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October 13, 2020

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

Re: Department of Homeland Security, U.S. Citizenship and Immigration Services, Notice of Proposed Rulemaking, *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services* (USCIS Docket No. USCIS-2019-0007, RIN 1615-AC14)

Dear Mr. McDermott,

The American Immigration Council (Council), the Immigration Defense Clinic at Colorado Law (the Clinic), and the American Immigration Lawyers Association (AILA), submit the following comments in opposition to the above-referenced Department of Homeland Security (“DHS”) and U.S. Citizenship and Immigration Services (“USCIS”) Notice of Proposed Rulemaking, *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services* (USCIS Docket No. USCIS-2019-0007, RIN 1615-AC14) (hereinafter “Proposed Rule”).

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

The Immigration Defense Clinic at Colorado Law (the Clinic) frequently assists noncitizen clients to file affirmative applications for immigration benefits for which they are eligible. The Clinic provides this assistance free of charge to clients, some of whom are students, enrolled at any of our colleges and universities across the state of Colorado. Based on the new requirements imposed by the proposed rule, clients of the Clinic would likely face increased fear and trepidation to file for immigration benefits that they are eligible for, increased application costs that would pose barriers to filing these applications, and unnecessary invasions of their personal liberty and privacy.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

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## I. The Council, the Clinic, and AILA strongly oppose the proposed rule

The Council, the Clinic, and AILA strongly oppose the proposed biometrics rule because it would impose sweeping new requirements for noncitizens and their U.S.-citizen loved ones to turn over sensitive biometric data to the government, add to the already-exorbitant price of immigrating to the United States, create new bureaucratic delays, and threaten to create a surveillance state of “continuous vetting” for noncitizens that is antithetical to basic American values. While we recognize that identity verification is an important aspect of fraud detection, USCIS’s “extreme vetting” proposal is contrary to the law, would do significantly more harm than good, and is not justified by the information provided in the rule. For all these reasons and the reasons detailed below, we urge the Department to withdraw the proposed rule.

## II. DHS’s attempt to expand the definition of “biometrics” to include the collection of palm print, voice print, iris image, or DNA information exceeds the statutory authority of the agency.

In the proposed rule, DHS attempts to vastly expand the collection of biometric information in relationship to immigration benefit adjudication, far beyond the intent of Congress. In doing so, it exceeds statutory authority. To assess whether a government agency exceeded the statutory authority it holds, one must first inquire “whether Congress has directly spoken to the precise question at issue.”<sup>1</sup> Then “the particular statutory language at issue, as well as the language and design of the statute as a whole,” and the traditional tools of statutory construction should be used to determine whether Congress has provided an agency with authority to interpret a statutory duty.<sup>2</sup>

DHS claims it has “general and specific statutory authority to collect or require submission of biometrics” for people “directly associated with a request for immigration benefits; and for purposes incident to apprehending, arresting, processing, and care and custody of aliens.”<sup>3</sup> DHS first tries to ground that claim in the general authority to administer and enforce immigration laws charged to the Secretary of the Department of Homeland Security, citing Immigration and Nationality Act (“INA”) section 103(a), 8 U.S.C. 1103(a).<sup>4</sup> But a general authority to pass regulations does not provide any *specific* statutory authority necessary to collect expansive biometric information.

As the proposed rule notes, in recent years DHS “has adopted the practice of referring to fingerprints and photographs collectively as biometrics, biometric information, or biometric services.”<sup>5</sup> Despite this well-established understanding, DHS is seeking to “clarify and expand its authority to collect more than just fingerprints” to include the authority to collect palm print, voice print, iris image, or DNA information.<sup>6</sup> According to DHS, the proposed rule:

“would provide DHS with the flexibility to change its biometrics collection practices and policies to ensure that DHS can make adjustments necessary to meet emerging needs, such as national security, public safety, or fraud concerns; enhance the use of biometrics

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<sup>1</sup> *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

<sup>2</sup> *Chem. Mfrs. Ass’n v. U.S. E.P.A.*, 919 F.2d 158, 162 (D.C. Cir. 1990).

<sup>3</sup> Proposed Rule, 85 Fed Reg. at 56347.

<sup>4</sup> *Id.* at 56340, 56347, 56389.

<sup>5</sup> *Id.* at 56354.

<sup>6</sup> *Id.* at 56355.

beyond national security and criminal history background checks and document production, to include identity management in the immigration lifecycle and enhanced vetting, to lessen the dependence on paper documents to prove identity and familial relationships and preclude imposters; and improve the consistency in biometrics terminology within DHS.<sup>7</sup>

To support this new, expansive definition of “biometrics,” DHS cites only one statutory provision, 18 U.S.C. § 1028(d)(7)(B), which references personal data like voice prints, and retina or iris images, in the context of an expansive list of potential “means of identification” that may form the basis for federal identity theft and fraud crimes.<sup>8</sup> DHS provides no source within Title 8 of the U.S. Code for a definition of “biometrics”—a term DHS admits it has previously only used to refer to fingerprints and photographs.

Despite the contention in the proposed rule, a definitional provision in an unrelated criminal law does not give DHS authority to first create a general requirement to vastly expand the scope of the term “biometrics” in the context of immigration law to include the collection of palm print, voice print, iris image, or DNA information. In fact, no such authority exists; Congress has never given DHS the authority to collect “biometrics” in the context of immigration benefits.

After providing purported general authority, DHS then says it *does* have “the specific authority for DHS to collect or require submission of biometrics” (while simultaneously trying to redefine the term).<sup>9</sup> In support of this contention, DHS cites 8 U.S.C. § 1225(d)(3) for the authority “to take and consider evidence of or from any person touching the privilege of an alien... concerning any matter which is material and relevant to the enforcement of this chapter,” as well as similar authority provided in 8 U.S.C. § 1357(b).<sup>10</sup> But these statutes are inapposite. Both statutes provide authority to *immigration officers* to “take and consider evidence,” not to DHS or USCIS to promulgate rules requiring the submission of biometrics. Neither of these statutes construe data-gathering or biometrics, and to the extent the statutes are ambiguous, they should not be interpreted to allow DHS to collect and indefinitely store millions of U.S. citizens’ and noncitizens’ biometric information.

Lacking any other specific statutory authority, DHS then cites several provisions of the INA that provide explicit authority to collect photographs from naturalization applicants<sup>11</sup> and fingerprints for “the purpose of registering aliens.”<sup>12</sup> Neither of these statutes mention the word “biometrics,” nor do they authorize the collection of palm print, voice print, iris image, or DNA information. Nevertheless, the Department attempts to use those portions of Title 8 of the U.S. Code to justify the vast expansion of the meaning of “biometrics” in U.S. immigration law through the Proposed Rule.

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<sup>7</sup> *Id.* at 56388.

<sup>8</sup> *Id.* at 56354.

<sup>9</sup> *Id.* at 56347.

<sup>10</sup> *Id.*; INA § 235(d)(3), 8 U.S.C. 1225(d)(3); *see also* INA 287(b), 8 U.S.C. 1357(b), (providing DHS authority to, “. . . take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service.”).

<sup>11</sup> INA § 333 8 U.S.C. 1444; INA § 335, 8 U.S.C. 1446.

<sup>12</sup> INA § 262(a), 8 U.S.C. 1302(a); INA § 264(a), 8 U.S.C. 1304(a).

But when Congress intends for DHS to collect “biometrics,” it has stated as much. The sole use of the phrase “biometrics” included in Title 8 comes in a requirement for Customs and Border Protection to create a “biometric entry/exit” system for individuals traveling into and out of the United States.<sup>13</sup> The term appears nowhere else within Title 8. Thus, to date, Congress has limited the term only to explicit situations relating to national security and border control and has not clearly stated its intent to apply such an expansive term to regular migration and the adjudication of immigration benefits.

DHS does cite to other statutes in an attempt to find authority to justify the expansion of the collection of biometric information from individuals. First, DHS refers to an old statute authorizing the Immigration and Naturalization Service (INS), which preceded the creation of DHS, to collect fingerprints, and connects the fee for that collection to the modern biometric services fee collected by USCIS.<sup>14</sup> But again, if Congress intended to require the submission of more than fingerprints, it would have indicated as much. Then, DHS references statutes that negatively impact applicants for certain benefits if they have been convicted of a “specified offense against a minor,”<sup>15</sup> a violation that affects criminal and security related grounds of inadmissibility,<sup>16</sup> violations that impact eligibility for asylum and refugee status,<sup>17</sup> and similar violations that impact eligibility for TPS status.<sup>18</sup> Finally, DHS refers to the general requirement that adjustment of status applicants be admissible in order to qualify,<sup>19</sup> and that naturalization applicants be assessed to have “good moral character.”<sup>20</sup> Again, none of these statutes mention the word “biometrics” nor the collection of palm print, voice print, iris image, or DNA information.

In a final attempt to justify the authority to vastly expand the amount and types of information collected from people who interact with DHS, the proposed rule references the USA PATRIOT Act<sup>21</sup> and the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>22</sup> which direct DHS to utilize “biometric technology” to develop an entry-exit system and require DHS to complete a biometric data system, respectively.<sup>23</sup> This terrorism prevention justification for the expansion of biometrics collection offered by DHS works hand-in-hand with the references to background checks and secure document production.<sup>24</sup> But as explained above, these statutes only show that Congress knows how to grant the authority to collect biometrics, and has not granted such authority in any other circumstance. The rule fails to justify why DHS seeks to expand the use of biometric technology beyond the entry and exit data system described in the statute. Rather, the relevant statutes provide only fingerprints and photographs as a

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<sup>13</sup> 8 U.S.C. § 1365b (“Biometric entry and exit data system”).

<sup>14</sup> Proposed Rule, 85 Fed Reg. at 56347 (citing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Title I, Public Law 105-119, 111 Stat. 2440, 2447-2448 (1997)).

<sup>15</sup> INA § 204(a)(1)(A)(viii), 8 U.S.C. 1154(a)(1)(A)(viii).

<sup>16</sup> INA § 212(a)(2)-(3), 8 U.S.C. 1182(a)(2)-(3).

