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RE: RIN 1651–AB12; Docket No. USCBP–2020–0062; Public Comment Opposing Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States (Reopening of Comment Period)

March 12, 2021

To Whom It May Concern,

The Immigrant Defense Project (IDP) submits this comment on the proposed rule issued by the U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS), Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States, Docket No. USCBP–2020–0062, RIN 1651–AB12, 85 Fed. Reg. 74,162 (November 19, 2020), 86 Fed. Reg. 8,878 (February 10, 2021) (The Proposed Rule). This rule would massively expand the government's use of facial recognition technology, endangering the rights of tens of millions of immigrants and visitors to the United States. IDP strongly opposes the proposed rule and urges that it be withdrawn.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. We provide 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 is also a member of the "Ban the Scan" Campaign, which calls for a ban on government uses of facial recognition technologies.[1]

IDP opposes the proposed rule in its entirety. However, because the proposed rule addresses so many issues related to screening of individuals entering and exiting the United States, we are not able to

[1] For more information, see https://banthescan.amnesty.org/.

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 during either of the two separate and discontinuous 30-day comment periods 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 and traveling in the United States, including how it can compel individuals not suspected of a crime to submit to facial recognition screening and possibly provide 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 stated by CBP. The proposal also fails to explain what procedures will be instituted to ensure the confidentiality and accuracy of information collected by CBP and to prevent the types of racial, gender, and religious discrimination that have already been identified in research related to the use of facial recognition technology.

IDP is also concerned about the failure of DHS to explain how it will share such information with other components of DHS, including Immigration and Customs Enforcement (ICE). 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 facial recognition technology and use of other biometric and genetic markers as tools for discriminatory policing and denial of Constitutional rights based on race

This proposal would significantly expand the surveillance powers of the CBP, massively expanding the government's use of facial recognition technology.[2] Once someone's faceprint is collected and associated with other personally identifiable information, it creates a risk of persistent surveillance, where government and law enforcement are able to identify and track people covertly.[3] This information could also be shared with foreign governments, and federal, state, and local law enforcement. CBP justifies these expanded surveillance powers, in part, by falsely claiming that "many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety."[4]

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

[2] *Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States*, 85 Fed. Reg. 74162 (Nov. 19, 2020).
[3] 85 Fed. Reg. 74191 ("CBP retains biographic records for 15 years for U.S. citizens and lawful permanent residents and 75 years for non-immigrant aliens . . . Records associated with a law enforcement action are retained for 75 years . . . .").
[4] 85 Fed. Reg. 74168.

security.[5] This is the problematic logic that DHS has already used to justify its dangerous expansion of the definition of "biometrics" in a previous proposed notice of rulemaking not discussed or explicitly mentioned in this proposed rule. Specifically, the Department has already proposed a new definition of "biometrics" as "the measurable biological (anatomical and physiological) or behavioral characteristics used for identification of an individual," in addition to proposing a wide array of "authorized biometric modalities" that DHS can collect in its own discretion.[6] IDP is opposed to the expanded collection of biometrics in its entirety, and objects to the proposed rule's requirement that such collection be provided in order for U.S. citizens and noncitizens alike to access the right of free movement across borders.[7] By requiring such biometrics to be collected upon entry and exit to the United States, DHS proposes an unprecedented and unwarranted expansion of data collection by the Department and the U.S. government overall.

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 its proposed scheme of comprehensive and continual surveillance,[9] 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, 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.[10]

A more recent example of this logic is the Special Registration Program, initiated as part of the War on Terror in 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."

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[5] 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.

[6] *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services*, 85 Fed. Reg. 56355 (Sept. 11, 2020).

[7] *See*, *e.g.*, Universal Declaration of Human Rights, Article 13 (Dec. 10, 1948), available at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf ("Everyone has the right to leave any country, including his own, and to return to his country.").

[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.

[9] *See generally*, 85 Fed. Reg. 56355 (proposing to subject immigrants to "a program of continuous immigration vetting").

