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Ann-Renee Rubia

American University Washington College of Law, Ar9295a@american.edu

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BARRIERS BEYOND THE BORDER: ADDRESSING THE ECONOMIC AND RACIAL DISPARITIES CREATED BY CBP ONE

By Ann-Renee Rubia¹¹

ABSTRACT

CBP One is a mobile app that allows asylum seekers to schedule appointments for inspection before entering the United States ("U.S."). First, this paper will discuss the ethical issues posed by CBP One—specifically asylum seekers' unequal access to the app. Second, this paper will examine the equal protection implications posed by CBP One and the application of constitutional rights to noncitizens inside and outside the U.S. Next, it will address the ongoing litigation concerning the extension of constitutional rights to noncitizens arriving at the southern border. Lastly, it will discuss the incompatibility of CBP One with the Immigration and Nationality Act ("INA") and how that incompatibility may be addressed under the Administrative Procedure Act ("APA").

INTRODUCTION

Under the Circumvention of Lawful Pathways ("CLP") rule, noncitizens arriving at the southern border may rebut a presumption of asylum ineligibility by securing an appointment on CBP One to present themselves at a designated port of entry ("POE").¹ According to the Department of Homeland Security ("DHS"), CBP One offers an alternative to dangerous illegal border crossing by making entry into the U.S. more safe, orderly, and humane for migrants.² CBP One aims to streamline entry into the U.S. by decreasing the amount of time needed to question asylum seekers and allowing them to input personal information such as their name, date of birth, and nationality prior to inspection.³ In addition, app users must upload a photo of themselves prior to inspection so that Customs and Border Patrol ("CBP") officers can vet the applicant for law enforcement and national security purposes.⁴ After CBP officers process and

screen individuals at a designated POE, the officer paroles the applicant into the United States.⁵ Because parolees are only allowed to remain in the U.S. temporarily, an applicant must still appear in immigration court to apply for asylum or other forms of relief.⁶

Despite the purported aims and benefits of CBP One, the app has significant technological issues, raises several ethical concerns, and frustrates users.⁷ One of the main issues that asylum seekers have is the inaccessibility of the app due to economic factors that exacerbate their ability to access the app and secure appointments.⁸ For example, many asylum seekers are unable to access the app due to an unreliable internet connection, lack of access to electricity, or access to an advanced mobile phone capable of running the CBP One app.⁹ A recent study in Tijuana revealed that some migrants who fly to Mexico, stay in hotels, and connect to the hotel's Wi-Fi can get a CBP appointment in one week, while others in migrant shelters may wait for months to get an appointment due to hundreds of migrants overwhelming Wi-Fi servers by trying to connect to it.¹⁰ In addition, CBP One poses racialized barriers for people with darker complexions because it is unable to capture or accept photos required to run some of the app's features.¹¹ In response to their photo submissions, migrants with darker complexions have received error messages, making it impossible for them to schedule an appointment.¹² CBP One is also only available in Spanish, English, and Haitian Creole, thereby posing accessibility issues for users who do not speak those languages.¹³

This article proposes a number of solutions for the issues posed by CBP One.¹⁴ The Supreme Court has ruled that noncitizens have no constitutional rights regarding their applications for admission¹⁵ and has

¹¹Ann-Renee Rubia is a first year J.D. student at the American University Washington College of Law ("WCL"). She graduated from the City College of New York, Macaulay Honors College in 2020 with a bachelor's in International Studies. She is currently the Project Coordinator for WCL's International Refugee Assistance Project and is a Junior Staffer for the Journal of Gender, Social Policy and the Law. She is interested in immigration, refugee, and asylum law.

