



NEW YORK
CITY BAR

**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

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Regulations Docket Clerk
Office of Legal Policy
Dept. of Justice
905 Pennsylvania Avenue, NW
Washington, DC 20530

Submitted via www.regulations.gov

Re: RIN No. 1105-AB56 or Docket No. DOJ-OAG-2019-0004, Comments in Response to the Proposed Rule Re: DNA Sample Collection from Immigration Detainees

Dear Assistant Director Alder Reid:

On behalf of the Immigration and Nationality Law Committee of the New York City Bar Association (“City Bar”)¹, we write to oppose the Department of Justice’s (DOJ) Proposed Rule (“Proposed Rule”) that broadly authorizes the Attorney General to require the Department of Homeland Security (“DHS”) to collect, store, and share DNA belonging to immigrants detained by the United States.²

When Congress originally passed laws to authorize DNA collection more than a decade ago, exemptions were put into place to protect immigrant populations that the Proposed Rule now explicitly targets. The Proposed Rule requires DNA collection of every “non-U.S. person” in U.S. custody, in addition to any who are arrested, facing charges, or convicted of federal criminal

¹ The City Bar and its 24,000 members have a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The City Bar’s Immigration & Nationality Law Committee addresses diverse issues pertaining to immigration law and policy. Our members include staff members of legal services organizations providing immigration assistance, private immigration attorneys, staff members of local prosecutor’s offices, staff members of immigrant advocacy organizations, academics, and law students. Many of our Committee members work for DOJ-recognized organizations that employ DOJ-accredited representatives.

² DNA-Sample Collection From Immigration Detainees, 84 Federal Register 204 (Oct. 22, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-22877.pdf>. (All links cited in this letter were last visited on November 12, 2019).

charges. This broad group could include legal permanent residents and U.S. Citizens wrongfully apprehended by U.S. Customs and Border Patrol and Immigration and Customs Enforcement, asylum-seekers with valid asylum claims, and others whose lawful documentation is wrongly questioned or contested.

The Proposed Rule would exponentially increase DNA sample collection without any individualized suspicion or probable cause to unprecedented levels. This collection would come at immense financial cost to the U.S. government while compromising the security and privacy of scores of immigrant families, including U.S. citizens and legal permanent residents. The Proposed Rule offers no justification for such an expansion of DNA sample collection which cannot be addressed by current comprehensive biometrics programs which already take fingerprints and photographs from non-immigrant visitors³ and immigrants to the United States, as well as reviewing identity and other documents. The Proposed Rule does not provide specificity about who shall be subject or exempt from such collection nor does it provide details about the storage, sharing, expungement, protection and gathering of such vast data. This hasty implementation without protections or protocols especially compromises the safety of asylum-seekers and crime victims in direct violation of domestic and international privacy protections for these vulnerable populations.

In addition to the vague nature of the rule and its costly implementation, the Proposed Rule has serious implications for Americans. It widely expands a surveillance apparatus that has been deployed in a biased and discriminatory manner, infringes on the privacy of civil society, and is vulnerable to bad actors and hacking. With such costs, the Proposed Rule offers no cognizable benefit. The Department of Justice provides no quantitative evidence to show how such data would aid in criminal prosecutions. In contrast, as outlined by the Government Accountability Office (“GAO”), scores of collected DNA information already sit untested in government laboratories due to back-logged labs and over-collection of this sensitive data. DNA collection and matching remains an imperfect science which can wrongfully implicate individuals who then have little or no recourse to respond to this intrusive search. For these reasons, the City Bar opposes the Proposed Rule in its entirety.

