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Submitted via <https://www.regulations.gov/>

Re: Comments in Response to the Department of Homeland Security Notice of Proposed Rulemaking: *Collection and Use of Biometrics by United States Citizenship and Immigration Services* Docket No.: USCIS-2019-0007; RIN 1615-AC14

The Tahirih Justice Center¹ (Tahirih) submits the following comments to the Department of Homeland Security (DHS) in response and opposition to its proposed rule (NPRM) entitled *Collection and Use of Biometrics by United States Citizenship and Immigration Services* (USCIS) published on September 11, 2020.²

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence and their families since its inception twenty-three years ago. Our clients are primarily women and girls who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and “honor” crimes.³

Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients’ stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for

¹ <https://www.tahirih.org/>. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

² All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

³ For background information on these forms of gender-based violence, see, e.g., UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>; https://en.wikipedia.org/wiki/Female_genital_mutilation; https://en.wikipedia.org/wiki/Forced_marriage; <https://www.widowsrights.org/>

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survivors fleeing gender-based violence. *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*;⁴ Tahirih Justice Center, *Congressional Testimony*;⁵ Tahirih Justice Center, *Comments*.⁶

Among the clients we have served are Julia*⁷ from Guatemala, who suffered severe domestic violence at the hands of her husband in the United States. She was so traumatized that she couldn't initially describe the abuse she suffered in much detail to her attorney. Her husband's abusive tactics included locking her in their bedroom, forcing her to keep the bathroom door open when showering while their two roommates were home, berating her in public, and leaving switchblades out on display to intimidate her. He also brutally sexually abused Julia*, and she eventually had to recount these violent sexual assaults in graphic detail in order to develop and prove her case. She was severely retraumatized throughout the entire process. After securing relief, however, Julia* found the strength to rebuild her life. She became employed at a medical laboratory and continues to volunteer for the Red Cross and for a clinic serving HIV positive individuals.

Another client, Maria*, was kept by a man as his "property" for 11 years, referring to her as "mi perra" ("my dog") and whistling rather than calling her by name. He told her she was registered to him like a car, and he constantly abused, controlled, and humiliated her. He tied her child up and tried to light him on fire. He mocked Maria's* religion, beat her for trying to go to church, and told her he owned her vote too. After she reported him to the police twice to no avail, he threatened to kill Maria* if she did so again. He sharpened his machete in front of her, saying he wanted a clean edge when he cut her head off.

Gender-based violence in all its forms involves a unique set of common characteristics that leave survivors of such violence—both abroad and within the United States—uniquely vulnerable. That set of characteristics includes (1) abuse by family members; (2) ostracization and social stigmas within one's community; (3) disbelief by family, friends, and others including law enforcement; (4) internalized shame; (5) the inability to disclose violence to or in the presence of children or male family members; (6) cultural acceptance of gender-based violence; (7) barriers to medical or mental health treatment; (8) economic abuse, social isolation, and forced dependence or unequal caretaking responsibilities; and (9) multiple victimization and revictimization.

Survivors—who include entrepreneurs, physicians, teachers, historians, grocery clerks, lawyers, authors, caregivers, politicians, entertainers, and scientists—are thus isolated, unimaginably traumatized, and cut off from family and community resources. Those who do manage to escape are in desperate need of counsel,⁸ medical, mental health, and other services as they navigate our systems. *See, e.g.,* Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence*

⁴ <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>

⁵ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131

⁶ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261

⁷ An asterisk denotes a pseudonym.

⁸ This is particularly the case for detained asylum seekers. *See, e.g.,* Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018), <http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf>

(May 2019).⁹ Yet due to the nature of gender-based violence, survivors are *least* likely to be able to access such services. The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic. *See, e.g.,* Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);¹⁰ Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).¹¹

While we oppose the NPRM for many reasons, given our experience and expertise, our comments specifically address the rule’s damaging impact on survivors of gender-based violence.

