

2. Since late 2019, Defendant has engaged in the practice of expelling immigrant women who recently gave birth, as well as their U.S. citizen infants, from the United States. *See, e.g.,* Felipe De La Hoz, *Citing the Pandemic, CBP Has Expelled Newborn U.S. Citizens with Their Migrant Mothers*, *The Intercept* (Jan. 2, 2021). According to this practice, pregnant women who enter the United States to seek asylum and give birth in hospitals in the United States are thereafter expelled or removed from the United States, usually to Mexico, by Defendant without consideration of the merits of their asylum requests. Even though their U.S.-born children are U.S. citizens, many of the mothers subjected to these expulsions are expelled without birth certificates for their children. *See, e.g.,* Tanvi Misra, *Revealed: U.S. Citizen Newborns Sent to Mexico Under Trump-Era Border Ban*, *The Guardian* (Feb. 5, 2021). Defendant has recently gone so far as to expel pregnant women from the United States who were in active labor. *See, e.g.,* Brendan Cole, *Pregnant Woman Trying to Cross Border Sent Back to Mexico While in Labor*, *Newsweek* (Mar. 31, 2021); *Q&A: US Title 42 Policy to Expel Migrants at the Border*, *Human Rights Watch* (Apr. 8, 2021).

3. On March 18, 2021, Plaintiffs submitted a request pursuant to FOIA to Defendant, requesting records including, without limitation:

- policies and/or guidance related to the treatment, including but not limited to transportation and access to medical services, of pregnant women in CBP custody; mothers in CBP custody who have given birth within the United States within the last six months; U.S. citizen children in CBP custody; U.S. citizen children who are with a parent in CBP custody, who are under the age of six months; and non-U.S. citizen children of mothers in CBP custody while their mother is giving birth at a U.S. hospital or other medical facility;
- policies and/or guidance related to either advising and/or informing or not advising and/or informing pregnant women in CBP custody or mothers in CBP custody who have given birth in the last six months regarding their immigration options following release from a U.S. hospital or other medical facility;

- statistics reflecting the total number of mothers with U.S. citizen children under the age of six months expelled under 42 U.S.C. § 265 or removed under any other provision of law since January 1, 2020;
- complaints since January 1, 2020, by pregnant women in CBP custody or mothers in CBP custody who had given birth within six months of the complaint; and
- policies and/or guidance related to the return of belongings of mothers with newborn U.S. citizen children under the age of six months prior to their expulsion under 42 U.S.C. § 265 or removal under any other provision of law (referred to herein as “the FOIA Request”).

A copy of the FOIA Request is attached as Exhibit A. Three months have passed since Plaintiffs submitted the FOIA Request, and Defendant has failed to produce any records in response to the FOIA Request, nor made any substantive response thereto. Accordingly, Plaintiffs are entitled to a judgment declaring Defendant has violated FOIA and ordering Defendant to conduct a reasonable search for records responsive to the FOIA Request and to provide such records to Plaintiffs in accordance with FOIA.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction under 5 U.S.C. § 552 *et seq.* (FOIA statute) and 28 U.S.C. § 1331 (federal question). This Court has jurisdiction to grant declaratory, injunctive, and further necessary or proper relief pursuant to 28 U.S.C. §§ 2201–2202 (Declaratory Judgment Act) and Federal Rules of Civil Procedure 57 and 65.

5. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because this is a civil action in which Defendant is a federal agency, there is no real property involved in this action, and Plaintiff NILA has its principal place of business in this District.

6. Defendant acknowledged receipt of the FOIA Request by sending a notice on March 19, 2021 (“the Acknowledgement Notice”). A copy of the Acknowledgement Notice is

attached as Exhibit B. Defendant did not make a determination of whether to comply with the FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(A). Defendant's failure to make a determination within the statutory time period constitutes a constructive denial of the FOIA Request. Thus, Plaintiffs are deemed to have exhausted their administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

PARTIES

7. Plaintiff NILA is a tax-exempt, not-for-profit charitable organization under section 501(c)(3) of the Internal Revenue Code, with its principal place of business at 10 Griggs Terrace, in Brookline, Massachusetts. Founded in 2020, NILA was established to realize systemic change in the immigrant rights' arena by engaging in impact litigation and by building the capacity of social justice attorneys to litigate in federal court through co-counseling in individual cases and providing strategic assistance. In addition to litigation, NILA disseminates practice materials on its public website and frequently presents on immigration issues.