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

> 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.[11]

Similarly, under the Obama Administration, a broad category of immigrants were deemed "a risk to public safety," and identified as a priority for removal.[12] 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, thus deeming them perpetual threats to society.[13] This prioritization scheme perpetuated 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 "dangerousness."[14] By requiring facial recognition screening and potentially 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.[15]

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

[12] 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.

[13] 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.

[14] *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.").

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

II. In attempting to add facial recognition screening to its 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

The Department's proposal to subject all U.S. citizens and noncitizens to facial recognition screening at entry and exit is just one part of DHS's plan to subject all individuals 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 this CBP proposal, the Department fails to mention a companion proposal to expand the types of biometrics collected by U.S. Citizenship and Immigration Services (USCIS), including DNA, palm prints, and iris scans, which the Department published only two months prior to this rule's first 30-day comment period.[17] Instead, the Department pretends that this CBP proposal is not just one of many programs intended to surveil and discriminate against immigrants of color on the false and harmful basis that immigrants are threats to national security and prone to criminality.[18]

The proposed CBP rule explains that facial recognition screening is necessary to address many disparate issues, including "the national security concerns arising from the threat of terrorism, the fraudulent use of legitimate travel documentation, aliens who overstay their authorized period of admission (overstays) or are present in the United States without having been admitted or paroled, and incorrect or incomplete biographic data for travelers."[19] Yet, the Department fails to explain how collecting the facial images of all persons leaving the United States would greatly improve the Department's ability to address any of these needs, considering the other procedures already used by the Department to meet these goals. The proposed rule outlines in great detail the extensive information that CBP already receives electronically for all passengers on flights leaving the United States.[20] It also describes that each passenger's identity is verified twice, once when being screened by the Transportation Safety Administration (another component of the Department), and again by the airline before boarding.[21] The Department does not provide any evidence to show why this process is insufficient to identify the individual passengers who are leaving the United States or to meet the other objectives identified for this proposed rule. The proposal also does not provide any instances where a passenger could not be identified through the well-

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[16] *See*, *e.g.*, 85 Fed. Reg. 56340.

[17] *See id.*

[18] *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.").

[19] 85 Fed. Reg. 74163.

[20] 85 Fed. Reg. 74165 ("The carrier is generally required to transmit the required manifest information electronically to CBP through the Advance Passenger Information System (APIS). . . . APIS information includes, but is not limited to, the following information: Full name, date of birth, citizenship, passport/alien registration card number, travel document type, passport number, expiration date and country of issuance (if passport required), alien registration number, country of residence, passenger name record locator number, and U.S. destination address (when applicable). The carrier also collects and transmits to CBP the traveler's U.S. destination address (except for U.S. citizens, lawful permanent residents, crew and persons in transit through the United States) and country of residence.").

[21] *Id.* at 74166.

established process of identification verification by two independent entities. Nor does it provide any examples where the current system led to harm to any individual or to the national security.[22]

Instead, the Department seeks to equate criminal contact by immigrants with a threat to public safety and national security.[23] This justification echoes that of the myriad programs proposed and implemented by the Department to paint large groups of noncitizens as imaginary threats to national security in order to subject them to constant surveillance. In 2018, ICE stated its goal was to "[e]nsure the integrity of individual identities throughout the immigration lifecycle," in order to support the DHS strategic goal of "Prevent[ing] Terrorism and Enhance Security" and the ICE goal to "Counter Terrorism and Protect the Borders."[24] These unjustified calls for "vetting" of immigrants were promoted in multiple recently-withdrawn presidential proclamations and executive orders issued under the prior administration,[25] which courts have viewed as discriminatory on nationality and religious grounds.[26]

DHS also previously proposed "vetting" programs that 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."[27] In light of these well-publicized criticisms, DHS provides no explanation in the instant CBP proposal regarding why it is necessary to continually subject people to continued surveillance and investigation, even upon exiting the physical limits of the United States. Instead, it provides the inadequate and generalized declarations

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[22] Although the Department states that "CBP has encountered hundreds of cases" where an individual was identified as having had contact with the criminal system, *id.* at 74168, and that it "has identified many recent national security cases that resulted from examining foreign nationals departing the United States on international flights," *id.* at 74169, the Department provides no extrinsic data or evidence for these "cases" apart from its statements in the proposed rule.

