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Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

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

October 2, 2017

RE: Supplemental Questions for Visa Applicants, OMB Control Number: 1405-0226, DS-5535,
Docket Number: DOS-2017-0032, 82 Fed. Reg. 36180

To Whom It May Concern:

The Supreme Court has described religious liberty as a “shield” under which “many types of life, character, opinion, and belief can develop unmolested and unobstructed.” *See Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940) (“Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.”). Muslim Advocates, a civil rights organization dedicated to ensuring the free and peaceful practice of all faiths, submits this comment to express our serious concern that making permanent the Department of State’s (“Department’s”) supplemental questionnaire for visa applicants will grossly undermine this shield by infringing upon our country’s religious liberty.

We urge the Office of Management and Budget (“OMB”) to reject the Department’s request. As we voiced in earlier comments to OMB when it first considered the Administration’s request on an emergency, interim basis,¹ we have been, and remain to be deeply concerned that the questionnaire poses a disproportionate impact on the Muslim community. The questionnaire is anathema to the U.S. Constitution and to American ideals of fairness and freedom. It has no place at the gates of our nation, where scores of people stand waiting for an opportunity to enrich and strengthen the fabric of American life.

I. Introduction

The use of Form DS-5535 was approved by OMB on May 23, 2017 as a temporary, “emergency” measure meant to implement a March 6, 2017 memorandum from President Trump. The memorandum created a 90-day travel ban against individuals from six Muslim-majority countries and ordered government entities to “enhance the screening and vetting of

¹ Letter to OMB and U.S. Department of State from Muslim Advocates, Re: Supplemental Questions for Visa Applicants, OMB Control Number: New, DS-5535, Docket Number: DOS-2017-0019 (May 18, 2017).

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applications for visas.”² This memorandum was supplemented by a March 15, 2017 State Department cable that directed “all diplomatic and consular posts” to identify sets of “applicant populations warranting increased scrutiny” and to ask members of such populations a series of highly invasive questions.³ The cable did not offer guidance on how to identify “applicant populations warranting increased scrutiny,” and the Department has yet to explain why it was necessary to go through OMB’s emergency procedure to approve its supplemental visa questionnaire in the first place. Nevertheless, it now seeks to make the questionnaire a permanent part of the visa application process. *See* 82 Fed. Reg. 36180 (Aug. 3, 2017).

Under its current proposal, the Department does not restrict travel outright, but we believe that, in practice, it carries out what President Trump has referred to as a “Muslim ban” by imposing burdensome and invasive administrative hurdles on particular visa applicants. In fact, in a series of tweets, the President himself hinted that the questionnaire and the original travel ban are intended to serve as a different means to the same end: earlier this year, after berating the Justice Department for abandoning the travel ban, he assured his Twitter followers that, “[i]n any event, we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!”⁴

The Department’s supplemental visa questionnaire, if made permanent, will ask an undefined “subset” of applicants to provide the following sets of information: (1) travel history during the last fifteen years, including source of funding for travel; (2) address history during the last fifteen years; (3) employment history during the last 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 last five years; and (9) phone numbers and email addresses used during the last five years. The Department does not specify which applicants will be asked these supplemental questions—it only repeats, without further justification or explanation, its initial proposal’s estimate that the number of respondents will be approximately 65,000 individuals. However, as we explain below, a multitude of factors provide ample evidence to suggest that the questionnaire will impose a disproportionate impact on Muslim travelers, travelers perceived to be Muslim, and travelers with even remote ties to Muslim-majority countries. As a result, the information collected from applicants will create a cache of data on people of a certain faith background—a significant step toward making the “Muslim registry” that President Trump promised during his campaign a reality.⁵

² Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, White House (Mar. 6, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

³ Rex Tillerson, *17 STATE 24324*, REUTERS at para. 2 (Mar. 15, 2017), http://live.reuters.com/Event/Live_US_Politics/791246151.

⁴ David G. Savage, *Trump undercuts his lawyers with tweets about travel ban*, L.A. TIMES (June 5, 2017), <http://www.latimes.com/politics/la-na-pol-trump-court-tweets-20170605-story.html>.

⁵ *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/>.

