AMA
AMERICAN MEDICAL ASSOCIATION

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The Honorable Chad Wolf
Acting Secretary
U.S. Department of Homeland Security
2707 Martin L. King Avenue, SE
Washington, DC 20528

Re: Opposition to U.S. Citizenship and Immigration Services, Department of Homeland Security RIN 1615-AC14 or CIS No. 2644-19: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

Dear Acting Secretary Wolf:

On behalf of the physician and medical student members of the American Medical Association (AMA), I welcome the opportunity to provide comment on the U.S. Department of Homeland Security's (DHS) proposed rule concerning the Collection and Use of Biometrics by U.S. Citizenship and Immigration Services (USCIS). The AMA urges DHS not to expand the use of DNA sample collection as it undermines fundamental and long-standing accepted ethical conventions related to patient privacy and consent when the federal government collects health information absent a compelling public health or public safety need. As such, the AMA urges DHS to withdraw the proposed rule in its entirety. We address a few of the more pertinent health, ethical, and social equity-related issues below.

<u>DHS does not have the capability to collect and process DNA at the appropriate scientific level to ensure evidence-based standards of accuracy are met throughout the immigration process.</u>

In the proposed rule, DHS asks for flexibility to change its biometrics collection practices and policies in order to require and store DNA test results from individuals going through the immigration process. These new requirements would include a partial DNA profile, to prove the existence of a claimed genetic relationship. Although DHS reports that there are internal procedural safeguards to ensure the technology used to collect, assess, and store the differing modalities is accurate, reliable, and valid, the agency does not explicitly discuss the procedures to ensure that DHS' practices meet evidence-based standards akin to those completed at medical and genetic research facilities.

DNA is the genetic information that a person carries throughout life and is the biological element responsible for determining our identity. For an individual, DNA is also inherently identifying. In fact, genetic data cannot be de-identified. The AMA has had significant involvement in policy and clinical discussions concerning the quality and accuracy of genetic testing over the past decade. While the AMA strongly supports the quality of such testing where health care professionals are extensively trained and have established protocols for the collection of specimens, the performance of tests, and returning results (including identifying the limitations of the testing), **we have strong concerns where DNA collection, testing, and return of results are not undertaken by trained health care professionals under the Centers for Disease Control and Prevention (CDC) Clinical Laboratory Improvement Amendments**

(CLIA-like) rigorous protocols. This is because errors (including contamination, incorrect procedures, and misinterpretation) undermine the quality and accuracy of the DNA testing and if inappropriately performed under the current proposed rule, could have disastrous consequence for those seeking to immigrate and their families.

To authenticate identifiable biological evidence, those who are responsible for managing thisprocess must be carefully trained in the handling and collection of samples. The vulnerable biometric samples are extremely susceptibleto contamination; thus, the quality andusability of the specimen will be lost with exposure to even miniscule amounts of DNA from others than the applicant. Such contamination may occur if multiple samples are handled at one time or if the handler touches a non-sterile surface while in possession of the DNA specimen. To appropriately analyze the collected samples, a polymerase chain reaction (PCR) process is performed. The PCR process will copy the DNA that is present within the specimen including the impurity. Therefore, there is no ability to distinguish between the DNA of the person of interest and the DNA of the contaminant. In addition, these biometric samples are highly sensitive to environmental factors.[1] Introduction of moisture, sunlight, or narrow temperature changes, factors that are easily overlooked and underestimated, also destroy the integrity of the DNA specimen.[2] Sample quality and meticulous conservation of the procedures required for biometric data analysis determines accuracy and usability of DNA evidence for immigration purposes.

Therefore, to accomplish the evidence-based, high-quality biometric system for immigration processing implied within the proposed rule, it would be necessary for all operations related to handling of the biometric data including sample collection, analyzation, transportation, storage, and data interpretation to be performed by highly trained medical or laboratory personnel at all DHS or other biometric processing facilities. It is very unlikely that immigration officers and general DHS/U.S. Department of State (DOS) staff have the training or education to perform such stringent measures, further increasing the likelihood that contamination or mixing of specimens may occur. The AMA has serious concerns regarding the capability of DHS, U.S. Customs and Border Protection (CBP), and DOS to ensure such critical provisions are implemented. Missteps in managing specimens or data analysis would not only substantially raise the cost of operation but would likely contribute to a greater backlog in immigration processing which has already become unmanageable. Thus, with DHS' assumption of infallibility of DNA sampling, errors in this process could lead to an applicant's unfair denial, slowing of the application process, and ultimately incorporating an incorrect DNA profile into a multitude of genetic data banks, further putting the individual and their families at risk for undue harm.

