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Criminalizing Asylum: DNA Testing Asylum Seekers Violates Privacy Rights

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CRIMINALIZING ASYLUM: DNA TESTING ASYLUM SEEKERS VIOLATES PRIVACY RIGHTS

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I. INTRODUCTION

On June 16, 2015, President Trump announced his 2016 presidential campaign and claimed that Mexicans are criminals who “[h]ave lots of problems . . . they’re bringing drugs. They’re bringing crime. They’re rapists . . . It’s coming from all over . . . Latin America.”¹ President Trump has publicly expressed his hostility towards immigrants by calling them “animals” and blaming them for drugs and gangs in the United States.² While in office, President Trump tweeted that immigrants were invading the United States and suggested that “we must immediately, with no Judges or Court Cases, bring them back from where they came.”³

Consistent with the Trump administration’s overarching view of immigrants as criminals, on March 6, 2020, the DOJ issued a final rule permitting collection of deoxyribonucleic acid (“DNA”) samples from those detained for immigration violations—a crime enforcement tool that courts have previously permitted only for those charged with significant crimes.⁴ The rule deletes 28 C.F.R. 28.12(b)(4), which gave the Secretary of Homeland Security the authority to exempt certain detained immigrants from

1. See *S.A., et al. v. Trump*, 363 F. Supp. 3d 1048, 1059 (2018) (citing Compl. – ECF No. 1 at 18 ¶ 45) (ellipses in original) (discussing the rhetoric in President Trump’s inaugural speech).

2. See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 298 F. Supp. 3d 1304, 1314 (N.D. Cal. 2018) (citing *Garcia* Compl. ¶¶ 102–13, 124; *Santa Clara Compl.* ¶¶ 75–76)) (noting that President Trump has called immigrants “[d]ruggies [sic], drug dealers, rapists and killers are coming across the southern border,” and “animals” responsible for “the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, MS 13”).

3. See Donald J. Trump, (@realDonaldTrump), Twitter (June 24, 2018, 11:02 AM), <https://twitter.com/realDonaldTrump/status/1010900865602019329> (indicating that our immigration system “is a mockery to good immigration policy and Law and Order”).

4. See *DNA-Sample Collection from Immigration Detainees*, 85 Fed. Reg. 13,483, 13,484 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (declaring that law enforcement will extract DNA samples from individuals detained for immigration violations).

the DNA-sample collection requirement.⁵ The final rule requires the Department of Homeland Security (“DHS”) to collect DNA samples from undocumented immigrants who are detained and pending removal, including asylum seekers.⁶ This class of individuals belong to the specific group that former Secretary of Homeland Security Janet A. Napolitano and former Attorney General Eric H. Holder, Jr. exempted in 2010.⁷ The DNA collected would then be entered into the FBI’s Combined DNA Index System (“CODIS”) for the purpose of solving past and future crimes before an individual is removed from this country.⁸ The DOJ argues that the government’s interest in protecting officers and the public outweighs defensive asylum seekers’ bodily interest in genetic privacy even though they have not been charged nor convicted of a crime.⁹

Law enforcement uses DNA samples collected at crime scenes to identify suspects by matching a suspect’s DNA to the DNA found at crime scenes.¹⁰ DNA testing has also been used as a tool to exonerate innocent defendants.¹¹ Under the Act, the government must collect, analyze, and store DNA samples from anyone arrested for any federal crime.¹² Further, all fifty states

5. *See id.* (discussing that before section (b)(4) was added to 28 C.F.R. 28.12, the Act required the collection of DNA samples from undocumented immigrants in DHS custody).

6. *See id.* (conveying that the government will collect DNA samples from “non-United States persons who are detained under the authority of the United States”).

7. *See* Letter from Janet A. Napolitano, the Secretary of Homeland Security to Attorney General Eric H. Holder, Jr., (Mar. 22, 2010) (explaining that under the power granted in 28 C.F.R. 28.12(b)(4), DHS would not collect DNA samples from undocumented immigrants who are detained for processing, for administrative proceedings, and from immigrants within DHS custody who are pending administrative removal proceedings).

8. *See* 85 Fed. Reg. at 13,483 (explaining that the DOJ plans to collect DNA samples from immigrants for crime-solving “before the individual’s removal from the United States places him or her beyond the ready reach of the United States justice system”).

9. *See id.* (asserting that the government has a right to extract DNA samples from defensive asylum seekers because they may be or become criminals).

10. *See* Patrick Haines, Comment, *Embracing the DNA Fingerprint Act*, 5 J. TELECOMM. & HIGH TECH. L. 629, 630 (2007) (noting that the matching of DNA at crime scenes has an evidentiary use that law enforcement may use to compel a suspect to provide a DNA sample through a warrant).

11. *See* *Maryland v. King*, 569 U.S. 435, 442 (2013) (conveying that since its first use in England in 1986, courts have acknowledged DNA testing’s ability to help exonerate the wrongly convicted).

12. *See* Haines, *supra* note 10, at 631 (recounting a brief history of the DNA Fingerprint Act of 2005).

have authorized law enforcement to collect and store DNA samples from anyone convicted of a felony in criminal court.¹³ In *Maryland v. King*, the Supreme Court held that it is reasonable for law enforcement to collect DNA samples from defendants arrested for violent crimes if there is probable cause to arrest for a serious offense.¹⁴

This Comment argues that warrantless collection of DNA samples from undocumented immigrants seeking defensive asylum violates the Fourth Amendment because a defensive asylum applicant's interest in personal privacy and bodily integrity is higher than the government's interest in law enforcement and public safety.¹⁵ It also argues that the DOJ erroneously concluded that *Maryland v. King* authorizes the DOJ to collect DNA samples from detained asylum seekers who have not been charged with, or convicted of, a violent crime.¹⁶ Part II describes the two ways to obtain asylum in the United States and how biometrics and DNA are used in the asylum process.¹⁷ Part II also describes the United States' use of DNA for law enforcement purposes, as well as the Supreme Court's decision in *King*.¹⁸ Part III explains how the DOJ's final rule violates the privacy rights of detained asylum seekers who have not been charged with, or convicted of, a crime.¹⁹ Part III further asserts that the DOJ wrongfully applied the Supreme Court's ruling in *King*, violating the privacy rights of detained asylum seekers and criminalizing immigrants.²⁰ Part IV recommends the DOJ halt the

13. See Anthony P. Gatto, *Under the Human Skin: Will Human Microchipping Prove to be a Survivor in the Courtroom Just as DNA Evidence Did?*, 16 J. HIGH TECH. L. 409, 446 (2016) (noting that all fifty states collect DNA samples from felons).

14. See *King*, 569 U.S. at 465-66 (reasoning that under the Fourth Amendment, the reasonableness of the search is assessed by conducting a balancing test that measures the government's legitimate interest against the person's privacy interest).

15. See *King*, 569 U.S. at 447 (declaring that in determining whether a governmental search is reasonable and constitutional, the Court must measure the government's interest against the public's interest); see also DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,485 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (arguing that the warrantless collection of DNA samples from defensive asylum seekers will help solve crimes, protect officers, and protect the public).

16. See *King*, 569 U.S. at 465-66 (holding that law enforcement officers may warrantlessly collect DNA samples when there is probable cause that the arrestee committed a violent crime); see also 85 Fed. Reg. at 13,483 (comparing undocumented immigrants to criminal arrestees).

17. See *infra* Part II (describing affirmative and defensive asylum applications).

18. See *infra* Part II (explaining the use of DNA in law enforcement and *Maryland v. King*).

19. See *infra* Part III (analyzing how the DOJ is violating the privacy rights of detained asylum seekers).

20. See *infra* Part III (demonstrating how the DOJ wrongfully applied *Maryland v.*

warrantless collection of DNA samples from asylum seekers in detention and demands the expungement of DNA samples in the CODIS database taken from asylum seekers in detainment.²¹ Part V concludes by proclaiming that the DOJ's final rule violates the Fourth Amendment privacy rights of detained asylum seekers, and that the DOJ wrongfully applied the holding in *King* to their rule.²²

II. BACKGROUND

A. Current Immigration Asylum Process

1. Asylum Process

In the United States, any individual who has entered the country may apply for asylum if they meet the definition of a refugee.²³ A refugee is a person who has suffered persecution, or has a well-founded fear of future persecution, in their home country based on their race, religion, nationality, political opinion or social group.²⁴ A grant of asylum permits an individual to work, apply for a social security card, and apply for permanent residency after one year in the United States.²⁵ A grant of asylum also creates a pathway to U.S. citizenship.²⁶ After asylum is granted, an asylee has all the removal protections of an immigrant with lawful permanent residency.²⁷

Various government departments adjudicate the United States' immigration process.²⁸ DHS has the vested power to administer, enforce,

King to the final rule).

