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Submitted via CBP_PRA@cbp.dhs.gov

Seth Renkema
Chief, Economic Impact Analysis Branch
U.S. Customs and Border Protection
Office of Trade, Regulations and Rulings
90 K Street NE, 10th Floor
Washington, DC 20229-1177

Re: Comment On Collection of Advance Information From Certain Undocumented Individuals on the Land Border, Docket Number 2021-20988; 86 FR 53667

Dear Mr. Renkema:

The National Immigrant Justice Center (“NIJC” or “we”) works to advance the rights of all immigrants. With the above-referenced notice and request for comment (“notice”), U.S. Customs and Border Protection (CBP) is extending and amending a data collection program at the land border, which was established on an emergency basis on May 3, 2021.ⁱ NIJC urges the administration to address concerns regarding the proposal to expand CBP’s collection of information from non-citizens arriving at the U.S.-Mexico border, including issuing a new Privacy Impact Assessment, prior to approving the expansion as described in the notice.

The notice proposes the expansion of collection on the previous collection process for persons who may warrant an exception to Title 42, to “include undocumented noncitizens who will be processed under Title 8 at the time they arrive at the POE after the CDC Order is rescinded, in whole or in part.”ⁱⁱ According to the notice, individuals will be able to modify their requests within the CBP One™ application (“CBP One”).ⁱⁱⁱ CBP is proposing requiring the submission of a photograph—previously optional—for all who choose to provide advance information. The proposal states that the submission of a photograph in advance will provide CBP officers with a mechanism to match a noncitizen who arrives at the POE with the photograph submitted in advance, therefore identifying those individuals, and verifying their identity.

The proposed data collection expansion could have unexamined consequences, impacting thousands of people a year, and lead to a large increase in non-U.S. citizens, including lawful permanent residents, submitting face scans prior to presenting at a U.S. port of entry.

Before allowing for information collection expansion by CBP as envisioned in this notice, DHS should further examine the consequences associated with the expansion. This comment addresses the following concerns: 1) The expanded information collection could become a de facto requirement and vehicle for externalization of the U.S.'s asylum process; 2) Concerns about the burden assessed and efficiency of the CBP One mobile application described in the notice; and 3) Lack of transparency and concerns regarding potential violations of privacy and civil liberties.

NIJC's interest and opposition to proposed changes

Headquartered in Chicago, NIJC offers a wide range of legal services to low-income immigrants. Attorneys and trained staff provide consultations and legal representation on matters that include family-based immigration, applications for Lawful Permanent Residence (LPR), legal protections for immigrant victims of family violence, visas for immigrant victims of crimes, visas for immigrant victims of human trafficking, and more. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC blends individual client advocacy with broad-based systemic change.

NIJC provides legal services to more than 10,000 individuals each year, including many children designated as unaccompanied upon arrival at the southern border, and asylum seekers. Under the text of the CBP notice, we are concerned that these individuals would suffer a burden not accounted for, including the potential for externalizing U.S. asylum processing obligations, and subjecting families, including children, to unnecessary additional facial recognition technology. There is a need to implement clear safeguards to ensure that sensitive and private information collected by CBP is not stored in error-prone government databases, and not used to target immigrants throughout the country.

The proposed expansion of information by CBP also raises concerns in light of the agency's record of abuse and lack of accountability, including its role in serious abuses against people from Haiti seeking safety in the United States,^{iv} family separation, history of detaining people in horrific conditions, use of lethal force, and racial and religious profiling.^v Faulty facial recognition technology and false matches runs the risk of enabling CBP to detain vulnerable individuals for hours without access to a lawyer,^{vi} potentially fueling ICE enforcement actions on faulty grounds,^{vii} and sharing information with foreign governments in ways that put asylum seekers at risk.^{viii} For these reasons, NIJC calls for a closer examination of the proposal and greater transparency, before giving more authority to CBP to collect additional sensitive data from people seeking entry into the United States.

