

Before the
BUREAU OF CONSULAR AFFAIRS
U.S. DEPARTMENT OF STATE
Washington, DC 20520

60-Day Notice of Proposed
Information Collection:
Supplemental Questions
for Visa Applicants (Form
DS-5535; OMB Control
Number 1405-0226), Docket
Number DOS-2017-0032,
FR Doc. 2017-16343

**COMMENTS OF THE
IDENTITY PROJECT
AND
RESTORE THE FOURTH**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

Restore The Fourth, Inc.

<<https://www.restorethe4th.com>>

October 2, 2017

I. INTRODUCTION

The Identity Project and Restore The Fourth, Inc., submit these comments in response to the “60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants” (Form DS–5535; OMB Control Number 1405–0226), Docket Number DOS–2017–0032, FR Doc. 2017-16343, published at 82 *Federal Register* 36180-36182 (August 3, 2017).

The proposed (and already ongoing) information collection does not comply with the Paperwork Reduction Act (PRA), the First and Fourth Amendments to the U.S. Constitution, or the International Covenant on Civil and Political Rights (ICCPR). This vague and overbroad supplemental collection of information from a vaguely-defined subset of would-be visitors to the U.S. is inappropriate as a matter of policy, and contrary to U.S. national and international interests in democracy and human rights. In many cases, it would be impossible for prospective visitors to provide the requested information. Exceptions to this collection of information, like decisions to require it in the first place, would be discretionary with the Department of State. The decision to demand that a prospective visitor complete Form DS-5535 would function as a pretext for denial of admission to the U.S. that could be arbitrarily imposed against anyone.

The current emergency approval of this information collection by OMB should be withdrawn. The Department of State should cease and desist from use of Form DS-5535 or similar verbal collection of the same information as is requested on this form. If this proposal is submitted to OMB for approval, it should be rejected as failing to meet the statutory standard of necessity for an agency purpose and as a violation of the Constitutional and human rights of visitors to the U.S. and of U.S. citizens and residents about whom information would be collected and who want to engage in protected acts of assembly and speech with foreign visitors.

II. ABOUT THE COMMENTERS

The Identity Project (IDP), provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

Restore The Fourth, Inc. is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the United States Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes in technology, governance, and law should foster the protection of this right. To advance these principles, Restore The Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore The Fourth also files amicus briefs in significant Fourth Amendment cases.

III. THIS INFORMATION COLLECTION IMPLICATES FREEDOM OF MOVEMENT, FREEDOM OF ASSEMBLY, FREEDOM OF SPEECH, FREEDOM OF THE PRESS, AND FREEDOM FROM UNREASONABLE SEARCHES.

Freedom of speech, freedom of the press, freedom of movement, freedom of association, and freedom of assembly ("the right of the people... peaceably to assemble") are recognized by

the First Amendment to the U.S. Constitution. The right to be free from unreasonable searches and seizures is recognized by the Fourth Amendment.

The right to travel is also recognized in Article 12 (Freedom of Movement) of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by, and binding on, the U.S. The ICCPR defines human rights, which by definition do not depend on citizenship.

It is a fundamental principle of statutory and Constitutional construction that whenever possible, different provisions of the Constitution and of treaties which have the same force of law should be so interpreted as to avoid inconsistency between those provisions. The only way to avoid unnecessary Constitutional conflict between the provisions of the First and Fourth Amendments and those of the parallel provisions of the ICCPR is to interpret those provisions of the Bill of Rights that are restated in the ICCPR as applying to all persons regardless of citizenship.

The Department of State, along with all other executive agencies, has been ordered by the President to consider human rights treaties including the ICCPR in performing its functions including rulemaking: Executive Order 13107, “Implementation of Human Rights Treaties,” directs all executive departments and agencies to “maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully.”

The Department of State has reiterated in its most recent report to the United Nations Human Rights Committee that, “As reported in the Initial Report, in the United States, the right to travel – both domestically and internationally – is constitutionally protected.”¹ This statement

1 (Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights, Paragraph 203, 28 November 2005, CCPR/C/USA/3, available at <<http://www.unhcr.ch>

was made in the context of review of U.S. implementation of the ICCPR, and in that context was clearly intended to indicate that, in the opinion of the Department of State, protection of the right to travel in the U.S. extends to all individuals regardless of citizenship.

