⁷ Videos Taken by Ashley Young, Petition, Exh. 17 at 00:01-00:11.

⁷⁸ Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment (2013), Petition, Exh. 10 at 57-58.

⁷⁹ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 341, 412, 413; Transcript of Videotaped Deposition of Kurt R. Sauer (2012), Petition, Exh. 24 at 62:8-13.

⁸⁰ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 550.

(6) After administering the fourth and final shock, at approximately 21:19:10,⁸¹ CBP Agent Vales realized that members of the public were “recording video and taking photos from the pedestrian bridge” overlooking Whiskey 2.⁸² Dozens of civilian eyewitnesses had gathered on the pedestrian bridge overlooking Whiskey 2.⁸³ The agent radioed to other officers on the scene and called for an agent “to go over there and apprehend [the witnesses], stop them from getting those photos.”⁸⁴ CBP Supervisor Ramon DeJesus radioed Paragon Systems Security.⁸⁵

CBP agents, including a supervisor, and Paragon Systems Security officers, who were assigned to assist BP and CBP agents on pedestrian security, confiscated phones, erased pictures and videos, and dispersed witnesses. Several Paragon security officers responded to the “request over the radio from Customs and Border Protection [] to clear the pedestrian bridge.”⁸⁶ The Paragon security officers told police investigators that for “30-45 minutes,”⁸⁷ “they “clear[ed] all the “looky lou” pedestrians from the [] bridge,”⁸⁸ “were trying to get the pedestrians to keep moving,”⁸⁹ and “we got the people moving along....”⁹⁰ Meanwhile, federal agents seized witnesses’ cellphones and deleted audio, video, and photographic evidence.⁹¹ One CBP officer told civilian eyewitnesses “to put their cell phones away and keep moving.”⁹² Two CBP officers worked to clear the area.⁹³ Supervisory CBP DeJesus and CBP Officer Kalnas told police investigators that they stopped “a female” who “had taken a photo with their camera phone” and “erased the photo.”⁹⁴ Unknown to the involved agents at the time, two eyewitnesses had been able to preserve recordings of the incident that showed federal agents beating and Tasing a subdued, unarmed civilian begging for mercy.⁹⁵

These actions by border agents deviated from CBP policy⁹⁶ and standard practice. According to former Deputy Assistant Commissioner of Customs and Border Protection Internal Affairs Office, James Wong:

[I] find it troubling that BP agents erased eye-witnesses video footage taken of the beating of Mr. Hernandez Rojas from the pedestrian footbridge. It is protocol to secure the scene after an incident like this. It is not protocol to delete evidence taken by onlookers. It may have been proper for these videos to be copied and preserved by

⁸¹ *Id.* at 95.

⁸² Interview of Jerry Vales (2010), Petition, Exh. 39 at 8.

⁸³ See San Diego Police Department Investigation (2010), Petition, Exh. 43 at 160 (“The people were bunching up.... I saw some people with their cell phones out recording something.”), 173 (“[T]here were more than 50 people going south. Suddenly, the whole crowd of people just stopped and they were yelling back....”), 180 (“8 to 10” people on the Mexican side watching through the fence), 207 (“There were a lot of people there watching this.”), 230 (observed approximately 30 witnesses).

⁸⁴ *Id.*

⁸⁵ *Id.* at 214.

⁸⁶ *Id.* at 281-82.

⁸⁷ *Id.*

⁸⁸ *Id.* at 223.

⁸⁹ *Id.* at 164.

⁹⁰ *Id.* at 164, 223, 241 282.

⁹¹ Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment (2013), Petition, Exh. 10 at 53.

⁹² San Diego Police Department Investigation (2010), Petition, Exh. 43 at 161.

⁹³ *Id.* at 244-245 (CBP Officer Guzman), 313 (CBP Officer Ramos).

⁹⁴ *Id.* at 214, 255.

⁹⁵ One of the videos was filmed by Humberto Navarette who was with two friends who also witnessed the incident. One of his friends, Sergio Gonzalez-Gomez, told police investigators that “[o]ne of the officers said to take the video but nobody got it. They told us we couldn’t leave, but we did.” *Id.* at 239.

⁹⁶ U.S. CUSTOMS AND BORDER PROTECTION OFFICE OF TRAINING AND DEVELOPMENT, USE OF FORCE POLICY HANDBOOK 22 (2010) [hereinafter 2010 USE OF FORCE POLICY HANDBOOK] (Exh. C).

Border Patrol. However, by destroying the videos, agents tampered with evidence and should have been prosecuted for that conduct.⁹⁷

When Mr. Hernandez arrived by ambulance to Sharp Chula Vista Hospital at 21:59,⁹⁸ physicians determined that his brain had been deprived of oxygen for eight minutes as a result of a heart attack he suffered at some point during the beating and Tasing.⁹⁹ Mr. Hernandez was diagnosed with an anoxic brain injury (the death of brain cells due to oxygen deprivation) secondary to his resuscitated cardiac arrest and was pronounced brain dead by physicians.¹⁰⁰

Mr. Hernandez's wife and brother, Maria and Bernardo, arrived to the hospital the evening of May 29, 2010. However, border patrol officers were guarding Mr. Hernandez's room and the hospital denied them entry.¹⁰¹ After the Mexican consulate and advocates intervened, Maria and other members of the family were allowed to see Mr. Hernandez shortly before he died.¹⁰² Mr. Hernandez remained briefly on life support until he went into asystole or cardiac standstill (also known as "flatlining") and was pronounced dead on May 31, 2010, at 4:30 p.m.¹⁰³ Mr. Hernandez was forty-two years old.¹⁰⁴

Mr. Hernandez's death certificate reports his immediate cause of death as anoxic encephalopathy (i.e., brain damage caused by a lack of oxygen to the brain), with secondary causes listed as resuscitated cardiac arrest, acute myocardial infarct, and physical altercation with law enforcement officers.¹⁰⁵ Two autopsies were performed. Both confirm that Mr. Hernandez suffered extensive injuries, including contusions, abrasions, and bruises on his right jaw, the upper jaw, the cheek area, both hands, right wrist, right thigh, and extensive hematoma extending into the posterior paravertebral musculature near the left scapula (running along the upper left side of his back), abrasions of both knees and buttocks, contusions and abrasions of the upper and lower lips, the upper gum line, the left anterior chest, the left upper abdomen, the right pelvis, the left inner thigh, the right forearm, and the right anterior tibial region of the leg,¹⁰⁶ five broken ribs, and "puncture marks over the right flank and left buttock" from a Taser.¹⁰⁷ When asked if the use of Tasers contributed to Mr. Hernandez's death, Glenn N. Wagner, the chief medical examiner for San Diego County (the first physician to perform an autopsy) stated, "There's no question in my mind."¹⁰⁸ Both autopsies ruled the manner of death a homicide.¹⁰⁹

⁹⁷ Affidavit of James Wong in Support of Petitioners (May 18, 2018) [hereinafter Wong Affidavit] (Exh. D) ¶ 32.

⁹⁸ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 562.

⁹⁹ County Autopsy Report (2010), Petition, Exh. 25 at 2.

¹⁰⁰ *Id.* at 1; Transcript of Videotaped Deposition I of Maria Puga (2013), Petition, Exh. 26 at 89:6-90:9; Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment (2013), Petition, Exh. 10 at 60.

¹⁰¹ Transcript of Videotaped Deposition I of Maria Puga (2013), Petition, Exh. 26 at 89:6-90:9.

¹⁰² *Id.* at 90:3-9.

¹⁰³ Marvin Pietruska Autopsy (2010), Petition, Exh. 27 at 7-10.

¹⁰⁴ Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment (2013), Petition, Exh. 10 at 10.

¹⁰⁵ County Autopsy Report (2010), Petition, Exh. 25 at 1.

¹⁰⁶ *Id.* at 9; Marvin Pietruska Autopsy (2010), Petition, Exh. 27 at 2.

¹⁰⁷ County Autopsy Report (2010), Petition, Exh. 25 at 9.

¹⁰⁸ Deposition of Wagner, Petition, Exh. 18 at 210:13-20.

¹⁰⁹ County Autopsy Report (2010), Petition, Exh. 25 at 4; Marvin Pietruska Autopsy (2010), Petition, Exh. 27 at 8.

B. State agents delayed the police investigation and disseminated a false narrative about Anastasio Hernandez Rojas.

According to the CBP's 2010 Use of Force Handbook, the agent in charge of the scene or reporting officer "shall ensure that the incident has been reported to the law enforcement authorities having jurisdiction over the investigation."¹¹⁰ San Diego Police Department (SDPD) had jurisdiction to investigate the use of force incident that led to Mr. Hernandez's hospitalization and death. The only role border agents had at the crime scene was to preserve the evidence, identify the witnesses, and notify local or state authorities with investigative powers.¹¹¹ At least four supervisors and more than a dozen of agents were present at the incident. None notified local police and none acted to preserve evidence. Border agents did notify, however, at least six CBP officers in addition to the CBP Commissioner's Situation Room in Washington, D.C.¹¹²

During the first 15 hours, CBP agents assumed control of the crime scene and worked with CBP leadership in San Diego and Washington, D.C. to construct a version of events that depicted Mr. Hernandez as the aggressor and CBP agents as the victims. At approximately 2 a.m. on May 29, 2010, less than four hours after Mr. Hernandez was taken to the hospital, CBP reported the incident to the CBP Commissioner's Situation Room in Washington, D.C., via phone.¹¹³ At the time, CBP's Acting Commissioner was Alan Bersin, the Deputy Commissioner of CBP was David Aguilar, and the Assistant Commissioner for CBP Internal Affairs was James Tomsheck.

Minutes later, U.S. Customs Border Protection San Ysidro Port of Entry Chief Joe V. Gonzalez submitted a Significant Incident Report (SIR).¹¹⁴ The SIR stated that Mr. Hernandez was "actively fighting and resisting" when agents began to take off his handcuffs.¹¹⁵ Agents were unable to control Mr. Hernandez, according to the SIR.¹¹⁶ The report also stated that CBP officer Vales told Mr. Hernandez he would be "Tased" if he continued to resist, but he "continue[d] to struggle and actively resist and fight," and was Tased.¹¹⁷ "While being tased," the SIR stated, Mr. Hernandez "succeed[ed] in kicking CBPO Vales in the chest several times," continued to struggle, attempted to break free, and attempted to "stand up."¹¹⁸ After being Tased a third time, the report stated that Mr. Hernandez "ceased struggling and appeared to go limp."¹¹⁹

The SIR indicated that only one CBP officer was involved in the beating, when nine used force against Mr. Hernandez and more than twenty officers were present. The SIR recorded the total number of law enforcement officers involved as three and does not note the presence of witnesses when dozens observed the incident.¹²⁰ The SIR also omitted that Mr. Hernandez was assaulted by a BP agent at the detention facility; beaten with batons prior to being Tased; was restrained in handcuffs, lying face down while Tased; and that after the agent Tased him a fourth time, agents swarmed him,

¹¹⁰ 2010 USE OF FORCE POLICY HANDBOOK Exh. C at 22.

¹¹¹ *Id.* (establishing that the Reporting Officer, in this case Supervisory CBP Officer Ramon DeJesus, has the obligation to "preserve the use of deadly force incident scene and all relevant evidence" and "identify witnesses" among other duties until "contact with the responsible law enforcement agency has been made.").

¹¹² San Diego Police Department Investigation (2010), Petition, Exh. 43 at 549, 551.

¹¹³ *Id.* at 549.

¹¹⁴ *Id.* at 549-51.

¹¹⁵ *Id.* at 550.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

pressed their weight on him, and tied his legs, risking positional asphyxia. Incident reports by CBP agents and SDPD described Mr. Hernandez as a suspect and the officers as victims of battery.¹²¹

According to then Assistant Commissioner of CBP Internal Affairs Office (IA) James F. Tomsheck, who attended a briefing for Commissioners about the use of force incident involving Mr. Hernandez in Washington, D.C., at 7:30 am on May 29, and subsequent briefings:

Border Patrol repeatedly stated that [Mr. Hernandez] was not restrained, that he was standing, and that he was combative when he was Tased. The initial briefing also mentioned that Anastasio Hernandez Rojas appeared to be under the influence of something or suffering some mental problem that caused him to become noncompliant and combative after having been more than somewhat cooperative during other stages of his detainment.¹²²

The version provided by U.S. Border Patrol officials directly contradicted information former Assistant Commissioner Tomsheck had received concurrently from the IA's San Diego Field Office:

All of the Field Operations reports clearly stated that Mr. Hernandez Rojas was face down on the ground and handcuffed when Tased. Jerry Vales, the CBP officer who Tased Mr. Hernandez Rojas, stated this in his own report. None of the Border Patrol reports reflected this. During [the] morning briefing when the incident was discussed, [U.S. Border Patrol Chief] David Aguilar stated that all reporting of this incident would reflect that Mr. Hernandez Rojas was standing, unrestrained, and combative when he was Tasered.¹²³

At approximately, 10:30 a.m. on May 29, 2010, twelve- and one-half hours after Mr. Hernandez, was taken to the hospital, CBP contacted the Federal Bureau of Investigation to pursue federal assault charges against Mr. Hernandez.¹²⁴ The FBI declined to take the case.¹²⁵

Contrary to statements by border agents, none of the agents present the night of the incident (including the four supervisors) notified the SDPD.¹²⁶ SDPD was first informed of the incident by a local news reporter who called the police department after 12 p.m. to inquire about the criminal investigation, nearly 15 hours after Mr. Hernandez was taken to the hospital.¹²⁷

¹²¹ US CBP Memorandum re Incident at Whiskey 2 (2010), Petition, Exh. 31 at 31; San Diego Regional Crime Incident Report (2010), Petition, Exh. 33.

¹²² Affidavit of James F. Tomsheck in Support of Petitioners (Aug. 13, 2018) [hereinafter Tomsheck Affidavit] (Exh. E) at ¶54.

¹²³ *Id.* at ¶56.

¹²⁴ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 10.

¹²⁵ *Id.* at 10.

¹²⁶ Border Patrol Briefing (2010), Petition, Exh. 30 at 30.

¹²⁷ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 25 (report prepared by a police detective relating that the police chief had been notified of the incident involving Mr. Hernandez by media, specifically a reporter from KPBS (San Diego Public Radio)).

- C. The police investigation focused on the victim rather than the state agents responsible for Anastasio Hernandez Rojas's torture and death.

On the afternoon of May 29, 2010, SDPD arrived to the crime scene. CBP agents had left the crime scene unattended during the night and failed to provide police detectives with a complete list of agents involved or witnesses.¹²⁸ The SDPD officer dispatched to locate the crime scene found the wires from the Taser used on Mr. Hernandez on the ground.¹²⁹

From approximately 14:20 until 21:00 on May 29th, SDPD officers interviewed 17 enforcement agents regarding the incident.¹³⁰ Most interviews of law enforcement lasted less than fifteen minutes. Police detectives repeatedly probed whether Mr. Hernandez had appeared to be under the influence of drugs and whether the agents had been injured. Agents did not report that they had observed any objective signs that Mr. Hernandez was under the influence of drugs and showed no signs of injury.¹³¹ A CBP official or union representative was present in nearly every interview of the agents.

SDPD did not interview all of the agents involved in the incident, including the agents who struck Mr. Hernandez with their batons or erased images taken by civilian eyewitnesses of the incident during their initial investigation.¹³² The detectives did not attempt to identify or contact any civilian witnesses to the crime. The only civilian eyewitnesses police investigators interviewed came forward of their own accord. Despite border agents' efforts to disperse the civilian eyewitnesses, it would have been possible to ascertain the identities of some of the witnesses. Some of individuals on the pedestrian bridge overlooking Whiskey 2 had just returned from Tijuana, Mexico, and U.S. immigration authorities at the port of entry would have verified and recorded their identities and legal status before allowing them to enter the United States.

Police investigators also failed to preserve physical evidence. Immigration authorities had used two vehicles to transport Mr. Hernandez. Agents continued to use the vehicles and police did not attempt to collect forensic evidence in a timely manner.¹³³ Additionally, Pedro, Mr. Hernandez's brother, remained in CBP custody although he was a witness in a homicide investigation. Police

¹²⁸ For example, SDPD detectives learned on June 11th, two weeks after the incident, that CBP officers Victoria Guzman and Heather Ramos were present and involved in dispersing witnesses during an interview with a Mexican immigration agent. SDPD did not interview Paragon Security Systems officers until June 22, 2010 (three weeks after the incident).

¹²⁹ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 28.

¹³⁰ In order, police investigators interviewed Ducoing, Krasielwicz, Melendez, Reyes, Austin, Vales, Sable, Llewellyn, Brown, Mitchell, Arcia, Finn, Sauer, Galvan, Cardenas, Ramirez, and Boutwell. *See generally id.* at San Diego Police Department Investigation (2010), Petition, Exh. 43.

¹³¹ *Id.* at 187 (Agent Boutwell stated, "He was totally out of control and I would guess that he was on something."), 197 (A police detective stated, "I asked Agent Cardenas if she smelled alcohol on Hernandez or if she felt he was under the influence of drugs when she had contact with him. Agent Cardenas stated that she did not get close enough to smell any alcohol and did not detect that his speech was slurred."), 204 (Agent Carlson "assumed this guy was on methamphetamine, cocaine or he has to have drugs in his system...."), 229 (Agent Finn stated, "I can't say that I got close enough to smell alcohol on his breath."), 230 (Agent Gable stated, "He did not appear to be under the influence of anything that I'm aware of."), 249-50 (Pedro Hernandez, Mr. Hernandez's brother, told police detectives, "Neither my brother nor I have used marijuana or methamphetamine.... We didn't use any medications or drugs."), 252 (Agent Jackson said, "There was no smell of alcohol. I didn't evaluate him for drugs or look him in the eyes."), 316 (A police detective stated, "I asked [Agent] Reyes if he noticed anything abnormal including under the influence drugs or alcohol." Reyes said, "No."), 321 (Agent Santoyo stated "I don't remember the smell of alcohol or drugs; nothing out of the ordinary.").

¹³² Witness Statement of Ernest Kalnas (2010), Petition, Exh. 42; Witness Statement of Harinzo Narainesingh (2010), Petition, Exh. 52; Witness Statement of Ramon DeJesus (2010), Petition, Exh. 41; Witness Statement of Andre T. Piligrino (2010), Petition, Exh. 32.

¹³³ The only marked unit that border agents attempted to put Mr. Hernandez in at Whiskey 2 was analyzed on May 29, 2010, at 20:10 hours after it had been driven by another agent. San Diego Police Department Investigation (2010), Petition, Exh. 43 at 29. The white, unmarked unit driven by Krasielwicz and Ducoing to take Mr. Hernandez to Whiskey 2 was never analyzed.

reports initially framed the investigation as a homicide, but Mr. Hernandez is soon identified on the police reports as the suspect and CBP agents as victims.¹³⁴

At 16:30 on May 29th, SDPD issued a press release addressing the incident for the first time publicly. The press release described Anastasio Hernandez as the subject, not the victim. According to the press release, Mr. Hernandez was “violent” and “combative,” which led a CBP agent to deploy a Taser against him. News articles also referred to SDPD investigators describing Mr. Hernandez as “violent”¹³⁵ and “combative”¹³⁶ and pointing to the role of “drugs or mental disorders” as contributing facts in Taser death cases.¹³⁷

Former Assistant Commissioner Tomscheck explained that:

It was standard practice for Border Patrol to defend incidents in use of force, to always make it appear that it was justified. This was frequently done by distorting or falsifying information that justified use of force. Border Patrol frequently attempted to spin incidents involving use of force that ended in death.¹³⁸

At 17:00 on May 29, 2010, after a public announcement, SDPD notified Mr. Hernandez’s family for the first time that Mr. Hernandez had been injured and hospitalized. At approximately 22:30 on May 29, 2010, CBP agents briefed SDPD detectives about the incident. Acting Assistant Patrol Agent in Charge Ryan S. Yamasaki of the Chula Vista Station alleged that Mr. Hernandez had attacked the agents when he was taken to Whisky 2. He also claimed that Mr. Hernandez continued to fight and strike agents after the initial Tasing, and after three Tasings had stopped breathing.¹³⁹ During the briefing, Acting Patrol Agent Yamasaki made no mention of the fourth Tasing.¹⁴⁰ He failed to inform SDPD that Mr. Hernandez had complained that he had been assaulted and requested medical care while he was in immigration detention on May 28th.¹⁴¹ Acting Patrol Agent Yamasaki stated that Border Patrol was looking to charge Mr. Hernandez with assaulting the agents.¹⁴²

On June 9, 2010, 12 days after the incident, a civilian eyewitness, Humberto Navarette Mendoza, posted videos of agents beating and Tasing Mr. Hernandez with an audio recording of the victim’s pleas for help to YouTube.¹⁴³ Prior to the public release of these videos, SDPD had not taken a single statement from a civilian eyewitness. SDPD detectives subsequently interviewed Humberto Navarette and at least two additional civilian (non-security) eye witnesses who were with Navarette when he filmed the incident.

A month later SDPD referred the case to the United States Attorney’s Office in San Diego. The investigative file does not reflect an additional effort to identify and interview additional civilian eyewitnesses.

¹³⁴ *Id.* at 7 (establishing BP Agent Krasielwicz as the victim and Mr. Hernandez as the suspect).

¹³⁵ Kristina Davis, *Man Who Was Shot with Taser at Border Dies*, UNION-TRIBUNE (June 1, 2010), <http://www.sandiegouniontribune.com/news/2010/jun/01/man-who-was-shot-with-taser-at-border-dies/>.

¹³⁶ *Mexican Detainee Death Ruled A Homicide*, CNN (June 2, 2010), <http://www.cnn.com/2010/US/06/02/california.detainee.death/>; Randall C. Archibold, *San Diego Police Investigate the Death of a Mexican Man Resisting Deportation*, N.Y. TIMES (June 1, 2010), <https://www.nytimes.com/2010/06/02/us/02border.html>.

¹³⁷ Davis, *supra* note 135.

¹³⁸ Tomscheck Affidavit Exh. E at ¶ 71.

¹³⁹ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 7-11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ SDPD Addendum Report (2010), Petition, Exh. 44 at 1-3.

On April 20, 2012—nearly two years after Mr. Hernandez’s death—the Public Broadcasting System (PBS) released an eyewitness video of CBP agents surrounding and beating Mr. Hernandez. A witness, Ashley Young, used her cell phone to take the footage, but concealed her phone when she saw CBP agents seize witnesses’ cameras and phones the day of the incident. After PBS released the video, members of the U.S. Congress wrote a letter to the Department of Homeland Security to express concern regarding “a troubling lack of training and accountability within the Department” and Border Patrol attempts to cover up the incident and “obfuscate” their use of force.¹⁴⁴

D. Border agents interfered with the criminal investigation.

Federal law does not grant the U.S. Border Patrol the authority to investigate allegations of misconduct or abuse by its agents. U.S. federal law establishes the powers of immigration authorities to engage in a broad range of explicitly defined enforcement activities.¹⁴⁵ However, federal law also limits the investigative powers of U.S. Border Patrol agents to crimes involving their immigration and border enforcement duties such as immigration proceedings and human or narcotics trafficking.¹⁴⁶ Indeed, federal law authorizes the Federal Bureau of Investigations and DHS’s Office of Inspector General (OIG) to conduct internal investigations of Border Patrol agents.

Nevertheless, U.S. Border Patrol has claimed authority to conduct a “parallel investigation” of use of force incidents.¹⁴⁷ U.S. Border Patrol has repeatedly misused investigative powers and deployed a Critical Incident Investigative Team (“CIIT”) to investigate many of the most severe use of force incidents involving BP agents, including the events that led to Mr. Hernandez’s death.¹⁴⁸ The CIIT unit, which has no legitimate or lawful purpose, intervened at critical stages of the criminal investigation into Mr. Hernandez’s death and obstructed police from securing evidence about the incident.¹⁴⁹

BP’s CIIT unit was notified to respond to the incident involving Mr. Hernandez at Whiskey 2 at 22:28 on May 28, 2010.¹⁵⁰ The CIIT unit was the first “investigative” team on the scene; the team arrived a day before police, even though they had no statutory authority to investigate.

Hours after Mr. Hernandez was taken to the hospital, a CIIT agent collected two Taser probes from a hospital tray at 23:56 hours on May 28, 2010, interfering with the chain of custody.¹⁵¹ CIIT agents were also present at the initial briefing by the SDPD where:

At approximately 1335 hours [on May 29, 2010], San Diego Police Department Acting Sergeant Eric BENNETT briefed members of Homicide Team III, the Border Patrol Critical Incident Investigation Team, and several other command staff members of both the United States Border Patrol and the San Diego Police Department regarding the

¹⁴⁴ Letter from the U.S. Congress to Secretary Napolitano of the Department of Homeland Security (May 10, 2012), <https://web.archive.org/web/20200220034857/https://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>.

¹⁴⁵ 8 U.S.C. § 1357.

¹⁴⁶ *Id.* § 1357(a).

¹⁴⁷ 2010 USE OF FORCE POLICY HANDBOOK, Exh. C at 20-21.

¹⁴⁸ *See, e.g.*, *United States v. Garcia-Pasqual*, No. CR–14–01633–001–TUC–JGZ, 2015 WL 935326 (D. Ariz. Mar. 4, 2015) (referencing the CIIT unit as the investigative unit responsible for examining the use of force allegation); *Guerra v. United States*, No. EP-18-CV-00270-FM, 2019 WL 7761440 (W.D. Tex. Dec. 2, 2019) (referring to Critical Incident Team as investigating a car collision involving a U.S. Border Patrol vehicle).

¹⁴⁹ During civil litigation, the defendants’ attorney stated that U.S. Border Patrol’s Critical Incident Investigative Team drafted a 160-page report about the events and circumstances preceding the death of Mr. Hernandez. *See* Declaration of Richard Tolles in Support of Motion for Stay (2012), Petition, Exh. 34 at 2.

¹⁵⁰ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 489.

¹⁵¹ *Id.* at 26.

details of the pending in-custody death of Anastacio (sic) HERNANDEZ-ROJAS. HERNANDEZ was declared brain dead by physicians at Sharp Chula Vista Hospital and was being kept alive by life support systems.¹⁵² (*italics added*)

CIIT agents were also dispatched to participate in the interviews conducted by SDPD during the first 24 hours of their investigation.¹⁵³ A CIIT agent also was present at the autopsy of Mr. Hernandez's body on June 1, 2010.¹⁵⁴ Former Assistant Commissioner Tomsheck commented that "[Border Patrol's] presence at the autopsy was "inappropriate and in violation of policy," but not unusual. According to Mr. Tomsheck, "this incident is like countless others, BP improperly trying to assert themselves in events that had potential to embarrass the agency."¹⁵⁵

During the course of their investigation, SDPD also discovered that CIIT agents served an administrative subpoena.¹⁵⁶ The administrative subpoena was signed by Rodney Scott, then Acting Deputy Chief Patrol Agent in San Diego Sector for U.S. Border Patrol, and was used to obtain Mr. Hernandez's medical records from the San Diego County Medical Examiner's Office and the Sharp Chula Vista Hospital.¹⁵⁷ Administrative subpoena authority is the power vested in various executive agencies to compel testimony or the production of documents without prior approval from a grand jury, court, or other judicial entity.¹⁵⁸ The exercise of administrative subpoena authority must fulfill basic requirements, including that the investigation is conducted pursuant to a legitimate purpose and the information requested under the subpoena is relevant to that purpose.¹⁵⁹

According to former Assistant Commissioner Tomsheck, the use of an administrative subpoena to obtain Mr. Hernandez's autopsy was more than inappropriate, it was "illegal and potentially obstruction of justice."¹⁶⁰ Mr. Tomsheck asserted that the "BP Agents who accessed the autopsy report should have face[d] consequences..."¹⁶¹ The former Deputy Assistant Commissioner of CBP Internal Affairs (IA), James Wong, also described the use of an administrative subpoena to procure medical records of a victim in a use of force incident as a "improper if not a criminal use of an administrative subpoena."¹⁶² As someone who "routinely used administrative subpoenas [as] an ICE supervisory special agent," Mr. Wong asserted that "[i]t is incredible that they attempted to get this information through that channel and problematic that it worked."¹⁶³ At the time, Mr. Wong and former Commissioner Tomsheck "spoke with [CBP leadership] because we were concerned that it was an abuse of power, and perhaps even criminal. We were told that the matter would be handled internally.

¹⁵² *Id.* at 139.

¹⁵³ According to the SDPD's investigative filing, CIIT agents participated in the interviews of Pedro Hernandez Rojas, BP Agent Austin, BP Agent Cardenas, BP Agent Ducoing, BP Agent Galvan, BP Agent Krasielwicz, BP Agent Ramirez, Supervisory BP Agent Caliri, BP Agent Carlson, BP Agent Llewellyn, BP Agent Mitchell, Supervisory BP Agent Finn, and BP Agent Reyes. *Id.* at 169 (Austin), 191 (Caliri), 196 (Cardenas), 199 (Carlson), 217 (Ducoing), 227 (Finn), 232 (Galvan), 248 (Hernandez), 261 (Krasielwicz), 269 (Llewellyn), 283 (Mitchell), 309 (Ramirez), 315 (Reyes).

