

Attn: Department of State Desk Officer  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street, N.W.  
Washington, DC 20503

Bureau of Consular Affairs, Visa Office  
U.S. Department of State  
2201 C Street, N.W.  
Washington, DC 20520

May 18, 2017

RE: Supplemental Questions for Visa Applicants, OMB Control Number: New,  
DS-5535, Docket Number: DOS-2017-0019

To Whom It May Concern:

The freedom to practice one's faith is enshrined in our nation's founding documents, and the United States Constitution expressly forbids discrimination on the basis of religion. Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. As such, we write to express our serious concerns regarding the Department of State's ("Department") recent information collection request ("ICR") seeking far-reaching, fast-tracked authority to collect supplemental information, including information related to uses of social media, from immigrant and non-immigrant visa applicants. See 85 Fed. Reg. 20956, 20957 (May 4, 2017).

Specifically, we urge the Office of Management and Budget to deny the Department's ICR because: (1) expedited review is unwarranted in this case; (2) the ICR imposes an immense and unjustified administrative burden; and (3) significant privacy and policy concerns have been disregarded in the request.

## **I. Introduction**

As we will explain below, it is apparent that the Department's ICR is another thinly veiled attempt by the Trump Administration to target Muslims under the guise of national security. Although the Department indicates that the ICR would only be imposed on those applicants who have been determined to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities, the policy is noticeably silent on how this determination would be made, by whom it would be made, and what safeguards would be put in place to protect against abuse. In fact, the potential for

government overreach with the social media aspects of the ICR is obvious and troubling, particularly in light of several recently documented instances of border agents demanding that travelers, particularly those who are Muslim or perceived to be Muslim—including U.S. citizens—disclose social media passwords or unlock their personal computing devices as a condition of entry into the United States.<sup>1</sup>

Moreover, the Department states that the estimated number of respondents would be 65,000 individuals, but fails to provide any justification or basis for how this specific number was reached. Of note, approximately 65,000 nonimmigrant visas were issued in fiscal year 2015 to citizens from the six Muslim-majority countries targeted by the Trump Administration's Executive Order 13780 banning travel to the United States.<sup>2</sup> It is therefore difficult to see this ICR as anything but another attempt to target Muslims.

Yet this proposal goes further than merely restricting travel. The ICR's proposed additional collection data points include: (1) travel history during the past fifteen years, including source of funding for travel; (2) address history during the past fifteen years; (3) employment history during the past fifteen years; (4) all passport numbers and country of issuance held by the applicant; (5) names and dates of birth for all siblings; (6) names and dates of birth for all children; (7) names and dates of birth for all current and former spouses or civil or domestic partners; (8) social media platforms and identifiers, also known as handles, used during the past five years; and (9) phone numbers and email addresses used during the past five years. Beyond violating fundamental principles of privacy and chilling freedom of expression—particularly through the mandatory collection of social media handles—this vast collection of information would effectively create a treasure trove of highly sensitive, private data, the majority of which would belong to Muslims. It would, in effect, be a substantial step forward for President Trump's prior commitments to create a Muslim registry.<sup>3</sup>

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<sup>1</sup> See Kaveh Waddell, *A Stand Against Invasive Phone Searches at the U.S. Border*, THE ATLANTIC (Feb. 21, 2017), <https://www.theatlantic.com/technology/archive/2017/02/ron-wyden-border-searches/517353/>.

<sup>2</sup> See Philip Connor & Jens Manuel Krogstad, *Six countries named in revised Trump travel order accounted for more than 650,000 U.S. entries since 2006*, PEW RESEARCH CTR. (Mar. 10, 2017), <http://www.pewresearch.org/fact-tank/2017/03/10/six-countries-named-in-revised-trump-travel-order-accounted-for-more-than-650000-u-s-entries-since-2006>.

<sup>3</sup> In an interview with NBC News in November 2015, then candidate-Trump said he “would certainly implement” a database system tracking Muslims in the United States. “There should be a lot of systems, beyond databases,” he added. “We should have a lot of systems.” Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS (Nov. 20, 2015), <http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>. Further, a November 15, 2016 Reuters article reported that Kansas Secretary of State Kris Kobach admitted in an interview that Trump's advisers had also discussed drafting a

Equally troubling, by invoking emergency review and approval procedures, the Administration is denying the public an adequate opportunity to provide input on the proposed regulation and its associated consequences by severely limiting the time period during which comments may be filed. Pursuant to the Paperwork Reduction Act, circumventing normal procedures is only permissible in a narrow set of circumstances—i.e., if the normal process would result in “public harm” or is impossible due to an “unanticipated event.”<sup>4</sup> Here, the Department has failed to provide any adequate or thorough explanation that would justify this rushed review.<sup>5</sup> In our view, the Administration is once again using the specter of terrorism to justify administrative overreach and to quietly impose undue burden and harm to individuals seeking to gain lawful entry into the United States.

