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**RE: RIN 1615–AC14; USCIS Docket No. USCIS-2019–0007, CIS No. 2644–19; Public Comment
Opposing Collection and Use of Biometrics by U.S. Citizenship and Immigration Services**

October 13, 2020

To Whom It May Concern,

The Immigrant Defense Project (IDP) submits this comment on the proposed rule issued by the U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS), Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, USCIS Docket No. USCIS-2019–0007, RIN 1615–AC14, 85 Fed. Reg. 56,338 (Sept. 11, 2020) (The Proposed Rule). IDP strongly opposes the proposed rule and urges that it be withdrawn.

IDP is a New York-based non-profit that conducts litigation and provides training, education, and advocacy in support of advancing the rights of immigrants who are subject to the criminal legal system. IDP’s mission is to secure fairness and justice for immigrants in the United States. The organization provides technical assistance to hundreds of immigration attorneys, DOJ-accredited representatives, and criminal and family defense attorneys on issues related to immigration, criminal, and family law, particularly the immigration consequences of law enforcement interactions and criminal court adjudications.

IDP opposes the proposed rule in its entirety. However, because the proposed rule covers so many topics, we are not able to comment on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; it simply means we did not have the resources or the time to respond to every proposed change, due to the 30-day comment period provided by the Department.

As we explain below in further detail, the Department’s proposal is arbitrary, capricious, contrary to the Constitution, in excess of the agency’s statutory authority, irresponsible, and dangerous for all persons in the United States. The proposal fails to justify its intent to violate the privacy rights of all persons living in the United States, including how it can compel individuals not suspected of a crime to give DNA and other sensitive biometrics data without consent. Nor does it show that the current procedures for collecting and sharing information—which do not require the collection of sensitive personal information—are inadequate to carry out the goals of USCIS. The proposal also fails to explain what procedures will be instituted to ensure the confidentiality and accuracy of information collected by USCIS and to prevent the types of racial and religious discrimination that have already been identified by federal courts and members of Congress in previous “vetting programs.”

IDP is also concerned about the failure of DHS to justify sharing such information with other components of DHS, including Immigration and Customs Enforcement (ICE). The Department fails to explain why USCIS should share such information with ICE, considering the distinct purpose and mission of USCIS and the lack of legal authority allowing USCIS to be involved in the enforcement of immigration laws. Most importantly, the proposal fails to consider the real potential for physical harm that will come to immigrants and their U.S.-citizen family members when USCIS shares some of their most private information with ICE and other components of DHS. This expanded and vague definition of “threat,” coupled with the proposed attacks on the privacy of personal and biological information, risks putting in jeopardy U.S. democracy and the integrity of the Constitution.

I. The Department deliberately ignores the history of the use of DNA and other genetic markers as tools for discriminatory policing and denial of Constitutional rights based on race

Currently, we are facing the most prolonged “state of emergency,” where DHS is continually expanding the categories of migrants and immigrants that present a purported threat to public safety and national security.¹ This is the problematic logic that DHS uses to justify its dangerous expansion of the definition of “biometrics” as “the measurable biological (anatomical and physiological) or behavioral characteristics used for identification of an individual” and allowing a wide array of “authorized biometric modalities” that DHS can collect in its own discretion.² While IDP is opposed to the expanded collection of biometrics in its entirety, our comment will focus on the particular concerns related to the proposed DHS inclusion of DNA test results and the requirement for noncitizen applicants, as well as their U.S. citizens and lawful permanent residents who submit family-based visa petitions, to submit biometrics collection, including DNA testing. By requiring such biometrics to be collected to verify family relationships and for criminal background checks, DHS proposes an unprecedented and unwarranted expansion of data collection by the Department and the U.S. government overall.

¹ ICE claimed in a 2018 fiscal report to Congress that “ensur[ing] the integrity of individual identities throughout the immigration lifecycle” was necessary to “Prevent Terrorism and Enhance Security” and to “Counter Terrorism and Protect the Borders.” U.S. Immigration and Customs Enforcement, *Comprehensive Plan for Immigration Data Improvement*, 8 (July 26, 2018), <https://bit.ly/3iSae1Q>.

² 85 Fed. Reg. at 56355.

Reliance on genetic analysis to categorize people has had a checkered history; as modern science evolved since the Enlightenment, those in power have repeatedly deployed notions of biological difference as a “neutral” scientific measure to justify conquest, social control, and exploitation based on notions of “inherent superiority.”³ Because DNA provides “a massive amount of unique, private information about a person that goes beyond identification of that person,” it raises heightened privacy concerns.⁴ At the same time, DNA analysis, despite its ability to be very precise, is not necessarily always accurate or reliable.⁵ The massive expansion of collection and retention of the DNA of immigrants and U.S. citizens with familial relationships, in addition to DHS collection of DNA of all detained immigrants, creates a repository of very detailed information that could be used to dangerously fuel racism and division. For example, this could enable schemes to target groups of people by which the government classifies as “threats” based on purported behavioral or biological markers. Indeed, courts in Kuwait, Kenya, and the United Kingdom have recently struck down DNA collection efforts.⁶ The European Court of Human Rights reached a unanimous judgment in a case against the U.K. on DNA collection, holding that “the retention [of DNA, biological samples and fingerprints] constitutes a disproportionate interference with the applicants’ right to respect for private life and cannot be regarded as necessary in a democratic society.”⁷

