

# Fact Sheet: The Deadly Trend of Border Patrol Vehicle Pursuits

## I. Introduction

Vehicle pursuits make for exciting movie scenes and capture the interest of reality TV viewers, but police chases are dangerous and often deadly.<sup>1</sup> Law enforcement agencies across the country are increasingly restricting when such pursuits may be undertaken. Many have issued policies authorizing chases only when the public faces immediate danger.<sup>2</sup> The United States Border Patrol, the largest law enforcement agency in the country, has taken no such steps. In fact, the agency is increasingly engaged in high-speed chases throughout the Southwest border region, with deadly results.

The number of fatalities resulting from Border Patrol vehicle pursuits has skyrocketed in recent years, from just 2 deaths in 2019 to 22 in 2021. Despite this trend, Border Patrol does not provide statistics on the number of car chases conducted by its agents unless the agency itself deems it a “use of force” incident, such as when a Border Patrol unit intentionally collides with a vehicle to cause it to crash or agents deploy spike strips to stop a vehicle.<sup>3</sup> Senator Dianne Feinstein demanded in 2019 that Customs and Border Protection (CBP) reevaluate its vehicle pursuit policy, stating: “CBP’s pursuit policy does not follow the Justice Department guidelines for vehicle pursuits, but instead offers insufficient protection against possible injuries and fatalities, either to bystander members of the public or occupants of a pursued vehicle. This has led to catastrophic and unwarranted results.”<sup>4</sup>

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<sup>1</sup> Molly Olmstead, *Why Police Pursuits Keep Killing People*, SLATE, (July 8, 2021), <https://slate.com/news-and-politics/2021/07/police-pursuit-high-speed-car-chase-deaths.html>; CBSLA Staff, *2020 Deadliest Year For Police Pursuits Since 2006, According To A Recent Analysis of Data From CHP*, CBS LOS ANGELES, (April 26, 2021), <https://losangeles.cbslocal.com/2021/04/26/2020-deadliest-year-for-police-pursuits-since-2006-according-to-a-recent-analysis-of-data-from-chp/>;

Statista Research Department, *Vehicle Pursuit Related Deaths By State*, STATISTA, (Feb. 2, 2021), <https://www.statista.com/statistics/727008/vehicle-pursuit-related-deaths-by-state/>.

<sup>2</sup> See e.g., Ella Fassler, *The Limitations of Police ‘No Chase’ Policies*, THE APPEAL, December 2, 2020, <https://theappeal.org/the-limitations-of-police-no-chase-policies/>; Asia Simone Burns, *Atlanta Police Alter ‘No-Chase’ Policy*, THE ATLANTA JOURNAL-CONSTITUTION, (Jan. 4, 2021), <https://www.ajc.com/news/breaking-atlanta-police-alter-no-chase-policy/ZMGZG5DKCVDSZMTFYUMOGHAT4/>.

<sup>3</sup> *Assaults and Use of Force Statistics*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/assaults-use-force-fy2021>.

<sup>4</sup> *Feinstein Calls for Border Patrol to Examine Vehicle Pursuit Policies After Recent Deaths*, COMMITTEE ON THE JUDICIARY (May 3, 2019), <https://www.judiciary.senate.gov/press/dem/releases/feinstein-calls-on-border-patrol-to-examine-vehicle-pursuit-policies-after-recent-deaths>.

On November 29, 2021, the agency finally posted its vehicle pursuit policy publicly, after resisting scrutiny for years.<sup>5</sup> The policy only heightens concerns that vehicle pursuits by Border Patrol will continue to needlessly cause grave injury and even death to not only those being chased, but the community at large. The policy, for example, grants nearly unlimited discretionary authority for agents to engage in vehicle pursuits when they determine a “law enforcement benefits...outweighs the risk to the public.”<sup>6</sup> The policy fails to put meaningful limitations on conducting dangerous and deadly pursuits, including any limitations on permissible speed above the speed limit.

Border Patrol’s own oversight and investigation protocols surrounding vehicle pursuits are deeply flawed and raise serious concerns. Not only are internal investigation and accountability mechanisms at the Department of Homeland Security in need of a deep overhaul,<sup>7</sup> independent oversight bodies permit impunity to thrive within Border Patrol. Legal remedies for victims of Border Patrol misconduct are ever shrinking, as the Supreme Court continues to cut off avenues for holding federal agents accountable.<sup>8</sup>

It was also recently revealed that secretive CBP investigatory units, known as “Critical Incident Teams,” which operate without authorization to conduct investigations, are tasked with the collection of evidence, statements, and accident reconstruction reports for Border Patrol pursuits and crashes.<sup>9</sup> Little is known about these teams, but records and testimony show that they have tampered with evidence and attempted to insulate agency personnel from consequences for misconduct in past cases.<sup>10</sup> The team in the El Paso Sector was recently confirmed to be the central investigative unit of a Border Patrol crash that killed two people, including a U.S. citizen.<sup>11</sup> Their involvement further heightens concern of misconduct.

