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Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

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

RE: RIN 1615-AC14; USCIS Docket No. 2019-0007; CIS No. 2644-19; Comment in Opposition to Proposed Rules on Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

To Whom It May Concern:

The City Bar Justice Center (“CBJC”), through its counsel and *pro bono* partner Dechert LLP (“Dechert”), submits this Comment in opposition to Proposed Rules on Collection and Use of Biometrics by U.S. Citizenship and Immigration Services (“USCIS”), published in the Federal Register on September 11, 2020 (the “Proposed Rule”). As an initial matter, the Department of Homeland Security (“DHS”) has introduced and is considering the Proposed Rule in a rushed and haphazard manner, evident through the absence of key detail and the lack of appropriate factual support, which has deprived the U.S. public and CBJC with the opportunity to adequately consider and respond to the Proposed Rule. CBJC also opposes the Proposed Rule because DHS lacks the authority, statutory or otherwise, to radically redefine the scope of biometric information that USCIS will collect in connection with immigration benefit applications, as it purports to do. The Proposed Rule would also severely and improperly invade the privacy of millions of individuals, including U.S. citizens, without providing any clear benefit to the speed or accuracy of benefit adjudications. Perhaps most significantly, the Proposed Rule would represent an unsupported departure from recent DHS policies seeking to alleviate the suffering of vulnerable populations like minors and victims of human trafficking, crime, or domestic violence. Instead, the Proposed Rule would disproportionately burden these populations and deter them from seeking the relief to which they are entitled.

As the nonprofit affiliate of the New York City Bar Association, CBJC increases access to justice by leveraging the *pro bono* efforts of New York lawyers, law firms, and corporate legal

departments. Each year, CBJC assists more than 25,000 low income and vulnerable New Yorkers through limited and direct legal representation, community outreach, and education efforts on a wide range of civil-justice matters. CBJC's Immigrant Justice Project assists asylum seekers fleeing persecution, survivors of violent crimes and trafficking that took place in the United States, and individuals seeking humanitarian protection and other forms of relief. CBJC represents clients before USCIS and the Executive Office for Immigration Review ("EOIR"), including both the immigration courts and the Board of Immigration Appeals ("BIA"), as well as federal courts.

Dechert LLP is an international law firm with over 900 attorneys, and a longstanding *pro bono* partner of CBJC. The firm takes great pride in the volume and variety of the work it performs on a *pro bono* basis and has a long-standing commitment to serving the underprivileged and promoting social justice. Through its partnership with CBJC and similar nonprofit organizations, Dechert attorneys across the United States have provided legal representation to individuals from across the world. In particular, Dechert has developed a strong practice representing victims of human trafficking, helping victims obtain immigration relief and compensation from their traffickers. Indeed, Dechert obtained a landmark victory against a Kuwaiti diplomat in *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010), paving the way for successful civil trafficking lawsuits against high ranking diplomatic officials. In addition, Dechert routinely helps immigrants apply for asylum, special immigrant juvenile status, U-Visas, T-Visas, and relief under the Violence Against Women Act ("VAWA").

I. The Proposed Rule Is Procedurally Deficient

A. The 30-Day Comment Period Is Inadequate

As a threshold matter, CBJC objects to DHS's 30-day comment period. The Administrative Procedures Act ("APA") requires agencies, including DHS, to "give interested persons an opportunity to participate" in rulemaking.¹ Consistent with the APA, Executive Order 12866 requires DHS to "...afford the public a *meaningful opportunity* to comment on any proposed regulation, which in most cases should include a comment period *of not less than 60 days*." (emphasis added). For "complex rulemakings," longer comment periods "such as 180 days or more" are appropriate.² The Proposed Rule, which is 80 pages long and is designed to impact more than 20 sections of the Code of Federal Regulations, undoubtedly qualifies as complex. And DHS has allowed far more than 60 days for comments for prior relevant rulemaking of comparable length and complexity.³ The paltry 30 days DHS provided for public review and comment, particularly during a global pandemic and at a time when other proposed rules relating to immigration are also out for public comment, does not give the public sufficient adequate time to respond meaningfully to the myriad of proposed changes. The short comment period is particularly unwarranted here given recent news that the Justice Department's Inspector General has nearly completed a report regarding his investigation into DHS's family separation policy.⁴ The prospective findings of this forthcoming

¹ Administrative Procedure Act, 5 U.S.C. § 553.

² Office of the Federal Register, *A Guide to the Rulemaking Process* 5 (2011), available at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

³ See, e.g., 62 Fed. Reg. 10312 (Mar. 6, 1997) (84 pages; 120-day comment period).

⁴ See Michael D. Shear, 'We Need to Take Away Children,' *No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html?action=click&module=Top%20Stories&pgtype=Homepage>.

report appear to have direct bearing on aspects of the Proposed Rule. Indeed, it appears that DHS may have designed the insufficient 30 day period in order to overwhelm and stifle public comment on its proposed broad expansion of the biometric collection performed by DHS. Based solely on the foregoing, we urge the withdrawal of the rulemaking and its republication with significant additional time allowed for public comment, particularly given the current pandemic.

Although we oppose the Proposed Rule in its entirety, because we are unable to address the many proposed changes within the 30 days provided, this Comment focuses on several specific problematic provisions. Failure to address a specific provision of the Proposed Rule should not be read as an endorsement of that provision's contents.

B. The Proposed Rule Lacks Sufficient Support and Important Details

An agency's proposed rules must be supported by data and reasoning.⁵ Although courts defer to agency rulemaking, agencies cannot simply promulgate rules without supporting findings and assessments.⁶ Here, DHS has offered only conclusions, unsupported by facts or critical details, to support its massive proposed expansion of the collection of biometric data.

DHS asserts that the Proposed Rule will "assist DHS in its mission to combat human trafficking, child sex trafficking, forced labor exploitation, and alien smuggling, while simultaneously promoting national security, public safety, and the integrity of the immigration system."⁷ DHS, however, cites no evidence to substantiate that the current use of fingerprints and photographs is insufficient to protect national security or that gathering the wide range of biometrics contemplated by the Proposed Rule would provide greater protection. On the contrary, studies have shown that biometrics "are inherently probabilistic, and hence inherently fallible."⁸ Reports regarding the effectiveness of facial recognition programs in both the United Kingdom and the United States have also shown unacceptably high failure rates.⁹ And regardless, there is no evidence that immigrants as a group present greater dangers to public safety than any other sub-population; therefore, "immigration policy has limited utility as a national security tool."¹⁰

Similarly, DHS claims that DNA collection through the Proposed Rule is necessary to prevent immigrants from claiming fraudulent biological relationships at the border.¹¹ Indeed, immigration fraud has been a focus from the early days of this Administration, with the White House issuing an executive order targeting possible fraud in the visa-issuance process mere months after the inauguration.¹² Yet despite its hyper-focus on this issue, DHS has detected relatively few

⁵ 5 U.S.C. § 706 (regulations may not be arbitrary or capricious); *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1142-43 (9th Cir. 2015) (rule invalid where "unsupported by any explained reasoning").

