



October 5, 2021

Lise Clavel
Ashley Feasley
Customs and Border Protection
1300 Pennsylvania Ave NW
Washington, DC 20229

Transmission via email

Dear Ms. Clavel and Ms. Feasley,

We write on behalf of No More Deaths (“NMD”) in response to Border Patrol’s pattern of surveillance, harassment, and raids against NMD aid stations and volunteers. Border Patrol’s actions threaten NMD’s mission, the safety of those it serves, and the safety of its volunteers. This conduct runs afoul of the recommendations of the International Red Cross and Red Crescent, raises serious constitutional concerns, and places a substantial burden on NMD’s sincere religious practice. On behalf of NMD, we demand that Border Patrol immediately cease raids, harassment, and surveillance of NMD camps and volunteers. We also request that Border Patrol reopen dialogue with NMD to seek reasonable accommodation of NMD’s religious and humanitarian mission. To this end, we request a prompt meeting with Border Patrol national leadership to discuss regular engagement on humanitarian work at the border and appropriate steps forward to ensure that humanitarian aid workers are able to operate without harassment and surveillance.

No More Deaths’ Humanitarian Aid Work

No More Deaths is a faith-based, humanitarian aid organization.¹ Its members are people compelled by faith and conscience to provide direct humanitarian aid to people in the deserts of southern Arizona and northwestern Mexico. NMD members believe that human suffering must be alleviated wherever it is found, regardless of race, creed, or nationality. To advance the mission of their organization, their work includes:

- leaving water, food, clothes, blankets, and other supplies in migration corridors in the southern Arizona desert;
- providing water, food, respite, medical assessments, and other necessities to people in distress, regardless of immigration status;

¹ Begun in 2004 as a ministry of St. Mark’s Presbyterian Church, since 2008 NMD has been an official ministry of the Unitarian Universalist Church of Tucson.

- responding to emergency calls and providing search and rescue and recovery services to locate people missing in the desert; and
- providing legal resources and assisting in family reunification efforts.

NMD's work is of the utmost urgency: 2020 and 2021 have been historically deadly for migrants crossing the southern Arizona desert, as record numbers of human remains were recovered in Pima County and the Tucson Sector's Area of Responsibility.² According to the Pima County Office of the Medical Examiner, the remains of more than 3,400 people have been discovered along the southern Arizona border since 2001.³ Deaths continue to rise as migrants are pushed into the most dangerous regions of the border by enforcement operations and the Trump border wall.⁴ Indeed, June 2021 was the deadliest month on record for migrants since 2010.⁵ NMD's work will therefore continue to be essential to mitigating the catastrophic loss of life in the southwest border region.

Border Patrol's Pattern of Harassment and Surveillance

For more than a year, Border Patrol has engaged in an ongoing pattern of harassment and surveillance of the Byrd Camp, a NMD humanitarian aid camp that provides medical assessment, water, and other necessities to migrants crossing the southern Arizona desert. Border Patrol's conduct has significantly impeded NMD's ability to provide emergency first aid and service life-saving water stations in the desert.

In July and October of 2020, Border Patrol conducted two unannounced, nighttime raids on the Byrd Camp humanitarian aid station. These raids were executed in a violent and dangerous fashion that caused unnecessary harm to NMD volunteers and the people they serve. During the July raid, a convoy of at least a dozen Border Patrol vehicles, including a "Bearcat" tank, drove into the Byrd Camp at high speed. Border Patrol agents entered NMD's aid station, where weapons are prohibited, with drawn assault rifles which they pointed at both patients and volunteers. Border Patrol agents chased and tackled vulnerable and ill patients, exacerbating their physical distress. Agents unnecessarily destroyed NMD property and targeted its volunteers.

² See Fernanda Echavarrri, "2020 Was the Deadliest Year on Record for Migrants Crossing the Arizona Desert," *MotherJones* (Dec. 22, 2020), available at <https://www.motherjones.com/politics/2020/12/record-deaths-migrants-arizona-desert/>; Rafael Carranza, "2020 on track to be among deadliest for migrants at the Arizona-Mexico border," *azcentral.com* (October 28, 2020), available at <https://www.azcentral.com/story/news/politics/border-issues/2020/10/28/could-be-deadliest-year-in-a-decade-at-arizona-mexico-border/3756399001/>.

³ *Id.*

⁴ Sarah Betancourt, "Forty-three bodies found in Arizona borderland amid brutal heat," *The Guardian* (July 12, 2021), available at <https://www.theguardian.com/us-news/2021/jul/12/us-immigration-bodies-heat-arizona>.

