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### CBP One Mobile Application: Violating Migrants' Rights to Privacy and Freedom from Discrimination

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# CBP One Mobile Application: Violating Migrants' Rights to Privacy and Freedom from Discrimination

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### UIC Law School International Human Rights Clinic

The UIC Law School International Human Rights Clinic (IHRC) is a non-profit, nonpartisan, law school legal clinic dedicated to promoting and protecting human rights in the United States and around the world. The IHRC offers students a background in human rights advocacy through the practical experience of working on international human rights cases and projects.

### National Lawyers Guild of Chicago

The National Lawyers Guild of Chicago (NLG Chicago) is a non-profit federation of lawyers, legal workers, and law students dedicated to actively eliminating racism, maintaining and protecting our civil rights and liberties, and using the law as an instrument for the protection of the people.

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# I. Introduction

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“Our leadership is buying into the narrative that we can’t control immigration, that the wealthiest country on earth can’t handle immigrants...They’re saying this is an impossible task, but New York City processed 100,000 Ukrainians in a matter of weeks. Our government leaned in.”<sup>1</sup>

On June 4, 2024, President Biden invoked his presidential authority to severely restrict access to asylum for migrants who cross the U.S.-Mexico border unauthorized.<sup>2</sup> The executive order will allow a partial suspension of asylum requests at the border when daily unauthorized crossings reach a threshold of 2,500 migrants.<sup>3</sup> Extreme measures like this, in conjunction with biased immigration procedures, fail to respect the principle of non-refoulement and migrants’ right to access justice.<sup>4</sup> Additionally, the United States government continues expanding the use of experimental government technology for border enforcement without transparency.<sup>5</sup> United States Immigration Departments use Artificial Intelligence (AI) tools to help screen cargo at ports of entry, validate identities through mobile applications, enhance awareness of threats at the border, conduct immigration enforcement, and more.<sup>6</sup> There is little information available to the public about these AI programs, such as what data is inputted in AI programs, what results or recommendations are returned by the AI programs, how AI programs work, or how oversight of AI programs is conducted to ensure data protection.<sup>7</sup> Immigrants are increasingly subject to automated decisions and processing while navigating the United States immigration system.<sup>8</sup> Currently, migrants are encouraged, and often required, to use an application to access entry into the United States.

The CBP One Mobile application (CBP One application or application), used by United States Customs and Border Protection (CBP), allows travelers to access certain agency functions through smart mobile devices. The application provides a direct system to request appointments, thus reducing the potential for smugglers or others to exploit migrants.<sup>9</sup> The application has allowed CBP to expand those functions, streamline processing, and collect biographic information of migrants prior to their arrival near a United States border.<sup>10</sup> Users must submit their biographic and biometric information, including their name, date of birth, facial images, geolocation, passport number and expiration date, and the names of family members traveling with them.<sup>11</sup> Asylum seekers presenting themselves at a land port of entry at the southwest border of the United States, and Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV) seeking humanitarian parole are *required* to download and use the CBP One application on a smartphone. The CBP One application requires users to submit biographic information about themselves and their family members as well as a live photo of the user.<sup>12</sup>

As advocates have noted, and as outlined in this report, the mandatory use of the CBP One application as the exclusive method of entry into the United States to seek international protection violates international human rights law.<sup>13</sup>

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<sup>1</sup> Fabiola Cineas, *New York City’s not-so-sudden migrant surge, explained*, Vox (Sep. 26, 2023) [www.vox.com/policy/2023/9/26/23875580/new-york-city-migrant-crisis-influx-eric-adams](http://www.vox.com/policy/2023/9/26/23875580/new-york-city-migrant-crisis-influx-eric-adams).

<sup>2</sup> This attempt to shut down the border to asylum seekers uses the same U.S. immigration laws that convicted felon Donald Trump used to implement the Muslim ban: Immigration and Nationality Act § 212(f) and 215(a). Memorandum from Patrick J. Lechleitner, Deputy Director and Senior Official Performing the Duties of Director, to Daniel A. Bible, Executive Associate Director of Enforcement and Removal Operations, on Implementation Guidance for Noncitizens Described in Presidential Proclamation of June 3, 2024, *Securing the Border*, and Interim Final Rule, *Securing the Border* (June 4, 2024).

<sup>3</sup> Ariana Figueroa, *Executive Order Limiting Asylum at the U.S.-Mexico Border Signed by Biden*, NEBRASKA EXAMINER (June 4, 2024) [nebraskalexaminer.com/2024/06/04/executive-order-limiting-asylum-at-the-u-s-mexico-border-to-be-signed-by-biden/](http://nebraskalexaminer.com/2024/06/04/executive-order-limiting-asylum-at-the-u-s-mexico-border-to-be-signed-by-biden/).

<sup>4</sup> The principle of non-refoulement asserts that refugees should not be returned to a country where they face serious threats to their life or freedom. This is considered customary international law. See Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

<sup>5</sup> JULIE MAO, ET AL., AUTOMATIC DEPORTATION: THE ARTIFICIAL INTELLIGENCE BEHIND THE THE DEPARTMENT OF HOMELAND SECURITY’S IMMIGRATION ENFORCEMENT REGIME (2024). Privacy Impact Assessments (PIAs) are reports U.S. Agencies are required to publish describing potential privacy issues for all new or substantially changed technology that collects, uses, disseminates, or maintains personally identifiable information, and how the agency plans to mitigate issues. *Government Documents Reveal Information about the Development of the CBP One App*, AM. IMMIGR. COUNCIL (Feb. 28, 2023), [www.americanimmigrationcouncil.org/foia/government-documents-reveal-information-about-development-cbp-one-app](http://www.americanimmigrationcouncil.org/foia/government-documents-reveal-information-about-development-cbp-one-app).

<sup>6</sup> *Using AI to Secure the Homeland*, DEPT. OF HOMELAND SECURITY (Feb. 29, 2024), [www.dhs.gov/ai/using-ai-to-secure-the-homeland](http://www.dhs.gov/ai/using-ai-to-secure-the-homeland).

<sup>7</sup> MAO, ET AL., *supra* note 5, at 10.

<sup>8</sup> Saba Mengesha, et al., *The Rise of AI and Technology in Immigration Enforcement*, THE REGULATORY REV. (Mar. 23, 2024), [www.theregreview.org/2024/03/23/the-rise-of-ai-and-technology-in-immigration-enforcement/](http://www.theregreview.org/2024/03/23/the-rise-of-ai-and-technology-in-immigration-enforcement/).

<sup>9</sup> The IHRC learned through informal conversations with immigration practitioners and migrants that the CBP One application allowed them to conduct a risk assessment on continuing the dangerous journey to the border based on the grant or denial of an appointment through the application. See *CBP One™ Appointments Increased to 1,450 Per Day*, U.S. CUSTOMS AND BORDER PROTECTION (June 30, 2023), [www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day](http://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day).

<sup>10</sup> *CBP One: An Overview*, AM. IMMIGR. COUNCIL (June 2, 2023), [www.americanimmigrationcouncil.org/research/cbp-one-overview](http://www.americanimmigrationcouncil.org/research/cbp-one-overview).

<sup>11</sup> AM. IMMIGR. COUNCIL, *CBP ONE: AN OVERVIEW* (2023).

<sup>12</sup> *CBP One: An Overview*, *supra* note 10.

<sup>13</sup> *Mandatory Use of CBP One Application Violates the Right to Seek Asylum*, AMNESTY INT’L (May 7, 2023), [www.amnesty.org/en/documents/amr51/6754/2023/en/](http://www.amnesty.org/en/documents/amr51/6754/2023/en/).

While the application provides for safer processing<sup>14</sup> and broader access to ports of entry, this practice raises serious privacy concerns. Can an agency whose mission is border enforcement be trusted to create reliable software for migrants at risk of persecution, while that same agency expands other forms of surveillance that facilitate migrant exclusion?<sup>15</sup> Through the CBP One application, CBP collects and stores sensitive data to share information amongst government agencies and private entities without migrants' consent, and allows for discrimination through the use of inherently biased facial recognition technology (FRT). This is particularly concerning regarding law enforcement's access to the data collected by the CBP One application. The Department of Homeland Security (DHS) collaborates with local Departments of Motor Vehicles (DMV) and uses DMV databases to locate people for immigration enforcement purposes without migrants' knowledge or consent.<sup>16</sup> The data collected through the CBP One application is at a similar risk as there is little transparency around the use of AI tools and data collection. Further, CBP is digitizing the process of asylum, and the use of the CBP One application represents technological barriers to seeking protection.

This report documents the human rights violations the United States government is committing through the use of the CBP One application. Specifically, this report discusses violations of migrants' rights to privacy, information, freedom from discrimination, and due process through the non-consensual collection, storage, and sharing of biometric data. The use of the CBP One application for certain asylum seekers and humanitarian parolees results in mass surveillance, a severe breach of privacy, and discrimination on the basis of race, color, sex, language, national origin, and immigration status.

## II. Historical Background

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After the September 11, 2001 attacks, the United States significantly overhauled policies to restrict immigration and increase surveillance.<sup>17</sup> In March 2003, Congress passed the Homeland Security Act (HSA), which consolidated twenty-two agencies under the former Immigration and Naturalization Service (INS) into a single umbrella – what is now the Department of Homeland Security (DHS).<sup>18</sup> The three biggest agencies under DHS are the current United States Citizenship and Immigration Services (USCIS), CBP, and Immigration and Customs Enforcement (ICE). The stated goal of HSA was to improve the internal security of the United States through coordination with other federal agencies, state and local government agencies and authorities, the private sector, and other entities.<sup>19</sup> In 2010, Former President Barack Obama commissioned the first-ever Quadrennial Homeland Security Review (QHSR), which served as a report to Congress on the DHS's strategic framework, mission priorities, and a new focus on public-private partnerships to ensure the achievement of each goal.<sup>20</sup> In the QHSR, DHS declared its mission to enhance the “unity of effort” across agencies to “prevent terrorism and enhance security, secure and manage our borders, enforce and administer our immigration laws, safeguard and secure cyberspace, and ensure resilience to disasters.”<sup>21</sup> The pursuit of an enhanced “unity of effort” of agencies marked the beginning of the United States' justification for the sharing of sensitive information across government agencies and their private, multi-national corporate partners, all in the name of national security.<sup>22</sup> DHS implemented Artificial Intelligence (AI) to make decisions from adjudicating immigration benefits, designating people as “public safety threats,” and locating individuals for detention and deportation.<sup>23</sup>

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<sup>14</sup> Migrants can make appointments from Central Mexico and do not have to travel to Northern Mexico until they have a confirmed appointment. This decreases the risk to their personal safety and need to rely on smugglers to enter the U.S. See *CBP One Appointments Increased to 1,450 Per Day*, *supra* note 9.

<sup>15</sup> This is a question posed by Professor Austin Kocher in the article *Glitches in the Digitization of Asylum: How CBP One Turns Migrants' Smartphones into Mobile Borders*. Austin Kocher, *Glitches in the Digitization of Asylum: How CBP One Turns Migrants' Smartphones into Mobile Borders*, 13 *SOCIETIES* 149 (2023).