21. See *infra* Part IV (recommending the DOJ halt the implementation of their final rule and expunge DNA samples it has already collected from asylum seekers).

22. See *infra* Part V (concluding that the DOJ's final rule violates detained asylum seekers Fourth Amendment right to privacy and wrongfully applied *Maryland v. King*).

23. See 8 C.F.R. § 208.13 (2019) (defining refugee as someone who has been persecuted or had a well-founded fear of future persecution).

24. See Regina Germain, *Seeking Refuge: The U.S. Asylum Process*, 35 COLO. LAW. 71, 71 (2006) (explaining that the definition of refugee was set forth in the 1967 Protocol Relating to the Status of Refugees, which the United States signed in 1968).

25. See 8 C.F.R. 209.2 (2020) (stating that an asylee's immigration status may be adjusted to lawful permanent resident); see also 8 C.F.R. 274a.12(a)(3)-(5) (2020) (indicating that asylees "are authorized to be employed in the United States . . .").

26. See 8 C.F.R. § 316.2 (2020) (noting that after five years, a lawful permanent resident may qualify for naturalization).

27. See 8 C.F.R. § 208.24 (2020) (explaining that an asylee may be removed only if the asylee commits a serious crime, violates their status or there has been a fundamental change in the original claim or the individual's life, or freedom is no longer threatened).

28. See 8 C.F.R. § 1003.0 (2020) (conveying that the power to administer

and delegate immigration laws through U.S. Citizenship & Immigration Services (“USCIS”).²⁹ The DOJ contains an Executive Office for Immigration Review (“EOIR”), headed by a Director appointed by the United States Attorney General.³⁰ The EOIR comprises the Board of Immigration Appeals, the office of the Chief Immigration Judge (“IJ”), the Office of the Chief Administrative Hearing Officer, the Office of Policy, the Office of the General Counsel, and any other staff delegated by the Attorney General or Director.³¹

Individuals may obtain asylum in two ways: through the affirmative process or the defensive process.³² To obtain asylum through the affirmative process, an individual must be present in the United States and must apply for asylum within one year of arrival.³³ The defensive asylum process is available to individuals who are in removal proceedings in immigration court, who can then apply for asylum as a defense against removal.³⁴ Individuals may be placed in removal proceedings if their affirmative asylum application is denied, if they are caught in the United States or at a port of entry without valid legal documentation, or if they have violated their immigration status.³⁵

When apprehended by immigration enforcement authorities at the border,

immigration laws is delegated to various agencies).

29. See 8 C.F.R. § 2.1 (2020) (declaring that the Secretary of DHS has the authority to administer and enforce immigration laws as well as delegate “through successive redelegation, or to any employee of the United States to the extent authorized by law”).

30. See 8 C.F.R. § 1003.0 (describing the organizational structure of the EOIR, which is led by a Director who is appointed by the Attorney General).

31. See *id.* (noting that only the Board, an IJ, the Chief Administrative Hearing Officer, or an Administrative Law Judge have the power to direct the result of an adjudication).

32. See *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-united-states> (last visited Sept. 28, 2020) (indicating that there are two main ways to apply for asylum, and the key difference is whether the individual has been placed in removal proceedings before an IJ).

33. See *id.* (noting that individuals applying for an affirmative asylum are rarely detained and may live in the United States while the application is pending with the USCIS asylum officer).

34. See 8 C.F.R. § 1208 (2020) (asserting that an individual may be placed in removal proceeding by an asylum officer if deemed inadmissible or deportable until the individual is referred to an IJ for adjudication in removal proceeding).

35. See *Obtaining Asylum in the United States*, *supra* note 32 (stating that if the affirmative asylum application is denied by USCIS, then the individual is referred to EOIR where an IJ conducts a “de novo” hearing of the case, where an independent decision from the one from USCIS is made).

individuals have the right to claim credible fear of returning to their country of origin while they are placed in removal proceedings.³⁶ During the removal process, a sworn statement is taken, and a U.S. Customs and Border Protection (“CBP”) agent or officer asks four questions to determine whether the individual will be safe if returned to their country.³⁷ The individual then goes through a credible fear screening process where a USCIS asylum officer conducts an interview.³⁸ If the officer decides that the applicant has a “significant possibility” of being persecuted or has a well-founded fear of persecution, the applicant is referred to immigration court and proceeds to a removal hearing, where an IJ decides whether the applicant has a right to remain in the United States.³⁹

Removal hearings are considered a “purely civil action,” and an IJ cannot consider criminal sanctions.⁴⁰ An IJ may only consider a person’s criminal past in deciding whether a person may remain in the United States.⁴¹ This consideration is because an immigrant may be denied asylum or withholding of removal if the person has been convicted of a serious crime, or if the IJ believes that the person may be a danger to the security of the United States.⁴² Because the EOIR is an executive agency and not a federal court, detainees

36. *See Claims of Fear*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear> (last visited Sept. 28, 2020) (noting that U.S. Border Patrol and the Office of Field Operations processes the credible fear claims and then refer the individuals to USCIS).

37. *See id.* (conveying that CBP agents and asylum officers do not decide whether the individual may be referred to a credible fear interview or whether credible fear claims are valid).

38. *See Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP AND IMMIGR. SERV.’S, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last visited June 9, 2020) (noting that the asylum applicant explains his or her persecution or well-founded fear during the credible fear screening process).

39. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (asserting that an IJ has the sole power to issue a decision on the “deportability” of an individual); *see also Questions & Answers: Credible Fear Screening*, *supra* note 38 (indicating that an IJ decides whether the individual may remain in the U.S.).

40. *See Lopez-Mendoza*, 468 U.S. at 1038 (asserting that removal hearings are not criminal hearings).

41. *See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, slip op. at 13 (U.S. June 18, 2020) (citing §§ 1158, 1231(b)(3)) (noting that an individual may be denied asylum if they have committed a certain crime); *see also Lopez-Mendoza*, 468 U.S. at 1038 (indicating that criminal history is only relevant when evaluating whether the person poses any threat to the U.S.).

42. *See Questions & Answers: Credible Fear Screening*, *supra* note 38 (noting that criminal record is considered during asylum proceedings for national security reasons).

do not have the same protections as criminal defendants.⁴³ Immigrants seeking asylum can be detained during that process, although an IJ also has the power to parole them into the United States while they await their asylum decision.⁴⁴

2. *The Use of Biometrics in Immigration*

To admit an individual into, or remove an individual from, the United States, the government must first establish the identity of the individual.⁴⁵ Immigration National Security (“INS”) developed an Automated Biometric Identification System (“IDENT”) to help DHS Border Patrol Agents manage, track and identify individuals entering the United States at the Southern border.⁴⁶ IDENT does this by processing biometric data such as fingerprints.⁴⁷ U.S. Immigration and Customs Enforcement (“ICE”), the CBP, the U.S. Coast Guard, USCIS, and the U.S. Department of State all have access to IDENT.⁴⁸ DHS has the power to use the biometric information collected to conduct background checks, for immigration and naturalization benefits, and enforcement.⁴⁹

If an individual is applying for asylum through the affirmative application process, USCIS will schedule an interview and send an appointment to get fingerprinted.⁵⁰ If an individual has been detained by DHS, photographing

43. See *Lopez-Mendoza*, 468 U.S. at 1038 (explaining that certain protections that apply to a criminal trial do not apply to a deportation hearing because of its civil nature).

44. See Linet Suárez, *Liberty at the Cost of Constitutional Protections: Undocumented Immigrants and Fourth Amendment Rights*, 48 U. MIAMI INTER-AM. L. REV. 153, 184 (2016) (describing how immigrants may be released from detention with GPS monitoring while awaiting immigration proceedings).

45. See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 29 (2014) (discussing that after September 11, 2001, the government had a heightened interest in identifying people at the border).

46. See *id.* at 30-31 (noting that at the time, IDENT held a record of over 160 million individuals in its data, including the data of detained immigrants, immigrants applying for immigration benefits such as asylum, naturalized citizens, and others).

47. See *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 305, 310-11 (E.D. Pa. 2018) (stating that the majority of the information in IDENT comes from encounters with various parts of DHS, such as applying for a visa).

