

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HERITAGE FOUNDATION.,
214 Massachusetts Ave. N.E.
Washington, D.C. 20002

MIKE HOWELL
214 Massachusetts Ave. N.E.
Washington, D.C. 20002

Plaintiffs,

v.

Case No. 1:22-cv-1770

U.S. DEPARTMENT OF HOMELAND
SECURITY
2707 Martin Luther King Jr Ave. S.E.
Washington, D.C. 20528

Defendant.

COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs THE HERITAGE FOUNDATION and MIKE HOWELL (collectively “Heritage”) for their complaint against Defendant DEPARTMENT OF HOMELAND SECURITY (“DHS”) allege on knowledge as to Plaintiffs, and on information and belief as to all other matters, as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the production of records related to DHS’s response to, and investigation of, an incident on September 19, 2021, in which Customs and Border Patrol (“CBP”) Agents (the “Border Patrol Agents”) were accused of “whipping” or otherwise improperly engaging migrants they encountered who were attempting to cross into the United States in or near the Rio Grande River near Del Rio (the “Incident”). The Incident was, and continues to be, a

subject of widespread media and high-level governmental attention. There is considerable and vigorous debate in the press, amongst Members of Congress, and between Members of Congress and high-ranking Executive Branch officials concerning the Incident.

2. On one side of the debate, the Administration and its allies in government, the media, and advocacy groups have judged the Border Patrol Agents guilty of egregious misconduct; the President himself has promised they “will pay”; and the Administration and its allies have announced that the Incident reflects inherent cruelty in the current immigration laws and vestiges of the Trump Administration’s immigration policies.¹ On the other side, many have argued that the “whipping” narrative is demonstrably false; the Administration’s pronouncement that the Border Patrol Agents were guilty without an investigation is un-American; and the Incident reflects an on-going campaign against the CBP as part of an “open borders” policy. These disputes directly impact on-going substantive arguments for or against pendant Congressional action, pendant regulatory action, and pendant legal claims.

3. DHS announced an investigation of the Incident on September 20, 2021, promising it would be conducted “with tremendous speed and with tremendous force,” “completed in day and not weeks,” and made public.² 274 days later—no such investigation has been released. Former White House Press Secretary Jen Psaki (“Psaki”) has spoken repeatedly of the investigation in the past tense and news outlet have reported it is completed and the Border Patrol Agents are to be administratively punished.

4. Without the release of the information Heritage seeks, the public cannot act as an informed citizenry and exercise their First Amendment rights as to any number of pendant

¹ See *infra* ¶46.

² See *infra* ¶¶ 30, 90..

legislative, pendant regulatory, and pendant legal issues for which the Incident and response thereto is relevant.

5. Perhaps even more fundamentally, without the information Heritage seeks the citizenry cannot judge for *itself* the sustained contest regarding the Incident, and response thereto, amongst its elected representatives. And without that clear line of accountability between the citizens' elected representatives and those representatives' actions, the citizenry is stymied in exercising its most basic function of holding our elected officials accountable. In that state of affairs, our system of government cannot properly function.

6. Plaintiffs have exhausted their administrative remedies and have no recourse but this lawsuit.

PARTIES

7. Plaintiff Heritage Foundation is a Washington, D.C.-based nonpartisan think tank with a national and international reputation whose mission is to “formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” Heritage Foundation, *About Heritage*, <https://www.heritage.org/about-heritage/mission> (last visited June 20, 2022). Heritage is a not-for-profit section 501(c)(3) organization which engages in substantial dissemination of information to the public. Heritage operates a national news outlet, *The Daily Signal*. *The Daily Signal* has repeatedly commented on the Administration's response to, and investigation of, the Incident and intends to continue to do so.³

³ See Erin Dwinell, *After Texas National Guardsman Drowns Saving Illegal Aliens at Border, Biden Administration Shirks Responsibility*, *The Daily Signal* (May 2, 2022); Thomas Homan, *Biden Owes Border Patrol Belated Apology Over Phony Charges of “Whipping”*, *The Daily Signal* (Mar. 24, 2022); Jarrett Stepman, *Biden Administration Maligns Border Patrol*, *The Daily Signal* (Sept. 27, 2021).

8. Plaintiff Mike Howell heads the Heritage Foundation's Oversight Project and is an author for *The Daily Signal*. The Oversight Project is an initiative aimed at obtaining information via Freedom of Information Act requests and other means in order to best inform the public and Congress for the purposes of Congressional oversight. The requests and analysis of information is informed by Heritage's deep policy expertise. For example, former Acting Customs and Border Protection Commissioner Mark Morgan and former Acting Immigration and Customs Enforcement Director Tom Homan are Visiting Fellows with The Heritage Foundation and draw on their experience and expertise to analyze information. They also use their broad public engagement to inform the general public.

9. Defendant DHS is a federal agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) whose mission statement is "[w]ith honor and integrity, we will safeguard the American people, our homeland, and our values." *Department of Homeland Security, About DHS*, <https://www.dhs.gov/mission> (last visited June 20, 2022).

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

11. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant DHS's principal place of business is in the District of Columbia.

FACTUAL BACKGROUND

The Incident: September 19 & 20

12. On September 19, 2021, horse-mounted Border Patrol Agents encountered Haitian migrants attempting to unlawfully enter the United States around the Rio Grande River near Del Rio.

13. Shortly after the encounter, photos taken by freelance photographer Paul Ratje and a video of the incident began to circulate. Media outlets, starting with *The El Paso Times*, began to run stories that the Border Patrol Agents whipped migrants to prevent them from entering the United States.⁴ These photos promptly “went viral.” Jarrett Stepman, *Biden Administration Maligins Border Patrol*, *The Daily Signal* (Sept. 27, 2021). Politicians and television network commentators joined the fray, with Sen Jeff Merkley’s tweet— “Use of whips on refugees? Disturbing and unacceptable. This must end immediately.”—being illustrative of the direction of commentary. @SenJeffMerkley, Twitter (Sept. 20, 2022, 4:46 PM), <https://twitter.com/SenJeffMerkley/status/1440054698531168259>. Psaski weighed in, condemning the Border Patrol Agents’ conduct:

⁴ See, e.g., Martha Pskowski, *Haitian Migrants Face Tough Choices in Del Rio Amid Crackdown at Texas-Mexico Border*, *El Paso Times* (Sept. 19, 2021) (“the agent swung his whip menacingly, charging his horse toward men in the river who were trying to return to the encampment under the international bridge in Del Rio after buying food and water”); *The Readout with Joy Reid*, (MSNBC television broadcast Sept. 20, 2021) (“**Joy Reid:** Should we be looking at the budget of Department of Homeland Security? Because I was not aware that whips which come from the slave era, slavery era, were part of the package that we issue to any sort of law enforcement or government-sanctioned personnel. Were you aware that was being issued to people, that people had that kind of equipment on them that they could use on humans? **Rep. Ilhan Omar:** I was not. And I am quite appalled. When it comes to our immigration policy, for so many years, cruelty has been very much embedded in it. There is obviously systematic racism at play here. We have seen many people come to our border.”); Shawna Chen, *New Photos Show Border Patrol Cracking Down on Haitian Migrants in Del Rio With Whips and Horses*, *Axios* (Sept. 20, 2021); *The Five*, (FOX News television broadcast Sept. 21, 2021) (collecting network video clips).

Photos and videos of the scene, as well as the mass deportations, have led to an intense backlash. The White House press secretary called the images horrific. “Is it the president’s stance or the White House’s stance that whoever these border agents are using what seems to be whips on migrants, that they would be fired, or at least never be able to do that again?” Jen Psaki, White House Press Secretary: “Of course they should never be able to do it again. I don’t know what the circumstances would be. It’s obviously horrific, the footage. I don’t have any more information on it, so let me venture to do that, and we will see if there’s more to convey.”)

News Hour (PBS television broadcast Sept. 20, 2021).

14. House Speaker Nancy Pelosi joined in with a statement: “Reports of the mistreatment of Haitian migrants fleeing violence and devastation from natural disasters are deeply troubling, including the inappropriate use of what appear to be whips by Border Patrol officers on horseback to intimidate migrants.” *House Speak Nancy Pelosi Statement on Reports of Mistreatment of Haitian Migrants at the Border* (Sept. 20, 2021).

15. DHS’s initial response from Secretary of Homeland Security Alejandro Mayorkas (“Secretary Mayorkas”) and Chief Border Patrol Agent Raul Ortiz (“Chief Ortiz”) was measured:

Q: Images have come out of border patrol agents whipping Haitian immigrants. So, my question to you, do you think that’s a humane way to treat migrants?

Sec. Mayorkas: You are assuming facts that have not been determined. To ensure control of the horse long reins are used but we are going to investigate the facts to ensure respond accordingly.

Any mistreatment or abuse of a migrant is unacceptable. We are very troubled by what we have seen.

The Five (FOX News television broadcast Sept. 21, 2021) (playing video clip); *see also*, Juan Lozano, et al., *U.S. Official Defend Expulsion of Haitians from Texas Town*, AP Online (Sept. 21, 2021; 03:25:41) (“Both officials said during an afternoon news conference they saw nothing apparently wrong *based on the widely seen photos and video*.” (emphasis added)); Morgan Phillips & Katelyn Caralle, “*Your Journey Will Not Succeed*”, Daily Mail Online (Sept. 20,

2021) (similar); Samuel Chamberlain, *DHS Chief Pushes Back on Claim Whips Used Against Haitian Migrants*, N.Y. Post (Sept. 20, 2021) (similar).

16. Critics of the Administration echoed this narrative. Texas Governor Greg Abbott opined that the whipping narrative was false for the very reason given by Secretary Mayorkas and Chief Ortiz: “[T]hese reports come from people who probably have never ridden a horse before and don’t understand what reins are and the way that you use reins as you are maneuvering a horse.” *The Ingraham Angle* (FOX News television broadcast Sept. 20, 2021).

17. That evening, “[a]mid heavy criticism”, Secretary Mayorkas announced a full internal inquiry into the Incident. John Wagner, *Harris, Mayorkas Say They Were Horrified By Images of Horse-Mounted Border Patrol Agents Confronting Haitian Migrants*, Wash. Post (Sept. 21, 2021).⁵

September 21, 2021

The Administration

18. Senior Administration Officials continued to condemn the Border Patrol Agents amidst similarly critical viral coverage by many media outlets. Vice President Kamala Harris (“Vice President Harris”) said the images were “horrible,” and Psaki stated “[President Joseph R. Biden] believes that the footage and photos are horrific. They don’t represent who we are as a country. And he was pleased to see the announcement of an investigation.” Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrols Treatment of Haitian Migrants Prompt Outrage*, N.Y. Times (Oct. 19, 2021) (internal quotation marks omitted).