<sup>16</sup> States enact laws that allow individuals to obtain a driver's license regardless of their immigration status. However, there is no consent mechanism that states the DMV can share that information with federal agencies or even what information is shared. See *How U.S. Immigration & Customs Enforcement and State Motor Vehicle Departments Share Information*, NILC, [www.nilc.org/issues/drivers-licenses/ice-dmvs-share-information/](http://www.nilc.org/issues/drivers-licenses/ice-dmvs-share-information/) (last visited Sept. 17, 2024); See also Drew Harwell, *Utah is one of at least three states where ICE went through driver license records with facial recognition software*, SALT LAKE TRIBUNE (July 7, 2019), [www.sltrib.com/news/2019/07/07/fbi-ice-use-driver/](http://www.sltrib.com/news/2019/07/07/fbi-ice-use-driver/).

<sup>17</sup> The Patriot Act is one of the policies put in place just 45 days after the September 11<sup>th</sup> terrorist attacks. This Act was the first of many changes to surveillance laws that allowed the United States government to monitor communication and internet use under the guise of curbing terrorism. See *Surveillance Under the Patriot Act*, AM. CIV. LIBERTIES UNION, [www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act](http://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act) (last visited Sept. 17, 2024).

<sup>18</sup> See Ava Barbour, *Ready... AIM... FOIA! Survey Freedom Information Act Post 9/11 United States*, BOS. U. PUB. INT. L. J. 203 (2004); see also Mara Rudman, Rudy DeLeon, & Joel Martinez, *Redefining Homeland Security: New Framework for DHS to Meet Today's Challenges*, CTR. FOR AM. PROGRESS (June 16, 2021), [www.americanprogress.org/article/redefining-homeland-security-new-framework-dhs-meet-todays-challenges/](http://www.americanprogress.org/article/redefining-homeland-security-new-framework-dhs-meet-todays-challenges/).

<sup>19</sup> Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2002).

<sup>20</sup> *Quadrennial Homeland Security Review (QHSR)*, U.S. DEPT. OF HOMELAND SECURITY (June 1, 2023), [www.dhs.gov/quadrennial-homeland-security-review](http://www.dhs.gov/quadrennial-homeland-security-review).

<sup>21</sup> U.S. DEPT. OF HOMELAND SECURITY, *QUADRENNIAL HOMELAND SECURITY REVIEW REPORT: A STRATEGIC FRAMEWORK FOR A SECURE HOMELAND* (2010).

<sup>22</sup> The White House, Office of the Press Secretary, *FACT SHEET: Data by the People, for the People — Eight Years of Progress Opening Government Data to Spur Innovation, Opportunity, & Economic Growth*, [whitehouse.gov](http://whitehouse.gov) (2016), [obamawhitehouse.archives.gov/the-press-office/2016/09/28/fact-sheet-data-people-people-eight-years-progress-opening-government](http://obamawhitehouse.archives.gov/the-press-office/2016/09/28/fact-sheet-data-people-people-eight-years-progress-opening-government).

<sup>23</sup> MAO, ET AL., *supra* note 5.

To facilitate the goals of the HSA, DHS launched the 2011 Federal Data Center Consolidation Initiative, in which it began contracting with private corporations to store consolidated data.<sup>24</sup> The purported goal for outsourcing data consolidation was to “foster more productive collaboration, facilitate efficient efforts and offer ease of data sharing to aid in the protection of the nation’s resident assets.”<sup>25</sup> This was the first step DHS took towards facilitating information sharing amongst agencies, using third-party corporations to achieve its goal. In 2015, the Southern Border and Approaches Campaign (SBAC) brought together the heads of USCIS, CBP, ICE, and the U.S. Coast Guard.<sup>26</sup> The SBAC aimed to enhance coordination among the agencies responsible for border security and immigration enforcement. At this time, CBP and ICE began using the TECS (not an acronym) system,<sup>27</sup> a system owned by CBP that stores biographic information from other sub-systems within DHS.<sup>28</sup> Because TECS solely relied on data collected by federal agents or provided by state or local agencies, CBP and ICE were limited in the information available to them due to sanctuary laws. In this context, “sanctuary law” refers to state or local policies limiting federal agencies and law enforcement from sharing specific information on immigrants with the federal government.<sup>29</sup> As such, ICE expanded its data resources by contracting with known data aggregators such as Thomson Reuters in 2015 and RELX in 2020.<sup>30</sup> Thomson Reuters is known for maintaining Westlaw, the largest legal database in the world. RELX is the parent company of the second-largest legal database, LexisNexis. These data aggregation companies purchase data from data brokers who collect information from internet users and then sell access to the aggregated data to interested parties, like ICE.<sup>31</sup> By contracting with data aggregators, ICE established an automated TECS system capable of obtaining sensitive information about individuals, including migrants, and effectively circumventing sanctuary laws.

In 2017, former President Donald Trump signed Executive Order 13780, “Protecting the Nation From Foreign Terrorist Entry Into the United States,” requiring DHS to expedite the completion and implementation of a biometric entry/exit tracking system.<sup>32</sup> CBP contracted with Atlanta’s Hartsfield-Jackson Airport to run the Departure Information System Test (DIST) to test a new system called the Departure Verification System (DVS).<sup>33</sup> As a part of the test, CBP contracted with Delta Airlines to prepopulate a database with photos of travelers on the flight to conduct a touchless identity verification process.<sup>34</sup> The Delta agent was required to manually match each passenger to the photo that was loaded into the system.<sup>35</sup> This match was then checked against the DIST’s match rate to confirm accuracy. This was CBP’s first full test to utilize facial recognition in an effort to create passenger automated entry/exit records. After deeming the test a success, CBP launched the Traveler Verification Service (TVS). The TVS is a cloud-matching service in which the biometric and biographic profiles are combined into one unique profile.<sup>36</sup> Once the live-scan is completed, and a match is made in the Virtual Private Cloud (VPC), notifications are sent to TECS and the Automated Targeting System (ATS) Unified Passenger Module (UPAX), known collectively as ATS-UPAX, for the CBP Officer’s use once the traveler arrives at their station.<sup>37</sup>

There was an increase in restrictive immigration policies that blocked certain migrants intending to enter the United States throughout the Trump Administration from 2017 to 2021. Notably, DHS Title 42 was a public health order passed by the Trump Administration in March 2020 that effectively blocked access to asylum.<sup>38</sup> This order enabled the U.S. government to remove migrants at the U.S.-Mexico border to Mexico or their countries of origin swiftly, citing an effort to halt the spread of COVID-19.<sup>39</sup> Title 42 was officially terminated by the Biden Administration on May 11, 2023, when COVID-19 was no longer a public health emergency.<sup>40</sup> However, it was effectively replaced by the Circumvention of Lawful

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<sup>24</sup> U.S. DEPT. OF HOMELAND SECURITY, FEDERAL DATA CENTER CONSOLIDATION INITIATIVE 2011 DATA CENTER CONSOLIDATION PLAN & PROGRESS REPORT 7 (2011).

<sup>25</sup> *Id.* at 4.

<sup>26</sup> U.S. DEPT. OF HOMELAND SECURITY, FACT SHEET (Jan. 13, 2016).

<sup>27</sup> “The TECS Platform facilitates information sharing among federal, state, local, and tribal government agencies, as well as with international governments and commercial organizations.” U.S. DEPT. OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE TECS SYSTEM: PLATFORM (2016).

<sup>28</sup> *Id.*

<sup>29</sup> See AM. IMMIGR. COUNCIL, SANCTUARY POLICIES: AN OVERVIEW (2020).

<sup>30</sup> Chris Mills Rodrigo, *Majority of independent shareholders vote to review Thomson Reuters’ ICE contracts*, THE HILL (June 9, 2021), [thehill.com/policy/technology/557591-majority-of-independent-shareholders-vote-to-review-thomson-reuters-ice/](https://thehill.com/policy/technology/557591-majority-of-independent-shareholders-vote-to-review-thomson-reuters-ice/).

<sup>31</sup> Sarah Lamdan, *When Westlaw Fuels Ice Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255 (2019).

<sup>32</sup> Exec. Order No. 13780, 82 FR 13209 (2017).

<sup>33</sup> The test itself was called the Departure Information System Test (DIST). U.S. DEPT. OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT UPDATE FOR THE TRAVELER VERIFICATION SERVICE (TVS) (2017).

<sup>34</sup> This began in February 2021. AM. IMMIGR. COUNCIL, *supra* note 29.

<sup>35</sup> U.S. DEPT. OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE TRAVELER VERIFICATION SERVICE 15 (2018).

<sup>36</sup> *TSA PreCheck®: Touchless Identity Solution*, TSA, [www.tsa.gov/biometrics-technology/evaluating-facial-identification-technology#:~:text=TSA%20is%20using%20facial%20identification,it%20against%20a%20gallery%20of](https://www.tsa.gov/biometrics-technology/evaluating-facial-identification-technology#:~:text=TSA%20is%20using%20facial%20identification,it%20against%20a%20gallery%20of) (last visited Sept. 17, 2024).

<sup>37</sup> U.S. DEPT. OF HOMELAND SECURITY, *supra* note 35.

<sup>38</sup> Colleen Long, *Title 42 has ended. Here’s what it did, and how US immigration policy is changing*, AP NEWS (May 12, 2023), [apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbefb798d;\\_r=0](https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbefb798d;_r=0); *What Does the End of Title 42 Mean for U.S. Migration Policy?*, CARNEGIE CORP. OF N.Y. (June 5, 2023), [www.carnegie.org/our-work/article/what-does-end-title-42-mean-us-migration-policy/#:~:text=Title%2042%20was%20a%20public,to%20their%20countries%20of%20origin](https://www.carnegie.org/our-work/article/what-does-end-title-42-mean-us-migration-policy/#:~:text=Title%2042%20was%20a%20public,to%20their%20countries%20of%20origin).

<sup>39</sup> Long, *supra* note 38.

<sup>40</sup> *Id.*

Pathways (CLP) final rule, also informally known as “the asylum transit ban.”<sup>41</sup> The CLP states that, with limited exceptions, individuals will be presumed ineligible for asylum unless they entered the United States through an official port of entry after attending a scheduled appointment at that entry point through CBP One.<sup>42</sup> The CLP provides that individuals seeking asylum may be ineligible to apply unless they made an effort to seek asylum in that third country first.<sup>43</sup> The CLP also requires that asylum seekers at the southern border must use the CBP One application to schedule an appointment at an official port of entry to initiate the process of filing an asylum claim.<sup>44</sup> Meanwhile, DHS continues to expand its system of surveillance through these restrictive policies that force migrants to use invasive technology like the CBP application and rely on AI tools to streamline processing.

