November 12, 2019

Via Federal e-Rulemaking Portal

Attorney General William Barr
Attn: Regulations Docket Clerk
Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue NW
Room 4234
Washington, DC 20530

Re: Request for Comment on DNA-Sample Collection for Immigration Detainees
84 Fed. Reg. 56397 (October 22, 2019)
Docket No. DOJ-OAG-2019-0004

Dear Attorney General Barr,

Brooklyn Defender Services ("BDS") submits these comments in opposition to the Department of Justice ("DOJ") Proposed Rule on DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. 56397, issued on October 22, 2019 (hereinafter, "Proposed Rule"), Docket No. DOJ-OAG-2019-0004.

BDS is a full-service public defender organization in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 30,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system. About a quarter of BDS's criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore risk losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project ("NYIFUP") providers and has represented more than 1,400 people in detained deportation proceedings since the inception of the program in 2013. BDS's immigration practice also represents people in applications for immigration relief, adjustment of

status, and naturalization before the United States Citizenship and Immigration Services ("USCIS"), and in non-detained removal proceedings in New York's immigration courts.

As set forth below, BDS strongly opposes the Proposed Rule that dramatically expands the reach of the federal DNA collection system and, in doing so, takes another step towards mass surveillance that threatens to subject everyone in the United States to DNA testing. By targeting the most marginalized people in the country, the Proposed Rule criminalizes the very notion of an immigrant. Even more troubling, the Proposed Rule disregards constitutionally-mandated due process guarantees and undermines public safety. Moreover, while these effects would be felt across racial, religious, ethnic, and immigration status lines, they would disproportionately impact vulnerable populations. In the face of these near-certain harms, the Proposed Rule serves no legitimate governmental purpose and represents a slippery slope towards a true surveillance state.[1]

In order to prevent these immediate and far-reaching impacts, BDS asks that DOJ immediately halt implementation of the Proposed Rule.

1. Background

The Proposed Rule seeks, for the first time, to mandate blanket DNA collection from civil immigration detainees in Department of Homeland Security ("DHS") custody by revising regulations that specifically treat immigration detainees differently than criminal detainees. The Proposed Rule fails to account for the reasons behind this well-reasoned distinction.

Authorized in 1994, the National DNA Index ("NDIS") was specifically established to capture DNA samples from 1) individuals convicted of crimes; 2) crime scenes; and 3) unidentified human remains.[2] When Congress expanded the scope of information that could be entered into the database by adopting the DNA Fingerprint Act of 2005, the intent remained focused on violent crime. *See, e.g.*, 151 Cong. Rec.

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[1] Justice Scalia warned about this erosion of privacy and civil liberties in *Maryland v. King*, which the Proposed Rule relies upon heavily. "Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason. . . . Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane . . . , applies for a driver's license, or attends a public school. . . . I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." 569 U.S. 435, 481-82 (2013) (Scalia, J., dissenting).

[2] DNA Identification Act of 1994, Pub. L No. 103-322(XXI)(C)(§ 210304). The NDIS is part of the federal Combined DNA Index System ("CODIS"). *See* FBI, Frequently Asked Questions on CODIS and NDIS, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet.

S.13756 (Dec. 16, 2005) (quoting Senator Jon Kyl, a chief sponsor of the DNA Fingerprint Act, who argued that the legislation was necessary to "remov[e] current barriers to maintaining data from *criminal* arrestees") (emphasis added).[3] The legislation authorized the Attorney General to collect DNA from criminal arrestees and certain other people in federal custody[4] and maintain it in the federal database intended to link serial violent crimes.[5] When promulgating regulations, then Attorney-General Michael Mukasey *required* all federal agencies *other than* DHS to collect DNA from all arrestees and people in federal custody. 28 C.F.R. § 28.12. Moreover, the regulations specifically excluded certain classes of non-citizens from the DNA collection, and largely deferred to the Secretary of Homeland Security to determine whether collection was feasible in light of operational exigencies and resource limitations. *Id.*[6]

After assessing the feasibility of any collection, the Secretary of Homeland Security determined that it would "pose[] severe organizational, resource, and financial challenges for this Department."[7] Specifically, the Secretary determined that the broad collections, which the Proposed Rule now effectively requires, would "divert critical resources," "further exacerbate the challenging resource limitations this Department already faces in conducting its mission," and "require diverting already limited U.S. Immigration and Customs Enforcement (ICE) resources, thus decreasing DHS's ability to deal with law enforcement matters with a nexus to the border."[8]

To date, DHS has not routinely collected DNA samples pursuant to the DNA Fingerprint Act from immigrants who are in DHS custody in conjunction with civil immigration proceedings. The Proposed Rule now seeks to eliminate the most significant regulatory carve-out to mandatory DNA collection and require DHS to collect DNA samples from nearly all people detained in its custody.[9]

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[3] The DNA Fingerprint Act was ultimately folded into the Department of Justice Appropriations Authorization bill. *See generally* Pub. L. 109-162.