upheld laws that exclude the entry of noncitizens on the basis of ethnicity and gender.¹⁶ Moreover, the Court has held that Congress may pass laws that only apply to noncitizens, which would be unconstitutional if applied to citizens.¹⁷ Although the prospects for legal protections and remedies for noncitizens have been bleak in the past, a promising case from the U.S. District Court for the Southern District of California has emerged, extending Fifth Amendment due process rights to noncitizens.¹⁸ Using the "functional approach" advanced in *Boumediene v. Bush*,¹⁹ the Court stated that the extension of constitutional rights to foreign noncitizens should be evaluated in light of particular circumstances, and necessities of a case and are not subject to a bright-line test.²⁰ Drawing from the holding and rationale from the case, asylum seekers at the southern border may be able to seek protection under the Fifth Amendment's Equal Protection Clause. Alternatively, the CLP rule can be challenged under the APA.²¹ Under the APA, a reviewing court can set aside unlawful agency actions.²² Given that the INA allows noncitizens to apply for asylum even if they arrive at a non-designated POE,²³ the CLP rule is unlawful and violates the APA.

I. ANALYSIS

Although the Fifth and Fourteenth Amendment guarantees equal protection²⁴ under the laws for all people in the United States, a discriminatory law may nevertheless be upheld if the government has a certain interest in upholding that law. This section will analyze the constitutionality of the CLP rule—which requires an inquiry into the classification of people being discriminated against under the CLP rule—and what level of scrutiny applies to uphold it. This section will also discuss how unlawful federal agency actions may be set aside under the APA.

A. EQUAL PROTECTION FOR NONCITIZENS

When laws discriminate against groups of people based on protected classifications like race or gender, the Supreme Court evaluates the constitutionality of such laws under the Fourteenth Amendment Equal

Protection Clause.²⁵ The Fourteenth Amendment, like the Fifth Amendment, guarantees equal protection by state governments.²⁶ Unlike the Fourteenth Amendment, the Fifth Amendment's guarantee for equal protection is not explicitly states; instead, it is read into it through the Fifth Amendment's Due Process Clause.²⁷ Accordingly, an equal protection analysis under the Fifth Amendment is the same as the Fourteenth Amendment's.²⁸

An equal protection analysis requires inquiry into the classification of people and what level of scrutiny applies. If the classification is based on suspect criteria such as race, strict scrutiny applies.²⁹ Factors considered in determining whether a classification is suspect include whether the class has a history of discrimination, is likely to be subject to prejudice, has an immutable characteristic, or lacks access to the political process.³⁰ Laws that abridge a fundamental right, such as voting or due process in criminal trials, are subject to strict scrutiny.³¹ For a law to be upheld under strict scrutiny, the law must be narrowly tailored to achieve a compelling government interest.³² If the classification is based on quasi-suspect criteria such as gender, intermediate scrutiny applies, and the law must be substantially related to an important government interest.³³ In all other cases, the law must be rationally related to a legitimate government interest.³⁴ Facially neutral laws may be found unconstitutional if they have a discriminatory purpose and a discriminatory effect.³⁵ Given these facts, it is important to discuss what classification applies to noncitizens both inside and outside of the United States, and what level of scrutiny applies when evaluating the constitutionality of laws discriminating against them.

i. Noncitizens in the United States

Equal protection applies to all people in the United States, regardless of immigration status.³⁶ Traditionally, classification based on citizenship (an "alienage" classification) *in the United States* is suspect because lawfully present noncitizens are a "discrete and insular minority" for whom heightened scrutiny is appropriate.³⁷ The Supreme Court declared state laws denying lawfully present

²⁴ Equal protection under the laws means that the federal and state government cannot discriminate against a person unless they have a government purpose.

noncitizens welfare benefits, financial aid, and civil service jobs as unconstitutional.³⁸ The Supreme Court, however, has applies less than strict scrutiny in cases where the classification was related to self-government or the democratic process, and where the discrimination was authorized by Congress or the President.³⁹ In cases involving unlawfully present noncitizens, the Court has also applied the rational basis test in evaluating the constitutionality of laws discriminating against them.⁴⁰

ii. Noncitizens Outside the United States

The Constitution has been inconsistently applied to extraterritorial noncitizens. In a majority of cases, the Court has stated that the Constitution does not apply to noncitizens outside of the United States.⁴¹ In certain cases, however, the Court has found it appropriate to extend certain constitutional rights to noncitizens abroad.⁴² In analyzing the extent of the Constitution for noncitizens, the Court has adopted two different approaches: the "functional" approach and the "substantial connections" approach.