⁵ See, e.g., Miami Herald Editorial Board, *If You Thought Kids in Cages Looked Bad, President Biden, Then Take a Look at This*, Miami Herald (Sept. 20, 2021) (harshly criticizing the Administration).

19. Psaki also briefed that the White House “hope[d] that investigation happens quickly.” *Press Gaggle by Press Secretary Jen Psaki En Route Washington, D.C.*, at 2 (Sept. 21, 2021).

20. Democratic Congressional leaders continued to join the fray. Senate Majority Leader Chuck Schumer tweeted: “The images of inhumane treatment of Haitian migrants by Border Patrol—including the use of whips—are unacceptable.” @SenSchumer, Twitter (Sept. 21, 2021; 12:40 AM), <https://twitter.com/SenSchumer/status/1440173960478429188>. He also took to the Senate Floor to state in pertinent part: “Images of Haitian migrants being hit with whips and other forms of physical violence is completely unacceptable. This behavior must be addressed, and we must provide accountability. The images turn your stomach. It must be stopped, this kind of violence.” 117 Cong. Rec. S6557, S6558 (Daily Ed. Sept. 21, 2021).⁶

21. Some media outlets began to extend their condemnation of the Border Patrol Agents to a general condemnation of the Administration. *See, e.g., Biden Faces Heat for*

⁶ *See also, e.g., Statement of Rep. Robin Kelly on Reports of Mistreatment of Haitian Migrants at the Border* (Sept. 21, 2021) (“I am outraged to see the photos and videos from our Southern border which appear to show border patrol agents using whips on migrants. This violence is unacceptable. Secretary Mayorkas should ensure that all migrants are being treated with humanity and respect and provide an update to Congress on this situation.”); *Statement of Texas Democrats on the Treatment of Migrants in Del Rio* (Sept. 21, 2021) (“We have seen horrifying images of horse-mounted border enforcement agents using horse reins to whip migrants on the shores of the Rio Grande. This response to migrants is unacceptable.”); *Rep. Brenda Lawrence Statement on Mistreatment of Haitian Migrants at U.S. Southern Border* (Sept. 21, 2021)” (“We cannot be silent over the horrific treatment of Haitian migrants in Del Rio. Watching the videos reminded me of our history where Black people, enslaved Africans, were treated like animals. Now, Border Patrol agents are using the rein as a whip, horses to intimidate, and herding Black people like sheep. I’ve been to our southern border, and I’ve never seen anything like this. It’s completely unacceptable. These inhumane actions need to stop immediately. An investigation can come afterward. For crying out loud, they are human beings.”).

Handling of Migrant Crisis, Reuters (Sept. 21, 2022); Justin Baragona, “*The View*” Trashes Biden’s Treatment of Haitian Migrants, *The Daily Beast* (Sept. 21, 2021).

22. Secretary Mayorkas appeared on CNN that morning to declare he was “horrified” by the images: “One cannot weaponize a horse to aggressively attack a child. That is unacceptable. That is not what our policies and our training require. Please understand, let me be quite clear that is not acceptable.” Secretary Mayorkas also declared that he looked forward to the “swift[]” completion of the DHS investigation and that the “public needs and deserves to know” the investigation’s results. John Wagner, *Harris, Mayorkas Say They Were Horrified By Images of Horse-Mounted Border Patrol Agents Confronting Haitian Migrants*, *Wash. Post* (Sept. 21, 2021) (internal quotation marks omitted); *New Day*, (CNN television broadcast Sept. 21, 2021). The Associated Press reported this position as a “shift” from Secretary Mayorkas’s position on September 20. Alexandra Jaffe & Ben Fox, *In Shift, DHS Head Says Images from Border “Horrified” Him*, *AP* (Sept. 21, 2021; 19:08:46).

23. Later in the day, Secretary Mayorkas testified before Congress in pertinent part that:

We commenced an investigation immediately, the Office of Professional Responsibility within the Department of Home Security’s U.S. Customs and Border Protection, number one.

Number two, we alerted the inspector general of the incidents. . . . I was horrified to see the images, and we look forward to learning the facts that are adduced from the investigation.

Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11: Hearing Before the S. Comm. on Homeland Sec., 117th Cong., CQ Transcript, at *114 (Sept. 21, 2021).

24. During a press gaggle, Psaki was asked whether Secretary Mayorkas had changed his position on the incident:

Q: First, with regard to what’s happening at the border with the Haitian border crossers, we initially saw Mayorkas make one statement. And then, last night, that began to evolve. Now he’s meeting with the Vice President. Can you explain the evolution of what’s going on and what the administration hopes to learn?

Ms. Psaki: Sure. Well, when the Secretary made comments earlier in the day yesterday, he had not yet seen the photos. As you all remember, they all started to emerge right before I did the briefing yesterday, kind of later in the morning, and he spoke right around that same time. Once he had an opportunity to see the photos, see the video footage—as you saw him say in a statement last night and again this morning, he was horrified. He believes this does not represent who we are as a country and does not represent the positions of the Biden-Harris administration.

Press Gaggle by Press Secretary Jen Psaki En Route Washington, D.C., at 1 (Sept. 21, 2021).

25. CNN’s analysis epitomized much of the press coverage as of that evening: [A]ll eyes are on the Biden administration as border patrol agents are aggressively threatening migrants, and their bosses, from President Biden and Vice President Harris, to Homeland Security Secretary Alejandro Mayorkas, say that they are horrified to what they see.” *The Lead* (CNN television broadcast Sept. 21, 2021).⁷

Contradictory News Reports

26. In the face of the foregoing, some articles noted in passing the “whipping” narrative was inaccurate: “Contrary to some reports, the agents in the images were not carrying whips but were seen swinging their horses reins. They did not appear to strike anyone.” John

⁷ See also, e.g., *Today Show* (NBC television broadcast Sept. 21, 2021) (condemning Border Patrol Agents for “whipping” migrants); *All Things Considered*, (NPR broadcast Sept. 21, 2021) (similar); Katelyn Caralle & Morgan Phillips, *Biden Claims He Will Get the Border “Under Control”*, Daily Mail Online (Sept. 21, 2021) (similar); *Early Start* (CNN television broadcast Sept. 21, 2021) (similar); Eliza Relman, *Texas Republican Congressman Says the Border Patrol Agents Filmed Whipping at Haitian Migrants are “Doing God’s Work”*, Business Insider (Sept. 21, 2021) (similar).

Wagner, *Harris, Mayorkas Say They Were Horrified By Images of Horse-Mounted Border Patrol Agents Confronting Haitian Migrants*, Wash. Post (Sept. 21, 2021).

27. The Border Patrol Council (the Border Patrol union) and the National Fraternal Order of Police also spoke out, condemning what they saw as a rush to judgement by the Administration and forcefully stated that there was no “whipping” of migrants, just the use of reins to control a horse. Kaelan Desse, *Border Patrol Union Leader Slams White House and Media for Claims of “Whipping” Migrants*, Wash. Exam’r (Sept. 21, 2021). That evening the President of the Border Patrol Counsel echoed Secretary Mayorkas’ and Chief Ortiz’s initial reactions:

The vast majority of border patrol agents are actually Hispanic. So no, they’re not racist. If you look at all of those images, you have to look at all of the different angles. Not one of those Haitian migrants was hit with one of the rains [sic]. We use those rains [sic] to keep the people away from the horses, to those people. Those horses have stepped on people, they’ve kicked people before. They can injure people. You have to keep them away.

Ingraham Angle (FOX News television broadcast Sept. 21, 2021) (statement of Brandon Judd, President of the Border Patrol Council (“Judd”)).

28. Political opponents of the Administration also continued to weigh in. Some reporters on the ground in Texas reported that there was no whipping, merely normal use of split reins via detailed reports on CBP riding equipment and training.⁸

⁸ See, e.g., *Special Report* (FOX News television broadcast Sept. 21, 2021) (“So, the narrative out there right now is that these horseback agents were whipping migrants, and that is just blatantly false. First off, these agents don’t have whips. We have a couple of them behind us right now. Look, we’ll show it to you. What was seen in the photos is they have what are called split reins. They are long, they are used to control the horse. You can see them holding right now. They’ve got a lot of slack to them. So, what—I’ve talked to a lot of these horseback agents, what—when I’ve been on the ground out here, they say they will sometimes spin them like a propeller when they want to surge the horse forward. It’s kind of a signal to the horse that they want it to move forward. If you look at the video or the pictures of this incident down at the river, nobody was whipped. No migrants were whipped. It was just them using the horses as

29. A Democratic Congressman, Representative Henry Cuellar, stated that the images of the Incident seemed to show the use of reins to control a horse, but indicated that if there was an issue it should be investigated and further comment withheld. *Newsroom* (CNN television broadcast Sept. 21, 2021).

September 22, 2021

The Administration

30. Secretary Mayorkas testified before Congress again. He began his testimony by condemning the images of the Incident:

I do want to address the images that emanated from Del Rio, Texas over the last several days and correctly and necessarily were met with our Nation's horror. Because they do not reflect who we are as a country nor do they reflect who the United States Customs and Border Protection is.

Worldwide Threats to the Homeland 20 Years After 9/11: Hearing Before H. Comm. on Homeland Sec., 117th Cong. 7 (Sept. 22, 2021). He then proceeded to assure the Committee “that we are addressing this with tremendous speed and with tremendous force. I have ordered an investigation to be conducted of the events that are captured in those images.” *Id.* Secretary Mayorkas disclosed that he had placed the Border Patrol Agents on administrative duties pending investigation. *Id.* As to the specific timing of the investigation, Secretary Mayorkas testified:

The facts will drive the actions that we take. We ourselves will pull no punches and we need to conduct this investigation thoroughly, but very quickly. It will be completed in days and not weeks. I wanted to assure this committee, and you, Mr. Chairman, and Mr. Ranking Member, of that fact.”

kind of a physical tool to force those people back into the water. But the agents are very frustrated by the narrative out there. But DHS has launched an investigation now. So, we'll see what they come back with.”).

