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Re: USCIS Docket No. USCIS-2019-0007, RIN 1615-AC14; Comments in Opposition to Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

To Whom it May Concern:

I am writing on behalf of First Focus on Children in response to the Department of Homeland Security (DHS) proposed rule entitled "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services," published in the Federal Register on September 11, 2020.

First Focus is a bipartisan advocacy organization dedicated to making children and families a priority in federal policy and budget decisions. As an organization committed to the safety and well-being of all children in the United States, we are deeply concerned about the many ways this proposed rule will unnecessarily require children to provide a broad scope of information, likely leading to continuous surveillance of them and their families and harm to their safety and well-being.

Immigrant children and families already face many barriers to lawful status in the United States. Many are seeking protection from persecution and violence they experienced either here in the United States or in their home country. Others are seeking to reunify with relatives. All must navigate an already complex and confusing immigration system. Without policies that take their particular needs into account, children and families face wrongful denials of their applications, separation, and struggles to build a new life in the United States. The proposed rule unquestionably does not consider the particular needs of children and families. It would force children and families to submit to highly intrusive and overly broad submissions of their personal information without justification, violating their rights to privacy and exposing them to harm.

For the reasons detailed in the comments that follow, we urge DHS to withdraw the rule in its entirety.

DHS has not afforded the public a meaningful opportunity to comment.

As a preliminary matter, DHS has not given the public sufficient time to comment on this proposed rule. The rule, nearly 90 pages in length, dramatically expands who will be subjected to biometric collection, how long and how frequently the government could demand their information, and what type of information the government can collect. If this rule is implemented, it will have a seismic impact on the lives of millions of

immigrants and their families, including their U.S. citizen and lawful permanent resident (LPR) relatives. The rule specifically proposes a dramatic expansion of biometric collection for children by removing the current age limitations on biometric collection, expanding the type of information collected from children to include voice prints, palm prints, facial images, and iris scans, and expanding the use of DNA to verify family relationship. All of this information about children will be collected and store into a new database described by experts as "the largest database of biometric and biographic data on citizens and foreigners in the United States,"[1] likely effecting children for the rest of their lives. The ramifications of the rule if implemented, therefore, will be breathtaking.

Typically, the administration should allow a comment period of at least 60 days following publication of a proposed rule to provide the public a meaningful period to comment.[2] Here, despite the sweep and complexity of this rule, DHS has given the public only 30 days to comment. DHS itself notes that the proposed rule would permit biometric data collection for at least six million people annually and will cost taxpayers hundreds of millions of dollars. The administration has also recently introduced multiple rules that have significant impact on our immigration laws, like the Executive Office for Immigration Review's proposed regulation on administrative closure and other procedural changes, and DHS's proposed rules regarding affidavits of support and procedures for asylum. These rules were published in short succession, all with 30-day comment periods. There is no justification for rushing through a rule of this scope and magnitude, particularly in light of the many other significant rules being published and a global pandemic.

Furthermore, the proposed rule is incomplete: it lacks information essential to affording the public a meaningful opportunity to comment. It fails to provide concrete data about the biometric information DHS currently collects, particularly from children. Other than conclusory statements about the reliability of documentary versus biometric information, the proposed rule does not explain why the information it current collects is insufficient to meet DHS's stated objectives of identity verification, criminal and national security checks, and preventing child exploitation. It also fails to describe how the massive amounts of new data it plans to collect will be stored and shared, even though this is critical to understanding the rule's ramifications, particularly for children.

For these reasons alone, the rule should be rescinded. Notwithstanding our objections to the limited time and information provided, we submit this comment to share our concerns about the grave consequences of the proposed rule on children's right to privacy and well-being.

DHS failed to engage in proper consultations on the rule.

Given the practical consequences of the proposed rule for government at all levels, as well as individuals and their families, the proposed rule should have undergone a risk assessment and consultation process corresponding to the complexities associated with its implementation.

In particular, DHS should have consulted experts in issues related to the ethics of collecting information from children that is overly broad, highly invasive, and infringes on their right to privacy. Research has shown that biometric collection for children, particularly young children, can be particularly difficult and inaccurate without the proper care.[3] Furthermore, experts have written extensively about the high intrusive nature of

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

[2] *See, e.g.*, Executive Order 12866 (Oct. 4, 1993) (requiring that the public generally be given 60 days to comment on a proposed rule); Executive Order 13563 (Jan. 18, 2011) (to provide the public an opportunity to participate in the regulatory process, comment period shall be at least 60 days).

[3] UNICEF, *Faces, Fingerprints, & Feet: Guidance on Assessing the Value of Including Biometric Technologies in UNICEF-supported Programs* [*hereinafter* UNICEF Biometric Guidance] 19 (July 2019), https://data.unicef.org/wp-content/uploads/2019/10/Biometrics_guidance_document_faces_fingersprint_feet-July-2019.pdf.

collecting DNA from children—UNICEF notes that there are "inherent ethical concerns over the level of intrusiveness" of DNA testing and the risks are difficult to manage.[4] The particularities of collecting children's biometric information are highly relevant to this rule.

The proposed rule infringes upon the privacy rights of immigrant children and their families.

If implemented, the proposed rule would infringe upon the privacy rights of immigrant children and their family members, subjecting them to unlawful and unnecessary surveillance. The rule makes certain key changes that substantially expand whose information would be collected, what information would be collected, and how often.

