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*IRLI is a public interest law firm working to protect the American people from the negative effects of uncontrolled immigration.*

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Department of State Desk Officer  
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Office of Management and Budget  
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**OMB Control Number 1405-0226: Public Comment of the Immigration Reform Law Institute Regarding the Supplemental Questions for Visa Applicants**

Dear Sir or Madam:

The Immigration Reform Law Institute (“IRLI”) submits the following public comment to the Office of Information and Regulatory Affairs in response to the agency’s Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants, as published in the Federal Register on November 27, 2017 (“the Notice”). 82 Fed. Reg. 65099 (Nov. 27, 2017).

IRLI is a non-profit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI supports the Department of State’s (“DOS”) proposed enhanced data collection on visa applicants who present terrorism, national security, or other ineligibility concerns. DOS must protect U.S. national security interests and ensure immigration authorities are able to issue visas based on complete information; therefore, it is necessary that the review of each visa applicant presenting the above concerns be as comprehensive as possible and include all relevant information. Accordingly, IRLI applauds DOS’s efforts to investigate all such visa applicants thoroughly.

This comment will focus on the requirement in the Notice that applicants provide information in two key categories: 1) the names and dates of birth of their children, current and former spouses or civil or domestic partners, and their siblings; and 2) the social media platforms and identifiers, also known as handles, they have used during the last five years.

The grounds for admissibility based on material support for terrorist activities have been broadly construed to ensure that national security is at the forefront of the visa and admission processes. Indeed, the Board of Immigration Appeals has stated that it is “unaware of any legislative history which indicates a limitation on the definition of the term, ‘material support.’”<sup>1</sup> That term includes “general support to a group that had terrorist aims,” including support that is “non-violent and tangential to any specific terrorist acts.”<sup>2</sup>

The federal government must have the information necessary to give effect to Congress’s mandate that those who have engaged in or given material support to terrorist activities are inadmissible. In most cases, DOS will be able to deduce from the standard visa application whether an individual’s conduct falls within the terrorist inadmissibility grounds of 8 U.S.C. § 212(a)(3)(B), or other grounds for inadmissibility. However, some applications may leave doubt about whether the applicant engaged in terrorist activities or provided material support to terrorist organizations. In such cases, it is imperative that the federal government have the information and resources necessary to resolve all questions before a visa is granted and a person is admitted into the country.

#### I. The Importance of Requiring the Names of Children, Spouses or Civil or Domestic Partners, and Siblings.

A major component of the United States’ current immigrant scheme is chain migration, that is, immigration based on qualifying familial relationships to a previous immigrant. Most green cards are awarded to aliens based on “an antiquated system of family ties, not skill or merit.”<sup>3</sup> A qualifying familial relationship can go far beyond just the nuclear family unit to include the siblings of adult U.S. citizens.<sup>4</sup> Even when nonimmigrant visas are given to aliens for work purposes, the applicant often brings a derivative beneficiary, a person who can “follow-to-join or accompany the principal [] based on a spousal or parent-child relationship.”<sup>5</sup> Chain migration has led to the admission into the United States of over 1.1 million aliens in 2016 alone.<sup>6</sup>

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<sup>1</sup> *Matter of S-K-*, 23 I. & N. Dec. 936, 943 (B.I.A. 2006).

<sup>2</sup> *Sesay v. Att’y Gen. of the United States*, 787 F.3d 215, 300-01 (3rd. Cir. 2015).

<sup>3</sup> *It’s Time To End Chain Migration*, The White House (Dec. 15, 2017), <https://www.whitehouse.gov/articles/time-end-chain-migration/>.

<sup>4</sup> See generally 8 U.S.C. §§ 201, 203.

<sup>5</sup> *Who is a derivative beneficiary?*, U.S. Citizenship & Immigration Servs., <https://my.uscis.gov/helpcenter/article/who-is-a-derivative-beneficiary> (last visited Dec. 6, 2017).

<sup>6</sup> Dep’t of Homeland Sec: Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2016* (Dec. 18 2017), available at <https://www.dhs.gov/immigration-statistics/yearbook/2016/table6>.