<sup>17</sup> INA § 207(c)(1), 8 U.S.C. 1157(c)(a); INA § 212, 8 U.S.C. 1182; INA § 208(b)(2)(a), 8 U.S.C. 1158(b)(2)(a)

<sup>18</sup> INA § 244(c)(2)(A)(iii)-(B), 8 U.S.C. 1254a (c)(2)(A)(iii)-(B).

<sup>19</sup> INA § 245(a)(2), 8 U.S.C. 1255(a)(2); INA § 209(b)(5), 8 U.S.C. 1159(b)(5).

<sup>20</sup> INA § 316(a)(3), 8 U.S.C. 1427(a)(3).

<sup>21</sup> Pub. L. 107-56, 115 Stat. 354 (2001) (codified at note to 8 U.S.C. 1365a).

<sup>22</sup> Pub. L. 108-456, 118 Stat. 3638 (2004) (codified as amended at 8 U.S.C. 1365b).

<sup>23</sup> Proposed Rule, 85 Fed Reg. at 56348.

<sup>24</sup> See *Id.* (referencing 8 U.S.C. 1158(d)(5)(A)(i) and 8 U.S.C. 1732(b)(1)).

means of verifying identity and ensuring registration.<sup>25</sup> Lastly, DHS attempts to justify its authority to collect palm print, voice print, iris image, and DNA information from U.S. citizens and lawful permanent residents who file family-based petitions “to determine if a petitioner has been convicted of certain crimes pursuant to the [Adam Walsh Child Protection and Safety Act of 2006 (AWA)].”<sup>26</sup> DHS claims these various statutory provisions justify, or even require, the vast expansion of the collection of personal information beyond photographs and fingerprints despite the complete lack of any mention of the collection of palm print, voice print, iris image, or DNA information in the statutory language.

As a result, the proposed rule is ultra vires and violates the Administrative Procedure Act (APA) as “contrary to constitutional right, power, privilege, or immunity” as well as that it is “in excess of statutory jurisdiction, authority or limitations, or short of statutory right.”<sup>27</sup> DHS attempts to ground its authority to expand the definition and collection of “biometrics” in various statutes, but in doing so DHS repeatedly attempts to unlawfully reinterpret statutes against the clear intent of Congress.

### III. DHS has failed to prove that the changes in the Proposed Rule are necessary or justified

Under current policy, the submission of biometrics is mandatory only for individuals pursuing a specific subset of immigration petitions and applications. If DHS wishes to collect biometrics from individuals pursuing other immigration benefits, the Department must justify the request and notify the individuals that biometrics are required. DHS now proposes flipping this presumption so that biometrics collection is generally always authorized unless the agency waives the requirement without meaningful analysis or justification.<sup>28</sup>

Serious constitutional concerns are implicated in the collection of personal data from U.S. citizens and noncitizens in the U.S. The Fourth Amendment provides critical protections against the unlawful intrusion on privacy rights, and its protections apply to citizens and noncitizens alike. Limitations on privacy must serve a legitimate purpose. They must also be necessary, proportional, and represent the least intrusive option available in reaching that purpose.<sup>29</sup> DHS’s Proposed Rule fails to meet this standard.

The Proposed Rule, as currently drafted, is incomplete. DHS claims that the sweeping changes in this Proposed Rule are necessary and justified as the current data it collects “possess inherent inconsistencies that could result in immigration benefits being granted to ineligible applicants or imposters.”<sup>30</sup> The Department uses this claim as a justification for both its sweeping redefinition of “biometrics” and requirement to include iris scans, palm prints, images for the purpose of facial recognition, and even

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<sup>25</sup> See 8 U.S.C. 1738 (requiring that individuals granted asylum be issued a document that contains the individual’s “fingerprint and photograph”).

<sup>26</sup> Proposed Rule, 85 Fed. Reg. at 56348.

<sup>27</sup> 5 U.S.C. § 706(2)(B)-(C) (1966).

<sup>28</sup> Proposed Rule, 85 Fed. Reg. at 56340.

<sup>29</sup> See, e.g., Federal Bureau of Investigation, Domestic Investigations and Operations Guide (Sept. 28, 2016), at 4.1.1 (listing the requirement that FBI agents “[e]mploy the least intrusive means that do not otherwise compromise FBI operations” as one of six “basic principles that serve as the foundation for all FBI mission-related activities”), available at

<https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29>.

<sup>30</sup> Proposed Rule, 85 Fed. Reg. at 56340.

DNA,<sup>31</sup> and also the broad proposed expansion of the pool of individuals subjected to biometrics collection.

While DHS claims that immigration benefits *could* be granted to people improperly under the current structure, it fails to provide any evidence or meaningful analysis to support its claim that fingerprints are less reliable for identity verification than iris scans, palm prints, and voice prints in justifying its proposed extraordinary expansion of biometrics collection. Such information is critical in affording the public a meaningful opportunity to analyze the Proposed Rule and its purported efficacy. Without providing such evidence, implementing a rule with such a broad reach would be improper.

#### IV. DHS proposes to expand biometrics collection to include faulty and unproven modalities with significant privacy implications for citizens and noncitizens alike

DHS proposes to expand the collection of biometric information beyond fingerprints and photographs to include DNA, voice prints, palm prints, iris scans, and the use of photographs for facial recognition. As explained below, DHS's rationale for this expansion of biometric modalities is unsupported. In addition, DHS's failure to articulate or even speculate as to the specific costs to the agency of implementing each biometric modality makes it impossible to effectively comment on the rule's cost/benefit analysis.

- a. *DNA*: The Proposed Rule alleges the unreliable nature of the current document-based system needs to be revised and replaced with a DNA-based system for establishing genetic relationships where required.<sup>32</sup> Although the AABB states "DNA testing provides the most reliable scientific test available to resolve a genetic relationship,"<sup>33</sup> the current use of primary evidence such as marriage and birth certificates functions without substantial fraud or the substantial costs created by the Proposed Rule, and DHS provides no evidence to the contrary.

Under the Proposed Rule, DHS would collect DNA samples from individuals using buccal swabs that would then be either tested locally by a Rapid DNA machine or mailed to an AABB-accredited laboratory for testing.<sup>34</sup> DHS acknowledges "cost-effective Rapid DNA equipment" that would allow non-technical users to produce reliable results does not exist."<sup>35</sup> Without these theoretical Rapid DNA tests, buccal swap samples will need to be transported to AABB-accredited laboratories, thereby creating a greater strain on an already overwhelmed United States medical testing system. The estimated wait time for results from a typical AABB-accredited facility ranges from two to three weeks for similar tests currently used to verify genetic relationships.<sup>36</sup> These tests are only performed in rare instances, but the Proposed Rule would dramatically increase the number of tests performed by these facilities, and the wait time for results would likely also increase considerably. The Proposed Rule fails to justify the additional burden it would place on the scientific testing infrastructure during a global pandemic that already faces

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<sup>31</sup> Proposed Rule, 85 Fed. Reg. at 56341.

<sup>32</sup> See Proposed 8 C.F.R. § 106.16(e).

<sup>33</sup> Proposed Rule, 85 Fed. Reg. at 56353.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at FN 37.

<sup>36</sup> *Frequently Asked Questions*, USA Immigration DNA Testing (last visited Oct. 8, 2020).

substantial backlogs. The Proposed Rule also fails to address the impact this increase in adjudication time would have on USCIS receipts or the agency's budget, or the effect that these testing-related delays could have on existing USCIS adjudication backlogs.

The Proposed Rule fails to describe how false negative, unexpected findings, or other unusual test results are to be handled and reported. A false negative test result could potentially result in the loss of an individual's immigration status if the adjudicator interpreted the inaccurate test as evidence of fraud on the part of the applicant.

If an individual is not provided means to contest a DNA test result, an erroneous result could lead to the denial of an immigration benefit, or deportation or worse in the case of some asylum applicants. Although DNA testing can be highly accurate, the sheer number of tests required by the Proposed Rule would inherently carry a risk of mistakes, wrongfully depriving an individual of their immigration status. The Proposed Rule fails to address the negative impacts of this dynamic, along with the possible deterrent effect it would create for potential applicants afraid of their DNA information being misused or inadequately protected by testing facilities and DHS.

DHS also fails to address the long-term privacy concerns of people subject to biometrics collection that will allow DHS to "use and store DNA test results with other law enforcement agencies to the extent permitted by and necessary to administer and enforce the immigration and naturalization laws."<sup>37</sup> While attempting to address the sensitive privacy concerns implicated by DNA collection, DHS states it will "not handle or share any raw DNA for any reason beyond the original purpose of submission (i.e., to establish or verify the claimed genetic relationship), unless DHS is required to share by law."<sup>38</sup> Since the initial programs to collect DNA from people convicted of serious violent crimes began in 1988, states and the federal government have steadily expanded the use of DNA collection throughout the criminal justice system. Under the Adam Walsh Child Protection and Safety Act of 2006, the federal government may collect DNA samples from individuals "detained under the authority of the United States."<sup>39</sup> The Department now purports to carryover the steady expansion of DNA collection by the federal government into the civil immigration context. The Proposed Rule claims the "DNA test results are valid indefinitely,"<sup>40</sup> while failing to address the privacy concerns of people subject to the DNA collection policy when history suggests that future laws will continue to expand the use of DNA evidence throughout the federal legal system.

- b. *Facial recognition*: DHS proposes to expand biometrics collection to include photographs for the specific use in facial recognition.<sup>41</sup> Despite rapid technological developments, significant concerns remain regarding the accuracy of facial recognition that undermine its stated purpose, as well as the secondary uses for such data.

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<sup>37</sup> Proposed 8 C.F.R. § 103.16(e).

<sup>38</sup> Proposed Rule, 85 Fed. Reg. at 56354.

<sup>39</sup> 42 U.S.C. 14135a(a)(1)(A).

<sup>40</sup> Proposed Rule, 85 Fed. Reg. at 56378, FN 99.

<sup>41</sup> *Id.* at 56341.



