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Submitted via <http://www.regulations.gov>

Re: National Immigration Project of NLG’s Comment in Response to CBP’s Request for Information, Docket No. USCBP-2022-0017

Dear Director Altneu and Deputy Executive Director Chavers:

The National Immigration Project of the National Lawyers Guild (NIPNLG) submits this comment in response to the request for information issued by U.S. Customs and Border Protection (CBP) on specific CBP processes, programs, regulations, collections of information, and policies for the agency to consider modifying, streamlining, expanding, or repealing in light of recent executive orders. Docket No. USCBP-2022-0017. Specifically, CBP aims to ensure that its policies align with Executive Orders 13985, 13990, and 14008, which call on federal agencies to advance equity for all, including those in underserved communities; protect public health and the environment and restore science to tackle the climate crisis; and bolster resilience from the effects of climate change, particularly for those disproportionately affected by climate change.¹

NIPNLG is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudications of their claims to enter into or remain in the United States.

NIPNLG commends CBP for seeking input from the public on this topic. Given the breadth of topics covered by this request for comment and NIPNLG’s expertise, this comment will aim to answer the first of CBP’s questions—does CBP perpetuate systemic barriers to

¹ Request for Information on U.S. Customs and Border Protection Processes, Programs, Regulations, Collections of Information and Policies Pursuant to 19 CFR Part I, 87 Fed. Reg. 24,185–86 (Apr. 22, 2022).

opportunities and benefits for people of color and/or other underserved groups?² The answer is plainly and evidently, yes. Many of the policies and practices of CBP are rooted in white supremacy, racism and discrimination and disproportionately affect Black, brown, and Indigenous people seeking entry into the United States.³ In this comment, NIPNLG will focus on two issues that CBP must systematically and urgently address—language access for persons with limited English proficiency and asylum access and safety for all at the border.

CBP Must Meet Its Legal Obligations to Ensure Meaningful Language Access to Individuals With Limited English Proficiency

CBP has long been on notice⁴ that its language access programs fall well-short of the standards set out under federal law, executive orders, and the agency’s own language access plan. This agency failure interferes with, or outright impedes, detained people’s access to health care and asylum, and puts families at risk of separation. These failures came into full view for many when two Indigenous Maya children—Jakelin Caal Maquin and Felipe Gómez Alonzo—died in Border Patrol (BP) custody within weeks of each other in 2018.⁵ The Department of Homeland Security (DHS) and the Trump administration quickly moved to shift blame on the children’s Indigenous fathers, who had been presented with, and had signed, English-language forms affirming that their children were in good health.⁶ These forms had been verbally translated into Spanish by BP officials, but neither father spoke Spanish well.⁷

CBP has a protocol for the provision of meaningful language access in cases where BP agents are unable to meaningfully communicate with people whom they have encountered and

² “Are there CBP processes, programs, regulations, information collections, forms, required documentation, guidance and/or policies that perpetuate systemic barriers to opportunities and benefits for people of color and/or other underserved groups as defined in Executive Order 13985 and, if so, what are they? How can those programs, regulations, and/or policies be modified, expanded, streamlined, or repealed to deliver resources and benefits more equitably?” Request for Information, 87 Fed. Reg. at 24,189.

³ See, e.g., Katy Murdza & Walter Ewing, Am. Immigration Council, *The Legacy of Racism within the U.S. Border Patrol* (Feb. 10, 2021), <https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol>.

⁴ U.S. Gov’t Accountability Office, GAO-1-714, *DHS Needs to Comprehensively Assess Its Foreign Language Needs and Capabilities and Identify Shortfalls* (June 2010), <https://www.gao.gov/assets/gao-10-714.pdf>.

⁵ Letter from the Mayan League et al. to John V. Kelly, Acting Inspector Gen., U.S. Dep’t of Homeland Sec., et al. on the death of Jakelin Amei Rosmery Caal Maquin (Dec. 21, 2018) https://issuu.com/mayanleague.org/docs/we_denounce_the_death_of_jakeline_c.

⁶ Rachel Nolan, *A Translation Crisis at the Border*, THE NEW YORKER (Dec. 30, 2019), <https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border>.