⁵ Curt Prendergast, "June was deadliest month for migrants in Southern AZ since 2010," *Tucson.com* (July 13, 2021) available at https://tucson.com/news/local/june-was-deadliest-month-for-migrants-in-southern-az-since/article_fdcec270-e34d-11eb-bee6-f335e47e3f57.html?hidenav=1&hidefooter=1&utm_source=nativeapp&utm_medium=mobile&utm_campaign=link.

Without any clear investigatory need, agents destroyed medical supplies, cut apart medical tents and sleeping spaces, and cut the water lines to a well which is the only source of water for the Byrd Camp. They also needlessly zip-tied volunteers' hands behind their backs and seized their personal property, including their cellphones and other electronic devices.

The subsequent October 2020 raid was similarly violent. After staking out the Byrd Camp for nearly two days, Border Patrol agents stormed the Camp in a convoy of vehicles that included a Bearcat tank. A Border Patrol helicopter buzzed the camp, flying so low that its rotor wash destroyed a NMD tent and storage shed. Agents detained at least a dozen people, including at least six NMD volunteers.

In late-December 2020, mounted Border Patrol agents circled the Byrd Camp and told volunteers that they were pursuing a warrant to carry out another raid on the camp. While Border Patrol agents surrounded the camp, a NMD volunteer contacted Border Patrol Division Chief Agent Daniel Parra. The NMD volunteer informed Agent Parra that Border Patrol's presence was disrupting humanitarian aid activities by preventing migrants in the area from seeking aid and requested that Border Patrol agents leave immediately. Though ultimately a raid was not conducted, Border Patrol agents remained at the camp for some time before departing, notwithstanding requests to leave.

Most recently, in July 2021 Border Patrol agents again surrounded the Byrd Camp and conducted low-altitude helicopter flyovers of the camp. When NMD volunteers refused to permit Border Patrol agents to enter the camp, they were informed that Border Patrol was seeking a warrant to conduct a raid. After several hours of surveillance, Border Patrol agents dispersed.

Border Patrol's Conduct Violates International Standards, Raises Serious Constitutional Concerns, and Unreasonably Burdens Sincere Religious Practice

Border Patrol's ongoing campaign of harassment and surveillance significantly interferes with NMD's ability to carry out its religiously compelled humanitarian work. This runs afoul of the Code of Conduct for the International Red Cross and Red Crescent Movement, which affirms that "the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries."⁶ The Red Cross Red Crescent Code of Conduct calls on government actors to "recognize and respect the independent humanitarian and impartial actions of [non-governmental humanitarian agencies]."⁷ Border Patrol's repeated, aggressive enforcement actions at the Byrd Camp unnecessarily interfere with the provision of needed humanitarian aid by deterring migrants from entering the camp and complicating NMD's efforts to recruit and maintain volunteers at the Byrd Camp.

Border Patrol's actions also violate important constitutional limitations on law enforcement conduct and unlawfully burden NMD's sincere religious practice:

⁶ International Committee of the Red Cross, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief* at 3 (Dec. 31, 1994), available at <https://www.icrc.org/en/doc/resources/documents/publication/p1067.htm>.

⁷ *Id.* at 5.

1. Retaliation for protected expressive conduct, in violation of the First Amendment

First, the timing and conduct of raids on and surveillance of the Byrd Camp suggest that they are aimed at retaliating against NMD for its humanitarian aid work and for speech critical of Border Patrol. The July 2020 raid on the Byrd Camp was conducted only a day after NMD published emails acquired through a Freedom of Information Act request which suggested that Border Patrol union leadership had pushed for police action against NMD as early 2017.⁸ This is not the first time federal law enforcement has used aggressive enforcement to deter NMD from publicly criticizing Border Patrol's conduct: in 2018, NMD volunteer Scott Warren was arrested just hours after NMD published a report on Border Patrol's interference with its humanitarian aid efforts, which included a video of Border Patrol agents destroying water bottles left in the desert.⁹

The First Amendment prohibits government officials from "subjecting an individual to retaliatory actions . . . for speaking out."¹⁰ NMD's publication of reports and FOIA disclosures shedding light on government misconduct occupies the "highest rung in the hierarchy of First Amendment values."¹¹ Border Patrol's pattern of engaging in aggressive enforcement actions against NMD shortly after the publication of such documents raises the strong inference that these actions are motivated by the constitutionally impermissible goal of retaliating against NMD and deterring its members from engaging in further speech critical of Border Patrol's own misconduct. This ongoing pattern of retaliation violates the First Amendment *even if* there was independent probable cause for specific enforcement actions.¹² The excessive use and show of force during raids and surveillance actions at the Byrd Camp further support the conclusion that Border Patrol's conduct was motivated by impermissible retaliatory intent.¹³