Previous administrations have undertaken similarly costly, invasive measures under the guise of concern for national security. In one such case—President George W. Bush’s controversial National Security Entry-Exit Registration System (“NSEERS”)—resulted in racial and religious profiling without enhancing national security efforts in any measureable way. Notably, NSEERS initially also applied to visitors from five Muslim-majority countries—Iran, Iraq, Libya, Sudan, and Syria—although it eventually grew to over two dozen countries, all but one of which had a Muslim-majority population.<sup>6</sup> The DHS Office of Inspector General (“OIG”) report noted that the costs were more than \$10 million per year at its apex, while being cumbersome for certain ports to implement and difficult for applicants to complete the requirements due to limited English proficiency. In light of these deficiencies, the OIG concluded there was “insufficient value of the NSEERS data” and the Department of

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proposal that would reinstate a registry for immigrants from Muslim countries, in light of Trump’s call for “extreme vetting.” Mica Rosenberg & Julia Edwards Ainsley, *Immigration hardliner says Trump team preparing plans for wall, mulling Muslim registry*, REUTERS (Nov. 15, 2016), <http://www.reuters.com/article/us-usa-trump-immigration-idUSKBN13B05C>. When asked about this plan to establish a Muslim registry in December 2016, President-elect Trump obliquely said, “You know my plans all along.” See Abby Phillip and Abigail Hauslohner, *Trump on the future of proposed Muslim ban, register: ‘You know my plans,’* WASH. POST (Dec. 22, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm\\_term=.31eec53d0c0](https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.31eec53d0c0).

<sup>4</sup> 44 U.S.C. § 3507(j)(1)(B).

<sup>5</sup> A limited explanation for enhancing “vetting” procedures was published by the White House on March 6, 2017. See *Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security*, OFFICE OF THE PRESS SECRETARY (Mar. 6, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

<sup>6</sup> See Kaveh Waddel, *America Already Had a Muslim Registry*, THE ATLANTIC (Dec. 20, 2016), <https://www.theatlantic.com/technology/archive/2016/12/america-already-had-a-muslim-registry/511214/>.

Homeland Security (“DHS”) was recommended to dismantle this program.<sup>7</sup> DHS did just that, phasing out NSEERS after determining that the program was “redundant, inefficient and unnecessary.”<sup>8</sup>

In the instant action, the Administration is doubling down on the failed model without any demonstrated purpose. As will be discussed below, approving a reduced review period in this instance would inhibit full consideration of a policy that would be a redundant, burdensome, and inefficient use of government resources at best, and a discriminatory, biased, and resource-draining program at worst. For these and other reasons detailed below, we urge Office of Management and Budget (“OMB”) to deny the Department’s request.

## II. Expedited Review is Unnecessary and Unwarranted

Under the Administrative Procedure Act, agencies are typically required to provide the public an opportunity to submit written comments for consideration by the agency prior to its implementation of a policy judgment. Executive Order 12866 established sixty days as the standard for the comment period.<sup>9</sup> In addition, pursuant to the Paperwork Reduction Act (44 U.S.C. §§ 3501–3520), if the proposed rule contains a “collection of information,” then the proposing agency must also prepare an information collection clearance package for OMB review and approval, and must also prepare a request for public comments.

Under traditional procedures, ICRs typically include a 90-day public review period. Specifically, following an agency’s initial publication in the *Federal Register*, the public is afforded sixty days to provide comments on the reporting and record keeping requirements associated with the potential information collection.<sup>10</sup> The proposing agency is then given time to consider the public’s comments and make appropriate revisions, after which the agency submits the ICR to the OMB for review and publishes a second *Federal Register* notice, providing the public with additional thirty days to submit comments.

The Paperwork Reduction Act was enacted to “maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government” while also minimizing paperwork and reporting

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<sup>7</sup> *Id.*

<sup>8</sup> Press Release, *DHS Removes Designated Countries from NSEERS Registration*, DEPT. OF HOMELAND SEC’Y (May 2011), <https://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011>.