¹⁵⁴ County Autopsy Report (2010), Petition, Exh. 25 at 5, 8.

¹⁵⁵ Tomsheck Affidavit, Exh. E at ¶ 83.

¹⁵⁶ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 19.

¹⁵⁷ Tomsheck Affidavit, Exh. E at ¶ 84; Wong Affidavit, Exh. D at ¶ 31.

¹⁵⁸ 8 C.F.R. § 2.1. Federal law grants immigration officials the authority to issue administrative subpoenas to require the attendance of witnesses or the production of documentary evidence at immigration proceedings. 8 C.F.R. § 287.4(1)-(2).

¹⁵⁹ *United States v. Powell*, 379 U.S. 48 (1964).

¹⁶⁰ Tomsheck Affidavit, Exh. E at ¶ 84.

¹⁶¹ *Id.* at ¶ 84.

¹⁶² Wong Affidavit, Exh. D at ¶ 31.

¹⁶³ *Id.*

And that was the end of that.”¹⁶⁴ CIIT agents refused to share the medical reports with SDPD investigators citing privacy laws.¹⁶⁵

CIIT agents also prevented SDPD investigators from obtaining video evidence of the incident captured by port cameras. Seven law enforcement cameras were positioned in or near Whiskey 2 where CBP agents beat and tortured Mr. Hernandez.¹⁶⁶ The San Diego Police Department investigation noted that there were “several cameras that could potentially capture surveillance footage of the incident that occurred.”¹⁶⁷ CBP is responsible for maintaining this video equipment.¹⁶⁸ CIIT agents requested and secured videotape from U.S. Border Patrol Agent Mark Weidman.¹⁶⁹ When a police detective received and reviewed the video footage on June 9, 2010, he discovered that the video showed the relevant area but not at the relevant time.¹⁷⁰ The video footage was taken an hour before the incident. SDPD police investigators contacted the CIIT unit on June 9th, June 10th, June 13th, June 29th, and July 6th to obtain the correct video recording.¹⁷¹ By the time SDPD secured CIIT and port authorities’ cooperation, the tapes had been reused and recorded over despite clear and repeated requests for the recording as evidence.¹⁷² Despite seven federally maintained cameras positioned in or near Whiskey 2, SDPD failed to collect any video evidence of the incident.¹⁷³

Former Deputy Assistant Commissioner of CBP IA James Wong provided context to understand BP’s interference with the criminal investigation by border agents,

In comparison to the other agencies I served during my thirty-five years in state and federal law enforcement, CBP had the worst accountability measures. This is by design; CBP was allowed to operate as a rogue agency within the U.S. government. My official role as Deputy Assistant Commissioner of Internal Affairs (IA) was to ensure compliance with CBP-wide programs relating to corruption, misconduct, and mismanagement, but I was not allowed to do my job. CBP leadership was reluctant to hold agents and others within the agency accountable for their actions, including if they were involved in criminal activity. CBP leadership’s priority was to protect the reputation of the agency, even if it meant allowing misconduct and corruption to go unpunished.¹⁷⁴

The investigation by CIIT agents resulted in a 160-page report.¹⁷⁵ Petitioners have not been provided access to the report, and the report has not been issued to the public. The SDPD investigative report does not include the CIIT report.

¹⁶⁴ *Id.*

¹⁶⁵ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 19.

¹⁶⁶ There were two “dummy” cameras that were inoperable and five functional cameras in or near the Whiskey 2 area, yet there was no surveillance footage of the incident. SDPD Addendum Report, Petition, Exh. 44 at 1-2.

¹⁶⁷ *Id.* at 1.

¹⁶⁸ *Id.* at 1.

¹⁶⁹ BP Agent Weidman told the police investigator that CIIT Agent Victor Garcia had been given the video and that Agent Garcia and Supervisory Border Patrol Agent Armando Gonzalez were in charge of the case. *Id.* at 1-2.

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 2-3. *See also* San Diego Police Department Investigation (2010), Petition, Exh. 43 at 467-68.

¹⁷² San Diego Police Department Investigation (2010), Petition, Exh. 43 at 467-68.

¹⁷³ *Id.*

¹⁷⁴ Wong Affidavit, Exh. D at ¶ 32.

¹⁷⁵ *See* Declaration of Richard Tolles in Support of Motion for Stay (2012), Petition, Exh. 34 at 2.

- E. Administrative investigations failed to prevent, identify, or respond to agent misconduct.

The Department of Homeland Security was founded in 2002 to enhance public security by preventing terrorism, ensuring resilience to natural disasters, enforcing and administering immigration laws, and securing and managing the U.S. borders. A year later, in 2003, the government created the U.S. Customs and Border Protection and Immigration and Customs Enforcement (“ICE”) to enforce the nation’s immigration laws. The U.S. Border Patrol is a unit of CBP comprised of “mobile, on-the-ground agents who prevent undocumented migrants, terrorists, and contraband from entering into the United States between the ports of entry.”¹⁷⁶

The DHS Office of Inspector General (DHS OIG) reviews allegations of corruption, misconduct, and abuse involving agents of DHS’s 22 agencies, including ICE, CBP, and Border Patrol, a unit within CBP. Investigations conducted by DHS OIG can result in criminal prosecutions, fines, civil monetary penalties, administrative sanctions, and personnel actions. DHS OIG also oversees the Internal Affairs (also referred to as “Offices of Professional Responsibility”) at all DHS agencies. Internal Affairs are offices within a DHS sub-agency, which are responsible for investigating allegations of misconduct involving that agency’s employees and report to the head of the agency being investigated.

The OIG Office of Investigations has the first right of refusal for investigating all criminal or misconduct matters arising within DHS.¹⁷⁷ In use of force cases, for example, DHS may decide to “(1) conduct an investigation; (2) conduct an investigation jointly with the relevant component agency; or (3) allow the component agency to carry out the investigation with OIG maintaining a right of supervision.”¹⁷⁸ If DHS OIG declines to investigate a matter due to resource constraints, for example, Internal Affairs offices have jurisdiction to conduct the investigation.¹⁷⁹

Generally, DHS OIG assigned use of force investigations to the specific regional office where the incident occurred. The Special Agent in Charge of the regional office would then assign a case agent to the matter who would conduct an investigation to determine if the matter should be opened as a criminal and/or administrative misconduct case, or whether the matter should be closed without further investigation. The former Assistant Inspector General for Investigations at the Department of Homeland Security Office of Inspector General, John Edward Dupuy explained that “[c]ase agents are fact-gatherers and were expected to use a number of techniques to collect and analyze evidence. The case agent would conduct interviews with witnesses, victims, and persons involved in the incident and gather non-testimonial evidence. The case agent would document all their investigative activity and evidence gathered and summarize their factual findings in a memorandum....”¹⁸⁰

¹⁷⁶ Tomsheck Affidavit, Exh. E at ¶ 15.

¹⁷⁷ U.S. DEPARTMENT OF HOMELAND SECURITY, INVESTIGATION OF DHS EMPLOYEE CORRUPTION CASES: FISCAL YEAR 2015 REPORT TO CONGRESS iii (2015) [hereinafter 2015 INVESTIGATION OF DHS EMPLOYEE CORRUPTION CASES], https://www.dhs.gov/sites/default/files/publications/Departmental%20Management%20and%20Operations%20%28DMO%29%20-%20Investigation%20of%20DHS%20Employee%20Corruption%20Cases_0.pdf (stating that “OIG is vested with the authority to investigate allegations of misconduct or may refer such cases to the ICE OPR or the CBP IA for investigation or administrative action.... Absent extraordinary circumstances, ICE and CBP must refrain from any investigation of such matters unless OIG refers the matter back to those components.”).

¹⁷⁸ Affidavit of John Edward Dupuy in Support of Petitioners (Jan. 15, 2021) [hereinafter Dupuy Affidavit] (Exh. F) ¶ 16.

¹⁷⁹ 2015 INVESTIGATION OF DHS EMPLOYEE CORRUPTION CASES, *supra* note 177, at 3 (“OIG has approximately 200 special agents vested with the authority to conduct investigations of criminal and administrative employee misconduct. It may also refer such allegations to U.S. Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR) or CBP Internal Affairs (IA) for investigation.”).

¹⁸⁰ Dupuy Affidavit, Exh. F at ¶ 18.

On June 1, 2010, DHS OIG opened an investigation of Mr. Hernandez Rojas's death through its San Diego office.¹⁸¹ Special Agent in Charge Dennis McGunagle, the supervisor for the San Diego office, supervised the investigation. The investigation was closed in January 6, 2012, without referring the case for a misconduct or criminal investigation. Notably, the DHS OIG investigation closed before the media released Ashley Young's eyewitness video in April 2012. To the knowledge of the Petitioners, the investigation was never reopened.

DHS OIG has not provided Petitioners or the public access to the investigative report. Petitioners have not had the opportunity to examine the agency's investigation or specific findings. However, Petitioners obtained affidavits from high-ranking former and active federal officials who have direct knowledge of DHS OIG's investigation of Mr. Hernandez's death and reviewed the case file. These officials describe the DHS OIG's investigation as "thin" and lacking "thoroughness" and "diligence."

In late 2011, Former Assistant Commissioner Tomsheck reviewed DHS OIG's file on the investigation of Mr. Hernandez's death. His affidavit described his alarm upon reviewing the file: "When I first saw the initial DHS OIG report, I was in disbelief. I didn't believe it was a well-written report. I didn't believe it was thorough or complete."¹⁸² Former Assistant Commissioner Tomsheck had learned of the use of force incident involving Mr. Hernandez shortly after the victim was taken to the hospital. As the head of CBP IA, he had attempted to investigate the incident. DHS OIG refused to cooperate with IA's investigation. According to Former Assistant Commissioner Tomsheck, "IA was walled off from information by DHS OIG."¹⁸³

DHS's disinterest in cooperating with agencies to root out and eliminate corruption and misconduct went well beyond the investigation of Mr. Hernandez's death. Deputy Assistant Commissioner of CBP IA James Wong recalls that

I was always looking for ways to collaborate with anybody who could help me accomplish a job. CBP was the first organization I was ever part of that refused to work with other agencies. They did not play well with others. In 2011, CBP superiors went so far as to sign a memorandum of understanding with the Department of Homeland Security Office of Inspector General (DHS OIG) prohibiting IA from sharing any information with any other agency, including the FBI. This new policy further exacerbated tenuous relationships and made it difficult, and at times impossible, to effectively work in partnership with these agencies to investigate misconduct. This meant that the only consistent way to find out about misconduct was to rely on reports from direct CBP supervisors. But they often covered for those under their command, meaning there was no effective way to detect and prevent abuse.¹⁸⁴

Mr. Wong recalled a shocking interaction with CBP Deputy Commissioner David Aguilar, who:

¹⁸¹ *Id.* According to documents produced as a result of FOIA requests, the case number is # I10-CBP-SND-00957 for the OIG investigation. The description of the case is redacted. U.S. Customs and Border Protection, May 28, 2010, Use of Force Incident at the San Ysidro Port of Entry San Ysidro, California, available at <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries/may-28-2010-use-force-incident-san-ysidro-port-entry-san> (last visited Jan. 25, 2021).

¹⁸² Tomsheck Affidavit, Exh. E at ¶ 67.

¹⁸³ *Id.* at ¶ 59.

¹⁸⁴ Wong Affidavit, Exh. C at ¶ 25.

instructed Commissioner Tomsheck and me to ‘cook the books’ in order to falsely reduce statistics related to corruption. IA Commissioner Tomsheck and I had compiled alarming statistics related to incidents of corruption committed by CBP agents. During a closed-door meeting on April 15, 2010, Deputy Commissioner Aguilar tried to pressure us to redefine corruption in order to reduce the number of incidents.... We refused to follow Deputy Commissioner Aguilar's order.¹⁸⁵

In May 2012, John Edward Dupuy was promoted to the position of DHS’s Assistant Inspector General for Investigations, where he was “responsible for the day-to-day operations, strategic planning, and supervising the investigating arms of civil, criminal, and misconduct cases.”¹⁸⁶ Shortly after arriving, he reviewed the DHS OIG investigation of Mr. Hernandez Rojas’s death “because there was a high level of public and congressional interest in the case.”¹⁸⁷ In April 2012, the media had released Ashley Young’s video of the incident in which Mr. Hernandez can be seen handcuffed, in a fetal position on the ground while he is being Tased. The video directly contradicted CBP’s claim that Mr. Hernandez was standing up, aggressive, and noncompliant. Former DHS Assistant Inspector General Dupuy stated:

When I reviewed [DHS OIG’s] investigation file two years after the incident I was shocked to see what I believe was a lack of diligence and thoroughness. From my recollection, the OIG relied entirely on the County of San Diego’s police report to conclude that an OIG investigation was not warranted. The OIG did not do a criminal or misconduct investigation in this case. In my opinion, the OIG should have opened a criminal or, at the very least, a misconduct investigation. An autopsy report is probative but should not be dispositive. The OIG is responsible for investigating the facts and this did not happen in Mr. Hernandez Rojas’s case. This case is an example of a pattern of dereliction of duty that I observed from the DHS OIG Office of Investigation San Diego field office in investigations involving allegations of use of force by federal agents.¹⁸⁸

Former Assistant Inspector General Dupuy observed that “a significant discrepancy” existed between the video of a CBP agent Tasing Mr. Hernandez and the OIG file which “did not report that Mr. Rojas was detained at the time he was Tased.”¹⁸⁹ According to former Assistant Inspector General Dupuy:

[A]t the very least, use of force against an individual who is detained requires an administrative misconduct review to assess the agent’s use of force against agency policies and procedures. I believed that the OIG investigation needed to be reopened to examine this new evidence and the significant discrepancy in Mr. Rojas’s physical position while being Tased. We needed to understand how and why an agent Tased someone who was already detained.¹⁹⁰

¹⁸⁵ *Id.* at ¶ 26.

¹⁸⁶ Dupuy Affidavit, Exh. F at ¶ 10.

¹⁸⁷ *Id.* at ¶ 26.

¹⁸⁸ *Id.* at ¶ 3.

¹⁸⁹ *Id.* at ¶ 33.

¹⁹⁰ *Id.*

Former Assistant Inspector General Dupuy was also shocked to discover that DHS OIG had not conducted an “after-action review” to understand what led to the agents’ use of force and assess agents’ compliance with agency policies and practices:

There was no review of the agency’s training, tactics, procedures, or protocols, or an assessment of whether CBP handled the matter in accordance with those procedures and protocols. I did not see a review of the agents in charge or an incident response. Based on my previous experience, the OIG investigator should have assessed: agency procedures, protocols, tactics and training; what decisions were made and by who; whether the officer/agents involved followed the relevant procedures and protocols; and the specific officers’/agents’ training and their use of equipment. In the case of Anastasio Hernandez Rojas, the officer should have assessed whether it was appropriate to use a Taser. Why was an intermediate force option not used? The review should be done with the aim of determining whether the agent acted in accordance with the agency rules, procedures, and training.¹⁹¹

After reviewing DHS OIG’s investigation, Former Assistant Inspector General Dupuy raised his concerns about the lack of due diligence with Special Agent in Charge of DHS OIG’s San Diego office Dennis McGunagle and recommended that the investigation be re-opened.¹⁹² Special Agent McGunagle refused. Despite the new video evidence, according to former Assistant Inspector General Dupuy, “[McGunagle] was adamant that nothing more should be done—the case was closed and should not be reopened. He saw no additional value in OIG reopening the case.”¹⁹³

In response to concerns about a lack of transparency and accountability, CBP established a Use of Force Review Board (“Review Board”) in February 2015.¹⁹⁴ The Review Board met on March 10, 2016, and discussed the killing of Mr. Hernandez. On February 14, 2018, more than seven years after the incident, CBP’s National Use of Force Review Board issued its findings of its internal review which consisted of four paragraphs about the incident. Despite new evidence, concerns raised by senior officials about DHS OIG’s investigation, and the United States’ decision to settle a civil lawsuit, the Review Board stuck by the version of the incident promulgated by border authorities from the beginning. In 2018, the Review Board continued to affirm, for example, that Mr. Hernandez was “combative during the cycling of the [Electronic Control Weapon (ECW)], and was able to forcibly kick the CBP[] [officer] deploying the ECW in between one of the ECW cycles.”¹⁹⁵ The Board

¹⁹¹ *Id.* at ¶ 31.

¹⁹² Dupuy Affidavit Exh. F at ¶ 37.

¹⁹³ *Id.*

¹⁹⁴ HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL ii (2016), https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20%28accessible%29_0.pdf. Since it was created, the Review Board has reviewed 38 cases. *CBP Use of Force Case Summaries*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries> (last visited Jan. 22, 2021). The incidents occurred between 2010 to 2017. An incident that took place on January 14, 2017, before President Donald J. Trump was inaugurated, is the last incident that the Review Board examined. Of the 38 that have been reviewed, only two resulted in a finding of noncompliance with the use of force policy. Neither incident resulted in a death. The fact that only 38 cases have been reviewed is troubling given that more than 100 people have died in the custody of U.S. border agents since 2010. *Deaths by Border Patrol: Track Death and Abuse by Border Patrol*, SOUTHERN BORDER COMMUNITIES COALITION, https://www.southernborder.org/deaths_by_border_patrol (last visited Jan. 22, 2021).

¹⁹⁵ *May 28, 2010, Use of Force Incident at the San Ysidro Port of Entry San Ysidro, California*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries/may-28-2010-use-force-incident-san-ysidro-port-entry-san> (last modified Feb. 14, 2018).

determined that the CBP officers involved acted in compliance with CBP's Use of Force policy in effect at the time.¹⁹⁶

Petitioners are unaware of any disciplinary investigation or action taken against any of the agents involved. To Petitioners' knowledge, all of the agents involved remain on active duty. Indeed, some of the agents have been promoted to leadership positions. Despite San Diego Special Agent in Charge Dennis McGunagle's failure to follow protocol during his DHS OIG investigation of Mr. Hernandez's death, he was promoted to Deputy Assistant Inspector General for DHS's OIG in 2015.¹⁹⁷ Rodney Scott, who was Acting Deputy Chief Patrol Agent in San Diego Sector for U.S. Border Patrol and signed the illegal administrative subpoena to access Mr. Hernandez's health records, is the current head of U.S. Border Patrol.¹⁹⁸ Ismael Finn, the BP agent who ignored Mr. Hernandez's request for medical assistance and decided to remove him to Mexico, is currently the Supervisory Border Patrol Agent at US Border Patrol at San Ysidro, California.¹⁹⁹ CBO Officer Jerry Vales who Tased Mr. Hernandez multiple times is a manager at DHS.²⁰⁰

III. U.S. LAWS AND PROCEDURES FOSTERED LAW ENFORCEMENT VIOLENCE AGAINST ANASTASIO HERNANDEZ ROJAS AND ENSURED IMPUNITY FOR HIS KILLING.

For the last three decades, politicians and government leadership have underscored the constant, grave, and life-threatening dangers faced by border agents on the U.S.-Mexico border to argue that migrants have overrun the border and justify increased border militarization. In 2007, a congressional representative from California who ran for president described why he authored the legislation to build the border wall in a candidate debate, stating, "We had massive murders on the border, massive illegal immigration, massive importation of drugs."²⁰¹ In 2014, a congressional representative from Texas attempted to portray the border as chaotic and overrun by criminals when he told a journalist, "38 Border Patrol Agents have been killed while on patrol since 2003. Our agents are outmanned, outnumbered and out-financed trying to prevent drug cartels from entering the United States."²⁰² More recently in 2020, the Acting Commissioner of CBP, Mark Morgan, tweeted in reference to the border wall, "Every mile helps us stop gang members, murderers, sexual predators, and drugs from entering our country."²⁰³

In reality, although not without risk, the U.S.-Mexico border is a relatively safe place for border agents. Since 2003, three on duty border agents at the U.S.-Mexico border have been killed due to

¹⁹⁶ *Id.*

¹⁹⁷ Federal Register, Senior Executive Service Performance Review Board Membership, available at <https://www.federalregister.gov/documents/2017/09/19/2017-19917/senior-executive-service-performance-review-board-membership>.

¹⁹⁸ U.S. Customs and Border Protection, Chief, United States Border Patrol Rodney Scott, available at <https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices/chief-united-states-border-patrol>.

¹⁹⁹ See https://rocketreach.co/ishmael-finn-email_3850139.

²⁰⁰ See <https://www.linkedin.com/public-profile/in/jerry-vales-17a9146?challengeId=AQFqOmJFU1HeSAAAAXchMW3JGLC8AxwnjWGhpr8LTC5CFS3O3xbsr4mw1t2wdbfink04in0CmOoK0dCvOoKXRrFba3GUmfo08uQ&submissionId=279aa46f-3c06-5c16-23bd-9a69da221b51>.

²⁰¹ 2007 GOP primary debate at Ronald Reagan Library, Simi Valley, California, hosted by MSNBC and Politico.com, May 3, 2007. https://www.ontheissues.org/2007_GOP_primary_Reagan.htm.

²⁰² Tom Cleary, *Rogelio Martinez: Five Fast Facts You Need to Know*, HEAVY (Nov. 20, 2017), <https://heavy.com/news/2017/11/rogelio-martinez-border-patrol-agent-killed-trump/>.

²⁰³ *Twitter suspends US Border Chief Mark Morgan for touting progress on wall construction*, KUSI News (Oct. 29, 2020), <https://www.kusi.com/twitter-suspends-us-border-chief-mark-morgan-for-touting-progress-of-wall-construction/>.

deliberate acts.²⁰⁴ Since 2010, less than 4% of border agents experienced an assault.²⁰⁵ Independent analysis demonstrates that U.S. Border Patrol agents face lower assault and injury rates than National Park Service agents and state and local law enforcement officers.²⁰⁶ According to statistics related to death, assault, and injury of law enforcement officers, “patrolling the U.S.-Mexico [border] is one of the safest law enforcement jobs.”²⁰⁷

Contrary to the political rhetoric, individuals who cross the border are the most frequent victims of violence and abuse. The Petition identified a pattern of extrajudicial killings by Customs and Border Protection (CBP) agents, including Mr. Hernandez’s torture and death, as part of a larger systemic pattern of violence by U.S. border agents with deep historical roots.²⁰⁸ A 2013 study found that U.S. immigration authorities physically abused 11% of migrants detained in Arizona.²⁰⁹ Since Mr. Hernandez’s death, CBP agents have killed more than 100 foreign-born and U.S. nationals along the U.S.-Mexico border. The victims include unarmed minors shot in the back and head, U.S. citizens killed while riding in moving vehicles, and Mexican nationals who died after being beaten and shot with Taser guns. The vast majority of victims are undocumented, Mexican migrants.²¹⁰

Additionally, the Petition demonstrated that successful disciplinary, civil, or criminal actions against U.S. border agents are exceedingly rare: CBP’s system for handling complaints of abuse and misconduct is patently ineffective; to date, no known civil plaintiff in a border killing case has won at trial; and the U.S. Department of Justice (“DOJ”) has closed all but one criminal investigation of a border killing without pursuing charges.²¹¹ In April 2018, the first federal prosecution of a U.S. border agent in relation to a killing that took part across the U.S.–Mexico border ended in an acquittal.²¹² In February 2020, the U.S. Supreme Court closed the courthouse doors on victims seeking redress for abuse of power by federal officers by ruling that a U.S. Border Patrol agent cannot be sued for

²⁰⁴ Christopher R. Montoya, Challenging the Border Threat Narrative: An Analysis of Testimony, Rhetoric, and Enforcement Data 43-44 (May 10, 2018) (M.A. thesis, University of Arizona), https://repository.arizona.edu/bitstream/handle/10150/628130/azu_etd_16380_sip1_m.pdf?sequence=1 (stating that “[i]n the period between 2003 and 2017, three on-duty agents have lost their lives due to deliberate attacks; two by gunfire and one agent was assaulted by a vehicle (Officer Down Memorial Page).”).

²⁰⁵ *Id.* at 51. The assault rate for border agents is probably even lower because U.S. Border Patrol inflates their statistics by multiplying assaulted officers by the perpetrators and the weapons. For example, in 2017, CBP reported a spike of 73% in assaults. A journalist from *The Intercept* discovered that the increase had been fabricated by border agents: “Almost the entire increase — 271 purported assaults — was said to have occurred in one sector, the Rio Grande Valley, in South Texas. A large number of the assaults supposedly occurred on a single day . . . according to charts and details provided by [a CBP spokesperson]. In response to questions from *The Intercept*, [the spokesperson explained] that ‘an incident in the Rio Grande Valley Sector on February 14, 2017, involved seven U.S. Border Patrol Agents assaulted by six subjects utilizing three different types of projectiles (rocks, bottles, and tree branches), totaling 126 assaults.’ According to conventional law enforcement accounting, this single incident should have been tallied as seven agents assaulted — not seven agents times six perpetrators times three projectiles.” Debbie Nathan, *How the Border Patrol Faked Statistics Showing a 73 Percent Rise in Assaults Against Agents*, INTERCEPT (Apr. 23, 2018), <https://theintercept.com/2018/04/23/border-patrol-agents-assaulted-cbp-fbi/>.

²⁰⁶ Montoya, *supra* note 204, at 52-55 (“Rangers from the National Park Service are injured at the rate of about 1 per 100 officers. In contrast, about 4 in every 1000 Border Patrol agents were injured each year as a result of an assault, a staggering difference.”).

²⁰⁷ *Id.* at 55.

²⁰⁸ Petition at 54-56.

²⁰⁹ JEREMY SLACK ET AL., CENTER FOR LATIN AMERICAN STUDIES, UNIVERSITY OF ARIZONA, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT, AND SECURITY—PRELIMINARY DATA FROM THE MIGRANT BORDER CROSSING STUDY 26 (2013).

²¹⁰ Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 Berkeley La Raza L.J. 3 (2017).

²¹¹ Petition at 11-14.

²¹² Ana Alderstein, *A Not-Guilty Verdict Absolves Border Patrol of Cross-Border Killing*, NPR (Nov. 25, 2018), <https://www.npr.org/2018/11/25/670668243/a-not-guilty-verdict-absolves-border-patrol-of-cross-border-killing>; Paul Ingram, *Swartz Trial: Boy Mortally Wounded But Alive When BP Agent Shot Him in Head, Says Expert*, Tuscon Sentinel (Nov. 5, 2018), http://www.tucsonsentinel.com/local/report/110518_swartz_trial/swartz-trial-boy-mortally-wounded-but-alive-when-bp-agent-shot-him-head-says-expert/.

monetary compensation for fatally shooting a Mexican teenager across the U.S.-Mexico border.²¹³ In his final month in office, President Donald J. Trump pardoned two of the only agents in the history of U.S. Border Patrol convicted of excessive use of force, Ignacio Ramos and Jose Compean, who shot a man in 2006 and then attempted to cover up their crime.²¹⁴

This brief will discuss in greater detail two structural factors that contribute to the pattern of rampant violence by border agents and impunity. First, this submission will examine U.S. laws and policies that regulate use of force by federal agents, and second, secret federal grand jury investigations of state violence. This section will identify how laws, policies, and procedures shielded states agents from accountability for Mr. Hernandez’s death to examine the United States’ responsibility for multiple violations of the American Declaration.

A. United States Laws and Policies Authorized Unnecessary and Disproportionate Force Against Anastasio Hernandez Rojas.

1. Contrary to evidence and international law, the United States concluded that the force used against Anastasio Hernandez Rojas was necessary.

a) U.S. law authorizes force that is “objectively reasonable.”

The Fourth Amendment of the U.S. Constitution protects “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures.”²¹⁵ It permits only uses of force that are “objectively reasonable.”²¹⁶ In general, this standard applies whenever a state agent uses physical force that infringes upon individual liberty.²¹⁷ The use of force must be “objectively reasonable” under the totality of facts and circumstances known to the officer at the time he or she decides to use force.²¹⁸ The “objective reasonableness” standard is the cornerstone of U.S. law and policy regulating the use of force.²¹⁹

The “objective reasonableness” standard figures prominently in law enforcement trainings and policy guidelines,²²⁰ as well as in both civil and criminal adjudications involving excessive force claims. For example, in the first and only federal prosecution of a U.S. border patrol officer for murder, the jury received instructions to consider whether the officer had acted reasonably when, in response to a thrown rock, he shot a child standing in Mexico multiple times.²²¹ The jury instructions provided that the “[u]se of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force[.]”²²² The instructions specified that “a

²¹³ Hernandez v. Mesa, 140 S. Ct. 735 (2020).

²¹⁴ Press Release, Southern Border Communities Coalition, Trump Pardons Border Agents Who Covered Up Shooting (Dec. 23, 2020), https://www.southernborder.org/trump_pardons_border_agents_who_covered_up_shooting.

²¹⁵ U.S. CONST. amend. IV.