I. CBP’s information collection system could become a de facto requirement and externalization vehicle for asylum processing

Turning people attempting to enter the U.S. to seek asylum is a violation of U.S. and international asylum law.^{ix} Nonetheless, policies blocking asylum seekers from entering the United States, such as the “Remain in Mexico” policy and “metering” (limiting the number of people given a chance to claim asylum), have inflicted violence against migrants and fueled organized crime. Importantly, on November 1, 2021, CBP released a memo ending the “metering” policy, and provided updated guidelines on management and processing of noncitizens at southwest border points of entry (POE).^x The memo states that asylum seekers or people seeking humanitarian parole cannot be required to submit advance information in order to be processed at a POE, stating: “POEs must strive to process all travelers, regardless of documentation status, who are waiting to enter, as expeditiously as possible, based on available resources and capacity.”^{xi}

However, the memo also addresses steps to “leverage technological and processing efficiencies to streamline POE processing,” including the “innovative use of existing tools such as the CBPOne™ mobile application.” According to the memo, the application “enables noncitizens seeking to cross through land POEs to securely submit certain biographic and biometric information prior to arrival and thus streamline their processing upon arrival.”^{xii}

The memo and CBP notice raise concerns that CBP One could exacerbate - rather than alleviate - “metering” at the border by creating new and separate backlogs. Since users of CBP One are not guaranteed an appointment at the port of entry at the time selected through the app, the utility of the application could quickly become illusory if registering does not diminish the amount of time one must wait in a border community before review by CBP at the port of entry. Failure to implement the application in a way that ensures users will be seen at the port of entry at the time indicated through the application will quickly erode confidence in the app, while leaving users vulnerable to harm in Mexico.

Moreover the proposed notice describes the use of CBP One as “voluntary;” however, the expanded use of the application runs the risk that it will be perceived as mandatory. Those who cannot afford access to the application will risk facing a segregated system in which they have to wait in line behind, or in an entirely different queue from, those with access to a smartphone. The proposal raises alarm that the broader use of CBP One could lead to another form of metering.

The Immigration and Nationality Act is unambiguous in its requirement that asylum seekers be processed into the United States to seek safety, at ports of entry or between. The imposition of processing requirements on asylum seekers *prior to arriving at the U.S. border*, even if technically not mandatory, raises questions regarding the equitable application of domestic asylum law and protections for those arriving at the border. Such proposals should be met with great scrutiny and care, particularly given the United States’ history of externalization of asylum

obligations.^{xiii} The harsh practices the U.S. has used to keep vulnerable people away from our borders have resulted in unimaginable harm, including sexual violence, torture, and death. Offshoring and externalization tactics have driven asylum seekers to take more dangerous routes – often to other parts of the border where they face more dangerous terrain. The introduction of a new (and now expanded) information collection asylum seekers are encouraged to utilize prior to arrival at the U.S. border must be scrutinized carefully to ensure it does not contribute to preferential treatment for certain asylum seekers over others and does not contribute to metering or other forms of externalized border control.

II. The notice raises concern about the assessed burden and efficiency of the CBP One Mobile Application

The CBP notice states that the purpose of the expanded information collection is to “continue to achieve efficiencies to process undocumented noncitizens under Title 8 upon their arrival at the POE, consistent with public health protocols, space limitations, and other restrictions.” The notice states that the process will “streamline” and on average take 16 min per user; however, CBP does not offer reliable data to support this premise. The additional information CBP plans to collect from individuals before their arrival at the U.S.-Mexico border is comprehensive, and the notice does not consider the financial burden and lack of access to resources required to use the CBP One application.

The notice fails to account for gaps in technology, language access, and economic disparity between groups of non-citizens attempting to use the application and upload photos before they arrive at a port of entry. There is no apparent consideration of how CBP One requires access to the internet and a smartphone, for example. Previously, the use of this application was largely facilitated by Non-Governmental Organizations (NGOs). Without ensuring that NGOs are willing and able to facilitate the process, the notice does not provide any assurance that the CBP One application will be used in a manner that is equitable and does not discriminate against migrants who have limited resources or literacy or speak only rare languages.

Expanding the use of CBP One also runs the risk of incentivizing individuals with language access or literacy concerns to turn to third parties to complete the application, which raises another set of concerns with regards to possible fraud and exploitation at the expense of migrants and asylum seekers. The U.S. government must remove all barriers to the processing of asylum seekers, and CBP should not be permitted to create a new tiered system that adds new barriers to access under the guise of technological progress.

