

December 21, 2020

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

Michael Hardin
Director, Entry/Exit Policy and Planning
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW
Washington, DC 20229

Re: Comment in Opposition to the Notice of Proposed Rulemaking, “Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States”; Docket Number USCBP-2020-0062, FR Doc. 2020-24707, RIN 1651-AB12

Dear Mr. Hardin:

The National Immigrant Justice Center (“NIJC” or “we”) works to advance the rights of all immigrants. With the above-referenced Proposed Rule (“Proposed Rule” or “NPRM”), U.S. Customs and Border Protection (CBP) seeks to drastically expand its intrusive biometrics data collection of immigrants entering and leaving the United States.¹ The Proposed Rule would have grave consequences, impacting millions of people a year, forcing non-U.S. citizens, including lawful permanent residents, to submit face scans whenever they enter or depart the country. The enhanced surveillance proposed by this rule is wholly unjustified, wasteful, and premised on xenophobic policymaking that seeks to falsely portray immigrants as threats to security.²

This comment addresses the following concerns: 1) The proposed regulation would expand government’s surveillance based on unfounded and xenophobic claims; 2) The NPRM exacerbates the harms of biased law enforcement practices and make it harder for immigrant

¹ U.S. Customs and Border Protection, Department of Homeland Security. Notice of Proposed Rulemaking, “Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States”, (hereinafter “Proposed Rule”) Docket Number USCBP-2020-0062, FR Doc. 2020-24707, RIN 1651-AB12. <https://www.federalregister.gov/documents/2020/11/19/2020-24707/collection-of-biometric-data-from-aliens-upon-entry-to-and-departure-from-the-united-states#open-comment>.

² In October 2020, NIJC joined hundreds of groups in submitting comments opposing the would dramatically expand government surveillance over immigrants and U.S. citizens sponsoring immigrants for lawful status. That rule will have grave consequences if it is implemented, impacting anyone submitting various types of U.S. immigration petitions and applications, including those seeking asylum, family-based immigration, employment-based immigration, religious worker visas and other protections. See Jesse Franzblau, “NIJC’s Public Comment Opposing Trump Administration’s Dangerous & Discriminatory Mass Surveillance Expansion,” National Immigrant Justice Center, October 13, 2020, <https://immigrantjustice.org/staff/blog/nijcs-public-comment-opposing-trump-administrations-dangerous-discriminatory-mass>.

populations to obtain immigration protection; and 3) Expanding biometrics collection from youth is unjustified and a violation of the Immigration and Nationality Act (INA).

NIJC's interest and opposition to proposed changes

Headquartered in Chicago, NIJC offers a wide range of legal services to low-income immigrants. Attorneys and trained staff provide consultations and legal representation on matters that include family-based immigration, applications for Lawful Permanent Residence (LPR), legal protections for immigrant victims of family violence, visas for immigrant victims of crimes, visas for immigrant victims of human trafficking, and more. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC blends individual client advocacy with broad-based systemic change.

NIJC provides legal services to more than 10,000 individuals each year, including many children designated as unaccompanied upon arrival at the southern border, and asylum seekers. Under the text of the new rule, these individuals would suffer the burden of perpetual surveillance, as *all* non-U.S. citizens may be required to be photographed upon both entry *and* departure from the United States.³ This sensitive and private information would then be stored in problematic and secretive government databases, and made available to target immigrants throughout the country. This represents a significant expansion of CBP's authority.

NIJC strongly condemns this broadly sweeping, unjustified rule that would expand biometrics collection on baseless claims. We condemn the rhetoric and misinformation endemic to this rule, which relies on nativist and racist tropes. The proposals set forth in this Rule echo programs and policies rolled out over the past three years that have dramatically harmed immigrant communities, and have proven to be motivated by anti-immigrant animus.

We also express serious concern about the rule change in light of CBP's record of abuse and corruption, including its role in family separation, history of detaining people in horrific conditions, use of lethal force, and racial and religious profiling. Faulty facial recognition technology and false matches could enable CBP to detain vulnerable individuals for hours without access to a lawyer, fuel ICE enforcement against sponsors and parents of unaccompanied children, and share information with foreign governments in ways that put asylum seekers at risk. For these reasons, NIJC calls for urgent rescission of the Proposed Rule.

