April 11, 2025

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DHS Docket No. USCIS-2025-0004

Mr. Mark Phillips, Chief
Residence and Naturalization Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Dr.
Camp Springs, MD 20746

Dear Chief Phillips:

LatinoJustice PRLDEF (LatinoJustice)[1] respectfully submits this comment to express its strong opposition to the Department of Homeland Security's interim final rule, Alien Registration Form and Evidence of Registration (hereinafter "Interim Final Rule" or "IFR"), published in the Federal Register on March 12, 2025.

About LatinoJustice

Since 1972, LatinoJustice has used and challenged laws and regulations to promote a more just and equitable society, particularly for Latinx communities—communities that are exceptionally impacted by immigration laws, rules, and regulations. In pursuit of its mandate, LatinoJustice has successfully sued to vindicate the rights of Latinx communities and has advanced policy initiatives to mitigate their marginalization, whether based on race, ethnicity, actual or perceived immigration status, national origin, or language proficiency. LatinoJustice shines a light on the great diversity within and among Latinx communities.

The Interim Final Rule: Overview of Harms

The Interim Final Rule would expose undocumented immigrants and those perceived as such to over-policing, racial profiling, and the risk of detention and/or deportation. DHS officials have openly stated that the registration requirement is meant to facilitate "mass deportation," including by encouraging people to self-deport.[2]

Below, after briefly discussing the history of the IFR's underlying laws, we discuss some of the key reasons why, procedurally and substantively, the IFR is deeply flawed. First, it was improperly promulgated in violation of section 553 of the Administrative Procedure Act; second,

[1] This comment was primarily authored by Karen Muñoz, Associate Counsel, Alex Cordoves Serrano, Legal Intern, and Namratha Somayajula, Columbia Justice Fellow.
[2] *FAQ: The Trump Immigration Registration Requirement*, NILC (April 10, 2025), https://www.nilc.org/resources/faq-the-trump-immigration-registration-requirement/.

it exposes Black and Latinx community members to racial and ethnic profiling; and third, it risks violating immigrants' constitutional rights, including under the Fifth and First Amendments.

I. BACKGROUND

A. Origin and Purpose of the Alien Registration Act of 1940

President Franklin D. Roosevelt signed into law the Alien Registration Act of 1940 (the "Smith Act") on June 28, 1940.[3] The statute (1) criminalized advocating for the violent overthrow of the U.S. Government, and (2) required all non-citizens 14 years of age or older to register with the federal government and provide detailed personal information such as their address, employment, and affiliations.[4] The Smith Act was a response to the growing fear of espionage, sabotage, and subversive activity against the United States during the lead-up to World War II.

The statute was part of broader efforts to scrutinize and control the movement of foreign nationals in a period marked by heightened xenophobia. Proponents framed the Smith Act as a national security measure. Critics, however, argued that, as enforced, the law discriminated against certain immigrant communities—most notably Japanese, Italian, and German immigrants—and further entrenched racial prejudices of the era.

In his statement at the signing, President Roosevelt directed agencies to interpret the registration program as designed not only to protect the United States, but also to protect the "loyal" immigrants who reside in the country.[5] According to Roosevelt, most of the immigrants in the country came "because they believed and had faith in the principles of American democracy," and thus deserved full protection under the law.[6] Roosevelt stressed the importance of carrying out the registration program with "a high sense of responsibility" to avoid harassment of immigrants who are "loyal to this country and its institutions."[7]

B. Connection to Japanese Internment

The Alien Registration Act of 1940 played a principal role in the internment of Japanese-Americans during World War II. In 1942, the U.S. government, citing national security concerns, forcibly relocated over 120,000 Japanese-Americans—most of whom were citizens—to internment camps pursuant to Executive Order 9066.[8] The internment policy was based on a racialized fear of espionage and sabotage, yet there was no evidence supporting the widespread suspicion. While the Smith Act did not mandate internment, the U.S. Government used the information gathered through the Act's provisions to identify and monitor individuals of Japanese

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[3] The Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (1940).