⁶ *See Am. Equity Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010) (rule arbitrary and capricious where supporting analysis flawed and insufficient).

⁷ *Proposed Rule* at 56357.

⁸ JOSEPH N. PATO AND LYNETTE I. MILLETT, *BIOMETRIC RECOGNITION: CHALLENGES & OPPORTUNITIES* 1 (2010).

⁹ *See* Big Brother Watch, *Face Off: The Lawless Growth of Facial Recognition in UK Policing* at 3 (2018); Patrick Grother et al., National Institute of Standards & Technology, U.S. Dep't of Commerce, *Face In Video Recognition* at 9-12 (2017).

¹⁰ Edward Alden, *National Security & U.S. Immigration Policy*, J. INT'L & COMP. LAW, Issue 1, Vol. 1 at 25 (2010).

¹¹ *Proposed Rule* at 56341.

¹² *Proposed Rule* at 56357.

examples of actual fraud.¹³ Indeed, in the Proposed Rule, DHS relies on misleading statistics from a four-month pilot program in 2019 to assert, “DHS encountered 1747 self-identified family units with indicators of fraud who were referred for additional screening” including DNA testing and that “DHS identified 432 incidents of fraudulent family claims.”¹⁴ DHS officials, however, have since admitted that its definition of “fraudulent family units” included children simply traveling with a non-parent relative, such as an older sibling, aunt, uncle or grandparents, and that it applied that definition “regardless of whether there was willful misrepresentation.”¹⁵ Moreover, these numbers were further inflated because, as DHS admits, it only selected for DNA testing those proposed family units it *already suspected of fraud*.¹⁶ And when considering *all* family units at the border rather than cherry-picking from a skewed sample, DHS’s own statistics reveal that some 93,138 family units were apprehended at the Southwest Border during the four-month period of this study.¹⁷ This means that less than 2% of family units apprehended were DNA tested, which can hardly be deemed an adequate sample. But of those 2%, less than a quarter were found to be fraudulent, or in other words, not even .5% of the overall number of family units apprehended at the Southwest Border.¹⁸ Such a negligible finding simply does not justify the implementation of the Orwellian regime contemplated here.

The Proposed Rule’s weak foundational basis is further undone by its lack of important detail. For example, DHS does not explain with any specificity how it plans to collect biometrics, whether or how its personnel would be trained to do so, or what equipment it will use.¹⁹ Critically, it also fails to provide details about how this vast array of data would be stored and protected from misuse or theft. Like any other digital information,²⁰ biometric data is vulnerable to data breaches²¹ that could be used to obtain a wide range of information about an individual’s medical characteristics and physical traits.²² Nor does the Proposed Rule detail how, if at all, it would limit the use of biometric information to identification and not gradually allow the information to be used into areas not initially contemplated, especially when it already anticipates sharing biometric data “with other agencies where there are national security, public safety, fraud, or other investigative needs.”²³ DHS should develop and publicly disclose a plan for the protection of such vital information before issuing rules that mandate its collection.

¹³ See Laura D. Francis, *Trump Immigration Fraud Focus Yields Limited Results*, BLOOMBERG LAW (Nov. 6, 2018).

¹⁴ *Proposed Rule* at 56352.

¹⁵ Resp. of K. McAleenan to Sen. S. Whitehouse QFR #12 re: June 11, 2019 S. Judiciary Comm. Hearing: The Secure and Protect Act: a Legislative Fix to the Crisis at the Southwest Border, judiciary.senate.gov/imo/media/doc/McAleenan%20Responses%20to%20Whitehouse%20QFRs.pdf.

¹⁶ *Proposed Rule* at 56352.

¹⁷ CBP, Southwest Border Migration FY 2020 (Sept. 4, 2020), <https://www.cbp.gov/newsroom/stats/sw-border-migration>; CBP, *Southwest Border Migration FY 2019* (Nov. 14, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

¹⁸ *Id.*

¹⁹ *Proposed Rule* at Table 1.

²⁰ The Editors, *Biometric Security Poses Huge Privacy Risks*, SCIENTIFIC AMERICAN (Jan. 1, 2014).

²¹ Jon Porter, *Huge Security Flaw Exposes Biometric Data of More Than a Million Users*, THE VERGE (Aug. 14, 2019).

²² National Research Council, *Forensic DNA Databanks and Privacy of Information*, DNA TECHNOLOGY IN FORENSIC SCIENCE 113 (1992).

²³ *Proposed Rule* at 56357.

Finally, when an agency undertakes a cost-benefit analysis to support a proposed rule, that analysis cannot be arbitrary and capricious.²⁴ Here, DHS estimates that, with regard to the Proposed Rule, “[t]he average annualized costs could range from \$320.4 million to \$499.7 million, with a midrange of \$410 million.”²⁵ But these already substantial cost estimates are on their face incomplete; “DHS does not know what the costs of expanding biometrics collection to the government in terms of assets and equipment.”²⁶ DHS also heavily caveats its cost estimates, stating that “the costs could vary from the figures reported herein” and “because the future actual generalized and form-specific collection rate of biometrics are unknown, the actual populations and costs could vary.”²⁷ In short, DHS’s costs estimates are insufficiently specific to support the massive increase in biometric collection it proposes.

C. The Proposed Rule Obscures Major Policy Changes Unrelated to Biometrics

Easily lost within the dozens of pages describing the sweeping expansion of biometric collection are several proposed substantive changes to how DHS intends to assess whether an applicant has “good moral character.” First, Violence Against Women Act (“VAWA”) self-petitioners would be required to submit to “national security and criminal history background checks” to establish their character, and the period of time to be considered would be expanded from the 3 years prior to the application to indefinitely.²⁸ Second, VAWA self-petitioners under the age of 14 would no longer be given a presumption of good moral character but would instead face the same background checks as adults.²⁹ Finally, the same changes would be made in the context of T nonimmigrant adjustment of status applicants—they would all be subject to background checks extending back indefinitely, regardless of age.³⁰

Momentarily putting aside the substantive problems with these proposed changes, addressed below, they represent a major change in the way USCIS has traditionally assessed good moral character, buried within a massive unrelated proposed rule regarding biometric collection. This hardly constitutes notice sufficient to ensure that these important regulations are “tested via exposure to diverse public comment” and that adequate “evidence in the record... to support... objections to the rule” can be developed.³¹

II. DHS Lacks the Authority to Make the Proposed Rule

“No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the

²⁴ See *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that “we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses”); *Owner–Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (vacating regulatory provisions because the cost-benefit analysis supporting them was based on an unexplained methodology).