<sup>9</sup> *Exec. Order No. 12,866*, 58 Fed. Reg. at § 6 (Oct. 4, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

<sup>10</sup> OMB approval for an information collection is subject to several requirements. See Office of Information and Regulatory Affairs, REGINFO FAQ, <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited May 17, 2017).

burdens on the American public.<sup>11</sup> In fact, the purpose of the sixty-day notice was to provide members of the public and affected agencies sufficient time to evaluate “whether the proposed collection of information [was] necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”<sup>12</sup> The public also has the ability in their comments to “evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information” and “minimize the burden of the collection of information on those who are to respond.”<sup>13</sup>

As noted, although the Paperwork Reduction Action permits emergency review and approval by the OMB in limited circumstances, this contravention of normal procedures is permissible only by a showing of public harm or if following the normal process is not possible.<sup>14</sup>

Here, the Department has requested emergency review and approval from OMB effective for 180 days, which provides a mere fourteen days for public comment. The Department makes this request without an adequate showing that this collection is immediately necessary and essential to the mission of the agency, nor does the Department make a minimal showing in its proposal that public harm would result if the standard, statutorily mandated clearance procedures were followed or that there are otherwise exigent circumstances requiring a hastened process. Moreover, the ICR does not indicate how long such information will be retained or safeguarded.

In sum, the Department fails to provide sufficient justification as to why the standard, statutorily mandated procedures should be bypassed in this instance. In absence of such information, the Department’s attempt to rush public review appears unnecessary and highly problematic, particularly given the lack of particularized evidence that foreign immigrant and nonimmigrant visa applicants pose an imminent threat to the United States and the potential for these “extreme vetting” procedures to trample the civil liberties of countless individuals.

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<sup>11</sup> 44 U.S.C. § 3501. *See also* Office of Information and Regulatory Affairs, REGINFO FAQ, <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited May 17, 2017).

<sup>12</sup> 44 U.S.C. § 3506(c)(2)(A).

<sup>13</sup> *Id.*

<sup>14</sup> The agency head may request the Director to authorize a collection of information if an agency head determines that-- (A) a collection of information—(i) is needed prior to the expiration of time periods established under this subchapter; and (ii) is essential to the mission of the agency; and (B) the agency cannot reasonably comply with the provisions of this subchapter because—(i) public harm is reasonably likely to result if normal clearance procedures are followed; (ii) an unanticipated event has occurred; or (iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed. *See id.* at § 3507(j)(1)(A).

### III. The ICR Creates an Immense and Unjustified Administrative Burden

The ICR's discussion of implementation is cursory at best. Based on the proposal's language alone, it is evident that the ICR presents an immense and unjustified administrative burden. This burden is most acute when weighing the vast expense of such a program against the likely negligible benefits drawn from the information that the Department is proposing to collect from visa applicants.

If implemented—even for an interim period of 180 days—the Department's proposal will lead to costly, excessive, and largely unhelpful paperwork and documentation requirements that will negatively impact visa applicants, government employees charged with handling new laborious review requirements, and American businesses that rely on members of the workforce who must retain visas in order to be employed in the United States. As noted, the ICR does not contemplate this burden and relies instead on unsubstantiated estimates by “relevant State Department officials” to contend that 65,000 visa applicants will fall subject to the ICR's requirements.<sup>15</sup>

Furthermore, the Department attempts to normalize its plan for enhanced information collection by comparing the measures to existing requirements for visa applications. In particular, the ICR states:

Most of this information is already collected on visa applications but for a shorter time period, e.g. five years rather than fifteen years. Requests for names and dates of birth of siblings and, for some applicants, children are new. The request for social media identifiers and associated platforms is new for the Department of State, although it is already collected on a voluntary basis by the Department of Homeland Security (DHS) for certain individuals. Regarding travel history, applicants may be requested to provide details of their international or domestic (within their country of nationality) travel, if it appears to the consular officer that the applicant has been in an area while the area was under the operational control of a terrorist organization . . . .<sup>16</sup>

Despite the Department's claim that “[m]ost of this information is already

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<sup>15</sup> To be sure, the administrative burden presented by unnecessary information collection is a significant problem. According to the OMB, in Fiscal Year 2015, the “public spent an estimated 9.78 billion hours responding to Federal information collections.” *Information Collection Budget of the United States Gov.*, OFF. OF MGMT. & BUDGET, at p. 3 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/icb/icb\\_2016.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/icb/icb_2016.pdf).

<sup>16</sup> 85 Fed. Reg. at 20957.

collected,” the subsequent description of the planned collection efforts—including the extended time periods and considerable additional data points—undermines this assertion. Several new categories of personal information are added without any articulated purpose or clear parameters. Moreover, adding an additional ten years to the standard five-year reporting period actually *triples* the reporting requirements by at least one measure. For context, applicants for U.S. government-issued secret and top secret security clearances typically only have to report address history over the preceding ten-year period. The ICR does little to explain why an even more onerous requirement should apply to an arbitrarily-defined group of visa applicants.

