October 13, 2020

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U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
Via federal eRulemaking portal, http://www.regulations.gov

RE: DHS Docket No. USCIS–2019–0007, RIN 1615-AC14, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

Dear Ms. Deshommes:

Kids in Need of Defense (KIND) submits the following comments in response to the above Notice of Proposed Rulemaking (NPRM) on Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, published by the Department of Homeland Security (DHS) on September 11, 2020 (the "Proposed Rule").[1] Among its many sweeping provisions, the Proposed Rule would authorize the collection of biometrics "without regard to age," and allow the government to request or require biometrics such as DNA, palm prints, iris images, and voice prints from children as young as infants and toddlers. This unprecedented expansion of DHS' authority to obtain biometrics from children under 14 is proposed without reasoned analysis of the unique considerations and concerns that attend the use of biometrics for children, and is justified through misleading claims about the arrival of "fraudulent" families at the border and combating trafficking and other crime.

While the prevention of trafficking is of paramount importance to the protection of migrant and refugee children—and central to the protections for unaccompanied children set forth in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)—the changes in the Proposed Rule are ill-tailored to achieve this goal. Indeed, they are being proposed as DHS is expelling more than 8,800 unaccompanied children at the border without critical trafficking screenings and other safeguards required by the TVPRA and as it continues to separate families for reasons unrelated to children's safety—placing children at great risk of trafficking, exploitation, and trauma. We urge DHS to withdraw this misguided proposal and to immediately restore processing pursuant to the TVPRA together with additional safeguards directed by Congress that prioritize the best interests of children and that can better ensure the protection of children and the prevention of trafficking and other harm.

We share the concerns raised by many stakeholders about the broad scope of the Proposed Rule and the potential for its misuse in ways that are detrimental to privacy rights and due process. Given that only 30 days were provided to comment on myriad technical provisions, however, we are unable to thoroughly and fully analyze and comment on the 85 page-proposal. We focus our comments here on

[1] U.S. Citizenship and Immigration Serv., Dep't of Homeland Security, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (Sept. 11, 2020).

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specific impacts we anticipate for unaccompanied children, although we object to the Proposed Rule in its entirety.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. KIND and its pro bono partners have helped numerous children to obtain humanitarian protection and lawful status in the United States, and our organization is well-known for providing expert advice and guidance on the unique issues and needs facing children, particularly unaccompanied children, throughout their immigration proceedings. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum and related protections, special immigrant juvenile status, and T and U nonimmigrant status on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

As discussed below, we urge that this rule be withdrawn in full as it is contrary to federal law, overlooks critical evidence calling into question the accuracy and appropriateness of biometrics collection for young children, fails to consider and implement existing and legally required alternatives, and mischaracterizes data supporting the need for the proposed changes.

I. The Proposed Rule Fails to Meaningfully Evaluate Evidence Raising Concerns about the Reliability and Appropriateness of Collecting Biometrics from Young Children, and Fails to Protect Children's Privacy Rights and Best Interests.

The Proposed Rule sets forth dramatic changes that would allow the government to collect biometric information from children as young as infants and toddlers either upon apprehension or when applying for a benefit or request[2]—departing from decades-long policy and provisions in the Immigration and Nationality Act (INA) limiting the collection of such data to persons 14 and older.[3] Importantly, the proposed provisions encompass not only fingerprints and photographs but palm prints, iris scans, and voice recognition. While the NPRM urges expanded authority to collect such data to improve identification and verification systems over one's immigration lifecycle and to combat crime and

[2] 85 Fed. Reg. at 56338 ("First, DHS proposes that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement. Second, DHS proposes to authorize biometric collection, without regard to age, upon arrest of an alien for purposes of processing, care, custody, and initiation of removal proceedings.").

[3] The expanded collection of biometrics from children, regardless of age, was set forth in a 2017 memorandum from then-DHS Secretary John Kelly to DHS component heads, which stated that pursuant to policy "Components and Offices will not have to use age as the basis for determining when to collect biometrics" and directed components and leadership to "amend relevant regulations and fund resulting changes in operations as a result of this policy and these directives." *See* DHS, Memorandum from John F. Kelly to Component Heads, dated May 24, 2017, at 2, https://www.dhs.gov/sites/default/files/publications/dhs_biometrics_expansion.pdf.

trafficking, the proposal tellingly fails to consider the many challenges that make it both inappropriate and ineffective to employ these technologies for the very youngest on this continuum. In particular, DHS' decision to move forward with this sweeping proposal without meaningfully considering the questionable reliability of biometric results for young children, and the limited capacity of children to consent to such data collection, renders the Proposed Rule arbitrary and capricious. Issuing a rule along these lines would violate both the Administrative Procedure Act (APA) and the INA.

A. The Proposed Rule Would Overturn Longstanding Statutory and Regulatory Limits on Data Collection from Children Under 14, Disregarding Children's Limited Capacity to Provide Informed Consent to Data Collection.

In seeking to justify the proposed changes, the NPRM cites various regulatory and statutory provisions that it suggests provide broad authority to collect data from individuals in the immigration system.[4] Among these are provisions that expressly limit, for example, registration and fingerprinting in the immigration system to individuals age 14 and older.[5] Although the NPRM notes that "DHS originally codified restrictions on the ages of individuals from whom biometrics could be collected based on the policies, practice, or technological limitations,"[6] it wholly fails to grapple with *why* federal law and policy treat younger children distinctly from adults and to explain why the government's interest in expanding identification and verification should warrant dispensing with these longstanding and well-founded procedures -- which it does not.