Moreover, the AMA is highly concerned that DHS and DOS facilities do not have the safeguards or capability to effectively manage the responsibilities surrounding the entirety of the collection, processing, and storage of DNA. Despite a multitude of audits by the U.S. Government Accountability Office (GAO), CBP continues to fail to appropriately use biometric technologies, such as facial recognition software, and has continually been found deficient by the GAO in ensuring appropriate security measure for data privacy and in achieving the required performance threshold. For example, shortly before the release of this proposed rule, the GAO published an audit highlighting critical concerns related to DHS' current use of biometrics. This audit found that facial recognition technology used by DHS and CBP to identify foreign nationals at various ports of entry had significant issues related to DHS'

[1] https://www.nist.gov/system/files/documents/2019/08/19/standards_for_prevention_monitoring_and_mitigation_of_dna_contamination_draft.pdf.
[2] https://www.ncjrs.gov/nij/DNAbro/evi.html.

conduct and maintenance of privacy standards.[3] With such persistent issues present within current DHS biometric practices, the addition of an even more intimate, intricate, and precise system such as DNA identification would be exceedingly ill-advised and unethical. The misuse of DNA has much more serious and far reaching consequences especially for those individuals going through the immigration process. Since DHS has proven that they cannot appropriately handle facial recognition technology they certainly should not be given access to hundreds of thousands of individuals' DNA. **Due to concerns regarding DNA sample collection, processing, and scientific accuracy, the AMA opposes this proposed rule in its entirety**.

DHS' collection of DNA from children and VAWA petitioners is unethical and cannot be properly accomplished due to an inability to collect these samples with informed, non-coercive consent.

DHS is proposing to require Violence Against Women Act (VAWA) self petitioners and children regardless of age to submit biometric data including DNA. In particular, VAWA self- petitioners would have to appear for biometric collection, DHS would require the good moral character requirement for a VAWA self-petitioner to extend beyond the three years immediately before filing, and would remove the automatic presumption of good moral character for VAWA self-petitioners under 14 years of age. Moreover, DHS is also proposing to remove the age restrictions for biometric collection writ large, including those for Notice to Appear (NTA) issuances. Based on FY 2018 statistics, under the proposed rule DHS could collect biometrics from as many as 63,000 individuals under the age of 14 years old annually associated with NTAs.

Children

DHS has stated that one of its primary goals for collecting DNA from children is to detect child trafficking, forced labor exploitation, and alien smuggling. However, the notion that the collection of children's DNA is the only, or even the most effective, way to stop this offense overlooks many of the realities surrounding trafficking, exploitation, and smuggling. For example, trafficking and exploitation do not require movement across borders and a majority of the time is done by a family member or romantic partner.[4] As such, the notion that children are only safe with biological family members is misleading and the proposed rule would do nothing to mitigate this reality.[5] Additionally, collection of DNA does nothing to curtail the smuggling that happens through illegal border crossing.

Furthermore, there are already protections in place to protect immigrant children and curtail trafficking, exploitation, and smuggling. Parent–child relationships must be established by objective evidence, such as authenticated birth certificates or other legal documentation. When other evidence is unavailable, USCIS already accepts voluntary DNA test results from laboratories accredited by the AABB (formerly the American Association of Blood Banks) as proof of the existence of a claimed genetic relationship. As such, the option to have DNA evidence collected and submitted in the immigration process already exists for children, families, and VAWA petitioners when nothing else is accessible and when they need to prove familial relationships making the current proposed rule change completely unnecessary. Moreover, under current law, "in some limited circumstances, police can obtain DNA without a warrant, where they have probable cause to think that the evidence will yield evidence of a crime and exigent circumstances exist that make it impossible to procure a warrant. These traditional and well-established safeguards are

[3] https://www.gao.gov/assets/710/709107.pdf.
[4] https://www.savethechildren.org/us/charity-stories/child-trafficking-myths-vs-facts.
[5] https://www.tandfonline.com/doi/full/10.1080/15265161.2018.1556514.

sufficient to allow law enforcement to investigate crime without undermining individual rights."[6] As such, **the mandatory collection of DNA is not needed since alternative and optional methods already exist and border officials already carefully screen for false claims of parentage or guardianship.**[7]