²¹⁶ Graham v. Connor, 490 U.S. 386, 397 (1989).

²¹⁷ See *id.* at 395, n.10 (citing Terry v. Ohio, 392 U.S. 1, 19, n.16 (1968) (defining “seizure” and discussing potential limits on Fourth Amendment protections against the “use of excessive physical force” in cases where force is used against pretrial detainees).

²¹⁸ See *id.* at 397; see also Tennessee v. Garner, 471 U.S. 1, 8-9 (1985).

²¹⁹ See, e.g., Michael J. Fisher, Memorandum: Use of Safe Tactics and Techniques, OBP 80/9 (Mar. 7, 2014) (stating that the Custom and Border Patrol use of force policy is “constitutionally derived”); POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 16 (2016) (stating that “all police agencies must have use of force policies that meet *Graham*’s standards.”).

²²⁰ See, e.g., Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 *TOURO L. REV.* 569, 581 (2008) (“We apply this *Graham* standard in law enforcement training.”).

²²¹ United States v. Swartz, No. 15-cr-1723 (D. Ariz. Sept. 23, 2015). CBP officer Lonnie Swartz fired through a border fence, hitting the child eight times in the back and twice in the head, killing him. Officer Swartz admitted to killing the child but claimed his use of force was reasonable because he was acting in self-defense. *Id.*

²²² Closing Jury Instructions at 14, United States v. Swartz, No. 4:15-cr-01723-RCC-DTF (D. Ariz. Apr. 23, 2018).

person must use no more force than appears reasonably necessary under the circumstances.”²²³ As to lethal force, the instructions stated that “[f]orce likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.”²²⁴ The instructions continued, in relevant part:

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that the police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. The reasonableness of an officer's use of force requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, and whether he is actively resisting arrest or attempted to evade arrest by flight.²²⁵

Following these instructions, the jury acquitted the officer of second-degree murder, and it was unable to reach a unanimous decision on either voluntary or involuntary manslaughter.²²⁶

Under the “objective reasonableness” standard, U.S. courts must examine the conduct of law enforcement officers “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight[.]”²²⁷ In *Graham v. Connor*, the U.S. Supreme Court explained that a “reasonable officer” perspective accounts for the “split-second judgments” that officers must often make “in circumstances that are tense, uncertain, and rapidly evolving. . . .”²²⁸

The *Graham* Court explained that the objective reasonableness standard lacks “precise definition.”²²⁹ Rather, courts must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.”²³⁰ Although non-exhaustive,²³¹ the Supreme Court recognized key factors to include: (1) the extent of the governmental intrusion;²³² (2) the severity of the crime at issue; (3) whether the subject posed an immediate threat to the safety of the officer or others; and (4) whether the subject was actively resisting arrest or attempting to evade arrest by flight.²³³

²²³ *Id.* Note that international and Inter-American standards require that state agents use only that force which is *absolutely* necessary. *See, e.g., Cruz Sanchez v. Peru*, Case 12.444, Inter-Am. Comm’n H.R., Report No. 66/10, ¶ 120 (2011).

²²⁴ Closing Jury Instructions, *supra* note 222, at 14.

²²⁵ *Id.* at 15.

²²⁶ Rafael Carranza & Rob O'Dell, *Border Patrol Agent Lonnie Swartz Found Not Guilty in Cross-Border Slaying of Mexican Teen*, AZCENTRAL (May 11, 2018), <https://www.azcentral.com/story/news/politics/border-issues/2018/04/23/border-patrol-agent-lonnie-swartz-found-not-guilty-crossborder-slaying-mexican-teen/544197002> [<https://perma.cc/TP5A-FC64>]. A jury found the BP Agent not guilty on manslaughter charges after a second trial. Ana Adlerstein, *A Not-Guilty Verdict Absolves Border Patrol of Cross-Border Killing*, NPR (Nov. 25, 2018), <https://www.npr.org/2018/11/25/670668243/a-not-guilty-verdict-absolves-border-patrol-of-crossborder-killing> [<https://perma.cc/H6WD-AVMG>].

²²⁷ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

²²⁸ *Id.* at 397.

²²⁹ *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

²³⁰ *Scott v. Harris*, 550 U.S. 372, 383 (2007) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

²³¹ *See, e.g., Pauly v. White*, 874 F.3d 1197, 1207 (10th Cir. 2017) (considering the “three non-exclusive factors articulated in *Graham v. Connor*”).

²³² *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (“[O]ne of the factors is the extent of the intrusion . . .”).

²³³ The first three factors are widely known as the *Graham* three-prong test. However, *Graham* provides that examining the particular “facts and circumstances” includes a review of these factors, indicating that the three-part test is non-exhaustive. *See Graham*, 490 U.S. at 396.

In an earlier case, *Tennessee v. Garner*, the U.S. Supreme Court held that it was not objectively reasonable to use a firearm to prevent the escape of an unarmed suspect.²³⁴ Only if an officer had probable cause to believe the suspect posed a threat of serious physical harm to the officer or others could they resort to such force.²³⁵ In dicta, the Supreme Court also stated that uses of lethal force should be accompanied by a warning.²³⁶

More recently, the U.S. Supreme Court has interpreted the reasonableness standard broadly, signaling a retreat from its prior jurisprudence. In *Scott v. Harris*, the Court held that an officer acted reasonably when he rammed his police car into the vehicle of a fleeing motorist, even though the lower courts had made factual determinations that, throughout the entire chase, the suspect had “maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road.”²³⁷ The underlying offense—speeding 73 miles per hour in a 55-mile-per-hour zone—was relatively minor. The Court stated, however, that the suspect posed an “actual and imminent threat” to law enforcement, as well as to any other motorist or pedestrian “who might have been present” during the chase.²³⁸ The Court also considered that the “flashing blue lights and blaring sirens” of the police vehicle sufficiently warned the suspect that officers might use a controlled vehicle maneuver to terminate the chase.²³⁹ The Scott Court arrived to its conclusions by reviewing video footage of the chase from the officer’s perspective.²⁴⁰

Lower federal courts interpreting *Scott* have applied a reasonableness inquiry that focuses almost exclusively on the perception of danger and subjective knowledge of state agents.²⁴¹ Even if the agent’s belief about the level of danger is mistaken—for example, if the officer believed the suspect was armed with a gun but an investigation determined she had a harmless, plastic toy—courts have determined that even the use of a firearm was reasonable under the Supreme Court’s Fourth Amendment excessive use of force doctrine.²⁴²

²³⁴ See *id.* at 3.

²³⁵ *Garner*, 471 U.S. at 11.

²³⁶ See *id.* at 11-12. (“[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”).

²³⁷ See *Scott v. Harris*, 550 U.S. 372, 384 (2007); *Harris v. Coweta County*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *5 (N.D. Ga. Sept. 25, 2003).

²³⁸ See *Scott*, 550 U.S. at 384 (emphasis added).

²³⁹ See *id.* at 385-86.

²⁴⁰ *Id.* at 379-81.

²⁴¹ See, e.g., *Plumhoff v. Rickard*, 572 U.S. 765, 775-77 (2014) (holding use of a firearm against a stalled motorist was not excessive because “a reasonable police officer” could have concluded that the motorist would resume escape and “once again pose a deadly threat”); *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007) (deferring to officer’s judgment that intentionally bumping the vehicle off road was necessary despite testimony from other law enforcement officers that the use of force was excessive); *Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015) (holding use of a Taser against a resisting subject is reasonable in part because the officer did not need to give the suspect time to comply); *Shreve v. Franklin County, Ohio*, 743 F.3d 126, 135 (6th Cir. 2014) (holding officers did not use excessive force when they deployed Tasers multiple times against a person who was confined in his prison cell, partially handcuffed, and seizing).

²⁴² See, e.g., *Small v. Glynn County, Ga.*, 77 F. Supp. 3d 1271, 1280-81 (S.D. Ga. 2014) (rejecting the relevance of expert testimony that the suspect could not have posed a threat that officers perceived and holding use of a firearm that resulted in death was not excessive); *Rush v. City of Lansing*, 644 Fed. App’x 415 (6th Cir. 2016) (holding that the officer did not use excessive force when he fired a second fatal shot into suspect’s head because, even if he was ultimately mistaken, he could have reasonably concluded that the suspect—despite collapsing to the ground after being shot in the stomach—continued to pose a threat to officer safety); *Slattery v. Rizzo*, 939 F.2d 213, 215 (4th Cir. 1991) (holding that the officer acted reasonably in using a firearm against the suspect who was holding a beer bottle because, even though the officer could not see the suspect’s hand, the officer could have reasonably concluded that the suspect had a weapon); see also *Thomas v. Durastanti*, 607 F.3d 655, 666 (10th Cir. 2010) (holding the officer’s use of a firearm was reasonable even if he was acting on “a mistaken belief as to the facts establishing the existence of exigent circumstances”); *Thomson v. Salt Lake City*, 584 F.3d 1304, 1315 (10th Cir. 2009) (“[A] reasonable but mistaken belief that the suspect is likely to fight back justifies using more force than is actually needed.”).

b) CBP use of force policy is based on the reasonableness standard

CBP use of force policy derives from constitutional law and the reasonableness standard as articulated by the U.S. Supreme Court in civil cases addressing excessive uses of force.²⁴³ At the time of Mr. Hernandez's killing, CBP use of force policy included the 2004 Interim CBP Use of Force and Firearms Guidelines ("2004 CBP Policy"),²⁴⁴ the 2004 DHS Use of Deadly Force Policy ("2004 DHS Deadly Force Policy"),²⁴⁵ and the 2009 CBP Directive No. 4510-029 on the Use of Electronic Control Devices.²⁴⁶

The 2004 CBP Policy provided guidance to officers on the varying levels of force by including a use of force continuum that escalated in five stages: (1) officer presence; (2) verbal commands; (3) soft techniques, such as "come along holds;" (4) hard techniques, such as strikes to the body; and (5) lethal force.²⁴⁷ The policy instructed that officers could only use lethal force when they reasonably believed that the suspect had "the means, the intent, and the opportunity of causing death or grievous bodily harm upon the officer or another person."²⁴⁸ Relatedly, the 2004 DHS Deadly Force Policy instructed that officers could only use lethal force when they reasonably believe that "the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person."²⁴⁹ Beyond these instructions, however, no policy in effect at the time of Mr. Hernandez's killing provided any information on the circumstances under which CBP officers could or could not resort to the use of force.

In 2009, CBP issued Directive No. 4510-029 to address the specific use of Electronic Control Devices (ECD's)—i.e., Tasers.²⁵⁰ The directive instructed that, before deploying a Taser, an officer

²⁴³ See, e.g., U.S. CUSTOMS & BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES & PROCEDURES HANDBOOK 1 (2014), <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf> (citing *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985)).

²⁴⁴ U.S. CUSTOMS AND BORDER PROTECTION, INTERIM USE OF FORCE AND FIREARMS (2004) [hereinafter 2004 CBP POLICY] (Exh. G). In October 2010, several months after Mr. Hernandez Rojas's death, CBP updated its general use of force policy. See 2010 USE OF FORCE POLICY HANDBOOK Exh. C. CBP revised its general use of force policy again and released its current policy in 2014. See U.S. CUSTOMS & BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES & PROCEDURES HANDBOOK 1 (2014), <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

²⁴⁵ Secretary of the Department of Homeland Security, Memorandum on Department of Homeland Security Policy on Use of Deadly Force (2004) [hereinafter 2004 DHS DEADLY USE OF FORCE POLICY] (Exh. H).

²⁴⁶ U.S. CUSTOMS AND BORDER PROTECTION, CBP DIRECTIVE 4510-029: POLICY ON THE USE OF ELECTRONIC CONTROL DEVICES (2009) [hereinafter 2009 CBP DIRECTIVE ON ECD] (Exh. I).

²⁴⁷ 2004 CBP POLICY, Exh. G at 50.

²⁴⁸ *Id.* at 40.

²⁴⁹ 2004 DHS DEADLY USE OF FORCE POLICY, Exh. H at 2. The 2004 DHS DEADLY USE OF FORCE POLICY is intended as an "umbrella policy" that allows DHS components, such as CBP, to supplement the policy with "more detailed operational guidance with DHS approval." *Id.* at 1. The 2004 DHS Policy Guidelines provide that all supplemental policy provisions are subject to approval by the DHS Office of General Counsel to ensure their compliance with applicable law. *Id.* at 2.

²⁵⁰ The Taser takes its name from its manufacturer TASER International, now rebranded Axon, whose X26 model—the device used against Mr. Hernandez—is one of the most widely used devices of its kind. See William Sousa et al., *The Impact of TASERS on Police Use of Force Decisions: Findings from a Randomized Field-Training Experiment*, 6 J. EXPERIMENTAL CRIMINOLOGY 35, 36 (2010). We use the term "Taser" because of its widespread use. However, different authorities have used a variety of terms to describe the same or similar devices: electronic control weapons, electro muscular disruption devices, stunning devices or stun guns, electro-shock weapons, electrical discharge weapons, and conducted energy weapons or devices. See, e.g., *Human Rights Committee Discusses Draft General Comment on the Right to Life*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (July 3, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23328&LangID=E>; *Anti-Torture Committee Issues Warning On Police Use of Electrical Weapons*, HUMAN RIGHTS EUROPE (Oct. 26, 2010), <https://humanrightseurope.blogspot.com/2010/10/anti-torture-committee-issues-warning.html?m=1>; INTERNATIONAL COMMITTEE OF THE RED CROSS, TO SERVE AND TO PROTECT: HUMAN RIGHTS AND HUMANITARIAN LAW FOR POLICE AND SECURITY FORCES 247 (2014), <https://www.icrc.org/eng/assets/files/publications/icrc-002-0698.pdf>; *Canada: Human Rights Committee Reminds the Government that Its Companies Must Respect Human Rights*, CENTER FOR CIVIL & POLITICAL RIGHTS, <http://ccprcentre.org/page/114th-session-in-brief/canada-human-rights-committee-reminds-the-government-that-its-companies-must-respect-human-rights/?the-human-rights-committee-reminds-canada-that-its-companies-must-respect-human->

“should verbalize ‘TASER, TASER, TASER’” so as to warn other officers.²⁵¹ The policy did not limit the number of times an officer could deploy a Taser, nor did it specify against whom an officer could not deploy a Taser, such as a person in custody. Instead, it provided that officers should “deliver only the number of ECD cycles reasonably necessary to control and secure a resistant subject,” and, if unsuccessful, could transition to another type of force.²⁵²

CBP Officer Vales, who shocked Mr. Hernandez four times, passed an ECD training course before the incident.²⁵³ The training course alerted CBP Officer Vales to some of the dangers of using a Taser, including that “[s]ubject(s) exposed to an ECD and handcuffed may experience Positional Asphyxiation if allowed to ... [l]ie in a prone/face down position or one that restricts normal breathing.”²⁵⁴ CBP Officer Vales was also trained to recognize the “typical physiological effects of the ECD” to include “yelling” and “involuntary muscle contractions.”²⁵⁵ Nevertheless, the border agents used the fact that Mr. Hernandez was yelling and flailing—which according to their training are normal responses to ECD—to justify additional shocks. The training did not prohibit the use of Tasers against individuals in custody.

- c) The DOJ concluded that CBP agents used objectively reasonable force against Anastasio Hernandez Rojas

Roughly two years after Mr. Hernandez Rojas’s death, the U.S. Department of Justice opened a criminal investigation into his murder.²⁵⁶ The investigation examined the conduct of the CBP officers responsible for killing Mr. Hernandez Rojas to determine whether it would be appropriate to pursue federal criminal civil rights, homicide, and manslaughter charges against them.²⁵⁷ On November 6, 2015, the DOJ announced that it had concluded its investigation and decided not to pursue any federal charges against the officers responsible.²⁵⁸

Federal criminal civil rights law prohibits law enforcement officers from willfully depriving a person of a constitutional right while acting under color of law.²⁵⁹ The DOJ, however, has rarely brought criminal civil rights charges against law enforcement officers for killings.²⁶⁰ In this case, the Fourth Amendment afforded Mr. Hernandez Rojas the right to be free from “objectively unreasonable” force.²⁶¹ With respect to these federal criminal civil rights charges, the DOJ concluded that federal prosecutors “could not prove beyond a reasonable doubt that the [agents] acted willfully, that is with

rights/; U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE DEPARTMENT OF JUSTICE’S USE OF LESS-LETHAL WEAPONS, Report No. I-2009-003, i (2009), <https://oig.justice.gov/reports/plus/e0903/final.pdf>.

²⁵¹ 2009 CBP DIRECTIVE ON ECD, Exh. I at 6.2.9.

²⁵² *Id.* at 6.2.8.

²⁵³ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 71.

²⁵⁴ *Id.* at 76.

²⁵⁵ *Id.* at 74.

²⁵⁶ See Declaration of Richard Tolles in Support of Motion for Stay (2012), Petition, Exh. 34 at 2.

²⁵⁷ Press Release, U.S. Department of Justice, Office of Public Affairs, Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas (Nov. 6, 2015) [hereinafter Federal Officials Close the Investigation], <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

²⁵⁸ *Id.* According to the DOJ, this decision was “based on the facts developed during an independent and comprehensive investigation[.]” Its review of the evidence included video footage of Mr. Hernandez’s killing; witness accounts from both law enforcement and civilians; medical personnel accounts and medical records, including autopsy reports; official use of force training materials; and forensic evidence. *Id.*

²⁵⁹ 18 U.S.C. § 242 (“Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].”).

²⁶⁰ See Chase Madar, *Why It’s Impossible to Indict a Cop*, NATION (Nov. 25, 2014), <https://www.thenation.com/article/why-its-impossible-indict-cop/>.

²⁶¹ See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

the specific intent to deprive the victim of a constitutional right.”²⁶² In a press release, the DOJ described the applicable standard:

[P]rosecutors must establish, beyond a reasonable doubt, that an official willfully deprived an individual of a constitutional right, meaning that the official acted with the deliberate and specific intent to do something that the law forbids. This is the highest standard of intent imposed by the law. Neither accident, mistake, fear, negligence nor bad judgment is sufficient to establish a federal criminal civil rights violation.²⁶³

The DOJ further stated that it could not disprove claims by CBP officers that they had “used reasonable force in an attempt to subdue and restrain a combative detainee so that he could be placed inside a transport vehicle.”²⁶⁴ The evidence before the DOJ had shown that numerous officers repeatedly kicked and punched Mr. Hernandez; struck him with batons in the arms and chest; used positional restraints, such as knees and feet placed upon his back and neck; and deployed a Taser four times, in both dart and stun-gun modes.²⁶⁵ Despite the danger of applying the Taser in stun-gun mode directly to Mr. Hernandez’s chest, CBP policy did not prohibit this application, and the DOJ did not find it unreasonable. According to the DOJ press release, Mr. Hernandez Rojas “stopped resisting” only after the CBP officer deployed his Taser four times against Mr. Hernandez Rojas.²⁶⁶ Unlike other investigatory conclusions made public,²⁶⁷ however, the DOJ’s press release did not confirm whether the DOJ had analyzed each individual use of force to determine whether any of those applications had violated federal law.²⁶⁸

The DOJ’s investigation also considered whether to bring federal homicide charges.²⁶⁹ The federal government has jurisdiction over a murder—i.e., the “unlawful killing of a human being with malice aforethought”—that occurs “within the special maritime and territorial jurisdiction of the United States.”²⁷⁰ However, the DOJ declined to pursue federal homicide charges. Even after reviewing video footage that showed Mr. Hernandez being Tased while laying handcuffed on the ground in a fetal position, surrounded by 17 agents, the DOJ based its decision on a lack of evidence that CBP officers had acted with the requisite malice under federal law.²⁷¹ The DOJ emphasized that several factors contributed to Mr. Hernandez Rojas’s death: “[a]cute methamphetamine intoxication, pre-existing heart disease, the level of physical exertion during the struggle, the electro-shocks from

²⁶² See Federal Officials Close the Investigation, *supra* note 257.

²⁶³ *Id.* See also *Law Enforcement Misconduct*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/law-enforcement-misconduct> (last updated July 6, 2020) (referring to § 242 as the “Law Enforcement Misconduct Statute”); U.S. DEPARTMENT OF JUSTICE, MEMORANDUM, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 9 (2015) [hereinafter MICHAEL BROWN MEMORANDUM], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf. The Michael Brown Memorandum explained that the appropriateness of a criminal prosecution turned on whether there was “sufficient evidence to establish that *any* of the shots fired by [the officer] were unreasonable, as defined under federal law, . . . and if so, whether [the officer] fired the shots with the requisite ‘willful’ criminal intent.” *Id.* at 10 (emphasis added).

²⁶⁴ Federal Officials Close the Investigation, *supra* note 257.

²⁶⁵ Deposition of Wagner (2012), Petition, Exh. 18 at 13:10-11; Transcript of Videotaped Deposition of Marvin Pietruszka (2013), Petition, Exh. 36 at 76:1-18; Deposition of Gonzalez-Gomez, Petition, Exh. 13 at 66:4-9; 74:8-20; Videos Taken by Ashley Young, Petition, Exh. 17. Enhanced Videos Taken by Ashley Young, Exh. B.

²⁶⁶ Federal Officials Close the Investigation, *supra* note 257.

²⁶⁷ See Michael Brown Memorandum, *supra* note 263, at 80-85.

²⁶⁸ See Federal Officials Close the Investigation, *supra* note 257.

²⁶⁹ See *id.*

²⁷⁰ 18 U.S.C. § 1111(b), <https://www.law.cornell.edu/uscode/text/18/1111>.

²⁷¹ Federal Officials Close the Investigation, *supra* note 257.

the taser and positional restraint[.]”²⁷² Essentially, DOJ argues that had Mr. Hernandez been in better health he would not have died from the beating and Tasing. The press release, did not mention that both autopsies performed on Mr. Hernandez Rojas ruled the manner of death a homicide.²⁷³

Lastly, the DOJ’s investigation considered whether to bring charges for involuntary manslaughter.²⁷⁴ U.S. federal law defines manslaughter as the “unlawful killing of a human being without malice.”²⁷⁵ Manslaughter is involuntary when done “[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.”²⁷⁶ In declining to pursue manslaughter charges, the DOJ first determined that the CBP officers’ uses of positional restraint and a Taser were not unlawful because Mr. Hernandez Rojas was “non-compliant and physically assaultive.”²⁷⁷ DOJ’s conclusion directly contradicts civilian eyewitness video recordings and statements. The DOJ then determined that, based on evidence related to the CBP officers’ use of force training, the officers had not acted without due caution and circumspection.²⁷⁸

Based on the DOJ’s press release, it appears that the DOJ did not investigate CBP officers involved in the killing of Mr. Hernandez Rojas for lesser crimes such as aggravated battery or obstruction of justice. Federal prosecutors only considered the highest criminal offenses (e.g., civil rights violations and homicide) and the most difficult to prove. Moreover, prosecutors did not conclude the federal criminal investigation in time to bring federal assault charges, or other lesser charges, with five-years statutes of limitations.²⁷⁹

2. The United States authorized the unnecessary and disproportionate use of force by federal border agents against Anastasio Hernandez Rojas.

The American Declaration permits state agents to use force that is strictly necessary and proportionate to the needs of the situation and to a legitimate objective.²⁸⁰ Under the Inter-American jurisprudence, state agents may only use force when “non-violent means are manifestly incapable” of achieving a legitimate objective.²⁸¹ If state agents decide to use force, officers must use “differentiated and progressive” levels of force in relation to the level of resistance or violence posed.²⁸²

Moreover, the Inter-American Commission has underscored the heightened responsibility states acquire in custodial setting “to protect and ensure the right to life and to personal integrity of those

²⁷² *Id.*

²⁷³ County Autopsy Report (2010), Petition, Exh. 25 at 4; Marvin Pietruska Autopsy (2010), Petition, Exh. 27 at 8.

²⁷⁴ Federal Officials Close the Investigation, *supra* note 257.

²⁷⁵ 18 U.S.C. § 1112(a) (emphasis added), <https://www.law.cornell.edu/uscode/text/18/1112>.

²⁷⁶ *Id.*

²⁷⁷ Federal Officials Close the Investigation, *supra* note 257.

²⁷⁸ *Id.*

²⁷⁹ For most federal offenses, including federal assault, U.S. federal prosecutors have a five-year statute of limitations to charge the defendant. CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, RL31253, STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 19-29 (2012) [hereinafter CRS REPORT ON FEDERAL GRAND JURY], <https://www.fas.org/sgp/crs/misc/RL31253.pdf> (prepared for members and committees of Congress). Federal investigators did not conclude the federal investigation until more than five years had passed since Mr. Hernandez’s death.

²⁸⁰ See *Salas Galindo v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report No. 121/18, OEA/Ser.L./V/II.169, doc. 138 ¶ 338 (2018) (observing protections of the right to life under the American Declaration include that uses of force be limited by principles of necessity and proportionality); *Ruiz Fuentes v. Guatemala*, Case 12.650, Inter-Am. Comm’n H.R., Report No. XX/17, OEA/Ser.L./V/II.163, doc. XX, ¶¶ 193-94 (2017); see also Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, ¶ 114, OEA/Ser.L./V/II, doc. 57 (Dec. 31, 2009) [hereinafter *Report on Citizen Security and Human Rights*].

²⁸¹ *Cruz Sanchez v. Peru*, Case 12.444, Inter-Am. Comm’n. H.R., Report No. 66/10, ¶ 121 (2011).

²⁸² *Ruiz Fuentes*, Case 12.650, Inter-Am. Comm’n. H.R., ¶ 194 (quoting *Dorzema v. Dominican Republic*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012)).

deprived of liberty....”²⁸³ International standards prohibit the use of force against detainees “except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.”²⁸⁴ In 2008, the Organization of American States adopted Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.²⁸⁵ The guidelines, endorsed by the Inter-American Commission,²⁸⁶ establish that:

The personnel of places of deprivation of liberty shall not use force and other coercive means, save exceptionally and proportionally, in serious, urgent and necessary cases as a last resort after having previously exhausted all other options, and for the time and to the extent strictly necessary in order to ensure security, internal order, the protection of the fundamental rights of persons deprived of liberty, the personnel, or the visitors.

The personnel shall be forbidden to use firearms or other lethal weapons inside places of deprivation of liberty, except when strictly unavoidable in order to protect the lives of persons.²⁸⁷

Moreover, the Inter-American Commission has stressed that “even non-lethal or incapacitating weapons such as rubber bullets or Tasers must be used in accordance with the principles of necessity and proportionality, after first attempting to use other dissuasive methods.”²⁸⁸

These standards differ substantively from the U.S. “objective reasonableness” standard established by U.S. Supreme Court jurisprudence and codified in CBP use of force policy in effect at the time federal agents tortured and killed Anastasio Hernandez Rojas. In violation of the American Declaration, the objective reasonableness standard does not require state agents to use the minimum amount of force necessary to achieve a legitimate objective. Nor does it require that agents use a type of force that is proportionate to the threat posed by the person against whom force is used or provide additional protections to persons in custodial settings. The danger that inheres to such relaxed use of force standards is most apparent where U.S. law and policy has failed to require that agents exhaust available, less-harmful force alternatives. The lack of any clear warning requirement before an officer uses lethal force is also a striking example of how far U.S. law has strayed from international principles. The unsurprising result of this insufficient use of force standard is impunity for killings at the U.S.-Mexico border: no border agent, including the state agents responsible for Mr. Hernandez Rojas’s death, has been held accountable for a killing during the Border Patrol’s ninety-year history.

U.S. law and policy has also failed to provide sufficient guidance on the use of Tasers. Numerous international bodies have concluded that use of force law and policy should regulate Tasers

²⁸³ Olivares Muñoz (Deaths at the Vista Hermosa Prison) vs. Venezuela, Case No. 12.184, Inter-Am. Comm’n H.R., Report No. 119/18, OEA/Ser.L.V/II.169, doc. 136, ¶ 63 (2018) (citing Matters of Certain Venezuelan Prisons, the Penitentiary Center of the Central Occidental Region (Uribana Prison), Provisional Measures, Order of the Inter-American Court of Human Rights, “Considering” ¶ 7 (Inter-Am. Ct. H.R. Feb. 13, 2013)).

²⁸⁴ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112, principle 9 (1990) [hereinafter U.N. Basic Principles on the Use of Force]; G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners, rule 82(1) (Jan. 8, 2016), <https://undocs.org/A/RES/70/175> [<https://perma.cc/9U9Q-ZWPK>].

²⁸⁵ Inter-Am. Comm’n on H.R. [IACHR], Res. 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Mar. 13, 2008) [hereinafter IACHR Principles & Best Practices], <https://tinyurl.com/y29rmcp7>.

²⁸⁶ Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, ¶ 222, OEA/Ser.L.V/II, doc. 64 (2011) [hereinafter *Report on the Human Rights of Persons Deprived of Liberty in the Americas*], <https://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>.

²⁸⁷ IACHR Principles & Best Practices, *supra* note 285, Principle XXIII(2).

