

Before
U.S. Customs and Border Protection
U.S. DEPARTMENT OF HOMELAND SECURITY
Washington, DC

Notice of Proposed Rulemaking,
“Advance Passenger Information
System: Electronic Validation of
Travel Documents”; Docket Number
USCBP-2023-0002, FR Doc. 2023–
02139, RIN 1651-AB43

**COMMENTS OF THE IDENTITY PROJECT (IDP),
GOVERNMENT INFORMATION WATCH,
RESTORE THE FOURTH (RT4), PRIVACY TIMES,
AND THE ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)**

The Identity Project (IDP)

<<https://PapersPlease.org>>

April 3, 2023

The undersigned civil liberties and human rights organizations – the Identity Project (IDP), Government Information Watch, Restore The Fourth (RT4), Privacy Times, and the Electronic Privacy Information Center (EPIC) – submit these comments in response to the Notice of Proposed Rulemaking, “Advance Passenger Information System: Electronic Validation of Travel Documents”, Docket Number USCBP-2023-0002, FR Doc. 2023–02139, RIN 1651-AB43, 88 Federal Register 7016-7033 (February 2, 2023).

By this Notice of Proposed Rulemaking (NPRM), U.S. Customs and Border Protection (CBP) proposes to (1) expand the fields of information that all international travelers flying to or from the U.S. by common carrier are required to provide to airlines and that airlines are required to pass on to CBP (while being free to retain copies for their own profitable use); and (2) prohibit airlines from allowing certain individuals including those who don’t have, or are unable or unwilling to provide, two phone numbers, an email address, and an address in the U.S. (even if they are U.S. citizens who reside abroad), to board flights, or recommend that airlines not board them (in violation of airlines’ duties as common carriers to transport all passengers paying the fares in their tariffs, and in violation of travelers’ rights under Federal statutes, the Bill of Rights, Executive Orders, and international human rights treaties to which the U.S. is a party).

The proposed rule is purportedly intended to “enable CBP to determine whether each passenger is traveling with valid authentic travel documents prior to the passenger boarding the aircraft.” Aside from the fact that CBP has no jurisdiction over foreign citizens boarding foreign-flagged aircraft at foreign airports, the proposed rule would have little or no effect on CBP’s ability to detect travelers using documents issued to other people. The proposed rule would not

serve its stated purpose, but would only serve to expand CBP’s systematic warrantless, suspicionless, surveillance of air travelers and CBP’s attempt to control airline travel.

As discussed below, the proposed rule exceeds CBP’s authority and jurisdiction and is contrary to law. It is also bad policy. It amounts to an attempt to impose a travel document requirement in the guise of document “validation”, to outsource to airlines surveillance and control of travelers that CBP would have no authority to conduct itself, and to frustrate the human right to asylum by preventing asylum-seekers from reaching the U.S.

Airlines would be induced to collaborate with CBP in (additional) surveillance and control of travelers, in violation of the rights of travelers and airlines’ duties as common carriers, by a carrot-and-stick combination of CBP extortion and CBP bribery.

Airlines would be extorted into denying passage to certain travelers on the basis of extrajudicial CBP recommendations and by CBP threats to impose financial sanctions on them if they fulfill their duties as common carriers. And airlines would be bribed to collaborate in this public-private travel surveillance and control partnership by being given an unrestricted free ride to use valuable and sensitive personal information provided to them by travelers under government duress for their own (likely highly profitable) commercial purposes.

The proposed rule would do no good for its stated purpose, and would do great harm in other ways omitted from the NPRM, at enormous cost to the airline industry and to travelers.

As elaborated in the sections below, the NPRM conflates requirements for entry to the U.S. with requirements for travel, conflates requirements to provide information to CBP with requirements to provide information to airlines and/or other third parties, and ignores the legal rights of travelers and the legal obligations of airlines as common carriers.

The proposed rule is directly contrary to multiple provisions of the Privacy Act.

Because the NPRM grossly misstates the current practices and overstates the data collection capabilities of airlines and other companies in the airline IT ecosystem, and ignores almost all of the effects of the proposed rule on travelers (including those who CBP would prohibit from boarding or recommend be denied boarding) and travelers' associates, the NPRM grossly understates the unfunded mandates to the airline industry and the financial costs and other impacts on individuals including substantial foreseeable loss of life.

The proposed rule should be withdrawn in its entirety. If it is not withdrawn entirely, a new cost-benefit analysis including assessments pursuant to the Regulatory Flexibility Act and the Unfunded Mandates Reform Act must be conducted to take into consideration the unfunded industry mandates and costs to travelers and other individuals ignored in the NPRM.

1. About the commenters

The Identity Project (IDP) is an independent not-for-profit project, founded in 2006, which provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights.

Government Information Watch is focused on open and accountable government. Our mission is to monitor access to information about government policy, process, and practice and to ensure and preserve open, accountable government through advocacy. In this capacity, we intend to serve as a resource for policymakers, the media, advocacy groups, and the public.

Restore The Fourth (RT4) is a not-for-profit social welfare corporation, founded in 2013, dedicated to robust enforcement of the Fourth Amendment and related due-process rights. Restore the Fourth oversees a series of local chapters whose membership includes lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs in major cases about Fourth Amendment or due process rights.

Privacy Times is a leading provider of expert witness and expert consulting services regarding all matters relating to the privacy of financial and other consumer information. From 1981-2013, Privacy Times published a specialized newsletter covering the Privacy Act, Freedom of Information Act, Fair Credit Reporting Act, and a wide variety of information privacy issues.

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. EPIC was established in 1994 to protect privacy, freedom of expression, and democratic values in the information age. Our mission is to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation. EPIC has engaged extensively with DHS to protect privacy for travelers and immigrants.

2. The proposed rule would be useless for its stated purpose.

The ostensible purpose of the proposed rule is to enable CBP to determine, prior to departure of a flight, whether an airline passenger or crew member is traveling with a valid, authentic, travel document. But requiring travelers to provide an address in the U.S., an email address, and/or two phone numbers will do nothing to authenticate or validate any documents.

With the exception of individuals under court supervision for having been convicted of a crime, and male U.S. residents ages 18 through 25 who are required to report their current

addresses to the Selective Service System, U.S. citizens are not required to report their address or changes of residence or postal address to any U.S. government agency. U.S. citizens are not required to have any fixed address, any phone number, or any email address. Many have none.

If any of these items of contact information is contained in government databases, it is likely to be out of date. Different government agencies may have different information for the same individual because it was provided at different times or for different purposes. Individuals are unlikely to remember, if they ever knew, what if any addresses and/or other contact information government agencies may have associated with them in their databases.

Some international air travelers on flights to and from the U.S. don't reside in the U.S., and may never have resided in or previously visited the U.S. If they provide any address or phone number in the U.S., it will most likely be the address and phone number of a hotel, friend, family member, or other transient location where they plan to stay or have stayed. These addresses and phone numbers are highly unlikely to be associated with them in any government or commercial database, and are inherently useless for document or identity validation.

If the government doesn't have this information in its own files about individuals, it will have to turn to commercial data brokers, whose information is notoriously inaccurate.

If CBP attempts to "authenticate" travel documents by comparing information provided by travelers with information in either government or commercial databases, it is likely that legitimate travelers will provide information that is deemed "incorrect" because it doesn't match the information in those databases. Identity thieves, on the other hand, who have obtained information from those databases, are more likely than legitimate travelers to be able to provide APIS contact information matching whatever is in those government or commercial records.

As a document “validation” methodology, collection of this additional information for purposes of comparison with government or commercial databases would be less than useless.

As an additional purpose of the proposed rule, CBP claims that, “The proposed additional requirements assist CBP in identifying and locating individuals suspected of posing a risk to national security and safety and aviation security before departing to and from the United States.”

But as the Identity Project said in our comments on the NPRM for the 2006 APIS rules, Compelled identification of travelers would be relevant to the protection of passengers if and only if, *inter alia*, the DHS has available a complete and accurate list of identifying information which would be presented by would-be terrorists seeking to travel by airline common carriers, who pose a threat to travel but against whom there is insufficient evidence to support the issuance of an arrest warrant and insufficient probable cause for arrest or detention without a warrant. There is no support in the NPRM for such a claim.¹

In our 2006 comments, we noted that “until it becomes transparent who is on ‘no-fly’ lists, and on the basis of what judicial process orders are issued that one be placed on or off these lists,” questions would remain about the construction of those lists.

