NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

October 13, 2020

Submitted via https://www.regulations.gov

Michael J. McDermott
Security and Public Safety Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW, Washington
DC 20529–2240

Re: 85 FR 56338; USCIS Docket No. 19-0007; NIJC comment in Opposition to Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

Dear Mr. McDermott:

The National Immigrant Justice Center ("NIJC" or "we") works to advance the rights of all immigrants. With the above-referenced Proposed Rule ("Proposed Rule" or "NPRM"), U.S. Citizenship and Immigration Services (USCIS) dramatically expands its surveillance over immigrants and U.S. citizens sponsoring immigrant petitioners.[1] The Proposed Rule would have grave consequences, impacting anyone submitting various types of U.S. immigration petitions and applications, including those seeking asylum, family-based immigration, employment-based immigration, religious worker visas and other protection through programs Congress created to support survivors of domestic violence and trafficking.

The mass surveillance proposed by this rule is wholly unjustified. Not only would the Proposed Rule deter survivors from coming forward to access benefits specifically created for their protection, it would put their lives at risk. The Proposed Rule even attempts to broadly criminalize children under the age of 14 simply because of their immigration status. The real purpose behind this proposal is not security, but an attempt to expand continuous surveillance of immigrant communities while further spreading a hateful and false narrative that immigrants are

[1] U.S. Citizenship and Immigration Service, Department of Homeland Security. Notice of Proposed Rulemaking "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services " (hereinafter "Proposed Rule" (85 FR 56338) September 11 2020, https://www.regulations.gov/contentStreamer?documentId=USCIS-2019-0007-0001&contentType=pdf.

to be feared.[2] NIJC writes to express our strong opposition to the Proposed Rule and call for its rescission.

NIJC's strong interest and opposition to proposed changes

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

Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many survivors of human trafficking, domestic violence and other crimes, asylum seekers, and children designed as unaccompanied upon arrival at the southern border, and asylum seekers. Under the Proposed Rule, these individuals would suffer the burden of enhanced surveillance, and victims of trafficking and children would lose critical legal protections. The proposal would require the collection of DNA, voices, iris and face scans as well as other personal characteristics for virtually all immigration and citizenship applicants. This sensitive and private information would then be stored in secretive government databases, potentially forever. The changes would apply to over six million people at a cost of nearly $300 million each year.

NIJC strongly condemns this broadly sweepingly, unjustified rule that would expand biometrics collection on baseless claims. We condemn the rhetoric and misinformation endemic to this rule, which relies on nativist and racist tropes. The proposals set forth in this Rule echo programs and policies rolled out over the past three years that have dramatically harmed immigrant communities, and have proven to be motivated by anti-immigrant animus. For these reasons, NIJC calls for rescission of the Proposed Rule.

Objection to the expedited time frame for these Proposed Rules

The APA requires the administration to provide notice of their proposed rules and the proposed legal bases for those rules.[3] This NPRM consists of hundreds of pages of proposed changes,

[2] *See e.g.,* William McCorkle, Mikel W. Cole, and Mindy Spearman, *Confronting False Narratives in the Debate over Immigration*, Social Education 82(6), pp. 348–354 (2018), https://www.socialstudies.org/system/files/publications/articles/se_8206348.pdf.

[3] *See* 5 U.S.C. § 553. *See Forester v. Consumer Product Safety Com*., 559 F.2d 774, 787 (D.C. Cir. 1977) (citation omitted); *Cal. Citizens Band Assn. v. U.S.,* 375 F.2d 43, 48-49 (9th Cir.), cert. denied, 389 U.S. 844 (1967); *Logansport Broadcasting Corp. v. U.S.,* 210 F.2d 24, 28 (1954); *Willapoint Oysters. v. Ewing*, 174 F.2d 676 (9th

regulatory justification, and analysis. NIJC and fellow stakeholders are greatly interested in commenting on the substance of the proposed rule, but were required to file comments within a 30-day period without justification.

On September 16, 2020, NIJC joined more than 100 organizations in delivering a letter to the Department of Homeland Security (DHS) Acting Secretary of the Acting Administrator of the Office of Information and Regulatory Affairs, requesting a minimum 60-day comment period for the public to respond to the proposal, based on the length and complexity of the rule and the insufficiency of a 30-day comment period for commenters navigating the challenges presented by a global pandemic.[4] Nonetheless, DHS has ignored this request. In light of these circumstances, the limited notice-and-comment period flies in the face of reasonable regulatory practices.

While we are adhering to the 30-day timeline, we continue to object to this comment period as insufficient and request a minimum 60-day public comment period for regulatory changes of this nature, in accordance with the APA, particularly for rules that would have a significant impact on millions of people across the United States.

I. The rule is based on unfounded claims regarding people born outside the United States & immigrant communities

A. The rule expands surveillance by falsely conflating immigration with national security

The new rule would dramatically expand the categories of individuals required to submit to biometrics collection as well as increase the length of time during which they could be asked for this information. The Proposed Rule implements "a program of continuous immigration vetting," that would empower DHS to require immigrants to be subjected to biometrics collection at any point along their immigration process until a grant of U.S. citizenship.[5] In practice, this would mean that non-citizens would be vulnerable to invasive biometrics collection for years, even after having been granted lawful permanent residence. Under this proposal, DHS would be able to demand updated biometric information from them at any point, and periodically require their U.S. citizen or lawful permanent resident relatives to resubmit information as well.[6]

Cir. 1949), cert. denied, 338 U.S. 860 (1949). Notice must afford interested parties "reasonable opportunity" to participate in the rule-making process.

[4] *See* "More Than 100 Organizations Join to Urge DHS to Provide 60-Day Comment Period to Respond to DHS's Proposed Biometrics Expansion Rule," Catholic Legal Immigration Network, September 17, 2020, https://cliniclegal.org/resources/federal-administrative-advocacy/more-100-organizations-join-urge-dhs-provide-60-day.

[5] 85 Fed. Reg. at 56352.

[6] Ibid. Proposed 8 C.F.R. 103.16(c)(2).

The stated justifications for the perpetual surveillance expansion is rooted in language that criminalizes immigrant children, their family members, and anyone who comes forward to sponsor them using vague and demonizing language. The Proposed Rule uses terminology that conflates false notions of security with immigration, without any evidence to support the claims.

This type of rhetoric follows a pernicious trend wherein the government has relied on Islamophobia and discourses of terrorism to justify militarized border security and anti-immigrant agendas.[7] This administration has used similar narrative rhetoric that seeks to characterize those seeking entry to the U.S. through the southern border as potential "terrorists" - a narrative that has been thoroughly discredited. A recent whistleblower complaint, for example, explains how DHS officials manipulated intelligence and lied to Congress in order to bolster such erroneous claims.[8] The complaint details surreptitious behind-the-scenes efforts by top DHS officials to build a false narrative to support President Trump's public comments regarding supposed suspected terrorists encountered along the southern border.[9]

As part of its justification for enhancing biometrics collection, the rule cites to E.O. 13780, one of the Muslim travel ban Executive Orders, when claiming that DHS needs to increase biometrics collection for foreign nationals because of "terrorism" threats.[10] The Muslim travel ban orders were explicitly based on discriminatory intent, and have disproportionately impacted Black and Brown immigrants and their families.[11] Still, the proposed rule relies on E.O. 13780 as justification and is a realization of the "extreme vetting" the Trump administration has long sought.[12] The decision to release a proposed regulation expanding mass surveillance on the anniversary of the September 11, 2001 terrorist attacks illustrates how this administration seeks to manipulate public perception by falsely conflating non-citizens as a national security threat.