8. Plaintiff AOL is a tax-exempt, not-for-profit charitable organization under section 501(c)(3) of the Internal Revenue Code, with its principal place of business at P.O. Box 907, Maywood, California. Founded in 2012, AOL is a bi-national legal services organization established to serve indigent refugees, migrants, and deportees in the United States and Mexico. AOL staff regularly provide information and analysis to the media and the general public, as well as international organizations and human rights monitoring bodies, including the International Committee of the Red Cross, Amnesty International, the United Nations High Commissioner for Refugees, and Human Rights Watch. Additionally, AOL co-directors regularly lecture at professional and academic conferences, and at schools and universities, on border enforcement practices. AOL also actively shares and disseminates information about its work and conditions on the U.S.-Mexico border through its various social media accounts, which have thousands of followers, including many immigration reporters.

9. Plaintiff HBA is a tax-exempt, not-for-profit charitable organization under section 501(c)(3) of the Internal Revenue Code, with its principal place of business at 4265 Fairmont Avenue, in San Diego, California. Founded in 2016, HBA is a community organization that provides direct services to asylum seekers and other detained immigrants in California, and across the United States, from Haiti and Africa. HBA advocates for fair and humane immigration policies and provides migrants and immigrants with humanitarian, legal, and social services, with a particular focus on Black migrants, the Haitian community, women and girls, LGBTQIA+ individuals, and survivors of torture and other human rights abuses. HBA also regularly shares and disseminates information about immigration issues unique to Black migrants to media, lawmakers, and the public at large in order to build solidarity and collective movement toward policy change.

10. Defendant CBP is a component agency of the Department of Homeland Security and an agency within the meaning of 5 U.S.C. § 552(f). Defendant is responsible for enforcing immigration laws at the borders and other ports of entry to the United States. Defendant inspects individuals seeking entry to the United States, including U.S. citizens, lawful permanent residents, nonimmigrants, and asylum seekers. Defendant purports to have authority to expel noncitizens pursuant to 42 U.S.C. § 265, 42 C.F.R. § 71.40, and/or Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 31,503 (May 26, 2020), and to order removed, and execute removal orders against, noncitizens in accordance with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* Defendant has possession and control over the records Plaintiffs seek to have made publicly available under 5 U.S.C. § 552(a)(2).

FACTUAL ALLEGATIONS

11. On March 18, 2021, Plaintiffs submitted the FOIA Request to Defendant, stating: “[Plaintiffs] request the records prepared, received, transmitted, and/or collected by U.S. Customs

and Border Protection (CBP) related to policies, complaints, and/or guidance related to CBP's advisals to, treatment of, and the expulsion or removal of mothers with children under six months."

12. The FOIA Request also asked that Defendant waive all associated processing fees because disclosure of the records is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the [Plaintiffs]." Exhibit A (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

13. Plaintiffs identified five non-exhaustive subcategories of records sought in the FOIA Request including, without limitation:

1. All policies and/or formal or informal guidance related to the treatment, including but not limited to transportation and access to medical services, of:
 - a. pregnant women in CBP custody;
 - b. mothers in CBP custody who have given birth within the United States within the last six months;
 - c. U.S. citizen children in CBP custody, or U.S. citizen children who are with a parent in CBP custody, who are under the age of six months; and
 - d. non-U.S. citizen children of mothers in CBP custody while their mother is giving birth at a U.S. hospital or other medical facility.
2. All policies and/or formal or informal guidance related to *either* advising and/or informing *or not* advising and/or informing pregnant women in CBP custody or mothers in CBP custody who have given birth in the last six months regarding their immigration options following release from a U.S. hospital or other medical facility, including but not limited to, whether the mother and child would:
 - a. be released from CBP custody;
 - b. remain in CBP custody;
 - c. be transferred to ICE custody; or
 - d. be expelled pursuant to 42 U.S.C. § 265 or removed under any other provision of law.
3. Statistics reflecting the total number of mothers with U.S. citizen children under the age of six months expelled under 42 U.S.C. § 265 or removed under any other provision of law since January 1, 2020, including:
 - a. CBP sector where the expulsion or removal occurred;