II. Procedural Infirmities

A. Insufficient Time for Public Comment

DHS has provided insufficient time for public comment without any attempted justification. The 328-page NPRM proposes a sweeping expansion of biometrics collection for over six million immigrants and United States citizens including children. The NPRM directly impacts adjudication of survivor-based relief requests created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). Yet, the public has been given a mere 30 days to respond, rather than a minimum of 60 days in accordance with Executive Orders 12866 and 13563.¹²

Even under normal circumstances, at least 60 days would be needed for the public to submit thorough, considered comments on a rule with such sweeping consequences. And these are not normal circumstances. The public - and survivors of gender-based violence in particular - is at an even greater disadvantage now due to the COVID-19 pandemic. Domestic violence rates have soared, and service providers face new complexities in providing critical assistance to survivors.¹³

The 30-day period has also proven insufficient in practice. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—one of whom was the primary drafter of these comments—reduced proportionally. Thus, these comments do not—and cannot—represent Tahirih’s full response to the rule. And they do not, because they cannot, include all of the analysis and evidence that Tahirih would have provided if given at least 60 days to respond to the rule. Tahirih has also currently been responding to other

⁹<https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf>

¹⁰<https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>

¹¹<https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence-Final-March-23-2020.pdf>

¹²<https://cliniclegal.org/resources/federal-administrative-advocacy/more-100-organizations-join-urge-dhs-provide-60-day>

¹³<https://static1.squarespace.com/static/57d7477b9de4bb8b14256cf4/t/5e9dc0e935d08275a98b9925/1587396842687/NTF+Fact+Sheet.DV-SA+survivors+and+the+COVID19+crisis.pdf>

rules that directly impact our clients, whose comment periods overlap with the NPRM's.¹⁴ The agency's decision not to provide more than 30 days for comment has therefore impaired Tahirih's opportunity and ability to meaningfully comment on the rules.

B. Failure to Undergo Privacy and Civil Liberties Oversight Board Review

The NPRM was required to, but apparently did not, undergo pre-publication review by the Privacy and Civil Liberties Oversight Board (PCLOB). Congress established the PCLOB "ensure that liberty concerns are appropriately considered in the development and implementation of" anti-terrorism "laws, regulations, and policies." 42 U.S.C. § 2000ee(c)(2). To that end, Congress provided that the PCLOB "shall review proposed ... regulations ... related to efforts to protect the Nation from terrorism." *Id.* § 2000ee(d)(1)(A) (emphasis added). The NPRM purports to be grounded in a "mandate[] to protect the American public from terrorist attacks." 85 Fed. Reg. at 56,347; *see also id.* at 56,340 (stating that DHS uses biometrics to, *inter alia*, check for "involvement in terrorist activities or organizations"); *id.* (citing "associations with a terrorist organization" as a purported justification for taking biometrics from infants, toddlers, and children); *id.* at 56,348 (claiming to draw authority from the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 354 (2001)); *id.* at 56,349 ("DHS also uses biometrics to determine if an individual has ... involvement in terrorist activities"); *id.* at 56,352 (citing terrorism as a reason for so-called "continuous vetting"). PCLOB review of the regulations is therefore required by federal law, and the agency's failure to seek such review renders the NPRM (and any final rule) contrary to law in violation of the Administrative Procedure Act.

III. **The NPRM Violates the Administrative Procedure Act**

A. The NPRM is *Ultra Vires*

The NPRM is *ultra vires* in its totality. DHS claims the sweeping power to continuously collect biometric data—in many cases up to, and including, DNA samples—from anyone who seeks a benefit from USCIS. And it seeks to base that power on a conglomeration of vaguely relevant statutory provisions. *See* 85 Fed. Reg. at 56,347. But those provisions cannot be read, either individually or collectively, to support the NPRM's Orwellian proposals.