[23] *See id.*

[24] 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).

[25] *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).

[26] *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).

[27] *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.

that individuals are "threats," simply for being born outside of the United States. Furthermore, as we explain below, the Department also fails to explain what protections the program would put in place to avoid infringing on the privacy rights of U.S. citizens as it collects data and continually surveils their noncitizen family members.

III. DHS has failed to consider that it 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 and CBP currently use the misguided perspective that all noncitizens (and those associated with noncitizens) are possible criminals or threats to national security. Both agencies use this rationale to justify using aggressive tactics—including armed force—against people whom they encounter in purporting to carry out immigration policing.[28] Since 2013, IDP has documented hundreds of instances of physical and emotional violence perpetrated by ICE during these arrests.[29] We include these representative examples of violence to demonstrate the risk of harm to all individuals who will become subject to ICE surveillance once their information is collected by CBP through this proposed rule:

- **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. In doing so, the agents caused JC to hit his head and knee on the pavement. None of the agents 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.[30]

- **Brooklyn, NY, February 7, 2020:** NC was driving a car in Sunset Park, Brooklyn. While 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

[28] 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).
[29] See Immigrant Defense Project and Center for Constitutional Rights, *ICEWatch*, https://raidsmap.immdefense.org/ (last visited Oct. 13, 2020).
[30] 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/.

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.[31]

- **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.[32]

- **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.[33]

- **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-clothed 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 threw 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. The other agent told MK's girlfriend that they had an immigration warrant before both agents drove away.[34]

- **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 taxi 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.[35]

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[31] 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/.
[32] Immigrant Defense Project and Center for Constitutional Rights, *ICEWatch*, Raids Map Story 1316, available at https://raidsmap.immdefense.org/ (last visited Oct. 13, 2020).
[33] Immigrant Defense Project and Center for Constitutional Rights, *ICEWatch*, Raids Map Story 1149, available at https://raidsmap.immdefense.org/ (last visited Oct. 13, 2020).
[34] Immigrant Defense Project and Center for Constitutional Rights, *ICEwatch: ICE Raids Tactics Map*, 16 (July 2018), available at https://raidsmap.immdefense.org/.
[35] *Id.* at 19.

- **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 could not 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 did not 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 agents.[36]

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."[37] The Department uses this same justification to propose expanding the number of noncitizens and citizens whose facial images and other personal information will be included in DHS's databases: to "be better able to identify known criminals and other threats to border security."[38]

Our concerns are heightened given CBP's record of human rights abuses, including the systematic abuse and deaths of people in CBP custody, the excessive deadly use of force, and unlawful asylum policies.[39] By adding the facial images of countless individuals to the Department's database, the proposed rule will likely place more immigrants and their loved ones, including U.S. citizens, at risk of the above violence demonstrated by CBP and ICE.[40] As we explain below, the proposal does not address what limits would be placed on ICE's access to such faceprints taken 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.

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[36] *Id.* at 16.
[37] *Id.* at 2.
[38] 85 Fed. Reg. 74174.
[39] *See* ACLU, *Border Patrol Violently Assaults Civil Rights and Liberties*, July 24, 2020, available at https://www.aclu.org/news/immigrants-rights/border-patrol-violently-assaults-civil-rights-and-liberties/; University of California, Berkeley International Human Rights Law Clinic, *Elusive Justice: Pursuing Legal Redress In The United States and Mexico for Killings by U.S. Border Agents*, 6 (August 2015), available at https://www.law.berkeley.edu/wp-content/uploads/2015/09/Working-Paper-Elusive-Justice-LARGE-FINAL.pdf ("Since the 1990's, U.S. Customs and Border Protection (CBP) agents have killed at least forty persons along the U.S.-Mexico border.").
[40] Publicly available documents indicate that Homeland Security Investigations--another component within DHS--funded a recent contract between ICE and Clearview AI. *See* Taylor Hatmaker, *Clearview AI landed a new facial recognition contract with ICE*, TECH CRUNCH, Aug. 14, 2020, available at https://techcrunch.com/2020/08/14/clearview-ai-ice-hsi-contract-2020/.