Finally, DNA is a highly personal aspect of one's being and should never be obtained without "prior, free, informed and express consent, without inducement by financial or other personal gain should be obtained for the collection of human genetic data, human proteomic data or biological samples, whether through invasive or non-invasive procedures, and for their subsequent processing, use and storage, whether carried out by public or private institutions. Limitations on this principle of consent should only be prescribed for compelling reasons by domestic law consistent with the international law of human rights."[8] Considering that children cannot give informed consent and that their adult guardians will undoubtedly provide consent due to the personal gain of obtaining access to the immigration system, or even worse due to coercion surrounding reunification for parents and children; thus, immigrant children's DNA cannot ethically be required to be collected as part of the immigration process.

Violence Against Women Act

VAWA is an essential tool to combat domestic violence and sexual abuse and to provide a safe haven for survivors. Since these petitioners are especially vulnerable, they may have an increased aversion to being touched and may understandably find it extremely difficult to give up control of any aspect of their body including their DNA. As such, placing these women, not to mention the thousands of other vulnerable asylum seekers and children, into a position where they would have to choose to either remain in, or return to, an unsafe environment where their life is at stake or provide their DNA to DHS is a highly coercive decision. If these women choose to submit DNA evidence because they feel that it would ease their immigration application process, then they can do so at their own inclination. However, to require biometric samples for a chance of permanent residency leaves an unrealistic choice for these women who have already experienced immense physical and emotional trauma. Furthermore, there has been no adequate rationale given by DHA for extending the three-year moral character deadline or undoing the automatic presumption of good moral character for VAWA self-petitioners under 14 years of age. These proposed rule changes would increase the documentary burden that VAWA petitioners face and could potentially create a scenario where young girls who have been sexually and physically abused are forced to go above and beyond to justify their moral character and explain why they are trying to escape unimaginably horrible situations.

<u>DHS is proposing to unreasonably intrude on U.S. citizen sponsors' privacy by requiring DNA collection.</u>

DHS is proposing to require the collection of biometrics, including the collection of DNA, from any applicant, petitioner, sponsor, beneficiary, or individual who is filing or associated with an immigration benefit or request, including United States citizens. Moreover, DHS is proposing to allow for the use and storage of these DNA test results from U.S. citizens. The rule further proposes that a U.S. citizen may be required to submit biometrics if he or she filed an immigration application, petition, or request in the past and was either reopened or the previous approval is considered relevant to an application, petition, or benefit request currently pending with DHS. As such, DHS is proposing to allow the DNA test results of U.S. citizens, which include a partial DNA profile, to become part of the "immigration record." Once that

[6] https://www.aclu.org/other/aclu-comments-justice-department-regarding-collection-dna-under-dna-fingerprint-act-2005-and.
[7] *Id.*
[8] http://portal.unesco.org/en/ev.php-URL_ID=17720&URL_DO=DO_TOPIC&URL_SECTION=201.html.

happens, DHS will store and share U.S. citizen DNA test results, including a partial DNA profile, for adjudication purposes, or to perform any other functions necessary for administering and enforcing immigration and naturalization laws, to the undefined and undetermined "extent permitted by law."

U.S. citizens have rightly challenged the collection and the subsequent analysis and storage of DNA as unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution.[9] In general, government action is considered a search when it intrudes upon a person's "reasonable expectation of privacy."[10] A reasonable expectation of privacy requires both that an "individual manifested a subjective expectation of privacy in the searched object" and that "society is willing to recognize that expectation as reasonable."[11] For example, individuals do not legally have a reasonable expectation of privacy for things that are "knowingly expos[ed] to the public."[12] The Supreme Court has recognized knowing exposure to the public to include fingerprints, however the drawing of blood and other internal bodily fluids is acknowledged by the courts as something that is not knowingly exposed.[13] Moreover, courts have considered DNA more closely aligned to the drawing of blood and other internal bodily fluids, therefore acknowledging that DNA is not something that is knowingly exposed to the public. As such, the forcible taking of DNA constitutes a search and must be considered something to which the individual has a reasonable expectation of privacy.