The Court in *Boumediene* adopted the functional approach and examined the practical considerations and barriers in extending habeas corpus⁴³ to noncitizens detained overseas.⁴⁴ In Justice Kennedy's concurrence, he listed factors such as the citizenship and status of the detainee as well as the practical obstacles in resolving the prisoner's entitlement to habeas corpus in the functional approach.⁴⁵ The Court found that the habeas corpus proceedings would not substantially burden a military tribunal; therefore, the Court ruled that the noncitizen was entitled to a habeas corpus hearing.⁴⁶

In contrast, the Court in *Verdugo-Urquidez* determined that certain constitutional rights could be extended to extraterritorial noncitizens if they have substantial connections with the United States.⁴⁷ This approach was used by the Fifth Circuit in *Hernández I*, a case involving the extension of Fourth and Fifth Amendment rights to a Mexican national who was killed in a cross-border shooting.⁴⁸ The Fifth Circuit dismissed Hernández's Fourth Amendment claim, stating that Hernández did not have a significant connection to the United States.⁴⁹ The Supreme Court

granted certiorari and found that the Border Patrol agent who killed Hernández was not liable for violating his rights, noting that concerns about national security justified the agent's actions.⁵⁰ In cases involving unlawfully present noncitizens, the Court has also applied the rational basis test in evaluating the constitutionality of laws discriminating against them.⁴⁰

iii. Ongoing Litigation

The Court for the Southern District of California recently held that noncitizens arriving at POEs at the U.S.-Mexico border have a Fifth Amendment right to due process.⁵¹ The case concerned CBP agents who refused to inspect migrants at POEs and refer them for asylum interviews violated the Fifth Amendment right to due process.⁵² This case is concerned with the application of constitutional rights on extraterritorial, noncitizen asylum seekers who have arrived at POEs located in the U.S.⁵³ The relevant POEs include San Ysidro, Otay Mesa, Calexico, Nogales, El Paso, Hidalgo, and Brownsville, all located north of the U.S.-Mexico border.⁵⁴ Because the conduct at issue in this case occurred on American soil, the Court found that the Fifth Amendment still applies.⁵⁵

Another factor that helped the Court to reach its decision in *Al Otro Lado* was the "functional approach" advanced in *Boumediene v. Bush*.⁵⁶ In resolving the question of extraterritorial application of the Constitution, the *Boumediene* Court ruled that it would consider the "objective factors and practical concerns" of a case and not resort to strict formalism when deciding whether noncitizens detained by the U.S. government abroad had a right to habeas corpus.⁵⁷ Taking this approach, the *Al Otro Lado* Court acknowledged the risks and burdens asylum seekers face when ordered to return to Mexico, including death, assault, and forced disappearances.⁵⁸ Humanitarian crises in communities along the border have grown, causing residents to call on local government to resolve the border issue.⁵⁹ Given both the graveness of the situation for asylum seekers and that the CBP's conduct occurs in the United States, the Court found it appropriate to extend constitutional rights to asylum seekers arriving at internal POEs.⁶⁰

⁴³ A writ of habeas corpus is a court order that allows a detained person to question the reasoning for their detention.

B. THE IMMIGRATION AND NATIONALITY ACT & THE ADMINISTRATIVE PROCEDURE ACT

For this paper, it is important to evaluate the relevant provisions of the INA and the APA together. A reading of the provisions of the INA and APA together demonstrates that the actions of CBP conflict with the INA, thereby making their actions unlawful.⁶¹ Specifically, the essentially mandated use of CBP One conflicts with a noncitizen's right to apply for asylum "whether or not at a designated port of arrival."⁶² The APA establishes rulemaking procedures and standards for federal agencies and is in the United States Code under Title 5, which covers "Government Organization and Employees." A provision of the APA states that a reviewing court may set aside agency actions, findings, and conclusions that are unlawful.⁶³ A provision of the Immigration and Nationality Act provides that all noncitizens who arrive in the U.S., whether or not at a designated POE, have a right to apply for asylum.⁶⁴ Therefore, because the CLP rule requires all noncitizens to arrive at a designated POE to apply for asylum, the CLP rule is unlawful and violates the APA.