- b. mother's date of release from the U.S. hospital in which she gave birth or the location of birth if not a U.S. hospital; and
 - c. date of birth of the U.S. citizen child expelled or removed with their mother.
4. Complaints, formal or informal, filed since January 1, 2020 by pregnant women in CBP custody or mothers in CBP custody who had given birth within six months of the complaint, including complaints filed either before or after expulsion under 42 U.S.C. § 265 or removal under any other provision of law.
 5. Policies and/or formal or informal guidance related to the return of belongings of mothers with newborn U.S. citizen children under the age of six months prior to their expulsion under 42 U.S.C. § 265 or removal under any other provision of law. Belongings referenced here include, but are not limited to, birth certificates, medications, passports, identification documents from the country of origin, and provisions issued by the hospital where the child was born.

14. The FOIA Request explained that disclosure of the requested information will contribute significantly to public understanding of U.S. government operations and activities related to advising, treating, and expelling immigrant women who recently gave birth and their newborn U.S. citizen children. Such information is of great public concern—multiple national and international publications have published articles that discuss the expulsion or removal by Defendant of pregnant women and mothers with newborn children in recent months. *See, e.g.,* Tanvi Misra, *Revealed: U.S. Citizen Newborns Sent to Mexico Under Trump-Era Border Ban*, The Guardian (Feb. 5, 2021); Felipe De La Hoz, *Citing the Pandemic, CBP Has Expelled Newborn U.S. Citizens with Their Migrant Mothers*, The Intercept (Jan. 2, 2021); Jasmine Aguilera, *Pregnant Asylum-Seekers Needed Help at the Border. Inside the Program That Provided Care—and Community*, TIME (Mar. 3, 2021). These reports document the shocking stories of mothers who were expelled or removed to Mexico within hours of discharge from the United States hospitals where they gave birth. Some of these women who are clients of Plaintiffs report that

they were misled by CBP officers or agents, who told them they would be released and could remain in the United States after leaving the hospital but were instead expelled or removed.

15. To the extent that Defendant conducts some or all of the expulsions of mothers and children pursuant to 42 U.S.C. § 265, the public has an interest in this ongoing program that has conducted hundreds of thousands of removals, largely outside the public view. The requested information is critically important to assist attorneys, immigrants, and the general public in understanding how Defendant is “expelling” families, including mothers who have just given birth and their newborn infants who are U.S. citizens, without the opportunity to explain why they should be entitled to remain in the United States and without consideration of either humanitarian concerns or the health and safety of mothers and newborn infants. *See Exhibit A.*

16. Plaintiffs have the capacity and intent to disseminate widely the requested information to the public. Plaintiffs will analyze and post the information obtained through the FOIA Request on their publicly accessible websites. If the responsive information is voluminous, Plaintiffs also will publish a summary analysis and will disseminate that summary through their established networks. Finally, Plaintiffs have regular contact with the national print and news media and plan to share information gleaned from the disclosures with interested media.

17. By letter dated March 19, 2021, Defendant acknowledged receipt of the FOIA Request. *See Exhibit B.*

18. By email dated March 19, 2021, Defendant determined that Plaintiffs’ “fee waiver request does not meet requirements per DHS regulations.” *See Exhibit C.*

19. Defendant did not notify Plaintiffs whether it determined to comply with the FOIA Request by the deadlines set forth in 5 U.S.C. § 552(a)(6)(A)(i) or 6 C.F.R. § 5.5(c). Defendant has failed to produce any records or make any substantive response to the FOIA Request.

CLAIMS FOR RELIEF

COUNT ONE

Violation of Freedom of Information Act for Failure to Timely Respond

20. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in paragraphs 1-19 above.

21. Pursuant to 5 U.S.C. § 552(a)(6)(A) and (B), Defendant was obligated to promptly produce records responsive to Plaintiffs' FOIA Request.