DHS claims that facial recognition will assist the Department in determining if an applicant is who they claim to be, but fails to provide any analysis or explanation of the purported benefits of facial recognition beyond those available through the current collection of fingerprints and photographs.<sup>42</sup> While the Proposed Rule indicates that facial recognition could be used to verify identity where “fingerprints are unobtainable subsequent to the initial biometric enrollment at an ASC,” it does not provide any information regarding the proportion of such fingerprints that become unobtainable in this manner. Such data is necessary for stakeholders to meaningfully analyze the purported benefits of subjecting millions of people to unproven and highly invasive technology on an annual basis.

The Proposed Rule cites a DHS facial recognition pilot program run by U.S. Customs and Border Protection (CBP) at several airports in support of the purported accuracy and value of the technology in identifying fraud, claiming that the initial results are “very favorable.”<sup>43</sup> This is the same pilot program that has been the subject of a massive data breach and subsequent investigation by the DHS Office of Inspector General described in greater detail below.<sup>44</sup> Beyond this data breach, however, serious questions remain regarding the accuracy of facial recognition technology.

The National Institute of Standards and Technology (NIST) within the U.S. Department of Commerce has worked closely with the public and private sectors since the 1960s in assessing developments in biometrics technologies.<sup>45</sup> NIST has conducted comprehensive testing of facial recognition technology platforms for over a decade.<sup>46</sup> According to NIST, while the overall accuracy of these systems has improved in recent years, the rate of false positives and false negatives can vary widely depending on a person’s gender, race, and age.<sup>47</sup> Of significant concern, NIST has found that the highest false positives in people of African and Asian origin, and the lowest for people of eastern European origin.<sup>48</sup> NIST also found that the highest false negatives for people born in Africa, Asia, and the Caribbean.<sup>49</sup> These findings, when combined with the knowledge that immigrants from Africa, Asia, and the Caribbean collectively made up a full 47 percent of *all* immigrants that came to the United States in 2018,<sup>50</sup> undermine DHS’s claim that facial recognition will serve as a more effective resource for identity verification

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Office of the Inspector General, U.S. Department of Homeland Security, Review of CBP’s Major Cybersecurity Incident during a 2019 Biometric Pilot, September 21, 2020, p. 6, *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf>.

<sup>45</sup> Dr. Charles Romine, Director, Information Technology Laboratory, National Institute of Standards and Technology, testimony before the U.S. House of Representatives, Committee on Homeland Security, February 6, 2020, *available at* <https://www.nist.gov/speech-testimony/facial-recognition-technology-frt-0>.

<sup>46</sup> *Id.*

<sup>47</sup> See National Institute of Standards and Technology, Face Recognition Vendor Test, December, 2019, p. 2, *available at* <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Abby Budiman, Key Findings About U.S. Immigrants, Pew Research Center, August 20, 2020, *available at* <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>.

than the current biometrics it collects, and it amplifies concerns relating to secondary uses of data and the effect of racial bias caused by erroneous results skewed towards certain populations.

The nature of facial recognition technology makes it highly susceptible to secondary uses and potential abuse. When combined with public video cameras, facial recognition technology can be used as a form of general surveillance. Moreover, it can be used in this manner passively and without the knowledge or consent of the parties impacted. When integrated with data from other governments and other government agencies, the collection practices proposed in this rule could allow DHS to build a database large enough to identify and track all people in public places, not just places DHS oversees, without their knowledge. Despite these concerns, the Proposed Rule does not provide any information regarding safeguards to prevent secondary uses and potential abuses.

- c. *Voice prints*: DHS proposes to expand biometrics collection to include voice prints. In support of this proposal, DHS claims that the collection of voice prints will assist in improving the services provided by its call centers.<sup>51</sup> The Proposed Rule states that voice prints will help reduce concerns regarding a caller's identity and that "individuals will more effectively be able to call for assistance or inquire about the status of a pending immigration benefit request."<sup>52</sup> DHS further claims that voice prints will also help to "identify indicia of fraud, screen for public safety or criminal history, and vet potential national security issues."<sup>53</sup>

DHS fails to provide any meaningful analysis to support these claims, and to justify the invasive practice of creating and storing recordings of individual voices in perpetuity. Unprecedented new surveillance regimes must be supported by detailed explanations that ensure that DHS has grappled with the significance of its actions, not cursory remarks and vague commentary. Moreover, serious questions remain regarding the overall efficacy and security of voice print technology that undermine DHS's stated justification.

A study by Pindrop, a leader in the field of voice print technology, analyzing changes in voices over time found slight changes in speed and pitch over months and years.<sup>54</sup> While these subtle changes are not necessarily obvious to the human ear, they can negatively impact voice detection technology, and the study found that error rates in voice biometrics can double over just a two-year period.<sup>55</sup> These results are not surprising given that the human body can use as many as 100 different muscles while speaking, and the fact that our muscles weaken as we age.

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<sup>51</sup> Proposed Rule, 85 Fed. Reg. at 56356.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Jonathan Keane, *Study Accuracy of Voice Biometrics Can Diminish as We Age*, Digitaltrends, February 23, 2017, available at <https://www.digitaltrends.com/computing/voice-biometrics-accuracy/>.

<sup>55</sup> *Id.*

Additionally, there are considerable security concerns associated with voice print technology that are entirely unaddressed by the Proposed Rule. Experts have indicated that technologies that are capable of emulating voices can easily fool voice print platforms, especially where potential imposters are able to obtain fragments of a person speaking.<sup>56</sup> It appears that USCIS proposes to create a system in which individuals could access confidential data by phone through the collection of voice prints. But given the ubiquity of podcasts, YouTube videos, voicemails, and the like, the ability to regenerate an individual's voice, and therefore to compromise their security, creates a real concern that is entirely unaddressed by the Proposed Rule.

- d. *Palm prints*: DHS proposes to expand biometrics collection to include palm prints. In support of this proposal, DHS states that it is “consistent with what the FBI has announced as part of its Next Generation Identification initiative for the development of ... an integrated National Palm Print Service,” which would “improve law enforcement’s ability to exchange a more complete set of biometric information.”<sup>57</sup>

DHS fails to explain why USCIS, which is not a law enforcement agency, would need to assist the FBI with expanding their database of palm prints, or how it is within their statutory mission to do so. USCIS is not an investigatory agency, and immigration officers adjudicating benefits are not authorized to conduct domestic law enforcement. Nor would an individual’s appearance in the National Palm Print Service generally affect eligibility for a benefit if the person had never been charged or convicted of a crime.

DHS also does not explain what USCIS would do with palm print data or how the collection of palm print data would assist in the adjudication of immigration benefits other than a vague reference to “background checks capability.”<sup>58</sup>

DHS’s complete failure to consider the cost/benefit analysis of collecting and storing palm print data indicates that DHS has not meaningfully considered or justified the collection.

- e. *Data retention*: The privacy risks associated with biometrics databases are extreme, with the greatest concerns relating to the breach or loss of personally identifiable information (PII) and the risk of misuse for largescale surveillance. The risk of such breaches or data loss relating to PII that DHS proposes to collect and store in perpetuity cannot be overstated.

While the Proposed Rule makes passing references to related requirements that DHS maintain “a robust system for biometrics collection, storage, and use related to providing adjudication and naturalization services...,”<sup>59</sup> the rule fails to specify the exact location where the department proposes to store the vast amount of PII that it proposes to

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<sup>56</sup> See Rupert Jones, *Voice Recognition: is it really as secure as it sounds?*, The Guardian, September 22, 2018, available at <https://www.theguardian.com/money/2018/sep/22/voice-recognition-is-it-really-as-secure-as-it-sounds>.

<sup>57</sup> Proposed Rule, 85 Fed. Reg. at 56355-56356.

<sup>58</sup> *Id.*

<sup>59</sup> Proposed Rule, 85 Fed. Reg. at 56348.

collect. While DHS has historically stored biometric data in its Automated Biometric Identification System (IDENT),<sup>60</sup> this new data will likely be stored in IDENT's replacement: DHS's new Homeland Advanced Recognition Technology (HART) database.

HART is currently the world's second largest biometrics collection and storage system,<sup>61</sup> and it is operated by DHS's office of Biometric Identity Management and hosted by Amazon's GovCloud. According to HART's original privacy impact assessment, its records already include a wide array of information such as biometric data, biographic data, derogatory information such as warrants and immigration violations, officer comment information, encounter data, and other unique machine-generated identifiers.<sup>62</sup> DHS estimates that under the Proposed Rule, an additional 2.17 million new biometrics submissions will be collected annually from approximately 6.07 million individuals. All this additional PII will presumably be stored in its HART database, combined with millions of other entries, and stored by a third-party contractor. If that is the case, the PII of millions of individuals impacted by this Proposed Rule will be vulnerable to breach or future misuse given that it will all be stored together in a single database and using a unique identifier to link several different biometrics to each person forever.

DHS recognizes in the Proposed Rule that individuals "could possibly be apprehensive about doing so and may be [sic] have concerns germane to privacy, intrusiveness, and security."<sup>63</sup> But DHS refuses to consider the potential costs or likelihood of such a breach, declaring that "data security is an intangible cost, and we do not rule out the possibility that there are costs that cannot be monetized that accrue to aspects of privacy and data security."<sup>64</sup>

This failure to consider the costs and dangers of information security is not justified. In recent years, Federal agencies, including DHS, have repeatedly failed to prove that they are capable of fully protecting PII, and the significant risk of data loss has been made clear by several major breaches of federal databases, including breaches impacting millions of records in the last five years alone. DHS must consider the costs of, and lessons learned, from these breaches when evaluating the Proposed Rule.

In 2015, the Office of Personnel Management was the subject of a breach that compromised 5.6 million fingerprints, social security numbers, and other personal

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<sup>60</sup> U.S. Department of Homeland Security, DHS/OBIM/PIA-001 Automated Biometric Identification System, last updated November 14, 2019, available at <https://www.dhs.gov/publication/dhsnppdpia-002-automated-biometric-identification-system>.

<sup>61</sup> Chris Burt, *Inside the HART of the DHS Office of Biometric Identity Management*, BiometricUpdate.com, September 4, 2018, available at <https://www.biometricupdate.com/201809/inside-the-hart-of-the-dhs-office-of-biometric-identity-management>.