The existence of chain migration makes it a paramount national security concern to know who, beyond the applicant, can benefit from an approved visa application. That chain migration can be an avenue for terrorism is demonstrated by the events that took place only a few short weeks ago. On December 11, 2017, Akayed Ullah, a national of Bangladesh, attempted a bombing in New York City at a public transit station. Ullah is a lawful permanent resident who came to the United States based on an extended family connection.<sup>7</sup> His uncle received a visa through the diversity visa program, commonly known as the visa lottery.<sup>8</sup> Once his uncle became a U.S. citizen, the uncle brought his brother—Ullah’s father—into the United States.<sup>9</sup> Ullah was then able to come to the United States through his father.<sup>10</sup>

Because the current U.S. immigration system is based on extended family ties, sometimes including ties to terrorists, it is eminently reasonable to require basic information pertaining to individuals who may benefit from a family member’s visa. The most recent terrorist attack in New York, in addition to the steady flow of other terrorist attacks in this country and around the world, starkly underscores DOS’s need to have information about not only applicants but their family members.<sup>11</sup>

## II. The Importance of Requiring the Social Media Platforms and Identifiers for the Last Five Years to Identify Potential Terrorist Activities or Ties.

Social media has transformed how we receive news, interact with peers, and find strangers with shared interests. It would be naïve not to realize that social media provides access to dangerous information, as well. “Today, the threat we face from terrorism is much more diverse than during the 9/11 period. [C]hanges in technology have made it easier for adversaries to plot attacks . . . and to recruit beyond borders.”<sup>12</sup> Indeed, that terrorists and terrorist organizations use social media to plan and carry out attacks, and also seek new recruits, is a real national security threat that has been examined by Congress on numerous occasions.<sup>13</sup>

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<sup>7</sup> Press Briefing of Francis Cissna, Director of U.S. Citizenship and Immigration Services (Dec. 12, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/12/12/press-briefing-press-secretary-sarah-sanders-12122017-40>.

<sup>8</sup> *Id.* (“The fraud, the low eligibility standards, all these contribute to its potential exploitation [of the visa lottery] by terrorists and other mala fide actors.”)

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (“You can sponsor a person like yesterday’s alleged terrorist at the extremity of that chain, and then that person, in turn, can sponsor people and so on, and so on, indefinitely.”).

<sup>12</sup> *Adapting to Defend the Homeland Against Evolving International Terrorist Threat before a Senate Comm. On Homeland Sec. & Governmental Affairs*, 115th Cong. (2017) (written testimony of I&A Acting Deputy Under Secretary for Intelligence Operations Robin Taylor), *available at* <https://www.dhs.gov/news/2017/12/06/written-testimony-ia-senate-committee-homeland-security-and-governmental-affairs>.

<sup>13</sup> *See* U.S. Senate Committee on Homeland Security and Governmental Affairs, Majority & Minority Staff Report: “Violent Islamist Extremism, the Internet, and the Homegrown Terrorist Threat” (May 8, 2008); U.S. House of Representatives’ Committee on Homeland Security: Subcommittee on Counterterrorism and Intelligence Hearing: “Jihadist use of Social Media – How to Prevent Terrorism and Preserve Innovation” (Dec. 6, 2011); U.S. House of

One example of such congressional scrutiny is a Senate Homeland Security and Governmental Affairs Committee hearing held on May 7, 2015. At the hearing, entitled, *Jihad 2.0: Social Media in the Next Evolution of Terrorist Recruitment*, several witnesses testified regarding the ways in which terrorist organizations, including the Islamic State in Iraq and Syria (“ISIS”), use social media to encourage and motivate individuals to carry out attacks in the U.S. and abroad.

The Brookings Institution’s J. M. Berger, who testified at the hearing, highlighted the increasing use of social media by terrorists, and, in particular, ISIS. Mr. Berger described the three major components of ISIS’s social media campaign:<sup>14</sup> first, to disseminate propaganda to generate support for the group;<sup>15</sup> next, to disseminate propaganda designed to manipulate its enemies’ perceptions and political reactions;<sup>16</sup> and finally, to seek new recruits.<sup>17</sup> Mr. Berger went on to testify that while ISIS “is not the first group to employ social media as a tool for recruitment and propaganda . . . its innovative and aggressive approach has afforded it an unprecedented level of success, and its activities will likely provide a template for future extremist initiatives.”<sup>18</sup> Adding to the urgency of his testimony, Mr. Berger’s appearance before the Committee came just two months after the Brookings Institution released a report he co-authored revealing that, in the fall of 2014, there were “no fewer than 46,000 Twitter accounts supporting ISIS.”<sup>19</sup>