II. PROPOSED REMEDIES

Given that *Al Otro Lado* extended Fifth Amendment due process rights to noncitizens arriving at the southern border, the case is also promising for the extraterritorial application of Fifth Amendment Equal Protection rights. Using the reasoning from *Al Otro Lado*, one may argue that an asylum seeker's circumstances necessitate an extension of equal protection due to the dire consequences that may result from turning an asylum seeker away at the border. Accepting that the CLP rule poses an equal protection problem, an equal protection analysis is required because a discriminatory law may nonetheless be upheld if the government has a legitimate interest in upholding the law. Due to the difficulty in arguing that the CLP rule is unconstitutional under the Fifth Amendment, the CLP rule may alternatively be challenged under the APA. This section will therefore discuss agency actions that conflicted with the APA in an immigration context, and the remedies that

followed after the Court found that an agency's actions were unlawful.

A. EXTRATERRITORIAL APPLICATION OF FIFTH AMENDMENT EQUAL PROTECTION RIGHTS

The inapplicability of constitutional rights to extraterritorial individuals has been emphasized in U.S. case law and history. The ruling in *Al Otro Lado*, however, gives hope to the extension of constitutional rights to asylum seekers at the southern border. The District Court ruled that CBP must inspect and refer asylum seekers who arrive at designated POEs under the Fifth Amendment.⁶⁵ The Court's analysis relied on the functional approach in *Boumediene*, which permitted the application of constitutional rights to extraterritorial individuals based on the needs and circumstances of a case.⁶⁶ Recognizing that many migrants and asylum seekers risk substantial harm when they are turned away at the southern border, the Court found that Fifth Amendment due process rights could extend to extraterritorial individuals.⁶⁷ Thus, equal protection should be extended to asylum seekers at the southern border because the discriminatory effects of CBP One put certain asylum seekers at substantial risk of harm.

Acceptance of extending constitutional rights to asylum seekers at the southern border, however, leads to another issue of determining what level of scrutiny would apply for equal protection analysis. Entry or admission into the United States is typically not considered a fundamental or constitutional right;⁶⁸ therefore, if one were to challenge the CLP rule, it would likely be subject to the rational basis test. Under the rational basis test, a court will uphold a law if it is rationally related to any legitimate government goal or purpose.⁶⁹ Due to the low level of scrutiny, the Supreme Court is frequently deferential to the government if the law has *an* conceivable rational basis.⁷⁰ Because of this, it would be very difficult to challenge the discriminatory effects of the CLP rule.

Analyzing the CLP rule as facially neutral leads to a similar result because a facially neutral law may be held unconstitutional only if it has a discriminatory purpose and discriminatory effects.⁷¹ While proving that the CLP rule has a discriminatory effect is substantially easier because CBP One makes it more

difficult for people with darker complexions to secure appointments necessary to be paroled into the U.S.,⁷² the CLP rule does not have a clear discriminatory purpose. According to DHS' Privacy Impact Assessment, CBP One requires users to submit a photo of themselves to confirm that the user is a real person to prevent fraud.⁷³ After submitting their photos, CBP stores the picture in its system for law enforcement purposes and to conduct facial comparisons when being presented at the border.⁷⁴ These concerns about fraud and security demonstrate a non-discriminatory purpose for the CLP rule.