To the extent that responding to this proposed (and already ongoing) information collection, or providing responses that the Department of State deems acceptable, is made a condition of the exercise of the right to freedom of movement, speech, and assembly, or the right to be free from unreasonable searches and arbitrary interference with privacy, it is a condition on the exercise of fundamental Constitutional and international human rights treaty rights. Such a condition requires a showing of necessity, and is subject to strict scrutiny.

The standard for assessing whether restrictions are “necessary” and consistent with the rights recognized by the ICCPR is discussed by the U.N. Human Rights Committee in its General Comment No. 27, “Freedom of movement (Article 12)”:

[L]aws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.... [I]t is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.²

Article 17 of the ICCPR provides that "No one shall be subjected to arbitrary ... interference with his privacy, family, home or correspondence." Article 19 provides, "Everyone

/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/\$FILE/G0545268.pdf>, referring to Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html>

2 CCPR/C/21/Rev.1/Add.9 (1 November 1999), available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9>

shall have the right to ... seek, receive and impart information and ideas of all kinds, regardless of frontiers... through any ... media of his choice." Article 21 recognizes "the right of peaceful assembly" and imposes an explicit standard of necessity for restrictions on that right.

Even if U.S. accession to the ICCPR is not deemed to extend the rights recognized by the First and Fourth Amendment to all individuals regardless of citizenship, many of the individuals whose rights would be affected by this proposal are entitled to First and Fourth Amendment protection. Regarding the Fourth Amendment, the casual beliefs that the Fourth Amendment does not apply at the border or that it does not apply to non-U.S. citizens are not supported by existing Supreme Court and appeals court precedents. Just as forensic examination of a digital device at the border must be supported by reasonable suspicion of involvement in a crime (*U.S. v. Cotterman*, 2013, 9th Cir. en banc), so the seizure of an extraordinary and forensic level of detail on fifteen years of one's travel patterns, associations, and social media handles and passwords, can be expected to require reasonable suspicion of involvement of the individual in a crime, rather than being a non-negotiable condition for the granting of a visa to any applicant. Many non-citizens applying for a visa will in fact be eligible for Fourth Amendment protection of their "person, papers and effects" from "unreasonable ... seizure", as a result of meeting the test of having "substantial voluntary connections" to the U.S. (*U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 1990), which test includes both U.S. persons and millions of non-U.S. persons.

In addition to the requirements of the U.S. Constitution and the ICCPR that intrusions on freedom of speech, press, movement, assembly, and privacy be justified as "necessary", the Paperwork Reduction Act at 44 USC § 3508 imposes a specific requirement that, "Before approving a proposed collection of information, the Director [of OMB] shall determine whether

the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”

IV. THIS INFORMATION COLLECTION IS NOT “NECESSARY” OR OF PRACTICAL UTILITY FOR ANY PERMISSIBLE PURPOSE, IS NOT PROPORTIONAL OR THE LEAST RESTRICTIVE INSTRUMENT FOR ACCOMPLISHING ANY PROPER AGENCY FUNCTION, AND DOES NOT WITHSTAND STRICT SCRUTINY OF ITS INTRUSIONS ON RIGHTS.

The Department of State is requesting OMB approval for continued use of Form DS-5535. The notice states that completion of the form is “Required to Obtain or Retain a Benefit”), and it requires certain applicants for visas for admission to the U.S. to state, *inter alia*:

- Travel history during the last fifteen years, including source of funding for travel;
- Address history during the last fifteen years;
- Employment history during the last fifteen years;
- All passport numbers and country of issuance held by the applicant;
- Names and dates of birth for all siblings;
- Name and dates of birth for all children;
- Names and dates of birth for all current and former spouses, or civil or domestic partners;
- Social media platforms and identifiers, also known as handles, used during the last five years; and
- Phone numbers and email addresses used during the last five years.

It should go without saying that this information, in this context, is not “necessary for the proper performance of the functions” of the Department of State.

The Department of State has been processing applications for visas for admission to the U.S. for almost two hundred years without without collecting this information. There is no indication in the notice of any circumstances in which not collecting any specific item on this list which would not already be available to the Department of State, much less all of the items on this list, would in any way prevent the Department from properly adjudicating a visa application.