Over the past several decades, the U.S. immigration system has become increasingly draconian, implementing laws and policies that are continually more restrictive and punitive. Since its creation in 2003, DHS has spent an estimated \$381 billion on immigration policing—institutionalizing and scaling up an extremely costly apparatus to exclude, surveil, police, imprison, and deport.⁸ The logic of DHS immigration policing, and this proposed scheme of comprehensive and continual surveillance, relies on the same misguided notion that immigrants present a potential and perpetual threat. In proposing this rule, DHS deliberately masks the long and sordid history of the U.S. government’s creation of internal enemies of the state to justify extreme measures of social control. This justification has been used to contain,

³ Adam Shapiro, *The Dangerous Resurgence in Race Science*, *American Scientist* (Jan. 29, 2020), <https://www.americanscientist.org/blog/macroscope/the-dangerous-resurgence-in-race-science>; Alok Jha, *Superior: The Return of Race Science by Angela Saini – review*, *The Guardian* (May 27, 2019), <https://www.theguardian.com/books/2019/may/27/superior-the-return-of-race-science-by-angela-saini-book-review>.

⁴ *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).

⁵ Electronic Frontier Foundation, DNA Collection, <https://www EFF.org/cases/dna-collection#:~:text=EFF%20has%20long%20been%20concerned,and%20sharing%20of%20genetic%20data.&text=DNA%20analysis%20is%20also%20not,or%20she%20didn't%20commit> (last visited Oct. 13, 2020).; Jim Mustian “New Orleans filmmaker cleared in cold-case murder; false positive highlights limitations of familial DNA searching” *The Times-Picayune*, November 21, 2019, available at: https://www.nola.com/article_d58a3d17-c89b-543f-8365-a2619719f6f0.html

⁶ In 2017, a court in Kuwait found that the collection of DNA samples of citizens and visitors by the government violated constitutional provisions on personal liberty and privacy, see Human Rights Watch, *Kuwait court strikes down draconian DNA law*, (Oct. 2017), available at <https://www.hrw.org/news/2017/10/17/kuwait-court-strikes-down-draconian-dna-law>.; High Court in Kenya struck down the collection of DNA in the context of a biometric digital ID system earlier this year, High Court of Kenya at Nairobi, *Nubian Rights Forum & 2 others v Attorney General & 6 others; child Welfare Society & 9 others (interested parties)* [2020] eKLR, (Jan 2020) available at <http://kenyalaw.org/caselaw/cases/view/189189/>

⁷ *Marper v The United Kingdom*, Eur Ct H. R., (2008), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-90051%22%7D>.

⁸ American Immigration Council, *Fact Sheet: The Cost of Immigration Enforcement and Border Security* (July 7, 2020), available at <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security>.

exclude and eliminate categories of people—including the removal and genocide of Native Americans, exclusion of Chinese from 1882 to 1943, the mass forced removal of people with Mexican ancestry during the Great Depression, the deportation of labor organizers and Leftists during the Red Scare, the internment of people of Japanese descent during World War II, and the exclusion of Haitian Refugees, to name just some examples.⁹

A more recent example of this logic is the Special Registration Program, initiated as part of the War on Terror 2002. The program singled out men aged 16 to 64 from 23 majority-Muslim countries or from Eritrea or North Korea, for surveillance, detention, and deportation because they were named generally as a “risk to national security.” “More than 200,000 Arab and Muslim men underwent this ‘special registration,’ all of whom were cleared of terrorism. Nevertheless, 13,424 of them who were present in the US were placed in removal proceedings, and faced deportation. As of 2004, an estimated 100,000 or more Arabs and Muslims in the United States had personally experienced one of the various post-9/11 state security measures. These included arbitrary arrests, secret and indefinite detentions, prolonged detention as ‘material witnesses,’ closed hearings, the production of secret evidence, government eavesdropping on attorney-client conversations; FBI home and work visits; wiretapping; seizures of property, removals for technical visa violations, and mandatory special registration.”¹⁰

Similarly, under the Obama Administration, a broad category of immigrants were deemed “a risk to public safety,” and identified as a priority for removal.¹¹ In order to fill deportation quotas, the term “criminal aliens”—an unfixed term with no legal definition—was used to label as perpetual threats all immigrant with criminal convictions, those who were arrested but not prosecuted, undocumented people with traffic offenses, and people prosecuted for civil immigration violations and deem them perpetual threats to society.¹² This prioritization scheme furthered the unfounded political assertion that the government needs immigration policing and deportation in order to protect public safety and national security—masking how mass deportation serves to enhance labor, socioeconomic, political, and demographic control.

The highly restrictive and discriminatory immigration policies under the current administration highlight the risks of expanding the tools by which DHS can make broad sweeping determinations of

⁹ See Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, MA: Harvard University Press, 2007).

¹⁰ Arun Kundani, *The Muslims Are Coming: Islamophobia, Extremism, and the Domestic War on Terror*, London/New York: Verso, 2014: 64.

¹¹ Department of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Jeh Johnson, Secretary (Nov. 20, 2014), available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion%281%29.pdf.

¹² Spencer S. Hsu and Andrew Becker, “ICE Officials Set Quotas to Deport More Illegal Immigrants,” *Washington Post*, 27 March 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html>. When Secure Communities was initially launched in 2008 the top priority included national security offenses and a short list of violent and drug felony offenses. Secure Communities Standard Operating Procedures issued in 2009 identified three levels of priorities based on a set of NCIC offense categories, https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf. The Morton memo in 2011 vastly expanded Level 1 priority offenses by including “aggravated felonies,” a federal immigration category that includes more than fifty classes of offenses, some of which are neither “aggravated” nor a “felony.” Undocumented immigrants who could be deported even without a conviction were classified as criminal aliens for traffic violations or immigration violations.