B. DECLARING THE CLP RULE AS UNLAWFUL

Alternatively, one may argue that CBP One is unlawful under provisions of the Immigration and Nationality Act and the Administrative Procedure Act. The APA requires that federal agencies' actions comport with federal laws.⁷⁵ Given that CBP One requires entry at a designated POE, CBP One violates a provision of the INA that permits asylum regardless of entry at a POE.⁷⁶ Accordingly, CBP One also violates the APA.

An illustrative case for the application of the APA to the INA is *O.A. v. Trump*.⁷⁷ On November 9, 2018, former President Trump issued a proclamation suspending entry of noncitizens who enter the United States through Mexico unless they present themselves for inspection at a POE.⁷⁸ A class of nationals from Honduras, El Salvador, Nicaragua, and Guatemala who entered the U.S. from Mexico outside POEs brought this suit against Trump in the U.S. District Court for the District of Columbia. They argued that they had a statutory right to seek asylum regardless of where they entered the U.S. at a designated POE and that the proclamation conflicts with the INA.⁷⁹ The plaintiffs also argued that the rule was a violation of the APA because the rule was "arbitrary and capricious."⁸⁰ The Court emphasized the need to enforce the plain and unambiguous language of INA § 208.⁸¹ The Court ruled that the rule was not in accordance with the law, and therefore "unlawful" within the meaning of the APA.⁸²

The appropriate remedy for agency actions and rules held to be "unlawful" under the meaning of the APA has been ambiguous.⁸³ Plaintiffs in *O.A.* argued that they were entitled to "nationwide" relief in the form

of a universal injunction.⁸⁴ Defendants, however, argued that the Plaintiffs were entitled to relief to the extent that they were personally injured.⁸⁵ The Court, which disfavored the imposition of a national injunction, relied on Justice Thomas' concurrence in *Trump v. Hawaii*, where he stated that nationwide injunctions could prevent legal questions from reaching federal courts.⁸⁶ In addition, the Court noted that injunctions are a "drastic" measure,⁸⁷ and that district courts should be weary of issuing an injunction unless it would actually serve as a vacatur.⁸⁸ Therefore, a reviewing court could vacate CLP and hold it as a violation of the APA.

III. CONCLUSION

CBP One poses equity concerns on the basis of race and wealth. CBP's de facto-mandated use of the app assumes that asylum seekers have a stable connection to Wi-Fi, electricity, and an up-to-date phone to be able to use the app. In reality, asylum seekers do not have reliable access to these resources, thereby making it difficult for them to secure an appointment to present themselves for inspection at the designated POE. Moreover, the facial recognition technologies and photo submission requirements make it difficult for asylum seekers with darker complexions to schedule appointments on the app. As a result, many groups of people lack meaningful access to the CBP One app and are unable to seek asylum in the U.S.

While the Fifth Amendment Equal Protection argument prohibits discrimination from the federal government, it is hard to argue that foreign noncitizens have an equal protection guarantee.⁸⁹ There is hope, however, due to a case that arose in the U.S. District Court for the Southern District of California, where the Court ruled that asylum seekers who have arrived at internal POEs may have Fifth Amendment Equal Protection rights in light of the particular circumstances and necessities of the case.⁹⁰ Since CBP One users arrive at POEs in the United States, this can be promising for the extension of constitutional rights to asylum seekers.

One could also challenge the CLP rule under the APA, which requires that reviewing courts vacate and hold agency actions unlawful if they are "arbitrary [and] capricious."⁹¹ Because the CLP rule contravenes a provision of the INA, a reviewing

court could hold the CLP rule as unlawful. Typically, when a reviewing court finds a rule unlawful under the APA, the reviewing court vacates the rule and is reluctant to impose an injunction.⁹²

Since the rolling out of CBP One, several individuals have alleged harm such as kidnapping and sexual assault as a result of waiting for an appointment on the app.⁹³ Many report that officers turned away migrants at the border, despite CBP's policy to not turn away people without an appointment on CBP One, and faced assault and forced disappearances in turn.⁹⁴ As judges resolve lawsuits surrounding the CLP rule throughout the country and in the upcoming years, many immigrant rights advocates and immigration attorneys can expect to see more guidance on how to help those seeking to challenge the Circumvention of Lawful Pathways Rule.

