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Margaret Noll

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Recommended Citation

Margaret Noll, *CBP One and the Due Process Rights of Asylum Seekers at the Threshold*, 24 U. Md. L.J. Race Relig. Gender & Class ().

Available at: <https://digitalcommons.law.umaryland.edu/rrgc/vol24/iss1/3>

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CBP ONE AND THE DUE PROCESS RIGHTS OF ASYLUM SEEKERS AT THE THRESHOLD

MARGARET NOLL*

For asylum seekers, the Southwestern border of the United States has become a mobile app, called CBP One.¹ In the past, to begin the asylum process at the border, a migrant would approach a port of entry (“POE”) and indicate their intent to apply for asylum, in accord with U.S. statutes.² Now, in order to seek asylum at the U.S. border, a migrant must first obtain an appointment through the CBP One app to present themselves at a POE.³ To reach this step, a migrant must have a smartphone, a stable Wi-Fi connection or cellular data, an email address, digital literacy, and the ability to read Spanish, English, or Haitian Creole.⁴ The migrant must be located in Central or Northern Mexico.⁵ The migrant and their family members must submit several selfies as “liveness” checks.⁶ The app may not register selfies of those with darker complexions.⁷ The government releases appointment slots each day, but they are often taken in minutes.⁸ The app frequently glitches and

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* J.D. Candidate, 2025, University of Maryland Francis King Carey School of Law. The author would like to especially thank the editors of the *Maryland Law Journal of Race, Religion, Gender & Class* for all their help in the writing process. The author also wishes to thank Liz, Mihaela, and Sylvia for inspiring and supporting her pursuit of immigration law; Robert, for uplifting her each day; Jennie, for being her role model and fiercest champion; and her friends, for their kindness and laughter through it all.

¹ See generally Austin Kocher, *Glitches in the Digitization of Asylum: How CBP One Turns Migrants’ Smartphones into Mobile Borders*, 13 SOCIETIES, June 2023.

² See *infra* notes 37-41 and accompanying text. *But see Beyond a Border Solution*, AM. IMMIGR. COUNCIL, 4-6 (May 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/02.23_border_whitepaper_v6.pdf. [hereinafter AM. IMMIGR. COUNCIL WHITE PAPER] (holding that the ability for a migrant to walk to a port of entry and request asylum has been inconsistent over the last five years, due recent asylum policies and the pandemic).

³ *CBP One: An Overview*, AM. IMMIGR. COUNCIL, 2 (June 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/cbp_one_an_overview_0.pdf.

⁴ See *USA: MANDATORY USE OF CBP ONE MOBILE APPLICATION VIOLATES THE RIGHT TO SEEK ASYLUM*, AMNESTY INT’L, 11 (May 2023), <https://www.amnesty.org/en/latest/news/2023/05/usa-mandatory-cbp-one-violates-right- asylum/>; AM. IMMIGR. COUNCIL, *supra* note 3.

⁵ See AMNESTY INT’L, *supra* note 4, at 6.

⁶ AM. IMMIGR. COUNCIL, *supra* note 3, at 5.

⁷ See *id.*, at 5.

⁸ Arelis R. Hernandez, *Desperate Migrants Seeking Asylum Face a New Hurdle: Technology*, WASH. POST (Mar. 11, 2023, 6:00 AM), <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>. CBP One releases 1,450 appointments

crashes.⁹ If a migrant is successful in requesting an appointment, they are entered into a lottery system.¹⁰ Once a migrant obtains an appointment, they may have to wait for up to three weeks for their appointment date.¹¹ It is evident that the CBP One process is unequitable, and it subjects asylum seekers to numerous hurdles.¹² The “digital border” is accessible to those who have socioeconomic and technological advantages: a functioning smartphone, high-speed internet access, and a safe place to wait for an appointment.¹³

The U.S. Customs and Border Protection (“CBP”) has established a procedure for seeking asylum that conflicts with the statutory requirements to which it is bound.¹⁴ Any noncitizen, regardless of their immigration status, has the right to apply for asylum in the United States.¹⁵ Those arriving at the border to seek lawful admission must be inspected in person at a POE by an immigration officer.¹⁶ Border officials must refer a noncitizen to the U.S. asylum process if they state an intent to apply for asylum or express a fear of persecution upon

each day. *CBP One™ Appointments Increased to 1,450 Per Day*, U.S. CUSTOMS AND BORDER PROTECTION, (June 30, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>.

⁹ See AMNESTY INT’L, *supra* note 4, at 11.

¹⁰ See AM. IMMGR. COUNCIL, *supra* note 3, at 3 (“[C]BP uses a semi-random selection process to choose the registrants who will receive the limited number of daily appointments . . .”).

¹¹ *CBP One™ Mobile Application*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last modified Feb. 28, 2024). Migrants have the option to schedule their appointments fourteen to twenty-one days in advance. *Id.*

¹² See Abigail F. Kolker & Kristin Finklea, *CBP One Application: Evolution and Functionality*, CONG. RSCH. SERV., IN12166 2-3, (May 30, 2023) (discussing some of the critiques of CBP One, including that it disadvantages certain migrants).

¹³ See *id.*; see also, Complaint at 32, *Al Otro Lado, Inc. v. Mayorkas*, No. 23-cv-01367-AGS-BLM (S.D. Cal. July 27, 2023).

CBP’s requirement that asylum seekers utilize the app has led to unequal access to POEs based on an individual’s socioeconomic status and ultimately, their nationality and race. People with newer or more advanced smartphones and those staying in hotels with strong internet connections have generally had better luck securing appointments through the app.

Id.

¹⁴ See Complaint *supra* note 13, at 63 (“The INA provides [asylum seekers] the right to be inspected and processed at a POE and granted access to the asylum process.”).

¹⁵ 8 U.S.C. § 1158(a)(1).

¹⁶ 8 U.S.C. § 1225(a)(3) (“All aliens who are applicants for admission or otherwise seeking admission . . . shall be inspected by immigration officers.”); 8 C.F.R. § 235.1(a) (“Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port of entry . . .”).

inspection.¹⁷ CBP's required use of a mobile app to schedule an appointment at a POE creates unnecessary burdens to the asylum process and further marginalizes vulnerable migrants.¹⁸ Despite CBP One's large extraterritorial use (in Mexico), this comment will set forth a novel argument that procedural due process rights should attach to its usage in order to safeguard the statutory right to seek asylum, since CBP's actions occur on both sides of the U.S. border and the app is a mandatory subjection of U.S. state authority.¹⁹

Part I provides a brief history of U.S. asylum law, the codification of asylum principles, and the current landscape of asylum procedures at the border.²⁰ Part II discusses due process and extraterritoriality case law.²¹ Part III argues that seeking asylum is a statutorily prescribed right that is made inaccessible through the CBP One mobile application.²² Part IV argues that this statutory right should be accompanied by procedural due process safeguards through the doctrine of extraterritoriality.²³ Finally, Part V weighs the realities of current migration and suggests that, even if the app worked perfectly, it still acts as a barrier to accessing asylum and excludes the most vulnerable noncitizens from humanitarian protection.²⁴

I. HISTORICAL BACKGROUND AND CURRENT LANDSCAPE OF UNITED STATES ASYLUM LAW

A. Evolution of the Right to Seek Asylum and Codification Into U.S. Law

The international right to seek asylum emerged from the recognition that certain individuals needed protection from persecution and could not return to their countries of origin after both World Wars.²⁵ The

¹⁷ 8 U.S.C. § 1225(b)(1)(A)(ii) (“If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible . . . and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer . . .”).