*Id.*⁹ Reports of Secretary Mayorkas’ testimony emphasized his promise for a quick investigation with public results. *See, e.g.,* Kevin Johnson, *DHS to Speed Inquiry on Treatment of Haitian Migrants*, Abilene Rep.-News (Sept. 23, 2021).

31. The Border Patrol Agents continued to be condemned for “whipping” Haitian migrants in increasingly harsh terms by other members of the Administration.

32. Psaki declared the Border Patrol Agents were guilty of misconduct: “We’ve watched the photos of Haitians gathering under a bridge, many with families, and the horrific video of the CBP officers on horse—on horses using brutal and inappropriate measures against innocent people.” *Press Briefing by Press Secretary Jen Psaki*, at 5 (Sept 22, 2021); *see also id.* (“So, as it relates to those photos and that horrific video, we’re not going to stand for that kind of inhumane treatment.”). She also promised DHS’s investigation into the incident “will be completed by next week—which the Secretary confirmed” and that the White House “want[s] this investigation to be completed rapidly.” *Id.*

33. Vice President Harris’ office released a read out of a call with Secretary Mayorkas (whom by that time the Administration had dispatched again to Del Rio):

[T]he Vice President raised her grave concerns about the mistreatment of Haitian migrants by border patrol agents on horses, and the need of all CBP agents to treat people with dignity, humanely and consistent with our laws and our values. Secretary Mayorkas shared the Vice President’s concern and noted that he looks forward to updating her on the investigation by the Office of Professional Responsibility once it concludes.

Statement by Senior Advisor and Chief Spokesperson Symone Sanders of the Vice President’s Call with Homeland Security Secretary Alejandro Mayorkas (Sept. 22, 2022).

⁹ *See also id.* at 39 (“The investigation is going to be all-encompassing. We are not going to cut a single corner or compromise any element of thoroughness. It will be a sweeping investigation.”).

34. On the Hill, Representative Maxine Waters, Chairwomen of the powerful House Financial Services Committee declared that the Border Patrol Agents were guilty not only of “whipping” migrants, but also of trying to take the country back to the days of slavery:

I’m pissed, I’m unhappy, and I’m not just unhappy with the cowboys who were running down Haitians and using their reins to whip them, I’m unhappy with the administration. We are following the Trump policy; he is the one who does not follow the constitution, and would not allow those seeking refuge to be able to petition to get into the country. What the hell are we doing here? What we witnessed takes us back hundreds of years. What we witnessed was worse than what we witnessed in slavery. Cowboys, with their reins again, whipping black people, Haitians, into the water, where they’re scrambling and falling down, when all they’re trying to do is escape from violence in their country. . . . And so yes, we’re here and we’re organized, and we’re saying to the president and everybody else: you gotta stop this madness. And I want to know in the first place who’s paying these cowboys to do this work? They’ve got to be gotten rid of. They’ve got to be stopped. It cannot go on. And so I thank you all of you [journalists] for being here today: write the story. Tell the story about what is going on. And let people know that they’re trying to take us back to slavery days and worse than that. And the children who are unfortunate to be in this situation must be allowed into the United States immediately: not tomorrow, not next week, not next month but immediately.”

(C-SPAN television broadcast Sept. 22, 2021), Congresswoman Anyanna Pressley accused the Border Patrol Agents of “egregious and white supremacist behavior.” Katelyn Caralle, *“It’s Worse than Slavery”*, Daily Mail (Sept. 22, 2021).

35. Much of the media continued to report this “whipping” narrative.¹⁰

A Counter Narrative

36. Conservative network news outlets reacted with fury to what they saw as clearly erroneous reporting. In their view the video and photos were conclusive there was no whipping.

¹⁰ See, e.g., Emily Goodin & Nikki Schwab, *The Washington Post Turns on Biden*, The Daily Mail Online (Sept. 22, 2021); Matthew Loh, *Texas Governor Greg Abbott Applauded Border Enforcement for a Mileslong “Steel Barrier” of Vehicles*, The Business Insider (Sept 22, 2021); Ivana Saric, *Texas Gov. Abbott Sends Fleet of Cars to Form “Steel Wall” Along Southern Border*, Axios (Sept. 22, 2021).

See, e.g., Tucker Carlson Tonight (FOX News television broadcast Sept. 22, 2022); *The Five* (FOX News television broadcast Sept. 22, 2021).

37. That evening the President and Vice President of the Border Patrol Council again pushed backed on the Administration's statements. *See, e.g., Rachel Sharp, Furious Mounted Texas Border Agents Deny They are Whipping Migrants and Accuse Biden Administration of Fueling Outrage to Deflect their Failings*, Daily Mail Online (Sept. 22, 2021).

September 23, 2021

The Administration

38. Psaki continued to pass judgement on the Border Patrol Agents' conduct while promising swift investigative results. *See Press Briefing by Press Secretary Jen Psaki*, at 5 (Sept. 23, 2021) (“[W]e feel those images are horrible and horrific. There was an investigation the President certainly supports, overseen by the Department of Homeland Security, which he has conveyed will happen quickly.”); *id.* at 11 (“I think Congresswoman Waters and others, as are we, have been horrified by the photos of the Border Patrol officers and that behavior.”); *id.* at 16 (“What I noted earlier before is that we have taken very specific actions as it relates to the horrific photos that we’ve—that are not—we’re not going to stand for in this administration”); *id.* at 23 (“Well, the Secretary of Homeland Security made clear he wants that investigation to be completed by next week. And part of that process will be determining what happens on a personnel level”). Psaki also disclosed that DHS had changed its policy and “would no longer be using horses in Del Rio.” *Id.* at 5.

39. Congressional judgment of guilt continued. The Chairman of the Senate Foreign Relations Committee, Senator Robert Menendez, released a statement:

The inhumane treatment of Haitian migrants at the border is abhorrent and in clear contradiction to the values we strive for as a nation. The cruel images of agents rounding

up black migrants on horseback using reins as whips are appalling and serve as a painful reminder of an ugly about very much pervasive legacy in this country of using fear to justify oppression, discrimination, and outright violence against people of color.

Statement of Senator Robert Menendez on Treatment of Haitian Migrants at Southern Border

(Sept. 23, 2021); *see also, e.g., Meet the Press* (MSNBC television broadcast Sept. 23, 2021)

(statement of Rep. Barbara Lee) (“I’m horrified, I know, everyone is horrified, and that just as an

African American woman to see these reins being used as whips, to see these Border Patrol

Officers on horseback doing things to people that is dehumanizing, that shows us that they’re

being treated like animals, and that is just so offensive and disgusting to have taxpayers pay for

this taking place. So let me tell you, we were very clear about what we think should happen, we

were very clear about how horrific this is, and again, the administration understands this, and

they also are very, you know, shattered by what they saw at the border.”); *@This Hour*, (CNN

television broadcast Sept. 23, 2021) (statement of Rep. Joyce Beatty) (“You know, seeing

cowboys on horses with reins whipping people, children, people—black individuals like us. So,

we spoke directly to that, wanting that to be halted immediately, wanted those individuals to be

terminated, wanted to see new legislation.). These opinions were widely covered in the press.

See, e.g., Inside Politics (CNN television broadcast Sept. 23, 2021); *New Day* (CNN television

broadcast Sept. 23, 2021); *Hala Gorani Tonight* (CNN television broadcast Sept. 23, 2021).

40. Many of the same Members who stated the Border Patrol Agents were guilty also insisted on a swift investigation:

We’ve asked for a full report. I also talked to the U.S. secretary of Homeland Security and told him we don’t want a long, drawn-out investigation. I’m expecting by the end of this week or Monday when I return to Washington for a full briefing, for the answers from the report, and in the interim, we think those individuals on the horses should be terminated.

@This Hour (CNN television broadcast Sept. 23, 2021) (statement of Rep. Joyce Beatty).

41. The Attorneys General from 16 states transmitted a letter to President Biden questioning the Administration's approach to the Haitian migrant crises at Del Rio which included the passage: "Like many Americans, we were grateful to learn that your administration will investigate the tactics of U.S. immigration officials on horseback who were recently filmed and photographed charging at—and apparently attempting to whip—Haitian migrants as they sought to bring food to their families massed under a bridge in Del Rio, Texas." *Letter from the Attorneys General of Illinois, the District of Columbia, Nevada, New York, the U.S. Virgin Islands, California, Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington to the Hon. Joseph R. Biden, President of the United States*, at 1 (Sept. 23, 2021).

42. Finally, press outlets continued to report the "whipping narrative." *See, e.g.,* Erin Doherty, *Special Envoy for Haiti Says He's Resigning over Deportation of Migrants and Asylum-Seekers*, Axios (Sept. 23, 2021); Erin Doherty, *DHS Temporarily Suspends Use of Horse Patrol in Del Rio*, Axios (Sept. 23, 2021).

Paul Ratje Comes Forward

43. While this was occurring, Paul Ratje, the photographer who took the viral photos, spoke to local news station KTSM and said: "Some of the Haitian men started running, trying to go around the horses, and that's kind of when the whole thing happened." "I didn't ever see them whip anybody with the thing" he stated as regards the split reins. "He was swinging it. But I didn't actually see him actually take—whip someone with it. That's something that can be misconstrued when you're looking at the picture." Natassia Paloma, *Photographer Behind Controversial Photos Speaks Exclusively to KTSM*, KTSM (Sept. 23,

2021); Carlie Patteson, *Border Patrol Pics Were “Misconstrued” as Whipping Photographer Says*, N.Y. Post (Sept. 24, 2021).

44. Judd continued to push back aggressively against the Administration narrative:

I’ve been patrolling the borders since Clinton was the President and I can tell you personally that the policies that have been in place were by far the best under President Trump, and President Biden completely and totally dismantled all of those policies. And when you look at our border patrol agents, when they are sent down there to do that job, and, by the way, Mayorkas was down on the border and he saw the horses, he knew the horses were out there and now he’s making—doing a 180. But when our agents are out there trying to patrol the border, do their job to the best of their ability, then they’re vilified by the president. You know, we feel like why even go out there and do it, why put on that uniform, why care about the American public? That’s why we do it. We put on that uniform because we care about the American public, we want to go out there and we want to protect them, and Joe Biden is trying to break that down.”)