48. See *id.* at 310 (showing that IDENT users have access to “the central DHS-wide system for the storage and processing of biometric and associated biographic information for national security, law enforcement, immigration, and border management, intelligence, and background investigation purposes”).

49. See Kalhan, *supra* note 45, at 33 (explaining that DHS checks for criminal history, outstanding warrants, the FBI’s Terrorist Screening Database and No Fly List).

50. See 8 C.F.R. § 103.2 (noting that if an individual were to miss their fingerprinting appointment, their request for asylum may be denied).

and fingerprinting, as well as the notation of identifying marks or other unusual physical characteristics, occurs during the intake process at a detention center.⁵¹

B. The Use of DNA for Law Enforcement Purposes

1. Evolution of The DNA Fingerprint Act of 2005

In 2005, Congress expanded the categories of individuals subject to DNA collection by enacting the Act placed under Title X of the Violence Against Women Act Reauthorization of 2005.⁵² The Act amended the DNA Identification Act of 1994 and the DNA Analysis Backlog Elimination Act of 2000, authorizing the Attorney General to collect DNA samples from people who are arrested, charged, or convicted of a crime and from immigrants who are detained under the authority of the U.S. federal government.⁵³ The Act grants the Attorney General the power to delegate and authorize other federal agencies that arrest and detain individuals, such as DHS, to collect DNA samples from people who are arrested, charged, or convicted of a crime.⁵⁴ In 2008, the DOJ issued and implemented a rule that amended 28 C.F.R. § 28.12 and gave the Attorney General the power to authorize certain exceptions to the DNA sample collection requirement.⁵⁵

In 2010, former Secretary of DHS Janet Napolitano and Attorney General Eric H. Holder, Jr. exempted undocumented immigrants who are detained under administrative proceedings and are not facing any criminal charges from the Act.⁵⁶ Napolitano claimed that collecting DNA samples from all

51. See *2011 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 1, 51, 57 (2011), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> (noting that an individual cannot be released, or removed without being fingerprinted).

52. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified at various sections of 42 U.S.C.) (2006) (setting forth the procedure to remove DNA samples from CODIS, expanding the use of CODIS grants, and authorizing the collection of DNA samples from individuals arrested or detained under federal authority).

53. See 34 U.S.C. §40702(a)(1)(A) (2018) (describing the Attorney General's power to collect DNA samples from individuals in custody).

54. See *id.* (contending that the Attorney General may delegate within the DOJ the power to detain and collect DNA samples from detainees).

55. See DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932-01 (final rule Dec. 10, 2008) (codified at 28 C.F.R. 28.12 pt. 28) (setting forth the categories of immigrants "from whom DHS will not be required to collect DNA samples, even if DHS collects fingerprints").

56. See Napolitano, *supra* note 7, at 2 (listing the two classes of undocumented

undocumented immigrants in DHS custody would impose serious organizational and financial challenges to DHS.⁵⁷ On March 6, 2020, Attorney General William Barr eliminated this exception, restoring the Attorney General's plenary authority under the Act and compelling law enforcement authorities to collect DNA samples from all detained undocumented immigrants, including those seeking asylum.⁵⁸ The DOJ plans to collect the DNA samples from detained asylum seekers and enter it into CODIS indefinitely to solve past and future crimes.⁵⁹

2. *DNA Basics and DNA Use in Criminal Investigations*

DNA are molecules that carry the genetic information of each human being.⁶⁰ DNA samples may be collected from "tissue, fluid, or other bodily sample of an individual."⁶¹ In 1994, Congress passed the Violent Crime Control and Law Enforcement Act ("Crime Control Act"), which led to the FBI's creation of CODIS.⁶² State and local forensic laboratories use CODIS to exchange and compare DNA profiles to find a DNA match with the DNA samples collected from crime scenes.⁶³ For twelve years, CODIS used short tandem repeat technology ("STR") that are "located at 13 markers (or loci) on DNA present in specimen," which then creates junk DNA.⁶⁴ Today,

immigrants that should be excluded from the Act).

57. *See id.* (claiming that collecting DNA samples from immigrants would cost DHS approximately \$30-40 million dollars annually for the training of staff and officers and establishment of procedures).

58. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,483 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (eliminating the rule that exempted DHS from collecting DNA samples from certain immigrant groups).

59. *See id.* (claiming that storing DNA samples in CODIS may help solve crime even if there is no DNA match when first processed).

60. *See* United States v. Sczubelek, 402 F.3d 175, 181 (3d Cir. 2005) (noting that each individual's DNA is unique, except in cases of identical twins).

61. *See* Jeffrey P. Doss, *A Structural Criticism of the DNA Analysis Backlog Elimination Act*, 39 CUMB. L. REV. 511, 515 (2008-2009) (citing 42 U.S.C. § 14135(a)(1)(A) & (a)(3) (2007)) (defining a DNA sample under the DNA Act).

62. *See* United States v. Mitchell, 652 F.3d 387, 399 (3d Cir. 2011) (describing how the Act authorized the FBI to create an electronic index of DNA samples).

63. *See id.* at 423 (citing H.R. Rep. 106-900(I), at 8 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2323, 2324) (indicating that DNA samples in CODIS are compared to DNA found at crime scenes).

64. *See id.* at 400 (citing United States v. Kincade, 379 F.3d 813, 818 (9th Cir. 2004)) (conveying that junk DNA does not have genetic stretches and is only responsible for trait coding).

CODIS uses twenty loci markers.⁶⁵

Congress later enacted the DNA Analysis Backlog Elimination Act of 2000, which authorized the Attorney General to provide grants to States to collect DNA samples from crime scenes and use CODIS to identify potential offenders.⁶⁶ It also authorized the collection of DNA from individuals in the custody of the Bureau of Prisons who have been convicted of a qualifying federal offense.⁶⁷ If someone qualifies for the collection of a DNA sample but refuses to comply, they may be guilty of a class A misdemeanor.⁶⁸

The Crime Control Act sets forth limitations to protect the DNA samples from being disclosed without authorization.⁶⁹ Disclosing a DNA sample result is a punishable offense.⁷⁰ Under the Crime Control Act, the Director of the FBI is required to expunge collected DNA samples after receiving proof that a conviction is overturned, a charge is dismissed, a case is acquitted, or if no charge is timely filed.⁷¹

C. Fourth Amendment

1. Right to Privacy

The Fourth Amendment provides that people are protected against unreasonable searches and seizures of their “persons, houses, papers, and effects.”⁷² The Court has established that “the Fourth Amendment protects

65. See *Combined DNA Index System (CODIS)*, FBI (last visited July 18, 2020), <https://www.fbi.gov/services/laboratory/biometric-analysis/codis> (explaining that effective January 1, 2017, the FBI added seven additional loci’s into CODIS).

66. See DNA Analysis Backlog Elimination Act, Pub. L. No. 106-546, 114 Stat. 2726 (2000) (indicating that States may also collect DNA samples from “individuals convicted of a qualifying State offense”).

67. See *id.* (explaining that offenses related to murder, voluntary manslaughter, homicide, sexual abuse, sexual exploitation or other abuse of children, transportation for illegal sexual activity, peonage and slavery, kidnapping, robbery, burglary qualify as federal offenses).

68. See *United States v. Mitchell*, 652 F.3d 387, 399 (3d Cir. 2011) (citing 42 U.S.C. § 14135a(a)(4)(A)) (conveying the legal consequences of refusing to submit a DNA sample).

69. See *United States v. Sczubelek*, 402 F.3d 175, 181 (3d Cir. 2005) (citing 42 U.S.C. § 14135e(b)) (asserting that only criminal justice agencies have access to DNA samples for use in judicial proceedings and criminal defense).

70. See *Mitchell*, 652 F.3d at 399 (contending that the unlawful disclosure of a DNA sample or result could result in a fine up to \$250,000 or up to one year of imprisonment).

71. See *id.* (citing 42 U.S.C. § 14132(d)(1)(A)) (explaining the DNA expungement process which requires the FBI to receive a certified copy of a final court order detailing the final decision of the arrest or conviction).

