

# CRADLE TO GRAVE

## Department of Homeland Security Builds System to Track and Surveil Immigrants and Impede Access to Lawful Status

FEBRUARY 2021

On September 11, 2020, U.S. Citizenship and Immigration Services (USCIS) issued a notice of proposed rulemaking (NPRM) misleadingly titled “Collection and Use of Biometrics by U.S. Citizenship and Immigration Services.”<sup>1</sup> USCIS, an agency within the U.S. Department of Homeland Security (DHS), seeks to change federal regulations so that DHS can collect a wide range of physical, personal, and behavioral characteristics and store them indefinitely in a giant “person-centric” database,<sup>2</sup> available to be searched and shared with other agencies. DHS could use the information to track and surveil non-U.S. citizens and citizens and to make it more difficult for noncitizens to obtain or retain lawful immigration status in the United States.

The NPRM’s title suggests that the proposed rule covers only applications for immigration benefits or status in the U.S., which are administered by USCIS. But the NPRM’s first sentence reveals that the new rule is intended to expand immigration enforcement by amending “DHS regulations concerning the use and collection of biometrics in the enforcement and administration of immigration laws by U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Customs Enforcement (ICE).”<sup>3</sup>

The NPRM is complicated, taking up 85 pages in the Federal Register. But in its haste to issue the new regulations, USCIS allowed a comment period of only 30 days, rather than the usual 60 days, and ignored requests for additional comment time. Nevertheless, 5,320 comments were submitted, overwhelmingly in opposition to the proposed rule change.<sup>4</sup>

Despite the Trump administration’s eagerness to issue the new regulations before President Biden was inaugurated, final regulations were not issued by January 20, 2021. But the risk remains that they could be issued, in the present or revised form, by the Biden administration. Therefore, it is important to understand the regulations’ negative impact on

<sup>1</sup> 85 Fed. Reg. 56388–422 (Sep. 11, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-11/pdf/2020-19145.pdf> (hereinafter “NPRM”).

<sup>2</sup> NPRM at 56340.

<sup>3</sup> NPRM at 56338.

<sup>4</sup> Proposed Rule: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, <https://beta.regulations.gov/document/USCIS-2019-0007-0001>. Examples of comments filed include: Electronic Frontier Foundation, <https://beta.regulations.gov/comment/USCIS-2019-0007-5370> (hereinafter “EFF comments”); Catholic Legal Immigration Network, <https://beta.regulations.gov/comment/USCIS-2019-0007-5240>; National Immigration Law Center and Just Futures Law, <https://beta.regulations.gov/comment/USCIS-2019-0007-5265>.

LOS ANGELES (Headquarters)  
3450 Wilshire Blvd. #108 – 62  
Los Angeles, CA 90010  
213 639-3900  
213 639-3911 fax



WASHINGTON, DC  
P.O. Box 34573  
Washington, DC 20043  
202 216-0261  
202 216-0266 fax

citizens and noncitizens and to advocate against their adoption by the current or any future administration.

This issue brief outlines what the proposed rule would do, explains how it would infringe on the rights of noncitizens and citizens and impede noncitizens' access to lawful immigration status, and suggests steps advocates can take to oppose adoption of the rule.

### ■ Under a new definition of “biometrics,” DHS will compel noncitizens and citizens to provide a vast range of physical and behavioral characteristics and can add to the list without asking for public comments

Until now and without providing a formal definition of “biometrics,” DHS has required only that people submit their fingerprints, photograph, and signature as part of routine immigration applications.<sup>5</sup> But in a departure from past practice and without specific statutory authority, the NPRM proposes a sweeping definition of biometrics to include a wide range of intimate physical and behavioral characteristics, such as fingerprints, palm prints, photographs (including “facial images specifically for facial recognition, as well as photographs of physical or anatomical features such as scars, skin marks, and tattoos”), signature, voice print, iris image, and DNA test results.<sup>6</sup>

And if DHS decides to expand its “biometrics submission requirements” in the future, it will not be required to issue a new proposed rule. It can simply publish a notice in the Federal Register or in the instructions for immigration forms.<sup>7</sup> That means, for example, that DHS could decide that a person’s gait or location patterns could also be included, and the agency would not even need to justify the addition.