Moreover, the administration has issued error-ridden reports using flawed methodology in conjunction with E.O. 13780, in violations of its own rules, for the sole purpose of justifying discriminatory immigration policies that are premised on misleading or incomplete

[7] Islamophobia and discourses of terrorism have been used to advance anti-immigration agendas in the past, particularly in the wake of the September 11, 2001 attacks. *See e.g.*, Luis A. Romero & Amina Zarrugh (2018) *Islamophobia and the making of Latinos/as into terrorist threats*, Ethnic and Racial Studies, 41:12, 2235-2254, DOI: 10.1080/01419870.2017.1349919.

[8] *See* Department of Homeland Security, Office of the Inspector General, "Whistleblower Reprisal Complaint: Murphy, Brian, Principal Deputy Under Secretary, Department of Homeland Security, Office of Intelligence & Analysis," September 8, 2020, https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

[9] Ibid at page 18.

[10] 85 Fed. Reg. at 56347. Cites to E.O. 13780 section 5, 82 FR 13209, 13215 (Mar. 9, 2017).

[11] *See* Harsha Panduranga and Faiza Patel, "Extreme Vetting and the Muslim Ban," The Brennan Center, October 2, 2017, https://www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban.

[12] *See* David J. Bier, "Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures," The Cato Institute, April 17, 2018, https://www.cato.org/publications/policy-analysis/extreme-vetting-immigrants-estimating-terrorism-vetting-failures.

information.[13] Thus, from the onset, the proposed rule bases its sweeping expansion of biometrics information collection programs on severely flawed premises.

The Proposed Rule erroneously suggests that immigrants are likely to pose a threat to "national security or public safety" and that tracking them will make the country safer.[14] But that assertion is unfounded. Migration is *not* a proxy for dangerousness. To the contrary, studies show that immigration, including by people without legal authorization, does not correlate with an increase in violent crime.[15] Similarly, research has found no relationship between deportations and crime.[16]

B. The rule relies on unsubstantiated claims relating to human trafficking

The submission of biometrics is currently mandatory only in conjunction with certain benefits requests. Otherwise, to collect biometrics, DHS must justify the request and notify the individual that biometrics are required. DHS proposes changing this presumption, so that biometrics collection would generally always be authorized, including upon apprehension or arrest by DHS, unless the agency waives the requirement.

The Proposed Rule claims that, "[b]iometrics collection upon apprehension or arrest by DHS will accurately identify the individuals encountered, and verify any claimed genetic relationship," which would allow DHS to "make better informed decisions as to the processing, transporting, and managing custody of aliens subject to DHS's law enforcement authorities," and "increase the safety of DHS detention facilities" by "increasing the reliability of data."[17] DHS also claims that requiring biometrics collection "would eliminate an incentive that currently exists for unscrupulous individuals to jeopardize the health and safety of minors to whom they are unrelated, transporting the minors on a dangerous journey across the United States border, and claiming to be the parents of unrelated minors in order to claim to be a 'family unit' and thus obtain a relatively quick release from DHS custody."[18]

The Proposed Rule relies on discredited and harmful narratives related to human trafficking to justify the expansion of biometrics collection, including DNA. DHS repeatedly asserts that biometric collection is necessary to prevent fraud without providing any reliable facts to support this claim. The rule presents misleading statistics from a rapid DNA test pilot program at the

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[13] *See Protect Democracy's Lawsuit Challenging the Government's Publication of Disinformation about Foreign Terrorism,* Protect Democracy, September 2020, https://protectdemocracy.org/false-terrorism-report/complaint.
[14] The rule claims that the increased biometrics collection are intended to "combat child trafficking, smuggling, and labor exploitation by facilitating identify verification, while confirming the absence of criminal history or associations with terrorist organizations or gang membership." 85 Fed. Reg. at 56340.
[15] *See, e.g.,* Michael Light and Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 Criminology 2 (2018), https://doi.org/10.1111/1745-9125.12175.
[16] Annie Laurie Hines & Giovanni Peri, *Immigrants' Deportations, Local Crime and Police Effectiveness*, IZA Institute of Labor Economics, IZA DP No. 12413, (June 2019), http://ftp.iza.org/dp12413.pdf.
[17] 85 Fed. Reg. at 56350.
[18] 85 Fed. Reg. at 56350.

border, claiming that between July 2019 and November 2019, DHS identified 432 incidents of fraudulent family claims by conducting a Rapid DNA testing of 1,747 family units under a pilot program named Operation Double Helix.[19] However, there is no publicly available information to verify these numbers. In fact, the only public information regarding "Operation Double Helix" reports on an investigation that led to the arrests of fraudulent medical practitioners involving fraudulent genetic testing results, and nothing to do with immigrant families.[20]

The expanded use of biometrics collection is part of the administration's efforts to manipulate information to justify cruel and extralegal enforcement practices. For example, top level officials have repeatedly told Congress that DHS has uncovered "recycling rings" where children were used multiple times to help undocumented immigrants enter the United States by claiming to be part of a family.[21] However, the administration has failed to provide any valid evidence to substantiate such claims. Instead, DHS officials have bolstered misleading percentages by relying on small samples or isolated incidents to justify extreme actions like family separation at the border.[22] When officials do answer requests from Congress, their figures show that their claims are exaggerated and unsubstantiated.[23] For example, when questioned by members of the Senate Homeland Security & Governmental Affairs Committee, the administration stated that during Fiscal Year 2019, DHS identified 11 "fraudulent families" involving an adult and child under the age of 13, and of those 11, only 2 of those were found to be unrelated.[24]

This administration has repeatedly shown that it is willing to put forward inflated and misleading, if not outright false, data to justify its anti-immigrant agenda.[25] Especially given this

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[19] 85 Fed. Reg. 56341.

[20] *See* U.S. Department of Justice, "Federal Law Enforcement Action Involving Fraudulent Genetic Testing Results in Charges Against 35 Individuals Responsible for Over $2.1 Billion in Losses in One of the Largest Health Care Fraud Schemes Ever Charged," September 27, 2019, https://www.justice.gov/opa/pr/federal-law-enforcement-action-involving-fraudulent-genetic-testing-results-charges-against.

[21] Former Homeland Security Secretary Nielsen told Congress in March 2019 that DHS had uncovered multiple recycling rings in which children were placed with unrelated adults; yet, neither Nielsen nor DHS provided follow-up information on this practice or quantified its frequency. *See* Adolfo Flores, "The Homeland Security Chief Says, Without Evidence, Children Are Being Recycled At The Border," BuzzFeed News, March 6, 2019, https://www.buzzfeednews.com/article/adolfoflores/nielsen-children-recycling-rings-border-immigration.

[22] "The Border, Trafficking, and Risks to Unaccompanied Children-Understanding the Impact of U.S. Policy on Children's Safety," Kids in Need of Defense (KIND), November 14, 2019, https://supportkind.org/wp-content/uploads/2019/11/KIND_Child-trafficking-at-border-paper-11-14-19-FINAL2.pdf. DHS used allegations that adults were fraudulently posing with children as family units as partial justification to separate families, even though such instances of family fraud are statistically exceedingly rare.

[23] Ibid. *See also* Linda Qiu, "Kirstjen Nielsen Justifies Family Separation by Pointing to Increase in Fraud. But the Data Is Very Limited," New York Times, June 18, 2018, https://www.nytimes.com/2018/06/18/us/politics/nielsen-family-separation-factcheck.html.