The notice states that information previously collected included a wide range of biographic and biometric information; yet, CBP is proposing widening the net of what they are requesting to include mandatory face scans without sufficient justification, under the guise of streamlining information collection. The proposal merits another review to accurately assess the true burden associated with CBP’s plan for expanded information collection.

III. Concerns regarding privacy, civil liberties, and the lack of transparency

The notice fails to address privacy and civil liberties concerns associated with the expanded collection of information through the CBP One app, and the broader growing expansion of collection of biometrics data, including facial recognition technology on people seeking to enter the U.S. via the U.S.-Mexico border.^{xiv}

According to the agency, CBP One has three main uses: merchants can make appointments for cargo inspection, foreign travelers can apply for an arrival and departure record, otherwise known as an I-94, and organizations in Mexico can verify whether individuals are enrolled in the Migrant Protection Protocols (MPP) program.

CBP One uses facial-recognition technology to check whether individuals are enrolled in MPP and have pending immigration cases.^{xv} The mobile application also can use its GPS function to collect information about users' location when such information is submitted. If not closely guarded, these technologies could be used to track immigrants and use collected data in ways that are outside of the application's stated purposes. According to a DHS Privacy Impact Assessment (PIA) from April 30, 2021, there are a number of privacy risks associated with the CBP One application in the context of MPP enrollee identification, including: a risk of the overcollection of biometrics and biographic information from individuals who are not MPP enrollees; and a risk the application will fail to match children, when they are in fact a match.^{xvi} Before rolling out any expansion, DHS should at the minimum conduct an updated PIA.

Likewise, one of the application's stated future uses would allow bus drivers and airplane pilots to submit biographic information to CBP on behalf of "consenting" travelers; yet the government fails to address what happens if the travel operators make use of the application mandatory.^{xvii} Ultimately, use of the new application may not be perceived as voluntary to the travelers subjected to CBP One.

CBP's expanded deployment of facial recognition technology raises concerns with regards to threats to civil liberties and privacy protections, creating new risks of surveillance and abuse. DHS regulations provide that any foreign national may be required to provide fingerprints, photographs or other specified biometric identifiers upon arrival into or departure from the United States.^{xviii} In the proposed notice, however, CBP proposes adding a requirement to submit a photo before they reach the border, which will significantly expand the amount of biometrics data collected and stored by the agency. When CBP collects such data, it can be used by other DHS agencies (including the U.S. Customs and Enforcement, ICE), as well as by foreign governments and federal, state, and local law enforcement to identify individuals for a variety of purposes.^{xix}

Moreover, U.S. law is clear that children under fourteen should not be subject to biometrics collection.^{xx} However, the notice provides no explicit protection for children, and does not

exempt them from the requirement to submit a photo. Further, the notice contains no information on how information-sharing will be restricted to protect against data falling in the wrong hands. There is no way to ensure that information collected through CBP One and shared with other databases is accurate.

By expanding the amount of information stored in DHS databases, the proposed rule risks placing asylum seekers in greater danger by exposing their biometrics data to the very foreign government persecutors they have sought to escape.^{xxi} NIJC represents clients who have had their children separated from them because DHS relied on erroneous information provided through information sharing programs with foreign governments.^{xxii} The increased biometrics collection runs the risk of placing more asylum seekers at risk of being wrongly accused of criminal activities and facing political violence, including torture, when returned to their home country.

As a general matter, facial recognition technologies are not reliably accurate.^{xxiii} These systems “vary in their ability to identify people, and no system is 100 percent accurate under all conditions.”^{xxiv} Database matching errors can result in delays or the wrongful detention of people lawfully in the U.S. When there is a faceprint-matching error, CBP may not have a traveler’s fingerprints on file as an alternative means of identity-verification. For these travelers in particular, faceprint-matching errors could lead to wrongful deportation or even false arrest for criminal charges.^{xxv}

Facial recognition technology is also infamous for its racial bias.^{xxvi} Many cities have banned the technology altogether, and members of Congress have introduced legislation to ban the use of facial recognition technology by federal law enforcement agencies.^{xxvii} Collecting additional biometrics face scans from individuals before they are allowed to enter the U.S. risks an increase in unwarranted, and discriminatory law enforcement surveillance.

