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Philip S. Kaplan
Chief Privacy Officer, Privacy Office
Department of Homeland Security
Washington, DC 20528-0655
Fax: 202-343-4010

Via Federal e-Rulemaking Portal: <http://www.regulations.gov>



RE: DHS Notice of Modified System of Records, Docket Number DHS-2018-0013-0001

Dear Chief Privacy Officer:

California Office
39 Drumm Street
San Francisco, CA 94111
p. (415) 343-0769
f. (415) 395-0950

National Office
125 Broad Street,
18th floor
New York NY 10014
(212) 549-2660
aclu.org

The American Civil Liberties Union (“ACLU”) submits this comment on the Notice of Modified System of Records published May 8, 2018 (the “Notice”) by the Department of Homeland Security (“DHS”). The Notice “proposes to modify, rename, and reissue a current DHS U.S. Immigration and Customs Enforcement . . . system of records titled, ‘Department of Homeland Security (DHS)/U.S. Immigration and Customs Enforcement (ICE)-007 Alien Criminal Response Information Management (ACRIME).’”¹

I. Introduction

The ACLU is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. The ACLU and its member affiliates engage in a nationwide litigation and advocacy program to enforce and protect the constitutional and civil rights of immigrants, including unaccompanied children and their family members. *See, e.g., Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017) (granting preliminary injunction against unlawful rearrest and detention of unaccompanied children based on unproven gang allegations); Complaint, *LVM v. Lloyd*, 18-cv-01453-PAC (S.D.N.Y. 2018), ECF. No. 1 (lawsuit by New York Civil Liberties Union challenging unlawful detention of unaccompanied children detained in New York). The ACLU and its member affiliates also frequently appear before the federal courts in cases involving the privacy rights of both citizens and noncitizens. *See, e.g., United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018) (addressing Fourth Amendment prohibition against unlawful border searches).

Among other things, the Notice proposes to use the System of Records “[t]o screen individuals to verify or ascertain citizenship or immigration status, immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children who are in the care and custody of

¹ Privacy Act of 1974, System of Records, 83 Fed. Reg. 20844, 20844 (May 8, 2018).



HHS and to identify and arrest those who may be subject to removal.”² The proposed information collection covers “[i]ndividuals seeking approval from HHS to sponsor an unaccompanied alien child and/or other adult members of the potential sponsor’s household.”³ The Notice partially implements the April 13, 2018 Memorandum of Agreement (“MOA”) between the Office of Refugee Resettlement (“ORR”) and components of the Department of Homeland Security (“DHS”), which sets forth a number of procedures for sharing information among the agencies.⁴

The ACLU is concerned that the Notice will frustrate the ability of the Office of Refugee Resettlement (“ORR”) to “promptly” place children in the least restrictive setting in their best interests, as federal law requires. Historically, ORR has identified and placed children with appropriate caregivers unimpeded by DHS’s immigration enforcement priorities, in furtherance of ORR’s duties to promptly release children from custody and promote family reunification.

The Notice proposes to authorize DHS to collect information that ORR obtains during the sponsor reunification process, and states that one of the proposed purposes of this information collection is to “identify and arrest” the very people who have come forward to take in vulnerable children. This will needlessly impede family reunification and harm children who ORR is meant to protect. Furthermore, the collection and long-term retention of broad categories of biometric information about potential sponsors and their adult family members is unnecessary and creates data security risks. The sharing of biometric information for enforcement purposes also raises the risk of discrimination and wrongful arrest, detention, or deportation.

Consequently, the ACLU urges DHS to rescind the Notice as it relates to potential sponsors and other adults in the sponsors’ households. At a minimum, DHS should conduct a Privacy Impact Assessment (“PIA”) before initiating the collection of biometric information.

II. The government is required by law to “promptly” place unaccompanied children in “the least restrictive setting that is in the best interest of the child.”