²⁸⁸ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, *supra* note 286, ¶ 240.

as lethal force devices, which would restrict their use to situations where there is an immediate and ongoing threat of death or serious injury, and the Taser is deployed in the interest of protecting life.²⁸⁹ U.S. law, however, has permitted Tasers in wide-ranging circumstances that involved no serious threat to life or safety.²⁹⁰ At the time of Mr. Hernandez Rojas's torture and death, CBP policy did not specify the level of force Tasers would occupy on the use of force continuum and restrict their use accordingly.²⁹¹ Nor did CBP policy address the use of Tasers against persons in custody.

In sum, DOJ's conclusion that border agents had used only lawful force against Mr. Hernandez was pre-ordained by the United States' failure to adequately, sufficiently, and effectively regulate the use of force by federal agents.

- a) U.S. law and CBP policy violate the right to life by failing to require that state agents use force that is necessary and proportionate in accordance with the American Declaration (Articles I and XXV)
 - i. The American Declaration permits the use of force only when strictly necessary and proportionate

Under the American Declaration, the principles of legality, absolute necessity, and proportionality guide and limit the use of force by state agents.²⁹² Taken together, these principles restrict the use of force to situations where "other means remain[] ineffective."²⁹³ State agents may only use force as a last resort. And they must always use persuasion and de-escalation tactics.²⁹⁴ This includes a requirement that, where feasible, state agents give clear warning of their intent to use force,

²⁸⁹ See *Cruz Sanchez v. Peru*, Case No. 12.444, Inter-Am. Comm'n H.R., Report No. 66/10, ¶ 121 (2011); *Dorzema v. Dominican Republic*, Case No. 12.688, Inter-Am. Comm'n H.R., Report No. 174/10, ¶ 109 (2010); see also Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 88(b), U.N. Doc. A/66/330 (Aug. 30, 2011) [hereinafter *2011 Report of Special Rapporteur Christof Heyns*] (explaining that "the right to life may be limited only in order to protect life").

²⁹⁰ See, e.g., *Brossart v. Janke*, 859 F.3d 616, 625 (8th Cir. 2017) (holding the second use of a Taser against a suspect on ground was reasonable because he attempted to stand up and had otherwise been resisting arrest); *Rodriguez v. Panarello*, 119 F. Supp. 3d 331, 339 (E.D. Pa. 2015) (holding use of a Taser against a person standing on top of a car was reasonable because he failed to comply with the officer's commands and did not show his hands); *Clark v. Ware*, 873 F. Supp. 2d 1117, 1120-21 (E.D. Mo. 2012) (holding use of a Taser against a person in handcuffs was reasonable where suspect refused to comply with officer's command to get into a patrol car); *McKenney v. Harrison*, 635 F.3d 354, 357, 360 (8th Cir. 2011) (holding the fatal use of a Taser to prevent escape of a person with arrest warrants for non-violent misdemeanors was reasonable); *Wargo v. Municipality of Monroeville, PA*, 646 F. Supp. 2d 777, 786 (W.D. Pa. 2009) (holding the continued use of a Taser against an unarmed person to effectuate an arrest did not constitute excessive force); *Buckley v. Haddock*, 292 Fed. App'x 791, 795 (11th Cir. 2008) (holding multiple uses of a Taser were reasonable even though backup assistance was in route and the suspect was handcuffed and laying on the ground); *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004) (holding use of a Taser in stun-gun mode was reasonable because the suspect was verbally hostile and non-compliant with the officer's commands to produce documents).

²⁹¹ See 2010 USE OF FORCE POLICY HANDBOOK, Exh. C. The 2009 Directive provided only that officers should follow reporting standards for uses of deadly force if their use of a Taser resulted in serious injury or death. 2009 CBP DIRECTIVE ON ECD, Exh. I at 8.1.5.

²⁹² See *Salas Galindo v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report No. 121/18, OEA/Ser.L./V/II.169, doc. 138, ¶ 338 (2018); see also Inter-American Commission on Human Rights, *Police Violence Against Afro-Descendants in the United States*, ¶ 202, OEA/Ser.L./V/II, doc. 156 (Nov. 26, 2018) [hereinafter *IACHR Report on Police Violence in the United States*], <https://www.oas.org/en/iachr/reports/pdfs/PoliceUseOffForceAfrosUSA.pdf> [<https://perma.cc/UC2F-PMG2>]; *Report on Citizen Security and Human Rights*, *supra* note 280, ¶¶ 114, 133.

²⁹³ U.N. Basic Principles on the Use of Force, *supra* note 284, principle 4 ("Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.").

²⁹⁴ See *Landaeta Mejías Brothers v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶ 135 (Aug. 27, 2014); Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Christof Heyns, ¶ 59, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) [hereinafter *2014 Report of Special Rapporteur Christof Heyns*].

followed by opportunity for compliance.²⁹⁵ The Inter-American Commission has stressed that in custodial settings force and coercive means may only be used against detainees “exceptionally and proportionally, in serious, urgent and necessary cases as a last resort after having previously exhausted all other options....”²⁹⁶

When state agents use force, they may apply only the minimum amount of force necessary, even if a greater level of force would be proportionate.²⁹⁷ In general, necessary force is that which is the “least harmful means” available.²⁹⁸ The level of force used must also be proportionate to the seriousness of the offense and the legitimate objective to be achieved.²⁹⁹ The essence of proportionality is that force be in “keeping with the level of resistance offered.”³⁰⁰ The Inter-American Court has identified several factors to consider:³⁰¹ (1) the level of intensity and danger of the threat; (2) the attitude of the individual; (3) the conditions of the surrounding area; and (4) the means available to law enforcement to deal with the situation.³⁰² Unlike U.S. law, this inquiry does not consider the “relative culpability” of persons involved, nor does it consider the severity of the underlying offense, but only the related level of threat or danger.

Global standards also delineate under what circumstances the use of force is lawful against detainees. According to the U.N. Basic Principles, a state agent may only use force against a person in custody when it is strictly necessary to maintain security and order, or where personal safety is threatened.³⁰³ As the Inter-American Court has held, “any use of force that is not strictly necessary to ensure the appropriate behavior of a detainee constitutes an attack against human dignity[.]”³⁰⁴

In *Dorzema v. Dominican Republic*, for example the Inter-American Court held that state agents violated the right to life when they opened fire on a fleeing vehicle.³⁰⁵ Dominican military officials pursued a truck transporting approximately thirty Haitian migrants after the vehicle failed to stop at a checkpoint.³⁰⁶ Officers shot at the vehicle, as well as at the passengers who fled on foot after

²⁹⁵ See *Landaeta Mejías*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶ 135 (requiring warning before use of a weapon, especially where fundamental rights are endangered); *2014 Report of Special Rapporteur Christof Heyns*, *supra* note 294, ¶ 59.

²⁹⁶ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, *supra* note 286, ¶ 222 (2011) (citing IACHR Principles & Best Practices, *supra* note 285).

²⁹⁷ *2011 Report of Special Rapporteur Christof Heyns*, *supra* note 289, ¶ 29.

²⁹⁸ See *Landaeta Mejías*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶¶ 134, 138; *Dorzema v. Dominican Republic*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶¶ 85, 88 (Oct. 24, 2012). See also Philip Alston (Special Rapporteur, on Extrajudicial, Summary or Arbitrary Executions), Report on Extrajudicial, Summary or Arbitrary Executions, ¶ 41, U.N. Doc. A/61/311 (Sept. 5, 2006) (“The use of force should be gradual, starting at a low level and escalating only where necessary, as determined by the resistance offered.”).

²⁹⁹ See, e.g., *Dorzema*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. ¶ 87 (explaining that there must be “proportionality between the use of force and the harm it sought to prevent”); see also *2011 Report of Special Rapporteur Christof Heyns*, *supra* note 289, ¶ 29; U.N. Basic Principles on the Use of Force, *supra* note 284, principle 9.

³⁰⁰ See Commentary to Article 3 of the UN Code of Conduct for Law Enforcement Officials (1979) (citing *Dorzema*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. ¶ 85(iii)). See also *2014 Report of Special Rapporteur Christof Heyns*, *supra* note 294, ¶ 66 (explaining the proportionality principle established the ceiling above which the use of force may not go, even when a particular use of force may be considered necessary).

³⁰¹ The Inter-American Commission has stated that Inter-American legal precedent on the right to life is applicable in all cases before it that involve the use of force. See *Ruiz Fuentes v. Guatemala*, Case 12.650, Inter-Am. Comm’n. H.R., Report No. XX/17, OEA/Ser.L/V/II.163, doc. XX, ¶ 189 (2017). When the failure by state agents to follow principles of necessity and proportionality results in death, those agents have arbitrarily deprived the subject of life in violation of the American Declaration. See *id.* at 190.

³⁰² *Landaeta Mejías Brothers v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶ 136 (Aug. 27, 2014).

³⁰³ U.N. Basic Principles on the Use of Force, *supra* note 284, principle 15.

³⁰⁴ *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 52 (Nov. 24, 2011); see also *Lysias Fleury v. Haiti*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 236, ¶ 74 (Nov. 23, 2011).

³⁰⁵ *Dorzema*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. ¶ 97.

³⁰⁶ *Id.* ¶¶ 41-44.

it crashed, killing seven people.³⁰⁷ The Court condemned the military officers' failure to employ less harmful measures, such as setting up barricades or tire-puncturing devices.³⁰⁸ The Court stated that the measures were also "extremely disproportionate" to the state's stated objective of stopping drugs and weapons trafficking.³⁰⁹ The Court concluded that the level of force used violated the principles of necessity and proportionality and, in turn, violated the right to life.³¹⁰

In the Case of the Landaeta Mejías Brothers v. Venezuela, the Inter-American Court again underscored the state duty to use the "least harmful means" available and provide clear warning of the intent to use force.³¹¹ The Inter-American Court held that Venezuelan police who had shot and killed a teenager as he begged for his life violated the right to life.³¹² Although there was conflicting evidence as to whether the teenager had been armed, the Court concluded that the officers would not have been justified in using lethal force in either scenario.³¹³ The Court noted forensic evidence revealing that police's first shot had struck the teenager's shoulder while he was running away from authorities and their second shot struck the victim's face while he was on the ground.³¹⁴

- ii. U.S. law and CBP use of policy do not adhere to "least harmful means" or clear warning requirements established by Inter-American standards

Under U.S. law, law enforcement's use of force may be considered "reasonable," even when state agents do not consider the deployment of available, less-harmful alternatives.³¹⁵ Relatedly, there is no requirement under U.S. law that state agents give clear warning before using a weapon or lethal force.³¹⁶

The failure to impose either the clear warning or "least harmful means" requirement violates the American Declaration. U.S. Supreme Court jurisprudence on use of force conflicts directly with Inter-American case law.³¹⁷ In *Scott v. Harris*, the U.S. Supreme Court rejected an argument that law enforcement officers in pursuit of a fleeing vehicle should have deployed less-harmful alternatives before ramming a vehicle off the road, causing a crash that paralyzed the driver.³¹⁸ Plaintiffs argued that officers could have terminated the pursuit more safely by placing tire-puncturing devices ("strip spikes") across the roadway.³¹⁹ The Scott Court disregarded this argument entirely, and rejected a similar argument that the innocent public would have been equally protected had officers ceased their pursuit.³²⁰ The U.S. Supreme Court held that the driver's "relative culpability"—for having initiated the chase—justified the level of force used by police.³²¹ The Scott Court also rejected the argument

³⁰⁷ *Id.* ¶¶ 48-49.

³⁰⁸ *Id.* ¶ 88.

³⁰⁹ *Id.* ¶ 89.

³¹⁰ *Id.* ¶¶ 91, 97.

³¹¹ *Landaeta Mejías Brothers v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶¶ 132, 135 (Aug. 27, 2014).

³¹² *See id.* ¶¶ 139, 142.

³¹³ *Id.* ¶ 137.

³¹⁴ *Id.*

³¹⁵ *See Scott v. Harris*, 550 U.S. 372, 385-86 (2007).

³¹⁶ *See id.*

³¹⁷ *See Dorzema v. Dominican Republic*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 88 (Oct. 24, 2012); *Landaeta Mejías Brothers v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶ 137 (Aug. 27, 2014).

³¹⁸ *Scott*, 550 U.S. at 385.

³¹⁹ Brief for Respondent at 5, *Scott*, 550 U.S. 372 (No. 05-1631), 2006 WL 118977.

³²⁰ *See Scott*, 550 U.S. at 385-86.

³²¹ *See id.* at 384.

that officers had a duty to first warn the fleeing suspect of their intent to ram his vehicle off the road.³²² The Court stressed that the “flashing blue lights and blaring sirens” sufficiently warned the driver that he should have pulled over to end the pursuit.³²³ Interpretations of *Scott* by the lower federal courts also demonstrate that U.S. law on use of force do not require state agents to consider less-harmful force alternatives or give clear warning of the intent to use force.³²⁴

The CBP policy in effect at the time of Mr. Hernandez Rojas’s killing similarly failed to impose either “least harmful means” or clear warning requirements. The policy included only a list of compliance techniques in its use of force continuum section: officer presence, verbal commands, soft techniques, hard techniques, and deadly force.³²⁵ The use of force policy did not provide guidance on when an officer could reasonably deploy these varying levels of force, or establish any preconditions for using weapons like Tasers, such as exhausting less-harmful alternatives or giving clear warning. Nor did the policy specify when border agents should use de-escalation or whether persons in custody were entitled to more stringent protections. CBP policy failed to implement use of force standards that conformed to the principles of necessity and proportionality required by international law.

The lenient use of force standards implemented by U.S. law and CBP policy established the conditions for border agents to use excessive force against Mr. Hernandez without consequence. Although Mr. Hernandez was unarmed and handcuffed on the ground, CBP officers escalated the level of force against him. The officers struck with steel batons, repeatedly hitting him in the chest, abdomen, and ribs, before they handcuffed and pressed him into the ground with their body weight on his neck, and another officer deployed his Taser four times without any clear warning. This reckless escalation of force fails to satisfy the “least harmful means” requirement. The DOJ, however, concluded that this conduct was objectively reasonable.

Moreover, border agents failed to uphold the protections afforded by the American Declaration to persons in custody. State agents used a level of force well beyond that necessary to secure a person’s safety. Throughout the entire incident, Mr. Hernandez was in a secure and restricted area, restrained, and helpless—posing no threat to officer safety, security, or order. Although CBP Policy recognized “officer presence” as a cooperative control technique capable of resolving a conflict,³²⁶ CBP officers never attempted to use their presence to this end. Video evidence of the beating showed, instead, the escalation of force against an immobilized Mr. Hernandez, encircled by numerous officers. As the district court observed, “[t]he sheer number of officers available at the scene demonstrates rather

³²² *Id.* at 384.

³²³ *Id.* at 384.

³²⁴ In *Long v. Slaton*, for example, the 11th Circuit held that the use of a firearm to terminate a police chase was reasonable, rejecting arguments by plaintiffs that the officer should have considered the less-harmful measures available, such as spike strips or later tracking the suspect vis-à-vis the stolen police cruiser’s tracking device. See 508 F.3d 576, 583 (11th Cir. 2007). The court reasoned that, under *Scott*, an officer “need not have taken [the] chance” that less harmful measures might have proven effective. *Id.* (quoting *Scott*, 550 U.S. at 385). Thus, even if firing at the suspect’s body “was not the best available means of preventing [his] escape and preventing potential harm to others,” the officer’s use of force was nevertheless reasonable. *Id.* See *Abney v. Coe*, 493 F.3d 412, 416 (4th Cir. 2007); see also *Pasco v. Knoblauch*, 566 F.3d 572, 579, 581 (5th Cir. 2009) (concluding that officer’s decision to ram a fleeing vehicle off the road, killing the driver, was reasonable, even though the officer gave no warning, made no attempt at terminating the chase by less lethal means, and conceded that the chase had not endangered any pedestrian or other motorists).

³²⁵ 2004 CBP Policy, Exh. G at 50. In 2010, CBP revised its policy to list the factors an officer might consider in escalating or de-escalating force, but notably failed to impose a clear warning or least harmful means requirement in accordance with international law. See 2010 USE OF FORCE POLICY HANDBOOK, Exh. C at 14. Although the updated 2010 CBP Policy required that force be “necessary,” it defined that term only to mean that “some force is required to carry out one’s duties,” which hardly comports with the absolute necessity requirement. See *id.* The first suggestion that CBP officers be required to use only “the lowest level of force necessary” appears to come from a 2013 OIG Report, which does not have the same force of law as regulations and formal CBP Policy. See DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-13-114 CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (REDACTED) 2 (2013), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf.

³²⁶ See 2010 USE OF FORCE POLICY HANDBOOK, Exh. C at 73.

strongly that there was no objectively reasonable threat to the safety of anyone other than Anastasio.”³²⁷

- b) U.S. law and CBP policy failed to regulate Tasers in conformance with international standards
 - i. Under international standards, Tasers must be regulated as lethal force devices

According to international legal experts, states should regulate Tasers as lethal force devices.³²⁸ To this end, domestic law should restrict the use of Tasers to “situations of exceptional nature” where there is an imminent threat to life or risk of serious injury,³²⁹ and guidelines should be “sufficiently clear.”³³⁰

There are numerous reasons to regulate Tasers as lethal force devices. As the Inter-American Commission has observed, Tasers have special lethal capacity that distinguishes their use from other less-lethal weapons.³³¹ This lethality, according to this Honorable Commission, is not simply a matter of weapon design or type, but also the weapon’s particular use and control in a given situation.³³² Other international human rights bodies have stressed that the United States should “carefully review the use of electroshock devices, strictly regulate their use, restricting it to substitution for lethal weapons, and eliminate the use of these devices to restrain persons in custody....”³³³ and prohibited the use of Tasers against a person who is already in state custody.³³⁴ CBP training also warns agents that

³²⁷ Order Denying Motions for Summary Judgment, *Estate of Hernandez-Rojas v. United States*, No. 11-CV-522-L (S.D. Cal. Sept. 29, 2014) ECF No. 325.

³²⁸ Committee against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, ¶ 27, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) [hereinafter CAT Concluding Observations] (stating that Tasers should only be used as a substitute for lethal force); see also *UN Committee Against Torture Condemns Dutch Plans for Broad Introduction of Taser Weapons*, PRIVACY FIRST (May 13, 2013), <https://www.privacyfirst.eu/focus-areas/law-and-politics/595-dutch-taser-weapons-on-agenda-of-un-committee-against-torture.html> (Committee member Fernando Mariño Menéndez of Spain stating, “Our position as a Committee is that Tasers shouldn’t be used at all.”); 20th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf (2010) 28, ¶ 69 (1 August 2009-31 July 2010) [hereinafter 20th General Report of the European Committee for the Prevention of Torture], <https://rm.coe.int/1680696a87> (explaining that regulations for weapons “capable of discharging projectiles” should be directly inspired by those applicable to firearms); CPT Belgium 2009 Visit Report ¶ 36 (Apr. 15, 2010) (recommending that regulations on Taser deployment be inspired from principles applicable to the use of firearms) (“[L]e CPT considère que la doctrine d’emploi du PIE devrait s’inspirer des principes relatifs à l’utilisation des armes à feu.”).

³²⁹ See U.N. Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (Advance Unedited Version)*, CCPR/C/GC/36, ¶ 14 (Oct. 30, 2018), https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf; Committee Against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Netherlands, Adopted by the Committee at Its Fiftieth Session (6-31 May 2013)*, U.N. Doc. CAT/C/NLD/CO/5-6 ¶ 27 (June 20, 2013) (adopted at 1163rd meeting on May 28, 2013 (CAT/C/SR/1163)) (“[E]lectrical discharge weapons should be used exclusively in extreme limited situations where there is a real and immediate threat to life or risk of serious injury, as a substitute for lethal weapons.”); Section:7/42, Bulgaria: Visit 2017 CPT/Inf (2018) 15, ¶ 24 (Mar. 28, 2018) (providing that Tasers may only be used where an officer confronts “a real and immediate threat to life or risk of serious injury.”).

³³⁰ *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 49 (Nov. 24, 2011).

³³¹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2015 ANNUAL REPORT ch. IV.B (Venezuela), ¶ 133 [hereinafter IACHR 2015 ANNUAL REPORT]; see also AMNESTY INTERNATIONAL, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES, executive summary, 3 (2015) (finding that between 2001 and 2012, law enforcement officers killed at least 540 people).

³³² IACHR 2015 ANNUAL REPORT, *supra* note 331, ch. IV.B (Venezuela), ¶ 133.

³³³ Committee against Torture, Concluding and Recommendations of the Committee against Torture: United States of America, ¶ 33, U.N. Doc. CAT/C/USA/CO/2 (Jul. 25, 2006); see also Human Rights Committee, Concluding Observations of the Human Rights Committee Australia, ¶ 21, U.N. Doc. CCPR/C/AUS/CO/5 (May 7, 2009).

³³⁴ See, e.g., Committee Against Torture, *supra* note 328, ¶ 27 (providing that Tasers should never be allowed in prisons or “other places of deprivation of liberty.”); Press Release, United Nations, Committee Against Torture Concludes Forty-Fourth Session

the use of a Taser against a person who is prone on the ground and in handcuffs may result in “positional asphyxiation.”³³⁵

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has reached similar conclusions. According to the CPT, Tasers should never be issued to law enforcement officers responsible for supervising immigration detainees and deportations.³³⁶ In a recent report, the CPT explained that the regular carrying of Tasers by staff in deportation facilities “is an intimidating and unjustified practice[.]”³³⁷ Moreover, the CPT has urged states only to use Tasers in extreme circumstances that present a “real and immediate threat to life or risk of serious injury.”³³⁸ Due to the potential for misuse, as well as the acute pain caused by Taser deployment, the CPT has urged a cautious approach toward authorizing Taser use by law enforcement, stating that “criteria for deploy[ment] should be both defined by law and spelt out in specific regulations.”³³⁹

ii. Inter-American law permits the use of lethal force devices only when absolutely necessary and proportionate

Inter-American law requires that the use of lethal force—defined as “force that has the capacity to cause death”—be subject to heightened standards of necessity and proportionality.³⁴⁰ State agents may only use lethal force “to save life or limb,”³⁴¹ and where it is strictly necessary to protect themselves or others from imminent threat of death or serious injury.³⁴² Lethal force is generally prohibited, and its use exceptional.³⁴³

The Inter-American Court has reviewed the lawfulness of state agents’ use of lethal force with heightened scrutiny. For example, in *Ibarra v. Ecuador*, the circumstances surrounding the victim’s death involved an argument and physical struggle between the officer and third parties suspected of gang activity. The Court held that the officer violated the right to life by using lethal force because the

(May 14, 2010) [hereinafter Committee Against Torture Concludes Forty-Fourth Session], <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10046&LangID=E> (finding that use of a Taser against persons in custody constituted breach of the Convention against Torture); see also 20th General Report of the European Committee for the Prevention of Torture, *supra* note 328, ¶ 71 (stating that the use of Tasers in confinement settings should be limited to exceptional circumstances such as hostage-takings).

³³⁵ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 76.

³³⁶ 20th General Report of the European Committee for the Prevention of Torture, *supra* note 328, ¶ 71.

³³⁷ See Report to the Polish Government, CPT/Inf (2018) 40, ¶ 51 (July 25, 2018).

³³⁸ 20th General Report of the European Committee for the Prevention of Torture, *supra* note 328, ¶ 70; see also Report to the Finnish Government, CPT/Inf (2009) 5, ¶ 102 (Jan. 20, 2009) (“Resort to a stun-gun would only be justified as a means of last resort in very extreme circumstances where a real and immediate threat to life had arisen.”).

³³⁹ 20th General Report of the European Committee for the Prevention of Torture, *supra* note 328, ¶ 68.

³⁴⁰ *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 208 (defining lethal force). See *Dorzema v. Dominican Republic*, Case No. 12.688, Inter-Am. Comm’n H.R., Report No. 174/10, ¶ 122 (2010); *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012); *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 49 (Nov. 24, 2011); *Report on Citizen Security and Human Rights*, *supra* note 280, ¶ 118; see also 2014 Report of Special Rapporteur Christof Heyns, *supra* note 294, ¶¶ 60, 67.

³⁴¹ 2011 Report of Special Rapporteur Christof Heyns, *supra* note 289, ¶¶ 56, 88.

³⁴² *Dorzema*, Case No. 12.688, Inter-Am. Comm’n. H.R., ¶ 109; *Cruz Sanchez v. Peru*, Case No. 12.444, Inter-Am. Comm’n H.R., Report No. 66/10, (2011).

³⁴³ *Cruz Sanchez*, Case No. 12.444, Inter-Am. Comm’n H.R., ¶ 120; see also *Barrios Family*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 49 (explaining that “as a general rule, the use of firearms and lethal force . . . must be prohibited, and the exceptional use must be established by law and be interpreted restrictively, so that it is only that which is ‘absolutely necessary’ in relation to the force or threat to be prevented”). Lethal force is therefore not an appropriate response, for example, to irregular border crossings, thrown rocks, or attempts to evade capture. U.N. Secretary General, *Unlawful Death of Refugees and Migrants*, ¶ 29, U.N. Doc. A/72/335 (Aug. 15, 2017).

victim had not resisted police, nor had he taken any action that endangered anyone's life.³⁴⁴ Similarly, in *Barrios Family*, the focus of the Inter-American Court's analysis was whether the victim presented an imminent threat of death or injury that could justify the use of lethal force.³⁴⁵ The Court did not seek to resolve conflicting accounts about whether the victim had been armed at the time of the incident. Rather, the Court explained that the use of lethal force violated the "absolute necessity" principle because, even if the victim was armed, there was no evidence he posed any danger.³⁴⁶

iii. U.S. law has permitted the use of Tasers even in the absence of a threat to life

U.S. law and policy consistently have categorized Tasers as a non-lethal or "intermediate" force device, and accordingly, both U.S. courts and law enforcement agencies have permitted the weapon's use in situations where there was no threat to life, nor any risk of serious bodily harm, to an officer or others.³⁴⁷ Moreover, courts have held an officer's use of a Taser reasonable even where the officer knew of its increased potential for lethality in the specific circumstances.³⁴⁸

U.S. law considers the Taser to be a compliance tool, designed to overcome a subject's physical resistance, regardless of the actual threat to safety that resistance might pose.³⁴⁹ For example, in *Lash v. Lemke*, the D.C. Circuit held that an officer used a reasonable amount of force when she deployed her Taser against a political protest participant who "pull[ed] his arms out of her grasp" twice after she attempted to grab his arms from behind him.³⁵⁰ Although the protestor's crime was non-violent, video evidence showed he was belligerent and physically resistant, which, according to the court, justified the use of the Taser.³⁵¹ Not only did the court find that the protestor "posed an immediate threat to safety of the officers or others[,]""³⁵² but it reasoned that whenever officers are conducting an arrest, there is "always a potential threat . . . because the individual may try to grab one of the officer's weapons or actually hit an officer trying to arrest him."³⁵³ Thus, under *Lemke*, an officer's use of a Taser will always be permitted when his or her goal is to effectuate the arrest of a resisting subject.

The highest standard articulated by any federal court in the U.S. still falls short of international principles regulating lethal force. In *Yates v. Terry*, the Fourth Circuit held the use of a Taser would only be appropriate where "'a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser.'"³⁵⁴ But the court's discussion also indicated that a person's status as a "dangerous felon" or becoming a "flight risk" may be sufficient to establish the "exigency" necessary.³⁵⁵ Within the Fourth Circuit, law enforcement

³⁴⁴ *Ibarra v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 306, ¶ 100, 111, 112 (Nov. 17, 2015).

³⁴⁵ *Barrios Family*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 67.

³⁴⁶ *Id.*

³⁴⁷ See, e.g., *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008); see also Blum & Ryan, *supra* note 220, at 583 (law enforcement officer responsible for use of force training describing Tasers as "a very low level use of force.").

³⁴⁸ See *McMillan v. Gem County, Idaho*, No. CIV 07-078-S-EJL, 2008 WL 5069094 (Nov. 25, 2008) (holding use of a Taser reasonable where a victim told officer he had history of heart attacks).

³⁴⁹ See, e.g., *Goodwin v. City of Painesville*, 781 F.3d 314, 325 (6th Cir. 2015) ("There is no clearly established right for a suspect who 'actively resists' and refuses to be handcuffed to be free from a Taser application."); 2010 USE OF FORCE POLICY HANDBOOK Exh. C at 17 (explaining that intermediate force may be used (1) to protect officers or others from bodily harm; (2) restrain a resisting subject; (3) make an arrest; (4) prevent escape; and/or (5) enforce compliance with a lawful order.).

³⁵⁰ See *Lash v. Lemke*, 971 F. Supp. 2d 85, 90, 95 (D.C. Cir. 2015).

³⁵¹ *Id.* at 95-96.

³⁵² *Id.* at 96.

³⁵³ *Id.*

³⁵⁴ See *Yates v. Terry*, 817 F.3d 877, 886 (4th Cir. 2016) (quoting *Pinehurst*).