It is widely accepted that children are psychologically, physically, and developmentally distinct from adults—differences that may affect the capacity of children to navigate immigration processes and proceedings. In some cases, these distinctions also limit the accuracy of biometric information captured while children are still developing. While concerns about the reliability of biometrics data in the context of children will be discussed in greater detail below, as a threshold matter, due to their age and developmental stage, most children under 14 will be unable to provide informed consent to the proposed biometrics collections, or to understand the ways in which their privacy rights may be affected

[4] *See* 85 Fed. Reg. at 56347.

[5] *See, e.g.*, *id.* at 56347 citing INA § 264(a), 8 U.S.C. § 1304(a), which provides that "[t]he Attorney General and the Secretary of State jointly are authorized and directed to prepare forms for the registration of aliens under section 1301 of this title, and the Attorney General is authorized and directed to prepare forms for the registration and fingerprinting of aliens under section 1302 of this title." Section 1302 provides in part that "[i]t shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days." *See also* 85 Fed. Reg. at 56340 ("The changes to the use and collection of biometrics and expanded scope of populations also are pertinent to U.S. Immigration and Customs Enforcement (ICE) and the Executive Office for Immigration Review (EOIR), a component of the U.S. Department of Justice (DOJ), given that immigration judges and the Board of Immigration Appeals (BIA) are prohibited from granting relief or protection from removal to an alien 14 years of age or older unless an ICE attorney reports that all required ''identity, law enforcement, or security investigations or examinations'' have been completed."), citing INA § 262, 8 CFR §§ 1003.1(d)(6), 1003.47(g).

[6] 85 Fed. Reg. at 56342.

by the continuous and potentially indefinite vetting the Proposed Rule envisions—a fact the NPRM overlooks.

In its guidance highlighting considerations for assessing the use of biometric technologies for children in its programs, UNICEF cautions that "[w]hile informed consent provides a legitimate legal basis for the collection or receipt of biometric data, many if not most children under age 13 are unlikely to have the capacity to provide informed consent to the processing of their personal data. . . . Teenagers and older children often struggle to understand the implications of providing personal data, especially the potential long-term consequences. As such, it is important to consider the evolving capacity of children, including age, level of maturity and development, and/or other factors when defining 'informed consent.'"[7]

The NPRM not only fails to consider these factors, but proposes to expand compulsory biometrics collections at the times in which children are at their most vulnerable, potentially demanding that children make decisions about whether to consent to personal data collection while alone and shortly after apprehension -- times when a child's fear and trauma surrounding the flight to the U.S., unfamiliarity with the immigration system, and language and cultural barriers are at their greatest. Unaccompanied children, many of whom have fled violence and harm by adults and who may fear individuals in positions of authority, may understandably interpret any request from a uniformed officer, even if couched as voluntary, to be a mandate. The Proposed Rule lacks a procedure for children to decline consent, and to ensure that notices and advisals about biometrics collection are provided in a way that the child understands – for example, by involving a professional with expertise in child welfare or children's best interests, rather than law enforcement. There is no requirement that the consent be secured in a language the child understands or in a manner appropriate to the child's literacy. This is especially troubling in the context of DNA testing—a process that, as will be discussed below, could lead to traumatic and potentially lifelong separations of families or reveal information about family relationships and parentage of which children themselves may have previously been unaware.

While unaccompanied children face particular challenges, the presence of a child's parent is unlikely to alleviate these concerns, as parents may likewise have difficulty understanding the broad nature and scope of the agency's biometrics request or the technologies involved, be uncertain about what consequences may follow if consent is denied, or have difficulty understanding privacy notices and advisals if provided in a language other than their primary one.[8] Even were a parent able to provide informed consent, children possess individual privacy rights that must be respected in their own right, apart from the wishes of their parents. Indeed, the proposed collection of biometrics from children of

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[7] UNICEF, Faces, Fingerprints & Feet: Guidance on assessing the value of including biometric technologies in UNICEF-supported programs (July 2019) (hereinafter "UNICEF, Faces, Fingerprints & Feet"), at 28, https://data.unicef.org/resources/biometrics/.

[8] *See, e.g., id.* ("Enabling parental consent to substitute for children's consent may be one way of ensuring children's rights are protected, but given the shortfall in technical literacy for adults, particularly in emerging areas such as biometric technologies, parental consent may be an ineffective way of protecting the privacy rights of young children.").

any age—continuously over the course of years[9]—only heightens these concerns, as errors, fraud, or misuse could take place early on and affect a child throughout his or her lifetime.[10]

Given these shortcomings, it is shocking that the rule ignores the unique needs of children, particularly given that DHS specifically notes that an estimated 63,000 children may be subjected to expanded procedures annually.[11] The agency's disregard for unique considerations affecting children is not only at odds with children's fundamental privacy rights but with immigration law underscoring the particular needs and vulnerability of children in the immigration system.[12]

B. The Proposed Rule Overlooks Research Raising Concerns about the Reliability of Biometrics Technologies for Young Children and Lacks Appropriate Mechanisms for Safeguarding Children's Best Interests.