[4] DNA Fingerprint Act of 2005, Pub. L. No. 109-162(X).

[5] *See, e.g.*, Combined DNA Index System, https://www.fbi.gov/services/laboratory/biometric-analysis/codis (describing the Combined DNA Index System ("CODIS") as a "tool for linking violent crimes" by "linking serial violent crimes to each other and to known offenders").

[6] *See* 28 C.F.R. § 28.12(b) (excusing DHS from DNA collection if the Secretary of Homeland Security "determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations").

[7] Ltr. Sec. J. Napolitano to Attorney Gen. E. Holder, March 22, 2010, at 1, https://www.eff.org/files/filenode/ice_dna_3-22-10_napolitanoletter.pdf ("DHS Secretary Letter").

[8] *Id.* at 2.

[9] The Proposed Rule would eliminate 28 C.F.R. § 28.12(b)(4), the subsection of the Attorney General's regulations that allows the Secretary of Homeland Security to forgo DNA collection from individuals in its custody because of operational exigencies or resource limitations, and

2. The Underlying Purpose of the Proposed Rule Is To Vilify Immigrants

The Proposed Rule seeks to expand a criminal law enforcement database on the backs of the most vulnerable members of society. There are significant legal and practical differences between criminal arrestees and civil immigration detainees that are well established in U.S. law and history.[10] However, the Proposed Rule seeks to blur these lines and, in doing so, overlooks critical aspects of the U.S. immigration statutory and regulatory structure.[11] It is well-established that immigration proceedings are civil, that the Immigration and Nationality Act ("INA") is a civil code, and related detention for immigrants occurs without guaranteed access to counsel or "prompt judicial determination of probable cause."[12] These harms are even further exacerbated for recent arrivals and asylum seekers, who may be detained by DHS regardless of any flight or danger assessment. Moreover, unlike people who are incarcerated in connection with a criminal offense, people detained pursuant to the INA are not guaranteed the Sixth Amendment's robust due process protections, or a fulsome judicial review of challenges to due process violations.[13] The Proposed Rule aims to skirt clearly-established constitutional requirements by targeting civil detainees, and fails to recognize that

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thus effectively roll back the DHS Secretary Letter. Because 28 C.F.R. § 28.12(b) requires, subject to a few limited exceptions, federal agencies to "collect DNA samples from individuals . . . who are detained under the authority of the United States" in criminal or immigration detention, DHS would be required to collect DNA samples from nearly everyone in its custody.

[10] *See generally* U.S. Const. amend. XI; *see, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (noting that civil immigration detention is warranted only to prevent flight or danger to the community, but noting that the second justification requires strong procedural protections and a finding that someone is "specially dangerous"); *id.* at 724-25 (2001) (Scalia, J. & Thomas, J., dissenting) ("Given the undeniable deprivation of liberty caused by [civil immigration] detention, there might be substantial questions concerning the severity necessary for there to be a community risk.").

[11] *See generally* Proposed Rule (describing the distinction between treatment of criminal arrestees and immigration detainees as "largely artificial," alleging that "most immigration detainees are held on the basis of conduct that is itself criminal," asserting that immigrants who lack legal status "have likely committed crimes," and saying that the "practical difference" between the two groups "has been further eroded through policies").

[12] *Riverside v. McLaughlin*, 500 U.S. 44 (1991) (requiring judicial determination of probable cause within 48 hours of criminal arrest without a warrant in order to justify continued criminal detention); *see also Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest [in conjunction with a criminal offense].").

[13] *See generally* 8 U.S.C. § 1252.

expansive DNA collection, without adequate justification or due process protection, likely violates the constitution and causes substantial harm to individuals and society as a whole.

Under this Administration, a record-breaking number of people are held by DHS in immigration detention.[14] Thousands of these individuals, who would be impacted by the Proposed Rule, have never been charged with or committed a crime or even encountered the criminal justice system. By downplaying this distinction and presenting it as nothing more than meaningless detail,[15] the Proposed Rule criminalizes immigrant communities in order to stigmatize and marginalize them further, while continuing to withhold any basic civil rights or constitutional protection.