2. Unreasonable use and show of force, in violation of the Fourth Amendment

Second, Border Patrol's use of unreasonable and overwhelming force to conduct military style raids on a humanitarian aid camp likely runs afoul of the Fourth Amendment. It is well established that unnecessarily destructive behavior during the execution of a warrant violates the

⁸ See Mariah Kreutter, "Raid on humanitarian group No More Deaths suggests government retaliation at the border," *Los Angeles Times* (Aug. 4, 2020), available at <https://www.latimes.com/opinion/story/2020-08-04/opinion-raid-on-humanitarian-group-no-more-deaths-suggests-government-retaliation-at-the-border>; No More Deaths, "NEW DOCUMENTS: BORTAC and Border Patrol union president played role in 2017 raid and arrests at humanitarian aid station" (July 29, 2020), available at <https://mailchi.mp/nomoredeaths/bortac>.

⁹ See Kreutter 2020.

¹⁰ See *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *Bello-Reyes v. Gaynor*, 985 F.3d 696, 701 (9th Cir. 2021).

¹¹ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

¹² See *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018).

¹³ See *Skoog v. Cty. of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) *abrogated in part by Nieves v. Bartlett*, 139 S. Ct. 1715 (2019); *Miale v. Tuolumne Cty. Sheriff's Dep't*, No. 1:06-cv-01483-AWI-YNP PC, 2009 WL 3073922, at *4 (E.D. Cal. Sept. 22, 2009).

Fourth Amendment.¹⁴ The intentional destruction of NMD property during the Byrd Camp raids served no lawful objective and was unnecessary to execute the search authorized by the warrants.¹⁵

Border Patrol's repeated, overwhelming shows of force also raise significant Fourth Amendment concerns. Shows of force by law enforcement officers are subject to the Fourth Amendment's reasonableness requirement, "even where no actual force is applied."¹⁶ Unnecessary and intimidating displays of force such as those deployed during raids and surveillance of the Byrd Camp are constitutionally suspect where, as here, the crime under investigation is not severe, there is no immediate threat to officer safety, and there are no attempts to resist or evade arrest.¹⁷ Of course, the shadow of impermissible retaliatory purpose casts further doubt on the constitutionality of Border Patrol's conduct in executing raids and surveillance of NMD property.

3. Substantial burdens on sincere religious conduct, in violation of the Religious Freedom Restoration Act

Finally, repeated raids and surveillance of the Byrd Camp place a substantial burden on NMD's ability to provide direct humanitarian aid to people in the deserts of southern Arizona and northwestern Mexico. These aggressive enforcement actions are not narrowly tailored to further a compelling government interest, as required by the Religious Freedom Restoration Act ("RFRA").

NMD is a ministry of the Unitarian Universalist Church of Tucson. Its provision of humanitarian aid is motivated by its sincere religious belief that human suffering must be alleviated wherever it is found, regardless of race, creed, or nationality. "Religion" includes moral, ethical, or religious beliefs about what is right and wrong that are sincerely held with the strength of traditional religious convictions.¹⁸ The provision of humanitarian aid clearly falls within the scope of religious practice protected by RFRA.¹⁹

It is equally clear that Border Patrol's conduct substantially burdens NMD's sincere religious practice, by placing substantial pressure on NMD volunteers to cease providing aid in violation of their beliefs; making it more difficult for NMD to maintain volunteer presence at the

¹⁴ See *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000).

¹⁵ See *Varlitskiy v. Cty. of Riverside*, No. EDCV 19-2099 JGB (SPx), 2020 WL 4187769, at *4 (C.D. Cal. Apr. 23, 2020).

¹⁶ *Motley v. Parks*, 432 F.3d 1072, 1088–89 (9th Cir. 2005).

¹⁷ See *Robinson v. Solano Cty.*, 278 F.3d 1007, 1013 (9th Cir. 2002).

¹⁸ See *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981); *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992). See also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (holding that "whether the religious belief asserted in a RFRA case is reasonable" is a question which "federal courts have no business addressing.").

¹⁹ See *United States v. Scott Daniel Warren*, Case No. 17-00341MJ-001-TUC-RCC, Doc. 146 at 2–3 (D. Arizona, Nov. 21, 2019).

Byrd Camp; and diverting NMD volunteers from their regular organizational duties to respond to raids and surveillance.²⁰

Border Patrol's decision to repeatedly target the Byrd Camp, and its unnecessarily aggressive and violent approach to doing so, does not further a compelling government interest. Even if it did, these enforcement actions are certainly not the least restrictive means to further that interest.²¹ Indeed, over the past year NMD has repeatedly requested meetings with Border Patrol sector leadership to discuss reasonable accommodations, all of which have been declined or cancelled.