For simplicity’s sake, this issue brief will use the term “biometrics” to refer to the physical and behavioral characteristics that DHS seeks to collect. This use of the term is broader than the meaning traditionally associated with “biometrics.”

### ■ Biometrics collection will be the default under the proposed rule

Under current rules, biometrics collection “is only mandatory for certain benefit requests and enforcement actions upon request of DHS”<sup>8</sup> (e.g., for identity verification when a Notice to Appear is issued). But, as DHS explains in the NPRM, the new rule will “*flip the current construct* from one where biometrics may be collected based on past practices, regulations, or the form instructions for a particular benefit, to a system under which biometrics are required for *any immigration benefit request* unless DHS determines that biometrics are unnecessary.”<sup>9</sup>

DHS does not explain how or under what circumstances it will exercise the option *not* to require biometrics collection. And, as explained by the Electronic Frontier Foundation in its

<sup>5</sup> NPRM at 56341.

<sup>6</sup> NPRM at 56341. Collection and retention of face imaging is particularly problematic, since “[f]ace recognition systems are notoriously unreliable for identifying Black people, women, and young people.” EFF comments at 22.

<sup>7</sup> NPRM at 56363; 8 CFR 103.16.

<sup>8</sup> NPRM at 56340.

<sup>9</sup> NPRM at 56350–351, emphasis added.

comments on the NPRM, DHS does not have legal authority to expand biometrics collection to the degree contemplated in the NPRM.<sup>10</sup>

### ■ **DHS will collect biometrics and other information from noncitizens and citizens under the proposed rule**

The new mandatory biometrics collection will apply across the board to a wide range of individuals interacting with DHS. As the NPRM indicates, DHS may collect biometrics for “any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with a certain benefit or request, including U.S. citizens” unless DHS waives the requirement.<sup>11</sup> This means that thousands of U.S. citizens who are in some way “associated” with noncitizens seeking immigration benefits may have their biometric information collected by DHS.

As noted above, DHS does not explain how it will decide in which cases or circumstances it will *not* collect biometrics.

### ■ **Even babies and toddlers will be subject to biometrics collection under the proposed rule**

Under current rules, DHS does not collect biometrics from children under the age of 14. The NPRM, however, says that DHS will be able to collect the full range of physical and behavioral characteristics of a person regardless of the person’s age.<sup>12</sup>

### ■ **Biometrics collection and use are part of DHS’s surveillance program of “enhanced and continuous” vetting of noncitizens and citizens**

Biometrics collection and use are part of DHS’s program of “enhanced and continuous vetting” of noncitizens and citizens that permits constant and ongoing surveillance.<sup>13</sup> Under the new rule, noncitizens and citizens may be called in repeatedly to comply with the full range of biometrics collection over a long period of time. The NPRM states:

Under continuous vetting, DHS may require aliens to be subjected to continued and subsequent evaluation of eligibility for their immigration benefits to ensure they continue to present no risk of causing harm subsequent to their entry. This rule proposes that any individual alien who is present in the United States following an approved immigration benefit may be required to submit biometrics unless and until they are granted U.S. citizenship.<sup>14</sup>

In addition,

a lawful permanent resident or U.S. citizen may be required to submit biometrics if he or she filed an application, petition, or request in the past, and it was either

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<sup>10</sup> EFF comments at 27.

<sup>11</sup> NPRM at 56340 (citation omitted).

<sup>12</sup> NPRM at 56357.

<sup>13</sup> NPRM at 56352.