Since the enactment of the Homeland Security Act of 2002 (“HSA”), ORR has been responsible for the care of unaccompanied immigrant children who come to the United States seeking relief and protection. Congress recognized that assigning care of vulnerable children to an enforcement agency would not be appropriate and instead gave those responsibilities to an agency with extensive

² *Id.* at 20846.

³ *Id.*

⁴ Memorandum of Agreement Among Office of Refugee Resettlement, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection, <https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1> (last visited June 7, 2018).



experience working with refugee children.⁵ ORR now provides care for unaccompanied children through a nationwide network of contracted facilities.

The law requires the federal government to ensure that children are swiftly placed with sponsors outside of detention, with whom they can live while they pursue immigration relief. Pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), ORR must ensure that unaccompanied children are “promptly placed in the least restrictive setting that is in the best interest of the child.”⁶ The government is also bound by the *Flores* Agreement, a nationwide consent decree that requires release of immigrant children from custody “without unnecessary delay” where an appropriate community placement is available.⁷ Pursuant to these obligations, ORR evaluates potential sponsors for their ability to provide for a child’s safety and well-being.⁸ And in keeping with the family reunification goals of the TVPRA and *Flores* Agreement, ORR currently reunites the majority of unaccompanied children with parents or close relatives.⁹

Critically, lawful immigration status is not a prerequisite for sponsorship. ORR’s policy is to “release of unaccompanied alien children [] to undocumented sponsors, in appropriate circumstances and subject to certain safeguards.”¹⁰ This policy recognizes that a caretaker’s lack of lawful status does not disqualify her or him from caring for a child, and that the benefits of family reunification exist regardless of immigration status.¹¹ This recognition informs ICE’s own Parental Interests Directive on facilitating the custodial rights of detained parents.¹²

III. The Notice’s proposed changes will frustrate ORR’s ability to promptly find appropriate sponsors for unaccompanied children.

The proposed modifications to the System of Records would mark a significant shift from prior agency policy in two critical ways. First, it would authorize DHS to collect information from ORR regarding potential sponsors and those

⁵ See *Flores v. Sessions*, 862 F.3d 863, 869-71 (9th Cir. 2017).

⁶ 8 U.S.C. § 1232(c)(2)(A).

⁷ *Flores* Settlement Agreement ¶ 14, available at <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

⁸ 8 U.S.C. § 1232(c)(3)(A).

⁹ ORR, Sponsors and Placement: Release of Unaccompanied Alien Children to Sponsors in the U.S., <https://www.acf.hhs.gov/orr/about/ucs/sponsors>; see also 154 Cong. Rec. S10886-01, 2008 WL 5169970 (Statement of Sen. Feinstein).

¹⁰ ORR, Sponsors and Placement, <https://www.acf.hhs.gov/orr/about/ucs/sponsors>; ORR, Children Entering the United States Unaccompanied (“ORR Guide”) § 2.5.2, § 2.6.

¹¹ See *Matter of Alan S.M.C.*, 160 A.D.3d 721 (N.Y. App. Div. 2018) (holding that “mother was not required to demonstrate that she has ‘legal status in this country’ or had taken steps to obtain such status to qualify as a guardian” for her children)

¹² See ICE, Policy 11064.2 Detention and Removal of Alien Parents and Legal Guardians at 3 (Aug. 29, 2017), <https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf>.



living in their households to aid in “screen[ing]” such individuals.¹³ This information will include biographic and biometric information, names, addresses, and other documents. Second, the proposed modifications would permit DHS to use and share that information for new purposes, including “to identify and arrest those who may be subject to removal.”¹⁴

Prior to the Notice and the MOA, DHS previously received some information from ORR concerning the sponsors of unaccompanied children, but such information was generally provided for purposes such as facilitating the children’s immigration cases.¹⁵ Thus, ORR and its care providers could offer assurance to potential sponsors that their information would be used only to verify their suitability to provide care and custody to children.

