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USCIS Docket No. USCIS–2019–0007-0001

Re: 85 FR 56338; EOIR Docket No. 19-0007, CIS No. 2644-19; RIN 1615-AC14; Comments in Opposition to Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

October 13, 2020

Dear Mr. McDermott:

I am writing on behalf of Futures Without Violence (FUTURES), in response to the Notice of Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services published in the Federal Register on September 11, 2020 (hereinafter “proposed rule”).

FUTURES strongly opposes the proposed rule as it significantly transforms the VAWA and T Visa processes and dramatically expands biometric collection for immigrants, lawful permanent residents, and US citizens. Given its breadth and intrusiveness, the proposed rule will deter thousands of immigrant survivors of gender-based violence from seeking immigration benefits that were specifically created for their protection. Concomitantly, it will increase the level of risk to survivors’ safety, privacy, and security.

Importantly, given the vastness and complicated nature of the proposed rule along with the exceedingly short timeframe to respond, we are not able to comment on every proposed change. The fact that we do not set forth and discuss a particular change to the law, does not mean that we agree with it. We oppose the proposed rule in its entirety and urge the US Citizenship and Immigration Services (USCIS) to withdraw and rescind the entire proposed rule.

FUTURES is a national nonprofit organization that has worked for more than 35 years to prevent and end violence against women and children in the United States (US) and around the world. We educate about and work to eliminate domestic violence, sexual assault, child abuse, and human trafficking through education and prevention campaigns; training and technical assistance to state agencies, public and private entities, judges and court systems, colleges and universities, and global organizations; and we advance sound policies and evidence-based practices at the state and federal level that prevent violence and help survivors and their children heal and thrive.

FUTURES staff are experts on family violence prevention, sexual assault, child trauma and human trafficking and the services and supports necessary for children and women to heal from violence and trauma. We were a driving force behind the passage of the Violence Against Women Act in 1994 (VAWA) as well the Trafficking Victims Protection Act in 2000 (TVPA). These laws, which include protections for immigrant survivors have saved lives and have helped survivors find independence, safety and stability. Based upon our experience, we know that violence against women and children is a global pandemic, affecting one in three women in the world and up to ¾ of the world's children.

I. USCIS Has Failed to Provide a Meaningful Opportunity for the Public to Comment on this Expansive and Invasive Biometric Proposed Rule.

FUTURES submits that a 30-day comment period is insufficient and the proposed rule should be rescinded on this basis alone. Typically, the administration should allow a comment period of *at least* 60 days following publication of the proposed rulemaking to provide the public a meaningful opportunity to comment.¹ Here, despite the sweep and complexity of this new rule, DHS has afforded the public only 30 days to comment.

There is no justification for rushing through a proposed rule of this scope and magnitude. The changes made by the proposed rule would apply to more than six million people at a cost of nearly \$300 million each year, requiring the collection of invasive biometric data from American citizens, lawful permanent residents, and immigrants.²

The importance of a sufficient comment period is even more critical due to the extraordinary changes to working conditions affected by the COVID-19 pandemic. The pandemic has caused an increased rate of domestic violence and augmented the complexity and challenges of serving survivors.³ Agencies that serve survivors of violence are either at capacity or must now navigate additional and novel barriers in their service provision.

¹ 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).

² Proposed Rule at 56343.

³ National Taskforce to End Sexual and Domestic Violence. (2020). "Fast Facts: Survivors of Domestic and Sexual Violence are at Heightened Risk Now, and Will Remain So Long After the Current Crisis," available at

FUTURES is a national organization with offices in San Francisco, Boston, and the District of Columbia and, like many organizations, is attempting to work remotely while allowing staff necessary leave to care for themselves and family members affected by the pandemic. It is challenging to access documents, information, and technology as well as coordinate, convene, and respond to a 90-page proposed rule in such a short time period.

Furthermore, the proposed rule lacks information essential to affording the public a meaningful opportunity to comment. It fails to provide concrete data about the biometric information USCIS currently collects. In addition, it makes conclusory statements about the reliability of documentary versus biometric information but does not explain why documentary information is insufficient to meet USCIS stated objectives of identity verification and criminal and national security checks. Also, it neglects to describe how the massive amounts of new data will be stored and shared, even though this information is absolutely critical to understanding the proposed rule's effects. For these procedural deficiencies alone, USCIS should withdraw the proposed rule.