[4] Benjamin C. Montoya, *Immigration Policy and US Foreign Policy before 1945*, OXFORD RSCH. ENCYC. OF AM. HIST. (Aug. 28, 2019), https://doi.org/10.1093/acrefore/9780199329175.013.619.

[5] Franklin D. Roosevelt, Statement on Signing the Alien Registration Act, AM. PRESIDENCY PROJECT (June 29, 1940), https://www.presidency.ucsb.edu/node/209766.

[6] *Id.*

[7] *Id.*

[8] Executive Order 9066, 7 Fed. Reg. 1407 (1942).

descent living on the West Coast and detain them. Thus, the Smith Act provided those acting on existing racial prejudices with tools for the mass incarceration of Japanese-Americans.[9] The legacy of the Act, particularly in the context of Japanese-American internment, demonstrates how such registration requirements can be weaponized to further racial discrimination under the guise of national security.

C. Reanimation Under National Security Entry-Exit Registration System

In 2002, as a response to the September 11 attacks, the Department of Justice Smith Act through the National Security Entry-Exit Registration System (NSEERS), a counterterrorism program designed to track foreign nationals residing in the United States.[10] Similar to the Alien Registration Act, NSEERS required certain non-citizen individuals to register with the federal government, undergo fingerprinting, and submit to interviews. If they stayed in the U.S. for more than 30 days, males over the age of 16 from designated countries—24 out of 25 which were majority Arab or Muslim—were required to regularly check in with the U.S. Government and provide proof of residence and employment, or matriculation. When departing from the U.S., NSEERS registrants had to record their departure and exit through designated ports.[11]

While NSEERS was initially presented as a necessary measure for countering terrorism, in practice, it was plagued by the same acts of discrimination and racial profiling that stemmed from the Smith Act.[12] The racial profiling inherent in the NSEERS invoked comparisons to internment of Japanese-Americans during World War II, as it was premised on a reactivation of the discriminatory practices embodied in the Alien Registration Act.[13]

NSEERS undermined civil liberties by subjecting individuals to indefinite surveillance and detention without just cause or evidence of wrongdoing. Despite its purported national security rationale, NSEERS failed to identify or prevent any terrorist threats—it did not produce a single terrorism prosecution. Instead, the program led to the registration of at least 138,000 individuals, and the deportation of over 13,000 immigrants—mostly Muslim and Arab—primarily for minor visa violations, rather than security concerns.[14] The NSEERS' registry system, which was

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[9] ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993); PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983).

[10] *Attorney General Prepared Remarks on the National Security Entry-Exit Registration System*, U.S. DEP'T OF JUST. (June 6, 2002), https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.

[11] *National Security Entry-Exit Registration System (NSEERS) Freedom of Information Act (FOIA) Request*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/national-security-entry-exit-registration-system-nseers-freedom.

[12] *Civil Rights Implications of Post-September 11 Law Enforcement Practices in New York*, NEW YORK ADVISORY COMM. TO THE U.S. COMM'N ON CIV. RTS. (2004).

[13] *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy*, Penn State Law's Center for Immigrants' Rights, May 2012.

[14] Hearing of the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary, 108th Cong. (2003), https://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954_0f.htm; *DHS Issues a Fact Sheet, FAQs, and Press Release on Changes to the NSEERS Program*, AILA (Dec. 1, 2003), https://www.aila.org/library/dhs-changes-to-the-nseers-program.

functionally analogous to the Alien Registration Act, provided federal immigration authorities with data that facilitated these deportations, without yielding intelligence meaningful to any national security efforts.[15] To the contrary, NSEER torn families apart and settled a deep fear in Muslim and Arab communities.

In 2011, after significant public backlash and legal challenges to the civil rights violations inherent to the program, the U.S. Government quietly dismantled NSEERS. The program's legacy is to serve as a stark reminder of the historical continuity of national security policies that disproportionately affect immigrant communities.[16]

D. Recent Effort to Repeal the Alien Registration Act of 1940

Recently, lawmakers have begun to revisit the legacy of the Alien Registration Act of 1940. In 2025, Representative Pramila Jayapal introduced a bill aimed at repealing the Act, highlighting its outdated and discriminatory nature.[17] The bill notes that the Smith Act no longer serves any legitimate purpose and that its continued existence poses a risk of further racial profiling and civil rights violations, especially in the context of increasingly xenophobic and Islamophobic sentiments in the U.S. The bill seeks to formally erase the statute from the books, marking a crucial step in confronting the historical harms it caused and ensuring that such policies do not remain part of the nation's legal framework.

