

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

September 27, 2018

Re: DS-160 and DS-156, Application for Nonimmigrant Visa, OMB Control No. 1405-0182; DS-260, Electronic Application for Immigrant Visa and Alien Registration, OMB Control No. 1405-185

Dear Sir or Madam:

We write to urge the Office of Management and Budget to deny the State Department's proposed information collection under Public Notices 10503 and 10505. By notice published August 28, 2018, the Department of State indicated it had submitted to OMB a proposal to ask visa applicants to provide social media identifiers, telephone numbers, and email addresses used in the past five years, among other information.<sup>1</sup> We reiterate the objections to this policy articulated in comments submitted to the State Department on May 29, 2018, which are enclosed along with this letter.

In light of OIRA's duty to "help agencies strike a balance between collecting information necessary to fulfill their statutory missions and guarding against unnecessary or duplicative information that imposes unjustified costs on the American public,"<sup>2</sup> we briefly highlight two specific concerns relevant to its review below.

First, the State Department lacks the statutory authority to implement this collection. It cites provisions which permit it to collect from visa applicants "such additional information *necessary* to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed."<sup>3</sup> The term "necessary" is an ambiguous one, not defined in the statutory language.<sup>4</sup> While agencies are generally afforded deference to interpret ambiguous statutes,<sup>5</sup> Congress is not presumed to have authorized constitutionally suspect policies.<sup>6</sup> As we

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<sup>1</sup> 83 Fed. Reg. 43,951-52 (posted Aug. 28, 2018).

<sup>2</sup> United States. OIRA, Office of Management and Budget. FAQ: Regulations and Rulemaking Process. <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp>. (Emphasis added.)

<sup>3</sup> U.S. Department of State (2018). SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION: Electronic Application for Immigrant Visa and Alien Registration, OMB Number 1405-0185, DS-260; U.S. Department of State (2018). SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION: Electronic Application for Nonimmigrant Visa, OMB Number 1405-0182, DS-160 and DS-156. The provisions cited are 8 U.S.C. § 1202(a)-(b) (2012). (Emphasis added.)

<sup>4</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (noting, in finding the phrase "appropriate and necessary" ambiguous, that "[o]ne does not need to open up a dictionary in order to realize the capaciousness of this phrase"); see also Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 Geo. Wash. L.J. 1392, 1411 (2017) (describing the word "necessary" as "obviously ambiguous" for purposes of *Chevron*).

<sup>5</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); see also *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984).

<sup>6</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) ("Congress does not casually authorize administrative agencies to interpret a statute to push the limit of

discuss extensively in **Section II.b** of our May 29, 2018 comments, collecting social media information from visa applicants “undermine[s] [the] First Amendment rights of speech, expression, and association,” including those of U.S. citizens.<sup>7</sup> As such, absent an explicit mandate to collect social media information, the State Department lacks the legislative grounding to proceed with this constitutionally suspect collection.

Second, the State Department’s proposal will have privacy implications for Americans not envisioned by the supporting materials it submitted pursuant to the Paperwork Reduction Act. Though the Department provides the standard confidentiality assurances covering the data collected,<sup>8</sup> visa policies are often reciprocal: if the U.S. government conditions entry to the U.S. on the provision of social media information, other countries will demand the same of Americans.<sup>9</sup> Indeed, as recently as 2016, the European Union considered stripping U.S. citizens’ visa-free travel privileges in response to a U.S. policy that would have imposed visa requirements on some E.U. citizens previously eligible for a waiver.<sup>10</sup> Implementing this collection could result in U.S. citizens having to turn over sensitive information to foreign governments subject to use and storage without the privacy protections afforded by American law.

We urge OMB to deny this proposed information collection initiative, and refer to the enclosed May 29, 2018 comments for a full account of our objections. Please do not hesitate to let us know if we can provide any further information regarding our concerns. We may be reached at patelf@brennan.law.nyu.edu (Faiza Patel: 646-292-8325), levinsonr@brennan.law.nyu.edu (Rachel Levinson-Waldman: 202-249-7193), or pandurangah@brennan.law.nyu.edu (Harsha Panduranga: 646-925-8719).

Sincerely,

Brennan Center for Justice at NYU School of Law

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congressional authority.”); *see also Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 817 (9th Cir. 2016) (citing *DeBartolo Corp v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–76 (1988)).

<sup>7</sup> Comments of the Brennan Center and EPIC, *Notice of Proposed Information Collection: Application for Immigrant and Nonimmigrant Visas*, May 29, 2018, <https://www.brennancenter.org/analysis/brennan-center-urges-state-department-abandon-collection-social-media-information-visa>, at 2, 6.

<sup>8</sup> *See* Supporting Statements at 3.

<sup>9</sup> United States. Department of State. U.S. Visa: Reciprocity and Civil Documents by Country. <https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html>; European Union. Visa Policy. [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en).

<sup>10</sup> David Inserra, “EU threatens retaliation against U.S. travelers,” *Washington Times*, March 21, 2016, <http://www.washingtontimes.com/news/2016/mar/21/david-inserra-eu-threatens-retaliation-against-us-/>.