Moreover, the highly sensitive nature of this data will pose a significant threat to visa applicants' privacy. The results of such invasions are deeply troubling: potential speakers on social media platforms may be chilled; potential audiences of important new ideas may look away; and potential relationships and exchanges will be hindered. The fallout from the questionnaire therefore will extend far beyond the applicants involved—it will extend to the applicants' families, friends, and their broader communities as well. Worse, it is unclear whether the Department has seriously considered whether the privacy and free expression-related costs will even provide a benefit from a national security standpoint, given the massive administrative burden that will be required for agents to adequately gather and review such large swaths of data.

For these and the other reasons discussed below, we strongly urge OMB to reject the Department's proposal to make its supplemental questionnaire a permanent part of the visa application system.

II. The Extreme Vetting Questionnaire Will Disproportionately Affect Muslims

A. The Proposed Questionnaire Will Target Muslims Because of Their Religious Background

Although the Department's proposal does not explicitly single out any religious group or nationality, there is ample evidence to suggest that the questionnaire will disproportionately affect Muslims and individuals from Muslim-majority countries. As a result, the Department's proposal presents a uniquely invasive burden to a specific group of people based on their religious background—a burden that goes against a core freedom guaranteed by the Bill of Rights and U.S. obligations under international human rights law.⁶

The Trump administration has already disproportionately targeted Muslim travelers and immigrants and has signaled repeatedly that it will continue to do so. Within the first four months of the Trump presidency, the number of non-immigrant visas issued to people from Muslim-majority countries declined by double digits—by 20 percent in April 2017, compared to the 2016 monthly average.⁷ In addition, visas issued in the six countries targeted by the March 6, 2017 travel ban were down 55 percent compared with the 2016 monthly average.⁸ Such dramatic changes could be attributed to enhanced screening practices conducted by border

⁶ U.S. Const. amend. I; International Religious Freedom Act of 1998, 22 U.S.C. § 6401 *et seq.* (2012) (noting that “[f]reedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms”).

⁷ Nahal Toosi and Ted Hesson, *Visas to Muslim-Majority countries down 20 percent*, Politico (May 25, 2017), <http://www.politico.com/story/2017/05/25/trump-muslim-visas-238846>.

⁸ Nahal Toosi and Ted Hesson, *Visas to Muslim-Majority countries down 20 percent*, Politico (May 25, 2017), <http://www.politico.com/story/2017/05/25/trump-muslim-visas-238846>.

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agents at the direction of the Trump Administration, a decline in the number of people from certain countries seeking to enter the United States to begin with, or a combination of both. In either scenario, a clear and pervasive message has been communicated across the world: that Muslims are not welcome in the United States.

Indeed, this message has been conveyed by President Trump himself, members of his Administration, and some of his more prominent supporters. Such rhetoric indicates that policies that disproportionately impact Muslims will only get worse, not better, throughout President Trump's tenure. During his campaign, for example, President Trump said he believes "Islam hates us."⁹ He also repeated, on multiple occasions, the disproven story that New Jersey Muslims cheered when the World Trade Center was attacked on September 11, 2001.¹⁰ And President Trump has coupled his rhetoric with proposals to combat the purported threat that all Muslims allegedly pose to the country. For example, he promised a complete ban on Muslims entering the United States and a "Muslim registry" (which he later denied ever proposing).¹¹ Then-candidate Trump also floated the idea of an ideological test to ensure that only those who "share our values and respect our people" are permitted to enter the country—a proposal that may have been a foreshadowing of the very visa questionnaire OMB is considering today.¹² As researchers at the Haas Institute have aptly described, "[w]hat began as outlandish, unconstitutional and almost unfathomable proposals in Trump's campaign statements calling for a Muslim registry, and banning all Muslims from entering the United States, have since become actual policy goals that are being worked towards"¹³

⁹ Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

¹⁰ Lauren Carroll, *Fact-checking Trump's claim that thousands in New Jersey cheered when World Trade Center tumbled*, POLITIFACT (Nov. 22, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/>. See also Tessa Berenson, *Video Debunks Trump's Claim That Thousands of American Muslims Celebrated 9/11*, TIME (Dec. 1, 2015), <http://time.com/4131439/donald-trump-muslims-9-11-video/>.

¹¹ 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/>. See also Phillip and Hauslohner, *Trump on the future of proposed Muslim ban, registry: '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=.60c7f520a28e.