³ The only exception appears to be for non-citizen U.S. nationals, *i.e.*, individuals born in American Samoa or on Swains Island to parents who are not citizens of the United States. *See* 85 Fed. Reg. 74178.

Objection to the expedited time frame for the Proposed Rule

The APA requires the administration to provide notice of their proposed rules and the proposed legal bases for those rules.⁴ This NPRM consists of highly significant proposed changes, regulatory justification, and analysis. NIJC and fellow stakeholders are greatly interested in commenting on the substance of the proposed rule, but were required to file comments within a 30-day period without justification. In doing so, the short timeframe circumvents the public right to weigh in on a major government decision-making.

The public should be allowed a minimum 60-day comment period to respond to the proposal, based on the complexity and widespread impact of the rule and the insufficiency of a 30-day comment period for commenters navigating the challenges presented by a global pandemic. In light of these circumstances, the limited notice-and-comment period flies in the face of reasonable regulatory practices.

While we are adhering to the 30-day timeline, we continue to object to this comment period as insufficient and request a minimum 60-day public comment period for regulatory changes of this nature, in accordance with the APA, particularly for rules that would have a significant impact on millions of people across the United States.

I. The proposed regulation expands government’s surveillance based on unfounded and xenophobic claims

A. The NPRM would enable the government’s surveillance and tracking of people on a dramatic scale

CBP’s deployment of facial recognition technology envisioned in this NPRM would threaten civil liberties and privacy protections, creating new risks of surveillance and abuse. Currently, the Department of Homeland Security (DHS) regulations provide that any foreign national may be required to provide fingerprints, photographs or other specified biometric identifiers upon arrival into or departure from the United States.⁵ Through the proposed regulations, however, DHS proposes to amend existing regulations to grant the agency open-ended authority to collect *any* other form of biometrics from foreign nationals entering and exiting the United States.⁶

⁴ See 5 U.S.C. § 553. See *Forester v. Consumer Product Safety Com.*, 559 F.2d 774, 787 (D.C. Cir. 1977) (citation omitted); *Cal. Citizens Band Assn. v. U.S.*, 375 F.2d 43, 48-49 (9th Cir.), cert. denied, 389 U.S. 844 (1967); *Logansport Broadcasting Corp. v. U.S.*, 210 F.2d 24, 28 (1954); *Willapoint Oysters. v. Ewing*, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949). Notice must afford interested parties “reasonable opportunity” to participate in the rule-making process.

⁵ 8 C.F.R. §§ 215.8(a) & 235.1(f).

⁶ 85 Fed. Reg. 74179.

The NPRM indicates that CBP intends to collect “faceprints,” precise measurements of the unique facial geometry of each non-U.S. citizen traveler.⁷ CBP will collect and store this data in a DHS database for up to 75 years, where they may be used not only by DHS, but by foreign governments and federal, state, and local law enforcement to identify individuals for a variety of purposes. The NPRM explains that CBP also intends to apply algorithms to cross-reference the gathered faceprints to a gallery of other images of the traveler in the government’s possession.

These techniques pose significant threats to privacy and civil liberties, in particular the ability to conduct facial recognition covertly, remotely and on a mass scale.

B. The rule justifies perpetual data collection of non-citizens by falsely conflating immigration with national security

As part of its justification for enhancing biometrics collection, the rule cites to E.O. 13780, one of the Muslim travel ban Executive Orders.⁸ The Muslim travel ban orders were explicitly based on discriminatory intent, and have disproportionately impacted Black and Brown immigrants and their families.⁹ Still, the proposed rule relies on E.O. 13780 as justification for expediting the completion and implementation of a full biometrics biometric entry-exit tracking system.¹⁰

Moreover, the administration has issued error-ridden reports using flawed methodology in conjunction with E.O. 13780, in violations of its own rules, for the sole purpose of justifying discriminatory immigration policies that are premised on misleading or incomplete information.¹¹ Thus, from the onset, the proposed rule bases its sweeping expansion of biometrics information collection programs on severely flawed premises.¹²

Along the same lines, the NPRM also cites to Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*, while claiming that foreigners who enter the U.S. without authorization or overstay their visas “present a significant threat to national security and public safety.”¹³ Such claims are based in hate, not science; and this EO has also been discredited as propagating anti-immigrant enforcement programs based on hateful rhetoric.¹⁴ For example, the

⁷ 85 Fed. Reg. 74163.

