Before

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
DEPARTMENT OF HOMELAND SECURITY

Camp Springs, MD 20746

Notice of Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services (Docket Number USCIS-2025-0205, FR Doc. 2025-19747)	**COMMENTS OF THE IDENTITY PROJECT (IDP) AND FIAT FIENDUM, INC.**

The Identity Project (IDP)

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I. INTRODUCTION

The Identity Project (IDP) and Fiat Fiendum, Inc., submit these comments in response to the Notice of Proposed Rulemaking (NPRM), "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services", Docket Number USCIS-2025-0205, FR Doc. 2025-19747, published at 90 *Federal Register* 49062-49145 (November 3, 2025).

By this NPRM, the U.S. Citizenship and Immigration Services (USCIS) component of the Department of Homeland Security (DHS) is proposing to "expand its routine biometric collections to include individuals associated with immigration benefit requests or other requests or require[d] collection of information…. DHS is proposing to revise 8 CFR 103.16 to require that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with a benefit request, other request, or collection of information, to include U.S. citizens, U.S. nationals, and lawful permanent residents, and without regard to age, must submit biometrics, unless DHS otherwise exempts the requirement."

These individuals would be required to submit to intrusive searches at U.S. borders and ports of entry and exit, at places outside the U.S., and at places in the interior of the U.S.

These searches and collections of biometric information and samples would include facial photography ("mug shots"), fingerprinting, iris and retina scans, voice samples, and DNA samples, on a dragnet basis for all applicants or "associates" of applicants or at the "discretion" of USCIS, rather than on the basis of warrants, probable cause, or individualized suspicion.

The NPRM does not mention the Constitutional rights or human rights treaties it implicates, much less justify the proposed rules as Constitutional or permitted by treaty.

The proposed searches would be unconstitutional and violate U.S. treaty obligations.

Warrantless, suspicionless searches, solely on the basis of citizenship, immigration status, exercise of the right to freedom of movement, and/or "association" with other individuals, would violate the First and Fourth Amendments to the U.S. Constitution and U.S. obligations as a party to the International Covenant on Civil and Political Rights (ICCPR).

The proposed rule should be withdrawn.

II. ABOUT THE COMMENTERS

The Identity Project (IDP) is an independent, nonprofit project which provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights.

Fiat Fiendum, Inc., is a 501(c)(3) nonprofit tax-exempt corporation devoted to promotion of direct and liquid democracy, enabling better voter empowerment, public interest journalism, government transparency and accountability, individuals' civil rights, public interest litigation, civil rights education, and related issues.

III. WARRANTLESS, SUSPICIONLESSN COLLECTION OF BIOMETRIC INFORMATION AND SAMPLES IS AN UNREASONABLE "SEARCH" PROHIBITED BY THE 4TH AMENDMENT TO THE U.S. CONSTITUTION.

Compelled collection of biometric information and samples has, from its first use more than a century ago, been recognized as a "search" as that term is used in the 4th Amendment to the U.S. Constitution. This has been the case even when, as in the case of "mug shots", the collection of biometric information entails no physical contact with the person's body.

The 4th Amendment is even more clearly implicated when, as in the case of DNA sampling, the collection of biometric information or samples requires physical contact with a person's body: "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." (*Schmerber v. California*, 384 U.S. 757, 1966)

Compelled taking of mug shots, fingerprints, voice samples, and DNA samples have all been analyzed within the framework of searches and seizures subject to 4th Amendment requirements. The proposed rule must likewise be assessed by those 4th AmeNdment standards

Courts have often accepted the "reasonableness" of warrantless searches and seizures of biometric information and samples as searches *incident to or following arrest*, where the arrest was itself supported by probable cause. But warrantless detention for the purpose of compelling

collection of biometrics (fingerprints), in the absence of probable cause, has itself been found to violate the 4th Amendment. (*Davis v. Mississippi*, 394 U.S. 721, 1969)

Even following arrest supported by probable cause for a violent or serious crime, the Supreme Court has looked closely at the specific circumstances of the collection of biometric samples and information and the manner in which those samples will be used before determining that certain such collections may, in specific circumstances, be reasonable without a warrant.