The Notice alters this practice by making clear that DHS can use the information it receives from ORR to arrest and deport potential sponsors and their household members. This will inevitably deter people from coming forward to accept custody of unaccompanied children, and could lead to the detention or deportation of those sponsors who do come forward. The proposed changes may even deter individuals who are lawfully present, including U.S. citizens, from sponsoring unaccompanied children to avoid exposing others living with or near them to DHS.¹⁶ All these consequences will lead to increased numbers of children in ORR custody for longer periods of time.

A similar chilling effect occurred during the summer of 2017, after ICE began targeting some sponsors as part of alleged investigations into unlawful smuggling activities. Legal services providers and advocacy organizations reported that caregivers were subjected to intimidation and enforcement actions without evidence of their involvement in smuggling, while other potential sponsors withdrew from the sponsorship process.¹⁷ Even ORR’s preexisting fingerprint requirements may have prolonged the custody of some children detained in New York ORR facilities, because of immigration status concerns

¹³ System of Records, 83 Fed. Reg. at 20846.

¹⁴ *Id.*

¹⁵ ORR Guide, § 2.8.2 (stating that care providers notified DHS prior to release of child to, inter alia, “prepare any DHS paperwork for the ICE Chief Counsel’s office”), § 2.6.4 (describing previous ORR policies concerning use of fingerprint checks)

¹⁶ Kathleen M. Roche, et. al, *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, J. of Adolescent Health (2018) at p. 5, http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/jah_10367.pdf (“Evidence for adverse consequences of immigration actions and news across residency statuses is consistent with research indicating that immigration policy can be equally harmful to documented and undocumented Latinos.”).

¹⁷ See Nat’l Immigrant Justice Center, et al., Complaint to DHS Acting Inspector General and DHS Office of Civil Rights and Civil Liberties Re: ICE and CBP Coercive Enforcement Actions against Sponsors of Unaccompanied Children Conducted in Violation of Family Unity, Protection, and Due Process Rights, at 3-10 (Dec. 6, 2017), <https://cliniclegal.org/sites/default/files/pressreleases/Sponsor-Enforcement-OIG-CRCL-Complaint-Cover-Letter-FINAL-PUBLIC.pdf>.



raised by potential sponsors and their household members.¹⁸ Indeed, advocates fear that the mere announcement of this Notice may *already* be deterring potential sponsors from coming forward to accept care of children.¹⁹

The prompt release of children from government custody is essential to their well-being. Youth who are subject to prolonged family separation and detention can suffer severe psychological and physiological harm.²⁰ Those harms include “frustration and a sense of helplessness,” which can result in suicidal ideation; self-harm; behavioral issues; and depression.²¹ These harms increase with each additional week of custody.²² Moreover, most unaccompanied children have survived trauma—such as persecution or torture, or distress during the difficult journey to the United States—that incarceration exacerbates.²³

The fiscal burdens of prolonged ORR detention are also significant. The Government Accountability Office estimated that the average daily cost per bed in a basic ORR shelter was \$248 for fiscal year 2014.²⁴ That same year, ORR received approximately 57,000 children from DHS; in fiscal year 2017 ORR has received over 40,000 children from DHS to date.²⁵

Finally, the Notice states that DHS’s records may be used “for other purposes consistent with DHS’ statutory authorities,”²⁶ without defining what “other purposes” might mean. This reference does not provide sponsors with adequate notice of how their personal information will be used; without further clarity, sponsors cannot meaningfully consent to the collection of their information.

¹⁸ Declaration of Ingrid E.V. Sydenstricker, June 6, 2018, on file with New York Civil Liberties Union.