¹⁸ See, e.g., Hernandez, *supra* note 8.

¹⁹ See *infra* Parts III-IV.

²⁰ See *infra* Part I.

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ See *infra* Part V.

²⁵ See B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 97-99 (2017). The League of Nations first recognized humanitarian protections of “certain categories of people” in 1921. *Id.* at 97; see also *Refugee Timeline*, U.S.

creation of the United Nations in 1945²⁶ spurred an international commitment to human rights, and the Universal Declaration of Human Rights, adopted in 1948 by the U.N. General Assembly, stated “everyone has the right to seek and to enjoy in other countries asylum from persecution.”²⁷ The 1951 U.N. Convention Relating to the Status of Refugees established the international definition of a “refugee.”²⁸ The United States became a signatory on the 1967 version of that Convention, which removed temporal and geographic limits on the definition of a “refugee.”²⁹ The U.S. incorporated many aspects of the 1967 Convention into its own domestic law through the passage of the 1980 Refugee Act.³⁰ This watershed act was the first attempt by U.S. law to “proactively address” the admission of refugees.³¹ Protection for refugees, or “asylum seekers” is presently codified in 8 U.S.C. § 1158.³²

B. Asylum Law in U.S. Statutes and Regulations

The commitment to safeguarding the right to seek asylum is codified in U.S. statutes and regulations.³³ The Refugee Act of 1980 directed the executive branch to “create a uniform procedure for the treatment of asylum claims.”³⁴ In its statutes, the U.S. adopted the international definition of a refugee,³⁵ and established the right and

CITIZENSHIP & IMMIGR. SERVS. (last updated Feb. 7, 2023), <https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline>. World War II created a massive global refugee crisis as Jews and other minorities fled persecution. *Id.*

²⁶ *Refugee Timeline*, *supra* note 25.

²⁷ G.A. Res. 217 (III) A, art. 14, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁸ Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137. The definition of a refugee is a person who has a “[W]ell-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” *Id.* at art. (1)(A)(2).

²⁹ *Refugee Timeline*, *supra* note 25.

³⁰ *See id.*

³¹ *See id.* Importantly, the 1980 Refugee Act incorporated the international definition of a refugee into U.S. law. *Id.*

³² *See Drake & Gibson*, *supra* note 25, at 102; *see also infra* note 37 and accompanying text.

³³ *See infra* notes 37-41 and accompanying text.

³⁴ *See Kendall Coffey, The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303, 313 (2000); *see also* Refugee Act of 1980, Pub. L. No. 96-2121 § 101(a), § 208(a), 94 Stat. 102, 102-05 (codified as amended in scattered sections of 8 U.S.C.).

³⁵ “The term ‘refugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or

procedure for accessing asylum at U.S. POEs.³⁶ Title 8 U.S.C. § 1158 states that:

[a]ny 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 . . . section 1225(b)³⁷

Section 1225 sets out more specific procedures for the process: “all aliens (including alien crewman) who are applicants for admission or otherwise seeking admission . . . shall be inspected by immigration officers.”³⁸ And an alien who is “arriving in the United States” must be referred to an asylum officer if “the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.”³⁹

The regulations provide further clarity on asylum procedures at POEs. Title 8 C.F.R. § 1.2 defines “arriving alien” as “an applicant for admission coming or attempting to come into the United States at a port-of-entry.”⁴⁰ Title 8 C.F.R. § 235.1(a) details that “application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port of entry. . . .”⁴¹ United States asylum statutes and regulations clearly set out a duty for border agents to inspect and process any noncitizen who accesses a POE and claims that they would like to apply for asylum.⁴² This duty applies to those noncitizens “arriving” at the border to seek asylum.⁴³

a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42).

³⁶ See *infra* notes 37-41 and accompanying text.

³⁷ 8 U.S.C. § 1158(a)(1).

³⁸ 8 U.S.C. § 1225(a)(3).

³⁹ 8 U.S.C. § 1225(b)(1)(A)(ii).

⁴⁰ 8 C.F.R. § 1.2 (2024).

⁴¹ 8 C.F.R. § 235.1(a) (2024).

⁴² See *Al Otro Lado, Inc. v. Mayorkas*, 2021 WL 3931890, at *20 (S.D. Cal. 2021) (finding the policy of metering (border officials turning away migrants at POEs) to be unlawful because it withheld the government's duties to inspect and refer migrants to the asylum process).

⁴³ *Id.*

C. Current Asylum Regulations and Litigation Over the Right to Seek Asylum

Historically, noncitizens could only access the U.S. asylum process either by being physically within the U.S. already or by requesting asylum at a U.S. POE.⁴⁴ The introduction of the CBP One mobile app and recent asylum regulations have somewhat changed this reality. In January 2023, CBP One began allowing asylum seekers to enter their personal information into the mobile app to request appointments at designated POEs.⁴⁵ In May 2023, the Biden Administration published a final rule regarding new asylum procedures at the border.⁴⁶ Part of these regulations create a presumption of ineligibility for asylum if a noncitizen fails to utilize a lawful pathway to seek admission into the United States.⁴⁷ One of these mandatory lawful pathways is “present[ing] at a POE at a pre-scheduled time,” unless the noncitizen can show they were unable to use the “mechanism for scheduling” because of a “language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”⁴⁸ The “mechanism for scheduling” is CBP One, “essentially requiring the use of the app to seek asylum at the southwest border.”⁴⁹

Soon after the regulation went into effect, immigrants’ rights groups filed a complaint with a federal court in the Southern District of California.⁵⁰ The complaint argued that CBP One violates the government’s mandatory duties under the Immigration and Nationality Act

⁴⁴ *Asylum in the United States*, AM. IMMIGR. COUNCIL, 2 (Jan. 2024), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> [hereinafter *Asylum in the United States*].

⁴⁵ AM. IMMIGR. COUNCIL, *supra* note 3, at 3. “CBP One’s original uses included 1) providing travelers with access to Form I-94 information, 2) scheduling inspection appointments for perishable cargo, and 3) assisting international organizations who sought to help individuals enter the United States.” *Id.* at 1.

⁴⁶ Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. 1003, 1208); AM. IMMIGR. COUNCIL, *supra* note 3, at 2.