As a threshold matter, the "general authority" given to DHS in 8 U.S.C. § 1103(a) has nothing to do with biometrics. In particular, intrusive biometric collection has nothing at all to do with the issuance of "forms, regulations, instructions, [and] other papers." 85 Fed. Reg. at 56,347; *see* 8 U.S.C. § 1103(a)(3). And the Secretary's authority to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter" (8 U.S.C. § 1103(a)(3)) is, by definition, limited by the terms of the INA. The NPRM's invocation of § 1103(a) thus, at most, merely begs the question. And although the NPRM also cites 8 U.S.C. §§ 1225(d)(3) & 1357(b), those provisions do no more than allow DHS to collect documentary and testimonial evidence.

¹⁴ See e.g., <https://www.federalregister.gov/documents/2020/09/30/2020-20045/professional-conduct-for-practitioners-rules-and-procedures-and-representation-and-appearances>; <https://www.federalregister.gov/documents/2020/09/23/2020-21027/procedures-for-asylum-and-withholding-of-removal>; <https://www.federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure>

The remainder of the statutes on which the NPRM relies (see 85 Fed. Reg. at 56,347-48) confirm as much. In those statutes, Congress has given DHS the targeted authority to engage in specific kinds of biometric collection in specific circumstances. Even the broadest of those statutes, 8 U.S.C. § 1365b, relates only to an “entry-exit screening system” that is much narrower than the NPRM’s proposals. And such targeted provisions would not be necessary—would, indeed, be superfluous—if other statutes gave DHS the wide-ranging authority it now claims.

B. Insufficient Justification

The NPRM proposes a dramatic expansion of biometric submission requirements, giving the government maximal information about immigrants and their family members. Under the rule, anyone associated with an immigration application, including the applicant, petitioner, U.S. citizen and permanent resident sponsor, and beneficiary spouse and children, would be required to submit biometric data to the government unless exempted by DHS. The rule also broadens the definition of biometrics to be more invasive, including voice prints, palm prints, eye and facial imaging, and DNA collection.

DHS primarily seeks to justify these sweeping changes as necessary to promote flexibility in biometrics collection practices, facilitate “identity verification and management in the immigration lifecycle;” reduce dependence on paper documents, and “preclude imposters.” 85 Fed. Reg. at 56347. The justifications are arbitrary and capricious on their face, as DHS provides inadequate explanations and paltry if any evidence to support them. While “[a]gencies are free to change their existing policies,” they must “provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, ___ U.S. ___, 136 S. Ct. 2117, 2125 (2016). The explanation must justify “disregarding facts and circumstances that underlay or were engendered by the prior policy.” *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 515-16 (2009) (“Fox”); see also *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Fox*, 556 U.S. at 515-16).

Immigration remedies available to survivors of gender-based violence in the United States include the U visa for victims of crime, the T visa for victims of human trafficking, and the VAWA Self-Petition; all provide avenues for adjustment of status to permanent residence. A bipartisan Congressional majority enacted these protections through the VAWA and the TVPA to help survivors seek safety and eventually achieve self-sufficiency. While DHS asserts that the rule is needed to prevent fraud, it provides absolutely no evidence showing that fraud rates within survivor-based relief requests justify the extreme privacy invasions it proposes. No such evidence exists. In fact, DHS’s own data show negligible rates of fraud among survivors’ requests.¹⁵

¹⁵ See Congressional Research Service report, “Immigration Provisions of the Violence Against Women Act (VAWA)”, by William Kandel, June 7, 2012 (hereafter CRS Report), 2nd page of summary, which states, “While some suggest that VAWA provides opportunities for dishonest and enterprising foreign nationals to circumvent U.S. immigration laws, empirical evidence offers minimal support for these assertions.” See Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Congress, Report 112- (March 12, 2012), Senate Committee on the Judiciary p. 13, fn. 30 (noting that the minority “cite no case or study – not even a single allegation – where a U visa was obtained fraudulently.” [emphasis added].”); p. 12 fn 72; FOIA results from USCIS showing minimal fraud rates for survivor-based petitions from 1/12 – 6/18 available upon request.