As in 2006, we still can find no indication that the U.S. government has ever sought to use its existing authority to seek a no-fly injunction or restraining order from a Federal court.

However, now we do know who has been on the extrajudicial U.S. government “no-fly” and “selectee” lists. Versions of those lists as they were provided to airlines in 2019 were recently found posted by an airline on an insecure commercial cloud server.²

1. “Comments of the Identity Project, World Privacy Forum, and John Gilmore: Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, USCBP-2005-0003”, October 12, 2006, <<https://hasbrouck.org/IDP/IDP-APIS-comments.pdf>>. Although our current comments are directed primarily to the additional violations of law and the deficiencies in the impact assessments in the current NPRM, we maintain our previous objections to the legality and appropriateness of the APIS program as a whole.
2. maia arson crimew, “how to completely own an airline in 3 easy steps and grab the TSA nofly list along the way”, January 19, 2023, <<https://maia.crimew.gay/posts/how-to-hack-an-airline/>>. “CommuteAir... confirmed

Review of the no-fly and selectee lists makes clear the unreliability, bias, and overconfidence of the U.S. government's algorithms and procedures for identifying who poses a threat to aviation security sufficient to justify denial of air transportation by common carrier.

The no-fly listings include 4-year-olds, 100-year-olds, and dead people.³ The corpse of Osama Bin Laden, still listed 26 times on the no-fly list with different spellings of his name, presumably poses no current threat to aviation. Is CBP still haunted by Bin Laden's ghost, or still afflicted with post-traumatic stress from 9/11 that continues to cloud its ability to make rational assessments of current threats?

The no-fly list contains more than one and a half million names, of which a grossly disproportionate number appear to be Muslim. More than 10% include "MUHAMMAD" in the first or last name field, and still more are named Muhammad but with other spellings. It's impossible to scan any random section of the list and not be overwhelmed by its Islamophobia.

The relative numbers of listings on the no-fly and selectee lists are a striking indication of the U.S. government's overconfidence in the accuracy of its pre-crime predictive algorithms.

Predictions are inherently uncertain. For every case in which a would-be passenger seems to present such a clear and present danger as to justify denial of access to the services of common carriers, one would expect that there would be many cases where there was some evidence of possible risk, enough to justify some extra precautions (such as a more thorough

the legitimacy of the data, stating that it was a version of the 'federal no-fly list' from roughly four years prior." Mikael Thalen and David Covucci, "U.S. airline accidentally exposes 'No Fly List' on unsecured server", Daily Dot, January 19, 2023, <<https://www.dailydot.com/debug/no-fly-list-us-tsa-unprotected-server-commuteair/>>. See also "Notice of Data Breach" filed by CommuteAir with the office of the Attorney General of Montana confirming that the data "included a 2019 sample of the federal no-fly list," <<https://dojmt.gov/wp-content/uploads/Consumer-Notification-Letter-802.pdf>>.

3. The Identity Project, "The #NoFly list is a #MuslimBan list", January 20, 2023, <<https://papersplease.org/wp/2023/01/20/the-nofly-list-is-a-muslimban-list/>>.

search for weapons or explosives) but not enough to justify a categorical no-fly order. There should, therefore, be many times more entries on the selectee list than on the no-fly list.

But the recently-found NOFLY.csv file contains 1,556,062 entries, while the SELECTEE.csv file contains 251,169. That the no-fly list is six times as large as the selectee list suggests either that the government wrongly believes that it has near-perfect precognition and that uncertainty as to travelers' criminal intentions (as inferred from profiling algorithms) is rare, or that it is erring on the side of saying "no" and violating the presumption of innocence and the right to travel by common carrier by putting most uncertain or edge cases on the no-fly list rather than the selectee list.

While it is characteristic of overconfident law enforcement agencies and officers to assume that their hunches and suspicions are infallible, they do not provide a basis for restriction of rights unless they meet the standard of probable cause of involvement in a crime. Travel by common carrier is itself the exercise of a right, and cannot be deemed a basis for suspicion.

Finally, with respect to the purported utility of the proposed rule in locating suspects once they are identified, CBP has the opportunity to question each traveler when they are inspected on arrival in the U.S. Nothing is gained, with respect to locating travelers, by collecting addresses prior to the departure of the flight rather than when it arrives. While a traveler is in transit, they won't be at whatever address in the U.S. they provided to an airline or CBP. And CBP knows exactly where they are while they are in flight: they are on the plane, and can readily be intercepted when it lands in the U.S. and they are inspected by a CBP officer.

As for U.S. citizens, if the U.S. wants to locate them, it can get a warrant to search for or to arrest them. If it wants to compel the assistance in the search for an individual of airlines or

the computerized reservation systems (CRSs) that host airline reservations, the government knows what to do, and regularly does it. Once an arrest warrant is issued, it can apply for an order pursuant to the All Writs Act,⁴ through an adversarial judicial proceeding in which the airline or CRS, and possibly the target of the search, would have standing to contest the order.⁵

It is true that the government might, as CBP explains in the NPRM, want to intercept some people who have traveled or plan to travel. But that is equally true of anyone, regardless of whether they have ever traveled internationally or plan to do so. The government cannot Constitutionally order all U.S. citizens to report their addresses to the police, so that the police know where to find them for some as-yet-unknown purpose at some future time. Nor can it do the same thing on the sole basis of their past lawful travel or future lawful travel plans.

CBP has no authority to demand addresses from innocent U.S. citizens, in case it might later want to arrest them, solely on the basis of their exercise of the right to travel. Such a scheme of suspicionless traveler tracking and surveillance would violate the Fourth Amendment.

3. The proposed rule exceeds the authority and jurisdiction of the CBP.

Having established that the proposed rule won't do what it is purportedly intended to do – enable “validation” of travel documents and identification and location of threats to aviation security – we turn to what it will do and to CBP's authority and jurisdiction.

4. Thomas Brewster, “The FBI Is Secretly Using A \$2 Billion Travel Company As A Global Surveillance Tool”, *Forbes*, July 16, 2020, <<https://www.forbes.com/sites/thomasbrewster/2020/07/16/the-fbi-is-secretly-using-a-2-billion-company-for-global-travel-surveillance--the-us-could-do-the-same-to-track-covid-19/e>>. See also the Identity Project, “FBI enlists reservation services to spy on travelers”, July 17, 2020, and “Sabre and Travelport help the government spy on air travelers”, July 1, 2022, <<https://papersplease.org/wp/2022/07/01/sabre-and-travelport-help-the-government-spy-on-air-travelers/>>.
5. See *Forbes Media and Thomas Brewster v. U.S.*, 9th Cir. Case No. 21-16233, slip opinion of March 13, 2023, <<https://cdn.ca9.uscourts.gov/datastore/opinions/2023/03/13/21-16233.pdf>>, surveying cases related to sealing of such orders to one of the major CRSs and noting likely standing of the CRS to contest the orders. We do not concede CBP's authority to compel the assistance of an airline or CRS in such a search, which is precisely why it should be sought through such an adversarial judicial proceeding and not taken for granted in rulemaking.

The intent of the APIS scheme is that airline staff and other third parties around the world (travel agents, tour operators, passenger ground handling agents at airports, etc.) will inspect documents and interrogate travelers on behalf of CBP, pass on information obtained from travelers under CBP duress to CBP (while retaining that information for their own use), and then act on orders or recommendations from CBP as to which passengers not to transport.

But both the existing scheme and the NPRM fail to take into consideration that travel is a right and that a common carrier has a duty to transport all passengers complying with its tariff.

The CBP has conceded, in response to our comments on the NPRM for one of the earlier versions of the APIS rules, that, “CBP recognizes, as the Supreme Court has stated, that the right to travel is an important and long-cherished liberty.”⁶

The Supreme Court has long recognized that there is a Constitutional right to travel internationally. The right to travel is “not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards” but “a virtually unconditional personal right.” *Shapiro v. Thompson*, 394 U.S. 618, 642-643 (1969); see also *Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1964); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (“Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic to our scheme of values.”).

Under Article VI, Section 2 of the U.S. Constitution, “treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land.”