II. ARGUMENT

A. The Interim Final Rule Violates the Administrative Procedure Act

The Administrative Procedure Act (APA) requires agencies to publish general notice of proposed rulemaking in the Federal Register to allow the public "an opportunity to participate in the rule making through submission of written data, views, or arguments."[18] There are some enumerated exceptions to this requirement, none of which apply here. Specifically, notice and comment are not required for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency finds for good cause…that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[19]

The Department of Homeland Security failed to provide prior notice and opportunity for comment, as required by the APA, before it issued its Interim Final Rule ("IFR").

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[15] *Id*.
[16] *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy*, Penn State Law's Center for Immigrants' Rights, May 2012.
[17] H.R.2129 - 119th Congress (2025-2026): "To Repeal the Alien Registration Act of 1940."
[18] 5 U.S.C. § 553(b)-(c).
[19] 5 U.S.C. § 553 (b)(4)(A)-(B).

DHS purported to justify its decision to bypass this process by incorrectly characterizing the rule as merely procedural.[20] However, the IFR is not merely procedural. It creates a newly enforceable duty for a large class of immigrants and dramatically changes the U.S. Government's previous enforcement policy for the underlying statute. That statute, 8 U.S.C. §§ 1301-06, includes provisions requiring immigrants' registration and grants the Attorney General and Secretary of State the power to create registration forms.[21] In practice, the government has only once before implemented a general registration requirement; since World War II, the registration process has been "integrated into the immigration process" itself.[22] In practical terms, this means that only those immigrants who entered through established pathways—and who were thus eligible for an immigration benefit—were required to register. But now, the IFR imposes "legally binding obligations" on undocumented immigrants, who were previously not required to register.[23] Carrying the force of law, this IFR is a legislative rule that must be promulgated only through prior notice and comment.[24]

DHS claims that the IFR is exempt from notice-and-comment requirements under the APA by incorrectly stating that it "do[es] not [itself] alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency."[25] It also claims that the IFR's purpose is to improve departmental efficiency.[26] But while procedural rules are "primarily directed toward improving the efficient and effective operations of an agency"[27], the APA's exemption for such rules is narrow. It does not encompass those that also "impose[] 'substantive burden[s],' 'encode[] a substantive value judgment,' 'trench[] on substantial private rights [or] interests,' or otherwise 'alter the rights or interests of parties.'"[28] In addition to impacting DHS's operations, the IFR also clearly has direct, substantive impacts on the newly regulated parties—a key characteristic that dilutes its facially procedural nature.[29]

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[20] 90 Fed. Reg. 11793, 11796 (March 12, 2025).
[21] 8 U.S.C. §§ 1301-06.
[22] *FAQ: The Trump Immigration Registration Requirement*, *supra* note 2.
[23] *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (discussing characteristics of a legislative rule subject to notice-and-comment requirements); *see also Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Sebelius*, 979 F.2d 227, 237 (D.C. Cir. 1992) ("[A] legislative or substantive rule is one that does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy…. A rule is legislative if it attempts 'to supplement [a statute], not simply construe it.'") (citing *Chamber of Commerce v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980)).
[24] *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) ("A rule is legislative if is supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." (citing *Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Sebelius*, 979 F.2d 227, 237 (D.C. Cir. 1992))).
[25] *Id.* (citing *JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994)).
[26] 90 Fed. Reg. at 11798.
[27] *Mendoza*, 754 F.3d at 1023.
[28] *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Nat'l Lab. Rels. Bd.*, 57 F.4th 1023 (D.C. Cir. 2023) (internal citations omitted).
[29] If a rule "'substantively affects the public' in some ancillary way, it might require notice and comment because of those impacts," irrespective of its procedural nature. *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Nat'l*