First, the rule would permit collection of information from "*any applicant, petitioner, sponsor, beneficiary, or individual* filing or associated with an immigration benefit or request," and any person placed into removal proceedings could be required to submit biometrics unless the agency specifically waives the requirement.[5] The rule further eliminates the age limitation on collecting biometric information such that all children could have their information collected, even young children.[6] Under the new rule, this information would be used not only for verifying identity, family relationship or criminal/national security concerns, but will also be used for "identity management" and "vetting"—in other words, continuous and all-around surveillance of immigrant children and families. Second, the rule expands the type of information DHS would collect to include iris scans, facial images, palm prints, and DNA test results, including partial samples.[7] Third, the rule would allow DHS subagencies to require DNA tests "as evidence of a claimed genetic relationship to determine eligibility for immigration or naturalization benefits or to perform any other functions necessary for administering and enforcing immigration and naturalization laws"[8]—an extremely broad use. Lastly, the rule would permit DHS to demand updated biometric information from immigrants at any time until they become a citizen,[9] which for immigrant children could be most of their lives. Additionally, DHS could require updated biometric information from U.S. citizen or LPR family members as well. In all, the rule would infringe on the privacy rights of children and their families by encouraging sweeping, unnecessary data collection and potentially empowering mass surveillance, thus disrupting the well-being of children and families across the country.

Under international law, the collection of data related to a child's identity, family, or life implicates the right to privacy. The right to privacy is a fundamental human right recognized in the Universal Declaration of Human Rights.[10] This right has been incorporated into other human rights instruments such as the International Covenant on Civil and Political Rights, which the United States has ratified.[11] The United States also signed the Convention on the Rights of the Child (CRC)[12] in 1995, which obligates the U.S. government not to defeat the object and purpose of the treaty.[13] The CRC provides that "*no* child shall be subjected to arbitrary or unlawful interference with his or her privacy [or] family,"[14] and that "the child has the right to the

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[4] *Id.* at 7.
[5] Proposed rule 8 C.F.R. § 103.16(a) (emphasis added); *id.* § 236.5.
[6] Proposed rule 8 C.F.R. § 236.5.
[7] Proposed Rule 8 C.F.R. § 1.2.
[8] Proposed Rule 8 C.F.R. § 103.16(d)(2).
[9] *Id.* at (c)(2).
[10] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html.
[11] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 17, available at: https://www.refworld.org/docid/3ae6b3aa0.html.
[12] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, art. 16, available at: https://www.refworld.org/docid/3ae6b38f0.html.
[13] United Nations, *Vienna Convention on the Law of Treaties*, art. 18, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html.
[14] Convention on the Rights of the Child, *supra* note 12, art. 16(1) (emphasis added).

protection of the law against such interference."[15] Infringements on the right to privacy are permissible only where they are lawful, necessary, and proportionate.[16] Additionally, under domestic law, data collection, such as the forced collection of DNA, implicates constitutional concerns, including under the Fourth Amendment's prohibition on unlawful government intrusion of privacy rights.

The right to privacy for children has particular importance in the digital age, where information that exists about a child's life or the decisions they make are even more available. As UNICEF puts it, "when contextualizing children's right to privacy in the full range of their other rights, best interests, and evolving capacities . . . it becomes evident that children's privacy differs both in scope and application from adults' privacy."[17] Therefore, any policy related to the collection of children's information must take into consideration that children are different from adults, and government agencies must ensure that such policies account for children's particular needs and capacities. Instead of taking children's particular status into account, the proposed rule expands biometric collection so the same standards apply to children and adults.

The proposed rule does not include a right to refuse or special provisions safeguarding the processing of children's data. The European General Data Protection Regulations (GDPR) provide that children merit special protection with respect to their personal data.[18] In comparative contexts, consent, a right to refuse, and the provision of alternatives are safeguards put in place to protect children's privacy rights.[19] No such protections are outlined, or even recognized in the proposed rule. This creates many concerns from a child safety and child welfare perspective. In many circumstances, both children and parents may lack the knowledge and understanding needed to make informed decisions about handing over their data to the government, particularly the risks and consequences.[20]

Even if DHS did include the special safeguards in the proposed rule, the agency lacks child- and family-friendly policies, making informed consent or a right to refuse nearly impossible. Though DHS proposes a broad expansion in the number of children whose information will be collected, as well as the type of information collected from children, they fail to mention whether or how child welfare experts or professionals or those trained in speaking to or interviewing children would be involved in such collection. Despite multiple efforts to encourage DHS to hire child welfare professionals at the border to process children and families in ways that protect their health, well-being, and family unity (including funds appropriated by Congress), DHS has refused to hire such professionals and continues to rely on border agents without the necessary expertise or training to process children and families at the border. DHS in its current existence is therefore incapable of providing the necessary safeguards needed to collect children's biometric information in a way that protects their rights.

Lastly, DHS fails to explain why its current practice of collecting photographs, fingerprints and signatures are insufficient to verify identities, criminal history, and national security concerns. It is clear that the invasive biometric collection contemplated in the proposed rule, particularly for children, is neither necessary nor proportionate to DHS's stated objectives, therefore constituting an impermissible infringement upon privacy rights.