72. See U.S. CONST. amend. IV (establishing that it is unconstitutional to conduct a

people not places,” as well as certain expectations of privacy.⁷³ The Fourth Amendment protects United States residents, not just United States citizens, from arbitrary searches and seizure by the U.S. government.⁷⁴ It also requires officers to seek a judicial warrant when searching for incriminating evidence.⁷⁵ Search warrants are also customarily required when the government seeks intrusion into the human body, including the government’s access to a human’s entire genome via a buccal swab.⁷⁶ The warrant is required because even though a buccal swab requires no surgical procedure, the Court has established that swabbing a person’s cheek for DNA collection is a search under the Fourth Amendment.⁷⁷

The Fourth Amendment warrant requirement has limited exceptions.⁷⁸ The Court has stated that arrestees have a diminished expectation of privacy.⁷⁹ Under the Fourth Amendment, an officer can conduct a warrantless search under the recognized exception of search incident to arrest.⁸⁰ An officer is not authorized to conduct any search simply because they chose to, the search must fall under the Fourth Amendment

warrantless search).

73. *See* *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)) (explaining that an expectation of privacy is one that society recognizes as reasonable).

74. *See* *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (indicating that the constitution protects all individuals).

75. *See* *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (affirming that a neutral judge or magistrate decides whether an officer has probable cause to conduct a search).

76. *See* *Winston v. Lee*, 470 U.S. 753, 760 (1985) (acknowledging that bodily intrusion implicates an individual’s deep rooted expectations of privacy, and therefore the Fourth Amendment); *see also* *Maryland v. King*, 569 U.S. 435, 445 (2013) (indicating that “using a buccal swab in the inner tissues of a person’s cheek to obtain DNA samples is a search”).

77. *See id.* at 436 (declaring that a negligible intrusion must be considered when determining whether a buccal swab search is constitutional); *see also* *United States v. Jones*, 565 U.S. 400, 401 (2012) (stating that the physical intrusion “of a constitutionally protected area in order to obtain information” is usually a violation of the Fourth Amendment).

78. *See* *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1185-86 (D.N.M. 2010) (explaining that a border patrol agent may stop a vehicle without a warrant or probable cause if the stop occurs 100 miles from the border).

79. *See* *King*, 569 U.S. at 462 (citing *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)) (stating that an individual in police custody has a “diminished scope” of their expectations of privacy).

80. *See* *United States v. Chartier*, 772 F.3d 539, 545 (8th Cir. 2014) (noting that an officer may search for a weapon after a reasonable arrest).

reasonableness requirement.⁸¹

III. ANALYSIS

A. The DOJ's Amendment to the DNA Fingerprint Act of 2005 Suggests Criminal Prosecution, Violating the Fourth Amendment's Right to Privacy of Detained Immigrants Lawfully Seeking Asylum

The DOJ's final rule violates the Fourth Amendment's privacy rights of detained immigrants applying for asylum under the defensive asylum process, since it warrantlessly collects their DNA samples even though they are not being convicted of, or charged with, a crime.⁸² While there is no Fourth Amendment case law that specifically addresses the collection of DNA samples from detained immigrants seeking asylum, the U.S. Supreme Court has ruled that law enforcement may collect DNA samples without a warrant only under certain circumstances.⁸³ In *King*, the Court held that a search using a buccal swab to collect an arrestee's DNA sample after an arrest of a violent crime was reasonable under the Fourth Amendment.⁸⁴ The Court measured the standard of reasonableness by applying a balancing test that weighed the government's legitimate interest against an individual's intrusion of privacy.⁸⁵

In the case of asylum seekers in removal proceedings, an asylum seeker's privacy interest outweighs the government's interest.⁸⁶ The government is

81. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2187-88 (2016) (Sotomayor, J., concurring in part) (asserting that the "Fourth Amendment 'is designed to prevent, not simply to redress, unlawful police action'"); see also *Winston v. Lee*, 470 U.S. 753, 760 (1985) (noting that the reasonableness of an intrusion depends on an "individual's interests in privacy and security . . . weighed against society's interests in conducting the procedure").

82. See *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (holding that the Due Process Clauses of the Fourth and Fifth Amendment protect undocumented immigrants no matter their immigration status).

83. See *King*, 569 U.S., at 456 (noting that when an arrestee is "already in valid police custody for a serious offense supported by probable cause" the constitutionality of the warrantless search is analyzed by reasonableness).

84. See *id.* at 465 (describing the balancing test used applied to measure reasonableness).

85. See *id.* at 448 (explaining that even if a warrant is not required, an intrusion of privacy must still pass scrutiny under the Fourth Amendment and must be reasonable in scope and means of execution).

86. See Nadwa Mossaad, *Annual Flow Report Refugees and Asylees: 2018*, DEP'T OF HOMELAND SEC., (Oct. 2019) 1, 6, https://www.dhs.gov/sites/default/files/publications/immigrationstatistics/yearbook/2018/refugees_asylees_2018.pdf (demonstrating that the government does not have an interest in collecting DNA samples

assuming that asylum seekers have committed criminal acts by claiming that the purpose of collecting DNA samples from asylum seekers is to solve crimes.⁸⁷ The DHS's affirmative asylum protocols demonstrate that the collection of DNA samples from immigrants seeking defensive asylum is unnecessary because affirmative asylum applicants are only required to submit fingerprints, not a DNA sample.⁸⁸ For both affirmative and defensive asylum, it is irrelevant how the person arrived or what their current immigration status is; the main difference is whether the individual is in removal proceedings or not.⁸⁹ This fact is irrelevant because both the affirmative and defensive asylum processes are administrative proceedings and not criminal proceedings.⁹⁰ The majority of asylum applications approved by DHS are affirmative; because DHS does not require DNA samples from affirmative asylum applicants, the government's interest in the collection of DNA samples from defensive asylum applications is not significant.⁹¹ Individuals placed in removal proceedings for an unauthorized entry, but lawfully apply for defensive asylum, are not being criminally prosecuted for an unauthorized entry.⁹² Like those in the affirmative asylum process, defensive asylum seekers have a privacy interest in their DNA that is not trumped by any government's interest.⁹³

In their final rule, the DOJ compares the DNA samples collected from immigrants in removal proceedings to fingerprints and photographs, but they

because the government grants a higher number of affirmative asylum applications); *see also The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERV.'S, (Sep. 22, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> (explaining that affirmative asylum applicants only need a fingerprint).

87. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,485 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (proposing that the rule will help the government solve current and future crimes).

88. *See* 8 C.F.R. § 103.2 (2020) (noting that asylum applications may be denied if applicants fail to appear to their required fingerprinting appointment).

89. *See Obtaining Asylum in the United States*, *supra* note 32 (indicating that an affirmative asylum applicant is not in removal proceedings).

90. *See* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (noting that removal hearings are "purely civil actions"); *see also* Napolitano, *supra* note 7 (clarifying that immigrants in administrative proceedings are not facing criminal charges).

91. *See* Mossaad, *supra* note 86, at 1 (describing that 25,439 immigrants were granted asylum affirmatively and 13,248 immigrants were granted asylum defensively).

92. *See Lopez-Mendoza*, 468 U.S. at 1038 (conveying that an immigration judge does not have jurisdiction to criminally prosecute).

93. *See Obtaining Asylum in the United States*, *supra* note 32 (suggesting affirmative and defensive asylum differ only because defensive asylum seekers are in removal proceeding).

are completely different.⁹⁴ A photograph or a fingerprint taken during the booking process cannot be equated to a DNA sample collected from an immigrant in removal proceedings, since fingerprinting is not a search under the Fourth Amendment because it requires no physical intrusion.⁹⁵ The information available in a DNA sample is also much greater than the information available in a fingerprint.⁹⁶ The DOJ argues that the information derived from the DNA sample will not disclose the person's "traits, disorders, or dispositions," and serves the same function as a fingerprint.⁹⁷ However, in *Birchfield v. North Dakota*, the Court acknowledged that law enforcement may keep a blood sample and use it in the future to extract information other than what law enforcement originally claimed it sought to obtain.⁹⁸ Similarly, the DOJ may store the DNA samples collected from detained undocumented immigrants awaiting asylum, and may have future access to extract more information than what was originally intended.⁹⁹

To expunge the DNA information in CODIS, the arrestee or their attorney must send the FBI a certified copy of a final court order noting that their criminal case was dismissed, acquitted, or a conviction was overturned.¹⁰⁰

94. See *United States v. Sczubelek*, 402 F.3d 175, 203 (3d Cir. 2005) (citing *United States v. Kincade*, 379 F.3d 813, 867 (9th Cir.2004) (en banc) ("Kincade II") (Reinhardt, J., dissenting)) (indicating that the collection of fingerprints does not involve "penetration of the skin, seizure of body fluids, nor cataloging of the otherwise personal information stored inside our cells"); see also *DNA-Sample Collection from Immigration Detainees*, 85 Fed. Reg. 13,483, 13,484 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (noting that fingerprinting is a regular identification measure in the booking process).