DHS also unsuccessfully uses the International Marriage Brokers Regulation Act of 2005 (IMBRA), Pub. L. 109-162, title VIII, subtitle D, 119 Stat. 2960, 3066 (2006) to attempt to support its sweeping proposals. The NPRM claims it will require biometrics from all family-based petitioners in order to “comply with” IMBRA. 85 Fed. Reg. at 56,342. IMBRA, however, does not give DHS the unfettered authority or mandate to conduct *any* kind of background check, or to collect *any* kind of biometric data, that it pleases.

To the contrary, IMBRA originally imposed background-check obligations solely on “international marriage broker[s]” (8 U.S.C. § 1375a(d)(2)-(3)) while expressly forbidding DHS from conducting additional background checks (Pub. L. 109-162, § 833(a)(5)(A)(iii)). And although Congress removed that flat ban in 2013 (*see* Violence Against Women Reauthorization Act of 2013, 113 Pub. L. 4, § 807(b)(1)(A)(ii), 127 Stat. 54, 112 (2013)), it contemporaneously gave DHS only very limited authority to conduct IMBRA-related background checks. Specifically, Congress provided that DHS is to do no more than “conduct a background check of the National Crime Information Center’s Protection Order Database.” 8 U.S.C. § 1375a(d)(5)(A)(iv). Congress has declined to expand that background-check authority since 2013, even though it has received post-2013 reports recommending improvements to IMBRA. *See* GAO, *Improvements Needed to Fully Implement the International Broker Marriage Regulation Act*, GAO-15-3 (Dec. 2014);¹⁶ DOJ, *Report to Congress Concerning the International Broker Marriage Regulation Act*. The limited authority given to DHS to conduct specific background checks under IMBRA thus in no way authorizes DHS to collect biometrics from anyone, much less from all family-based petitioners.

Congress had good reason to cabin DHS’s background-check authority in this way. IMBRA is a limited statute aimed at a very specific problem: The use of the K fiancée visa process by U.S. clients of international marriage brokers as a means of “importing” women who were susceptible to domestic violence and sexual abuse because they had no connections in the United States and were unaware of their rights. *See, e.g.*, 151 Cong Rec S13,749 (Dec. 16, 2005) (statement of Sen. Brownback); 151 Cong. Rec. E2605 (Dec. 18, 2005) (statement of Rep. Conyers). In the words of the court that upheld IMBRA against constitutional challenges in part because of its narrow nature, Congress did no more than address the fact “that commercial, for-profit [international marriage brokers] contributed to the growing problem of domestic violence against particularly vulnerable foreign women.” *Euro. Connections & Tours, Inc. v. Gonzales*, 480 F. Supp. 2d 1355, 1378 (N.D. Ga. 2007).

Finally, of profound further concern is that certain forms of biometric data proposed for collection are considered not only unreliable, but also discriminatory; they may perpetuate biases against transgender individuals and people of color.¹⁷

IV. The NPRM will Harm Survivors of Gender-Based Violence

¹⁶ <https://www.gao.gov/assets/670/667348.pdf>

¹⁷ *See* <https://www.theguardian.com/technology/2017/dec/04/racist-facial-recognition-white-coders-black-people-police>; *See also* <https://www.vice.com/en/article/7xnwed/facial-recognition-software-regularly-misgenders-trans-people>; <https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases>

The NPRM will harm vulnerable survivors of gender-based violence for a variety of reasons. DHS fails to consider alternatives to its proposals sufficient to outweigh the harm it will inflict on them.

A. Retraumatization Due to Repeated, Invasive, and Dehumanizing Biometric Data Collection

Survivors often suffer from extended periods of Post-Traumatic-Stress-Disorder (PTSD),¹⁸ remaining extremely sensitive to various forms of physical touch long after they have experienced violence. Retraumatization is particularly intense in situations where survivors have minimal agency over physical contact initiated by another person, especially strangers. The effects of trauma for clients like Maria* and Julia*, who have been subjected to unimaginable violence and torture, are well-documented. Circumstances that trigger memories of a traumatic event such as sexual assault can force an individual to “relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring.” Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat’l Crime Victim Law Institute, *Violence Against Women Bulletin* at 1-2 (Sept. 2011) (internal quotation marks and alteration omitted). Research supports similar conclusions about the trauma of human trafficking: “The stress of the trafficking situation is almost guaranteed to create dissonance between thoughts, feelings, and behavior that can greatly reduce flexible coping and rational decisions that could be expected of people in free conditions.” T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 *Trauma, Violence, & Abuse* 3, 16 (January 2009).