<sup>14</sup> NPRM at 56352.

reopened or the previous approval is relevant to an application, petition, or benefit request currently pending with USCIS.<sup>15</sup>

And, since the biometrics collection requirement applies to “any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with a certain benefit or request, including U.S. citizens”<sup>16</sup> (unless DHS waives the requirement), acquiring U.S. citizenship does not end the requirement.

Once collected, the biometrics are available for all surveillance purposes. As the NPRM states:

DHS proposes to further clarify the purposes for which biometrics are collected from individuals filing immigration applications or petitions, to include criminal history and national security background checks; identity enrollment, verification, and management; secure document production, and to administer and enforce immigration and naturalization laws.<sup>17</sup>

Once the biometrics and other information are in the DHS database described below, they may be searched and shared for purposes that go far beyond immigration applications and will be available to agencies outside DHS for other purposes.

■ **The NPRM is part of DHS’s under-the-radar creation of a giant “person-centric” database that will include physical characteristics, biographic and encounter information, and other personal information about millions of citizens and noncitizens and that will be shared with domestic and foreign law enforcement and intelligence agencies**

The NPRM’s biometrics collection is part of DHS’s under-the-radar creation of a vast database called Homeland Advanced Recognition Technology (HART),<sup>18</sup> which will replace DHS’s current IDENT (Automated Biometric Identification System) biometrics database in fiscal year 2020.<sup>19</sup> HART will centralize access to federal and international databases, provide real-time access in the field, and involve the use of “multi-modal biometrics” (e.g., the wide range of physical and behavioral characteristics that the NPRM authorizes).<sup>20</sup>

Creation of this enormous database is central to DHS’s strategy of biometrics collection and tracking of noncitizens. But it warrants only a footnote in the biometrics NPRM, which

<sup>15</sup> NPRM at 56352.

<sup>16</sup> NPRM at 56340.

<sup>17</sup> NPRM at 56338.

<sup>18</sup> Supplemental Programmatic Environmental Assessment (SPEA) for the Proposed Establishment and Operations of the Office of Biometric Identity Management and the Homeland Advanced Biometric Technology (HART), 81 Fed. Reg. 90862 (Dec. 15, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-12-15/pdf/2016-30187.pdf>.

<sup>19</sup> Privacy Act; IDENT System of Records, 72 Fed. Reg. 31080–82 (June 5, 2007), <https://www.govinfo.gov/content/pkg/FR-2007-06-05/html/07-2781.htm>; Anthony Kimery, “DHS Is the Big Winner in DHS’s FY 2020 Funding Budget for Biometrics,” *BiometricUpdate.com*, Jan. 21, 2020, <https://www.biometricupdate.com/202001/obim-is-the-big-winner-in-dhss-fy-2020-funding-budget-for-biometrics>.

<sup>20</sup> Zack Martin, “Homeland Security Releases Biometric Framework,” *Secure ID News*, Aug. 31, 2015, <https://www.secureidnews.com/news-item/homeland-security-releases-biometric-framework/>.

instead refers only to the more limited biometric database called IDENT (Automated Biometric Identification System) that HART will replace.<sup>21</sup>

In 2016, DHS disclosed the creation of HART with little fanfare, providing no overall picture of the immensity of its future operations,<sup>22</sup> which extend well beyond biometrics. Instead, DHS has used piecemeal “system of records” notices (SORNs) to surreptitiously build HART’s enormous capabilities. For example, the 2018 notice about the Department of Homeland Security/ALL–041 External Biometric Records (EBR) System of Records makes clear that HART will include more than biometrics and associated biographic information.<sup>23</sup> It will also include identifiers for derogatory information, miscellaneous officer comment information, and encounter data. These items are undefined and unlimited in scope. HART, through EBR, will also include “[r]ecords related to the analysis of relationship patterns among individuals and organizations.”<sup>24</sup> EBR will allow “DHS to receive, maintain, and disseminate biometric and associated biographic information from non-DHS entities, both foreign and domestic.”<sup>25</sup>