⁴⁷ Circumvention of Lawful Pathways, 88 Fed. Reg. at 31,318, 31,314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, and 1208). Specifically, the rule creates a rebuttable presumption of ineligibility for asylum unless a noncitizen was “provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a POE at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or sought asylum or other protection in a country through which they traveled and received a final decision denying that application.” *Id.*

⁴⁸ *Id.*

⁴⁹ AM. IMMIGR. COUNCIL, *supra* note 3, at 2.

⁵⁰ *See Complaint*, *supra* note 13, at 1.

(“INA”) and the Due Process Clause of the Fifth Amendment.⁵¹ It further alleged that the use of the app creates a technological barrier, and prevents the statutory right to seek asylum at the U.S. border.⁵² On October 13, 2023, the District Court denied the plaintiff’s request for a preliminary injunction on procedural issues, but did not rule on the merits of the complaint or the legality of CBP One.⁵³ Thus, the question of CBP One’s legality remains open.⁵⁴ The following sections of this paper will delve into the due process and statutory rights arguments raised in the complaint and offer a new constitutional argument about extraterritoriality.⁵⁵

II. DUE PROCESS FOR ASYLUM SEEKERS AND THE EXTRATERRITORIALITY DOCTRINE

A. Who Gets Due Process? Evolution of the Plenary Power Doctrine

As discussed in Part I, the international recognition of the rights of asylum seekers evolved over the last century and is now enshrined in United States law.⁵⁶ Alongside the evolution of this right, also developed the plenary power doctrine, and the right of the sovereign to exclude migrants from United States territory.⁵⁷ Plenary power stands for the proposition that Congress enjoys broad authority to create immigration laws and those laws will not be second-guessed by the federal judiciary.⁵⁸ However, certain due process rights for migrants have slowly been recognized in U.S. jurisprudence.⁵⁹

⁵¹ *Id.* at 2. The complaint argues that the Fifth Amendment prohibits the federal government from depriving any person of life, liberty or property without due process of law, and that Congress granted certain statutory rights to asylum seekers, told DHS to establish a procedure for providing such rights, and now DHS is failing to abide by that procedure. *Id.* at 62-63.

⁵² *Id.* at 3.

⁵³ See *Court Allows Turnbacks of Asylum Seekers Without CBP One Appointments to Continue*, AM. IMMIGR. COUNCIL, (Oct. 13, 2023), <https://www.americanimmigrationcouncil.org/news/court-allows-turnbacks-asylum-seekers-without-cbp-one-appointments-continue>.

⁵⁴ See *id.*

⁵⁵ See *infra* Parts III and IV.

⁵⁶ See *supra* Part I.A-IB.

⁵⁷ The plenary power doctrine emerged from the Chinese Exclusion Case, *Chae Chan Ping v. United States*. See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 606-09 (1889). At the turn of the 20th century, the Court recognized the prerogative of the sovereign to restrict and admit certain noncitizens from entry to the United States. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

⁵⁸ See Zainab A. Cheema, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After Boumediene*, 87 *FORDHAM L. REV.* 289, 304 (2018).

⁵⁹ See Drake & Gibson, *supra* note 25, at 106.

There is a stark difference in due process rights based on a noncitizen's location. In *Wong Wing v. United States*,⁶⁰ the U.S. Supreme Court recognized that basic constitutional provisions, including the Fifth Amendment, apply to noncitizens based on their presence inside the United States.⁶¹ However, noncitizens "on the threshold" of entry have significantly fewer constitutional protections and the Court has consistently held that due process for those outside the territory of the United States is whatever Congress authorizes.⁶²

B. The Doctrine of Extraterritoriality

While Congress determines due process for migrants and asylum seekers via immigration statutes,⁶³ over the last fifty years U.S. courts have grappled with the application of constitutional rights when U.S. activities and jurisdiction extend over noncitizens outside of the territorial borders of the nation.⁶⁴ The notion of framing the U.S. Constitution in a "territorial" framework assumes that "government action outside the borders of the nation is not constrained by constitutional limitations."⁶⁵ The U.S. Supreme Court initially approached the extraterritorial application of constitutional protections with a strict lens, established in *Johnson v. Eisentrager*,⁶⁶ determining that it is the noncitizen's presence inside the U.S. which affords them any constitutional rights.⁶⁷ However, over time, the Supreme Court deviated from the strict territorial approach and suggested two frameworks for applying

⁶⁰ 163 U.S. 228 (1896).

⁶¹ See *id.* at 238; see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (affirming that every "alien within the jurisdiction of the United States" is entitled to due process under the Fifth and Fourteenth Amendments, even those whose presence is "unlawful, involuntary, or transitory").

⁶² See *Shaughnessy v. U.S. ex rel. Mezei*, 345 US 206, 212 (1953) (determining that those who have passed through our borders are entitled to due process, but "an alien on the threshold of initial entry stands on a different footing"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *Sale v. Haitian Ctrs., Council*, 509 U.S. 155, 160 (1993) (finding that the INA only offers statutory protections of asylum for noncitizens "who reside in or have arrived at the border of the United States"); *Dep't Homeland Sec. v. Thuraissigiam*, 140 S.Ct. 1959, 1977 (2020) (acknowledging that "the only procedural rights of an alien seeking to enter the country are those conferred by statute").

⁶³ See *Thuraissigiam*, 140 S. Ct. at 1977.

⁶⁴ See *infra* notes 65-78 and accompanying text.

⁶⁵ See *Cheema*, *supra* note 58, at 312.

⁶⁶ 339 U.S. 763 (1950).

⁶⁷ See *id.* (holding that German prisoners who committed war crimes and were imprisoned by the U.S. in a war camp in Germany had no right to a writ of habeas corpus).

extraterritoriality: the substantial connections doctrine and the functional approach.⁶⁸

In *United States v. Verdugo-Urquidez*,⁶⁹ the Court determined that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”⁷⁰ The Court also suggested that immigrants who voluntarily connect themselves to the country “accept[] some societal obligations” and thus constitutional protections.⁷¹ The Fifth Circuit interpreted the “substantial connections” doctrine to include “[voluntary] acquiescence in the U.S. system of immigration.”⁷²

Adjacent to the substantial connections doctrine is the “functional” approach to extraterritoriality, established by the Court in *Boumediene v. Bush*.⁷³ Here, the Court held that Guantanamo Bay detainees had the right to invoke the procedural protections afforded by the U.S. Constitution in writs of habeas corpus.⁷⁴ The Court rejected the strict approach set out over fifty years earlier in *Eisentrager*,⁷⁵ and instead suggested a functional approach to the extraterritorial application of the Constitution.⁷⁶ Writing for the majority, Justice Kennedy emphasized that “questions of extraterritoriality turn on objective factors and practical concerns.”⁷⁷ For Guantanamo Bay detainees, such practical concerns included the sufficiency of the process provided and the “practical obstacles inherent in resolving the prisoner’s entitlement to the writ [of habeas corpus].”⁷⁸

⁶⁸ See Fatma Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 778 (2020).