To determine whether a rule effects a substantive regulatory change, such that it would be a legislative rule subject to notice-and-comment requirements under the APA, the D.C. Circuit has applied a four-factor test. The court has considered:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; (2) whether the agency has published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its general legislative authority; and (4) whether the rule effectively amends a prior legislative rule[30]…Generally, if ***any one*** of the four prongs…is satisfied, the rule is legislative" for notice-and-comment purposes.[31]

This IFR satisfies at least two elements of the D.C. Circuit's test. First, while the underlying statute specifies the criminal penalties for non-compliance, the IFR itself is "the basis for an enforcement action for violations" of its newly imposed obligations on a broad class of immigrants.[32] Prior to the IFR, there was no adequate legislative basis by which registration duties discussed in the statute could be enforced on immigrants who were not otherwise registered by existing mechanisms.

Second, in promulgating this IFR, DHS also explicitly invoked the delegation of rulemaking power authorizing it to do so[33] and made clear that the rule would have "the force and effect of law."[34] Just as the Sixth Circuit has held that the IRS must engage in notice-and-comment before it requires taxpayers to report the use of certain trusts under threat of a tax penalty, DHS must engage in notice-and-comment before requiring immigrants to report personal information under threat of deportation.

While the line between procedural and legislative rules is not always clear, a rule is legislative when "the substantive effect is sufficiently grave so that notice and comment are needed

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Lab. Rels. Bd., 57 F.4th 1023, 1052 (D.C. Cir. 2023) (Rao, J., concurring in part) (noting that if a rule "'substantively affects the public' in some ancillary way, it might require notice and comment because of those impacts") (citing Elec. Priv. Info. Ctr. V. U.S. Dep't of Homeland Sec., 653 F.3d 1, 6 (D.C. Cir. 2011) (recognizing the 'personal privacy' impact on the public of TSA technology that produced 'an image of the unclothed passenger'")).

[30] *Securities Industry and Financial Markets Assoc. v. United States Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 416 (D.D.C. 2014) (citing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

[31] *Id.* (citing 5 U.S.C.A. § 553) (emphasis added).

[32] *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

[33] 90 Fed. Reg. at 11794.

[34] *Mann Construction, Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022) (deeming legislative a rule that "ha[d] the force and effect of law [and that] define[d] a set of transactions that taxpayers must report…[and] stems from an express and binding delegation of rulemaking power.").

to safeguard the policies underlying the APA."[35] An agency rule with such grave effects "can only be nominally procedural," and in such cases, the notice-and-comment exemption does not apply.[36]

The substantive effects of the IFR pose a grave threat to undocumented immigrants' rights under the First and Fifth Amendments of the U.S. Constitution,[37] expose undocumented immigrants—and those discriminatorily perceived as such—to racial profiling by local police and federal law enforcement,[38] jeopardize current non-citizens' future rights as citizens, and even "spell the difference between retaining and losing the right to remain in this country."[39] Federal courts have specifically emphasized that agencies are required "to engage in notice and comment rulemaking when implementing policy changes with substantive consequences for refugees and other immigrants."[40]

An agency rule also has legislative effect when it "fill[s] a gap that Congress intended the agency to fill" through its delegated powers.[41] Effectively contradicting its earlier characterization of the rule as procedural, DHS now invokes its delegation of authority and explicitly states that the IFR is meant to "fill[] the gap in the regulatory regime by prescribing a registration form available to all aliens regardless of their status."[42]

Lastly, this IFR amends part of a chapter in the Code of Regulations of which other subsections have previously been amended with prior notice and opportunity to comment—including when an amendment was predicted to impact a narrower set of immigrants than would this IFR.[43] The Ninth Circuit has held that "[a]ny rule that effectively amends a prior legislative rule is legislative and must be promulgated under notice and comment rulemaking."[44] This IFR amends a subsection of the same chapter that the court had found required notice-and-comment rule making for previous, similar amendments to this chapter is yet another indication that notice-and-comment rule making is the appropriate procedure for the IFR, as well.