⁸ 85 Fed. Reg. at 74165 Cites to E.O. 13780 (82 FR 13209) section 8, (Mar. 9, 2017).

⁹ See Harsha Panduranga and Faiza Patel, “Extreme Vetting and the Muslim Ban,” The Brennan Center, October 2, 2017, <https://www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban>.

¹⁰ 85 Fed. Reg. at 74163.

¹¹ See *Protect Democracy’s Lawsuit Challenging the Government’s Publication of Disinformation about Foreign Terrorism*, Protect Democracy, September 2020, <https://protectdemocracy.org/false-terrorism-report/complaint>.

¹² The NPRM is premised on xenophobic narratives commonly used in the past to demonize foreigners and conflate migration with threats to security. See e.g., William McCorkle, Mikel W. Cole, and Mindy Spearman, *Confronting False Narratives in the Debate over Immigration*, Social Education 82(6), pp. 348–354 (2018), https://www.socialstudies.org/system/files/publications/articles/se_8206348.pdf.

¹³ 85 Fed. Reg. at 74168, citing Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*.

¹⁴ American Immigration Council, *Fact Sheet: Summary of Executive Order “Enhancing Public Safety in the Interior of the United States”* (May 2017), <https://www.americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order>.

EO ordered the production of “Declined Detainer Outcome Reports,”¹⁵ which were widely criticized for being used in a discriminatory manner to target undocumented communities and punish cities that the administration claimed were not cooperating with federal authorities on immigration enforcement.¹⁶ The reports were so problematic and error ridden they faced intense criticism, and ICE was forced to suspend their publication.¹⁷

The proposed rule claims that “DHS data supports the conclusion that some status violators and illegal aliens also have links to terrorism and criminal activity.”¹⁸ But that assertion is unfounded and ripe with anti-immigrant bias. Migration is *not* a proxy for dangerousness. To the contrary, studies show that immigration, including by people without legal authorization, does not correlate with an increase in violent crime.¹⁹ Similarly, research has found no relationship between deportations and crime.²⁰

This type of rhetoric follows a pernicious trend wherein the government has relied on Islamophobia and discourses of terrorism to justify militarized border security and anti-immigrant agendas.²¹ This administration has used similar narrative rhetoric that seeks to characterize those seeking entry to the U.S. through the southern border as potential “terrorists” - a narrative that has been thoroughly discredited. A recent whistleblower complaint, for example, explains how DHS officials manipulated intelligence and lied to Congress in order to bolster such erroneous claims.²² The complaint details surreptitious behind-the-scenes efforts by top DHS officials to build a false narrative to support President Trump’s public comments regarding supposed suspected terrorists encountered along the southern border.²³

¹⁵ American Immigration Lawyers Association, *DHS Releases ICE Declined Detainer Outcome Report*, AILA Doc. No. 17032002, July 15, 2019, <https://www.aila.org/infonet/dhs-releases-ice-declined-detainer-outcome-report>.

¹⁶ Nikita Biryukov, “ICE Suspends Weekly ‘Sanctuary City’ Report Over Accuracy Concerns,” NBC News, April 11, 2017, <https://www.nbcnews.com/news/us-news/ice-suspends-weekly-sanctuary-city-report-over-accuracy-concerns-n745246>.

¹⁷ See Ron Nixon, “Trump Administration Halts Reports on Immigration Cooperation,” New York Times, April 10, 2017, <https://www.nytimes.com/2017/04/10/us/politics/trump-administration-immigration.html>.

¹⁸ 85 Fed. Reg. at 74164.

¹⁹ See, e.g., Michael Light and Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 *Criminology* 2 (2018), <https://doi.org/10.1111/1745-9125.12175>.

²⁰ Annie Laurie Hines & Giovanni Peri, *Immigrants’ Deportations, Local Crime and Police Effectiveness*, IZA Institute of Labor Economics, IZA DP No. 12413, (June 2019), <http://ftp.iza.org/dp12413.pdf>.

²¹ Islamophobia and discourses of terrorism have been used to advance anti-immigration agendas in the past, particularly in the wake of the September 11, 2001 attacks. See e.g., Luis A. Romero & Amina Zarrugh, *Islamophobia and the making of Latinos/as into terrorist threats*, *Ethnic and Racial Studies*, 41:12, 2235-2254, DOI, (2018), <https://www.tandfonline.com/doi/full/10.1080/01419870.2017.1349919>.