The NPRM suggests that biometric data may be superior to biographic information, which can change over time and lack uniqueness,[13] while at the same time acknowledging that "rapidly changing attributes of children" may impact DHS's ability to reuse children's biometrics.[14] Absent from this discussion is an analysis of how this fact affects the overall integrity or reliability of biometrics collected from younger children or the necessity or benefit of the Proposed Rule's expanded collection procedures, in light of the many countervailing concerns. As a result, the NPRM overlooks research indicating weaknesses in the ability of biometric technologies to provide reliable results for very young children—findings the

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[9] 85 Fed. Reg. at 56340 ("DHS also plans to implement a program of continuous immigration vetting, and require that aliens be subjected to continued and subsequent evaluation to ensure they continue to present no risk of causing harm subsequent to their entry.").

[10] UNICEF, Faces, Fingerprints & Feet*, supra* note 7, at 19 ("Overall, the misuse of children's biometric information can have permanent and serious consequences, especially in terms of privacy and identity fraud. While biometric technologies have the potential to strengthen identity management systems; they also have the potential to disrupt and lock-in the identities of children from a much earlier age.").

[11] 85 Fed. Reg. 56343, note 11; *id.* at 56364.

[12] See, for example, the statutory mandate that children's applications for relief from removal "be governed by regulations which take into account the specialized needs of unaccompanied alien children," 8 U.S.C. § 1232(d)(8); *see generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, ("TVPRA"), Pub. L. 110–457, title II, § 235 (Dec. 23, 2008), codified at 8 U.S.C. 1232, et. al. A principal drafter of the TVPRA has described it as providing important procedural protections for unaccompanied children "to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life threatening circumstances" and to fulfill "a special obligation to ensure that these children are treated humanely and fairly" in recognition of the challenges they face in navigating "an immigration system designed for adults." *See* 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008); Statement of Sen. Feinstein, 153 Cong. Rec. S3004-05 (daily ed. Mar. 12, 2007). The *Flores* Settlement Agreement also sets forth important protections to ensure the government treats "all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors" and that it "place[s] each detained minor in the least restrictive setting appropriate to the minor's *age* and special needs," *Flores* Settlement Agreement (*Flores v. Meese*, No. 85- 4544 (C.D. Cal. 1985)), at ¶ 11 (emphasis added)).

[13] *See, e.g.,* 85 Fed. Reg. at 56368.

[14] *See id.* at 56351 ("DHS recognizes that biometric reuse is acceptable, when there is identity verification, but in the case of children biometric reuse could be impacted by the rapidly changing physical attributes of children. . . . Biometrics are unique to each individual and provide USCIS with tools for identity management while improving the services provided to those who submit immigration benefit requests. With regard to age, DHS proposes to reserve the authority to collect biometrics at any age to ensure the immigration records created for children can more assuredly be related to their subsequent adult records despite changes to their biographic information.").

agency should have considered given the NPRM's stated aim of organizing and verifying "immigration records in a highly-reliable, on-going, and continuous manner."[15]

For example, UNICEF reports that many biometric technologies were created for use with adults, and so may be far less accurate for young children, particularly those under 5 years old.[16] This can be a product of both changes to children's traits as they develop—complicating matching over time—as well as the difficulty of obtaining sufficiently precise images of infants and younger children[17]:

> Among adults for example, iris recognition is considered one of the most accurate and inclusive biometric technologies, with lower rates of false accepts and rejects, and the ability to enrol more people than other traits. However, it is not considered suitable for use with newborns and infants, or young children, given the high level of cooperation required to obtain a high-quality image. Similarly, while fingerprints have been used extensively among adults, given the much smaller size of children's fingers, most standard sensors cannot adequately extract the features needed for template generation, even when the ridge structure is clear.[18]

Adding to these concerns, biometric technologies such as facial recognition and voice recognition can lead to biased or discriminatory results.[19]

Although the NPRM acknowledges "constant and rapid change" in biometrics technology,[20] it lacks discussion of how or whether the agency evaluates the appropriateness and reliability of different biometrics methods with respect to younger children. Without such consideration, the proposed changes could lead to a system in which new and emerging technologies are rapidly embraced regardless of their accuracy for young children or their ability to safeguard children's best interests, results that run counter to both the NPRM's stated goal of protecting vulnerable populations and the reasoned policymaking the APA requires. This concern is only magnified by the NPRM's proposal to make its expanded biometrics collection a near default and to "flip the current construct from one where biometrics may be collected based on past practices, regulations, or the form instructions for a

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[15] *Id.*

[16] UNICEF, Faces, Fingerprints & Feet*, supra* note 7, at 5 ("Traits with the longest history of success in practical applications among adults include facial, fingerprint, palmprint and iris recognition. The technology is much less reliable for use with children (particularly very young children). Currently (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), although several are in development. Evidence is also weak for use of biometrics in children aged 5–15 years, however the development industry has broadly adopted their use with this age group, including UNHCR and WFP, along with several countries as part of national identification systems.") (citations omitted).

[17] *Id.* at 31; *id.* at 35.

[18] *Id.* at 31.

[19] *See, e.g., id.* at 16 ("Algorithms may also have inherent biases built in, which mean they are better at recognising some people than others (based on age, gender, skin colour, etc.). Recent research from the National Institute of Standards and Technology (NIST), for example, showed significant differences in accuracy between males and females in some of the latest iris-recognition systems; and a study on facial recognition showed 'substantial disparities in the accuracy' of systems between males and females, and between darker- and lighter-skinned people") (citations omitted).