[24] DHS response to Questions for the Record, June 26, 2019 HSGAC hearing, "unprecedented migration at the US southern border: exploitation of migrants through smuggling, and voluntary servitude" [records on file with author].

[25] Whistleblower disclosures indicate, for example, that former Homeland Security Secretary Kirstjen Nielsen provided false material information in two separate Congressional hearings, and Acting Deputy Secretary of Homeland Security Ken Cuccinelli engaged in abuses of authority and improper administration of an intelligence program to falsify intelligence relating to immigration policies. *See* Department of Homeland Security, Office of the Inspector General, "Whistleblower Reprisal Complaint: Murphy, Brian, Principal Deputy Under Secretary,

history, this administration cannot put forward such large-scale changes to biometrics collection and justify them on the basis of unsubstantiated numbers, pulled from an unverified study, and conducted with a small sample size. These numbers and claims must be closely examined and scrutinized before any sweeping regulatory changes are enacted. And even if these numbers are shown to be accurate, it is incumbent on the government to consider far less intrusive and sweeping policy responses than these.

C. The rule will increase risks for unaccompanied children and their family members

The Proposed Rule would allow collection of biometric data regardless of age when issuing Notices to Appear (NTAs), leading to the collection of the data of 63,000 additional children under the age of 14 in the NTA issuance process.[26] This change represents a dramatic expansion of the collection and storage of children's data.[27] The rule also expands the scope of biometric information to be collected, allowing DHS to collect iris scans, facial images, palm prints, and, in some cases, DNA test results, including partial DNA samples.[28]

DHS presents unsubstantiated and flawed claims that the proposal to remove age restrictions would help ensure accuracy in record keeping and to combat human trafficking. The Proposed Rule states that the changes are justified "to ensure that the immigration records created for children can more assuredly be related to their subsequent adult records despite changes to their biographic information," and further claims the changes are needed, "to help combat human trafficking, specifically human trafficking of children, including the trafficking and exploitation of children forced to accompany adults traveling to the United States with the goal of avoiding detention and exploit immigration laws."[29]

The administration's desire to gather more data to track immigrant children through adulthood is not a sufficient justification to subject them to such invasive biometrics collection. Moreover, the expanded information collection would likely fuel ICE enforcement operations that target individuals who come forward as a sponsor, potential sponsor, or other caregiver of an unaccompanied immigrant child. Far from protecting children, these enforcement operations and the fear they engender leave children exposed to myriad harms including family separation and prolonged detention.

Department of Homeland Security, Office of Intelligence & Analysis," September 8, 2020, https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

[26] 85 Fed. Reg. at 56343.

[27] The administration began enacting policies in an effort to circumvent age restrictions on biometrics collection in 2017. In a 2017 memo, then-DHS Secretary John Kelly announced that age would no longer be a basis for determining when to collect biometrics. That policy memorandum additionally encouraged DHS to amend existing regulations to allow for expansive collection of biometrics regardless of age. *See* U.S. Department of Homeland Security, "DHS Biometrics Expansion for Improved Identification and Encounter Management," May 24, 2017, https://www.dhs.gov/sites/default/files/publications/dhs_biometrics_expansion.pdf.

[28] 85 Fed. Reg. at 56341. Proposed 8 C.F.R. 103.16.

[29] 85 Fed. Reg. at 56352.

We have seen the administration intentionally resort to similar tactics in the past with other programs claiming to target human trafficking.[30] Part of the administration's policy playbook involves exploiting such rhetoric to make it more difficult for adult relatives of unaccompanied minors to secure the children's release from U.S. custody, knowingly leaving them in deplorable, deadly, conditions.[31] Enhanced vetting of sponsors involving the collection of biometrics data, and the sharing of that information between Health and Human Services (HHS) Office of Refugee Resettlement (ORR) and DHS, has deliberately slowed down the release of children and exposed the sponsors to deportation.[32]

For example, as a precursor to the family separation crisis, the administration initiated a "Smuggling Disruption Initiative," program in May 2017, which led to the arrest of more than 400 family members and potential sponsors of unaccompanied between June and August 2017.[33] Declassified documents obtained through the Freedom of Information Act (FOIA) provide a first-hand look at how the government started using children as bait to target sponsors, and falsely portray potential sponsors of migrant children as smugglers.[34] The initiative had devastating effects, leading to coercion, misrepresentation, and circumvention of due process rights.[35]

As detailed extensively in a complaint filed with the DHS Office of Civil Rights and Civil Liberties by NIJC and other organizations, such enforcement actions cause significant harm to children and their families in contravention of anti-trafficking aims, and increase the risk that children will be trafficked.[36] According to ICE figures disclosed in May 2019, the 2017 initiative led to 443 arrests, including 35 criminal arrests. However, the program led to few prosecutions, with ICE acknowledging that the campaign led to just 38 prosecutions related to "alien

[30] Neena Satija, Karoun Demirjian, Abigail Hauslohner, & Josh Dawsey, "A Trump Administration strategy led to the child migrant backup crisis at the border," Washington Post, November 12, 2019, https://www.washingtonpost.com/immigration/a-trump-administration-strategy-led-to-the-child-migrant-backup-crisis-at-the-border/2019/11/12/85d4f18c-c9ae-11e9-a1fe-ca46e8d573c0_story.html.
[31] "Children as Bait, Impacts Of The ORR-DHS Information-Sharing Agreement," National Immigrant Justice Center et al., March 26, 2019, https://immigrantjustice.org/research-items/report-children-bait-impacts-orr-dhs-information-sharing-agreement.
[32] Ibid.
[33] This initiative was discussed in a secret December 2017 memo released by Senator Merkley as one of the policy options the administration recommended to expand to deter asylum seekers. *See* Jesse Franzblau, "New Documents Expose Government Monitoring of Protests Against Family Separation," National Immigrant Justice Center, April 29, 2019, https://immigrantjustice.org/staff/blog/new-documents-expose-government-monitoring-protests-against-family-separation.
[34] *See* United States Department of Homeland Security, "Unaccompanied Alien Children Human Smuggling Disruption Initiative/Concept of Operations" May 5, 2018 https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_ice_production_03.08.19.pdf.
[35] *See* "ICE and CBP Coercive Enforcement Actions against Sponsors of Unaccompanied Children Conducted in Violation of Family Unity, Protection, and Due Process Rights," National Immigrant Justice Center et al., December 6, 2017, https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2017-12/Sponsor%20Enforcement-OIG_CRCL_Complaint_Cover_Letter-FINAL_PUBLIC.pdf.
[36] Ibid.

smuggling" or "re-entry of removed aliens."[37] Moreover, the charges relating to illegal re-entry have nothing to do with accusations of smuggling or trafficking. The only offense associated with illegal re-entry is returning to the country without authorization, meaning these charges had nothing to do with the expressed intent of the program.[38]

II. The NPRM exacerbates the harms of biased police practices and will make it harder for immigrant populations – including survivors of violence – to obtain immigration protection

A. The NPRM poses harms to immigrant populations already fearful of engaging with government officials to obtain protection

Currently, DHS biometric data is stored in IDENT (Automated Biometric Identification System) under the auspices of the Office of Biometric Identity Management (OBIM). Going forward, this data will be stored in DHS's new Homeland Advanced Recognition Technology (HART) database, raising serious concerns regarding information-sharing and use.[39]

The rule contains no information on how information-sharing will be limited to protect against data falling in the wrong hands. There is no way to ensure that information fed into the databases linking with HART is accurate. Further, this proposed rule would allow biometrics to be fed into HART on a large scale without the necessary privacy impact assessments having been conducted.[40]

The implications of biometrics being stored in HART, and that data being shared with foreign governments, is particularly alarming for immigrants who have a fear of persecution in their home countries or who were subject to trafficking. HART allows for more interoperability between U.S. agencies, including the Department of Defense and Federal Bureau of Investigations (FBI), as well as with foreign databases.[41] By expanding the amount of

[37] Ryan Devereaux & Sam Biddle, "Peter Thiel's Palantir Was Used to Bust Relatives of Migrant Children, New Documents Show," The Intercept, May 2, 2019, https://theintercept.com/2019/05/02/peter-thiels-palantir-was-used-to-bust-hundreds-of-relatives-of-migrant-children-new-documents-show.