³⁵⁵ See *id.*

agencies have interpreted the holding in *Yates* as a prohibition on Tasers outside of circumstances where a suspect poses an “imminent danger.”³⁵⁶ But even this restriction does not comport with the protecting-life principle, because it does not require that the “immediate safety risk” involve a threat to life or risk of serious bodily harm, as necessary under international standards.

The DOJ’s investigation into Mr. Hernandez’s killing illustrated the consequences of the permissive approach to using Tasers taken by U.S. courts and law enforcement agencies. Despite the agent’s own training on the dangers associated with the duration of use and positional asphyxiation,³⁵⁷ the DOJ determined it was “objectively reasonable” to use a Taser four times against a man who was handcuffed, in the fetal on the ground surrounded by 17 agents.

iv. CBP policy has failed to regulate Tasers as lethal force devices

Similar to U.S. case law, CBP use of force policy has failed to regulate Tasers as lethal force devices. CBP policy does not restrict the use of Tasers to situations presenting serious dangers or threats to life. The 2009 CBP Directive on ECD, which governed the use of Tasers by CBP officers at the time of Mr. Hernandez Rojas’s murder, provided no such guidance. To the contrary, it stated that a Taser was “not a substitute for the use of deadly force.”³⁵⁸ Moreover, CBP policy did not prohibit using Tasers in situations presenting a greater-than-usual potential for lethality, such as their use against vulnerable persons. The only prohibition on their use was a safety measure advising officers to avoid using Tasers near flammable materials.³⁵⁹

CBP use of force policy has also failed to provide the clear and sufficiently detailed guidance on the use of Tasers which international law requires for regulations of lethal force devices. A sufficiently detailed Taser policy would have included specific criteria for deployment and the necessary prohibitions on its use, for example against persons in custody or who posed no threat to the safety of officers.³⁶⁰ Aside from the 2009 CBP Directive on ECD, which did not outline any restrictions on the use of Tasers, CBP use of force policy omitted any mention of Tasers entirely.

B. The United States violated the rights of the Anastasio Hernandez Rojas’s family members.

The Petition examines the multiple failures of the United States to respect and protect the rights of Mr. Hernandez’s family members during the criminal investigation and provide full reparations. This submission will focus specifically on the corrosive effect of the federal grand jury investigation on the rights of Mr. Hernandez’s family members and society. During the summer of 2012, weeks after the media released an eyewitness video of Mr. Hernandez’s killing, the U.S. Department of Justice opened a criminal investigation into Mr. Hernandez’s death and quickly convened a federal grand

³⁵⁶ Martin Kaste, *Court Ruling Forces Police in Southern States to Reconsider Use of Tasers*, NPR (Feb. 5, 2016), <https://www.npr.org/2016/02/05/465743796/court-ruling-forces-police-in-southern-states-to-reconsider-use-of-tasers>.

³⁵⁷ San Diego Police Department Investigation (2010), Petition, Exh. 43 at 76.

³⁵⁸ 2009 CBP DIRECTIVE ON ECD Exh.I at 6.2.3.

³⁵⁹ *Id.* at 6.2.7.

³⁶⁰ See Report to the Finnish Government, CPT/Inf (2009) 5, ¶ 102 (Jan. 20, 2009) (restricting use of a Taser in stun-gun mode “as a means of last resort in very extreme circumstances where a real and immediate threat to life had arisen.”).

jury.³⁶¹ The secret, federal grand jury investigation spanned three years, according to the media.³⁶² To date, the United States has not provided the Hernandez family with information about the investigation, its scope, methods, or outcome. The federal grand jury investigation undermined the rights of Mr. Hernandez's family members in three important ways. First, the federal grand jury investigation failed to satisfy the family members' right to an impartial and effective investigation of Mr. Hernandez's death. Second, the secret federal grand jury investigation created insurmountable impediments to the right of Mr. Hernandez's family members and society to the truth by not providing access to information about the incident. Third, the secret grand jury proceedings prohibited participation by Mr. Hernandez's family members. In sum, U.S. law shrouded the criminal investigation of a law enforcement killing in secrecy in violation of the United States' obligations under Articles IV (access to information), XVIII (right to fair trial), and XXIV (right to due process) of the American Declaration.

1. U.S. Law requires federal prosecutors to conduct secret grand jury proceedings.

The deleterious role of the grand jury is not unique to this case and has been recognized by the Inter-American Commission. In its report *Police Violence Against Afro-Descendants in the United States*, the Inter-American Commission referred to empirical evidence that the prosecutor's decision to bring charges against law enforcement officials may be impacted by "the secretive nature of grand juries and deliberations, a lack of transparent selection processes, a lack of diversity in jury pools, and the role of prosecutors in guiding the grand jury process and instructing on the law...."³⁶³ Concerned that grand juries acted as a barrier to effective accountability for law enforcement killings,³⁶⁴ the Inter-American Commission "emphasize[d] the importance of exploring the use of special prosecutors or investigatory bodies without close institutional connections to the police for the investigation and prosecution of police killings."³⁶⁵

The U.S. Constitution requires federal prosecutors to convene a federal grand jury to charge an individual for a federal crime.³⁶⁶ The grand jurors—a group of citizens—investigate the alleged crime, establish whether probable cause exists, and decide whether to allow the prosecutors to bring charges.³⁶⁷ The federal grand jury has broad investigative powers.³⁶⁸ Prosecutors and grand jurors are empowered to compel witness testimony and document production through subpoenas, and their

³⁶¹ Officer 7663 and the United States' Opposition to Plaintiffs' Motion to Strike Answer and for Default at 2-3, *Estate of Hernandez-Rojas v. United States*, No. 11-CV-0522-L(DHB) (S.D. Cal. July 22, 2013); Elisabeth Ponsot, *Web Exclusive: Grand Jury to Investigate Death at the Border*, PBS (July 20, 2012), <http://www.pbs.org/wnet/need-to-know/video/video-web-exclusive-grand-jury-to-investigate-death-at-the-border/14290/>. See also Memorandum of Points and Authorities in Support of Defendants' Motion for Stay of Discovery Pending Conclusion of Grand Jury Proceedings at 2-3, *Estate of Hernandez-Rojas*, Case No. 11-CV-0522-L(DHB) (S.D. Cal. Sept. 4, 2012).

³⁶² Samantha Tatso & Omari Fleming, *Activists Discuss Trial of Man Allegedly Shot and Tased by CBP*, NBC SAN DIEGO (Apr. 14, 2015), <https://www.nbcsandiego.com/news/local/Court-Set-to-Rule-on-Appeal-in-Anastasio-Rojas-That-May-Delay-Trial--299723151.html>.

³⁶³ *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 111.

³⁶⁴ *Id.* ¶ 286.

³⁶⁵ *Id.* ¶ 273.

³⁶⁶ U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

³⁶⁷ CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, *Function of the Grand Jury*, in 1 *FEDERAL PRACTICE & PROCEDURE* § 101 (4th ed. 2008).

³⁶⁸ *United States v. Calandra*, 414 U.S. 338, 344 (1974); CRS REPORT ON FEDERAL GRAND JURY, *supra* note 279, at 2; see 18 U.S.C. § 3332(a).

inquiries are unconstrained by rules of evidence.³⁶⁹ The Supreme Court has observed that a grand jury “investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.”³⁷⁰

Originally, the purpose of the grand jury was to protect the accused from unfounded prosecution by the state.³⁷¹ In theory, the federal grand jury belongs to “no branch of the institutional government.”³⁷² In reality, prosecutorial control over modern-day grand jury proceedings have ensured that the grand jury acts as a “prosecutorial arm of the executive branch.”³⁷³

A federal grand jury investigation has four possible outcomes: (1) a vote to indict the accused; (2) a vote not to indict; (3) discharge or expiration of the grand jury without any action; or (4) submission of a report to the court.³⁷⁴ Even when the grand jury decides that probable cause exists to indict, the prosecutor has “ultimate veto power,” or the authority to overrule the grand jury’s decision and decline to bring charges.³⁷⁵

U.S. law requires that federal grand jury proceedings be conducted in secret.³⁷⁶ Only witnesses may speak publicly about their testimony.³⁷⁷ Neither prosecutors nor grand jurors may divulge any “matter occurring before the grand jury.”³⁷⁸ The veil of secrecy stays in place after an outcome is reached, “to the extent and as long as necessary.”³⁷⁹ While federal courts have discretion to order the release of grand jury records,³⁸⁰ the burden is on the party seeking the transcripts to show that the “need for disclosure is greater than the need for continued secrecy.”³⁸¹ Due to this burden and judicial reluctance, courts almost always keep grand jury proceedings sealed for many years after the grand jury has concluded.³⁸²

³⁶⁹ CRS REPORT ON FEDERAL GRAND JURY, *supra* note 279, at 7-8. The grand jury can issue “forthwith” subpoenas to compel a witness to appear immediately, but only with approval from the prosecutor. U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL 9-11.140, <https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.140>.

³⁷⁰ *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).

³⁷¹ *WRIGHT & LEIPOLD*, *supra* note 367, § 101; *see Calandra*, 414 U.S. at 343.

³⁷² *United States v. Williams*, 504 U.S. 36, 47 (1992).

³⁷³ *WRIGHT & LEIPOLD*, *supra* note 367, § 101.

³⁷⁴ CRS REPORT ON FEDERAL GRAND JURY, *supra* note 279, at 34. If deciding to issue an indictment, grand jurors have “the power to charge a greater offense or a lesser offense” or to charge “numerous counts or a single count.” *Vasquez v. Hillery*, 474 U.S. 254, 263, (1986).

³⁷⁵ *WRIGHT & LEIPOLD*, *supra* note 367, § 101. Alternatively, if a grand jury decides *not to indict*, the prosecutor may not override this decision by unilaterally issuing an indictment.

³⁷⁶ FED. R. CRIM. PROC. 6(e). The Supreme Court has affirmed five reasons for this secrecy: “(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt....” *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 n.10 (1979) (citations omitted).

³⁷⁷ CRS REPORT ON FEDERAL GRAND JURY, *supra* note 279, at 24.

³⁷⁸ FED. R. CRIM. PROC. 6(e). This covers the “workings of the grand jury” and includes “information...sought because it has been presented to the grand jury,” *see* CRS REPORT ON FEDERAL GRAND JURY, *supra* note 279, at 25-26. Grand jurors that violate the confidentiality obligation are subject to legal punishment, *see id.* at 33-34.

³⁷⁹ *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1139 (D.C. Cir. 2006).

³⁸⁰ *Douglas Oil Co. of Cal.*, 441 U.S. at 223.

³⁸¹ *Id.* at 217 (detailing the balancing test courts should apply in these cases).

³⁸² SUSAN W. BRENNER & LORI E. SHAW, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE* § 16:36 (2d ed. 2006); Roger Roots, *Grand Juries Gone Wrong*, 14 RICH. J.L. & PUB. INT. 331, 341 (2010) (noting that “historic grand jury transcripts” had only been released to the public *four* times in history as of 2008); Jonathan Blitzer, *The Case to Release the Garner Grand-Jury Records*, NEW YORKER (Mar. 20, 2015), <https://www.newyorker.com/news/news-desk/the-case-to-release-the-garner-grand-jury-records> (mentioning that grand jury records are rarely released).

2. Federal grand juries shield law enforcement from accountability for misconduct for abuse.

Federal prosecutors control federal grand jury proceedings.³⁸³ Prior to convening a grand jury, federal prosecutors carry out their own investigation and collect evidence to present to the jurors.³⁸⁴ During the grand jury proceedings, prosecutors lead the jurors in an examination of the existing evidence and in the procurement of new evidence.³⁸⁵ The prosecutor decides what witnesses appear and in what order.³⁸⁶ The prosecutor takes the lead in questioning the witnesses, is the first to examine them, and has control over the questions posed by jurors.³⁸⁷ The prosecutor chooses what charges to recommend for indictment³⁸⁸ and acts as a legal advisor to the grand jurors—clarifying and instructing on issues of law.³⁸⁹ In short, the prosecutor “runs the show.”³⁹⁰

Empirical evidence demonstrates that grand juries nearly always vote to indict when prosecutors seek an indictment. In 2013 and 2014, federal grand juries voted not to indict in less than 0.05 percent of cases.³⁹¹ A judge famously remarked that a prosecutor could persuade a grand jury to “indict a ham sandwich” in the United States.³⁹²

It is therefore striking that indictments in state and federal cases involving acts of violence committed by law enforcement are rare.³⁹³ In several recent high profile cases involving law enforcement violence against Black persons, including Michael Brown, Tamir Rice, Eric Garner, Terrance Sterling, and Breonna Taylor, grand juries failed to return an indictment. Statistics also suggest that federal prosecutors are disinclined to convene grand juries in cases involving acts of violence by law enforcement.³⁹⁴ Once before a grand jury, prosecutors “have the ability to significantly increase the likelihood of a non-indictment by presenting materials and witnesses that play up the inconclusiveness of the evidence.”³⁹⁵ The prosecutor, who controls the evidence and narrative presented to the grand jury, “can decide to let an officer’s version of events go unchallenged or to

³⁸³ Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIR. REV. 1, 27 (2011) (“Today’s police and prosecutors have much more power than the Framers of the Constitution could have ever predicted.”); Steven M. Witzel, *Grand Jury Practice, Protests and Reform*, N.Y. L.J. (Jan. 15, 2015) (“Federal prosecutors have considerable freedom from judicial oversight and control over the grand jury.”); see *United States v. Laurent*, 861 F. Supp. 2d 71, 89 (E.D.N.Y. 2011) (summarizing concerns over the prosecutor’s control of the grand jury).

³⁸⁴ CRS REPORT ON FEDERAL GRAND JURY, *supra* note 279, at 27.

³⁸⁵ Brenner & Shaw, *supra* note 382, at § 6:1 (the prosecutor also summarizes the evidence for the jurors).

³⁸⁶ WRIGHT & LEIPOLD, *supra* note 367 § 101, n.20.

³⁸⁷ BRENNER & SHAW, *supra* note 382, §§ 5:11, 5:12 (the Department of Justice suggests that the jurors allow the prosecutor to ask their questions on their behalf, which gives “the prosecutor some control over juror questions and an opportunity to discourage irrelevant, harassing and/or prejudicial questions”).

³⁸⁸ WRIGHT & LEIPOLD, *supra* note 367 § 101, n.20.

³⁸⁹ *Id.* at fn. 20; BRENNER & SHAW, *supra* note 382, at 255-58.

³⁹⁰ WRIGHT & LEIPOLD, *supra* note 367, § 101, n.20.

³⁹¹ MARK MOTIVANS, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2013 – STATISTICAL TABLES tbl.2.3 (2017), <https://www.bjs.gov/content/pub/pdf/fjs13st.pdf>; MARK MOTIVANS, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2014 – STATISTICAL TABLES tbl.2.3 (2017), <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf>. 2014 is the most recent year for which data is available.

³⁹² BRENNER & SHAW, *supra* note 382, at 255.

³⁹³ Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson/>; see James Pinkerton, *Hard to Charge*, HOUS. CHRON., <https://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php>.

³⁹⁴ According to one study, federal prosecutors declined to bring charges (thus not even reaching the grand jury stage) in 96 percent of cases alleging civil rights violations by law enforcement officials. In all other types of criminal cases, federal prosecutors declined to bring charges in only 23 percent of cases, see Joseph Ax, *Police Escape Federal Charges in 96 Percent of Rights Cases: Newspaper*, REUTERS (Mar. 13, 2016), <https://www.reuters.com/article/us-usa-police/u-s-police-escape-federal-charges-in-96-percent-of-rights-cases-newspaper-idUSKCN0WF0KM>.

³⁹⁵ Blitzer, *supra* note 382.

discredit it with cross-examination.”³⁹⁶ Further, in certain cases, the prosecutor may use the grand jury and its secrecy as “political cover” when the prosecutor does not want to bring charges against law enforcement, but also wants to avoid public backlash.³⁹⁷

Numerous academics have challenged the grand jury institution for imposing an unnecessary level of secrecy and permitting prosecutors an inordinate amount of power.³⁹⁸ Similar concerns have prompted legislators to attempt to reform the federal grand jury. In 2015, for example, California passed a law banning grand juries in cases where the accused was a law enforcement official.³⁹⁹ The U.S. Congress has proposed federal legislation that would bypass grand juries in state prosecutions of law enforcement misconduct.⁴⁰⁰ In the United States, there is a growing public mistrust of grand juries in cases where the accused is a law enforcement official.⁴⁰¹

3. The American Declaration affords Anastasio Hernandez Rojas’s family the rights to an impartial and effective investigation of the victim’s death, access information, and participate in the criminal investigation.
 - a) The American Declaration requires the effective and impartial investigation of state violence (Articles I, XXV, XVIII, XXVI)

The Inter-American Commission has interpreted the American Declaration to require that state investigations of human rights abuses be “effective” and “impartial.”⁴⁰² Effective investigations must “follow every investigative lead that could help identify the authors of the crime and bring them to

³⁹⁶ James C. McKinley, Jr. & Al Baker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (DEC. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html>.

³⁹⁷ Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. STATE L. REV. 519, 524-30 (2017) (referring to the Federal Grand Jury investigation of Tamir Rice, a twelve-year-old Black child who was holding a toy gun when shot by police, in which the prosecutor can present a “weak case” to the grand jury and who according to grand jury witnesses, acted “more like defense attorneys” and “aggressively cross-examin[ed] the witnesses who argued that the killing was unjustified).

³⁹⁸ See, e.g., Nicole D. Valente, *Quiet No Longer: Opening the Door for Empowered Juries and Transparency*, 35 REV. LITIG. 135, 144 (2016); Roots, *supra* note 382, at 341 (“It is not at this point easy to imagine how federal grand jury practice could be more favorable to the government.”); Simmons, *supra* note 397, at 531 (“[I]n cases involving police lethal use of force, there are no real benefits to maintaining grand jury secrecy after the grand jury has made its decision. On the other hand, the costs of maintaining secrecy are substantial.”).

³⁹⁹ The bill, California Senate Bill No. 227, is available at http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB227. The legislation, however, was struck down on state constitutional grounds. *Court Tosses California Law that Barred Grand Juries from Investigating Police Shootings*, L.A. TIMES (Jan. 11, 2017), <https://www.latimes.com/local/lanow/la-me-ln-grand-jury-police-shootings-20170111-story.html>.

⁴⁰⁰ See H.R. 4332, Grand Jury Reform Act of 2017, 115th Cong. (introduced Nov. 9, 2017), <https://www.congress.gov/bill/115th-congress/house-bill/4332/text> (this bill provides that state governors must appoint special prosecutors to present evidence before a judge to determine whether probable cause exists to criminally charge local law enforcement officials involved in use of force incidents that result in a person’s death).

⁴⁰¹ Nicole Smith Futrell, *Visibly (Un)just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 56 (2018) (stating that “[t]wenty-five states permit prosecutors to use an information or a complaint in lieu of a grand jury indictment when making a charging determination”).

⁴⁰² *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 181 (2011) (“Investigations must be serious, prompt, thorough, and impartial, and must be conducted in accordance with international standards in this area.”); see *Salas Galindo v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report No. 121/18, OEA/Ser.L/V/II.169, doc. 138 ¶ 434 (2018); see also *Fernandez Ortega v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 191 (Aug. 30, 2010); Philip Alston (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Study on Police Oversight Mechanisms*, ¶¶ 22-23, U.N. Doc. A/HRC/14/214/Add.8 (May 28, 2010) (discussing the requirements of an “effective” and “independent” investigation, citing case law); *Finucane v. United Kingdom*, App. No. 29178/95, ¶¶ 68-69, 82 (July 1, 2003); *Amnesty International v. Sudan*, Communication 48/90, African Commission on Human and Peoples’ Rights, ¶ 51 (Nov. 15, 1999). The term “effective” is sometimes used interchangeably with, or in conjunction with, the term “thorough.”

justice”⁴⁰³ and must “use all available legal means with the aim of discovering the truth.”⁴⁰⁴ The Inter-American Commission has interpreted the American Declaration to require that the state must demonstrate that “the investigation was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth.”⁴⁰⁵

Under international standards, an effective investigation into a human rights violation must be “impartial.”⁴⁰⁶ In the Inter-American system, impartiality requires independence between those investigating a human rights violation and the person being investigated.⁴⁰⁷ The Inter-American Court has held that “bodies of administration of justice must be organized in a manner so that its independence and impartiality is guaranteed.”⁴⁰⁸ A tribunal’s impartiality, moreover, is based on its members not having a “direct interest, a pre-established position or a preference for one of the parties, nor any involvement in the controversy.”⁴⁰⁹ And because “independence is critical” in investigations of state violence, the Commission has found that “institutional connections and relationships that may impact the independence of investigations and future prosecutions must be carefully evaluated.”⁴¹⁰

The Commission has challenged investigative procedures that do not uphold the required elements of effectiveness and impartiality. In the United States, for example, the Commission has expressed concern about the independence of local prosecutors and local grand juries because of the “secretive nature” of the grand jury and “the role of prosecutors in guiding the grand jury process and instructing on the law.”⁴¹¹

⁴⁰³ *Romero v. El Salvador*, Case 11.481, Inter-Am. Comm’n H.R., Report No. 37/00, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 80 (1999). *See also* *Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 275 (Nov. 25, 2003) (“[T]o completely redress [the right to truth violation], the State must effectively investigate the facts in the instant case, so as to identify, try, and punish all the direct perpetrators and accessories, and the other persons responsible for the extra-legal execution....”).

⁴⁰⁴ *Fernandez Ortega*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 191; *Cantoral-Huamani v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 131 (July 10, 2007); *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 192 (Nov. 23, 2009). An effective investigation of an extrajudicial killing must seek to establish the circumstances of the death, the people responsible for it, as well as any procedure or practice that may have caused the death. *Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., ¶ 182; *Romero*, Case 11.481, Inter-Am. Comm’n H.R., ¶ 80.

⁴⁰⁵ *Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., ¶ 181.

⁴⁰⁶ IACHR 2015 ANNUAL REPORT, *supra* note 331, ch. IV.A (Use of Force), ¶ 229 (the Commission underscoring that investigations into state violence must meet certain standards, including being “conducted by authorities with real institutional independence.”).

⁴⁰⁷ *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 125 (Feb. 22, 2002). *See* *Dorzema v. Dominican Republic*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 201 (Oct. 24, 2012); *Las Palmeras v. Colombia*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 58 (Dec. 6, 2001).

⁴⁰⁸ *Bámaca-Velásquez*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 125 (internal citations omitted) (emphasis added).

⁴⁰⁹ *Cruz Sanchez v. Peru*, Case No. 12.444, Inter-Am. Comm’n H.R., Report No. 66/10, ¶ 195 (2011).

⁴¹⁰ IACHR Report on Police Violence in the United States, *supra* note 292, ¶ 273.

⁴¹¹ *Id.* ¶¶ 111-12. *See also* Press Release, Inter-American Commission on Human Rights, IACHR Expresses Concern over Police Killings of African-American Persons in the United States (Aug. 22, 2014), http://www.oas.org/en/iachr/media_center/preleases/2014/090.asp (“The IACHR emphasizes that in cases of killings at the hand of State security forces it is necessary for the State to ensure that investigations into the killings are carried out promptly, thoroughly and independently and it urges the State to do so.”).

- b) The American Declaration guarantees the family and society's right to truth in killings by law enforcement

The right to truth is enshrined in several international instruments.⁴¹² The Inter-American Commission links the right to truth to other rights, specifically the rights to information, an effective investigation, and a judicial remedy codified in Articles IV, XVIII, XXIV of the American Declaration.⁴¹³ The right to truth exists as a right for victims and broader society.

The Inter-American Commission has interpreted the American Declaration to protect the right to access information as “a crucial component of a victim's adequate access to judicial remedies.”⁴¹⁴ In accordance with the right to truth, the State is obligated to investigate the circumstances of the victim's death and inform the family members of the victim “of all happenings related to a serious human rights violation. . . .”⁴¹⁵ The Inter-American Commission and Court have held that victims' family members have a right “to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them.”⁴¹⁶

To this end, state authorities must provide family members with descriptions of events, names of witnesses who testified, the scope of the inquiry, the methods used to evaluate evidence, and recommendations.⁴¹⁷ The State has an obligation to reveal the findings of the investigation within a reasonable period of time.⁴¹⁸ In *Jessica Lenahan (Gonzales) et al. v. United States*, the Commission found that the United States had violated the family's rights to judicial protection by failing to inform them of the results of the criminal investigation.⁴¹⁹

The Inter-American Commission has also interpreted the American Declaration to protect the right of “society as a whole” to know the truth about human rights violations.⁴²⁰ States uphold their obligations under the collective right to truth by dutifully investigating human rights violations and through “public dissemination of the results of the criminal and investigative proceedings.”⁴²¹ The

⁴¹² See, e.g., Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, OEA/Ser.L./V/II.152, doc. 2 (Aug. 13, 2014) [hereinafter *Right to Truth Commission Report*], <http://www.oas.org/en/iachr/reports/pdfs/Right-to-Truth-en.pdf>; Commission on Human Rights, Study on the Right to the Truth: Report of the Office of the High Commissioner of the United Nations for Human Rights, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006); G.A. Res. 60/147, 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, ¶ 24 (Mar. 21, 2006); Additional Protocol I, Geneva Conventions, Art. 32 (Aug. 12, 1959); INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I, Rule 117, p. 421 (2005). Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/1989/89, principle 16 (1989).

⁴¹³ *Right to Truth Commission Report*, supra note 412, ¶ 69.

⁴¹⁴ *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 193 (2011). See also *Right to Truth Commission Report*, supra note 412, ¶ 69; *IACHR Report on Police Violence in the United States*, supra note 292, ¶ 302.

⁴¹⁵ *Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm'n H.R., ¶¶ 193, 195.

⁴¹⁶ *Romero v. El Salvador*, Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/00, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 671 (1999); *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 147 (June 15, 2005) (The Court in *Moiwana Community* explained that “victims of rights violations and their family members have a right to know the truth regarding those violations—that is, to be informed about the relevant facts and responsible parties.”).

⁴¹⁷ *Vargas-Areco v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 102 (Sept. 26, 2006).

⁴¹⁸ *Id.*

⁴¹⁹ *Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm'n H.R., ¶ 195-96.

⁴²⁰ *Right to Truth Commission Report*, supra note 412, ¶¶ 71, 81; Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1985-1986*, OEA/Ser.L./V/II.68, Doc. 8 rev. 1, chapter V (Sept. 26, 1986) (“Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed. . . .”).

⁴²¹ *Right to Truth Commission Report*, supra note 412, ¶ 81; see also *Contreras v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 170 (Aug. 31, 2011); *Castro v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 119 (Sept. 22, 2009).

Inter-American Commission has found that the “collective right [to truth] . . . ensures that society has access to information essential for the workings of democratic systems”⁴²² and held that public dissemination is necessary to “prevent recurrence” of human rights violations.⁴²³

- c) The American Declaration protects the right of the victim and their family members to participate in the criminal proceedings

The Inter-American Commission has recognized that States have a “special duty” to investigate law enforcement misconduct.⁴²⁴ During these investigations, “the victims [] or their next of kin [] should have extensive opportunities to participate and be heard, in the clarification of facts and the punishment of those responsible, and in seeking fair compensation.”⁴²⁵ Indeed, the Inter-American Commission has interpreted the American Declaration to require that States protect the right of the victims and their family members “to participate in all phases of the respective proceedings” so that victims and their family members can “assert their interests and rights.”⁴²⁶ Similarly, the Inter-American Court has held that States have an obligation to ensure the rights of a victim’s relatives to participate in all stages of the proceedings “so that they can make proposals, receive information, provide evidence, formulate arguments and . . . assert their interests and rights.”⁴²⁷ In extrajudicial killing cases specifically, the Inter-American Court has held that state authorities must “completely and seriously analyze” concerns presented by victims and their family members before making any critical investigatory determinations.⁴²⁸

The Inter-American Commission and Court have condemned laws and policies that hinder the participation of victims and their family in the investigations and prosecutions of serious human rights violations. The Inter-American Commission and Court have held that criminal proceedings, such as military tribunals and legislation, such as amnesty laws, that do not protect the rights of family members to participate in criminal proceedings violate international standards.⁴²⁹ Under Inter-American case law, states cannot justify blocking the access of the victim’s family to investigatory information on “procedural confidentiality” grounds.⁴³⁰

⁴²² *Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., ¶ 193. *See also* *Parada Cea v. El Salvador*, Case 10.480, Inter-Am. Comm’n H.R., Report No. 1/99, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 151 (Jan. 27, 1999).

⁴²³ *Right to Truth Commission Report*, *supra* note 412, ¶¶ 15, 81 (noting that government authorities must ensure this collective right to truth by “act[ing] in good faith and carry[ing] out diligently the actions required to ensure the effectiveness of that right”); *see also Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., ¶ 193; *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 77 (Feb. 22, 2002) (“[S]ociety has the right to know the truth regarding [human rights violations], so as to be capable of preventing them in the future,” and “[p]reventive measures and those against recidivism begin by revealing and recognizing the atrocities of the past).