I. THE PROPOSED RULE HAS NO STATED PURPOSE AND IS VAGUE ABOUT BASIC PROTECTIONS OF SENSITIVE INFORMATION

a. There is No Clear Purpose to Such Unprecedented DNA Gathering

The United States presently has an expansive biometrics collection program. DHS’s Automated Biometric Identification System (IDENT) which includes the U.S. Visitor and Immigration Status Indicator Technology (US-VISIT), stores hundreds of millions of records of individuals who interact with DHS sub-agencies and all visitors to the United States. Given this expansive biometrics infrastructure, the Proposed Rule offers no explanation or quantitative

³ The term “non-immigrant” refers to those who are admitted to the United States for a specific temporary period. This category includes tourists and those who enter on temporary student or work visas. All non-immigrants have biometrics taken upon entry to the U.S. See *Requirements for Immigrant and Non-Immigrant Visas*, U.S. Customs and Border Patrol, <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas>.

research supporting the need for additional, invasive DNA collection to further criminal investigations or to address other public safety concerns.⁴

If law enforcement personnel need a DNA sample to investigate a crime in response to reasonable suspicion or probable cause, they can obtain a warrant for DNA collection. DOJ denotes in the Proposed Rule's language that DNA is "functionally no different from the corresponding use of fingerprints." Given this functional similarity, the Proposed Rule offers no further justification for the need to add this costly and invasive testing that fingerprinting cannot already achieve.

While the rule provides no information on precisely what data the government will collect and how it will collect it, experts believe that the data taken will include 20 markers called short tandem repeats (STR), repeating regions of DNA in a person, which can be matched to more genetic data resulting in a comprehensive genetic profile which can include ancestry and disease predisposition of at least 4,000 diseases.⁵ Because genetic information provides information on whether two people are related, the Proposed Rule would also affect the families of individuals tested, including U.S. citizens and legal permanent residents, thereby affecting millions of people beyond the millions whose samples are already on file or will be taken under the Proposed Rule.

b. The Proposed Rule Fails to Precisely Specify Who Will Be Subject to DNA Collection and How Exemptions Will Be Determined

The Proposed Rule lacks definitions and specificity of foundational terms. For example, the Proposed Rule requires DNA collection from "non-United States persons" who are detained under the authority of the United States. Yet, there is no specific definition of who is included in the definition of "non-United States persons,"⁶ leaving confusion about whether long-term residents, citizens and those arriving with green cards whose documents are questioned or revoked will be included.

Although the Proposed Rule requires that DHS collect DNA samples from noncitizens who are detained, it also adopts multiple exceptions to this general rule, making it impossible to know who will be required to provide DNA samples. The rule mentions three exemptions for collections from non-U.S. persons as well as limitations and exceptions "because of operational exigencies, resource limitations, or other grounds."⁷ However, the Proposed Rule is vague about how these

⁴ See Jennifer Lynch, *From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities & Beyond*, Immigration Policy Center (May 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/lynch_-_biometrics_052112.pdf.

⁵ See Lindzi Wessel, *Scientists Concerned Over US Plans to Collect DNA Data from Immigrants*, NATURE (Oct. 7, 2019), <https://www.nature.com/articles/d41586-019-02998-3>.

⁶ The Proposed Rule only defines "non-United States persons" as those who are not U.S. Citizens and who are not lawfully admitted for permanent residence leaving open whether those whose citizenship or residency status is questioned or not recognized by DHS would be subject to the rule. DNA-Sample Collection From Immigration Detainees, 84 Federal Register 204 (Oct. 22, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-22877.pdf>.

⁷ DNA-Sample Collection From Immigration Detainees, 84 Federal Register 204 (Oct. 22, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-22877.pdf>.

exceptions are to be determined or enforced. Instead, the Proposed Rule gives DHS free rein to determine who will or will not have to submit DNA samples with no specificity or direction about who is exempted, in likely derogation of due process rights and the Administrative Procedures Act.

c. The Proposed Rule Provides No Information About How the Information Would be Gathered, Stored, Protected and Shielded from False Positives

The Proposed Rule fails to detail where the DNA samples will be tested and what safeguards will be put in place to mitigate errors, including false matches, which will inevitably occur in DNA analysis. Further, the Proposed Rule offers no limits on the storage of this sensitive information and is silent on how DNA samples will be protected from hacking and other cybersecurity vulnerabilities. If the information were made publicly available, it could compromise the privacy of the affected individuals and/or be used to discriminate against them in various ways, such as denying a person employment, health insurance, or life insurance.⁸