²⁵ *Proposed Rule* at 56365.

²⁶ *Id.* at Table 1.

²⁷ *Id.* at 56368.

²⁸ *Proposed Rule* at 56342.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011).

bounds of its statutory authority.”³² An agency may not make rules that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”³³ Where an agency’s proposed rules contradict clearly-expressed Congressional intent, they are not valid.³⁴

Here, the Proposed Rule contradicts DHS’s express statutory authority limiting its collection of biometrics to fingerprinting and photographs. DHS, however, seeks to require individuals applying for immigration benefits to provide a full range of highly-invasive biometrics that Congress has not authorized it to collect. Indeed, by statute, the Attorney General and Secretary of State have been “authorized and directed to prepare forms for the registration and *fingerprinting* of aliens.”³⁵ Aliens are required by statute to be “registered and fingerprinted,” not registered and subjected to collection of iris scans, facial recognition data, palm prints, voice prints, and in some cases DNA.³⁶ And applicants for asylum may be required to “submit fingerprints and a photograph,” not all manner of biometric data DHS may decide it wishes to collect.³⁷ The applicable statutes are specific about what information DHS can collect to verify identity and they do not include the materials DHS now proposes to collect. Because agencies are not entitled to regulate in a way that is “inconsistent with the design and structure of the statute as a whole,” the Proposed Rule must fail.³⁸

In particular, it is clear that DHS lacks the authority to make collection of DNA mandatory in cases hinging on a claimed biological relationship because proposed legislation to require such testing has been rejected on several occasions. Legislation introduced in the House of Representatives in 2016 would have provided that “[n]o petition or application... predicated on the fact that a biological relationship exists between the petitioner or applicant and the beneficiary or derivative, may be approved, unless a genetic test is conducted to confirm such biological relationship and the results of such test are submitted as part of the petition or application.”³⁹ This proposed legislation, however, did not pass. A similar failed bill in 2018 would have permitted DNA testing “[w]here considered necessary, by the consular officer or immigration official, to establish family relationships.”⁴⁰ And a 2019 bill “to amend the Immigration and Nationality Act to require a DNA test to determine the familial relationship between an alien and an accompanying minor, and for other purposes” has yet to obtain a floor vote.⁴¹ Clearly, DHS cannot create powers for itself by rule that Congress has repeatedly declined to grant it by statute.

Attempting to justify the Proposed Rule, DHS places emphasis on the fact that Congress has given the agency power to “to take and consider evidence of or from any person touching the privilege of any alien... to enter, reenter, transit through, or reside in the United States.”⁴² But the ordinary meaning of the term “evidence” does not include intrusive biometrics; rather, it is

³² *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

³³ 5 U.S.C. § 706.

³⁴ See *New York v. DHS*, 969 F.3d 42, 74 (2d Cir. 2020).

³⁵ 8 U.S.C. § 1304 (emphasis added).

³⁶ *Id.* § 1302.

³⁷ 8 U.S.C. § 1158.

³⁸ *Gulf Fisherman’s Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020).

³⁹ H.R. 5203, 114th Congress § 21B (2016).

⁴⁰ H.R. 4760, 115th Congress § 3109 (2018).

⁴¹ H.R. 3864, 116th Congress § 211A (2019).

⁴² *Proposed Rule* at 56347 (citing 8 U.S.C. § 1225(d)(3)).

commonly understood by reference to “testimony, documents, and tangible objects.”⁴³ In any proceeding, the collection of evidence is limited to that which is relevant.⁴⁴ And even in criminal proceedings, intrusions into the person such as by collecting biometrics constitutes a search that must be reasonable in light of all the facts and circumstances.⁴⁵ DHS’s claim that its statutory power to “take evidence” allows it to collect biometrics from every single applicant for an immigration benefit without any showing of cause or reasonableness is simply not supported by any existing legal authority and contrary to its explicit statutory authority.

In addition, even if Congress had given DHS the power to make the Proposed Rule (which it did not), giving DHS the broad and unrestricted authority to collect the invasive biometrics it seeks would be inconsistent with fundamental principles of international law. The Universal Declaration of Human Rights protects against “arbitrary interference with... privacy,” and recommit to “the right to life, liberty, and the security of property.”⁴⁶ The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol specifically protect refugees from discrimination and safeguard their personal rights.⁴⁷ DHS cannot, consistent with these provisions, collect a wide range of personal biometrics from every single individual seeking an immigration benefit.

III. The Proposed Rule Severely Invades Privacy Without Any Demonstrable Benefit

A. The Taking of Biometrics Intrudes on Long-Recognized Privacy Interests

“[T]he Fourth Amendment protects people, not places.”⁴⁸ Accordingly, the United Supreme Court has recognized that “intrusions into the human body” constitute searches subject to the Fourth Amendment’s requirements.⁴⁹ The Court has applied this principle to blood draws,⁵⁰ breathalyzer tests,⁵¹ and fingernail scrapings.⁵² Most recently, the Court specifically addressed DNA testing in *Maryland v. King*, and held that it constituted a search subject to reasonableness scrutiny under the Fourth Amendment.⁵³

“To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”⁵⁴ The Proposed Rule, however, contemplates suspicionless biometric searches of “any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request.”⁵⁵ Although the Supreme Court permitted such a mass search in *King*, it did so because the searches were confined to arrestees,

⁴³ BLACK’S LAW DICTIONARY (11th ed. 2019).

⁴⁴ FED. R. EVID. 401.

⁴⁵ *Maryland v. King*, 569 U.S. 435, 446-47 (2013).

⁴⁶ UN General Assembly, *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, arts. 3 & 12 (Dec. 12, 1948).

⁴⁷ UN General Assembly, *Protocol Relating to the Status of Refugees*, 19 U.S.T. 6223; 606 U.N.T.S. 267, arts. 3 & 12 (Jan. 31, 1967).

⁴⁸ *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

⁴⁹ *Schmerber v. California*, 384 U.S. 757, 767 (1966).

⁵⁰ *Missouri v. McNeely*, 569 U.S. 141 (2013).

⁵¹ *Skinner v. Railway Labor Execs. Ass’n*, 489 U.S. 602 (1989).

⁵² *Cupp v. Murphy*, 412 U.S. 291 (1973).

⁵³ 569 U.S. 435, 446 (2013).