II. The Proposed Rule Will Harm Survivors and Deter Them From Accessing Protections Created for Their Safety.

A. Expansion of Biometrics to Include Invasive Modalities

The proposed rule vastly expands USCIS biometrics collection authority in a way that is overbroad, ambiguous, and needlessly invasive. Specifically, the proposed rule gives USCIS authority to collect biometric data beyond fingerprints and photographs to include additional “modalities” such as an iris scan, palm print, facial recognition, voice print, and DNA.⁴ For survivors of violence who have endured physical, sexual, and emotional abuse complying with these new and invasive biometric requirements will likely increase and exacerbate the harm and trauma they have suffered and deter them from accessing protections statutorily created for them in both VAWA and TVPA.

While USCIS purports it will not deploy an absolute biometric requirement in all instances for all forms,⁵ the proposed rule fails to specify which modalities will be utilized in the collection of survivor-based relief. Indeed, USCIS is giving itself wide latitude to choose from an array of modalities, all of which infringe upon privacy and civil liberties. Additionally, the lack of information and the lack of transparency of what is expected of survivors and what they may face when they self-petition for VAWA or apply for T adjustment of status, undermines their confidence that the process is safe and their information and privacy secure.

<https://static1.squarespace.com/static/57d7477b9de4bb8b14256cf4/t/5e9dc0e935d08275a98b9925/1587396842687/NTF+Fact+Sheet.DV-SA+survivors+and+the+COVID19+crisis.pdf>

⁴ Proposed Rule at 56355.

⁵ Proposed Rule at 56351.

Most importantly, FUTURES stringently objects to USCIS collecting invasive biometrics from survivors of violence as they implicate privacy concerns and have been found to be unreliable, racially biased, and reinforce bias against transgender individuals.⁶ Several studies have shown that facial recognition technology results in higher rate of false identifications for people of color. A December 2019 report by the National Institute of Standards and Technology found a higher rate of incorrect facial matches for photos of Black and Asian people relative to white people.⁷ Also, iris scans are not foolproof, and can yield false negative error rates of 2.5-20%.⁸

Moreover, USCIS justification for using voice prints to be integrated into the USCIS call center processes is not only deeply disturbing but raises concerns of racial and gender bias.⁹ The possibility of both false positive and false negative identifications is particularly worrisome in the use of voice prints, as is the presence of both race and gender bias, which could adversely impact people who speak English with an accent as well as people who are transgender. USCIS fails to explain why a less intrusive mechanism could not be used for telephonic and electronic verification.

Further, these biometrics may link to databases that have incomplete, inaccurate or outdated information about the applicant. This is especially harmful for survivors because abusers often falsely report survivors for crimes that they did not commit to keep them within their power and control. Also, invasive biometrics collection may reveal criminal charges survivors incurred in conjunction with past abuse and coerced activity, leading to wrongful denials of their applications. While USCIS indicates applicants will be offered an opportunity to rebut derogatory information, the agency does not explain how applicants can redress these errors or provide an avenue for applicants to challenge the information in the database.

⁶ Ali Breland. (December 4, 2017). "How white engineers built racist code – and why it's dangerous for black people." The Guardian, available at <https://www.theguardian.com/technology/2017/dec/04/racist-facial-recognition-white-coders-black-people-police>; See also Matthew Gault. (Feb. 19, 2019), "Facial Recognition Software Regularly Misgenders Transgender People." Vice, available at <https://www.vice.com/en/article/7xnwed/facial-recognition-software-regularly-misgenders-trans-people>

⁷ National Institute of Standards and Technology, US Department of Commerce. (December 19, 2019). "NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software," available at: <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>. See also, Amnesty International. "Amnesty International Calls for Ban On the Use of Facial Recognition Technology for Mass Surveillance," available at: 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; American Civil Liberties Union. "The Government's Nightmare Vision for Face Recognition at Airports and Beyond," available at: <https://www.aclu.org/news/privacy-technology/the-governments-nightmare-vision-for-face-recognition-at-airports-and-beyond/>.