[20] 85 Fed. Reg. at 56355.

particular benefit, to a system under which biometrics are required for any immigration benefit request unless DHS determines that biometrics are unnecessary."[21]

The NPRM's vague references to the potential availability of waivers or exemptions from biometrics requirements and to "reasonable efforts" it may undertake in "certain contexts"—without criteria or more detailed discussion—are insufficient to protect children from the collection or use of their data in ways that may not only provide little benefit to the government but could negatively impact children's privacy interests, the agency's actions with respect to children and their families, and children's access to immigration relief.[22] Similarly unavailing are the NPRM's references to unspecified "internal procedural safeguards" and an opportunity for individuals to rebut negative information that may arise during consideration of their applications by USCIS.[23] These mechanisms at best saddle children affected by the government's use of unreliable data with the burden of unwinding harms that the agency should have considered during rulemaking. The agency cannot relieve itself of its burdens under the APA through conclusory statements or by shifting them to individuals affected by agency policies, including very young children, and the effort to do so in the Proposed Rule is arbitrary and capricious. As discussed below, the Proposed Rule fails to demonstrate the reliability not only of the biometrics measures the proposal introduces but also of the data it cites in support of its claim that these procedures are required to prevent trafficking at the border.

C. The Proposed Rule Would Allow for Broad Sharing of Children's Personal Data in Ways that Compromise the Fairness of Adjudications, Children's Privacy Rights, and Their Safety.

The collection of volumes of new data that would follow from the Proposed Rule poses grave concerns about how DHS will store, share, and use such information, which contains personal data about not only those from whom biometrics were collected, but in the case of DNA testing, about relatives from generations past and those yet to come. While the precise mechanisms envisioned by the Proposed Rule are unclear, the NPRM mentions that its Automated Biometric Identification System (IDENT) will be replaced with one known as the Homeland Advanced Recognition Technology (HART) system.[24] This new database, for which DHS has yet to complete all phases and privacy impact assessments,[25] allows for data sharing between a broad range of federal agencies, as well as foreign countries, and federal, state, and local investigative agencies.[26] In its privacy impact assessment for increment 1, the agency notes

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[21] *Id.* at 56350-51.

[22] *Id.* at 56351 ("DHS may waive or exempt the biometrics requirement at its discretion or based on a request for reasonable accommodation. See proposed 8 CFR 103.16(a)(1). The Department will make reasonable efforts that are also consistent with the Government's need for biometrics in certain contexts, and will follow all required procedures that are applicable under the Americans with Disabilities Act and the Federal Rehabilitation Act.").

[23] *Id.* at 56355.

[24] *Id.* at 56349, note 21.

[25] *See* DHS, DHS/OBIM/PIA-004 Homeland Advanced Recognition Technology System (HART) Increment 1 (last published date May 1, 2020), https://www.dhs.gov/publication/dhsobimpia-004-homeland-advanced-recognition-technology-system-hart-increment-1#:~:text=The%20Homeland%20Advanced%20Recognition%20Technology%20System%20%28HART%29%20replaces,development%20of%20new%20technologies%2C%20and%20other%20administrative%20uses.

[26] *See* DHS, Privacy Impact Assessment, Homeland Advanced Recognition Technology System (HART) Increment 1 PIA DHS/OBIM/PIA-004 (Feb. 24, 2020), at 5-6, https://www.dhs.gov/sites/default/files/publications/privacy-pia-

that among other uses it "maintains this information to support its information sharing agreements and arrangements with foreign partners. Such sharing augments the law enforcement and border control efforts of both the United States and its partners. Additionally, DHS is using this information in concert with external partners to facilitate the screening of refugees in an effort to combat terrorist travel consistent with DHS's and Components' authorities."[27]

Recent efforts to prevent unaccompanied children and families from accessing the U.S. border to request protection—from the use of metering and turnbacks to the Migrant Protection Protocols and current expulsions and turnbacks under Title 42—raise concerns that biometrics information may be used in ways that undermine, rather than safeguard, individuals whose data is part of the system. These practices are particularly troubling in the context of child asylum seekers, many of whom are fleeing threats and violence from which the governments of their countries cannot or will not protect them. The potential for personal information—from personally identifying biometric data to comments of officers who come into contact with a child—to be transmitted to and between children's countries of origin and the United States while cases are ongoing or a child is fleeing to the U.S. threatens to trap children in unsafe situations and compromises the rights provided under international law for those seeking protection. It also raises concerns that unverified or erroneous information, including that of which children may not even be aware,[28] may be stored and shared in ways that could lead to adverse impacts in the adjudication of their immigration cases or to other enforcement actions against them. That this data could be continuously gathered and transmitted potentially for years under the Proposed Rule only heightens these concerns and the privacy rights in the balance. Impacts of this import and magnitude warrant serious consideration in the NPRM, particularly given the agency's recent regulatory proposal on asylum procedures that weakens confidentiality requirements for asylum applications.[29]

II. The NPRM Mischaracterizes Data about "Fraudulent" Families and Trafficking at the Border to Justify Unnecessary and Intrusive Biometrics Collection from Children and their Families, While Failing to Consider or Comply with Legally Required Alternatives That Are Critical to Preventing Child Trafficking.

The NPRM relies on unsubstantiated claims about the potential "proliferation of fraudulent family unit schemes" and misleading data about trafficking at the border to justify expanded biometrics collection

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obim004-hartincrement1-february2020_0.pdf; *see also* Proposed 8 CFR § 103.16(d) (stating in part that "[b]iometrics collected, other than DNA, may be shared with appropriate federal, state, and local law enforcement; or intelligence community entities; foreign governments, as authorized by law and/ or international agreements.").