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<sup>5</sup> U.S. Customs and Border Protection, CBP Directive No. 4510-26 (Jan. 16, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-directive-emergency-driving-Including-vehicular-pursuits-us-cbp-personnel-redacted.pdf>.

<sup>6</sup> *Id.* at Sec. 7.4(A)(1).

<sup>7</sup> American Civil Liberties Union, *Customs and Border Protection Accountability*, ACLU, <https://www.aclu.org/other/customs-and-border-protection-accountability>.

<sup>8</sup> Reuters Investigates, *Shielded: How An Obscure Legal Doctrine Called Qualified Immunity Protects Police Accused of Excessive Force*, REUTERS, (2020) <https://www.reuters.com/investigates/section/usa-police-immunity/>.

<sup>9</sup> Southern Border Communities Coalition, *Request For Congressional Investigations and Oversight Hearings on The Unlawful Operation of the U.S. Border Patrol’s Critical incident (BPCITs)*, SBCC, (Oct. 27, 2021), [https://d3n8a8pro7vhm.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC\\_letter\\_to\\_Congress\\_Final\\_10.27.21.pdf?1635367319](https://d3n8a8pro7vhm.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC_letter_to_Congress_Final_10.27.21.pdf?1635367319).

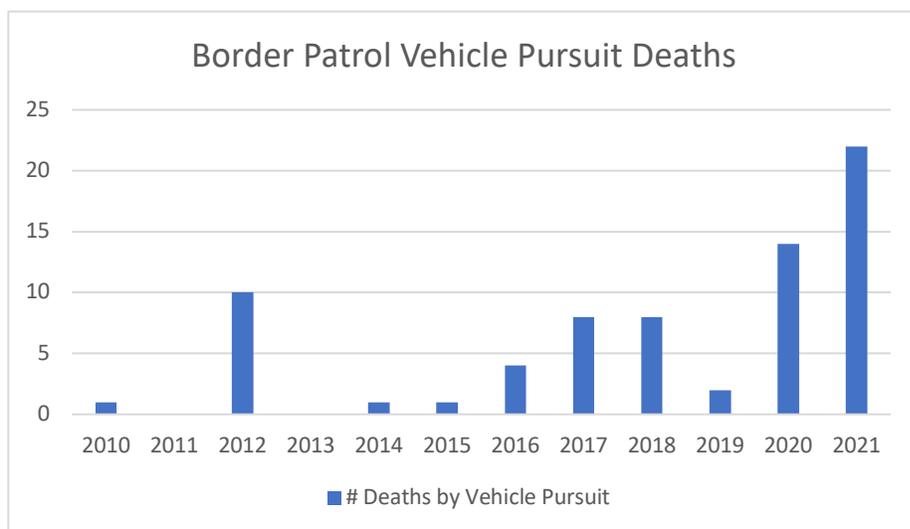
<sup>10</sup> *Id.* at Exhibits A-H.

<sup>11</sup> Vigil, Tommy, New Mexico State Police, *State of New Mexico Uniform Crash Report*, Case NMSPR2107814, Donna Ana County; New Mexico State Police District 4, (Aug. 3, 2021), [https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0+NM+police+report.&preview=NMSPR2107814\\_R.pdf](https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0+NM+police+report.&preview=NMSPR2107814_R.pdf).

The lack of adequate oversight or accountability mechanisms means that Border Patrol rarely faces any scrutiny for the harm caused by its vehicle pursuits and agents remain insulated from consequences for misconduct. As more and more people – including border residents and people seeking asylum – die from Border Patrol vehicle pursuits immediate action is required.

## II. By the Numbers

Border Patrol does not make public the number of deaths resulting from encounters with its agents. The ACLU of Texas has tracked publicly available information on fatal encounters with Border Patrol agents and other Customs and Border Protection (CBP) officials going back to 2010. One-third, or 71 out of 208, of all deaths documented since 2010 were a result of vehicle pursuits.<sup>12</sup> For 10 years – from 2010 through 2019 – an average of 3.5 people died per year due to Border Patrol vehicle pursuits. The number has been trending upward in recent years. In 2020, 14 people lost their lives following a Border Patrol pursuit. In 2021 to date, 22 deaths, based on publicly available information, can be attributed directly to Border Patrol vehicle pursuits.<sup>13</sup>



In 2019, investigations by the Los Angeles Times and ProPublica revealed that at least 250 people had been injured and 22 killed in Border Patrol vehicle crashes between 2015 and 2018 alone.<sup>14</sup> The study, relying on a survey of criminal complaints filed against surviving drivers, found that one in three Border Patrol pursuits ended in a crash.<sup>15</sup> The true number

<sup>12</sup> American Civil Liberties of Texas, *CBP Fatal Encounters Tracker*, <https://www.aclutx.org/en/cbp-fatal-encounters-tracker>.