¹⁹ Daniella Silva, *New U.S. rule will make it harder for immigrant children to reunite with families, advocates fear*, NBC News (June 6, 2018), available at <https://www.nbcnews.com/news/us-news/new-u-s-rule-will-make-it-harder-immigrant-children-n879606>

²⁰ See Affidavit of Dr. Lisa Fortuna, Director of the Child and Adolescent Psychiatry Division at Boston Medical Center at ¶¶ 11-17, 19-23; *LVM v. Lloyd*, 18-cv-1453 (S.D.N.Y. May 9, 2018) (ECF No. 46)

²¹ See *id.* at ¶ 18(c)-(d).

²² *Id.* at ¶¶ 15-16.

²³ See, e.g., Julie M. Linton, et al., Am. Academy of Pediatrics, *Detention of Immigrant Children*, Pediatrics (Apr. 2017), at 6-7, <http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf>; Luis Zayas & Laurie Cook Heffron, Am. Psychological Ass’n, *Disrupting Young Lives: How Detention and Deportation Affect US-born Children of Immigrants*, CFY News (Nov. 2016), <http://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation.aspx>.

²⁴ See Government Accountability Office, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody*, at 66 (July 2015), available at <https://www.gao.gov/assets/680/671393.pdf>

²⁵ ORR, Facts and Data, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

²⁶ System of Records, 83 Fed. Reg. at 20844.



IV. Enforcement against sponsors and other adults in the sponsors' households will obstruct access to due process for unaccompanied children.

The Notice may also impede children's access to information and documentation necessary to prove their immigration cases. First, parents and other close family members frequently possess information and evidence that is essential to substantiate children's asylum cases.²⁷ That information is often unavailable to children due to their youth or their parents' efforts to shield them from danger. The detention and deportation of proposed caregivers will make it more difficult for children to obtain critical evidence to prove their cases.

Second, enforcement against caregivers will force many children to navigate their legal cases while in detention. Even for adults, detention severely hampers people's ability to gather evidence and prepare for immigration hearings.²⁸ The burdens on children—many of whom have endured trauma and who are seeking humanitarian relief—will be even greater. More children, isolated and fatigued by their incarceration, will face an unfair choice between detention and returning to countries where they face danger.²⁹

V. The broad collection of biometric information is unnecessary, creates a security risk, and raises the risk of discrimination and erroneous enforcement actions.

The Notice proposes to collect and retain biometric information from potential sponsors and adult household members, without specifying or limiting the types and uses of biometric information that is covered. As explained below, any broad or mandatory collection of such information creates unnecessary security risks and raises the threat of discriminatory enforcement.

In cases where identity verification of sponsors and adult household members is required, it is unnecessary to collect more than one biometric identifier. A fingerprint can positively identify an individual whose fingerprints are already enrolled in a database and collecting multiple biometrics in such a circumstance is unjustified. In particular, the collection of photographs of scars, marks, and tattoos ("SMT biometrics") has no clear value or connection to the sponsor verification process. Such characteristics—known as "soft biometrics"—are far more subjective as unique identifiers,³⁰ and their accuracy is not well

²⁷ See, e.g., *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314 (9th Cir. 2012); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).

²⁸ See *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017), *order clarified sub nom. Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018).

²⁹ See Motion for Preliminary Injunction at 15, n. 12, *LVM v. Lloyd*, 18-cv-1453 (S.D.N.Y. April 30, 2018) (ECF No. 42).

³⁰ See JUNG-EUN LEE ET AL., SCARS, MARKS AND TATTOOS (SMT): SOFT BIOMETRIC FOR SUSPECT AND VICTIM IDENTIFICATION 1 (2008), *available at* http://www.cse.msu.edu/biometrics/Publications/SoftBiometrics/LeeJainJin_SMT_BSYM2008.pdf.



established.³¹ Facial recognition similarly suffers from accuracy problems.³² Because facial recognition involves some subjectivity, matching faces requires a degree of human judgment, which introduces even more error, particularly when the subject is of a different racial or ethnic group than the operator.³³ The inherent subjectivity of SMT biometrics and facial recognition increases the risk of false positives and false negatives, making sponsor identity verification less, rather than more, accurate. Thus, any required collection of biometrics from potential sponsors and adult household members is not only unnecessary, but counterproductive.