⁶⁹ 494 U.S. 259 (1990) (finding that a search and seizure which occurred in Mexico by U.S. government agents did not violate the Fourth Amendment because it occurred outside of U.S. territory, even though it would have violated the Fourth Amendment if it occurred within U.S. territory).

⁷⁰ *Id.* at 271 (finding that the noncitizen plaintiff “had no previous significant voluntary connection with the United States”).

⁷¹ *Id.* at 273 (distinguishing the *Verdugo-Urquidez* plaintiff, who had no voluntary connections to the United States, with the plaintiffs in *INS v. Lopez-Mendoza*, 494 U.S. 259 (1990), who were noncitizens residing in the U.S. unlawfully, but did so voluntarily and “had presumably accepted some societal obligations”).

⁷² *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006).

⁷³ 553 U.S. 723 (2008).

⁷⁴ *Id.* at 771.

⁷⁵ *Id.* (stating that a “constricted reading of *Eisentrager* overlooks . . . the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”).

⁷⁶ *Id.* at 766.

⁷⁷ *Id.* at 764.

⁷⁸ See Cheema, *supra* note 58, at 314; see *id.* at 766 (stating that one factor to consider is the “the adequacy of the process through which that status determination was made”).

In analyzing whether constitutional provisions apply extraterritorially, *Boumediene* suggested that courts could consider the “‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and . . . whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”⁷⁹ While the *Boumediene* Court did not address whether the petitioners were afforded due process protections,⁸⁰ the “functional” approach seems to suggest that the extension of certain constitutional provisions depends on the contextual consideration of practical and objective factors.⁸¹

As the jurisprudence stands today, courts vacillate on which extraterritoriality test to implement, and sometimes combine the two tests.⁸² Unsurprisingly, circuit splits have occurred.⁸³ The Supreme Court has not provided much clarity on the two tests, and in two recent cases, engaged with both. The Court appeared to apply a “substantial connections” test in *Department of Homeland Security v. Thuraissigiam*,⁸⁴ a case regarding the suspension clause, noting that noncitizens with “established connections” are entitled to some constitutional protections.⁸⁵ In *Hernandez v. Mesa*,⁸⁶ the Court declined to extend the *Bivens* remedy to cross-border shootings.⁸⁷ The Court did not reach the Fourth and Fifth Amendment issues in the case, but stated in a footnote that the *Verdugo-Urquidez* substantial connections test was not controlling in the Fourth Amendment context, and cited the functional approach of *Boumediene*.⁸⁸ The lack of a clear rule from the Supreme Court has led to lower federal courts interpreting that due process rights can be extended to noncitizens on the threshold of entry in specific factual circumstances, as Part IV will discuss in further detail.⁸⁹

⁷⁹ *Id.* at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring)).

⁸⁰ *Id.* at 785.

⁸¹ See Cheema, *supra* note 58, at 317.

⁸² See Marouf, *supra* note 68, at 816.

⁸³ *Id.* at 820.

⁸⁴ 140 S. Ct. 1959, 1963-64 (2020)

⁸⁵ *Id.*

⁸⁶ 140 S. Ct. 735 (2020).

⁸⁷ *Id.* at 739.

⁸⁸ *Id.* at 754 n.1 (Ginsburg, J., dissenting).

⁸⁹ See *infra* Part IV.

III. SEEKING ASYLUM IS A STATUTORILY PRESCRIBED RIGHT THAT THE CBP ONE APP INHIBITS

To address the influx of migration at the border in recent years,⁹⁰ the U.S. government implemented policies to restrict migration at the border, and with it the rights of asylum seekers.⁹¹ These policies are often met with litigation from immigrants' rights groups,⁹² which lead to U.S. courts' recognition of certain rights for asylum seekers, including due process.⁹³

A pair of recent cases held that the asylum procedures in the INA sweep in "arriving aliens," which includes noncitizens in the process of seeking admission but who are physically located outside of the United States.⁹⁴ In *Al Otro Lado v. McAleenan*,⁹⁵ a district court found a policy of turning back asylum seekers at the border or on international bridges⁹⁶ unlawful and in violation of Fifth Amendment due process protections because the statute obligates CBP to perform certain inspection duties and ensure meaningful access to the asylum process.⁹⁷ The court determined that the use of the phrase "is arriving" in 1225(b)(1)(A)(ii) clearly encompasses those outside of the United States.⁹⁸

Additionally, the use of the present tense and present participle for the words "arrives," and "arriving," in the statute, instead of the past tense use of "arrived," signifies that the statute protects an ongoing process and applies to those engaged in many parts of that process.⁹⁹ Further support for this argument is found in the regulations, where "arriving alien" is defined as one "coming or attempting to come into the United

⁹⁰ John Gramlich, *Migrant encounters at the U.S.-Mexico border hit a record high at the end of 2023*, Pew Rsch. Ctr. (Jan. 13, 2023) <https://www.pewresearch.org/short-reads/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/> (last updated Feb. 15, 2024).

⁹¹ *Asylum in the United States*, *supra* note 44, at 3.

⁹² *See, e.g.*, *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810, 2023 WL 4729278 (N.D. Cal. July 25, 2023); *M.A. v. Mayorkas*, No. 23-cv-01843, 2023 WL 5321924 (D.D.C., Jun. 23, 2023); *Class Action Complaint, Al Otro Lado v. Mayorkas*, No. 23-cv-01367-AGS-BLM (S.D. Cal. 2023); *Al Otro Lado, Inc. v. Mayorkas*, 2021 WL 3931890 (S.D. Cal. 2021); *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019)

⁹³ *See supra* notes 84-5 and accompanying text; *see infra* Part IV.

⁹⁴ *See infra* notes 98-108 and accompanying text.

⁹⁵ 394 F. Supp. 3d 1168 (S.D. Cal. 2019).

⁹⁶ *Id.* at 1180, 1186-87.

⁹⁷ *Id.* at 1221-22.

⁹⁸ *Id.* at 1200. The Court found that "Congress included aliens in the process of arriving in the United States in section 1158(a)(1)'s general authorization to apply for asylum." *Id.* at 1199.

⁹⁹ *Id.* at 1200.

States at a port-of-entry.”¹⁰⁰ Importantly, the Ninth Circuit Court of Appeals mentioned that the *McAleenan* court was “likely correct” in its interpretation of the statute to include aliens not yet inside the United States, but in the process of seeking admission through a POE.¹⁰¹

Because those outside of the United States seeking admission were determined to be included in the statute, the *McAleenan* court held that the plaintiffs adequately pleaded a violation of their Fifth Amendment procedural due process rights under the statute.¹⁰² The court reasoned that “Congress has plainly established procedural protections” for noncitizens who are “in the process of arriving to the United States” and by turning them away, “immigration officers failed to discharge their mandatory duties under the relevant provisions.”¹⁰³

The same district court, two years later, found unlawful a policy of metering at the border.¹⁰⁴ Under this policy, border officials turned asylum seekers away from POEs, citing a lack of capacity and assigning migrants to informal lists.¹⁰⁵ The court granted summary judgment to the plaintiffs on their claim that the government violated their due process rights.¹⁰⁶ The court again engaged in statutory interpretation of the asylum procedure provision of the INA, and found that it encompassed those on the threshold of entry or attempting to enter at a POE, and that the due process rights of asylum seekers extend at least to the procedure afforded by the statute.¹⁰⁷ Because the metering policy of turning back asylum seekers unlawfully withheld the government’s duties under the statute, it was a violation of due process.¹⁰⁸

The court also discussed how the metering process adds additional hurdles and complicates the procedure for asylum seekers, who, as per the statute, must arrive at a POE and notify an immigration official that they intend to apply for asylum.¹⁰⁹ The metering policy also

¹⁰⁰ The regulation further supports the argument that aliens on the threshold or who are attempting to access a POE are included in the statutory protections. *Id.* at 1200-01.