6. “Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft”, April 7, 2005, 70 *Federal Register* 17828.

Article 12 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. Senate on April 2, 1992 (138 *Congressional Record* S4782), provides that, “Everyone shall be free to leave any country, including his own” and “No one shall be arbitrarily deprived of the right to enter his own country.”⁷

While the U.S. has argued that the ICCPR has not, in its entirety, been effectuated in U.S. law, these provisions of Article 12 of the ICCPR, as they apply to air travel by common carrier, have been effectuated by 49 U.S. Code § 40101, which provides that, “the Administrator of the Federal Aviation Administration shall consider the following matters: . . . the public right of freedom of transit through the navigable airspace.”⁸ In addition, Executive Order 13107, issued in 1998 and never modified or rescinded,⁹ provides that, “All executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.” Those functions, of course, include agency rulemaking.

The U.S. government has reiterated in its reports to the U.N. Human Rights Committee that, “in the United States, the right to travel – both domestically and internationally – is constitutionally protected,”¹⁰ thereby making clear that it believes that the provisions of the ICCPR recognizing and requiring treaty parties including the U.S. to respect and protect the right to travel have been effectuated in U.S. law – presumably including through 49 U.S.C. § 40101.

7. Available at <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights#article-12>>. Guidance on the meaning and application of Article 12 of the ICCPR has been provided by the U.N. Human Rights Committee in its “General Comment No. 27: Freedom of Movement (Article 12)”, CCPR/C/21/Rev.1/Add.9, November 1, 1999, <<https://digitallibrary.un.org/record/366604>>.
8. The reference to the Administrator of the FAA was made applicable to the Administrator of the Transportation Security Administration (TSA) pursuant to the Aviation and Transportation Security Act of 2002.
9. “Executive Order 13107—Implementation of Human Rights Treaties”, December 10, 1998, <<https://www.govinfo.gov/content/pkg/WCPD-1998-12-14/pdf/WCPD-1998-12-14-Pg2459.pdf>>.
10. “Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights”, Para. 203, November 28, 2005, CCPR/C/USA/3, <<https://2009-2017.state.gov/j/drl/rls/55504.htm>>.

In accordance with 49 U.S.C. § 40101 and E.O. 13107, therefore, CBP must take into consideration in rulemaking, and act at all times in accordance with, Article 12 of the ICCPR, regardless of whether other parts or the entirety of the ICCPR have been effectuated in U.S. law.

Closely intertwined with the right to travel is the duty of a common carrier to transport all passengers in accordance with its tariff, which is central to the definition of a common carrier.

In analyzing CBP's proposal to issue recommendations to airlines not to board certain individuals, the NPRM states that, "it is within the discretion of the carrier whether to board the passenger upon receiving CBP's recommendation." CBP does not say from what source a carrier would derive this discretion to refuse passage. So far as we know, there is none. A common carrier, unlike an ordinary business, may *not* "reserve the right to refuse service to anyone."

49 U.S.C. § 4492(b) provides that, "an air carrier... or foreign air carrier may refuse to transport a passenger... the carrier decides is, or might be, inimical to safety." We question the Constitutionality of this section. But even if it is valid, discretion under this section is limited to passengers that the carrier reasonably and in good faith believes to be "inimical to safety". Many innocent travelers, as discussed further below, are undocumented. Lack of documents does not constitute a basis for a decision that an individual is "inimical to safety."

Even more puzzling is the footnote to this section of the NPRM, in which CBP notes that, "CBP cannot require that a passenger be denied boarding."

If CBP itself lacks authority in these circumstances to require that an airline derogate from its duty as a common carrier and refuse to respect the "public right of transit through the navigable airspace," what greater authority would a common carrier, which has no police or judicial authority, have to make such a derogation? CBP doesn't say. We think there is none.

Since CBP doesn't specify the basis for the authority and extraterritorial jurisdiction it claims for itself and airlines, we have to speculate in order to try to respond to those claims.

The implied minor premises of the NPRM appear to be that (1) passports or similar documents are required for travel, not merely for entry to the U.S., and (2) the authority of CBP to inspect documents, search and question travelers, and determine their admissibility to the U.S. at airports and ports of entry implies jurisdiction and authority to delegate similar authority to carry out searches, inspections, and interrogation to commercial airline staff worldwide and to order common carriers not to allow individuals to board foreign aircraft at foreign airports.

But the NPRM provides no support in statute or case law for what would be an extraordinary series of leapfrogging expansions of extraterritorial, outsourced, and privatized CBP authority and jurisdiction.

CBP's erroneous conflation of entry requirements and travel requirements is perhaps most clearly indicated in Section II of the NPRM, in which CBP says that, "the manifest must contain... passport number and country of issuance (if a passport is required for travel)".¹¹

What does this mean, "if a passport is required for travel"? Passports are sometimes (although often not, as discussed below) required for entry to or exit from the U.S. But CBP cites no source for any requirement for passports for travel to or from the U.S., and we know of none. It's deeply disturbing that CBP officials responsible for rulemaking are so confused or misguided about the requirements of the laws CBP is supposed to enforce and uphold.

CBP appears to have failed to make a critical distinction between what a person must do in order to travel by common carrier (pay the fare and satisfy the conditions in the carrier's tariff,

11. 88 *Federal Register* 7016-7017.

and not be forbidden to travel by competent authorities), and what they must do to be admitted to, or depart from, the U.S., which varies depending on citizenship and other factors.

We know of no circumstance in which “a passport is required for travel” to the U.S.

Even on arrival, passports are not always required for entry. For example, while an administrative penalty can be assessed against a U.S. citizen who enters the U.S. without a passport, they must be admitted in the absence of a evidence that they are not a U.S. citizen.

CBP says in the NPRM, “United States citizens traveling outside the United States require a passport or other WHTI-approved travel document to re-enter the United States.” But CBP cites no basis for this claim, and it simply is not true.

Asylum seekers are not, and cannot be, required to have any documents for entry. Lack of a passport or other documents may be evidence in support of their claim for asylum, since some repressive governments withhold or confiscate passports of persecuted groups or individuals. By definition, an asylum claim can be made and adjudicated only after an asylum seeker arrives. So it is *per se* impossible for anyone to say with certainty, prior to departure, what if any documents will or will not prove to be necessary or dispositive in making a claim for asylum on arrival.

Passports are not always required for admission to the U.S. U.S. citizens and asylum seekers lacking these documents travel to and arrive in the U.S. and are admitted, every day.

So we return to our earlier question: If passports are never required for travel, and often not required for entry, on what basis could an airline refuse passage? We know of none.

An airline might try to justify denial of passage by inserting a provision in its conditions of carriage that requires passengers to have “all documents required for their destination.” But as we have just discussed, passports are not required for admission to the U.S., at least for U.S.

citizens and asylum seekers. So even if a common carrier could lawfully publish, and the Department of Transportation could lawfully approve, a tariff containing such a provision¹², it would not justify denial of passage to undocumented U.S. citizens or asylum seekers.

CBP's implicit assertion of long-arm jurisdiction at foreign airports and implicit claim of authority to delegate police powers to airline staff and contractors are also problematic.

We find it hard to imagine on what basis CBP thinks it has the right to control, or to direct a foreign air carrier to control, whether or not a foreign citizen steps over the threshold from the jetway into the cabin of a foreign-registered aircraft parked on the ground at a foreign airport. CBP has provided no basis for its claim to such authority.

Even if a CBP officer were standing on the jetway by the door to a foreign aircraft at its departure airport in a foreign country, they would be out of their jurisdiction. Their authority would be limited to the ability to report suspected crimes to police in that country – the same thing an airline can and should do if it suspects a possible crime.

CBP's authority is to examine aircraft and their passengers, luggage, and cargo, and determine their admissibility, if and when a plane lands in the U.S. and those passengers apply for admission to the U.S. At that point, a U.S. citizen need only provide sufficient evidence, though a U.S. passport or otherwise, to establish a *prima facie* claim of U.S. citizenship. In the absence of evidence rebutting their claim to citizenship, or evidence of probable cause to suspect them of a crime, they must then be admitted once they and their belongings have been searched.