Likewise, the 2020 notice about the Department of Homeland Security/All–043 Enterprise Biometric Administrative Records (EBAR) System of Records (SOR) offers only a vague description of EBAR’s role to allow HART to “link individuals with their encounters, biometrics, records, and other data elements” and to share information with domestic and international agencies.<sup>26</sup>

HART will expand DHS’s ability to share biometrics and other information with federal, state, and local law enforcement, intelligence community entities, and foreign governments. For example, the DHS/USCIS Immigration Biometric and Background Check (IBBC) System of Records<sup>27</sup> (a system “to collect and maintain biographic, biometric, and background check records on applicants, petitioners, sponsors, beneficiaries, or other individuals in connection with a benefit request”<sup>28</sup>) may be shared with federal, state, local, tribal, territorial, foreign or international agencies for a variety of “national security, law enforcement, criminal justice, immigration and border management, and intelligence purposes.”<sup>29</sup>

DHS has not issued a SORN that describes HART’s full operation, instead issuing a privacy impact assessment (PIA) in 2020 that describes only the database’s first phase.<sup>30</sup>

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<sup>21</sup> NPRM note 21.

<sup>22</sup> Supplemental Programmatic Environmental Assessment (SPEA) for the Proposed Establishment and Operations of the Office of Biometric Identity Management and the Homeland Advanced Biometric Technology (HART), 81 Fed. Reg. 90862 (Dec. 15, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-12-15/pdf/2016-30187.pdf>.

<sup>23</sup> Privacy Act of 1974; System of Records, 83 Fed. Reg. 17829–33 (Apr. 24, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-04-24/pdf/2018-08453.pdf>.

<sup>24</sup> *Id.* at 17833.

<sup>25</sup> *Id.* at 17829.

<sup>26</sup> Privacy Act of 1974; System of Records, 85 Fed. Reg. 14955–58 (Mar. 16, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-16/pdf/2020-04979.pdf>.

<sup>27</sup> Privacy Act of 1974; System of Records, 83 Fed. Reg. 36950–55 (July 31, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-07-31/pdf/2018-16138.pdf>.

<sup>28</sup> *Id.* at 36950.

<sup>29</sup> *Id.* at 36951.

<sup>30</sup> *Privacy Impact Assessment for the Homeland Advanced Recognition Technology System (HART) Increment 1 PIA* (U.S. Dept. of Homeland Security, DHS/OBIM/PIA-004, Feb. 24, 2020),

Although it was issued just months before the NPRM, it does not address the full range of biometrics that the NPRM contemplates.

HART will not limit the data collected to information that is available from government entities. According to the PIA, “HART may use information from publicly available sources, collected according to the data provider’s authority. Specific publicly available sources are discussed in more detail in the appropriate data provider’s privacy compliance documentation.”<sup>31</sup> But the PIA itself provides no meaningful information about the role that information from commercial entities will play in HART.

These commercial entities have become a major source of data for immigration enforcement.<sup>32</sup> Companies with a strong record of unfettered biometrics collection, data sharing, and analytics continue to build and host systems for ICE, yet little is known about their contracts or their use, collection, and third party sharing of data with other federal, local, and state agencies or other companies.<sup>33</sup> And on the infrequent occasions when reviews are performed (for example, the Government Accountability Office’s review of U.S. Customs and Border Protection’s supervision of companies’ compliance with privacy standards for facial recognition programs), DHS’s failure to conduct audits was soundly criticized.<sup>34</sup>

DHS’s apparent plan is to surreptitiously build HART, disclosing its full terms and impact only when all the puzzle pieces are in place.

## ■ The biometrics expansion was part of a Trump administration campaign to restrict legal immigration

### DHS attempted to severely limit access to fee waivers, while proposing dramatic fee increases

Under the new rule, anyone “filing or associated with an immigration benefit or request” must appear for biometrics collection and pay a \$85 biometric services fee “unless the individual is statutorily exempt from paying the biometric services fee or if he or she has received a fee waiver.”<sup>35</sup> The \$85 fee will be incorporated into the application fee.

