

**PETITION  
to the  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**submitted by  
THE BORDER ACTION NETWORK in relation to  
VICTIMS OF ANTI-IMMIGRANT ACTIVITIES AND VIGILANTE VIOLENCE  
IN SOUTHERN ARIZONA**

**against  
THE UNITED STATES OF AMERICA**

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APPENDICES

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**I. Introduction**

1. The BORDER ACTION NETWORK (“BAN”) hereby submits this petition to the Inter-American Commission on Human Rights (the “Commission”) against the United States of America (the “United States” or the “U.S.”). BAN—a non-governmental organization based in Tucson, Douglas and Nogales, Arizona that defends the rights of immigrants to the United States—seeks redress for human rights violations caused by the United States’ utter lack of protection and legal remedies for immigrant victims of intimidating and violent confrontations with vigilante groups in the southern part of the state of Arizona, close to the U.S. border with Mexico. Further, BAN seeks redress for the government’s failure to act against more widespread harms created by anti-immigrant groups that affect the broader population of southern Arizona and have fostered an attitude of racism, fear and discrimination toward U.S. citizens of Mexican origin or descent (“Mexican Americans”) in the region.

2. Over the past half-century and especially within the last five years, anti-immigrant groups and individuals (aptly referred to throughout this petition as “vigilantes”) have committed repeated incidents of intimidation and violence against immigrants crossing the Arizona desert. These incidents have resulted in grievous harms to hundreds—perhaps thousands—of immigrants, from degrading verbal insults and threats, robbery and false imprisonment to physical assault, battery and serious wounds from firearms. Recently, these occurrences have become commonplace due to regular patrols conducted by vigilante groups looking to apprehend immigrants in southern Arizona.

3. Disregarding the extensive suffering caused by these human rights violations, the United States has failed to take sufficient action against the perpetrators of these crimes. Over the past two years alone, numerous individuals and non-governmental organizations—including the petitioner—have organized widespread campaigns to contact government officials and demand that they take action to prevent anti-immigrant human rights abuses. Nevertheless, despite repeated pleas to the U.S. Attorney, the Cochise County Attorney, the Arizona Attorney General and other public officials;

federal, state and local governments have done little or nothing to prevent or even discourage this hateful and illegal activity, or to hold responsible those who commit crimes against immigrants.

4. This failure of the U.S. federal government and various Arizona state and local entities violates rights to physical integrity and freedom from bodily harm, as well the right to effective judicial protection; and that failure also contributes to a pattern of conduct and neglect that infringes on the rights of immigrants and Mexican Americans to be free from discrimination. The American Declaration of the Rights and Duties of Man and other provisions of international human rights law affirm and protect these rights, and bind the United States to uphold them.<sup>1</sup> BAN seeks the Commission's assistance in reversing the United States' refusal to recognize and protect the human rights of immigrants and Mexican Americans in the border area of southern Arizona, especially considering that domestic petitions for the government to do so have proven futile.

## **II. Jurisdiction**

5. The Commission is competent to receive and act on this petition pursuant to Articles 1.2(b), 18 and 20 of the Commission's Statute.

## **III. The Victims and the Petitioner**

6. There are two distinct classes of victims in this case. First and more specifically, the victims are immigrants—principally from Mexico, but also from other countries of Latin America—who have suffered specific physical abuses at the hands of vigilantes in southern Arizona and whose physical and psychological well-being have been adversely affected by the failure of the United States to prevent and remedy these abuses against them; and other immigrants who are likely to suffer similar harm in the future.

7. Because of the nature of the human rights violations specified in this petition, it is impossible to name all of these victims. However, among the past victims of specific instances of anti-immigrant abuse and human rights violations for which the United States is responsible are the individuals named in paragraphs 32, 34, and 37 below, as well as those named in the law enforcement incident reports appended hereto, in particular appendices W1-W17, which are incorporated herein by this reference, and those persons identified in the summary of vigilante incidents compiled by the Mexican Consulate, appendix X hereto, also incorporated herein by this reference.

8. Second and more generally, the broader Mexican-American population of southern Arizona in close proximity to the border with Mexico has fallen victim to the attitudes of racism, fear and discrimination toward immigrants that have been created by

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<sup>1</sup> See *infra* paras. 69-70.

anti-immigrant groups in the region without redress by the United States. Vigilantism and violence has surfaced not only against immigrants traversing the desert, but also against U.S. citizens and legal permanent residents of Hispanic descent despite their legal status in the country. In one extreme manifestation, an anti-immigrant activist assaulted a Mexican-American family with young children with a loaded automatic weapon.<sup>2</sup> In all its shades, however, the recent surge of anti-immigrant attitudes and behavior in southern Arizona has created an environment where Mexican Americans live with feelings of perpetual fear and insecurity.<sup>3</sup> Among the victims in this class are the persons, including children, named in paragraphs 37 and 38, below.

9. This petition is submitted by the BORDER ACTION NETWORK (“BAN”), a non-governmental organization recognized under the laws of the United States, operating in various Mexican and Latino communities of southern Arizona and northern Sonora, Mexico. BAN’s address is P.O. Box 384, Tucson, AZ, 85702, U.S.A. The organization was founded in 1999 to protect human rights, civil rights and the natural desert environment along the Arizona-Mexico border. Since its inception, BAN has led efforts to eliminate vigilante abuses of immigrants in southern Arizona, including repeated petitions to U.S. federal and Arizona state government officials. BAN has a significant interest in this petition, not only as part of its greater mission to eradicate race- and nationality-based prejudice in southern Arizona, but also because many of its members and supporters are part of the group of Mexican-American victims in this case. The organization’s executive director is Jennifer Allen, who has the authority to act on behalf BAN in respect of this petition.

10. For the purposes of this petition and all related proceedings, BAN is represented by Professor S. James Anaya of the International Human Rights Advocacy Workshop of the University of Arizona Rogers College of Law, located at 1201 E. Speedway Blvd., Tucson, Arizona, 85721. All notices and correspondence should be sent to Professor Anaya at this address. Professor Anaya, a member of BAN, is a licensed attorney and a member of the Bar of the State of New Mexico and of the Bar of the United States Supreme Court. Andrew Stevenson, a law student advocate, participated substantially in drafting this petition.

#### IV. Facts

11. For the entire month of April 2005, a large anti-immigrant movement called “the Minuteman Project” has mobilized in southern Arizona, garnering worldwide

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<sup>2</sup> See Border Action Network, *Border Vigilantes Armed With Assault Weapons Terrorize Local Douglas Families and Children*, Dec. 7, 2004, at <http://www.borderaction.org/news2.php?articleID=13> [hereinafter *Border Vigilantes*] (Attached as Appendix A1).

<sup>3</sup> See Children’s letters to Arizona Attorney General Goddard and Arizona Governor Napolitano (attached as Appendix B) (including 48 letters written by youth from Ray Borane Middle School in Douglas, Arizona, petitioning state officials to act out against anti-immigrant vigilante violence); see also *infra* para. 38 (discussing and quoting the children’s letters as indicative of anti-immigrants activists’ negative impact on Mexican-American communities in the Douglas area).

media attention.<sup>4</sup> Organized by James W. Gilchrist, a retired accountant from California, and endorsed by other anti-immigrant groups and individuals,<sup>5</sup> the Minuteman Project has called for nationwide volunteers to form part of “a blocking force against entry into the United States by illegal aliens.”<sup>6</sup> The project is posting volunteers on ranches and public land adjacent to a thirty-mile stretch of the U.S.-Mexico border near Douglas, Arizona, to spot and report undocumented immigrants crossing into the United States.<sup>7</sup> The Minuteman Project has emphasized that volunteers will at all times abide by state law, but “by legal means . . . will surprise *ILLEGAL* immigrants” and “suggest that [immigrants] sit and wait for [Border Patrol agents] to pick them up.”<sup>8</sup> Nevertheless, the movement does not discourage volunteers from bringing their firearms when they conduct their patrols<sup>9</sup> and employs the same rhetoric as other vigilante groups and individuals that have been previously documented as violating state law.<sup>10</sup> Before Minuteman Project volunteers gathered at the beginning of April, U.S. President George W. Bush himself denounced its participants as “vigilantes.”<sup>11</sup> Simply stated, the Minuteman Project and the larger movement of anti-immigrant vigilantism in southern Arizona that it represents pose a dangerous threat to immigrants crossing the U.S.-Mexico border in remote areas of the desert, a threat of the kind that previously has resulted in repeated detentions, threats, beatings, shootings, and other abuses against immigrants. So far, Minuteman Project patrols have disrupted the law enforcement efforts of the U.S. Border Patrol by triggering sensors near the border,<sup>12</sup> and have spread fear and unease throughout Arizona and Mexico by their sheer numbers—nearly 500 and counting.<sup>13</sup>

12. This latest mobilization represents an escalation of an already volatile problem of anti-immigration vigilantism in southern Arizona that has existed for several years, and U.S. government officials have failed to take any action to prevent it.

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<sup>4</sup> See David Schwartz & Tim Gaynor, *Citizens' Group Set to Patrol U.S.-Mexico Border*, REUTERS, Jan. 18, 2005 (attached as Appendix C); MinuteMan Project Home Page, at <http://www.minutemanproject.com> (last visited Mar. 30, 2005) (attached as Appendix D1).

<sup>5</sup> The MinuteMan Project website states that it “is not a chartered organization with official membership or corporate officers...a militia, or a band of vigilantes, and literally has no organizational structure.” About the MinuteMan Project, at <http://www.minutemanproject.com/AboutMMP.html> (last visited Mar. 30, 2005) (attached as Appendix D2). It is apparent at first glance, however, that this effort to distinguish MinuteMan Project from other anti-immigrant groups in southern Arizona may be misleading, given its explicit endorsement of those groups. See MinuteMan Project Home Page, *supra* note 4.

<sup>6</sup> *Id.*

<sup>7</sup> See Schwartz & Gaynor, *supra* note 4.

<sup>8</sup> MinuteMan Project FAQ, at <http://www.minutemanproject.com/FAQ.html> (last visited Mar. 30, 2005) (attached as Appendix D3).

<sup>9</sup> See *id.*

<sup>10</sup> See generally *infra* Sections IV.B-C (describing the activity of anti-immigrant groups and individuals in southern Arizona); see also *infra* para. 39 (detailing some examples of anti-immigrant actions that have been judged by law enforcement officers to violate Arizona State law).

<sup>11</sup> See James G. Lakely, *Bush Decries Border Project*, WASHINGTON TIMES, Mar. 25, 2005 (attached as Appendix E).

<sup>12</sup> See Arthur R. Rotstein, *Border Watchers Tripping Sensors*, VENTURA COUNTY STAR, Apr. 5, 2005 (attached as Appendix F).

<sup>13</sup> See Brian MacQuarrie, *Citizen Patrol Spreads Fear, Resolve*, BOSTON GLOBE, Apr. 5, 2005 (attached as Appendix G).

Unfortunately, this recent pattern of government inaction has remained consistent over at least the past decade, and has allowed for increases in the victimization of immigrants and Mexican-American citizens.

#### **A. A Brief History of Immigration to Arizona and Reactive Hostility**

13. Arizona has hosted a long history of immigration of persons across its border with Mexico. Over the past several decades, unregulated immigration has increased exponentially in response to widespread availability of employment to undocumented workers. Currently, millions of immigrants are living and working permanently in the United States, forming a fundamental part of the country's economy.<sup>14</sup> In an attempt to stifle immigration of persons across its southern border, the United States has increasingly fortified the more populated border areas with law enforcement personnel and sophisticated surveillance technology.<sup>15</sup> Due to these efforts, the vast and desolate Sonoran Desert—spanning much of southern Arizona and Sonora, Mexico—has become the heaviest trafficking area where persons cross the border to evade official inspection.<sup>16</sup>

14. Some extremist groups have voiced angry opposition to the influx of immigrants into the United States. Incidents of violence against immigrants to southern Arizona have occurred for many years. These acts have routinely included robbery, unlawful detention, assault and impersonation of law enforcement authorities, all crimes under U.S. law.<sup>17</sup> The traditional justification for these acts when undertaken by local ranchers has been the “protection of their land” from immigrants, yet more disturbing tones of racism have always been present.<sup>18</sup> In the past, brutal and illegal actions against immigrants were somewhat infrequent incidents. The few such encounters that did occur, however, reflected high tension between U.S. citizens and immigrants, and were occasionally prosecuted to widely varying results.

15. Perhaps the most historic and paradoxical example of vigilantism occurred in August 1976 when Arizona ranchers Tom, Patrick and George Hanigan stopped a group of three Mexican citizens at gunpoint as they crossed the Hanigan family's land.<sup>19</sup> Although these immigrants were merely passing through the property on their way to seek agricultural work elsewhere in the United States, the Hanigans subjected them to severe torture. The ranchers stripped the immigrants of their clothes and robbed them of

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<sup>14</sup> See D'Vera Cohn, *Illegal Immigrant Total is Raised*, WASHINGTON POST, Oct. 25, 2001 (attached as Appendix H) (citing the latest national census data, which reported between 7 and 8 million undocumented immigrants living in the U.S.).

<sup>15</sup> See Robert F. Castro, *Exorcising Tombstone's Evil Spirits: Eradicating Vigilante Ranch Enterprises Through Public Interest Litigation*, 20 L. & INEQ. 203, 205 (2002).

<sup>16</sup> See *id.*; Jerry Seper, *Frustrated traffickers target agents*, WASHINGTON TIMES, Aug. 5, 2004 (attached as Appendix I) (noting that, according to U.S. Border Patrol figures, “Arizona is the busiest illegal entry point along the 1,940-mile U.S.-Mexico border”).

<sup>17</sup> See *infra* para. 39.

<sup>18</sup> See Border Action Network, *Hate or Heroism: Vigilantes on the Arizona-Mexico Border* (attached as Appendix A2) [hereinafter *Hate or Heroism*], 1-7 (Dec. 2002).

<sup>19</sup> See *United States v. Hanigan*, 681 F.2d 1127, 1128-29 (9th Cir. 1982); Bob Moser, Southern Poverty Law Center, *Open Season*, 109 INTELLIGENCE REPORT 2 (2003) (attached as Appendix J1).

all their possessions, then after further menacing—including burning them and threatening to cut off their testicles with a knife—the immigrants were told to run toward the border.<sup>20</sup> As the naked men ran toward the border, the Hanigans fired shotguns and pistols at their backs, and two of the three suffered substantial pellet wounds.<sup>21</sup> Although the Cochise County Attorney indicted the ranchers on eleven different criminal charges, a local, all-white jury found them not guilty on all counts.<sup>22</sup>

16. Despite this failure of Cochise County authorities to hold the Hanigans accountable, federal prosecutors successfully indicted the ranchers on charges of aiding and abetting a robbery in violation of federal law. In 1980, Tom and Patrick were convicted by a federal jury, and in 1982, the Ninth Circuit Court of Appeals upheld the conviction.<sup>23</sup> In the final hearing of the case, the court ruled that Hanigan’s actions against the immigrants constituted “a direct interference with and a potential threat to interstate commerce” and thus violated the Hobbs Act.<sup>24</sup> For nearly two decades, this decision appeared to effectively deter vigilante activity in the region. Nevertheless, the threat represented by the Hanigans was not ultimately abated and has resurfaced in a pattern of now ongoing violence and intimidation toward immigrants.