<sup>62</sup> U.S. Department of Homeland Security, Privacy Threshold Analysis for Homeland Advanced Recognition Technology, April 2015, at 16, available at <https://epic.org/foia/dhs/hart/EPIC-2018-06-18-DHS-FOIA-20190422-Production.pdf>.

<sup>63</sup> *Proposed Rule*, 85 Fed. Reg. at 56388.

<sup>64</sup> *Id.*

information of more than 25 million people across the country.<sup>65</sup> Similarly, in 2019, DHS admitted that the images of nearly 200,000 people taken as part of a pilot program for its facial recognition program, as well as license plate data, were the subject of a cyberattack that resulted in the information being posted on the dark web.<sup>66</sup> The latter breach related to biometrics data collected by U.S. Customs and Border Protection (CBP) during a facial recognition pilot program known as the “Vehicle Face System”<sup>67</sup>—some of the very same data that DHS now proposes to collect en masse. This breach has been the subject of an investigation by the DHS Office of Inspector General (OIG) which culminated in a report and recommendations from the OIG to CBP on September 21, 2020<sup>68</sup>—just three weeks before the submission of this comment. While the report notes that CBP has agreed to all the OIG’s recommendations, it remains highly unlikely that they have been fully implemented at this time.

Moreover, the consequences of such breaches often are not fully understood for years, given their scale and the relatively minimal understanding among the public of the information contained in federal government databases. DHS’s plans to move forward with a dramatic expansion of biometrics collection under these conditions, while refusing to conduct a thorough analysis of the anticipated costs and likelihood of an information security breach, demonstrates a willful disregard of the privacy interests of millions of Americans and the impact that these breaches have on individuals.

**V. DHS’s justification for eliminating age restrictions on biometrics fails to justify its departure from current practice, misstates issues around processing of children at the border, and fails to consider the effects of puberty and aging on biometric capture for children.**

In the Proposed Rule, DHS provides five distinct reasons for eliminating age restrictions on biometrics collection:

- DHS identifies “[enhancing] the ability of ICE and CBP to identify fraudulent biological relationships claimed at the border and upon apprehension,” or variants thereof, two times.<sup>69</sup>
- “[assisting] DHS in its mission to combat human trafficking, child sex trafficking, forced labor exploitation, and alien smuggling” or variants thereof, five times.<sup>70</sup>
- “identity verification and management in the immigration lifecycle via biometrics is even more important in the case of children because their physical appearances can change relatively rapidly and children often lack identity documents,” or variants thereof, one time.<sup>71</sup>

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<sup>65</sup> U.S. Office of Personnel Management, Cybersecurity Resource Center: Cybersecurity Incidents, *available at* <https://www.opm.gov/cybersecurity/cybersecurity-incidents/>.

<sup>66</sup> Office of the Inspector General, U.S. Department of Homeland Security, Review of CBP’s Major Cybersecurity Incident during a 2019 Biometric Pilot, September 21, 2020, p. 6, *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Proposed Rule, 85 Fed. Reg. at 56341; 56351-56352.

<sup>70</sup> Proposed Rule, 85 Fed. Reg. at 56345; 56346; 56357; 56366; 56367.

<sup>71</sup> Proposed Rule, 85 Fed. Reg. at 56357.

- “ensuring that every individual’s identity is established or verified—regardless of age—when they are placed in removal proceedings under the INA,” or variants thereof, one time.<sup>72</sup>
- “permit[ting] DHS components maximum flexibility in their day-to-day operations,” or variants thereof, one time.<sup>73</sup>

In total, DHS provides asylum and border-related arguments as justification for the removal of age restrictions seven times, identity verification arguments twice, and “flexibility” once. These arguments are fundamentally flawed for six key reasons.

First, DHS’s argument that lifting age restrictions will combat human trafficking at the border is flawed because DHS *already* collects DNA from individuals apprehended at the border, including children under the age of 14.<sup>74</sup> Although the data collection is supposedly voluntary, DHS has used it to test thousands of family units at the border in FY2019 and FY2020, including children.<sup>75</sup> Despite the fact that DHS has already used DNA testing and other biometric analysis to verify claims of child trafficking at the border, DHS does not explain whether these current procedures are inadequate, flawed, or otherwise insufficient to “combat human trafficking, child sex trafficking, forced labor exploitation, and alien smuggling.”

The Proposed Rule provides no information on the effectiveness of the current procedures to combat trafficking, nor an explanation for why removing age restrictions on biometric collection in connection with applications for immigration benefits would fight child sex trafficking and other severe crimes.

Second, the Proposed Rule falsely claims removing all restrictions on the collection of biometrics for children would enhance ICE and CBP’s ability to “identify fraudulent biological relationships claimed at the border.” In making this argument, the Proposed Rule cites extensively to the so-called problem of “fraudulent family units” at the border, defining “fraudulent family units” as “unrelated adults and children [who] claim biological relationships.”<sup>76</sup> But this definition does not match DHS’s own definition.

As DHS itself has acknowledged to Congress, a “family unit” is “an alien parent(s) or legal guardian(s) and the alien child(ren) under the age of 18,” and a “fraudulent family unit” is “group of aliens that identify themselves to be a family unit.”<sup>77</sup> There is no requirement that a “fraudulent family unit” consist of “unrelated” individuals. If a grandparent, aunt, uncle, brother, sister, or other family member represents themselves to a Border Patrol officer as the parent of the child, they will be labeled a “fraudulent family unit” despite a clear biological relationship.

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<sup>72</sup> Proposed Rule, 85 Fed. Reg. at 56357

<sup>73</sup> *Id.*

<sup>74</sup> ICE and CBP have conducted DNA tests at the border through Operation Double Helix and Operation Noble Guardian. See Statement of Derek Benner, Acting Deputy Director, U.S. Immigration and Customs Enforcement, Regarding “Unprecedented Migration and the U.S. Southern Border: The Year in Review,” at 6 (Nov. 13, 2019), available at <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Benner-2019-11-13.pdf>.

<sup>75</sup> Noah Lanard, *ICE Wants to Subject Up to 100,000 Migrants to DNA Tests*, Mother Jones, May 29, 2019, available at <https://www.motherjones.com/politics/2019/05/ice-wants-to-subject-up-to-100000-migrants-to-dna-tests/>.

<sup>76</sup> Proposed Rule, 85 Fed. Reg. at 56341.

<sup>77</sup> Responses to Post-Hearing Question for the Record, Submitted by Brian S. Hastings, Randy Howe, and Gregory Nevano, Senate Homeland Security and Governmental Affairs Committee Hearing, “Unprecedented Migration at the U.S. Southern Border: The Exploitation of Migrants through Smuggling, Trafficking, and Involuntary Servitude,” June 26, 2019, on file with author.

DHS has also acknowledged to Congress that the exact scenario it claims these rules seek to prevent— "placing children into the hands of adult strangers, so they can pose as families"—is exceedingly rare. DHS previously stated:<sup>78</sup>

In Fiscal Year (FY) 2019, from October 1, 2018 through July 29, 2019, a total of 11 fraudulent families involving an adult and child under the age of 13 were identified. Of those 11 fraudulent families identified, two were designated as an unknown escort. Assuming “unknown” means unrelated, then two of the 11 fraudulent families may have been unrelated.

As this response indicates, nine out of 11 “fraudulent families” apprehended at the border where the child was under the age of 13 did not involve “unrelated adults and children [who] claim biological relationships.” While the exact biological relationship claimed may not have been accurate, in all but two of those cases the child was apparently related to the adult.

DHS has not justified or explained why subjecting tens or hundreds of thousands of children to invasive DNA testing each year is an appropriate response to a problem that seemingly occurs in extremely rare circumstances. DHS has also not considered whether there are alternative means to detect actual cases of “unrelated adults” bringing children across the border other than through DNA testing, or indeed whether the current DNA testing allowed under Operation Double Helix and Operation Noble Guardian has proven insufficient to protect against this concern.

Third, DHS does not explain why current identity verification processes for children are insufficient. DHS provides no data as to whether “identity verification” is currently a problem for the agency when it comes to children.

Fourth, DHS does not provide any support for its contention that eliminating age restrictions on the collection of biometrics will “permit DHS components maximum flexibility.” DHS simply suggests that some components might choose to “establish [their own] age threshold for biometric collection,” but does not provide any explanation for why components might do that, or what such age thresholds might be. This could result in inconsistent application and inconsistency in decisions. Neither does DHS examine the potential costs to eliminating a clear, agency-wide rule and replacing it with multiple different component-specific rules. Without such information, providing a comment in response to that contention is impossible.

Fifth, DHS does not provide any specific explanation for why it is also lifting age restrictions on individuals age 80 or older.<sup>79</sup> “An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.”<sup>80</sup> Here, unlike its proposal to lift age restrictions on children, DHS has provided no explanation for why it is necessary to lift age restrictions on biometric collection of individuals above age 79. DHS must articulate why it has chosen to end the previous policy which exempted elderly individuals, and must examine the specific costs and benefits of lifting age restrictions on individuals above age 79.

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<sup>78</sup> *Id.*

<sup>79</sup> Proposed Rule, 85 Fed. Reg. at 56368 n. 64 (explaining that current rules limit biometrics to people aged 14-79).

<sup>80</sup> *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (citations omitted).

Finally, DHS does not adequately examine the potential problems that may be caused by the collection of biometrics from children who have not gone through puberty. Fingerprints, voiceprints, and facial recognition are all affected by the growth process during childhood. In 2006, the European Union noted the following:<sup>81</sup>

Scientific tests have confirmed that the papillary ridges on the fingers are not sufficiently developed to allow biometric capture and analysis until the age of six. Even then, account must be taken of the fact that major changes take place as children grow and this will entail considerable expense in the form of computer programs. When checks are carried out, the software must make allowance for age-related changes, or else no match will be possible. The same procedure will be necessary for face recognition.

The problem of storing biometric data from children emerged particularly clearly from a study conducted by the Netherlands Ministry of the Interior and Kingdom Relations. The study was distributed as room document No 17/05 at the meeting of the Visa Working Party on 10 and 11 May 2005. The facial changes taking place up to the age of 12 are so marked that face recognition is not possible without highly sophisticated software and the considerable expense which goes with it.