[27] DHS, Privacy Impact Assessment, *supra* note 26, at 1-2.

[28] *Id.* at 26-27 ("HART does not provide individuals notice prior to the collection of information, as it is merely a service provider and data repository. This PIA and the EBR SORN and forthcoming EBAR SORN provide general notice that an individuals' personal information may reside in HART. Notice is also provided through the publication of PIAs and SORNs on the underlying systems of original collection and the information shared from those systems. If required by law or policy, DHS Components, as well as external partners that submit information to HART and other DHS systems, provide notice to the individual at the point of collection related to storage and retention of information, including whether it is retained initially in IDENT or currently in HART.")

[29] Dep't of Homeland Security, Dep't. of Justice, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36288 (June 15, 2020).

from children.[30] The prevention of trafficking and other harm to migrant and refugee children is undeniably important, and at the very core of KIND's work. Regrettably, the Proposed Rule would do little to advance this aim and would only expand DHS's authority amid real and ongoing concerns about the agency's ability to responsibly manage the processing and care of children in its custody and its noncompliance with legal directives that are essential to preventing harm to children.

The agency's forced separation of thousands of children from their families and its recent expulsion of thousands more from the U.S. without screenings and safeguards required by the TVPRA have only made children more vulnerable to trafficking and harm. Indeed, concern about the well-being of children in DHS custody has led to widespread public outcry, broad congressional oversight, and a congressional directive that CBP hire child welfare professionals to assist with the screening and care of children at the border—a requirement that DHS has failed to implement. The expansion of DHS' discretion toward children and families amid this backdrop is troubling and unwarranted. Adding to these concerns, DHS mischaracterizes the nature of trafficking at the border, mischaracterizing data from a small-scale pilot program and conflating trafficking with migration patterns in which children may flee to the U.S. with relatives or individuals other than their parents or in which their families are based on non-genetic ties. In so doing, the NPRM proposes changes laden with new risks for children while overlooking legally directed alternatives that can more effectively and appropriately protect children. Consequently, it falls woefully short of the APA's requirements.

A. Data Cited in the NPRM from a Pilot Program Cannot Be Extrapolated to Justify Broad-Scale Changes to Biometrics Collection.

The NPRM states that expanding biometrics collection without regard to age "will help combat human trafficking, specifically human trafficking of children, including the trafficking and exploitation of children forced to accompany adults traveling to the United States with the goal of avoiding detention and exploit immigration laws."[31] In support, the NPRM cites to a 2019 pilot project, known as Operation Double Helix, through which DHS claims to have "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."[32] The prevention of trafficking on any scale is important, yet data from a small-scale pilot project is inadequate to justify policy changes of the sweeping scope the Proposed Rule envisions, and moreover, eclipses the distinction between potentially fraudulent claims and the crime of trafficking. Context is critical in evaluating the significance of the data on which the Proposed NPRM relies.

Importantly, the number of families tested in the 2019 pilot was not a random sample of families arriving at the border, but a population for which DHS had already identified "indicators of fraud." Thus, the findings do not indicate the prevalence of trafficking among families arriving at the border in a given

[30] *See, e.g.,* 85 Fed. Reg. at 56341.
[31] *Id.* at 56352.
[32] *Id.* Additionally, the NPRM states elsewhere that "DHS' system for verifying the identity of vulnerable children is not as robust as it could be. For example, a vulnerable child with similar biographical characteristics to a child who has lawful immigration status in the United States may be moved across the border under the assumed identity of that other child, although DHS does not have specific data to identify the entire scope of this problem*." Id.* at 56385.

period, but rather pertain to a subset of individuals who DHS believed to have raised suspicion and who may in fact not have been engaged in fraud or trafficking.[33] By comparison, in the months in which the pilot was conducted more than 80,000 individuals identified as part of family units were apprehended by CBP at the Southwest border.[34]

From the information provided in the NPRM, it is difficult to discern what "indicators" were flagged by DHS in the pilot cases. However, it is possible that some of the "fraudulent" families referenced by DHS could have involved relatives such as siblings, aunts, or uncles who indicated that they were the child's parent or who DHS assumed to be.[35] Language barriers, misunderstandings, and testing flaws may have also played a part.[36] Further, although the NPRM lacks detail about how families were selected for DNA testing, a privacy impact assessment submitted in relation to the pilot program describes circumstances in which families likely would have felt compelled to consent to testing or may have faced difficulty understanding the broad legal and technical information before them. It states, for example, that families were "provided a privacy statement containing the purpose of the Rapid DNA testing, the legal authority under which DNA is collected, that information related to the collection of DNA (e.g., the existence of a positive or negative match) may be shared according to federal law and policy, and that submitting to Rapid DNA testing is voluntary, but that failure to submit to Rapid DNA testing may be taken into account as one factor in ICE's assessment of the validity of the claimed parent-child relationship."[37] As previously mentioned, various factors affect one's ability to provide informed consent; the use of newer technologies, broad and nonspecific parameters for the use and sharing of test data, and the suggestion of consequences for not consenting only heighten these barriers.