## **B. Recent Increases in Anti-Immigrant Activity in Southern Arizona**

17. Over the past several years, there has been an alarming and unprecedented increase in the frequency of violent and criminal acts committed by civilians against immigrants in Southern Arizona. These acts are no longer random or isolated events, as was the case in the past. In fact, numerous anti-immigrant organizations have mobilized at locations near the Arizona-Mexico border and include substantial armed operations. Effectively, southern Cochise County, Arizona, has become a host for numerous quasi-paramilitary forces patrolling near the border with firearms and all-terrain vehicles (“ATVs”), several of whom dress in camouflage fatigues or other clothing bearing law enforcement insignia. Some twenty to thirty armed vigilantes regularly scour both public land and other landowners’ private property in search of immigrants. If they find anyone on their patrols, they ordinarily detain them at gunpoint, often assault them physically, and barrage them with racial insults.<sup>25</sup>

18. Vigilante groups have formed a network of solidarity and cooperation, and have fostered an environment of hatred and animosity toward immigrants and Mexican-American U.S. citizens that has pervaded and disturbed the peace of the border communities of southeast Arizona. Traditionally, these anti-immigrant actors have claimed to be “protecting their property” from trespassers. What was once voiced as a desire to defend personal property, however, is now—at best—a mismatched justification for violent vigilante behavior. Vigilante activities now extend far beyond the land of the

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<sup>20</sup> See *Hanigan*, 681 F.2d at 1129; Moser, *supra* note 19, at 2.

<sup>21</sup> See *Hanigan*, 681 F.2d at 1129; Moser, *supra* note 19, at 2.

<sup>22</sup> Moser, *supra* note 19, at 2.

<sup>23</sup> *Hanigan*, 681 F.2d at 1128.

<sup>24</sup> *Id.* at 1131. The Hobbs Act is codified at 18 U.S.C. § 1951.

<sup>25</sup> See *infra* paras. 28-37 (providing evidence of this pattern of behavior and describing particular incidents in detail).

private property owners who are active in these groups, their patrols canvassing large tracts of public land, and even other individuals' private property. Simultaneously, this flurry of anti-immigrant activity has demonstrated ties to more sinister motives of xenophobia, conspiracy theories of Mexican "invasion" and neo-Nazism.<sup>26</sup>

19. Some of the impetus for this surge of activity over the last six years has arisen at the hands of Arizona locals. On March 10, 1999, a coalition of twenty Arizona ranchers delivered a signed proclamation to Arizona state and federal officials. The proclamation expressed the ranchers' concern over the lack of law enforcement near the border, and put the government on notice that they planned on taking anti-immigrant action. In pertinent part, the document declared "[i]f the government refuses to provide . . . security, then the only recourse is to provide it for ourselves" and further stated that "friction between invader and property owner in this area may increase to the point of blood being shed."<sup>27</sup>

20. Also in 1999, rancher Larry Vance founded the Cochise County Concerned Citizens ("CCCC"), an organization "dedicated to the restoration and preservation of national autonomy and sovereignty."<sup>28</sup> This cryptic mission statement is used to support anti-immigrant political activities, networking southern Arizona with other groups nationwide that call on the U.S. government to increase the military presence near the border and protect against the "foreign invasion" of immigrants.<sup>29</sup> Although CCCC has not been reported to engage in or organize acts of violence against immigrants, they at least provide a political mouthpiece for vigilante groups and do not oppose these groups' actions on the ground. As Vance stated paradoxically to a Douglas newspaper, "[the CCCC] hate[s] violence and vigilantism but we recognize that state and federal laws entitle citizens to use reasonable force when necessary to protect persons and property."<sup>30</sup> Vance himself has constructed a thirty-foot watchtower in his backyard in order to detect any immigrants that cross his twenty-acre property.<sup>31</sup>

21. In addition to the anti-immigrant activities of Vance and fellow members of the CCCC, other local citizens have engaged in similar practices. Roger Barnett, a

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<sup>26</sup> See *Hate or Heroism*, *supra* note 18, at 13; Valerie Richardson, *Chicano group denied funding: Stanford acts after refusal to repudiate racist origin*, WASHINGTON TIMES, May 9, 2004 (attached as Appendix K) (including comments from American Border Patrol's Glenn Spencer, *see infra* paras. 24-25). Numerous links exist between vigilante groups and a larger, more bureaucratic, anti-immigrant network in the U.S. See *Hate or Heroism*, *supra* note 18, at 1-2 & 10-11; *see generally* Southern Poverty Law Center, *The Puppeteer*, 106 INTELLIGENCE REPORT (2002) (attached as Appendix J2).

<sup>27</sup> Castro, *supra* note 15, at 208. The government did not respond to the ranchers' communication and has continually failed to curb illegal and violent activity by these groups and their affiliates. *See generally infra* Part IV.C.

<sup>28</sup> *Hate or Heroism*, *supra* note 18, at 4; Xavier Zaragoza, *Citizens group wants illegal immigration stopped*, DOUGLAS DAILY DISPATCH, Aug. 26, 1999 (attached as Appendix L).

<sup>29</sup> See *Hate or Heroism*, *supra* note 18, at 4; Zaragoza, *supra* note 28.

<sup>30</sup> *Id.* Vance's understanding that vigilante detention of undocumented immigrants as a legal activity is grossly misinformed. *See infra* para. 39 (discussing how vigilante activities violate federal and Arizona State laws).

<sup>31</sup> Richard Woodbury, *Danger and Alarm on a New Alien Gateway: An Arizona desert has become a conduit for hundreds of thousands of illegals*, TIME, Sept. 27, 1999 (attached as Appendix M).

businessman and owner of 22,000 acres of ranch land near Sierra Vista and Douglas, Arizona has long been notorious for his vigilante attitude and activities. In recent years, he has garnered enough press attention to be profiled in several nationwide publications, including Time Magazine and USA Today.<sup>32</sup> In these news profiles, Barnett has been described as one of the “heroes of anti-immigration activists from around the country.”<sup>33</sup> His brazen statements demonstrate his willingness to arm himself and take action against immigrants that—he claims—is necessary to defend “his” property. In his interview with USA Today, Barnett denounced government-run immigration enforcement for not doing their job and stated, “[a]s a citizen, you’re going to have to do it yourself.”<sup>34</sup> For Barnett, his family and their ranch hands, “doing it yourself” means tracking and hunting as many immigrants as possible that cross southern Arizona in the vicinity of their land<sup>35</sup>—binoculars, M-16 rifle and 9mm pistol in hand.<sup>36</sup>

22. Beyond these locally founded groups, perhaps the most alarming increase in anti-immigrant activity has come from new actors who have recently moved to Douglas and Cochise Counties from outside of Arizona. Many of these groups and their organizers have long advocated anti-immigrant agendas in other border states, including California and Texas. Beyond their mere connections to anti-immigrant networks, however, many of these groups also possess strong ties to and receive funding from overtly racist, white supremacist and neo-Nazi groups.<sup>37</sup>

23. One of these groups is “Ranch Rescue.” Headed by Texan Jack Foote, Ranch Rescue transplanted from Texas and began to recruit members to come to Arizona in April 2000. Their major method of recruitment involved the use of flyers, calling volunteers nationwide to “come have fun in the sun” and protect local ranchers’ property from “hordes of criminal aliens.”<sup>38</sup> Reported to have an international membership of over 250, the group now regularly conducts armed patrols near the Arizona-Mexico border.<sup>39</sup> Ranch Rescue calls these operations “volunteer security for . . . landowners, their homes, and their private property” against “[d]rug smugglers, criminal gang members, bandits, thugs, and international terrorists” who “victimize” rural property owners.<sup>40</sup> Notwithstanding the group’s self-characterization as protecting locals from danger, these patrols have resulted in serious harms to innocent, unarmed immigrants traversing the desert in Southern Arizona.<sup>41</sup> Since its founding, Ranch Rescue has

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<sup>32</sup> See *Hate or Heroism*, *supra* note 18, at 3. See also Woodbury, *supra* note 31; Elliot Blair Smith, *Armed rancher acts as one-man border patrol*, USA TODAY, Apr. 28, 2000 (attached as Appendix N).

<sup>33</sup> Tim McGirk, *Border Clash: Private citizens are deputizing themselves as border patrollers to capture illegal aliens pouring across from Mexico in record numbers*, TIME, June 26, 2000 (attached as Appendix O).

<sup>34</sup> See Smith, *supra* note 32.

<sup>35</sup> See *id.*

<sup>36</sup> See Woodbury, *supra* note 31; Smith, *supra* note 32; McGirk, *supra* note 33.

<sup>37</sup> See Castro, *supra* note 15, at 214-15 n.113.

<sup>38</sup> *Id.* at 210; *Hate or Heroism*, *supra* note 18, at 2.

<sup>39</sup> Moser, *supra* note 19.

<sup>40</sup> Ranch Rescue Home Page, at <http://www.ranchrescue.com/index.htm> (last visited Mar. 30, 2005) (attached as Appendix P). See also *supra* para. 14 and accompanying footnotes (discussing the disingenuousness of the “private property” defense justification for anti-immigrant vigilantism).

<sup>41</sup> See generally *Hate or Heroism*, *supra* note 18, at 2-6.

spawned at least one other, smaller self-proclaimed “militia” group with similar mission statements and operations, the “Arizona Guard.”<sup>42</sup>

24. The American Border Patrol (“ABP”), a vigilante group founded by Glenn Spencer, is another out-of-state transplant. The ABP established its base of operations in Sierra Vista, Arizona in 2002. Before moving to Arizona in late 2001, Spencer acted as the leader of the Voices of Citizens Together, an organization based in California that distributed propaganda declaring Mexicans a “cultural cancer” that threatened the birthright of “white colonists” who “earned the right to stewardship of the land.”<sup>43</sup> As head of this group, Spencer worked in concert with other overtly racist and anti-immigrant groups in the United States, including the Council of Conservative Citizens, the California Coalition for Immigration Reform, and the Federation for American Immigration Reform.<sup>44</sup> On May 13, 2000, he visited southern Arizona to co-sponsor a press conference with rancher Roger Barnett, supporting Barnett’s hostile policy of armed detention of immigrants who crossed his land.<sup>45</sup> Also during the years before he moved permanently to Arizona, Spencer traveled all over the United States to speak at anti-immigrant rallies and regularly hosted a syndicated anti-immigrant radio show.<sup>46</sup>

25. Spencer has now organized both military and political anti-immigrant activities in southern Arizona through the ABP, reiterating the extremist mantra that Mexican immigrants are “invading” the Southwest United States in an attempt to “re-conquer” the area for the Mexican government.<sup>47</sup> Further, the ABP has implemented sophisticated technology into its arsenal to detect, expose and prevent immigration of persons into southern Arizona. For example, in May of 2003, Spencer announced the purchase of an unmanned spy plane complete with cameras and a global positioning system, automatically launching itself to record footage when triggered by ground sensors the ABP placed near the border.<sup>48</sup> Major funding for Spencer’s operations has come from U.S. Inc., a non-profit that has spawned and actively supported multiple far-right and anti-immigrant groups.<sup>49</sup> Spencer continues to expand his organization’s role to

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<sup>42</sup> See Arizona Guard Home Page, at <http://www.arizonagaurd.com> (last visited Mar. 30, 2005) (attached as Appendix Q).

<sup>43</sup> Southern Poverty Law Center, *Blood on the Border*, 101 INTELLIGENCE REPORT (2001) (attached as Appendix J3) [hereinafter *Blood on the Border*].

<sup>44</sup> *Id.* The white supremacist and anti-immigrant agendas of these groups are made blatantly evident by their own propaganda and literature, easily accessible on their web pages. See Council of Conservative Citizens FAQ, at <http://www.cofcc.org> (last visited Mar. 30, 2005) (attached as Appendix R); California Coalition for Immigration Reform Home Page, at <http://ccir.net> (last visited Mar. 30, 2005) (attached as Appendix S); Federation for American Immigration Reform Home Page, at <http://www.fairus.org> (last visited Mar. 30, 2005) (attached as Appendix T).

<sup>45</sup> See *Blood on the Border*, *supra* note 43.

<sup>46</sup> See *id.*

<sup>47</sup> See *Hate or Heroism*, *supra* note 18, at 5.

<sup>48</sup> See Kevin Johnson, *Private spy plane patrols border; Critics say U.S. policy on groups encourages vigilantism*, USA TODAY, May 22, 2003 (attached as Appendix U). The ABP also maintains 24-hour live camera images on its website of what it deems “Khyber Pass”—a trail used by some immigrants through the Huachuca Mountains—and infrared camera footage of militia groups detaining immigrants. See American Patrol Update, at <http://www.americanborderpatrol.com> (last visited Mar. 30, 2005) (attached as Appendix V).

<sup>49</sup> See *Blood on the Border*, *supra* note 43.

hunt down immigrants, boasting that citizens—completely apart from U.S. immigration officers—are “within reach of developing an independent capability to monitor the entire southern border.”<sup>50</sup>

26. A third addition to the growing anti-immigrant corps in southern Arizona is the group “Civilian Homeland Defense,” founded by Chris Simcox. Simcox, a former California elementary school teacher, transplanted to Tombstone, Arizona in November 2001 and founded the organization, attempting to form a citizen militia to defend the border against illegal immigration.<sup>51</sup> He regularly promotes the group’s activity through the Tombstone Tumbleweed—a local newspaper he bought upon moving to town—and actively recruits membership to a militia he describes as “free from constraining jurisdiction” and “less controlled by the laws that create the paralysis in our Government agencies that are sworn to protect us.”<sup>52</sup> Unlike other vigilante groups in the area, Simcox’s motivation has little to do with protecting private property and much to do with a fanatic opposition to immigrants, especially Hispanics. It is unclear just where it derives from, but it *is* clear that Simcox harbors deep serial prejudice. In a 2003 interview, he stated, “they are hard-core criminals . . . [t]hey have no problem slitting your throat and taking your money or selling drugs to your kids or raping your daughters and they are evil people.”<sup>53</sup>

27. Over the past six years, the presence of these anti-immigrant groups has loomed large in southern Arizona. Actively recruiting members from all over the United States and continuing to intensify their violent and unlawful activities, out-of-state transplant groups have heightened already existing tensions and have continually caused harm to various southern Arizona populations.<sup>54</sup> The so-called “Minuteman Project” is just the latest in a series of anti-immigrant actions in this ongoing pattern.