⁸ Alice Lipowicz. (April 23, 2012). "NIST tests accuracy in iris recognition for identification." Federal Computer Week, available at: <https://fcw.com/articles/2012/04/23/nist-iris-recognition.aspx>

⁹ Joan Palmiter Bajorek. (May 10, 2019). "Voice Recognition Still Has Significant Race and Gender Biases." Harvard Business Review, available at <https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases>

Lastly, the expansion of biometrics is deeply concerning for survivors given that it will necessarily increase *who* has access to this information. As noted above, abusers often threaten to report survivors to the police or to the immigration authorities in order to maintain power over their victims and keep them silent.¹⁰ Congress created confidentiality protections for survivors codified at 8 USC § 1367, to ensure that abusers and other perpetrators cannot use the immigration system against their victims.”¹¹ Despite the numerous policies put in place surrounding survivor information, violations of these provisions occur with regularity. Indeed, we are deeply concerned that the sweeping expansion of biometrics will lead to additional disclosures (either intentionally or through vulnerabilities to hacking and other breaches), which will jeopardize survivor safety.

B. Expansion of Biometrics to Include DNA Collection

The proposed rule will allow USCIS, in its discretion, to request, require, or accept DNA or DNA test results, which include a partial DNA profile, for individual benefit requests requiring proof of a genetic relationship.¹² Phase V of their implementation plan would permit DHS to request or require DNA evidence in survivor-based relief including but not limited to:

- VAWA Self-Petitions involving abuse of children or parents (Form I-360)¹³
- Application for T Nonimmigrant Status Supplement A (Form I-914A);
- Petition for U Nonimmigrant Status Supplement A (Form I-918A);
- Petition for Qualifying Family Member of a U-1 Nonimmigrant (Form I-929).¹⁴

Requiring DNA collection is a marked departure from existing policy that is not acknowledged or justified in the proposed rule. Although USCIS and consular posts have long accepted DNA analysis as evidence of biological familial relationship, they have never formally required it. Rather, DNA evidence is one of several forms of secondary evidence to be considered in determining the veracity of a familial claim.¹⁵

DNA collection is considered highly invasive and raises constitutional concerns under the Fourth Amendment, as it provides a massive amount of unique and private information about an

¹⁰ See e.g. Samantha Schmidt. (June 18, 2018). “Deputy accused of sexually assaulting girl, 4, threatening to have mother deported if she spoke up.” Washington Post, available at <https://www.washingtonpost.com/news/morning-mix/wp/2018/06/18/deputy-accused-of-sexually-assaulting-girl-4-threatening-to-have-mother-deported-if-she-spoke-up/>

¹¹ “Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402” H.R. Rep. No. 109-233, at 120 (2005). Available at: <https://www.congress.gov/109/crpt/hrpt233/CRPT-109hrpt233.pdf>

¹² Proposed Rule at 56343.

¹³ Proposed Rule at 56375

¹⁴ Proposed Rule at 56378.

¹⁵ *Matter of Rehman*, 27 I&N Dec. 124 (BIA 2017).

individual.¹⁶ A DNA sample “contains [a person’s] entire genetic code —information that has the capacity to reveal the individual’s race, biological sex, ethnic background, familial relationships, behavioral characteristics, health status, genetic diseases, predisposition to certain traits.”¹⁷ DNA “contains an extensive amount of sensitive personal information beyond mere identifying information and has the potential to reveal intensely private details about a person’s life and future.”¹⁸ USCIS fails to justify why it should have unfettered discretion to require invasive DNA collection and testing to prove family relationships when less invasive means - such as the provision of documentary evidence like birth certificates - could suffice to prove familial relationships in most instances.

USCIS estimates that thousands of survivors and their family members may be subject to these new DNA requests.¹⁹ As these requests are within the “discretion” of the adjudicator, the process set forth in the proposed rule will lead to inconsistent treatment of survivors, adding additional costs and burdens to an already challenging adjudication process.