In *Maryland v. King (*569 U.S. 435, 2013), the Supreme Court assessed the Constitutionality of warrantless post-arrest DNA sampling. The Court began by noting that, "using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search." It then reviewed the circumstances in which it found this search to be reasonable:

> The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with ... a crime of violence or an attempt to commit a crime of violence; or ... burglary or an attempt to commit burglary. Md. Pub. Saf. Code Ann. § 2-504(a)(3)(i) (Lexis 2011). Maryland law defines a crime of violence to include murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes. Md. Crim. Law Code Ann. § 14-101 (Lexis 2012). Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). Md. Pub. Saf. Code Ann. § 2-504(d)(1) (Lexis 2011). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. If "all qualifying criminal charges are determined to be unsupported by probable cause ... the DNA sample shall be immediately destroyed." § 2-504(d)(2)(i). DNA samples are also destroyed if "a criminal action begun against the individual ... does not result in a conviction," "the conviction is finally reversed or vacated and no new trial is permitted," or "the individual is granted an unconditional pardon." § 2-511(a)(1).
>
> The Act also limits the information added to a DNA database and how it may be used. Specifically, "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." § 2-505(b)(1). No purpose other than

> identification is permissible…. The arrestee is already in valid police custody for a serious offense supported by probable cause.

There are no such restrictions in the proposed rule on the collection or use of biometric information and samples by USCIS. The proposed searches would not be limited to individuals arrested for crimes, or with respect to whom there is probable cause for suspicion.

The NPRM provides no basis for a finding that these warrantless, suspicionless personal searches would be "reasonable". They are not: They are unreasonable and unconstitutional.

IV. NO EXCEPTION TO THE 4TH AMENDMENT APPLIES TO THE PROPOSED COLLECTION OF BIOMETRIC INFORMATION AND SAMPLES.

Only in limited exceptional circumstances might warrantless searches be consistent with the 4th Amendment. None of those exceptions apply to the proposed rule.

First, the proposed rule would subject to search individuals who are not suspected of any crime. The mere fact of not being a U.S. citizen is neither criminal nor suspicious.

The proposed rule would also subject to search any U.S. citizen "associated" with a non-U.S. citizen interacting with USCIS. But freedom of assembly and association are rights recognized by the 1st Amendment. Mere "association" with foreign citizens who are not themselves suspected of any crime may not Constitutionally be deemed suspicious or criminal, and may not therefore be used to bootstrap the Constitutionality of a warrantless search.

Second, the proposed rule is not limited to searches at borders or ports of entry or exit to and from the U.S. The proposed rule would authorize mandatory searches at any location where USCIS operates or where an individual is directed by USCIS to report for collection of biometrics – anywhere within the U.S., or anywhere in the world. These searches would not be subject to any exceptions to the 4th Amendment arguably applicable at U.S. borders.

Third, the proposed compelled submission to collection of biometric information and samples would not be limited to information that is "in plain view". In the absence of the mandate in the proposed rule, an individual submitting a written application or signing a form would have the right to remain silent rather than providing voice samples. They might choose, or might for medical reasons need, to wear dark glasses that would block iris or retinal scans. They might wear a mask over their face for religious reasons, or health reasons, or to protect their privacy or personal security. For example, being seen and identified by a repressive government as having visited a U.S. embassy or consulate can place a would-be asylum seeker at grave risk, even endangering their life. Many U.S. consulates and embassies are surrounded by cameras linked to facial recognition systems operated by governments that people have good reasons to fear and to flee. Applicants for USCIS "benefits" may have good reasons to hide their faces.

If the proposed rule were limited to taking of photographs in public places or collections of other information "in plain view", it wouldn't be necessary. The whole point of the propsoed rule is to compel the exposure and collection of private information and bodily samples.

Fourth, the proposed rule would make submission of biometric information and samples a condition of many determinations by USCIS, described in the proposed rule as "benefits". But some of these "benefits", such as the right to asylum, are rights under U.S. and treaty law.