### **C. Violent and Illegal Acts Committed by Anti-Immigrant Groups Toward Immigrants and Mexican-Americans in Southern Arizona, and the Resulting Climate of Fear and Intimidation in the Area**

28. As described in the paragraphs that follow and as documented in the appendices to this petition,<sup>55</sup> vigilantes have repeatedly committed intimidating and violent acts that violate both federal and Arizona State law in their detention and harassment of immigrant and Mexican-American victims. Often dressed in military-style fatigues or decorated with quasi-official insignia,<sup>56</sup> anti-immigrant groups and individuals

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<sup>50</sup> Johnson, *supra* note 48.

<sup>51</sup> *See id.*

<sup>52</sup> *Hate or Heroism*, *supra* note 18, at 6 (quoting Chris Simcox, TOMBSTONE TUMBLEWEED, Oct. 31, 2002).

<sup>53</sup> Moser, *supra* note 19 (quoting Chris Simcox).

<sup>54</sup> *See Moser*, *supra* note 19.

<sup>55</sup> *See* Cochise County Sheriff’s Department and U.S. Border Patrol incident reports (attached collectively as Appendices W1-W28) [hereinafter “Law Enforcement Incident Reports”]; Mexican Consulate list of abuses (attached as Appendix X) [hereinafter Mexican Consulate list].

<sup>56</sup> Ranch Rescue volunteers, for example, have been reported to dress in camouflage, and have been described by eyewitnesses as “soldiers.” Moser, *supra* note 19, at 6. Over time, anti-immigrant actors have more openly and aggressively assumed quasi-official roles; most recently, as part of the MinuteMan

regularly patrol the desert in Southern Arizona, either on ATVs or on foot. When they come upon any individuals of apparent Hispanic descent, they detain them at gunpoint, using force or verbal abuse to subdue any who resist. After threatening and intimidating their captives into submission, the vigilantes inquire about their citizenship. If the detained individuals are unresponsive or admit to a lack of U.S. citizenship, the vigilantes contact the U.S. Border Patrol to inform officers of their location. Border Patrol officials then come to apprehend the immigrants and take them into custody. If the detained individuals possess U.S. citizenship, they are accused of trespassing and often threatened with physical harm if they don't immediately leave the tract of land where they are found.

29. The Mexican Consulate in Douglas, Arizona has recorded numerous abuses by vigilantes. Between April 1999 and July 2004, the Consulate documented 65 separate incidents in which a total of 939 immigrants were forcibly detained by or otherwise abused by vigilantes.<sup>57</sup> Of these 65 incidents, 57 involved the unlawful detention of immigrants, 57 involved the use or threatened use of firearms clearly visible to the detainees, eight included the discharge of firearms aimed at immigrants and two involved immigrants wounded by ranchers' dogs.<sup>58</sup> In the documentation of these abuses, Roger Barnett is cited as the most frequent perpetrator of anti-immigrant acts, but the groups Ranch Rescue, Civilian Homeland Defense and the American Border Patrol are all on record for committing similar offenses, as well as sixteen specifically-named private citizens.<sup>59</sup>

30. Despite a general reticence to combat anti-immigrant activity, numerous incidents of unlawful behavior by anti-immigrant actors have also been documented in reports written by the Cochise County Sheriff's Department and the U.S. Border Patrol.<sup>60</sup> These reports give insight to typical vigilante interaction with immigrants in southern Arizona and represent a reckless disregard for both U.S. domestic law and international human rights norms. The following paragraphs summarize a few of these incidents to provide examples of the violent, confrontational nature of anti-immigrant vigilantes in southern Arizona.

31. On January 5, 2003, at approximately 6:00 p.m., private citizen Steven Nelson parked his vehicle across the roadway on Canada Road near Hereford, Arizona to block the passage of traffic.<sup>61</sup> Suspecting that an approaching car carried immigrant passengers, Nelson did not intend to let it pass without inspection. As the car advanced toward the roadblock, Nelson walked to the vehicle with a flashlight and a firearm in

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Project, vigilante volunteers were given patches reading "Undocumented Border Patrol Agent" to wear on their shoulders. Editorial, *Amateurs on the border*, CHI. TRIB., Apr. 5, 2005 (attached as Appendix Y).

<sup>57</sup> See Mexican Consulate list, *supra* note 55.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See generally Law Enforcement Incident Reports, *supra* note 55 (reports by the Cochise County Sheriff's Department and the U.S. Border Patrol identifying discussing numerous unlawful incidents that occurred between Oct. 1999 and Jan. 2005).

<sup>61</sup> Law Enforcement Incident Reports, Jan. 5, 2003 Vigilante Incident (Cochise County Sheriff's Incident Report # 03-00275, prepared by T. Smalley) (attached as Appendix W7) [hereinafter Appendix W7].

hand.<sup>62</sup> He then shined his flashlight at the occupants of the vehicle and instructed them to exit.<sup>63</sup> Although the driver fled on foot, five passengers of the vehicle remained on the scene.<sup>64</sup> Nelson, his firearm still drawn, took the keys to the car, and called the U.S. Border Patrol to detain the suspected immigrants.<sup>65</sup> In documenting this encounter, the Cochise County Sheriff reviewing officer determined that Nelson's behavior violated three separate provisions of Arizona criminal law.<sup>66</sup> Nevertheless, the County prosecutor did not press charges against Nelson.

32. On January 19, 2003, at 10:15 a.m., rancher Roger Barnett and his dogs intercepted an immigrant—[REDACTED]<sup>67</sup>—walking near Arizona Highway 80 east, about fifteen miles west of the New Mexico State line. U.S. Border Patrol reports indicate that Border Patrol agent Gurlea “observed Mr. Barnett with his dog make contact with [REDACTED]” from a distance.<sup>68</sup> When the agent arrived at the scene, [REDACTED] told Gurlea that Barnett had hit him in the head with a flashlight and that Barnett's dog had bit him several times.<sup>69</sup> Miguel Escobar Valdez, the Mexican consul in Douglas, Arizona, confirmed his knowledge of these attacks, adding that Barnett had allegedly attempted to run [REDACTED] over with his vehicle at high speed at first sight.<sup>70</sup> After the encounter, [REDACTED] was treated for injuries on his hands, leg, head and arm at Southeast Arizona Medical Center in Douglas,<sup>71</sup> and was deported shortly thereafter.

33. On February 27, 2004 at approximately 2:45 p.m., two members of Ranch Rescue detained eighteen immigrants and threatened them at gunpoint. Dressed in military fatigues, the gunmen came upon the immigrants—actually two different groups of border-crossers—while on a patrol southeast of Ranch Rescue property only several hundred yards north of the U.S.-Mexico border.<sup>72</sup> The gunmen told the immigrants to stay where they were and one stated, “If you run we'll shoot.”<sup>73</sup> They notified the U.S. Border Patrol of the situation and the immigrants were taken into custody soon thereafter. Several days later, sheriff's Deputy Sean Gijanto prepared a report and sent a copy to the Cochise County Attorney's office, noting that the activities of the Ranch Rescue

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Mr. Quiroz-Acosta's name is included in this petition—unlike the names of other immigrant victims—because he has agreed to disclose his identity. In fact, also distinguishing him from the great majority of victims, Mr. Quiroz-Acosta has filed a civil lawsuit against Barnett in federal court in Arizona. *See infra* Section IV.D.

<sup>68</sup> Law Enforcement Incident Reports, Jan. 19, 2003 Vigilante Incident (Cochise County Sheriff's Incident Report #03-01019, prepared by L. Hernandez) (attached as Appendix W8) [hereinafter Appendix W8].

<sup>69</sup> *Id.*

<sup>70</sup> *See* Letter from Miguel Escobar Valdez, Mexican Consulate to Hon. Chris Roll, Cochise County Attorney (Jan. 31, 2003) (attached as Appendix Z) [hereinafter Escobar-Roll letter].

<sup>71</sup> Appendix W8, *supra* note 68.

<sup>72</sup> Law Enforcement Incident Reports, Feb. 27, 2004 Vigilante Incident (Cochise County Sheriff's Incident Report #04-03470, prepared by C. Trujillo, Mar. 2, 2004) (attached as Appendix W11) [hereinafter Appendix W11].

<sup>73</sup> *Id.*

members violated two sections of Arizona state law.<sup>74</sup> Yet again, the County Attorney's office failed to prosecute or even further investigate the incident.

34. Little over a week later, on March 7, 2004, another incident occurred involving rancher Roger Barnett.<sup>75</sup> A group of about twenty immigrants was walking in the desert when they heard the sound of a motorcycle.<sup>76</sup> They hid under some brush and rested, when Barnett appeared on an ATV with his dogs close behind and noticed them. He approached the group, cursing and his gun in hand, and kicked ██████████, a female immigrant, on her right hip.<sup>77</sup> Stepping down on ██████████'s right calf, Barnett told her, "Get up, bitch."<sup>78</sup> He then attempted to kick her again, but she blocked his foot with a backpack; the blow broke a religious statue in half inside the bag.<sup>79</sup> Barnett yelled aggressively at the group, "you fucking Mexicans sit down"—adding that his dog "likes ass" and "likes to eat trespassers"<sup>80</sup>—and told them not look up and keep their heads down.<sup>81</sup> Some time afterwards, Barnett's wife arrived in a pickup and U.S. Border Patrol agents came to take the immigrants into custody. Once the immigrants were taken into custody, they were interviewed and Border Patrol documented their accounts of the encounter with Barnett.<sup>82</sup> Although official reports on Barnett's actions were sent for review to Cochise County Attorney Chris Roll, Roll told Border Patrol agent Ritchie that he did not intend to place a hold on any of the victims to aid in prosecution.<sup>83</sup> Agent Ritchie made several attempts over the following week to communicate with Barnett at his business in Sierra Vista, but Barnett ignored all visits and messages, and the investigation was discontinued.<sup>84</sup>

35. Yet another documented incident of violent anti-immigrant behavior by the Barnett family took place on June 5, 2004.<sup>85</sup> In the early afternoon that day, a group of immigrants was resting in the brush near Highway 80.<sup>86</sup> They heard the sound of a vehicle nearby, and Roger Barnett and his brother appeared shortly thereafter. The immigrants split up to run away and hide, but the Barnetts pursued and eventually caught up to them.<sup>87</sup> Roger Barnett overtook one group of immigrants on foot, then grabbed an

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<sup>74</sup> *Id.*; see *infra* para. 39 (detailing vigilante violations of Arizona State law).

<sup>75</sup> See generally Law Enforcement Incident Reports, Mar. 7, 2004 Vigilante Incident (Cochise County Sheriff's Incident Report #04-04075, prepared by L. Hernandez, Mar. 13, 2004) (attached as Appendix W12) [hereinafter Appendix W12]; Mexican Consulate list, *supra* note 55, at para. 55.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* As documented in Cochise County Sheriff's Department and U.S. Border Patrol reports and confirmed by the Mexican Consulate's list of vigilante abuses, Barnett's exact statement was "levántate perra." See *id.*; Appendix W12, *supra* note 75.

<sup>79</sup> Appendix W12, *supra* note 75.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See generally Law Enforcement Incident Reports, June 5, 2004 Vigilante Incident (Cochise County Sheriff's Incident Report # 04-10362, prepared by D. Rachilla, June 7, 2003) (attached as Appendix W14) [hereinafter Appendix W14]; Mexican Consulate list, *supra* note 55, at para. 62.

<sup>86</sup> Appendix W14, *supra* note 85; Mexican Consulate list, *supra* note 55, at para. 62.

<sup>87</sup> Appendix W14, *supra* note 85; Mexican Consulate list, *supra* note 55, at para. 62.

immigrant woman by her hair and stuck a pistol against her left side near her ribs.<sup>88</sup> He then held up his gun in front of the rest of the immigrants and said, “Do you know what this is?”<sup>89</sup> Meanwhile, Barnett’s brother mounted an ATV and, with his dog, followed behind an immigrant male who was attempting to escape on foot.<sup>90</sup> The Barnetts’ dog caught up with the fleeing immigrant and bit the man in the thigh.<sup>91</sup> The dog bite caused him to fall to the ground, where Barnett’s brother soon arrived, kned him in the stomach and carried him away on the front of his ATV to meet Barnett and the others.<sup>92</sup> The Cochise County Sheriff’s Department report on the incident states that the Barnetts had committed two felony violations under Arizona State law.<sup>93</sup> The U.S. Border Patrol also notified the U.S. Attorney’s office of the Barnetts’ actions several days after the incident.<sup>94</sup> Nevertheless, like the other documented confrontations, neither the federal nor Arizona state prosecutors ultimately brought charges against the anti-immigrant actors.

36. The above accounts represent just a few of the numerous incidents of immigrant abuse that have been documented, and the nature of these documented incidents and their frequency suggests that numerous additional, undocumented incidents have occurred. The boasting of vigilante groups concerning their own achievements provides further grounds for speculation on how many additional, unreported incidents of immigrant abuse have taken place. In early 2003, Simcox alone claimed to have apprehended 500 immigrants since his arrival in Tombstone in November 2001.<sup>95</sup> With the help of his brothers and ranch employees, Barnett reported to have captured more than 5,000 immigrants as well as more than a ton of marijuana.<sup>96</sup> Based on the numbers in these two claims alone, without even considering all the other anti-immigrant actors, it is clear that many, many more cases similar to those document by official sources have occurred and continue to occur near the border.

37. Just as disturbing as this pattern of abuses against immigrants, anti-immigrant activists have also terrorized Mexican Americans who are citizens of the United States and residents of southern Arizona communities. On October 30, 2004, Roger and Don Barnett detained members of the ██████████ and ██████████ families—all Mexican Americans and longstanding residents of Cochise County—at gunpoint, barraging them with harsh language and racial insults.<sup>97</sup> Ron and Art Morales were hunting that afternoon on what they believed to be state land, accompanied by Ron’s

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<sup>88</sup> Appendix W14, *supra* note 85; Mexican Consulate list, *supra* note 55, at para. 62.

<sup>89</sup> Appendix W14, *supra* note 85.

<sup>90</sup> *Id.*; Mexican Consulate list, *supra* note 55, at para. 62.

<sup>91</sup> Appendix W14, *supra* note 85; Mexican Consulate list, *supra* note 55, at para. 62.

<sup>92</sup> Appendix W14, *supra* note 85; Mexican Consulate list, *supra* note 55, at para. 62.

<sup>93</sup> Appendix W14, *supra* note 85.

<sup>94</sup> *Id.*

<sup>95</sup> Moser, *supra* note 19.