A U.S. citizen's address in the U.S., telephone number(s), and/or e-mail address, if they have any, have no relevance to their citizenship or admissibility to the U.S. as a citizen. In

12. Conditions of carriage are part of an airline's tariff. 49 U.S. Code § 41510 requires adherence to tariffs for international air transportation and prohibits an airline from imposing conditions not specified in its tariff.

accordance with the Fourth and Fifth Amendments, a citizen is entitled to stand mute in response to questions unrelated to admissibility from a CBP officer on arrival in the U.S. Their exercise of their right to remain silent cannot be used as a basis for suspicion, probable cause, or denial of admission to the U.S., as long as their citizenship is not called into question by other evidence.

CBP seeks to delegate greater authority and wider jurisdiction than its own officers have. But police do not ordinarily have the authority to delegate any of their police powers, including powers of search and seizure, to civilian third parties or even other U.S. government employees. Airline staff are not deputized as law enforcement officers and have no police powers.

In light of all this, it is clearly wrong for CBP to presume that it can outsource authority and extraterritorial jurisdiction to foreign airline staff to demand answers from U.S. citizens to questions asked by airline staff at foreign airports that travelers would not be required to answer if those questions were asked of those U.S. citizens by CBP officers on arrival in the U.S.

4. The proposed rule would violate the Privacy Act.

The NPRM proposes a rule and describes procedures that would involve collection of records of how individuals exercise rights guaranteed by the First Amendment to the U.S. Constitution, without satisfying the conditions in the Privacy Act for this collection of records.

The Privacy Act of 1974, at 5 U.S.C. §552a(e)(7), requires that:

Each agency that maintains a system of records shall –... maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

Records of addresses and contact information that reveal with whom we communicate and associate are records of how we exercise rights guaranteed by the First Amendment, including the right to freedom of speech and the right of the people peaceably to assemble.

In one of the case studies cited in the NPRM as justification for the proposed rule, CBP admits that it wants this information “to identify other individuals associated with the traveler.”¹³ Who we associate with is information protected by the First Amendment.

The Privacy Act permits the maintenance by a Federal agency of records such as these of how U.S. persons exercise rights guaranteed by the First Amendment only if this is: (a) expressly authorized by statute, (b) expressly authorized by the individual about whom the record is maintained, or (c) pertinent to and within the scope of an authorized law enforcement activity.

The proposed collection of addresses and contact information, for the purpose of identifying travelers’ associates, satisfies none of these three conditions.

First, there is no explicit authorization in any Federal statute for CBP to collect street addresses in the U.S., phone numbers, or email addresses of U.S. persons. It is irrelevant whether authorization might arguably be implicit in some general authority claimed by CBP. The Privacy Act requires *express* statutory authorization for such information collection, and there is none.

Second, the maintenance of these records with respect to U.S. persons would not be “expressly authorized by... the individuals about whom these records are maintained.”

Provision of information in response to the threat of (unlawful) denial of the right to travel by common carrier cannot be considered to be genuinely “authorized.”

Nor is any putative consent, even under such duress, likely to be given “expressly.” We know of no airline that provides passengers, prior to collection of APIS information, with the

13. 88 *Federal Register* 7019.

notice required by the Paperwork Reduction Act (PRA). Searches for the current OMB Control Number for the collection of APIS information, “1651-0088”, which must be included in the PRA notice, find no mention on any airline, travel agency, or tour operator website.

Third, the maintenance of these records of location and movement is not, “pertinent to and within the scope of an authorized law enforcement activity.” As noted above, the airline staff and other third parties collecting this information are not law enforcement officers. The APIS program is a warrantless, suspicionless administrative search, not a law enforcement search.

The proposed rule would thus involve the collection of information about how U.S. persons exercise rights of communication and association protected by the First Amendment, without satisfying any of the three alternative conditions under which collection of this information would be permitted by the Privacy Act. The proposed rule must be withdrawn.

The Privacy Act also provides, at 5 U.S.C. §552a(e)(2), that:

Each agency that maintains a system of records shall –... collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs.

There are good policy reasons for this provision of law, and potentially serious adverse impacts on individuals of noncompliance, as we discuss further below in our assessment of costs.

The statutory language “to the greatest extent practicable” means that it’s not enough to argue that it would be cheaper for CBP to outsource collection of this information to airlines and airlines’ agents around the world – even if that were true, which isn’t at all clear in light of the costs that airlines would incur to develop the capacity to collect, store, and transmit this data.

All inbound passengers are examined by CBP inspectors on arrival at U.S. airports. Given that common carriers are required to transport passengers regardless of whether or not

they are likely to be admitted to the U.S., the only lawful use of this data would be in connection with inspection on arrival. There's no need to decide on admissibility in advance of arrival. In the case of asylum seekers, it's *per se* impossible to decide on admissibility prior to arrival. It would be practicable for CBP inspectors to collect APIS data directly from travelers on arrival.

At foreign airports with pre-clearance facilities, passengers are inspected by CBP officers before their flights depart for the U.S. In these cases it is especially obvious that even if CBP has some legitimate lawful use for this additional information prior to departure, it would be practicable for CBP officers at pre-clearance facilities to collect it directly from passengers. Having airlines or other intermediaries collect this information from passengers departing for the U.S. from airports with CBP pre-clearance facilities is clearly barred by the Privacy Act.

Another practicable alternative for both inbound and outbound airline passengers would be for CBP to collect information directly from travelers through a Web-based system like the Electronic System for Travel Authorization (ESTA). CBP has already demonstrated the capability to build, deploy, and operate the ESTA system.¹⁴

Unless CBP wants to argue that the ESTA program is “not practicable” and should be rescinded, CBP cannot credibly argue that it would not be practicable for CBP to build and deploy a similar Web-based system for collection of APIS data directly from travelers.

Given the existence of such an obviously practicable alternative, both the current APIS system of indirect information collection through airlines and the expanded NPRM are in clear violation of this section. This information collection must be suspended, and the proposed rule must be withdrawn or modified to comply with this provision of the Privacy Act. If CBP wants to collect this information about travelers, it can – and it must – collect it from them directly.

14. See “Official ESTA Application” at <<https://esta.cbp.dhs.gov/>>.

5. The impact assessment in the NPRM is grossly incomplete and inaccurate.

The NPRM omits most of the direct and consequential costs that the proposed rule would impose on airlines, the air travel industry, travelers, and individuals associated with travelers, including small travel businesses and travelers who are themselves small businesses.

The NPRM ignores the extensive administrative record with respect to these costs submitted in parallel rulemakings before another Federal agency. As a result, the NPRM grossly understates the adverse impact of the proposed rule, and wrongly concludes that it does not exceed the \$100 million threshold for an analysis pursuant to the Unfunded Mandates Act.

(a) Costs to airlines and the air travel industry

The analysis of the proposed rule in the NPRM is based on the patently false assumption that airlines would “require no new technology” and “would not face additional technology maintenance costs to comply with this proposed rule.” While the NPRM acknowledges that “some air carriers may need to make programming improvements to handle the messages required by the proposed rule,” it claims that “these programming costs are expected to be minor and are generally built into overall technology maintenance budgets.”

The CBP should know better. The NPRM mentions the interim final rule (IFR) issued by the Centers for Disease Control and Prevention (CDC) on February 12, 2020, by which CDC required airlines, on demand, to transmit to CDC, to the extent they already have this information, and required passengers to provide, to the extent that this information exists, the *exact same data fields* which the proposed rule would require be provided to airlines and to CBP:

street address, email address, and two phone numbers.¹⁵ But despite seeking exactly the same information from airlines and passengers, and despite being aware of the parallel rulemakings by the CDC, CBP entirely ignores the administrative record in the CDC’s recent rulemakings.

Airline commenters and the CDC have disagreed on the CDC’s jurisdiction and authority, on the compatibility of the IFR with other laws, and on the wisdom of the IFR as a policy choice. Airlines have argued, and we agree, that any information collection from travelers for use by Federal agencies should be done directly by those agencies, not outsourced to airlines.

But, crucially for this CBP rulemaking, both CDC and the airline industry agreed that, contrary to the baseless claim in this NPRM by CBP, airlines do not currently have these data fields in any of their business records or have the ability readily to provide them in normalized form in those cases where they do have them somewhere in various of their systems of records.