⁵⁴ *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

⁵⁵ *Proposed Rule* at 56338.

noting that “[t]he validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged.”⁵⁶ The Proposed Rule would not apply only to arrestees but to anyone applying for *or even associated with* an immigration benefit, including U.S. citizens.⁵⁷ Unlike arrestees, these individuals do not have a reduced expectation of privacy; nor is there a “special law enforcement need” to justify the intrusion on that privacy.⁵⁸

It is also true that the Supreme Court has upheld some suspicionless searches in the context of border patrol traffic-checking operations, noting the special government interest in “apprehend[ing] smugglers and illegal aliens” along “important highways.”⁵⁹ But the Proposed Rule would apply to all applicants for immigration benefits (and even those who support their applications), not just those at or near the borders. The court has recognized that, unlike at the border, suspicionless searches are not justified when they are hundreds of miles from the border and not “specifically related to the need to police the border.”⁶⁰ The Proposed Rule does not even purport to be a border control measure; rather, it requires invasive biometrics of all individuals associated with a benefit application, including immigrants who crossed the border legally and overstayed their visas and even U.S. citizens who have never even been near the border but simply support a spouse’s benefit application.

The Fourth Amendment privacy concerns are especially significant here because of the wide range of biometric information the Proposed Rule seeks to collect. In addition to the fingerprints and photographs presently collected, DHS would collect “iris image[s], palm print[s], and voice print[s]” from all applicants for benefits.⁶¹ And DNA would be collected in cases where it was necessary “to prove the existence of a claimed genetic relationship.”⁶² DHS has not explained why it needs to collect multiple biometrics to verify a benefit applicant’s identity, particularly when it claims each of these biometrics is individually reliable.⁶³ It is well-settled that for a search to be permissible under the Fourth Amendment, the scope of the intrusion must be reasonable.⁶⁴ However, it is hard to see how multiple redundant biometric searches to verify the same point could ever be deemed reasonable in scope. And although DHS claims that it will gather DNA for only limited purposes, it cannot dispute that a wide range of information can be derived from DNA samples, including sensitive information about an individual’s medical characteristics and physical traits and, as discussed above, it has not proposed any measures to ensure that the biometric data collected is used only for those limited purposes.⁶⁵ The scope of the proposed search is simply not reasonable.

⁵⁶ 569 U.S. at 449.

⁵⁷ *Proposed Rule* at 56338.

⁵⁸ *Cf. King*, 569 U.S. at 447.

⁵⁹ *See United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

⁶⁰ *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000).

⁶¹ *Proposed Rule* at 56338.

⁶² *Id.*

⁶³ *Id.* at 56355.

⁶⁴ *O’Connor v. Ortega*, 480 U.S. 709, 728 (1987).

⁶⁵ National Research Council, *Forensic DNA Databanks and Privacy of Information*, DNA TECH. IN FORENSIC SCIENCE 113 (1992).

B. The Proposed Rule's Invasion of Privacy Is Not Balanced by an Appreciable Benefit to DHS

DHS claims that collecting a range of biometrics in accordance with the Proposed Rule will provide “more reliable data about detainees’ identities.”⁶⁶ The existing rules, however, already provide for the collection of fingerprints, which studies have shown to be “highly accurate” in determining identity.⁶⁷ In fact, a 2011 study of latent print examiners found that fingerprints made false positive errors at a rate of only .1%.⁶⁸ Thus, the Proposed Rule is unnecessary to help DHS accurately determine identity.

By comparison, a 2012 study of 92 different types of iris scanning technology—which the Proposed Rule seeks to implement—found that some types had as low as a 90% accuracy rate.⁶⁹ Although it is believed to have the potential to be as accurate as fingerprint identification, palm print recognition is subject to many “problems... like skin distortion, computational complexity and diversity of different palm regions.”⁷⁰ Voice recognition systems, meanwhile, “generally aren’t efficient yet in recognizing voice modifications,” which poses “significant security concerns.”⁷¹ Therefore, the Proposed Rule in essence seeks to supplement a time-tested and generally accurate identification method with several other, newer, less secure biometrics that may not be as accurate.

Of course, the problems with the use of DNA evidence—which the Proposed Rule would require in cases where a genetic relationship is at issue—have been significantly discussed in recent years. The cases of mishandling of this evidence by technicians have been numerous.⁷² DNA samples can also be impacted by humidity, temperature, and exposure to sunlight.⁷³ The result can be the use of false evidence and wrongful convictions.⁷⁴

In fact, the Proposed Rule’s expansion of the biometrics collected by DHS has the potential to make the agency’s determinations less, rather than more, accurate. The collection and use of these biometrics could lead to a form of “automation bias,” a phenomenon in which individuals put too much trust in the functioning of automated systems even when they have reason to suspect error or

⁶⁶ *Proposed Rule* at 56350.

⁶⁷ National Institute of Standards & Technology, U.S. Dep’t of Commerce, *NIST Study Shows Computerized Fingerprint Matching Is Highly Accurate* (Nov. 27, 2017).

⁶⁸ Bradford T. Ulery et al., *Accuracy & Reliability of Forensic Latent Fingerprint Decisions*, PNAS, vol. 108, no. 19 (May 10, 2011).

⁶⁹ National Institute of Standards & Technology, U.S. Dep’t of Commerce, *NIST: Iris Recognition Report Evaluates “Needle in Haystack” Search Capability* (April 23, 2012).

⁷⁰ Priyanka Kamboj & Goutam Gupta, *A Brief Review of Palm Print Recognition Techniques*, Int’l J of Advanced Res. In Elec. & Comm. Eng’g, vol. 5, issue 6 (June 2016).

⁷¹ *Voice Impersonators Can Fool Speaker Recognition Systems*, Science Daily (Nov. 14, 2017).

⁷² See, e.g., Jaxon van Derbeken, *Technician, Boss in SFPD Lab Scandal Flunked DNA Skills Exam*, SFGATE (March 31, 2015); Joseph Goldstein, *New York Examines Over 800 Rape Cases for Possible Mishandling of Evidence*, THE NEW YORK TIMES (Jan. 10, 2013).

⁷³ Anam Sahar et al., *Issues with DNA Fingerprinting in Forensic Lab: A Review*, J. MED. RESEARCH & CASE REPORTS (2019). Contamination and DNA transfer can greatly skew results. Matthew Shaer, *The False Promise of DNA Testing*, THE ATLANTIC (June 2016).

⁷⁴ Douglas Starr, *Forensics Gone Wrong: When DNA Snares the Innocent*, SCIENCE (Mar. 7 2016).

malfunction.⁷⁵ DHS agents are well accustomed to evaluating testimony and documentary evidence submitted by benefit applicants and making reasoned conclusions about their cases; the availability of these not-infallible biometrics could cause them to doubt their judgments when it is the biometrics themselves that should be doubted.

IV. The Proposed Rule Would Cause Special Harm to the Vulnerable Populations It Claims to Protect

A. The Proposed Rule Would Cause Additional Harm to Children

The Proposed Rule would authorize DHS to “routinely collect biometrics information from children under the age of 14.”⁷⁶ DHS also proposes eliminating the presumption of good moral character for VAWA self-petitioners and T visa applicants under 14 years of age.⁷⁷ DHS, however, has made no showing that would support such dramatic departures from longstanding immigration law and practice.