Since it has been established that the collection of DNA is a search under the Fourth Amendment, the reasonableness of the collection of U.S. citizen DNA must be considered to determine the "touchstone" of the search's constitutionality.[14] In the case of administrative actions by the government, which is likely the standard that would apply for the collection of biometrics data for the processing of immigration applications by a federal agency, the courts have applied a "totality of-the circumstances" test to determine reasonableness "by assessing, on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[15] The U.S. district court in *Mitchell* viewed DNA collection as a significant invasion of privacy and found that though the government has a valid interest in identifying individuals. They can and should fulfill this interest with "a fingerprint and a photograph" rather than through the collection of DNA samples.[16] As such, the court was in effect saying that the collection of DNA unreasonably intruded on the privacy of the individual and since there were other methods which could be used to determine the identity of an individual that were far less intrusive, the right to privacy outweighed governmental interests.

Any entity seeking access to an individual's DNA must pass the stringent test of showing why its professed need should override the individual's most basic right in keeping his or her own information private. **DHS has failed to pass the Fourth Amendment test since it has far less intrusive means with which to fulfill its administrative duties and identify individuals such as fingerprints, pictures, and documentation. This viable alternative provides DHS with a method to track applicants and maintain the integrity of the immigration system without crossing into deeply intrusive searches of U.S. citizens' DNA.**

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[9] https://fas.org/sgp/crs/misc/R40077.pdf.
[10] *Id*.
[11] *Kyllo v. United States*, 533 U.S. 27, 34 (2001).
[12] *Katz v. United States*, 389 U.S. 347, 351 (1967).
[13] *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).
[14] *United States v. Knights*, 534 U.S. 112, 118 (2001).
[15] *Samson v. California*, 547 U.S. 843, 848 (2006).
[16] *United States v. Mitchell*, 2009 U.S. Dist. LEXIS 103575 (2009).

The AMA's approach to privacy is governed by our *Code of Medical Ethics* and long-standing policies adopted by our policymaking body, the House of Delegates, which support strong personal privacy protections. AMA policy and ethical opinions on privacy and confidentiality provide that an individual's privacy should be honored unless waived by the person in a meaningful way, is de-identified, or in rare instances when strong countervailing interests in public health or safety justify invasions of privacy or breaches of confidentiality. When breaches of confidentiality are compelled by concerns for public health and safety, these breaches must be as narrow in scope and content as possible, must contain the least identifiable and sensitive information possible, and must be disclosed to the fewest entities and individuals as possible to achieve the necessary end. However, the new proposed rule does not fall within this narrowly defined exception. Instead, this rule is amorphous in its reach and states that at a minimum U.S. citizen DNA profiles will be stored for an unspecified period of time and shared with, at a minimum, DOS, U.S. Department of Justice (DOJ), and the Federal Bureau of Investigation (FBI).

Finally, the way that this rule has been written creates a negative stigma around the immigration process and serving as a U.S. citizen sponsor. Since one of the only other areas of U.S. society where DNA collection is mandatory for citizens is when individuals are convicted of serious crimes, the rule connotates that immigrant sponsors are on equal footing with convicted criminals.[17] However, the choice of whether or not to sponsor an immigrant family member or submit to an unreasonable search of their own bodies is a false one. If this proposed rule is implemented U.S. citizens will be placed in an impossible situation, submit to the most intimate and invasive of searches and provide DNA biometric data, or lose the opportunity to be reunited with children, siblings, parents and other family members. As such, the choice of whether to help immigrant family members apply for U.S. citizenship is coercive and not a true, independent choice.

DHS' proposed collection of DNA and biometric data raises multiple privacy concerns and lends itself to data breaches.

Within the proposed rule by DHS, in an attempt to reduce privacy concerns, the agency reports that "under Section 1367 of Title 8 of the U.S. Code, all DHS officers and employees are generally prohibited from permitting use by or disclosure to anyone other than a sworn officer or employee of DHS, DOS, or DOJ of any information relating to a beneficiary of a pending or approved request for certain immigration benefits." Although these federal agencies collaborate on certain efforts, each individual agency functions autonomously with independent roles, responsibilities, and jurisdiction. The lack of definitive standards for divulging sensitive, personal genetic information between agencies is highly concerning. Without explicit stipulations and heightened safeguards in place, which have not been indicated within this proposed rule, it is unclear which agencies will be able to obtain biometric information and under what circumstances this information will be used.