²² See Department of Homeland Security, Office of the Inspector General, *Whistleblower Reprisal Complaint: Murphy, Brian, Principal Deputy Under Secretary, Department of Homeland Security, Office of Intelligence & Analysis*, September 8, 2020, https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

²³ Ibid at page 18.

C. The rule relies on baseless claims & increase risks for unaccompanied children and their family members

The Proposed Rule relies on discredited and harmful narratives related to human trafficking to justify the expansion of biometrics collection of children. The NPRM proposes to collect photographs from all non-citizens, regardless of their age, and claims this “will enable DHS to associate the immigration records created for children to their adult records later, which will help combat trafficking of children, and confirm the absence of criminal history or associations with terrorist or other organizations seeking to violate applicable law.”²⁴

In reality, the expanded use of biometrics collection is part of a trend by this administration to manipulate information to justify cruel and extralegal enforcement practices. The expanded information collection would likely fuel ICE enforcement operations that target individuals who come forward as a sponsor, potential sponsor, or other caregiver of an unaccompanied immigrant child. Far from protecting children, these enforcement operations and the fear they engender leave children exposed to myriad harms including family separation and prolonged detention.

We have seen the administration intentionally resort to similar tactics in the past with other programs claiming to target human trafficking.²⁵ Part of the administration’s policy playbook involves exploiting such rhetoric to make it more difficult for adult relatives of unaccompanied minors to secure the children’s release from U.S. custody, knowingly leaving them in deplorable, deadly, conditions.²⁶ Enhanced vetting of sponsors involving the collection of biometrics data, and the sharing of that information between Health and Human Services (HHS) Office of Refugee Resettlement (ORR) and DHS has deliberately slowed down the release of children, exposed their potential sponsors to deportation, and resulted in overcrowding in border facilities.²⁷

II. The NPRM exacerbates the harms of biased law enforcement practices and will make it harder for immigrant populations – including survivors of violence – to obtain immigration protection

²⁴ 85 Fed. Reg. at 74175.

²⁵ Neena Satija, Karoun Demirjian, Abigail Hauslohner, & Josh Dawsey, “A Trump Administration strategy led to the child migrant backup crisis at the border,” Washington Post, November 12, 2019, https://www.washingtonpost.com/immigration/a-trump-administration-strategy-led-to-the-child-migrant-backup-crisis-at-the-border/2019/11/12/85d4f18c-c9ae-11e9-a1fe-ca46e8d573c0_story.html.

²⁶ “Children as Bait, Impacts Of The ORR-DHS Information-Sharing Agreement,” National Immigrant Justice Center et al., March 26, 2019, <https://immigrantjustice.org/research-items/report-children-bait-impacts-orr-dhs-information-sharing-agreement>.

²⁷ Ibid.

A. The NPRM poses harms to immigrant populations already fearful of engaging with government officials to obtain protection

Under the proposed regulations, faceprints collected by CBP would feed into a broader ecosystem of DHS data, and would facilitate surveillance by foreign governments and law enforcement agencies across the country. CBP would add travelers' faceprints to DHS's expansive Automated Biometric Identification System database (IDENT), which stores data ranging from names and nationalities to fingerprints, personal physical details, and data from DHS or law enforcement encounters, resulting in comprehensive, detailed profiles of individuals.²⁸ DHS, including ICE, can then use faceprints collected by CBP, together with the accompanying profiles, during agents' subsequent interactions with travelers, and numerous other government agencies can access this data as well.²⁹

The rule contains no information on how information-sharing will be limited to protect against data falling in the wrong hands. There is no way to ensure that information fed into these databases is accurate. The implications of increased biometrics being collected by CBP, and that data being shared with foreign governments, is particularly alarming for immigrants who have a fear of persecution in their home countries or who were subject to trafficking.