IV. The Department has not considered the grave risks to privacy rights as well as the constitutional rights by requiring facial recognition screening

A. DHS fails to justify collecting facial images from the proposed individuals and has not explained how it will protect the privacy of such information after it is 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.[41] Now DHS proposes that U.S. citizens[42] and noncitizens alike must provide DHS with facial images,[43] and, with the previously proposed expanded definition of "biometrics," possibly some of their most personal data, including DNA, iris scans, and palm prints.[44] The proposed rule massively expands the collection and retention of facial images 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 is a "threat[] to border security."[45] The proposal also does not justify the need to implement this expanded program of information collection in light of 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 who seek to enter the United States. In fact, the proposed rule explains in elaborate detail that individuals are already screened by CBP through means other than facial recognition, with no significant detriment to the stated goal of CBP.[46] Furthermore, the Department fails to justify such an intrusive form of screening for individuals who seek to exit the physical borders of the United States, particularly given the high value that the Constitution places on the privacy of the people, see section IV.B below. While the Department "acknowledges that the traveler may perceive this process to be a loss of privacy, which is a cost of the rule," the proposal does not justify this cost nor does it explain any consideration of how this cost might be minimized.[47] Instead, the proposal simply refers the public to other documents outside of this rule's

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[41] 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.

[42] Although the proposed rule states that U.S. citizens will be allowed to "opt out" of facial recognition screening, 85 Fed. Reg. 74177, the data provided by the Department shows that most U.S. citizens who participated in pilot programs submitted to such screening in practice. *Id.* at 74183 ("TSA tracked the number of opt outs over two days in the summer of 2019 and found an opt-out rate of 0.18 percent across more than 13,000 travelers. We adopt this rate as our estimate for U.S. citizens who will opt out of biometric collection under this rule.").

[43] Proposed 8 CFR § 215.8(a)(1); 85 Fed. Reg. 74192.

[44] *See generally*, 85 Fed. Reg. 56355.

[45] 85 Fed. Reg. 74174.

[46] The proposal states that, in 2019, "CBP's facial recognition technology ha[d] identified at least 138 imposters . . . attempting to enter the United States using another person's travel documents at the San Luis and Nogales, Arizona land border ports." 85 Fed. Reg. 74167. However, 2019 border crossing statistics from the Department of Transportation show that over 3.4 million and 2.5 million pedestrians entered through the ports of Nogales and San Luis, respectively in that year alone. Dept. of Transportation, *Border Crossing Entry Data: Annual Data*, *available at* https://explore.dot.gov/views/BorderCrossingData/Annual?:isGuestRedirectFromVizportal=y&:embed=y (sorted by 2019, Nogales and San Luis ports) (last visited Dec. 8, 2020). Another 6.7 million and 5 million personal vehicle passengers entered through the Nogales and San Luis ports, respectively, in 2019. *Id.* In total, out of 17,785,278 individuals who entered through these two ports in 2019, the 138 "imposters" identified through CBP facial recognition screening represent 0.0008% of all border crossers in that year.