ENDNOTES

- ¹ *Fact Sheet: Circumvention of Lawful Pathways Final Rule*, DEP'T OF HOMELAND SEC. (May 11, 2023), <https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule>.
- ² *CBP Releases December 2023 Monthly Update*, U.S. CUSTOMS & BORDER PROT. (Jan. 26, 2024), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2023-monthly-update#:~:text=CBP%20One%E2%84%A2%20App,cross%20between%20ports%20of%20entry>.
- ³ *CBP One: An Overview*, AM. IMMIGR. COUNCIL, (Jun. 2, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/cbp_one_an_overview_0.pdf.
- ⁴ *Id.*
- ⁵ *Fact Sheet: CBP One Facilitated Over 170,000 Appointments in Six Months, and Continues to be a Safe, Orderly, and Humane Tool for Border Management*, DEP'T OF HOMELAND SEC. (Aug. 3, 2023), <https://www.dhs.gov/news/2023/08/03/fact-sheet-cbp-one-facilitated-over-170000-appointments-six-months-and-continues-be>.
- ⁶ Camilo Montoya-Galvez, *Migrants in Mexico have used CBP One app 64 million times to request entry into U.S.*, CBS NEWS (Feb. 12, 2024, 5:36 PM), <https://www.cbsnews.com/news/immigration-cbp-one-app-migrants-mexico-64-million>.
- ⁷ 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/>.
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ Gustavo Solis, *CBP One app for asylum seekers favors Russians with strong Wi-Fi signals over vulnerable migrants*, KBPS (May 5, 2023, 5:36 PM), <https://www.kpbs.org/news/border-immigration/2023/05/05/cbp-one-app-for-asylum-seekers-favors-russians-with-strong-wi-fi-signals-over-vulnerable-migrants>.
- ¹¹ Melissa del Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, THE GUARDIAN (Feb. 8, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>.
- ¹² *Id.*
- ¹³ *CBP One Tips for Users*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/sites/default/files/assets/documents/2023-Feb/CBP%20One%20Tips%20for%20Users%20-%20English_1.pdf (last visited Apr. 14, 2024).
- ¹⁴ The Northern District of California found the CLP rule unlawful and gave the Biden administration fourteen days to roll it back. *See East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, at *35 (N.D. Cal. July 25, 2023).
- ¹⁵ *See Kleindiesnt v. Mandel*, 408 U.S. 753, 762 (1972) (stating that unadmitted noncitizens have no constitutional right to entry in the United States).
- ¹⁶ *Artl.S8.C18.8.1 Overview of Congress's Immigration Powers*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artl-S8-C18-8-1/ALDE_00001255/ (last visited Feb. 25, 2024).
- ¹⁷ *See Demore v. Kim*, 538 U.S. 510, 522 (2003) (stating that the detention of an individual pending a determination of removability may be constitutional as it relates to noncitizens but unconstitutional as it applies to citizens).
- ¹⁸ *Al Otro Lado, Inc. v. Mayorkas*, 17-cv-02366-BAS-KSC (S.D. Cal. Sep. 2, 2021).
- ¹⁹ *Boumediene v. Bush*, 533 U.S. 723, 726 (2008).
- ²⁰ *Al Otro Lado, Inc.*, 17-cv-02366-BAS-KSC, at *34.
- ²¹ 5 U.S.C. § 706(2)(A).
- ²² *Id.*
- ²³ 8 U.S.C. § 1158(a)(1).
- ²⁴ Equal protection under the laws means that the federal and state government cannot discriminate against a person unless they have a government purpose. *See The Equal Protection Clause*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702> (last visited Apr. 19, 2024).
- ²⁵ *Equal Protection Supreme Court Cases*, JUSTIA, <https://supreme.justia.com/cases-by-topic/equal-protection/> (last visited Apr. 10, 2024).
- ²⁶ U.S. CONST. amend. V.
- ²⁷ Const. Ann., *Amdt5,7,3*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-7-3/ALDE_00013730/ (last visited Mar. 24, 2024).
- ²⁸ *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).
- ²⁹ JUSTIA, *supra* note 17.
- ³⁰ *See United States v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (stating that a suspect class of people is one that is a “discrete and insular minority” that has been historically discriminated against and lacked access to the political process).
- ³¹ *See Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956) (holding that indigent criminal defendants have a right to defend themselves in court regardless of wealth); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding that poll taxes violate the Fourteenth Amendment Equal Protection Clause and are unconstitutional).
- ³² Justia, *supra* note 17.
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Amdt14.S1.8.5 Facially Neutral Laws Implicating Suspect Classifications*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-8-5/ALDE_00013838/#:~:text=3Washington%20v.-,Davis%2C%20426%20U.S.,race%20than%20of%20another.%20 (last visited Mar. 24, 2024).