The extremely invasive, dehumanizing biometric collection modalities permitted under the rule in addition to fingerprints and photographs - facial recognition, voice prints, iris scans, palm prints, and DNA collection - will unnecessarily trigger traumatic responses in survivors. They already fear immigration enforcement or encountering abusers during appointments; while each modality might not necessarily be used in all cases, survivors will be even further triggered by the unpredictability inherent in the data collection process because they will simply not know what to expect. And, if the rule is finalized, DHS should ensure that appointments scheduled for survivors are never scheduled for the same time and location as an appointment for an abuser.

The NPRM further proposes a perpetual vetting process permitting DHS to require biometrics data at any time until an individual becomes a U.S. citizen. Data could be requested anew regardless of whether the individual already has an approved immigration benefit. See 85 Fed. Reg. at 56350. The concept of “continuous vetting” was born out of the Administration’s executive orders authorizing impermissibly discriminatory immigration bans for individuals from Muslim majority countries. The NPRM’s proposal to keep individuals on perpetually precarious footing signals that they are not welcome here and not to be trusted.

This proposal is especially cruel and trauma-triggering for survivors. Abusers notoriously use threats to manipulate and intimidate survivors, leaving them on pins and needles at all times. The impact of continuous vetting is eerily parallel to the uncertainty and trepidation survivors endure

¹⁸ <https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967>

waiting for an abuser to carry out a threat. Continuous vetting is also not in the government's interest, as it creates redundancies that ultimately squander agency resources.

B. Confidentiality and Privacy Concerns

1. *Survivors Facing Violence in the United States*

As DHS itself acknowledged in the NPRM: "For many immigrant victims of domestic violence, battery, or extreme cruelty, the U.S. citizen or lawful permanent resident family members who sponsor their applications threaten to withhold legal immigration sponsorship as a tool of abuse." See 85 Fed. Reg. at 56359. Abusers and traffickers are also known to report survivors to the police or immigration authorities to retaliate against them for reporting violence. Maintaining the confidentiality of survivors' information is critical to their safety and for preventing abusers from further manipulating them. 8 U.S.C. § 1367, entitled "Penalties for disclosure of information," codified confidentiality protections for survivors for this reason.

DHS, however, admits to its own shortcomings when it comes to complying with 8 USC § 1367,¹⁹ and the NPRM will increase the likelihood that violations will occur. More transfers of sensitive information between government agencies make data more vulnerable to unauthorized access, putting survivors' safety at risk. This is the case regardless of whether breaches are intentional or as the result of hacking.²⁰ In fact, as explained by the Electronic Privacy Information Center, "Domestic violence victims have high needs for privacy, as they are already the target of an abuser, and often need to keep data from them. This abuse can also involve privacy violations such as surveillance, monitoring, or other stalking. For a domestic violence victim, the need for privacy is a need for physical safety."²¹ The NPRM fails to address the safety concerns specific to survivors of crime. Survivors of sexual assault, domestic violence, and other crimes where the perpetrator, his friends, or family has connections with law enforcement are at particular risk; researchers estimate a high prevalence of domestic violence among law enforcement officers.²²

The rule also authorizes DHS to "request, require, or accept" DNA or DNA test results, including a partial DNA profile, where proof of a genetic relationship is required to establish eligibility for an immigration benefit. See 85 Fed. Reg. at 56353. In the case of VAWA Self-Petitioners abused by either their children or their parents, documentary evidence should suffice as it currently does, to establish family relationships. If DHS seeks DNA evidence from abusers, they will learn about their victims' Self-Petitions in violation of 8 U.S.C. § 1367 and this will put them at risk of further abuse and retaliation. In addition, the uncertainty survivors will face throughout this process will be traumatizing; they won't know if DHS, in its discretion, will or will not contact their abuser about submitting DNA. And, this might deter them from applying for relief altogether, thwarting the will of Congress in creating the Self-Petition and enacting the confidentiality provisions to begin with.