⁷ See *id.* (Indigenous language speakers who speak no or rudimentary Spanish may say “yes” to most questions asked by Border Patrol, regardless of their level of comprehension, because they are afraid and want to do as the authority figure says.); Jennifer Medina, *Anyone Speak K’iche’ or Mam? Immigration Courts Overwhelmed by Indigenous Languages*, N.Y. TIMES (Mar. 19, 2019) (“migrants who speak only rudimentary Spanish try to get by in that language, sometimes out of shame or a belief that Spanish will help them convince United States officials that they should be allowed to stay.”).

apprehended.⁸ In these instances, BP agents are supposed to access interpretation services via telephone.⁹ CBP’s plan also references a BP policy requiring its agents to ascertain the best language for unaccompanied children in their custody and “ensur[e] that all procedures and documents are explained” in that language.¹⁰ CBP finalized its Language Access Plan and adopted the language of the DHS Language Access Plan, which was finalized four years earlier, in 2016.¹¹ Both the CBP and DHS plans commit to making “reasonable efforts to provide meaningful access to individuals with limited English proficiency in its operations, services, and other conducted activities and programs.”¹² This commitment has roots in Executive Order 13166,¹³ which sought to enforce Title VI of the Civil Rights Act of 1964¹⁴ by directing federal agencies to identify and address the needs of persons with limited English proficiency.

Despite its protocols, plans, and commitments, CBP routinely fails to provide meaningful language access to noncitizens it apprehends at the border. This is particularly true for persons who speak neither English nor Spanish.¹⁵ BP agents frequently speak in Spanish to people from Indigenous communities in Latin America, whose first or best language may be an Indigenous language and who may not be fully fluent in Spanish.¹⁶ For example, in 2018, BP agents failed to provide language interpretation for an Indigenous Mam-speaking mother, Erendira, and her six-year-old child, Yasmin, after CBP apprehended them at the US-Mexico border.¹⁷ Within hours of arriving at the BP station, an English-speaking agent told Erendira in barely comprehensible Spanish that her daughter would be taken away from her.¹⁸ When Erendira made sense of the of

⁸ U.S. Dep’t of Homeland Sec., U.S. Customs and Border Protection, Language Access Plan (Nov. 18, 2016), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Oct/CBP%20Language%20Access%20Plan%2011%2018%202016.pdf>; supplemented in 2020, U.S. Dep’t of Homeland Sec., U.S. Customs and Border Protection, Supplementary Language Access Plan (Feb. 7, 2020), <https://www.dhs.gov/sites/default/files/publications/cbp-updated-language-access-plan-2020.pdf>

⁹ U.S. Dep’t of Homeland Sec., U.S. Customs and Border Protection, Language Access Plan at 7.

¹⁰ *Id.*

¹¹ U.S. Dep’t of Homeland Sec., Language Access Plan (Feb. 28, 2012), [dhs.gov/xlibrary/assets/crcl/crcl-dhs-language-access-plan.pdf](https://www.dhs.gov/xlibrary/assets/crcl/crcl-dhs-language-access-plan.pdf).

¹² U.S. Customs and Border Protection, Language Access Plan, *supra* note 2, at 4.

¹³ Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency”

¹⁴ 42 U.S.C. § 2000d (Stating that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

¹⁵ Migrants who are deaf or hard-of-hearing also face enormous challenges communicating with Border Patrol agents. *See, e.g.*, Civil Rights Education and Enforcement Ctr., *Fighting for the Rights of Deaf Immigrants in Detention* (Aug. 15, 2019), <https://creeclaw.org/2019/08/15/fighting-for-the-rights-of-deaf-immigrants-in-detention/>.

¹⁶ For more analysis on the experiences and discrimination faced by Indigenous migrants in immigration custody, *see, e.g.*, Denise N. Obinna, *Alone in a Crowd: Indigenous Migrants and Language Barriers in American Immigration*, RACE AND JUSTICE (Mar. 2021); Jennifer Gisman, *An Invisible Wall: How Language Barriers Block Indigenous Latin American Asylum Seekers*, 27 TRANSNAT’L L. & CONTEMP. PROBS. 451 (2018); Tristan Ahtone, *Indigenous immigrants face unique challenges at the border*, HIGH COUNTRY NEWS (June 21, 2018), <https://www.hcn.org/articles/tribal-affairs-indigenous-immigrants-face-unique-challenges-at-the-border>.

¹⁷ Compl. at 129, *P.G. v. United States*, 4:21-cv-04457-KAW (N.D. Cal, June 10, 2021).