Hannity (FOX News television broadcast Sept. 24, 2022) (statement of Brandon Judd) (“

45. Congressman Cuellar again pushed back on his party’s narratives noting that whips simply were not used and that it is not appropriate to condemn anyone while an investigation is pending.¹¹

September 24, 2002

The President of the United States: The Border Patrol Agents are Guilty and “Will Pay”

46. That morning the President held a press conference:

Q: You said on the campaign trail that you were going to restore the moral standing of the U.S., that you were going to immediately end Trump’s assault on the dignity of the

¹¹ *Newsroom* (CNN television broadcast Sept. 23, 2022) (“Well, you know, again, as you know, there is an investigation as to some of the actions that some of the border patrol folks have taken. I certainly have to say this, that I know a lot of border patrol agents, I see them in my church, the kids go to school, they’re good folks. But they’ll investigate this. We cannot paint everybody the same brush. They were not using whips, they were certainly not using lassos. The horse brigades have been there for a long time. We don’t know what the context was, were they running, were they told not to run? And we don’t know what the context is until we find out. And I don’t want to condemn anybody without knowing what the facts are or what the investigation is going to lead in. We certainly want to treat everybody with respect, certainly want to treat everybody with respect.”).

immigrant communities. Given what we saw at the border this week, have you failed in that promise? And this is happening under your watch. Do you take responsibility for the chaos that's unfolding?

The President: Of course I take responsibility. I'm President. But it was horrible what—to see, as you saw—to see people treated like they did: horses nearly running them over and people being strapped. It's outrageous. I promise you, those people will pay. They will be—an investigation is underway now, and there will be consequences. There will be consequences. It's an embarrassment. But beyond an embarrassment, it's dangerous; it's wrong. It sends the wrong message around the world. It sends the wrong message at home. It's simply not who we are. Thank you.

Remarks by President Biden on the COVID-19 Response and the Vaccination Program, at 4–5

(Sept. 24, 2021). The President did not explain how he had determined guilt and would impose consequences while DHS's investigation was still pending.

47. Later that afternoon, Vice President Harris was interviewed about the Incident:

Q: Madam Vice President, we've discussing those disturbing images of US border patrol agents on horseback inhumanely corralling Haitians at the Texas border. And you've been tasked with immigration. How do you explain this?

The Vice President: Well, first of all, I've been very clear about the images that you and I both saw of those law enforcement officials on horses. I was outraged by it. It was horrible and deeply troubling. There's been now an investigation that has been conducted, which I fully support, and there needs to be consequences and accountability. Human beings should not be treated that way. And as we all know, it also evoked images of some of the worst moments of our history, where that kind of behavior has been used against the indigenous people of our country, has been used against African-Americans during times of slavery. So I'm glad to know that that Allie Mayorkas, who is the Secretary of the Department of Homeland Security is taking it very seriously.

The View (ABC television broadcast Sept. 24, 2021).

48. Shortly thereafter, Secretary Mayorkas spoke at the daily White House Press Briefing. He made three major points relevant here.

49. *First*, the Secretary unequivocally condemned the images:

[H]orrifying images that do not reflect who we are, who we aspire to be, or the integrity and values of our truly heroic personnel in the Department of Homeland Security. The investigation into what occurred has not yet concluded. We know that those images

painfully conjured up the worst elements of our nation’s ongoing battle against systemic racism.

White House Press Briefing By Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas, at 2, (Sept. 24, 2021); *accord, id.* at 5 (“First of all, the images, as I expressed earlier—the images horrified us in terms of what they suggest and what they conjure up, in terms of not only our nation’s history, but, unfortunately, the fact that that page of history has not been turned entirely.”).¹²

50. *Second*, Secretary Mayorkas stated he would not prejudge the investigation:

But I will not prejudge the facts. I do not, in any way, want to impair the integrity of the investigative process. We have investigators who are looking at it independently. They will draw their conclusions according to their standard operating procedures, and then the results of that investigation will be determined by the facts that are adduced.

Id. at 5.

51. *Third*, Secretary Mayorkas reiterated both his repeated promise of a quick investigation and his commitment to make the results of the investigation public: “The highest levels of the CBP Office of Professional Responsibility are leading the investigation, which will conclude quickly. The results of the investigation I will make public.” *Id.* at 2.

52. The White House Press Corps then asked Secretary Mayorkas several questions pertinent here.

¹² See also, *id.* at 15 (“**Q:** And one follow-up—the whipping—the whips, the horse whips—**Sec. Mayorkas:** Sir, that is something—that is something that horrified us all. And, you know, this morning, I was on radio, and the interviewer said that it was—it troubled, very profoundly, the Black and the African American community. And I said one thing—, and this should be clear: Those are not the only communities that it horrified. Those are not the only communities that it concerned. Of course, that concern might be most acute, given the history in this country and in other parts of the world. But all of America is horrified to see what those images suggest.”).

53. *First:*

Q: Thank you, Mr. Secretary. I know you said you'd be looking into this, but the President was really clear today. He said those Border Patrol agents on horseback seen in those images "will pay." He said, "It's dangerous." He says, "It's wrong." And he said, "There will be consequences." So do you disagree with that?

Sec. Mayorkas: Oh—I know the President was echoing the sentiments of the American public in response to the images and what those images suggest, but I want to speak to the fact that this investigation will be based on the facts that the investigators learn, and the results of the investigation will be driven by those facts and nothing less and nothing more.

Q: But the President said that they would pay, so you guys are not on the same page on that?

Sec. Mayorkas: I think the President was speaking in terms of the horror that he observed from seeing the images and what they suggest.

* * *

Sec. Mayorkas: That investigation will have integrity, I can assure you of that.

Id. at 9–10.

54. *Second:*

Q: Thank you very much. Just to go back, please, to the images of these mounted Border Patrol officers: You said on Saturday—or rather, on the 20th, "To ensure control of the horse, long reins are used." The person who took these photos of the Border Patrol agents says, "I've never seen them whip anyone." So, why is the President out there today talking about people being "strapped"?

Sec. Mayorkas: So let me—let me correct the statements in your question, if I may. It was—

Q: They're direct quotes.

Sec. Mayorkas: No, no—if I may. It was on Friday when I was—actually, it was on Monday, I believe, when I was in Del Rio on the ground and I made the statements without having seen the images. I saw the images on the flight back, and I made the statement that I did with respect to what those images suggested. There—the horses have long reins, and the image in the photograph that we all saw, and that horrified the nation, raised serious questions about what it—let me finish—about what occurred and of—as I stated quite clearly, it conjured up images of what has occurred in the past. Let me—let me finish. There's also a question of how one uses the horse and how one interacts with individuals with the horse. And so I'm going to let the investigation run its course. I'm not going to interfere with that investigation. The facts will be determined by the investigators, and then the results will be driven by the facts that are determined.

Q: And just to follow up, please—before the facts are in, is it helpful to your investigation for the President of the United States to use inflammatory language, like people being “strapped”?

Sec. Mayorkas: Let me just be very clear and repeat what I’ve said: I am not concerned with respect to the integrity of the investigation. We know how to conduct an investigation with integrity. I served as—12 years as a federal prosecutor. There were a great deal of comments in many of the cases that I handled in the public sphere, and I know how to maintain the integrity of an investigation, and this investigation will have integrity.

Id. at 11–12.

55. Later during the press conference, Psaki was pushed to reconcile what press saw as contradictions between the President’s statements that morning and Secretary Mayorkas’ statements earlier in the press conference.

56. *First:*

Q: The DHS Secretary several times said he didn’t want to impair the integrity of the investigation to the Border Patrol agents. He said, “I will not prejudge the facts.” Did the President prejudge the facts when he said, “I promise you those people will pay”?

Ms. Psaki: I think what you heard from the President is a very human and visceral response to those images, which I think reflects how a lot of people in the country felt when they saw them. There is an investigation the Department of Homeland Security is overseeing. That will determine what the personnel decisions may be, any other policy decisions, and that needs to see itself through. But I think the President wanted to make clear to people who watched those photos, who had understandably emotional responses, that that’s not acceptable to him, even while the investigation is being so—is being—is happening and moving forward. That will determine what the consequences will look like.

Id. at 26.

57. *Second:*

Q: Is it your view or the White House’s position that what the President said this morning is not legally operative, with respect to consequences, and these people “paying” was simply his personal view and not representative of actions that the government will take?

Ms. Psaki: The President was not prejudging the outcome of an investigation either; the President was responding from his heart and responding to seeing horrific photos that we have seen over the last several days.

Q: But he is the head of the executive branch; the Constitution vests him with the authority in Article Two. You're saying that what he said will not necessarily be the outcome?

Ms. Psaki: Again, there's an investigation that's ongoing. I don't know that anyone saw those photos and didn't have a similar reaction to the President's, and that was what it was a reflection of.

Id. at 29–30.

58. Critical press coverage of the Border Patrol Agents continued. For example, *The New York Times* extensively covered the President's remarks and reported "images of agents on horseback chasing, and in some cases using the reins of their horses to strike at running migrants." Michael D. Shear, *Biden Says Border Patrol Agents Who Mistreated Haitians Migrants "Will Pay"*, N.Y. Times (Sept. 24, 2022).¹³

¹³ See also, e.g., *All Things Considered* (NPR broadcast Sept. 24, 2022) ("**Leila Fadel:** The images of asylum-seekers being whipped by U.S. Border Patrol officers on horseback have really become a symbol of this crisis and, for many, evoked images of slavery. That and then the forced return of people to Haiti is being called unacceptable, inhumane. For you, what was it like to see those images? **Edwidge Danticat:** Well, those images were harrowing. They were devastating and frightening, just trying to imagine yourself on the other end of that reign or whip or whatever it was, looking up at the horse and already being in the water. And of course, there's that whole correlation with enslavement and the whips and lashes. But for me, as a Haitian, it also had parallels to images that I have seen of the U.S. occupation of Haiti, of what they used to call, you know, the corvee, with the white Marines who were part of the U.S. occupation on horseback. So there were also, in addition to the historical echoes of this country, historical echoes of our country, of the U.S. occupation between 1915 and 1934.").

The Other Side

59. Later that day, Judd, on behalf of the Border Patrol Council, attacked the President's statement both for what Judd viewed as its factual falsity and for its pre-judgement of the Border Patrol Agents:

“Now that the President of the United States has already said they did wrong, how is an investigator supposed to do a true and honest investigation?” he told Fox News. “Because if that investigator finds they did nothing wrong—and they didn't do anything wrong—but if that investigator finds they didn't do anything wrong, how is that investigator's job going to go?”