[47] 85 Fed. Reg. 74186.

analysis, which purport to explain and consider the privacy interests implicated by the use of facial recognition technology.[48] Nor does the proposal mention which 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. Finally, the proposal does not explain in any detail whether the Department explored the alternatives that did not require collecting and storing additional biometrics while still meeting the stated objectives of CBP. IDP is alarmed that the 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 regard 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 the Department's failure to state how it will collect and manage this data in the proposed rule, as we have long warned about the dangers of this dragnet of collecting massive amounts of personal information without clear guidance on how it will be used, stored, and accessed. Finally, the proposal fails to consider how this data collection, like other "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 Amendment[49] right to association. DHS does not address these concerns, which were raised in response to other vetting proposals, nor does the Department's proposal explain what protections the program would put in place to avoid infringing on these constitutional rights of U.S. citizens and noncitizens. For these reasons, we oppose this rule in its entirety as irresponsible, unnecessary, arbitrary, and capricious.

B. The Department fails to consider the likelihood that its proposed use of facial recognition screening violates the Fourth Amendment

The proposed rule is arbitrary and capricious because it very likely violates the Fourth Amendment's privacy protections for all persons in the United States. "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."[50] The Supreme Court "has insisted on some purpose other than 'to detect evidence of ordinary criminal wrongdoing' to justify [] 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.[51] This protection does not simply disappear when an individual enters the public space of an airport: "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what

[48] *See* 85 Fed. Reg. 74186 (stating without explanation that facial comparison, "as with all biometric collections, poses privacy risks which, as discussed in the PIA for the TVS, are mostly mitigated").
[49] *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.
[50] *Maryland v. King*, 569 U.S. 435, 466 (2013) (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.").
[51] *King*, 569 U.S. at 463 (citing *Indianapolis v. Edmond,* 531 U.S. 32, 38 (2000)).

[one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'"[52]

The Department's proposal fails to consider how a requirement that all individuals submit to a facial recognition search violates the Fourth Amendment's protection against unreasonable searches of the people.[53] Indeed, the proposed rule explicitly states that the Department's pilot programs involve a search of an individual's criminal background during such facial recognition screening.[54] The Department nonetheless does not explain in its proposal how it is authorized to use such images for the exact purpose prohibited by the Fourth Amendment: to detect evidence of criminal wrongdoing.[55]

Citizens and noncitizens are not under arrest upon boarding a flight to depart the United States, nor does the act of boarding a flight provide probable cause that the individual has committed a crime. Traveling outside of the United States on its own implicates no involvement at all in activity suspected to be "criminal." In fact, studies have repeatedly demonstrated no correlation between immigrants and criminality.[56] Furthermore, the fact that artificial intelligence software purports to be unable to identify an individual does not constitute "probable cause" sufficient to authorize a search of the person or their criminal history, especially in light of numerous studies showing that facial recognition software inaccurately identifies people of color at higher rates than people with lighter pigments.[57]

Along with other programs that the Trump administration has proposed and implemented, the proposed rule demonstrates a push toward normalizing additional biometric collection from immigrants and their family members based on specious notions of public safety. By vastly expanding the population of individuals whose facial images will be populating law enforcement databases, the proposed rule brings

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[52] *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (citing *Katz v. United States,* 389 U.S. 347, 351–352 (1967)).

[53] 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).

[54] *See*, *e.g.*, 85 Fed. Reg. 74168 (describing individuals "apprehended" by CBP after "further inspection" during a facial recognition screening pilot program); *id.* ("By performing a biometric check at departure, . . . this provides CBP with more reliable information to better identify persons of law enforcement or national security concern."); *id.* at 74169 (For individuals on a terrorist watch list, law enforcement and intelligence agencies may have a need to track that individual's movements and travel. . . . Preventing these individuals from leaving the United States, or at minimum, gaining intelligence on their whereabouts, is critical to diminishing a terrorist network's ability to mobilize.").

[55] *Id.* at 74177-78 (explaining that "CBP officers may inspect the traveler's passport or other valid travel document. If the traveler is subject to biometric collection (under the current regulations or under the amended regulations once this rule is finalized), the officer may . . . collect the traveler's fingerprints" and that CBP will "identify any law enforcement lookouts related to the traveler. . . . [I]f CBP finds actionable derogatory information on the traveler, the CBP officer may escort the traveler to the FIS area to conduct further questioning and take the appropriate actions under CBP's law enforcement authorities.").