“dangerousness.”¹³ By making invasive and unnecessary biometrics collection the norm, we face the likelihood that more people will be categorized as a threat, leading to an increase in the erosion of rights and privacy. IDP has serious concerns that DHS and its components will dangerously be able to weaponize information gathered through technologies that they hold out as being neutral, masking the inherent biases and flaws driving DHS policies to advance an ever-hardening regime of exclusion and criminalization.¹⁴

II. In attempting to institute a larger “vetting” program, the Department fails to consider how past “vetting” attempts have been rejected as threatening Constitutional rights and discriminating based on race and religion

In addition to using DNA—a tool that has been historically being used as foundation to prop up racist justifications for colonialism, conquest, and enslavement¹⁵—the Department also proposes to subject all noncitizens to “a program of continuous immigration vetting,” in order to “ensure they continue to present no risk of causing harm subsequent to their entry.”¹⁶ In doing so, the Department proposes to recycle a practice that already has been opposed for great risk of racial profiling. Indeed, this is yet another program proposed by this administration to surveil and discriminate against immigrants of color and their U.S.-citizen family members on the false and harmful basis that immigrants are threats to national security and prone to criminality.¹⁷

The proposed rule justifies this new collection of data as needed to aid in the “identity management in the immigration lifecycle.” However, the Department has historical amnesia and neglects to consider how this goal has been used to justify other programs considering large groups of noncitizens to be an unjustified threat to national security. In 2018, ICE made this exact claim to Congress, stating that the goal to “[e]nsure the integrity of individual identities throughout the immigration lifecycle,” was necessary to support the DHS strategic goal of “Prevent[ing] Terrorism and Enhance Security” and the ICE goal to “Counter Terrorism and Protect the Borders.”¹⁸ This goal echoes the unjustified calls for “vetting” of immigrants promoted in multiple presidential proclamations and executive orders issued

¹³ See, e.g., *Saget v. Trump*, 375 F. Supp. 3d 280, 369 (E.D.N.Y. 2019) (“[T]hese communications also reveal the intent to formulate a general policy of terminating TPS for predominantly non-white foreign countries in order to decrease the presence of non-white immigrants in the United States.”)

¹⁴ Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code*, Wiley: 2019.

¹⁵ Kim TallBear, *Native American DNA: Tribal Belonging and the False Promise of Genetic Science*, Minnesota Press: 2013; Angela Saini, *Superior: The Return of Race Science*, Beacon Press: 2019.

¹⁶ 85 Fed. Reg. 56340.

¹⁷ See George Joseph, *Extreme Digital Vetting of Visitors to the U.S. Moves Forward Under a New Name*, ProPublica (Nov. 22, 2017), available at <https://www.propublica.org/article/extreme-digital-vetting-of-visitors-to-the-u-s-moves-forward-under-a-new-name> (“ICE officials subsequently changed the [“extreme vetting” of Muslims] program’s name to ‘Visa Lifecycle Vetting.’ But, according to the ICE presentation, the goal of the initiative — enhanced monitoring of visa holders using social media — remains the same.”).

¹⁸ See U.S. Immigration and Customs Enforcement, *Comprehensive Plan for Immigration Data Improvement: Fiscal Year 2017 Report to Congress*, at 8, July 26, 2019, <https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Comprehensive%20Plan%20for%20Immigration%20Data%20Improvement.pdf>).

under this Administration,¹⁹ which courts have viewed as discriminatory on nationality and religious grounds.²⁰

DHS also prior proposed “vetting” programs related to have been resoundingly rejected by Congressional members for raising “serious constitutional concerns” and posing a danger of “collecting data from others living in the United States, such as family members and associates—including U.S. citizens.”²¹ In light of these well-publicized criticisms, DHS provides no explanation for why it is necessary to continually subject people to continued surveillance and investigation without any justification other than the generalized declarations that they are “threats,” simply for being not U.S. citizens. Furthermore, as we explain below, the Department also fails to explain what protections the program would put in place to avoid infringing on the constitutional rights of U.S. citizens and their noncitizen family members.²²

III. DHS already has a pervasive, racist surveillance scheme based on ever expanding notion of “threats to public safety,” which currently harms U.S. citizens and noncitizens alike

As part of its stated mission to enforce immigration laws, ICE currently uses the misguided perspective that all noncitizens (and those associated with noncitizens) are possible criminals to justify using aggressive tactics, including armed force, against people whom they encounter.²³ Since 2013, IDP has documented hundreds of instances of physical and emotional violence perpetrated by ICE during these arrests.²⁴ We include these representative examples of violence to demonstrate the risk of harm to all individuals who will become subject to ICE surveillance under this proposed rule:

¹⁹ See, e.g., Executive Order No. 13780, *Protecting the Nation From Foreign Terrorist Entry Into the United States* 82 Fed. Reg. 13209, 13218 (March 6, 2017); Executive Order (E.O.) 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (January 27, 2017); “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/> (last visited Oct. 13, 2020); “Proclamation on Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry” (January 31, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-improving-enhanced-vetting-capabilities-processes-detecting-attempted-entry/> (last visited Oct. 13, 2020).

²⁰ *Hawaii v. Trump*, 859 F.3d 741, 774 (9th Cir.), *vacated and remanded on other grounds*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017) (finding “the Order does not offer a sufficient justification to suspend the entry of more than 180 million people on the basis of nationality” and explaining that “[n]ational security is not a ‘talismanic incantation’ that, once invoked, can support any and all exercise of executive power under § 1182(f)”; *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *6 (W.D. Wash. June 21, 2017) (by implementing extreme vetting programs, “Defendants are not pursuing a course of neutrality with regard to different religious faiths”) (internal quotation marks omitted).