Judd said Biden's comments were “completely and totally outrageous” and accused Biden of “playing politics with Border Patrol agents' lives.”

Judd again backed the agents at the center of the investigation and noted that they were doing the job they were tasked with doing by the same president who was now throwing them under the bus.

“Nobody was struck by a rein, not one person was struck by a rein, not one person was run over by those horses. They used the tactics they were trained to use, to do the job [Biden] sent them out to do—these are executive branch employees,” he said. “He sent them out there to do the job, and now he's criticizing them because his base wants them to.”

Adam Shaw, et al., *Border Patrol Stunned as Biden Goes to War With His Own Agents Over False “Whipping” Allegations*, FOX News (Sept. 24, 2022) (alteration in original).¹⁴

60. FOX News reported:

President Biden, the Vice President, outraged today about the picture that we saw of the Border Patrol agents on horseback and the migrants from Haiti. The photographer who took the picture that was in question gave as you quote. “Some of the Haitian men started running, trying to go around the horses.” He, again, took the picture. “I have never seen them whip anyone. He was swinging it, but it can be misconstrued when you're looking at the picture.” Meantime, Border Patrol agents talking to our people on the ground there in Del Rio, Texas, said would you go to work and do your best knowing that if you do your boss is going to make you pay? I'm dumbfounded and don't know what to say. They said they were stunned and disappointed by the President's remarks today.

¹⁴ See also, e.g., *The Story* (FOX News television broadcast Sept. 24, 2021) (statement of Former Acting Director of Immigration and Customs Enforcement Tom Homan) (making similar points).

Special Report (FOX News television broadcast Sept 24, 2022) (statement of Bret Baier).

61. Senator Lindsey Graham was more direct with his criticism of the Administration tweeting: “When President Biden says that Border Patrol agents will pay for doing their job, it is an affront to all those in uniform at the border and is the ultimate blame-shifting.” @LindseyGrahamSC, Twitter (Sept. 24, 2021, 1:03 P.M.), <https://twitter.com/LindseyGrahamSC/status/1441448204105666564>.

62. Former Secretary of State Mike Pompeo¹⁵, former Republican Member of Congress Trey Gowdy¹⁶, and former Democratic Member of Congress Harold Ford Jr.¹⁷ all took to FOX News to criticize the Administration for prejudging the case.

¹⁵ *The Story* (FOX News television broadcast Sept 24, 2022) (“So, the President uses inflammatory language like whipping I, you know, there’s still a lot of questions about precisely what was happening. We should determine what happened, but these, these men and women who are doing this work done, they’re in very difficult conditions, they were doing their jobs, we should make sure that every benefit of the doubt given to them not suggest that we’re just going to go punish them willy-nilly because of a still photograph that we’ve seen, and because the progressive part of the Democratic Party is up in arms in asserting racism. There’s nothing to indicate that this was motely like that, and to talk about this in the same context of slavery. Just it’, it’s, it’s the worst of what the Democrat Progressive Party has become.”).

¹⁶ *Special Report* (FOX News television broadcast Sept. 24, 2022) (“Bret, I don’t know what happened, and I’m in that real small category of people that likes to withhold judgment when I don’t know what happened. I can tell you this—[President Biden] . . . is a lot tougher on cops, Afghani aid workers, and the French than he was on crime last summer. And a lot tougher than he has been on the Chinese. So how about give cops the benefit of the doubt and wait until the investigation is over. That just seems like a reasonable thing to do, doesn’t it?”).

¹⁷ *Special Report* (FOX News television broadcast Sept. 24, 2022) (“Look, I think for a lot of Americans we didn’t know there were horses used at the border. So I think a lot of people are learning about this. I think Trey is right. We have to withhold judgment until we know everything. And context, I think, is important here. I think there is frustration on the part of the administration, continued frustration by not being able to—not being able to articulate and execute on an immigration policy that wins broad support. And I think until they find that we will continue to have episodes like this. But let’s get the facts before we mete out too much judgment here. I will say, as an African American, it did hurt me to see those images, but context answers a lot of things as well.”).

63. Of note in the on-going press coverage, *The New York Times* “corrected” its story issued earlier in the day (*see, supra* ¶58) writing, “[a]n earlier version of this article overstated what is known about the behavior of some Border Patrol agents on horseback. While the agents waived their reins while pushing migrants back into the Rio Grande, The Times has not seen conclusive evidence that migrants were struck with the reins.” Katie Roger & Michael D. Shear, *Biden Condemns Border Patrol Treatment of Haitian Migrants as Expulsions Continue*, N.Y. Times (Sept. 24, 2021).

The Balance of September

64. On September 25, 2021, news outlets continued to address the Incident from both negative and positive perspectives. From a different perspective, noted Law Professor and Constitutional commentator Jonathan Turley opined that President Biden had committed a major error:

It was wrong for Biden to say what he did in promising punishment for agents before any investigation is complete. It sends a message to investigators about the expected conclusions of their work. It also suggests that a finding of no whipping or wrongdoing would contradict the President and would not be supported by the White House. That could present serious career issues for investigators. It is unfair to the agents. It is unfair to the investigators and it undermines the integrity of the investigation.

Jonathan Turley, *“Those People Will Pay”: Did Biden Just Prejudice the Border Investigation?*, JonathanTurley.org (Sept. 25, 2021), <https://jonathanturley.org/2021/09/25/those-people-will-pay-did-biden-just-prejudice-the-border-investigation/>. The next day, former Democratic Presidential Candidate and former Congresswomen Tulsi Gabbard condemned President Biden’s remarks. *Watters World* (FOX News television broadcast Sept. 26, 2021) (“You know, he is somebody who has been very outspoken as being against autocrats, autocracies, dictators, but what he essentially did was act as judge, jury, and executioner for these Customs and Border Patrol agents on horseback.”).

65. On September 26, *Axios* deleted a previous tweet and modified a recently published article which accused the Border Patrol Agents of “whipping” migrants. *Axios* explained: “We deleted a previous tweet that referred to Border Patrol agents as whipping at Haitian migrants. The story has been updated to include comments from some journalists on the border who did not see whipping occur.” @axios, Twitter (Sept. 26, 2021, 5:12 PM), <https://twitter.com/axios/status/1442235753744850950>.

66. The same day, the original *El Paso Times* article that helped kick off the viral coverage was amended to read: “Clarification: Our reporting team witnessed at least one agent on horseback swing his reins like a whip. We have updated the story to clarify that fact since it was not an actual whip.” Martha Pskowski, *Haitian Migrants Face Tough Choices in Del Rio Amid Crackdown at Texas-Mexico Border*, *El Paso Times* (Sept. 21, 2021). This “clarification” received considerable press coverage. *See, e.g., Texas Newspaper Updates Viral Border Incident: “It was Not an Actual Whip”*, *Wash. Times* (Sept. 26, 2021).

67. That same day, without commenting on a specific press account, *The Washington Post* wrote “[t]here has been no evidence that agents st[r]uck any of the migrants or used ‘whips’ as some claimed.” Felicia Sonmez & Nick Miroff, *Haitian Migrants are Cleared from the Texas Border*, *Wash. Post* (Sept. 26, 2021). FOX News also summarized what it viewed as issues with some of the reporting on the Incident as follows:

This was the lie that horse riding border patrol agents were whipping the migrants that included mentions why among others *Reuters*, *Politico* and a CNN international correspondent. *The El Paso Times* reported that one agent menacingly swung his reigns [sic] like a whip, charging his horse toward the men in the river, later running a clarification that it was not a whip. These were reigns [sic] used to control the horses. Al Jazeera English reported on the images with this headline. U.S. border patrol uses whips on Haitian migrants. The interpretation later contradicted by its reporter, John Holman, not to mention the photographer who shot the pictures.

Media Buzz (FOX News television broadcast Sept. 26, 2021).

68. The next day, September 27, Psaki was asked to comment on *The El Paso Times*' clarification:

Q: . . . I'm wondering, you know, the El Paso Times has walked back their claim that border agents were using whips to deter Haitian migrants. This is kind of a controversy; some people are weighing what is a whip versus what is a rein. And the El Paso Times put out a clarification saying, "It was not an actual whip." Does that change anything for the administration, in light of the statements that were made last week?

Ms. Psaki: I don't think anyone could look at those photos and think that was appropriate action or behavior or something that should be accepted within our administration. There's an investigation. That's ongoing. We'll let that play out. But our reaction to the photos has not changed.

White House Press Briefing by Press Secretary Jen Psaki, at 26 (Sept. 27, 2021).

69. That same day, FOX News reported that "senior administration officials told Fox News that the investigation should produce little more than a suspension of a few days with pay for the agents—and should be a 'non-issue.'" William La Jeunesse & Adam Shaw, *Border Patrol Agents Who Biden Said Would "Pay" Could Get Minimal Punishment, Officials Say*, FOX News (Sept. 27, 2021). An official said of the Border Patrol Agents, "[t]hey did their job." *Id.* (internal quotation marks omitted)

Remainder of 2021

70. As September turned to October without any news of the DHS investigation being made public, Professor Turley further analyzed President Biden's statements. Jonathan Turley, *Biden's Red Queen Justice: How He Destroyed Both the Investigation and the Reputations of Border Agents*, The Hill (Oct. 2, 2021). He again roundly condemned what he saw as President Biden improperly pre-judging the investigation. Then he opined that the actual statements made about the Border Patrol Agents' conduct by President Biden and others in his Administration may be libelous unless Presidential privilege applied. *Id.*

71. On October 22, Press Secretary Psaki was again questioned on the status of the investigation:

Q: Thanks. The DHS Secretary said—I think it’s just about a month ago now—that the investigation into the horseback Border Patrol agents would be completed in days, not weeks. Has the White House received any update on this investigation? Was there any conclusion on whether the Border Patrol agents were whipping migrants?

Ms. Psaki: It’s really under the Homeland Security Department. I can check with them and see what the status is. I know what he said at the time, and I will see if there’s any particular update on that.

Q: So is the White House in active communication with the DHS on this? Like, do we know why this has been stalled?

Ms. Psaki: Yes, but they’re overseeing the investigation, so we’ll—I would point to them on any update on the status.

White House Briefing by Press Secretary Jen Psaki, at 29 (Oct. 22, 2021).