Despite DHS's contentions, the IFR's substantive impacts on immigrants' rights remain clear and profound. The public, including affected immigrants, deserves an opportunity to participate in this rulemaking process. This IFR—facially procedural but substantive at its core—

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[35] *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295 (D.C. Cir. 1983).
[36] *Texas v. U.S.*, 787 F.3d 733 (5th Cir. 2015) (citing *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir.1984))).
[37] *See infra* Section II.C.
[38] *See infra* Section II.B.
[39] *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 47 (D.D.C. 2018) (characterizing as "substantive" a nominally procedural agency policy that had sufficiently grave substantive effects, such that "the policy of public participation in decision-making that underlies the APA ha[d] considerable force") *Id.*
[40] *Doe v. Trump*, 288 F. Supp. 3d 1045 (W.D. Wash. 2017) (referencing, *inter alia*, *Zhang v. Slattery*, 55 F.3d 732, 744-47 (2d Cir. 1995), superseded by statute on other grounds, 8 U.S.C. § 1101(a)(42)).
[41] *Abbott Laboratories v. U.S.*, 84 Fed. Cl. 96, 109 (2008).
[42] 90 Fed. Reg. at 11796.
[43] 67 Fed. Reg. 57032 (Sept. 6, 2002).
[44] *Erringer v. Thompson*, 371 F.3d 625 (9th Cir. 2004).

is exactly the kind of rule Congress contemplated when requiring agencies to engage in notice-and-comment rule making.

B. The IFR Exposes Latinx, Black, and Indigenous Communities to Racial and Ethnic Profiling

The IFR includes criminal penalties for: "willfully fail[ing]" to register, failing to carry proof of registration, and failing to keep your registration current.[45] By its nature, enforcing these penalties will require that law enforcement implement a "show-your-papers" practice – a scheme which, on the ground, inherently leads to racial profiling by law enforcement officers. Policing in the United States already disproportionately affects Black and Latinx communities; according to a 2023 report, Black and Latinx communities are criminalized at much higher rates than their White counterparts.[46]

In the immigration context, racial and ethnic profiling is already a cornerstone of the U.S. government's approach to enforcing immigration law. The IFR gives law enforcement license to stop anyone they do not believe is authorized to live in the United States.[47] It carries the potential for overbroad enforcement within and without the groups most likely to be targeted, in a manner that infringes upon constitutional and statutory protections.

The impact of such a "show-your-papers" scheme is evident in the racially discriminatory policing that has emerged from the 287(g) program Task Force Model. The 287(g) Task Force Model specifically allows deputized officers to ask about immigration status of individuals stopped during routine traffic stops and make arrests based solely on federal immigration grounds.[48] DOJ investigations by past administrations in Arizona and North Carolina revealed that local law enforcement engaged in racial profiling as part of their previous 287(g) Task Force Agreements. The DOJ discontinued the Task Force Model in 2012.[49] Unfortunately, the 287(g) Task Force Model was revived by the Trump administration.

The criminal penalties contemplated by this IFR also extend to children between the ages of 14–18, placing them at particular risk of profiling and criminalization. The 1940-era statute underlining this IFR does not account for the decades of improvements that have been made

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[45] 8 U.S.C. § 1305(a) (requiring that registrants notify DHS of any address change within 10 days or risk criminal penalties).
[46] Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing*, SENTENCING PROJECT (Nov. 2, 2023) https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/.
[47] Charles Kamasaki, *U.S. Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, Brookings (March 26, 2021), https://www.brookings.edu/articles/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/.
[48] *The 287(g) Program*, AM. IMMIGR. COUNCIL (Jan. 20, 2025) https://www.americanimmigrationcouncil.org/research/287g-program-immigration.
[49] Anneliese Hermann, *287(g) Agreements Harm Individuals, Families, and Communities, but They Aren't Always Permanent*, CTR. FOR AM. PROGRESS (April 4, 2018) https://www.americanprogress.org/article/287g-agreements-harm-individuals-families-communities-arent-always-permanent/.

regarding the criminal prosecution of juveniles, including a shifting toward the diversion of juveniles away from the criminal legal system.[50]

The "show-your-papers" enforcement will inevitably lead to civil right violations, discriminatory policing, unlawful detentions, and arrests of U.S. citizens. It will disparately impact Black and Latinx communities. Indeed, in the past few months, several U.S. citizens have been wrongfully detained, including a 10-year-old citizen recovering from cancer who was ultimately deported along with her citizen siblings.[51] The government does not specifically track the arrests or detention of U.S. citizens, but available data indicate ICE arrested 674, detained 121, and removed 70 potential U.S. citizens between 2015 and 2020.[52] This IFR risks exacerbating this reality.