<sup>96</sup> *Hate or Heroism*, *supra* note 18, at 3.

<sup>97</sup> See generally Law Enforcement Incident Reports, Oct. 30, 2004 Vigilante Incident (Cochise County Sheriff’s Incident Report #04-20707, prepared by Williams) (attached as Appendix W16) [hereinafter Appendix W16] (including written statements by 9 year-old ██████████, 11 year-old ██████████ and 11 year-old ██████████). See also Bill Hess, *Plaintiffs discuss suit against rancher*, SIERRA VISTA HERALD, Nov. 30, 2004 (attached as Appendix AA1); *Border Vigilantes*, *supra* note 2.

daughters, nine year-old ██████, eleven year-old ██████, and ██████'s eleven year-old friend, ██████.<sup>98</sup> As ██████ was away tracking a deer with ██████ close behind, Don Barnett approached ██████, ██████ and ██████ on an ATV and began yelling at them to “get the fuck out” of his property.<sup>99</sup> ██████ and ██████ heard the commotion and came quickly to the scene, followed by Roger Barnett, who arrived in a Dodge pickup.<sup>100</sup> Roger Barnett got out of his truck toting an A-15 assault rifle, then fired a round into the ground and pointed the gun at the ██████’ and the young girls.<sup>101</sup> ██████ instructed the girls to go get in the back of their vehicle and duck behind the seat, and attempted to explain to Barnett that he had a permit to be hunting on the land.<sup>102</sup> Barnett yelled that ██████ probably knocked down a “No Trespassing” sign himself and, calling him an “ignorant Mexican,” advanced on him, all the while pointing his rifle and screaming obscenities and death threats.<sup>103</sup> The statements of the young girls reveal the extreme intensity of the encounter and the vicious attitude of the Barnetts; the girls describe screaming, crying and shaking with fear that Barnett—himself shaking and red in the face with rage—was going to kill them.<sup>104</sup> Despite official documentation from the Sheriff’s Department that the Barnetts committed eight counts of aggravated assault, five counts of disorderly conduct and five counts of threat and intimidation during the incident, no charges were filed against them. Following this incident, other local Mexican-American hunters were also violently confronted by Barnett.<sup>105</sup>

38. These abuses of immigrants and U.S. citizens alike have been continually buttressed by a growing sense of fear in the Mexican-American community of southern Arizona in reaction to vigilante anti-immigrant violence. In early 2003, children from Ray Borane Middle School in Douglas, Arizona, handwrote letters to Arizona Attorney General Goddard regarding the lack of government prosecution of anti-immigrant vigilantism.<sup>106</sup> These letters not only confirmed general feelings of indignation toward the Attorney General’s neutral stance on prosecuting blatant acts of violence, but also reflected a growing uneasiness and fear in the Mexican-American community. Some students, like Aurora Millán, voiced the anxiety of her parents and neighbors: “[t]he people in my community feel afraid to go out in night [sic], especially where there are no houses around.”<sup>107</sup> Others, including Fernando Galaviz, communicated more personal fears: “I would like this to stop because I woundent fell comtorble [sic] walking around . . . if you [sic] walking in the night and your [sic] not well dress [sic], and one of the vigilantis [sic] sees you he can pull a gun at you and scare you.”<sup>108</sup> He added, “it [sic] very dangerous to have anybody with a gun . . . expecialy [sic] if the person has hatred

<sup>98</sup> Appendix W16, *supra* note 97; *Border Vigilantes*, *supra* note 2.

<sup>99</sup> Appendix W16, *supra* note 97.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (statements of Angelique and Venese Morales).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (statements of Angelique and Venese Morales).

<sup>105</sup> See Law Enforcement Incident Reports, Jan. 22, 2005 Vigilante Incident (Cochise County Sheriff’s Incident Report #05-01383) (attached as Appendix W17).

<sup>106</sup> See Children’s letters to Arizona Attorney General Goddard and Arizona Governor Napolitano (attached as Appendix B).

<sup>107</sup> *Id.* at 1.

<sup>108</sup> *Id.* at 2.

against other races.”<sup>109</sup> Many more youth shared the views of these classmates; none of them felt comfortable in Douglas with “a bunch of looneys [sic] running around with guns”<sup>110</sup> who appeared to have little inhibitions about “taking the law into their own hands.”<sup>111</sup> On April 8, 2003, a delegation—represented by BAN, the ACLU, members of local governments, a representative for Bishop Kicanis of the Tucson archdiocese, and many concerned citizens—delivered the children’s letters, along with the petitioned described above, to Arizona Attorney General Terry Goddard and his staff.<sup>112</sup>

39. Even according to the reports of law enforcement officials, who have been generally reticent to involve themselves in preventing or providing redress for these abuses, vigilante behavior in Arizona regularly violates state law. Cochise County Sheriff’s Department reports on vigilante incidents explicitly characterize those incidents as involving a litany of criminal activity, including aggravated assault,<sup>113</sup> disorderly conduct involving a weapon,<sup>114</sup> unlawful imprisonment,<sup>115</sup> and threatening and intimidating.<sup>116</sup> Based on the general pattern of vigilante behavior, the actions by these groups may also regularly constitute the state crimes of impersonating a peace officer,<sup>117</sup> participating in or assisting a criminal syndicate,<sup>118</sup> maintenance of private troops,<sup>119</sup> and conspiracy to commit unlawful conduct.<sup>120</sup> Additionally, anti-immigrant activity stands in apparent violation of numerous provisions of U.S. federal law, including the Hobbs

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 3 (letter by Evelyn Owen).

<sup>111</sup> *Id.* at 4 (letter by Nallely Arreola).

<sup>112</sup> See Border Action Network, *Campaign Chronology: Challenging the Anti-Immigrant Movement in Arizona* (last visited Jan. 25, 2005), at <http://www.borderaction.org/campaigns3.php?articleID=40> (attached as Appendix A3) [hereinafter *BAN Campaign Chronology*].

<sup>113</sup> For example, the Cochise County Sheriff’s Department found the January 5, 2003 actions of Steven Nelson, the February 27, 2004 actions of Ranch Rescue, and the March 7 and June 5, 2004 actions of Roger Barnett to constitute the crime of aggravated assault as defined in ARIZ. REV. STAT. § 13-1204 (2005). See Appendix W7, *supra* note 61; Appendix W11, *supra* note 72; Appendix W12, *supra* note 75; Appendix W14, *supra* note 85; see also *supra* paras. 31 & 33-35 (describing these actions in detail).

<sup>114</sup> For example, the Cochise County Sheriff’s Department found the January 5, 2003 actions of Steven Nelson and the June 5, 2004 actions of Roger Barnett to constitute the crime of disorderly conduct with a weapon as defined in RIZ. REV. STAT. § 13-2904 (2005). See Appendix W7, *supra* note 61; Appendix W14, *supra* note 85; see also *supra* paras. 31 & 35 (describing these actions in detail).

<sup>115</sup> For example, the Cochise County Sheriff’s Department found the January 5, 2003 actions of Steven Nelson, the February 27, 2004 actions of Ranch Rescue, and the March 7, 2004 actions of Roger Barnett to constitute the crime of unlawful imprisonment as defined in ARIZ. REV. STAT. § 13-1303 (2005). See Appendix W7, *supra* note 61; Appendix W11, *supra* note 72; Appendix W12, *supra* note 75; see also *supra* paras. 31 & 33-34 (describing these actions in detail).

<sup>116</sup> For example, the Cochise County Sheriff’s Department found the February 27, 2004 actions of Ranch Rescue and the March 7, 2004 actions of Roger Barnett to constitute the crime of threatening and intimidating as defined in ARIZ. REV. STAT. § 13-1202 (2005). See Appendix W11, *supra* note 72; Appendix W12, *supra* note 75; see also *supra* paras. 33-34 (describing these actions in detail).

<sup>117</sup> See ARIZ. REV. STAT. § 13-2411 (2005); Letter from Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow, to Chris Roll, Cochise County Attorney 6-8 (Sept. 30, 2004) (attached as Appendix BB1) [hereinafter *ACLU-Roll letter*].

<sup>118</sup> See ARIZ. REV. STAT. § 13-2308 (2005); *ACLU-Roll letter*, *supra* note 117, at 4.

<sup>119</sup> See ARIZ. REV. STAT. § 26-123 (2005); *ACLU-Roll letter*, *supra* note 117, at 4-6.

<sup>120</sup> See ARIZ. REV. STAT. § 13-1003 (2005).

Act,<sup>121</sup> as well as statutes prohibiting impersonation of a federal officer,<sup>122</sup> civil disorders,<sup>123</sup> and solicitation to commit a crime of violence.<sup>124</sup>

#### **D. Citizen Petitions for U.S. Government Intervention Against Anti-Immigrant Vigilantes**

40. In reaction to these incidents, there has been a steady wave of petitions from citizens to government officials to address problems of vigilantism in Arizona over the past several years. Concerned citizens and non-governmental organizations have tried many different strategies in an attempt to elicit some sort of government response or condemnation. These efforts can be generally separated into three distinct categories: petitions to government officials, civil lawsuits and grassroots mobilization. Unfortunately, none of these efforts has succeeded in gaining sufficient attention from the government.

##### *Unanswered Petitions to Government Officials*

41. In reaction to the gross human rights violations detailed above against immigrants and Mexican-Americans, citizens and non-profit organizations have been calling upon governmental authorities to prosecute these crimes. On July 26, 2004, the American Civil Liberties Union (“ACLU”) wrote a letter to U.S. Attorney Paul Charlton, the chief federal prosecutor in Arizona, concerning vigilante activity near the border in Cochise County.<sup>125</sup> In this communication, the ACLU detailed six different federal laws that had been violated by vigilante groups in repeated incidents over the past several years.<sup>126</sup> Attached to the communication were copies of official internal documents from the U.S. Border Patrol, the Cochise County Sheriff’s office and the Cochise County Attorney that contained details concerning these violations, including details about the individuals and groups that committed them.<sup>127</sup> After the ACLU initiated contact with his office, U.S. Attorney Charlton assigned Assistant U.S. Attorney Nicole Savel to maintain communications with the ACLU to “make sure that...information [on vigilante incidents and pending prosecution] is reviewed in a timely manner.”<sup>128</sup> The ACLU and the U.S. Attorney’s office have kept in regular contact since August 2004,<sup>129</sup> but federal prosecutors have remained reticent to take prosecutorial action against anti-immigrant

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<sup>121</sup> See 18 U.S.C. § 1951 (2005); Letter from Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow, to Paul Charlton, U.S. Attorney (Phoenix office) 1-2 (July 26, 2004) (attached as Appendix BB2) [hereinafter ACLU-Charlton letter]. The Hobbs Act was used in the late 1970s under very similar circumstances to prosecute anti-immigrant activity committed by the Hanigans. See *supra* paras. 15-16 and accompanying footnotes.

<sup>122</sup> See 18 U.S.C. § 912 (2005); ACLU-Charlton letter, *supra* note 121, at 2-3.

<sup>123</sup> See 18 U.S.C. § 231 (2005); ACLU-Charlton letter, *supra* note 121, at 3-4.

<sup>124</sup> See 18 U.S.C. § 373 (2005); ACLU-Charlton letter, *supra* note 121, at 4.

<sup>125</sup> See ACLU-Charlton letter, *supra* note 121.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> E-mail from Paul Charlton, U.S. Attorney (Phoenix office), to Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow (Aug. 31, 2004, 14:12:45 EDT) (attached as Appendix CC2).

<sup>129</sup> See generally Appendices CC1-CC14 (e-mails between the ACLU’s Ray Ybarra, and U.S. Attorney Paul Charlton and Assistant U.S. Attorney Nicole Savel).

vigilantism, deferring to the decisional authority of the Cochise County Attorney's office in declining to prosecute vigilante incidents at the state level.<sup>130</sup>

42. The ACLU has also written similar letters to Arizona Attorney General Terry Goddard,<sup>131</sup> Cochise County Attorney Chris Roll,<sup>132</sup> and Cochise County Sheriff Larry Dever<sup>133</sup> denouncing the inaction of governmental entities in the face of clearly illegal vigilante actions. Just like the U.S. Attorney, these other authorities have not taken any steps toward prosecuting or even discouraging vigilante activity in response to the ACLU's communications. Disturbingly, Cochise County prosecutors have been the *least* reactive to petitions from victims' advocates. In fact, for some time, the ACLU was only able to successfully communicate with the County prosecutors second-hand—through Assistant U.S. Attorney Nicole Savel—because County prosecutors had not returned correspondence via e-mail or letters from the ACLU.<sup>134</sup> Eventually, however, the Cochise County Attorney's office contacted the ACLU and agreed to interview a number of immigrant victims of an incident involving Roger Barnett that occurred on March 7, 2004.<sup>135</sup>

43. Beyond the ACLU's communication with government officials, BAN has organized a widespread campaign<sup>136</sup> against vigilante groups in southern Arizona ever since anti-immigrant zealots began to move to the region and mobilize. This movement started in 2002, when BAN published a report<sup>137</sup> on these groups and their actions in the State, and distributed it widely. This statewide distribution campaign included several press conferences and repeated attempts to personally meet with then Arizona Attorney General Janet Napolitano to urge her to prosecute the criminal actions of anti-immigrant

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<sup>130</sup> See, e.g., E-mail from Nicole Savel, Assistant U.S. Attorney (Phoenix office), to Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow (Sept. 28, 2004, 17:03:59 EDT) (attached as Appendix CC4) (“I touched based with Vincent Festa from Cochise County [Attorney’s Office]... We... generally discussed the incident reports from Cochise County you forwarded to me and the bases for declination of prosecution, where applicable.”); E-mail from Nicole Savel, Assistant U.S. Attorney (Phoenix office), to Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow (Oct. 5, 2004, 10:01 AM) (attached as Appendix CC5) (“I did briefly discuss with Vince Festa whether there are currently any protocols or mechanisms in place to deal with any future incidents... When we discussed these concerns we were in agreement that there has to be that [sic] separate evaluation of the law and of the evidence to determine whether a case can be, in good faith, prosecuted.”).

<sup>131</sup> See Letter from Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow, to Terry Goddard, Arizona Attorney General (Sept. 28, 2004) (attached as Appendix BB3).

<sup>132</sup> See ACLU-Roll letter, *supra* note 117.

<sup>133</sup> See Letter from Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow, to Larry Dever, Cochise County Sheriff (Mar. 7, 2005) (attached as Appendix BB4).

<sup>134</sup> See E-mail from Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow, to Nicole Savel, Assistant U.S. Attorney (Phoenix office) (Oct. 6, 2004, 10:32 AM) (attached as Appendix BB5) (“I am glad to hear that you spoke with Mr. Festa, he has yet to return my call or respond to a letter I sent to his office.”).