The ICR’s text also appears to suggest that this “extreme vetting” is justified because some of the new demands, such as the collection of information on applicants’ travel history, are already required in certain circumstances. This argument lacks merit. In attempting to hastily make the exception a rule, the Department has failed to explain why such information should stop being collected on a need-only basis. The ICR does not discuss why an available tool should instead become a requirement, circumventing the sound discretion of American consular officers when they believe no risk is presented.

The ICR also does not describe the analytical or strategic value of the additional information sought, particularly as it relates to the estimated burden of 65,000 hours presented by the Department. In particular, the ICR does not contemplate how the collected information will be used and whether the associated burden hours—felt entirely by already strained government employees—is calculated in the overall 65,000 hour estimate. For instance, does the Department plan to add research requirements to overlay collecting visa applicants’ social media handles? If so, how was the estimated burden on consular officers estimated? On average, how many of the supposed 65,000 applicants does the Department suppose will have held social media accounts over the past five years? Will the consular officials need to consult with local experts regarding foreign-language social media platforms competing with sites such as Facebook, Twitter, YouTube, SnapChat, Instagram, Pinterest, Tumblr, Reddit, LiveJournal, Tinder, Grindr, and OKCupid? What kinds of information would raise a “red flag” for a particular applicant? Absent answers to these basic questions, the Department’s collection and retention of such an unprecedented amount of information is particularly problematic and, as discussed below, raises serious concerns about how such information will be used.

None of these complicated factors have been considered in the ICR, nor does it appear that these issues are included in

the burden estimate provided by the Department. Thus, in evaluating the proposed new information that would be collected under the proposed ICR, we find a burdensome, worrisome, and costly invasion that lacks any articulated or legitimate purpose.

#### **IV. Privacy Concerns and Policy Considerations**

##### **A. The Proposed Expansion Sets a Dangerous Precedent and Paves the Way to a Muslim Registry**

Although the administrative burdens are substantial, the most alarming aspect of this ICR is the harm it would impose from a policy standpoint. Throughout his campaign, then-candidate Trump promised to resort to “extreme vetting” of potential immigrant and nonimmigrant visitors to the United States, including an examination of entrants’ ideological leanings in order to weed out those who do not “share our values and respect our people.”<sup>17</sup> As part of this “extreme vetting,” Trump repeatedly promised to establish a “Muslim registry” and a complete ban (albeit a temporary one) on Muslims entering the United States.<sup>18</sup>

The Trump Administration has denied its intention of creating a Muslim registry.<sup>19</sup> However, in light of the Administration’s previous statements and actions—and the fact that the Department’s proposed data collection would be borne most heavily by people who are or who are perceived to be Muslim—it is hard to square their assurances with the reality of the situation.<sup>20</sup>

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<sup>17</sup> Katie Zezima, *Donald Trump calls for ‘extreme vetting’ of people looking to come to the United States*, WASH. POST (Aug. 15, 2016),

[https://www.washingtonpost.com/news/post-politics/wp/2016/08/15/donald-trump-calls-for-extreme-vetting-of-people-looking-to-come-to-the-united-states/?utm\\_term=.9c844195311f](https://www.washingtonpost.com/news/post-politics/wp/2016/08/15/donald-trump-calls-for-extreme-vetting-of-people-looking-to-come-to-the-united-states/?utm_term=.9c844195311f).

<sup>18</sup> Maggie Haberman, *Donald Trump’s Call for Muslim Registry Denounced by Democrats*, N.Y. TIMES (Nov. 20, 2015),

<https://www.nytimes.com/politics/first-draft/2015/11/20/donald-trumps-call-for-muslim-registry-denounced-by-democrats/>; Abby Phillip and Abigail Hauslohner, *Trump on the future of proposed Muslim ban, registry: ‘You know my plans’*, *supra* note 3.

<sup>19</sup> See Jessie Hellmann, *Trump team denies reports of plans for Muslim registry*, THE HILL (Nov. 17, 2016),

<http://thehill.com/homenews/administration/306694-aide-trump-doesnt-advocate-tracking-individuals-based-on-religion>.