The first version of the CDC’s rules requiring collection and transmission of these data fields was promulgated in 2017.¹⁶ In adopting those rules, after notice and comment including extensive submissions from the airline industry, CDC concluded as follows:

In the experience of the HHS/CDC, queries from APIS/PNR rarely result in full sets of contact information (i.e. the record includes all five additional data fields as outlined in the final rule). The data fields that are most commonly missing from the records are email addresses (missing 90 percent of the time), secondary phone number (missing 90 percent of the time), and street addresses (missing or insufficient for public health contact tracing up to 50 percent of the time)... In looking at a random sample of 20% of the compiled international air travel manifests for 2015, those including a compiled data set from NTC [CBP’s National Targeting Center] and the airlines, 100% were missing at least one of the 5 data fields. Email address and secondary phone number were among those most frequently missing.¹⁷

15. “Control of Communicable Diseases; Foreign Quarantine: Interim final rule with request for comments”, CDC Docket No. CDC-2020-0013, 85 *Federal Register* 7874-7880.

16. Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), “Control of Communicable Diseases: Final Rule”, CDC Docket No. CDC-0016-0068, 82 *Federal Register* 6890-6978, January 19, 2017, <<https://www.regulations.gov/document/CDC-2016-0068-15589>>.

17. 82 *Federal Register* 6919, January 19, 2017.

More recent airline industry comments to the CDC indicate that the contents of airlines' records and their technical capabilities to collect or deliver this data in normalized form have not changed. In joint comments in response to the 2020 CDC interim final rule amending the CDC data collection and transmission requirements, U.S. and international airlines said as follows:

[T]he airline industry could take many months and obligate hundreds of millions of dollars to modify systems to collect passenger contact information and send it to the CDC....

Airlines do not have all the passenger contact information that the CDC desires...

Airlines compile API from multiple systems that would need to be modified to ensure capture and inclusion of specific passenger contact information in API and transmission to CBP. CBP, OTAs [online travel agencies], and GDSs [global distribution systems, also known as computerized reservation systems or CRSs] would also need to modify their systems to capture, transmit, and/or receive the contact information that is not already required by the APIS regulations (i.e., phone numbers, email, and a crewmember's address in the United States).

Despite very close collaboration between all stakeholders, APIS changes have historically taken years to develop and implement because APIS is designed to collect verifiable biographic information which can be collected in an automated manner. Modification of the APIS framework to include manually entered and unverifiable passenger contact information... would represent a significant departure from the API framework and standards.

Like PNR systems, we anticipate that airlines will need at least 12-18 months to modify their systems to transmit the CDC-required passenger contact information as API.¹⁸

We reiterate that these comments speak to the collection and transmission of *exactly the same data fields* to CBP as were proposed to be required by CDC, but with the significant difference that CBP proposes to require this data regardless of whether it even exists, while CDC only requires this information from travelers or airlines to the extent that it already exists.¹⁹

18. Joint Comments of Airlines for America (A4A), International Air Transport Association (IATA), Regional Airline Association (RAA), and National Air Carrier Association: Control of Communicable Diseases", CDC Docket No. 2020-0013, March 13, 2020, <<https://www.regulations.gov/comment/CDC-2020-0013-0025>>.

19. According to the CDC order implementing its Interim Final Rule, "Passengers must provide the designated information, to the extent it exists, to airlines and operators.... Airlines must also transmit these data elements to

We respectfully direct CBP’s attention to these comments from the airline industry, in their entirety, which accurately detail the state of play and the cost and complexity of the changes that would be required to enable compliance with CBP’s proposed rule.

As airlines have explained in the CDC rulemaking, every component and layer of the airline reservation IT ecosystem, and the interfaces between them and with end users, will need to be modified to support the collection, storage, and transmission of these new fields in normalized formats. Modifications to some layers can’t begin until specifications for others, such as interline messaging protocols (the AIRIMP²⁰), line commands, and APIs, have been developed. Tens of thousands of pieces of airline reservation software, including every airline booking Web site (in every language) and mobile app, and every travel agency booking script, around the world, will need to be modified. Hundreds of thousands of airline, airport, travel agency, and call center staff will need to be trained in these new formats and procedures.

CBP does not acknowledge or explain the discrepancy between this recent and detailed airline testimony and CBP’s claim that airlines already collect and have the capability to deliver this data with no significant costs or modifications to their IT systems and business processes.

CBP’s failure to address this recent and detailed (and, we believe, accurate) industry testimony, while asserting unsupported claims to the contrary as the basis for the NPRM, calls into question the competence, diligence, and good faith of CBP’s impact assessments.

CDC within 24 hours of an order, to the extent such data elements are already available and maintained by the airline.” (“Requirement for Airlines and Operators To Collect and Transmit Designated Information for Passengers and Crew Arriving Into the United States; Requirement for Passengers To Provide Designated Information: Notice of agency order”, 86 *Federal Register* 61246-61252, November 5, 2021). According to a footnote to the notice of the CDC order “An individual may not, for example, have an email address or phone number, in which case the individual would not be required to provide one.” (86 *Federal Register* 61250, n. 36.) The CBP’s proposed rule has no such limitation or exception for cases in which this data does not exist.

20. On the history and nature of changes to the AIRIMP required to support government-mandated collection by airlines of personal information about passengers in normalized formats, see the Identity Project, “‘Secure Flight’ data formats added to the AIRIMP”, May 1, 2009, <<https://papersplease.org/wp/2009/05/01/secure-flight-data-formats-added-to-the-airimp/>>.

A new impact assessment, including these costs and the assessment required by the Unfunded Mandates Reform Act, must be conducted before the proposed rule can be finalized.

(b) Costs to travelers and other individuals associated with them

The costs of the proposed rule to individuals (including self-employed individuals and sole proprietors who as individuals are “small business” within the meaning of the Small Business Act) would range from time and money to continued, perhaps lifelong, persecution abroad (if they are unable to travel to the U.S. to seek asylum because they are denied their right to travel by common carrier), to death for some number of those who are forced to travel by means other than by common carrier to seek asylum because they are denied their right to travel by common carrier.

The costs to individuals will vary depending on their situations. We will consider these cases in order from the least-impacted travelers to those who would be most adversely impacted.

Those travelers for whom compliance with the new requirements in the proposed rule will be least costly are those who have (and have memorized) an address in the U.S., an email address, and two personal phone numbers that they do not need to obtain permission from anyone else (cohabitant, shared user of landline, etc.) to divulge to the airline, CBP, and any intermediaries that would be involved (travel agency, CRS/GDS company, airport operator, etc.).

CBP claims in the NPRM that, “Because the passenger generally provides most of these data elements when booking a ticket for air travel and the carrier then forwards this information to CBP, the estimated time burden for this information has not increased.”²¹

21. 88 *Federal Register* 7030.

But as discussed above, the premise of this assessment is simply wrong. Airlines do not already collect this information or have it available to transmit to CBP.

As airlines have pointed out in their comments to the CDC, unlike the current APIS data, the new data elements required by the proposed rule will have to be entered manually:

The foundational element of the PNR is the information from passports, which are machine-readable to facilitate data entry and reduce errors. Additional passenger contact information beyond what is already contained in API will not be machine readable – all information must be entered manually, substantially increasing booking and check-in times, as well as the potential for errors.²²

CBP estimates that the average total time to enter all APIS data, including the current APIS data elements and the new data elements required by the proposed rule, would remain 10 seconds per passenger. Presumably, this is a (low) estimate of the time required to scan a machine-readable passport. But the proposed new data fields are not on passports.

How much longer long will it actually take to manually enter the new data elements required by the proposed rule? Imagine typing a complete and correct street address, two complete international phone numbers, and an email address, most likely on the cramped virtual keyboard of a smartphone or the touchscreen of a check-in kiosk at an airport. We suggest that a better estimate for a normal typist would be at least an additional 30 seconds per passenger.

But most travelers wouldn't fall into this best-case scenario.

The next least-impacted group of travelers, and perhaps the largest, would be those who have or are able to create or obtain the required information, but who have to consult other people and/or take other action to create or obtain this information or permission to disclose it.

22. Joint Comments of A4A, IATA, RAA, and National Air Carrier Association: Control of Communicable Diseases”, CDC Docket No. 2020-0013, March 13, 2020, <<https://www.regulations.gov/comment/CDC-2020-0013-0025>>, at p. 21.