95. See *Maryland v. King*, 569 U.S. 435, 476-77 (2013) (Scalia, J., dissenting) (citing *Florida v. Jardines*, 133 S. Ct. 1409, 1413-14 (2013); *Katz v. United States*, 389 U.S. 347, 351 (1967)) (explaining that taking a photograph is not a search under the Fourth Amendment).

96. See *Combined DNA Index System (CODIS)*, *supra* note 65 (describing how the government could find a family through DNA).

97. See *DNA-Sample Collection from Immigration Detainees*, 85 Fed. Reg. at 13,485 (equating DNA samples to fingerprints and photographs collected during the booking process for identification purposes).

98. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (indicating that although law enforcement may be precluded from testing the blood samples for any purpose other than to measure the blood alcohol concentration, they may preserve the samples).

99. See *id.* (suggesting that extracting a sample from a person's body, which law enforcement may keep indefinitely, may cause the person tested additional anxiety).

100. See *Combined DNA Index System (CODIS)*, *supra* note 65 (explaining that the FBI may expunge DNA information from CODIS under certain circumstances, but only if requested).

The FBI offers no instructions on how a defensive asylum seeker, who has not been charged or convicted of a crime, may remove their DNA information from CODIS once their asylum application is granted.¹⁰¹ In *United States v. Mitchell*, the court notes that nothing in the Act stops the FBI from storing a DNA sample indefinitely once the individual is no longer under government custody.¹⁰² The final rule does not indicate whether the government is disposing or preserving the DNA sample after acquiring the unique identifier submitted into CODIS, which implicates a privacy interest for asylum seeking immigrants in removal proceedings.¹⁰³

Similar to a cell phone, a DNA sample contains a vast amount of personal and private information that intrudes on a person's privacy.¹⁰⁴ The Court has implied that arrestees in police custody for a serious offense supported by probable cause have a diminished right to privacy.¹⁰⁵ Despite this, the fact that an immigrant in removal proceedings is under DHS custody does not mean that they are not protected by the Fourth Amendment.¹⁰⁶ In fact, the Court has also stated that a warrant may still be necessary for a search despite an arrestee's diminished expectation of privacy.¹⁰⁷ This statement is important because significant scientific and technological advances, which Justice Scalia and Justice Alito have warned us about, have occurred since the Court's decision in *King*.¹⁰⁸

101. See *id.* (listing instructions only for criminal charges or convictions but setting forth no instructions on defensive asylum seekers whose asylum is granted).

102. See *United States v. Mitchell*, 652 F.3d 387, 420-21 (3d Cir. 2011) (noting that the Act is silent about what the government does with a DNA sample once it is expunged from CODIS).

103. See *generally* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,491 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (setting forth no language on the DNA sample expungement process for defensive asylum seekers).

104. See *Riley v. California*, 573 U.S. 373, 393-94 (2014) (noting that cell phones have privacy implications because of their "immense storage capacity" and capabilities to reconstruct a person's private life through all its personal data).

105. See *Maryland v. King*, 569 U.S. 435, 436 (2013) (citing *Samson v. California*, 547 U.S. 843, 855, n.4 (2006)) (explaining how reasonableness for a search is measured when the need for a warrant is diminished because of an arrest for a serious offense).

106. See *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (noting that "aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments").

107. See *Riley*, 573 U.S. at 392 (stating that a search may require a warrant even if there is a diminished expectation of privacy).

108. See *King*, 569 U.S. at 480 (Scalia, J., dissenting) (inferring that the government may use DNA samples for "a purpose other than crime-solving"); see also *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring) (asserting that a reasonable persons expectation of privacy can change based on technological advances).

The DOJ alleges that the DNA data in CODIS is confidential and stripped of any identifiable information.¹⁰⁹ Since *King*, the FBI has added seven new loci DNA markers to CODIS that help facilitate greater discrimination, help with missing person investigations, and promote international data sharing efforts by having more loci in common with other countries.¹¹⁰ Unlike with fingerprints, scientists and law enforcement are now able to conduct searches where all alleles do not have to match a DNA profile, which may lead to matches of “biological relatives to the unknown forensic profile obtained from crime scene evidence.”¹¹¹ *King* is based on a Maryland statute that specified that familial matches are prohibited.¹¹² Unlike fingerprints, DNA samples on CODIS may also produce a partial match with a DNA sample found at a crime scene.¹¹³ The scientific and technological advances occurring in the field of forensic DNA, including the current popular use of genetic genealogy, require an updated Fourth Amendment analysis, especially when considering the privacy interest of an asylum seeker in removal proceedings who has not committed a crime and has expressed interest in becoming a U.S. Citizen.¹¹⁴

The Supreme Court has established that in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.¹¹⁵ One of these exceptions is the border exception.¹¹⁶ The

109. See DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,489 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (stating that CODIS does not store “name, date of birth, social security number, or criminal history record number”).

110. See *Combined DNA Index System (CODIS)*, *supra* note 65 (noting that on January 1, 2017 the FBI added seven additional loci’s into CODIS).

111. See *id.* (explaining that law enforcement might use DNA samples in CODIS to find relatives that match the DNA samples found at crime scenes).

112. See *Maryland v. King*, 569 U.S. 435, 444 (2013) (discussing how the Maryland Act sets limits on what law enforcement may use CODIS for).

113. See *Combined DNA Index System (CODIS)*, *supra* note 65 (defining a partial match as a random result where the DNA sample in CODIS does not exactly match the DNA sample at the crime scene but has enough shared alleles with the DNA sample at the crime scene to be considered a biological relative).

114. Cf. *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (citing *Kyllo v. United States*, 533 U.S. 27, 36 (2001)) (indicating that the Court’s ruling must consider “systems that are already in use or in development”).

115. E.g., *United States v. Chartier*, 772 F.3d 539, 545 (8th Cir. 2014) (citing *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013)) (noting that after a lawful arrest, a person may fall into the “search-incident-to-arrest exception” if an officer has probable cause to suspect a criminal offense).

116. See *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1185-86 (D.N.M. 2010) (describing the requirements a Border Patrol agent must meet before conducting a warrantless search).

border exception gives border patrol agents the authority to conduct a warrantless search within 100 miles of the border if, based on the totality of the circumstances, there is reasonable suspicion of an immigration violation or criminal activity.¹¹⁷ According to the CBP, only two percent of the total arrests of undocumented immigrants happen at border checkpoints, meaning that the majority of individuals detained are outside the 100-mile radius and have the full protection of the Fourth Amendment.¹¹⁸

The majority of unauthorized immigrants in this country are individuals who have overstayed their visas.¹¹⁹ Additionally, detained immigrants may be placed in any of the 250 federal detention centers, private for-profit prisons, and county and municipal jails in the U.S. that are not within a 100-mile radius of the border.¹²⁰ Moreover, the two percent of immigrants who are stopped at a port entry and have a diminished expectation of privacy nonetheless have civil liberties.¹²¹ To use the border exception doctrine, an officer must have reasonable suspicion that a crime is being committed.¹²²

B. The Department of Justice's Amendment to the DNA Fingerprint Act of 2005 Wrongfully Applied Maryland v. King and Criminalizes Detained Immigrants Who Have Never Been Charged or Convicted of a Violent Crime

The DOJ incorrectly applied *King* when it concluded that DNA samples may be collected from immigrants in removal proceedings because the

117. See *id.* at 1185 (asserting that the government conceded that Border Patrol must have reasonable suspicion that a crime that falls under their jurisdiction is being committed).

118. See Tanvi Misra, *Inside the Massive U.S. 'Border Zone'*, BLOOMBERG CITYLAB, (May 14, 2018), <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone> (describing how the majority of people arrested at the border have lawful status).

119. See *US Proposal to Collect DNA from Detained Immigrants Violate Rights*, HUMAN RIGHTS WATCH, https://www.hrw.org/news/2019/11/12/us-proposal-collect-dna-detained-immigrants-violates-privacy-rights#_ftn16 (asserting that most immigrants are in removal proceedings for civil violations such as visa overstay).

120. See David Hernandez, *Detained in Obscurity: The U.S. Immigrant Detention Regime*, 46 NACLA REP. ON THE AM. (Oct. 2, 2013), <https://nacla.org/article/detained-obscurity-us-immigrant-detention-regime> (conveying that immigrants are detained at different kind of facilities across the country).