¹² Jeremy Diamond, *Trump proposes values test for would-be immigrants in fiery ISIS speech*, CNN (Aug. 15, 2016), <http://www.cnn.com/2016/08/14/politics/donald-trump-isis-fight/>. See generally Elsadig Elsheikh, Basima Sisemore, and Natalia Ramirez Lee, *Legalizing Othering: The United States of Islamophobia*, HAAS INSTITUTE 26-29 (Sept. 2017) [hereinafter "*Legalizing Othering*"], available at http://haasinstitute.berkeley.edu/sites/default/files/haas_institute_legalizing_othering_the_united_states_of_islamophobia.pdf.

¹³ See *Legalizing Othering*, *supra*, note 12 at 26.

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Once he made it to the Oval Office, President Trump asked his advisors to find ways to carry out his campaign proposals “legally.”¹⁴ The campaign promise of a “Muslim ban” was softened to a travel ban, which has been continuously tweaked in efforts to enable it to pass judicial muster.¹⁵ The most recent of such attempts occurred on September 24, 2017, when President Trump issued a third revised version of the travel ban as a presidential proclamation.¹⁶ Although the revised ban adds North Korea and certain individuals from Venezuela to its scope—ostensibly appearing to broaden the scope beyond just Muslim-majority countries, these additions do not detract from the ban’s primary focus on Muslim-majority countries and disproportionate impact on Muslim communities. This is particularly true since there the number of visitors from North Korea is nominal and the travel ban only restricts travel to certain government officials and their families from Venezuela.

In addition, the Administration issued, under emergency procedure, the supplemental visa questionnaire that it now seeks to make permanent. President Trump’s harsh rhetoric against Muslims also has persisted. Most recently, while investigations were ongoing, President Trump responded to an explosion on a London subway car by immediately tweeting: “The travel ban into the United States should be far larger, tougher and *more specific*—but stupidly, that would not be politically correct!”¹⁷

Although, on its face, the proposed supplemental questionnaire does not purport to target any specific subset of applicants, both the Department’s most recent notice in the Federal Register, as well as its original notice asking for emergency review, stated that the supplemental questionnaire is meant to implement the original March 6 travel ban that prohibited travel to the United States from Iran, Libya, Somalia, Sudan, Syria, and Yemen. In addition, as we pointed out in our previous comments responding to the Department’s request for emergency review, in Fiscal Year 2015 there were approximately 65,000 nonimmigrant visas issued to citizens from those six countries, which may well be where the Department obtained its uncited “65,000” figure for the number of estimated responses to the questionnaire.

Unsurprisingly, within the past three months of being used, it already appears that the questionnaire is being leveled against Muslim applicants in particular. An attorney running an

¹⁴ Amy B. Wang, *Trump asked for a ‘Muslim ban,’ Giuliani says – and ordered a commission to do it ‘legally’*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.d29a4de1838f.

¹⁵ Jay Willis, *President Trump’s new Repulsive Muslim Ban Is Still a Repulsive Muslim Ban*, GQ (Mar. 6, 2017), <https://www.gq.com/story/new-muslim-ban>.

¹⁶ Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry>.

¹⁷ John Wagner and Matt Zaptosky, *Citing London terrorist attack, Trump calls for expansion of his travel ban*, WASH. POST (Sep. 15, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/09/15/citing-london-terrorist-attack-trump-calls-for-expansion-of-his-travel-ban/?utm_term=.e2a864aa1b23 (emphasis added).

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immigration consultancy for Iranian clients applying for U.S. visas has found that since June 2017, every single one of his clients referred for extra security checks have also been asked to fill out the new form.¹⁸ Another immigration attorney said he is aware of Iraqis, Libyans, and Iranians who have all been asked to fill out the form.¹⁹ Should use of the questionnaire continue, it is likely that certain travelers will have yet another “screening mechanism” to add to their list of time-consuming, degrading, embarrassing, and invasive procedures they have come to expect simply for traveling while being Muslim or being of Muslim-majority national origin.