Immigration authorities have long treated children under 14 years old as both more vulnerable and less of a security risk compared to adults. The current restriction on routine biometrics collection from those under 14 years of age dates back to the 1940 Alien Registration Act, which required “every alien ... fourteen years of age or older ... [who] remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted.”⁷⁸ Congress passed that legislation “[n]ear the onset of World War II, [when] the U.S. government [had] bec[o]me increasingly concerned about the possibility of hostile foreign enemies living in the United States.”⁷⁹ Despite those genuinely dire circumstances, Congress exempted immigrant children younger than 14 from the Act’s fingerprinting requirement.

DHS offers no compelling policy justification for eliminating the age restriction here and subjecting children to a vastly more invasive array of biometrics modalities and the resulting risk of fraud and identity theft. By definition, each person’s biometric data is biologically unique. Once compromised, that person “has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions.”⁸⁰ These risks are especially salient for children, some of whom will be mere infants. Collecting biometrics from younger children inherently increases their lifetime risk of theft and fraud. In addition, children are increasingly targeted for identity theft because they tend to have both clean credit records and “minimal ability to protect [themselves] without assistance.”⁸¹

⁷⁵ Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO STATE L.J. 1105, 1134-35 (2013).

⁷⁶ *Proposed Rule* at 56344.

⁷⁷ *Id.* at 56342.

⁷⁸ 76 Cong. Ch. 439, 54 Stat. 670, 673-74 (June 28, 1940).

⁷⁹ USCIS Policy Manual, Vol. 7, Part A., Ch. 1, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-1>.

⁸⁰ *Rosenbach v. Six Flags Entm’t Corp.*, 129 N.E.3d 1197, 1206 (Ill. S. Ct. 2019) (quoting 740 Ill. Comp. Stat. Ann. 14/5).

⁸¹ 2018 Child Identity Fraud Study, Javelin Strategy & Rsch., <https://www.javelinstrategy.com/coverage-area/2018-child-identity-fraud-study>.

Moreover, the Alien Registration Act provides a useful object lesson in the problem of “function creep.” After the United States declared war following the attack on Pearl Harbor, the federal government improperly used registration data collected under the Act to identify and arrest thousands of foreign citizens.⁸² Here, the Proposed Rule’s lack of details regarding the collection and storage of biometrics, coupled with the compressed period for review and comment, heightens the risk that DHS’s proposed new authorities may “be abused—or, even more likely, expanded even further to include activities that would now be widely regarded as abusive but that will gradually come to be seen as the new normal.”⁸³

The presumption of good moral character for children under 14 years old is likewise supported by sound legal and policy considerations that DHS simply fails to address. The Proposed Rule treats the current presumption as an unearned privilege, stating that children henceforth will submit character evidence “like any other applicant.”⁸⁴ But this framing ignores the relevant background and the rationale for applying a presumption to young children. Congress and federal immigration authorities have long “recognize[d] that children deserve special treatment under immigration law” and therefore “often make special provisions for children and others who may have difficulty acting in their own best interests.”⁸⁵ In particular, federal immigration law and policy “treat[] children fourteen years of age and older differently from younger [children]” based, *inter alia*, “on an assumption that older children are better able to make important decisions.”⁸⁶ This is consistent with longstanding Supreme Court precedent noting that “during the formative years of childhood, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”⁸⁷ Indeed, “USCIS waives the oath [of allegiance] requirement for a child younger than 14 years of age,” having “determined that children under the age of 14 are generally unable to understand the meaning of the oath.”⁸⁸

As these authorities make clear, removing the presumption of good moral character risks penalizing children for conduct that may indicate nothing more than lack of maturity. And in the context of VAWA self-petitioners and T visa applicants, removing the presumption risks penalizing trafficked and abused children for acts that may have been influenced or compelled by their abusers. *See infra* Section IV.C. In addition, by removing any limiting time period, the Proposed Rule allows DHS to consider a child’s moral character essentially since inception.⁸⁹ The Proposed Rule appears to contemplate that a trafficked or abused 13-year old child who otherwise qualifies for the immigration status she requests should be denied that status based on her behavior when she was 9 years old or younger.

DHS has shown no compelling need to impose these burdens or for children to incur these risks. Indeed, DHS acknowledges that “the existing presumption is rebuttable. USCIS may

⁸² See Robert F. Whitney, *Only 2,971 Enemy Aliens are Held*, N.Y. TIMES, January 4, 1942, <https://timesmachine.nytimes.com/timesmachine/1942/01/04/85504277.html>.

⁸³ Grover J. Rees, *Slouching Toward Mordor*, THE FEDERALIST SOC’Y (Oct. 21, 2013).

⁸⁴ *Proposed Rule* at 56361.

⁸⁵ *Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1192 (S.D. Fla.), *aff’d*, 212 F.3d 1338 (11th Cir. 2000).

⁸⁶ *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656, 661 (C.D. Cal. 1985).

⁸⁷ *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

⁸⁸ USCIS Policy Manual, Vol. 12, Part J., Ch. 3, <https://www.uscis.gov/policy-manual/volume-12-part-j-chapter-3>.

⁸⁹ *See Proposed Rule* at 56360.

currently request evidence of good moral character for self-petitioning children under 14 years of age if USCIS has reason to believe the self-petitioning child lacks good moral character.”⁹⁰ DHS has made no showing that abolishing the presumption across the board—rather than seeking to rebut it in appropriate cases—is necessary to serve its legitimate objectives.

B. The Proposed Rule Will Intensify Children’s Trauma At the Border

The Proposed Rule would authorize DHS to collect DNA and other biometrics, without age restrictions, ostensibly “to identify fraudulent biological relationships claimed at the border and upon apprehension.”⁹¹ DHS claims these measures are warranted because the release of minors from detention facilities pursuant to the *Flores* Settlement Agreement “may encourage the proliferation of fraudulent family unit schemes wherein unrelated adults and children claim biological relationships in order to secure prompt release into the United States.”⁹²

This stated rationale is immediately suspect given DHS’s notorious policy of separating children from their parents at the border without implementing measures to reunite those separated families. A forthcoming report from the Justice Department’s Inspector General quotes the former deputy attorney general and an unnamed Border Patrol officer describing the resulting crisis as an intended and explicit “deterrent” to other immigrant families.⁹³ Compulsory DNA testing at the border would “provide[] one more tool that the administration can use to separate children from their families. Unless a child is accompanied by a biological parent or legal guardian—siblings, grandparents, aunts and uncles won’t do—they’ll be taken from their relatives and placed in custody.”⁹⁴ In other words, DNA testing will be purposefully used to separate children from caretakers, an inherently traumatic event with long-term developmental consequences for children.⁹⁵

DHS has shown no compelling need to impose these burdens or for children to incur these risks. As demonstrated repeatedly throughout the Proposed Rule, DHS is taking an existing option reserved for limited application where warranted and instead making it into the default. Field offices have long had the ability to suggest DNA testing to establish parent-child relationships “when initial and secondary forms of evidence have proven inconclusive.”⁹⁶ DHS has not shown that this

⁹⁰ *Id.*; see also 8 C.F.R. § 245.23(g)(4).