The Proposed Rule's failure to address mechanisms to protect against false positives is troubling because DNA false positives are not uncommon. Indeed, there are numerous documented cases of false positives leading to wrongful conviction where the sole evidence relied upon in the case is DNA.⁹ In 2013, Michael Coble, a geneticist with the National Institute of Standards and Technology in Gaithersburg, Maryland, in a hypothetical scenario, asked 108 labs across the country to determine whether a DNA sample found on a ski hat containing a mix of DNA had come from a suspect.¹⁰ Seventy-three of the labs incorrectly said that the suspect's DNA was left on the hat, when in fact it was not.¹¹ Moreover, communities of color will be disproportionately vulnerable to such false matches as they are disproportionately detained in government custody. In the face of these dangerous possibilities, the Proposed Rule provides no guidance on how to contest the manipulation or mishandling of DNA evidence.

II. THE PROPOSED RULE IS AN UNPRECEDENTED AND DANGEROUS EXPANSION OF GOVERNMENT SURVEILLANCE

a. Further Expanding CODIS with DNA Data from Immigrants Compromises the Precision of the Database and Allows for Perpetual Storage of DNA Information

The Proposed Rule allows immigrant DNA profiles to be searched against the Combined DNA Index System (CODIS), a national DNA databased created and maintained by the Federal Bureau of Investigation (FBI), which is utilized by various state and law enforcement authorities.¹²

⁸ *Id.*

⁹ See Matthew Shaer, *The False Promise of DNA Testing*, THE ATLANTIC (June 2016), <https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/>.

¹⁰ See Douglas Starr, *Forensics Gone Wrong: When DNA Snares the Innocent*, SCIENCE (Mar. 7, 2016), <https://www.sciencemag.org/news/2016/03/forensics-gone-wrong-when-dna-snares-innocent>.

¹¹ *Id.*

¹² See Lindzi Wessel, *Scientists Concerned Over US Plans to Collect DNA Data from Immigrants*, NATURE (October 7, 2019), <https://www.nature.com/articles/d41586-019-02998-3>.

Allowing multiple agencies to collect and access DNA samples increases the risk that the data will be misused.

CODIS, established in 1998, includes information from both state and federal databases. At the start, DNA was collected only from convicted sex offenders, expanding through the years to include violent offenders, to juvenile offenders, and later to those who have been arrested but never convicted of a crime. The Proposed Rule would further expand this group to include DNA collection from an individual accused solely of an immigration violation. Even if one supports DNA collection of those convicted of crimes with high rates of recidivism or where biological evidence is relevant, both of these arguments are inapplicable to immigrant detainees accused only of civil immigration violations.

In addition to the intrusive nature of DNA collection, DNA collection remains an imprecise science vulnerable to false matches. If implemented, the Proposed Rule will disproportionately impact communities of color and alter norms regarding previously accepted documentation. CODIS has long been vulnerable to false matches, but as the database becomes larger the chances for false matches increase,¹³ and since people of color are disproportionately subject to immigration enforcement, they will bear the burden of widening surveillance.¹⁴

Compounding the above problems is the lack of ability to remove oneself from CODIS if, for example, the individual is granted relief from deportation or was wrongfully detained by the U.S. government in the first place. Though state and federal laws provide for expungement, scholars have argued that DNA expungement from federal and state databases is largely a myth – a burdensome, costly and arduous process which differs from state to state.¹⁵ The Proposed Rule offers no guidance on how one who is not in government custody, who has been removed back to their home country, or who has attained lawful status would have this sensitive information expunged from agency databases and/or external databases at CODIS. As it reads, the Proposed Rule allows for perpetual storage of this information, even for an individual who one day becomes a U.S. citizen and has no criminal record.

b. DNA Is An Inaccurate Marker of Familial Relationships

DNA collection was piloted by DHS earlier this year to verify claims of familial relationships of asylum seekers, potentially referring for prosecution those cases where asylum seekers had allegedly lied about being parents to their children.¹⁶ Relying on DNA testing to verify familial claims ignores the reality that family is not always a straightforward biological construct, has the potential to traumatize and disrupt families, and will surely raise the bar on previously

¹³ Erin E. Murphy, *The Dark Side of DNA Databases*, THE ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/science/archive/2015/10/the-dark-side-of-dna-databases/408709/>.