<sup>135</sup> See E-mail from Vince Festa, Deputy Cochise County Attorney, to Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow (Feb. 25, 2005, 10:08 AM) (attached as Appendix DD1). The March 7, 2004, incident that occurred between Roger Barnett and a number of immigrant victims is detailed *supra* at paragraph 34.

<sup>136</sup> See BAN Campaign Chronology, *supra* note 112.

<sup>137</sup> See *Hate or Heroism*, *supra* note 18.

groups.<sup>138</sup> Napolitano declined to meet with BAN representatives, but a copy of their report was hand-delivered to the Attorney General's office in December 2002.<sup>139</sup>

44. On April 8, 2003, in conjunction with a significant grassroots petition effort,<sup>140</sup> BAN delivered a list of formal recommendations to the newly elected Attorney General, Terry Goddard, regarding the pressing need to investigate and prosecute vigilante anti-immigrant activity.<sup>141</sup> At that time, Goddard said he would review the recommendations and respond to these groups.<sup>142</sup> To date, however, the Attorney General's office has merely voiced its concern over the issue, and deferred responsibility to the "primary criminal jurisdiction on the border" of the U.S. Attorney and County prosecutors.<sup>143</sup> This failure of the Arizona Attorney General to act and pressure other State authorities to do the same constitutes a significant roadblock to pursuing remedies under U.S. federal and state laws.

45. Individual victims of anti-immigrant vigilantism have also petitioned government officials to take action. On January 14, 2005, ██████████ wrote a letter to the Cochise County Attorney's Office to inquire about the status of criminal charges against Roger Barnett. ██████████—on behalf of his daughter ██████████, as well as ██████████ and ██████████, and ██████████'s daughters ██████████ and ██████████—denounced Barnett for his actions on October 30, 2004, when he fired a shot into the ground, screamed insults and pointed a loaded automatic weapon at members of the ██████████ and ██████████ families.<sup>144</sup> Significantly, in addition to discussing the "horrendous criminal acts against our families, and [Barnett's] intentional disregard for the safety and well being of our three innocent young daughters," ██████████'s letter strongly criticized the County Attorney's Office for failing to prosecute.<sup>145</sup> Because over ten weeks had passed since the Cochise County Sheriff's Department reported the incident and no prosecutorial action had been taken to reprimand Barnett for his criminal activity, the families demanded to be informed about

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<sup>138</sup> See *BAN Campaign Chronology*, *supra* note 112.

<sup>139</sup> See *id.*

<sup>140</sup> See *infra* paras. 51-52 (describing BAN's grassroots petition efforts in more detail).

<sup>141</sup> See Border Action Network, *Recommendations to the Attorney General* (Apr. 8, 2003), available at <http://www.borderaction.org/campaigns3.php?articleID=8> (attached as Appendix A4). These recommendations included the investigation of specific violations of Arizona anti-militia and civilian arrest statutes, and specifically named many anti-immigrant groups as well as local ranchers as known perpetrators of these and other laws. See *id.*

<sup>142</sup> See *BAN Campaign Chronology*, *supra* note 112.

<sup>143</sup> See Letter from John R. Evans, Unit Chief Counsel, Office of the Arizona Attorney General—Criminal Division, to Jennifer Allen, BAN Director (Aug. 12, 2003) (attached as Appendix EE1) [hereinafter Evans-BAN letter]; Letter from Terry Goddard, Arizona Attorney General, to Border Action Network Supporters (Oct. 6, 2003) [hereinafter Goddard-BAN Supporter letter] (attached as Appendix EE2); Letter from Terry Goddard, Arizona Attorney General, to Jennifer Allen, BAN Director (May 17, 2004) (attached as Appendix EE3). Despite the Attorney General's assurance that prosecutorial efforts would proceed against anti-immigrant vigilantes if "credible witnesses and verifiable information" were produced, see Appendix EE1, no action has been taken even after numerous official law enforcement reports of illegal activity, see generally Appendix W.

<sup>144</sup> See Letter from Edward English to Edward G. Rheinheimer, Cochise County Attorney (Jan. 14, 2005) (attached as Appendix FF).

<sup>145</sup> See *id.*

the status of the case.<sup>146</sup> Several days later, the County Attorney's office sent a four-sentence reply letter to ██████, stating that the "matter [was] not being ignored" and was "still under review for possible prosecution."<sup>147</sup> Since this brief and unsubstantiated letter, the ██████ and ██████ families have not heard back from the County Attorney regarding the allegedly ongoing investigation of Barnett's assault with an automatic weapon against them and their daughters.

### *Civil Lawsuits*

46. Southern Arizona's history of lawsuits against individuals who violate immigrants' rights is limited, but reveals a hesitancy on the part of the U.S. justice system to recognize liability for immigrant abusers. Over the past two decades, numerous suits have been filed against government officials—mostly U.S. Border Patrol agents—for alleged abuses of immigrants, including serious violations such as rape<sup>148</sup> and murder.<sup>149</sup> Some of these cases either settled or ultimately resulted in both individual agent and U.S. government liability for violating immigrants' rights, and monetary awards to the victim.<sup>150</sup> Alarming, however, other cases involving immigrant abuses—especially those that have gone to trial or failed to settle—have been dismissed. In one extreme instance, a Border Patrol agent accused of murdering an immigrant was brought to trial and acquitted by two separate southern Arizona juries.<sup>151</sup> Later, when the case was reframed as a civil wrongful death suit, the agent and the U.S. government settled, and granted damages to the dead immigrant's family.<sup>152</sup>

47. Specifically in reaction to the surge in anti-immigrant vigilantism in recent years, BAN has emerged as a driving force in encouraging civil suits against private immigrant abusers. Unfortunately, these challenges have been unsuccessful, reflecting a continued reticence by the U.S. justice system to declare individual abusers of immigrant rights as violators of the law. To date, none of the legal attempts to hold vigilantes liable

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<sup>146</sup> See *id.*

<sup>147</sup> See Letter from Edward G. Rheinheimer, Cochise County Attorney, to Edward English (Jan. 19, 2005) (attached as Appendix FF).

<sup>148</sup> See Joe Salkowski & Robin Hardle, *Bond reduced for Border Patrol agent accused of rape*, ARIZ. DAILY STAR, Sept. 9, 1993 (attached as Appendix GG).

<sup>149</sup> See Ignacio Ibarra, *Douglas families sue Border Patrol agent in '94 slayings*, ARIZ. DAILY STAR, Apr. 19, 1996 (attached as Appendix HH).

<sup>150</sup> See, e.g., *Bernal v. United States*, No. CIV-95-491-TUC-FRZ (D. Ariz. Oct. 13, 1999) (attached as Appendix II) (declaring the U.S. government vicariously liable for an on-duty Border Patrol agent's rape of a Mexican woman in Nogales, AZ, under the Federal Tort Claims Act and pursuant to the doctrine of *respondeat superior*). It is important to recognize, however, that the U.S. government is broadly protected from liability for the behavior of its agents in the performance of a discretionary function or duty. See, e.g., 28 U.S.C. § 2680(a) (2005) (setting forth the discretionary function exception in the Federal Tort Claims Act). Specifically in the context of government prosecutors who choose not to prosecute individual perpetrators of crimes, the U.S. federal and state governments are immune from legal liability. See *infra* note 205 (citing U.S. case law upholding the doctrine of prosecutorial immunity).

<sup>151</sup> Editorial, *Elmer Verdict: Looking for justice*, ARIZ. REPUBLIC, Feb. 7, 1994 (attached as Appendix JJ). One jury was in Arizona Superior Court in Tucson; the other was in U.S. Federal District Court in Phoenix. See Miriam Davidson, *Victim's kin get \$612,000: Border agent killed Mexican citizen*, ARIZ. REPUBLIC, June 5, 1995 (attached as Appendix KK).

<sup>152</sup> See *id.*



Barnett on March 7, 2004.<sup>163</sup> This second suit charged Barnett with conspiracy to violate the immigrants' civil rights.<sup>164</sup> While these legal actions may represent an important step to remedy several gross human rights violations of a few immigrant plaintiffs, it should be recognized that even a decision holding Barnett liable for his actions will not provide any relief for other immigrants, including future victims of similar violations. Furthermore, non-profit organizations<sup>165</sup> sought out these few immigrant plaintiffs and informed them of their right to bring a civil lawsuit, supporting them throughout the process; without access to the knowledge, help or resources of immigrant advocacy organizations, other immigrant victims are mostly unable to pursue these remedies on their own.<sup>166</sup>

50. As a result of another recently filed civil lawsuit, a few Mexican-American victims of vigilante confrontation who are U.S. citizens may yet achieve *some* redress for their harms. The Morales and English families held a press conference with BAN on November 29, 2004, to announce the filing of a tort suit against the Barnetts for the violent confrontation they experienced on October 30, 2004.<sup>167</sup> As of now, however, it remains unclear if this suit will be successful and what, if any, damages will be ordered by the court.

#### *Grassroots Efforts*

51. Realizing that pleas to government officials and civil lawsuits were yielding no results, BAN has organized other, more informal efforts to raise civilian consciousness of and condemn anti-immigrant crimes in southern Arizona. Between January and March of 2003, Cochise and Santa Cruz County residents circulated petitions calling for the Arizona Attorney General to investigate anti-immigrant groups and their blatant violations of State laws.<sup>168</sup> Over 2,000 signatures of citizens from border communities were obtained in this initiative.<sup>169</sup>

52. Creative attempts to make contact with government actors have also continued through citizen action. In the summer of 2003, over 4,000 postcards reading "Arizona Attorney General Goddard: Stop Border Vigilantes" were distributed

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<sup>163</sup> These immigrants' encounter with Barnett is detailed at *supra* para. 34.

<sup>164</sup> The legal basis for the charges against Barnett is 42 U.S.C. § 1985. See *Vicente*, No. CIV-05-157TUC-JMR, at 9.

<sup>165</sup> BAN helped Mr. ██████████ file his complaint; the Mexican American Legal Defense and Educational Fund facilitated the other plaintiffs' lawsuit. See *id.* at 16.

<sup>166</sup> It is important to note that overall, individual civil lawsuits represent a grossly impractical solution to grant legal remedies to the average immigrant victim of vigilante violence. Each case would require an immense and extremely charitable effort, not only involving counseling and facilitating filing for each victim, but also seeking them out one by one in Mexico (or other countries of origin). Nevertheless, in its efforts to help immigrant victims, BAN has advertised throughout Mexico offering free legal services to anyone who has suffered at the hand of vigilante groups in southern Arizona. See *BAN Campaign Chronology*, *supra* note 112.

<sup>167</sup> See *Border Vigilantes*, *supra* note 2. The encounter between the Barnetts and ██████████ families is discussed in detail in *supra* para. 37.

<sup>168</sup> See *BAN Campaign Chronology*, *supra* note 112.

<sup>169</sup> See *id.*

nationwide; many of these were then mailed to Goddard's office.<sup>170</sup> In November 2003, BAN organized talks between business owners in Cochise County about ways to "boycott" vigilantes in their communities.<sup>171</sup> In April 2004, community members held a solemn prayer vigil for immigrant victims of vigilante violence in front of Goddard's home in Phoenix.<sup>172</sup> In preparation for the event, BAN drafted letters to Goddard's neighbors informing them of the upcoming protest and describing the harm that the Attorney General's inaction had brought onto their neighbors in more remote areas of southern Arizona.<sup>173</sup>

#### **E. The Failure of the United States to Prevent, Prosecute, Condemn or even Discourage Anti-Immigrant Violence and Crimes**

53. In spite of citizens' petitions to government officials, lawsuits and extensive grassroots activities, U.S. officials have taken no initiative to act against anti-immigrant vigilantes. Appeals have been made to authorities at both federal and Arizona state levels, but these have all been systematically ignored. As long as criminal anti-immigrant acts committed by vigilante individuals groups are not prosecuted, the abusers are encouraged to continue their actions. Furthermore, with this impunity it is impossible for victims to feel that they have achieved justice for the harms they suffered—no matter how extensive any civil damage awards may be—if the federal and state governments takes on no responsibility for its failure to protect them from abuse.

##### *Federal Government: the U.S. Border Patrol, U.S. Attorneys and the U.S. Federal Court System*

54. Almost without fail in cases involving immigrant detention and abuse by vigilantes, the vigilantes eventually contact the U.S. Border Patrol to formally arrest immigrants and take them into custody. Through this coordination, the Border Patrol maintains extensive contact with anti-immigrant groups in their routine response to calls when these groups detain immigrants.<sup>174</sup> Throughout this contact, Border Patrol officers have frequently witnessed violations of state and federal law committed by anti-immigrant groups.<sup>175</sup> Despite this knowledge, these officials have failed to arrest violators or to conduct follow-up investigations. Border Patrol agents report some of the illegal actions they see in official agency letters, memoranda and "significant incident

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See Border Action Network, *Attorney General Denies Responsibility*, at <http://www.borderaction.org/campaigns3.php?articleID=39> (attached as Appendix A5).

<sup>173</sup> Interview with Jennifer Allen, Director, BAN, in Tucson, Ariz. (Nov. 22, 2004).

<sup>174</sup> See generally Law Enforcement Incident Reports, *supra* note 55 (including examples of the Border Patrol's routine responses to anti-immigrant groups' radio calls and the corresponding detention of immigrants in almost every documented case).

<sup>175</sup> See, e.g., Appendix W14, *supra* note 85 (U.S. Border Patrol Significant Incident Report No. 04-DGL-SIR-6-2-50) (documenting Border Patrol communications with the Cochise County and U.S. Attorney's offices to refer a specific vigilante incident for prosecution).

worksheets.”<sup>176</sup> But despite such reports, Border Patrol agents have failed to act on the information witnessed and collected other than to, at least sometimes, pass those reports on state or federal prosecutors.

55. Even more troubling, further evidence hints at significant ties—and possibly even collusion—between the U.S. Border Patrol and anti-immigrant vigilante groups. In fact, members of various groups, including the American Border Patrol and the Border Defense Coalition, are former U.S. Border Patrol agents.<sup>177</sup> If these connections are more than coincidental, the reality of Border Patrol inaction may be even bleaker than a mere omission to act against these groups; Border Patrol agents may even be *condoning* criminal actions against immigrants. At the very least, their passive stance toward towards illegal and often violent detentions of immigrants effectively encourages the wrongful behavior and, further, puts these individuals in serious breach of their duties as federal law enforcement officers.