<sup>20</sup> This is especially true if, as we suspect, the supposed 65,000 applicants deemed to warrant additional scrutiny come from the six Muslim-majority countries designated in Executive Order 13780. Those countries are Iran, Libya, Somalia, Sudan, Syria, and Yemen. See *Exec. Order No. 13,780*, 82 Fed. Reg. 13,209 (Mar. 9, 2017),

<https://www.gpo.gov/fdsys/pkg/FR-2017-03-09/pdf/2017-04837.pdf>; see also *Memorandum for*

In reality, the Muslim community is already subject to “extreme vetting.” Within four years after September 11th, the Federal Bureau of Investigation (“FBI”) conducted nearly 500,000 “voluntary” interviews with American Muslims at their homes and workplaces, asking personal questions about their family, friends, and community acquaintances.<sup>21</sup> Since then, many law-abiding Muslims have been targeted by repeated, intrusive interrogations, such as a practicing attorney who was interrogated about people in her travel photos (mostly family members) and her political views of the 2008 presidential election candidates upon returning from visiting relatives overseas.<sup>22</sup> In another case, a Gulf War veteran and current firefighter was detained for up to four hours as CBP agents searched his car and cell phone records, asking why he chose to convert to Islam.<sup>23</sup> In yet another, an American Muslim man reportedly was grabbed by the neck and pinned to his chair while an agent forcibly removed his cell phone from his pocket—the same cell phone the man had voluntarily handed over during a separate stop at the Canadian border just a few days before.<sup>24</sup> Such experiences only scratch the surface of the scrutiny faced by Muslim travelers when partaking in everyday, innocuous activities, such as speaking in Arabic in an airport or asking to sit with other friends of Middle Eastern descent on an airplane.<sup>25</sup>

As previously discussed, the United States has already experimented with the idea of a “Muslim registry.” Beginning September 11, 2002, the NSEERS program required foreign nationals from designated countries to “check in” with the government before entering and leaving the United States and required some

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*the Secretary of State, the Attorney General, the Secretary of Homeland Security*, OFF. OF THE PRESS SEC’Y (Mar. 6, 2017),  
<https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

<sup>21</sup> *Hearing on Willful Blindness—The Consequences of Agency Efforts to De-Emphasize Radical Islam in Combating Terrorism* (statement of Farhana Y. Khera, President & Executive Director, Muslim Advocates), SUBCOMM. ON OVERSIGHT, AGENCY ACTION, FED. RIGHTS & FED. COURTS OF THE SEN. COMM. ON THE JUDICIARY (June 28, 2016),  
<https://www.judiciary.senate.gov/imo/media/doc/06-28-16%20Khera%20Testimony.pdf>.

<sup>22</sup> See Debi Kar, *Muslim Advocates Testifies Before US Senate Judiciary Subcommittee on Laptop Seizures & Other Privacy Violations* (Jun. 25, 2008),  
<https://www.muslimadvocates.org/muslim-advocates-testifies-before-us-senate-judiciary-subcommittee-on-laptop-seizures-other-privacy-violations/>.

<sup>23</sup> See *id.*

<sup>24</sup> See Murtaza Hassain, *Complaints Describe Border Agents Interrogating Muslim Americans, Asking for Social Media Accounts*, THE INTERCEPT (Jan. 14, 2017),  
<https://theintercept.com/2017/01/14/complaints-describes-border-agents-interrogating-muslim-americans-asking-for-social-media-accounts/>.

<sup>25</sup> B.R., *Southwest Airlines accused of profiling Muslims*, THE ECONOMIST (Nov. 23, 2015),  
<http://www.economist.com/blogs/gulliver/2015/11/nothing-fear-except-fear-itself>.

foreigners living in the United States to report regularly to immigration officials.<sup>26</sup> While NSEERS existed, the program intrusively registered and continuously monitored nearly 80,000 men and boys—and failed to result in a single terrorism conviction.<sup>27</sup>

Muslim Advocates is thus acutely aware of the particular impact the Department's proposal will have on Muslim travelers, individuals who are perceived to be Muslim, and their American contacts. As an advocacy organization, we represent those who live through heightened scrutiny as a result of their religious beliefs on a daily basis, and can testify to the fact that such humiliating, invasive, "special treatment" is already alive and well in America—despite the fact that, as history demonstrates, such treatment is largely ineffective when it comes to preventing actual terrorism.

The Department's proposal will only aggravate the burdens Muslims endure without advancing any articulated security benefit. Requiring certain visa applicants to produce fifteen years' worth of travel history (along with the source of funding for that travel), for example, would be particularly onerous, if not impossible—especially if the requirement includes both foreign and domestic travel (the Department's proposal does not specify). Many people likely would not be able to comply with such a tedious requirement—even though they have nothing to hide. More importantly, the proposed policies will stigmatize Muslim communities by insinuating that they necessitate such heightened scrutiny, and send the negative message to Muslims that they are perceived as a threat simply because of their faith.