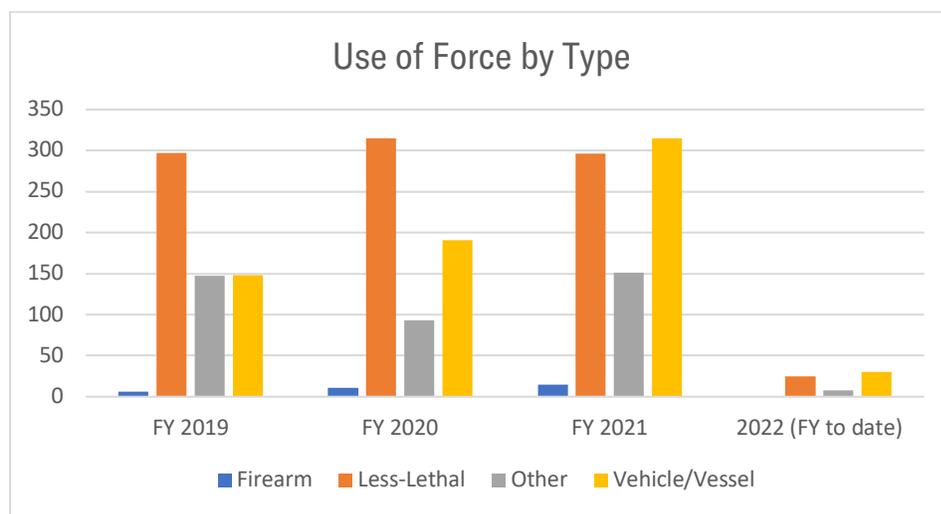
<sup>13</sup> *Id.*

<sup>14</sup> Brittany Mejia, Kavitha Surana, & James Queally, “Trapped in a Deadly Chase,” PROPUBLICA (Apr. 4, 2019), available at <https://features.propublica.org/border-crashes/death-injuries-in-high-speed-border-patrol-chases/>.

<sup>15</sup> *Id.*

is likely higher; not all Border Patrol pursuits that end in injury or death result in a criminal complaint, such as cases where the driver dies.

Although CBP tracks data on vehicle pursuits internally, the agency does not provide statistics to the public on the number of vehicle pursuits undertaken or the resulting number of injuries and deaths.<sup>16</sup> The agency only reports data on “use of force incidents by type,” which includes a category for vehicle/vessel incidents.<sup>17</sup> The number of use of force incidents involving a vehicle has increased dramatically between fiscal year 2019 and 2022 (the only years the agency currently reports).<sup>18</sup> In fiscal year 2021, the number of use of force incidents involving vehicles nearly doubled from fiscal year 2019 totals, from 148 to 315.<sup>19</sup>



The growth in deaths and frequency of use of force incidents related to vehicle pursuits demonstrate the urgent need for both policy reform and accountability. Absent changes, deaths are likely to mount as the agency continues to conduct dangerous vehicle pursuits without meaningful limitations or consequences.

<sup>16</sup> U.S. Customs and Border Protection, *supra* note 5 at 7.5(E)-(G), App’x A; CBP Vehicular Pursuit Reporting in Assaults and Use of Force Reporting System (AUFERS), July 26, 2016, <https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=6-CBP+Vehicular+Pursuit+Reporting+in+AUFERS+20160726+Redacted.pdf>; Implementation of CBP Vehicle Pursuit Reporting in the Assault and Use of Force Reporting System (Aug. 30, 2016), <https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=4-16-31655+Implementation+of+the+CBP+Vehicle+Pursuit+Reporting+AUFERS+Redacted.pdf>.

<sup>17</sup> *Assaults and Use of Force Statistics*, *supra* note 3.

<sup>18</sup> *Id.* (Data based on adjustment of “Force Type” chart adjusted to select only the agency “components” of Office of Field Operations and U.S. Border Patrol).

<sup>19</sup> *Id.*

### III. Case Examples

The following cases are emblematic examples of Border Patrol vehicle pursuits, where concerning information came to light through investigation or public reporting.

**a. Border Patrol concealed its role in vehicle pursuit on New Mexico State Road 185 on August 3, 2021, that killed two and injured eight, and failed to inform family or report publicly the death of a U.S. citizen in the crash.<sup>20</sup>**

On August 3, 2021, two individuals were killed and eight injured following a vehicle pursuit by Border Patrol near the agency's permanent interior checkpoint on New Mexico State Road 185.<sup>21</sup> The agency did not issue a press statement on the incident until August 17, 2021, 14 days after the crash. That press statement only reported that one individual had died as a result of the crash. The agency later added an undated update to the press statement indicating that a second individual involved in the crash, a U.S. citizen, had also died.<sup>22</sup> That U.S. citizen had died two days prior to the initial press statement, on August 15, 2021, and Border Patrol was immediately informed of his death according to police reports obtained by the ACLU.<sup>23</sup> Inexplicably, Border Patrol failed to report his death in its initial press statement.