Raids and Surveillance of NMD Aid Stations Must End Immediately

Border Patrol's pattern of raids and surveillance of the Byrd Camp must end. Not only is this conduct unlawful, it also causes real, ongoing harm by frightening people receiving medical aid and deterring others from obtaining needed medical assessments and water from our relief stations. Further, Border Patrol's actions continue to make it difficult for NMD to recruit volunteers, staff its aid stations, and provide care to migrants in need.

Border Patrol should engage in enforcement actions at NMD camps only when doing so is consistent with DHS's "sensitive locations" policies. ICE and CBP policies dictate a strong presumption against enforcement actions in courthouses and other sensitive locations, which include schools; hospitals; churches and other institutions of worship; the sites of funerals, weddings, or other public religious ceremonies; and sites of public demonstrations, such as marches, rallies, or parades.²² Under these policies, enforcement actions may be taken at, in, or near courthouses or sensitive locations only if (1) they involve a national security threat; (2) there is an imminent risk of death, violence, or physical harm to persons or property; (3) they involve a risk to public safety or hot pursuit of an individual who poses an imminent danger to public safety, or other risk; or (4) there is imminent risk of destruction of evidence material to a criminal case.²³

Border Patrol should apply the same strong presumption against enforcement actions when considering raids or surveillance of NMD humanitarian aid camps.²⁴ As emergency medical assessment facilities established in accordance with NMD's fundamental religious beliefs, these camps should *already* be included under the sensitive locations policy, which

²⁰ See *Jones v. Williams*, 791 F.3d 1023, 1031–32 (9th Cir. 2015).

²¹ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *United States v. Christie*, 825 F.3d 1048, 1060–61 (9th Cir. 2016).

²² See Tae Johnson, Acting Director, U.S. Immigration and Customs Enforcement and Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, *Civil Immigration Enforcement Actions in or near Courthouses* (April 27, 2021); John Morton, Director, U.S. Immigration and Customs Enforcement, Policy Number 10029.2, *Enforcement Actions at or Focused on Sensitive Locations* (Oct. 24, 2011).

²³ See Johnson Memo at 2–3; Morton Memo at 2–3.

²⁴ Under CBP and ICE policy, "enforcement actions" include civil apprehensions, service of subpoenas, searches, seizures, interviews, and surveillance. See Johnson Memo at 2.

defines sensitive locations by means of a non-exhaustive list including hospitals and sites of religious worship or ceremony.²⁵ Treating humanitarian aid camps as sensitive locations is also consistent with current DHS and CBP policies. As with courthouses, hospitals, and places of worship, the presumption against enforcement actions would ensure that vulnerable migrants continue to have largely unfettered access to essential services—emergency aid necessary for their survival. It would also help ensure that Border Patrol does not unnecessarily burden NMD’s sincere religious practice.

In the rare event that enforcement actions at NMD encampments become necessary and meet the narrow sensitive locations criteria, Border Patrol should make the following accommodations to ensure that it does not unreasonably burden NMD’s religious practice or violate the Fourth Amendment:

- warrants should be executed during daylight hours and with adequate notice through designated liaisons;
- agents should be unarmed or, in the alternative, should not enter NMD property with weapons drawn;
- Border Patrol should use only the minimum necessary number of agents, vehicles, and helicopters;
- agents should not tackle or use other violent apprehension tactics that put medically vulnerable people at risk;
- agents should not intentionally damage aid station infrastructure;
- agents should not seize the personal property or cellphones of volunteers or other people not placed under arrest; and
- Border Patrol should not share confidential information or otherwise collaborate with private vigilante organizations.

We request a meeting with Border Patrol national and local leadership as soon as possible to discuss these requests and identify a collaborative way of moving forward with urgent humanitarian work without facing harassment and retaliation. Since July 2020, NMD has repeatedly requested to meet with Border Patrol Tucson Sector leadership with the goal of obtaining reasonable accommodations for its work. Those requests have been ignored or denied. Indeed, the July and October raids were conducted without prior notice to NMD despite an explicit prior commitment from NMD’s Border Patrol liaison that NMD would be informed in advance of a warrant being executed on its property.

Despite Border Patrol’s brutal conduct, NMD is committed to open dialogue. All of NMD’s work is done openly and in accordance with the Code of Conduct for the International Red Cross and Red Crescent Movement. The right to receive humanitarian assistance should also be recognized and respected by Border Patrol.

Thank you for your attention. We look forward to discussing our concerns with you directly.

²⁵ See Morton Memo at 1-2

Sincerely,

/s/

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