B. The Questionnaire Will Exacerbate the “Extreme Vetting” to which Muslims Worldwide Already Have Been Subjected

Making the questionnaire permanent will only exacerbate the “extreme vetting” that Muslims and others of Muslim-majority national origin have been subjected to for some time, without any apparent national security benefit. To illustrate, within four years after September 11, 2001, the Federal Bureau of Investigation (FBI) conducted nearly half a million “voluntary” interviews of American Muslims, at times asking them invasive questions regarding their friends, family, and members of their community.²⁰ Not one of these interviews led to information that would have enabled the FBI to detect or prevent the September 11 attacks, yet such questions continued and often became more personal over time.²¹ While there are countless problematic interviews that have occurred, we highlight just a few: Since spring 2007, a vice president of a major U.S.-based tech company was questioned about the names, birth dates, and addresses of family members; an American Muslim attorney was interrogated about the identities of the people in her travel photos (mostly family members); and a Gulf War veteran and current firefighter from Ohio was detained for four hours and asked why he converted to Islam.²² Shortly before President Trump was inaugurated, formal complaints were

¹⁸ Yeganeh Torbati, *Trump administration moves to make tougher U.S. visa vetting permanent*, REUTERS (Aug. 3, 2017), <http://www.reuters.com/article/us-usa-immigration-visa/trump-administration-moves-to-make-tougher-u-s-visa-vetting-permanent-idUSKBN1AJ2UC>.

¹⁹ Yeganeh Torbati, *Trump administration moves to make tougher U.S. visa vetting permanent*, REUTERS (Aug. 3, 2017), <http://www.reuters.com/article/us-usa-immigration-visa/trump-administration-moves-to-make-tougher-u-s-visa-vetting-permanent-idUSKBN1AJ2UC>.

²⁰ *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 (2016), <https://www.judiciary.senate.gov/imo/media/doc/06-28-16%20Khera%20Testimony.pdf>.

²¹ *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 (2016), <https://www.judiciary.senate.gov/imo/media/doc/06-28-16%20Khera%20Testimony.pdf>.

²² Debi Kar, *Muslim Advocates Testifies Before U.S. Senate Judiciary Subcommittee on Laptop Seizures & Other Privacy Violations*, Muslim Advocates (Jun. 25, 2008), (continued...)

filed alleging instances in which border agents asked Muslim travelers derogatory questions related to their faith: “Are you a devout Muslim?, Do you pray five times a day? . . . “Why do you have a Qur’an in your luggage? . . . ”²³

During the first few months of Trump’s presidency—even before the emergency “extreme vetting” questionnaire was put into place—news outlets reported cases of Muslims and people from Muslim-majority countries being disproportionately detained and questioned regarding their religion, from the ACLU’s national security project director (a woman of Pakistani descent who was detained by border officials and asked why someone “[may] have a different perspective” about her)²⁴ to Muhammad Ali’s son, who, according to his lawyer, was detained at a Florida airport with his mother and questioned about his religion.²⁵ In addition, as discussed above, visa denials and detentions of individuals from Muslim-majority countries have skyrocketed. In March 2017, for example, every African participant in an African trade summit taking place in California was denied a visa.²⁶ In addition, an Iranian woman visiting her family with a tourist visa was detained overnight in an Oregon county jail for what a Customs Border Patrol (CBP) agent described as a “minor administrative violation.”²⁷ Moreover, in July 2017, the entire Afghan girls’ robotics team was initially denied entry into the United States, where they had planned to participate in a science competition.²⁸

Even without being detained or subjected to invasive questioning, simply “flying while Muslim” results in increased scrutiny from security officials and even fellow passengers, often for innocuous activity that ordinarily would not cause concern. This unfair treatment is

<https://www.muslimadvocates.org/muslim-advocates-testifies-before-us-senate-judiciary-subcommittee-on-laptop-seizures-other-privacy-violations/>.

²³ Andrew Lindsay, *Trump’s ‘Extreme Vetting’ Could Criminalize Islam*, BRENNAN CTR. FOR JUSTICE (Mar. 23, 2017), <https://www.brennancenter.org/blog/trump%E2%80%99s-%E2%80%99extreme-vetting%E2%80%99-could-criminalize-islam>.

²⁴ Hina Shamsi, *Flying Home From Abroad, a Border Agent Stopped and Questioned Me . . . About My Work for the ACLU*, ACLU (Feb. 7, 2017), <https://www.aclu.org/blog/immigrants-rights/flying-home-abroad-border-agent-stopped-and-questioned-me-about-my-work-aclu?redirect=blog/speak-freely/flying-home-abroad-border-agent-stopped-and-questioned-me-about-my-work-aclu>.

²⁵ Don Melvin and Molly Roecker, *Muhammad Ali Jr. Detained at Airport, Asked About Being Muslim: Lawyer*, NBC NEWS (Feb. 25, 2017), <https://www.nbcnews.com/news/us-news/muhammad-ali-jr-detained-airport-asked-about-being-muslim-lawyer-n725571>.