Health care information, including genomic information, is one of the most personal types of information an individual can possess and generate. While the DHS states its intent to use the collected DNA samples to confirm identification of individuals entering the immigration system, it fails to consider the potential downstream consequences of the mass collection of genetic information, particularly for individuals who most often have committed no previous crime. Such consequences may include re-identification of individuals through de-identified (or partially de-identified) data, embarrassment or stigma resulting from an unwanted disclosure of information or from fear of a potential unwanted disclosure, perceived and real

[17] https://fas.org/sgp/crs/misc/R40077.pdf.

risks of discrimination including future employment and loss of access to or increased costs of insurance, and law enforcement accessing data repositories beyond their intended scope.

Consequently, there remains apprehension surrounding how DHS plans to utilize the biometric data collected from those entering the immigration system. According to the proposed rule, although the primary purpose for DNA collection would be for identification management purposes, DHS may utilize this data for adjudication purposes, or to perform any other functions necessary for administering and enforcing immigration and naturalization laws. This statement in itself asserts broad authority over the use of private genetic information for reasons that the participant may be unaware of. Creation of a general biometric database introduces the risk of inadvertent privacy infringement and severe unintended consequences. Following naturalization of the applicant the collected DNA data does not disappear from the data base. Once an individual's DNA is stored within these federal directories such as the FBI Combined DNA Index System/National DNA Index System (CODIS/NDIS),[18] law enforcement at any level of government with a general criminal investigative interest may access these records without any consent, suspicion, or warrant, long after the finalization of the immigration process.[19] Therefore, "a biometric system that does not internally link an individual's biometric data with other identifying information may fail to preserve anonymity if it were to be linked using biometric data to another system that does connect biometric data to identity data. This means that even a well-designed biometric system with significant privacy and security protections may still compromise privacy when considered in a larger context."[20]

Additionally, DHS proposes to collect biometric data from "all family-based petitioners, which would allow DHS to review an FBI report of the petitioner's criminal history. The DNA collection requirement would extend to family-based petitions for a spouse, fiancé(e), parent, unmarried child under 21 years of age, unmarried son or daughter 21 years of age or over, married son or daughter of any age, sibling, and any derivative beneficiary immigrant or nonimmigrant visa based on a familial relationship." Within the proposed rule, DHS asserts that it intends to modernize the technological capabilities in order to facilitate sharing and comparing of biometric data with the FBI, foreign governments, and additional federal agencies. Currently, the FBI stores unique DNA profiles in a national distributive database operated by the FBI/Criminal Justice Information Services Division (CJIS). The biometric database is accessible to those included in law enforcement, U.S. Department of Defense, DHS, and the U.S. Department of Justice. According to the prospective rule, DHS components are authorized to share relevant information with law enforcement or other DHS components and, consequently, it may share DNA test results, which include a partial DNA profile, with other agencies when there are national security, public safety, fraud, or other investigative needs. This objective intensifies concerns that intimate personal information may be used for purposes that the subject did not consent to, potentially leading to disenfranchisement.[21]

Furthermore, **adequate privacy protections are not in place to protect the vulnerable biometric data handled by DHS and its counterparts.** In 2019, a report from the DHS Office of Inspector General (OIG) found that biometric data of US citizens including photos of faces and license plates from CBP's facial recognition technology had been compromised and the information of over 100,000 individuals was hacked.[22] The limited privacy protection infrastructure demonstrates that DHS has insufficient safeguards

[18] https://www.dhs.gov/publication/dhsallpia-080-cbp-and-ice-dna-collection.
[19] https://fas.org/sgp/crs/misc/R40077.pdf.
[20] https://www.ncbi.nlm.nih.gov/books/NBK219893/.
[21] https://fas.org/sgp/crs/misc/R40077.pdf.
[22] https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf.

in place to prevent sensitive materials, such as identifiable DNA data, from being exploited for malicious purposes. DHS claims that they will be accessing only a partial DNA profile containing a "very small portion of an individual's full DNA characteristics" which would not hold any information regarding potential health or heritable conditions. However, as new scientific discoveries regarding health conditions linked to DNA composition arise, information that is considered de-identified at the present could be found to have critical biological significance in the future. Without specific guidelines on the exact number of genomic regions used for analysis, there is potential for misuse and discovery of sensitive genetic health information.

We appreciate the opportunity to comment and urge the Administration to prioritize supporting and protecting the health and well-being of immigrants and their U.S. citizen sponsors by withdrawing the Proposed Rule in its entirety. We welcome the opportunity to share our views further. If you have any questions, please contact Margaret Garikes, Vice President for Federal Affairs, by calling 202-789-7409 or margaret.garikes@ama-assn.org.

Sincerely,

James L. Madara, MD