²¹ *Congressional Black Caucus Calls for DHS to Suspend Extreme Vetting Initiative 2* (March 8, 2018), https://www.brennancenter.org/sites/default/files/analysis/CBC%20DHS%20Letter%20re%20Extreme%20Vetting_1.pdf.

²² In fact, the proposal mentions the Constitution only once in the 85 pages of this proposal, to explain that it would not infringe on “Constitutionally Protected Property Rights,” a cursory statement that is not founded and is arguably inaccurate considering the breadth of this proposed rule. 85 Fed. Reg. 56413.

²³ See Immigrant Defense Project and Center for Constitutional Rights, *Defend Against ICE Raids and Community Arrests*, updated July 2019, <https://www.immigrantdefenseproject.org/raids-toolkit/> (last visited Oct. 13, 2020).

²⁴ See Immigrant Defense Project and Center for Constitutional Rights, *ICEWatch*, <https://raidsmap.immdefense.org/> (last visited Oct. 13, 2020).

- **New York, NY: June 4, 2020:** A little after 7:00pm, ICE agents detained JC, a US citizen, as he was walking in a George Floyd/Black Lives Matter protest on the Upper West Side. JC was wearing a PPE mask because of the COVID-19 pandemic and had walked a few blocks with the protesters when four men jumped out of a black minivan, three of them pulled out their guns, tackled him to the ground on the pavement, and handcuffed him. The agents' force caused JC to hit his head and knee on the pavement. None of them were wearing masks or PPE despite the COVID-19 pandemic. The agents held JC to the ground in handcuffs for a few minutes, during which they reached into his pockets and pulled out his wallet, phone, and a handheld infrared thermometer, without his consent. After moving JC to an unmarked van for about more 10 minutes, they released him without providing any medical assistance.²⁵
- **Brooklyn, NY, February 7, 2020:** NC was driving a car in Sunset Park, Brooklyn. When he was stopped at a red light, plain-clothes ICE agents came up to the window of his car with their guns drawn. The agents said they were the narcotics police and asked to check his car. NC told them they could check the car. They searched the car and then asked NC for his ID. After NC showed them his ID, the agents revealed that they were ICE and arrested him.
- **Brooklyn, NY, February 6, 2020:** ICE agents in plain clothes rushed up to GAH on the street as he was leaving for work. The agents grabbed GAH and shot him repeatedly with a taser. During the incident, GAH's family came outside, including ED, GAH's girlfriend's son. One of the ICE agents saw the family, pulled out his gun, and pointed it at ED, even though no one in the family was armed. ED put up his hand to protect his face and the ICE agent fired his weapon, shooting ED in the face and hand. ED required immediate hospitalization for these injuries.²⁶
- **Brooklyn, NY, November 17, 2019:** JR was stopped by an ICE agent while leaving an appointment with his personal injury attorney. A car then pulled over beside JR, blocking him in. Several ICE agents got out and told him to get out of his vehicle. The officers pointed a gun to his back while they arrested him.²⁷
- **New York, NY, April 11, 2019:** A pedestrian witnessed plain-clothed ICE officers pull over and approach a nearby car on both sides. The officers forcibly pulled a person out of the back seat of the car. At least 3-4 agents assaulted the person when he was on the ground, by punching and kicking him. By the end of the incident, there were about 5-6 agents involved in the arrest. They handcuffed the person and put him in the back of one of the four vehicles involved in the incident.²⁸

²⁵ For more information, see Jasmine Aguilera, *ICE Agents Detain a Police Brutality Protester, Reportedly a U.S. Citizen and Military Vet, in New York City*, Time (June 6, 2020) <https://time.com/5849517/protester-new-york-city-protests-immigration-ice/>.

²⁶ For more information, see Teo Armus, *ICE officers shot a man in the face as he tried to intervene in an arrest*, The Washington Post (Feb. 7, 2020) <https://www.washingtonpost.com/nation/2020/02/07/ice-shooting-brooklyn/>.

²⁷ Immigrant Defense Project and Center for Constitutional Rights, *ICEWatch*, Raids Map Story 1316, available at <https://raidsmap.immdefense.org/> (last visited Oct. 13, 2020).

²⁸ Immigrant Defense Project and Center for Constitutional Rights, *ICEWatch*, Raids Map Story 1149, available at <https://raidsmap.immdefense.org/> (last visited Oct. 13, 2020).

- **Brooklyn, NY September 21, 2017:** MK and his visibly pregnant girlfriend were walking down Jay Street in Brooklyn towards a subway entrance. As they crossed Livingston St., right in front of Brooklyn Housing Court, two plain-clothes ICE agents dressed in jeans and sweaters came towards them and tackled MK. One agent grabbed MK’s arm and threw him to the ground and got on top of him. MK’s girlfriend kept asking what was going on, and telling them that she was pregnant, but the agents did not explain themselves. She grabbed one of the agents and he tossed her to the ground. She fell on her knees and her knees started to bleed. As she was sobbing, one agent took MK into an unmarked car, while the other told MK’s girlfriend that they had an immigration warrant, before both agents drove away.²⁹
- **Suffolk County, NY, February 23, 2017:** Seven plain-clothes ICE agents stopped JAQ in a taxi in which he was riding in Bay Shore, Long Island. The agents approached the car with guns already drawn, and told JAQ to get out of the car. One agent approached the driver side and told the taxi driver not to worry, but did not identify himself or show any identification documents. Two other agents approached the passenger side and opened the back door. They pulled JAQ out of the backseat of the taxi and shoved him against the back of the car while handcuffing and searching him. When they took JAQ away, they left the taxi driver with all of JAQ’s belongings and with no explanation of who they were.³⁰
- **Brooklyn, NY, February 8, 2017:** Eight ICE agents banged on the door to ALA’s apartment at 5am, yelling “Police.” ALA’s girlfriend asked the officers through a closed door why they were there and told them they couldn’t enter without a warrant. The ICE officers responded to “either open the door or the door is going to come off the hinges.” ALA’s girlfriend opened the door and the officers barged in so quickly that she didn’t have time to turn on the lights. The officers ran in and held their guns up to ALA’s girlfriend and ALA, who was still in bed. They arrested ALA while he was wearing only his underwear. When ALA’s girlfriend tried to give ALA clothes, the officers continued to point their guns at her, so she had to give the clothes to the officers. The officers refused to identify themselves and asked ALA’s girlfriend for her name and ID. When ALA’s girlfriend asked if they were taking ALA to the local NYPD precinct, they said they were taking him “somewhere else.” ALA’s girlfriend later learned from ALA that the officers were ICE.³¹