¹⁸ *Id.* at 121.

the words and asked why, the BP agent’s only response was “no sé”—“I don’t know” in Spanish.¹⁹ Fewer than two days later, BP agents separated a terrified Yasmin from her mother.²⁰ BP agents offered no Mam interpreter to attempt to explain the separation, and then proceeded to detain Erendira for two more weeks in cold and crowded conditions as they threatened to deport her without Yasmin.²¹ In 2015, BP interviewed Mabelle, a Maya woman whose best language is Kanjobal, in Spanish, a language in which she could not communicate.²² The agent incorrectly concluded that Mabelle did not have a fear of returning to Guatemala because she was not able to communicate her fear of return in Spanish.²³ Lack of meaningful language access affects asylum seekers from outside of Latin America as well. In 2021, for example, CBP unlawfully detained 24 Haitian families under a bridge in Del Rio, Texas under deplorable conditions for days without ever providing a Creole interpreter to facilitate communication between them and government officials.²⁴

The tragic deaths of Jakelin and Felipe, the brutal separation of Erendira and Yasmin, the wrongful finding that Mabelle did not have a fear of return to her home country, and the unconstitutional and inhumane treatment of the 24 Haitian families reflect the serious consequences of CBP failing to provide appropriate language assistance. Without meaningful language access, CBP wrongly deports noncitizens, blocks them from accessing critical medical care, unlawfully separates them from their loved ones, deprives them of essential rights, and subjects them to unnecessarily isolating and traumatic detention in BP facilities.

The BP’s failure to abide by its own language compliance policies is especially troubling in the context of the growing linguistic and cultural diversity among the people now arriving at the border. In the past fifteen years, the United States has experienced a decline in apprehensions of Mexican, mostly Spanish-speaking noncitizens and an increase in noncitizens from Guatemala, El Salvador, and Honduras, the Northern Triangle of Central America who may not speak Spanish.²⁵ From 2007 to 2017, noncitizens from the Northern Triangle went from making up just 6 percent of BP Apprehensions to making up more than half of the agency’s apprehensions.²⁶ Many of these noncitizens speak Indigenous languages, in particular, Maya

¹⁹ *Id.*

²⁰ *Id.* at 127.

²¹ *Id.* at 127, 132.

²² CARA Family Detention Pro Bono Project, Complaint to Dep’t of Homeland Sec. Off. for Civil Rights and Civil Liberties and Off. of Inspector General, Challenges Faced by Indigenous Language Speakers of Homeland Sec. 4 (Dec. 10, 2015), <https://www.aila.org/advo-media/press-releases/2015/crci-complaint-challenges-faced-family-detention>.

²³ *Id.*

²⁴ Lawyers for Civil Rights, Complaint to Dep’t of Homeland Sec. Off. for Civil Rights and Civil Liberties and Off. of Inspector General, Civil Rights Complaint Asserting Abuse Of 48 Black Immigrants Fleeing Haiti, Including Racial Discrimination, Medical Deprivation, Inhumane Detention Conditions, Due Process Violations, and Language Access Violations 11–12 (Oct. 18, 2021), <http://lawyersforcivilrights.org/wp-content/uploads/2021/10/DHS-Complaint-FINAL-10.18.2021.pdf>.

²⁵ Tom Jawetz & Scott Schuchart, Ctr. for Am. Progress, *Language Access Has Life-or-Death Consequences for Migrants* (Feb. 20, 2019), <https://www.americanprogress.org/article/language-access-life-death-consequences-migrants/>.

²⁶ *Id.*

languages that have been spoken since pre-Columbian times.²⁷ A 2015 study found that 42 percent of Guatemalan families who crossed the border in Southern Arizona spoke an Indigenous language as their primary language.²⁸ Recently, BP has apprehended increasing numbers of noncitizens from not only the Northern Triangle and Mexico, but also Venezuela, Nicaragua, Brazil, Ecuador, Cuba, and Haiti, all countries with vast language diversity.²⁹

CBP can and must act to close the gap between what is promised to non-English speakers on paper and what the reality is for these people in fact. To prevent further violations of its legal obligations and ensure CBP is meeting its goal of advancing equity for all, including those in underserved communities, the agency must:

- Fully implement a policy to determine the best language for each noncitizen immediately after they are apprehended. BP officers should not assume that noncitizens from Latin America speak Spanish sufficiently well to communicate effectively, even if they are able to provide their name and basic information in Spanish or are seemingly responsive to Spanish. CBP staff carrying out this duty must be especially trained and culturally competent, and be especially attuned to the linguistic needs of Indigenous peoples. CBP should implement solutions for identifying a person's best language beyond the "I Speak"³⁰ poster, posted in locations where CBP operates, which assumes the speaker is also literate in their best language.
- Connect every encountered person with low English proficiency with a certified language interpreter, whether it is in person or remotely, and ensure all critical conversations and documents are translated to them using the interpreter. CBP should be open to reassessing its dominant language determination as needed, especially in cases where its initial determination is wrong. BP should also allow noncitizens with limited English proficiency access to the language interpreter on demand so that they are able to communicate proactively with BP agents.
- Establish stringent oversight and monitoring mechanisms to ensure compliance with the above recommendations. Create a loopback mechanism for complaints filed with the DHS Office for Civil Rights and Civil Liberties and the DHS Office of the Inspector General, to ensure that changes are made in instances where CBP falls short of their legal responsibilities.