¹⁴ Jason Silverstein, *The Dark Side of DNA Evidence*, THE NATION (March 27, 2013), <https://www.thenation.com/article/dark-side-dna-evidence/>.

¹⁵ Elizabeth E. Joh, *The Myth of Arrestee DNA Expungement*, 164 UNIV. OF PENN. L. REV. Online 51 (2015).

¹⁶ Adolfo Flores, *The Trump Administration is Going to Start DNA Testing Families at the Border*, BUZZFEEDNEWS.COM (May 1, 2019), <https://www.buzzfeednews.com/article/adolfoflores/dna-testing-migrants-border-trump-homeland-security>.

acceptable documentation. It is on account of these potential dangers that scholars have recommended DNA testing be used as a *last resort* strategy not as a *carte blanche* on every immigrant family.¹⁷

The use of DNA testing to confirm familial relationships among refugees and their families has also come under criticism for being an imprecise measure of the relationship of some asylum seekers to their derivative family members.¹⁸ Though the Proposed Rule has been explained as a measure to help curtail “alien smuggling,” characterized as the false claiming of a child to gain access to a family detention center, this purpose does not justify such a broad incursion of privacy.

c. The Proposed Rule Offers No Checks to Avoid Discriminatory Collection

Though the rule generally “requires” DNA-sample collection from “non-U.S. persons” in U.S. custody, it allows exceptions for 1) those lawfully in, or being processed for lawful admission to, the United States; 2) those held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; 3) those held in connection with maritime interdiction; and 4) where the Secretary of DHS determines DNA samples are not feasible because of operational exigencies or resource limitations. In turn, the Proposed Rule essentially leaves the determination of who will be subjected to DNA collection and who will fall under an exception to line level DHS officers.

Custom and Border Protection’s (CBP) wide discretion to stop, question, and detain border travelers and residents has long led to wide-scale and improper detentions and searches.¹⁹ Enhanced DNA collection will only compound discrimination faced by people of color in the border regions. Not only will these populations remain subject to disproportionate stops and arrests, the Proposed Rule will require that their DNA be entered into databases where that sensitive information will remain indefinitely.

d. The Proposed Rule Creates a Potent Infrastructure that Can Enable Wide-Scale Governmental Genetic Discrimination

The Proposed Rule states that the “genetic fingerprints” collected under the new rule will be used to identify an individual, but will not disclose the individual’s traits, disorders, or dispositions arguably “not compromising the interest in genetic privacy.” The Proposed Rule is silent about how it would prevent data from being used in this manner, offering no specific checks, protections, or guidelines to protect genetic privacy.

¹⁷ J. Taitz, J.E.M. Weekers, and D.T. Mosca, *The Last Resort: Exploring the Use of DNA Testing for Family Reunification*, HEALTH AND HUMAN RIGHTS: AN INTERNATIONAL JOURNAL 6, no. 1, p. 20-32 (2002).

¹⁸ See Janice D. Villiers, *Brave New World: The Use and Potential Misuse of DNA Technology in Immigration Law*, 30 B.C. THIRD WORLD L.J. 239 (2010).