[38] Illegal reentry prosecutions have increasingly been brought against individuals caught up in mass immigration enforcement operations, including mass workplace raids. *See* Jesse Franzblau et al., "A Legacy of Injustice: The U.S. Criminalization Of Migration," National Immigrant Justice Center, July 23, 2020, https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration.

[39] *See* Jennifer Lynch, "HART: Homeland Security's Massive New Database Will Include Face Recognition, DNA, and Peoples' "Non-Obvious Relationships" Electronic Frontier Foundation, June 7, 2018, https://www.eff.org/deeplinks/2018/06/hart-homeland-securitys-massive-new-database-will-include-face-recognition-dna-and.

[40] DHS has only conducted a privacy impact assessment (PIA) for the first increment of HART (which is rolling out in four increments). *See* U.S. Department of Homeland Security, "Homeland Advanced Recognition Technology System (HART) Increment 1 Privacy Impact Statement (PIA)," DHS/OBIM/PIA-004 (February 24, 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf [hereinafter HART PIA].

[41] United States Department of Defense officials announced in 2018 that the DOD, FBI, and DHS were introducing new standards to facilitate interoperability, and enable information sharing with foreign partners. *See* Chris Burt,

information stored in this database, the proposed rule risks placing asylum seekers in greater danger by exposing their biometrics data to the very foreign government persecutors they have sought to escape. For example, DHS components have relied on data via a transnational intelligence-sharing program[42] involving Mexico, El Salvador, Guatemala, and Honduras to make determinations to separate families.[43] NIJC represents clients who have had their children separated from them because DHS relied on erroneous information provided through information sharing programs with foreign governments.[44] The increased biometrics collection will mean that DHS will have access to more unreliable biometrics data that can be shared with foreign governments, putting more asylum seekers at risk of being wrongly accused of criminal activities and facing political violence, including torture, when returned to their home country.

Furthermore, survivors of violence and trafficking may be particularly subject to harm if their data falls into the wrong hands. This risk is heightened by data-sharing agreements, including foreign data-sharing agreements, governing the HART database in which the data will be stored.[45] People's biometric information is unique to them, and they may be rightly scared of the ramifications of sharing such data with the government in the context of applying for protection. Requiring invasive data collection for survivors will likely create a chilling effect, preventing them from coming forward and applying for protections they desperately need.

As discussed herein, biometrics collection is also error-prone, and there is no way to contest the outcomes of biometrics testing that could result in detentions and deportations. Increased

"U.S. agencies working on standard for seamless communication between biometric databases," Biometric Update, September 26, 2018, https://www.biometricupdate.com/201809/u-s-agencies-working-on-standard-for-seamless-communication-between-biometric-databases.

[42] According to the U.S. State Department, in 2018, the intelligence sharing helped CBP identify more than 2,000 immigrants with alleged criminal histories, including individuals with suspected gang affiliations. *See* United States Bureau of International Narcotics and Law Enforcement Affairs, "El Salvador Summary," (2019) https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/el-salvador-summary.

[43] In relying on foreign data as the basis for separations, CBP has circumvented legal rights and falsely criminalized migrants, including asylum seekers fleeing political violence. *See* Jesse Franzblau, "Family Separation Policy Continues, New Documents Show," National Immigrant Justice Center, June 22, 2019, https://immigrantjustice.org/staff/blog/family-separation-policy-continues-new-documents-show.

[44] NIJC represents parents who had their children separated from them by DHS on the basis of unsubstantiated information shared from foreign governments. *See* U.S. House Judiciary Committee, "Hearing Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration," Statement of the National Immigrant Justice Center (NIJC), July 25, 2019, https://www.congress.gov/116/meeting/house/109852/documents/HHRG-116-JU00-20190725-SD014.pdf. *See also Ms. L., et al., Petitioners-Plaintiffs, v. U.S. Immigration and Customs Enforcement ("ICE"), et al.,* Declaration of Lisa Koop, National Immigrant Justice Center, July 20, 2019 [copy on file with author].

[45] This proposed rule allows biometrics to be fed into HART on a large scale without the necessary privacy impact assessments having been conducted. For more information about this database, *see* the U.S. Department of Homeland Security, "Privacy Threshold Assessment (PTA)," obtained by the Electronic Privacy Information Center (EPIC), https://epic.org/foia/dhs/hart/EPIC-2018-06-18-DHS-FOIA-20190422-Production.pdf.

biometrics usage will invariably lead to more unjustified family separations which run contrary to constitutional standards and rights of non-citizens.[46]

B. The expansion of biometrics collection will exacerbate existing bias in policing and immigration enforcement

Currently, biometric information collected by DHS generally includes fingerprints, photographs, and signatures. Biometrics checks are used primarily to determine an applicant's criminal history or possible concerns related to national security that may affect their eligibility for admission or status in the United States. The Proposed Rule purports to "clarify and expand its authority to collect more than just fingerprints in connection [sic] while administering and enforcing the immigration and naturalization benefits or other services."[47]

The rule describes a set of "authorized biometric modalities" that DHS may "request, require, or accept from individuals in connection to services provided by DHS and to perform other functions related to administering and enforcing the immigration and naturalization laws."[48] This includes fingerprints, palm prints, photograph (facial recognition), signature, voice print, iris image, and DNA.[49] DHS provides a generally vague justification in doing so stating that "DHS needs to keep up with technological developments that will be used by the FBI and agencies" which DHS will be "sharing and comparing biometrics in this area and adjust collection and retention practices for both convenience and security, and to ensure the maximum level of service for all stakeholders."[50] Under the new rule, DHS would require biometrics collection for "identity management," to "establish and manage unique identities as it organizes and verifies immigration records."[51] This data will be included in the DHS HART database, and can be shared with other law enforcement agencies.

The technologies contemplated for use in the rule replicate and enhance existing biases in criminal justice and immigration enforcement systems.[52] With the proposed changes, DHS is giving itself broad discretion to choose from an array of data collection modalities, all of which threaten privacy and civil liberties and can be weaponized for surveillance and intrusion. Privacy

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[46] In *Ms. L. v U.S. Immigration & Customs Enforcement*, the Court found Plaintiffs had stated a legally cognizable claim for violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations the Government had separated Plaintiffs from their minor children while Plaintiffs were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children. *See Ms. L. v. U.S. Immigration & Customs Enforcement*, 302 F. Supp. 3d 1149, 2018 WL 2725736, at *7-12 (S.D. Cal. June 6, 2018).
[47] 85 Fed. Reg. at 56355.
[48] 85 Fed. Reg. at 56341.
[49] 85 Fed. Reg. at 56341.
[50] 85 Fed. Reg. at 56355.
[51] 85 Fed. Reg. at 56340.
[52] Alina Glaubitz, "Bots and Biometrics," Yale Human Rights Journal, May 31, 2020, http://www.yhrj.org/2020/05/31/bots-and-biometrics.

experts warn that the "privacy risks that accompany biometrics databases are extreme."[53] Thus, DHS is paving the way for a system of mass biometrics collection without explicitly justifying why its current practice of collecting photographs, fingerprints, and signatures has proven insufficient to verify identities and criminal history.