³⁶ See *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating that noncitizens, even those who have entered illegally, are entitled to due process during removal proceedings); see also *Wong Wing v. United States*, 163 U.S. 228, 237-38 (stating that all persons within the territory of the United States have Fifth and Sixth Amendment rights).

³⁷ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53).

³⁸ See *Graham v. Richardson*, 403 U.S. 365, 365 (1971) (holding that state law barring noncitizens from receiving welfare benefits is unconstitutional); *Nyquist v. Mauclet*, 432 U.S. 1, 1 (1977) (holding that a New York law that restricted financial aid to higher-education students who applied for citizenship or manifested an intent to apply for citizenship is unconstitutional); *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (holding that a New York law barring noncitizens from holding civil service positions is unconstitutional).

³⁹ See *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (holding that a state may deny a noncitizen's right to vote or run for office); *Sugarman*, 413 U.S. at 647 (holding that a state may deny a noncitizen's right to run for office to "preserve the basic conception of a political community"); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (holding that Congress may restrict welfare benefits to citizens only).

⁴⁰ See *Plyler v. Doe*, 457 U.S. 202 (1982) (applying the rational basis test in evaluating a Texas law withholding state funds from schools with undocumented students).

⁴¹ See *In re Ross*, 140 U.S. 453, 464 (1891) (holding that the Constitution does not apply to countries outside of the United States); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (stating that constitutional protections have been extended to noncitizens only when they are within the territorial jurisdiction of the United States); *Agency for Intl. Dev. v. All. For Open Soc'y. Intl., Inc.*, 140 S. Ct. 2082, 2083 (2020) (stating "As a matter of American constitutional law, foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution). But see *Boumediene v. Bush*, 553 U.S. 723, 749 (2008) (holding that habeas corpus is a fundamental right for all people).

⁴² *Boumediene*, 553 U.S. at 726.

⁴³ A writ of habeas corpus is a court order that allows a detained person to question the reasoning for their detention. See *Writ of Habeas Corpus*, FINDLAW, <https://www.findlaw.com/criminal/criminal-procedure/writ-of-habeas-corpus.html> (last reviewed on Dec. 8, 2023).

⁴⁴ *Id.*

⁴⁵ *Id.* at 766.

⁴⁶ *Id.* at 795.

⁴⁷ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990).

⁴⁸ *Hernández v. United States*, 757 F.3d 249, 255 (2014).

⁴⁹ *Id.* at 263.

⁵⁰ *Hernández v. Mesa*, 589 U.S. 89, 98 (2020).

⁵¹ *Al Otro Lado, Inc. v. Mayorkas*, 17-cv-02366-BAS-KSC (S.D. Cal. Sep. 2, 2021).

⁵² *Id.* at *1.

⁵³ *Id.* (stating that the plaintiffs in this case was a class action that included Al Otro Lado and several plaintiffs who either were or in the future would be presenting themselves at a POE on the U.S.-Mexican border and a subclass of plaintiffs who were or in the future would be denied access to the asylum process at the border).