Even more troubling, the NPRM fails to discuss whether or how families in the pilot were informed of alternatives to DNA testing that are available to prove their family relationships. As the NPRM recognizes,[38] family relationships may exist apart from genetic ties, as in the case of legal guardians, stepparents, children born through gamete donation, and children who are adopted. Without clear safeguards, however, families with a non-matching DNA test result may be separated or deemed "fraudulent" by DHS not because they lack a true and lawful parent-child or legal guardian-child

[33] *See* KIND, The Border, Trafficking, and Risks to Unaccompanied Children— Understanding the Impact of U.S. Policy on Children's Safety (Nov. 2019), at 6, https://supportkind.org/wp-content/uploads/2019/12/KIND_Child-trafficking-at-border-paper-11-18-19-FINAL-1.pdf (discussing other DHS pilots projects).
[34] *See* CBP, Southwest Border Migration FY19, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019; CBP, Southwest Border Migration, FY20, https://www.cbp.gov/newsroom/stats/sw-border-migration?_ga=2.184197666.546372033.1602023013-773227298.1589478692.
[35] *See* KIND, The Border, Trafficking, and Risks to Unaccompanied Children, *supra* note 33, at 6.
[36] *See id.*; Saira Hussain, *Rapid DNA Testing on Migrants at the Border is Yet Another Iteration of Family Separation*, EFF Deeplinks Blog (Aug. 2, 2019) (citing to a report by the Swedish Forensic Centre identifying concerns with the reliability of another Rapid DNA testing system), https://www.eff.org/deeplinks/2019/08/ices-rapid-dna-testing-migrants-border-yet-another-iteration- family-separation.
[37] DHS, Privacy Impact Assessment for the Rapid DNA Operational Use DHS/ICE/PIA-050 (June 25, 2019), at 4, https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019_3.pdf.
[38] *See* 85 Fed. Reg. at 56341 ("DHS recognizes that there are qualifying family members, such as adopted children, who do not have a genetic relationship to the individual who makes an immigration benefit request on their behalf. To the extent the rule discusses using DNA evidence to establish qualifying relationships in support of certain immigration benefit requests, it is referring only to genetic relationships that can be demonstrated through DNA testing.").

relationship but because DHS may not deem sufficient or valid documentation presented to confirm the relationship, as has occurred to clients KIND has served.[39] In many cases, CBP flags as "fraudulent" bona fide birth certificates from some Central American countries in which grandparents are identified as a child's parents if the child's mother is a minor. Misunderstandings during interviews at the border, exacerbated by language barriers, may lead to wrongful separations that once made are extraordinarily difficult to reverse. Inadequate systems for tracking family relationships and sharing accurate information among separated children and parents, attorneys, and the agencies caring for children, and the lack of established procedures for challenging wrongful separations at the outset only compound these difficulties and exacerbate the traumatic impacts of separations on children and their families.[40]

The Proposed Rule only increases the risk that families may be wrongfully separated, particularly in cases of non-biological relationships, stepparents, guardianships, and adoptions. If rapid DNA testing becomes the default mechanism available to verify relationships, those parents and families with non-genetic relationships will face increased barriers for proving their lawful relationships. While DNA testing should be available to families who request it when facing a separation based on parentage concerns, the testing should not be forced upon families, and robust alternative mechanisms for verifying non-genetic relationships should be accessible and clearly presented to families.[41] Meaningful alternatives to help prevent trafficking while safeguarding children's best interests exist—including Congress' recent directive that DHS hire child welfare professionals at the border to assist with screening and care of children—and should have been considered and indeed implemented by the agency before attempting to proceed with the seismic changes proposed here. As will be discussed below, the agency's failure to do so while advancing measures that raise myriad privacy, reliability, and child welfare concerns is arbitrary and capricious, violates federal law, and puts children at even greater risk of harm.

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[39] *See* KIND, Family Separation Two Years Later, the Crisis Continues (2020) (hereinafter "KIND, Family Separation Two Years Later"), at 9-10, https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf; *see also* 85 Fed. Reg. at 56345 (stating that "DNA testing would provide a means to demonstrate a claimed genetic relationship using a quicker and more effective technology than the current reliance on primary and secondary records and document based evidence that may be unreliable or unavailable."); *id.* at 56385 (addressing filing of immigration requests and stating that "DHS will not be conducting a DNA test for all applications or petitions where a genetic relationship is relevant or claimed. Instead, DHS will only require or request DNA when a claimed genetic relationship cannot be verified through other/documentary means. In addition, applicants can volunteer on their own to submit DNA, but DHS has no method to project the number of people who will submit it.").

[40] KIND, Family Separation Two Years Later, supra note 39, at 11.

[41] In January 2020, in *Ms. L v. ICE*, the court ordered that DHS must conduct DNA testing prior to separating families based on parentage concerns. *Ms. L v. ICE,* 18cv0428 DMS (MDD), Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Preliminary Injunction (S.D. Ca. Jan. 13, 2020) ("Given the right at issue here, the harm that parents and children suffer when they are separated, the undisputed speed, accuracy and availability of DNA testing, the Court finds Defendants must conduct DNA testing before separating an adult from a child based on parentage concerns.").

B. The NPRM Overlooks Meaningful and Legally Required Alternatives to the Intrusive and Problematic Measures It Proposes to Prevent Child Trafficking.

Through KIND's experience assisting more than 1,100 individuals affected by family separation before, during, and after the Administration's Zero Tolerance Policy, it has become clear that there are no meaningful standards guiding the decisions made by CBP officers to refer some individuals for further inspection and possible separation despite the significant risk of error and the potentially lifelong impact of separations for children and families. The privacy impact assessment describing the 2019 pilot program referenced in the NPRM underscores the broad nature of DHS' discretion, stating that "[f]rom th[e] pool of removable individuals, ICE personnel review documents, observe the individuals, conduct interviews, and select claimed FAMUs [family units] for Rapid DNA testing. ICE personnel use their law enforcement expertise to identify suspected fraudulent FAMUs."[42] However, decisions with such profound and potentially lifelong consequences for children are best made not by law enforcement professionals, but by professionals with expertise in child welfare and development and specialized training in identifying and preventing risks and harm to children.