## **B. The Proposal Will Result in an Acute Invasion of Privacy for Both Visa Applicants and the Americans with Whom They Are in Contact**

A person's social media presence can yield an intimate, detailed picture of their lives, which makes it far more sensitive than data typically gathered for visa-related purposes (such as an applicant's address, citizenship, and criminal history). A user's tweets, Instagram photos, and even Facebook "likes"<sup>28</sup> can

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<sup>26</sup> Kaveh Waddell, *America Already Had a Muslim Registry*, *supra* note 6.

<sup>27</sup> Nadeem Muaddi, *The Bush-era Muslim registry failed. Yet the US could be trying it again*, CNN.COM (Dec. 22, 2016), <http://www.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/index.html>.

<sup>28</sup> Christina Dong, *Stanford scholar finds social media reveals much about the human condition*, STANFORD NEWS (Aug. 26, 2015), <http://news.stanford.edu/2015/08/26/social-media-kosinski-082515/>; *see also* Aviva Hope Rutkin, *How Your Facebook Profile Reveals More About Your Personality Than You Know*, MIT TECHNOLOGY REVIEW (Oct. 1, 2013), <https://www.technologyreview.com/s/519766/how-your-facebook-profile-reveals-more-about-your-personality-than-you-know/>.

provide details on the sexual preferences, religion, ideas, and political affiliations of not only that user, but also the contacts swept up in their digital social circles. The Department may argue that by using social media accounts and allowing certain information to be publicly searchable and viewable, respondents have waived expectations of privacy since they could have placed their setting as private. However, this generalization misses the mark. For example, certain professions—such as journalists and human rights activists—might require a somewhat public online presence, but they are nevertheless able to mask their actual identity by using a handle that does not match their real name. By forcing individuals to disclose these handles to a government authority, personal safety could be put at risk. Moreover, information a viewer assumes is private may be viewable without the user’s knowledge or consent, through features such as “likes,” comments on public photos or articles, or unsolicited posts from third-party users with public profiles.

When viewed out of context, such an amalgam of personal data can easily be misinterpreted, particularly when language and cultural barriers are thrown into the mix. However, even when not misinterpreted, such information is highly sensitive yet of questionable value for screening purposes, and can even open the door to discrimination accusations against uninvited viewers who have the best of intentions. In fact, an article for the Society for Human Resource Management cautions against social media screenings of job applicants because it can expose hiring managers to details about candidates—such as religious beliefs, political opinions, race, age, and medical conditions—that cannot legally be used to make decisions about employment (or visa applications, for that matter).<sup>29</sup> According to the article, “it is much easier for an organization to defend against a discrimination claim when it never knew of the discriminatory grounds in the first place. . . .”<sup>30</sup> Thus, in reviewing the present ICR, although the Department proposal promises that “visas will not be denied on the basis of race, religion, ethnicity, national origin, political views, gender, or sexual orientation,” it nevertheless will be difficult to defend against accusations of differential treatment of persons based on their religion or place of birth, particularly if the vast majority of the 65,000 affected people contemplated by the proposal are from Muslim-majority countries.

Compounding the sensitivity of the data to be collected is the fact that the ICR leaves data privacy and data security unaddressed. How will applicants’ information be stored? For how long? What measures will be taken to ensure the information is safeguarded? The chances of any meaningful privacy

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<sup>29</sup> See Gregory M. Saylin and Tyson C. Horrocks, *The Risks of Pre-employment Social Media Screening*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Jul. 18, 2013), <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Preemployment-Social-Media-Screening.aspx>.

<sup>30</sup> *Id.*

protections are bleak, given that Executive Order 13768 specifically instructs agencies to “ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the [Federal Privacy Act of 1974] regarding personally identifiable information.”<sup>31</sup> As a result, visa applicants likely will have no means to access and correct their data that officials have on record, and their information may be shared without consent, including with other government agencies.<sup>32</sup>

Moreover, U.S. government systems have been repeatedly hacked by state and non-state actors, demonstrating that U.S. government storage of personal information is vulnerable to outside intrusions. Less than four years ago, leaked documents revealed that the Department’s State Messaging and Archive Retrieval Toolset (“SMART”) system is built with “out of the box software” and “commercial grade” services and applications, operating “without basic technical security measures in place, despite warnings about its vulnerabilities.”<sup>33</sup> In late 2014, an analysis of incidents reported by the Department to DHS revealed that nearly fifty-eight percent of security incidents during FY2013 had a social engineering component—which is generally considered to be a sign of more sophisticated adversaries, such as state actors.<sup>34</sup> Such antiquated, vulnerable systems therefore cannot be trusted with the information to be gathered from visa applicants through the “extreme vetting” process, particularly given that a breach of such personal information may endanger applicants by exposing to their home governments their sexual orientation, status as refugees, or the fact that they are political dissidents.<sup>35</sup>

### **C. The Proposal Would Chill Free Speech and Association that Typically Flourishes Online, for Those Visiting America as well**

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<sup>31</sup> *Exec. Order No. 13,768*, 82 Fed. Reg. 8,799, 8802 (Jan. 30, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf>.