²⁶ See Sam Levin, *No African Citizens Granted Visas for African Trade Summit in California*, THE GUARDIAN (Mar. 20, 2017), <https://www.theguardian.com/us-news/2017/mar/20/no-african-citizens-visas-california-annual-trade-summit>.

²⁷ Sam Levin, *Iranian woman visiting family on tourist visa detained in Oregon jail*, THE GUARDIAN (Mar. 29, 2017), <https://www.theguardian.com/us-news/2017/mar/29/iranian-woman-detained-oregon-jail>.

²⁸ Laurel Wamsley, *Afghan Girls Robotics Team Allowed to Enter U.S. For Competition*, NPR NEWS (Jul. 13, 2017), <http://www.npr.org/sections/thetwo-way/2017/07/13/537050073/afghan-girls-robotics-team-allowed-to-enter-u-s-for-competition>.

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displayed in formal government action,²⁹ as well as in countless anecdotes. In one such incident, an American Muslim who runs a pizzeria in Philadelphia was asked to step aside with his friend during an airline boarding process because a fellow passenger heard them speaking Arabic and was afraid to fly with them.³⁰ In another, six people of Middle Eastern descent were forced to leave a plane after passengers felt nervous after they had asked people to swap seats so they could all sit next to each other.³¹ In yet another incident, two Muslim women were removed from a flight after a crewmember was concerned by the way they were “staring back at her.”³² Even *appearing* to be of Middle Eastern descent is a trigger for discriminatory treatment. Last year, a passenger with “dark, curly hair, olive skin and an exotic foreign accent” was removed from a plane after a passenger thought the math problem he was working on looked suspicious. The passenger turned out to be Italian.³³

These examples—which are merely a sampling of countless other stories—demonstrate that unlawful profiling of individuals due to their actual or perceived religious background is alarmingly common. Making the proposed supplemental visa questionnaire permanent will only exacerbate the problem. With hardly any guidance, border officials will be asked to examine not only an individual’s national origin and purpose of travel (information typically gathered at the border), but also their social media presence, community ties, their employment histories, and other pieces of sensitive information that, in combination, can be grossly invasive and used for discriminatory purposes.

III. Results: Privacy & Policy Threats to the Muslim Community

A. The Supplemental Questionnaire Will Pose a Unique Threat to the Muslim Community’s Right to Privacy

Given the questionnaire’s likely disproportionate impact on Muslims and people of Muslim-majority national origin, a group of people of a certain religious faith background will

²⁹ See, e.g., Gardiner Harris, *State Department Tightens Rules for Visas to U.S.*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/us/politics/us-visa-rules-tillerson.html?emc=eta1> (explaining a recently issued State Department cable that enhances compliance requirements for individuals who require a visa for entry to the United States, which, by definition, disproportionately impacts those from the Middle East, Africa, and Asia).

³⁰ Gulliver, *Nothing to Fear Except Fear Itself*, THE ECONOMIST (Nov. 23, 2015), <https://www.economist.com/blogs/gulliver/2015/11/nothing-fear-except-fear-itself> (noting that then-candidate Trump seemed “determined to make political capital by stoking hysteria”).

³¹ Gulliver, *Nothing to Fear Except Fear Itself*, THE ECONOMIST (Nov. 23, 2015), <https://www.economist.com/blogs/gulliver/2015/11/nothing-fear-except-fear-itself>.

³² Letter from Muslim Advocates and the Legal Defense Fund to Kathryn Thomson, General Counsel, U.S. Department of Transportation (May 11, 2016), https://www.muslimadvocates.org/files/Final-Letter-to-DOT-051116_MA-NAACP-LDF.pdf.

³³ Letter from Muslim Advocates and the Legal Defense Fund to Kathryn Thomson, General Counsel, U.S. Department of Transportation (May 11, 2016), https://www.muslimadvocates.org/files/Final-Letter-to-DOT-051116_MA-NAACP-LDF.pdf.

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be subject to uniquely invasive privacy violations. For example, the visa questionnaire will ask for certain travelers’ “social media platforms and identifiers,” which may include a traveler’s handle from Facebook, Twitter, Instagram, Reddit, Snapchat, or Tinder (to name a few). Although not “mandatory,” the Department’s proposal notes that failure to provide such information without a “credible explanation” may result in visa denial. As a result, many who are desperate to enter the country will hand over as much information as they can, and may even forgo certain social media platforms for fear that participation could hinder their ability to travel.