22. Plaintiffs submitted the FOIA Request on March 18, 2021. Defendant failed to issue a response, including a determination of whether to comply with the request and the reasons therefore, in the time provided under 5 U.S.C. § 552(a)(6)(A)(i) (20 days, excluding Saturdays, Sundays, and legal public holidays) or within the time permitted in certain unusual circumstances pursuant to 5 U.S.C. § 552(a)(6)(B)(i) and 6 C.F.R. § 5.5(c) (10 additional working days).

23. Defendant's failure to disclose all responsive records within the statutory time period therefore violates, at a minimum, 5 U.S.C. § 552(a)(6)(A) and (B) and the corresponding regulations.

COUNT TWO

Violation of Freedom of Information Act for Failure to Conduct an Adequate Search for Responsive Records

24. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in paragraphs 1-23 above.

25. Defendant is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to the FOIA Request.

26. Plaintiffs have a legal right to obtain such records, and no legal basis exists for Defendant's failure to search for them.

27. Defendant's failure to conduct a reasonable search for records responsive to the FOIA Request violates, at a minimum, 5 U.S.C. § 552(a)(3)(C), as well as the regulations promulgated thereunder.

COUNT THREE

**Violation of Freedom of Information Act for
Failure to Disclose Responsive Records**

28. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in paragraphs 1-27 above.

29. Defendant is obligated under 5 U.S.C. § 552(a)(3) to promptly produce records responsive to the FOIA Request. Plaintiffs have a legal right to obtain such records, and no legal basis exists for Defendant's failure to disclose them.

30. Defendant's failure to disclose all responsive records violates, at a minimum, 5 U.S.C. § 552(a)(3)(A), as well as the regulations promulgated thereunder.

COUNT FOUR

**Violation of Freedom of Information Act for
Failure to Grant Plaintiffs' Public Interest Fee Waiver Request**

31. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in paragraphs 1-30 above.

32. Plaintiffs are entitled to a waiver of processing fees associated with responding to the FOIA Request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

33. Pursuant to 5 U.S.C. § 552(a)(4)(A)(viii), NILA, AOL, and HBA are each entitled to a waiver of fees associated with searching for records responsive to the FOIA Request because (a) Defendant failed to respond to the FOIA Request within the statutory time limits, and (b) no unusual or exceptional circumstances (as defined in 5 U.S.C. §§ 552(a)(6)(B) and (C)) exist that would excuse Defendant's failure to respond.

34. The disclosure of the information sought through the FOIA Request is in the public interest.

35. As non-profit organizations, Plaintiffs do not seek the requested information for commercial gain, but rather to educate interested members of the public.

36. Plaintiffs have the capacity and intent to disseminate widely the requested information to the public.

37. Defendant wrongly determined that Plaintiffs' fee waiver was not applicable and denied Plaintiffs a fee waiver. Plaintiffs request the Court order Defendant to waive processing fees associated with responding to the FOIA Request in accordance with 5 U.S.C. § 552(a)(4)(A)(iii).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court:

- a. On Count 1, declare that Defendant's failure to disclose all responsive records within the statutory time period violates at a minimum, 5 U.S.C. § 552(a)(6)(A) and (B) and the corresponding regulations;
- b. On Count 2, declare that Defendant failed to expeditiously conduct an adequate search for all records responsive to the FOIA Request in accordance with 5 U.S.C. § 552(a)(3)(C);
- c. On Count 3, declare that Defendant's failure to disclose the records responsive to the FOIA Request violates FOIA, 5 U.S.C. § 552(a)(3)(A), as well as the regulations promulgated thereunder;
- d. On Count 4, declare that Defendant wrongly denied Plaintiffs a fee waiver;
- e. Order Defendant to waive processing fees associated with responding to the FOIA Request in accordance with 5 U.S.C. § 552(a)(4)(A)(iii);

- f. Order Defendant to expeditiously process and disclose all responsive, nonexempt records, and to waive processing fees associated with responding to the FOIA Request, and enjoin Defendant from improperly withholding the requested records;
- g. Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E), 28 U.S.C. § 2412, and any other applicable provision of law; and
- h. Grant such other relief as the Court may deem just, equitable, and appropriate.

Dated: July 1, 2021

Respectfully Submitted,

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