A showing of necessity for collection of this information would require a showing, for each item on this list, of a situation in which that information would not otherwise be collected by the Department, but would be relevant and potentially dispositive of some lawful, explicitly defined criterion of admissibility to the U.S. The Department of State has provided no such list.

Many of the items on this form would never be relevant to, much less dispositive of, any lawfully defined criterion of admissibility. Others would be relevant only in circumstances in which the relevant information would be, and is already, collected on other forms.

For example, information about the identity of an individual’s sibling, spouse, or child might be relevant to the individual’s admissibility to the U.S., if and only if admission is being applied for on the basis of the familial relationship with that family member. But in any such case, that information about the relationship with the sponsoring or qualifying family member would already be collected on other forms as part of the visa or sponsorship application.

We know of no other circumstances in which, for example, the identity of an individual’s sibling(s) or former domestic partner(s) would be relevant to their admissibility, much less in which it would be impossible to adjudicate their application without this information.

An individual who declines to identify current or former family members may lose some potential benefits of family sponsorship for admission to the U.S. But an individual cannot lawfully be discriminated against by the Department of State in adjudicating their application for admission to the U.S. on the basis of current or former relationships of blood or marriage, or because they choose not to disclose those relationships, if they form no part of the basis for their application. Our system of justice is founded on the notions of individual responsibility and of judgment for our own, and only our own, actions. Absent evidence of criminal conspiracy, collective judgment or collective or familial punishment is anathema to our legal process.

Even in cases of treason, Article III, Section 3, of the U.S. Constitution prohibits “corruption of blood” as a penalty. It would clearly be unconstitutional to take into consideration, in determining guilt or sentencing for a crime, allegations against an individual’s sibling, parent, child or (former) spouse who was not proven to be a co-conspirator or party to the same crime.

It would be equally improper – and a violation of the rights of both the applicant for admission to the U.S. and the family member who might be a U.S. citizen or resident – to discriminate against an applicant on the basis of the identity of their family member. “We don’t like your mother” or “We don’t like your ex-husband” is not a lawful basis for denying you a visa or admission to the U.S., regardless of the allegations against your relatives or in-laws. That your brother is an ax-murderer is, and must be, irrelevant to your admissibility to the U.S.

Much of the information collected on Form DS-5535 pertains to U.S. persons. Siblings, children, and current and former spouses and domestic partners of applicants for admission to the U.S. are often U.S. citizens or permanent residents. The “source of funding for travel” by

individuals who are now applying for admission to the U.S. is often a U.S. person – it is routine for U.S. persons to pay for travel by friends and family visiting from less wealthy countries.

Many of those “associated” on social media with applicants for admission to the U.S. are U.S. persons. The notice states that, “Consular staff are also directed in connection with this collection to take particular care to avoid collection of third-party information.” But the manifest intent of the form is to collect third-party and associational data as well as the first-party data which is already, to the extent relevant, collected on other forms. The Department of State is seeking information about social media, and only social media, because it is social.

Form DS-5535 does not ask applicants for visas to list their published books or articles, or the names, pen names, or pseudonyms in which they have written or published in print or electronic media other than “social media”. The notice gives no explanation of why information about publications in other media is not requested (except when it is relevant to specific criteria for admission, such as when a publication list might be evidence of eligibility for a visa based on specific expertise) and has not been deemed “necessary” for the functioning of the Department of State, but “social media” identifiers are now being requested. The obvious inference is that, as discussed further below, the purpose of this form is to collect information not solely or primarily about applicants for visas but also about third parties, many of whom are U.S. persons.

This collection of information is not “necessary for the proper performance of the functions” of the Department of State. When some of this information is relevant to lawful criteria for issuance of visas, that information is already collected on other forms. The rest of this information has “practical utility” only for other, impermissible purposes, viz.:

- robotic predictive pre-crime profiling;
- suspicion generation and guilt by association; and
- pretextual denial of applications for visas and/or of admission to the U.S.