121. See *Maryland v. King*, 569 U.S. 435, 463 (2013) (suggesting that even when an individual's expectation of privacy is diminished, the court must evaluate whether a search is reasonable).

122. See *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1185-86 (D.N.M. 2010) (asserting that Border Patrol agents must have reasonable suspicion determined from a list of factors, to stop a car).

government's interest is higher than an individual's genetic privacy interest.¹²³ The DOJ failed to distinguish the difference between collecting DNA samples from an individual arrested for or convicted of a serious criminal offense and an individual detained based on immigration status.¹²⁴ It only inferred that the "prompt DNA-sample collection could be essential to the detection and solution of crimes they may have committed or may commit in the United States . . . before the individual's removal from the United States places him or her beyond the ready reach of the United States justice system."¹²⁵ This logic would erroneously justify taking the DNA of every noncitizen leaving the United States.¹²⁶

The DOJ is oblivious to the fact that *King* was a criminal case about an arrestee accused of a violent crime.¹²⁷ In *King*, the Court was answering the question of "whether the Fourth Amendment prohibits the collection and analysis of DNA sample from persons arrested, but not yet convicted, on felony charges."¹²⁸ In contrast, individuals who have been detained and are lawfully applying for defensive asylum are considered to be in removal proceedings, which are civil and not criminal proceedings.¹²⁹ In a criminal proceeding, an individual is presumed innocent until proven guilty; in a civil immigration proceeding, a person is not protected by a presumption of citizenship.¹³⁰ An IJ in a removal hearing does not have the jurisdiction to

123. *See generally* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,484-85 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (citing *King*, 569 U.S. at 442-46, 461-65; 73 Fed. Reg. at 74933, 74937-38) (inferring that the rule serves a governmental interests by protecting officers, the public, and "bringing the guilty to justice").

124. *See id.* (distinguishing between the treatment of an individual arrested for a crime and an immigrant in removal proceeding is "largely artificial").

125. *See id.* at 13,485 (citing 73 Fed. Reg. at 74934) (conveying that the courts in the United States may remove detained immigrants from the country).

126. *See id.* at 13,484-485 (suggesting that the rule will help identify criminals and allow the government to prosecute them before they have an opportunity to leave the country).

127. *See* *Maryland v. King*, 569 U.S. 435, 440 (2013) (ruling that law enforcement may collect DNA samples from individuals who are arrested of a serious crime, such as King's first and second-degree assault charges).

128. *See id.* at 442 (noting that federal and state courts have had conflicting opinions on whether the Fourth Amendment prohibits law enforcement from warrantlessly collecting DNA samples from individuals who have not been convicted of a felony).

129. *See* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (setting forth that a judge in a removal hearing can only determine the eligibility to remain in the United States).

130. *See id.* at 1043 (discussing how there is no provision preventing an immigration enforcement officer from making an inference on a detainee's citizenship status).

criminally punish an individual for an unlawful entry.¹³¹

The DOJ stated that one of the reasons they decided to repeal § 28.12(b)(4) was because “most immigration detainees are held on the basis of conduct that is itself criminal.”¹³² They note that immigrants who are apprehended after entering the country have violated immigration laws and likely committed a crime under 8 U.S.C. 1325(a) and 1326.¹³³ However, as stated earlier, individuals seeking defensive asylum are in a civil proceeding and not a criminal proceeding.¹³⁴ 8 U.S.C. § 1302 explains that an individual has thirty days to register their presence in the United States before it is considered a crime.¹³⁵ The DOJ is incorrect to rely on the authority in *King* because the willful failure to register within the first thirty days is a misdemeanor, and not a serious offense, like the Court intended its ruling to be for.¹³⁶

The DOJ reasoned that the collection of DNA samples from detainees pending removal is appropriate because “prompt DNA collection could be essential to the detection and solution of crimes they may have committed or may commit in the United States . . . before the individual’s removal from the United States places him or her beyond the ready reach of the United States justice system.”¹³⁷ They argue that there is a public and government interest in doing so.¹³⁸ This statement shows that the DOJ assumes a

131. *See id.* at 1038 (stating that an IJ “cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry in this country”).

132. *E.g.*, DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,484 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (inferring that there is no difference between an individual arrested for a crime and an immigrant in removal proceeding for immigration status violation).

133. *See id.* (claiming that undocumented immigrants may be prosecuted for an unlawful entry).

134. *E.g.*, *Lopez-Mendoza*, 468 U.S. at 1038 (noting that because of the civil nature of a removal hearing, some protections offered during criminal trial do not apply in a removal hearing).

135. *E.g.*, *id.* at 1058 (citing 8 U.S.C. § 1302) (recognizing that the failure to register for the first 30 days after entry into the U.S. is not a crime).

136. *See id.* (citing 8 U.S.C. § 1302) (explaining that failure to register may lead to a misdemeanor).

137. *E.g.*, DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,485 (contending that the purpose of the rule is to solve past and future crimes).

138. *See id.* at 13,491 (citing *Maryland v. King*, 569 U.S. at 541-52) (collecting DNA from both documented and undocumented immigrants serves a government interest); *see also* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74933-34, 74936-37 (final rule Dec. 10, 2008) (codified at 28 C.F.R. pt. 28) (inferring that the rule is meant to criminally prosecute immigrants before they are removed).

defensive asylum seeker is or may become a criminal, which is factually incorrect.¹³⁹ Undocumented immigrants have a legal right to arrive at the border and apply for asylum.¹⁴⁰ Asylum is only granted to individuals who have not been convicted of a serious crime and who the IJ determines will pose no threat to the United States.¹⁴¹

In *King*, the Court specified that law enforcement must have probable cause to arrest a person suspected of a serious crime, “and for a brief period of detention to take the administrative steps incident to arrest.”¹⁴² The decision in *King* is based on the Maryland DNA Collection Act, which instructs law enforcement to collect DNA samples from individuals arrested for “a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary.”¹⁴³ The Maryland statute notes that a judicial officer may only process and place the DNA sample in the database if there is probable cause to detain the individual on a qualifying serious offense.¹⁴⁴ A defensive asylum seeker is not kept in DHS custody because they are a suspect in a violent crime; they are under custody for a civil immigration violation while awaiting their asylum decision.¹⁴⁵ Since deportation proceedings are purely civil actions, the purpose is not to punish but to determine the eligibility of the immigrant to remain in the United States.¹⁴⁶ Accordingly, immigration officers have no probable cause of a serious offense providing legal justification for the extraction of DNA

139. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (conveying that due to the civil nature of immigration proceedings, IJ do not have jurisdiction to criminally prosecute immigrants).

140. See 8 U.S.C. § 1158 (2009) (declaring that noncitizens may arrive in the United States and claim asylum “whether or not at a designated port of arrival”).

141. See *id.* (defining a serious crime as an aggravated felony as well as any regulation offenses that the Attorney General designates as a serious crime); see also 8 C.F.R. § 1003.0 (conveying that an IJ has the power to adjudicate asylum decisions).

142. See *Maryland v. King*, 569 U.S. 435, 449 (2013) (describing that an officer must have probable cause that the arrestee has or is committing a serious crime to conduct a warrantless search after lawful arrest).

143. *E.g., id.* at 443 (defining a crime of violence as “murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes”).

144. See *id.* (noting that if “all qualifying criminal charges are determined to be unsupported by probable cause . . . the DNA sample shall be immediately destroyed”).

145. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (asserting that undocumented immigrants in immigration proceedings are not criminals).

146. See *id.* (describing how certain rights that apply to defendants in a criminal proceeding do not apply to immigrants in immigration proceeding because of its civil nature).

samples from immigrants lawfully seeking defensive asylum.¹⁴⁷

The DOJ claims that one of the government's interests in collecting the DNA sample from immigrants in removal proceedings is to identify the person and keep law enforcement safe.¹⁴⁸ The only identifying result a rapid DNA machine will provide is the gender-based on X and Y chromosomes, a match in CODIS, and a familial match in CODIS.¹⁴⁹ If the person is not in CODIS, the only information law enforcement will have to protect public safety is a certification of the person's assigned gender at birth.¹⁵⁰ By the time an FBI Laboratory processes a DNA sample submitted by CBP or ICE, the result of a CODIS match may come back after the individual is no longer in DHS custody.¹⁵¹ An officer's duty to search an individual when making an arrest is to ensure that the arrestee has no weapons or evidence that may be easily destroyed or for evidence of the crime, which could not be found through the collection of a DNA sample of an immigrant in DHS custody who has not been charged nor convicted of a crime and is lawfully seeking asylum.¹⁵² Because immigrants lawfully seeking asylum through the defensive process have not been charged or convicted of a crime, extracting their DNA is inappropriate because warrantless searches for crime-solving are prohibited under *King*.¹⁵³

The final rule describes a need for federal authorities to use DNA samples as a tool to ensure that individuals do not flee and will appear at their future

147. See *King*, 569 U.S. at 453 (declaring that the DNA of a "suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness").