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[15] *Id.* art. 16(2).
[16] United Nations General Assembly, *Resolution A/68/167 on the right to privacy in the digital age*, December 2013, available at: https://undocs.org/pdf?symbol=en/a/res/68/167.
[17] UNICEF, *Privacy, Protection of Personal Information and Reputation Rights* 9 https://www.unicef.org/csr/files/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf. Accessed October 8, 2020.
[18] European General Data Protection Regulations, Recital 38, available at: https://gdpr-info.eu/recitals/no-38/. Accessed October 8, 2020.
[19] UK Department of Education, *Protection of Biometric Information of Children in Schools and Colleges* 6-7 (March 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/692116/Protection_of_Biometric_Information.pdf.
[20] UNICEF Biometric Guide, *supra* note 3, at 19.

The proposed rule does not serve DHS's stated justifications of linking children to their adult records and combating child trafficking.

The proposed rule would allow collection of biometric data regardless of age when issuing Notices to Appear (NTAs). DHS estimates that this would lead to the collection of the data of 63,000 additional children in the NTA issuance process.[21] This is a dramatic expansion of the collection and storage of children's data.[22] DHS articulates its reasons for collecting biometrics at any age as 1) to ensure that immigration records created for children can be linked to subsequent records when they are adults, and 2) to combat the trafficking and exploitation of children. However, the proposed rule serves neither of these objectives.

Regarding DHS's first justification, children's biometrics are still in development and therefore unreliable, becoming more stable only at age 15.[23] UNICEF stated that as of mid-2019, "there [were] no biometric technologies capable of consistently providing high levels of accuracy in young children."[24] Biometric technology "was largely designed to work with adults and may not perform as well when used with children. Errors in biometric recognition can result in potential exclusion from important services and create additional barriers for marginalized and vulnerable groups."[25]

Additionally, the proposed expanded modalities of biometric information to be collected also have high probabilities of inaccuracy for children. As children get older and their features and voices change, biometric information collected from them become less accurate, and quickly. Facial recognition technology is likely to frequently misidentify children who are still developing, particularly black children and other children of color, exposing them to increased policing and surveillance.[26] There is also a high probability of false positives and false negative indications of voice prints, which would disproportionately impact Black children and families, women and girls, and transgender children or their transgender family members.[27] Additionally, young children may not cooperate long enough to accurately capture an iris, palm print, or facial image.[28] Thus, proposing to remove all age limitations on and simultaneously expand the types of biometric information collected will not only fail to serve DHS's justification of linking a child's records with later adult records, but also increase the risk that children will be locked out of the biometric system or misidentified.

The proposed rule also does not serve DHS's second justification of combatting child trafficking. While concerns about human trafficking and child safety must be addressed, the indiscriminate collection of children's biometrics is not proportionate to this goal and may even work against it. Relying on biometrics to prove family relationship could lead to children being erroneously separated from guardians or caretakers who are not their biological parents, breaching the right to family unity and leaving children more vulnerable.[29] Furthermore, DHS and the current administration have shown that they are not serious about

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[21] 85 Fed. Reg. 56343.

[22] In a 2017 memo, then-DHS Secretary John Kelly announced via memorandum a change of policy in which age would no longer be a basis for determining when to collect biometrics. That policy memorandum additionally encouraged DHS to amend existing regulations to allow for expansive collection of biometrics regardless of age. "DHS Biometrics Expansion for Improved Identification and Encounter Management," May 24, 2017, https://www.dhs.gov/sites/default/files/publications/dhs_biometrics_expansion.pdf.

[23] UNICEF Biometrics Guide, *supra* note 3, at 5.

[24] *Id.*

[25] *Biometrics*, UNICEF (October 2019), https://data.unicef.org/resources/biometrics/.

[26] *See* Amnesty International, *Amnesty International Calls for Ban on the Use of Facial Recognition Technology for Mass Surveillance*, https://www.amnestyusa.org/wp-content/uploads/2020/06/061120_Public-Statement-Amnesty-International-Calls-for-Ban-on-the-Use-of-Facial-Recognition-Technology-for-Mass-Surveillance.pdf. Accessed October 8, 2020.

[27] *See, e.g.*, Joan Palmiter Bajorek, *Voice Recognition Still Has Significant Race and Gender Biases*, Harvard Business Review (May 10, 2019), https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases.

[28] UNICEF Biometrics Guide, *supra* note 3, at 19, 31.

[29] Saira Hussain, *ICE's Rapid DNA Test on Migrants at the Border Is Yet Another Iteration of Family Separation*, EFF Deeplinks Blog (August 2, 2019), https://www.eff.org/deeplinks/2019/08/ices-rapid-dna-testing-migrants-border-yet-another-iteration-family-separation.

child trafficking concerns. If they were, they would not have repeatedly referred to the Trafficking Victims Protection Reauthorization Act (TVPRA) as a "loophole," instead of protecting this vital piece of legislation that ensures unaccompanied children are cared for by an agency with a child welfare mandate and requires screening of children from contiguous countries to ensure that they are not returned to persecution or put at risk of trafficking. They would not be summarily expelling children at the border during the COVID-19 pandemic, flagrantly disregarding the law and returning children to harm's way. If the administration were serious about child trafficking concerns, they would restore TVPRA protections for unaccompanied children, vigorously champion the TVPRA, and ensure that those screening children and families at the border have training and expertise in child welfare and child protection.

The proposed rule exposes children and families to trauma and family separation by allowing DHS to require highly invasive and unnecessary DNA testing to establish family relationship.