Consider why and how each of these invidious uses of the information collected through use of Form DS-5535 is inevitable and is portended by the nature of this information collection:

Robotic predictive pre-crime profiling: The volume of information collected on the basis of form DS-5535 is such as to preclude any possibility of it being read or individually assessed by human staff of the Department of State. More than 100,000 foreign visitors arrive in the U.S. every day. Consider how long it would take to review a single historical Facebook timeline, much less the snowballing web of that user's friends, people who have commented on that user's page, and people on whose pages that user has commented. It simply is not plausible to imagine that the Department of State has sufficient investigatory or visa adjudication staff to review more than a tiny fraction of even those social media postings that are in the English language. Now consider that many visa applicants' social media activities are carried on in other languages, many of them languages for which the Department of State probably has minimal staff literate and fluent in the contemporary slang used on social media. Even for the numbers of respondents estimated by the Department of State in the notice, most of this information cannot possibly be, and will never be, read by a human being at the Department of State.

Either the Department of State wishes to amass a data lake of currently unused personal information for possible future data mining for as-yet-undefined purposes -- which would itself be unnecessary, in violation of the basic goals of the Paperwork Reduction Act, and a violation of

Constitutional and international treaty privacy rights -- or the Department of State wants to use this fire hose of data today as grist for the mill of robotic predictive pre-crime profiling.

This is illegitimate for two reasons. First, there is no evidence that either robotic or human "pre-cogs", or any algorithmic profiling ruleset, have any actual utility for predicting which individuals will engage in extremely rare acts of terrorism – regardless of the biographic data they are fed. Second, the Constitution does not permit the imposition of sanctions or the denial of rights based on either algorithmic scoring or predictions of possible future criminality, but only on the basis of fact-finding about past conduct proscribed by laws or regulations.

Suspicion generation and guilt by association: Many of the categories of information collected on Form DS-5535 pertain explicitly to other individuals associated with applicants for visas or admission to the U.S. – family members, domestic partners, people who provide funds for travel – rather than to those applicants themselves. And as discussed above, other categories such as social media information implicate both applicants and their associates, but appear to have been selected for collection (in preference to otherwise similar but more narrowly targeted information, such as print publications) primarily because of their spillover into information regarding associations between visa applicants and other individuals including U.S. persons.

The notice states that, "The collection of social media platforms and identifiers will not be used to deny visas based on applicants' race, religion, ethnicity, national origin, political views, gender, or sexual orientation." But while that purports to rule out certain kinds of categorical discrimination, it says nothing to disavow guilt by association: placing people under suspicion and further surveillance, making adverse determinations with respect to applications for visas or admission to the US, blacklisting (euphemistically called "watchlisting"), or

assignment of other sanctions or adverse consequences solely on the basis of familial, friendship, business, or social media "associations" with other blacklisted or disfavored individuals.

Aside from its inherent illegitimacy as collective punishment, any such snowballing scheme of suspicion generation and guilt by association will, even if the process of linking each individual to others is nominally unbiased, tend to replicate and universalize any biases (whether with respect to religion, ethnicity, national origin, gender, political views, or otherwise) in the initial blacklist of villains or initial exemplars of negative profiles with which it is seeded.

"Garbage in, garbage out," can be restated in the context of such a suspicion-generating or guilt-by-association *deus ex machina* as, "Bigotry in, bigotry out (on an ever-growing scale)".

Pretextual denial of applications for visas or of admission to the U.S.: As discussed further below, many people would find it impossible to provide complete answers to the questions on Form DS-5535. Because the terms used on the form are so vague (there is no statutory or regulatory or case law definition of "social media", for example), most answers could be interpreted by hostile or malign Department of State staff as inaccurate or incomplete. And if we follow social media network connection maps, anyone in the world is associated with any arbitrarily designated individual "axis of evil" by no more than six degrees of separation.

One way or another, almost everyone who is asked to complete Form DS-5535 will provide, either through their answers or their inability to provide them, grounds for denial of their application for a visa or for admission to the U.S., and/or for imposition of other sanctions for incomplete answers, for "false" good-faith responses to ill-defined or undefined queries, or for being "associated" through social media (however distantly) with blacklisted individuals.