As these stories illustrate, ICE agents have a pattern and practice of using threats and violence against noncitizens and their loved ones based on the justification that such individuals are “a significant threat to national security and public safety.”³² Using this same justification to propose expanding the number of noncitizens and citizens who will be included in DHS’s databases—“to identify potential threats to national security, border security, homeland security, and public safety”³³—the Department will likely place more immigrants and their loved ones, including U.S. citizens, at risk of the above violence

²⁹ Immigrant Defense Project and Center for Constitutional Rights, *ICEwatch: ICE Raids Tactics Map*, 16 (July 2018), available at <https://raidsmap.immdefense.org/>.

³⁰ *Id.* at 19.

³¹ *Id.* at 16.

³² *Id.* at 2.

³³ 85 Fed. Reg. 56348.

demonstrated by ICE. As we explain below, the proposal does not address what limits would be placed on ICE's access to such information submitted by U.S. citizens and noncitizens alike or the risk for similar physical and emotional harm that will be caused by this data collection, and so this proposal is arbitrary and dangerously capricious.

IV. The Department has not considered the grave risks to privacy rights as well as the constitutional rights by requiring widespread DNA and other biometrics collection

A. DHS fails to justify collecting DNA from the proposed individuals and has not explained how it will protect the privacy of such information after collected

DHS already collects vast amounts of personal, biographic, and biometric data on millions of U.S. citizens and noncitizens. DHS manages over 10 billion biographic records and adds 10-15 million more each week.³⁴ Now DHS proposes that applicants seeking an immigration benefit in the United States, their petitioners, and sponsors must allow the government to provide some of the most personal data, including DNA, iris scans, and palm prints. Specifically, DNA provides “a massive amount of unique, private information about a person that goes beyond identification of that person.”³⁵ A DNA sample “contains [a person’s] entire genetic code—information that has the capacity to reveal the individual’s race, biological sex, ethnic background, familial relationships, behavioral characteristics, health status, genetic diseases, predisposition to certain traits, and even the propensity to engage in violent or criminal behavior.”³⁶ Despite this, the proposed rule massively expands DNA collection and retention for millions more individuals without evidence that the program will meet any of the goals of the proposed rule, much less determine whether any one person “poses a risk to national security or public safety.” The proposal also does not justify the need to “flip the current construct from one where biometrics may be collected based on past practices, regulations, or the form instructions for a particular benefit, to a system under which biometrics are required for any immigration benefit request unless DHS determines that biometrics are unnecessary,”³⁷ in light of such harm to the privacy rights of noncitizens and their U.S.-citizen family members.

The Department fails in its entirety to justify such harm to the right of privacy for individuals connected to the adjudication of immigration benefits, particularly given the high value that the Constitution places on privacy of the people, see section III.B below. The proposed rule flags this grave risk, without any discussion, explaining, “There could be some unquantified impacts related to privacy concerns for risks associated with the collection and retention of biometric information, as discussed in DHS’s Privacy Act compliance documentation” and that the changes “would expand the population that could have privacy concerns.”³⁸ Nor does the proposal mention whether private contractors would be involved in collecting and storing such extremely private information and how DHS would ensure that any involved private contractors would protect the privacy of such information. IDP is alarmed that the

³⁴ DHS Immigration Data Integration Initiative, *Federal Identify Forum and Homeland Security Conference*, DHS (Sept. 14, 2017), available at https://www.eff.org/files/2018/06/06/14sep_1000_01_panel-dhs_immigration.pdf.

³⁵ *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).

³⁶ *People v. Buza*, 4 Cal. 5th 658, 720 (2018) (Cuéllar, J., dissenting) (citations omitted).

³⁷ 85 Fed. Reg. 56350-51.

³⁸ 85 Fed. Reg. 56343.

Department, in the name of protecting the safety and security of those living in the United States, would propose risking the personal information of millions of individuals without putting any effort into protecting those individuals' same interest in their privacy.

DHS has a dismal track record in regards to providing clear and accountable information on its record systems and ensuring that Congress and the public have adequate oversight of how information is collected, stored, accessed, and protected. IDP also is concerned about DHS' failure to state how it will collect and manage this data in the proposed rule, as we have long been concerned about this dragnet to collect massive amounts of personal information without clear guidance on how it will be used, stored, and accessed. Finally, the proposal also fails to consider how this data collection, like previous "vetting" programs, risks harming the constitutional rights of U.S. citizens and their loved ones, including the Fourth Amendment right against unreasonable searches and the First Amendment³⁹ right to association. DHS does not address these concerns raised in response to previous vetting proposals, nor does the Department's proposal explain what protections the program would put in place to avoid infringing on the constitutional rights of U.S. citizens and their noncitizen family members.⁴⁰ For these reasons, we oppose this rule in its entirety as irresponsible, unnecessary, arbitrary, and capricious.