⁹¹ *Proposed Rule* at 56341.

⁹² *Id.*

⁹³ See Michael D. Shear, ‘We Need to Take Away Children,’ *No Matter How Young*, *Justice Dept. Officials Said*, N.Y. TIMES, Oct. 6, 2020, <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html?action=click&module=Top%20Stories&pgtype=Homepage>.

⁹⁴ Manuel Madrid, *DNA Testing at the Border Could Provide Cover for More Family Separations*, THE AM. PROSPECT, May 20, 2019, <https://prospect.org/power/dna-testing-border-provide-cover-family-separations>.

⁹⁵ See Laura C. N. Wood, *Impact of punitive immigration policies, parent-child separation and child detention on the mental health and development of children*, BMJ PAEDIATRICS OPEN, 2018;2:e000338, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6173255/>.

⁹⁶ 4 U.S. CITIZENSHIP & IMMIGR. SERVS., Adjudicator’s Field Manual 21.2 at 38, <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf#page=38>. See also, e.g., U.S. IMMIGR. & NATURALIZATION SERV., HQADN 70/11, GUIDANCE ON PARENTAGE TESTING FOR FAMILY-BASED IMMIGRANT VISA PETITIONS, at 2 (July 14, 2000), <https://www.aila.org/infonet/ins-on-parentage-testing>; U.S. CITIZENSHIP & IMMIGR. SERVS., HQORPM AD07-25, MEMO: GENETIC RELATIONSHIP TESTING; SUGGESTING DNA TESTS REVISIONS TO THE ADJUDICATORS FIELD MANUAL (AFM) CHAPTER 21 (AFM UPDATE AD07-25), at 2 (Mar. 19, 2008), <https://www.hsdl.org/?view&did=21363>; U.S. CITIZENSHIP & IMMIGR. SERVS., DNA POLICY AND PROCEDURE

voluntary testing regime is insufficient. Moreover, longstanding federal policy recognizes that DNA testing has limited utility for “prov[ing] the existence of a claimed genetic relationship” or exposing “fraudulent family unit schemes.”⁹⁷ DHS itself concedes that “no parentage testing, including DNA testing, is 100 percent conclusive.”⁹⁸ Under DHS policy, DNA testing can conclusively establish *only* that a parent-child relationship exists, and *only* if the results indicate at least a 99.5% statistical likelihood of parentage.⁹⁹ Conversely, a statistical likelihood below 99.5% “does NOT disprove the [parent-child] relationship” and “should not be treated as meaningful evidence in adjudicating the case.”¹⁰⁰ Accordingly, “DNA testing to verify family relationships may be resorted to only where serious doubts remain after all other types of proof have been examined, or, where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud.”¹⁰¹ A child traveling with her older sibling, or the grandmother who raised her, seems a poor proving ground for demonstrating fraud.

Until now, the federal government has generally adhered to these principles by, *inter alia*, advising field offices to “be extremely cautious when [even] **suggesting** DNA testing as a means of establishing a claimed parental relationship” because of “the expense, complexity and logistical problems and sensitivity inherent in [such] testing.”¹⁰² The Proposed Rule would arbitrarily sweep these concerns aside by allowing agents to **require** DNA testing at their whim. DHS has made no showing that compulsory DNA testing is necessary or proportionate to any legitimate objective.

C. Expanded Biometrics Collection May Compromise the Safety and Privacy of Crime Victims and Domestic Violence Survivors

The Proposed Rule would harm survivors of domestic violence, trafficking, and other crimes in three principal ways.

First, expanded biometrics collection would enable abusers to leverage the criminal justice system to control their victims. Survivors’ criminal history often arises as a direct result of their abuse. For example, sex traffickers, by definition, force their victims to engage in illegal prostitution. Indeed, in a 2016 survey, 90.8% of trafficking survivors reported being arrested and most of those arrests were prostitution-related.¹⁰³ Likewise, a common control tactic of domestic abusers is to

FOR INTERNATIONAL OPERATIONS, at 9 (Sept. 2011), https://www.eff.org/files/filenode/2012_uscis_rapid_dna_foia_records-highlighted-2of3_pp997-1970.pdf#page=9.

⁹⁷ See *Proposed Rule* at 56338, 56341.

⁹⁸ 4 U.S. CITIZENSHIP & IMMIGR. SERVS., Adjudicator’s Field Manual 21.2 at 39, <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf#page=39>.

⁹⁹ U.S. CITIZENSHIP & IMMIGR. SERVS., DNA POLICY AND PROCEDURE FOR INTERNATIONAL OPERATIONS, at 21 (Sept. 2011), https://www.eff.org/files/filenode/2012_uscis_rapid_dna_foia_records-highlighted-2of3_pp997-1970.pdf#page=21.

¹⁰⁰ *Id.* at 21-22.

¹⁰¹ UN High Commissioner for Refugees (UNHCR), *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, at ¶¶ 13, 16 (June 2008), <https://www.refworld.org/docid/48620c2d2.html>.

¹⁰² U.S. IMMIGR. & NATURALIZATION SERV., HQADN 70/11, GUIDANCE ON PARENTAGE TESTING FOR FAMILY-BASED IMMIGRANT VISA PETITIONS, at 2 (July 14, 2000) (emphasis added), <https://www.aila.org/infonet/ins-on-parentage-testing>.

¹⁰³ See NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING, at 3-4 (Aug. 2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf>.

falsely accuse their victims of domestic violence or other crimes.¹⁰⁴ These criminal complaints and charges heighten a survivor's vulnerability, tying them to the abusive scenario and limiting their options for escape. In the immigration context, the potential consequences of a criminal record are all the more dire.¹⁰⁵ Recognizing these dynamics, Congress has carved out various exemptions and waivers of inadmissibility for VAWA self-petitioners and T visa applicants.¹⁰⁶ However, for purposes of establishing good moral character, DHS places the burden on survivors to establish the connection between their past abuse and their criminal records.¹⁰⁷ Given the potential for information-sharing between law enforcement and immigration agencies, plus outdated court systems that may contain dismissed or expunged charges, expanded biometrics collection has the potential to disrupt an application for relief.