Children over the age of six do have measurable fingerprints, but these are subject to particularly marked changes as the child grows, with the result that special algorithms must be used in order to calculate the changes and arrive at a result which is as accurate as for an adult.

While there have likely been advances in biometric identification technology since 2006, DHS neither examines the current state of the technology as applied to children nor even acknowledges that such examination is necessary; because DHS does not acknowledge that there are *any* concerns related to the accuracy of the collection of biometrics for children who have yet to go through puberty. Likewise, DHS does not indicate how “identify verification” would be improved through the collection of biometric information which may change over time, potentially leading to a negative match upon subsequent checks simply because a child had gone through puberty.<sup>82</sup>

#### **VI. DHS fails to consider the cost/benefit analysis in imposing sweeping new biometric requirements to eliminate rare instances of fraud.**

The Proposed Rule violates the most basic principle of rulemaking; its benefits must outweigh its costs. Here, the costs are significant. DHS estimates that the Proposed Rule would increase the number of biometrics taken “from 3.90 million currently to 6.07 million,” which would impose “a combined total of \$297.3 million in quantified costs.”<sup>83</sup> DHS also estimates that the cost of DNA tests alone would impose

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<sup>81</sup> Council of the European Union, Note from Presidency to delegations, “Setting of the minimum age for recording and storing facial images and fingerprints in the chip of a passport,” June 26, 2006, *available at* <https://www.statewatch.org/media/documents/news/2006/jul/9403-rev1-06.pdf>.

<sup>82</sup> Similar concerns arise where individuals transition gender and take hormones, which can drastically change both face shape (frustrating facial recognition) and a person’s voice.

<sup>83</sup> Proposed Rule, 85 Fed. Reg. at 56343.



anywhere from \$22.4 million to \$224.1 million annually, in undiscounted costs.<sup>84</sup> DHS estimates that the ten-year costs of the rule run anywhere from \$3.204 billion to \$4.997 billion.<sup>85</sup>

As an initial matter, DHS's estimate of 6.07 million total biometrics taken as a result of the Proposed Rule is internally inconsistent. In the list of information collections, DHS provides for each form "the estimated total number of respondents for the information collection biometrics."<sup>86</sup> Added together, DHS indicates that there are 8,941,283 "estimated total respondents for the information collection biometrics"—nearly three million higher than DHS's 6.07 million estimate. DHS does not explain this discrepancy, which, if accurate, would raise overall costs to respondents by nearly \$250 million (presuming each additional respondent would be required to pay the \$85 biometrics fee).

To justify this enormous cost, DHS says that increasing biometric collection would provide a "more reliable system" for identity verification and counteract fraud, allowing DHS to improve "vetting of individuals" seeking immigration benefits. Notably, DHS provides absolutely no evidence that immigration fraud is widespread. The only concrete examples of fraud that DHS provides in the Proposed Rule are either inapposite or do not justify costs of \$5 billion.

The first reference to fraud included in the Proposed Rule is so-called "fraudulent families" at the border. As explained above, DHS applies an inaccurate definition of the term, does not explain how current procedures are inadequate to address the problem, and entirely fails to connect this supposed problem to the use of increased biometrics collection for the adjudication of immigration benefits.

Second, DHS references data on the use of a CBP pilot program for biometric entry/exit verification, indicating that in a span of 40 days, three "imposters" were detected.<sup>87</sup> DHS does not indicate how many people passed through the system, nor does it indicate what the system's false positive rate was. As with the prior example, whatever the success rate of a congressionally mandated biometric entry/exit system may be, it is entirely irrelevant to the adjudication of immigration benefits.

Third, DHS references USCIS's need to "verify identities of principals, because there are identified trends of regional centers engaging in fraud,"<sup>88</sup> citing to three GAO reports on the EB-5 investor visa program. But the GAO reports say no such thing. The first GAO report cited references three "unique fraud risks" identified by USCIS: (1) "uncertain source of immigrant investor funds," (2) "legitimacy of investment entity," and (3) "appearance of favoritism and special access."<sup>89</sup> At no point does the report raise any concern about the "identity of principals," nor does it mention the need to improve identity verification or biometrics. Similarly, the other two GAO reports cited by DHS do not reference the need for identity

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<sup>84</sup> *Id.*

<sup>85</sup> Proposed Rule, 85 Fed. Reg. at 56344.

<sup>86</sup> See Proposed Rule, 85 Fed. Reg. at 56393-56413.

<sup>87</sup> Proposed Rule, 85 Fed. Reg. at 56356.

<sup>88</sup> Proposed Rule, 85 Fed. Reg.

<sup>89</sup> U.S. Government Accountability Office (GAO), GAO-15-696, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," August 12, 2015.

verification of principals, nor do they suggest increased biometrics as a solution to fraud in the EB-5 program.<sup>90</sup>

Thus, the only concrete data or examples provided by DHS on identity-related fraud include two examples which have nothing to do with the adjudication of immigration benefits and a third example which misrepresents GAO reports and is unrelated to biometric collection.

What limited public data exists on immigration-related fraud that *could* be addressed by increased biometric identity verification reveals that it is a minor problem at most. In a 2013 analysis, the Department of Homeland Security's Office of Inspector General published a report entitled "U.S. Citizenship and Immigration Services' Tracking and Monitoring of Potentially Fraudulent Petitions and Applications for Family-Based Immigration Benefits."<sup>91</sup>

The OIG found that "nationwide from fiscal year (FY) 2008 through FY 2011, USCIS denied or revoked 2,557 family-based I-130 petitions for fraud."<sup>92</sup> The OIG report does not indicate how many of these petitioners were denied because of a fraudulent claimed genetic relationship. Over that same time period, USCIS granted 661,379 green cards through family-based preference categories and an additional 1,465,126 green cards to immediate relatives of US citizens.<sup>93</sup>

The OIG report suggests that identity fraud in family-based immigration petitions occurs at a rate below 1%. DHS provides no information in the Proposed Rule suggesting otherwise. Without any analysis of the rate of suspected fraud, it is impossible for commenters to fully consider the adequacy of DHS's cost/benefit analysis.

Thus, DHS attempts to justify nearly five billion dollars in costs over the course of a decade to root out what could be an identity fraud occurrence rate below 1%—without providing any data suggesting otherwise. This approach is unjustified and unsupported.

## **VII. DHS is wrong to use the prevailing minimum wage to calculate the time cost of biometrics appointments.**

In the Proposed Rule, DHS requested comment on its choice to calculate the opportunity cost to petitioners in traveling to Application Support Centers using the fully-burdened prevailing minimum wage, \$12.05, based off of a "prevailing" minimum wage of \$8.25, to produce an estimate of time-related opportunity costs per person of \$30.13 for an estimated 2.5 hour average travel time to the nearest ASC.<sup>94</sup>

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<sup>90</sup> See GAO, GAO-16-828, "Immigrant Investor Program: Progress Made to Detect and Prevent Fraud, but Additional Actions Could Further Agency Efforts," February 11, 2016; GAO, GAO-16-431T, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," September 13, 2016.

<sup>91</sup> DHS OIG, OIG-13-97, U.S. Citizenship and Immigration Services' Tracking and Monitoring of Potentially Fraudulent Petitions and Applications for Family-Based Immigration Benefits," June 2013, *available at* [https://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-97\\_Jun13.pdf](https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-97_Jun13.pdf).

<sup>92</sup> *Id.* at 4

<sup>93</sup> Office of Immigration Statistics, "Fiscal Year 2011 Yearbook of Immigration Statistics," September 2012, *available at* [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2011.pdf).

<sup>94</sup> Proposed Rule, 85 Fed. Reg. at 56381.

Despite DHS's claims to the contrary, relying on the prevailing minimum wage is unjustifiable in light of clear research showing that most immigrants earn considerably more than the minimum wage.

DHS claims that most people subject to the rule "would be new entrants to the labor force and would not be expected to earn relatively high wages." This is flawed for several reasons. First, a significant portion of new biometrics collections will be for *petitioners*, who are U.S. citizens or lawful permanent residents who are not likely to be "new entrants" to the labor force. DHS does not explain why U.S. citizens and lawful permanent residents who are likely to be more well-established in the United States should be expected to earn a prevailing minimum wage of \$8.25.

Second, nearly half of all new immigrants to the United States have a college education or higher. A 2017 study by the Migration Policy Institute determined that "48 percent of recently arrived immigrants to the United States (those coming between 2011 and 2015) were college graduates."<sup>95</sup> Studies of the real hourly wage of recent college graduates found in 2017 that the average young graduate was paid real hourly wages of \$19.18, more than double the prevailing minimum wage used by the Proposed Rule.<sup>96</sup> As a result, DHS is not justified in presuming that the average new immigrant to the United States is paid at or near the federal minimum wage.

Third, data from the American Community Survey reveals that the median annual personal earnings in 2018 for U.S. immigrants was \$31,900, which is the equivalent of \$15.95/hour at a rate of 40 hours per week and 50 weeks per year<sup>97</sup>—nearly double the prevailing minimum wage used by the Proposed Rule.

Therefore, DHS's use of a fully burdened prevailing wage calculation of \$12.05 is not justified. DHS should *at the very least* use the hourly rate of the median immigrant, \$15.95, which when calculated using DHS's 1.46 multiplier produces a fully burdened prevailing wage of \$23.87. This would produce a total cost of traveling to a biometrics appointment of \$88.68, compared to the Proposed Rule's calculation of \$59.13, and a time-based opportunity cost for 1.17 hours spent in an ASC of \$27.93 (not \$14.10).

Using this more accurate figure would increase the overall cost imposed by the rule to individuals in non-fee-related costs from the \$73.23 calculated by DHS to a more accurate \$116.61. This results in an overall non-fee biometrics submission cost of \$253,093,259, fully \$94 million higher than DHS's estimate.

#### VIII. DHS appears to have entirely failed to consider that the Proposed Rule would require petitioning employers to submit biometrics.