But the NPRM misrepresents the availability of fee waivers, suggesting that they are widely available. The Trump administration tried to eliminate fee waivers for many applications, including applications for U.S. citizenship, unless the Immigration and Nationality Act requires that one be available. This barrier would leave people without access

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[https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf).

<sup>31</sup> *Id.* at 18.

<sup>32</sup> *Who’s Behind ICE: The Tech and Data Companies Fueling Deportations* (Mijente, National Immigration Project of the National Lawyers Guild, and Immigrant Defense Project, Aug. 2018), [https://mijente.net/wp-content/uploads/2018/10/WHO%E2%80%99S-BEHIND-ICE\\_-The-Tech-and-Data-Companies-Fueling-Deportations-\\_v1.pdf](https://mijente.net/wp-content/uploads/2018/10/WHO%E2%80%99S-BEHIND-ICE_-The-Tech-and-Data-Companies-Fueling-Deportations-_v1.pdf).

<sup>33</sup> Felipe De La Hoz, “DHS Plans to Start Collecting Eye Scans and DNA – with the Help of Defense Contractors,” *The Intercept*, Nov. 17, 2020, <https://theintercept.com/2020/11/17/dhs-biometrics-dna/>; “Immigrant Rights Groups, Law School and Legal Organization FOIA for Info on Thomson Reuters, RELX Group Contracts with ICE,” Center for Constitutional Rights press release, Sept. 14, 2020, <https://ccrjustice.org/home/press-center/press-releases/immigrant-rights-groups-law-school-and-legal-organization-foia-info>.

<sup>34</sup> Felipe De La Hoz, note 33, above.

<sup>35</sup> NPRM at 56343.

to a fee waiver for most immigration processes. DHS likewise attempted to make it much more difficult for applicants to qualify for a waiver by eliminating receipt of a means-tested benefit as a basis for a waiver and by imposing burdensome documentation requirements.

The NPRM also does not mention that fee waivers were increasingly unavailable when the Trump administration was in the process of dramatically increasing fees for immigration applications across the board, increases that were to take effect on October 2, 2020.<sup>36</sup> For example, the fee for a naturalization application was to increase 80 percent to more than \$1,100. Even children would have to pay the fee. Applications for which a fee was never charged now would require one. Even asylum-seekers who are fleeing for their lives would be required to pay a \$50 filing fee.

On September 30, 2020, the federal judge presiding over *Immigrant Legal Resource Center v. Wolf* issued a decision temporarily blocking the fee increases and fee waiver elimination.<sup>37</sup> Earlier, in December 2019, another federal judge had issued an injunction halting new policies that would make it more difficult for naturalization applicants to qualify for fee waivers.<sup>38</sup>

On December 28, 2020, the federal government moved to dismiss its appeal in *Immigrant Legal Resource Center v. Wolf*.<sup>39</sup> And on January 29, 2021, the government announced that it is complying with the terms of injunctions issued in two fee increase/fee waiver cases and that prior fees and fee waiver rules would remain in place.<sup>40</sup>

The biometrics rules were proposed in the context of increasing barriers to obtaining lawful immigration status. While the fee increases and waivers may be stopped for the moment, the underlying intent for imposing restrictive biometrics rules remains the same.

### **The NPRM imposes burdensome requirements for survivors of abuse and trafficking**

The NPRM makes self-petitioners under the Violence Against Women Act (VAWA), including children, subject to the NPRM's biometrics expansion, extends the period for establishing "good moral character" beyond a 3-year period before filing, and eliminates a presumption of good moral character for children. It also makes survivors of trafficking who apply for adjustment of status, including children, subject to the same provisions.

<sup>36</sup> Victor Valdez Gonzalez, *USCIS Fee Increases Effective October 2, 2020* (Immigrant Legal Resource Center, Aug. 2020),

[https://www.ilrc.org/sites/default/files/resources/revised\\_uscis\\_fee\\_increases\\_october\\_2020.pdf](https://www.ilrc.org/sites/default/files/resources/revised_uscis_fee_increases_october_2020.pdf).