Additionally, collecting and storing more biometric information than necessary creates a security risk. Personally identifying information compiled by government agencies is subject to hacking and data breaches.³⁴ Breaches of biometric data are particularly harmful since biometrics cannot be changed.

Finally, using biometric information for enforcement purposes raises the risk of discriminatory treatment. The challenge of matching faces across ethnicities exacerbates the potential for a disparate impact on immigrant communities and communities of color. The “false-positive risk inherent in large facial recognition databases could result in even greater racial profiling by disproportionately shifting the burden of identification onto certain ethnicities.”³⁵ The false positive risk in this context is serious—database or human matching errors can result in the wrongful detention or deportation of people lawfully in the United States, and wrongful arrests for criminal charges.

³¹ See *id.*; HU HAN ET AL., TATTOO BASED IDENTIFICATION: SKETCH TO IMAGE MATCHING, 6TH INTERNATIONAL CONFERENCE ON BIOMETRICS (2013), available at http://www.cse.msu.edu/biometrics/Publications/SoftBiometrics/HanJain_TattooBasedIdentification_Sketch2ImageMatching_ICB13.pdf (explaining that “a tattoo is not a unique identifier”).

³² The accuracy of facial recognition depends in part on the lighting, angle, facial expression, and quality of the photo. See, e.g., Jonathon Phillips et al., *An Introduction to the Good, the Bad, & the Ugly Face Recognition Challenge Problem*, National Institute of Standards & Testing (Dec. 2011), available at <http://www.nist.gov/itl/iad/ig/upload/05771424.pdf>. Even without such challenges, facial recognition technology may be less accurate for non-white, non-male faces. See, e.g., Steve Lohr, *Facial Recognition is Accurate, if You’re a White Guy*, N.Y. Times (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html>.

³³ See Lucas D. Introna and Helen Nissenbaum, New York University Center for Catastrophe Preparedness and Response, *Facial Recognition Technology: A Survey of Policy and Implementation Issues*, 12 (April 2009), available at http://www.nyu.edu/ccpr/pubs/Niss_04.08.09.pdf.

³⁴ See, e.g., Devlin Barrett et al., *U.S. Suspects Hackers in China Breached About 4 Million People’s Records, Officials Say*, THE WALL STREET JOURNAL, June 5, 2015, <http://www.wsj.com/articles/u-s-suspects-hackers-in-china-behind-government-data-breach-sources-say-1433451888>.

³⁵ Testimony of Jennifer Lynch, Staff attorney with the Electronic Frontier Foundation, to the Senate Committee on the Judiciary Subcommittee on Privacy, Technology, and the Law, *What Facial Recognition Means for Privacy and Civil Liberties*, 15, July 18, 2012, available at https://www.eff.org/files/filenode/jenniferlynch_eff-senate-testimony-face_recognition.pdf.

Federal agencies are required to conduct a Privacy Impact Assessment before initiating a new collection of personally identifiable information.³⁶ Because DHS proposes to collect a new category of information—namely biometric information—this Notice triggers the PIA requirement. DHS should conduct and publish a PIA *before* initiating the collection of biometric information.

* * *

We therefore urge DHS to rescind the Notice as it relates to sponsors and other adults in the sponsors' home to ensure the best interests of children remain the overarching and unimpeded priority of ORR's sponsorship review process. At a minimum, DHS should conduct a Privacy Impact Assessment before initiating the collection of biometric information. If you have any questions, please contact us at skang@aclu.org or ebhandari@aclu.org. Thank you.



Sincerely,

Stephen B. Kang & Esha Bhandari
American Civil Liberties Union

³⁶ E-Government Act of 2002 § 208(b)(1)(A), 44 U.S.C. § 3501 (2008).