The exercise of a right cannot lawfully be conditioned on the waiver of another right. The right to asylum or to freedom of association with non-U.S. citizens cannot lawfully be conditioned on waiver of the right to be free from unreasonable searches and seizures.

V. THE PROPOSED COLLECTION OF BIOMETRIC INFORMATION AND SAMPLES WOULD VIOLATE U.S. HUMAN RIGHTS TREATY OBLIGATIONS.

Freedom of association is recognized by the 1st Amendment to the U.S. Constitution. The right to be free from unreasonable searches and seizures is recognized by the 4th Amendment.

The rights of peacable assembly and freedom of association are also recognized in Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by, and binding on, the U.S. In addition, Article 17 of the ICCPR provides that "No one shall be subjected to arbitrary ... interference with his privacy, family, home or correspondence."

The ICCPR defines *human* rights, which by definition do not depend on citizenship. Article 16 of the ICCPR provides, "Everyone shall have the right to recognition everywhere as a person before the law." It would violate Article 16 of the ICCPR for the U.S. to deprive non-U.S. citizens of any of the rights of "persons" recognized in the Constitution or elsewhere in U.S. law.

It is a fundamental principle of statutory and Constitutional construction that, whenever possible, provisions of the Constitution and of treaties which have the same force of law should be so interpreted as to avoid inconsistency between those provisions. The only way to avoid unnecessary conflict between the provisions of the First and Fourth Amendments to the U.S. Constitution and the provisions of the ICCPR is to interpret those provisions of the Bill of Rights that are restated in the ICCPR as applying to all persons regardless of citizenship.

USCIS, along with all other executive agencies, has been ordered by the President to consider human rights treaties including the ICCPR in performing its functions including rulemaking: Executive Order 13107, "Implementation of Human Rights Treaties," directs all executive departments and agencies to "maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully."[1]

To the extent that submitting to collection of biometric information and samples is made a condition of the exercise of the right to freedom of movement, speech, or assembly, or the right to be free from unreasonable searches and arbitrary interference with privacy, it is a condition on the exercise of fundamental Constitutional and international human rights treaty rights. Such a condition requires a showing of necessity, and is subject to strict scrutiny.

Even if U.S. accession to the ICCPR is not deemed to have extended the rights recognized by the 1st and 4th Amendment to all individuals regardless of citizenship, many of

[1]Executive Order 13107 – Implementation of Human Rights Treaties, December 10, 1998, published at 63 *Federal Register* 68991, <https://www.govinfo.gov/content/pkg/FR-1998-12-15/pdf/98-33348.pdf>.

the individuals who would be affected by this proposal, including U.S. citizens and permanent residents, are entitled to 1st and 4th Amendment protection under even the narrowest interpreataion of U.S. law. Regarding the 4th Amendment, the casual beliefs that the 4th Amendment does not apply at the border or that it does not apply to non-U.S. citizens are not supported by existing Supreme Court and appeals court precedents. Just as forensic examination of a digital device at the border must be supported by reasonable suspicion of involvement in a crime (*U.S. v. Cotterman*, 709 F.3d 952, 2013, 9th Cir. *en banc*), so the seizure of an extraordinary and forensic level of detail on one's use of social media can be expected to require reasonable suspicion of involvement of the individual in a crime. Many non-U.S. citizens applying for permanent residency, adjustment of status, or naturalization will in fact be eligible for 4th Amendment protection, as a result of meeting the test of having 'substantial voluntary connections' to the U.S. (*U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 1990), which test includes permanent U.S. residents applying for naturalization and millions of other non-U.S. persons.

Moreover, the proposed rule would require U.S. citizens "associated" with non-U.S. citizens to submit biometric information and samples. These U.S. citizens are clearly protected by the First and Fourth Amendments, and the warrantless, suspicionless search and collection of their biometric information and samples is subject to – and fails to satisfy – strict scrutiny.

USCIS failed to consider wheter the proposed rule is consistent with the U.S. Constitution and U.S. treaty obligations. It is not. We urge USCIS to withdraw the proposed rule.

Respectfully submitted,

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