¹⁹ See e.g. <https://www.dhs.gov/sites/default/files/publications/1367%20PCR%20Report%20FINAL%2020190204.pdf>

²⁰ See e.g., <https://www.wired.com/2016/02/hack-brief-fbi-and-dhs-are-targets-in-employee-info-hack/>

²¹ <https://www.epic.org/privacy/dv/>

²² https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?referer=https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/&httpsredir=1&article=1005&context=crim_just_pub;
[https://www.fatherly.com/love-money/police-brutality-and-domestic-violence/;](https://www.fatherly.com/love-money/police-brutality-and-domestic-violence/)
<https://www.theguardian.com/society/2019/oct/20/domestic-abuse-within-police-force-to-be-investigated>

The cost of DNA tests can be exorbitant – *e.g.*, \$440 for the first test, and an additional \$220 for each test beyond that for other family members. *See* 85 Fed. Reg. at 56382. Thousands of survivors and their families pursuing U or T visa relief will incur these costs, over and above what they already pay during different stages of the application process. Survivors are predominantly indigent and may even be forced to return to abusers or face homelessness. Adding to these costs is unnecessary; no evidence was presented in the NPRM showing widespread problems applicants have proving family relationships currently such that DNA testing is needed.

2. *Survivors Fleeing Gender-based Persecution Abroad*

Some survivors seeking refuge from gender-based persecution in their home countries have unique privacy concerns, for example, if a woman was raped and gave birth to a child as a result. Due to severe social stigmas and shame surrounding rape in many cultures, a survivor might not have disclosed the rape to her family. In revealing biological parentage, DNA testing will significantly impact survivors and their children in these circumstances. The NPRM fails to acknowledge the sensitive and potentially traumatizing implications that required DNA testing will have for survivors.²³

In addition, the confidentiality of asylum seekers' identifying information is critical to their safety. Yet, the NPRM's breathtaking expansion of such information collection fails to ensure that asylum seekers' biometrics data will be safe from discovery by a persecuting government. *See* 85 Fed. Reg. at 56415. And, those whose applications are denied will face increased safety risks upon removal if their government has access to their biometrics information and can more easily track them.

The hardship survivors in all contexts will endure as a result of the NPRM far outweigh DHS's purported justifications for its expansive changes in policy.

D. Heightened Risk of Retraumatization and Arbitrary Denials of Survivor-Based Petitions

VAWA Self-Petitioners and T visa-based adjustment of status applicants are required by statute to establish "good moral character" to be granted relief. Per 8 C.F.R. § 204.2(c)(2)(v), USCIS considers VAWA Self-petitioners' conduct during the 3 years immediately preceding filing to evaluate whether they have demonstrated good moral character. For T-visa holders applying for adjustment of status, good moral character is evaluated for a continuous period "of at least 3 years since the date of admission as a (T) nonimmigrant" or "during the investigation or prosecution of acts of trafficking." *See* INA § 245(l)(1)(A).

Currently, petitioners and applicants for both remedies submit police clearance letters and other relevant evidence to show good moral character. The NPRM, however, deems police clearance

²³ See <https://www.refworld.org/docid/48620c2d2.html>

letters unnecessary for individuals who have resided in the United States because their criminal histories will now be detectable through the proposed expanded biometrics data collection. And, per the rule, conduct during any period of time will also be considered if the petitioner/applicant's (1) earlier conduct appears relevant to moral character; and (2) conduct during the three years prior to filing does not show a reform of character. *See* 8 C.F.R. § 316.10(a)(2). The NPRM also eliminates the presumption that those 14 years of age and under have good moral character, requiring submission of expanded biometrics for children as well.