For instance, the Proposed Rule would mandate collection of DNA from many people fleeing persecution who arrive in the United States seeking refuge. This could include asylum seekers who the United States government has already determined have a credible fear of persecution if returned to their native countries. As initial arrivals to the United States, these people would not be viable candidates for suspicion in *any* criminal investigation that preceded their arrival and immediate detention. Logically, there could be no "crime solving" value of any collection from this group. Across the board, the impact of this expanded collection would be felt most acutely by people of color who, as is the case with many other aspects of the criminal justice system, are overrepresented in the national DNA database already.[16]

The Proposed Rule will likely impact even people who are allegedly outside its reach. For instance, we know that U.S. citizens have been erroneously put into deportation proceedings, detained, and even deported.[17] These individuals—who are never properly in DHS custody—would be subject to DNA collection under the Proposed Rule. Relatedly, although the regulations purport to exclude lawful permanent residents

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[14] *See, e.g.*, Isabela Dias, ICE is Detaining More People than Ever—and for Longer, Pacific Standard, Aug. 1, 2019, https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer (noting that 55,185 people in ICE custody as of August 1, 2019 represented an all-time high); Emily Kassie, Detained, The Guardian, Sept. 24, 2019, https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump (showing that the average daily population in U.S. immigration detention centers has nearly doubled since 2010, and grown more than twentyfold since 1979).

[15] *See supra* note 11.

[16] Erin E. Murphy & Jun Tong, *The Racial Composition of Forensic DNA Databases*, 108 Cal. L. Rev. __ (2019) (forthcoming), https://dx.doi.org/10.2139/ssrn.3477974.

[17] *Cf. Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018) (a U.S. citizen since birth was civilly detained in immigration detention for years while appealing his immigration case up to the Second Circuit Court of Appeals, who confirmed he indeed was a U.S. citizen and ordered his release); *Watson v. United States*, 865 F.3d 123, 136 (2d Cir. 2017) (Katzmann, J., concurring) (detailing a 1,273-day detention of a U.S. citizen who "did everything possible to assert his citizenship in the face of colossal government failure").

("LPRs") in DHS custody from collection,[18] the Proposed Rule fails to provide any safeguards to ensure DHS does not inadvertently capture DNA from LPRs.[19] Once DNA is collected from those individuals—even if they should have been excluded initially—there is no clear or accessible process for expunging their DNA.

Indeed, the Proposed Rule exacerbates the harms that then-Democratic Senate Leader Harry Reid foreshadowed during debate on the DNA Fingerprint Act of 2005. He predicted that "authorizing the collection of DNA evidence without probable cause is an invitation to racial profiling, infringes on privacy rights, and may well be unconstitutional." 151 Cong. Rec. S.11054 (daily ed. Oct. 4, 2005).

Rather than serving the goal of the federal DNA database, and related DNA collection, to target and prevent violent crime,[20] the Proposed Rule would commit millions of dollars to collecting and analyzing DNA samples from people who there is no basis to believe have ever—or will ever—commit a violent crime. While characterizing immigrants as dangerous criminals may be convenient for political rhetoric, it is wholly inaccurate.[21] Contrary to the baseless allegations in the Proposed Rule, there is simply no correlation between immigration status and propensity to commit violent crimes.[22] Casting such an overly broad net is contrary to the principles underlying our Constitution and the values on which the American dream was built.

3. The Proposed Rule Undermines Public Safety and Violates Privacy

Once considered a panacea in criminal investigations, more recent scientific advancements have demonstrated the danger of relying too heavily on DNA. While science and experience have demonstrated the inherent flaws in forensic DNA, parallel

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[18] *See* 28 C.F.R. § 28.12(b) and (b)(1).

[19] Similarly, because the Proposed Rule is vague and overbroad, and does not provide any mechanisms for it may result in DNA collection from children who are in DHS detention with their parent.

[20] *See, e.g.*, Combined DNA Index System, https://www.fbi.gov/services/laboratory/biometric-analysis/codis (describing the Combined DNA Index System ("CODIS") as a "tool for linking violent crimes" by "linking serial violent crimes to each other and to known offenders").