¹⁰¹ See *Al Otro Lado v. Wolf*, 952 F.3d 999, 1011 (9th Cir. 2020) (“[T]he district court’s interpretation of ‘arrives in the United States is likely correct.’”).

¹⁰² See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1221-22 (S.D. Cal. 2019). The defendants, the government, conceded that the due process clause protects the plaintiff’s statutory rights. See *id.* at 1221.

¹⁰³ *Id.* at 1221.

¹⁰⁴ *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at *33-34 (S.D. Cal. 2021).

¹⁰⁵ See *id.* at *31-32.

¹⁰⁶ *Id.* at *38.

¹⁰⁷ See *id.* at *19, 37.

¹⁰⁸ *Id.* at *38.

¹⁰⁹ See *id.* at *31-34.

adds barriers to the process and may incentivize unlawful crossings.¹¹⁰ The court stated that this could not have been Congress's intent in enacting the statute and the additional steps incident to metering are not stated or contemplated by section 1225(b)(1)(A)(ii) of the INA.¹¹¹

Recent litigation over the mandatory use of CBP One to seek asylum alleged similar violations of due process.¹¹² It can be argued that CBP One creates an electronic form of metering, where those attempting to access a POE are put on a "waitlist" and metered for capacity.¹¹³ It is true that capacity issues are important to consider, but when the only way to access the asylum process is through a mobile application on a smartphone, this meaningfully restricts access to a statutorily prescribed procedure and violates due process.¹¹⁴

IV. CBP ONE SHOULD BE ACCOMPANIED BY PROCEDURAL DUE PROCESS SAFEGUARDS VIA THE DOCTRINE OF EXTRATERRITORIALITY

Another way to analyze the mandatory use of CBP One is through a lens of extraterritoriality.¹¹⁵ The requirement of using CBP One to access the statutory asylum procedures at U.S. POEs is a subjection of state authority that extends outside of U.S. territory.¹¹⁶ Under the *Boumediene* framework of practical concerns and objective factors, constitutional protections could attach in this context.¹¹⁷

¹¹⁰ *See id.* at *31.

¹¹¹ *Id.* at *33.

¹¹² *See* Complaint, *supra* note 13. The complaint also alleges that CBP One is a technological barrier and prevents the statutory right to seek asylum. *Id.* at 3.

¹¹³ The prior metering policy, "required" noncitizens to leave the ports of entry, "[P]ut their names on a list (which, evidence shows, itself sometimes required a wait), and spend additional time in Mexico waiting for their 'appointments.'" *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at *32 (S.D. Cal. 2021). This sounds quite similar to the procedure for obtaining an appointment at a POE with CBP One. Amnesty International posits "[T]hat the use of the CBP One application as the sole means of making an asylum appointment at the southwest border is akin to the previous "metering" policy in that asylum-seekers are now once again forced to sign up for appointments at ports-of-entry to access asylum." AMNESTY INT'L, *supra* note 4, at 9.

¹¹⁴ AMNESTY INT'L, *supra* note 4, at 8.

¹¹⁵ Courts have considered turnbacks and metering in the extraterritorial context and determined that due process protections attached to asylum seekers in these situations. *See Mayorkas*, 2021 WL 3931890; *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019).

¹¹⁶ AMNESTY INT'L, *supra* note 4, at 8.

¹¹⁷ *See infra* notes 139-68 and accompanying text.

A. CBP One Differs From Past Migration Control Policies

The required use of CBP One is similar to metering and turnback policies but also differs in significant ways. Akin to a metering waitlist, asylum seekers must wait for their turn to access a POE.¹¹⁸ They are also comparably at the whim of the U.S. immigration system and immigration officers.¹¹⁹ In metering and turnback policies, immigration officials often stood on U.S. soil and physically waved away or metered people at the threshold of entry or on international bridges, bringing this conduct under the territorial jurisdiction of the United States.¹²⁰ The CBP One smartphone app similarly places asylum seekers under U.S. jurisdiction, albeit digitally.¹²¹

However, instead of turning people away once they reach a POE, the U.S. government affirmatively places a barrier to the ability to even approach a POE, and consequently, access to the statutory process of asylum.¹²² In doing this, asylum seekers that struggle to obtain a border appointment cannot take the first step in effectuating the right to pursue asylum at POEs, which is different than previous border management policies.¹²³ The government is extending its jurisdiction outside of its territory and placing a digital administrative hurdle that blocks access in the first place, without providing a meaningful alternative for marginalized asylum seekers.¹²⁴

¹¹⁸ See *Metering and Asylum Turnbacks*, AM. IMMIGR. COUNCIL, 1 (March 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/metering_and_asylum_turnbacks_0.pdf.

¹¹⁹ Much of the waitlist procedures were informal. *Id.* “While metering was in effect, CBP contacted the person or entity in charge of the list and informed them of how many people could be admitted and processed in order to request asylum on a given day.” *Id.* at 2. Some days, no one would be called from the list. *Id.* at 2. Shortly after the presidential administration changed in 2021, no plan was put in place to address the existing metering lists. *Id.* at 3.

¹²⁰ See *id.* at 1; *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1186 (S.D. Cal. 2019).

¹²¹ See Kocher, *supra* note 1, at 4.

¹²² See Complaint, *supra* note 13, at 3.

¹²³ “[A]sylum seekers arriving at ports of entry and along the border have the right to present themselves to border officers to seek protection, and their reception at that border and referral to asylum proceedings is the essential step in giving that right meaning.” Drake & Gibson, *supra* note 25, at 94; see also AMNESTY INT’L, *supra* note 4, at 7 (“Access to territory is a necessary requirement for realizing the right to seek asylum.”).

¹²⁴ See Complaint, *supra* note 13, at 3. The Circumvention of Lawful Pathways Rule provides an exception for certain migrants to present themselves at ports of entry “for individuals who are not able to access or use the application due a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, [however] it is unclear how this will be determined at the border and if border agents will have discretion in these decisions.” See AMNESTY INT’L, *supra* note 4, at 9.