⁴²⁴ *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 263.

⁴²⁵ *Id.* ¶ 264.

⁴²⁶ *Right to Truth Commission Report*, *supra* note 412, ¶ 80, *accord* *Gonzales Medina v. Dominican Republic*, Preliminary Exception, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 240, ¶ 251 (Feb. 27, 2012). *See also* *Kawas-Fernandez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 196, ¶ 194 (Apr. 3, 2009) (relatives of the victim of a human rights violation must have “recognized standing to act at all stages of . . . domestic investigations”); *Fernandez Ortega v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 192 (Aug. 30, 2010) (a victim’s family must “have wide ranging possibilities of being heard and taking part” in criminal investigations).

⁴²⁷ *Gonzales Medina*, Preliminary Exception, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 251.

⁴²⁸ *Rochela Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 195 (May 11, 2007). *See also* *Valle Jaramillo v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 233 (Nov. 27, 2008).

⁴²⁹ *Dorzema v. Dominican Republic*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 201 (Oct. 24, 2012); *Cruz Sánchez v. Peru*, Case 12.444, Inter-Am. Comm’n H.R., Report No. 66/10, ¶¶ 197-99 (2011); *Right to Truth Commission Report*, *supra* note 412, ¶ 23.

⁴³⁰ *Gonzales Medina*, Preliminary Exception, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶¶ 250-54 (holding that by restricting the family’s access to the preliminary investigation case file, the Dominican Republic “failed to comply with its

4. The federal grand jury failed to guarantee an independent and impartial investigation of the death, denied Anastasio Hernandez Rojas's family members access to the truth, and blocked their participation.

To date, Petitioners do not know the outcome of the grand jury proceedings. Petitioners only know that federal prosecutors ran the show. They decided what evidence to present to the grand jurors, what witnesses would appear and in what order, and what questions jurors could pose to law enforcement or civilian witnesses who testified. To the Petitioners' knowledge, the grand jury did not identify additional civilian eyewitnesses. It is therefore likely that the grand jury was presented with an incomplete and biased narrative about Mr. Hernandez's death that deferred to law enforcement's version of the incident. By truncating the investigation and curating the evidence, federal prosecutors were able to shield border agents from accountability.

Access to grand jury transcripts is necessary to determine how prosecutors conducted the grand jury investigation. However, U.S. law requires that federal grand jury proceedings be conducted in secret.⁴³¹ From 2012, when federal prosecutors convened the grand jury until now, the United States has failed to provide the Hernandez family with the descriptions of the incident provided to the grand jury, names of witnesses who testified before the grand jury, the scope of the grand jury's inquiry, the standards applied to assess the evidence, the outcome of the grand jury investigation, or the federal prosecutors' recommendations regarding the charges, as required by Inter-American standards.⁴³² The Hernandez family was also denied the right to participate in the grand jury investigation.

The Inter-American Commission has held that "procedural confidentiality" is not an adequate justification for denying a victim's next-of-kin access to a criminal investigation into a gross human rights violation.⁴³³ Indeed, according to the Inter-American Court, confidentiality can never be used to justify withholding criminal case information from a victim or victim's family.⁴³⁴ Since these transcripts and other grand jury records remain sealed, Mr. Hernandez's next-of-kin have suffered an on-going violation of their right to truth.⁴³⁵

obligation to respect [the family's] right to take part in the proceedings" and violated the family's right to "participate fully in the criminal investigation"); *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 247, 254-56, 259 (Nov. 23, 2009) (holding that denying the family member of a forcibly disappeared person copies of a preliminary inquiry case file violated her right to participate in the investigation); *see also* *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 195-96 (2011) (Commission finding a violation of Article XVIII of the American Declaration, in part, because the U.S. government "failed to convey information to the family members related to the circumstances of their deaths"); *Caracazo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶¶ 97, 116 (Aug. 29, 2002) (noting that the "lack of access by the victims, their next of kin or their representatives to the criminal investigations and proceedings due to the so called 'secrecy of the preliminary investigations,'" constituted an obstacle to the investigation).

⁴³¹ FED. R. CRIM. PROC. 6(e). The Supreme Court has affirmed five reasons for this secrecy: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt," *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 n.10 (1979) (citations omitted).

⁴³² *Vargas-Areco v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 102 (Sept. 26, 2006).

⁴³³ *See, e.g., Gonzales Medina*, Preliminary Exception, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. ¶ 253.

⁴³⁴ *See id.* ("Although the Court has considered it admissible that, in certain cases, the measures taken during the preliminary investigation in the criminal proceedings may be kept confidential in order to ensure the effectiveness of the administration of justice, this confidentiality *may never be invoked to prevent the victim from having access to the file of a criminal case.*" (emphasis added)).

⁴³⁵ *See Contreras v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 170 (Aug. 31, 2011) ("[I]n a democratic society, the truth is known about the facts of grave human rights violations. This is a fair expectation that the State must satisfy . . . [on one hand] by the public dissemination of the results of the criminal and investigative proceedings.").

The United States also continues to violate society's right to truth by withholding information about the federal grand jury investigation from the public. To date, the United States has failed to provide a "full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them."⁴³⁶ The United States has allowed allegations by state agents that Mr. Hernandez was combative and on drugs to supplant a full and accurate accounting of the incident.⁴³⁷ The federal grand jury serves as a legal impediment to the public's access to important information regarding Mr. Hernandez's extrajudicial killing.⁴³⁸ The grand jury investigation was kept secret in violation of the public's right to truth while a fabricated narrative was allowed to take hold.⁴³⁹

IV. THE UNITED STATES HAS FAILED TO PROVIDE FULL REPARATIONS TO THE FAMILY OF ANASTASIO HERNANDEZ ROJAS.

The United States has a legal duty to provide full reparations to Anastasio Hernandez Rojas's family members for the harms they suffered as a result of violations of the American Declaration.⁴⁴⁰ The Inter-American Court on Human Rights "has reiterated in its constant jurisprudence as a principle of international law that any violation of an international obligation that has caused damage carries with it the obligation to repair it adequately."⁴⁴¹ This Honorable Commission has the authority to identify measures of reparations owed to the victims in this case.⁴⁴²

The purpose of reparations measures is to make the victim whole by providing "restitutio in integrum" or full restitution, for the damages caused.⁴⁴³ Restitutio in integrum "consists of reestablishing the previous situation. If that is not possible, the international court must order steps to guarantee the rights infringed, redress the consequences of the infringements, and determine payment of indemnification as compensation for damage caused."⁴⁴⁴ Victims and their families are entitled to "adequate, effective and prompt reparation" which should be "proportional to the gravity of the

⁴³⁶ *Romero v. El Salvador*, Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/00, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 671 (1999); *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 147 (June 15, 2005) (The Court in *Moiwana Community* explained that "victims of rights violations and their family members have a right to know the truth regarding those violations—that is, to be informed about the relevant facts and responsible parties").

⁴³⁷ See Federal Officials Close the Investigation, *supra* note 257.

⁴³⁸ See *Parada Cea v. El Salvador*, Case 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 152 (Jan. 27, 1999) ("The presence of artificial or legal impediments [such as an amnesty law] to accessing and obtaining important information regarding the facts and circumstances surrounding the violation of a fundamental right, constitutes an open violation to the right [to truth], and hampers the establishment of domestic remedies which allow for judicial protection of the fundamental rights established in the Convention, the Constitution, and the laws.").

⁴³⁹ *Right to Truth Commission Report*, *supra* note 412, ¶ 15 ("The Commission has maintained that '[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.'" (internal citations omitted)); *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./VII.142, doc 11, ¶ 193 (2011); *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 77 (Feb. 22, 2002).

⁴⁴⁰ See e.g. U.N. GAOR. 56th Sess., Supp. No. 10 at 91, U.N. Doc. A/56/10 (2001); see also American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/1.4 rev.8 at 43, art. 62(3) (2001).

⁴⁴¹ *Baena-Ricardo v. Panama*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 201 (Feb. 2, 2001).

⁴⁴² See Inter-Am. Comm'n H.R., Rules of Procedure, Arts. 44(2), 47(1)(3), 48(1). See e.g., *Salas Galindo v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report No. 121/18, OEA/Ser.L/V/II.169, doc. 138, ¶¶ 472-473 (2018); *Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm'n H.R., ¶¶ 199-201; *Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, ¶¶ 57-58 (1999); *Haitian Centre for Human Rights v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, ¶¶ 183-89 (1997).

⁴⁴³ Inter-American Commission on Human Rights, *Reparations for the Violation of the Right to Freedom of Expression in the Inter-American System*, OEA/Ser.L/V/II. CIDH/RELE/INF.5/12, ¶¶ 7, 9 (Dec. 30, 2012).

⁴⁴⁴ *Barrios Altos vs. Peru*, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 87, ¶25 (Nov. 30, 2001).

violations and the harm suffered.”⁴⁴⁵ The Inter-American Commission has classified reparations into truth and justice measures, guarantees of non-repetition, measures of satisfaction and rehabilitation, and monetary compensation.⁴⁴⁶

The United States opposes reparations in this case.⁴⁴⁷ The State has argued that the harms inflicted as a result of the killing and impunity were remedied, and that the Hernandez family agreed to waive their right to pursue justice before the Inter-American Commission. According to the United States’ response to the Petition, Mr. Hernandez’s family received “adequate and effective remedies for the actions surrounding [his] death, in the form of significant monetary compensation, in exchange for the dismissal of the [civil] claims brought by Petitioners in district court.”⁴⁴⁸ The United States also claimed that “[t]he dismissal of the [civil] case with prejudice means that Petitioners are legally prohibited from ever again raising the claims asserted in the U.S. federal court case.”⁴⁴⁹ Therefore, the United States argued, Petitioners are barred from bringing a petition before the Inter-American Commission against the United States because they “have [] obligated themselves under U.S. law not to further pursue the claims in the Petition against the United States....”⁴⁵⁰

The Inter-American Commission rejected these arguments and decided to admit the case. First, the Commission affirmed that “regardless of the nature and legal effects” that the civil settlement agreement between the United States and Mr. Hernandez’s children “could have under domestic law, access by the victims to the [Inter-American Commission] is an entirely different matter, one governed by international law.”⁴⁵¹ The Inter-American Commission observed that

the parties to the civil judicial proceedings before the US District Court for the Southern District of California were pursuing different claims, and seeking remedies of a different nature, through domestic procedures that are distinct from the international ones, and guided by a different body of law.... [T]he settlement reached between the parties, by its own terms—literally cited by the State—only applies to claims of a civil nature arising from the facts surrounding the death of Mr. Hernández; the criminal responsibility of the perpetrators of torture or extrajudicial killing is of a fundamentally different legal nature, as is in turn the international responsibility of the State for violation of its human rights obligations.⁴⁵²

Additionally, the Inter-American Commission rejected the United States’ position that monetary compensation alone constitutes adequate and sufficient reparations for the harms suffered by the victim of a summary execution and his family members. Referencing long standing case law, the Inter-American Commission stated “[c]ivil remedies are neither appropriate nor necessary to exhaust before resorting to the [Inter-American Commission] in cases where the violation of the right to life and torture is claimed....”⁴⁵³ Indeed, the notion that a settlement agreement in domestic civil litigation

⁴⁴⁵ G.A. Res. 60/147, UN Principles on the Right to a Remedy and Reparation, ¶ 15 (Dec. 6, 2005).

⁴⁴⁶ Inter-American Commission on Human Rights, *General Guidelines on the Follow-up of Recommendations and Decisions of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.173, doc. 177, at 10 (Sept. 30, 2019) [hereinafter *IACHR Guidelines on the Follow-up of Recommendations and Decisions*], <https://www.oas.org/en/iachr/activities/follow-up/Directrices-en.pdf>.

⁴⁴⁷ U.S. Resp. (Sept. 12, 2017).

⁴⁴⁸ *Id.* at 4.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ Hernandez Rojas vs. United States, Petition 524-16, Inter-Am. Comm’n H.R., Report No. 198/20, ¶ 11 (July 23, 2020).

⁴⁵² *Id.*

⁴⁵³ *Id.*

for monetary compensation extinguishes the United States' obligation to investigate and punish those responsible for Mr. Hernandez's death runs counter to decades of Inter-American case law.

The Honorable Commission should instruct the United States to make full restitution for its violations. In this case, a report by the Commission alone is insufficient to ensure that the violations will not be repeated, nor will a report make the victims whole again from the severe emotional, psychological, and economic harm they have suffered. Full restitution entails truth and justice measures, including carrying out a thorough and effective investigation into the death of Anastasio Hernandez Rojas and public access to the investigative files of all the agencies that investigate the incident. Full reparations also requires measures of satisfaction which include guarantees of non-repetition that will change U.S. law and practice to prevent repetition of the harm, such as reform of use of force laws and policies and investigative procedures, a public apology for the government's violations, and assistance to the family members and their community. Finally, although money will not return the loss of their loved one nor result in justice,⁴⁵⁴ this Honorable Commission should instruct the United States to pay monetary damages to compensate the victim's family members for the damage to their life plans and moral damages.

A. Beneficiaries

The Inter-American Commission has recognized that relatives of the victims of human rights violations may also be victims.⁴⁵⁵ In this matter, the individuals "who suffered direct harm as a result of the violation in question"⁴⁵⁶ and are beneficiaries entitled to remedy include:⁴⁵⁷ Porfirio Hernandez and Maria de la Luz Rojas who lost their son;⁴⁵⁸ Maria Puga who lost her partner of almost 20 years and was forced to become the sole breadwinner for her family of six; Bernardo and Martin Hernandez Rojas who lost their brother and business partner; and Yeimi Judith, Daisy Alejandra, Fabian, Daniel, and Daniela who lost their father, the breadwinner for the family, and role model.

B. The human rights of Anastasio Hernandez Rojas's family will not be ensured until the United States provides justice and truth by conducting thorough, independent, and impartial investigations of Anastasio Hernandez Rojas's death.

The investigations of Anastasio Hernandez Rojas's death were predestined for impunity. The actions of border agents to interfere with the investigation and conceal or destroy evidence, the disinterest of police and disciplinary investigators in uncovering the truth, and the inaction of federal prosecutors combined with permissive use of force standards and secret proceedings shielded border agents from accountability. Based on a flawed, biased, and incomplete investigation, it is unsurprising that, despite audio and video evidence, federal internal investigators failed to take disciplinary action and federal prosecutors asserted that they were unable to disprove "the agents' claim that they used reasonable force in an attempt to subdue and restrain a combative detainee" and closed the criminal investigation.⁴⁵⁹ Virtually every instance of violence perpetrated by border agents has ended in the same way—with impunity.

⁴⁵⁴ Interview with Bernardo Hernandez Rojas (Mar. 19, 2019).

⁴⁵⁵ Victims of the Tugboat "13 de Marzo" v. Cuba, Case No. 11.436, Inter-Am. Comm'n H.R., Report 47/96, ¶ 69 (1996).

⁴⁵⁶ Rosendo Cantú v. Mexico, Case 12.579, Application, Inter-Am. Ct. H.R., ¶ 214 (Aug. 2, 2009).

⁴⁵⁷ Rosendo Cantú v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 140 (Aug. 31, 2010).

⁴⁵⁸ On April 30, 2017, Porfirio Hernandez, Anastasio Hernandez Rojas's father, passed away. On December 22, 2017, Maria de la Luz Rojas, Anastasio Hernandez Rojas's mother, was involved in a tragic car accident and died as a result of her injuries.

⁴⁵⁹ Federal Officials Close the Investigation, *supra* note 257.

The Hernandez family has relentlessly sought justice for Mr. Hernandez, and the United States has hindered their search for truth and justice at every turn. Denied access to justice, the Hernandez family suffer ongoing mental, emotional, and psychological anguish. For nearly a decade, U.S. action and inaction has shielded CBP agents from accountability and condemned the victim's family to uncertainty and impotence.

The Hernandez family feels betrayed by the U.S. legal system. Anastasio Hernandez was the heart of their family. They remember him as someone who worked hard to provide for his family and always brought a smile to their faces. He was beloved by their neighbors and always eager to organize celebrations for the holidays and birthdays. His family members do not recognize the person described by law enforcement. He was never violent and did not use drugs. After his death, his family was overwhelmed by grief from their loss and shame because of the lack of justice.

Yeimi, Mr. Hernandez's eldest daughter, recalled the day federal prosecutors informed her family of their decision to close the case without bringing charges:

I remember going with my [family] downtown and people from Washington told us there was not enough evidence. I just walked out of the room. I didn't want to hear no more.... It is an injustice. I always feel super small next to [law enforcement], super small.... [T]hey took it like a joke, and they are just laughing at us. They see us. They have everything right there, and they got away with it.⁴⁶⁰

Daisy, Mr. Hernandez's daughter, also believes that the outcome was "not right."⁴⁶¹ She believes "there is enough evidence." She explained that "you can see it that something didn't go right [at Whiskey 2]. No one yells like that for no reason. The number of men surrounding him was ridiculous."⁴⁶² She questions the seriousness of the investigation: "I think they didn't look into it. They didn't care about it. An illegal immigrant meant nothing to them."⁴⁶³ Every time she sees a border agent she wonders, "Is this one of them?"⁴⁶⁴

In violation of the American Declaration, the "failure to pursue criminal charges" in this case, "stemmed in large part from the inadequacies in the investigation from its outset...."⁴⁶⁵ Full restitution in this case requires a new investigation of Mr. Hernandez's death that is thorough, impartial, and prompt; upholds the family members rights to participate in all stages of the criminal proceedings; and "know[ing] the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them."⁴⁶⁶

The Hernandez family's highest priority is for those responsible for Mr. Hernandez's death to be held to account. Martin, Mr. Hernandez's brother states, "Before he died my father lost hope in seeking justice. He would say 'los van a pagar allá' [they will pay on judgement day], but I would say 'first they should pay here on earth'.... More than anything, I just want the agents responsible to be held accountable, that is what would help me move on."⁴⁶⁷ Maria Puga, Mr. Hernandez's partner,

⁴⁶⁰ Interview with Yeimi Judith Hernandez (Mar. 20, 2019).

⁴⁶¹ Interview with Daisy Alejandra Hernandez (Mar. 20, 2019).

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm'n H.R., Report No. 92/05, OEA/Ser.L/V/II.124, doc. 5, ¶ 100 (2005).

⁴⁶⁶ *Romero v. El Salvador*, Case 11.481, Inter-Am. Comm. H.R., Report 37/00, ¶¶ 148, 116 (1999). *See also* *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 124, ¶ 147 (June 15, 2005) (The Court in *Moiwana Community* explained that "victims of rights violations and their family members have a right to know the truth regarding those violations—that is, to be informed about the relevant facts and responsible parties").

⁴⁶⁷ Interview with Porfirio Martin Hernandez (Jan. 23, 2021).

remembers being shut out of the investigation although she “had the right to know about my husband’s case and what was happening with the investigation.”⁴⁶⁸ She is convinced that the agents lied, and the investigation was closed “to protect the agents.”⁴⁶⁹ Daisy explains, “these people in uniform are supposed to serve and protect me. And they didn’t serve and protect me... They need to pay for what they did.”⁴⁷⁰ Yeimi believes that the laws need to change and those responsible should be prosecuted: “These people did not have to serve their time. They were not even fired. They are a menace to society because it could happen to somebody else.”⁴⁷¹ In her eyes, U.S. Border Patrol is “another form of a gang. They’re just a whole other gang... they’re skilled, and they have the tools and people and money... They are not giving us justice like we are nobodies....”⁴⁷²

The United States’ position that civil settlement between the United States and Mr. Hernandez’s children extinguishes the State’s international obligation to investigate, prosecute, and punish those responsible for killing Mr. Hernandez and obstructing the investigation runs counter to well-established Inter-American case law. The Inter-American Commission and Court have instructed states to investigate, identify, prosecute, and punish those responsible for human rights violations as a remedy in the majority of its cases.⁴⁷³ Inter-American case law requires states to remedy violations of judicial protection and due process by investigating not only all the material and intellectual authors of grave violations of human rights but also those who concealed evidence or obstructed the investigation.⁴⁷⁴ Additionally, the state has a duty to remove “all obstacles, de facto and de jure, that maintain impunity” of state agents, including amnesty laws, statutes of limitations, *res judicata* and other procedural doctrines.⁴⁷⁵ To this end, the Inter-American Court has annulled prosecutorial decisions not to bring charges against suspects or court acquittals that resulted from ineffective investigations.⁴⁷⁶ As a guarantee of non-repetition, the Inter-American Commission, for example, instructed the United States in *Jessica Lenahan (Gonzales) v. United States* to “[c]onduct a serious, impartial and exhaustive investigation into systemic failures” that led to the violations of the victim’s rights, “including performing an inquiry to determine the responsibilities of public officials for violating state and/or federal laws, and holding those responsible accountable.”⁴⁷⁷

A first step in addressing the harm caused by the denial of justice and truth about the death of Mr. Hernandez is the disclosure of official information about the incident. The United States must act to clarify the truth and hold those responsible accountable by publicly disclosing all official records related to the killing of Anastasio Hernandez Rojas, specifically records related to investigations by the CIIT, DHS OIG, CBP OIA, the federal grand jury and CBP’s Use of Force Review Board. The Inter-

⁴⁶⁸ Interview with Maria Puga (Mar. 20, 2019).

⁴⁶⁹ *Id.*

⁴⁷⁰ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁴⁷¹ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁴⁷² *Id.*

⁴⁷³ Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L.J. 493 (2011).

⁴⁷⁴ *Mack Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 275 (Nov. 25, 2003).

⁴⁷⁵ *Rodríguez Vera v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, ¶ 556 (Nov. 14, 2014).

⁴⁷⁶ *See e.g., Gutiérrez-Soler v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 96-100 (Sept. 12, 2005) (ordering the State of Colombia to vacate an acquittal that resulted from an investigation and prosecution that failed to meet Inter-American standards).

⁴⁷⁷ *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/VII.142, doc 11, ¶ 201(2) (2011). *See also Romero v. El Salvador*, Case 11.481, Inter-Am. Comm. H.R., Report 37/00, ¶¶ 87-122, 159 (1999) (finding that El Salvador had not “undertake[n] an effective investigation” and instructing the State to “expeditiously” conduct a “complete, impartial, and effective judicial investigation,” with the aim to “try and punish all the direct perpetrators and planners of the [established human rights] violations”).

American Commission and Court have required that victims and the public be provided access to official documents related to serious violations of human rights.⁴⁷⁸ The United States' continued refusal to disclose this information can only be interpreted as a deliberate effort to deny the right to truth and facilitate a cover-up.

A new criminal investigation of the circumstances of Mr. Hernandez's death should address the gaps, errors, and defects that undermined the initial investigation. Independent and impartial investigators should identify civilian witnesses and re-examine the evidence. Prosecutors should also act to hold those who interfered with the initial investigation—including the border agents who destroyed eyewitness videos and images of the incident and illegally used an administrative subpoena to obtain the victim's autopsy—responsible for those actions. The investigation must be open to victim participation at all stages of the proceedings. Grand jury proceedings convened as part of a new investigation must conduct a complete, effective, and impartial examination of the incident and provide an official and public accounting of what happened to Mr. Hernandez Rojas. The investigation also must allow for public dissemination of the investigation's results, including grand jury transcripts. The United States must not employ the statute of limitations, or any other "mechanism that excludes responsibility in order to avoid the obligation to investigate and prosecute" the parties responsible for Mr. Hernandez Rojas's torture and death.⁴⁷⁹

- C. Anastasio Hernandez Rojas's family members are entitled to satisfaction damages for the harm they have suffered.

Generally, this Honorable Commission has considered three types of satisfaction measures when crafting remedial provisions: (1) non-repetition; (2) public acknowledgement; and (3) assistance to the community. These categories of satisfaction measures are integral to an effective *restitutio in integrum* by the state in this case because the nature of the harm inflicted is one that monetary damages alone are not sufficient to cure. Monetary damages will not rectify past human rights abuses or protect the victims from future abuses.⁴⁸⁰

1. The Hernandez family is entitled to guarantees from the United States that the human rights violations at issue will not be repeated.

Anastasio Hernandez Rojas's family members will not receive full restitution until the laws and practices that violated their fundamental human rights are changed to conform to the guarantees of the American Declaration. Until the use of force laws and policies, investigative procedures, and training programs fully reflect the state's obligation to ensure fundamental human rights, law enforcement agents will be shielded from accountability for acts of unjustified violence and victims of law enforcement like Anastasio Hernandez Rojas and his family members will suffer repeated violations of basic human rights, including the right to life.

Maria Puga, Mr. Hernandez's partner, has watched in utter terror as the list of victims of border agents grows longer with each passing year. Yeimi has called for legal reform, stating "something has

⁴⁷⁸ *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 247, 252, 258 (Nov. 23, 2009). *See also* *Favela Nova Brasília vs. Brasil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 333, ¶ 292(a) (Feb. 16, 2017); *Contreras v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 212 (Aug. 31, 2011); *El Mozote Massacre v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 321 (Oct. 25, 2012).

⁴⁷⁹ *Rodríguez Vera*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. ¶556.

⁴⁸⁰ *See IACHR Guidelines on the Follow-up of Recommendations and Decisions*, *supra* note 446, at 14-16.

to happen to change these laws.... I don't wish this upon nobody else. It is not fair for the next person to go through it, and the next, and they wash their hands of it...."⁴⁸¹ Bernardo, Mr. Hernandez's brother, has stated his strong desire for "reform to ensure that this does not happen again."⁴⁸²

- a) The United States must reform its use of force laws and policies to prevent future unlawful killings

Mr. Hernandez and his family are among the many victims of U.S. Customs and Border Protection. Since 2010, border agents have killed over 100 foreign and U.S. nationals along the U.S.-Mexico border. The Hernandez family's demand for justice derives from enormous suffering and the recognition that absent structural and meaningful reform of U.S. laws and policies, specifically the "objective reasonableness" standard, border agents who use excessive force will be continued to be shielded from accountability.

Unaccountable border agents pose a growing threat to foreign and U.S. nationals. Customs and Border Protection (CBP) is the largest law enforcement agency in the United States with over 60,000 employees.⁴⁸³ Roughly, 85% of CBP agents are deployed at the U.S.-Mexico border.⁴⁸⁴ CBP claims the authority to conduct warrantless stops and seizures anywhere within 100 miles of U.S. land or sea borders, an area that covers approximately two-thirds of the U.S. population. The recent national deployment of the highly militarized Border Patrol Tactical Units (BORTAC) to sanctuary cities and urban centers experiencing Black Lives Matter protests are examples of border agents asserting their extraordinary jurisdiction to harass and terrorize communities far beyond the southern border.⁴⁸⁵

These recent examples also reveal CBP's ambition to become a national police force with extraconstitutional powers.⁴⁸⁶ Increases in CBP's budgets may provide the agency with the resources to realize that ambition. In 2019, CBP was allocated \$17.1 billion—almost four times more than in 2003. In 2017, nearly \$300 million was allocated to hire an additional 7500 Border Patrol agents.⁴⁸⁷ Each year, the U.S. allocates more funding to CBP than the combined budgets of the FBI; Bureau of Alcohol, Tobacco, Firearms and Explosives; Drug Enforcement Administration; Secret Service; and U.S. Marshals—plus the entire annual budget of the New York Police Department.⁴⁸⁸

U.S. law and policies on use of force policy establish the conditions under which CBP agents may use excessive force and are shielded from accountability. As a guarantee of non-repetition, the United States must adopt a use of force standard that incorporates the international law principles of legality, necessity, and proportionality. To this end, the United States should require that law

⁴⁸¹ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁴⁸² Interview with Bernardo Hernandez Rojas (Mar. 20, 2019).

⁴⁸³ *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/about> (last visited Jan. 24, 2021).

⁴⁸⁴ United States Border Patrol, Border Patrol Agent Nationwide Staffing by Fiscal Year, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202019%29_0.pdf.

⁴⁸⁵ Caitlin Dickerson, Zolan Kanno-Youngs & Annie Correal, *'Flood the Streets': ICE Targets Sanctuary Cities With Increased Surveillance*, N.Y. Times (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/us/ICE-BORTAC-sanctuary-cities.html>.

⁴⁸⁶ CBP's stated goal is "[t]o serve as the premier law enforcement agency." U.S. Customs and Boarder Protection, Snapshot: A Summary of CBP Facts and Figures (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Jun/CBP-Snapshot-20200611-web.pdf>.

⁴⁸⁷ AMERICAN IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf.

⁴⁸⁸ Garrett M. Graff, *The Green Monster*, POLITICO MAG. (Nov./Dec. 2014), <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220>.

enforcement agents exhaust less harmful alternatives before deploying force,⁴⁸⁹ apply a level of force that is “keeping with the level of resistance offered,”⁴⁹⁰ impose strict limitations on the use of lethal force against detainees, and require clear warning before an officer uses lethal force. Adhering to these principles would, for example, prevent officers from repeatedly striking and Tasing a detainee, like Mr. Hernandez, who is hog-tied and lying prone on the ground.