Despite the length of the Proposed Rule, DHS does not provide a *single* explanation or acknowledgment that the rule will affect petitioners outside of the family-based immigration system. The Proposed Rule even states that DHS is only requiring biometrics collection for U.S. citizen or lawful permanent resident

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<sup>95</sup> Migration Policy Institute, *New Brain Gain: Rising Human Capital among Recent Immigrants to the United States* (June 2017), available at <https://www.migrationpolicy.org/research/new-brain-gain-rising-human-capital-among-recent-immigrants-united-states>.

<sup>96</sup> Kathleen Elkins, *Here's how much the average young graduate earns*, CNBC, May 5, 2017, available at <https://www.cnbc.com/2017/05/05/how-much-young-grads-are-earning-per-hour.html>.

<sup>97</sup> Pew Research Center, *Facts on U.S. immigrants, 2018*, August 20, 2020, available at <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants-current-data/>.

petitioners “when they submit a family-based visa petition.”<sup>98</sup> Despite this claim, Proposed 8 C.F.R. § 103.16(a) unambiguously applies to employment-based petitioners as well.

Under Proposed 8 C.F.R. § 103.16(a), “Any applicant, petitioner, sponsor, derivative, dependent, beneficiary, or individual filing or associated with benefit requests . . . must submit biometrics.” 8 C.F.R. § 1.2 defines a “benefit request” as “any application, petition, motion, appeal, or other request relating to an immigration or naturalization benefit.” Thus, under the plain text of Proposed 8 C.F.R. § 103.16, all petitioners, *including employers*, could be required to submit biometrics. DHS tacitly acknowledges as much through its inclusion of Forms I-129 and I-140 in its Proposed Information Collections.<sup>99</sup>

Each reason listed by DHS for requiring biometrics collection from petitioners stems from DHS’s incorrect statement that the Proposed Rule would only “require biometrics from U.S. citizens or lawful permanent residents when they submit a family-based visa petition,” as well as EB-5 investor visa regional center principals.<sup>100</sup> For example, the Adam Walsh Act would not apply to employment-based petitioners, nor would the International Marriage Broker Regulation Act.

Most employment-based petitioners are entities. Forms I-129, I-140, and I-924 have a signature block for an “Authorized Signatory” and include the following “declaration and certification:” “If filing this petition on behalf of an organization, I certify that I am authorized to do so by the organization.” In many cases, the authorized signatory is a human resources employee, not the president or CEO of a company.

The biometrics mandate in the Proposed Rule, which includes “[a]ny petitioner” or “individual filing or associated with benefits request,” is broad enough to be read as including the individual who signs for a petitioner that is an entity. DHS does not provide any explanation for why an individual filing for a petitioning employer that is an entity should be required to submit biometrics to prove their identity, or consideration of the impact of requiring them to take time out of the work day to get fingerprinted. For employment-based petitioners who are not entities, DHS does not provide any explanation for why a petitioning employer should be required to submit biometrics.

Perhaps as a result of the seeming failure to recognize that the rule’s text could apply to petitioning employers and authorized signatories of entities filing employment-based petitions, DHS states that there will be no costs to small businesses.<sup>101</sup> This small business regulatory analysis is clearly inaccurate, given that DHS indicates in the rule that it estimates 225,637 respondents are covered by the I-140 biometric information collection at an estimated hour burden per response of 3.67 hours, and an additional 1.08 hour burden for completing Form I-140 in the first place.<sup>102</sup> A combined impact of 1,071,775 additional hours for petitioning employers cannot be squared with a regulatory impact statement indicating the impact on small business will be “none.”

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<sup>98</sup> See, e.g. Proposed Rule, 85 Fed. Reg. at 56343 (“DHS is also proposing to require biometrics from U.S. citizens or lawful permanent residents when they submit a family-based visa petition.”).

<sup>99</sup> Proposed Rule, 85 Fed. Reg. at 56390.

<sup>100</sup> Proposed Rule, 85 Fed. Reg. at 56358; 56361.

<sup>101</sup> Proposed Rule, 85 Fed. Reg. at 56368.

<sup>102</sup> Proposed Rule, 85 Fed. Reg. at 56395.

The extent of this error is so significant that for this reason alone, DHS must withdraw the rule entirely and resubmit it once it has considered the impact on petitioning employers.

**IX. DHS must consider the interaction of two separate proposed rules on the cost/benefit analysis.**

While the comment period for this rule was running, DHS proposed two new rules which could have a significant impact on the cost/benefit analysis for this rule. Because these rules were proposed at the same time and would impact each other, DHS is required to consider the way in which these rules would interact.<sup>103</sup>

The first rule, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, was proposed on September 25, 2020, and would end “duration of status” periods of admission. The rule would require students and exchange visitors to file I-539 Extension of Status requests following the expiration of the fixed period of admission. DHS estimates in that rule that by the end of the transition period, over 350,000 additional extension of status requests would be filed, all requiring additional biometrics.<sup>104</sup> DHS must consider and account for these additional biometrics in finalizing the Proposed Rule.

The second rule, *Affidavit of Support on Behalf of Immigrants*, was published on October 2, 2020, and proposes to increase the circumstances in which individuals would be required to find a co-sponsor for an affidavit of support. Because Proposed 8 C.F.R. § 103.16(a) applies to sponsors, this rule would also increase the number of biometrics required each year. DHS must consider and account for these additional biometrics in finalizing the Proposed Rule.

**X. The biometrics rule will impose significant costs on individuals.**

**a. DHS fails to consider reliance interests and the potential deterrent effect on applicants**

In the Proposed Rule, DHS estimates that applicants and petitioners would pay an additional \$138.4 million annually, with 1.63 million new biometric fee payments of \$85.<sup>105</sup> These additional costs could be significant for large families. For example, consider a U.S. citizen filing an immediate relative petition for their spouse, who has two derivative children under the age of 14. Under current rules, only a single \$85 biometrics fee would be paid. But under Proposed 8 C.F.R. § 103.16(a), a total of four \$85 biometrics fees would be required, raising the overall cost of the application process by \$255.

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<sup>103</sup> See, e.g. *Casa de Maryland v. Wolf*, \_\_\_ F. Supp. 3d \_\_\_, No 8:20-cv-02118-PX, at \*51-53 (Sept. 11, 2020) (finding that the agency failed to meaningfully consider the impact of interrelated rules proposed at similar times, in violation of the Administrative Procedure Act).

<sup>104</sup> See *Establishing a Fixed Period of Admission*, 85 Fed. Reg. at 60571.

<sup>105</sup> Proposed Rule, 85 Fed. Reg. 56343. The USCIS fee rule, which was recently enjoined by a federal district court, would have eliminated this \$85 fee by incorporating it into the cost of the application. See Order Granting Plaintiff's Motion for Preliminary Injunction, *Immigrant Legal Resource Center v. Wolf*, \_\_\_ F. Supp. 3d \_\_\_, No. 4:20-cv-05883-JSW (Sept. 29, 2020), available at [https://www.courtlistener.com/recap/gov.uscourts.cand.364673/gov.uscourts.cand.364673.98.0\\_1.pdf](https://www.courtlistener.com/recap/gov.uscourts.cand.364673/gov.uscourts.cand.364673.98.0_1.pdf).

This increase in fees would fall most heavily on families with large numbers of derivative children, potentially raising the cost of immigration significantly.

Notably, DHS does not consider whether requiring applicants to pay increased fees could deter some of them from applying for a benefit in the first place, or whether the increase in fees would affect different population groups in different ways. DHS does not consider whether this would deter individuals from seeking immigration benefits, nor does DHS consider whether it could affect reliance interests on organizations that provide financial or legal assistance to immigrants and their petitioners. Similar cursory analysis, or lack thereof, recently formed the basis for a federal judge to strike down USCIS fee increases.<sup>106</sup>

*b. DHS fails to consider the impact of the rule on applicants for benefits who are detained by ICE and ORR*

As a general policy matter, “USCIS will not provide mobile biometrics services in prisons or jails for individuals who cannot attend their ASC appointment due to incarceration or detention.”<sup>107</sup> For individuals held in immigration detention, biometric collection is conducted by Immigration and Customs Enforcement (“ICE”).<sup>108</sup> Unaccompanied children held in the custody of the Office of Refugee Resettlement (ORR) are also taken to biometrics appointments by ORR staff.

While ICE is currently equipped with mobile biometric scanners through a mobile application named EDDIE, that system takes only fingerprints and photos, and does not collect palm prints, voice prints, iris scans, or DNA.<sup>109</sup> As a result, ICE will have to either purchase or acquire additional technology to conduct biometrics for individuals held in its custody, or transport individuals held in custody to a USCIS Application Support Center. Scheduling appointments for biometrics in these circumstances could prolong the length of time that an individual is held in detention at the expense of the government. If immigration judges are unwilling to wait for ICE to arrange biometrics appointments where a petition is filed with USCIS, some individuals could find themselves ordered removed because of the additional delay. DHS does not consider any of these additional costs to ICE or to applicants.

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<sup>106</sup> *Id.* at 22-23 (rejecting DHS’s cursory analysis determining that the market for immigration services is inelastic and would not respond to changes in price).

<sup>107</sup> US. Citizenship and Immigration Services, USCIS Issues Updates to Biometrics Collection Guidance, Jan. 31, 2020, available at <https://www.uscis.gov/news/alerts/uscis-issues-updates-to-biometrics-collection-guidance>.

<sup>108</sup> *Id.*

<sup>109</sup> Proposed Rule, 85 Fed. Reg. at 56386 (describing “a handheld mobile biometrics application called ‘EDDIE’”); Department of Homeland Security, Privacy Impact Assessment Update for the Enforcement Integrated Database (EID) – EAGLE, EDDIE, and DAVID (May 14, 2019), available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-eid-may2019.pdf> (noting that EDDIE can be used to “collect an investigation subject’s fingerprints and photograph using a mobile device”).

c. *DHS does not consider the effect of COVID-19 on the health of individuals subject to the Proposed Rule*

We are currently facing one of the most significant public health crises of the last century, one which has caused over 200,000 deaths in the United States alone and which has led to profound changes in the immigration system.<sup>110</sup> Despite DHS's acknowledgement that the rule could require millions of people each year to travel to a USCIS Application Support Center to have their biometrics taken, DHS entirely fails to consider any potential public health concerns caused by the pandemic.