148. See *id.* at 451 (proposing that the rule will help officers safely and accurately process and identify individuals by matching the person "with his or her public persona, as reflected in records of his or her actions").

149. See *What is Rapid DNA?*, ANDE, <https://www.ande.com/what-is-rapid-dna/> (last visited July 18, 2020) (describing the results of a rapid DNA machine approved by the FBI and used in accredited forensic DNA laboratories).

150. *E.g., id.* (explaining that rapid DNA machines disclose X and Y chromosomes).

151. See Timothy S. Robbins, *Privacy Impact Assessment for CBP and ICE DNA Collection*, U.S. Dep't of Homeland Sec. (Jan. 3, 2020), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs080-detaineddna-january2020.pdf> (concluding that it is unlikely that CBP or ICE could use DNA profile match prior to either detainees' removal to their country, release into the interior of the United States, or transfer to another federal agency).

152. See *Maryland v. King*, 569 U.S. 435, 469 (2013) (Scalia, J., dissenting) (citing *Arizona v. Gant*, 556 U.S. 332, 343-344 (2009); *Thornton v. United States* 541 U.S. 615, 632 (2004)) (indicating that the officers in *King* were not looking for weapons or preserving evidence in their search).

153. See *id.* at 469 (stating that "no matter the degree of invasiveness, suspiciousness searches are *never* allowed if their principal end is ordinary crime-solving").

immigration hearings for future proceedings regarding their immigration status if they are released.¹⁵⁴ The final rule quotes the Court in *King*, proposing that a DNA sample helps decide whether an individual should remain detained or be released while awaiting immigration proceedings.¹⁵⁵ The government sets forth no evidence to support that the collection of DNA samples guarantees that defensive asylum seekers will appear at their immigration proceedings if released.¹⁵⁶ On the contrary, government data shows that most immigrants attend their immigration hearings, and the main reason some fail to do so is because the immigration court system is difficult to navigate.¹⁵⁷ The government's data also demonstrates that in 2018, almost 100 percent of asylum seekers who were released from immigration detention facilities while awaiting their asylum proceedings appeared at their court hearing.¹⁵⁸ The DOJ's interest in surveilling defensive asylum seekers to ensure that they appear at their immigration hearing is invalid.¹⁵⁹

The DOJ uses *King* to allege that there is a public interest in ensuring that DNA samples are collected by immigrants lawfully seeking asylum through the defensive process before they are released.¹⁶⁰ If an individual in defensive asylum proceeding is paroled before her immigration court

154. *E.g.*, DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,491 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (indicating that the matching of DNA will show if an individual has a criminal history that may influence the individual to flee and must be considered when deciding whether to release).

155. *See id.* (citing *King*, 569 U.S. at 452-53) (stating that “a person who . . . knows he has yet to answer for some past crime may be more inclined to flee”).

156. *See id.* at 13,485 (citing *King*, 569 U.S. at 452– 53) (assuming that a criminal may flee the country if not kept under custody).

157. *See* The Refugee and Immigrant Center for Education and Legal Services, *Comment Letter on Proposed Rule to Require DNA-Samples Collection from Immigration Detainees* (Nov. 29, 2019), <https://www.regulations.gov/document?D=DOJ-OAG-2019-0004-1219> at 14 (explaining that most immigrants do attend their hearings).

158. *See* Human Rights First, *FACT CHECK: Asylum Seekers Regularly Attend Immigration Court Hearings* (Jan. 25, 2019), <https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings> (relaying that out of 10,427 asylum decisions in fiscal year 2018, only 160 were denied because the applicant missed a court hearing, demonstrating a 98.5 percent court hearing compliance rate).

159. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491 (Apr. 9, 2020) (alleging that the extraction of DNA samples ensures that an individual does not flee the country if released).

160. *See id.* at 13,485 (citing *King*, 569 U.S. at 453) (quoting “an arrestee’s past conduct is essential to an assessment of the danger he poses to the public, and this will inform a . . . determination whether the individual should be released”).

hearing, she must pay bail and may be monitored by a GPS ankle bracelet.¹⁶¹ Further, the DHS only grants temporary release by GPS monitoring to detained immigrants who they believe do not pose a threat to society, are not a flight risk, and have no criminal record.¹⁶² Here, the asylees' dignitary interest in personal privacy and bodily integrity is higher than the government's intent to surveil immigrants by claiming that DNA collection guarantees public safety.¹⁶³

IV. POLICY RECOMMENDATION

The United States Constitution grants every individual the fundamental right to be protected against unreasonable searches of their "persons, houses, papers, and effects."¹⁶⁴ This right extends to undocumented immigrants in removal proceedings who are lawfully seeking asylum through the defensive process.¹⁶⁵ While an individual's expectation of bodily privacy may be diminished when held under DHS custody, the government's extraction of a DNA sample, which is a search, must be supported by the Fourth Amendment's reasonableness requirement.¹⁶⁶

In *Jones*, Justice Sotomayor emphasized that one must "consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially

161. See National Immigration Forum, *Fact Sheet: U.S. Asylum Process*, (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/> (addressing that if an official decides that the individual is unlikely to flee and poses no safety threat to the community, he or she may be released from detention).

162. See Linet Suárez, *Liberty at the Cost of Constitutional Protections: Undocumented Immigrants and Fourth Amendment Rights*, 48 U. Miami Inter-Am. L. Rev. 153, at 184 (2016) (explaining that undocumented immigrants released from detention centers have been released due to their clean record and good behavior).

163. See *Winston v. Lee*, 470 U.S. 753, 754 (1985) (noting that the States' interest justified bodily intrusion for Fourth Amendment purposes because the officers had reasonable suspicion that the driver was drunk and because of the difficulty of proving drunkenness by means other than a blood test).

164. See U.S. Const. amend. IV. (protecting individuals from warrantless searches); see also *United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005) (asserting that the Fourth Amendment protects people from unreasonable searches).

165. See *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (affirming that the Fourth Amendment protects undocumented immigrants regardless of their immigration status).

166. See *Maryland v. King*, 569 U.S. 435, 463 (2013) (setting forth that even in situations when an individual's expectation of privacy is diminished, the Court must weigh the "privacy-related and law enforcement-related concerns to determine if the intrusion is reasonable"); see also *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005) (holding that the extraction and analysis of a prisoner's blood for DNA-indexing constitutes a search under the Fourth Amendment).

in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance.'"¹⁶⁷ When considering the rhetoric President Trump's administration has used to describe immigrants and its quest to reduce immigration, we should all be wary in entrusting the Executive with the power to surveil immigrants by extracting their DNA information.¹⁶⁸ We should especially be concerned that the government may retain personal information indefinitely and disclose the information in the future for reasons other than intended.¹⁶⁹ Nothing stops the government from one day using the DNA information input into CODIS from defensive asylum-seeking individuals to conduct familial matches to track down their undocumented relatives in the United States.¹⁷⁰

The DOJ should immediately withdraw the amendment made to the DNA Fingerprint Act of 2005 that requires the DHS to collect DNA samples from all immigration detainees, including defensive asylum seekers.¹⁷¹ In 2010, when former Secretary of DHS Nancy Napolitano and former Attorney General Eric H. Holder, Jr. exempted immigrants in removal proceedings from the Act because it would strain agency resources, they listed that 750,000 immigrants not facing criminal charges were being processed for administrative proceedings annually.¹⁷² According to the DOJ's final rule, DHS plans to collect 748,000 samples in one year; however, according to the CBP, there were a total of 851,508 apprehensions at the Southwest border in

167. See *United States v. Jones*, 565 U.S. 400, 416-17 (2012) (Sotomayor, J., concurring) (questioning whether individuals reasonably expect to be surveilled in a manner that enables the government to obtain personal and private information).