The inherent bias and unreliability of biometrics collection puts immigrants at risk without redress. The Proposed Rule vaguely states that USCIS "has internal procedural safeguards to ensure technology used to collect, assess, and store the different modalities is accurate, reliable and valid."[54] Yet, USCIS fails to elaborate on what these internal procedures entail. Problems in existing DHS databases[55] indicate that there are not sufficient safeguards in place to protect against misidentification or data protection violations. Challenging flawed information in the HART database, for example, is procedurally cumbersome and only possible for U.S. citizens, lawful permanent residents, and other individuals covered under the Judicial Redress Act.[56]

Of particular concern, the rule changes would increase the mass use of facial recognition technology,[57] which is notorious for frequently misidentifying people of color.[58] In doing so, the Proposed Rule paves the way for mass, pervasive, continuous surveillance without cause.[59] Many cities have banned the technology altogether, and members of Congress have introduced legislation to ban the use of facial recognition technology by federal law enforcement agencies.[60] Collecting biometrics data from individuals seeking immigration relief will only lead to increased, unwarranted, discriminatory law enforcement surveillance.[61]

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[53] Electronic Frontier Foundation, Issues, "Biometrics," https://www.eff.org/issues/biometrics [last visited October 8, 2020].
[54] 85 Fed. Reg. at 56355.
[55] In *Gonzales v. Immigration and Customs Enforcement* (ICE), the Court found current government immigration databases to be "largely erroneous" and of "dubious reliability," and held that "the collection of datapoints ICE gathers from the various databases does not provide affirmative indicia of removability to satisfy probable cause determination because the aggregation of information ICE receives from the databases is largely erroneous and fails to capture certain complexities and nuances of immigration law." *See Gerardo Gonzales v. Immigration and Customs Enforcement*, 126, (C.D. Cal 2019), https://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/2019-09/gonzalez-v-ice_20190927_decision.pdf.
[56] U.S. Department of Homeland Security, "Homeland Advanced Recognition Technology System (HART) Increment 1 Privacy Impact Statement (PIA)," DHS/OBIM/PIA-004 (February 24, 2020), at 34-35.
[57] "DHS proposes to begin requesting biometric collection (now and through emerging technologies) with the following additional biometric modalities: Iris, palm, face, voice, and DNA." 85 Fed. Reg. at 56355.
[58] Sophie Bushwick, "How NIST Tested Facial Recognition Algorithms for Racial Bias," December 27, 2019, https://www.scientificamerican.com/article/how-nist-tested-facial-recognition-algorithms-for-racial-bias. *See also* https://www.amnestyusa.org/wp-content/uploads/2020/06/061120_Public-Statement-Amnesty-International-Calls-for-Ban-on-the-Use-of-Facial-Recognition-Technology-for-Mass-Surveillance.pdf
[59] Jay Stanley, "The Government's Nightmare Vision for Face Recognition at Airports and Beyond," American Civil Liberties Union, February 6, 2020, https://www.aclu.org/news/privacy-technology/the-governments-nightmare-vision-for-face-recognition-at-airports-and-beyond.
[60] Olivia Solon, "Facial recognition bill would ban use by federal law enforcement," NBC News, June 25, 2020, https://www.nbcnews.com/tech/security/2-democratic-senators-propose-ban-use-facial-recognition-federal-law-n1232128.
[61] *See, e.g.*, Jason Silverstein, "The Dark Side of DNA Evidence," The Nation, March 27, 2013, https://www.thenation.com/article/dark-side-dna-evidence. *See also* Michael T. Risher, *Racial Disparities in*

The enhanced information sharing of biometrics data with law enforcement will fuel immigration enforcement actions that destabilize communities. The Rule proposes adding newly collected biometric information to existing databases, in spite of the flaws and uncertainties in existing such databases.[62] That information gathered will be stored in the HART database, with information being shared across law enforcement agencies, meaning that communities already overly policed would be more easily surveilled and falsely identified in connection with crimes. ICE will have access to growing access to immigrants data, which it has used to make flawed determinations of removability based on their reliance incomplete, error-riddle databases.[63] In *Gonzalez v. ICE,* for example, the Ninth Circuit has held that, in their enforcement actions, ICE has relied on databases with large gaps in necessary data that have significant error rates in the data they contain.[64] In February 2020, the court upheld a permanent injunction barring ICE from relying on a database of inaccurate, incomplete records to issue detainers.[65] The proposed rule would only add more data to problematic databases, adding to inherent reliability concerns.

C. The rule will create insecurity for families and lead to a general sense of fearfulness and lack of trust in public institutions

Currently, applicants for certain immigration benefits are required to submit biometrics for criminal and national security background checks. If DHS wishes to collect biometrics otherwise, it must justify why it is doing so. Under the new rule, this presumption is reversed, as it requires that "any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request," as well as anyone arrested by DHS, could be required to submit to biometrics collection unless DHS waives the requirement - not just for background checks, but for "identity management" and "continuous vetting."[66] DHS itself estimates that, as a result of this rule, the biometrics-submitting population will drastically increase.[67]

Databanking of DNA Profiles, in Race and the Genetic Revolution: *Science, Myth, and Culture* 47, 50–51 (Sheldon Krimsky & Kathleen Sloan eds., 2011). Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 Colum. L. Rev. 1164, 1165 (2007).

[62] *See e.g*., "Immigration Enforcement–related Information Sharing and Privacy Protection," National Immigrant Legal Center, (March 2020), www.nilc.org/issues/immigration-enforcement/imm-enforcement-info-sharing-and-privacy-protection.

[63] In *Gonzales v. Immigration and Customs Enforcement* (ICE), the Court found current government immigration databases to be "largely erroneous" and of "dubious reliability," and held that "the collection of datapoints ICE gathers from the various databases does not provide affirmative indicia of removability to satisfy probable cause determination because the aggregation of information ICE receives from the databases is largely erroneous and fails to capture certain complexities and nuances of immigration law." *See Gerardo Gonzales et al v. Immigration and Customs Enforcement et al*, 126, (C.D. Cal 2019), https://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/2019-09/gonzalez-v-ice_20190927_decision.pdf. *See also* "Explaining the Gonzalez v. ICE Injunctions," Immigrant Legal Resource Center, October 2019, https://www.ilrc.org/sites/default/files/resources/2019.11_ilrc_gonzalez_v_ice-11.07.pdf.

[64] Ibid.

[65] *Gonzalez v. ICE*, Judgement, Case No. CV 12-09012 AB, Consolidated with: Case No. CV 13-04416 AB, February 2, 2020, https://www.aclusocal.org/sites/default/files/aclu_socal_roy_20200205_final_judgment.pdf.

[66] 85 Fed. Reg. at 56351-2.

[67] Specifically, DHS estimates that biometrics collection will increase to 6.07 million people, from 3.9 million currently. 85 Fed. Reg. at 56343.