The United States should also comply with this Honorable Commission’s prior instruction to distinguish between lethal and non-lethal force.⁴⁹¹ In its report on police violence against Afro-descendants in the United States, the Commission examined the U.S. Supreme Court’s analysis in *Scott v. Harris* which “does not require differentiation between the use of lethal and non-lethal force, and does not identify the elements of necessity and proportionality...” The Commission concluded that “the failure to apply different standards to the use of lethal versus non-lethal force clearly runs contrary to the U.N. Basic Principles and the standards of the Inter-American human rights system.”⁴⁹²

Accordingly, the United States must categorize and designate Tasers as deadly force. CBP’s policies on Taser use are not publicly available. Three years after Mr. Hernandez’s death, the Police Executive Research Forum (PERF) released a critical review of CBP use of force policies.⁴⁹³ PERF recommended that CBP update its Use of Force Handbook to clarify that the use of electronic control weapons (Tasers) should be limited to situations in which the subject is resisting in a manner that will cause injury.⁴⁹⁴ PERF also recommended that personnel should apply a Taser “for one standard cycle (five seconds) and then evaluate the situation to determine if subsequent cycles are necessary.”⁴⁹⁵ PERF further recommended that personnel “consider that exposure to the [Taser] for longer than 15 seconds (whether due to multiple applications or continuous cycling) may increase death or serious injury.”⁴⁹⁶ In the absence of a clear prohibition against the use of a Taser, a border agent deployed multiple shocks from a Taser against a handcuffed detainee. Then, CBP agents disregarded their training that the use of Tasers increases the danger of positional or restraint asphyxia and to avoid placing detainees in restraints on their stomach.⁴⁹⁷

Moreover, the United States must abandon aspects of use of force law and policies that violate Inter-American standards. In *Graham v. Connor*, the U.S. Supreme Court considered the severity of the underlying crime as a key factor for determining the officer’s use of force.⁴⁹⁸ In *Scott v. Harris*, the Court emphasized the “relative culpability” of a driver who was rendered quadriplegic when law enforcement rammed his car to end a police chase.⁴⁹⁹ Under international standards, the severity of the underlying crime and the relative culpability of the victim is irrelevant because these factors have no

⁴⁸⁹ A requirement that law enforcement use “less harmful” alternatives has been explicitly rejected by U.S. courts. *See, e.g., Long v. Slaton*, 508 F.3d 576, 583 (11th Cir. 2007) (holding officer’s use of a firearm was reasonable, even if less harmful alternatives available would have been effective at achieving officer’s objective).

⁴⁹⁰ *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85(iii) (Oct. 24, 2012).

⁴⁹¹ *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 211.

⁴⁹² *Id.* ¶ 211 (citing U.N. Basic Principles on the Use of Force, *supra* note 284, principle 9).

⁴⁹³ POLICE EXECUTIVE RESEARCH FORUM, U.S. CUSTOMS & BORDER PROTECTION—USE OF FORCE REVIEW: CASES AND POLICIES (2013) [hereinafter *USE OF FORCE REVIEW*], <http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

⁴⁹⁴ *Id.* at 19.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ Deposition of Ducoing, Petition, Exh. 6 at 77:23–78:5.

⁴⁹⁸ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁴⁹⁹ *See Scott v. Harris*, 550 U.S. 372, 384–85 (2007).

bearing on the level of threat to safety posed by the situation, the amount of force necessary, or the means of force available to the officer.⁵⁰⁰

The Commission has previously instructed states to adopt “legislative, administrative, and other types of measures” that incorporate international use of force standards.⁵⁰¹ In *Diaz Family v. Venezuela*, for example, the Commission ordered Venezuela to enact legislation that bring domestic use of lethal force standards in compliance with international principles of necessity and proportionality.⁵⁰² Similarly, in *Nadege Dorzema*, the Inter-American Court stated that “the State must prevent the recurrence of [killings by security forces],” and, to this end, “adopt all necessary legal, administrative, and any other measures to avoid a repetition of similar events in the future....”⁵⁰³ The Court ordered that “[i]n particular, the State must, within a reasonable time, adapt its domestic law to the American Convention, incorporating the international standards on the use of force by law enforcement agents, in accordance with the principles of legality, proportionality, necessity and exceptionality....”⁵⁰⁴ (citations omitted).

These measures are in keeping with Inter-American Commission’s recognition of the need for law reform to address law enforcement violence against minorities in the United States. The Commission has observed that historically marginalized groups are particularly susceptible to the police violence that results from the failure of law and policy to regulate effectively the use of force.⁵⁰⁵ The Inter-American Commission instructed the United States to cease its pattern of discriminatory, unlawful killings by bringing domestic law in line with international use of force standards and ensuring compliance from state agents.⁵⁰⁶

Lastly, under international law, the United States has a positive obligation to prevent, investigate, and punish acts of torture within its borders.⁵⁰⁷ Current U.S. federal law does not criminalize torture committed within the United States,⁵⁰⁸ and thus the federal investigation of Mr. Hernandez’s death did not include the crime of torture. The United States must criminalize torture committed within the United States by state agents in accordance with its obligations under the American Declaration.

⁵⁰⁰ See, e.g., *Landaeta Mejias Brothers v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶ 136 (Aug. 27, 2014).

⁵⁰¹ See *Diaz Family v. Venezuela*, Case 12.662, Inter-Am. Comm’n H.R., Report No. 80/17, OEA/Ser.L./II.163, doc. 93, ¶ 132(4) (July 5, 2017).

⁵⁰² *Id.*

⁵⁰³ *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 274 (Oct. 24, 2012).

⁵⁰⁴ *Id.* ¶ 275.

⁵⁰⁵ See generally *IACHR Report on Police Violence in the United States*, *supra* note 292.

⁵⁰⁶ *Id.* at 160-61.

⁵⁰⁷ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at art. 2(1), June 26, 1987, 1465 U.N.T.S. 85 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); U.N. Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, at 30, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 10, 1992) (“It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”).

⁵⁰⁸ The State Department has stated that legislation specifically criminalizing torture was unnecessary because “existing criminal law was determined to be adequate to fulfil [sic] the Convention’s [i.e., the CAT’s] prohibitory obligations, and in deference to the federal-state relationship.” Committee against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, 13, ¶ 48, U.N. Doc. CAT/C/28/Add.5 (U.S.) (Feb. 9, 2000).

- b) The United States must ensure independent and impartial investigations of law enforcement officers involved in cases of serious injury or death.

International human rights standards and best practices call for independent and impartial investigations of law enforcement officers involved in cases of serious injury or death. In response to the police shooting death of Michael Brown and the civil unrest that followed, then President Barack Obama created by executive order the President's Task Force on 21st Century Policing. In its final report, the "task force encourage[d] policies that mandate the use of external and independent prosecutors in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths."⁵⁰⁹

This Honorable Commission has also emphasized the importance of "the use of special prosecutors or investigatory bodies without close institutional connections to the police for the investigation and prosecution of police killings."⁵¹⁰ Each of the agencies—U.S. Border Patrol's Critical Incident Investigative Team (CIIT), Customs and Border Protection Internal Affairs Office (CBP IA), Department of Homeland Security Office of Inspector General (DHS OIG), Department of Justice Federal Bureau of Investigation (DOJ FBI)—that investigated Mr. Hernandez's death lacked independence and impartiality. Indeed, these agencies had the "institutional connections and relationships" the Inter-American Commission has established undermine impartiality and independence of investigators.⁵¹¹ Those investigators conducted the kind of perfunctory, "mechanical" investigations the Inter-American Commission has established violate the American Declaration.⁵¹²

Since Mr. Hernandez's death, the CBP has not implemented measures to ensure independent and impartial investigations of excessive use of force by its border agents. Federal law does not grant the U.S. Border Patrol the authority to investigate allegations of misconduct or abuse by its agents. Nevertheless, U.S. Border Patrol has claimed authority to conduct "parallel investigations" of use of force incidents and deployed a CIIT unit to investigate many of the most severe use of force incidents involving BP agents, including the events that led to Mr. Hernandez's death. The CIIT unit, which has no legitimate or lawful purpose, intervened at critical stages of the criminal investigation into Mr. Hernandez's death, illegally issued an administrative subpoena to obtain the victim's health records, and obstructed police from securing evidence about the incident without consequence.

Moreover, U.S. law authorizes CBP to investigate its own, to shield its employees from investigations by the Office of Inspector General (OIG), and to create dangerous gaps in accountability. Under federal law, the CBP Office of Professional Responsibility (OPR) (formerly CBP IA) "investigate[s] criminal and administrative matters and misconduct by officers, agents, and other employees."⁵¹³ The authority granted to CBP OPR to investigate criminal matters is unique in the U.S. government.⁵¹⁴

According to U.S. law, the DHS OIG also has the authority to investigate border agents, but it is not fully independent. All OIG offices in the federal government are authorized to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of their

⁵⁰⁹ PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 21 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

⁵¹⁰ *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 273.

⁵¹¹ *Id.*

⁵¹² *See* Lenahan (Gonzales) v. United States, Case 12-626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./VII.142, doc 11, ¶ 181 (2011).

⁵¹³ *See* 6 U.S.C. § 211(j).

⁵¹⁴ Other federal agencies, including other agencies within DHS, have limited investigative powers. For example, federal law limits DHS investigative authority of employees of the U.S. Immigration and Customs Enforcement (ICE) to "noncriminal allegations of misconduct, corruption, and fraud." *See id.* § 253(1).

respective Department.⁵¹⁵ However, DHS OIG is subject to the “authority, direction, and control” of the Secretary of Homeland Security who is empowered to prohibit the Inspector General from “carrying out or completing any audit or investigation, from accessing information ... or from issuing any subpoena” if the Secretary determines that such prohibition is necessary to prevent the disclosure of information it deems sensitive.⁵¹⁶ While this control may have a sound basis, it also undermines the autonomy of investigators and precludes DHS OIG from being truly independent.

The DOJ and its investigative arm, the FBI, have the authority to investigate any violation of federal criminal law involving government officers and employees, including DHS employees and CBP agents and officers.⁵¹⁷ The statute granting this authority explicitly states that it does not limit the authority to investigate conferred on another department or agency.⁵¹⁸ This has created overlapping jurisdictions between the FBI and CBP OPR to investigate criminal matters, without establishing legal clarity as to how these agencies interact with each other and with DHS OIG.

Of the three entities authorized in federal law to investigate federal criminal matters relating to U.S. border agents, only the FBI is independent and external to DHS and its component CBP, which employ those agents. As such, the FBI is in the best position to conduct an impartial investigation, but it does not always assert its jurisdiction or does it do so in a timely or diligent manner. The confusion that arises from overlapping jurisdictions and the lack of attention and/or capacity of the FBI to pursue these investigations, creates dangerous gaps in accountability that fuels the impunity of border agents and endangers those they come into contact with.⁵¹⁹

The United States must implement measures to ensure that independent and impartial investigators carry out a thorough and timely investigation of Mr. Hernandez’s death. Structural reform is also required to ensure that other incidents of serious injury or death involving border agents are not condemned to languish in impunity.

First, the United States must prohibit the U.S. Border Patrol from conducting investigations of use of force incidents. Although U.S. law does not explicitly grant such authority, U.S. Border Patrol routinely deploys CIIT units to the detriment of independent investigations. The actions of the CIIT unit in the investigation of Mr. Hernandez’s demonstrate the need for legislative action to prevent interference by U.S. Border Patrol.

Second, the United States must create a special prosecutorial unit in the DOJ that is dedicated, resourced, and directed to investigate criminal matters involving federal border agents. The unit must act independently of DHS/CBP pursuant to best practices and the highest standards for carrying out independent and impartial investigations. To build trust with the community, the unit must be transparent about the status of investigations, subject to oversight regarding the investigations, and accountable for violating the standards of independent and impartial investigations.

Third, the United States must clarify and limit the roles of DHS OIG and CBP OPR to conduct investigations. The United States must eliminate CBP OPR’s statutory authority to investigate criminal matters by amending federal law,⁵²⁰ limiting their authority to administrative matters. The United States must strengthen the expectations of CBP OPR to conduct independent, impartial, and timely

⁵¹⁵ See Appendix 5a U.S.C. § 4(a)(1).

⁵¹⁶ See Appendix 5a U.S.C. § 8I(a).

⁵¹⁷ See 28 U.S.C. § 535(a).

⁵¹⁸ See *id.* § 535(a)(2).

⁵¹⁹ Local police also have jurisdiction to investigate criminal matters but are often compromised because of local relationships with border agents who in many places outnumber them. Local district attorneys have authority to prosecute agents under state law, but they too can be compromised. In very small communities, DHS/CBP has funded the local law enforcement through jail contracts and grants such as through Operation Stonegarden, which further compromises the ability of local police to investigate federal border agents.

⁵²⁰ Specifically, the United States must amend 6 U.S.C. § 211(j).

investigations of administrative misconduct, and strengthen the public reporting requirements on the results of investigations. The United States must designate the law enforcement and investigators allowed to respond to an incident and require specific certification and regular training regarding the preservation of evidence and witnesses that aligns with international standards and best practices.⁵²¹

- c) The United States must reform the use of the federal grand jury to prevent repetition of the harm

This Honorable Commission has recognized the deleterious role of the grand juries in prosecutions involving law enforcement violence and referred to empirical evidence that the prosecutor's decision to bring charges against law enforcement officials may be impacted by "the secretive nature of grand juries and deliberations, a lack of transparent selection processes, a lack of diversity in jury pools, and the role of prosecutors in guiding the grand jury process and instructing on the law...."⁵²² Indeed, federal grand juries rarely indict law enforcement for misconduct or abuse presumably because prosecutors are disinclined to marshal the evidence and press for an indictment. In certain cases, prosecutors have used the grand jury as "political cover" when the prosecutor did not want to bring charges against law enforcement, but also wanted to avoid public backlash.

The grand jury proceedings proved to be a barrier to accountability in the investigation of Mr. Hernandez's death in violation of the American Declaration. First, the United States must act to ensure the impartiality and independence of grand jury proceedings by creating special prosecutors without "close institutional connections" the policing agencies responsible for the use of force.⁵²³

Second, the United States must publish and release the grand jury transcripts. Under the American Declaration, victims and society have the right "to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them."⁵²⁴ Accordingly, the United States is obligated to provide the Hernandez family and the public with descriptions of events, names of witnesses who testified, the scope of the inquiry, the methods used to evaluate evidence, and recommendations within a reasonable period of time.⁵²⁵ Without transparency, the victims and society are unable to assess the effectiveness of the grand jury investigation.

Third, the United States must reform grand jury proceedings involving violence by state agents to bring these investigations in compliance with Inter-American standards. The American Declaration obligates states to allow victims and their next-of-kin to participate in, and have access to, the criminal investigations of unlawful use of force by state agents. The United States should reform the grand jury process to allow the victim and the next-of-kin to be present throughout the proceedings and to have access to all evidence in the case. Under the American Declaration, the grand jury process must afford victims and their next-of-kin the opportunity to testify before the grand jury to present their concerns and evidence.

⁵²¹ See generally, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE AND U.S. DEPARTMENT OF JUSTICE, OFFICER-INVOLVED SHOOTINGS: A GUIDE FOR LAW ENFORCEMENT LEADERS (2016), <https://cops.usdoj.gov/RIC/Publications/cops-p350-pub.pdf>.

⁵²² *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 111.

⁵²³ *Id.* at ¶ 273.

⁵²⁴ *Romero v. El Salvador*, Case 11.481, Inter-Am. Comm. H.R., Report 37/00, ¶ 148 (1999).

⁵²⁵ *Vargas-Areco v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶¶ 101-102 (Sept. 26, 2006).

- d) The United States must provide use of force training to Customs and Border Protection officers to prevent repetition of the harm.

Revised training programs are necessary to ensure that CBP uphold its obligation to protect the right to life. The case of Mr. Hernandez painfully illustrates the need to educate and train officers from the human rights perspective. Border agents repeatedly punched, kicked, struck, and Tased Mr. Hernandez as he lay on the ground defenseless, crying out in pain and begging for mercy. Moreover, agents acted to interfere with the investigation of the incident by destroying evidence. New training programs must instill in CBP officers a greater respect for human dignity and the protections enshrined in the American Declaration.

The Inter-American Commission should instruct CBP to revise its training programs in accordance with the international standards of legality, necessity, and proportionality. The Commission has previously instructed the United States to mandate human rights training programs for law enforcement.⁵²⁶ This Honorable Commission has underscored the significance of human rights training programs that instruct officers to use force in a manner that is “in strict accordance with internationally accepted standards”⁵²⁷ and address “issues ranging from negotiation and conflict resolution techniques to gradual escalation in force when so allowed . . . in keeping with the principles of legality, absolute necessity, and proportionality”⁵²⁸ The Inter-American Court also has recognized that human rights training programs are “crucial to generate guarantees of non-repetition”⁵²⁹ and ordered state parties to revised training programs.⁵³⁰

The United States must revise its training program to feature: “the definition of force, use of force, and permissible use of lethal force; de-escalation tactics, in order to comply with the principle of necessity; alternatives to use of lethal force, including less lethal weapons; [and] instruction in nondiscrimination and implicit bias”⁵³¹ Specifically, the revised training program must address the use of Tasers. As with all weapons training, training on the use of Tasers must provide guidance and test officers on “the limits to which the use of [the weapon] is subject.”⁵³² The United States should develop trainings that are consistent with emerging international standards that limit the use of Tasers to extreme circumstances where there is a serious threat to life and prohibit using Tasers on persons in custody.⁵³³ Every CBP agent should be trained to understand that the level of force used against Mr. Hernandez was life-threatening and excessive. Otherwise, the risk that CBP agents will continue to use disproportionate and unnecessary force for illegitimate reasons is great.

⁵²⁶ See *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L./VII.142, doc 11, ¶ 201(6) (2011) (ordering training program for U.S. law enforcement officials).

⁵²⁷ *Report on Citizen Security and Human Rights*, *supra* note 280, ¶ 115; see also *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶¶ 215-220 (emphasizing “the importance of police officer training guided by the principles of legality, necessity, absolute necessity, and proportionality in the use of force...”).

⁵²⁸ IACHR 2015 ANNUAL REPORT, *supra* note 331, ch. IV.A (Use of Force), ¶ 23; see also *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 219.

⁵²⁹ *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 269 (Oct. 24, 2012).

⁵³⁰ See *Cruz Sánchez v. Peru*, Case 12.444, Inter-Am. H.R. Comm’n H.R., Report No. 66/10, ¶ 228(A)(4) (2011) (ordering state party to “implement ongoing human rights programs in Armed Forces and National Police training schools”); *Dorzema v. Dominican Republic*, Case 12.688, Inter-Am. Comm’n H.R., Report No. 174/10, ¶ 211(A)(4) (2010) (instructing the state to “implement permanent human rights programs” in law enforcement training academies).

⁵³¹ *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶ 220.

⁵³² IACHR 2015 ANNUAL REPORT, *supra* note 331, ch. IV.A (Use of Force), ¶ 21.

⁵³³ See, e.g., CAT Concluding Observations, *supra* note 328, ¶ 27 (providing that Tasers should never be allowed in prisons or “other places of deprivation of liberty”); Committee Against Torture Concludes Forty-Fourth Session, *supra* note 334 (finding that use of a Taser against persons in custody constituted a breach of Convention against Torture).

D. Anastasio Hernandez Rojas and his family's human rights will not be ensured until the United States publicly acknowledges its responsibility for the violations and apologizes.

The Hernandez family has been deeply affected by the brutality of Mr. Hernandez's death and the failure to hold those responsible accountable. The image of Mr. Hernandez in the hospital bed before he died torments Maria: "I will never forget how he looked in the bed with tubes, a man who had been so strong surrounded by law enforcement. He was injured, unrecognizable."⁵³⁴ Both Maria and Daisy heard the video recording of Mr. Hernandez calling for help and begging for mercy. Maria recalls, "When I heard his voice, he was really screaming in pain. I had never heard so much pain. He never screamed like that, he never cried."⁵³⁵ Yeimi says she feels "[t]otal disrespect.... I just felt like they just spit on my family. That's just how I feel, so disrespected."⁵³⁶

The United States must acknowledge its violations of Anastasio Hernandez Rojas and his family's human rights and publicly apologize for those violations in order to signal a break from a brutal past and affirm its commitment to ensuring the rights of victims. Daisy explains the significance of a public apology to the family in the following manner:

It's a sign they did something wrong. They need to show this isn't normal, that they weren't following directions, that what they did is not right. Everybody who was there [the] day [they killed my father should attend]. The whole world would see it. Their neighbors should see it, to know who they live next to.⁵³⁷

Additionally, public acknowledgement would send a signal to border agents, investigators, and prosecutors that excessive use of force and impunity will not be tolerated. A public acknowledgement is necessary to provide a measure of justice to the family and prevent future violations of the state's obligations under the American Declaration.

In accordance with Inter-American case law, the United States must publicly recognize its international responsibility for the facts of this case and issue an apology to the Hernandez family.⁵³⁸ It is crucial that that the United States' acknowledgement and apology assume a visible, tangible form. Therefore, the United States should organize a public ceremony, in consultation with and with the participation of the Hernandez family, and issue the acknowledgement and apology to the family in the presence of high-ranking state authorities. As an additional and necessary measure of satisfaction, the United States must publish the Commission's final decision and recommendations in national and local newspapers, such as the New York Times and San Diego Tribune, in English and Spanish.⁵³⁹ Public acknowledgement of past violations thus signals the state's commitment to reject its past violations and its determination to ensure the human rights of the victims.⁵⁴⁰

⁵³⁴ Interview with Maria Puga, *supra* note 468.

⁵³⁵ *Id.*

⁵³⁶ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁵³⁷ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁵³⁸ See Cantoral Benavides v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 81 (Dec. 3, 2001); Mack Chang v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 278 (Nov. 25, 2003); Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 216 (June 15, 2005).

⁵³⁹ See Tiu-Tojin v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 136(8) (Nov. 26, 2008); Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 252-53 (June 23, 2005); Serrano-Cruz Sisters v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 195 (Mar. 1 2005).

⁵⁴⁰ See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 112 (1998) ("Apologies... acknowledge the fact of the harms, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offense.").

Undocumented Mexican migrants have suffered severe and violent discrimination by government officials based on race and perceived national origin. Former Deputy Assistant Commissioner for CBP Internal Affairs described the disregard for human life, prevalence of bias and racism, and the culture of impunity that characterizes U.S. Customs and Border Protection in the following manner:

During periodic field investigations and official discussions with CBP and BP officials, I have often heard agents describe this civilian law enforcement agency's mission in militaristic terms. CBP agents, in particular BP agents, see themselves as members of a 'paramilitary organization' and soldiers 'on the front line' of a war against criminal organizations and terrorism. Many agents asserted that CBP's mission was to protect the border at all costs, even at the expense of human life. This militaristic understanding of the agency's role is supported by some high-ranking officials. For example, while Deputy Assistant Commissioner of IA, I heard CBP Deputy Commissioner David Aguilar refer to BP as the 'Marine Corps of law enforcement.'

While Deputy Assistant Commissioner of Internal Affairs and Special Agent in Charge, I spoke with many BP agents who did not want to acknowledge that undocumented individuals had basic human rights. I heard BP agents characterize undocumented migrants as the enemy and undeserving of any legal rights, much less the same rights as U.S. citizens. On at least one occasion, I have heard a BP agent say that 'they don't have any rights.'

...

During my time as a CBP agent and investigating CBP misconduct, I was struck by the strength of the BP's esprit de corps. BP continued the training of freshly graduated agents at facilities located on the U.S.-Mexico border and continued teaching them to see themselves as members of a paramilitary organization that provides front-line defense of the United States. I heard BP agents refer to themselves as the 'Big Green Machine' (in reference to Border Patrol's green uniforms). I encountered daily resistance to my efforts to hold agents engaged in misconduct accountable. I was told that those who had 'never worn green' could not understand the challenges of being a BP agent.⁵⁴¹

In light of the history of anti-immigrant bias and law enforcement brutality, the state's public acknowledgement of past violations will help solidify its commitment to prevent the repetition of the harm and provide a measure of redress to the Hernandez family.

E. The Hernandez family is entitled to measures of rehabilitation for the harm they have suffered.

The Commission has awarded rehabilitation measures to remedy physical, emotional, and mental distress that has occurred as a result of a human rights violation.⁵⁴² These measures fall into two

⁵⁴¹ Wong Affidavit Exh. D ¶¶ 11, 12, 14.

⁵⁴² See *IACHR Guidelines on the Follow-up of Recommendations and Decisions*, *supra* note 446, at 14-16.

broad categories: (1) educational and vocational training for the victim and close family members,⁵⁴³ and (2) individualized medical and psychological treatment⁵⁴⁴ that the state must provide free of charge,⁵⁴⁵ at a convenient location,⁵⁴⁶ and for as long as necessary.⁵⁴⁷

1. Full rehabilitation in this case requires assistance to the education and training Anastasio Hernandez Rojas's children and widow.

The United States must provide the educational and vocational training that the children need. Mr. Hernandez's brutal death at the hands of state agents created instability that derailed the educational and professional goals of his older children and imperiled the ambitions of his younger children. When border agents killed Mr. Hernandez, Yeimi was 20, Daisy was 18, Fabian was 12, and the twins, Daniel and Daniela, were four. When they were young, Mr. Hernandez repeatedly told his children "you can do whatever you want."⁵⁴⁸ Yeimi remembers, "He wanted us to stay in school. We were Chicanas and had lots of opportunity by just being born here."⁵⁴⁹ Mr. Hernandez's death destroyed this idyllic, "anything is possible" vision of the future.

After Mr. Hernandez's death, Yeimi, Mr. Hernandez's daughter, lost her way. She recalls:

I felt like I was watching my whole family suffering, and I could do nothing for us. I avoided everything, didn't want to know nothing. The first thing I did: I went and grabbed something to drink. I didn't know what to feel, I just wanted to feel like dying. I didn't care about nothing, so I didn't even see them when they dropped his casket. I stayed by the tree, distanced myself, and went home by myself. I distanced myself from everybody. I was running the streets and ended up getting on drugs, just until I went to prison.⁵⁵⁰

The road to recovery has been long for Yeimi, but she has persisted, finding inspiration in her son. She wants to get her general contractor's license and pursue the entrepreneurial ambitions that her father never had a chance to achieve.

The year before her father was killed, Daisy focused on her studies; she was 18 years old and wanted to be a corrections officer.⁵⁵¹ After his death, Daisy could no longer bear the idea of working within the same system that had killed her father.⁵⁵² Daisy left her high school and her home.⁵⁵³ When she returned for her high school diploma two years later, she was pregnant, friendless, and had a

⁵⁴³ See e.g., *Rosendo Cantú v. Mexico*, Case 12.579, Application, Inter-Am. Ct. H.R., ¶¶ 202-05 (Aug. 2, 2009); *Barrios Family v. Venezuela*, Case 12.488, Application, Inter-Am. Ct. H.R., ¶ 383 (July 26, 2010); *IACHR Report on Police Violence in the United States*, *supra* note 292, ¶¶ 299-300. See also *IACHR Guidelines on the Follow-up of Recommendations and Decisions*, *supra* note 446, ¶¶ 18-19.

⁵⁴⁴ See *García Lucero v. Chile*, Case 12.519, Inter-Am. Comm'n H.R., Report No. 23/11, ¶ 108 (2011).

⁵⁴⁵ See e.g., *Espinoza Gonzales v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶¶ 311, 334 (Nov. 20, 2014).

⁵⁴⁶ See e.g., *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 253, 274 (Aug. 31, 2010).

⁵⁴⁷ See e.g., *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 259 (Oct. 24, 2012).

⁵⁴⁸ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁵⁴⁹ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁵⁵⁰ *Id.*

⁵⁵¹ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁵⁵² *Id.*

⁵⁵³ *Id.*

criminal record.⁵⁵⁴ She returned because she had promised her father that she would take care of her mother and because her newborn son provided new motivation.⁵⁵⁵ Daisy aspires to finish her college education and explore fields where she can help people.⁵⁵⁶ She goes to community college part-time and hopes to be able to transfer to a university to pursue a psychology degree. But she also works full time and cares for her two young sons (ages 9 and 8 months), which makes it difficult to pursue her education.⁵⁵⁷ Daisy wants to work with people harmed by the same system that killed her father.⁵⁵⁸

Daniel and Daniela, age 16, dream of becoming professionals: Daniela would like to become a lawyer and Daniel would like to study medicine. They are currently in high school and are still traumatized by the loss of their father and the lack of justice in his case. They stay close to their mother and look forward to a day when they can turn the page on the tragedy that befell their family when they were just 4 years old.⁵⁵⁹

Maria Puga, the widow of Anastasio Hernandez Rojas, also has educational dreams that have been waylaid by the loss of her husband. She has long dreamed of pursuing training to work in the medical field as a nurse, assistant, or technician. As the sole provider for her family and sole parent who has held her family together financially, physically, and emotionally, pursuit of her dreams has been near to impossible. She states, “since I was a young woman, I have dreamed of career helping people, but that seems impossible now because my family depends on me.”⁵⁶⁰ If her husband had not been killed, Maria would not carry the same burden she does now and would have been able to pursue her dreams with the support of her life partner.