The original uses of the CBP One application were to provide travelers with access to entry/exit records, such as I-94 forms, and traveler arrival records (issued to those admitted in the U.S.), in addition to assisting in scheduling inspection appointments for perishables.<sup>45</sup> The CBP One application’s original use did not include the plan to process individuals at the port of entry.<sup>46</sup> By February 19, 2021, DHS published a Privacy Impact Assessment (PIA)<sup>47</sup> for the CBP One application, which included a description of how to use the application to help process travelers enrolled in the Migrant Protection Protocols (MPP).<sup>48</sup> A month later, the use of the application was expanded to processing individuals seeking exemptions from Title 42.<sup>49</sup> The use of the CBP One application further expanded after CLP went into effect, presuming that individuals would be ineligible for asylum unless they entered the United States after attending a scheduled appointment through the CBP One application at an official point of entry.<sup>50</sup>

Since January 2023, CBP has encouraged individuals to submit their information in advance and schedule appointments at ports of entry.<sup>51</sup> However, CBP has failed to provide alternative methods for those unable to access the application.<sup>52</sup> The CBP One application became the only way for land port-of-entry asylum seekers and intending CHNV parolees to submit their biometric information to CBP while seeking to secure admission into the United States.<sup>53</sup> CBP has not explained to the public how an individual may opt out of using the CBP One application.<sup>54</sup> Moreover, CBP has not clarified whether noncitizens who use the CBP One application will be given preference at ports of entry.<sup>55</sup>

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<sup>41</sup> *Featured Issue: Border Processing and Asylum*, AM. ASS’N OF IMMIGR. ATT’YS (Mar. 14, 2024), [www.aila.org/library/featured-issue-border-processing-and-asylum](http://www.aila.org/library/featured-issue-border-processing-and-asylum).

<sup>42</sup> The presumption of ineligibility is rebuttable when the person “[p]resented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” 8 C.F.R. 208.33(a)(2)(B).

<sup>43</sup> “Asylum seekers” refers to individuals seeking entry into the United States by foot through the Mexico border. This definition assumes that asylum seekers who have passed through a country other than their nation of origin have also made an effort to seek asylum in that third country and have received a definitive denial in accordance with 8 C.F.R. 208.33(a)(2)(ii)(C). See *Circumvention of Lawful Pathways*, 88 Fed. Reg. 94, 31314, 31316. (May 16, 2023) (codified at 8 C.F.R. pt. 208, 1003, and 1208).

<sup>44</sup> *Id.* at 31317.

<sup>45</sup> *Government Documents Reveal Information about the development of the CBP One App*, *supra* note 5; see also *CBP One: An Overview*, *supra* note 10.

<sup>46</sup> U.S. CUSTOMS AND BORDER PROTECTION, *CBP ONE 5* (2020).

<sup>47</sup> U.S. DEPT. OF HOMELAND SECURITY, *PRIVACY IMPACT STATEMENT FOR THE CBP ONE™ MOBILE APPLICATION* (2021).

<sup>48</sup> MPP, also known as the “Remain in Mexico Program,” forced certain individuals seeking asylum in the United States to wait in Mexico for the duration of their immigration proceedings. The Biden Administration ended this program on June 1, 2021.

<sup>49</sup> Title 42 was a public health order passed by the Trump administration in March 2020 which allowed the United States government to remove migrants at the southern border to Mexico or their countries of origin citing an effort against the COVID-19 infection. See *What Does the End of Title 42 Mean for U.S. Migration Policy?*, *supra* note 38; *Government Documents Reveal Information about the development of the CBP One App*, *supra* note 5.

<sup>50</sup> 8 C.F.R. 208.33(a)(2)(ii)(B).

<sup>51</sup> *CBP One Mobile Application*, U.S. CUSTOMS AND BORDER PROTECTION (Mar. 4, 2024), [www.cbp.gov/about/mobile-apps-directory/cbpone](http://www.cbp.gov/about/mobile-apps-directory/cbpone).

<sup>52</sup> Individuals experience difficulty in accessing appointments through the application where there are language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles. *Government Documents Reveal Information about the development of the CBP One App*, *supra* note 5.

<sup>53</sup> See *CBP One: An Overview*, *supra* note 10; *Government Documents Reveal Information About the Development of the CBP One App*, *supra* note 5.

<sup>54</sup> Asylum seekers at the southern border are required to schedule an appointment at a port of entry using the CBP One application. The Circumvention of Lawful Pathways Rule permits asylum seekers to seek protection without a scheduled appointment through the app. However, asylum seekers bear the burden of proving their inability to use the app, which poses a significant challenge. See Monette Zard, *Comment on the Circumvention of Lawful Pathways*, COLUMBIA UNIVERSITY MAILMAN SCHOOL OF PUBLIC HEALTH (Mar. 27, 2023), [www.publichealth.columbia.edu/research/programs/program-forced-migration-health/voices/march-2023-asylum-rule](http://www.publichealth.columbia.edu/research/programs/program-forced-migration-health/voices/march-2023-asylum-rule).

<sup>55</sup> *Government Documents Reveal Information about the development of the CBP One App*, *supra* note 5.



### III. The United States' Requirement for Migrants to Use the CBP One Application Violates Their Right to Privacy

The United States is a party to the International Covenant on Civil and Political Rights (ICCPR) and is obligated to protect the human right to privacy of all individuals within its power or control, including asylum seekers and refugees.<sup>56</sup> The enjoyment of rights under the Covenant must be available to “asylum seekers, refugees, migrant workers, and other persons, regardless of nationality or statelessness.”<sup>57</sup> Article 17 of the ICCPR ensures “no one shall be subjected to arbitrary or unlawful interference with his privacy...”<sup>58</sup> These two rights apply to individuals across all borders regardless of immigration status within the country where they are physically present.<sup>59</sup> The United States, and thus its agency CBP, has the obligation to ensure that privacy rights are protected.<sup>60</sup> The technology used by CBP unlawfully<sup>61</sup> and arbitrarily<sup>62</sup> interferes with the privacy provision under the ICCPR. Surveillance technology that interferes with the privacy rights of individuals must satisfy a test that takes three factors into consideration: (1) legality, (2) necessity and proportionality, and (3) legitimacy.<sup>63</sup> Under this three-part test, any surveillance technology interfering with privacy rights must be legally justified, the use of surveillance technology must be necessary and not disproportionately impact individuals, and there must be a legitimate reason for needing and using surveillance technology.<sup>64</sup> The CBP One application fails to satisfy this test and, as discussed below, it is an unlawful and arbitrary interference of privacy. As such, its required use to access immigration protections is a violation of migrants’ privacy rights. Each of these three factors will be discussed below.

#### A. CBP One Application Causes Unlawful Privacy Interference

The CBP One application’s collection, distribution, and use of data fails to have explicit and accessible legal provisions that meet the standard for lawfully interfering with users’ privacy rights. The United States must use publicly accessible laws<sup>65</sup> that provide information to ensure the public is meaningfully informed, in order to authorize any privacy interference.<sup>66</sup> The State has the burden to ensure data collection, access, and use are tailored to specific legitimate aims.<sup>67</sup> Any action to limit privacy must be authorized by a publicly accessible law that complies with the United States domestic law<sup>68</sup> and international human rights law.<sup>69</sup> The law must be clearly written and available so that individuals can understand their rights.<sup>70</sup> While CBP states that the information is shared voluntarily, migrants without documents sufficient for lawful admission to the United States are required to use the CBP One application to register and request an appointment to then

<sup>56</sup> The International Convention on Civil and Political Rights [hereinafter ICCPR] art. 17, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

<sup>57</sup> See Glossary for the definition of each category as used in the context of this report. See also Off. of the High Comm’r for Hum. Rts., *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, (Apr. 11, 1986).

<sup>58</sup> ICCPR, *supra* note 56, at art. 17.

<sup>59</sup> Off. of the High Comm’r for Hum. Rts., *CCPR General Comment No. 30: Reporting Obligations of State Parties under Article 40 of the Covenant*, (Sept. 18, 2002). See also *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981) (the Committee reasoned that “it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”).

<sup>60</sup> Actions of individuals or groups, whether its official State Agents or companies, are an act of a State when the acts are carried out under the supervision or control of the United States. G.A. Res. 56/84, art. 8 (Jan. 28, 2002).

<sup>61</sup> “Unlawful” refers to actions that are not in accordance with the law and that fail to comply with legal standards and procedures established by the states. See Off. of the High Comm’r for Hum. Rts., *CCPR General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, ¶ 3 (Apr. 8, 1988)

<sup>62</sup> “Arbitrary” implies that actions are unreasonable, unjust, or unpredictable, even if the action is technically legal. See *Id.* ¶ 4.

<sup>63</sup> It is the long-standing practice of the Human Rights Committee and other instruments of the UN Human Rights Commission, supports the interpretation that Article 17 requires any interference with the right to privacy to be (i) prescribed by the law, (ii) necessary and proportionate, and (iii) to achieve a legitimate aim. See U.N. Human Rights Council, *The Right to Privacy in the Digital Age*, ¶¶ 21-23, U.N. Doc. A/HRC/27/37 (June 30, 2014) [hereinafter *The Right to Privacy in the Digital Age*]; Szabo and Vissy v. Hungary, App. No. 37138/14, ¶ 4 (June 6, 2016); *Ooo Flavus and Others v. Russia*, App. Nos. 12468/15, 23489/15, and 19074/16, (Nov. 16, 2020).

<sup>64</sup> *Ricardo Canese v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 73 (Aug. 31, 2004).

<sup>65</sup> Accessibility of public laws requires precise language to give framework so those affected know whether surveillance is clear and foreseeable from the law. See dissent in *Lopez Ribalda and Others v. Spain*, (Judgment) App. Nos. 1874/13 & 8567/13, ¶ 4 (Oct. 17, 2019).

<sup>66</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 28; see also U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 22 (April 23, 2014); *Malone v. the United Kingdom*, (Judgment) App. Nos. 8691/79, ¶¶ 67, 68 Eur. Ct H.R. (Apr. 26, 1985); *Weber and Saravia v. Germany*, App. Nos. 54934/00, 29 Eur. Ct H.R. (June 29, 2006) (discussing the minimum safeguards that should be set out in statute or law).

<sup>67</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 28; see also U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 22 (Apr. 23, 2014); *Malone v. the United Kingdom*, (Judgment) App. Nos. 8691/79, ¶¶ 67, 68 Eur. Ct H.R. (Apr. 26, 1985); *Weber and Saravia v. Germany*, App. Nos. 54934/00, 29 Eur. Ct H.R. (June 29, 2006) (discussing the minimum safeguards that should be set out in statute or law).

<sup>68</sup> This report only focuses on international human rights law. The discussion on the legality of the CBP One application within United States domestic law is outside the scope of this report.

<sup>69</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 28; see also *Madhewoo v. Maruitius*, Communication No. 3163/2018, U.N. Doc. CCPR/C/131/D/3163/2018, ¶ 7.3 (Mar. 24, 2021) (discussing interference authorized by States must be on basis of law and gathering/holding personal information in data banks must be regulated by law).