Border Patrol's press statement claimed a Border Patrol agent observed the vehicle pull to the side of the road before the checkpoint and then continue north, at which time the agent began to follow the vehicle.<sup>24</sup> New Mexico State Police reports obtained by the ACLU, however, make no mention of this reported conduct and instead state that Border Patrol began to follow the vehicle because it was driving slowly and appeared loaded down, calling into question why Border Patrol initially engaged the vehicle.<sup>25</sup>

After the vehicle allegedly failed to yield at a Border Patrol permanent checkpoint, two Border Patrol agents pursued the vehicle at high speeds. The agency claims simply that the "driver lost control and crashed."<sup>26</sup> Yet dispatch audio from the county sheriff, recorded just minutes after the crash, states: "BP IN PURSUIT CLIPPED THE VEHICLE AND IT ROLLED."<sup>27</sup>

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<sup>20</sup> The ACLU of TX and the ACLU of New Mexico currently represent the mother of the U.S. citizen who died from injuries sustained during this incident. *See also*, American Civil Liberties Union, *ACLU Demands Customs and Border Protection Investigate Recent Deadly Vehicle Pursuit, Release Vehicle Pursuit Policy*, ACLU, <https://www.aclu.org/press-releases/aclu-demands-customs-and-border-protection-investigate-recent-deadly-vehicle-pursuit>.

<sup>21</sup> U.S. Customs & Border Protection, *Smuggler Loses Control of Vehicle While Evading Checkpoint, Causing A Death And Injuries To Ejected Passengers*, (Aug. 17, 2021), <https://www.cbp.gov/newsroom/speeches-and-statements/smuggler-loses-control-vehicle-while-evading-checkpoint-causing>.

<sup>22</sup> *Id.*

<sup>23</sup> Vigil, Tommy, *supra* note 11.

<sup>24</sup> *Assaults and Use of Force Statistics*, *supra* note 3.

<sup>25</sup> Vigil, Tommy, *supra* note 11.

<sup>26</sup> *Assaults and Use of Force Statistics*, *supra* note 3.

<sup>27</sup> *Sierra County Dispatch Log*, (2021), <https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0>.

Documents, including emails, obtained by the ACLU confirm that CBP’s “El Paso Sector Critical Incident Team” was dispatched to investigate the fatal crash.<sup>28</sup> Body camera video from New Mexico State Police show Border Patrol agents deferring to the Critical Incident Team for statements from agents involved in the vehicle pursuit.<sup>29</sup> Records prepared by the New Mexico State Police indicate that the CBP Critical Incident Team also produced an accident reconstruction report.<sup>30</sup> Despite multiple requests, Border Patrol has not provided any documents related to the incident.

Body camera footage also confirms that Border Patrol and New Mexico State Police knew the name of the U.S. citizen at the crash site and had his state ID card in their possession. Border Patrol, however, never informed the U.S. citizen’s family of his involvement in the crash. The family, desperate to locate him, filed a missing person report. They found him at a local hospital six days after the crash, listed under a non-public status, just days before he succumbed to his injuries.

Five surviving passengers were promptly expelled to Mexico under the Title 42 expulsion policy, despite them having been witnesses to and victims of a Border Patrol pursuit for which multiple investigations were ongoing.<sup>31</sup>

**b. Border Patrol deployed a “Vehicle Immobilization Device” nearly 100 miles from the border in Arizona on August 7, 2021, causing a vehicle to strike oncoming traffic, killing three occupants and injuring eight others.**

On August 7, 2021, three people died and eight were injured following a Border Patrol vehicle pursuit on Interstate 10 north of Tucson, Arizona, around 100 miles from the U.S.-Mexico border.<sup>32</sup> According to Border Patrol’s account of the events, agents pursued a vehicle for more than 50 miles after it failed to stop at a permanent Border Patrol checkpoint.<sup>33</sup> Thirty-nine miles north of Tucson, Border Patrol agents deployed a “Vehicle Immobilization Device” on the highway. The vehicle, upon colliding with the device, veered into oncoming traffic, “struck a tractor trailer,” and caught fire.<sup>34</sup> Two people died on the

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<sup>28</sup> Vigil, Tommy, *supra* note 11; Jose Rodriguez, El Paso Sector Critical Incident Team, Personal Communication, *NMSPR2107814*, (Aug. 6, 2021), [https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=IPRA\\_Request\\_8.6.21.msg](https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=IPRA_Request_8.6.21.msg).

<sup>29</sup> New Mexico State Police, Case NMSPR2107814 Body Camera Footage, (Aug. 3, 2021), <https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=NMSPR+Bodycam+clip.mp4>.

<sup>30</sup> Vigil, Tommy, *supra* note 11.

<sup>31</sup> New Mexico State Police report indicates that five passengers were removed to Mexico under current protocols. Border Patrol later confirmed they were expelled to Mexico under Title 42. *See* Vigil, Tommy, *supra* note 11.