Among the COVID-19-related concerns to applicants that USCIS does not consider are:

- DHS currently limits biometrics to individuals between the ages of 14 and 79.<sup>111</sup> DHS proposes to lift age restrictions on all biometrics collection, requiring individuals age 80 or older to appear for biometrics.<sup>112</sup> Individuals over the age of 80 are in the CDC's highest risk category.<sup>113</sup> DHS must consider whether the increased risk of death or serious infection due to COVID-19 for elderly individuals who previously were not required to submit biometrics is justified by the reasons for eliminating age restrictions.
- DHS proposes to collect DNA using a buccal swab, which involves collecting saliva from a person's mouth.<sup>114</sup> As the CDC has recently confirmed, "The principal mode by which people are infected with SARS-CoV-2 (the virus that causes COVID-19) is through exposure to respiratory droplets carrying infectious virus."<sup>115</sup> DHS must consider whether the collection of DNA through buccal swabs, which could increase infection risk to respondents and USCIS employees, is justified in light of the higher risk of increased COVID-19 infections.
- USCIS Application Support Centers are currently experiencing significant delays caused by COVID-19, including "[a] longer wait time to receive [a] biometrics appointment notice," "[r]estrictions limiting access to ASCs," and "[l]onger biometrics collection times."<sup>116</sup> The Proposed Rule would require an additional

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<sup>110</sup> See generally American Immigration Council, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System* (Sept. 30, 2020), available at <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigrati%E2%80%A6>.

<sup>111</sup> Proposed Rule, 85 Fed. Reg. at 56368 n. 64.

<sup>112</sup> Proposed Rule, 85 Fed. Reg. at 56386.

<sup>113</sup> Centers for Disease Control, *CDC updates, expands list of people at risk of severe COVID-19 illness*, June 25, 2020, available at <https://www.cdc.gov/media/releases/2020/p0625-update-expands-covid-19.html> ("CDC now warns that among adults, risk increases steadily as you age, and it's not just those over the age of 65 who are at increased risk for severe illness.").

<sup>114</sup> Proposed Rule, 85 Fed. Reg. at 56353 ("When DHS uses the term 'DNA' in this rule it is a reference to the raw genetic material, typically saliva, collected via buccal swab from an individual in order to facilitate DNA testing to establish genetic relationships.")

<sup>115</sup> Centers for Disease Control, *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*, October 5, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>

<sup>116</sup> U.S. Citizenship and Immigration Services, *USCIS Response to COVID-19*, available at <https://www.uscis.gov/about-us/uscis-response-to-covid-19>, last accessed October 7, 2020.

2.17 million applicants to obtain biometrics per year, an increase of 55 percent.<sup>117</sup> DHS must consider the effect that COVID-19 restrictions would have on the additional delays to applicants necessarily caused by increasing biometrics collection by 55 percent. This could include delays in granting of work authorization, extensions or changes of status, and other benefits which directly affect the ability of immigrants to safely remain in the United States.

- d. *DHS does not adequately explain “continuous immigration vetting,” which could have a detrimental impact on immigrants*

In the Proposed Rule, DHS indicates that the agency:

plans to implement continuous immigration vetting, and require that aliens be subjected to continued and subsequent evaluation to ensure they continue to present no risk of causing harm subsequent to their entry. This rule proposes that any individual alien who is present in the United States following an approved immigration benefit may be required to submit biometrics unless and until they are granted U.S. citizenship.<sup>118</sup>

This provision is implemented through Proposed 8 C.F.R. § 103.16(c)(2), which provides that:

(2) After approval. Any individual alien may be required to submit biometrics again for purposes of continuous vetting, unless and until he or she is granted U.S. citizenship.

At no point does DHS explain in the Proposed Rule *when* a noncitizen “may be required to submit biometrics again,” how a noncitizen would be notified of that requirement, whether DHS would automatically schedule a new biometrics appointment, or what DHS would do with new collections of biometric data for the purposes of continuous immigration vetting.

Without that information, it is impossible to provide an adequate comment on the proposal, and for that reason alone DHS should decline to finalize any aspect of the Proposed Rule as it relates to “continuous immigration vetting.”

However, based purely on the limited information on continuous immigration vetting provided in the rule, it is possible to raise at least some concerns about the proposal.

First, there is a troubling possibility that individuals could find themselves stripped of their immigration status through no fault of their own. Proposed Rule 103.16(b) indicates that the penalty for a noncitizen who fails to appear for a DHS-scheduled biometrics appointment is that “DHS may terminate, rescind, or revoke the individual’s immigration status.” No person should have their immigration status revoked because an appointment notice was lost in the mail, an email got caught in spam filters, or they were

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<sup>117</sup> Proposed Rule, 85 Fed. Reg. at 56343.

<sup>118</sup> Proposed Rule, 85 Fed. Reg. at 56340.



simply unable to attend an appointment due to extenuating circumstances. Any system of continuous vetting under which that is a possibility would pose severe statutory and Constitutional due process concerns.

Second, individuals who are subject to “continuous vetting” are forced to live in a state of constant concern about whether they will be allowed to remain in the United States. Studies have shown that living under constant surveillance can cause significant changes in the brain, including increased anxiety and Post-Traumatic Stress Disorder.<sup>119</sup> DHS does not consider the mental health impact of subjecting noncitizens to constant surveillance.

Third, subjecting immigrants to “continuous vetting” fosters a sense of distrust against immigrants and their families that could harm the United States’ legacy as a nation of immigrants. Rather than treating noncitizens as threats to be analyzed and tracked, DHS should focus its resources on fostering community and ensuring immigrant integration.

**XI. DHS failed to adequately explain the costs of the proposed expansion of biometrics collection and the associated impact on the budget of USCIS.**

Despite the substantial increase in costs associated with the rule, DHS fails to provide an adequate explanation for how the expansion of “biometrics” would impact the already strained budget of USCIS. If implemented, the proposed rule would create a massive increase in the cost of adjudication of applications that would either need to be borne by the agency or the applicants.

An agency rule is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>120</sup> The proposed rule is arbitrary and capricious because it attempts to incorporate biometric modalities which Congress did not intend it to consider into the adjudication process,<sup>121</sup> the rule fails to consider the substantial pressures expansive collection would have on the USCIS budget and adjudication backlogs, and it fails to support the purported justification related to immigration fraud with significant evidence.<sup>122</sup> No rational explanation exists for vastly increasing the adjudication costs of an agency already suffering from decreased receipts and an associated budget crisis.

The COVID-19 crisis forced USCIS to drastically alter operations to protect the health of officers and applicants. Receipts dropped drastically due to office closures and related uncertainties, resulting in a USCIS request to Congress of \$1.2 billion in emergency funding to cover the shortfall.<sup>123</sup> USCIS ultimately

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<sup>119</sup> See Kaleigh Rogers, *What Constant Surveillance Does to Your Brain*, Motherboard, Nov. 14, 2018, available at <https://www.vice.com/en/article/pa5d9g/what-constant-surveillance-does-to-your-brain>.

<sup>120</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>121</sup> See *infra*, Section IX.

<sup>122</sup> See *infra*, Section VI.

<sup>123</sup> Camilo Montoya-Galves, *Thousands of U.S. immigration agency employees could face furloughs without emergency funds*, CBS News (May 26, 2020), available at <https://www.cbsnews.com/news/u-s-immigration-agency-could-furlough-10000-employees-without-emergency-coronavirus-funds/>; see also AILA and the American Immigration

announced it would “be able to maintain operations through the end of fiscal year 2020” thanks to the adoption of “[a]ggressive spending reduction measures.”<sup>124</sup> The anticipated operational impacts of these measures “include increased wait times for pending case inquiries with the USCIS Contact Center, longer case processing times, and increased adjudication time for aliens adjusting status or naturalizing.”<sup>125</sup> This delay will inevitably be layered on top of existing backlogs that have plagued the USCIS adjudication system for decades.<sup>126</sup> The backlog and budget shortfall persists despite increasing fees paid by applicants throughout the Trump and Obama administrations.<sup>127</sup> This budget issue is due in part to an increase of almost 20 percent in the staffing of USCIS during the Trump administration.<sup>128</sup> New staff increasingly focused on anti-fraud measures without an associated change in application denial rates due to fraud.<sup>129</sup> Through the proposed rule, DHS is continuing a practice of dedicating financial resources to search for rare instances of fraud. These actions cannot reasonably be ascribed to agency expertise on the issue where DHS fails to offer quantifiable benefits of the proposed rule and fails to adequately support the alleged qualitative benefits of the proposed rule.

The quantitative and qualitative analyses of the proposed rule offered by DHS further confirm the arbitrary and capricious nature of the agency’s action. In the proposed rule, DHS estimates that the expansion of biometrics collection without regard to age will result in total annual direct costs exceeding \$150 million.<sup>130</sup> DHS goes on to repeatedly state that it “does not know the costs of expanding biometrics collection to the government in terms of assets and equipment;” but “it is possible that costs could be incurred for the new equipment and information technologies.”<sup>131</sup> When combining the costs of biometrics collection with the DNA costs, DHS estimated the costs from 2021 to 2030 could range from \$3 billion to almost \$5 billion, while providing “benefits that are not possible to quantify.”<sup>132</sup>

When an agency that is predominantly funded by applicant fees intentionally incurs these immense costs, the burden will inevitably be passed on to applicants. Associated fee increases could further decrease

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*Council Send Letter to Congressional Appropriators Regarding USCIS Emergency Funding Request* (May 29, 2020), available at <https://www.aila.org/advo-media/aila-correspondence/2020/aila-and-aic-letter-to-congressional-appropriators>,

<sup>124</sup> *USCIS Avert Furlough of Nearly 70% of Workforce*, USCIS (Aug. 25, 2020), available at <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>.

<sup>125</sup> *Id.*

<sup>126</sup> See generally, Colorado State Advisory Committee to the U.S. Commission on Civil Rights, *Citizenship Delayed: Civil Rights and Voting Rights Implications of the Backlog in Citizenship and Naturalization Applications* (Sept. 2019), available at <https://www.usccr.gov/pubs/2019/09-12-Citizenship-Delayed-Colorado-Naturalization-Backlog.pdf> [hereinafter *Citizenship Delayed*].