[56] *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.

[57] *See*, *e.g.*, Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University: Science in the News Blog (Oct. 24, 2020), http://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/; Larry Hardesty, S*tudy finds gender and skin-type bias in commercial artificial-intelligence systems*, MIT News (Feb. 11, 2018), http://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212.

us closer to a regime of the federal government's collection of biometric data from the entire population. Supreme Court Justice Scalia cautioned in his dissent in *King* about the dangers of failing to recognize the need to protect privacy rights, in the context of DNA collection:

> 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.[58]

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

The Department also fails to adequately disclose how CBP would share the data collected with other components of DHS or other law enforcement agencies, nor does it explain how such sharing could violate the Fourth Amendment and other privacy rights.[59] Specifically, the proposal does not discuss at all how the Department would limit law enforcement agencies such as ICE from using such data to "to detect evidence of ordinary criminal wrongdoing" in violation of the Fourth Amendment.[60] In fact, the proposed rule devotes no efforts at all to inform the reader that ICE will have access to such images and provides no explanation as to why ICE needs access to such photographic images despite public reporting that ICE just signed a contract with facial recognition company Clearview AI.[61] Instead, the proposed rule vaguely refers to sharing such information with "public and private section[s]" as an aside.[62]

Given the close collaboration and entanglement of agencies within DHS, and of DHS 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."[63] The proposal provides no statements on how CBP will limit the use of the facial images, meaning that DHS will practically impose no limits on sharing such personal information in violation of the individual's Fourth Amendment rights. In doing so, the Department not only will expose travelers to discriminatory policing, but will also populate biometric databases that could be used for mass surveillance.

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[58] *King*, 569 U.S at 466 (emphasis added).
[59] Publicly available documents indicate that Homeland Security Investigations--another component within DHS--funded a recent contract between ICE and Clearview AI. *See* Taylor Hatmaker, *Clearview AI landed a new facial recognition contract with ICE*, TECH CRUNCH, Aug, 14, 2020, available at https://techcrunch.com/2020/08/14/clearview-ai-ice-hsi-contract-2020/.
[60] *See id.* at 463.
[61] Kim Lyons, *ICE just signed a contract with facial recognition company Clearview AI*, The Verge (Aug 14, 2020), available at https://www.theverge.com/2020/8/14/21368930/clearview-ai-ice-contract-privacy-immigration.
[62] 85 Fed. Reg. 74169 ("By collecting and sharing relevant information on terrorist travel and identities, this information can be used for the benefit of the public and private section to identify and disrupt the movement of terrorists.").
[63] *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").

The Department has failed to explain how it can constitutionally collect facial images from individuals who are not under arrest. It also has failed to explain how it will protect the Fourth Amendment rights of such individuals in the storage, use, and sharing of such private information. For these reasons, the proposed rule is arbitrary, capricious, and in violation of the Constitution and thus should be abandoned by the Department.

D. The Department fails to consider the documented inaccuracies in facial recognition technology and discriminatory use of facial recognition screening by law enforcement, which will disproportionately burden black and brown communities

The proposed rule will likely exacerbate the problems identified with increased police reliance on facial recognition as an investigative tool, and fails to consider the fact that Black and brown people have been shown to be disproportionately profiled by police and thus overrepresented in criminal databases.[64] Local police are increasingly relying on facial recognition software—along with images from social media profiles—to target people, including demonstrators, without any meaningful safeguards for the public.[65] For example, a co-founder of a social justice organization in New York City was targeted for arrest by NYPD in August 2020 after peaceful participation in a June protest. The officers used a "Facial Identification Section Informational Lead Report" during the attempted arrest.[66]