¹⁹ See Encarnacion Pyle, *Alleging profile, OSU students help sue Border Patrol*, THE COLUMBUS DISPATCH (Nov. 19, 2015), <https://www.dispatch.com/article/20141119/NEWS/311199571>; Fernando Santos, *Border Patrol Accused of Profiling and Abuse*, THE NEW YORK TIMES, (Oct. 14, 2015), <https://www.nytimes.com/2015/10/15/us/aclu-accuses-border-patrol-of-underreporting-civil-rights-complaints.html>; Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA, (June 8, 2018), <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania>; Kathleen Masterson, *Broad Jurisdiction of U.S. Border Patrol Raises Concerns About Racial Profiling*, VPR NEWS (Oct. 6, 2017), <https://www.vpr.org/post/broad-jurisdiction-us-border-patrol-raises-concerns-about-racial-profiling#stream/0/>.

This silence is troubling. The Administration’s recent “public charge” rule signals a desire to make it more difficult for those deemed unhealthy or weak to adjust to lawful status in the U.S.²⁰ The Administration also has attempted to require health insurance for those entering with immigrant status.²¹ Given these intentions, access to DNA information collected under the Proposed Rule – whether intended or unintended, authorized or unauthorized - could surely be susceptible to uses beyond simple identification, including use of this data to deny admission or receipt of benefits where the individual may have a disease, disability or propensity towards certain illnesses. Given the longevity of such DNA data, the future use of this information to serve discriminatory or otherwise illegitimate goals is endless. Building out a framework to require and store large-scale collection of this information leaves a powerful structure in place for future manipulation and use. In that regard, it is important to note that in the Netherlands, a population data system constructed years prior to World War II was later adapted to apprehend and deport Dutch Jews to concentration camps.²²

e. The Proposed Rule Escalates the Stigmatization of Immigrant Communities

The Proposed Rule claims that differences between criminal arrestees and immigration detainees with respect to DNA identification is “largely artificial” conflating those that have been historically subject to DNA identification - mostly those convicted of violent felonies - with immigrants detained by DHS for civil immigration violations. This rhetoric further stigmatizes and criminalizes immigrant communities, creating an air of suspicion around those who are themselves often fleeing violent crime. The mere fact of entry at the US/Mexico border is not a predictor of criminal behavior or activity and should not be a basis for singling out this population for DNA collection.

III. WIDESCALE DNA COLLECTION COMPROMISES THE PRIVACY AND SAFETY OF VULNERABLE IMMIGRANT POPULATIONS

The City Bar further opposes the rule because it has a racially disparate impact on non-white migrants, infringes the privacy rights of vulnerable populations including children, and, in application, will likely sweep lawful permanent residents and U.S. citizens into its dragnet.

²⁰ See INA § 212 (a)(4)(B).

²¹ *Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System*, (Oct. 4, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/>

²² O’Doherty KC, Christofides E, Yen J, et al. *If you build it, they will come: unintended uses of organized health data collections*, BMC Med. Ethics. 17:54 (September 6, 2016) citing W. Seltzer & M. Anderson, *The dark side of numbers: the role of population data systems in human rights abuses*, Soc. Res. 2001, 68(2): 481-513.

a. People of Color Would be Disproportionately Impacted by Expanded DNA Collection

Expansion of DNA collection as a criminal justice strategy has been criticized for racially disparate application.²³ In the same way that racial disparities exist in the rates of those arrested for suspicion of committing crimes, so too is there a disparity in DNA collected at the time of arrest.²⁴ CODIS already disproportionately impacts African-Americans, who make up 40% of individuals with DNA information stored in the database.²⁵ Due to their large representation in the database, researchers at Duke University's Center for Ethics, Law and Policy found that it is possible to identify up to 17% of the nation's African American population through CODIS.²⁶

The Proposed Rule would have a similarly disparate result. Black immigrants already make up a disproportionate number of those facing deportation on criminal grounds.²⁷ The Proposed Rule would exacerbate the racial disparity in rates of DNA collection by targeting immigrants arriving at the southern border. The Pew Research Center recently reported that in fiscal year 2019, 71% of all apprehensions at the US/Mexico border were of immigrants from the Northern Triangle nations – El Salvador, Guatemala, and Honduras.²⁸ The inevitable result of the proposed DNA collection policy is to increase the number of Latino migrants included in CODIS, while leaving immigrants arriving from Europe and other countries, and by air, largely untouched by this expanded DNA collection.