72. On November 16, 2021, DHS released an update on their investigation. DHS’s Office of Professional Responsibility (“OPR”) “refers all allegations of serious misconduct against law enforcement officers to the DHS Office of Inspector General (OIG).” *DHS Update Regarding the Investigation of Horse Patrol Activity in Del Rio, Texas on September 19, 2021*, at 1 (Nov. 16, 2021). OPR did so in the case of the Border Patrol Agents. *Id.* On November 16, DHS revealed that “[t]he OIG declined to investigate.” *Id.*

73. News outlets speculated that the OIG declination was an “indication that the inspector general did not consider the incident to be serious.” Anna Giaritelli, *DHS Inspector General Declined to Investigate Horse-Mounted Border Patrol “Whipping” Accusation*, Wash. Exam’r (Nov. 16, 2021). An individual “familiar with the matter” told *USA Today* “an inquiry would have been launched if the conduct involved allegations of possible criminal activity.” Kevin Johnson & Rebecca Morin, *DHS Inspector General Declines Review of Horse-Mounted Agents in Haitian Migrant Confrontation*, *USA Today* (Nov. 16, 2021). According to that

source, “[n]o such allegations were included when the case was referred to the inspector general for consideration.” *Id.* FOX News reporter Bill Melugin adverted while reporting on the DHS OIG declination: “Keep in mind back when this happened in September, DHS Secretary Alejandro Mayorkas told the public, this investigation would be completed in days, not weeks. Those were his exact words. That was two months ago, and it’s still not done yet.” *Special Report* (FOX News television broadcast Nov. 16, 2021).

Questions in the New Year

74. As the New Year opened, questions began to be asked about why the investigation into the Border Patrol Agents had not been completed and publicly released. On January 27, 2022, multiple Department of Homeland Security officials told *The Washington Examiner* that the promised report “may never be released” and that the investigation “should have been concluded by now regardless of the outcome.” Anna Giaritelli, *Report on Border Agents “Whipping” Haitian Migrants May Never Appear*, Wash. Exam’r (Jan. 27, 2022) (internal quotation marks omitted). One DHS official stated, “I doubt that the current administration will release this report on the horse patrol incident because it makes the administration look terrible,” and elaborated “[t]hey essentially convicted the mounted agents based upon a lie, which the investigation after 120 days would surely have revealed.” *Id.* (internal quotation marks omitted). That DHS Official went on to state, that his “experience would be that this would have been done within a period of weeks.” *Id.* (internal quotation marks omitted). To that official’s knowledge no Border Patrol Agent had been disciplined from the Incident. *Id.*; see also, *The Five* (FOX News television broadcast Jan. 27, 2022) (statement of Dana Perino) (“Looks like they will never release a report about the migrant [sic] who were

whipped by the horse patrol and border patrol. And again—so, again, a lack of transparency, a lack of a willingness to say we were wrong.”).

75. On January 31, 2022, 7 House Members sent Secretary Mayorkas a letter condemning the Administration for having in their view “smeared” the Border Patrol Agents. *Letter from Hon. Chip Roy et al. to the Hon. Alejandro Mayorkas*, at 1 (Jan 31, 2022). Based on that condemnation and the January 27 *Washington Examiner* report, the letter requested that DHS disclose the “findings of the ‘investigative work’ done by CBP’s OPR on the September 19th 2021 incident in Del Rio, Texas.” *Id.* Plaintiffs are unaware of a substantive response by DHS to this letter. This letter was covered by the press. *See, e.g., The Story* (Fox News television broadcast Feb. 1, 2022).

Press Reports—The Border Patrol Agents Were Cleared of Any Criminal Wrongdoing

76. On March 29, 2022, *The New York Post* reported that “[t]he Border Patrol agents accused of “whipping” Haitian migrants last September have been cleared of criminal wrongdoing—but remain under an administrative investigation that could cost them their jobs six months after the initial probe began.” Callie Paterson & MaryAnn Martinez, *Border Patrol Agents Accused of “Whipping” Migrants in Legal Clear, Could Still Lose Jobs*, N.Y. Post (Mar. 29, 2022). It also quoted Judd as saying “[t]he [Department of Homeland Security’s] Office of the Inspector General, they had first crack at it[.] . . . They determined there was no criminal activity that was done so they closed out their investigation.” *Id.* (first alteration in original).

77. FOX News reported on April 13, 2022, that it had “learned that officials have cleared the horse man of border patrol agents of wrongdoing after they were accused of whipping migrants in September and placing them on probation.” *Special Report* (FOX News television broadcast Apr. 13, 2022). Martha MacCallum reported similar information several

days later. *The Story* (FOX News television broadcast Apr. 19, 2022) (“And on my way out here, I just want to mention that the Border Patrol agents who were accused of whipping migrants coming across the border, that process has finished, they were not charged with any wrongdoing.”).

Senators’ Inquires

78. On April 6, 2022, 7 Senators wrote to Secretary Mayorkas to “request that [he] . . . disclose the investigative findings of the investigation by U.S. Customs and Border Protection’s Office of Professional Responsibility (OPR) regarding horse patrol activity in Del Rio, TX in September.” *Letter from Hon. Bill Hagerty et al. to Hon. Alejandro Mayorkas*, at 1 (Apr. 6, 2022). Their letter recounted reporting questioning the Administration’s position on the Incident, President Biden’s pre-judgment of the investigation, and asked why an investigation that was promised to be swift with results made public had not been released “more than six months” since the Incident. *Id.* at 1–2. The Letter requested disclosure of any investigative findings, including any reports related thereto, by April 13, 2022.

79. Plaintiffs are not aware of a substantive response to this letter by DHS.

Psaki: “There *Was* an Investigation”

80. At the April 5, 2022, White House Press Briefing Psaki was pressed as to why the Broder Patrol Agents were not yet punished. Her response referred to DHS’s investigation in the past tense:

Q: Patrol agents that were seen whipping Haitian migrants were not charged and held accountable for actions. Even the President early on talked about how it was outrageous. How does he—what’s his reaction to that response? And to those who saw this horr—horrific video go viral, and then, at the end of the day, nothing happens; there’s no accountability.

Ms. Psaki: Well, there *was* an investigation by the Department of Homeland Security, so I’d have you—point you to them for any further comment on it.

Press Briefing by Press Secretary Jen Psaki, at 26 (Apr. 5, 2022) (emphasis added).

81. Two weeks later, Press Secretary Psaki again referred to DHS's investigation of the Incident in the past tense:

Q: We've been told that the mounted Border Patrol officers the President accused of whipping migrants have been notified they will not face criminal charges. So, when is the President going to apologize to them?

Ms. Psaki: There is a process and an investigation that's gone to the Department of Homeland Security. I don't have any update on that.

Q: The President said that they were whipping people, which would be a criminal offense. And they've been told they're not going to be criminally charged. So will the President—

Ms. Psaki: And there *was* an investigation into that. And I'll let the Department of Homeland Security announce any conclusion of that investigation.

Q: You accused these officers of brutal and inappropriate measures. Now that they've been told they will not be criminally charged, will you apologize to them?

Ms. Psaki: And, Peter, there *was* an investigation into their behavior, so that investigation is playing out. Whenever there—it's going to be announced, the Department of Homeland Security will announce that. And then I'm sure we'll have a comment on it after that.

Press Briefing by Press Secretary Jen Psaki, at 13–14 (Apr. 18, 2022) (emphases added).

The New York Post: The Investigative Report is Done

82. On April 14 *The New York Post* reported that “The Biden administration has compiled a 500-page report on the investigation into Border Patrol agents accused of ‘whipping’ Haitian migrants last year and could release it any day now.” MaryAnn Martinez, *Border Patrol Agent “Whip” Probe Done, Produced 500-page Report: Union*, N.Y. Post (Apr. 14, 2022). This report was sourced to Judd, who was quoted as saying: “No one knows what’s in the report,” “I don’t know what’s in it. As of yesterday afternoon, the chief of the Border Patrol didn’t know what’s in it.” *Id.* (internal quotation marks omitted).

Reports the Border Patrol Agents Will be Disciplined

83. On June 14, 2022, FOX News reporter Bill Melugin tweeted the following thread:

BREAKING: Per federal source, DHS is preparing to discipline multiple horseback Border Patrol agents who were accused of “whipping” Haitian migrants in Del Rio last summer. I’m told DHS will imminently allege “administrative violations”, agents will be able to respond @FoxNews

Per federal source, this announcement is expected to come down any day now. It’s unclear what “administrative violations” the BP agents will be accused of, but they are not being accused of any criminal conduct. The horseback unit involved is based out of Carrizo Springs, TX.

It has been nearly 9 months since this incident took place. The agents have been taken off their normal duties and have not been allowed to have contact w/ migrants since. President Biden assured the public at the time that “there will be consequences” for the agents involved.

@BillFOXLA, Twitter (June 14, 2022, 7:04 PM),

<https://twitter.com/BillFOXLA/status/1536846948061401094>; *see also*, Anna Giaritelli, *Border Patrol Agents to be Disciplined for Horseback “Whipping” Incident*, Wash. Exam’r (June 14, 2022) (“senior agency official” confirming earlier FOX News report).

84. Judd harshly condemned these reports, stating:

Because of what the president said, these investigators had no choice but to find some sort of wrongdoing. And we know that they did nothing wrong. We know that it was a powder keg. We know that they were sent there to do a specific job, and they did that job. And now they are coming back to be vilified.

Special Report (FOX News television broadcast June 15, 2022).

85. House Republican Leader Kevin McCarthy was even more blunt: “Border patrol agents deserve a president who will support them, not smear them—which is exactly what President Biden did when he promised, without knowing the facts, that agents would ‘pay’ for the false allegations of ‘whipping’ migrants.” Katelyn Caralle & Harriet Alexander, *EXCLUSIVE: “Border Patrol Deserves a President Who Will Support Them Not Smear Them”*,

Daily Online (June 15, 2022) (internal quotation marks omitted). Leader McCarthy continued, “[i]f reports are accurate,” “the Biden administration is now clearly targeting those same border patrol agents to impose the penalty Biden demanded.” *Id.* (internal quotation marks omitted). Leader McCarthy also noted, “[w]e look forward to reviewing this report we were told would be completed nine months ago.” *Id.* (internal quotation marks omitted).