At the same hearing, Mr. Peter Bergen, Director of the National Security Studies Program at the New America Foundation, similarly attested to the growing use of social media by terrorists, and the expanding influence of that use. He testified:

More than eight out of ten of the 62 individuals New America identified as involved in Syria-related militancy—with either ISIS or the al-Qaeda-affiliated Nusra Front—were active in **online jihadist circles**. This is something of a boon for law enforcement as **many of these militants are prolific posters on publicly available social media, which it is perfectly legal for the FBI and police departments to monitor**. Militants in the United States today **radicalize after reading and interacting with propaganda online** and have little or no physical interaction with

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Representatives’ Committee on Homeland Security: Subcommittee on Counterterrorism and Intelligence Hearing: “DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy” (Feb. 16, 2012); U.S. House of Representatives’ Committee on Homeland Security Hearing: “Terrorism Gone Viral: The Attack in Garland, Texas and Beyond” (June 3, 2015); U.S. Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations Hearing: “ISIS Online: Countering Terrorist Radicalization & Recruitment on the Internet & Social Media” (July 6, 2016).

<sup>14</sup> U.S. Senate, Committee on Homeland Security and Governmental Affairs Hearing: “Jihad 2.0: Social Media in the Next Evolution of Terrorist Recruitment” (Written Statement of J.M. Berger, Nonresident Fellow, Project on U.S. Relations with the Islamic World, The Brookings Institution) (May 7, 2015).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1.

<sup>19</sup> J.M. Berger and Jonathon Morgan, The Brookings Institution, *The ISIS Twitter Census: Defining and describing the population of ISIS supporters on Twitter* (March 2015).

other extremists. **This trend has been going on for the past several years . . . .  
Social media has dramatically accelerated this trend.**

(emphasis added).<sup>20</sup> Mr. Bergen’s statement highlights the rapidly growing use of social media by violent terrorist organizations who desire to radicalize those seeking to enter the country, and also the organizations’ efforts to recruit vulnerable populations within the U.S. to carry out their attacks.

To handcuff immigration authorities and expect them to not research, review, analyze, collect, maintain, or otherwise consider an individual’s social media presence would thus create a gaping hole in our immigration screening process and record-keeping system that would jeopardize law-abiding U.S. citizens and residents. Nevertheless, some opponents of previous Notices requiring such scrutiny have argued that collecting and maintaining information posted using social media by asking for social media handles would have a chilling effect on free speech and raise privacy concerns.<sup>21</sup> Critics state that requiring additional information from some applicants will make our country “less hospitable” to those applicants.<sup>22</sup> However, these concerns are invalid for three separate reasons.

First, the “chilling effect” analysis only applies to speech that is protected by the First Amendment of the Constitution. There are numerous categories of speech that are not protected by the First Amendment. Social media posts by aliens outside of the United States fall within the realm of unprotected speech because it has never been thought that the First Amendment applies to the speech of aliens outside of the United States. For example, in the Supreme Court decision of *Kleindienst v. Mandel*, the Court considered whether American professors’ First Amendment rights of free association and to receive information were infringed upon because a non-resident alien whose discourses on Marxism they wished to hear was denied a visa.<sup>23</sup> Notably, no one sued to enforce the First Amendment rights of the alien lecturer.<sup>24</sup>

Quite clearly, aliens applying for a visa outside of the United States lack a “sufficient connection” to the country to warrant protection under the Bill of Rights.<sup>25</sup> Therefore, it is unnecessary to

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<sup>20</sup> U.S. Senate, Committee on Homeland Security and Governmental Affairs Hearing: “Jihad 2.0: Social Media in the Next Evolution of Terrorist Recruitment” (Written Statement of Peter Bergen, Director, International Security Program, The New America Foundation) (May 7, 2015).

<sup>21</sup> Letter from the American Immigration Lawyers Associate in Response to Supplemental Questions for Visa Applicants Form DS-5535 (May 18, 2018); Letter from the American Civil Liberties Union (ACLU) in Response to Supplemental Questions for Visa Applicants, OMB Control Number 1405-XXX, DS Docket Number:DOS-2017-0019 (May 18, 2017).