The increased information collection proposed in the rule will fuel surveillance of immigrant communities, heightening fears of detention and deportations. Studies have determined that, following immigration raids and deportations, community members are often more fearful and mistrustful of public institutions, less likely to participate in churches, schools, health clinics, cultural activities, and social services, and more reluctant to report crime.[68]

The Proposed Rule fails to contemplate the mental health toll that results from immigration enforcement actions, especially on young people.[69] A recent study found that a majority of Latinx high school students in the United States live in fear that someone close to them will be arrested and deported, and that more than half of those surveyed reported symptoms of mental conditions significant enough to warrant treatment, including anxiety, depression, and PTSD. The psycho-social impact of the proposed rule must be closely examined before any changes in biometrics collection should be considered.

III. Imposing greater biometrics requirements on youth is unjustified, violates the INA, and perpetuates harmful myths about immigrant children

A. Removing the presumption of good moral character for children under the age of 14 and requiring biometrics from VAWA survivors is unjustified and violates the APA

The proposed rule would require survivor self-petitioners under the Violence Against Women Act (VAWA) and applicants for T visas, regardless of age, to submit to invasive biometrics collection to establish "good moral character."[70] Currently, both groups of petitioners can establish good moral character through provision of affidavits and police clearance letters for three years.[71] With the proposed changes, however, adjudicators would assess good moral character based on the "applicant's criminal history, national security background check, and any other credible and relevant evidence submitted."[72] Moreover, the rule would remove the presumption of good moral character for T visa applicants under the age of 14, requiring children to submit to invasive biometrics collection as well.

[68] Regina Day Langhout, et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62:3–12, Am J Community Psychology (2018), https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256.
[69] Randy Capps, Jodi Berger Cardoso, Kalina Brabeck, Michael Fix, and Ariel G. Ruiz Soto, *Immigration Enforcement and the Mental Health of Latino High School Students,* Migration Policy Institute, (September 2020), https://www.migrationpolicy.org/research/immigration-enforcement-mental-health-latino-students.
[70] 85 Fed. Reg. at 56342.
[71] For VAWA self-petitioners, the requisite period to demonstrate good moral character is 3 years, according to the regulations. *See e.g.* 8 CFR 204.2(c)(2)(v); With regard to T visa applicants applying for adjustment, the requisite period is for ''for a continuous period of at least 3 years since the date of admission as a nonimmigrant'' or ''continuous period during the investigation or prosecution of acts of trafficking.'' *See* INA 245(l)(1)(A).
[72] 85 Fed. Reg. at 56342.

The rule change would allow, without proper justification, adjudicators to assess good moral character based on the applicant's *entire* criminal history, national security background check, and any other credible and relevant evidence submitted.[73] The rule provides no clear or substantive justification for this expanded vetting of good moral character for the proposed changes for VAWA or T visa applicants.[74] DHS supplies no justification for the need to subject domestic violence survivors to biometrics, which would scrutinize their records well beyond the three-year timeframe the current regulations provide. Existing safeguards already permit USCIS to inquire into conduct beyond this three-year timeframe within specific criteria.[75] Further, VAWA self-petitioners already are required to submit biometrics in order to obtain employment authorization (I-765) or apply for adjustment of status (I-485).

Similarly, T visa holders already are required to submit biometric evidence upon filing of their adjustment applications. Thus, USCIS already has existing mechanisms in place in order to verify an applicant's identity. The rule vaguely states that the "proposed changes would remove the superfluous need for police clearance letters from T nonimmigrant adjustment applicants."[76] Congress explicitly limited the requisite period for evaluating good moral character.[77] This was done to ensure that T visa holders would not be unjustly prejudiced or retraumatized by repeatedly reviewing criminal acts that they were forced to engage in as part of their abuse and exploitation. These issues would *already have* been addressed as part of their underlying T visa application. By allowing this examination beyond the period authorized by Congress, USCIS would be unlawfully introducing additional subjective elements which can be used to re-traumatize survivors and deny them the protections afforded under the law. Yet, DHS fails to justify why existing methods to establish good moral character, including affidavits or police certifications, are insufficient or burdensome. As discussed above, biometrics databases that USCIS searches may contain incomplete, inaccurate or outdated information about the applicant. USCIS has not sufficiently demonstrated how the current process is unreliable or how this change would be less of a burden.

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[73] The rule allows USCIS to consider applicant's conduct beyond the requisite period (since T grant), where: (1) the earlier conduct or acts appear relevant to a determination of the applicant's present moral character; and (2) the conduct of the applicant during the requisite period does not reflect that there has been a reform of character from an earlier period. 85 Fed. Reg. at 56360.

[74] DHS proposes to require VAWA self-petitioners and T visa applicants to appear for biometric collection, and to remove the requirement that self-petitioners who have resided in the United States submit police clearance letters as evidence of good moral character because DHS will be able to obtain the self-petitioner's criminal history using the biometrics. 85 Fed. Reg. at 56342.

[75] The current rules permit USCIS officers to consider conduct beyond the requisite period# immediately before filing, where: (1) The earlier conduct or acts appear relevant to an individual's present moral character; and (2) the conduct of the self-petitioner/applicant during the three years immediately before filing does not reflect that there has been a reform of character from an earlier period. *See generally* 8 CFR 316.10(a)(2).

[76] 85 Fed. Reg. at 56342.

[77] Ibid.

In failing to provide a reasonable justification for these changes, the rule violates the APA.[78] An agency's regulatory changes must be "based on a consideration of the relevant factors" to survive review, and will be deemed arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[79] DHS bears the burden under the APA to justify and consider relevant factors in their rulemaking.[80] Reasoned rulemaking would demand at least that they have proper justification prior to finalizing their proposed rule. Instead, in the proposed rule, DHS has failed to "articulate a satisfactory explanation for their action."[81]

Not only is there no plausible justification for removing the presumption of good moral character currently provided, it is inherently suspect given this administration's alarming campaign of demonizing immigrant children. While removing the presumption of good moral character may appear administratively benign, it betrays impermissible animus towards immigrant children who this administration has consistently vilified. Former Attorney General Jeff Sessions called immigrant children "wolves in sheep clothing."[82] The President also called immigrant children "animals,"[83] while his Acting CBP Commissioner has proclaimed the power to detect when "so-called minors" are "soon-to-be" gang members by staring into children's eyes.[84] The language is reflective of the racist rhetoric relating to "super predators" of the 1990s, when political figures demonized Black communities by characterizing children as less than humane, and undeserving of empathy.[85]

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[78] Under *State Farm*, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29 (1983).

[79] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29 (1983) at 43. *See also* Id. at 43 n.9; *see also Bowen v. American Hospital Association*, 476 U.S. 610, 626-27 (1986) (plurality opinion) ("Agency deference has not come so far that we [the Supreme Court] will uphold regulations whenever it is possible to 'conceive a basis' for administrative action…[T]he mere fact that there is 'some rational basis within the knowledge and experience of the [regulators]' under which they 'might have concluded' that the regulation was necessary to discharge their statutorily authorized mission will not suffice to validate agency decisionmaking." (internal citations omitted).

[80] *See State Farm*, 463 U.S. at 43. An agency must "examine the relevant data and articulate a satisfactory explanation for its action."