When enforcing congressional legislation, the executive branch “must respect the procedural safeguards of due process.”¹²⁵ CBP One is the government’s method to carry out the mandatory asylum inspection duties under the INA,¹²⁶ but this method blocks access to the process for some.¹²⁷ This begs the question of whether due process could apply to asylum seekers in this situation.¹²⁸ With the extraterritorial reach of this administrative requirement placing migrants within the digital jurisdiction of the United States in order to access a statutory right, *Boumediene*’s functional test may be applicable.¹²⁹

B. Applying the Doctrine of Extraterritoriality

In two cases considering the legality of turnback and metering policies, *Al Otro Lado v. McAleenan* and *Al Otro Lado v. Mayorkas*, due process rights were found to attach to asylum seekers extraterritorially.¹³⁰ These cases reasoned that because unlawful conduct to which due process rights attached was being performed on U.S. soil, and affected asylum seekers extraterritorially, constitutional protections applied.¹³¹ The court used the “functional” approach endorsed by the Supreme Court in *Boumediene* to analyze whether the Fifth Amendment due process protections should extend to asylum seekers outside the United States.¹³²

[T]he rule fails to explain how officers would assess a person’s inability to use CBP One. In response to public comment about these exceptions to the obligatory use of CBP One, DHS suggests that those who seek to invoke the language barrier or illiteracy exceptions may have to meet a steep burden because ‘individuals may seek assistance, including translation, in using the app.’

AM. IMMIGR. COUNCIL, *supra* note 3, at 7. “[T]he agency has failed to provide meaningful alternatives for the app.” *Id.* at 8.

¹²⁵ *Kleindienst v. Mandel*, 408 U.S. 753, 767-70 (1972) (finding that Congress delegated the power to exclude noncitizens to the executive branch so the Attorney General could exclude from entry, a Belgian journalist, since the reason for his exclusion was bona fide and legitimate and the Attorney General respected due process).

¹²⁶ *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31, 314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 1003, 1208).

¹²⁷ *See* AMNESTY INT’L, *supra* note 4, at 7-8.

¹²⁸ *See* Complaint, *supra* note 13.

¹²⁹ *See* *Al Otro Lado v. McAleenan*, where the court analyzed a metering policy under the *Boumediene* framework and found that due process protections applied to asylum seekers in this case. 394 F. Supp. 3d 1168, 1220-22 (S.D. Cal. 2019).

¹³⁰ *See id.*; *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at *19 (S.D. Cal. 2021).

¹³¹ *See* *McAleenan*, 394 F. Supp. at 1220-22; *Mayorkas*, 2021 WL 3931890, at *19.

¹³² *See* *McAleenan*, 394 F. Supp. at 1218-21; *Mayorkas*, 2021 WL 3931890 at *37.

In *Al Otro Lado v. McAleenan*, the court found that objective factors and practical considerations supported the plaintiffs' argument that due process should be applied to asylum seekers affected by metering.¹³³ The court agreed with the plaintiffs that there was nothing "impracticable [or] anomalous" in applying elementary due process protection at the U.S. border.¹³⁴ And objectively, the conduct under review was not fully occurring outside of the United States.¹³⁵ Asylum seekers largely felt the impacts of the metering policy while they waited in Mexico, but U.S. government officials created the policy, disseminated it down to border officers, and implemented it on U.S. soil at POEs or on international bridges, all of which fell under U.S. jurisdiction.¹³⁶ Practically, the policy impeded access to the "statutorily mandated asylum procedure" intended by Congress to extend to certain "arriving aliens."¹³⁷ Due to these considerations, the court found that due process protections should be extended extraterritorially to noncitizens impacted by metering.¹³⁸

A similar extraterritorial analysis under *Boumediene* could be performed regarding the use of CBP One.¹³⁹ According to Justice Kennedy in *Boumediene*, "questions of extraterritoriality turn on objective factors and practical concerns."¹⁴⁰ Such practical concerns can include "the adequacy of the process" provided and the "practical obstacles inherent in resolving" the constitutional entitlement.¹⁴¹ Another functional consideration is "whether judicial enforcement of the provision would be 'impracticable and anomalous.'"¹⁴²

As the *McAleenan* court suggested, enforcing basic procedural due process rights at the border is not judicially impracticable or anomalous.¹⁴³ Turning to objective factors, similar to the metering policy, it can be argued that objectively, CBP One, as a mobile application,

¹³³ See *McAleenan*, 394 F. Supp. at 1218-21.

¹³⁴ *Id.* at 1220.

¹³⁵ See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1220 (S.D. Cal. 2019).

¹³⁶ See *id.*

¹³⁷ *Id.* at 1221.

¹³⁸ *Id.* at 1221-1222. Two years later, the court re-endorsed this approach and came to the same conclusion about the extraterritorial extension of due process for asylum seekers. See *Al Otro Lado, Inc. v. Mayorcas*, 2021 WL 3931890, at *37 (S.D. Cal. 2021).

¹³⁹ Since CBP One has been referred to as an electronic version of metering, a similar analysis can be implemented as the court did in *Al Otro Lado v. McAleenan*. 394 F. Supp. 3d 1168, 1218-1221 (S.D. Cal. 2019).

¹⁴⁰ *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).

¹⁴¹ See *id.* at 766.

¹⁴² *Id.* at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring)).

¹⁴³ Cf. *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1220 (S.D. Cal. 2019).

involves conduct occurring on both sides of the U.S. border.¹⁴⁴ While asylum seekers are primarily attempting to use CBP One while they are physically in Mexico, the data is transmitted to U.S. servers, and border officials presumably use the data to collect information and make decisions about noncitizens seeking appointments.¹⁴⁵ The developers of the app are likely physically present in the United States, and they have quite a large degree of control over the app's functionality.¹⁴⁶ Even with the CBP One policy in place, there have still been reports of noncitizens being turned back from the border, despite having CBP One appointments,¹⁴⁷ or when they attempt to explain to border officers their inability to obtain an appointment.¹⁴⁸ Further, the use of CBP One is the sole way to legally pursue asylum at the border.¹⁴⁹ This mandatory legal requirement arguably injects CBP One with additional U.S. authority and jurisdiction.¹⁵⁰

The mandatory use of CBP One to access asylum creates many practical concerns including obstacles to resolving the statutorily protected right to seek asylum and the insufficiency of the process provided

¹⁴⁴ See Complaint, *supra* note 13, at 13. Migrants use the app while located in Mexico. *Id.* at 28. The app's data is likely being stored in the U.S., and when migrants attempt to present at a POE with or without an appointment, they are interacting with U.S. officials likely standing on U.S. soil. *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ See, e.g., *Government Documents Reveal Information about the Development of the CBP One App*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/foia/government-documents-reveal-information-about-development-cbp-one-app> (Feb. 28, 2023) (“[C]BP’s Office of Field Operations (OFO) funded the app and developed it with the help of the agency’s Office of Information Technology.”).

¹⁴⁷ The Washington Post reported on a family, who had obtained a border appointment through CBP One, but U.S. officials turned them away as well as about fifty other families, stating that they required each child to register for an appointment individually. See Hernandez, *supra* note 8.