<sup>32</sup> Edward Celaya, Border Patrol Chase Near Tucson That Ended In Deadly Crash Being Probed, TUCSON.COM, (Aug. 10, 2021), [https://tucson.com/news/local/border-patrol-chase-near-tucson-that-ended-in-deadly-crash-being-probed/article\\_93f7e934-fa23-11eb-9f9d-9f1ba1f79471.html](https://tucson.com/news/local/border-patrol-chase-near-tucson-that-ended-in-deadly-crash-being-probed/article_93f7e934-fa23-11eb-9f9d-9f1ba1f79471.html).

<sup>33</sup> U.S. Customs and Border Protection, *CBP Statement – Three Fatalities in Arizona Motor Vehicle Accident*, (Aug. 9, 2021), <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-three-fatalities-arizona-motor-vehicle-accident>.

<sup>34</sup> *Id.*

scene, and a third was later pronounced dead at a nearby hospital.<sup>35</sup> Eight other occupants of the vehicle were injured. The ACLU of Arizona issued a letter to CBP on September 14, 2021, calling for further investigation into the incident and demanding the release of the agency's vehicle pursuit policy.

**c. Border Patrol vehicle pursuit on June 25, 2020, in El Paso, Texas, resulted in seven deaths, the deadliest crash in the city's history. The agency quickly attempted to deport a surviving witness who challenged the agency's account of the crash.**

On June 25, 2020, Border Patrol agents chased a vehicle down a main street near downtown El Paso, Texas. The vehicle lost control around a known dangerous curve, where another Border Patrol vehicle pursuit had ended in a deadly crash just months prior. Seven people were killed, including teenagers and El Paso residents.<sup>36</sup> Border Patrol claimed its agents had called off the chase well before the crash occurred. Yet three security guards working nearby recounted seeing a Border Patrol vehicle mere "seconds" behind the vehicle being pursued at the time of the crash.<sup>37</sup>

Wilmer Gomez, from Guatemala, was one of three survivors in the vehicle. Mr. Gomez recalled seeing Border Patrol vehicles, with their emergency lights on, directly behind the vehicle at the time of the crash.<sup>38</sup> "They were chasing us, they never stopped chasing us," he told reporters.<sup>39</sup> Despite Mr. Gomez providing critical testimony of an incident that killed seven people, and having being hospitalized following the crash, DHS pursued his immediate deportation. Only after lawyers intervened did the agency permit his testimony to be recorded by the El Paso District Attorney's Office, which was investigating the crash at the time.<sup>40</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Cynthia Pompa, *Will Border Patrol Be Held Accountable For Yet Another Deadly Crash?*, ACLU of TX, (July 20, 2020), <https://www.aclutx.org/en/news/will-border-patrol-be-held-accountable-yet-another-deadly-crash>.

<sup>37</sup> Alfredo Corchado, *Witnesses Contradict Border Patrol's Claim That They Weren't Chasing Car When 7 Died In Crash*, THE DALLAS MORNING NEWS, (July 1, 2020), <https://www.dallasnews.com/news/immigration/2020/07/01/witnesses-contradicts-border-patrols-claim-that-they-werent-chasing-car-when-7-died-in-crash/>.

<sup>38</sup> René Kladzyk, *Witnesses Say Border Patrol Chased Car Moments Before It Crashed, Killing 7*, EL PASO MATTERS, (July 1, 2020), <https://elpasomatters.org/2020/07/01/witnesses-say-border-patrol-chased-car-moments-before-it-crashed-killing-7/>.

<sup>39</sup> *Id.*

<sup>40</sup> René Kladzyk, *Deadly Paisano Crash Update, ICE Tells Lawyer It's Not Moving A Witness and Survivor Who Faced Imminent Deportation*, EL PASO MATTERS, (Aug. 5, 2020), <https://elpasomatters.org/2020/08/05/deadly-paisano-crash-update-ice-tells-lawyer-its-not-moving-a-witness-and-survivor-who-faced-imminent-deportation/U>.

**d. Border Patrol agent confirms involvement in deadly vehicle pursuit and crash after agency denies pursuing vehicle in El Paso, Texas, on January 29, 2020.**

On January 29, 2020, a car crashed near downtown El Paso, Texas, killing an Ecuadorian man and putting an Ecuadorian woman in a coma for weeks.<sup>41</sup> The crash occurred on the same deadly curve where a crash just months later would kill seven following a Border Patrol pursuit. Border Patrol initially denied chasing the vehicle, claiming that its agents stumbled upon the crash after observing migrants crossing the border and getting into a car. A Border Patrol agent who had been working in the area that night, and took an injured passenger to the hospital, later contradicted the agency's account. The agent recounted seeing Border Patrol vehicles in pursuit of the car and hearing radio chatter discussing the pursuit prior to the crash.<sup>42</sup>