b. DNA Collection from Asylum Seekers Violates Domestic and International Law

Collection of DNA from asylum seekers at the border also raises concerns about informed consent, privacy and anti-discrimination guaranteed by domestic laws and international human rights instruments. Both the 1951 Refugee Convention, on which the Refugee Act of 1980 is based, and the 1967 Protocol Relating to the Status of Refugees, which the Senate ratified with limited reservations, reflect the principle that the human rights of refugees should be protected in full.²⁹ Similarly, United States Citizenship and Immigration Services' (USCIS) own regulations protect

²³ Jennifer Wagner, *DNA, Disparities, and Biases in Criminal Justice: Searching for Solutions*, 27 ALB. L.J. SCI. & TECH. 2 (2017).

²⁴ See *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that Maryland's state law expanding DNA collection to those arrested but not convicted was constitutionally permissible); See also data and reports collected by The Sentencing Project, available at <https://www.sentencingproject.org/issues/racial-disparity/>.

²⁵ Jason Silverstein, *The Dark Side of DNA Evidence*, THE NATION (Mar. 27, 2013), <https://www.thenation.com/article/dark-side-dna-evidence/>.

²⁶ *Id.*

²⁷ Juliana Morgan-Trostle & Kexin Zheng, *The State of Black Immigrations, Part II: Black Immigrants in the Mass Criminalization System*, NYU School of Law Immigrant Rights Clinic, <http://stateofblackimmigrants.com/wp-content/uploads/2018/09/sobi-fullreport-jan22.pdf>.

²⁸ John Gramlich and Luis Noe-Bustamante, *What's Happening at the US-Mexico Border in 5 Charts*, Pew Research Center, (Nov. 1, 2019), <https://www.pewresearch.org/fact-tank/2019/11/01/whats-happening-at-the-u-s-mexico-border-in-5-charts/>.

²⁹ Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 6261, 189 U. N.T.S. 150, 152 (entered into force Apr. 22, 1952).

the confidentiality of asylum applicants.³⁰ 8 CFR §208.6 prohibits the disclosure of information “contained in or pertaining to asylum applications, credible fear determinations, and reasonable fear determinations.”

The purpose of such prohibition is to prevent retaliation against the migrant by “government authorities or non-state actors.”³¹ The Proposed Rule does not provide sufficient safeguards to protect the identity of asylum seekers once their data is included in CODIS. Nor does it establish a process for obtaining informed consent for the release of such information from the asylum seeker, or a basis for waiving these protections by the Secretary of DHS. Inclusion of migrants fleeing persecution in CODIS upon their apprehension by CBP would signal to anyone, or any government, with access (or granted access) that they were asylum seekers.³² The regulation cited here does not distinguish between asylum applicants and those who were granted relief. All are entitled to confidentiality protections that would be breached by inclusion of their DNA into CODIS.

c. DNA Collection from Crime Victims and Domestic Violence Survivors May Compromise Their Safety and Confidentiality

Asylum seekers at the border have increasingly included women and children fleeing violence from intimate partners and family members along with other human rights violators that their governments are unwilling or incapable of controlling. The Proposed Rule does not contain safeguards that would protect crime victims from the fallibility of the DNA collection methods or maintenance. For example, the collection of DNA intended to dispel fraud or locate criminals may also be used to link abusers and their victims, which would only increase the danger to them.³³ It is also foreseeable that the innocent victims of unspeakable harm are forever linked to their abuses by familial matches in CODIS, thus compounding their trauma and enveloping them in an unnecessary cloud of suspicion for the rest of their lives.

³⁰USCIS Fact Sheet: *Federal Regulation Protecting the Confidentiality of Asylum Applicants*, USCIS Asylum Div., (Oct. 18, 2012), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Asylum-ConfidentialityFactSheet.pdf>.