Finally, this notice follows a troubling trend of subjecting immigrant populations to emerging and experimental digital technologies. The United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance recently investigated the use of surveillance technology for border and migration control. In the report, the Special Rapporteur urged states to move beyond simplistic notions that technology is race-neutral, as its use either signals disparate intent to jeopardize the rights of immigrants of color or disparate impacts racial minorities.^{xxviii} We urge DHS to consider the issues relating to racial bias and other concerns regarding the use of the facial recognition technology before approving CBPs expanded collection of facial scans and other biometrics data.

Conclusion

Before allowing for CBP to expand its information collection programs as envisioned in this notice, DHS should further examine the consequences associated with the expansion. The

administration must further consider the concerns regarding: the potential that CBP One will be used to create a new form of metering; questions relating to efficiency and lack of equity; and possible violations of privacy and civil liberties. NIJC urges DHS to re-consider the proposed information collection expansion and to protect non-citizens from intrusive and unwarranted information collection.

Thank you for your consideration and please do not hesitate to contact Jesse Franzblau for further information.

/s/ Jesse Franzblau
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ⁱ U.S. Customs and Border Protection (CBP), Department of Homeland Security, Collection of Advance Information From Certain Undocumented Individuals on the Land Border, September 28, 2021, <https://www.federalregister.gov/documents/2021/09/28/2021-20988/collection-of-advance-information-from-certain-undocumented-individuals-on-the-land-border>.

ⁱⁱ 86 Fed. Reg. at 53668.

ⁱⁱⁱ U.S. Customs and Border Patrol, CBP One Mobile Application, last modified August 2, 2021, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

^{iv} *See, i.e.*, Letter from 39 civil rights leaders delivered September 21, 2021 to President Biden calling for a halt to the deportations of Haitian migrants and an end to the summary expulsions that violate asylum rights and human rights on the border. Text of the letter is available at [https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2021-09/Civil Rights Leaders Letter to President 9-21-21.pdf](https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2021-09/Civil%20Rights%20Leaders%20Letter%20to%20President%209-21-21.pdf).

^v A recent Human Rights Watch report, for example, detailed systematic abuses and from 2016-2021, including sexual assault, and a lack of accountability for those responsible for such abuses. *See* “Internal DHS Reports of Abuses by US Border Officials,” Human Rights Watch, October 21, 2021, <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials#6949>.

^{vi} *See, i.e.*, Ashley Gorski, “CBP’s Plan to Expand Face Surveillance at Airports is a Civil Liberties Disaster in the Making,” American Civil Liberties Union (ACLU), December 21, 2020, <https://www.aclu.org/news/immigrants-rights/cbps-plan-to-expand-face-surveillance-at-airports-is-a-civil-liberties-disaster-in-the-making/>.

^{vii} *See, i.e.*, Caroline Haskins, “ICE just paid a MasterCard-backed company called Trust Stamp \$3.9 million for ‘rapid’ facial recognition at migrant detention facilities,” Business Insider, September 27, 2021, <https://www.businessinsider.com/ice-gets-rapid-ai-facial-recognition-at-migrant-detention-facilities-2021-9>.

^{viii} *See, i.e.*, Jesse Franzblau, “NIJC’s Public Comment Opposing Trump Administration’s Dangerous & Discriminatory Mass Surveillance Expansion,” National Immigrant Justice Center, October 13, 2021, <https://immigrantjustice.org/staff/blog/nijcs-public-comment-opposing-trump-administrations-dangerous-discriminatory-mass>.

^{ix} 8 U.S.C. § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.”).

^x *See* “CBP Issues Memo on Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry,” AILA Doc. No. 21110307, November 1, 2021, <https://www.aila.org/infonet/cbp-issues-memo-on-processing-of-undocumented>.

^{xi} *Ibid.*

^{xii} Ibid.

^{xiii} See *i.e.*, Azadeh Erfani and Maria Garcia, “Pushing Back Protection: How Offshoring And Externalization Imperil The Right To Asylum,” August 3, 2021, <https://immigrantjustice.org/research-items/off-shoring-asylum>.