B. The Department fails to consider that its proposed collection of DNA violates the Fourth Amendment

The proposed rule is arbitrary and capricious because it violates the Fourth Amendment privacy protections of all persons in the United States. Collection of DNA is a search under the fourth amendment.⁴¹ "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence."⁴² The Supreme Court "has insisted on some purpose other than 'to detect evidence of ordinary criminal wrongdoing' to justify these searches in the absence of individualized suspicion," when considering the constitutionality of "programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding" people.⁴³

The proposed rule further erodes civil liberties protected by the Supreme Court in *King* by shifting from DNA collection for arrest or conviction of a criminal offense to DNA collection based on an

³⁹ *Congressional Black Caucus Calls for DHS to Suspend Extreme Vetting Initiative 2* (March 8, 2018), https://www.brennancenter.org/sites/default/files/analysis/CBC%20DHS%20Letter%20re%20Extreme%20Vetting_1.pdf.

⁴⁰ In fact, the proposal mentions the Constitution only once in the 85 pages of this proposal, to explain that it would not infringe on "Constitutionally Protected Property Rights," a cursory statement that is not founded and is arguably inaccurate considering the breadth of this proposed rule. 85 Fed. Reg. 56413.

⁴¹ *Maryland v. King*, 569 U.S. 435, 446 (2013) ("It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any intrusion into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny.") (internal quotations and citations omitted).

⁴² *Id.* at 466 (Scalia, J., dissenting). See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The Fourth Amendment functions . . . prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion.").

⁴³ *Id.* at 463 (citing *Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000)).

individual's connection to an application for immigration benefits. In *King*, the Supreme Court held that a DNA swab did not violate an arrestee's expectation of privacy "[i]n light of the context of a valid arrest supported by probable cause."⁴⁴ However, for immigrants applying for a benefit from USCIS (and their U.S.-citizen family members or employers) there is neither a valid arrest nor probable cause of the individual having committed a crime — because filing a petition for immigration benefits is civil in nature and implicates no involvement at all in activity suspected to be "criminal." In fact, studies have repeatedly demonstrated no correlation between immigrants and criminality.⁴⁵ Along with other programs that the Trump administration has implemented, the proposed rule demonstrates a push toward normalizing biometric collection from immigrants and their family members based on specious notions of public safety. By vastly expanding the amount of DNA collected and added to national DNA databases based on association rather than conduct, the proposed rule brings us closer to a regime of DNA collection from the entire population.

The Department's proposal fails to consider how its collection of DNA violates the Fourth Amendment's protection against unreasonable searches of the people.⁴⁶ In fact, the Department obfuscates the fact that it will use such DNA for the exact purpose prohibited by the Fourth Amendment: to detect evidence of criminal wrongdoing.⁴⁷ The rule claims that DNA "would only be collected in limited circumstances to verify the existence of a claimed genetic relationship;"⁴⁸ however, the same paragraph states that: "[t]he proposed definition of biometrics would authorize the collection of specific biometric modalities and the use of biometrics for: . . . national security and criminal history background checks . . . and to perform other functions related to administering and enforcing the immigration and naturalization laws."⁴⁹ The Department rule further attempts to bury its intention to use DNA for "law enforcement purposes" in multiple tables⁵⁰ throughout the proposal as well as in an additional "Background and Purpose of the Proposed Rule" on the 32nd page of its 85-page proposed rule.⁵¹ It also mentions sharing such information with the FBI, without explaining how the FBI would be prevented from using this information to investigate immigration applicants and their U.S.-citizen family members for criminal wrongdoing in violation of the Fourth Amendment.⁵²

⁴⁴ *King*, 569 U.S. at 465. (citations omitted).

⁴⁵ See, e.g., Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, Marshall Project (May 13, 2019), <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime>.

⁴⁶ The right against Fourth amendment searches and seizures applies to citizens and noncitizens alike. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 265 (1990); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

⁴⁷ The Department also explicitly states how it would use other biometrics for this exact purpose. 85 Fed. Reg. 56355-56 (justifying palm print collection by the fact that palm prints, not fingerprints, are more commonly lifted from "crime scenes" and that "capturing and scanning latent palm prints is becoming an area of increasing interest among the law enforcement community").

⁴⁸ 85 Fed. Reg. 56341.

⁴⁹ *Id.*

⁵⁰ *Id.* at 56345 (explaining in "TABLE 1—Summary Of Provisions and Impacts" that "DHS may require, request, or accept the submission of DNA or DNA test results, . . . for benefits adjudication and law enforcement purposes"); *Id.* at 56367. ("Additionally, the proposed rule would enhance the U.S. Government's capability to identify criminal activities and protect vulnerable populations.").

⁵¹ *Id.* at 56369 ("The proposed rule would also enhance the U.S. Government's capability to identify criminal activities and protect vulnerable populations. Further, it is conducive and relevant to the evolution to a person-centric model for . . . enhanced and continuous vetting.").

⁵² *Id.* at 56355 (explaining that DNA and other modalities "will be used by the FBI and agencies with which we will be sharing and comparing biometrics in this area").