86. On June 16, 2022, 26 Members of Congress sent Secretary Mayorkas a letter on this reporting: “Reports that Border Patrol agents in Del *Rio*, Texas, who were falsely charged by the media, the President, and open-borders advocates will be disciplined are extremely troubling because they did nothing wrong.” *Letter from the Hon. Andy Biggs et al. to the Hon. Alejandro Mayorkas*, at 1 (June 16, 2022). That letter condemned what it viewed both as President Biden’s prejudgment of the issues and Secretary Mayorkas’ failure to complete the promised quick investigation. *Id.* It requested a briefing by June 24, 2022.

HERITAGE’S FOIA REQUESTS

87. On March 23, 2022, pursuant to DHS’s “decentralized” FOIA system in which each component processes requests for its records, Heritage transmitted three identical FOIA Requests via PAL to DHS Headquarters, CBP, and DHS Office of Civil Rights and Civil Liberties (“OCR”). FOIA Request 2022-HQFO-00769 (Mar. 22, 2022) (“the HQ Request” or “Heritage’s HQ FOIA Request”); DHS FOIA Request CBP-2022-056926 (Mar. 22, 2022) (“the CPB Request” or “Heritage’s CPB FOIA Request”); OCR Request 2022-CRFO-00090 (Mar. 22,

2022) (“the OCR Request” or “Heritage’s OCR FOIA Request”) (collectively the “Requests”) (Ex. 1).

88. The Requests sought discrete categories of information related to DHS’s response to, and investigation of, what Heritage termed “the September 19, 2021 incident,” which was defined as:

Allegations made against or about United States Customs and Border Protection (CBP) agents “whipping” or otherwise engaging migrants attempting to cross into the United States in or near the Rio Grande River near Del Rio, Texas during the migrants’ encounter with CBP agents on September 19, 2021. Photographs of this encounter were taken by El Paso freelance journalist Paul Ratje.

The Requests at 1. The temporal scope of the Requests was from September 18, 2021 to March 22, 2022. *Id.* The Requests also sought production of records in patrial responses as soon as they became available. *Id.* at 4.

89. The Requests additionally sought a fee waiver based on Heritage’s status as a not-for-profit and the fact that a purpose of the Requests was to allow Heritage to gather information on a matter of public interest for (among other things) use by authors of its publication, *The Daily Signal*, which is a major news outlet. *Id.* at 3–4; *see also, supra* n. 5.

FOIA Request 2022-HQ-00769

90. DHS received the HQ Request the same day it was transmitted. DHS Acknowledgement of FOIA Request 2022-HQFO-00769, at 1 (Mar. 31, 2022) (Ex. 2). DHS’s Headquarters FOIA Office transferred portions of the HQ Request to CBP and OCR for direct response. *Id.* at 3. It also granted a fee waiver conditional on sampling random responsive documents. *Id.* at 2–3. Finally, because the HQ Request sought “documents that will require a

thorough and wide-ranging search,” DHS invoked a 10-day extension to make a determination on the HQ Request pursuant to 6 C.F.R. § 5.5.(c). *Id.*

91. On June 1, 2022, Heritage wrote to DHS via PAL to convey that Heritage understood the HQ Request could be “voluminous” and therefore Heritage was “requesting monthly partial responses” with the first response requested by “June 1, 2022.” Heritage received no response to this communication.

92. On June 7, 2022, Heritage again wrote via PAL to remind DHS “not to hold records pending completion of review” and that Heritage had requested a rolling production as records became available. Heritage also noted that it was contemplating litigating the HQ Request. *Id.* Heritage received no response to this communication.

93. Taking into account the invocation of a 10-day extension pursuant to 6 C.F.R. § 5.5(c) 30 working days from March 23, 2022 is May 4, 2022.

FOIA Request CPB-2022-056936

DHS’s Denial

94. The FOIA Division of the U.S. Customs and Border Patrol (“FOIA Division”) transmitted what appears to be a “form” response to the CBP Request on March 31, 2022. DHS Denial of DHS FOIA CBP-2022-056926 (Mar. 31, 2022) (“Denial”) (Ex. 3). That response stated in pertinent part:

A search of CBP databases produced records responsive to your Freedom of information Act (FOIA) request CBP-2022-056936.

CBP has determined that the responsive records are denied in full, pursuant to Title 5 U.S.C. § 552 and have applied the appropriate exemptions¹⁸.

¹⁸ The language “exemptions” was hyperlinked to a DHS document entitled *Definitions of Exemptions Under the Freedom of Information Act (5 U.S.C. § 552)* (Ex. 3-1). The document recited a form list of FOIA Exemptions and contained other general FOIA related information.

Pursuant to DHS Instruction 262-11-004, FOIA Officers at DHS have been instructed to withhold personally identifiable information (PII) and sensitive personally identifiable information (SPII) of DHS personnel unless a determination is made that the disclosure does not raise security or privacy concerns, or if those concerns are outweighed by any public interest in that information. This policy is available online.¹⁹ Under this policy, the names of senior leaders, spokespersons, and political appointees are generally releasable. With respect to this FOIA request, DHS may have applied FOIA Exemption 6 to protect PII of DHS employees, including names and contact information. To the extent that has DHS withheld employee PII within these records, it has been determined that the employee(s) has/have substantial and legitimate privacy interests and that these interests are not outweighed by any public interest in the operations of the Department.

Id. at 1.

95. No information accompanied the Denial to explain how the apparent form portions of its language traversed the specifics of the CBP Request.²⁰

Heritage's Administrative Appeal

96. On April 1, 2002, Heritage appealed the Denial both as to the denial in full and the adequacy of search. Heritage Appeal of DHS FOIA CBP-2022-056926, at 1 (Apr. 1, 2022) (“Heritage Appeal”) (Ex. 4).

97. Heritage's Appeal noted that the Denial—on its face—violated numerous provisions of the applicable DHS FOIA regulations. *Id.* at 3.

98. *First*, the Heritage Appeal noted that DHS Regulations require both that a denial “be signed by a head of the component, or designee” and that any denial include “[t]he name and title or position of the person responsible for the denial.” 6 C.F.R. § 5.6(e). Heritage Appeal at 3. But the Denial's form language lacked such signature or information. *Id.*

99. *Second*, the Heritage Appeal noted that DHS Regulations require that “[a] brief statement of the reasons for the denial, including any FOIA exemption applied by the component

¹⁹ The language: “This policy is available online” was hyperlinked to what appears to be *DHS Directives System Instruction Number 262-11-004* (Jan. 15, 2021) (Ex. 3-2).

²⁰ The Denial did not address Heritage's fee waiver request for the CBP Request.

in denying the request.” 6 C.F.R. § 5.6(e)(2). Heritage Appeal at 3. But the Denial’s seeming “form” language simply stated “CBP has determined that the responsive records are denied in full, pursuant to Title 5 U.S.C. §552 and have applied the appropriate exemptions,” and that DHS “*may* have applied FOIA Exemption 6.” Denial at 1 (emphasis added).

100. *Third*, the Heritage Appeal noted that DHS regulations require that a denial provide: “[An] ‘estimate of the volume of any records or information withheld, for example, by providing the number of pages of some other reasonable form of estimation. This estimation is not required if the volume is otherwise indicated by deletions. . . .’” Heritage Appeal at 3 (quoting 6 C.F.R. § 5.6(e)(3)). But the Denial simply stated that “[a] search of CBP databases produced records responsive” to the Request and the Request was “denied in full.” Denial at 1.

101. *Fourth*, the Heritage Appeal questioned the adequacy of the search (or existence of a search at all) in light of the boilerplate response which failed to comply with basic procedural DHS FOIA regulations and the lack of any affirmative description of how the putative search was conducted. Heritage Appeal at 3.

FOIA Appeal Office’s Remand

102. The U.S. Customs and Border Patrol FOIA Appeals Office (“Appeals Office”) responded to the Heritage Appeal by letter on April 12, 2022 “remand[ing] . . . [the] case file to FOIA Division for further processing of your request.” Remand of DHS FOIA Request CBP-2022-056936, at 1 (Apr. 12, 2022) (“Remand”) (Ex. 5).²¹

103. The Remand began by disclosing that a review of the internal DHS case file for the CBP Request (the “File”) allowed the Appeals Office to “determine[] that FOIA Division

²¹ DHS FOIA Regulations do not provide for “remand” on appeal. *See* 6 C.F.R. § 5.8. At no time has Heritage received any information from DHS regarding DHS’s process or procedure for FOIA remands other than as set forth herein.

intended to withhold those records pursuant to both Exemptions 6 and Exemption 7A.” *Id.* The Remand did not explain why DHS violated its own regulations by not conveying this basic information to Heritage in the Denial. Nor did the Remand explain why the intended Exemptions were not clear on the face of the File (as one presumes they would have been) such that the Appeals Office had to “determine[]” the intended Exemptions.

104. The Remand then revealed that:

FOIA Division did not conduct a segregability review. Indeed, although FOIA Division contacted the Office of Professional Responsibility (OPR) to obtain records responsive to your request, it relied on OPR’s assertion that the responsive records are part of “open/pending investigations” to conclude that the records should be withheld in full pursuant to the above referenced exemptions. FOIA Division did not collect the records or review them to ensure that the entirety of each record fit within the bounds of the exemptions or determine that “the agency reasonably foresees that disclosure would harm an interest protected by an exemption,” 5 U.S.C. §552(a)(8)(A)(i).

Remand at 2.

105. No explanation was provided for how the FOIA Division admittedly violated and disregard multiple core precepts of both FOIA and DHS Regulations that the FOIA Division presumably applies every day.²²

106. The Remand did not expressly address Heritage’s appeal of the adequacy of the FOIA Division’s search referring only to a nebulous set of “responsive” records to be “collect[ed]” and “review[ed]” on remand suggesting only that some search was undertaken.

Remand at 2.²³

107. The operative language of the actual remand provides in pertinent part:

²² See 5 U.S.C. § 555(a)(8)(A)(ii) (requiring segregability review); 5 U.S.C. § 552(a)(8)(A)(i) (permitting withholding only where review of records allows a determination that “the agency reasonably foresees that disclosure would harm an interest protected by an exemption”); 6 C.F.R. § 5.6(e) (denials must contain the “name and title or position of the person responsible for the denial”; a “brief statement of reasons for the denial” specifically noting any “FOIA exemption applied”; and “an estimate of the volume of records withheld”).

²³ The Remand did not address Heritage’s fee waiver request.

[W]e are remanding your request to FOIA Division to collect and meaningfully review the records responsive to your request. In doing so, we preserve your administrative appeal rights. . . . Because there were no substantive determinations made related to the records responsive to your request, we have determined that a remand is the most appropriate recourse. FOIA Division is aware of this remand and we note your initial request case file is open.