By expanding the amount of information stored in this database, the proposed rule risks placing asylum seekers in greater danger by exposing their biometrics data to the very foreign government persecutors they have sought to escape. For example, DHS components have relied on data via a transnational intelligence-sharing program³⁰ involving Mexico, El Salvador, Guatemala, and Honduras to make determinations to separate families.³¹ NIJC represents clients who have had their children separated from them because DHS relied on erroneous information

²⁸ See, e.g., DHS, Privacy Act: IDENT System of Records, 72 Fed. Reg. 31080, 31081 (June 5, 2007). IDENT allows for interoperability between U.S. agencies, including the Department of Defense and Federal Bureau of Investigations (FBI), as well as with foreign databases. United States Department of Defense officials announced in 2018 that the DOD, FBI, and DHS were introducing new standards to facilitate interoperability, and enable information sharing with foreign partners. See Chris Burt, "U.S. agencies working on standard for seamless communication between biometric databases," Biometric Update, September 26, 2018, <https://www.biometricupdate.com/201809/u-s-agencies-working-on-standard-for-seamless-communication-between-biometric-databases>.

²⁹ See, e.g., DHS, Privacy Impact Assessment for the Automated Biometric Identification System (IDENT), DHS/NPPD/PIA-002 3-5 (Dec. 7, 2012); 85 Fed. Reg. 56349.

³⁰ According to the U.S. State Department, in 2018, the intelligence sharing helped CBP identify more than 2,000 immigrants with alleged criminal histories, including individuals with suspected gang affiliations. See United States Bureau of International Narcotics and Law Enforcement Affairs, "El Salvador Summary," (2019) <https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/el-salvador-summary>.

³¹ In relying on foreign data as the basis for separations, CBP has circumvented legal rights and falsely criminalized migrants, including asylum seekers fleeing political violence. 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>.

provided through information sharing programs with foreign governments.³² The increased biometrics collection will put more asylum seekers at risk of being wrongly accused of criminal activities and facing political violence, including torture, when returned to their home country.

Furthermore, survivors of violence and trafficking may be particularly subject to harm if their data falls into the wrong hands. People's biometric information is unique to them, and they may be rightly scared of the ramifications of sharing such data with the government in the context of applying for protection. Requiring invasive data collection for survivors will likely create a chilling effect, preventing them from coming forward and applying for protections they desperately need.

As discussed herein, biometrics collection is severely error-prone, and there is no way to contest the outcomes of biometrics testing that could result in detentions and deportations. Increased biometrics usage will invariably lead to more unjustified family separations which run contrary to constitutional standards and rights of non-citizens.³³

B. The expansion of biometrics collection will exacerbate existing bias in immigration enforcement

By collecting and retaining faceprints for up to 75 years, and by sharing this information with foreign governments, contractors, and federal, state, and local law enforcement, CBP would create a vast surveillance and tracking apparatus. CBP's collection of faceprints could enable systematic surveillance by other government agencies and expose where people go, who they associate with. It would lead to increased government scrutiny, surveillance, and investigation of immigrants and people of color.

The technologies contemplated for use in the rule replicate and enhance existing biases in criminal justice and immigration enforcement systems.³⁴ With the proposed changes, DHS is giving itself broad discretion to collect biometrics data, which can be weaponized for

³² NIJC represents parents who had their children separated from them by DHS 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 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>. See also *Ms. L., et al., Petitioners-Plaintiffs, v. U.S. Immigration and Customs Enforcement ("ICE"), et al.*, Declaration of Lisa Koop, National Immigrant Justice Center, July 20, 2019 [copy on file with author].

³³ In *Ms. L. v U.S. Immigration & Customs Enforcement*, the Court found Plaintiffs had stated a legally cognizable claim for violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations the Government had separated Plaintiffs from their minor children while Plaintiffs were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children. See *Ms. L. v. U.S. Immigration & Customs Enforcement*, 302 F. Supp. 3d 1149, 2018 WL 2725736, at *7-12 (S.D. Cal. June 6, 2018).

³⁴ Alina Glaubitz, "Bots and Biometrics," Yale Human Rights Journal, May 31, 2020, <http://www.yhrj.org/2020/05/31/bots-and-biometrics>.

surveillance and intrusion. Privacy experts warn that the “privacy risks that accompany biometrics databases are extreme.”³⁵

The risks and consequences of faceprint-matching errors in this context are serious. As a general matter, facial recognition technologies are not reliably accurate. These systems “vary in their ability to identify people, and no system is 100 percent accurate under all conditions.”³⁶ Database matching errors can result in delays or the wrongful detention of people lawfully in the U.S. When there is a faceprint-matching error, CBP may not have a traveler’s fingerprints on file as an alternative means of identity-verification. For these travelers in particular, faceprint-matching errors could lead to wrongful deportation or even false arrest for criminal charges.³⁷

Facial recognition technology is notorious for frequently misidentifying people of color.³⁸ Many cities have banned the technology altogether, and members of Congress have introduced legislation to ban the use of facial recognition technology by federal law enforcement agencies.³⁹ Collecting biometrics data from individuals entering and leaving the country will only lead to increased, unwarranted, discriminatory law enforcement surveillance.