Many (although certainly not all) travelers have a personal cellphone with a phone number that pertains only to them. But relatively few people, except for people who both live alone and have a landline not shared with anyone else as well as a cellphone, have a second phone number they can divulge without implicating the rights of others who share that number.

The only address in the U.S. available to a traveler who does not reside in the U.S. will often be the address of a family member, friend, or other associate.

As noted above, the additional APIS data elements required by the proposed rule are intended by CBP to be used to identify “individuals associated with the traveler.”

To be permanently linked to another individual in a government file used as the input to algorithms used to decide on who to target for search or seizure, place under suspicion, or place on blacklists (“watchlists”) that result in restrictions on fundamental rights is a serious matter. It would be inappropriate and generally unethical to provide such associational information, such as a shared phone number or address, to the government for such a purpose without permission.

A doctor visiting a patient, an attorney visiting a client, a journalist visiting a confidential source, or a party to a nondisclosure agreement regarding negotiations in progress may be prohibited by promises of confidentiality and/or codes of professional ethics from disclosing their associations with others to airlines or the government without those others’ permission.

The costs of the proposed rule for these travelers will include the time and communication costs to contact each other individual who shares a secondary phone number (e.g. a home landline shared by all cohabitants) and/or U.S. address, explaining the information to be provided and the ways it might be used, and obtaining their permission for the disclosure.

Some travelers will be able to provide the required information only by taking other time-consuming actions, such as signing up for an email account if they don't have one, or reserving a hotel in the U.S., to be able to provide a U.S. address, even if they hadn't planned to stay in one.

A low estimate of average costs for this group of travelers, which might include multiple international phone calls,²³ would be 15 minutes for the traveler and 15 minutes for their associate(s), for a total of 30 minutes, plus communications costs of \$5 per traveler.

The next category of travelers would be those who are eventually able to provide the required information, but not in time to make their planned flight (perhaps because the associates from whom they need to obtain permission to divulge their address are unavailable when they are checking for a flight in a time zone on the other side of the world), or who are delayed by CBP's "document validation" long enough to miss their planned flight because the information they provide, although correct, doesn't match the data (if any) in government databases or whatever "garbage in, garbage out" databases of commercial data aggregators are consulted by CBP.

Most international flights to and from the U.S. operate on daily schedules, so the typical costs of missing an international flight include the room and board for a night in a hotel at the departure airport and the loss of a full working day at the destination. There may be additional consequential damages, for example if a performer misses a scheduled performance, a lawyer or party to a lawsuit misses a scheduled court appearance, a journalist misses a news event, etc. Consequential costs for leisure travelers of a day's delay could include missing the sailing of a cruise and, as a no-show, forfeiting the cruise price of as much as tens of thousands of dollars.

23. Pay-per-use AT&T international calling rates from the U.S., for example, range from \$3 to \$5 per minute to the majority of countries for customers without special international calling plans, although to some countries they are more than \$10 per minute. See <<https://www.att.com/international/long-distance/>>.

Our initial guesstimate of the cost to travelers of missing an international flight due to delay from the proposed rule would be an average of \$1,000 per traveler.

The next category of travelers, in order of increasing cost of the proposed rule, would be those who are prohibited from traveling by CBP, or who are prevented from traveling by airlines at the instigation of CBP recommendations. As we know from the experience of individuals on the no-fly list, inability to fly often results in the loss of a job or a career, if it requires air travel. Even the possibility that one might not be able to travel, and can't be relied on to be able to travel, can be enough to cause the loss of jobs, clients, or other income opportunities.

An estimate of the average consequential cost of being barred from air travel for the set of people who do lose jobs, clients, or other income opportunities would be \$50,000 per person.

The highest per-person costs of the proposed rule would be imposed on asylum seekers.

Many asylum seekers will, of course, be unable to provide the information required by the proposed rule, even if they might, on arrival in the U.S., be able to obtain asylum.

It's difficult to put a dollar value on asylum or on its denial. Every time someone obtains asylum, it's a triumph of freedom over tyranny. How much is that worth? How much would you pay for asylum from a country in which you are being persecuted or reasonably fear persecution?

The amounts of money asylum seekers are willing to pay and the amounts they are willing to suffer to reach the U.S. and to pursue asylum claims suggest that for asylum seekers who are forced to remain under persecution in countries they are trying to flee, because they are denied their right to travel by common carrier, the average lifetime damages are \$100,000.

But these are not the worst cases. Some asylum seekers, denied their right to travel by common carrier to potential sanctuary in the U.S., will attempt to travel to the U.S. by other means. Some of them will die trying. Irregular means of land or sea travel are dangerous.

By land, “At least 853 migrants died trying to cross the U.S.-Mexico border unlawfully in the past 12 months, ... according to internal Border Patrol data obtained by CBS News.”²⁴

By sea, according to the U.N. International Organization for Migration (IOM):

In 2021, 67 deaths and disappearances were recorded on migratory routes from the Caribbean to the United States. Additionally, 65 deaths and disappearances were recorded on the route from the Dominican Republic to Puerto Rico. More people may have gone missing on these routes in ‘invisible shipwrecks’ – cases where boats disappear without a trace.²⁵

The total comes to almost 1,000 lives lost per year attempting to travel to the U.S.²⁶

Many of those who die are asylum seekers. It is, of course, asylum seekers who are most likely to think that – given the alternative of continued, perhaps lifelong, persecution – irregular travel is worth the risks, even if they know they might die trying to reach sanctuary in the U.S.

Typical fees paid to smugglers, guides, and facilitators for irregular transport to the U.S. border by asylum seekers are at least an order of magnitude greater than typical airfares.²⁷

24. Camilo Montoya-Galvez, “At least 853 migrants died crossing the U.S.-Mexico border in past 12 months – a record high”, CBS News, October 28, 2022 / 10:37 AM / CBS News, <<https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/>>.
25. IOM Missing Migrants Project, “Annual Regional Overview – Executive Summary: The Americas, January – December 2021”, <https://missingmigrants.iom.int/sites/g/files/tmzbd1601/files/publication/file/MMP%20annual%20regional%20overview%202021%20LAC_Executive%20Summary-ENG_0.pdf>
26. Asylum seekers who travel by irregular means also are vulnerable to vastly greater risk of robbery, rape, kidnapping, and murder in transit than if they traveled by air by common carrier.
27. See e.g. Open Borders Project, “Human Smuggling Fees”, <<https://openborders.info/human-smuggling-fees/>>, surveying typical fees by region ranging from \$3,000-4,000 to cross the U.S. border from Mexico on foot and higher fees for travel from more distant parts of the world. See also Jay Root, “How one migrant family got caught between smugglers, the cartel and Trump's zero-tolerance policy,” *Texas Tribune*, March 17, 2019, <<https://www.texastribune.org/2019/03/07/migration-us-border-generating-billions-smugglers/>>: “In the early 2000s, migrants paid \$1,000 to \$3,000 for a coyote’s help crossing the border, according to a 2017 Department of Homeland Security report. Now, smugglers’ fees average double and triple that.” As of March 27, 2023, Google Flights, <<https://www.google.com/travel/flights/search>>, shows tickets available for flights tomorrow, March 28, 2023, for total prices round trip including taxes for \$170 from Cancún to Ft. Lauderdale, \$217 from Mexico City to Houston, \$233 from Cancún to Baltimore, and \$278 from Mexico City to Los Angeles.

Almost all of those who died in the desert or at sea could have afforded to fly, and would have done so *but for* CBP’s successful efforts to induce airlines to deny them passage in circumstances in which CBP has no authority to order the airline not to transport them.

Their deaths are solely and directly attributable to the U.S. government’s “carrier sanctions”.²⁸

As these sanctions are described in the NPRM, “if an air carrier boards a passenger who is then denied entry to the United States, the air carrier may have to pay a penalty.”²⁹

Instead of sanctioning airlines that fulfill their legal duty as common carriers to transport all passengers in compliance with their tariffs, the U.S. government should be sanctioning airlines that refuse to transport undocumented asylum seekers. Their applications for asylum may not be approved. But as noted above, that can be adjudicated only after they arrive in the U.S.