Even with privacy settings, a person’s social media presence can yield an extremely intimate, detailed picture of his or her private life. A person’s Facebook posts, hashtags, “likes,” shares, and even online community memberships can reveal their beliefs, sexual preferences, interests, thoughts, political affiliations, and even details about their relationships with other people.³⁴ Such revelations are particularly dangerous for journalists and humanitarian aid workers—who may rely on the discretion provided by their social media handle pseudonyms to conduct their work without being persecuted by malicious actors.

In addition to the heightened degree of sensitivity that can stem from social media platforms, the same content may also provide a viewer with a warped, inaccurate, or completely mistaken view of the data when taken out of context—which can easily happen without proper training. Border officials particularly will be prone to mistakes when it comes to examining online profiles in different languages and from a variety of cultures. The Department’s proposal does not suggest that it has contemplated the enormous resource allocation that will be required to hire a sufficient number of linguists and cultural experts to thoroughly examine every flagged traveler’s online presence and determine whether any content actually warrants suspicion. Without such safeguards, border officials are left to rely on their own biases when making critical determinations about who can enter this country.

B. Knowledge of Their Increased Likelihood to be Targeted Will Result in Muslims Refraining From Speech and Others Refraining from Associating with Them

Multiple studies show that people alter their behavior if they are aware (or fearful) of being watched.³⁵ As a result of their increased likelihood of being targeted by border agents, Muslims will be uniquely impacted by the chilling effect posed by government surveillance, particularly those who want to study, work, or visit friends or relatives in America. As noted, the visa questionnaire asks for social media handles, travel history, employment history, and other

³⁴ 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/>.

³⁵ See, e.g., Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L. J. 1, 117 (2016) (finding a statistically significant decrease in traffic to Wikipedia articles on topics that raise privacy concerns following Edward Snowden’s NSA/PRISM online surveillance revelations); Rafi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, NTIA (May 13, 2016) (finding Americans’ concerns with online privacy and security have led them to limit their online activity), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

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information, but does not specify what types of information should raise suspicion. As a result, Muslim travelers may, out of an abundance of caution, refrain from posting certain opinions, reacting to certain articles, visiting certain locations, or associating with certain people that may raise suspicion, or simply be embarrassing, in the event border agents view it.

The questionnaire therefore will stifle the free expression of those who practice the world’s fastest growing religion;³⁶ a religion that is shrouded in misunderstanding as well as unfounded fear and prejudice.³⁷ This chilling effect may be felt most profoundly at U.S. educational institutions, which opened their doors to nearly 110,000 students from the Middle East and North Africa in the academic year 2015-2016.³⁸ Fear of arousing suspicion may lead such students and other academics to limit their online activity, employment opportunities, and community contacts, which will ultimately stifle the participation of Muslims in world forums at a time when transparency and openness are more crucial than ever.

C. The Rule Provides Little to No National Security or Intelligence Benefit and Will Result in Unjustified Administrative Burden and Parallel Demands from Other Governments

Although our primary concern rests with the disproportionate consequences and burdens the visa questionnaire will pose to Muslims and people from Muslim-majority countries, as discussed in our previous comment to OMB, we remain deeply concerned about the other consequences the proposed rule presents.

1. *The Rule Presents an Enormous Administrative Burden*

The Administration has not sufficiently addressed the enormous administrative burden that the Department’s proposal will impose on U.S. border officials and the negligible national security and intelligence benefit that will be gained in return. 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.

Importantly, the Department’s proposal does not make clear its methodology for examining the vast volume of additional information that it will be gathering from their undefined “subset” of applicants. Although typical visa applications collect information from the past five years, the proposal bumps this time period up threefold, to fifteen years. In addition, visa applications typically do not require the provision and analysis of names and dates of birth of siblings and children. Also, and perhaps most peculiarly, the Department does not appear to contemplate in its proposal the potential scope of an applicant’s social media presence. The average internet user has nearly six social media accounts—not only Facebook,

³⁶ Michael Lipka and Conrad Hackett, *Why Muslims are the world’s fastest-growing religious group*, PEW RESEARCH CENTER (Apr. 6, 2017), <http://www.pewresearch.org/fact-tank/2017/04/06/why-muslims-are-the-worlds-fastest-growing-religious-group/>.