III. Expanding biometrics collection from youth is unjustified and a violation of the INA

If Congress intended for the government to collect biometrics data on everyone, including children, they would not have explicitly carved children under the age of 14 out of this requirement in 8 USC 1302(a). In the proposed rule, however, CBP claims, without providing any supporting evidence, that the current regulations that exempt biometric collection for children under 14 and over 79 were based on “technological limitations on collecting fingerprints from children and elderly persons, as well as traditional law enforcement policies and other policies, such as not running criminal history background checks on children.”⁴⁰

³⁵ Electronic Frontier Foundation, Issues, “Biometrics,” <https://www.eff.org/issues/biometrics> [last visited December 8, 2020].

³⁶ Jennifer Lynch, Face Off: Law Enforcement Use of Face Recognition Technology, Electronic Frontier Foundation 6 (May 2019) <https://www.eff.org/files/2018/02/15/face-off-report-1b.pdf>.

³⁷ See, i.e., Elisha Anderson, “Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn’t Commit,” Detroit Free Press, July 11, 2020, <https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002>.

³⁸ Sophie Bushwick, “How NIST Tested Facial Recognition Algorithms for Racial Bias,” December 27, 2019, <https://www.scientificamerican.com/article/how-nist-tested-facial-recognition-algorithms-for-racial-bias>. See also Amnesty International, “Amnesty International Calls for Ban on the Use of Facial Recognition Technology for Mass Surveillance,” (June 2020), 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.

³⁹ Olivia Solon, “Facial recognition bill would ban use by federal law enforcement,” NBC News, June 25, 2020, <https://www.nbcnews.com/tech/security/2-democratic-senators-propose-ban-use-facial-recognition-federal-law-n1232128>.

⁴⁰ 85 Fed. Reg. at 74175.

Congress was not silent on the subjection of children below 14 years old being subject to biometrics collection. INA section 262(b), 8 U.S.C. 1302, states, “Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted.”⁴¹ INA section 264(a), 8 U.S.C. 1304, provides that the Secretary is authorized to prepare forms for the registration and fingerprinting of non-citizens “aged 14 and older in the United States, as required by INA section 262.”⁴²

Under this rule, DHS seeks to circumvent its statutory limitations and expand its authority to target children for harmful data collection. In removing restrictions for biometrics collection for children under 14, the rule violates the INA based on the plain text of the statute. Moreover, the proposed regulations exceed DHS’s authority, because Congress never intended to authorize DHS to use face recognition on people entering and leaving the United States.

CBP officials have explained that one of the primary purposes behind the deployment of facial recognition technology is to comply with a congressional mandate to create a biometric entry-exit system.⁴³ However, Congress never intended to authorize DHS to collect faceprints, let alone mandated it.⁴⁴ Moreover, in December 2019, the Director of the Office of Test and Evaluation for DHS even reviewed CBP’s facial recognition tests for departing flights, and concluded that the program “did not provide clear, measurable benefits to CBP’s existing operations at airports,” and “did not change or enhance the day-to-day capabilities of CBP officers.”⁴⁵

Thus, the changes in this NPRM are a violation of the APA, as the administration does not have authority to issue regulations that go beyond their statutory mandate. In failing to provide a reasonable justification for these changes, the rule violates the APA.⁴⁶ An agency’s regulatory changes must be “based on a consideration of the relevant factors” to survive review, and will be deemed 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

⁴¹ INA section 262(b), 8 U.S.C. 1302.

⁴² INA section 264(a), 8 U.S.C. 1304.

⁴³ *See, i.e.*, 85 Fed. Reg. at 74163.