Abusers' well-established use of the criminal justice system as a means of control also undermines any rationale for the Proposed Rule's heightening of the Good Moral Character requirements. Survivors of trafficking who have been granted T nonimmigrant status are eligible to apply to adjust status to lawful permanent resident after 3 years. Congress expressly limited the requisite period for evaluating good moral character to that time period. This was done to ensure that T visa holders would not be prejudiced or retraumatized by repeatedly being called to account for criminal acts incident to their exploitation. The Proposed Rule does away with this sensible accommodation, which limits both retraumatization and costly and time-intensive readjudication of the same facts by DHS. Under the Proposed Rule, trafficking survivors will be forced to again justify any past criminal charges, regardless of their behavior since escaping their trafficking. Although the time lines are not quite as clear cut in the domestic violence context, the same basic principles apply. By removing the time limitation for Good Moral Character, the Proposed Rule creates additional burdens to both survivor applicants and USCIS adjudicators, without any appreciable benefit.

Second, collecting DNA samples from abuse and trafficking survivors could render them forever vulnerable to harmful connections with their abusers. Survivors often have children with their abusers. For example, "[v]ictims of sex trafficking frequently are forced into abusive intimate relations with their traffickers or pimps."¹⁰⁸ In both domestic violence and trafficking, children are often used as another tool of control and leverage. Under the Proposed Rule, a VAWA or T applicant will have to provide not only their own biometric data, but potentially the biometrics and DNA of their children as well. Collecting and storing those children's DNA profiles creates the risk that familial searches in the Combined DNA Index System (CODIS) could identify a survivor and her abuser as their child's first-degree relatives.¹⁰⁹ This will ensure that a trafficking or domestic

¹⁰⁴ See, e.g., Julie E. Dinnerstein, *Violence Against Women Act (VAWA) Self-Petitions*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 482 (Richard J. Link et al. eds., 2007).

¹⁰⁵ Cecelia M. Espenosa, *No Relief For The Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQUETTE L. REV. 163, 171 (1999).

¹⁰⁶ See, e.g., 8 U.S.C. § 1154(a)(1)(C), § 1182(a)(4)(E), § 1182(a)(9)(C)(iii), § 1182(d)(13), § 1182(h)(1)(C).

¹⁰⁷ See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., HQOPRD 70/8.1/8.2, MEMO: DETERMINATIONS OF GOOD MORAL CHARACTER IN VAWA-BASED SELF-PETITIONS, at 3-4 (Jan. 19, 2005), https://www.uscis.gov/sites/default/files/document/memos/gmc_011905.pdf.

¹⁰⁸ Julie E. Dinnerstein, *Immigration Options for Immigrant Victims of Domestic Violence*, 38 CLEARINGHOUSE REV. 427, 432 (2004).

¹⁰⁹ See, e.g., Sara Debus-Sherill and Michael B. Field, *Understanding Familial DNA Searching: Policies, Procedures, and Potential Impact*, ICF, (June 2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/251043.pdf>; S.P. Myers, et al.,

violence survivor may never be able to fully escape their violent past. It may provide ongoing linkages and destabilize family units.

Third, while intrusive biometrics collection inherently infringes on the right to privacy and bodily autonomy, *see* Section IV.A, *supra*, it poses special harms to recently traumatized survivors of trafficking and domestic abuse. Many survivors of domestic violence experience stalking and surveillance, as well as a destabilizing lack of agency from emotional and financial abuse. In the trafficking context, an individual's body is no longer under their control. To be required to provide the most personal data possible, to be kept in a large database with uncertain quality and confidentiality controls, may exact a psychological toll on these survivors. Beyond the psychological toll, there may be real safety concerns if their abuser is able to access this information. While the Proposed Rule notes that biometric requirements may be applied uniformly, the special situation of survivors demands a clearer framework. Because of the lack of necessary detail in the Proposed Rule, it remains unclear exactly how this expanded biometric collection will occur, causing increased anxiety for survivors and additional burdens for the organizations like CBJC that serve them.

D. Expanded Biometrics Collection May Compromise the Safety of Asylum Seekers

Biometrics collection from asylum seekers raises important concerns not addressed in the Proposed Rule. “[U]nder data-sharing agreements between the United States and other nations, refugees’ biometric data may end up in the hands of the same repressive government they fled. As a result, should they ever be deported or repatriated, they could face heightened risks from discrimination or even ethnic cleansing within their former home countries.”¹¹⁰ For example, “ICE and the FBI have a draft agreement allowing them to share information on deportees with the countries to which they are deported, and DHS has entered into agreements with foreign governments to provide such information on deportees upon repatriation. This kind of biometrics sharing could prove disastrous for repatriated refugees or immigrants from countries with a history of ethnic cleansing.”¹¹¹

Even where deportation does not occur, the refugees’ home governments “could use the information in a retaliatory manner to threaten or to persecute those friends and family members that remain in the country.”¹¹² The Proposed Rule’s collection of biometric data, if shared, could provide repressive home governments with the tools to connect familial networks, providing them with additional leverage against political dissidents or additional data to enforce ethnic animus. The collection of such biometric data may well be triggering to those who fled to the United States to escape intrusive monitoring and surveillance. The prospect of being treated like a criminal, of being

Searching for First-degree Familial Relationships in California’s Offender DNA Database: Validation of a Likelihood Ratio-based Approach, 5 FORENSIC SCI. INT’L: GENETICS 493 (2010); Erin E. Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010).

¹¹⁰ Jennifer Lynch, Immigration Policy Ctr. & Elec. Frontier Found., *From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities and Beyond*, at 3 (2012).

¹¹¹ *Id.* at 9.

¹¹² Glenna MacGregor, *Human Rights First Concerns about US-VISIT’s Implications on Asylum Seekers’ Confidentiality and Safety*, at 3, https://epic.org/privacy/us-visit/hrf_memo.pdf.

asked to provide your most intimate identifying information in order to apply for protection, takes on heightened significance for an individual who has been detained and tortured by their own government. “These concerns demand that policymakers take into account the unique circumstances of refugees and asylum seekers and take steps to ensure that their well-being is in fact furthered by the collection, storage, and utilization of their biometric information.”¹¹³

E. Increased Entanglement of Immigration and Criminal Justice Databases Will Have a Disparate Racial Impact

Certain biometric modalities, including DNA sampling and facial recognition technology, can produce a high rate of false positives that disproportionately burdens people of color.