¹⁴⁸ The Circumvention of Lawful Pathways Rule allows migrants to get around the requirement to use CBP One if they can demonstrate that they were unable to make an appointment “due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle”. Circumvention of Lawful Pathways, 88 Fed. Reg. at 31,318; *but see* Sanya Mansoor, ‘It’s Like a Lottery.’ Migrants Struggle to Make Asylum Appointments Through U.S. Government App, TIME (May 16, 2023, 4:13 PM), <https://time.com/6280220/migrants-border-cbp-app-asylum/> (reporting that immigration officials told migrants to get a smartphone and “figure it out” after they attempted to explain that they did not speak Spanish nor have a smartphone and were unable to get a CBP One Appointment); see Complaint, *supra* note 13, at 6-10 (discussing various plaintiffs who had been turned away at ports of entry while trying to explain their difficulties using the app). One family was even turned away at the port of entry despite explaining that they were kidnapped and missed their previous CBP One appointment. *Id.* at 38.

¹⁴⁹ “[T]he app has become essentially mandatory for individuals to access certain immigration processes with limited exceptions.” AM. IMMIGR. COUNCIL, *supra* note 3, at 8.

¹⁵⁰ AMNESTY INT’L, *supra* note 4, at 7-8.

via CBP One.¹⁵¹ Practical obstacles include economic resources, digital literacy, access to stable Wi-Fi or cellular data, and language barriers.¹⁵² Those with darker skin encounter an additional, discriminatory obstacle when their self-taken photos are not recognized in the CBP One software.¹⁵³ While there is an exception one can assert if they encounter such obstacles,¹⁵⁴ practically it is not clear how to overcome the exception, and the burden is on the asylum seeker to do so.¹⁵⁵

If the mobile app worked seamlessly, without a hitch, it might be a sufficient way to access the asylum procedures afforded to noncitizens by U.S. statutes.¹⁵⁶ However, as the app functions currently, it is riddled with issues, and thus causes asylum seekers to wait in Mexico, effectively metered.¹⁵⁷ The app is reported to glitch and crash.¹⁵⁸ The appointments are not offered at every POE, causing migrants to sometimes travel hundreds of miles just to make their border appointment.¹⁵⁹ The process favors certain migrants over others, often those with greater economic and technological resources.¹⁶⁰ For example, in May 2023, data from the Tijuana POE showed that “40% of CBP One appointments

¹⁵¹ For example, only eight POEs across the entire Southern border process CBP One appointments. *See* Complaint, *supra* note 13, at 34, 37. It is estimated that the average wait time to get an appointment is one to two months, as the 1,450 slots per day do not meet the demand of those interested. Ayelet Parness, *For Asylum Seekers, CBP One App Poses Major Challenges*, HIAS, (Nov. 8, 2023) <https://hias.org/news/asylum-seekers-cbp-one-app-poses-major-challenges/>.

¹⁵² *See* AMNESTY INT’L, *supra* note 4, at 6, 11; AM. IMMIGR. COUNCIL, *supra* note 3; Parness, *supra* note 151.

¹⁵³ *See* AM. IMMIGR. COUNCIL, *supra* note 3, at 5; *see also*, Hernandez, *supra* note 8 (describing a Haitian migrant demonstrating to a reporter that the camera function on the CBP One app struggled to register his darker skin tone).

¹⁵⁴ *See supra* note 124.

¹⁵⁵ *See* AMNESTY INT’L, *supra* note 4, at 9. “In response to public comment about these exceptions to the obligatory use of CBP One, DHS suggests that those who seek to invoke the language barrier or illiteracy exceptions may have to meet a steep burden because ‘individuals may seek assistance, including translation, in using the app.’” AM. IMMIGR. COUNCIL, *supra* note 3, at 7. In stakeholder calls, DHS indicated “[T]hat ‘asylum seekers will face a significant burden in meeting the exception . . .’” and border officials might ask about their attempt to seek third party assistance in using the app if they are illiterate or have a language barrier. *Biden’s Asylum Ban*, NAT’L. IMMIGR. PROJECT 3, https://nipnl.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf.

¹⁵⁶ *See* Kocher, *supra* note 1, at 2 (“[D]igitizing various aspects of the asylum process using mobile phones may promise improvements in access and efficiency . . .”).

¹⁵⁷ AM. BAR ASS’N, PRIMER: IMMIGRATION ENFORCEMENT MECHANISMS AT THE U.S. BORDER, 19-20 (last updated on Mar. 29, 2023).

¹⁵⁸ *See* Kolker & Finklea, *supra* note 12, at 3; Hernandez, *supra* note 8.

¹⁵⁹ AM. IMMIGR. COUNCIL WHITE PAPER, *supra* note 2, at 10.

¹⁶⁰ *Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways*, HUM. RTS. WATCH, (Mar. 23, 2023), <https://www.hrw.org/news/2023/03/24/comment-proposed-rule-department-homeland-security-dhs-and-executive-office>.

secured by migrants in Tijuana have gone to Russian nationals, despite Russians making up less than 10% of Tijuana's overall migrant population."¹⁶¹ This could be explained by the fact that Russian migrants may have more updated smartphones and the economic resources to stay in hotels with stronger internet connections near the border than migrants with less economic resources staying in crowded shelters with lagging Wi-Fi signals and outdated smartphones.¹⁶² Unfortunately, the practical realities of the app's usage leave certain migrants completely outside of the process, which is clearly not sufficient.¹⁶³

The functional approach to extraterritoriality supports the notion that the constitutional protections of due process under the Fifth Amendment could realistically extend to asylum seekers who cannot access asylum at the border due to CBP One.¹⁶⁴ Congress intended the statutorily mandated asylum procedures to extend to arriving aliens.¹⁶⁵ CBP One involves conduct that objectively occurs both inside and outside of the United States,¹⁶⁶ and for those impacted outside the United States, the process to realize their right to seek asylum is insufficient and riddled with practical obstacles.¹⁶⁷ Extending the safeguards of procedural due process to the CBP One context would likely be possible under *Boumediene*'s functional test.¹⁶⁸

V. EVEN IN A PERFECT WORLD, CBP ONE STILL RESTRICTS ACCESS TO ASYLUM FOR THE MOST VULNERABLE POPULATIONS

Any analysis of this issue must acknowledge that along the U.S.-Mexico border exists a humanitarian crisis,¹⁶⁹ and that POEs must be able to manage capacity in order to ensure safe and orderly movement

¹⁶¹ See Complaint, *supra* note 13, at 32.

¹⁶² *Id.*

¹⁶³ AMNESTY INT'L, *supra* note 4, at 6, 11.

¹⁶⁴ The electronic metering caused by CBP One is analogous to the metering policy found unlawful in *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d. 1168 (S.D. Cal. 2019). There, the court applied the functional test from *Boumediene*. See *id.* at 1218-21.