<sup>70</sup> Additionally, a guide should be provided to those who apply the law to limit the scope of discretion afforded to authorities and prevent arbitrary application. *CCPR General Comment No. 16*, *supra* note 61, ¶ 3.

seek entry.<sup>71</sup> Users should be aware of the circumstances under which their privacy may be lawfully compromised.<sup>72</sup> The law must outline the precise circumstances where interference is allowed, provide authorizing procedures, articulate the categories of persons who may be surveilled, provide limits on duration, outline procedures for data post-collection, and have effective safeguards against abuse.<sup>73</sup>

CBP has failed to keep the public adequately informed as to how the application would be and is presently being used, its functions, what is required of users, and how the data information collected is stored and used.<sup>74</sup> The Privacy Impact Assessments (PIA) provided by CBP and DHS contain limited details about the technology it uses to collect, disseminate, or maintain personally identifiable information.<sup>75</sup> Further, CBP does not explain the photo submission requirement through the application and DHS does not mention this requirement in its assessments.<sup>76</sup> CBP fails to be transparent about its use of FRT and “facial comparison technology.”<sup>77</sup> Users may be unable to understand how their information is used due to obstacles, including language and literacy barriers.<sup>78</sup> CBP does not address the potential issues that arise when users submit photos through the application, and does not provide viable alternatives for those who cannot use it.<sup>79</sup> The right to privacy is threatened without accessible and precise federal privacy protection laws addressing migrants’ data.<sup>80</sup>

United States agencies like ICE and CBP have paid multiple third-party companies to collect and share data of travelers without user privacy safeguards.<sup>81</sup> The State is responsible for implementing adequate safeguards as part of the legality test to lawfully interfere with privacy rights. Information entered into the CBP One application, particularly photos that are then sent to the TVS, is stored in government databases for up to 75 years.<sup>82</sup> The current procedure permits photos, names, family relations, and other personal identifying information collected by the agency to be stored and shared with other databases operated by DHS.<sup>83</sup> This is particularly concerning when this information can be used to surveil individuals or use the information for other law enforcement purposes.<sup>84</sup> Law enforcement agencies already have a complex network of relationships and systems of communication that facilitate data sharing with no transparency with the public and/or directly impacted persons.<sup>85</sup> Utah, Vermont, and Washington allow undocumented immigrants to obtain driver’s licenses. ICE agents may use the DMV databases to run facial recognition searches.<sup>86</sup> In Utah, the Federal Bureau of Investigation (FBI) and ICE agents logged more than 1,000 facial recognition searches between 2015 and 2017, which were searches non-citizens did not consent to be subject to by obtaining a driver’s license.<sup>87</sup> There is a pattern of practice in taking advantage of AI technology with few guidelines and protections for people.

Under Article 17 of the ICCPR, the United States is obligated to regulate practices which may violate privacy and extend human rights protections to those affected by privacy interferences.<sup>88</sup> The United States fails to have clear, accessible, and

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<sup>71</sup> Using the CBP One application is required for noncitizens to request entry at a land port without prior authorization. *CBP One™ Mobile Application*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Sept. 17, 2024), [www.cbp.gov/about/mobile-apps-directory/cbpone](http://www.cbp.gov/about/mobile-apps-directory/cbpone).

<sup>72</sup> For a norm to be characterized as a law, it must be formulated with sufficient precision to enable an individual to regulate their conduct accordingly and it must be made accessible to the public. Off. of the High Comm’r for Hum. Rts., *CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression*, ¶ 25 (Sept. 12, 2011).

<sup>73</sup> Such safeguards are meant to prevent abusive or arbitrary application of the law by State agencies. *Breyer v. Germany*, (Judgment) App. No. 50001/12, ¶19 (Sept. 7, 2020); *Wieser and Bicos Beteiligungen GmbH v. Austria*, (Judgment), App. No 74336/01, ¶ 66 (Jan. 16, 2008).

<sup>74</sup> *Government Documents Reveal Information about the Development of the CBP One App*, *supra* note 5.

<sup>75</sup> Privacy Impact Assessments (PIAs) are reports U.S. Agencies are required to publish describing potential privacy issues for all new or substantially changed technology that collects, uses, disseminates, or maintains personally identifiable information, and how the agency plans to mitigate issues. *Government Documents Reveal Information about the Development of the CBP One App*, *supra* note 5.

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

<sup>77</sup> CBP One Application’s terms and conditions, and privacy policy are missing alternatives to the application and lack transparency in how FRT is used. *Id.*

<sup>78</sup> Even though migrants have access to smartphones, it is not practical for vulnerable populations on the move. Many gender-based violence survivors leave their phones because their abusers could track them. Women who have suffered gender-based violence may also be housed in maximum-security shelters that do not allow phones. See also *CBP One: An Overview*, *supra* note 10.

<sup>79</sup> *Government Documents Reveal Information about the development of the CBP One App*, *supra* note 5.

<sup>80</sup> Due to the lack of transparency in existing law on CBP’s ability to contract with third-party companies to share migrants’ data collected from the CBP One application, the UIC Law IHRC submitted sixteen Freedom of Information Act (FOIA) requests for government contracts with third-party companies pertaining to information sharing and received only one responsive record in total.; see also GEORGETOWN LAW CENTER ON PRIVACY & TECHNOLOGY, *SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE DURING ITS PERIODIC REVIEW OF THE UNITED STATES OF AMERICA* (Sept. 12, 2023).

<sup>81</sup> See Ana Temu Otting, *How ICE Sidesteps the Law to Find and Deport People*, AM. CIV. LIBERTIES UNION (June 9, 2022), <https://www.aclu.org/news/immigrants-rights/how-ice-sidesteps-the-law-to-find-and-deport-people>.

<sup>82</sup> PIAs are published by DHS. “The PIA confirms some of this information, and photographs in particular, may be stored in government databases for up to 75 years...DHS stated that CBP will...store this geolocation information for a period of one year.” *CBP One: An Overview*, *supra* note 10; see also U.S. DEPT. OF HOMELAND SECURITY, *supra* note 35.

<sup>83</sup> Erica Hellerstein, *When your body becomes the border*, CODA (June 7, 2023), [www.codastory.com/authoritarian-tech/us-immigration-surveillance/](http://www.codastory.com/authoritarian-tech/us-immigration-surveillance/).

<sup>84</sup> DHS has failed to alleviate concerns that other law enforcement agencies, including local police departments and sheriffs’ offices that lack policies about limiting the use of such data, would be able to access migrant data. *CBP One: An Overview*, *supra* note 10.

<sup>85</sup> Harwell, *supra* note 16.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> The United States has this obligation to affected individuals regardless of location. *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 34.

precise legal provisions that meet the legality standard for interfering with users' privacy rights in data collection through the CBP One application.

## B. The CBP One Application's Privacy Interference is Overly Intrusive

The privacy interference involved in the use and collection of data through the CBP One application is overly intrusive and collects unnecessary data. An interference of the right to privacy by the State must be strictly necessary.<sup>89</sup> Whether privacy interferences are considered overly intrusive is context-dependent.<sup>90</sup> For privacy interferences to pass the three-part test, the State must use the least intrusive means to achieve the goal.<sup>91</sup> The State must balance an individual's privacy interests and a public interest in the interference, showing a rational connection between the interference and the State's aim.<sup>92</sup> In sharing access to bulk data,<sup>93</sup> like that collected by CBP, an agency must show the necessity of the transfer<sup>94</sup> in a statement of precision and detail.<sup>95</sup> Bulk interception must pass a standard similar to reasonable suspicion to be authorized for national security.<sup>96</sup> The CBP One application collects personal identifying information (PII)<sup>97</sup> to streamline the processing of migrants, enhance security at borders, and improve the efficiency of CBP operations.<sup>98</sup>

As a routine practice, CBP shares data with other federal, state, local, and international law enforcement agencies who have the authority to receive the data.<sup>99</sup> The data collected includes biographical information, biometric data, geolocation data, contact information, travel information, and device information.<sup>100</sup> CBP uses the information gathered from the CBP One application to assess security risk as part of their screening process of migrants entering through the southern border. For example, the application captures GPS locations of users and stores the information for a one-year period.<sup>101</sup> Location data reveals information about the number of users in a location, their movements, daily routine, and can expose otherwise unknown associations between users and locations.<sup>102</sup> DHS and CBP have failed to alleviate concerns that other law enforcement agencies would be able to access migrant data collected through the CBP One application.<sup>103</sup> Further, ICE has contracts with third-party data collection companies, including, but not limited to, Thomson Reuters,<sup>104</sup> RELX,<sup>105</sup> and Palantir Technologies.<sup>106</sup> Thomson Reuters acquired CLEAR in 2015, the public record database that is in nearly every major United States airport.<sup>107</sup> United States contracting with third parties<sup>108</sup> to manage CBP One application data and sharing among agencies effectively circumvents international legal standards and perpetually violates migrants' rights to privacy.<sup>109</sup>

CBP does not describe the need for such data with the sufficient precision required to justify such an intrusion into an individual's privacy. Instead, CBP aggregates as much data as possible, so DHS may use this data infrastructure to carry

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<sup>89</sup> *Kruk v. Belarus*, Communication No. 1996/2010, U.N. Doc CCPR/C/115/D/1996/2010, ¶ 7.4 (Oct. 29, 2015) (constant close supervision by enforcement bodies violated Article 17 of the Covenant); *Lopez Ribalda and Others v. Spain*, (Judgment), App. Nos. 1874/13 & 8567/13, ¶ 80 (Oct. 17, 2019) (privacy right was violated when court failed to strike balance between applicants' right to respect for their private life and the other interests at stake); *Madhewoo v. Maritius*, Communication No. 3163/2018, U.N. Doc CCPR/C/120/D/2147/2012, ¶ 7.5 (Mar. 24, 2021) (discussing the need to balance protection of personal data with the social need to preventing identity fraud); *Amanda Jane Mellet v. Ireland*, Communication No. 2324/2013, U.N. Doc CCPR/C/116/D/2324/2013, ¶ 4.14 (Mar. 31, 2016) (discussing whether measures struck a fair balance between rights and freedoms of individual and general interest); see also *Skoberne v. Slovenia*, (Judgment), App No. 19920/20, ¶ 136 (Feb. 15, 2024).

<sup>90</sup> *Szabo and Vissy v. Hungary*, (Judgment), App. Nos. 37138/14, ¶ 6 (June 6, 2016) (stating measures may be necessary and proportionate for one aim but not another).

<sup>91</sup> *Id.*

<sup>92</sup> AM. CIV. LIBERTIES UNION, PRIVACY RIGHTS IN THE DIGITAL AGE ¶ 27 (Mar. 2014).

<sup>93</sup> "Bulk data" is large quantities of information which is often transferred without effort to exclude information not relevant to the need of the recipients. See U.S. DEPT. OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE DATA SERVICE BRANCH 7 (2020).

<sup>94</sup> *ClientEarth and Pesticide Action Network Europe (PAN Europe) v. European Food Safety Authority*, Judgment of the General Court Second Chamber, ¶ 47 (June 16, 2015); see also *Philip Morris Ltd. v. European Commission*, Judgment of the General Court Eighth Chamber, ¶ 28 (Sept. 15, 2016).

<sup>95</sup> *Technion-Israel Institute of Tech. and Technion Research & Development Foundation Ltd. v. European Commission*, Judgment of the General Court First Chamber, ¶ 48 (May 12, 2015).

<sup>96</sup> See *Big Brother Watch and Others v. The United Kingdom*, (Judgment), App. Nos. 58170/13 & 62322/14 & 24960/15, ¶ 20 (May 25, 2021).

<sup>97</sup> Personal identifiable information (PII) is any data that can identify a specific person, including name, date of birth, characteristics, country of origin, biometric identifiers, address, phone numbers, medical records, etc.

<sup>98</sup> *CPB One™ Mobile Application*, *supra* note 71.