<sup>22</sup> Letter from the American Civil Liberties Union (ACLU) in Response to Supplemental Questions for Visa Applicants. *See also* Kyle Jahner, *State Dept. Moves To Extend Enhanced Visa Vetting Process*, Law360 (Nov. 28, 2017).

<sup>23</sup> 408 U.S. 753 (1972).

<sup>24</sup> *Id.* (internal citation and quotation omitted).

<sup>25</sup> *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that to be considered part of the “the people” for Fourth Amendment purposes, an alien must have a substantial connection with the United States); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (holding that an excludable alien is not entitled to

consider the next question of whether their speech is chilled by being required to submit social media names.

Second, the primary objective of collecting additional information is to protect the United States from future terrorist attacks. “Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.”<sup>26</sup> Terrorism is an existential threat to the United States.<sup>27</sup> A terrorist attack affects not only those who are injured or killed but the American psyche. It affects how we view everyday situations from flying on a plane to riding on a public bus or train. To combat future terrorist threats in and against the United States, “Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.”<sup>28</sup>

Indeed, the Supreme Court has recognized in the criminal context that an individual can provide material support to terrorist organizations in the form of speech.<sup>29</sup> Accordingly, the Supreme Court has found that speech that provides such support is not protected under the First Amendment.<sup>30</sup> Even when the speech supports non-terrorism activities of a terrorist organization, it is still not protected.<sup>31</sup> The urgent national security concerns that support those holdings also override any worry that asking for information on internet monikers may chill the speech of aliens abroad.

Third, DHS is only seeking to capture social media that is posted publicly. It is well-established that while the Fourth Amendment to the U.S. Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” these protections only apply when an individual has a “reasonable expectation of privacy.”<sup>32</sup>

Any information posted publicly by an individual online may be viewed by anyone with an internet connection. It is therefore unreasonable that anyone posting information publicly via social media would believe that such information is private and immune from government detection. By the same token, it is unreasonable for an individual applying for the privilege of admission into the United States to expect that his or her postings will be kept private and not be seen, collected, or

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First Amendment rights, because “he does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law”), *quoted in Verdugo-Urquidez*, 494 U.S. at 265. *See also Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (per curiam) *vacated on other grounds*, 137 S. Ct. 2003 (2017) (per curiam) (finding that an ICE officer who shot an alien in Mexico did not violate the alien’s Fourth Amendment rights).

<sup>26</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)

<sup>27</sup> *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013); 18 U.S.C. § 2339B note (“[I]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States.”).

<sup>28</sup> *Humanitarian Law Project*, 561 U.S. at 35.

<sup>29</sup> *Humanitarian Law Project*, 561 U.S. at 36-39 (holding that the Title 18 did not violate the First Amendment’s free speech clause by criminalizing political advocacy in favor of designated terrorism organizations).

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> U.S. CONST. amend. IV.; *Katz v. United States*, 389 U.S. 347 (1967).

otherwise used by officials charged with determining admission, especially since a background check is an entirely reasonable part of the application process.

The same holds true for any aliases or social media handles an individual may use when posting on the internet. In the context of an admissibility investigation, there is no reasonable expectation of privacy in these handles. Just as, unquestionably, the government may require a married woman's maiden name in order to conduct a thorough background check on her pre-marriage activities, the ability to use aliases, pseudonyms, and otherwise change one's identity on the internet justifies researching and collecting information on online aliases, as mandated by law, as part of a comprehensive investigation of an applicant for admission.<sup>33</sup> Presumably, if need be, DOS will search for the requested information in publicly available sources. Requiring applicants to provide the information themselves makes the investigatory process both more efficient and more effective.

Respectfully submitted,

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<sup>33</sup> 8 U.S.C. § 1202(a) (“Every alien applying for an immigrant visa shall . . . state his full and true name, any other name which he has used or by which he has been known . . . and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws . . . .”); 8 U.S.C. § 1202(c) (“In the application the alien shall state his full and true name, . . . and such additional information necessary to the identification of the applicant, the determination of his eligibility for a nonimmigrant visa, and the enforcement of the immigration and nationality laws . . . .”).