56. Compounding the passivity of the Border Patrol is the inaction of the U.S. Attorney’s office, which is responsible for prosecuting federal criminal offenses in the area. That office has failed to use its formidable prosecutorial power to protect against anti-immigrant abuses. The broad mandate of prosecutorial discretion gives the U.S. Attorney and subordinate government lawyers the power—in conjunction with law enforcement—to identify perpetrators of illegal activity and prosecute them for their crimes in federal criminal court.<sup>178</sup> Despite a surge in the number of criminal incidents committed by anti-immigrant groups in recent years, the U.S. Attorney’s office has not taken any legal action against vigilante abuses toward immigrants since 1982.<sup>179</sup>

57. The dereliction of the U.S. Attorney’s office has rendered the U.S. justice system, including the federal courts, ineffective for the protection against and relief from anti-immigrant abuse. Victims of vigilante abuse are left to their own means before the U.S. justice system, with only the daunting possibility of attempting civil lawsuits. Only a handful of civil lawsuits in the past decade—those already mentioned in this petition<sup>180</sup>—have even been successfully *initiated* against perpetrators of anti-immigrant violence.<sup>181</sup> Among those that have been filed, some have been dismissed for procedural problems such as lack of standing.<sup>182</sup> Although the dispositions of some surviving civil lawsuits are yet to be determined, there is no guarantee that any significant damages will be awarded to very few victims of anti-immigrant activity. And even if damages are

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<sup>176</sup> See, e.g., Appendix W8, *supra* note 68 (Memorandum for Chief Patrol Agent from Nicolas Gurlea, U.S. Border Patrol, Jan. 19, 2003; Memorandum for Chief Patrol Agent from J.B. Houston, U.S. Border Patrol, Jan. 20, 2003) (documenting alleged assaults conducted by rancher Roger Barnett on immigrant victims).

<sup>177</sup> See *Hate or Heroism*, *supra* note 18, at 5 & 7.

<sup>178</sup> See *infra* note 205.

<sup>179</sup> See *supra* paras. 15-16 (describing *United States v. Hanigan*, 681 F.2d 1127 (9th Cir. 1982)).

<sup>180</sup> See *supra* paras. 45-46.

<sup>181</sup> See, e.g. *Border Action Network v. Barnett*, No. CIV 03-613-TUC-JMR (D. Ariz. Dec. 17, 2003) (attached as Appendix LL); *Mackenzie v. Barnett* (Super. Ct. Ariz. Nov. 26, 2004) (attached as Appendix NN); ██████████ v. Barnett, No. CIV-04-367-TUCFRZ (D. Ariz. July 12, 2004) (attached as Appendix OO); ██████████ v. Barnett, No. CIV-05-157-TUC-JMR (D. Ariz. Mar. 4, 2005) (attached as Appendix PP).

<sup>182</sup> The lawsuit filed by BAN and ██████████ in 2003, see *Border Action Network*, No. CIV 03-613-TUC-JMR (attached as Appendix LL), was dismissed for lack of standing.

awarded in these suits, the failure of the criminal justice system with regard to hundreds of victims and the impunity it represents will remain.

*Arizona State and Local Government: the Arizona Attorney General, County Attorneys and County Law Enforcement Officials*

58. Perhaps the most troubling arena of government inaction is at the local level in Cochise County of the State of Arizona. Through a simple public records request, the ACLU uncovered documents indicating an ongoing dialogue between the Cochise County Sheriff's Department and the Cochise County Attorney's office concerning anti-immigrant crimes.<sup>183</sup> As evidenced by numerous law enforcement reports,<sup>184</sup> a substantial number of immigrants complain upon arrival at Border Patrol detention centers that they have been illegally detained, assaulted or otherwise seriously mistreated by anti-immigrant groups. The County Attorney's office, however, has failed to respond to these cases, stating that "[w]e have not prosecuted cases involving aliens as victims in the past because we have not found that the conduct by the suspect rose to the level of criminal conduct."<sup>185</sup> This statement is astounding, given that numerous incident reports by the County Sheriff's Department specifically cite anti-immigrant individuals and groups for conduct identified in those very reports as crimes under Arizona law, including felony aggravated assault with a weapon.<sup>186</sup>

59. Recently, the Cochise County Attorney's office has moved closer toward complicity with anti-immigrant vigilantes. Since the ACLU facilitated an interview between County prosecutors and immigrant victims of vigilante behavior in March 2005, the office has abandoned a passive position of inaction in favor of an active stance *against* prosecuting anti-immigrant vigilantes. Despite immigrants' claims that Barnett yelled insults and pointed a gun at them—in addition to kicking a woman—the County Attorney's office stated that they would not prosecute Barnett for his behavior.<sup>187</sup> Emphasizing that "without any injury to [the woman kicked during the incident] we could only convict Mr. Barnett on the basis that he intended to place her in apprehension of immediate injury or that he intended to insult or provoke her,"<sup>188</sup> Deputy County Attorney Vince Festa anticipated that "Barnett would claim that his intent was to cause her to move to join the group [of other detained immigrants], not to injure or insult."<sup>189</sup> Even in possession of a wealth of other law enforcement incident reports clearly evidencing Barnett's reputation as a hostile, violently anti-immigrant actor, the Cochise

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<sup>183</sup> See, e.g., Letter from Vincent J. Festa, Chief Deputy Cochise County Attorney, to Commander Rodney Rothrock, Cochise County Sheriff's Office (Aug. 2, 2004) (attached as Appendix DD3) [hereinafter Cochise County Attorney-Sheriff letter].

<sup>184</sup> See generally Appendix W.

<sup>185</sup> See Cochise County Attorney-Sheriff letter, *supra* note 183.

<sup>186</sup> See *supra* para. 39 and accompanying footnotes.

<sup>187</sup> See E-mail from Vince Festa, Deputy Cochise County Attorney, to Ray Ybarra, ACLU Ira Glasser Racial Justice Fellow (Mar. 3, 2005, 17:34:06 MST) (attached as Appendix DD4) [hereinafter Cochise County Attorney-ACLU e-mail (Mar. 3, 2005)]; Bill Hess, *Millions Sought from Barnett, Dever*, SIERRA VISTA HERALD, Mar. 8, 2005 (attached as Appendix AA2).

<sup>188</sup> Cochise County Attorney-ACLU e-mail (Mar. 3, 2005), *supra* note 187.

<sup>189</sup> *Id.*

County Attorney's office wrote to the ACLU that "[f]aced with [Barnett's anticipated defense], we did not think that there was a reasonable likelihood of securing a conviction and so no misdemeanor charges will be filed at this time."<sup>190</sup> Deputy Attorney Festa reported to the press several days later that no charges would be filed against Barnett, stating that "[t]here wasn't enough evidence"<sup>191</sup> and "[a]ssault is a tricky thing to prove."<sup>192</sup> Festa went on to more generally condone anti-immigrant vigilante activity in his newspaper interview, adding that while defending property, "as long as [vigilantes] don't use deadly force, no criminal action has taken place."<sup>193</sup>

60. Reacting to increasingly hostile attitudes toward immigrants, the Mexican Consul in Douglas, Arizona—Miguel Escobar Valdez—has initiated communications with the County Attorney in hopes of moving prosecution forward.<sup>194</sup> Currently, Escobar's policy is to send an official letter from the Mexican Consulate to the Cochise County Attorney's office following every incident involving anti-immigrant vigilantes, encouraging government prosecutors to press charges.<sup>195</sup> To date, however, the County Attorney has not responded to these communications.

61. Despite concrete evidence produced by Cochise County law enforcement officials and maintained in their internal records, the County Sheriff has failed to make any arrests of anti-immigrant zealots and the County Attorney has failed to prosecute these individuals for their criminal activity. These government omissions have been devastating, effectively preventing immigrants access to remedies through the U.S. legal system and failing to protect against future abuses.

## V. Exception to Exhaustion of Domestic Remedies

62. Because anti-immigrant vigilantism has created a pattern of abuses against immigrants and Mexican Americans in southern Arizona, and because U.S. authorities have ignored and neglected these unlawful actions, the petitioner now turns to the Inter-American Commission on Human Rights to denounce the United States for failing to take the action necessary to prevent or remedy vigilante abuses. Even though U.S. and Mexican civilians and officials alike have continuously reported these abuses to governmental authorities, the United States has allowed for assaults on the dignity and safety of immigrants and Mexican Americans in the border area of southern Arizona to persist and for the perpetrators of crimes against individuals to enjoy impunity. This pattern of neglect by the United States at both the federal and local levels, in addition resulting in international responsibility for the United States,<sup>196</sup> has effectively denied access to adequate domestic judicial remedies for victims of anti-immigrant abuse; hence,

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<sup>190</sup> *Id.*

<sup>191</sup> Hess, *supra* note 187 (quoting Festa).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See Escobar-Roll letter, *supra* note 70; Interview with Lic. Miguel Escobar Valdez, Mexican Consul (Secretaría de Relaciones Exteriores) in Douglas, Ariz. (Feb. 15, 2005).

<sup>195</sup> *Id.*

<sup>196</sup> See *infra* Section VI.

the requirement of exhaustion of domestic remedies is inapplicable to this case.

63. Article 31(1) of the Commission's Rules of Procedure requires that "the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law" before a complaint will be admissible before the Commission. There are, however, several exceptions to this rule. Article 31(2) allows the requirement of exhaustion of domestic remedies to be bypassed when at least one of three conditions is present:

- a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Moreover, in accordance with "generally recognized principles of international law," the exhaustion requirement does not "apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact."<sup>197</sup>

64. The Commission has held that a case qualifies for the exception to the exhaustion requirement when years pass after a human rights violation comes to the attention of state law enforcement officials, and no or insufficient state action is taken to remedy the violation.<sup>198</sup> Under these circumstances, where "investigation has been prolonged to an excessive degree, without any sign that the government intends to intensify or accelerate it," domestic remedies are proven unavailable as a matter of fact.<sup>199</sup> In particular, the Commission has maintained that the requirement of exhaustion of domestic remedies is inapplicable to cases where human rights violations represent "crimes of public action," even when they "may be prosecuted by a private actor."<sup>200</sup> In cases where such crimes are implicated, the Commission has held that states have "a duty to maintain public order, and therefore...[have] an obligation to set the criminal law system into motion and to process the matter until the end."<sup>201</sup> The jurisprudence of the inter-American human rights system requires states to "investigate, prosecute and punish persons liable for human rights violations," and hence criminal prosecution of these violations is a "non-delegable duty of the state" such that victims are not required to exhaust domestic remedies where the state fails to fulfill that duty.<sup>202</sup>

65. In the present case, government records show that both the U.S. Border Patrol and the Cochise County Sheriff's Department have either witnessed or received

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<sup>197</sup> Exceptions to the Exhaustion of Remedies under Domestic Law (art. 46.1, 46.2(a) and 46.2(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, Aug. 10, 1990, Inter-Am. Ct. H.R. (Ser. A.) No. 11, para. 17 (1990) (analyzing the analogous provisions of the American Convention on Human Rights).

<sup>198</sup> See Case 11.598 (Brazil), Inter-Am. C.H.R. 399, OEA/Ser.L/V/II.106, doc. 3 rev. paras. 24-25 (2000).

<sup>199</sup> *Id.* at para. 25.

<sup>200</sup> See Case 11.589 (Cuba), Inter-Am. C.H.R. 586, OEA/Ser.L/V/II.106 doc. 3 rev. para. 47 (2000).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

reports of violent crimes committed against immigrant victims on numerous occasions, dating back to at least January 2003.<sup>203</sup> Internal documents also reveal that these crimes have been reported and referred to U.S. government attorneys for further investigation and prosecution.<sup>204</sup> Nevertheless, as discussed above, neither the U.S. Attorney's office nor the Cochise County Attorney's office has pursued investigation or filed charges against anti-immigrant actors that have violated the rights of countless victims in southern Arizona. Furthermore, the Cochise County Attorney's office has more recently adopted an actively oppositional stance to prosecuting border vigilantism, inflating the legal defenses available to anti-immigrant perpetrators and continually refraining from investigation of vigilante incidents.

66. Moreover, the human rights abuses complained of in this petition constitute "crimes of public action" under both federal and Arizona state law, yet immigrants are denied access to prevention and vindication of these crimes by the U.S. criminal justice system. Immigrant advocates have done everything possible to advance prevention and prosecution by the United States of anti-immigrant human rights violations through their communications to U.S. federal and state officials. Nevertheless, the ultimate decision to initiate criminal prosecution lies within the discretion of federal and state prosecutors, which have chosen not to do so.<sup>205</sup>

67. Although there are a number of pending civil lawsuits charging anti-immigrant actors with tort assault, trespassing and other violations, these do not indicate the existence of remedies that need to be exhausted.<sup>206</sup> While holding out some hope for relief for a limited number of victims, existing or potential civil lawsuits do not constitute adequate remedies for the violations alleged in this petition. Even a successful civil lawsuit could not alter the onerous facts that no criminal charges have been brought by the United States against vigilante abusers of the plaintiffs in these lawsuits or of others who have been the victims of anti-immigrant vigilantism. Moreover, the violations alleged in this petition concern a systemic failure of the criminal justice and law enforcement systems to prevent a pattern of human rights abuses and hold accountable the perpetrators of those abuses. That systemic failure is not remedied by placing the burden on victims of anti-immigrant abuses to themselves mount civil lawsuits after they

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<sup>203</sup> See *supra* paras. 31-35 & 39.

<sup>204</sup> See *id.*

<sup>205</sup> The discretion of prosecutors in this regard is complete, and their decision whether or not to initiate criminal proceedings is not easily, if at all, subjected to judicial review. See *Imbler v. Pachtman*, 424 U.S. 409, 427-31 (U.S. Supreme Court decision holding that prosecutors are absolutely immune to challenges involving the exercise of their prosecutorial discretion). The Ninth Circuit Court of Appeals, a U.S. federal court whose jurisdiction includes the State of Arizona, has stated that the decision whether to prosecute may not be based on racially discriminatory or arbitrary criteria. See *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1069 (9th Cir. 2003) (citation omitted). Nonetheless, neither the Ninth Circuit nor any other federal court has issued an order forcing prosecution or holding a federal or state authority liable for failing to prosecute. Instead, the federal courts have consistently rejected challenges to prosecutorial discretion. See, e.g., *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988); *Dohaish v. Tooley*, 670 F.2d 934, 938 (10th Cir. 1984); *Brian v. Gugin*, 853 F. Supp. 358, 363 (D. Idaho 1994); *Iseley v. Bucks County*, 549 F. Supp. 160, 166-67 (E.D. Pa. 1982).

<sup>206</sup> Domestic remedies need not be exhausted if they are inadequate. See *Velasquez Rodriguez*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) no. 4, at para. 63 (1988)

have been harmed.<sup>207</sup> These unfortunate circumstances have effectively allowed the United States to fully and cleanly avoid its responsibility to ensure the protection of individual human rights, leaving human rights violators with impunity and the door open for them to commit further violations.