1. *Retraumatization*

Expanding the period within which USCIS will now evaluate survivors' good moral character will unnecessarily retraumatize them. A survivor of human trafficking, for example, is already retraumatized by recounting the circumstances of her exploitation and abuse at length as part of her T visa petition. Congress expressly authorized a limited 'look back' period of time for evaluation of character for survivors applying for adjustment of status. In doing so, it sought to minimize additional harm to a vulnerable population already facing unique hardship as they navigate the process of seeking relief. Now, under the NPRM, survivors will again have to rehash details of trauma with no rationale justification for these changes. Current avenues exist now for USCIS to verify a petitioner/applicant's identity. VAWA Self-Petitioners and T visa-based adjustment of status applicants already must submit biometrics data to secure work permits. DHS has not explained why existing procedures are insufficient, burdensome or in need of sweeping reform.

2. *Heightened Risk of Prejudice*

An unlimited "look back" period for evaluating good moral character for survivors will unnecessarily heighten the risk of prejudice in adjudications of their requests for relief. The NPRM provides for advisal of a petitioner/applicant of an adverse decision based on derogatory information, along with an opportunity to rebut the information. *See* 8 C.F.R. § 103.2(b)(16)(i). However, it is unclear what if any trauma-informed analysis will be applied by USCIS in initial decision-making or in reviewing rebuttals where survivors are aware of their right to challenge the decision.

Given the unique dynamics inherent to domestic violence and related abuses, a trauma informed approach to review of survivors' requests for relief is critical to ensuring they receive due process in pursuing relief. For example, dual arrests that occur in the domestic violence context can unwittingly harm survivors. When a survivor acts in self-defense or when an abuser fabricates a cross-complaint for abuse against the victim to avoid accountability or retaliate, a survivor herself might be arrested. In these cases, even trained law enforcement officers can be reluctant to determine which party is the primary aggressor when arriving at the scene of an incident.

Language and/or cultural barriers exacerbate the situation. In 2017, Tahirih conducted a nationwide survey of immigrant women and advocates working with them to determine the most urgent and prevalent challenges immigrant women face in the United States. The responses to that survey indicate that language barriers faced by survivors allow many abusers to control the narrative in dual-arrest situations. One advocate noted that an interpreter "is often someone the victim

knows personally. I've even had cases where the only available interpreter was the accused perpetrator of the crime." Another stated: "We've had women arrested when they were abused by their spouse because they can't explain to the officer what happened, especially since they are under so much stress in that moment." Children without the vocabulary or cognitive ability to adequately express what they are seeing or hearing, and who might be the primary or secondary victims of abuse themselves, might be forced to serve as interpreters as well. Faced with an impossible "choice," some intentionally mistranslate their mother's words for fear of sending their father to jail or causing his deportation.

Abusers are also known to retaliate against victims by framing them for crimes. Tahirih is aware of a case in which an abuser planted drugs in his wife's car and then smashed her taillight to get her pulled over and arrested. In another case, an abuser set fire to his home himself and called the fire department to report that his wife did it. She was arrested and jailed for weeks. These examples show the insidious lengths to which perpetrators are willing to go to manipulate the legal system to silence and intimidate their victims. In other cases, survivors encounter law enforcement because of conduct directly related to abuse. One client, Hanna*, was beaten, strangled, and locked in a closet for hours by her husband. He had told her he would chop her body into little pieces and leave them in the mountains. He said nobody would even notice or miss her because she is "illegal." After her shift at work, she was terrified to go home so she went for some drinks that night to avoid seeking her husband. She was pulled over by the police.

More police reports against survivors will appear under the NPRM's expanded "look back" period for assessing character and in their background checks. Without safeguards to ensure adjudicators meaningfully consider the unique dynamics surrounding gender-based violence in evaluating survivors' character as intended by Congress, arbitrary and unjust denials will be the norm.