<sup>127</sup> Doug Rand and Lindsay Milliken, *The Case of the Insolvent Federal Agency: A Forensic Analysis of Public Data on U.S. Citizenship and Immigration Services*, N.Y.U. Journal of Leg. & Public Policy (Jun. 15, 2020); see also American Immigration Council & American Immigration Lawyers Association, *Letter to House and Senate Appropriators, Re: USCIS Request for Emergency Funding*, May 29, 2020, available at <https://www.aila.org/advo-media/aila-correspondence/2020/aila-and-aic-letter-to-congressional-appropriators>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; see also *Citizenship Delayed*, *supra* note 33, at 30 (referencing a statement by a USCIS officer that approval rate for N-400 application rates have remained relatively constant despite an increased focus on fraud detection).

<sup>130</sup> Proposed Rule, 85 Fed Reg. at 56344 (Table 1).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 56344.

application receipts, thereby further harming the fiscal situation of USCIS. Failing to consider the impact of the proposed rule on the already strained budget of USCIS compels DHS to revise its proposed arbitrary and capricious action.

DHS also entirely fails to consider the costs which will inevitably be imposed on the agency by requiring at least an additional 2.17 million people to be subject to biometrics each year, a 55 percent increase, in a time where COVID-19 related restrictions have limited the agency's ability to process individuals at ASCs. While USCIS indicates that its current ASC contracts would allow it to conduct a theoretical maximum limit of 19,607,616 biometrics annually,<sup>133</sup> that number was likely calculated before the COVID-19 pandemic, and DHS does not explain why it has not taken social distancing space limitations into account in the Proposed Rule.

In addition, this maximum capacity number was likely calculated based on USCIS's current collection of fingerprints and photographs alone. While DHS states that it believes taking palm prints, iris scans, and voice prints would only add a matter of "seconds" to the process, DHS also admits that it "has not conducted any pilot programs or field test to test this expectation."<sup>134</sup> But seconds add up quickly. Even an additional 30 seconds of time required to take palm prints, iris scans, and voice prints for the 6.07 million people subject to biometrics under the Proposed Rule amounts to an additional 50,583 hours of biometrics collection alone—before taking into account DNA tests and the additional 2.17 million people required to take fingerprints and photographs.

As a result, when considering additional biometric modalities and COVID-19-related social distancing requirements, it is unclear whether the 19.6 million maximum biometric appointment capacity is still accurate. If USCIS is wrong, it could be required to spend considerable funds in additional infrastructure and contracting capacity, all of which would cut into the agency's already limited finances.

## **XII. Insufficient Comment Period**

The Council, the Clinic, and AILA, note that the Department of Homeland Security failed to provide a sufficient period for interested parties to comment on this Proposed Rule. Under most circumstances, agencies must provide public comment periods of at least 60 days in length.<sup>135</sup> There is no evidence that 60 days would be unfeasible or unlawful in the present case, but DHS nevertheless elected to limit the comment period to 30 days. This rushed 30-day comment period is inappropriate given the sweeping scope of this Proposed Rule, the ongoing coronavirus pandemic, and the fact that the Federal Rulemaking Portal remains under construction.

The Proposed Rule is 328 pages in length and includes major changes with broad privacy and economic implications for individuals and the federal government alike, as well as more than a dozen information collection notices that commenters must respond to. Additionally, many individuals interested in

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<sup>133</sup> Proposed Rule, 85 Fed. Reg. at 56384.

<sup>134</sup> Proposed Rule, 85 Fed. Reg. at 56381-382.

<sup>135</sup> See, e.g., Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (directing agencies generally to furnish "not less than 60 days" for public comment); Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

commenting on this Proposed Rule are dealing with unanticipated and emergent matters resulting from the pandemic limiting their ability to do so.

Within the comment period, DHS also proposed two other “significant” immigration rules which interact with the provisions in the Proposed Rule, each with their own 30-day comment periods, forcing stakeholders to respond to the interactions between all three rules.<sup>136</sup> DHS also published an interim final rule on H-1B nonimmigrant visas with another overlapping 30-day comment period.<sup>137</sup> Stakeholders do not have a meaningful opportunity to comment on complex changes when the period to do so is limited and when a series of changes are proposed in such quick succession.

Finally, the ongoing development of the regulations.gov website has almost certainly impacted the ability of individuals and organizations to submit comments through the e-portal. The Council and the Clinic have observed that visitors to the site are supposed to be redirected to a “beta version” of the website on Tuesdays and Thursdays. While the page indicates that comments submitted through the beta portal will be accepted, we have also observed that individuals who attempt to visit the regulations.gov site on Tuesdays or Thursdays through a bookmarked link are not redirected to the beta site properly. Therefore, prospective commenters may be delayed or prevented from submitting their comments in response to the Proposed Rule two days per week during the short 30-day comment period.

Developments on the day the comment was due injected even further uncertainty into the comment process. A person going to the Federal Register site on October 13 was presented with the following screen showing that the comment was due on October 13:

## Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

A Proposed Rule by the [Homeland Security Department](#) on 09/11/2020

This document has a comment period that ends today. (10/13/2020)

[SUBMIT A FORMAL COMMENT](#)

[Read the 4937 public comments](#)

However, when a person clicked on the “SUBMIT A FORMAL COMMENT” button, the website indicated instead that comments were due by November 12, 2020, fully 30 days after the October 13 date:

<sup>136</sup> Department of Homeland Security, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, 85 Fed. Reg. 60526 (Sept. 25, 2020); Department of Homeland Security, *Affidavit of Support on Behalf of Immigrants*, 85 Fed. Reg. 62432 (Oct. 2, 2020).

<sup>137</sup> Department of Homeland Security, *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63918 (Oct. 7, 2020).

# Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

A Proposed Rule by the [Homeland Security Department](#) on 09/11/2020



You are submitting an official comment to Regulations.gov.  
Comments are due 11/12/2020 at 11:59 pm -0500

regulations.gov  
close comment form

Similarly, a person who went to the comment docket on beta.regulations.gov on the morning of October 13 would be shown two separate comment due dates, with October 13th reflected in the text and November 12 posted in the sidebar:

**Document ID**  
USCIS-2019-0007-0001

**Comments Received**  
4,937  
[More Details](#)

**Document Details**

**Comment Due Date**  
Nov 12, 2020

**Federal Register Number**  
2020-19145

**CFR**  
8 CFR Parts 1, 103, 204, 207, 208

**Topic(s)**  
Waivers  
[More Details](#)

**Content**

**Action**  
Notice of proposed rulemaking.

**Summary**  
This rule proposes to amend DHS regulations concerning the use and collection of biometrics in the enforcement and administration of immigration laws by U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). First, DHS proposes that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement. Second, DHS proposes to authorize biometric collection, without regard to age, upon arrest of an alien for purposes of processing, care, custody, and initiation of removal proceedings. Third, DHS proposes to define the term biometrics. Fourth, this rule proposes to increase the biometric modalities that DHS collects, to include iris image, palm print, and voice print. Fifth, this rule proposes that DHS may require, request, or accept DNA test results, which include a partial DNA profile, to prove the existence of a claimed genetic relationship and that DHS may use and store DNA test results for the relevant adjudications or to perform any other functions necessary for administering and enforcing immigration and naturalization laws. Sixth, this rule would modify how VAWA and T nonimmigrant petitioners demonstrate good moral character, as well as remove the presumption of good moral character for those under the age of 14. Lastly, DHS proposes to further clarify the purposes for which biometrics are collected from individuals filing immigration applications or petitions, to include criminal history and national security background checks; identity enrollment, verification, and management; secure document production, and to administer and enforce immigration and naturalization laws.

The changes proposed in this rule are intended to: Provide DHS with the flexibility to change its biometrics collection practices and policies to ensure that necessary adjustments can be made to meet emerging needs, enhance the use of biometrics beyond background checks and document production to include identity verification and management in the immigration lifecycle, enhance vetting to lessen the dependence on paper documents to prove identity and familial relationships, preclude imposters, and improve the consistency in biometrics terminology within DHS .

**Dates**  
Written comments must be submitted on this rule on or before October 13, 2020. Comments on the Paperwork Reduction Act section of this rule (the information collection discussed therein) must be received on or before November 10, 2020.

It is unclear why these two different dates are displayed. If DHS has extended the comment period from October 13 to November 12, it has not indicated as such anywhere on FederalRegister.gov or regulations.gov, and the inconsistent way in which those dates are displayed has generated significant confusion. Given the uncertainty, the Council, AILA, and the Clinic are forced to submit this comment on October 13, 2020.

The Council and AILA, along with 100 other organizations, called on the Department Homeland Security to extend the comment period associated with this Proposed Rule.<sup>138</sup> DHS has failed to act on this

<sup>138</sup> See Letter to Department of Homeland Security, September, 16, 2020, available at: <https://www.americanimmigrationcouncil.org/advocacy/letter-requesting-60-day-comment-period-proposed-rule-expanding-collection-biometrics>.

request, or, if it has granted this extension, has failed to make that clear.<sup>139</sup> For this reason alone, we call on DHS to withdraw the proposed rule and provide at least an additional 30 days to comment.

### XIII. Conclusion

The American Immigration Council, the Immigration Defense Clinic at the University of Colorado Law School, and AILA oppose the Proposed Rule as it constitutes an improper invasion of privacy that is neither necessary nor proportionate to DHS's stated objectives. It therefore represents an impermissible infringement upon the rights of citizens and noncitizens alike. We therefore respectfully urge DHS to rescind the Proposed Rule and withdraw it from consideration.

Sincerely,

American Immigration Council

University of Colorado Law School, Immigration Defense Clinic

American Immigration Lawyers Association

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<sup>139</sup> After a congressional office reached out to USCIS, the agency indicated that the comment period has *not* been extended, suggesting that a website glitch has caused an incorrect deadline to be displayed on [FederalRegister.gov](http://FederalRegister.gov) and [beta.regulations.gov](http://beta.regulations.gov). If this is correct, this is even more reason that DHS should withdraw the proposed rule and provide at least another 30 days to comment, as many individuals may be unaware of this glitch.