Recognizing this need and in response to both the family separation crisis and the deaths of children and poor conditions in CBP custody, Congress recently directed DHS to hire child welfare professionals at all points along the Southwest border to assist with the screening and care of children.[43] To date, DHS has not implemented this legal requirement and fails to even address it in the NPRM. The agency's failure to meaningfully implement and evaluate this alternative renders hollow the agency's claim that "[u]sing DNA to verify claimed genetic relationships is the most effective tool to deter fraud and trafficking."[44]

The Proposed Rule also notably fails to address the critical role of the TVPRA's legal protections for unaccompanied children in preventing trafficking and other harm—an omission that is especially glaring in light of the agency's expulsion of more than 8,800 unaccompanied children from the U.S. without required trafficking and protection screenings since March 2020, purportedly in furtherance of an order by the Centers for Disease Control.[45] In stark contrast to the NPRM's stated concern about the risk of

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[42] DHS, Privacy Impact Assessment for the Rapid DNA Operational Use DHS/ICE/PIA-050 (June 25, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019_3.pdf.

[43] Dep't. of Homeland Security Appropriations Bill, 2020, H. Rep. 116-180, at 20 (July 24, 2019), https://www.congress.gov/116/crpt/hrpt180/CRPT-116hrpt180.pdf ("Migrants–Child Welfare Professionals.—With the funds provided in this Act and prior Acts, the Committee directs the Department to hire or otherwise obtain the services of child welfare professionals with culturally competent, trauma-centered, and developmentally appropriate interviewing skills to provide child welfare expertise and screening services on a full-time basis at each land POE or Border Patrol station along the southern land border. Not later than 60 days after the date of enactment of this Act, CBP shall provide an execution plan for hiring child welfare professionals to include how the personnel will be deployed in the field.").

[44] 85 Fed. Reg. at 56387.

[45] Associated Press, About 8,800 unaccompanied children are expelled at US border (Sept. 11, 2020), https://www.washingtonpost.com/health/about-8800-unaccompanied-children-are-expelled-at-us-border/2020/09/11/04452e1a-f48d-11ea-8025-5d3489768ac8_story.html; Jason Dearen and Garance Burke, AP, Pence ordered borders closed after CDC experts refused (Oct. 3, 2020), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae ("Vice President Mike Pence in March directed the nation's top disease control agency to use its emergency powers to effectively seal

"trafficking and exploitation of children forced to accompany adults traveling to the United States with the goal of avoiding detention and exploit immigration laws,"[46] DHS is *currently* circumventing the TVPRA's protections by failing to designate children arriving without parents or legal guardians as "unaccompanied alien children," and failing to conduct required trafficking screenings and refer unaccompanied children to Office of Refugee Resettlement custody. Instead, the agency is expelling children to Mexico with any adult without screening to ensure these individuals are family members or to verify their safety.[47] In cases where there is no adult present, children have been turned back to Mexico alone—including late at night and in the predawn hours—without any coordination with Mexican authorities. Children have also been expelled to their countries of origin, regardless of whether they have family in the country who can safely care for them[48] or of the dangers they may have fled. These turn backs and expulsions imperil the lives and safety of children by placing them in dangerous circumstances that only increase their vulnerability to trafficking and other harm--risks that have become even more acute during the COVID-19 pandemic as children face violence; limited access to protection, services, and shelter; and difficulties reuniting with family members in the countries and border regions to which they are expelled or turned back.[49]

DHS' proposal of broad measures to collect data from children in the name of protecting them from trafficking[50] while flouting anti-trafficking law and placing children in harm's way is shockingly disingenuous and makes a mockery of the reasoned analysis required by the APA. DHS should withdraw the Proposed Rule, and immediately restore processing pursuant to the TVPRA and comply with Congress' directive to hire child welfare professionals at the border. Additionally, KIND urges the agency to engage with the stakeholders about additional measures that support the stated goals of the proposal while preventing family separation, minimizing privacy risks, and prioritizing children's unique needs and best interests.

III. The Proposed Rule Creates Confusion and Injects Inefficiencies into the Adjudication Process for Children's Applications.

The Proposed Rule creates new biometrics procedures for children that diverge from those governing the adjudication of children's applications by EOIR. Under the Proposed Rule, if a child under 14 proceeds with an application for relief before USCIS, he or she "may be required to submit biometrics for an application submitted to USCIS, but the same child would be exempt from biometrics for an

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the U.S. Borders, overruling the agency's scientists who said there was no evidence the action would slow the coronavirus, according to two former health officials.").

[46] 85 Fed. Reg. at 56352.

[47] *See* KIND, *Sending Children Back to Danger* (Oct. 8, 2020), at 2, https://supportkind.org/wp-content/uploads/2020/10/Updated-Expulsions-at-US-MX-border-10.8.20.pdf

[48] *Id.*

[49] *Id.* at 3.