²⁷ *Id.*

²⁸ Blake Gentry, Ama Consultants, *Exclusion of Indigenous Language Speaking Immigrants in the US Immigration System, A Technical Review* (2015), http://www.amaconsultants.org/uploads/Exclusion_of_Indigenous%20Languages_in_US_Immigration_System_19_June2015version_i.pdf.

²⁹ Am. Immigration Council, *Rising Border Encounters in 2021: An Overview and Analysis* (Mar. 4, 2022), americanimmigrationcouncil.org/rising-border-encounters-in-2021.

³⁰ U.S. Dep't of Homeland Sec., U.S. Customs and Border Protection, *I Speak* (Apr. 10, 2015), <https://www.cbp.gov/document/publications/i-speak>.

CBP Must Ensure Equal Access to Asylum Regardless of Race or National Origin and Must Confront Its History of Anti-Black Violence and Discrimination

Since March 2020, CBP has carried out the U.S. Centers for Disease Control and Prevention (CDC)'s public health law—Title 42—which has unlawfully halted the processing of asylum-seeking people along the southern border.³¹ The Title 42 policy has never had a credible public health rationale,³² and was born instead of the Trump administration's desire to close the border to asylum seekers.³³ Both the Trump and Biden administrations have used the policy to block asylum seekers from seeking protection at ports of entry. The Biden Administration continued this anti-asylum policy for over a year before attempting to end it on May 23, 2022.³⁴ A federal judge in Louisiana has blocked the administration from implementing the order ending Title 42.³⁵ Many asylum seekers, facing dangerous and life-threatening conditions in Mexico,³⁶ have been forced to undertake border crossings between ports of entry, putting their lives at risk³⁷ of further harm. At the same time, CBP has used Title 42 to expel people seeking refuge in the United States to Mexico and returned asylum seekers to their countries of persecution without an opportunity to apply for asylum in the United States.

³¹ 85 Fed. Reg. 16,559 (March 24, 2020); U.S. Ctrs. for Disease Control and Prevention, U.S. Department of Health and Human Services, Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists (Mar. 20, 2020), 2–3, https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

³² See Press Release, Columbia University Mailman School of Public Health, Epidemiologists and Public Health Experts Implore Biden Administration to End Title 42 and Restart Asylum (Sept. 1, 2021), <https://www.publichealth.columbia.edu/research/program-forced-migration-and-health/press-release-epidemiologists-and-public-health-experts-implore-biden-administration-end-title-42>; Letter from Public Health Experts to CDC Director Walensky, HHS Secretary Becerra, and DHS Secretary Mayorkas (Sept. 1, 2021), <https://www.publichealth.columbia.edu/node/76271>; Michelle Hackman et al., *CDC Officials Objected to Order Turning Away Migrants at Border*, WALL ST. JOURNAL (Oct. 3, 2020), <https://www.wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601>.

³³ Caitlin Dickerson & Michael D. Shear, Before Covid-19, Trump Aide Sought to Use Disease to Close Borders, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>.

³⁴ U.S. Ctrs. for Disease Control and Prevention, Public Health Determination And Order Regarding The Right To Introduce Certain Persons From Countries Where A Quarantinable Communicable Disease Exists (Apr. 1, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/Final-CDC-Order-Prohibiting-Introduction-of-Persons.pdf>.

³⁵ Maria Sacchetti, *Federal judge blocks Biden administration from ending Title 42*, WASH. POST (May 20, 2022), <https://www.washingtonpost.com/national-security/2022/05/20/title-42-asylum-border/>.

³⁶ Human Rights First, Tracker of Reported Attacks During the Biden Administration Against Asylum Seekers and Migrants Who Are Stranded in and/or Expelled to Mexico, <https://www.humanrightsfirst.org/sites/default/files/AttacksonAsylumSeekersStrandedinMexicoDuringBidenAdministration.3.15.2022.pdf>.