C. The IFR Fails to Address Fundamental Constitutional Concerns

1. Fifth Amendment – Self-Incrimination

A non-citizen seeking to follow the Rule's requirements must complete Form G-325R's mandatory questions, which requires that they disclose all potential criminal activity and immigration history–even where no charges resulted.

Unlike other registries related to immigration, the IFR does not confer any immigration benefit. Instead, Secretary Noem has made clear that the registry will be used for enforcement purposes.[53]

The mandatory questions in Form G-325, when placed in the context of the administration's comments regarding enforcement, implicates both the right against self-incrimination and the right to remain silent, essentially nullifying the Fifth Amendment as it relates

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[50] Richard Mendel, *Protect and Redirect: America's Growing Movement to Divert Youth Out of the Justice System*, SENTENCING PROJECT (Mar. 20, 2024) https://www.sentencingproject.org/reports/protect-and-redirect-americas-growing-movement-to-divert-youth-out-of-the-justice-system/.

[51] Nicole Foy, *Some Americans Have Already Been Caught in Trump's Immigration Dragnet. More Will Be.*, PROPUBLICA (March 18, 2025) https://www.propublica.org/article/more-americans-will-be-caught-up-trump-immigration-raids (reporting on the detention of Jonathan Guerrero, a U.S. citizen detained in Philadelphia during a workplace raid who was released only after law enforcement checked his identification, as well as others in Utah, New Mexico, Texas, and Virginia); Eyder Peralta, *You Say You're An American, But What If You Had To Prove It Or Be Deported?*, NPR (Dec. 22, 2016) https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported (detailing the stories of several citizens wrongfully detained).

[52] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-487 IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER TRACK CASES INVOLVING U.S. CITIZENSHIP INVESTIGATIONS (2021).

[53] Press Release, Secretary Noem announces agency will enforce laws that penalize aliens in the country illegally, Dept of Homeland Security (Feb. 25, 2025), *available at* https://www.dhs.gov/news/2025/02/25/secretary-noem-announces-agency-will-enforce-laws-penalize-aliens-country-illegally.

to non-citizens. The Fifth Amendment, like all rights enshrined in the Constitution, apply to all persons in the United States, regardless of nationality.[54]

Still, the registry requirement, and Form G-325R's mandatory questions place non-citizens in an impossible, unconstitutional Catch-22: register and forfeit your Fifth Amendment rights *or* don't register and place yourself at risk of criminalization. To allow a rule to circumvent these foundational rights would upend constitutional criminal law, and places large swaths of people at risk of having their civil rights violated.

2. Fifth Amendment – Due Process

As discussed above, the IFR and the mandatory use of Form G-325R are likely to have discriminatory impacts on Latinx and Black communities. The IFR, however is facially neutral—it applies generally to any immigrant who is undocumented, and those subject to the Rule's requirements must carry proof of registration with them at all times.[55] Unlike registration rules of the past, this IFR does not restrict registration requirements to immigrants from a particular country or set of countries. All the same, as discussed *supra* Section II.B., it will likely lead to racial and ethnic profiling of people perceived as undocumented, or of individuals living in communities that law enforcement target as part of their enforcement strategy.[56] As in the past, this increased racial and ethnic policing of immigrant communities and individuals perceived as undocumented will disproportionately impact Latinx communities and, in particular, Black, darker-skinned, and/or Indigenous Latinx individuals and families.[57]

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[54] *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens. ... These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.")

[55] Fed. Reg. at 11794 (requiring every registered immigrant who is 18 years of age or older to "at all times carry and have in their personal possession any certificate of alien registration or alien registration receipt card," or face a misdemeanor charge).