¹⁶⁵ See *McAleenan*, 394 F. Supp. at 1199; *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at *19 (S.D. Cal. 2021).

¹⁶⁶ See *supra* notes 144-150 and accompanying text.

¹⁶⁷ See *supra* notes 151-163 and accompanying text.

¹⁶⁸ See *supra* notes 139-163 and accompanying text.

¹⁶⁹ Eric Reidy, *How the U.S. Border Became an Unrelenting Humanitarian Crisis*, THE NEW HUMANITARIAN (May 10, 2023) <https://www.thenewhumanitarian.org/news-feature/2023/05/10/how-us-mexico-border-became-unrelenting-humanitarian-crisis>.

of people.¹⁷⁰ While there are no clear solutions to border management, CBP heralds the CBP One app as an incentive for migrants to use “safe, lawful and orderly processes,”¹⁷¹ and the incorporation of technology into the U.S. asylum system could have tangible benefits for asylum seekers.¹⁷² However, at the time of this publication, migration across the Southwest border is surging at unprecedented levels,¹⁷³ yet only a fraction of migrants are processed at POEs via CBP One.¹⁷⁴ The use of technology in humanitarian asylum processing is certainly not an evil in and of itself, and can be an advantage to both migrants and government bodies.¹⁷⁵ But in its current state, the CBP One mobile app acts as a technological barrier to access the protections of the U.S. asylum system, and therefore violates U.S. statutes.¹⁷⁶

Even if the app worked perfectly, and POEs operated at capacity, access to the asylum process would still be premised on one’s economic status and ability to navigate a smartphone and application.¹⁷⁷ As long as migrants are required to wait in Mexico for their chance to legally effectuate an entry to the United States, sometimes indefinitely, a

¹⁷⁰ *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration*, U.S. DEP’T OF HOMELAND SEC., (Apr. 27, 2023) <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration> (discussing initiatives to ensure safe and orderly migration processes).

¹⁷¹ *CBP Releases August 2023 Monthly Update*, U.S. CUSTOMS AND BORDER PROT., (Sept. 9, 2023) <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-august-2023-monthly-update>.

¹⁷² See Kocher, *supra* note 1, at 2 (“[D]igitizing various aspects of the asylum process using mobile phones may promise improvements to access and efficiency[.]”).

¹⁷³ In December 2023, “[B]order Patrol agents processed nearly 235,000 migrants . . .” who crossed unlawfully, or between ports of entry. Camilo Montoya-Galvez, *U.S. border Officials on Track to Process Over 300,000 Migrants in December, the Highest Monthly Tally on Record*, CBS NEWS (Dec. 31, 2023, 10:30 AM) <https://www.cbsnews.com/news/us-mexico-border-migrants-processed-december-record/>.

¹⁷⁴ Approximately 43,000 migrants per month effectuate legal entries via CBP One at POEs. *CBP Releases November 2023 Monthly Update*, U.S. CUSTOMS AND BORDER PROT. (Dec. 22, 2023) DEP’T OF HOMELAND SEC., <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-november-2023-monthly-update>.

¹⁷⁵ For example, smartphones can be used to “store or retrieve evidence” for asylum claims, such as photographs or threatening messages. Kocher, *supra* note 1, at 3. Speech recognition technology is used in Latvia to assess migrants’ dialects and language fluency. *Id.* An iris scan system is used in Jordan to facilitate refugees’ access to food and financial services. *Id.*

¹⁷⁶ See AMNESTY INT’L, *supra* note 4, at 8.

¹⁷⁷ HUM. RTS. WATCH, *supra* note 160.

humanitarian crisis will persist.¹⁷⁸ Some may grow tired of waiting, or feel they have no choice, and decide to cross the border between POEs.¹⁷⁹

At the very least, the United States should remove practical barriers to seeking asylum at the border and ensure basic due process rights.¹⁸⁰ Much of this could be accomplished by improving the capabilities of the CBP One app.¹⁸¹ Making it easier to navigate, reducing technological glitches, improving language offerings, and ensuring facial recognition for immigrants with darker complexions could help greatly.¹⁸² The United States could implement Wi-Fi hotspots in migrant shelters,¹⁸³ reduce the waiting times for appointments, or offer expedited appointments to those who are most vulnerable, such as victims of violence, LGBTQIA individuals, and indigenous migrants.¹⁸⁴ While an exception to using CBP One exists, it is difficult to claim, and so the United States should expand the paths to lawfully seek asylum at the border, or at least provide a meaningful alternative to using the app if the capabilities cannot be improved.¹⁸⁵

CONCLUSION

The United States has essentially established a digital border for asylum seekers through the CBP One app, despite being mandated by its own laws to process asylum seekers who “arrive” at POEs.¹⁸⁶ While U.S. courts have long recognized due process rights for noncitizens within the territorial border of the country, much less certain is the status

¹⁷⁸ Hernandez, *supra* note 8.

¹⁷⁹ See AM. IMMIGR. COUNCIL WHITE PAPER, *supra* note 2, at 10 (“There is growing frustration in Mexico over the lack of appointments, and some migrants have given up hope and decided to cross between ports of entry instead.”).

¹⁸⁰ See *id.* at 11.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ In the text of the Circumvention of Lawful Pathways final rule, “[C]BP acknowledges that there can be connectivity gaps and unreliable Wi-Fi in central and northern Mexico.” Circumvention of Lawful Pathways, 88 Fed. Reg. at 31,401 (May 16, 2023) (to be codified at 8 C.F.R. pts. 1003, 1208).

¹⁸⁴ “Border officials say case-by-case determinations are still being made, but there are no options to check a box or otherwise indicate that one belongs to an especially vulnerable group when applying for an appointment through CBP One.” Hernandez, *supra* note 8.

¹⁸⁵ See AM. IMMIGR. COUNCIL WHITE PAPER, *supra* note 2, at 11; Sanya Mansoor, *supra* note 148.

¹⁸⁶ See Kocher, *supra* note 1, at 1; see also *supra* Parts I.B., III.

of due process rights afforded to noncitizens just beyond the border, but still subject to extraterritorial state authority.¹⁸⁷

In recent years, U.S. jurisprudence recognized certain extensions of constitutional protections extraterritorially, via a fact specific and contextual analysis.¹⁸⁸ Recent litigation over policies that turn back asylum seekers outside the border affirms that due process rights attach to the statutory right to seek asylum and could therefore be applied extraterritorially.¹⁸⁹

Even if the CBP One app operated flawlessly, it would still act as a digital border and exclude those most vulnerable from accessing a necessary form of humanitarian protection afforded by the United States.¹⁹⁰ While CBP One remains the sole manner to access asylum, the government should strive to ensure basic procedural due process rights for asylum seekers on the threshold of entry.¹⁹¹

¹⁸⁷ *See supra* Part II.

¹⁸⁸ *See supra* Part II.B.

¹⁸⁹ *See supra* Part IV.B.

¹⁹⁰ *See supra* Part V.

¹⁹¹ *See supra* Part V.