The United States must cover the costs of the educational pursuits of Mr. Hernandez’s children—such as the cost of tuition, books, and vocational courses—as a measure of reparations.

2. The United States should pay the Hernandez family’s healthcare treatments, including for physical, psychological, and psychiatric care.

Anastasio Hernandez and his family shared a tight-knit bond: he was close with his eight siblings, his parents, his partner, and his five children. Mr. Hernandez was the primary source of economic support for his wife and children. Mr. Hernandez’s death not only deprived his family of his love and affection, but also plunged his immediate family into an economic crisis from which they have never recovered. His surviving family members have suffered extreme hardship in coping with Mr. Hernandez’s death. The brutality of his death devastated his partner and children. The last memory that Mr. Hernandez’s children have of their father is of his severely beaten face and body on life support.

The Hernandez home, which was the center of neighborhood activity and family gatherings,⁵⁶¹ became a place of sorrow and mourning after border agents killed Mr. Hernandez.⁵⁶² Yeimi, then 20 years old, and Daisy, then 18 years old, distanced themselves from their friends; both sought temporarily to numb their pain with drugs.⁵⁶³ Yeimi explains, “Nothing can take the pain away.... I

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* Interview with Daisy Alejandra Hernandez (Jan. 21, 2021).

⁵⁵⁸ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁵⁵⁹ Interview with Maria Puga (Jan. 19, 2021).

⁵⁶⁰ *Id.*

⁵⁶¹ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁵⁶² Interview with Yeimi Judith Hernandez, *supra* note 460.

⁵⁶³ Interview with Daisy Alejandra Hernandez, *supra* note 461.

have an emptiness that I can't fill."⁵⁶⁴ Daisy suffers from anxiety attacks: she cannot breathe, her heart races, and she starts to cry.⁵⁶⁵ Every conversation she has is fraught with the fear that someone will ask her about her father.⁵⁶⁶ She feels his absence every day. She does not talk about him even to her partner or her sons, and she struggles to visit her father's grave on his birthday.⁵⁶⁷

The denial of truth and justice by the United States has further exacerbated the family members' feelings of frustration, helplessness, and anxiety. A decade after Mr. Hernandez's death, his daughter Yeimi and his brother Bernardo, struggle to concentrate at their work because they can't stop thinking about Mr. Hernandez, the way he died and the lack of justice.⁵⁶⁸ Moreover, the family have had to contend with officials' attempts to defame and denigrate Mr. Hernandez's character by arguing that he was a combative, drug user who was responsible for his own death.

Daniela and Daniel have been bullied at school when children discover what happened to their father which has undermined their confidence and self-esteem. Maria has dedicated herself fully to the fight for justice and taking care of her family. Her health has suffered due to the stress and the hard work of supporting her family. She currently suffers from back pains and other health conditions that jeopardize her ability to work and support her family.

The Inter-American Commission and Court have repeatedly affirmed that states must provide medical treatment to victims and their next-of-kin for the harm suffered as a result of the human rights violation.⁵⁶⁹ In *Baldéon García v. Peru*, the Court ordered Peru to provide psychological and psychiatric treatment free-of-charge to the victim's next-of-kin.⁵⁷⁰ The victim had suffered arbitrary arrest, torture, and death at the hands of the state, which then failed to properly investigate and prosecute the killing. In ordering the reparation, the Court specified that the next-of-kin continued to experience "psychological suffering ... [that] has lasted through to this day and impaired their respective life projects."⁵⁷¹

The United States must provide the Hernandez family with physical, psychological, and psychiatric support. In the alternative, it must provide the family with the financial support necessary for the individuals to find their desired treatment. Private specialists trained to assist victims of human rights violations should provide the treatment.⁵⁷² These specialists should work together with the Hernandez family to formulate a treatment plan. Moreover, the medical professionals who assist the Hernandez family should speak both Spanish and English in order to make the family feel more comfortable in seeking treatment, despite the threat of deportation.

F. The Hernandez family should receive monetary compensation for the state's violations of their rights.

⁵⁶⁴ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁵⁶⁵ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ Interview with Yeimi Judith Hernandez, *supra* note 460; Interview with Bernardo Hernandez Rojas, *supra* note 454.

⁵⁶⁹ See, e.g., *García Lucero v. Chile*, Case 12.519, Inter-Am. Comm'n H.R., Report No. 23/11, ¶ 117(2) (2011); *Espinoza Gonzales v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶ 310 (Nov. 20, 2014); *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 250, 253 (Aug. 31, 2010); *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶¶ 255, 259 (Oct. 24, 2012).

⁵⁷⁰ See *Baldéon-García v. Perú*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 207 (Apr. 6, 2006).

⁵⁷¹ See *id.* ¶ 206.

⁵⁷² See Interview with Daisy Alejandra Hernandez, *supra* note 461 (visiting a general therapist did not provide Daisy with relief).

No amount of money could ever adequately compensate the Hernandez family for the loss of their husband, father, son, and brother. However, when non-monetary options are also inadequate, the Commission may order the state party to issue a monetary remedy.⁵⁷³ Under Inter-American law, there is a presumption that the next of kin have incurred damages meriting monetary compensation, and the state party responsible for the right-to-life violation has the burden of proof to show otherwise.⁵⁷⁴

Monetary compensation addresses the loss of income, attacks on reputation, the costs and expenses incurred as a result of litigation, and damage to the life plan of the victims.⁵⁷⁵ Compensation can be based on either pecuniary or non-pecuniary damages. Pecuniary damages restore a loss of income or expenses incurred as a result of the violation. Non-pecuniary damages, meanwhile, attempt to quantify the “distress and suffering” experienced by the victims and their family. Here, the Commission should order the United States to issue monetary compensation for lost earnings, material and moral damages that resulted from the violations, and the damage to the life plans of the members of the Hernandez family.

In 2016, the United States offered to pay \$US 1 million to Mr. Hernandez’s children to settle a civil lawsuit brought by Daisy, Fabian, Daniel, and Daniela Hernandez. The family decided to agree to a settlement after Donald J. Trump was elected president. Maria, who was undocumented at the time, feared the implications on-going litigation against the United States government may have for her family. At the time, Maria said “[t]his agreement is not justice. My husband’s life does not have a price. The decision had to be taken and it was difficult.”⁵⁷⁶

Petitioners reject the United States’ assertion that the State has provided “adequate and effective remedies for the actions surrounding [Mr. Hernandez’s] death, in the form of significant monetary compensation, in exchange for the dismissal of the [civil] claims brought by Petitioners in district court.”⁵⁷⁷ First, the civil suit was brought only by four of the five children—Mr. Hernandez’s partner, Maria Puga, oldest daughter, Yeimi, and brothers, Bernardo and Martin, were not parties to the civil action and did not participate in the settlement. For more than a decade, Maria has shouldered the responsibility of supporting her children, especially the younger ones. Monetary compensation offers her the possibility of providing her family the stability that has been impossible to achieve with her wages. She wants to buy a family home and leave behind the uncertainty and instability that comes with trying to pay the rent each month. Second, the federal civil suit failed to compensate for all aspects of the damages suffered by Petitioners. The civil settlement reached by Mr. Hernandez’s four children does not address the violations of international law alleged by the Petition, provide access to justice as defined by Inter-American standards, or recognize the damages resulting from violating the protections established by the American Declaration. For example, the settlement did not address the long-term, life-altering effects of impunity, the decade-long struggle for justice undertaken by Maria and her family, or the expenses they incurred. Third, the United States did not arrive at the settlement figure through explicit, clear, objective or reasonable criteria as required by Inter-American

⁵⁷³ See, e.g., *Noguera v. Paraguay*, Case 12.329, Inter-Am. Comm’n H.R., Report No. 23/18, OEA/Ser.L/V/II.167, doc. 27, ¶ 102(1) (Feb. 24, 2018) (finding violation of right to life and ordering that Paraguay “adopt measures of economic compensation”); *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/VII.142, doc 11, ¶ 201(3) (2011) (holding the United States violated right to life and ordering “full reparations to Jessica Lenahan and her next-of-kin considering their perspective and specific needs”).

⁵⁷⁴ See *Aloeboetoe v. Suriname*, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 54 (Sept. 10, 1993).

⁵⁷⁵ See *IACHR Guidelines on the Follow-up of Recommendations and Decisions*, *supra* note 446, at 15-16, 26.

⁵⁷⁶ Kristina Davis, *San Diego Judge Poised to Approve \$1 Million Settlement in Border Death Case*, SAN DIEGO TRIB. (Mar. 2, 2017), <https://www.sandiegouniontribune.com/news/courts/sd-me-hernandez-settlement-20170302-story.html>.

⁵⁷⁷ U.S. Resp. 4 (Sept. 12, 2017).

standards.⁵⁷⁸ The method used by the United States to calculate the amount is unknown to Petitioners. What is clear is that the amount is insufficient to compensate the Hernandez family for the range of damages suffered as a result of state action and inaction.

The Principles and Guidelines on the Right to a Remedy adopted by the General Assembly of the United Nations established that “compensation should be provided for any economically accessible damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from ... violations....”⁵⁷⁹ The Petitioners respectfully request that the Inter-American Commission instruct the United States to compensate the Petitioners for pecuniary and non-pecuniary damages.

1. The United States should compensate the Hernandez family for lost earnings caused by its violations.

The Commission routinely instructs state parties responsible for violating the right to life to issue monetary compensation for lost earnings attributable to the deceased.⁵⁸⁰ Inter-American law also provides direct compensation to next of kin who have lost income due to the violations of state agents.⁵⁸¹ Calculations for lost earnings may take a “flexible interpretation” of what is appropriate.⁵⁸² At a minimum, the Commission should base this compensation on principles of equity and fairness,⁵⁸³ and the amount must be equal to or greater than “the minimum necessary for subsistence.”⁵⁸⁴ The Commission should recall that the need to compensate for lost earnings is especially present when family members maintained a close personal relationship with the deceased victim.⁵⁸⁵ In such cases, it may presume there was a strong likelihood of continued financial support.⁵⁸⁶

The Commission may order the United States to distribute an award for lost earnings among all eligible next of kin. According to Inter-American case law, the order of succession for distribution begins with the decedent’s children and spouse,⁵⁸⁷ followed by the decedent’s parents, and then siblings.⁵⁸⁸ Where there are no next of kin in a given category, the Commission may distribute that portion to those in the category after them.⁵⁸⁹

⁵⁷⁸ *Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 246 (May 26, 2010).

⁵⁷⁹ G.A. Res. 60/147, *supra* note 412, ¶ 20.

⁵⁸⁰ See *IACHR Guidelines on the Follow-up of Recommendations and Decisions*, *supra* note 446, at 10, 15-16.

⁵⁸¹ *Id.* at 16.

⁵⁸² See *Bámaca Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 91, ¶ 70(f) (Feb. 22, 2002).

⁵⁸³ See, e.g., *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 373 (Nov. 24, 2011 (awarding sum based in part on equity principle); *Neira-Alegría v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 50 (Sept. 19, 1996) (awarding sum in equity). *Cf.* *19 Merchants v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 240 (July 5, 2004) (awarding fixed sum in equity while “taking into account the circumstances of the case, and the minimum legal wage”).

⁵⁸⁴ *19 Merchants*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 240 (citing to the Commission).

⁵⁸⁵ See *Bámaca Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am Ct. H.R., ¶ 52.

⁵⁸⁶ See *id.*; *Paniagua-Morales (White Van) v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 76, ¶ 85 (May 25, 2001).

⁵⁸⁷ See *Bámaca Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am Ct. H.R., ¶ 50 (stating that decedent’s spouse is first in order of succession); *Caracazo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 91 (Aug. 29, 2002) (awarding 50% of reparations for pecuniary damages to children, 25% to spouse, and 25% to parents); *Aloeboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 62 (Sept. 10, 1993) (“It is a norm common to most legal systems that a person’s successors are his or her children.”).

⁵⁸⁸ See *19 Merchants*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 230; *Caracazo*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 91.

⁵⁸⁹ See *Caracazo*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 91.

The Commission should order the United States to compensate the Hernandez family for lost earnings. Mr. Hernandez supported his wife, children, and parents financially. The family had a legitimate expectation of continued financial support. Recompense is especially necessary to assist Maria Puga and her brothers-in-law—the providers for Mr. Hernandez’s children who have now grown up without a father.⁵⁹⁰ Daisy explains that when her father died, “My mom barely had enough to pay the rent. We barely had food.”

In awarding monetary compensation, the Commission should take into account that Mr. Hernandez worked steadily since 1989 in construction.⁵⁹¹ The Commission may therefore base compensation on the average monthly earnings of those working within the construction industry. Mr. Hernandez was a proud worker, and he used his earnings to provide the most comfortable quality of life possible for his loved ones.⁵⁹² At a minimum, adequate compensation will reflect the cost of living in San Diego, California, where Mr. Hernandez worked and his family still resides.⁵⁹³ Because Mr. Hernandez went above and beyond providing the minimum for subsistence, principles of equity and fairness require that the Commission order compensation in excess of that minimum.⁵⁹⁴

The Commission should also consider the earnings that Maria has necessarily lost as a result of the right-to-life violation in this case.⁵⁹⁵ Maria has had to miss work and lose income to be present for both domestic and international litigation.⁵⁹⁶ In accordance with Inter-American case law, the Commission should order that the United States compensate Maria for the earnings she has lost during her search for justice.⁵⁹⁷

The Commission should order that the United States distribute monetary compensation to all of the family members who are parties to this case. Mr. Hernandez maintained loving, affectionate, and supportive relationships with his entire family, and his role as a financial provider entitles them to compensation for his lost earnings.⁵⁹⁸ Maria remembers Mr. Hernandez as a true partner, “he supported me, helped ensure that I was successful, he made me feel important.”⁵⁹⁹ Yeimi describes family time as “going out to eat, to the beach. When there were days off, we always go out to eat like family. We went to Chicano Park a lot, just little places, nothing fancy. Just go to eat and spend family time.”⁶⁰⁰ She also remembers that her father “was always there for us. If we wanted something, we would have to ask dad.”⁶⁰¹ Daisy remembers that her father would take her everywhere, even his job sites where he would teach her about his work.⁶⁰² Martin describes his brother as someone who was always there for him, “I saw him almost every day, we shared almost everything, worked together, spent time with our families at the beach, grilled, had fun together.”⁶⁰³

⁵⁹⁰ See Interview with Maria Puga (March 19, 2019); Interview with Bernardo Hernandez Rojas, *supra* note 454.

⁵⁹¹ See Interview with Maria Puga, *supra* note 590; Interview with Bernardo Hernandez Rojas, *supra* note 454.

⁵⁹² See Interview with Maria Puga, *supra* note 590.

⁵⁹³ See *Landaeta Mejías Brothers v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶ 125 (Aug. 27, 2014).

⁵⁹⁴ See *19 Merchants v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 240 (July 5, 2004).

⁵⁹⁵ See *Bámaca Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 91, ¶ 54(a) (Feb. 22, 2002).

⁵⁹⁶ Interview with Maria Puga, *supra* note 590.

⁵⁹⁷ See *Bámaca Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am Ct. H.R., ¶¶ 2(3), 20(a), 54(a), 55.

⁵⁹⁸ See *id.* at ¶ 52.

⁵⁹⁹ Interview with Maria Puga, *supra* note 590.

⁶⁰⁰ Interview with Yeimi Judith Hernandez (Mar. 19, 2019).

⁶⁰¹ *Id.*

⁶⁰² Interview with Daisy Alejandra Hernandez (Mar. 19, 2019).

⁶⁰³ Interview with Porfirio Martin Hernandez Rojas (Mar. 19, 2019).

As to the portion of lost earnings that would compensate Mr. Hernandez’s parents—who passed away in 2017—the Commission should order that the United States distribute this portion to his siblings because they succeed their parents under the Inter-American rules of succession.⁶⁰⁴ Redistribution to the brothers is also appropriate given that Mr. Hernandez and his brothers regularly sent money, approximately \$150/week, to their parents.⁶⁰⁵

2. The United States has caused the Hernandez family to endure extreme and prolonged pain and suffering and should be ordered to pay compensation for such harms.

The Inter-American Commission also should award non-pecuniary damages for Mr. Hernandez’s extrajudicial killing.⁶⁰⁶ The Inter-American Court has held that compensation for non-pecuniary damages should stem from “the suffering and harm caused to . . . [the] victim’s relatives, the erosion of meaningful value to persons, as well as the alteration” to the next-of-kin’s living conditions.⁶⁰⁷ Factors that the Court has considered in awarding “moral damages” include, but are not limited to, (1) the severity of the violations, (2) the way the victims are treated by the state, (3) the time that has elapsed since the violation, (4) any denial of justice, and (5) proven alterations in a victim’s living conditions.⁶⁰⁸

The Hernandez family was ripped apart by Mr. Hernandez’s death. May 28, 2010, marks a before and after. Before, Mr. Hernandez was the heart of a hard-working, close knit, joyful family. Yeimi remembers her home as being a hub of social activity:

My dad was very outgoing. He had a lot of friends. He had friends everywhere. People always just thought of our house if they needed something. And we had a huge backyard. They could leave tools and cars there, use it as storage. There was a lot of in and out, a lot of traffic. He was just trying to help out. He would never say no to them. He had a lot of people and a lot of friends.”⁶⁰⁹

Daisy describes the joy she experienced as a child, “We’d have parties at the house. All kinds of people would come to the house. We’d make food, go to the beach together, and go to places together as a family. Just anything we do – go to the park, anything – would be fun.”⁶¹⁰

The pain and suffering experienced by Petitioners as a result of Mr. Hernandez’s extrajudicial killing is undeniable and unyielding. The killing itself was a gross human rights violation that stole away a beloved family member—a violation that no amount of compensation could ever redeem.

Mr. Hernandez’s death traumatized his daughters, Yeimi and Daisy. At age 18, Daisy visited her father at the hospital after he was severely beaten by border agents. She was asked by the doctors treating her father if they should disconnect him, and she responded, “Why are you asking me?” ...

⁶⁰⁴ See *Caracazo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 91 (Aug. 29, 2002).

⁶⁰⁵ Interview with Bernardo Hernandez Rojas, *supra* note 454.

⁶⁰⁶ *Salas Galindo v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report No. 121/18, OEA/Ser.L/V/II.169, doc. 138, ¶ 472 (2018) (the Commission recommending that the United States provide full reparations, “including both the material and moral dimensions,” and recommending that the United States “[a]dopt measures that provide both financial compensation and satisfaction”).

⁶⁰⁷ *Fernandez Ortega v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 289 (Aug. 30, 2010) (citing *Villagrán Morales (Street Children) v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 84 (May 26, 2001) (internal citations omitted)).

⁶⁰⁸ *Id.* ¶ 293.

⁶⁰⁹ Interview with Yeimi Judith Hernandez, *supra* note 600.

⁶¹⁰ Interview with Daisy Alejandra Hernandez, *supra* note 602.

started crying and [couldn't] answer anymore."⁶¹¹ After the death of her father, Daisy distanced herself from her former friends, dropped out of school, used drugs as an escape mechanism, and lost interest in daily life activities.⁶¹² During this time, Daisy says, "I didn't care about living. I didn't care about nothing."⁶¹³ Daisy explains:

Every time I'd try to talk to anybody they'd say, 'Oh, I heard about your dad; I'm sorry' I didn't know how to respond so I just distanced myself... His absence has made me feel like something was missing. Everything that has happened has made me feel scared every time I talk to people. They might talk about their parents and it becomes a big whole story that I don't want to tell but I'm not a liar so I tell them a little and say I don't like to talk about it. But I'm always on my toes, [thinking:] 'Are they going to ask me?'"⁶¹⁴

Yeimi, too, distanced herself from family and friends and felt isolated and powerless following her father's death. She describes feeling an "emptiness I can't fill"⁶¹⁵ and has also "lost hope" that justice can be achieved in this case, given the U.S. government's reluctance to bring any criminal prosecutions against the CBP agents involved. Yeimi and Daisy's pain and suffering is also evident in their relationships with other members of their family. Both discuss their continual worry regarding their siblings' ability to cope with Mr. Hernandez's death, as well as their concern for their mother's well-being. Yeimi describes the unbearable weight of the death and impunity:

People feeling sorry for me. I just hate this feeling, feeling vulnerable, especially when nothing is done about it. The worst part is nothing was done about it. I don't want people to know about it, I just avoid it, and don't want to put it on social media. If people think they know something, I will stop talking to you because they don't know anything. In a way, it made me anti-social.

We can go to work, and we can function like normal, but there is this an emotional burden on us, and it does not let us work in peace or generally be happy. I don't feel generally happy. I have to fake it... My brothers and sisters, my smallest ones ... they go to school, there is bullying. I worry about that. I don't want my brothers and sisters being asked about it. They don't know. They're young."⁶¹⁶

Maria feels unrelenting grief—the person she believed she would spend the rest of her life with has been taken away.⁶¹⁷ She has recurring dreams of Mr. Hernandez. She suffers as she watches her children struggle with their own grief.⁶¹⁸ As relatives and friends have distanced themselves, she has battled to hold her family together.⁶¹⁹ She admits that, despite her efforts, her family has been

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ *Id.*

⁶¹⁵ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁶¹⁶ *Id.*

⁶¹⁷ Interview with Maria Puga, *supra* note 468.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

“destroyed” by Mr. Hernandez’s extrajudicial killing. And she is prevented from achieving any sense of peace while those responsible for Mr. Hernandez’s death are allowed to live without punishment.

Two of Mr. Hernandez’s siblings—his brothers Bernardo and Martin—have also experienced devastating effects. Bernardo has difficulty sleeping, and, after seeing video of the killing, is haunted by the screams of his brother as he died.⁶²⁰ He has trouble concentrating in his daily life and has entirely withdrawn from any social life. Despite his efforts to help, he watches helplessly as Mr. Hernandez’s children struggle and suffer because of their father’s death.⁶²¹ Martin has similarly changed from a once-sociable man to a withdrawn person who has nearly lost hope in being happy again.⁶²² Like the other Petitioners, he found no satisfaction in the civil settlement in this case, even reproaching a friend for congratulating him when the amount was publicized. Martin has lost friends, become estranged from family members, been overcome by anxiety, and experienced nightmares as a result of Mr. Hernández’s death, to the point that he “no longer knows where it hurts.”⁶²³ There are no pills for this pain,”⁶²⁴ Martin adds. Martin and Bernardo’s pain has been further aggravated by the impunity. Both emphasize the impotence they feel when faced with the failure of the United States to hold those responsible to account.

- G. The United States damaged the life plans of members of the Hernandez family and must pay compensation for those harms.

The United States must provide monetary compensation to Mr. Hernandez’s family for damage that his death has had on their life plans. A dignified life requires not only physical integrity and financial opportunity but the possibility of achieving personal goals and projects. Separate and apart from the loss of income or the expenses that victims and their families may incur as a result of an act of violence, serious human rights violations damage the life plans of victims and their family members.⁶²⁵ The Inter-American Court on Human Rights has defined “life plan” to encompass an individual’s calling, potential, and ambitions.⁶²⁶ The Court has addressed the loss of life options, such as the inability to pursue an education, professional ambitions, or personal goals, as an injury and ordered States to pay compensation, acknowledge wrongdoing, and establish educational scholarships.⁶²⁷

Mr. Hernandez’s children have experienced significant damage to their life plans. Due to their father’s death at the hands of agents of the state, Yeimi and Daisy were unable to fulfill his hope that they would stay in school⁶²⁸ and pursue any path they wanted.⁶²⁹ When Anastasio died, Yeimi distanced herself by turning away from family and towards drugs.⁶³⁰ She feels that she cannot focus on moving forward because the United States has failed to acknowledge responsibility.⁶³¹ Yeimi says, “I

⁶²⁰ Interview with Bernardo Hernandez Rojas, *supra* note 482.

⁶²¹ *Id.*

⁶²² Interview with Porfirio Martin Hernandez Rojas (Mar. 20, 2019).

⁶²³ *Id.*

⁶²⁴ *Id.*

⁶²⁵ *Loayza-Tamayo v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 147-148 (Nov. 27, 1998); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶¶ 85-93 (Sept. 7, 2004).

⁶²⁶ *Loayza-Tamayo*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶¶ 147-148.

⁶²⁷ See *Cantoral Benavides v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 60 (Dec. 3, 2001); *Gutiérrez-Soler v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 87-88 (Sept. 12, 2005).

⁶²⁸ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁶²⁹ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁶³⁰ Interview with Yeimi Judith Hernandez, *supra* note 460.

⁶³¹ *Id.*

can't give my 100% to everything because I feel like this is unsolved. It's hard to do anything good in life when you didn't even solve this issue. Nothing can be done. I can't do anything right until something is done with my dad's thing."⁶³² She struggles to answer her son's questions about his grandfather, "I feel embarrassed. I'm his mom, and I can't even explain to him about what happened. I feel like it's just not a good example. I don't want [my son] to feel like something like that to happen to him and basically be satisfied with the injustice."⁶³³ Her father's death also damaged Daisy's career path. When she was little, Daisy wanted to be a corrections officer.⁶³⁴ Her father's death at the hands of the United States closed that career path.⁶³⁵ Daniel and Daniela struggle to maintain focus at school and suffer without the caring, loving guidance of their father. The damage inflicted on Mr. Hernandez's children is irreparable and the United States has a duty to provide compensation for damage to their life plans.

V. CONCLUSION & PETITION

The facts alleged in this Petition establish that the United States of America is responsible for the violation of the rights guaranteed under I, II, XVIII, XXV, and XXVI of the American Declaration. Petitioners respectfully request that the Inter-American Commission on Human Rights:

1. Investigate, with hearings and witnesses as necessary, the facts alleged in this case;
2. Based on the facts and arguments submitted in this brief, in addition to the allegations presented by the Petition and other pleadings, declare that the United States has violated Petitioners' rights enshrined in Articles I, II, XVIII, XXV, and XXVI of the American Declaration;
3. Instruct the United States to:
 - a. Conduct an exhaustive, timely, independent, or impartial investigation of Anastasio Hernandez Rojas's death;
 - b. Disclose publicly all official records related to prior investigations, including investigations conducted by the grand jury, the U.S. Border Patrol Critical Incident Investigative Team, the Department of Homeland Security Office of Inspector General, Customs and Border Protection Office of Internal Affairs, and CBP Use of Force Review Board;
 - c. Amend use of force laws and policies and relevant law enforcement trainings to conform to its obligations under the American Declaration to align with the use of force standards of legality, necessity, and proportionality;
 - d. Enact legislation that criminalizes torture committed within the United States;
 - e. Enact legislation that prohibits U.S. Border Patrol from investigating incidents involving death or serious injury, creates a special prosecutorial unit within the Department of Justice to investigate criminal matters involving federal border

⁶³² *Id.*

⁶³³ *Id.*

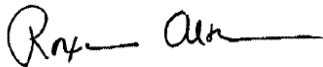
⁶³⁴ Interview with Daisy Alejandra Hernandez, *supra* note 461.

⁶³⁵ *Id.*

- agents, and eliminates Custom and Border Protection's statutory authority to investigate criminal matters;
- f. Reform grand jury proceedings to allow participation by victims and their next-of-kin, require public disclosure of grand jury transcripts in cases involving law enforcement violence, and ensure the impartiality and independence of prosecutors;
 - g. Publicly acknowledge and apologize for its responsibility for violating Anastasio Hernandez and his family's human rights and affirm its commitment to respecting and protecting the rights of undocumented Mexican migrants;
 - h. Provide health and educational assistance to Petitioners;
 - i. Compensate Petitioners for moral damages inflicted by the state's violations; and
 - j. Compensate Petitioners for the damage to their life plans.

Dated: January 28, 2021

Respectfully submitted,



Roxanna Altholz
Co-Director
International Human Rights Law Clinic
Berkeley Law



Andrea Guerrero
Executive Director
Alliance San Diego

VI. EXHIBIT LIST

Exhibit A	Estate of Hernandez-Rojas ex rel. Hernandez v. United States, 62 F. Supp. 3d 1169 (S.D. Cal. 2014)
Exhibit B	Enhanced Videos Taken by Ashley Young
Exhibit C	U.S. Customs and Border Protection Office of Training and Development, Use of Force Policy Handbook (2010)
Exhibit D	Affidavit of James Wong in Support of Petitioners (May 18, 2018)
Exhibit E	Affidavit of James F. Tomsheck in Support of Petitioners (Aug. 13, 2018)
Exhibit F	Affidavit of John Edward Dupuy in Support of Petitioners (Jan. 15, 2021)
Exhibit G	U.S. Customs and Border Protection, Interim Use of Force and Firearms (2004)
Exhibit H	Secretary of the Department of Homeland Security, Memorandum on Department of Homeland Security Policy on Use of Deadly Force (2004)
Exhibit I	U.S. Customs and Border Protection, CBP Directive 4510-029: Policy on the Use of Electronic Control Devices (2009)