Supreme Court Justice Scalia cautioned in his dissent in *King* about the dangers of failing to recognize the need to protect privacy rights in regard to DNA:

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime. It is obvious that no such noninvestigative motive exists in this case. *The Court's assertion that DNA is being taken, not to solve crimes, but to identify those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.*⁵³

C. The Department misrepresents the fact that DNA results will likely be shared widely and fails to explain any limits on such information sharing with other agencies, including ICE

The Department also fails to fully explain how USCIS would share the data collected, including DNA samples and test results with other components of DHS, and how such sharing might also violate the Fourth Amendment. Specifically, the proposal does not discuss at all how it would limit ICE from using such data to “to detect evidence of ordinary criminal wrongdoing” in violation of the Fourth Amendment. In fact, the proposed rule only explicitly mentions that ICE will have access to such information in footnote 1 of the Executive Summary and devotes no further explanation of why ICE needs access to the expanded biometrics.⁵⁴ Furthermore, the proposed rule refers to sharing such information with “other DHS components” a vague aside.⁵⁵

Given the close collaboration and entanglement between DHS and its agencies with local law enforcement agencies and other federal policing agencies, it is highly likely that this information will be shared and used for purposes related “to detect[ing] evidence of ordinary criminal wrongdoing.”⁵⁶ In fact, the proposed rule leaves open the possibility for raw DNA and testing results, and other biometric data, could be shared “with other agencies where there are national security, public safety, fraud, or other

⁵³ *King*, 569 U.S. at 466 (emphasis added).

⁵⁴ *Id.* at 56339 (“This rule proposes changes to the regulations governing collection of biometrics for benefit requests administered by U.S. Citizenship and Immigration Services (USCIS). It also impacts U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE), which have immigration enforcement responsibilities that may require collection, use, and storage of biometrics and use USCIS systems or service forms for which biometrics would be required by this rule. . . .this rule does propose to authorize CBP and ICE to expand their current biometrics collections for immigration benefit requests to individuals under the age of 14 and authorizes collection of additional biometrics modalities.”).

⁵⁵ *Id.* at 56352 (“USCIS is authorized to share relevant information with law enforcement or other DHS components, including ‘biometrics’ for identity verification and, consequently, it may share DNA test results, which include a partial DNA profile, with other agencies as it does other record information pursuant to existing law.”).

⁵⁶ *See id.* at 56349 (explaining the interoperability of databases currently used by DHS and FBI, and Department of Defense, as well as “data sets of foreign partners in accordance with international agreements”).

investigative needs.”⁵⁷ DHS also points to PATRIOT ACT as a statute directing it to utilize “biometric technology . . . in the development of the integrated entry-entry system originally mandated by [IIRIRA]; also cites Intelligence Reform and Terrorism Prevention Act of 2004 as “requir[ing] the completion of a biometric data system to facilitate efficient immigration benefits processing and to protect the United States by preventing the entry of terrorists.”⁵⁸ Disturbingly, the proposal states that biometrics may be shared with foreign governments, without any discussion of how DHS would limit sharing of biometrics with countries from which an asylum seeker or refugee has sought protection.⁵⁹

The Department’s statements that it would limit the use and sharing of DNA and other data are a poor attempt to claim it will protect privacy rights under the Fourth Amendment. First the proposal includes a vaguely worded authorization to use and share collected DNA, which provides almost no limitation on the Department: “DHS would only store, use, and share DNA test results . . . for adjudication purposes and would retain the results to perform *any other functions necessary for administering and enforcing immigration and naturalization laws, to the extent permitted by law.*”⁶⁰ Furthermore, the proposal does not contain any explanation of what uses would or *would not* be considered part of “enforcing immigration . . . laws” or what is not “permitted by law,” including how such actions may not be permitted by the Fourth Amendment. Finally, even this inadequate attempt at limiting the use or sharing of DNA and other data is so riddled with exceptions—such as “when there are national security, public safety, fraud, or other investigative needs,”⁶¹—that DHS will practically have no limits on sharing such personal information in violation of the individual’s Fourth Amendment rights.

In proposing to collect DNA from individuals in violation of the Fourth Amendment and placing no limits on the sharing of such information with law enforcement agencies, the Department not only will expose people who apply for immigration benefits with USCIS and their family members to discriminatory policing, but will also populate biometric databases that could be used for mass surveillance. It will also likely exacerbate the problems that have been identified with increasing police reliance on DNA as an investigative tool, including the fact that Black and brown people have been shown to be disproportionately profiled by police and thus overrepresented in criminal DNA databases.⁶² Because the Department has failed to explain how it can constitutionally collect DNA from individuals who are not under arrest nor how it will protect the Fourth Amendment rights of such individuals in the storage, use, and sharing of such private information, the proposed rule is arbitrary, capricious, and in violation of of the Constitution and thus should be abandoned by the Department.

V. The proposed rule unjustifiably subjects immigrants to lifelong surveillance.

No provision of the Immigration and Nationality Act or any other statute authorizes DHS to engage in “continuous vetting” of individuals throughout the “immigration lifecycle.” To start, the proposed rule does not adequately define or justify the term “continuous vetting.” The proposed rule

⁵⁷ *Id.* at 56354.

⁵⁸ *Id.* at 56348.

⁵⁹ *Id.* at 56415.

⁶⁰ *Id.* at 56354 (emphasis added).