This risk of weaponized harm against communities of color is particularly heightened by the fact that facial recognition technology has been repeatedly demonstrated to be less accurate when used to identify Black people, people of Asian descent, and women.[67] Many facial recognition algorithms also misgender transgender and gender nonconforming people, while others purport to identify a person's sexual orientation by relying on and perpetuating harmful stereotypes about physical appearance.[68] These inaccuracies have led to wrongful detentions of people for crimes they did not commit, such as the wrongful arrest of Robert Julian-Borchak Williams recently documented in the *New York Times*.[69] As a part of IDP's work to fight for the rights of people who are targeted by the criminal and immigration

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[64] *See*, *e.g.*, Kade Crockford, *How is Face Recognition Surveillance Technology Racist?*, ACLU (June 16, 2020), https://www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist/ (explaining "police in many jurisdictions in the U.S. use mugshot databases to identify people with face recognition algorithms").

[65] James Vincent, *NYPD used facial recognition to track down Black Lives Matter activist*, The Verge (Aug. 18, 2020), available at: https://www.theverge.com/2020/8/18/21373316/nypd-facial-recognition-black-lives-matter-activist-derrick-ingram.

[66] Amnesty International, *Ban dangerous facial recognition technology that amplifies racist policing* (Jan. 26, 2021), available at: https://www.amnesty.org/en/latest/news/2021/01/ban-dangerous-facial-recognition-technology-that-amplifies-racist-policing/.

[67] *See* Joy Buolamwini & Timnit Gebru, *Gender Shades: IntersectionalAccuracy Disparities in Commercial Gender Classification*, Proceedings of Machine Learning Research, (2018) http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

[68] Vanessa Taylor, *Facial recognition misclassifies transgender and non-binary people, study finds*, MIC, https://www.mic.com/p/facial-recognition-misclassifies-transgender-non-binary-people-study-finds-19281490 (Oct. 30, 2019).

[69] Kashmir Hill, *Wrongfully Accused by an Algorithm*, NEW YORK TIMES, https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html (Jun. 24, 2020).

systems, we have partnered with Amnesty International and other organizations in a Ban the Scan campaign, pushing to ban the use of facial recognition technology in New York City.[70]

According to a memorandum issued by President Joseph R. Biden on January 20, 2021, the Office of Management and Budget has a mandate to address the systemic racial inequality in the regulatory process by including an "analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."[71] The proposed rule provides no such required quantitative nor qualitative analysis to consider how the use of facial recognition technology will disproportionately burden disadvantaged communities of color, women, and people who are transgender or gender nonconforming, despite widely available research indicating that such groups are disproportionately burdened. Nor does the Department explain any limitations that it intends to place on use of information gathered by this harmful technology in order to minimize these disproportionate burdens and impacts. For all these reasons, we urge the Department to rescind this rule in its entirety.

V. The Department fails to adequately disclose its intention to expand the definition of "biometrics" to include DNA and other forms of personal information

The Department categorizes as an "editorial change" a proposal to dramatically change the definition of biometrics and to require that such biometrics be collected "when departing the United States."[72] However, the proposed "editorial change" neglects entirely to mention the Department's previously proposed expansion to the definition of "biometrics," which would include DNA, iris scans, and palm prints.[73] The proposed rule also unjustifiably adds language requiring any noncitizens to provide such "biometrics" when departing the U.S. or they "may be found in violation of the terms of his or her admission, parole, or other immigration status."[74]

Practically speaking, the Department proposes to coerce immigrants to provide an unjustified amount of private information under the threat of losing their immigration status. DNA provides "a massive amount of unique, private information about a person that goes beyond identification of that person."[75] 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."[76] The Department has not only failed to provide a legal basis for creating such consequences to refuse information collection, but it also fails to explain why such information is