USCIS purportedly “recognizes that some individuals who submit biometrics/DNA could possibly be apprehensive about doing so and may have concerns germane to privacy, intrusiveness, and security.”²⁰ In cases of domestic violence, stalking, human trafficking and other crimes, survivors may have valid concerns about this process and the privacy of this information. According to the Electronic Privacy Information Center, “Domestic violence victims have high needs for privacy, as they are already the target of an abuser, and often need to keep data from them. This abuse can also involve privacy violations such as surveillance, monitoring, or other stalking. For a domestic violence victim, the need for privacy is a need for physical safety.”²¹ While the proposed rule acknowledges the protections of 8 USC 1367, it does not sufficiently consider the unique concerns of survivors of crime and lacks specific details about how this information may potentially be used outside the adjudication setting.

Finally, USCIS 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

¹⁶ See, National Immigration Project of the National Lawyers Guild. (April 9, 2020). “Explainer: DHS Expands Effort to Collect DNA Samples from Immigrants,” available at: https://ninp.org/PDFs/practitioners/practice_advisories/gen/2020_09Apr_dna-explainer.pdf.

¹⁷ *People v. Buza*, 4 Cal. 5th 658, 720 (2018) (Cuellar, J., dissenting) (citations omitted).

¹⁸ Electronic Frontier Foundation, “DNA Collection,” available at: <https://www.eff.org/cases/dna-collection#:~:text=EFF%20has%20long%20been%20concerned,and%20sharing%20of%20genetic%20data.&text=DNA%20analysis%20is%20also%20not,or%20she%20didn't%20commit>.

¹⁹ Proposed Rule at 56380.

²⁰ Proposed Rule at 56388.

²¹ Electronic Privacy Information Center (EPIC). “Domestic Violence & Privacy,” available at <https://www.epic.org/privacy/dv/>

contained in human DNA.”²² This statement is less than reassuring: DHS leaves open the possibility that raw DNA could be shared “as required by law,” and contemplates sharing test results, which still contain a significant number of genetic markers, “with other agencies when there are national security, public safety, fraud, or other investigative needs.”²³ Quite simply, 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.

III. The Proposed Rule Creates Evidentiary Changes to the VAWA and T Visa Adjustment of Status Processes that are Harmful and Unjustified.

The proposed rule would require VAWA self-petitioners and T adjustment of status applicants, regardless of age, to submit to invasive biometrics collection to establish “good moral character.” The invasive biometrics USCIS proposes to collect may include palm prints, facial recognition, voice prints, iris images, and DNA. Additionally, the proposed rule would expand and codify the time period for evaluating good moral character.²⁴

These provisions are simply unnecessary and unjustified. VAWA self-petitioners *already* are required to submit biometrics in order to obtain work permits incident to approval of the self-petition. Similarly, T visa holders *already* are required to submit biometric evidence upon filing of their adjustment applications. Thus, USCIS already has existing mechanisms in place in order to verify an applicant’s identity. Additionally, USCIS already has existing methods to establish good moral character, including police certifications. USCIS has completely failed to articulate and demonstrate how the current process of collecting photographs, fingerprints, and signatures is unreliable or burdensome and why a regime of mass biometrics collection is necessary.

In addition, the proposed rule impermissibly expands the period of time for establishing good moral character. Indeed, it appears that USCIS is adopting the regulatory language from the naturalization context to demonstrate good moral character in the VAWA and T visa contexts. This adoption is completely inappropriate for VAWA self-petitions and T visa adjustment applicants. When Congress passed VAWA and TVPA it recognized the unique circumstances facing survivors of violence and thus established different time periods to consider good moral character in these forms of relief. As an example, in the T visa adjustment of status content, Congress limited the requisite period for evaluating good moral character to 3 years.²⁵ This was done to ensure that T visa holders would not be unjustly prejudiced or retraumatized by repeatedly reviewing criminal acts that they were forced to engage in as part of their abuse and

²² Proposed Rule at 56353.

²³ Proposed Rule at 56354.

²⁴ For VAWA self-petitioners, the requisite period to demonstrate good moral character is 3 years, according to the regulations. See e.g. 8 CFR 204.2(c)(2)(v); With regard to T visa applicants applying for adjustment, the requisite period is for “for a continuous period of at least 3 years since the date of admission as a nonimmigrant” or “continuous period during the investigation or prosecution of acts of trafficking.” See INA 245(l)(1)(A).