<sup>99</sup> Under the Principle of Use Limitation, CBP may share information collected through CBP One both inside and outside of DHS consistent with applicable law and policy. U.S. DEPT. OF HOMELAND SECURITY, *supra* note 47.

<sup>100</sup> *CPB One™ Mobile Application*, *supra* note 71.

<sup>101</sup> *CPB One: An Overview*, *supra* note 10.

<sup>102</sup> *Id.* The National Security Agency issued guidance in 2020 that cautioned against applications that could collect, aggregate, and transmit information that exposes a user's location. *Id.*

<sup>103</sup> *CPB One: An Overview*, *supra* note 10.

<sup>104</sup> *Rodrigo*, *supra* note 30.

<sup>105</sup> *Lamdan*, *supra* note 31, at 278.

<sup>106</sup> Rosalie Chan, *Big Data Company Palantir Renews Its Controversial Contract With ICE That Is Worth Nearly \$50 Million*, BUSINESS INSIDER (Aug. 21, 2019), [www.businessinsider.com/palantir-renews-ice-government-contract-gotham-amid-protests-2019-8](http://www.businessinsider.com/palantir-renews-ice-government-contract-gotham-amid-protests-2019-8).

<sup>107</sup> *Lamdan*, *supra* note 31, at 278.

<sup>108</sup> *Id.* See also Chan, *supra* note 106; *Rodrigo*, *supra* note 30.

<sup>109</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 42. (FRT tool made by company Clearview AI was built by scraping billions of photos of people from the internet, a massive intrusion of privacy rights, yet has been used by thousands of law enforcement agencies).

out any goal related loosely to national security at any time in the future.<sup>110</sup> The access to databases developed by third parties and pervasive data sharing among DHS agencies violates migrants' right to privacy because different agencies have distinct aims for data collection and retention.<sup>111</sup> This data sharing system between DHS and its subagencies leaves migrants subject to nonconsensual mass surveillance after they use the CBP One application – an exceedingly intrusive practice.<sup>112</sup> The United States government already uses LexisNexis Risk Solutions to access comprehensive dossiers with identifying information, court data, and details of relatives, associates, and social media usage of U.S. residents, citizens, and non-citizens.<sup>113</sup> Migrants can experience a chilling effect due to the invasive amount of data collected and used by law enforcement. Interactions of a non-citizen with a government agency, utility company, social media platform, or even their geo-location could be used to identify, detain, and deport them.<sup>114</sup> The privacy interference does not meet the baseline to be deemed necessary and proportionate, as the data collected could be accessed for other law enforcement purposes.<sup>115</sup>

Despite being obligated to protect migrants' rights to privacy under Article 17 of the ICCPR, the United States continues to use intrusive practices and fails to be transparent about how the privacy interferences on migrants are proportionate.

### C. The Implementation and Use of the CBP One Application Lacks Legitimacy to Justify Privacy Interference

The use and implementation of the CBP One application in the context of data collection lacks a legitimate reason to infringe on the privacy rights of non-U.S. citizens seeking entry into or being physically present in the United States.<sup>116</sup> The U.N. High Commissioner for Human Rights has stated that national security, among other societal values, can constitute a legitimate State aim for restricting privacy.<sup>117</sup> However, this aim must be stated before the State carries out surveillance. In the age of data-driven technology, States have a heightened power and responsibility to establish legitimate aims to protect the right to privacy before carrying out surveillance or authorizing an entity to carry out surveillance.<sup>118</sup> The United States is required to identify the least intrusive method,<sup>119</sup> after considering other methods,<sup>120</sup> focused on specific locations and times to address a legitimate State aim.<sup>121</sup> Further, the purpose of the data collection must have a process and procedure, even in cases where national security concerns are implicated.<sup>122</sup>

The CBP One application collects personal identifying information to streamline the processing of migrants, enhance security at borders, and improve the efficiency of CBP operations.<sup>123</sup> Migrants requesting entry at the U.S.-Mexico border are most vulnerable to data collection through the CBP One application because they are required to use it to request an appointment for lawful admission, particularly asylum-seekers.<sup>124</sup> The general public knows little about the various surveillance practices and CBP has failed to release reliable information on the kinds of systems it uses.<sup>125</sup> Most CBP One application users are unaware of their options regarding their consent to share biometric information that is required when

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<sup>110</sup> UC IRVINE LAW INTERNATIONAL JUSTICE CLINIC & GEORGETOWN LAW CENTER ON PRIVACY & TECHNOLOGY, SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE DURING ITS PERIODIC REVIEW OF THE UNITED STATES OF AMERICA, 14 (2023).

<sup>111</sup> The wide collection of photos and biometrics causes concerns that CBP, other DHS components, and even local law enforcement could use the information for other enforcement purposes. Molly O'Toole, *Biden Has Quietly Deployed an App for Asylum Seekers. Privacy Experts are Worried*, L.A. TIMES (June 6, 2021), [www.latimes.com/politics/story/2021-06-04/asylum-bidens-got-an-app-for-that-with-privacy-risks-and-surveillance-beyond-border](http://www.latimes.com/politics/story/2021-06-04/asylum-bidens-got-an-app-for-that-with-privacy-risks-and-surveillance-beyond-border). See also *CBP One: An Overview*, *supra* note 10.

<sup>112</sup> Mass surveillance under international law refers to the large-scale monitoring and collection of individuals' communications and personal data by government entities or other actors. This practice involves extensive and systematic data collection without specific targeting, often raising significant concerns about privacy, human rights, and civil liberties. See *Mass Surveillance*, PRIVACY INTERNATIONAL, [privacyinternational.org/learn/mass-surveillance](http://privacyinternational.org/learn/mass-surveillance) (last visited Sept. 17, 2024); Ashley Gorski & Patrick Toomey, *The Privacy Lesson of 9/11: Mass Surveillance is Not the Way Forward*, AM. CIV. LIBERTIES UNION (Sept. 7, 2021), [www.aclu.org/news/national-security/the-privacy-lesson-of-9-11-mass-surveillance-is-not-the-way-forward](http://www.aclu.org/news/national-security/the-privacy-lesson-of-9-11-mass-surveillance-is-not-the-way-forward); *Big Brother Watch and Others v. The United Kingdom*, (Judgment), App. Nos. 58170/13 & 62322/14 & 24960/15, ¶ 20 (May 25, 2021); ICCPR, *supra* note 56, at art. 17.

<sup>113</sup> Maurizio Guerrero, *Surveillance capitalism has taken over immigration enforcement—stifling dissent and sowing fear for profit*, PRISM (Jan. 9, 2024), [prismreports.org/2024/01/09/surveillance-capitalism-taken-over-immigration-enforcement/](http://prismreports.org/2024/01/09/surveillance-capitalism-taken-over-immigration-enforcement/).

<sup>114</sup> *Id.*

<sup>115</sup> The wide collection of photos and biometrics causes concerns that CBP, other DHS components, and even local law enforcement could use the information for other enforcement purposes. O'Toole, *supra* note 111. See also *CBP One: An Overview*, *supra* note 10.

<sup>116</sup> For the context of this report, non-citizens refer to migrants, asylum seekers, parolees, refugees, and other persons, regardless of nationality or statelessness. See Glossary.

<sup>117</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 50.

<sup>118</sup> *Id.* ¶ 38.

<sup>119</sup> *Amanda Jane Mellet v. Ireland*, Communication No. 2324/2013, U.N. Doc CCPR/C/116/D/2324/2013, ¶ 4.14 (Mar. 31, 2016) (discussing whether the measures were proportionate); see also *Lopez Ribalda and Others v. Spain*, (Judgment), App. Nos. 1874/13 & 8567/13, ¶ 132 (Oct. 17, 2019) (discussing whether legitimate aim employer sought could be attained through less intrusive measures).

<sup>120</sup> See also *Madhewoo v. Mauritius*, Communication No. 3163/2018, U.N. Doc CCPR/C/120/D/2147/2012, ¶ 3.5 (Mar. 24, 2021) (discussing whether a database of identity cards lost or stolen would achieved similar objective without intrusion of collecting and storing biometric data).

<sup>121</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 52.

<sup>122</sup> AM. CIV. LIBERTIES UNION, *supra* note 92, ¶¶ 26-29.

<sup>123</sup> *CPB One™ Mobile Application*, *supra* note 71.

<sup>124</sup> As discussed above, for certain foreign nationals the use of the CBP application is optional. *Id.*

<sup>125</sup> Hum. Rts. Council, *The Right to Privacy in the Digital Age*, ¶ 54, U.N. Doc. A/HRC/51/17 (Aug. 4, 2022). The IHRC submitted FOIA requests to agencies, including, but not limited to, the Department of Homeland Security, U.S. Customs & Border Protection, and U.S. Immigration & Customs Enforcement.

registering to use the application.<sup>126</sup> This issue is exacerbated by other barriers like language or education.<sup>127</sup> CBP continues to expand the application's functions, but fails to communicate plans for future use.<sup>128</sup> For example, CBP requires additional biometric and geolocation surveillance of individuals not even present in the U.S.<sup>129</sup> While cognizable national security interest exists, the method of data collection is too invasive, lacks transparency, and is an arbitrary interference with the right to privacy.<sup>130</sup>

Under Article 17 of the ICCPR, the United States must use the least intrusive means necessary to achieve a legitimate aim. However, the United States has not shown the CBP One application is the least intrusive means, and the lack of transparency affects the legitimacy of the practice. Individual privacy interests outweigh the privacy interference and due process rights violations discussed in the next section, implicated in the operation of the CBP One application.

## IV. The United States Requiring Certain Migrants to Use the CBP One Application Violates Their Right to be Free from Discrimination

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The United States is also a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>131</sup> The ICERD prohibits racial discrimination and defines it as:

Any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise on an equal footing, or human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Functioning as more than just a prohibition on racial discrimination generally, Article 5(a) of the ICERD specifically provides for the right to equal treatment before tribunals and all other organs administering justice or access to justice. The ICERD imposes a duty on States, including the United States, to prohibit racial profiling and take measures to end illegal surveillance of racial or ethnic minorities.<sup>132</sup> The Committee on the Elimination of Racial Discrimination (CERD)<sup>133</sup> General Recommendation No. 36 defines racial profiling by law enforcement to include targeting minority groups based on a person's presumed race, skin color, descent or national, or ethnic origin.<sup>134</sup>

Additionally, CERD General Recommendation No. 30 extends the right to due process and non-discriminatory immigration policies to all persons, citizens or non-citizens.<sup>135</sup> Therefore, the United States is obligated to ensure that its immigration policies are not discriminatory and that migrants<sup>136</sup> are guaranteed due process in accessing protections provided by U.S. law. Taken together, the ICCPR and ICERD directly prohibit the United States from passing legislation that effectively imposes special requirements on specific groups of migrants entering through the U.S.-Mexico border. The United States currently requires migrants seeking asylum or eligible for humanitarian parole programs to use the CBP One application to access its immigration system.<sup>137</sup> Studies show that the technology used by DHS to enforce immigration processing, like the facial recognition technology (FRT) implemented by the CBP One application, results in racially

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<sup>126</sup> U.S. DEPT. OF HOMELAND SECURITY, *supra* note 35.