³¹ *Id.*

³² FBI policies state that access to CODIS is restricted to “criminal justice agencies” for “law enforcement identification purposes,” making it plausible that DNA information could be shared with foreign law enforcement agencies, including governments from which one may be fleeing. *See* “Frequently Asked Questions on CODIS and NDIS,” FBI.Gov, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

³³ For example, when a DNA sample is run through CODIS through Familial DNA Searching it may reveal a ranking of those who are close biological relatives, i.e. parent, child, spouse. Through this matching, those who are survivors of abuse from family members may be especially vulnerable to identification by their abuser who may be entitled to analysis of samples collected in the course of their criminal case. *See* Sara Debus-Sherill and Michael B. Field, *Understanding Familial DNA Searching: Policies, Procedures, and Potential Impact*, ICF, (June 2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/251043.pdf>.

d. Legal Permanent Residents and Citizens Would Inevitably Be Impacted by Intrusive DNA Collection

The Proposed Rule will inevitably subject lawful permanent residents or U.S. citizens subject to DNA collection without their consent. Although the rule explicitly exempts lawful permanent residents or US citizens who have not been arrested, it is undisputed that people in those categories have been detained by Immigration and Customs Enforcement (ICE) and subject to the same conditions as undocumented immigrants.³⁴ The Proposed Rule contains no safeguards to ensure that DNA is not being collected from US citizens, who have thus far been protected from such incursions to their privacy. For them, the DNA collection would amount to a suspicion-less search that gives rise to Constitutional concerns.

e. The Proposed Rule Provides for No Means of Information Sharing Which Especially Impacts Minors, Those with Compromised Mental Competency and Those without Sufficient English Language Capabilities

The Proposed Rule offers no guidance as to whether those subject to the broad rule will be given any information on the DNA collection. Further, even if any explanation is offered, there is no mention of how this will be provided to those with compromised mental competency, to those whose native language is not English, and/or to minors.

IV. THE PROPOSED RULE IS INEFFICIENT AND COSTLY, AND INCREASES DELAYS IN AN ALREADY BACKLOGGED IMMIGRATION SYSTEM

a. Border Patrol Agents are Not Trained on DNA Collection Measures

CBP is not prepared or qualified to collect DNA. Brian Hastings, Chief of CBP's law enforcement directorate, warned against expanding DNA collection at the border, noting that, "Border Patrol Agents are not currently trained on DNA collection measures, health and safety precautions, or the appropriate handling of DNA samples for processing."³⁵ The Proposed Rule fails to note what equipment, support, and procedures will be put in place to provide CBP officers with competent training. The Proposed Rule is also silent on what procedures will be put in place to update training and equipment as technological advances are made.

b. Wide-Scale DNA Collection Would Strain the Resources of an Already Back-Logged Agency to Collect Data that is Often Unused and Error-Prone

The Proposed Rule will undermine law enforcement by contributing to massive laboratory backlogs for DNA testing. Despite funneling \$1 billion dollars to reduce DNA backlogs, in March 2019 the GAO reported that the number of backlogged cases for DNA analysis at state and local

³⁴ Paige St. John & Joel Rubin, *Must reads: ICE Held an American Man in Custody for 1,237 days. He's Not The Only One Who's Had to Prove His Citizenship*, LOS ANGELES TIMES, (Apr. 27, 2018), <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htm1story.html>.

³⁵ See *Trump plans huge expansion of DNA collection from migrants at US-Mexico border*, THE INDEPENDENT (Oct. 3, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/trump-us-border-migrant-dna-collection-fbi-database-expand-a9133606.html>.

government labs has increased by 85 percent from 2011 through 2017.³⁶ Expansion in DNA collection has already overwhelmed the DOJ so much that officials have stated that eliminating the backlog is unachievable in the foreseeable future.³⁷ Expanding DNA databases to include more categories of individuals would clearly exacerbate this problem.