[81] *See East Bay*, 964 F.3d at 851 (citing *State Farm*, 463 U.S. at 43) (stressing the agency's dearth of evidence to support the large-scale transformation to the DHS biometrics information collection system)

[82] U.S. Department of Justice, "Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations," September 21, 2017, https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about.

[83] "Trump calls some illegal immigrants 'animals' in meeting with sheriffs," CBS News, May 16, 2018, https://www.cbsnews.com/video/trump-calls-some-illegal-immigrants-animals.

[84] Ted Hesson, "Trump's pick for ICE director: I can tell which migrant children will become gang members by looking into their eyes," Politico, May 16, 2019, https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570.

[85] Kevin Drum, "A Very Brief History of Super-Predators," Mother Jones, March 3, 2016, https://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators. *See also* Laila L. Hlass, "Our

Additionally, the administration has deprioritized the reauthorization of VAWA and shown little interest in the welfare of survivors, even while domestic violence has reached severe levels under this pandemic.[86] With this rule, they show no consideration for the chilling effect of subjecting survivors to increased surveillance and unwarranted scrutiny. Given the potential for information-sharing between state/federal law enforcement and immigration agencies, as well as the frequency with which abusers may falsely report survivors for crimes or otherwise entangle them in the criminal enforcement apparatus, biometrics collection may reveal criminal charges survivors incurred in conjunction with past abuse, leading to wrongful denials of their applications. The Proposed Rule only confirms the administration's disinterest in protecting survivors.[87]

B. Altering the standard for good moral character for T adjustment of status applicants will harm trafficking survivors

The rule allows USCIS to consider applicant's conduct beyond the requisite period (since T grant), where: (1) the earlier conduct or acts appear relevant to a determination of the applicant's present moral character; and (2) the conduct of the applicant during the requisite period does not reflect that there has been a reform of character from an earlier period.[88]

Allowing USCIS to consider conduct prior to being granted a T visa grant would be detrimental to survivors of trafficking. Individuals who survive trafficking experience severe trauma and instability, and often are not connected to supportive and restorative resources until many years after their victimization.[89] The rule change would unfairly punish survivors for criminal conduct coerced by traffickers, conduct related to their attempts to escape, and conduct related to the severe trauma and instability they face after exiting their trafficking victimization.

Lilian (NIJC Client) *was a child victim of sex trafficking. As a minor, she was subjected to years of severe sexual and physical abuse by her traffickers and other family members. As a result of this abuse, she faced instability and trauma as an adult, as well as prior drug addiction. Prior to obtaining a T visa, she was convicted of several criminal offenses, including escaping criminal custody. She was later a victim of domestic violence, and her abuser forced her into a scheme of*

immigration system must treat immigrant children as children," The Hill Opinion, December 28, 2018, https://thehill.com/opinion/immigration/422351-our-immigration-system-must-treat-immigrant-children-as-children.
[86] Shefali Luthra, "26 years in, the Violence Against Women Act hangs in limbo - while COVID-19 fuels domestic violence surge," USA Today, September 26, 2020, https://www.usatoday.com/story/news/politics/2020/09/26/26-years-in-violence-against-women-act-hangs-limbo-while-covid-fuels-domestic-violence-surge/5827171002.
[87] Natalie Nanasi, "The Trump Administration Quietly Changed the Definition of Domestic Violence and We Have No Idea What For," Slate January 21, 2019, https://slate.com/news-and-politics/2019/01/trump-domestic-violence-definition-change.html.
[88] 85 Fed. Reg. at 56360.
[89] *See* Veronica Garcia, "Humanitarian Forms of Relief Part I: U, T, VAWA," Immigrant Legal Resource Center, (June 2019) https://www.ilrc.org/sites/default/files/resources/humanitarian_part_i.u.t.vawa_.pdf.

producing fake identification documents, which resulted in a criminal conviction. USCIS granted her T visa and waiver of inadmissibility. Under the new rule, USCIS could use this past conduct to deny her adjustment application.

C. Removing age restriction for biometrics collection violates the INA

Congress was not silent on the subjection of children below 14 years old being subject to biometrics collection. INA section 262(b), 8 U.S.C. 1302, states, ‘‘Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted.’’ INA section 264(a), 8 U.S.C. 1304, provides that the Secretary is authorized to prepare forms for the registration and fingerprinting of non-citizens "aged 14 and older in the United States, as required by INA section 262."[90]

If Congress intended for the government to collect biometrics data on everyone, including children, they would not have explicitly carved children under the age of 14 out of this requirement in 8 USC 1302(a). The Proposed Rule indicates, however, that DHS interprets section 264(a) as requiring that biometrics be submitted by lawful permanent residents aged 14 and older, but "not as imposing a lower age limit prohibiting DHS from requiring anyone, including lawful permanent residents or individuals seeking immigration benefits who are under the age of 14, from submitting biometrics as authorized by other laws."[91]

By this perverse interpretation, DHS seeks to circumvent its statutory limitations and expand its authority to target children for harmful data collection. In expanding biometrics collection for children under 14, the rule violates the INA based on the plain text of the statute. This is also a violation of the APA, as the administration does not have authority to issue regulations that go beyond their statutory mandate.

Congress set age limits on collecting biometrics data on children for a reason. Children's biometrics are still in development and therefore unreliable, only becoming more stable only at age 15.[92] A UNICEF guide on "Biometrics and Children" suggests that "while biometric technologies have *some* application in children above 5 years of age, solutions at younger ages are largely experimental and require more research."[93] Removing age restrictions could also hinder the ability of non-citizens to obtain family-based visas, due to the burden and privacy

[90] 85 Fed. Reg. at 56357.
[91] 85 Fed. Reg. at 56357.
[92] *See* C. Gottschlich, T. Hotz, R. Lorenz, S. Bernhardt, M. Hantschel and A. Munk, "Modeling the Growth of Fingerprints Improves Matching for Adolescents," IEEE Transactions on Information Forensics and Security, vol. 6, no. 3, pp. 1165-1169, (September 2011), http://www.stochastik.math.uni-goettingen.de/preprints/ModelingTheGrowthOfFingerprintsImprovesMatching.pdf.
[93] "UNICEF guidance on the use of biometrics in children-focused services," UNICEF, (October 2019), https://data.unicef.org/resources/biometrics.

concerns that arise with forcing U.S. citizens and LPRs to submit additional biometrics information.[94]

IV. The expanded scope of surveillance to not only immigrants but U.S. citizens will push DHS further toward a mission of securitization and militarization

A. Rapid DNA collection from people seeking immigration relief poses a serious threat to privacy

Currently, familial relationships are established by DHS primarily through provision of documentary evidence; where that evidence is unavailable, individuals may submit blood tests. The proposed rule, however, would authorize DHS to use Rapid DNA testing, when available, to verify biological parent-child relationships in the course of evaluating eligibility for immigration benefits. It asserts that officers use "Rapid DNA testing technologies as a precise and focused investigative tool to identify suspected fraudulent families and vulnerable children who may be potentially exploited."[95]

The collection and retention of DNA from immigrant communities, including children, is a dangerous, unwarranted privacy intrusion. DHS claims DNA testing is necessary to establish family relationships because "DNA is the only biometric that can verify a claimed genetic relationship…DNA testing provides the most reliable scientific test available to resolve a genetic relationship and replace older serological testing."[96]

However, unlike fingerprints, which can only be used for identification, DNA provides a massive amount of unique, private information about a person that goes beyond identification of that person.[97] The rule would increase government access to DNA samples that can provide insights into deeply private and personal information, including biological familial relationships.[98] Allowing this type of data of children and immigrant communities to proliferate in government databases merits serious concern, particularly given this country's history of discrimination against marginalized populations and practices of eugenics. The U.S. government has discriminated against communities of color in everything from marriage to employment because