<sup>127</sup> *Government Documents Reveal Information about the development of the CBP One App*, *supra* note 5; *CBP One: An Overview*, *supra* note 10.

<sup>128</sup> *CBP One: An Overview*, *supra* note 10.

<sup>129</sup> Rebecca Heilweil & Caroline Niwhill, *CBP leaning into biometrics on controversial app, raising concerns from immigrant rights advocates*, FEDSCOOP (Mar. 7, 2024), [fedscoop.com/cbp-one-app-biometrics-immigrants-rights/](https://fedscoop.com/cbp-one-app-biometrics-immigrants-rights/).

<sup>130</sup> For example, mass surveillance of the contents of communications, including the interceptions, wire-tapping, searching or recording of communications, constitutes an arbitrary interference on the right to privacy, as it does not represent the least intrusive means to achieve the aim. AM. CIV. LIBERTIES UNION, *supra* note 92, ¶ 30.

<sup>131</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965. U.N.T.S. 660.

<sup>132</sup> This report will highlight the discriminatory impact against Black and Brown asylum seekers specifically, rather than the broader racial and ethnic minority groups. UN Committee on the Elimination of Racial Discrimination, *List of themes in relation to the combined tenth to twelfth reports of the United States of America*, 24 June 2022, CERD/C/USA/Q/10-12 ¶ 5; UN Committee on the Elimination of Racial Discrimination, *CERD General Recommendation No. 36 on preventing and combating racial profiling by law enforcement officials*, 17 December 2020, CERD/C/GC/36.

<sup>133</sup> The CERD is the Committee on the Elimination of All Racial Discrimination.

<sup>134</sup> UN Committee on the Elimination of Racial Discrimination, *CERD General Recommendation No. 36 on preventing and combating racial profiling by law enforcement officials*, 17 Dec. 2020, CERD/C/GC/36, ¶ 13.

<sup>135</sup> UN Committee on the Elimination of Racial Discrimination, *CERD General Recommendation No. 30 Discrimination against non-citizens*, 2005, CERD/c/64/Misc.11/rev.3 (2005), ¶¶ 1-5, 9.

<sup>136</sup> Migrants are people staying outside of their country of origin regardless of their reason for leaving. See Glossary.

<sup>137</sup> Asylum-seekers at the southern border are required to use the CBP One application to request an appointment. Similarly, Cuban, Haitian, Nicaraguan and Venezuelan nationals applying for parole must use the CBP One application to enter their biographic information and provide a photograph. *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (last updated Aug. 29, 2024), [www.uscis.gov/CHNV](https://www.uscis.gov/CHNV).

discriminatory impacts and exposes migrants to mass surveillance.<sup>138</sup> Studies further show that AI tools, like FRT, can worsen discrimination because it uses vast amounts of data— data that is often biased.<sup>139</sup>

The United States violates migrants' rights to be free from discrimination in three ways: (1) using facial recognition technology in the CBP One application without adequate denial redress;<sup>140</sup> (2) facilitating the surveillance of racial and ethnic minorities, particularly affecting Black and Brown migrants;<sup>141</sup> and (3) has a discriminatory impact in access to justice based on their immigration status.

## A. The Use of Biased Facial Recognition Technology (FRT) Constitutes Discrimination on the Basis of Race, Color, and Sex

The CBP One application uses biased facial recognition technology (FRT) that has a discriminatory impact on migrants with darker skin tones.<sup>142</sup> FRT itself is discriminatory because skin color, gender, and age impact the accuracy of FRT, resulting in the misidentification of users within certain demographics.<sup>143</sup> A study conducted by the National Institute of Standards and Technology (NIST) showed the most inaccurate facial recognition identification produced by FRT was of a Somali woman between the age of 65-99, while the most accurate identification was of a Ukrainian male aged 20-35.<sup>144</sup> False positive match rates<sup>145</sup> were more prevalent for Asian women than European men,<sup>146</sup> and lower matching rates exist for young (age 14-25) and old (age 66-79) individuals.<sup>147</sup> The analysis showing false match rates indicated that FRT performed significantly better in 1-1 comparison tests of light-skinned individuals than those with darker skin.<sup>148</sup> The CBP One application's FRT is not immune to similar algorithmic errors.

Asylum seekers<sup>149</sup> are particularly affected by biased FRT because they must use the CBP One application to secure an appointment to access asylum-based protections. Asylum seekers who approach the border without an appointment or who cross between legal ports of entry are largely ineligible to apply for asylum.<sup>150</sup> Asylum seekers must capture and upload a live image of themselves to confirm their identity before scheduling an appointment, but those with darker skin tones face issues with the application's photograph-capturing functionality.<sup>151</sup> Organizations, such as Immigration Justice Project and ABARA provide shelter, humanitarian aid, and legal assistance to migrants at the border, and have resorted to using bright

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<sup>138</sup> See Alex Najibi, *Racial Discrimination in Face Recognition Technology*, SCIENCE IN THE NEWS (Oct. 24, 2020), [sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/](https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/); Melissa del Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, THE GUARDIAN (Feb. 8, 2023), [www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias](https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias).

<sup>139</sup> The algorithms used by AI are created by human actors who decide what factors and data the algorithm considers. For example, AI tools for predictive policing or threat assessment use historical crime data which reflects the police's discriminatory targeting of Black and Brown people. See MAO, ET AL., *supra* note 5; *Crime Prediction Software Promised to Be Free of Biases. New Data Shows It Perpetuates Them*, THE MARKUP (Dec. 2, 2021), [themarkup.org/prediction-bias/2021/12/02/crime-prediction-software-promised-to-be-free-of-biases-newdata-shows-it-perpetuates-them](https://themarkup.org/prediction-bias/2021/12/02/crime-prediction-software-promised-to-be-free-of-biases-newdata-shows-it-perpetuates-them).

<sup>140</sup> The only alternatives for people not authorized to travel through the Advanced Travel Authorization process are humanitarian parole or visa processing, both of which have different requirements that may be more difficult to meet for nationals of the selected countries who may be eligible for the special parole program. Lacking alternatives, CBP One application is essentially obligatory. *CBP One: An Overview*, *supra* note 10.

<sup>141</sup> Throughout this Report, we capitalize the letter "b" in Black and Brown when referring to people in a racial, ethnic, or cultural context. Capitalizing the "b" in Black and Brown is done to align with long-standing identifiers such as Latino, Asian American, and Native American. Further, the lack of capitalization of the letter "w" in white is to reflect the studies of critical race theorists who do not see the word white as descriptive of a group with a sense of common experiences. Importantly, white supremacist groups frequently capitalize white. See Michael J. Dumas, *Against the Dark: Antiracism in Education Policy and Discourse*, 55 THEORY INTO PRACTICE 11, 13 (2016); Leticia Villareal Sosa, *School Resource Officers and Black Lives Matter Protests: It's Time for School Social Work to Take a Stand*, 42 CHILDREN & SCHOOLS 203, 206 (2020).

<sup>142</sup> Hellerstein, *supra* note 83.

<sup>143</sup> *CBP One: An Overview*, *supra* note 10. See also Hellerstein, *supra* note 83; William Crumpler & James A. Lewis, *How Does Facial Recognition Work? A Primer*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Jun. 2021), [csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210610\\_Crumpler\\_Lewis\\_FacialRecognition.pdf?VersionId=xdae\\_qQa80\\_Fimc1mzF3wxN6Klp.01Xg](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210610_Crumpler_Lewis_FacialRecognition.pdf?VersionId=xdae_qQa80_Fimc1mzF3wxN6Klp.01Xg).

<sup>144</sup> The NIST Information Technology Laboratory (ITL) quantified the accuracy of face recognition algorithms for demographic groups defined by sex, age, and race or country of birth. PATRIC GROTH, MEI NGAN, KAYEE HANOAKA, *FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS* (2019).

<sup>145</sup> A false positive is where the system flags two unlike images as being a match and a false negative means two like images that the system does not match. Since systems are coded to prefer one over the other and this system exists for national security interests, it is likely it was coded to prefer false negatives over false positives.

<sup>146</sup> PATRICK GROTH, AUSTIN HOM, MEI NGAN, & KAYLEE HANOAKA, *FACE RECOGNITION VENDOR TEST (FRVT) PART 7: IDENTIFICATION FOR PAPERLESS TRAVEL AND IMMIGRATION 8* (July 2021).

<sup>147</sup> U.S. CUSTOMS AND BORDER PROTECTION, *CBP PRIVACY EVALUATION OF THE TRAVELER VERIFICATION SERVICE (TVS) IN SUPPORT OF THE CVP BIOMETRIC ENTRY-EXIT PROGRAM* (Aug. 15, 2022).

<sup>148</sup> NAT'L INST. OF STANDARDS AND TECH., *ONGOING FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS* (2019).

<sup>149</sup> "Asylum seekers" refers to individuals seeking entry into the United States by foot through the Mexico border. This definition assumes that asylum seekers who have passed through a country other than their nation of origin have also made an effort to seek asylum in that third country and have received a definitive denial in accordance with 8 C.F.R. 208.33(a)(2)(B).

<sup>150</sup> *Circumvention of Lawful Pathways*, *supra* note 43, at 31318.

<sup>151</sup> App users with darker skin tones stated the application was unable to map their features. This error also occurs when a user is conducting a "liveness check," which migrants must conduct within 24 hours of their appointment with CBP by taking a picture of themselves and completion a geolocation check to ensure they are within central or northern Mexico. *CPB One™ Mobile Application*, *supra* note 71. See also del Bosque, *supra* note 138.

construction lights to illuminate the faces of users with darker skin tones.<sup>152</sup> The FRT's algorithm then compares the illuminated photographs with those available through the Traveler Verification Service (TVS), a virtual private cloud system hosted by a third party.<sup>153</sup> Those seeking humanitarian parole<sup>154</sup> are similarly affected as they are required to upload their biographic information and submit a photo to the CBP One application.<sup>155</sup> This inhibits many individuals from obtaining an appointment with CBP, leaving them in dangerous conditions with no meaningful alternatives to access CBP. Black and Brown asylum seekers<sup>156</sup> face more barriers to securing appointments through the CBP One application, frustrating their efforts to enter the United States as asylum seekers.<sup>157</sup>

CBP is aware of the biased FRT used in the CBP One application, but has made no changes or alternatives for those experiencing issues.<sup>158</sup> Adding an AI tool to a complicated adjudication process can increase erroneous and biased decision-making by immigration officials.<sup>159</sup> Communities who are directly impacted by these technologies are unable to access information on the instructions or rationale behind decisions made by AI.<sup>160</sup> AI programs used by USCIS reflect similar issues, such as the Asylum Text Analytics, a program that uses machine learning and data graphic techniques to identify plagiarism-based fraud in applications for asylum status.<sup>161</sup> AI tools created to detect plagiarism or fraud are particularly discriminatory when used on non-native English speakers, leading decision-makers to misclassify the written narratives as fraudulent.<sup>162</sup> It is unclear whether any oversight mechanisms monitor bias, accuracy, or the impact of the AI determinations — the same is true for the CBP One application.<sup>163</sup> This results in a clear violation by the United States of Article 5(a) of the ICERD for its continued use of biased FRT, which has a discriminatory impact on racial and ethnic minorities, particularly Black and Brown asylum seekers.