[70] See Amnesty International, *Ban the Scan: Do You Want Your Face to Be Used to Track You?*, available at: https://banthescan.amnesty.org/ (last visited Mar. 9, 2021).
[71] Presidential Memorandum, *Modernizing Regulatory Review*, 86 Fed. Reg. 7223 (Jan. 26, 2021).
[72] 85 Fed. Reg. 74179.
[73] *See generally*, 85 Fed. Reg. 56355. While this proposed rule has not yet been finalized, it has also not been withdrawn by OMB or the Department and thus is a potential harm that must be considered by in the instant proposal.
[74] Proposed 8 CFR § 215.8(b); 85 Fed. Reg. 74192.
[75] *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).
[76] *People v. Buza*, 4 Cal. 5th 658, 720 (2018) (Cuéllar, J., dissenting) (citations omitted).

necessary to adequately satisfy the proposed rule's purpose of identifying the individuals who are departing the United States.

Reliance on DNA as a tool to police and 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."[77] 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 that are not considered at all by this proposed rule.[78] At the same time, DNA analysis, despite its ability to be very precise, is not necessarily always accurate or reliable.[79] The massive proposed expansion of collection and retention of the DNA of immigrants and U.S. citizens with familial relationships, along with the current 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 for this reason.[80] 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."[81]

The proposed "editorial change" deliberately denies the public notice that the Department intends to require collection of DNA from individuals entering and exiting the United States. This puts at risk not only the personal information of immigrants entering and exiting the United States, but also their U.S.-citizen family members who share such DNA and are otherwise associated with immigrants. The proposal and its lack of consideration of other biometrics proposed rules are both irresponsibly arbitrary

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[77] 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.

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

[79] 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.

[80] 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/

[81] *Marper v The United Kingdom*, Eur Ct H. R., (2008), available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90051%22]}.

and maliciously capricious.[82] IDP believes that both proposed rules should be abandoned by the Department.

VI. The Department fails to explain how it is statutorily authorized to collect facial images

No provision of the Immigration and Nationality Act or any other statute authorizes DHS to collect *facial images* from individuals who are entering, much less exiting the United States. Although the proposed rule lists many statutes and executive orders that mandate "[t]he creation of an automated entry-exit system that integrates electronic alien arrival and departure information,"[83] none of the cited statutes authorize the Department to require *facial images* to be collected for individuals upon entering or exiting the United States.[84] No statute authorizes the indiscriminate collection of biometrics from anyone exiting the United States, including U.S.-citizens. Furthermore, the proposed rule provides no justification for why the definition of biometrics collected upon entry (and thus exit) should be expanded to include facial images, beyond the superficial—and demonstrably inaccurate—declaration that facial images, as opposed to other procedures to collect personal information, "can be performed relatively quickly, with a high degree of accuracy, and in a manner perceived as less invasive to the traveler."[85] The Department proposes to expand the collection and maintenance of facial images and other personal data, see section V above, without statutory authorization and without any effort to justify this sudden and dangerous departure in practice.

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. As explained above, ICE has claimed that "ensur[ing] the integrity of individual identities throughout the immigration lifecycle" is necessary to "Prevent Terrorism and Enhance Security" and to "Counter Terrorism and Protect the Borders."[86] Here again, DHS purports throughout the proposed rule that facial recognition screening and image retention is necessary to ensure "national security" and "public safety." But the agency provides no evidence of whether any threat or harm exists in fact nor does it explain how CBP is authorized to use facial recognition technology to address such a threat, if one actually existed.

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[82] See *Immigrant Legal Res. Ctr. v. Wolf*, 2020 WL 5798269, at *14 (N.D. Cal. Sept. 29, 2020) ("By failing to consider the combined impact of these rules, DHS [] failed to consider an important aspect of the problem and disregarded "inconvenient facts" about the combined impact of these rules") (citing *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 537 (2009)).

[83] 85 Fed. Reg. 74164.

[84] *See* 8 U.S.C. § 1365a(c) ("Nothing in this section shall be construed to permit the Attorney General or the Secretary of State to impose any new documentary or data collection requirements on any person in order to satisfy the requirements of this section").

[85] 85 Fed. Reg. 74186.

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

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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