⁶¹ *Id.*

⁶² See, e.g., Carrie Arnold, “The Controversial Company Using DNA To Sketch the Faces of Criminals,” *Nature*, September 9, 2020: <https://www.nature.com/articles/d41586-020-02545-5>.

states, without any legal or factual support, that “aliens” must “be subjected to continued and subsequent evaluation to ensure they continue to present no risk of causing harm subsequent to their entry.”⁶³ Nor does DHS define the term “immigration lifecycle.” The Trump administration has made clear it intends to implement *lifelong* vetting for all immigrants—irrespective of the ties they develop to the United States and even after they obtain U.S. citizenship.⁶⁴ Tellingly, USCIS itself is already actively involved in investigating and prosecuting naturalized citizens,⁶⁵ and DHS has diverted funding from USCIS fee applications specifically for denaturalization efforts.⁶⁶

Furthermore, no statute authorizes the indiscriminate collection of biometrics from anyone involved in an immigration benefit application, including U.S.-citizen petitioners and sponsors. Indeed, the Trump administration has continuously advanced its anti-immigrant agenda by increasing USCIS’s involvement in removal operations and thus intimidating immigrants and family members from applying for benefits.⁶⁷

Additionally, the proposed rule exceeds USCIS’s statutory mandate. In 2002, Congress recognized that “the former [Immigration and Nationality Service’s] two main functions—service and enforcement—needed to be separated,”⁶⁸ leading to proposals to abolish INS and separate its varied responsibilities to USCIS, ICE, and CBP. Notably, Congress specifically transferred *only* adjudicatory functions to USCIS in the Homeland Security Act of 2002.⁶⁹ USCIS itself also recognizes that it was founded to “focus[] exclusively on the administration of benefit applications.”⁷⁰ Yet many of the benefits that DHS uses to justify the proposed rule are not related to serving USCIS’s mandate of adjudicating benefits applications, but instead seek to aid other DHS components in the detention and deportation of individuals. DHS claims, for example, that “[h]aving more reliable data about detainees’ identities will increase safety of DHS detention facilities for both DHS law enforcement officers and the detainees,” and that it would prevent “family unit fraud” at the border.⁷¹ Such objectives not only illustrate that USCIS will not be the component within DHS that is collecting such biometric information, but these objectives also impermissibly transform USCIS to an arm of ICE and CBP, contrary to Congressional intent.

⁶³ *Id.* at 56340.

⁶⁴ Since 2017, “denaturalization case referrals to the department have increased 600 percent.” Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. Times (June 17, 2020), <https://nyti.ms/3ID57UT>. See also, e.g., Maryam Saleh, *Trump Administration is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, The Intercept (Apr. 4, 2019) (reporting that the Department of Justice sought significant funding to investigate denaturalization leads and “to review another 700,000 immigrant files.”).

⁶⁵ E.g., U.S. Citizenship and Immigration Services, *USCIS partners with Justice Department and Secures First Denaturalization As a Result of Operation Janus* (Jan. 10, 2018), <https://bit.ly/2SKnjzS>.

⁶⁶ Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview for Fiscal Year 2019* at 20 (Sept. 20, 2019), <https://bit.ly/2GZdLOs>.

⁶⁷ See, e.g., U.S. Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, PM-602-0050.1 (June 28, 2018), <https://bit.ly/3iRj3sT> (dramatically expanding the circumstances in which USCIS may place noncitizens into removal proceedings); Ryan Devereaux, *U.S. Citizenship and Immigration Services Will Remove “Nation of Immigrants” from Mission Statement*, The Intercept (Feb. 23, 2018), <https://bit.ly/2IIG9LF>.

⁶⁸ Congressional Research Service, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress* at 1 (Dec. 30, 2002), <https://bit.ly/34Nntfd>.

⁶⁹ Pub. L. No. 107-296 § 451(b), codified at 6 U.S.C. § 271(b).

⁷⁰ U.S. Citizenship and Immigration Services, *Our History* (Aug. 24, 2020), <https://www.uscis.gov/about-us/our-history>.

⁷¹ 85 Fed. Reg. at 56350.

The proposed scheme of comprehensive surveillance has no basis in law, but rather is founded upon the false and constructed premise that immigrants represent a perpetual threat to national security, and thus must be managed and controlled. Previously, ICE claimed in a 2018 fiscal report to Congress that “ensur[ing] the integrity of individual identities throughout the immigration lifecycle” was necessary to “Prevent Terrorism and Enhance Security” and to “Counter Terrorism and Protect the Borders.”⁷² Here again, DHS purports throughout the proposed rule that expanded biometrics collection is necessary to ensure “national security” and “public safety” and to identify “criminal activity.” But the agency provides no evidence of whether any threat or harm actually exists nor how USCIS is authorized to address such a threat, if one actually existed.

Nor has DHS shown how it has been unable to conduct “a rigorous evaluation of any grounds of inadmissibility or grounds for the denial of an immigration benefit” using the tools currently available to it or why expanded biometrics collection specifically would address this imaginary and unsubstantiated problem.⁷³ As the proposed rule itself demonstrates, DHS is already equipped with myriad ways to conduct background checks of all individuals who apply for an immigration benefit.⁷⁴ DHS provides no evidence demonstrating why the current system is insufficient to verify the identity of applicant, identify the relationships between petitioner and beneficiary, and to conduct criminal and immigration background checks. Instead, the proposed rule baldly asserts that its current use of biometrics “is outdated and not fully in conformity with current biometrics use policies by government agencies,”⁷⁵ considering neither the legality nor practicality of the proposed surveillance system.

* * *

For all of the foregoing reasons, we strongly oppose the proposed rule and request that DHS rescind it in its entirety. Please do not hesitate to contact Em Puhl at em@immdefense.org if you have any questions or need any further information. Thank you for your consideration.

Sincerely,

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⁷² U.S. Immigration and Customs Enforcement, *Comprehensive Plan for Immigration Data Improvement* at 8 (July 26, 2018), <https://bit.ly/3iSae1Q>.

⁷³ 85 Fed. Reg. at 56352.

⁷⁴ See *id.* at 56349-50 (laying out “multiple types of national security and criminal history background checks” that DHS conducts).

⁷⁵ *Id.* at 56350.