⁵⁴ *Id.*

⁵⁵ The "entry fiction" doctrine may limit this argument, since many courts hold that entry at a port of entry does not qualify as entering the country. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) (holding that arrival to Ellis Island is not entry into the United States).

⁵⁶ *Al Otro Lado, Inc.*, 17-cv-02366-BAS-KSC, at *36.

⁵⁷ *Boumediene v. Bush*, 553 U.S. 523, 527 (2008).

⁵⁸ *Al Otro Lado, Inc.*, 17-cv-02366-BAS-KSC, at *31.

⁵⁹ *Id.*

⁶⁰ *Id.* at *36.

⁶¹ 8 U.S.C. § 1158(a)(1); 5 U.S.C. § 706(2)(A).

⁶² 8 U.S.C. § 1158(a)(1).

⁶³ 5 U.S.C. § 706(2)(A).

⁶⁴ 8 U.S.C. § 1158(a)(1).

⁶⁵ *Al Otro Lado, Inc.*, 17-cv-02366-BAS-KSC, at *34.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Trump v. Hawaii*, No. 17-965, slip op. at 30 (U.S. June 26, 2018) (stating "foreign nationals seeking admission have no constitutional right to entry into the United States").

⁶⁹ *Amdt14.S1.8.1.2 Equal Protection and Rational Basis Review Generally*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-8-1-2/ALDE_00000817/ (last visited Feb. 25, 2024).

⁷⁰ Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401 (2016).

⁷¹ CONST. ANNOTATED., *supra* note 35.

⁷² Solis, *supra* note 10.

⁷³ *Privacy Impact Statement for CBP One™*, DEP'T OF HOMELAND SEC. 21 (Feb. 19, 2021), <https://www.dhs.gov/sites/default/files/2023-05/privacy-pia-cbp068-cbpmobileapplication-may2023.pdf>.

⁷⁴ *Id.*

⁷⁵ 5 U.S.C. § 1158(a)(1).

⁷⁶ *Id.*

⁷⁷ *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).

⁷⁸ *Id.* at 117.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 157.

⁸² *Id.* at 151.

⁸³ *Georgia v. Pres. of the U.S.*, 46 F.4th 1283, 1303 (11th Cir. 2022) (holding that universal injunctions “push against the boundaries of judicial power”).

⁸⁴ *Id.* at 152.

⁸⁵ *Id.*

⁸⁶ *Trump v. Hawaii*, 585 U.S. 713 (2018).

⁸⁷ *O.A.*, 404 F. Supp. 3d at 154.

⁸⁸ *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

⁸⁹ *See Agency for Intl. Dev. v. All. For Open Soc’y. Intl., Inc.*, 140 S. Ct. 2082, 2083 (2020) (stating “As a matter of American constitutional law, foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution”).

⁹⁰ *Al Otro Lado, Inc. v. Mayorkas*, 17-cv-02366-BAS-KSC, at *34.

⁹¹ 5 U.S.C. § 706(2)(A).

⁹² Ronald M. Levin, Vacatur, Nationwide Injunctions, and the Evolving APA, 98 NOTRE DAME L. REV. 1997, 1997 (stating that universal injunctions and vacaturs pose concerns about preventing dialogue and encourage forum shopping). *See also Georgia v. Pres. of the U.S.*, 46 F.4th 1283, 1303 (11th Cir. 2022) (stating that courts should be wary to impose a universal injunction).

⁹³ *Asylum Ban Strands Asylum Seekers and Migrants in Mexico and Returns Them to Danger*, HUMAN RIGHTS FIRST (Nov. 1, 2024), <https://humanrightsfirst.org/wp-content/uploads/2023/11/Asylum-Ban-Harms-Factsheet-formatted.pdf>.

⁹⁴ *Al Otro Lado, Inc. v. Mayorkas*, 17-cv-02366-BAS-KSC, at *31 (S.D. Cal. Sep. 2, 2021) (stating that asylum seekers who were turned back at the border faced death, assault, and forced disappearances).