^{xiv} See, *i.e.*, Raul Pinto, “The New CBP One App May Put Immigrants and Travelers’ Privacy at Risk,” American Immigration Council, August 5, 2021, <https://immigrationimpact.com/2021/08/05/cbp-one-app-privacy-risks/#.YYly8p7MI2x>.

^{xv} See U.S. Department of Homeland Security, “Privacy Impact Assessment for the Processing Individuals Subject to Migrant Protection Protocols (MPP)” DHS Reference No. DHS/CBP/PIA-070, April 30, 2021, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp070-mpp-may2021.pdf>.

^{xvi} Ibid at Section 2.5.

^{xvii} U.S. Customs and Border Patrol, CBP One Mobile Application, last modified August 2, 2021, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

^{xviii} 8 C.F.R. §§ 215.8(a) & 235.1(f).

^{xix} See *i.e.*, Dr. Krisztina Huszti-Orbán & Prof. Fionnuala Ní Aoláin, *Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?*, University of Minnesota Human Rights Center, (2020), <https://www.ohchr.org/Documents/Issues/Terrorism/biometricsreport.pdf>.

^{xx} INA section 262(b), 8 U.S.C. 1302, states, “Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted.” INA section 264(a), 8 U.S.C. 1304, provides that the Secretary is authorized to prepare forms for the registration and fingerprinting of non-citizens “aged 14 and older in the United States, as required by INA section 262.”

^{xxi} In relying on foreign data as the basis for enforcement purposes, CBP has circumvented legal rights and falsely criminalized migrants, including asylum seekers fleeing political violence. See *i.e.*, Jesse Franzblau, “Consequences Of Unreliable Transnational Gang Allegations,” National Immigrant Justice Center, September 30, 2021, <https://immigrantjustice.org/staff/blog/consequences-unreliable-transnational-gang-allegations>.

^{xxii} See U.S. House Judiciary Committee, “Hearing Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration,” Statement of the National Immigrant Justice Center (NIJC), July 25, 2019, <https://www.congress.gov/116/meeting/house/109852/documents/HHRG-116-JU00-20190725-SD014.pdf>. See also *Ms. L., et al., Petitioners-Plaintiffs, v. U.S. Immigration and Customs Enforcement (“ICE”), et al.*, Declaration of Lisa Koop, National Immigrant Justice Center, July 20, 2019 [copy on file with author].

^{xxiii} Electronic Frontier Foundation, Issues, “Biometrics,” <https://www.eff.org/issues/biometrics> [last visited December 8, 2020].

^{xxiv} Jennifer Lynch, Face Off: Law Enforcement Use of Face Recognition Technology, Electronic Frontier Foundation 6 (May 2019) <https://www.eff.org/files/2018/02/15/face-off-report-1b.pdf>.

^{xxv} See, *i.e.*, Elisha Anderson, “Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn’t Commit,” Detroit Free Press, July 11, 2020, <https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002>.

^{xxvi} Sophie Bushwick, “How NIST Tested Facial Recognition Algorithms for Racial Bias,” December 27, 2019, <https://www.scientificamerican.com/article/how-nist-tested-facial-recognition-algorithms-for-racial-bias>. See also Amnesty International, “Amnesty International Calls for Ban on the Use of Facial Recognition Technology for Mass Surveillance,” (June 2020), https://www.amnestyusa.org/wp-content/uploads/2020/06/061120_Public-Statement-Amnesty-International-Calls-for-Ban-on-the-Use-of-Facial-Recognition-Technology-for-Mass-Surveillance.pdf.

^{xxvii} Olivia Solon, “Facial recognition bill would ban use by federal law enforcement,” NBC News, June 25, 2020, <https://www.nbcnews.com/tech/security/2-democratic-senators-propose-ban-use-facial-recognition-federal-law-n1232128>.

^{xxviii} Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Advance Unedited Version, 10 November 2020, A/75/50289 (“This report highlights how digital technologies are being deployed to advance the xenophobic and racially discriminatory ideologies that have become so prevalent, in part due to widespread perceptions of refugees and migrants as *per se* threats to national security. In other cases, discrimination and exclusion occur in the absence of explicit animus, but as a result of the pursuit of bureaucratic and humanitarian efficiency without the necessary human rights safeguards. The report also highlights how ongoing securitization of borders, and related massive economic profits are a significant part of the problem.”).