³⁷ Hishaam Siddiqi, *10 Misconceptions About Islam that Muslim Americans Are Tired of Hearing*, TEEN VOGUE (Jul. 6, 2015), <http://www.teenvogue.com/story/islam-and-muslim-american-misconceptions>.

³⁸ Institute of International Education, *Open Doors 2016 Report*, <https://www.iie.org/Research-and-Insights/Open-Doors/Open-Doors-2016-Media-Information>.

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Twitter, and Instagram, but also perhaps LinkedIn, Snapchat, Tumblr, Pinterest, Reddit, LiveJournal, Fotolog, Pixnet, Tinder, OKCupid, and WeChat (and the list could go on).³⁹ Does the Department plan to check them all? If not, which accounts will it choose? Will the Department be hiring an adequate number of linguists and cultural experts to ensure their analysis of an applicant’s online presence is accurate? None of these factors have been publicly explained by the Department, let alone included in its estimate for the additional burden its proposal will impose.

Despite the great effort to be expended collecting and reviewing such data, it appears there is very little for border agents to gain from requesting information that can be readily hidden or altered. Those seeking to enter the U.S., whether for nefarious or perfectly innocent reasons, can readily amend (or delete) any social media platforms that may be flagged by border officials as warranting additional scrutiny. The proposal therefore is likely to result in the collection of merely innocent accounts or worse—“dummy” accounts created specifically to undermine border officials’ investigations.

Relatedly, as noted in our previous comment to OMB, 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 and in dire need of further investment and support. For example, in recent years 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.”⁴⁰ 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.⁴¹ The Department has not provided any guidance on how such systems will support an influx of personal data entries that will be gathered through the proposed enhanced measures.

2. *Americans Will Likely be Subject to Reciprocal Restrictions*

As we noted in our earlier comments to OMB, immigration policies are susceptible to reciprocity effects, which likely will occur if the Department’s proposal is approved. For example, shortly after Executive Order 13780 was announced, Iran’s foreign minister, Mohammad Javad Zarif, promised that his country would take “reciprocal measures to protect

³⁹ Jason Mander, *Internet users have average of 5.54 social media accounts*, GLOBALWEBINDEX (Jan. 23, 2015), <http://blog.globalwebindex.net/chart-of-the-day/internet-users-have-average-of-5-54-social-media-accounts/>.

⁴⁰ 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#.adE8voQ7Y.

⁴¹ 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>.

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citizens.”⁴² The Iraqi Parliament subsequently approved reciprocal measures, as well.⁴³ Other countries were quick to denounce the U.S. government and its proposal, from France and Germany to Canada and Luxembourg.⁴⁴ 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.⁴⁵

It follows that Americans could be subject to stricter scrutiny when traveling abroad if the Department’s rule is permanently 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.⁴⁶ Americans and citizens of our allies, therefore, have a great interest in ensuring that the Administration’s proposed vetting measures do not ignite throughout the rest of the world a trend of examining travelers’ social media presence.

IV. Conclusion

The Department’s proposal to make its supplemental questionnaire permanent will impose an immensely invasive and discriminatory impact on Muslims and people of Muslim-majority national origin. As a result, the disturbing trend of illegally discriminating against a group of people based on their religious background will be further normalized and condoned by our government, adding to the hysterical fear already held by so many about a certain group of people. If the questionnaire is formalized, Muslims and those in their communities will be subject to further unjustified invasions, which will hinder their ability to speak and associate freely. Additionally, cementing the questionnaire will create a vast and ill-defined administrative burden for a negligible benefit to U.S. national security. Therefore, OMB should reject the Department’s proposal and send a message to those belonging to the Muslim faith, and the rest of the world, that our screening procedures are fair, effective, purposeful, and nondiscriminatory.

Please do not hesitate to let us know if we can provide any additional information. You may contact us directly at juvaria@muslimadvocates.org or (202) 897-1897.

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

⁴³ 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>.

⁴⁴ See Marketplace Staff, *Trump’s immigration ban: Countries plan retaliation*, *supra* note 42.

⁴⁵ See Bill Chappell, *European Commission Says It Won’t Require American Travelers To Get Visas*, NPR 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>.

⁴⁶ 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/>.

Respectfully Submitted,

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