#### **IV. Border Patrol's Critical Incident Teams**

Recently released documents reveal that Border Patrol operates "Critical Incident Teams," which are tasked internally with conducting investigations of "any traffic collision" or any Border Patrol conduct that "results in death, serious bodily injury, significant property damage, or other exposure to significant civil liability."<sup>43</sup> The teams' stated mission is the "mitigation of civil liability" for Border Patrol agents who might face lawsuits for misconduct.<sup>44</sup> Critical Incident Teams therefore are tasked with investigating incidents where agency personnel may prove to be criminally liable for misconduct. The teams, however, are not designated by the U.S. Office of Personnel Management as criminal investigators and are not authorized to undertake any such investigations.<sup>45</sup> All other federal agencies tasked with the investigation potential criminal misconduct operate under explicit statutory authority.<sup>46</sup> The U.S. Department of Justice's own "standards and guidelines" for internal investigations further instructs that only allegations of minor misconduct, such as "discourtesy or rudeness," should be relegated to the "unit level," with

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<sup>41</sup> Debbie Nathan, *Border Patrol Agent Speaks Out About A High-Speed Chase That Ended In An Immigrant's Death*, (Feb. 28, 2020), <https://theintercept.com/2020/02/28/border-patrol-el-paso-texas-car-chase/>.

<sup>42</sup> *Id.*

<sup>43</sup> Southern Border Communities Coalition, *supra*, note 9.

<sup>44</sup> *See e.g.*, U.S. Department of Homeland Security, U.S. Customs and Border Protection, *San Diego Sector Critical Incident Investigative Team Presentation*, <https://www.dropbox.com/sh/4r5dzamxq8fjzon/AABmConSjaFosUR6BRgh88Ula?dl=0&preview=Exhibit+A+-+SDCIITPresentation.pdf>.

<sup>45</sup> *See* OPM Handbook of Occupational Groups and Families at 109, 113, <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf>; Job Family Position Classification Standard for Administrative Work in the Inspection, Investigation, Enforcement, and Compliance Group, 1800 at 12-14, 40-41, <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/1800/1800a.pdf>.

<sup>46</sup> *See e.g.*, 28 U.S.C. § 535(a) (Federal Bureau of Investigation); 5a U.S.C. §§ 4(a), 6(f), 8I(c) (Department of Homeland Security Office of Inspector General).

oversight by the authorized internal affairs office.<sup>47</sup> According to uncovered documents, these units prepare “an administrative report that preserves and protects the integrity of the Border Patrol and its personnel.”<sup>48</sup> These amount to a highly concerning set of goals for a unit that is often the first to respond to deadly Border Patrol vehicle pursuits.

Critical Incident Teams have a long, previously unknown history of obstructing investigations, tampering with evidence, and attempting to insulate agency personnel from consequences for misconduct. The head of CBP Internal Affairs from 2006 to 2014, James Tomsheck, recently stated in court documents that “Border Patrol had no authority to investigate, but it nonetheless consistently tried to assert investigative authority, and very frequently interfered with legitimate investigations...It was standard practice for Border Patrol to defend incidents in use of force, to always make it appear that it was justified.”<sup>49</sup>

On May 28, 2010, Border Patrol agents killed Anastasio Hernandez Rojas in San Diego, California.<sup>50</sup> The San Diego Police Department eventually investigated his death as a homicide. But according to evidence collected in subsequent litigation, before the police department even knew of the incident the Border Patrol Critical Incident Team in San Diego had tampered with evidence, pressured doctors to manufacture evidence falsely showing that Anastasio had drugs in his system and pressured the FBI to charge Anastasio with assault.<sup>51</sup> Even after the San Diego Police Department learned of the incident via media inquiries, the Border Patrol Critical Incident Team controlled the witness list of Border Patrol agents available to police investigators, failed to preserve video footage, and provided information to the defense attorneys for agency personnel that was not turned over to police investigators.<sup>52</sup>

Little is known about Critical Incident Teams’ activities in cases involving deadly vehicle pursuits, beyond their apparent mandate within the agency to investigate such incidents and their confirmed direct involvement in investigating recent crashes. The complete lack of transparency around such units raises grave concerns that vehicle pursuits will continue to be isolated from accountability for misconduct with deadly results.

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<sup>47</sup> U.S. Department of Justice, *STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: Recommendations from a Community of Practice*, at page 31-32, <https://cops.usdoj.gov/ric/Publications/cops-p164-pub.pdf>.

<sup>48</sup> U.S. Department of Homeland Security, *supra* note 44.

<sup>49</sup> Additional Observations on Merits submitted to the Inter-American Commission on Human Rights in the case of Anastasio Hernandez Rojas, Case No. 14.0-42, (Jan. 27, 2021), Exhibit E and Declaration of James F. Tomsheck paragraphs 48, 71, [https://d3n8a8pro7vhm.cloudfront.net/alliancesandiego/pages/3138/attachments/original/1612382773/Additional\\_Observations\\_on\\_Merits\\_Case\\_14042\\_Exhibits.pdf?1612382773](https://d3n8a8pro7vhm.cloudfront.net/alliancesandiego/pages/3138/attachments/original/1612382773/Additional_Observations_on_Merits_Case_14042_Exhibits.pdf?1612382773).