Under the proposed rule, DHS proposes *requiring* the collection of DNA to establish a claimed genetic relationship. While DHS claims it will not share or store raw DNA or biological samples "unless required to share by law," the agency "may store or share DNA test results, which include a partial DNA profile, with other law enforcement agencies to the extent permitted by and necessary to enforce and administer the immigration laws."[30] DHS claims that DNA testing is necessary because it is the most reliable test to verify a genetic relationship.[31]

Requiring DNA collection is a marked departure from existing policy that is not acknowledged or justified in the proposed rule. Though U.S. Customs and Immigration Services (USCIS) and consular posts have long accepted DNA analysis as evidence of biological family relationship, they have never required it. Rather, DNA evidence is one of several forms of secondary evidence to be considered in determining the veracity of a claim to family relationship.[32] A 2008 USCIS policy memorandum incorporated into the USCIS Policy Manual explicitly states that DNA testing is *not required* to establish a claimed relationship. If submitted, however, the agency requires that DNA analysis be conducted by a laboratory certified by the American Association of Blood Banks (AABB).[33] USCIS currently does not accept DNA test results using alternative technologies such as Rapid DNA analysis. This rule therefore abandons existing policy without justification.

Additionally, unlike the forms of family verification that DHS currently uses, DNA provides "a massive amount of unique, private information about a person that goes beyond identification of that person."[34] DNA samples contain information that has the capability to reveals an individual's race, biological sex, ethnic background, familial relationships, health status, genetic diseases, and predisposition to certain traits.[35] All of that information goes far beyond the scope of DHS's given justification for using DNA testing to verify family relationships, especially when there are alternative, less invasive methods such as providing documentation.

DHS briefly acknowledges the heightened privacy concerns with DNA collection and attempts to address those by stating that it will "not handle or share any raw DNA for any reason beyond the original purpose of submission (e.g., to establish or verify a claimed genetic relationship), unless DHS is required to share by law," and store only "DNA test results, which include a partial DNA profile," including 16-24 genetic markers of the "over two million contained in human DNA."[36] This is not reassuring. DHS leaves open the possibility that raw DNA could be shared "as required by law," and contemplates sharing test results, which

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[30] Proposed 8 C.F.R. § 103.16(e).
[31] 85 Fed. Reg. at 56353.
[32] *Matter of Rehman*, 27 I&N Dec. 124 (BIA 2017).
[33] Memo, Aytes, Assoc. Dir. Domestic Operations, USCIS (Mar. 19, 2008), https://www.uscis.gov/sites/default/files/document/news/genetic_testing.pdf.
[34] *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).
[35] *People v. Buza*, 4 Cal. 5th 658, 720 (2018) (Cuellar, J., dissenting) (citations omitted).
[36] 85 Fed. Reg. at 56353.

still contain a significant number of genetic markers, "with other agencies when there are national security, public safety, fraud, or other investigative needs."[37] Simply put, both highly sensitive raw DNA and DNA test results could be shared for a potentially broad and indeterminate set of reasons unknown to the public at this time.

The agency does not address these serious matters in its proposed rule. The agency believes that the rule does not create new privacy concerns but merely expands the population affected by privacy concerns.[38] Even if that were so, the agency makes no effort to allay concerns related to privacy and overreach. It does not propose any measures that would lessen the impact of the rule where less invasive measures of identity verification are available and sufficient, such as supervisory review of DNA requests, any threshold of evidence short of DNA collection that would satisfy requirements, a provision requiring informed consent, or any protocol for the evaluation of test results reported by the government. By extending to DHS broad, unreviewable discretion to determine when DNA collection should be required and analyzed, the proposed rule fails utterly to respond to these important and relevant policy concerns.

The proposed rule's authorization for the continued use of Rapid DNA raises additional privacy, accuracy, and quality control concerns. DHS asserts that "Rapid DNA testing technolog[y] [is] a precise and focused investigative tool to identify suspected fraudulent families and vulnerable children who may be potentially exploited."[39] Experts do not agree, however, that Rapid DNA testing provides results of biological relationships that are accurate enough to support allegations of fraud. In 2017, the Swedish National Forensic Centre reported serious errors with a similar Rapid DNA testing system, including "the retrieval of an incorrect DNA profile, PCR product or sample leakage and the low success rate."[40] Additionally, USCIS's own current policy only permits the submission of DNA analysis as evidence of familial relationship if it occurred at an AABB-certified laboratory.[41] The continued use of Rapid DNA, despite the likelihood of serious errors, is likely to lead to family separation.

DHS cites the results of its own pilot program as evidence of the success of Rapid DNA testing technology, but the data it reports in the proposed rule is incomplete and achieved using flawed methods. The agency asserts that:

> "Beginning in July 2019 DHS has been conducting a small-scale pilot program where, with consent from individuals presenting themselves as family units, officers use Rapid DNA testing technologies as a precise and focused investigative tool to identify suspected fraudulent families and vulnerable children who may be potentially exploited. Between July 1, 2019 and November 7, 2019, DHS encountered 1747 self-identified family units with indicators of fraud who were referred for additional screening. Of this number, DHS identified 432 incidents of fraudulent family claims (over 2020 [*sic*] percent)."[42]

First, although DHS claims to have received consent from participants in the pilot program, it is likely that many of participants felt coerced and lacked sufficient understanding in their best language to provide informed consent. As explained earlier, receiving the informed consent of children or their parents is particularly important in collecting biometric information, and DHS has neither the