## **B. The CBP One Application Facilitates the Illegal Surveillance and Racial Profiling of Migrants, Particularly Black and Brown Migrants**

The required use of the CBP One application facilitates the illegal surveillance of migrants, particularly Black and Brown migrants. In recent years, CBP and ICE have deployed mass surveillance tools and purchased access to databases of personal information to target arrest and detain immigrants.<sup>164</sup> For example, ICE uses a predictive algorithm on a weekly basis to make decisions on a person's conditions of supervision under the Intensive Supervision Appearance Program (ISAP)— it predicts the likelihood that someone will fail to comply with supervision requirements.<sup>165</sup> There is no publicly available information on how the AI analyzes the risk factors or what the risk factors are, nor is there any information on which data the AI machine was trained.<sup>166</sup> This classification system may be used to justify the surveillance conditions or re-detain individuals.

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<sup>152</sup> del Bosque, *supra* note 138.

<sup>153</sup> U.S. DEPT. OF HOMELAND SECURITY, *supra* note 35.

<sup>154</sup> If granted parole under the various programs available to foreign nationals, they are parole beneficiaries allowed entry into the United States.

<sup>155</sup> *CBP One: An Overview*, *supra* note 10.

<sup>156</sup> Throughout this Report, we capitalize the letter “b” in Black and Brown when referring to people in a racial, ethnic, or cultural context. Capitalizing the “b” in Black and Brown is done to align with long-standing identifiers such as Latino, Asian American, and Native American. Further, the lack of capitalization of the letter “w” in white is to reflect the studies of critical race theorists who do not see the word white as descriptive of a group with a sense of common experiences. Importantly, white supremacist groups frequently capitalize white. See Michael J. Dumas, *Against the Dark: Antiracism in Education Policy and Discourse*, 55 *THEORY INTO PRACTICE* 11, 13 (2016); Leticia Villareal Sosa, *School Resource Officers and Black Lives Matter Protests: It's Time for School Social Work to Take a Stand*, 42 *CHILDREN & SCHOOLS* 203, 206 (2020).

<sup>157</sup> *CBP One: An Overview*, *supra* note 10. See also del Bosque, *supra* note 138.

<sup>158</sup> GROTH, ET AL., *supra* note 146.

<sup>159</sup> There are disparities in the USCIS asylum system based on country of origin and religion, in which USCIS disproportionately denies asylum to Black and Muslim immigrants. *US Discrimination Against Black Migrants, Refugees and Asylum Seekers at the Border and Beyond*, HUMAN RIGHTS FIRST (Aug. 8, 2022), [humanrightsfirst.org/library/cerd-us-discrimination-against-black-migrants-refugees-and-asylum-seekers-at-the-border-and-beyond/](https://humanrightsfirst.org/library/cerd-us-discrimination-against-black-migrants-refugees-and-asylum-seekers-at-the-border-and-beyond/).

<sup>160</sup> MAO, ET AL., *supra* note 5.

<sup>161</sup> *Asylum Test Analytics (ATA)*, ACT-IAC (Oct. 2022), [www.actiac.org/et-use-case/asylum-text-analytics-ata#:~:text=The%20ATA%20capability%20employs%20machine,looking%20for%20common%20language%20patterns.](https://www.actiac.org/et-use-case/asylum-text-analytics-ata#:~:text=The%20ATA%20capability%20employs%20machine,looking%20for%20common%20language%20patterns.)

<sup>162</sup> MAO, ET AL., *supra* note 5.

<sup>163</sup> USCIS failed to state what data it uses to train AI to identify “threats” or “plagiarism-based fraud.” *Id.*

<sup>164</sup> Records uncovered by reporters indicate CBP and ICE agents have run thousands of facial recognition searches with the Clearview AI Technology. Letter From Vasudha Talla, Immigrants' Rights Program Director, ACLU Foundation of Northern California, et al., to Freedom of Information Act Office, U.S. Immigration and Customs Enforcement, et al., (Oct. 19, 2020). See Ryan Mac, Caroline Haskins, Logan McDonald, *Clearview's Facial Recognition App Has Been Used By The Justice Department, ICE, Macy's, Walmart, And The NBA*, BUZZFEED (Feb. 27, 2020), [www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement](https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement).

<sup>165</sup> The ICE ISAP program is an electronic monitoring program that subjects immigrants to location surveillance, facial recognition, and voice recognition surveillance via GPS Tracking Devices and the SmartLINK cell phone app. *Alternatives to Detention (ATD)*, TRAC IMMIGRATION, [trac.syr.edu/immigration/detentionstats/atd\\_pop\\_table.html](https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html) (last visit Sept. 17, 2024).

<sup>166</sup> MAO, ET AL., *supra* note 5.

The CBP One application expands its databases drastically by requiring travelers to submit their photos to access features on the application.<sup>167</sup> The biased FRT and photo capture function of the CBP application can result in incorrectly matched photographs during CBP's vetting process. When the errors disproportionately impact Black and Brown migrants, they are more likely to be subject to increased screening and negative outcomes due to this technical error.<sup>168</sup> A study by the American Civil Liberties Union (ACLU) found that since Black people are more likely to be arrested than white people for minor crimes, their faces and personal data are more likely to be in mugshot databases.<sup>169</sup> The federal government recognized that FRT tends to work best on middle-aged white men's faces, concluding that the rates of error tended to be highest for people of color, women, children, and the elderly.<sup>170</sup> DHS has even clarified that the biometric information collected through the application could be shared with other DHS agencies, including local law enforcement agencies, which could use the information for other enforcement purposes.<sup>171</sup> Further, FRT allows governments and private actors the ability to identify, locate, and track individuals.<sup>172</sup> Similarly, CBP One's ability to collect GPS location data can be used by law enforcement to track users or learn details about users in the same location, their routines, and expose unknown associations.<sup>173</sup>

Relying on biased FRT to make matches for law enforcement purposes can lead to wrongful arrests, lengthy detentions or deportations, and even deadly police violence.<sup>174</sup> The mass collection of data and use of biased FRT through the CBP One application facilitates the surveillance of Black and Brown migrants.<sup>175</sup>

### C. Migrants Required to Use the CBP One Application May Experience Due Process Violations

Migrants, specifically asylum seekers and individuals pursuing humanitarian parole, seeking admission to the United States face discrimination based on their immigration status because they are required to use the CBP One application to access the United States immigration system. Under Article 2 of the ICCPR, States have an obligation to guarantee the human rights of all individuals under their jurisdiction, regardless of their nationality or migration status, including the right to access to justice and due process.<sup>176</sup> Facilitation of arrival in or entry into the State is a crucial part of ensuring migrants have access to justice.<sup>177</sup> Guarantees of due process enable migrants to claim their rights in migration procedures or asylum applications<sup>178</sup> When applying for asylum and parole in the United States, many are required to use the CBP One application, or else they cannot access the U.S. immigration system.<sup>179</sup>

Users of experimental technology implemented by DHS are not notified whether an AI tool was involved in a derogatory determination and are unable to review or challenge the AI's decision.<sup>180</sup> Currently, ICE uses an AI tool called the Risk Classification Assessment (RCA) to make decisions on the detention of immigrants.<sup>181</sup> The program examines criminal justice information, disability status, substance abuse history, immigration history and case status, ties to the community, length of time at a home address, the number of family members in someone's home, property information, employment

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<sup>167</sup> *CBP One: An Overview*, *supra* note 10.

<sup>168</sup> *Id.*

<sup>169</sup> Black people face overwhelming disparities at every single stage of the criminal punishment system, from street-level surveillance and profiling all the way through to sentencing and conditions of confinement. Rachel Fergus, *Facial recognition remains largely ungoverned – and dangerous – in Minnesota*, AM. CIV. LIBERTIES UNION MINN. (Feb. 29, 2024), [www.aclu-mn.org/en/news/biased-technology-automated-discrimination-facial-recognition#:~:text=It%20gives%20blanketed%20and%20indiscriminate,such%20as%20immigrants%20and%20refugees](http://www.aclu-mn.org/en/news/biased-technology-automated-discrimination-facial-recognition#:~:text=It%20gives%20blanketed%20and%20indiscriminate,such%20as%20immigrants%20and%20refugees).

<sup>170</sup> GROTH, *supra* note 144.

<sup>171</sup> *CBP One: An Overview*, *supra* note 10.

<sup>172</sup> Talla, et al., *supra* note 164.

<sup>173</sup> *CBP One: An Overview*, *supra* note 10.

<sup>174</sup> Police in many jurisdictions in the U.S. use mugshot databases to identify people with face recognition algorithms. Using mugshot databases for face recognition reinforces racial bias from the past. Kade Crockford, *How is Face Recognition Surveillance Technology Racist?*, AM. CIV. LIBERTIES UNION (June 16, 2020), [www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist](http://www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist).

<sup>175</sup> See Kade Crockford, *How is Face Recognition Surveillance Technology Racist?*, AM. CIV. LIBERTIES UNION (June 16, 2020), [www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist](http://www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist); GROTH, ET AL., *supra* note 144; AM. CIV. LIBERTIES UNION & PRINCETON POLICY ADVOCACY CLINIC, REVIEW OF U.S. CRIMINAL LEGAL SYSTEM COMPLIANCE WITH THE ICCPR AND RECOMMENDATIONS FOR POLICY CHANGES (Sept. 12, 2023).

<sup>176</sup> Effective access to justice includes the right to legal aid and representation, the right to information and an interpreter, the right to consular assistance, a competent authority to which access is provided, as well as remedies and redress. ICCPR, *supra* note 56, at art. 2. See also Cecilia Jimenez-Damary (Special Rapporteur on the Human Rights of Internally Displaced Persons), Rights of Internally Displaced Persons, U.N. Doc. A/73/173 (July 17, 2018).

<sup>177</sup> *Id.* ¶ 43. The Inter-American Court of Human Rights has also found that due process of law is a right that must be ensured to all persons, irrespective of their migratory status. Inter-American Court of Human Rights, Advisory Opinion 18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, ¶ 121. See also Nadege Dorzema et al. v. Dominican Republic, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251 (Oct. 24, 2012).

<sup>178</sup> A/73/173/Rev.1, ¶ 8.

<sup>179</sup> *CBP One: An Overview*, *supra* note 10.

<sup>180</sup> MAO, ET AL., *supra* note 5.