As discussed above, DNA samples can be compromised or contaminated in various ways, leading to false positives and wrongful convictions. *See* Section III.B., *supra*. Because people of color are disproportionately subjected to immigration enforcement proceedings, and because their DNA profiles are overrepresented in CODIS, they face a heightened risk of false positives.¹¹⁴ “[T]he false-positive risk could result in even greater racial profiling by disproportionately shifting the burden of identification onto certain ethnicities” and effectively requiring “the defendant to show he is *not* who the system identifies him to be.”¹¹⁵

Likewise, facial recognition false positives are common and have a disproportionate impact on people—especially women—of color. Automated facial analysis algorithms are highly sensitive to pose, illumination, and expression.¹¹⁶ An MIT study evaluated three such commercial algorithms and found that all three consistently misclassified darker-skinned females at rates much higher than lighter-skinned males.¹¹⁷ “These issues can lead to a high rate of false positives—when, for example, the system falsely identifies someone as the perpetrator of a crime or as having overstayed their visa.”¹¹⁸

F. The Costs and Burdens Associated with the Proposed Rule May Deter Qualified Applicants

The Proposed Rule would impose direct financial costs on vulnerable populations by “expand[ing] the collection of the \$85 biometric services fee to include any individual appearing for biometrics collection in connection with a benefit request unless the individual is statutorily exempt [or] has received a fee waiver. DHS estimates that there will be 1.63 million new biometrics fee

¹¹³ Achraf Farraj, *Refugees and the Biometric Future: The Impact of Biometrics on Refugees and Asylum Seekers*, 42 COLUM. HUMAN RTS. L. REV. 891, 891 (2011).

¹¹⁴ *See* Erin E. Murphy, The Dark Side of DNA Databases, THE ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/science/archive/2015/10/the-dark-side-of-dna-databases/408709>; Jason Silverstein, The Dark Side of DNA Evidence, THE NATION (March 27, 2013), <https://www.thenation.com/article/dark-side-dna-evidence>.

¹¹⁵ Jennifer Lynch, Immigration Policy Ctr. & Elec. Frontier Found., *From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities and Beyond*, at 3 (2012).

¹¹⁶ *See* Jay Buolamwini, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification* 81 PROC. MACH. LEARNING RSRCH. 1, 11 (2018).

¹¹⁷ *See id.* at 12.

¹¹⁸ Jennifer Lynch, Immigration Policy Ctr. & Elec. Frontier Found., *From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities and Beyond*, at 11 (2012).

payments annually.”¹¹⁹ Additionally, applicants would have to bear the significant costs associated with the now-default DNA testing regime under the Proposed Rule.

These financial costs would unduly burden vulnerable populations. For example, the per-person biometrics fee could quickly become unsustainable for single mother families with multiple children, a common scenario in many VAWA and trafficking cases. Tellingly, “[l]ack of money is a primary reason why immigrant domestic violence victims cannot escape.”¹²⁰ The Proposed Rule would create further obstacles on the road to safety. Asylum seekers would also be disproportionately burdened. Many fully exhaust their resources to flee persecution. Indeed, DHS has found that asylum seekers may spend up to \$9,200 just to reach the U.S. border.¹²¹ Seeking humanitarian protection, they would now have to pay a \$50 fee for asylum applications under a newly published Rule recently enjoined, as well as the proposed \$85 biometrics fee, even as DHS, in separate Rules, significantly curtails their ability to apply for an Employment Authorization Document and raises its costs. For those granted asylum who then seek to reunite with their families, DHS would further impose exorbitant, and unnecessary, DNA testing costs, estimated at \$440 for the first test, and an additional \$220 for each test beyond that for other family members.¹²² Staggering under the cumulative weight of such fees, it is difficult to see how any but the wealthiest individuals will be able to successfully seek humanitarian protection, much less reunite with loved ones under the current proposal.

Biometrics collection also burdens privacy and autonomy in ways that, though less quantifiable, loom larger than the direct financial cost. However well-intentioned, biometrics “is the technology par excellence for new forms of surveillance that not only impinge on rights, privacy, expression, and well-being, but also create new government monoliths of identity administration laden, of course, with the potential for corruption and the abuse of power.”¹²³ Among the numerous burdens it imposes, biometrics collection:

is “intrusive” on the body, and psyche of ... recipients; it creates an ambiance in which everyone is potentially a criminal or suspect (thus, creating new forms of collective moral panic, fear, and paranoia); it impinges on dignity and often ... [is] the grounds for humiliation and embarrassment; it also create various “states of exception” where biometrics can be instituted as a practice that does not require the consent of those it targets.¹²⁴

DHS acknowledges “that [t]here could be some unquantified impacts related to privacy concerns for risks associated with the collection and retention of biometric information,”¹²⁵ but gives

¹¹⁹ *Proposed Rule* at 56343.

¹²⁰ Julie E. Dinnerstein, *Immigration Options for Immigrant Victims of Domestic Violence*, 38 CLEARINGHOUSE REV. 427, 427 (2004).

¹²¹ Dept. of Homeland Security, *Efforts by DHS to Estimate Southwest Border Security Between Points of Entry*, at 13-14 (Sept. 2017), https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf.

¹²² *Proposed Rule* at 56382

¹²³ S. Romi Mukherjee, *Ethical & Societal Challenges of the Information Society*, at 12, Rsch. Rep. to UNESCO’s World Comm’n on the Ethics of Sci. Knowledge & Tech. (May 2013), <http://www.iseforum.org/Untitled%20attachment%2000334.pdf>.

¹²⁴ *Id.*

¹²⁵ *Proposed Rule* at 56343.

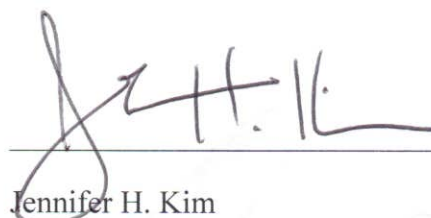
no assurance that it has appropriately evaluated these risks or weighed them against the purported benefits of this drastic change in biometrics collection.

CONCLUSION

The Proposed Rule represents an unauthorized, unwarranted expansion of surveillance of all immigrants and even U.S. citizens submitting immigration applications, further intensifying the overt criminalization of the immigration sphere. The Proposed Rule is an attempt by DHS to enact a rule that far outstrips its statutory authority and that, if promulgated, will affect millions of individuals. Yet, DHS has not offered more than cursory and at times misleading justifications for seeking to exceed its statutory authority. The bulk of the Proposed Rule is focused on potential costs and is remarkably thin on required details regarding implementation or DHS's rationale for such a marked departure from past practices. The 30-day deadline for Public Comment, on a Proposed Rule with such sweeping impact and privacy concerns, is also an affront and fails to provide the public with a meaningful opportunity to respond to the Proposed Rules' drastic and potentially harmful surveillance. It is indisputable that the Proposed Rule's impact upon vulnerable populations, including children, asylum seekers, and victims of human trafficking, crime, or domestic violence, are grave and multifaceted.

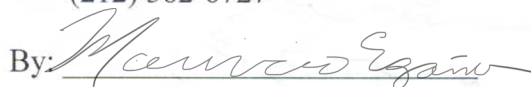
For all the reasons set out above, the City Bar Justice Center urges the Department not to put into effect the drastic changes to immigration law and procedure set forth in the Proposed Rule.

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