The risk of abuse of this information collection as a pretext for adverse action that would otherwise lack a lawful basis is greatly heightened by the lack of standards or of procedures for administrative and judicial review of decisions to require any particular individual to complete Form DS-5535. The decision to require an applicant complete the form is discretionary, and requiring an applicant to complete the form can be counted on to provide some pretext for denial of the application. That means that any staff member with the authority to make that discretionary determination to order an individual to complete Form DS-5535 has the arbitrary and unreviewable power to manufacture a pretext to deny any individual's application.

We are particularly concerned that Form DS-5535 will be misused in this way because of the similarities between Form DS-5535 and Form DS-5513, a supplemental form used to request additional information from some U.S. citizens applying for passports. Our comments when Form DS-5513 was submitted for approval apply equally today to Form DS-5535, if one substitutes "visa or admission to the U.S." for "passport":

According to the Paperwork Reduction Act submission and supporting statement, as provided to us by the DOS [Department of State], 74,000 people per year would be required to complete the proposed Form DS-5513. That is only a small fraction of the number of annual passport applicants. But the DOS is silent as to how – according to what substantive standards and what procedural due process – the decision will be made as to which passport applicant will be required to complete the proposed Form DS-5513. The complete lack of substantive standards and procedural safeguards violates the due process requirements of the Administrative Procedure Act, the U.S. Constitution, and Article 12 of the International Covenant on Civil and Political Rights (ICCPR), and must therefore be withdrawn by the DOS or rejected by OMB.

The proposed form reminds us unpleasantly of the invidious historic "Jim Crow" use of a literacy or civics test of arbitrary difficulty, required as a condition of registering to vote and administered in a standardless manner. By making the test impossible to pass, voter registrars could use it as an arbitrary and discriminatory – but facially neutral – excuse to prevent any applicant to whom they chose to give a

sufficiently difficult test from registering to vote, on the ostensible basis of their having "failed" the test.

In a similar way, choosing to require an applicant for a passport to complete the proposed Form DS-5513, which few if any applicants could complete, would amount to a *de facto* decision to deny that applicant a passport. And that decision would be standardless, arbitrary, and illegal.

Standardless or "discretionary" imposition of the requirement to complete the proposed form invites and creates the potential for, and likelihood of, numerous forms of abuse....

Will standardless DOS discretion be exercised to require individuals to complete the proposed Form DS-5513 on the basis of race, religion, or national origin? On the basis of their having visited ... particular other countries? Or on the basis of their exercise of other rights protected by the First Amendment, such as associating with certain other people, expressing certain ideas, or criticizing the U.S. government in general and/or the DOS in particular?...

And how, if at all, would it be possible to detect such invidious abuses of discretion?³

To help the public assess how the Department of State has used its discretion to order individuals to complete Form DS-5513, we have attempted to determine how many people the Department of State has ordered to complete Form DS-5513, and what, if any, criteria or procedures have been established for those decisions. We requested all records of this information from the Department of State, pursuant to the Freedom Of Information Act, in 2011.⁴ More than six years later, we have received no response to this request. A year ago, the Department of State formally apologized for its improper actions with respect to this and others of our pending FOIA requests, and estimated that a response would be provided by January

3 Comments of the Identity Project, Center for Financial Privacy and Human Rights, Knowledge Ecology International, Center for Media and Democracy, Privacy Activism, Consumer Travel Alliance, Robert Ellis Smith, and John Gilmore, Department of State Public Notice 7345, "60-Day Notice of Proposed Information Collection: DS-5513, Biographical Questionnaire for U.S. Passport, 1405-XXXX" (April 24, 2011), available at <<https://papersplease.org/wp/wp-content/uploads/2011/04/idp-passport-ds-5513-comments.pdf>>.

4 Freedom Of Information Act Request F-2011-03370 (April 27, 2011) available at <https://papersplease.org/wp/wp-content/uploads/2011/04/dos-foia-supp_worksheet-attach-27apr2011.pdf>.

2017.⁵ But on September 7, 2017, the Department of State again revised its estimate by another year, telling us it does not expect to complete its response to this request until July 31, 2018.