The U.N. Office of the High Commissioner for Human Rights (OHCHR), citing with approval the submission of the Identity Project, has reported to the U.N. Human Rights Council as follows:³⁰

OHCHR has provided guidance to States to ensure the accountability of private transport companies and other private actors that are implementing entry restriction measures. OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 4.6.... See also the contribution to the present study from the Identity Project (<http://papersplease.org>).³¹

28. The Identity Project, “Asylum Requires Traveling to a Border”, March 29, 2022, <<https://papersplease.org/wp/2022/03/29/asylum-requires-traveling-to-a-border/>>. On the incompatibility of carrier sanctions with international aviation, common carrier, human rights, and refuge law, see Tilman Rodenhäuser, “Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control”, *International Journal of Refugee Law*, 26:2 (June 2014), pp. 223-247, <<https://doi.org/10.1093/ijrl/eeu020>>, and Tendayi Bloom and Verena Risse, “Examining hidden coercion at state borders: why carrier sanctions cannot be justified”, *Ethics & Global Politics*, 7:2 (2014), pp. 65-82, <<https://doi.org/10.3402/egp.v7.24736>>
29. 88 *Federal Register* 7023, n. 19.
30. OHCHR, “A/HRC/31/35: Report on the situation of migrants in transit”, January 27, 2016, <<https://www.ohchr.org/en/documents/reports/ahrc3135-report-situation-migrants-transit>>, English version at <https://www.ohchr.org/sites/default/files/2021-12/INT_CMW_INF_7940_E.pdf>.
31. The cited submissions of the Identity Project to the OHCHR are “Re: General Assembly Resolution A/RES/68/179 on the Protection of Migrants”, May 30, 2014,

Guideline 4.6 on human rights at borders, as recommended by OHCHR, is as follows:

Guideline 4.6: Ensuring the accountability of private transport companies and other private actors that are involved in implementing entry restriction measures such as pre-departure screening and decisions on access to transportation, and providing effective remedies for those unlawfully denied transport. Developing and encouraging the adoption of human rights-based codes of conduct for private actors in this regard that set out expected standards of behaviour and the consequences of failure to adhere to those standards.³²

Despite these recommendations, the U.S. government has done nothing to “ensure the accountability of private transport companies... that are implementing entry restriction measures.” Nor has the U.S. provided any “effective remedies for those unlawfully denied transport” or any guidance for airlines with respect to the rights of asylum seekers.³³

Carrier sanctions kill, and the proposed rule would increase the death toll.

The number of additional lives lost as a result of the proposed rule would depend on how many times CBP prohibits an airline from transporting an asylum seeker or sends an airline a recommendation not to transport them to potential asylum in the U.S., and how airlines respond. Will airlines stand up for travelers’ rights by challenging those orders?³⁴ Will airlines comply with their duty as common carriers to disregard those nonbinding recommendations?

<<https://papersplease.org/wp/wp-content/uploads/2014/06/idp-ohchr-30may2014.pdf> >, and “Re: Human Rights Council Resolution A/HRC/29/2 on ‘Protection of the human rights of migrants in transit’”, November 16, 2015, <<https://papersplease.org/wp/wp-content/uploads/2015/11/idp-ohchr-16nov2015.pdf>>.

32. OHCHR, “Recommended Principles and Guidelines on Human Rights at International Borders”, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf >.
33. The proposed rule does not specify the substantive criteria or procedures for the issuance by CBP of travel prohibitions or recommendations to airlines, or for administrative appeals or judicial review of these orders. According to the NPRM, travelers would not be provided with notice of these orders and recommendations, which would make it difficult if not impossible for travelers to establish standing to challenge them in court. In practice, any *ex post facto* judicial review would likely be too late to be an effective remedy, especially for asylum seekers who may have only a fleeting opportunity to flee a country where they are being persecuted.
34. On the possibility for common carriers to transport asylum seekers, see Theodore Baird and Thomas Spijkerboer, “Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage”, *Amsterdam Law Forum*, 11:1 (2019), pp. 4–19, <<http://doi.org/10.37974/ALF.325>>, and the Identity Project, “Carrier sanctions kill. Airlines collaborate,” February 1, 2017, <<https://papersplease.org/wp/2017/02/01/carrier-sanctions-kill-airlines-collaborate/>>.

How many more asylum seekers will die in the desert, or drown, because they are not allowed to fly as a result of the proposed rule? How much are their lives worth? Those lives, and their value, must be included in the CBP’s assessment of the impact of the proposed rule.

(c) Costs to small entities

The NPRM correctly notes that, “The Regulatory Flexibility Act... requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities.”

However, the NPRM continues by stating that, “This proposed rule would not have a significant impact on small businesses or entities. All the estimated costs are to the federal government instead of carriers.”

But “all the estimated costs are to the federal government instead of carriers” only because, as discussed above, the CBP has willfully disregarded all of the impacts on the air travel industry and on travelers.

In fact, many impacted travel businesses and travelers are small businesses.

The largest category of small travel industry businesses may consist of travel agencies. While the travel agency industry is dominated by a few online mega-agencies, the largest number of U.S. travel agencies are small “mom-and-pop” (or “mom-and-mom”) businesses. There are more than 10,000 travel agencies in the U.S. alone.³⁵ Most of them are small businesses, including many sole proprietors.

35. “ASTA members represent 80 percent of all travel sold in the United States through the travel agency distribution channel and we have hundreds of internationally-based members. Our 10,000-plus domestic travel agency and travel supplier companies employ more than 100,000 people.” American Society of Travel Advisors (ASTA), <<https://www.asta.org/home>>.

Small travel agencies will face the same need as larger agencies to modify their software and business processes and train their staff on new procedures. Unlike airlines, CRS/GDS companies, or large travel agencies, small travel agencies typically have no in-house IT staff, and will need to scramble to find and hire qualified outside contractors to modify their systems.

Individual travel agencies and agents, for example, use scripts created in proprietary CRS/GDS scripting languages to automate tasks such as creating and entering required elements in PNRs. Each of these scripts will need to be modified. Programmers without specialized expertise in CRS/GDS scripting will need to be paid for the time needed to learn these scripting languages and PNR formats before they can even begin to update an agency's or agent's scripts.

In addition to the costs imposed on small travel business in the travel industry, the proposed rule will impose costs on travelers who, as sole proprietors, are small businesses.

CBP itself has conceded, in response to the comments of the Identity Project in a prior rulemaking, that individual travelers are in fact among "small entities" as that term is used in the Regulatory Flexibility Act (RFA). In a 2008 joint rulemaking by CBP and the Department of State concerning passport rules, the agencies said:

Comment: One commenter [The Identity Project] noted several examples of individuals who would be considered small businesses, including sole proprietors, self-employed individuals, and freelancers.

Response: CBP agrees that these "sole proprietors" would be considered small businesses and could be directly affected by the rule if their occupation requires travel.... The number of such sole proprietors is not available from the Small Business Administration or other available business databases, but we acknowledge that the number could be considered "substantial."³⁶

36. "Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere: Final rule", Docket No. USCBP 2007-0061, 73 *Federal Register* 18403, April 3, 2008.

It's odd that the Small Business Administration (SBA) did not have data on numbers of sole proprietors, since the SBA itself says that, "The sole proprietorship is the most common form of legal structure for small businesses."³⁷ Where a proposed rule affects individuals, as with this NPRM, it's likely that most of the affected "small entities" will be individuals, and that the RFA assessment will (or should) primarily concern impacts on these individuals.

We again urge the SBA advocacy office, as we have done before, to develop guidelines for agencies to use in estimating the numbers of individuals affected by proposed rules who are likely to constitute "small entities" as that term is used in the RFA.

A significant percentage of international travelers are self-employed sole proprietors, such as freelancers, gig workers, independent contractors, and consultants. The cost to a business traveler, perhaps especially to a sole proprietor (who may not have a co-worker to fill in for them) of missing a flight and therefore missing a business appointment or losing billable time on a job site may be significantly greater than the cost to a typical leisure traveler.

CBP's analysis of the impact of the proposed rule on small businesses must be revised to include the costs the rule would impose on small travel businesses and on travelers such as self-employed individuals and sole proprietors who are small businesses.

6. Use by airlines of APIS data collected for CBP should be prohibited.

According to the NPRM, "CBP seeks input from the public regarding whether the data should be retained, used, and shared under the terms of the current APIS data, and if not, what use, retention, and sharing limitations are appropriate."