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[37] 85 Fed. Reg. at 56354.
[38] 85 Fed. Reg. at 56343. ("There could be some unquantified impacts related to privacy concerns for risks associated with the collection and retention of biometric information, as discussed in DHS's Privacy Act compliance documentation. However, this rule would not create new impacts in this regard but would expand the population that could have privacy concerns.")
[39] 85 Fed. Reg. at 56352.
[40] Saira Hussain, *supra* note 29.
[41] Memo, Aytes, Assoc. Dir. Domestic Operations, U.S. Citizenship and Immigration Services (Mar. 19, 2008), https://www.uscis.gov/sites/default/files/document/news/genetic_testing.pdf.
[42] 85 Fed. Reg. at 56352. *See also id.* At 56341 n. 7, where DHS notes that 20% of those tested were found to not match.

expertise nor the will to ensure that children and their families fully understand the consequences of agreeing to undergo DNA testing. The program and others like it were undertaken without public review and were the subject of a letter of inquiry from members of Congress only after they began.[43] DHS's own Privacy Impact Assessment, published shortly before embarking on the 2019 pilot program, notes that declining to participate in the Rapid DNA testing is to be considered a factor in determining whether to allow the family unit to proceed together, a condition of participation that is explicitly coercive.[44] It identifies several other privacy concerns, but disposes of most of them as "partially mitigated" by the small sample size. DHS did not update their assessment prior to publishing this notice of proposed rulemaking

Second, based on the "severe errors" and "low success rate" reported in the Swedish study, it is likely that some of the 432 "fraudulent family" claims reported by DHS were the result of failures in testing. DHS's own results fail to show that fraudulent family claims are a large enough problem to justify invasive DNA collection. In fiscal year 2019, CBP encountered 473,682 persons classified as belonging to family units.[45] During the period from July through October 2019, CBP encountered over 83,000 noncitizens that were classified as members of family units.[46] The 1,747 family units that were selected for testing during that period were referred because they showed certain unspecified "indicators of fraud." As the testing group was small and not random, and results based on flawed technology, the tiny number of purportedly fraudulent findings cited by the agency is an insufficient data point from which to conclude that expanded DNA collection using Rapid DNA testing is warranted.

Even if the families above had accurate results showing no biological relationship, that is still not sufficient to show that there is no relationship between a child and an adult. DHS uses Rapid DNA only to verify parent-child relationships,[47] excluding the many other loving relationships that could exist between a child and an adult. It is important that DHS know of *any* family relationship between a child and adult, as it could inform DHS' decisions regarding discretionary release. For children transferred to the care of the Office of Refugee Resettlement (ORR) as unaccompanied, it is vital that DHS relay information about any family relationship to ORR so that the agency knows of all family members within the United States who could sponsor a child's release from custody. Without this vital information, a child could spend a prolonged period in ORR custody and separated from family, deeply affecting their health and development.[48]

Additionally, the rule stigmatizes nontraditional family relationships. Within and outside the United States, there are many families whose relationships are not determined by biology.[49] In these cases, a DNA test is useless in identifying a relationship between a child and a safe and loving adult. In fact, in some cases, DNA testing could reveal misattributed parental relationships or unknown adoptions, which unnecessarily interferes

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[43] Letter to Acting DHS Secretary Chad Wolf from Reps. Rashida Tlaib, Joaquin Castro, and Veronica Escobar dated Jan. 21, 2020, https://tlaib.house.gov/sites/tlaib.house.gov/files/DHS%20DNA%20Collection%20Letter_Signed.pdf.
[44] DHS Privacy Impact Assessment for the Rapid DNA Operational Use, Department of Homeland Security (June 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019_3.pdf
[45] U.S. Customs and Border Protection, Statistics of Southwest Border Migration FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.
[46] *Id.*
[47] Saira Hussain, *supra* note 29.
[48] Julie M. Linton et al., *Detention of Immigrant Children*, Pediatrics (March 2017), https://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.
[49] *The American Family Today,* Pew Research Center (December 17, 2015), https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/. Marcia Carteret, *Cultural Differences in Family Dynamics,* Dimensions of Culture (November 2, 2010), https://www.dimensionsofculture.com/2010/11/culture-and-family-dynamics/ ("In cultures such as American Indian, Asian, Hispanic, African, and Middle Eastern, individuals rely heavily on an extended network of reciprocal relationships with parents, siblings, grandparents, aunts and uncles, cousins, and many others.").

with the family relationship and disrupts family bonds.[50] A study of families seeking to reunify though family-preference green cards found that the revelation of secret adoptions or unknown misattributed parental relationship had harmful consequences on family bonds and trust within families and communities.[51] However, other forms of proof for family relationship, like birth certificates or other documentation, could indicate that the child is with a primary caregiver or a known, safe and loving adult. By upending long-standing DHS policy regarding family relationship, the proposed rule fixes into law an extremely narrow view of family that is not reflective of the reality of many children and caregivers, subjecting even more children to the harms of family separation.

Family separation that is not in the best interest of the child—that is, for reasons other than an imminent risk of harm to a child—is traumatic in ways that could last a lifetime. Physicians for Human Rights found that families separated during the administration's 2018 zero-tolerance policy exhibited trauma responses including excessive crying, difficulty sleeping, loss of appetite, depression, anxiety, and hopelessness.[52] They noted that "it may take several years . . . for children to overcome such trauma."[53] The American Psychiatric Association states that family separation has long-lasting negative outcomes for children, including psychological distress, difficulties in school, and disruptions to their development.[54]

Rather than once again intentionally inflicting harm and trauma on children and families, DHS should instead continue with its current policy of relying on documentation to prove familial relationship and strengthen its guidance and training regarding the use of DNA testing to verify family relationship. In particular, DHS should ensure that professionals with training and expertise in child welfare and child protection assess family relationship at the border. Furthermore, DHS should ensure that all migrant families receive notices that explain that DNA testing is fully voluntary, all alternative options, the risks of DNA testing, and all the ways the information is being used or shared. These notices should be in written form and explained to families in their native language, so that they can make informed choices. DHS should develop guidance, trainings, and notices in consultation with stakeholders who work with immigrant populations and children.