<sup>32</sup> *See Trump Administration Restricts Privacy Rights for non U.S. Citizens*, NAT’L L. REV. (May 2, 2017), <http://www.natlawreview.com/article/trump-administration-restricts-privacy-rights-non-us-citizens>.

<sup>33</sup> Justine Sharrock, *Exclusive: Years After Manning Leaks, State Department Cable System Lacks Basic Security*, BUZZFEED NEWS (Oct. 2, 2013), [https://www.buzzfeed.com/justinesharrock/exclusive-years-after-manning-leaks-state-department-cable-s?utm\\_term=.wy307LOed#.adE8v0Q7Y](https://www.buzzfeed.com/justinesharrock/exclusive-years-after-manning-leaks-state-department-cable-s?utm_term=.wy307LOed#.adE8v0Q7Y).

<sup>34</sup> David Perera, *Auditors: State Department has history of poor cybersecurity*, POLITICO (Nov. 17, 2014), <http://www.politico.com/story/2014/11/state-department-cybersecurity-hacking-112951>.

<sup>35</sup> Dan Littauer, *Man arrested for Facebook gay date in Saudi Arabia*, PINKNEWS (Jan. 13, 2012), <http://www.pinknews.co.uk/2012/01/13/man-arrested-for-facebook-gay-date-in-saudi-arabia/>; see also Associated Press, *Saudi teen arrested for online flirting with U.S. woman*, CBS NEWS (Oct. 5, 2016), <http://www.cbsnews.com/news/saudi-arabian-teen-arrested-online-flirting-american-younow/>.

## as Their American Contacts

The risk of being denied a visa likely will lead many travelers to remove controversial posts or refrain from conversing with citizens from certain parts of the world. Multiple studies demonstrate the chilling effect of privacy and surveillance concerns. In the government's own recent study, for example, forty-five percent of online households reported that such concerns stopped them from "conducting financial transactions . . . posting on social networks, or expressing opinions on controversial or political issues via the Internet."<sup>36</sup> A study of Facebook users demonstrated that people censor themselves on the social network when they are made aware that the National Security Agency ("NSA") monitors online activities.<sup>37</sup> Such effects will be particularly felt by visa applicants whose personal details could be used against them if, for example, their sexual identity or political affiliations are frowned upon, or even criminalized, in their home countries.

Given the high-stakes nature of the visa application process—a process that stands between applicants and academic opportunities, economic opportunities, and visits with family and friends—many will refrain from posting their opinions about hot button issues, "liking" contentious articles, or communicating with certain individuals for fear that such activities could be taken out of context and used against them. Moreover, American citizens may forgo forging any connections with people who come from a particular country or region for fear that they may be flagged as a threat, diminishing opportunities for valuable cultural exchanges. Such serious consequences for online speech directly undermine the image of America as a forbearer of free speech and is incompatible with the Universal Declaration of Human Rights, which guarantees "the right to freedom of opinion and expression," including the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>38</sup>

Because the Department's ICR does not specify what types of information—on what it ambiguously refers to as "social media platforms"—could constitute a security concern that may warrant denying a visa application, the

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<sup>36</sup> Rafi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, NTIA (May 13, 2016), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

<sup>37</sup> Karen Gullo, *Surveillance Chills Speech-As New Studies Show—And Free Association Suffers*, ELEC. FRONTIER FOUND. (May 19, 2016), <https://www.eff.org/deeplinks/2016/05/when-surveillance-chills-speech-new-studies-show-our-rights-free-association>.