68. The absence of effective and adequate remedies applies both to the direct victims of abuse at the hand of vigilantes and to the many Mexican-American U.S. citizens who suffer a climate of fear and intimidation as a result of the unmitigated vigilante activity. Mexican Americans have been denied a judicial system that would abate this situation and instead are suffering at the hands of a governmental apparatus that has allowed this climate of fear and intimidation to fester and their quality of life to diminish. Despite the urgent pleas—even from children—for vigilante activity to cease and desist, these appeals have fallen on deaf ears.

## VI. Timeliness

69. Ordinarily, under article 32.1 of the Commission's Rules of Procedure, a petition to the Commission should be lodged within six months of notification of the final ruling that constitutes the exhaustion of domestic remedies. However, article 32.1 provides that in cases such as the present in which the requirement of exhaustion does not apply, as here, "the petition shall be presented within a reasonable period of time. For this purpose, the Commission shall consider the date on which the alleged violation of rights has occurred and the circumstances of each case."

70. The circumstances of this case are such that this petition is being submitted within a reasonable period of time. The acts and omission of the United States which give rise to this petition—its failure to prevent or complicity with vigilante behavior and failure to fully investigate and prosecute vigilante crimes in the border area of southern Arizona—are ongoing, as is the threat of vigilantism itself. Moreover, the Border Action Network and other citizen's groups have been diligent in communicating their grievances in this respect to relevant government officials and continue to do so, but to no avail.

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<sup>207</sup> This is so especially since a favorable outcome in civil lawsuits against vigilantes is far from certain. In 2002, the U.S. Supreme Court ruled that an undocumented worker could not be awarded damages from his employer after an unlawful termination; this denial was based solely on the immigrant's illicit entry and procurement of employment in the U.S. in violation of federal law. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-49 (2002). Although not specified by the Court, the *Hoffman* decision potentially stands for a broad policy of denying damages to plaintiffs based on initial violations of federal immigration law. See generally Brooke H. Russ, *Comments: Secrets on the Texas-Mexico Border: Leiva et al. v. Ranch Rescue and Rodriguez et. al. v. Ranch Rescue and the Right of Undocumented Aliens to Bring Suit*, 35 U. MIAMI INTER-AM L. REV. 405, 412-20 & 424-26 (2004) (discussing the tension between U.S. Supreme Court rulings concerning undocumented immigrants' rights and how this may affect undocumented plaintiffs' civil remedies against vigilante groups).

## VII. Absence of Parallel International Proceedings

71. The subject of this petition is not pending in any other international proceeding for settlement.

## VIII. U.S. Responsibility for the Violation of Immigrant and Mexican American Victims' Human Rights

72. According to the facts described above, the United States is internationally responsible for failing to protect Mexican immigrants' and Mexican-American U.S. citizens' rights of physical integrity and security of person, judicial protection, and equal protection under the law. Because the United States is a member of the Organization of American States ("OAS") and a party to the OAS Charter, it is legally bound to respect internationally recognized human rights norms.<sup>208</sup> The OAS Charter obliges the United States, at a minimum, to uphold the human rights set forth in the American Declaration of the Rights and Duties of Man ("American Declaration").<sup>209</sup> Further, other international instruments also inform the United States human rights obligation under the OAS Charter, including human rights treaties to which the United States is a party. These instruments include the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Convention on the Elimination of All Forms of Racial Discrimination. Finally, the United States—like all other nations of the world—is bound to respect and adhere to *jus cogens* norms embracing universal rights that are fundamental to human dignity and nonderogable by states.<sup>210</sup>

73. By virtue of the above sources of international law, the United States is bound to several tiers of responsibility to respect human rights. First, the United States must ensure that the behavior of its agents and its domestic laws comply with applicable human rights norms.<sup>211</sup> Further, the United States is obligated to affirmatively protect the human rights of *all individuals* within its national territory,<sup>212</sup> regardless of their immigration status (or lack thereof).<sup>213</sup> Specifically, the Commission has held that

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<sup>208</sup> See OAS Charter, art. 3(j) (proclaiming among the organization's principles "the fundamental rights of the individual without distinction as to race, nationality, creed or sex").

<sup>209</sup> See Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10, paras. 42-43 (1989).

<sup>210</sup> See OAS Charter, art. 17 (obligating States parties to respect "principles of universal morality").

<sup>211</sup> See International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 (December 9, 1994), Inter-Am. Ct. H.R. (Ser. A.) no. 14 (1994)

<sup>212</sup> See Theodore Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AND CUSTOMARY INTERNATIONAL LAW 139 (1989) (on the obligation of states to effectively protect human rights). The obligation of effectiveness is made explicit in the American Convention on Human Rights, arts. 1 & 2.

<sup>213</sup> See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Sept. 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003) [hereinafter OC-18/03]; American Declaration, art.

American states have a duty to “prevent, investigate and punish” human rights violations.<sup>214</sup>

74. Among the legally protected human rights of individuals applicable within U.S. territory are the rights to physical integrity and security of person, judicial protection, and equal protection under the law. The United States has failed to protect these rights with respect to a multitude of individual victims of intimidating and often violent anti-immigrant vigilantism in southern Arizona. First, the United States is responsible for violations of victims’ physical integrity because government agents have failed to exercise the requisite diligence to prevent anti-immigrant physical abuses or prosecute the perpetrators of those abuses—not only in cases of violent physical attacks, but also where vigilantes have merely threatened and detained individuals in the desert. Second, because the United States justice system has denied victims of anti-immigrant vigilantism access to judicial remedies through criminal proceedings, the United States is also responsible for failing to protect these victims’ rights to judicial protection and due process of law. Finally, because relevant government agents have not acted to prevent this class of crimes, that *solely* targets persons of Mexican descent, the United States is responsible for violating these persons’ rights to equal protection and freedom from discrimination under the law.

#### **A. The Right to Physical Integrity and Security of Person**

75. The right to physical integrity and security of person is well enshrined in international law, both in the inter-American and United Nations (“UN”) systems. Article I of the American Declaration states that “[e]very human being has the right to life, liberty and the security of his person.” The Commission has held this norm prohibits arbitrary detention, physical assault, torture, and other affronts to individual physical liberty and integrity imposed by state actors,<sup>215</sup> and the larger corpus of international human rights law extends the norm to protection against threats and other degrading treatment or punishment.<sup>216</sup>

76. In addition to prohibiting direct violations by state actors, Article I of the Declaration also represents a more general state responsibility to protect individuals within its borders from bodily harm at the hands of other individuals. Following the jurisprudence of the Inter-American Court of Human Rights, the Commission has declared that “[a] State must answer for the acts of its agents performed in their official capacity *and for their omissions*, even if they were acting outside the scope of their

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XVII (stating that “[e]very person has the right to be recognized *everywhere* as a person having rights and obligations, and to enjoy the basic civil rights.”) (emphasis added).

<sup>214</sup> See Case 11.287 (Brazil), Inter-Am. C.H.R. 379, OEA/Ser. L/V/II.95 doc. 7 rev. at para. 28 (1997).

<sup>215</sup> See, for example, the following case interpreting the equivalent provision of the American Convention on Human Rights: Case 4236 (Argentina), Inter-Am. C.H.R. 23, OEA/ser. L/V/II.57. doc. 6 rev. 1 (1982) (unlawful detention); Case 4666 (Chile), Inter-Am. C.H.R. 50, OEA/ser. L/V/II.57, doc. 6 rev. 1 (1981) (physical assault); Case 2450 (Argentina), Inter-Am. C.H.R. 33, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1978) (torture).

<sup>216</sup> See *infra* para. 77 (discussing the UN Human Rights Committee’s interpretation of the ICCPR’s protection of liberty and security of person).

authority or in violation of domestic law.”<sup>217</sup> This responsibility imposes a duty of “diligence” on law enforcement officials and public prosecutors to take preventative measures and to enforce criminal laws against persons who violate others’ human rights, and holds the State accountable where they err in failing to press charges or allow for unconscionable delays in prosecution.<sup>218</sup> The Commission has held that the failure of a state “to conduct a prompt, efficient investigation constitutes in itself a specific, independent violation.”<sup>219</sup>

77. Further, Article 9 of the U.S.-ratified International Covenant on Civil and Political Rights states that “[e]veryone has the right to liberty and security of person...No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Related to Article 9 is Article 7, which affirms that “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” The UN Human Rights Committee has interpreted both articles to require state protection of individuals against affronts to their physical security by public officials or private individuals.<sup>220</sup>

78. In this case, the inaction of federal and Arizona state officials incurs U.S. responsibility for failing to protect the physical integrity of victims of vigilante violence in southern Arizona. For the past several years, relevant government agents knew that anti-immigrant groups and individuals were detaining Mexican immigrants and Mexican-American citizens at gunpoint, at times threatening to kill or seriously injure them, and even beating them up. Information about specific incidents has been given to government prosecutors, information that is not vague or otherwise insufficient as a basis for pressing criminal charges; it specifically refers to both the victims and those who perpetrated crimes against them, and includes all the details relevant to the legal violations at issue. Nor does this information come from unreliable sources; in fact, most of the communications to prosecutors were made through referrals in law enforcement reports. Because law enforcement officials have failed to prevent these abuses or pursue a full investigation having knowledge of them, and government prosecutors have done nothing to press charges, the United States has violated victims’ rights to physical integrity and security of person.

## **B. The Right to Judicial Protection**

79. The failure of federal and Arizona state law enforcement officials and prosecutors to hold accountable perpetrators of anti-immigrant abuses also amounts to a violation of the right to judicial protection, a right firmly established in instruments and jurisprudence of the inter-American system. Article XVIII of the American Declaration states: “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts

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<sup>217</sup> See Case 11.287, *supra* note 214, at para. 40.

<sup>218</sup> See *id.* at para. 41.

<sup>219</sup> *Id.* at para. 57.

<sup>220</sup> See U.N. Human Rights Committee, No. 195/85 (Delgado Páez v. Colombia), para. 5.5 (1990); U.N. Human Rights Committee, General Comment 20 (article 7), March 10, 1992, para. 2 (1992).

will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”<sup>221</sup> Article XVIII, like articles 8 and 25 of the American Convention on Human Rights, ensures individuals a judicial system that is accessible to them and that functions effectively to protect their rights.<sup>222</sup> An absence of effective judicial remedies, as in this case, not only exonerates a petitioner to the Commission from having to exhaust domestic remedies, but also constitutes a violation of the right to judicial protection.<sup>223</sup>

80. The right to judicial protection reflected in Article XVIII of the American Declaration goes beyond requiring direct access by individuals to judicial proceedings. It also is a right that ensures investigation and prosecution of human rights violations *by the state* in a timely and effective manner. In its decision in the *Velasquez-Rodriguez* case, the Inter-American Court stated:

[Investigations] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends on the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.<sup>224</sup>

81. The Commission has applied this principle in subsequent cases. Case 11.287 involved an investigation and prosecution in a murder case that was prolonged for several years; but prosecution was finally carried out by Brazilian law enforcement authorities after the case was brought before the Inter-American Commission.<sup>225</sup> Because the “lack of efficiency” in the Brazilian law enforcement investigation and prosecution of the case resulted in “unjustified delays” in the case’s processing in the Brazilian criminal justice system, the Commission held the state’s failure to act to be a violation of the victim’s right to judicial protection of the American Declaration and the American Convention.<sup>226</sup>

82. Case 11.598—involving a similarly inadequate state investigation and prosecution of a criminal act that appeared to be “biased towards legitimizing the conduct of the [perpetrator of human rights]”<sup>227</sup>—set forth criteria that “must be taken into account to determine whether an unwarranted delay has occurred in the administration of justice.”<sup>228</sup> Four factors should be considered to determine whether a delay in law enforcement or prosecutorial investigation of a criminal case is reasonable: “(1) the complexity of the case; (2) the conduct of the injured party in terms of his cooperation in the course of the proceedings; (3) the form in which the preliminary investigation of the

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<sup>221</sup> American Declaration Art. XVIII.

<sup>222</sup> See “Judicial Guarantees in States of Emergency,” Arts. 27(2), 25 and 8 American Convention on Human Rights, Advisory Opinion OC-9/87, October, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9, paras. 27 & 28 (1987) (discussing articles 8 and 25 of the American Convention).

<sup>223</sup> See Case 11.233 (Peru), Inter-Am.C.H.R. 799, OEA/Ser.L/VII.98, Doc.7 rev. para. 98 (discussing articles 25 and 8 of the American Convention).

<sup>224</sup> *Velasquez Rodríguez*, *supra* note 206, at para. 177.

<sup>225</sup> See Case 11.287, *supra* note 214, at paras. 1-7.

<sup>226</sup> See *id.* at paras. 63 & 67.

<sup>227</sup> See Case 11.598, *supra* note 198, at para. 42.

<sup>228</sup> *Id.* at para. 45.

proceedings has been carried out; (4) the activities of the judicial authorities.”<sup>229</sup> The Commission clarified that none of these four criteria should be decisive; rather, all should be considered together to yield a comprehensive analysis.<sup>230</sup> Although the facts of Case 11.598 did not leave much to be analyzed according to the four criteria, the Commission set a few guidelines for future interpretation. First, the Commission noted that crimes committed under “defined and simple circumstances” should not leave any room for states to argue the “complexity of the case;” in fact, in cases where a state alleges that delays have been imposed to reinforce the seriousness and thoroughness of a criminal investigation, the Commission will look to the state’s prior acts to determine whether “a serious and effective investigation” has indeed been ongoing.<sup>231</sup> Second, the Commission recognized the responsibility of other state agents besides law enforcement authorities—in this case, public ministry officials responsible for enforcement policy—to require the state to conduct a timely investigation.<sup>232</sup> Finally, in regard to that particular case, the Commission held that “ineffectiveness, negligence [and] omission by the authorities in the investigation, which resulted in an unwarranted delay” violated the victim’s right to judicial protection under Article XVIII of the Declaration.<sup>233</sup>

83. Because U.S. government prosecutors—most notably those at the Cochise County Attorney’s office—have systematically excluded victims of anti-immigrant vigilantism from redress through the U.S. criminal justice system, the United States must be held responsible for failing to provide these victims judicial protection. Both the Cochise County Sheriff’s Department and the U.S. Border Patrol, in addition to the Mexican consulate, have documented a litany of criminal offenses committed regularly between 1999 and the present by anti-immigrant vigilantes in violation of Arizona law. Nevertheless, these law enforcement agencies and the Cochise County Attorney’s office have failed to investigate further these claims and take prosecutorial action through the criminal justice system. These repeated failures by U.S. prosecutors to press criminal charges against anti-immigrant abusers at best represent negligent failures to act and, at worst, state complicity with illegal criminal behavior victimizing undocumented migrants to the United States. Under either circumstance, the United States must be held responsible for the denial of judicial protection condoned by this pattern of prosecutorial behavior.