The proposed rule creates a barrier for children and families who seek family-based immigration benefits.

Currently, DHS runs name-based criminal background checks on U.S. citizens and LPR family members petitioning for immigrant relatives in order to comply with statutes regarding petitioners' criminal history. The proposed rule would allow DHS to collect a broad swath of information from U.S. citizen and LPR petitioners and demand such biometrics at multiple points in the application process. This unnecessary collection of information could deter U.S. citizens and LPRs seeking to reunite with family, which a foundational principle of our current immigration law.

While the proposed rule claims that name-based checks do not identify all petitioners who have committed crimes that would disqualify them as petitioners under immigration law, it ignores that petitioners self-report, under penalty of perjury, any disqualifying criminal history in the process of petitioning for family-based

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[50] Nita Farahany, Saheel Chodavidia, & Sara H. Katsanis, *Ethical Guidelines for DNA Testing in Migrant Family Reunification*, The American Journal of Bioethics (2019), https://www.tandfonline.com/doi/epub/10.1080/15265161.2018.1556514?needAccess=true.

[51] Llilda P. Barata et al., *What DNA Can and Cannot Say: Perspectives of Immigrant Families About the Use of Genetic Testing in Immigration*, Standford Law & Policy Review pgs. 618-621 (2015), https://www-cdn.law.stanford.edu/wp-content/uploads/2017/11/07_barata.pdf.

[52] *You Will Never See Your Child Again: The Persistent Psychological Effects of Family Separation*, Physicians for Human Rights 4 (February 2020), https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf.

[53] *Id.* at 20.

[54] *Statement of the APA President Regarding the Traumatic Effects of Separating Immigrant Families*, American Psychological Association (May 29, 2018), https://www.apa.org/news/press/releases/2018/05/separating-immigrant-families.

visas.[55] Rather than limiting biometrics collection in those cases where there might be a disqualifying criminal history, the proposed rule instead treats every family-based visa petitioner as a potential criminal suspect, subjecting them to invasive biometrics collection even where there are no indications of criminal history. Even more chillingly, it requires subsequent collection of biometrics if a petition is reopened, potentially subjecting every U.S. citizen and LPR petitioner to multiple rounds of biometric collection just in the process of seeking to reunify with family. In short, this rule forces U.S. citizens and LPRs seeking family unity to potentially subject themselves to intrusive data collection and ongoing surveillance.

The proposed rule will undoubtedly have a chilling effect on citizens and LPRs sponsoring family members, leading to prolonged and maybe indefinite family separation. In fiscal year 2018, approximately one fourth of those who were granted LPR status were children.[56] Family unity is important for those children's health and development and family bonds, and Congress created visa categories specifically with that in mind.[57] DHS should not impose additional, unnecessary barriers and the prospect of ongoing surveillance on families who seek to reunify with their relatives.

The proposed rule exposes children to continued persecution and harm by relying on and sharing information with their country of origin.

Under the proposed rule, DHS proposes greater information sharing of biometric data between the United States and foreign countries. DHS's proposed new database, the Homeland Advanced Recognition Technology (HART) database, would allow for more interoperability between U.S. databases and foreign databases. The disastrous effects of information sharing between inaccurate, biased, and unreliable law enforcement databases and immigration databases has been extensively documented.[58] For children, this information sharing has led to prolonged detention and family separation. ORR has often held children for prolonged periods of time or in more restrictive settings based on alleged criminal histories in their home countries.[59] The rule could lead to an increase of children subjected to longer periods of detention in harmful, restrictive settings. CBP has relied on data from a transnational intelligence-sharing program involving Mexico, El Salvador, Guatemala, and Honduras to separate families based on unsubstantiated and alleged criminal histories.[60] With the vast expansion of information collection contemplated by this rule, even more

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[55] Policy Manual, *Chapter 2-Signatures*, U.S. Customs and Immigration Services (October 6, 2020). https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-2 ("Signers may be held accountable for any fraud or material misrepresentation associated with the benefit request.").

[56] *Table 8: Persons Obtaining Lawful Permanent Resident Status by Sex, Age, Marital Status, and Occupation: Fiscal Year 2018*, 2018 Yearbook of Immigration Statistics, Department of Homeland Security (September 29, 2020), https://www.dhs.gov/immigration-statistics/yearbook/2018/table8.

[57] *See, e.g.*, *Green Card for Family Members of a Permanent Resident*, U.S. Citizenship and Immigration Services (July 8, 2020), https://www.uscis.gov/forms/explore-my-options/green-card-for-family-members-of-a-permanent-resident ("To promote family unity, immigration law allows lawful permanent residents of the United States (also called LPRs or Green Card holders) to petition for certain eligible family members to obtain immigrant visas to come and live permanently in the United States or to adjust their status to LPRs if they are currently living in the United States.").

[58] In *Gonzalez v. ICE*, for example, the Ninth Circuit has held that, in their enforcement actions, ICE has relied on databases with large gaps in necessary data that have significant error rates in the data they contain. *See* "Explaining the Gonzalez v. ICE Injunctions," Immigrant Legal Resource Center (October 2019), https://www.ilrc.org/sites/default/files/resources/2019.11_ilrc_gonzalez_v_ice-11.07.pdf. See also Joan Friedland et al., Untangling The Immigration Enforcement Web, National Immigration Law Center, (September 2017), https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf.