[50] *See, e.g.,* 85 Fed. Reg. at 56350 (stating in part that having more reliable data "would also eliminate an incentive that currently exists for unscrupulous individuals to jeopardize the health and safety of minors to whom they are unrelated, transporting the minors on a dangerous journey across the United States border, and claiming to be the parents of unrelated minors in order to claim to be a 'family unit' and thus obtain a relatively quick release from DHS custody.").

application submitted with DOJ EOIR."[51] The NRPM acknowledges the confusion that might result from these "disparate authorities," but states that should conflicts arise, DHS will follow EOIR's regulations on age restrictions "when collecting biometrics for an application or petition that will be adjudicated by EOIR."[52] The Proposed Rule provides an unduly simplistic characterization of the current adjudication and application process, particularly in light of recent policies, and creates inefficiencies and inconsistencies that will only increase existing backlogs and risk the wrongful denial of children's applications.

Pursuant to the TVPRA, USCIS has initial jurisdiction over unaccompanied children's applications for asylum. USCIS also adjudicates applications for Special Immigration Juvenile Status and other forms of humanitarian protection, including visas for victims of trafficking or crime. Despite these procedures, recent policies[53] have led to inconsistencies in how unaccompanied children's applications are adjudicated, with devastating impacts for due process and children's access to protection. For example, policies narrowing the discretion of adjudicators to grant administrative closure, termination, and continuances, have created circumstances in which unaccompanied children in removal proceedings may file applications for SIJS or asylum with USCIS only to be required to proceed in immigration court (and potentially file for other relief there) before USCIS has adjudicated their application. In other cases, unaccompanied children may be denied an opportunity to even apply for relief before USCIS and be required to make their cases for protection before EOIR in the first instance. Other policies have led to the re-determination of children's unaccompanied status, including in the middle of their cases, with the effect of stripping USCIS of jurisdiction over their asylum applications and requiring consideration of them by EOIR. While several of these policies are the subject of litigation or currently enjoined they nevertheless have contributed to widespread confusion and inconsistencies in USCIS and EOIR's adjudication of children's cases.

Thus, the Proposed Rule's assurances that DHS will abide by EOIR's regulations for applications that EOIR will adjudicate are unavailing, as it is not possible to know upfront which agency may ultimately adjudicate a child's case. Significantly, unaccompanied children will disproportionately bear these burdens, which include being required to provide biometrics, with the related privacy intrusions, for applications that may never reach adjudication by USCIS or having their applications rejected for failing to comply with biometrics requirements that may not be clear even to the agencies before which they are appearing. The consequences of this are not simply administrative; in the case of children applying for protection, such denials may result in the return of children to harm or danger. DHS offers no explanation of why the benefits of the proposed procedures outweigh these significant costs, and

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[51] *Id.* at 56340.
[52] *Id.*
[53] Such policies include the Attorney General's decisions in *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018); *Matter of S-O-G- & F-D-B-,* 27 I&N Dec. 462 (A.G. 2018); EOIR's proposed regulation on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure (85 Fed. Reg. 52491) (Aug. 26, 2020); the Board of Immigration Appeals' decision in *Matter of M-A-C-O-,* 27 I&N Dec. 477 (BIA 2018); and USCIS' May 31, 2019 memorandum, "Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children," enjoined by *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367 (D.Md. 2019) (temporary restraining order later converted to preliminary injunction, No. 19-cv-1944, Dkt. # 71 (Oct. 15, 2019)).

indeed it cannot. We urge DHS to promptly withdraw the Proposed Rule to prevent unnecessary confusion, costly delays, and potential harm to the very children the Proposed Rule purports to protect.

IV. The Proposed Rule Creates New and Unjustified Barriers to Protection for Child Survivors of Trafficking, Despite Its Stated Goal of Protecting Vulnerable Populations.

The Proposed Rule proposes numerous changes that would create new barriers to protection for child survivors of violence and trafficking, including by requiring biometrics, but also through wholly unrelated provisions, such as eliminating the presumption of "good moral character" for children under 14 applying for T nonimmigrant adjustment of status.[54] The agency suggests these changes will allow for more reliable, efficient, and thorough review of an applicants' criminal history than is possible through an applicant's submission of multiple police reports, and further proposes to broaden the period of time that will be considered when assessing whether applicants can prove "good moral character." While purporting to ease the burden on survivors of trauma, the proposed changes do the very opposite—exposing survivors of violence and trafficking to more searching inquiries into their backgrounds that could lead to denial of their applications while overlooking the ways in which abusers and traffickers frequently manipulate and control their victims through false reporting of crime and forced involvement in criminal activities. These changes will likely deter child survivors of violence and trafficking from pursuing legal protection and increase the likelihood that those able to apply will be denied relief. Far from preventing trafficking, these changes only increase children's vulnerability to future harm and exploitation.

Conclusion

The Proposed Rule would advance dramatic changes that disregard the unique needs of children under the pretext of protecting them. The NPRM lacks sufficient evidence to support its justifications related to fraud and trafficking, or to prove the reliability and effectiveness of biometrics for young children. Alarmingly, and to the detriment of thousands of children, the agency fails to consider or in other instances flouts important legal safeguards set forth in the TVPRA and appropriations legislation that were enacted by Congress to improve screening of children and prevent trafficking. We urge DHS to withdraw this misguided proposal and to immediately restore processing of unaccompanied children pursuant to the TVPRA, to engage child welfare professionals to assist with screening and care of children at the border, and to collaborate with stakeholders to identify additional measures that can meaningfully and effectively protect migrant and refugee children.

Sincerely,

/s/

Jennifer Podkul
Vice President for Advocacy and Policy

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[54] 85 Fed. Reg. at 56342.