168. See Hansi Lo Wang, *With No Final Say, Trump Wants To Change Who Counts For Dividing Up Congress' Seats*, NPR (July 21, 2020, 12:47 PM), <https://www.npr.org/2020/07/21/892340508/with-no-final-say-trump-wants-to-change-who-counts-for-dividing-up-congress-seat> (inferring that President Trump considers undocumented immigrants less than a free person by attempting to remove them from the 2020 census).

169. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (explaining that law enforcement may keep a blood sample used to extract DNA-indexing).

170. See *Combined DNA Index System (CODIS)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis> (last visited July 18, 2020) at 9 (affirming that the FBI may conduct familial searches to identify possible biological relatives of the DNA sample found at crime scenes to DNA samples on CODIS).

171. See *DNA-Sample Collection from Immigration Detainees*, 85 Fed. Reg. 13,483, 13,484 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (setting forth the elimination of the exception exempting defensive asylum seekers from the extraction of DNA).

172. See Napolitano, *supra* note 7, at 1-3 (asking the DOJ to exempt certain categories of undocumented immigrants from the Act).

2019, compared to the 396,579 in 2018.¹⁷³ The final rule projects an estimated \$5.1 million cost to the DHS, a \$4,024,240 cost to the FBI, and possible additional costs for the expansion and implementation of the Act.¹⁷⁴ During a worldwide pandemic, these are dollars the United States could save and use to improve COVID-19 conditions at the border and ICE facilities in accordance with public health standards.¹⁷⁵

Currently, the Act has an expungement policy that requires the FBI to destroy collected buccal collection devices and extracted DNA from overturned convictions, dismissed charges, acquittals, or if no charge is timely filed.¹⁷⁶ However, this policy, along with the final rules, sets forth no language or process for the expungement of DNA samples from defensive asylum seekers in DHS custody who have never been charged nor convicted of a crime.¹⁷⁷ The DHS reported that in 2018, 25,439 individuals were granted asylum affirmatively.¹⁷⁸ Like many U.S. citizens who have never been convicted or charged with a crime, these 25,439 individuals now lawfully reside in the U.S. and may one day become U.S. citizens, and they have not had their DNA extracted nor input into CODIS.¹⁷⁹ The DOJ should

173. See DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488, 13,492 (indicating that DHS plans to collect the DNA samples from 748,000 individuals in a three year, phased system); see also U.S. Customs and Border Protection, *Southwest Border Migration FY 2019*, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> (last visited June 19, 2020) (relaying the number of immigrants stopped at the Southwest border only).

174. See DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488 (stating the projected government costs of the rule).

175. See Kavitha Cardoza, *Farmville ICE Detention Center With COVID-19 Outbreak Must Stop Transfers, Judge Orders*, DCist, (Aug. 12, 2020, 12:43 PM), <https://dcist.com/story/20/08/12/farmville-virginia-immigrant-detention-covid19-outbreak-ice-judge-order/> (blaming crowded conditions at Farmville Detention Center for the largest COVID-19 virus outbreak in the country, with 93 percent of detainees testing positive for the virus in July).

176. See *United States v. Mitchell*, 652 F.3d 387, 399, 420 (2011) (citing 42 U.S.C. §14132(d)(1)(A)) (explaining that DNA may be expunged from CODIS if an individual provides a copy of an overturned conviction, dismissed charge, or acquittal); See *Combined DNA Index System (CODIS)*, *supra* note 65 (noting that individuals need to submit a written request to the FBI to request an expungement of their DNA from CODIS).

177. See *Combined DNA Index System (CODIS)*, *supra* note 65 (proposing no process for the expungement of DNA samples from CODIS for granted asylum applications).

178. See Mossaad, *supra* note 86, at 1 (relaying the number of affirmative and defensive asylum applications granted in 2018).

179. See USCIS, *USCIS Welcomes Refugees and Asylees* (2019), https://www.uscis.gov/sites/default/files/document/brochures/USCIS_Welcomes_Refugees_and_Asylees.pdf at 6, 7 (explaining that asylees are eligible to become U.S. citizens

expunge all the DNA samples it has already collected from undocumented immigrants lawfully seeking asylum from CODIS.¹⁸⁰

V. CONCLUSION

The Fourth Amendment prohibits the government from conducting warrantless searches when there is no suspicion that the individual is guilty of a crime or has no incriminating evidence.¹⁸¹ The DOJ's warrantless collection of DNA samples from immigrants in removal proceedings who have never been charged or convicted of a crime, and are lawfully seeking asylum, violates a person's and society's expectation of bodily privacy.¹⁸² The Court has held that law enforcement may only collect DNA samples from arrestees of a serious crime because the degree to which the DOJ is intruding into a defensive asylum applicant's privacy is higher than the degree needed to advance legitimate governmental interests.¹⁸³

The DOJ cites *King* to claim that there is a heightened government interest supporting the use of DNA technology for law enforcement officers to 1) safely and accurately identify the individual, 2) protect facility staff and inmate population, 3) ensure an individual will appear to future proceedings, 4) decide release and protect the public, 5) solve crimes.¹⁸⁴ However, the

when they meet certain eligibility requirements).

180. See *Obtaining Asylum in the United States*, *supra* note 32 (discussing that individuals who have had their criminal cases overturned, acquitted or charges dropped may request the FBI to expunge their DNA sample).

181. See *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting) (asserting that historically the Court has only allowed suspicionless searches when there is "a justifying motive apart from the investigation of a crime").

182. See *DNA-Sample Collection from Immigration Detainees*, 85 Fed. Reg. 13,483, 13,491 (Apr. 9, 2020) (to be codified at 28 C.F.R. pt. 28) (proposing the warrantless collection of DNA samples from detained undocumented immigrants applying for asylum).

183. See *King*, 569 U.S. at 435 (2013) (ruling that law enforcement may collect DNA samples from individuals being arrested for a serious crime); see also *United States v. Sczubelek*, 402 F.3d 175, 181 (3d Cir. 2005) (citing *Knights*, 534 U.S. at 119, 122 S. Ct. 587) (explaining that in order to determine whether a search is reasonable the court needs to balance "the degree to which [the search] intrudes upon an individual's privacy and, on the other hand, the degree to which [the search] is needed for the promotion of legitimate governmental interests").

184. See *King*, 569 U.S. at 435 (2013) (declaring that law enforcement may only warrantlessly collect DNA samples from arrestees when the "promotion of legitimate government interests" is measured against "the degree to which [the search] intrudes upon an individual's privacy"); see also *DNA-Sample Collection from Immigration Detainees*, 85 Fed. Reg. at 13,485 (claiming the government has a heightened interest in collecting DNA samples to further justice and public safety).

DOJ wrongfully applied *King* to their final rule because immigration detention facilities already identify individuals lawfully seeking asylum through the defensive process via their fingerprint.¹⁸⁵ The method of arrival and immigration status is irrelevant for those seeking asylum through the defensive process, and such asylum seekers are in civil proceedings, not criminal.¹⁸⁶ Government data demonstrates that most immigrants do not miss their administrative hearing.¹⁸⁷ An immigrant pending a proceeding is only released if they pose no security threat, and they are monitored via a GPS ankle bracelet.¹⁸⁸ Immigrants in removal proceedings awaiting their defensive asylum claim have not been convicted or charged with a serious crime, as the Court in *King* required.¹⁸⁹ When looking at the totality of the circumstances, the bodily privacy right of a defensive asylum applicant outweighs the government's interest in collecting their DNA sample.¹⁹⁰

185. See *King*, 569 U.S. at 435 (2013) (asserting that there's a higher government interest in the collection of DNA samples when an officer has reasonable suspicion that the arrestee has committed a violent crime); see also 8 C.F.R. § 103.2 (2020) (noting that asylum applicants are required to submit a fingerprint).

186. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984) (describing that unlike criminal trials, because immigration proceedings are civil, INS is only required to show identity and alienage, but they may proceed without the respondent).

187. See Human Rights First, *supra* note 158.

188. See National Immigration Forum, *supra* note 161.

189. See *Maryland v. King*, 569 U.S. 435, 436 (2013) (citing *Samson v. California*, 547 U.S. 843, 855, n.4, 126 S. Ct 2193, 165 L. Ed. 2d 250) (indicating that law enforcement may collect DNA samples from someone who has been arrested for a serious crime).

190. See *id.* at 448 (explaining that the Court must apply a balancing test to weigh the government's legitimate interest against an individual's intrusion of privacy).