²⁵ *Id.*

exploitation. Indeed, these issues would *already have* been addressed as part of their underlying T visa application. By allowing USCIS a more expansive look back beyond the period authorized by Congress, USCIS is unlawfully introducing additional subjective elements which can be used to retraumatize survivors and deny them the protections afforded under the law.

Also, removing the presumption of good moral character for VAWA self-petitioners and T visa adjustment applicants who are under 14 years-old creates needless barriers for young applicants and increases the burden on survivors. USCIS already had the authority to get more information from applicants if warranted and codifying these provisions in the regulations adds additional barriers without sufficient justification.

Moreover, there is no justification for subjecting children 14 and younger to invasive biometric collection. DHS utterly fails to justify why existing methods to establish good moral character, including police certifications, are insufficient. It is particularly troubling because personal data about children is particularly sensitive and should receive additional protections.²⁶ Indeed, it is difficult to get informed consent from children. UNICEF reports that many, if not most children under age 13, are unlikely to have the capacity of informed consent to the processing of their personal data.²⁷ And, given the shortfall in technical literacy for adults, particularly in the emerging areas of biometric technologies, UNICEF points out that parental consent may be an ineffective way of protecting children's privacy rights.

Further, because current biometric technology has been developed primarily for use with adults, not children, it lacks reliability. According to UNICEF, as of mid-2019, there are no biometric technologies capable of consistently providing high levels of accuracy in very young children (less than five years) and the evidence is weak for use of biometrics in children aged 5-15 years.²⁸ Importantly, UNICEF does not recommend use of DNA biometrics for children because the risks are difficult to manage and it is a much more intrusive from a privacy perspective.²⁹ Additionally, iris recognition is not suitable for use with young children, given the high level of cooperation required to obtain a high-quality image.³⁰ And, given the much smaller size of children's fingers most standard sensors cannot adequately extract the features needed for template generation.³¹ Perhaps, not surprising, the rapid growth of children pose another challenge to capturing and comparing physical features accurately.

Finally, for children survivors of violence, having the government collect intrusive biometric information could cause harm. Many children survivors come from countries where the government has failed to protect them from their abusers and traffickers. Therefore, they often have a high level of distrust for government officials. Indeed, many child survivors may harbor

²⁶ UNICEF. (July 2019). "Faces, Fingerprints & Feet: Guidance on assessing the value of including biometric technologies in UNICEF-supported programs," available at: <https://data.unicef.org/resources/biometrics/#>.

²⁷ *Id.* at 28.

²⁸ *Id.* at 5.

²⁹ *Id.* at 7.

³⁰ *Id.* at 31.

³¹ *Id.* at 31.

real concerns for the privacy, confidentiality, and intrusiveness of the biometric collection by USCIS and experience fear and apprehension as to whether their physical safety will be maintained.

IV. Continuous Vetting Erodes Due Process and Survivor Security

The proposed rule would implement “continuous vetting” procedures in which individuals may “be subjected to continued and subsequent evaluation of eligibility for their immigration benefits to ensure they continue to present no risk of causing harm subsequent to their entry.”³² This proposed rule states 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.”³³

Continuous vetting has its origins in the administration’s discriminatory executive orders authorizing the Muslim bans.³⁴ These policies raise significant civil rights concerns and open up further discriminatory surveillance of people of color. Requiring survivors to submit biometrics repeatedly, at any time, until they obtain citizenship not only is a tremendous waste of agency resources but creates instability and insecurity for survivors seeking to heal from victimization.

V. Conclusion

For the reasons set forth above, Futures Without Violence strongly opposes the proposed rule due to the significant and extremely harmful affect it would have on survivors of gender-based violence. We ardently urge USCIS to rescind the proposed rule in its entirety.

Thank you for the opportunity to submit comments on the Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Service.

Please contact me if you have any questions or concerns relating to these comments.

Respectfully submitted,

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³² Proposed Rule at 56352.

³³ *Id.*

³⁴ See e.g. [“Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.”](#)