[59] *Children Entering the United States Unaccompanied: Section 1*, Policy Guide, Office of Refugee Resettlement §§ 1.2.4, 1.4.2 (January 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1.

[60] *See* Jesse Franzblau, "Family Separation Policy Continues, New Documents Show," National Immigrant Justice Center (June 22, 2019), https://immigrantjustice.org/staff/blog/family-separation-policy-continues-new-documents-show. DHS officials have separated families on the basis of unsubstantiated information shared from foreign governments. *See* U.S. House Judiciary Committee Hearing Oversight of Family Separation and U.S. Customs and Border Protection

families could be subjected to unlawful and unwarranted family separation. As explained above, separation from a loving caregiver affects children's physical and psychological development in ways that could be irreparable.

Information sharing with foreign governments regarding immigration also has terrible and alarming implications for immigrant children and families who were trafficked or have a fear of persecution in their home countries. Unlike a name or an identification number, people's biometric information is immutable and unique to them. Some children and families have faced harm by government officials, and information sharing might provide foreign governments with information that would allow officials to find asylum-seeking children and families in the United States and further persecute them or their families who remain in the country.

DHS has also not provided any information on how they will limit information sharing or require safeguards in other countries to protect against data falling into the wrong hands. If the information DHS shares is not properly protected, persecutors and traffickers could hack into a government's database, find information about immigrants and their families, and further threaten them. Immigrants seeking protection may rightly be terrified of the ramifications of sharing multiple biometric identifiers with the U.S. government in the context of applying for protection. This will likely create a chilling effect for children and families who desperately need protection.

The proposed rule would adversely impact child survivors of violence and trafficking.

The proposed rule would require self-petitioners under the Violence Against Women Act (VAWA) and applicants for T visas, regardless of age, to submit to invasive biometrics collection to establish "good moral character." Cruelly, the rule would remove the presumption of good moral character for T visa applicants under the age of 14. DHS fails to justify why existing methods to establish good moral character, including police certifications, are insufficient, and why children under 14 should no longer be presumed to have good moral character.

As the Tahirih Justice Center notes, given the potential for information sharing between state and federal law enforcement and immigration agencies, as well as the frequency with which abusers may falsely report survivors for crimes or otherwise entangle them in the criminal enforcement apparatus, biometrics collection may reveal criminal charges survivors incurred in conjunction with past abuse.[61] Similarly, child trafficking survivors frequently incur criminal records through coerced activity.[62] By removing the presumption of good moral character for child survivors of violence and trafficking and relying on uncontextualized information through biometric collection, the proposed rule may lead to wrongful denials of applications and return children to harm. Additionally, as explained above, information sharing with foreign governments without requiring safeguards could expose survivors to further harm and trauma.

The proposed rule harms child well-being by exposing immigrant children and families to ongoing surveillance.

The proposed rule would allow DHS to demand biometrics of immigrants at any time as part of a regime of "continuous immigration vetting," which experts have described as "a moment-by-moment monitoring of

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Short-Term Custody under the Trump Administration, Statement of the National Immigrant Justice Center (NIJC) (July 25, 2019), https://www.congress.gov/116/meeting/house/109852/documents/HHRG-116-JU00-20190725-SD014.pdf.

[61] *Tahirih Statement on Sweeping Proposal to Expand Biometrics Collection*, Tahirih Justice Center (September 10, 2020), https://www.tahirih.org/news/tahirih-statement-on-sweeping-proposal-to-expand-biometrics-collection/.

[62] U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, *The Use of Forced Criminality: Victims Hidden Behind the Crime* (June 2014), https://2009-2017.state.gov/documents/organization/233938.pdf.

immigrant activities during the lifecycle of their interactions with the United States."[63] DHS barely attempts to justify why the rule is necessary, other than citing to Trump's explicitly discriminatory vision of "extreme vetting" for immigrants and their family members.[64]

Continuous vetting raises serious human rights concerns and paves the way for discriminatory surveillance of predominantly people, and children, of color.[65] Under the rule, communities already more likely to be policed and scapegoated could now be easily surveilled and even falsely identified in connection with crimes.

Research has shown that the over-policing and surveillance of children in the United States has negative effects on their well-being. Adolescent children are more likely to have contact with the police than any other age group.[66] One study found that Black and Latino adolescent boys who were often stopped by police experience psychological distress and other harmful outcomes, and those outcomes are compounded when encounters occur earlier in a child's life.[67] Increased surveillance that leads to the incarceration or detention of a family member strains emotional and material resources in ways that disrupt children's care and development.[68] Surveillance can also make families more likely to avoid public services that support children's growth and education.[69] In the context of this rule, the prospect of constant vetting could lead families to avoid seeking further immigration benefits, such as adjustment of status or naturalization.