37. SBA and Federal Deposit Insurance Corp., "Organizational Types and Considerations for a Small Business", <https://www.sba.gov/sites/default/files/files/PARTICIPANT_GUIDE_ORGANIZATIONAL_TYPES.pdf>.

The current APIS rules are clearly inadequate to protect the privacy and civil liberties of travelers and other individuals whose personal information is included in APIS data.

Many of the privacy problems of the current APIS scheme, which would be greatly exacerbated by the proposed rule, derive from CBP's decision to outsource collection of this sensitive personal information to airlines, without restricting how airlines can use it.

Pursuant to the Privacy Act, CBP has promulgated System Of Records Notices (SORNs) governing how CBP uses its copies of API and Passenger Name Record data.³⁸

But despite our comments and those of others in prior rulemakings and in response to the promulgation of those SORNs, CBP has imposed no restrictions whatsoever on the retention, use, or sharing by airlines of their copies of this data.

But for the APIS rules, travelers would have no obligation to provide this data to airlines.

So implicit in the current API scheme and its proposed expansion through the proposed rule is a mandate for travelers to grant airlines free and unlimited access to and use of information that airlines could otherwise obtain from travelers only with travelers' consent.

Monetization of passenger data is a significant and highly profitable line of business for airlines. Airlines generate billions of dollars a year in revenues through their frequent flyer programs, primarily by targeting advertising to members of those programs. Many airlines' frequent flyer programs, as standalone businesses, have larger valuations than the associated airlines themselves.

38. API and PNR data and systems overlap because many airlines store some or all API data in PNRs. In such cases, CBP receives two copies of the API data, one through the API channel and the other as part of the PNR. All of the copies sent to CBP are mirror copies of the data in airline systems. Airlines can and do retain their master copies of PNRs, and often their copies of API data, after transmitting mirror copies of both to CBP.

If passengers are required by CBP to provide contact information to airlines, and CBP does not restrict airlines' use of that information, airlines will use and monetize it, without the need to compensate travelers or provide value in exchange for the use of this information.

The contact information that the proposed rule will require travelers to provide to airlines will allow airlines to target advertising to travelers who are not members of their frequent flyer programs, without needing to give passengers any incentive to provide this information.

A key feature of current frequent flyer programs is that participation is voluntary. In order to persuade passengers to sign up for these programs, airlines provide travelers with valuable compensation in the form of travel and other benefits. If travelers don't feel they are being offered sufficient value to justify providing the contact information needed to participate in these "loyalty" programs and receive these benefits, they don't have to do so.

To put it another way, the trade in personal information between passengers and airlines is an active multi-billion dollar a year market in air travelers' personal information.

The proposed rule would require travelers to hand over personal information to airlines without any compensation or restriction on its retention, use, or disclosure. They would give the airlines a free ride to use valuable personal information for their own purposes without restriction, when it was provided for government purposes under government mandate.

By doing so, the proposed rule would undermine the existing free market in personal information between passengers and airlines. This interference by CBP with market forces would be entirely to airlines' benefit and to passengers' detriment.

Because air travelers' personal information has clearly demonstrated financial value to airlines, which airlines are currently willing to provide valuable consideration to obtain, forcing

travelers to provide this information to airlines without compensation constitutes an unconstitutional taking of travelers' informational property without due process.

What is the value of this taking and the damage to travelers and other individuals? A lower bound is provided by airlines' willingness to comply with the proposed rule. If airlines are willing to comply, even grudgingly, that is because the long-term value to airlines of this additional government-coerced informational windfall would exceed the "hundreds of millions of dollars" or more in one-time costs airlines expect to incur to implement the proposed rule.

Because API data is collected on behalf of CBP, and would not be provided by travelers to airlines but for the mandate to airlines to collect it on behalf of CBP, airlines' systems of records containing this information constitute systems of CBP records subject to the Privacy Act.

The fact that hosting of records is outsourced to a third party such as an airline or a CRS/GDS company does not negate the applicability of the Privacy Act where the records are collected and maintained for the use of and at the direction of a Federal agency such as CBP.

If CBP wants airlines to function solely as a conveyor belt for data between travelers and CBP, and not to maintain a system of records held by airlines on CBP's behalf and subject to the Privacy Act, CBP must mandate that airlines neither use this data nor share it with anyone other than CBP, and expunge it as soon as it has been transmitted to CBP. If, on the other hand, CBP wants to continue to allow airlines to retain this data, it must first promulgate a SORN for the system of CBP records constituted by API data collected and held on CBP's behalf by airlines.

Privacy Act requirements applicable to the system of airline-held copies of API data include the requirements for US persons to be able to obtain copies of the records pertaining to them, and to obtain an accounting of disclosures of those records. Because current major

CRS/GDS systems do not contain access logs for PNRs, airlines that outsource hosting of their PNR data (and of API data included in PNRs) to those CRS/GDS companies are unable to provide an accounting of disclosures. Bringing these airline-hosted systems of CBP records into compliance with the Privacy Act would require adding PNR access logs to core CRS/GDS and airline hosting capabilities. Fortunately, this would be relatively straightforward. All major CRS/GDS systems include an immutable change log in the “History” of each PNR. The same structure could readily be extended to log each access to the PNR as well as each change.

Access logs might get long, as logs tend to do. But costs of storage are dramatically lower than when these CRS/GDS databases were conceived. The cost of maintaining access logs in PNRs would not be unduly burdensome. Not all of the cost of implementing access logging in PNR histories would be attributable to U.S. Privacy Act requirements, since PNR access logs would also be a prerequisite to compliance with data protection laws in other countries that require an accounting of disclosures even for commercial databases of personal information.

On the other hand, if airlines or CRS/GDS companies don’t want their records of API data collected and maintained on behalf of CBP to be subject to the Privacy Act, including data subjects’ rights to access records and to obtain an accounting of disclosures, they should decline to retain or make any use of this data, so that they will not be operating a system of CBP records.

A further privacy problem results from the fact that many foreign airlines are government-owned or parastatal entities. Many airports are also government-operated. At some foreign airports, all airlines including US-flag airlines are required to use the shared check-in services and/or infrastructure of a government-owned or parastatal ground handling entity.

The requirement to provide this data to airlines thus amounts to a requirement to provide it to foreign governments, including the world's most privacy-invasive and repressive regimes.

This is especially true if sensitive personal information is included in structured API data or in PNRs, since many foreign governments have followed the lead of the U.S. in requiring airlines to send them API data and mirror copies of all PNRs that include flights to or from their countries. The U.S. is now seeking to globalize this API and PNR requirement, thereby ensuring that the world's most repressive regimes, which include the world's worst governmental human rights violators, receive copies of API and PNR data for travelers to their countries.³⁹

Malign foreign governments could misuse data obtained through airlines and/or airports for both economic and political purposes. They could use this data for economic espionage against competitors of their state-owned enterprises. And they could use this data to target repressive measures against their own citizens and foreign visitors, including U.S. persons.

As an example of what can happen, in one incident with which the Identity Project is familiar an authoritarian government obtained contact information from the reservations of human rights lawyers from the U.S. and other countries who had traveled to that country to try to provide legal assistance to a political prisoner. The foreign government used that information to locate and expel the lawyers, frustrating their attempt to assist their client in asserting their human rights.⁴⁰

The danger of providing contact information would perhaps be greatest for asylum-seekers seeking to flee. Repressive regimes could use this information to intercept and prevent asylum-seekers from leaving, or to harass or persecute their associates even after they escape.

39. See the Identity Project, "Precog in a Box", February 25, 2021, <<https://papersplease.org/wp/2021/02/25/precog-in-a-box/>>.

40. These events were not announced publicly, lest that jeopardize the lawyers' clients. Our obligations of confidentiality to these lawyers and their clients prohibit us from identifying them or the country involved.

This harm could be easily mitigated by having CBP collect any required information directly from travelers, so it would not be available to foreign governments by way of airlines. As was discussed earlier, this is what is required by the Privacy Act, for just this good reason.

The NPRM, in its entirety, should be withdrawn, and the current API rule should be rescinded. If the NPRM is not withdrawn, the proposed rule must first be modified, and the required assessments and a SORN for airline-hosted CBP records must first be promulgated.

Respectfully submitted,

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_____/s/____

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Government Information Watch

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Restore The Fourth (RT4)

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