<sup>50</sup> Southern Border Communities Coalition, *supra*, note 9 at 4-7.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

## V. Border Patrol's Vehicle Pursuit Policy

After years of refusing demands from members of Congress and the ACLU, among others, to release its policy, CBP recently published a partially redacted copy of the current version of the agency's vehicle pursuit policy.<sup>53</sup> The policy directive was issued by CBP on January 16, 2021, replacing prior versions, and was signed by Mark A. Morgan, Senior Official Performing the Duties of the Commissioner under the Trump Administration.

The policy itself is troubling, essentially authorizing vehicle pursuits based on the individual Border Patrol agents' determination that an undefined "law enforcement benefit" outweighs risk to public safety. The core provision of the policy authorizes pursuits when:

there is reasonable suspicion to believe that the occupant(s) of the vehicle failed to stop at an immigration checkpoint, failed to yield to an Officer's/Agent's attempt to stop a vehicle for an underlying violation of law, or committed a vehicle incursion into the United States at or between a POE, and both the Officer/Agent and the pursuit supervisor have determined that the law enforcement benefit of the vehicle pursuit outweighs the risk to the public, and supervisory approval is granted, on a continuing basis, subject to the evolving state of conditions of the pursuit.<sup>54</sup>

The inclusion of "failed to yield to an Officer's/Agent's attempt to stop a vehicle for an underlying violation of law" in the list of justifications of a pursuit means, in practice, that any failure by a person to stop when engaged by Border Patrol or other CBP officers would satisfy this initial requirement. Once that condition is met, the policy grants discretion to the individual officer or agent and their supervisor to weigh the "law enforcement benefit" against the risk to the public. The policy, however, fails to define "law enforcement benefit," suggesting that agency personnel could view any possible arrest, even if the underlying violation is a civil immigration violation or non-violent criminal violation, as a "benefit" to law enforcement justifying a pursuit.

The policy does list "factors to be considered in making pursuit determinations," including "maintaining a probability of arrest," "the nature of the crime," and "immediate danger to the public." But, again, the policy fails to delineate how such factors should be weighed and leaves open the possibility that other unspecified factors may also be taken into consideration.<sup>55</sup> The policy also requires "supervisory approval...on a continuing basis" but allows personnel to initiate pursuits prior to receiving such approval, raising questions as to how supervisors can make appropriately objective determinations when they are relying primarily on information relayed to them from the engaging agents or officers. The policy also fails to provide meaningful guidance to supervisors about when a pursuit should be terminated, instead permitting them to exercise broad discretion on this critical question.

Critically, the policy does not address the element of speed or how the speed of the pursuit should calculate into the weight of the potential for harm to public safety or the safety of

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<sup>53</sup> U.S. Customs and Border Protection, *supra* note 5.

<sup>54</sup> *Id.* at Sec. 7.4(A)(1).

<sup>55</sup> *Id.* at Sec. 7.3.

officers and vehicle occupants. Existing “emergency driving” procedures fail to account for needed limitations on vehicle pursuits at a high speed that vastly increase the risk of harm.<sup>56</sup> Instead, the “emergency driving” policy permits chases at high speeds or through congested areas under the same broad standard for any type of vehicle pursuit provided above. Functionally, this has led to the use of high-speed chases that have resulted in severe injury and even death for suspected violations that do not present an immediate danger to the community.

Even more fundamentally, the policy’s definition of what constitutes a “vehicle pursuit” raises concerns. The policy predicates a vehicle pursuit on the activation of a Border Patrol vehicle’s “emergency warning equipment.”<sup>57</sup> If the agent’s conduct is considered merely “an attempt to develop the requisite articulable suspicion to effect a vehicle stop” but their emergency lights or siren have not been activated, the agent’s actions would not fall within the definition of a vehicle pursuit and the agent therefore would not have to adhere to the policies about pursuit tactics.<sup>58</sup> Further, the policy’s definition of “pursuit termination” indicates that an agent may officially terminate a vehicle pursuit by turning off their emergency equipment and ceasing “any attempt to maintain contact with the suspect vehicle,” but unmarked Border Patrol vehicles may still maintain “situational awareness of the suspect’s location in order to maintain a probability of arrest.” Under the policy, then, the agency may technically consider a pursuit “terminated” when practically speaking the chase continues.