The GAO report also flags a growing body of unsubmitted DNA which, though collected, remains stockpiled and unused. The report describes situations where fingerprints were instead used to verify identities, diminishing the need for DNA data in the first place. Further, limited lab capacity, over-collected DNA evidence that is later deemed unnecessary, and lack of consent from sexual assault victims who underwent exams, has led to the stockpiling of unused DNA data.³⁸ The GAO's observations about the stockpiling of DNA information that is never used and lacks value argues against further expansion of DNA collection.

c. Taxpayers Will Pay for an Exorbitantly Expensive Program with No Stated Benefit

DOJ estimates the price of collecting DNA samples to be over \$13 million for the first three years. The Proposed Rule, however, is silent about the costs involved in transporting, tracking, analyzing and storing the samples.

The Proposed Rule provides estimates of the number of additional work hours that will be required by CBP employees in order to carry out enhanced DNA collection, as well as additional compensation costs, but without much supporting detail. For instance, the Proposed Rule notes that DHS would require 20,778 additional work hours in the first year, 41,556 hours in the second year, and 62,333 hours in the third year to collect the samples. Nowhere in the rule is there an explanation of how DOJ determined that it would take 124,667 hours of work in the first three years to collect DNA samples. Similarly, the Proposed Rule notes that compensation to CBP employees for DNA collection would be \$4,600,000 in the first three years which indicates that CBP employees would be compensated on average approximately \$36.89 per hour for the DNA collection but does not provide an explanation of how DOJ determined the compensation. The rule is also silent on how many CBP employees will be responsible for the DNA collection or whether new employees will be hired solely for the purpose of the DNA collection.

The estimates provided in the Proposed Rule appear to cover only baseline costs of DNA collection. DOJ estimates the per-kit cost to be \$5.38 but provides no information on the actual cost of DNA testing. DHS has found that DNA testing by traditional forensic laboratories typically costs around \$500 per sample.³⁹ As the Proposed Rule only indicates the cost for DNA collection, the \$13 million estimated does not reflect the costs for analysis, indefinite storage, and upkeep

³⁶ Gov't Accountability Office, *DNA Evidence: DOJ Should Improve Performance Measurement and Properly Design Controls for National Grant Program*, March 21, 2019, <https://www.gao.gov/assets/700/697768.pdf>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Department of Homeland Security, *Bringing a New Biometric Capability to Verify Families Separated by Crisis* (Oct. 20, 2015), <https://www.dhs.gov/science-and-technology/rapid-dna>.

(such as the purchase of additional equipment), indicating that the actual cost of implementing the Proposed Rule will be well over \$13 million.

V. CONCLUSION

The Proposed Rule is an unprecedented expansion of current DNA collection policies, expanding DNA testing as a tool for mass surveillance without any law enforcement purpose. DHS submitted nearly 7,000 DNA samples in FY2018. Under the Proposed Rule, DHS would be expected to submit an additional 748,000 samples annually, increasing the population subject to this rule exponentially.⁴⁰

The Proposed Rule remains dangerously deficient in describing what populations would be subject to required DNA collection, leaving immense discretion in the hands of line DHS officers to gather a plethora of familial, health and ancestry information without the consent, or even knowledge, of immigrants they interact with. The Proposed Rule offers no clear justification for such an expansion that is not already met by the many biometrics programs the government has in place that capture every single visiting and immigrating individual and those in U.S. custody.

Finally, with the promulgation of this Proposed Rule the Department is constructing a dangerous infrastructure that may be used to monitor, deny and deport immigrant populations in scenarios not involving any criminal activity, irreversibly allowing for wide-scale surveillance of immigrants, visitors, and potentially Americans without their consent.

For these reasons, the City Bar opposes the Proposed Rule and urges its withdrawal.

Respectfully,



Victoria F. Neilson, Chair
Immigration & Nationality Law Committee

⁴⁰ DNA-Sample Collection From Immigration Detainees, 84 Federal Register 204 (Oct. 22, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-22877.pdf>.