<sup>37</sup> *Immigrant Legal Resource Center v. Wolf*, Case No. 4:20-cv-05883 (N.D. Cal., order issued Sept. 29, 2020); "Federal Judge Enjoins DHS's Illegal and Immoral Immigration Fee Increase," CLINIC press release, Sept. 30, 2020), <https://cliniclegal.org/press-releases/federal-judge-enjoins-dhs-illegal-and-immoral-immigration-fee-increase>. A similar injunction was issued in *Nw. Immigrant Rts. Project, et al., v. USCIS*, No. 19-cv-3283 (RDM) (*NWIRP v. USCIS*), (U.S. D.Ct. DC) on Oct. 8, 2020.

<sup>38</sup> *City of Seattle v. Department of Homeland Security*, Case No. 3:19-cv-07151 (N.D. Cal.); "Judge Blocks DHS From Implementing Unlawful Restrictions to Citizenship and Immigration Applications," Immigrant Legal Resource Center press release, Dec. 9, 2019, <https://www.ilrc.org/judge-blocks-dhs-implementing-unlawful-restrictions-citizenship-and-immigration-applications>.

<sup>39</sup> *Featured Issue: Changes to USCIS Fee Schedule* (American Immigration Lawyers Association, Doc. No. 20073101, Jan. 29, 2021), <https://www.aila.org/advo-media/issues/all/changes-to-uscis-fee-schedule>.

<sup>40</sup> U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 86 Fed. Reg. 7493 (Jan. 29, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02044.pdf>.

The addition of standardless, subjective requirements grants DHS unfettered discretion to deny the applications. In addition, these requirements create unnecessary administrative barriers and costs that will impede the ability of survivors to obtain lawful permanent residence in the U.S.

**The NPRM allows DHS to require, request, or accept DNA evidence to demonstrate the existence of a claimed genetic relationship, even when less burdensome means are available**

The proposed rule allows DHS to require, request, or accept DNA evidence to demonstrate the existence of a genetic relationship. It claims that only DNA results and not the raw DNA will be made part of an individual’s immigration record.<sup>41</sup> But the rule suggests no standards regarding when a requirement or request for DNA is appropriate and does not provide for any review of these decisions or auditing of how and when DNA is collected, stored, and shared.

DHS thus would have expansive discretion to require DNA testing, even in situations where significant documentary evidence, such as birth certificates or medical or school records, is available. Obtaining DNA testing is not a benign task, particularly for applicants or beneficiaries who live outside of the U.S., where testing would require travel or is prohibitively expensive. And the “rapid” DNA testing that DHS proposes using is notoriously inaccurate.<sup>42</sup>

■ **What you can do**

Here are some steps advocates can take:

- Meet with local, state, and federal officials to ensure that they know about and can object to adoption and implementation of the biometric collection rule.
- Challenge the rule:
  - If the rule has not yet been finalized, advocate against its adoption.
  - If the rule has been finalized, advocate for it to be withdrawn.
  - If the rule has been finalized, advocate for interpretations that mitigate its harm.
  - Support legal challenges to the rule.
- Document the harm this rule creates. Collect stories of clients, members, and others whom the rule harms and share these stories with the media, advocacy organizations, and elected officials.
- Encourage your state and local officials to limit collection and sharing of biometric and other personal information that might become part of IDENT/HART and be used for immigration enforcement.
- Spread the word, through community education, social media, and personal contacts, about government efforts to collect or share personal or biometric information so community members are aware of the potential changes.

<sup>41</sup> According to the NPRM, “When DHS uses the term ‘DNA’ in this rule it is a reference to the raw genetic material, typically saliva, collected via buccal [mouth] swab from an individual.” NPRM at 56353.

<sup>42</sup> NPRM at 56353; EFF comments at 22.