This policy directive, spanning 19 pages, is meant to govern and instruct split-second decision made by thousands of officers and agents in the field across a wide range of circumstances. CBP maintains a training curriculum instructing officers and agents, as well as supervisors, in the implementation of this policy.<sup>59</sup> And yet, while setting out some of the important factors to weigh before undertaking a vehicle pursuit, the policy gives far too much discretion to Border Patrol agents and fails to delineate sufficiently clear and precise standards for when dangerous vehicle pursuits are permitted and when they are not. In the absence of more specific guidance, mechanisms intended to provide oversight and accountability may end up as mere rubber-stamping exercises. Moreover, the policy is out of line with policing practices across the country that tend to limit chases to only pursuits of suspected perpetrators of violent felonies when public safety is not at risk. Indeed, it is likely that Border Patrol agents interpret this policy as granting them permission to conduct vehicle pursuits under almost any circumstances, so long as they can

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<sup>56</sup> *Id.* at Sec. 7.1.

<sup>57</sup> *Id.* at Sec. 5.26.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at Sec. 6.4, 7.6; U.S. Border Patrol Academy, Instructor Guide, Lesson 9.01, “Vehicle Pursuits and CBP Policy” (Dec. 20, 2017),

[https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=3-Pursuit+Driving+-+USBP\\_Redacted+\(1\).pdf](https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=3-Pursuit+Driving+-+USBP_Redacted+(1).pdf); Instructor Guide – Appendix A,

[https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=1-Apendix+A+Day+pursuits\\_Redacted.pdf](https://www.dropbox.com/sh/2rtfmy4az3wifln/AABGenw8W54JqF9Cb8Fql8uea?dl=0&preview=1-Apendix+A+Day+pursuits_Redacted.pdf); Instructor Guide – Appendix B,

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later articulate an undefined “law enforcement benefit” that outweighed a similarly amorphous assessment of the risk to public safety.

Proof of the problematic application of this policy can be found in the 18 deaths that have occurred just since this most recent version of the policy was issued, the highest single-year tally of fatalities in at least a decade.<sup>60</sup> In none of those cases has the agency claimed they were in pursuit of someone they knew to be presenting an immediate danger to the public.<sup>61</sup> It is difficult to view how any “law enforcement benefit” would justify the taking of so many lives. The agency’s policy should reflect a more genuine concern for public safety and protect against such outcomes. It currently does not.

## **VI. Recommendations**

To address the trend of deadly Border Patrol vehicle pursuits, Customs and Border Protection should:<sup>62</sup>

1. Immediately revise the agency’s vehicle pursuit policy and related training materials in consultation with independent experts to bring the policy in alignment with policing best practices and relevant U.S. Department of Justice guidelines. A revised policy should:
  - a. More effectively constrain discretion granted to agency personnel, including supervisors, by: clearly defining limited conditions under which a pursuit can be initiated and continued; clearly defining permissible pursuit tactics; establishing strict requirements for pursuit termination; and placing clear restrictions on pursuits involving suspected violations that are civil or nonviolent in nature.
  - b. Add to the agency’s “emergency driving” procedures a definition of and policy for “high-speed pursuits,” which must include:
    - i. a directive that vehicle speed is directly proportionate to the risk to public safety, while recognizing that low or moderate speeds in congested areas should also be considered a public safety risk;
    - ii. a prohibition on high-speed vehicle pursuits unless the agent or officer has probable cause to believe that the suspect committed a violent felony and poses a threat of serious physical harm to agents, officers, or others; and
    - iii. a specific prohibition on high-speed vehicle pursuits in which the underlying suspected violation is civil or nonviolent in nature or does not present an immediate danger to the officer or the public.

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<sup>60</sup> See American Civil Liberties Union of Texas, *supra* note 12 (all 18 deaths this year occurred after this policy was issued).

<sup>61</sup> *Id.* (None of the deaths reported this year claimed the victim was involved in a violent crime).

<sup>62</sup> In addition to these recommendations, the Department of Homeland Security should promptly implement previously provided recommendations regarding overhauling existing internal accountability mechanisms across the agency. See American Civil Liberties Union, *supra* note 7.

- c. Require release of a public statement on each vehicle pursuit resulting in death or injury within 24 hours.
    - d. Prohibit the removal or expulsion of any victims or witness during pendency of investigation.
    - e. Implement additional best practice measures based on recommendations from leading independent experts.
  2. Immediately revise the agency's use of force policy to explicitly define the use of "vehicular immobilizations and pursuit intervention" as use of deadly force, given that such actions are "likely to cause serious bodily injury or death of a person."
  3. Disband Critical Incident Teams and immediately ban their involvement in investigations into vehicle pursuit incidents.
    - a. Promptly release all Critical Incident Team reports from cases of vehicle pursuits that resulted in deaths or injuries.
    - b. Engage an independent investigative agency outside of the Department of Homeland Security to review all past cases involving Critical Incident Teams and issue a report detailing findings and recommendations.
  4. Track and release monthly data tallying:
    - a. Vehicle pursuits by sector, including reason for pursuit and reason for terminating pursuit;
    - b. Vehicle pursuits in which CBP units engaged in offensive driving techniques;
    - c. Injuries resulting from vehicle pursuits;
    - d. Deaths resulting from vehicle pursuits.