84. Especially in light of the criteria articulated by the Commission to determine whether delay is “reasonable” under the Declaration’s guarantees of judicial protection, Cochise County prosecutors’ failures to act must give rise to state responsibility. First, as to the “complexity” of anti-immigrant abuse cases, law enforcement authorities have documented specific criminal actions committed by vigilantes, making follow-up investigation and prosecution a relatively simple matter. In all cases on record, all relevant parties are identified—both victims and abusers—and the

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *See id.* at paras. 46-47.

<sup>232</sup> *See id.* at paras. 48-51.

<sup>233</sup> *Id.* at para. 52.

laws allegedly violated are clearly enumerated.

85. Second, as to the cooperation of the injured parties, although the victims of these incidents have largely been undocumented immigrants to the United States who were deported shortly after the criminal actions occurred, there is no indication that any of the victims would be or has been uncooperative with prosecutorial efforts. On the contrary, multiple victims have made willful efforts to pursue and encourage judicial remedies. In one instance, a large group of victims traveled from all over Mexico to Cochise County to meet with a County prosecutor,<sup>234</sup> and other victims have filed civil lawsuits against their abusers in Arizona;<sup>235</sup> Mexican-American U.S. citizen Edward English even wrote a letter to the Cochise County Attorney's office to inquire about the status and progress of his case's prosecution. With regard to all other victims who now reside in Mexico, the Mexican Consulate has maintained extensive records of these individuals and the incidents of their abuse in southern Arizona, and has repeatedly offered its services to aid Cochise County authorities in prosecuting incidents of anti-immigrant vigilantism.

86. Third, regarding any preliminary investigations conducted by state agents, the facts of this case present a remarkable and disturbing lack of investigation conducted by state prosecutorial authorities—including the Cochise County Attorney's office, but also the U.S. Attorney's office and the Arizona Attorney General. Despite repeated pleas from citizens and victims alike, all of these state offices have maintained a distant, aloof stance with regard to prosecuting criminal anti-immigrant behavior. This lack of prosecutorial investigation is highlighted, in contrast, by the complete and diligent documentation of anti-immigrant abuses of state law enforcement authorities. The Arizona Attorney General, instead of adopting a proactive investigatory stance and availing themselves of state reports on anti-immigrant vigilantism, told non-governmental organizations they would have to produce "credible witnesses and verifiable information" for the Attorney General's office to take action.<sup>236</sup> Later, they evaded responsibility for prosecuting these cases and stated, "the best approaches to dealing with [anti-immigrant vigilante] crimes are within the jurisdiction of the local county attorneys and in some cases the United States Attorney."<sup>237</sup> The U.S. Attorney's office demonstrated a similar, if less indignant, deferral of prosecutorial responsibility to the Cochise County Attorney's office.<sup>238</sup> Ultimately, however, the Cochise County Attorney's office has conducted little to no investigation of anti-immigrant crimes, only interviewing one group of victims when pressured to do so by the ACLU, and failing to press charges after the interview.<sup>239</sup> If anything, Cochise County prosecutors have continually demonstrated their *refusal* to seriously investigate or prosecute anti-immigrant vigilantism.<sup>240</sup> In the one case the office has identified as "under review for possible prosecution"—the incident involving Roger Barnett threatening four U.S. citizens, including two young girls, at gunpoint—

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<sup>234</sup> See *supra* paras. 42 & 59.

<sup>235</sup> See *supra* paras. 46-50.

<sup>236</sup> Evans-BAN letter, *supra* note 143.

<sup>237</sup> Goddard-BAN supporter letter, *supra* note 143.

<sup>238</sup> See *supra* para. 41.

<sup>239</sup> See *supra* para. 59.

<sup>240</sup> See *id.*

prosecutors have not responded to victims' queries about the case in over three months.<sup>241</sup>

87. Finally, there are no "activities of judicial authorities" that mitigate the lack of investigation and prosecution of anti-immigrant crimes. No judge has intervened to denounce the lack of prosecution, and it is unlikely that they would or could. In fact, a substantial body of U.S. case law grants prosecutorial authorities absolute immunity from judicial redress in their decision not to prosecute certain cases.<sup>242</sup> In sum, in the absence of any factors to justify the failure of state authorities to fully investigate and prosecute vigilante activities, the United States is responsible for violating victims' rights to judicial protection.

### **C. The Right to Equal Protection and Freedom from Discrimination under the Law**

88. Article II of the American Declaration states that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." The Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights also contain similar provisions guaranteeing individual protection against discrimination based on race or national origin.<sup>243</sup> Because of its persistent failure to prosecute or adequately investigate vigilante crimes, and because those crimes are aimed at Mexican immigrants and persons of apparent Hispanic descent, the United States is responsible for failing to provide equal protection of the law to the victims of these crimes, as well as to the larger resident Mexican-American population in southern Arizona that lives in a climate of fear and intimidation.

89. The right to equal protection under the law, like human rights norms in general, must be adhered to by the United States with respect to all persons falling under its jurisdiction, including non-citizens regardless of their immigration status.<sup>244</sup> Equal protection does not prohibit all distinction in the treatment of non-citizens or immigrants. In its Advisory Opinion OC-18/03 on the rights of undocumented workers, the Inter-American Court of Human Rights clarified that a state may provide differential treatment to immigrants in certain circumstances as long as that treatment is "reasonable, objective, proportionate, and...not [harmful of] human rights."<sup>245</sup> On this point, the Court pointed out that states may reduce some rights of political participation of immigrants, and may establish "mechanisms to control [immigrants'] entry into and departure from their territory."<sup>246</sup> Outside of such narrow exceptions, however, no discriminatory treatment

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<sup>241</sup> See *supra* para. 45.

<sup>242</sup> See *supra* note 205.

<sup>243</sup> See U.N. Universal Declaration of Human Rights, arts. 2(1) & 7; International Covenant on Civil and Political Rights, art. 26.

<sup>244</sup> See generally OC-18/03, *supra* note 213.

<sup>245</sup> *Id.* at para. 119.

<sup>246</sup> *Id.* at para. 119. Even these areas of acceptable differential treatment, however, must be carefully curtailed in their application "with strict regard for the guarantees of due process and respect for human dignity." *Id.*

should be tolerated, much less condoned, by any state.<sup>247</sup> The Court explicitly declared the norm of equal protection and non-discrimination in regard to all including immigrants to be *jus cogens*<sup>248</sup> and binding on all OAS member states.<sup>249</sup>

90. In its Advisory Opinion, the Inter-American Court echoed concern about the particular vulnerability of migrant workers, including undocumented ones, and their families and the high propensity of discrimination and abuse against them.<sup>250</sup> This same concern led the United Nations to adopt on December 8, 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,<sup>251</sup> the most recent UN human rights convention to come into force.<sup>252</sup> Following the lead of the United Nations, the OAS has passed numerous resolutions in recent years on the subject and, in 1997, endorsed the Commission's establishment of a Special Rapporteur on Migrant Workers and their Families to investigate the plight of migrants in the Western Hemisphere.<sup>253</sup> The Special Rapporteur has published various reports, emphasizing that the human rights principles of equality before the law and non-discrimination are important protections that need to be better applied against practices that victimize immigrants.<sup>254</sup> The Inter-American Commission has further recognized the importance of protecting migrants against discrimination; in the proceedings leading to the Court's Advisory Opinion OC-18/03, the Commission stated:

The American States are obliged to guarantee the basic protection of the human rights established in the human rights treaties to all persons subject to their authority, "and [this] does not depend [...] for its application on factors such as citizenship, nationality or any other aspect of the person, including his migratory status." The rights embodied in the human rights treaties may be regulated reasonably and the exercise of some of them may be subject to some legitimate restrictions. The establishment of such restrictions must respect the relevant formal and substantive limits; in other words, it must be accomplished by law and satisfy an urgent public interest. Restrictions may not be imposed for discriminatory purposes, nor may they be applied in a discriminatory manner.<sup>255</sup>

91. By virtue of the obligation to uphold the human right of equal protection, states must refrain from any acts or omissions that "in *any* way, directly or

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<sup>247</sup> See *id.* at para. 105 ("States may only establish objective and reasonable distinctions when these are made with due respect for human rights and in accordance with the principle of applying the norm that grants protection to the individual.").

<sup>248</sup> See *id.* at para. 101.

<sup>249</sup> *Id.* at para. 110.

<sup>250</sup> *Id.* at paras. 131-132.

<sup>251</sup> See G.A. Res. 45/158, U.N. (1990).

<sup>252</sup> The Convention on Migrant Workers has been ratified by twenty-one countries, and it entered into force on July 1, 2003. Press Release, United Nations, Convention on Protection of Rights of Migrant Workers to Enter into Force Next July (Mar. 19, 2003).

<sup>253</sup> See OAS Ag/Res. 1404 XXVI-O/96 (1996); OAS Ag/Res. 1480 XXVII-O/97 (1997) (endorsing the establishment of the Special Rapporteurship and noting special vulnerabilities to abuse of migrant workers in the Western Hemisphere).

<sup>254</sup> See, e.g., *Fourth Progress Report of the Special Rapporteurship on Migrant Workers and their Families*, in Inter-Am. C.H.R., *Annual Report 2002*, paras. 63-92 (2003).

<sup>255</sup> OC-18/03, *supra* note 213, at 24.

indirectly...[create] situations of *de jure* or *de facto* discrimination.”<sup>256</sup> This mandate extends to the “acts or practices” of state agents “in implementation or interpretation of the law,”<sup>257</sup> including law enforcement officials and government prosecutors in their discretionary application of the law in investigating crimes and pressing criminal charges. Moreover, all states and their agents have a “special obligation” to protect against “acts and practices of third parties, who, with [state] tolerance or acquiescence, create, maintain or promote discriminatory situations.”<sup>258</sup> The Court in its Advisory Opinion clarified that the failure to comply with these obligations would give rise to “international responsibility of the State, and this [would be] exacerbated insofar as non-compliance violate[d] peremptory norms of international human rights law.”<sup>259</sup>

92. The Court has specifically recognized problems of discrimination that may arise in the administration of justice, and has admonished that states must be vigilant and take special measures to prevent such discrimination:

[T]he judicial process must recognize and correct any real disadvantages that those brought before the bar may have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.<sup>260</sup>

93. In the face of these obligations to take special care to prevent discriminatory treatment, and increased international sensitivity focusing on the problems and prejudices faced by migrant workers, the United States has failed to protect immigrants who cross the U.S. border in southern Arizona from blatant discrimination based on race and national origin. Not only Latino immigrants but also Mexican-American U.S. citizens in Cochise County have been victims of unlawful criminal abuses—including aggravated assault, unlawful detention, and other violations of state and federal law—that can be directly linked to their national origin or racial heritage. Not only do vigilantes target these victims for their national origin, many have been documented in official law enforcement reports as yelling racial insults and slurs at the victims they abuse,<sup>261</sup> and some have even voiced white supremacist and anti-Mexican messages to the press.<sup>262</sup> Significantly, however, discrimination in Cochise County has

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<sup>256</sup> *Id.* at para. 103 (emphasis added).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at para. 104.

<sup>259</sup> *Id.* at para. 106.

<sup>260</sup> OC-18/03, *supra* note 213, at para. 121 (quoting The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16, paras. 117 & 119 (1999)).

<sup>261</sup> *See, e.g.*, Law Enforcement Incident Reports, Jan. 22, 2005 Vigilante Incident (Cochise County Sheriff’s Incident Report #05-01383) (attached as Appendix W17) (documenting Roger Barnett calling one detainee—actually a Mexican-American U.S. citizen—a “dumb fucking Mexican”).

<sup>262</sup> *See supra* note 26.

become more pervasive than the mere behavior of anti-immigrant vigilantes, and has also become characteristic of the County's justice system in its blatant failures to act in relation to incidents victimizing immigrants and Mexican-American U.S. citizens.<sup>263</sup> Because the United States has failed to protect immigrant and Mexican-American U.S. citizens from discriminatory abuses based on their race and national origin, it is internationally responsible for violations of their right to equal protection. Further, because the United States has allowed openly racist and discriminatory attitudes to persist in conjunction with a widespread pattern of criminal activity that it has allowed occur with impunity, Mexican Americans in southern Arizona generally live under a cloud of government neglect that deprives them this fundamental right to be treated equally under the law.

94. The Inter-American Commission has recognized the deep social consequences that impunity can generate, which are all the more acute when that impunity is bound up with discriminatory animus and effects:

[p]erpetrators of human rights violations...become all the more irresponsible if they are not held to account before a court of law...It may therefore be concluded that in a social and political climate where impunity prevails, the right to reparations for victims of gross violations of human rights and fundamental freedoms is likely to become illusory.<sup>264</sup>

Because "[i]t is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators,"<sup>265</sup> the Commission should intervene in this case.

## IX. Request for Relief

95. By reason of the foregoing, BAN respectfully requests that the Commission prepare a report setting forth all the facts and applicable law, declaring that the United States is in violation of its obligations under international law, and recommending that the United States:

- a) investigate and prosecute all documented criminal incidents of anti-immigrant vigilantism in southern Arizona;
- b) mandate appropriate education and training for state agents of the U.S. criminal justice system—including law enforcement and prosecutorial authorities—on immigrants' rights, xenophobia and crimes of prejudice against individuals based on race or national origin, and the applicable international human rights norms governing these subjects;

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<sup>263</sup> See *supra* paras. 58-61.

<sup>264</sup> Case 11.589, *supra* note 200, at para. 49 (quoting Theo Van Boven, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights).

<sup>265</sup> *Id.*

- c) institute a public information campaign in southern Arizona to educate the public on the rights of migrants in the United States, including advertisements in both print and broadcast media; and
- d) comply with any other relief that the Commission deems appropriate.

**X. Signature, Designation of Representative, and  
Consent to Disclose Identity of Petitioner**

96. Jennifer Allen, the Executive Director of the Border Action Network, has the authority to sign this petition on behalf of the organization and does so below, attesting to the veracity of the facts set forth herein to the best of her information and belief.

97. By affixing her signature hereto, Jennifer Allen also designates, as the representative of BAN for the purposes of this petition and all associated proceedings, Professor James Anaya of the International Human Rights Advocacy Workshop at the University of Arizona Rogers College of Law. All notices and communications to the petitioner and related to this case should be sent to Professor Anaya at the address below.

98. The petitioner agrees that its identity and those of its Executive Director and representative may be disclosed to all concerned with this petition.

Dated: April 28, 2005

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Jennifer Allen, Executive Director, Border Action Network

Representative of the Petitioner:

S. James Anaya  
International Human Rights Advocacy Workshop  
The University of Arizona Rogers College of Law  
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## **APPENDICES**

Submitted with this petition, as appendices A through PP, are documents probative of the facts stated in this petition.