[21] *See, e.g.*, Anna Flagg, Is There a Connection Between Undocumented Immigrants and Crime? The Marshall Project, May 13, 2019, https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime (data analysis finding no correlation—or a negative correlation—between unauthorized immigration and crime); Myths and Facts About Immigrants and Immigration, ADL.org, https://www.adl.org/media/6950/download ("Studies have consistently found that . . . there is a negative correlation between levels of immigration and crime rates.").

[22] *Id.*

advancements have also revealed the science-fiction-level invasion of privacy that results from our ability to manipulate DNA.

> In a sense, a person's DNA represents the intersection between the physical and emotional selves. DNA is, of course, the physical embodiment of a person—it is the code that dictates everything from hair color to taste preferences. But it also is a metaphysical representation of the self. Familiar expressions such as 'it's in my DNA' capture the symbolic value of DNA as a marker of identity. Our DNA connects us to the past via our families and ancestral history, and also thrusts us into the future by forecasting the traits of our children or the manner of our death. The romance of genetic testing is what propels people to send in their samples to total strangers, hoping to connect their biology to others in the world, both alive and dead, wholly unknown to them. That same drive should counsel against allowing the [government] to appropriate DNA testing in ways that may be disruptive or destructive to personhood, identity, and a sense belonging.

Murphy, E., *Inside the Cell* at 307 (Nation Books 2015). The twin risks of DNA collection—an utter lack of increased security and a complete destruction of genetic privacy—brutally undermine the Proposed Rule's purported goals.

First, the Proposed Rule will increase the risk that an innocent individual will be accused of a crime based on an adventitious or coincidental match, *i.e.,* a false match. As Sir Alex Jeffreys (the inventor of forensic DNA testing) has repeatedly warned, increasing the size of any known-person database, such as NDIS, necessarily increases the risk of an adventitious or coincidental match. In other words, including more people's DNA in the federal DNA database does not necessarily make us safer; rather, it increases the chance that a "hit" reported from that database will be entirely coincidental. Examples of this kind of "false match" have been reported in Illinois and Ohio, where government databases identified individuals as DNA "hits," although the matches were later disproven (by outside circumstance or further testing) and the individuals were found to be innocent.[23] This increased risk of a coincidental match undermines public safety.

Second, the history of database expansion demonstrates that the Proposed Rule will increase the testing backlog in government crime labs and will have other unintended consequences. The current NDIS database houses almost 18 million known-person's DNA, but only has roughly 1 million crime scene samples. At regular intervals the Bureau of Justice Statistics administers a major census of publicly funded laboratories; the 2009 and 2014 census clearly demonstrated that implementing new known-person sample collection rules creates a backlog. In 2009, 90% of all requests for

[23] *See, e.g.,* Appellant's Opening Brief, *People v. Puckett*, No. A121368 (First Appellate District, California Court of Appeal) at 28.

forensic testing of any kind were backlogged; a result that the 2014 census demonstrated was "because of an increase in the collection of DNA samples as mandated by federal legislation."[24] Indeed, the FBI's NDIS statistics—which publicly record the numbers of samples uploaded to the national database—reveal that while forensic testing backlogs overall have ballooned, the rate at which forensic samples from crime scenes are uploaded into the database has actually declined.[25] The collection and processing of DNA from people detained in conjunction with immigration proceedings will inevitably increase the backlog, cause reallocation of other government funding, and have other far-reaching and unintended consequences.

DNA is not like a fingerprint or a photograph. Its capacity to reveal is unparalleled. As the government expands collection to more and more populations—without true oversight and while eschewing our national foundational principles of liberty and autonomy, privacy, free speech, and free association—the Proposed Rule exposes substantially more than it reveals. The tradeoff is too high; the cost too great. The Proposed Rule not only undermines public safety and decimates individual privacy, it does so by stigmatizing the most vulnerable people in our society.

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BDS strongly opposes the Proposed Rule. We request that DOJ consider these recommendations and immediately halt the implementation of the Proposed Rule. Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your attention and considering our concerns.

Sincerely,

/s/ *Brooke Menschel*
Brooke Menschel
Civil Rights Counsel

/s/ *Elizabeth Daniel Vasquez*
Elizabeth Daniel Vasquez
Special Forensic Science Counsel

[24] Bureau of Justice Statistics, Census of Publicly Funded Forensic Crime Laboratories, 2014 at 4.

[25] The logical conclusion from an analysis of this data is that the backlog itself is the result of increasing uploads of DNA samples from known-persons, such as those who would be subject to collection because of the Proposed Rule.