<sup>38</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/>.

proposal may end up being a means of delivering the ideological profiling that President Trump promised during his campaign. Ideological targeting risks stymying opportunities to understand a vibrant culture that belongs to over 1.5 billion Muslims around the world.<sup>39</sup> The effects will be particularly felt by educational institutions, which hosted over 100,000 students from the Middle East and North Africa in the academic year 2014-2015.<sup>40</sup> Given the harsh scrutiny foreign students are already subjected to when they apply for their F, J, or M nonimmigrant visas, additional scrutiny would be unnecessary and harmful to U.S. relations with such regions.<sup>41</sup>

#### **D. Demanding Sensitive Information from Visa Applicants Will Result in Other Governments Making Parallel Demands to American Travelers**

Immigration policies are susceptible to reciprocity effects, which likely will occur if the Department's proposal is approved. Shortly after Executive Order 13780 was announced, Iran's foreign minister, Mohammad Javad Zarif, promised that his country would take "reciprocal measures to protect citizens."<sup>42</sup> The Iraqi Parliament subsequently approved reciprocal measures, as well.<sup>43</sup> Other countries were quick to denounce the U.S. government and its proposal, from France and Germany to Canada and Luxembourg.<sup>44</sup> Such criticism came on the heels of debate surrounding the possibility of requiring visas for Americans who want to visit Europe in response to U.S. refusal to waive visa requirements of certain European countries—a reciprocal measure the European Commission just recently decided not to pursue at this time.<sup>45</sup>

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<sup>39</sup> *The Future of World Religions: Population Growth Projections, 2010-2050*, PEW RESEARCH CENTER (Apr. 2, 2015), <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>. According to the Pew Research Center, by 2050 the number of Muslims in the world will be nearly equal to the number of Christians. *Id.*

<sup>40</sup> Elizabeth Redden, *Trump Proposal Ideological Test for Entry to U.S.*, INSIDE HIGHER ED (Aug. 16, 2016), <https://www.insidehighered.com/news/2016/08/16/trump-proposes-extreme-vetting-and-ideological-test-visas>.

<sup>41</sup> *Id.*; see also *How the travel crackdown is affecting North American debate on Islam*, THE ECONOMIST (Feb. 1, 2017), <http://www.economist.com/blogs/erasmus/2017/02/why-muslim-pundits-feel-let-down> ("The [travel] ban threatened to 'poison...the public's understanding of Islam in particular and religion in general,'").

<sup>42</sup> Marketplace Staff, *Trump's immigration ban: Countries plan retaliation*, WUNC (Jan. 30, 2017), <http://wunc.org/post/trumps-immigration-ban-countries-plan-retaliation#stream/0>.

<sup>43</sup> See The Associated Press, *Iraq parliament approves 'reciprocity' to U.S. ban*, POLITICO (Jan. 30, 2017), <http://www.politico.com/story/2017/01/iraq-parliament-approves-reciprocity-to-us-ban-234354>.

<sup>44</sup> See Marketplace Staff, *Trump's immigration ban: Countries plan retaliation*, *supra* note 44.

<sup>45</sup> See Bill Chappell, *European Commission Says It Won't Require American Travelers To Get Visas*, NPR

It follows that Americans could be subject to stricter scrutiny when traveling abroad if the Department's ICR is implemented. This scrutiny could result in visa denials or involuntary detention for activities that are perfectly legal in the United States and many other parts of the world, such as being a member of the LGBTQ community, displaying female "immodesty," or engaging in political campaigning.<sup>46</sup> Americans and citizens of our allies, therefore, have a great interest in ensuring that the ICR's proposed vetting measures do not ignite throughout the rest of the world a trend of examining travelers' social media presence.

## V. Conclusion

The Department's proposal to collect visa applicants' travel history from the past fifteen years, social media handles, and other pieces of sensitive information is highly invasive, will chill the exchange of ideas and the formation of contacts online, disproportionately burden a particular religious group, and likely will result in reciprocal screenings against Americans abroad. Moreover, the government has failed to demonstrate that expedited review of the Department's proposal is necessary. Indeed, such expedited review will severely limit experts' ability to examine the vast administrative costs and potential for discrimination that likely will result from the "extreme vetting" program. Accordingly, we urge OMB to deny the Department's ICR.

Please do not hesitate to let us know if we can provide any further information regarding our concerns. You may contact us directly at [juvaria@muslimadvocates.org](mailto:juvaria@muslimadvocates.org) or (415) 692-1484.

Respectfully Submitted,

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Muslim Advocates

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NEWS (May 2, 2017),

<http://www.npr.org/sections/thetwo-way/2017/05/02/526594435/european-commission-says-it-wont-require-american-travelers-to-get-visas>.

<sup>46</sup> See, e.g., Adam Boulton, *British man imprisoned in Dubai over Facebook post*, THE TELEGRAPH (Aug. 19, 2016),

<http://www.telegraph.co.uk/news/2016/08/19/british-man-imprisoned-in-dubai-over-facebook-post/>.