Importantly, constant vetting affects children's sense of place, and therefore their feeling of belonging. Research shows that children begin developing a sense of place in early childhood, which in turn helps children know that they belong in the physical, social, and cultural world in which they live.[70] For children, "place, identity, and well-being are often closely connected."[71] The constant vetting of immigrant children,

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[63] Chinmayi Sharma, *The National Vetting Enterprise: Artificial Intelligence and Immigratio Enforcement*, Lawfare (January 8, 2019), https://www.lawfareblog.com/national-vetting-enterprise-artificial-intelligence-and-immigration-enforcement.
[64] See e.g. White House, Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (September 24, 2017), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/
[65] Faiza Patel & Harsha Panduranga, *DHS' Constant Vetting Initiative: A Muslim Ban by Algorithm*, Brennan Center for Justice (March 12, 2018), https://www.brennancenter.org/our-work/analysis-opinion/dhs-constant-vetting-initiative-muslim-ban-algorithm.
[66] *Interactions Between Youth and Law Enforcement*, Washington D.C. Office of Juvenile Justice and Delinquency Prevention 2 (January 2018), https://www.ojjdp.gov/mpg/litreviews/interactions-youth-law-enforcement.pdf.
[67] Juan Del Toro et al, *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, PNAS 8267 (April 23, 2019), https://www.pnas.org/content/pnas/116/17/8261.full.pdf.
[68] Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, Russell Sage Foundation Journal of the Social Sciences 51 (2019), https://www.rsfjournal.org/content/rsfjss/5/1/50.full.pdf. Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families*, Urban Institute & Migration Policy Institute 6-11 (September 2015), https://www.urban.org/sites/default/files/publication/76006/2000535-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families-A-Review-of-the-Literature.pdf.
[69] Rachel Blustain & Norma McCarthy, *The harmful Effects of New York City's Over-Surveillance*, The Imprint: Youth & Family News (October 21, 2019), https://imprintnews.org/child-welfare-2/the-harmful-effects-of-over-surveillance/38441 (explaining that parents hid family struggles from schools or doctors they saw as threats due to over-reporting).
[70] Pamela Brillante & Sue Mankiw, *A Sense of Place: Human Geography in the Early Childhood Classroom*, NAEYC (July 2015), https://www.naeyc.org/resources/pubs/yc/jul2015/sense-of-place-human-geography#:~:text=Developing%20this%20sense%20of%20place,world%20they%20share%20with%20others.
[71] Gordon Jack, *Place Matters: The Significance of Place Attachments for Children's Well-Being*, The British Journal of Social Work 758 (April 2010), https://watermark.silverchair.com/bcn142.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc485ysgAAAp4wggKaBgkqhkiG9w0BBwagggKLMIICChwIBADCCAoAGCSqGSIb3DQEHATAeBglghkgBZQMEAS4wEQQMVBMbLFUMiJr0OTPYAgEQgIICUVaww3TCZJCDvHnhPluz6l65hCkEE6OpVi92yWyvk8DvX1ykwKShlRUCtxok93zyzsf6z3QKoahBYKdwrtFZdTvX9OGsjhT74K7-K7xXlQtIEdWBoOGk1pRskzWAw8q-

potentially throughout their lives until citizenship, is likely to make children feel like they do not belong in the United States and negatively impact their development and growth.

The proposed rule exposes children's information to theft.

Once children's biometric information is stored, they are "no longer the sole possessor of their own biometric data."[72] This could lead not only to the misuse of this data, but also theft.[73] Child identity theft is a growing problem—over 1 million children were victims of identity theft or fraud in 2017.[74] Because children have a "blank slate," thieves are able to use their data to open new lines of credit or engage in criminal activity, and can go undetected for years.[75] The harm to children may be severe—children could face obstacles getting a student loan, lines of credit, or housing in the future.[76] Children could even face arrest for criminal activity they were never involved with.[77] By expanding the collection of children's biometric information without a clear explanation of how that information will be protected, DHS is exposing more children to data theft.

Furthermore, DHS has shown that they are incapable of protecting the information it collects from immigrants. A September 2020 report by the DHS Office of the Inspector General found that during a 2019 biometric pilot by Customs and Border Protection (CBP), CBP did not adequately safeguard sensitive data, resulting in a breach of over 184,000 people's facial images.[78] At least 19 of those images were posted to the dark web.[79] Despite this breach, DHS is now seeking to expand both the number of people it collects information from and type of information collected from those people. In the case of children, inadequate safeguards for sensitive data could not only lead to identity theft and fraud, but also heightened risk of exploitation.

Conclusion

The administration's proposed changes to the collection and use of biometric information would flagrantly violate children's right to privacy and inflict harm on immigrant children and families in a myriad of ways. This is not only cruel and immoral, but also thwarts Congressional intent and international obligations. We

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[72] UNICEF Biometric Guidance, *supra* note 3, at 17.

[73] *Id.*

[74] Kelly B. Grant, *Identity Theft Isn't Just an Adult Problem. Kids Are Victims Too,* CNBC (April 24, 2018), https://www.cnbc.com/2018/04/24/child-identity-theft-is-a-growing-and-expensive-problem.html.

[75] *Id.* Cathy Krebs & Amy Harfeld, *The Crisis of Child Identity Theft*, American Bar Association (November 21, 2011), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2011/crisis-child-identity-theft/.

[76] Krebs & Hartfelt, *supra* note 75.

[77] *Id.*

[78]Department of Homeland Security, Office of the Inspector General, OIG-20-71, Review of CBP's Major Cybersecurity Incident During a 2019 Biometric Pilot (September 21, 2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf.

[79] *Id.* at 6.

urge DHS to promptly withdraw the proposed rule in its entirety, and instead dedicate its efforts to ensuring that every policy considers the best interests of children.

Thank you for the opportunity to submit comments on the proposed rulemaking. Please do not hesitate to contact Miriam Abaya at miriama@firstfocus.org to provide further information.

Sincerely,

Bruce Lesley
President