³⁷ Alisa Reznick, A record number of migrants died along the U.S.-Mexico border in 2021, ARIZONA PUBLIC MEDIA (Jan. 4, 2022), <https://news.azpm.org/p/news-topical-border/2022/1/4/205215-a-record-number-of-migrants-died-along-the-us-mexico-border-in-2021/>.

While this unlawful and inhumane policy has prevented countless of asylum seekers³⁸ from across the world from seeking refuge in the United States, there is no doubt that the policy has had a disparate impact on Black, brown, and Indigenous people.³⁹ Whether a CBP agent expels a noncitizen pursuant to Title 42 depends in part on the noncitizen's country of origin. Mexico has agreed to permit only nationals of Mexico, Guatemala, El Salvador, and Honduras to be expelled to its territory from the United States. CBP expels others that Mexico has not agreed to receive to the country from which they fled or are permits them to remain in the United States to seek relief from removal. Moreover, exemptions to Title 42 are granted unevenly. While CBP processed nearly 10,000 Ukrainians⁴⁰ over the course of two months this year, it did not offer the same exemption to refugees from Africa, the Americas, or the Caribbean.

Haitian asylum seekers, in particular, have borne the brunt of the Title 42 mass expulsions. When CBP encounters Haitians at the southern border they are 26 times more likely to subject that noncitizen to the Title 42 policy than they would a Romanian, Russian, or Ukrainian (29.5 percent incidence of placement into Title 42 for Haitians, versus 1.1 percent average incidence rate of placement in Title 42 for Romanians, Russians, and Ukrainians from March 2020 through May 2022).⁴¹ In addition to blocking Haitian persons from seeking asylum in the United States and expelling tens of thousands⁴² back to an insecure and politically unstable Haiti, CBP has subjected Haitian to inhumane and heinous abuse. This abuse includes BP agents charging Haitian asylums seekers on horseback in Del Rio, Texas in September 2021.⁴³

To ensure that CBP meets its goal of advancing asylum access equity for all, it must:

- Confront its culture of racism, discrimination, and xenophobia.
- Take all legally permissible steps to end the use of Title 42 and terminate the Migrant Protection Protocols (MPP).
- While courts require Title 42 and MPP remain in place, ensure that DHS applies exemptions and non-refoulement processes fairly and does not return a

³⁸ John Gramlich, Pew Research Ctr., Key facts about Title 42, the pandemic policy that has reshaped immigration enforcement at U.S.-Mexico border (Apr. 27, 2022), <https://www.pewresearch.org/fact-tank/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border/>.

³⁹ *Examining Title 42 and the Need to Restore Asylum at the Border*, Hearing Before H. Comm. on Homeland Sec., 117th Cong. (2022) (Statement of Kennji Kizuka), https://homeland.house.gov/imo/media/doc/kizuka_testimony_bsfo_040622.pdf.

⁴⁰ Camilo Montoya-Galvez, *U.S. officials processed 9,926 undocumented Ukrainians in last 2 months, data show*, CBS NEWS (Apr. 11, 2022), <https://www.cbsnews.com/news/immigration-ukraine-us-mexico-border/>.

⁴¹ U.S. Dep't of Homeland Sec., U.S. Customs and Border Protection, *Nationwide Encounters*, <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

⁴² Adam Isacson, WOLA, *A tragic milestone: 20,000th migrant deported to Haiti since Biden inauguration* (Feb. 17, 2022), <https://www.wola.org/analysis/a-tragic-milestone-20000th-migrant-deported-to-haiti-since-biden-inauguration/>.

⁴³ Haitian Bridge Alliance & Robert F. Kennedy Human Rights, *Beyond the Bridge: Documented Human Rights Abuses and Civil Rights Violations Against Haitian Migrants in the Del Rio, Texas Encampment* (Mar. 29, 2022), <https://rfkhr.imgix.net/asset/Del-Rio-Report.pdf>.

disproportionate number of Black, brown, and Indigenous asylum seekers to harm's way.

- Restore asylum across the border, including at ports of entry and uphold U.S. refugee law, and swiftly process asylum seekers at ports of entry as they present.
- Employ humanitarian parole legal authority evenly across race.
- Invest in infrastructure and planning to receive asylum seekers humanely and expeditiously process and refer their cases to USCIS for adjudication in accordance with U.S. refugee and asylum law.

Conclusion

CBP has a long road to travel before it can meet its mission in a manner that advances equity for all. On that road, the agency must ensure language access for persons with limited English proficiency and asylum access and safety for all at the border.

Please do not hesitate to contact Ann Garcia at ann@nipnlg.org if you have any questions or need any further information. Thank you for your consideration.



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