⁴⁴ The primary statute at issue, 8 U.S.C. § 1365b, was passed in 2004—more than a decade before facial recognition technology was ready for CBP testing in the airport environment. 85 Fed. Reg. 74164 citing 8 U.S.C. § 1365b. By requiring, in 2004, the creation of an entry-exit system that uses “biometric” data, Congress plainly did not intend to authorize DHS’s collection of any and all biometrics in perpetuity, in known and unknown forms.

⁴⁵ United States Government Accountability Office (GAO), *Facial Recognition: CBP and TSA Are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues* 76 (September 2020), at 55-56, <https://www.gao.gov/assets/710/709107.pdf>.

⁴⁶ Under *State Farm*, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

expertise.”⁴⁷ Reasoned rulemaking would demand at least that they have proper justification prior to finalizing their proposed rule. Instead, in the proposed rule, CBP has failed to “articulate a satisfactory explanation for their action.”⁴⁸

Congress set age limits on collecting biometrics data on children for a reason. Children’s biometrics are still in development and therefore unreliable, only becoming more stable only at age 15.⁴⁹ A UNICEF guide on “Biometrics and Children” suggests that “while biometric technologies have *some* application in children above 5 years of age, solutions at younger ages are largely experimental and require more research.”⁵⁰ Removing age restrictions could also hinder the ability of non-citizens to obtain family-based visas, due to the burden and privacy concerns that arise with forcing U.S. citizens and LPRs to submit additional biometrics information.⁵¹

Conclusion

CBP’s proposed use of face surveillance at airports, sea ports, and the land border would put the United States on a dangerous path toward the normalization of bulk surveillance, and raises profound concerns around privacy, civil liberties, and human rights. The administration has failed to abide by its obligations under U.S. law and usurped Congress’s role as the architect of our immigration system. This should suffice for the immediate rescission of the Proposed Rule. Moreover, the glaring absence of reasonable justification for this NPRM and evidence of animus in its development further undermines DHS’s duty to put forth reasonable rulemaking. The proposal is an affront to democracy and the values of privacy enshrined in the U.S. Constitution, is deeply dehumanizing, and dangerous. NIJC urges DHS to rescind the proposed rule and abide

⁴⁷ See *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) at 43. See also *Id.* at 43 n.9; see also *Bowen v. American Hospital Association*, 476 U.S. 610, 626-27 (1986) (plurality opinion) (“Agency deference has not come so far that we [the Supreme Court] will uphold regulations whenever it is possible to ‘conceive a basis’ for administrative action...[T]he mere fact that there is ‘some rational basis within the knowledge and experience of the [regulators]’ under which they ‘might have concluded’ that the regulation was necessary to discharge their statutorily authorized mission will not suffice to validate agency decisionmaking.” (internal citations omitted).

⁴⁸ See *East Bay*, 964 F.3d at 851 (citing *State Farm*, 463 U.S. at 43) (stressing the agency’s dearth of evidence to support the large-scale transformation to the DHS biometrics information collection system)

⁴⁹ See C. Gottschlich, T. Hotz, R. Lorenz, S. Bernhardt, M. Hantschel and A. Munk, “Modeling the Growth of Fingerprints Improves Matching for Adolescents,” *IEEE Transactions on Information Forensics and Security*, vol. 6, no. 3, pp. 1165-1169, (September 2011), <http://www.stochastik.math.uni-goettingen.de/preprints/ModelingTheGrowthOfFingerprintsImprovesMatching.pdf>.

⁵⁰ “UNICEF guidance on the use of biometrics in children-focused services,” UNICEF, (October 2019), <https://data.unicef.org/resources/biometrics>.

⁵¹ This would follow a pattern of DHS weaponizing fears of trafficking to “scare and intimidate” children. See Hamed Aleaziz, “ICE Is Now Fingerprinting Immigrants As Young As 14 Years Old” *BuzzFeed news*, February 5, 2020, <https://www.buzzfeednews.com/article/hamedaleaziz/ice-immigration-customs-fingerprinting-refugees-teens>. (quoting chair of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, Rep. Rosa DeLauro: “Make no mistake: ICE’s intention is to intimidate and scare children by entering these shelters, and if HHS allows ICE to do so, they will be complicit.”)

by its obligations to protect non-citizens and citizens alike from intrusive and unwarranted information collection.

Thank you for your consideration and please do not hesitate to contact Jesse Franzblau for further information.

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