D. Impact of Decreased Efficiency on Survivors

USCIS is currently working its way through a massive, historic backlog, with survivors waiting in limbo for years before their petitions and applications are adjudicated.²⁴ Implementation of the NPRM will increase the ever-growing backlog and create new inefficiencies. DHS will have to leverage limited resources for training and new equipment required for new biometrics testing modalities. Many more stakeholders will now undergo testing, diverting the resources currently used and still desperately needed for adjudication of relief requests. Even more lengthy delays in adjudications will result, on top of those currently plaguing the process.

Waiting long periods of time before being able to secure work authorization and legal relief in and of itself inflicts severe hardship on survivors in a variety of ways. A hallmark of domestic violence is economic abuse; abusers use threats of violence to keep survivors in a perpetual state of impoverishment and financial dependence. Without work authorization, survivors often have no

²⁴ See <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>; See also <https://egov.uscis.gov/processing-times/historic-pt>

choice but to remain in a violent home. Those who do manage to escape while still waiting for work authorization face homelessness for themselves and their children, or eventual return to their abuser accompanied by punishment for trying to escape in the first place.

Sarah*, a client from Venezuela, reported her children's father to the police after discovering him videotaping their daughter in the shower. With Sarah's* help, her husband was prosecuted and convicted, and served a prison sentence and was deported. Still waiting for work authorization, Sarah was forced from her home along with her three US citizen children and they spent 8 months in a state of homelessness. To make matters worse, one of Sarah's* children had two severe medical conditions that required around-the-clock care that she could not afford. Sarah* and her children barely survived, as she cobbled together food stamps and episodic assistance from local churches over the course of four years until she was granted a U visa.

Diana* reported her former husband to the police for domestic violence and she assisted law enforcement in bringing charges against him. Diana* petitioned for a U visa and concurrently sought employment authorization. As a single mother with a son with special needs, she suffered severe anxiety and other mental health issues while waiting for her work authorization. At one point, Diana* asked USCIS to expedite adjudication, and USCIS took a mere 8 days to deny that request. However, a full 3 years had elapsed before USCIS finally authorized her to work.

Delays in adjudications also help abusers use children as pawns to punish and manipulate survivors. Rachel* has been waiting for adjudication of her U visa petition for over 4 years. During this time, while her divorce was pending, her abuser gained lawful permanent residence. He reopened child custody proceedings and won custody back from Rachel* precisely because she lacked immigration status. Katya* filed a VAWA Self-petition and has been awaiting adjudication for over a year. In the meantime, she cannot see her son or pursue custody because her abuser has threatened violence and deportation if she does.

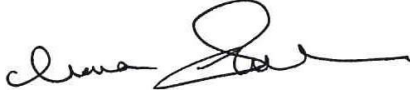
Finally, survivors fleeing gender-based persecution in their home countries also suffer tremendously when their children cannot initially accompany them as they flee. Often, children wait in dangerous conditions at home. Nancy* from Nigeria fled severe domestic violence and applied for asylum in the US. Her application has been stuck in the backlog for several years. In the meantime, her 14-year-old daughter was brutally attacked on her way home from school last fall and died the next day of her injuries. Nancy's* husband had been threatening her children for months. Nancy's* other son is in hiding and her attorney is requesting humanitarian parole for him and an expedited asylum interview as a result.

IV. Conclusion

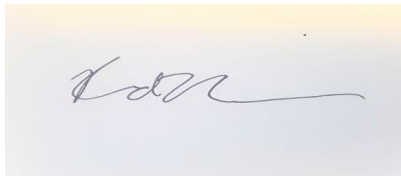
Tahirih opposes the NPRM for the foregoing reasons, in addition to others we have been unable to address due to the unreasonably and inexplicably truncated comment period provided. The rule will inflict severe and irreparable harm on survivors of gender-based violence. And, any

attempt to undermine privacy – a fundamental human right²⁵ – demands robust justification and meaningful Congressional oversight. We urge DHS to promptly withdraw the rule in its entirety.

Sincerely,



Irena Sullivan
Senior Immigration Policy Counsel



Richard Caldarone
Litigation Counsel

/s/Julie Carpenter

Julie Carpenter
Senior Litigation Counsel

²⁵ See https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf;
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

See also