[94] This would follow a pattern of DHS weaponizing fears of trafficking to "scare and intimidate" children. *See* Hamed Aleaziz,"ICE Is Now Fingerprinting Immigrants As Young As 14 Years Old" BuzzFeed news, February 5, 2020, https://www.buzzfeednews.com/article/hamedaleaziz/ice-immigration-customs-fingerprinting-refugees-teens. (quoting chair of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, Rep. Rosa DeLauro: "Make no mistake: ICE's intention is to intimidate and scare children by entering these shelters, and if HHS allows ICE to do so, they will be complicit.")
[95] 85 Fed. Reg. at 56352.
[96] 85 Fed. Reg. at 56353.
[97] *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).
[98] Ibid. *See also* "DHS Expands Efforts to Collect DNA Samples from Immigrants," National Immigration Project of the National Lawyers Guild & Electronic Frontier Foundation, April 9, 2020, https://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2020_09Apr_dna-explainer.pdf.

of perceptions about their DNA.[99] More recently, in the immigration context, the exposure of the use of forced hysterectomies on women in detention has raised grave fear over forced sterilization practices.[100] As such, the public has reason to be gravely concerned about the future ways in which an expanded use of a DNA database for immigrant populations could be used by government entities.

Moreover, this would also not be the first time the U.S. uses fear mongering to impose onerous surveillance and vetting practices on immigrants. From 2002 to 2003, more than 83,500 immigrants were forced to undergo special registration under the National Security Entry-Exit Registration System (NSEERS).[101] This program impermissibly targeted immigrants on the basis of their religion, ethnicity, gender, and national origin.[102] This Proposed Rule conjures up the failures of NSEERS by casting a shadow of discriminatory surveillance on *all* immigrants--under the dubious pretenses of national security concerns.[103]

B. Increasing collection and access to DNA data will fuel inaccuracy under a cloak of secrecy

Congress has never authorized ICE to conduct Rapid DNA testing on migrant families at the border. Yet, DHS has deployed this privacy-invasive technology without explaining how accurate the testing is, whether families can challenge the results, or how the program may be expanded in the future.[104]

The rule equates rapid DNA testing with lab tested DNA; however, rapid DNA testing is much less reliable that lab testing.[105] Rapid DNA testing has been criticized for failing to meet

[99] *See* Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110–233, § 2, 122 Stat. 881 (2008), as amended Pub. L. No. 111–256, § 2(j) (2010).
[100] *See* "Jayapal Statement on New Details Regarding Forced Unnecessary Medical Procedures-Including Hysterectomies-Being Performed on At Least 17 Immigrant Women in Irwin County, Georgia," Statement of United States Representative Pramila Jayapal (WA-07), September 16, 2020, https://jayapal.house.gov/2020/09/16/new-details-regarding-forced-medical-procedures-on-immigrant-women/.
[101] Nadeem Muaddi, "The Bush-era Muslim registry failed. Yet the US could be trying it again," CNN, December 22, 2016, https://www.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/index.html.
[102] American-Arab Anti-Discrimination Committee et al., Coalition letter urging the rescission of the National Security Exit-Entry Registration System (NSEERS), November 21, 2016, https://www.adc.org/wp-content/uploads/2016/11/NSEERS_Coalition_Letter.pdf.
[103] "UN experts applaud US decision to dismantle 'discriminatory and ineffective' counterterrorism programme," UN News, November 29, 2016, https://news.un.org/en/story/2016/12/548642-un-experts-applaud-us-decision-dismantle-discriminatory-and-ineffective.
[104] ICE has already awarded new contracts for rapid DNA testing at the southwest border, expanding on the pilot program discussed in the rule. *See* U.S. Immigration and Customs Enforcement, "ICE awards new contract for rapid DNA testing at southwest border, expands pilot program," June 18, 2019, https://www.ice.gov/news/releases/ice-awards-new-contract-rapid-dna-testing-southwest-border-expands-pilot-program.
[105] Jennifer Lynch, "Rapid DNA: Coming Soon to a Police Department or Immigration Office Near You," Electronic Frontier Foundation, January 6, 2013, https://www.eff.org/deeplinks/2012/12/rapid-dna-analysis.

standards used by accredited DNA laboratories, with a Swedish report showing incorrect profiles and problems or errors in 36 percent of tests run on one particular Rapid DNA system.[106]

In addition to serious accuracy concerns, the rule will fuel the expansion of secretive contracts with private companies seeking to profit off increased surveillance of immigrant communities.[107] The rule, for example, is expanding the definition of biometrics as part of efforts to allow the massive HART database to come in line with existing regulations and legal protections.[108] In 2018, Northrop Grumman won a $95 million contract to develop the first two stages of the HART system, and its contract is set to expire in 2021.[109] Concerned investors have demanded the Board of Directors of the company explain how they would protect human rights while building the tech behind the massive, privacy-invasive database.[110] There is a dire need for greater transparency and scrutiny into the new private contracts that will ensue from the dramatic DHS technology expansion envisioned through this rule.

Conclusion

The administration has failed to abide by its obligations under U.S. law and usurped Congress's role as the architect of our immigration system. This should suffice for the immediate rescission of the Proposed Rule. Moreover, the glaring absence of reasonable justification for this NPRM and evidence of animus in its development further undermines DHS's duty to put forth reasonable rulemaking. The proposal expands the perpetual surveillance of immigrant communities, is an affront to democracy and the values of privacy enshrined in the U.S. Constitution, and is deeply dehumanizing. NIJC urges DHS to rescind the proposed rule and abide by its obligations to protect non-citizens and citizens alike from intrusive and unwarranted information collection.

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[106] "EFF Sues DHS to Obtain Information About the Agency's Use of Rapid DNA Testing on Migrant Families at the Border," Electronic Frontier Foundation, November 12, 2019, https://www.eff.org/press/releases/eff-sues-dhs-obtain-information-about-agencys-use-rapid-dna-testing-migrant-families.

[107] The company Northrop Grumman's HART database stores immigrants' faces, irises, and likely voices, in a custom-built $94 million database. The agency's Office of Biometric Identity Management will replace its legacy biometric analysis platform, called the Automated Biometric Identification System, or IDENT, with a new, more robust system hosted by Amazon Web Services. https://www.nextgov.com/it-modernization/2019/06/dhs-move-biometric-data-hundreds-millions-people-amazon-cloud/157837.

[108] Jennifer Lynch, "HART: Homeland Security's Massive New Database Will Include Face Recognition, DNA, and Peoples' 'Non-Obvious Relationships'," Electronic Frontier Foundation, June 7, 2018, https://www.eff.org/deeplinks/2018/06/hart-homeland-securitys-massive-new-database-will-include-face-recognition-dna-and.

[109] Stephen Mayhew, "Northrop Grumman awarded $95M OBIM contract," February 17, 2017, https://www.biometricupdate.com/201802/northrop-grumman-awarded-95m-obim-contract.

[110] Jason Kelley, "Shareholders Demand To Know How Northrop Grumman Will Protect Human Rights While Building Massive DHS Database," Electronic Frontier Foundation, May 8, 2019, https://www.eff.org/deeplinks/2019/05/shareholders-northrop-grumman-demand-know-how-company-will-protect-human-rights.

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

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