Remand at 2.

DHS's Failure to Adhere to Statutory Timelines on Remand

108. The Remand reached the FOIA Division no later than April 12, 2022. *See* Remand at 2 (“FOIA Division is aware of this remand”). DHS previously admitted that FOIA Division is the appropriate component to receive the CBP Request.

109. Subsequent to the Remand, on April 12, 2022, Heritage emailed the Chief of the Appeals Office to transmit an article stating that DHS’s investigation into the Incident had concluded and requested that DHS take appropriate action on potential use of FOIA Exemption 7A. Email from R. Jankowski to S. Suzuki (Apr. 14, 2022, 12:58 EST) (Ex. 6). The Appeals Office responded that the investigation was open as of the date of the Denial, but that the current status was unknown. Email from S. Suzuki to R. Jankowski (Apr. 19, 2022; 09:26 EST).

110. 20 working days from April 12, 2022 is May 10, 2022.

111. At no point has DHS made findings of “unusual circumstances” under 5 U.S.C. § 552(a)(6)(B) regarding the Request.

112. Heritage has not received any communication regarding the Request from DHS since the Remand other than those discussed, *supra* ¶109.

FOIA Request 2022-CRFO-00090

113. On June 1, 2022, Heritage wrote to DHS via PAL to convey that Heritage understood the CRO Request could be “voluminous” and therefore Heritage was “requesting monthly partial responses” with the first response requested by “June 1, 2022.”

114. CRO responded on June 15, 2022, stating “[w]e will work on sending you partial responses and do our best to send the first response by June 1, 2022.”

115. CRO informed Heritage on June 5, 2022, that it would make “a production” that week. Email from CRO FOIA to Heritage (June 5, 2022, 1:34 PM EST).

116. On June 9, OCR sent Heritage a document they described as “our response” to Heritage’s OCR Request. Letter Re: 2022-CRFO-00090, at 1 (June 9, 2022) (Ex. 7). OCR produced 57 pages of records in whole or in part. *Id.* at 3. It transferred 502 pages of records to CBP and 14 pages of records to the OIG for processing. *Id.* at 1.

117. On June 9, 2022, Heritage received an email from the FOIA Division at CBP stating that the tracking number of the referral to CBP had changed: “The FOIA referral CBP-2022-090010 has had its Tracking Number changed to CBP-OPA-2022-090010. This is normally due to the referral being transferred to another agency (for example, EPA to Dept. of Commerce) or to a sub-agency to process it.” Email from FOIA Division to Heritage (June 9, 2022, 16:14 EST) (Ex. 8). The referral indicated that OCR sent CBP’s Office of Public Accountability 502 pages of records. *Id.*

FIRST CLAIM FOR RELIEF
FOIA 2022-HQFO-00769
Violation of FOIA, 5 U.S.C. §552
Failure to Conduct Adequate Searches for Responsive Records

118. Heritage re-alleges paragraphs 1–117 as if fully set out herein.

119. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022). Secretary Mayorkas has testified that “[o]ne of the

hallmarks . . . of our department is openness and transparency,”²⁴ and “[w]e pride ourselves on responsiveness.”²⁵

120. Heritage properly requested records within the possession, custody, or control of Defendant.

121. Defendant is subject to FOIA and therefore must make reasonable efforts to search for requested records.

122. Defendant has failed to promptly review agency records for the purpose of locating and collecting those records that are responsive to Heritage’s HQ FOIA Request.

123. Defendant’s failure to conduct searches for responsive records violates FOIA and the DHS regulations.

124. Heritage has a statutory right to the information it seeks.

125. Defendant is in violation of FOIA.

126. Heritage is being irreparably harmed by reason of Defendant’s violation of FOIA. Heritage is being denied information to which it is statutorily entitled and that is important to carrying out Heritage’s functions as a non-partisan research and educational institution and publisher of news. Heritage will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

127. Heritage has no adequate remedy at law.

128. Heritage has constructively exhausted its administrative remedies.

SECOND CLAIM FOR RELIEF
FOIA 2022-HQFO-00769
Violation of FOIA, 5 U.S.C. § 552

²⁴ *Oversight of the Department of Homeland Security: Hearing Before the H. Comm on Jud.*, 117th Cong., CQ Transcript, at *27 (Apr. 28, 2022).

²⁵ *A Review of the Fiscal Year 2022 Budget Request for the Department of Homeland Security: Hearing Before the H. Comm. Homeland Security*, 117th Cong. 47 (June 17, 2021).

Wrongful Withholding of Non-Exempt Responsive Records

129. Heritage re-alleges paragraphs 1–128 as if fully set out herein.

130. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022). Secretary Mayorkas has testified that “[o]ne of the hallmarks . . . of our department is openness and transparency,”²⁶ and “[w]e pride ourselves on responsiveness.”²⁷

131. Heritage properly requested records within the possession, custody, or control of Defendant.

132. Defendant is subject to FOIA, and therefore must release to a FOIA requester any non-exempt records and provide a lawful reason for withholding any records.

133. Defendant is wrongfully withholding non-exempt records requested by Heritage by failing to produce any records responsive to Heritage’s HQ FOIA Request.

134. Defendant is wrongfully withholding non-exempt-agency records requested by Heritage by failing to segregate exempt information in otherwise non-exempt records responsive to Heritage’s HQ FOIA Request.

135. Defendant’s failure to provide all non-exempt responsive records violates FOIA and DHS regulations.

136. Heritage has a statutory right to the information it seeks.

²⁶ *Oversight of the Department of Homeland Security: Hearing Before the H. Comm on Jud.*, 117th Cong., CQ Transcript, at *27 (Apr. 28, 2022).

²⁷ *A Review of the Fiscal Year 2022 Budget Request for the Department of Homeland Security: Hearing Before the H. Comm. Homeland Security*, 117th Cong. 47 (June 17, 2021).

137. Defendant is in violation of FOIA.

138. Heritage is being irreparably harmed by reason of Defendant's violation of FOIA.

Heritage is being denied information to which it is statutorily entitled and that is important to carrying out Heritage's functions as a non-partisan research and educational institution and publisher of news. Heritage will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

139. Heritage has no adequate remedy at law.

140. Plaintiff has constructively exhausted its administrative remedies.

THIRD CLAIM FOR RELIEF

FOIA CBP-2022-056926

Violation of FOIA, 5 U.S.C. §552

Failure to Conduct Adequate Searches for Responsive Records

141. Heritage re-alleges paragraphs 1–140 as if fully set out herein.

142. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022). Secretary Mayorkas has testified that “[o]ne of the hallmarks . . . of our department is openness and transparency,”²⁸ and “[w]e pride ourselves on responsiveness.”²⁹

143. Heritage properly requested records within the possession, custody, or control of Defendant.

²⁸ *Oversight of the Department of Homeland Security: Hearing Before the H. Comm on Jud.*, 117th Cong., CQ Transcript, at *27 (Apr. 28, 2022).

²⁹ *A Review of the Fiscal Year 2022 Budget Request for the Department of Homeland Security: Hearing Before the H. Comm. Homeland Security*, 117th Cong. 47 (June 17, 2021).

144. Defendant is subject to FOIA and therefore must make reasonable efforts to search for requested records.

145. Defendant has failed to promptly review agency records for the purpose of locating and collecting those records that are responsive to Heritage's CBP FOIA Request.

146. Defendant's failure to conduct searches for responsive records violates FOIA and the DHS regulations.

147. Heritage has a statutory right to the information it seeks.

148. Defendant is in violation of FOIA.

149. Heritage is being irreparably harmed by reason of Defendant's violation of FOIA. Heritage is being denied information to which it is statutorily entitled and that is important to carrying out Heritage's functions as a non-partisan research and educational institution and publisher of news. Heritage will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

150. Heritage has no adequate remedy at law.

151. Heritage has constructively exhausted its administrative remedies.

FOURTH CLAIM FOR RELIEF
FOIA CBP-2022-056926
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

152. Heritage re-alleges paragraphs 1–151 as if fully set out herein.

153. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2002). Secretary Mayorkas has testified that “[o]ne of the

hallmarks . . . of our department is openness and transparency,”³⁰ and “[w]e pride ourselves on responsiveness.”³¹

154. Heritage properly requested records within the possession, custody, or control of Defendant.

155. Defendant is subject to FOIA, and therefore must release to a FOIA requester any non-exempt records and provide a lawful reason for withholding any records.

156. Defendant is wrongfully withholding non-exempt records requested by Heritage by failing to produce any records responsive to Heritage’s CBP FOIA Request.

157. Defendant is wrongfully withholding non-exempt-agency records requested by Heritage by failing to segregate exempt information in otherwise non-exempt records responsive to Heritage’s CBP FOIA Request.

158. Defendant’s failure to provide all non-exempt responsive records violates FOIA and DHS regulations.

159. Heritage has a statutory right to the information it seeks.

160. Defendant is in violation of FOIA.

161. Heritage is being irreparably harmed by reason of Defendant’s violation of FOIA. Heritage is being denied information to which it is statutorily entitled and that is important to carrying out Heritage’s functions as a non-partisan research and educational institution and publisher of news. Heritage will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

³⁰ *Oversight of the Department of Homeland Security: Hearing Before the H. Comm on Jud.*, 117th Cong., CQ Transcript, at *27 (Apr. 28, 2022).

³¹ *A Review of the Fiscal Year 2022 Budget Request for the Department of Homeland Security: Hearing Before the H. Comm. Homeland Security*, 117th Cong. 47 (June 17, 2021).

162. Heritage has no adequate remedy at law.

163. Plaintiff has constructively exhausted its administrative remedies.

WHEREFORE as a result of the foregoing, Plaintiff prays that this Court:

- A. Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to Heritage's HQ FOIA Request and Heritage's CBP FOIA Request;
- B. Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Heritage's HQ FOIA Request and Heritage's CBP FOIA Request and indexes justifying the withholding of any responsive records withheld in whole or in part under claim of exemption;
- C. Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to Heritage's HQ FOIA Request and Heritage's CBP FOIA Request;
- D. Retain jurisdiction over this matter as appropriate;
- E. Award Heritage its costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 522(a)(4)(E); and
- F. Grant such other and further relief as this Court may deem just and proper.

Dated: June 21, 2022

Respectfully submitted,

/s/ Samuel Everett Dewey
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