[56] Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, 1 SOC. OF RACE & ETHNICITY 88 (2015) ("[A]lthough legal discourse regarding immigration enforcement theoretically purports colorblindness, racial practices such as profiling subject immigrants to arrest, detention, and deportation and, in effect, criminalize them."); *see, e.g.*, Press Release, AILA: Ending NSEERS Closes Dark Chapter in U.S. History, AILA (Dec. 22, 2016), https://www.aila.org/library/ending-nseers-closes-dark-chapter-in-us-history ("[T]he NSEERS registration requirements were based solely on national origin, race, and religion rather than on legitimate intelligence information, and led to notorious ethnic profiling and civil rights violations.").

[57] *See* Press Release, New York Civil Liberties Union, NYCLU Seeks Records Regarding the Suffolk County Police Department's Treatment of Immigrants (Feb. 24, 2009) https://www.nyclu.org/press-release/nyclu-seeks-records-regarding-suffolk-county-police-departments-treatment-immigrants; *see also* Press Release, LatinoJustice PRLDEF, Federal Judge Approves Settlement in Lawsuit Against Suffolk County Police for Racial Discrimination (July 24, 2023) https://www.latinojustice.org/en/press/federal-judge-approves-settlement-lawsuit-against-suffolk-county-police-racial-discrimination.

The IFR goes further to violate equal protection principles of the Fifth Amendment's Due Process Clause, including because Form G-325R will only be made available in English.[58] In order for a court to find for a plaintiff claiming that a law or policy impacted those subject to it in a racially discriminatory way, the plaintiff must show the government's discriminatory purpose in enacting the law or policy at issue.[59] While the IFR is written in facially neutral terms, the Administration's prior actions to undermine language access and to declare English the official language of the United States[60] support the contention that it has failed to translate Form G-325R as part of larger scheme to limit language access in government services.

3. First Amendment

The IFR, and the racial profiling that will likely result, will also cause a chilling effect on the protected First Amendment activities of people who are undocumented or who may be perceived as such. Evidence from surveillance programs of the past demonstrates the link between surveillance or profiling and restricted First Amendment activity among members of the community being targeted.

The fear of profiling will discourage people in targeted communities from exercising their First Amendment liberties—including the right to assembly, and free expression—and statutory rights, including the exercise of religion.[61] The fear of ICE enforcement at churches, for example, has already correlated with declines in attendance at some Hispanic congregations as congregants fear they will be arrested at church.[62] Studies on widespread surveillance have shown, for example, that for some individuals, "surveillance had a 'chilling effect' in that it made them acutely aware that their actions were being monitored and led them to change 'legitimate' forms of behavior or activities due to a concern that their actions could be misinterpreted by the 'surveyors.'"[63]

III. CONCLUSION

As an organization focused on protecting the civil rights of Latinx communities, and for the reasons laid about above, LatinoJustice strongly urges that you rescind this Rule.

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[58] The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In 1954, the Supreme Court made clear that the principles of equal protection also bind the federal government, through the Due Process Clause of the Fifth Amendment. U.S. Const. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Hernandez v. New York*, 500 U.S. 352, 371 (1991) (acknowledging that in some circumstances, "proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis").

[59] *Washington v. Davis*, 426 U.S. 229 (1976).

[60] Julianne McShane, *Trump's Order to Make English Official Language Does Nothing but Embolden Xenophobia*, MOTHER JONES (Mar. 2, 2025), https://www.motherjones.com/politics/2025/03/trumps-order-to-make-english-official-language-anti-simmigrant-xenophobia/.

[61] Complaint at 24-25, *Menonite Church et. al. v. DHS, et. al.*, No. 1:25-cv-00403 (D.D.C. Feb. 11, 2025).

[62] Diana Chandler, *Hispanic Baptist Leaders Say Loss of 'Sensitive Locations' Rule Hurts Church*, BAPTIST PRESS (Jan. 29, 2025), https://www.baptistpress.com/resource-library/news/hispanic-baptist-leaders-say-loss-of-sensitive-locations-rule-hurts-church/.

[63] Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 UNIV. RICH. L. REV. 465, 498 at n.227 (2015).

Thank you for your consideration of our comment.

Sincerely,

LatinoJustice PRLDEF