<sup>181</sup> *Id.*



and education information to make detention decisions.<sup>182</sup> ICE has never revealed how RCA analyzes these factors to produce a recommendation.<sup>183</sup>

Migrants, particularly those with darker skin tones, seeking protection in the United States are disproportionately facing rejection when using the CBP One application.<sup>184</sup> While there are efforts to expand pathways for legal entry, the United States made seeking admission increasingly difficult for specific groups of migrants, like asylum seekers.<sup>185</sup> Stark contrasts can be seen through the programs created for countries, such as Ukraine, whose citizens were able to resettle quickly in the United States.<sup>186</sup> The United States rejected proposed rules providing a better structure for migrants who have trouble navigating the CBP One application.<sup>187</sup>

Further, migrants may not have meaningful access to justice when they are required to use the CBP One application because of the technology needed to use the application. Not all asylum seekers have access to a smartphone, and those with cell phones often do not have smartphones that support the CBP One application.<sup>188</sup> It is not uncommon for migrants' cell phones to be stolen as they await an appointment, forcing them to scrape money together for a new phone.<sup>189</sup> Migrants also face application glitches due to the large volume of users attempting to schedule appointments.<sup>190</sup> While the Circumvention of Lawful Pathways (CLP) rule suggests that asylum seekers in these situations could seek protection without an appointment, the burden is placed on the migrant to prove their inability to use the application, which is nearly impossible for those facing language barriers, illiteracy, or other vulnerabilities.<sup>191</sup> As a result, asylum seekers who cannot secure appointments through the CBP One application may be compelled to remain at the border indefinitely or take the risk of crossing the border without authorization. Effectively requiring asylum seekers and individuals seeking humanitarian parole to use the CBP One application to access entry into the United States has a discriminatory effect on migrants due to their immigration status. This practice is contrary to international obligations under Article 2 of the ICCPR.

## V. The United States' Failure to Provide Redress is a Denial of Access to Justice

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Under Articles 2 and 14 of the ICCPR, the United States is obligated to ensure effective remedies determined by "competent judicial, administrative or legislative authorities..." to individuals whose due process rights have been violated and equitable access to justice.<sup>192</sup> The right to an effective remedy requires (1) known and accessible to individuals with arguable rights violation claims;<sup>193</sup> (2) prompt, thorough, and impartial investigation into claims;<sup>194</sup> (3) the remedy must be capable of ending ongoing violations;<sup>195</sup> and (4) gross violations require criminal prosecution.<sup>196</sup> Access to justice means that individuals have access to existing judicial or quasi-judicial mechanisms to protect their rights and obtain redress in response to violations.<sup>197</sup> While access to redress, or an effective remedy, should be available for migrants who do not wish to use the CBP One application to gain humanitarian parole or seek asylum, the United States has not made alternative options known.

Migrants feel pressured to provide consent to the CPB One application's collection of data and geolocation function.<sup>198</sup> Since the application is only available in English, Spanish, and Haitian Creole, users who speak other languages may not

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> HAITIAN BRIDGE ALLIANCE ET. AL., COMMENT OF BLACK IMMIGRANT BAIL FUND, CAMEROON ADVOCACY NETWORK, HAITIAN BRIDGE ALLIANCE, AND ROBERT F. KENNEDY HUMAN RIGHTS ON PROPOSED RULE, "CIRCUMVENTION OF LAWFULL PATHWAYS" 88 FR 11704 3 (Mar. 27, 2023).

<sup>185</sup> *Id.* at 12.

<sup>186</sup> Blake Ramsey, *Failures and Success of the US Response to Ukrainian Refugees*, ACE (Apr. 12, 2023), [ace-usa.org/blog/research/research-foreignpolicy/successes-and-failures-of-us-response-to-ukrainian-refugees/](https://ace-usa.org/blog/research/research-foreignpolicy/successes-and-failures-of-us-response-to-ukrainian-refugees/).

<sup>187</sup> HAITIAN BRIDGE ALLIANCE ET. AL., *supra* note 184, at 12.

<sup>188</sup> del Bosque, *supra* note 138.

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

<sup>190</sup> PBS NewsHour, *Glitches plague CBP One app for asylum-seekers as Title 42 comes to an end*, YOUTUBE (Apr. 23, 2023), [www.youtube.com/watch?v=64AU6-WifiY](https://www.youtube.com/watch?v=64AU6-WifiY).

<sup>191</sup> Circumvention of Lawful Pathways, *supra* note 43.

<sup>192</sup> ICCPR, *supra* note 56, at art. 2(3)(a)-(c), 14. See also U.N. DEVELOPMENT PROGRAMME, PROGRAMMING FOR JUSTICE: ACCESS FOR ALL - A PRACTITIONER'S GUIDE TO A HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE 5 (2005); FRANCESCO FRANCONI, ACCESS TO JUSTICE AS A HUMAN RIGHT 3-4 (Oxford University Press, 1st ed. 2007).

<sup>193</sup> *The Right to Privacy in the Digital Age*, *supra* note 63, ¶ 40.

<sup>194</sup> *Id.* ¶ 41.

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

<sup>196</sup> *Id.* See G.A. Res. 60/147, annex. (Dec. 16, 2005).

<sup>197</sup> INT'L MIGRATION LAW UNIT, MIGRANTS' ACCESS TO JUSTICE: INTERNATIONAL STANDARDS AND HOW THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION HELPS PAVING THE WAY 3 (Mar. 23, 2022).

<sup>198</sup> *CBP One: An Overview*, *supra* note 10.

understand the application's functions or warnings that implicate their privacy rights.<sup>199</sup> Access to redress should be available<sup>200</sup> for migrants whose privacy rights have been violated and who are affected by the application's glitches,<sup>201</sup> which result in racialized barriers to seeking asylum.<sup>202</sup> Asylum seekers are likely unaware that their rights are being violated because they are not privy to the contracts the United States has with third-party data companies, are unable to give consent, and do not understand how their information will be used in the future. To acquire information about United States contracts with third-party data companies, migrants whose rights have been violated would need to submit a Freedom of Information Act (FOIA) request and interpret FOIA's responses, despite any potential language barriers and limited resources, which is an unreasonable expectation for individuals seeking asylum.<sup>203</sup> Similarly, migrants impacted by rejections via the CBP One application based on the biased FRT do not have an avenue of complaint, redress, or other alternative.<sup>204</sup> A recent regulation stated that migrants encountering technical difficulties<sup>205</sup> with CBP One may be able to access asylum at ports of entry without using the application.<sup>206</sup> However, the regulation fails to explain the burden of proof migrants would have to show or how officers assess a person's inability to use the CBP One application.<sup>207</sup> These gaps in access to justice further victimize migrants and do not provide meaningful redress.

## VI. Conclusion

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While the United States is expanding pathways of entry for migrants, it is important to highlight the discriminatory impacts caused by the technology implemented to streamline border processing. The United States must address the privacy and due process concerns impacted by the use of the CBP One application. CBP continues to expand the functions of the CBP One application without full transparency about how it actively works and how it could be used in the future. The privacy interferences are overly intrusive and do not justify the loss of an individual's right to privacy. The United States has immigration programs that provide broader access to justice that do not require the use of the CBP One application. Similar programming and entry options should be expanded to include asylum seekers and individuals seeking parole. By using biased facial recognition technology, the CBP One application perpetuates discrimination on the basis of race, color, and sex. The mass collection of data and lack of regulations regarding access to DHS databases facilitates the illegal surveillance of migrants, particularly Black and Brown migrants. The United States has a responsibility to respect and maintain, at all times, the fundamental rights of migrants to seek asylum at the border, respect individual privacy rights, and provide redress when processes have discriminatory effects on the migrant population.

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<sup>199</sup> DHS suggested that users seek assistance in navigating the CBP One application when there is a language barrier.

<sup>200</sup> Ruzimatov et al. v. Turkmenistan, Communication No. 3285/2019, U.N. Doc CCPR/C/136/D/3285/2019, ¶ 8 (Oct. 26, 2022) (discussing the obligation of State to provide individual with effective remedy).

<sup>201</sup> Glitches are technological failures in how the technology functions. Scholars argue that glitches are signs that government technology beaks down; fails to function as intended or expected, and is fallible. AUSTIN KOCHER, GLITCHES IN THE DIGITIZATION OF ASYLUM: HOW CBP ONE TURNS MIGRANTS' SMARTPHONES INTO MOBILE BORDERS (June 20, 2023).

<sup>202</sup> Billy and others v. Australia, U.N. Doc CCPR/C/135/D/3624/2019, ¶ 7.3 (Sept. 22, 2022); see also G.A.P. v. Romania, U.N. Doc CCPR/C/137/D/3662/2019, ¶ 6.5 (June 5, 2023).

<sup>203</sup> The UIC Law IHRC, with English-language capabilities and resources to do so, has submitted sixteen FOIA requests and has received one responsive record in response.

<sup>204</sup> *CBP One: An Overview*, *supra* note 10.

<sup>205</sup> Technical difficulties could include improper operating systems on the smartphones, lack of software to run CBP One, loss of cell phone tied to CBP One account, or language and illiteracy barriers. *CBP One: An Overview*, *supra* note 10.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

## Glossary

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**Asylee:** Individuals who have been granted asylum by a U.S. agency like EOIR or USCIS.

**Asylum:** Legal protection offered by the United States to individuals who are unable or unwilling to return to their country of origin because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 USC 1158.

**Asylum Seeker:** In the context of this report, this is a person who has left their country and is seeking protection from persecution in another country. Individuals have an intent to seek asylum or are waiting to receive a decision on their asylum claim.

**Customs and Border Protections (CBP):** A law enforcement organization that protects the United States by preventing people from entering the country unlawfully or anything harmful into the country. CBP enforces customs and immigration law at and near the border, or at ports of entry, keeping track of people and goods entering the country.

**Department of Homeland Security (DHS):** The department responsible for public security, including protecting the United States' borders and immigration enforcement.

**Executive Office of Immigration Review (EOIR):** Sub-agency of the U.S. Department of Justice whose chief function is to conduct removal proceedings in immigration courts and adjudicate appeals arising from the proceedings.

**Facial Recognition Technology (FRT):** Technology that automatically identifies and verifies the identity of an individual from a digital image or video frame. This technology is compared with other biometric technologies.

**Humanitarian Parole:** Parole allows an individual, who may be inadmissible or otherwise ineligible for admission into the United States, to be allowed entry into the United States for a temporary period for urgent humanitarian reasons or significant public benefit. INA § 212(d)(5).

**Immigrant:** Any person lawfully in the United States who is not a U.S. citizen, U.S. national, or person admitted under a nonimmigrant category as defined by the Immigration and Nationality Act (INA) §101(a)(15).

**Immigration and Customs Enforcement (ICE):** A federal law enforcement agency that protects the United States from cross-border crime. ICE enforces custom and immigration laws at the border and in the interior of the United States, focusing on detention and removal operations.

**International Covenant on Civil and Political Rights (ICCPR):** An international human rights treaty, providing a range of protections for civil and political rights. The United States ratified the ICCPR in 1992, thus giving the treaty the status of federal law.

**International Convention on the Elimination of Racial Discrimination (ICERD):** An international human rights instrument that commits its members to the elimination of racial discrimination and the promotion of understanding among all races. The United States signed the ICERD in 1966 and entered into force in 1994.

**Migrant:** There is no internationally accepted legal definition of a migrant. For the context of this report, migrants are people staying outside of their country of origin regardless of their reason for leaving. Migrants may leave their country of origin to work, study, flee natural disasters or gang violence, or escape poverty.

**Refugee:** Refugee status is a form of protection that may be granted to people who meet the definition of refugee and who are of special humanitarian concern to the United States. Refugees are generally people outside of their country who are unable or unwilling to return home because they fear serious harm. INA § 101(a)(42)

**United States Citizenship and Immigration Services (USCIS):** A federal agency that manages the legal immigration system of the United States. They are responsible for processing lawful immigration and naturalization.