While the Department of State's unlawful delay in responding to our FOIA requests has denied us access to parts of the administrative record in a proceeding relevant to this one, and prevents us from giving as fully informed comments as we would like, the anecdotal information we continue to receive from applicants for U.S. passports suggests that the Department of State is continuing to misuse decisions to require applicants to complete Form DS-5513 as a pretext for baseless and unlawful *de facto* denial of passport applications from disfavored U.S. citizens.

In view of the similarities in these forms and their manner of use, it is reasonable to infer from this factual record that the Department of State is probably misusing Form DS-5535 in similar fashion as a pretext for denial of visa applications from disfavored individuals, and is likely to continue doing so if OMB approves the continuation of this collection of information.

V. THIS COLLECTION OF INFORMATION UNNECESSARILY AND DISPROPORTIONATELY BURDENS FREEDOM OF SPEECH, FREEDOM OF THE PRESS, AND FREEDOM OF ASSEMBLY.

According to the notice, "consular officers are directed not to request user passwords [and] not to violate or attempt to violate individual privacy settings or controls." But this is contradicted by the inclusion of social media identifiers ("handles") on Form DS-5535.

5 See letter of apology (August 25, 2016), <<https://papersplease.org/wp/wp-content/uploads/2016/08/DOS-apology-25AUG2016.pdf>>, "An apology from the State Department" (August 19, 2016) <<https://papersplease.org/wp/2016/08/19/an-apology-from-the-state-department/>>, and "Yes, we still want the State Department to answer our 5-year-old FOIA requests" (August 11, 2016), <<https://papersplease.org/wp/2016/08/11/yes-we-still-want-the-state-department-to-answer-our-5-year-old-foia-requests/>>.

The first and most fundamental "privacy setting or control" for a social media user (or, for that matter, for most other modes of speech and publication) is whether to write or speak in a known name, a pseudonym, or anonymously. For pseudonymous speech or writing on social media, the social media identifier or handle is effectively the "key" needed to unlock the identity of the speaker or writer, and equivalent to the password for an encrypted message.

To require a pseudonymous social media user to disclose her handle or identifier is, in effect, to require her to change her most fundamental privacy settings and to disclose the root password protecting her exercise of her rights to freedom of speech and of the press.

As such, it is *per se* an invasion of her privacy, and the legality of such a demand should be assessed according to the standards that would apply to compelled disclosure of a password.

The burden of the proposed information collection is also relevant to whether its impact on individuals and their rights is "proportional" to any utility for a permissible purpose. We cannot overstate the significance of anonymity or pseudonymity as a potentially life-or-death matter for social media users, most especially for dissidents, victims of discrimination, and those living under the jurisdiction of repressive regimes or otherwise in fear of persecution.

Anonymous or pseudonymous speech, publication, and assembly are the only forms of dissident speech, publication, or assembly that are possible under some repressive regimes.

Activities which are protected by the First Amendment, including some which advance U.S. interests in freedom and democracy, are subject to legal sanctions in many other countries.

Capital crimes in Saudi Arabia, for example, include blasphemy against the state religion, disparagement of members of the royal family or the institution of hereditary absolute monarchy,

trafficking in prohibited mind-altering substances including alcoholic beverages, and private sexual activity between consenting adults of the same gender in their home.

Saudi Arabia is a U.S. ally with which the U.S. Department of State might be expected to share information obtained through this collection of information – including information that could identify Saudi Arabian citizens or residents who have perpetrated these "crimes". As a result, this collection of information could subject these individuals, including pro-democracy activists, to sanctions in Saudi Arabia ranging from public whipping to beheading.

Even if this compelled disclosure of information were lawful – which we believe it isn't – it would be bad public policy. The possibility of anonymous and pseudonymous discourse is an essential element of an open marketplace of ideas, and plays a particularly important role in the places where identifiable speakers and speech are subject to the greatest repression.

Anonymous and pseudonymous speech and publication have a long and honorable tradition in the U.S., going back to the anonymous authors and publishers of anti-monarchist handbills in the British colonies of North America and the pseudonymous authors of the Federalist Papers. Today, these works would probably be published on social media, and "Publius" – the pseudonym used by the authors of the Federalist – would probably be a social media "handle" rather than a name printed on the title pages of a series of pamphlets.

Anonymity and pseudonymity are especially critical for social media users, whose speech can be, and sometimes is, held not only against themselves but against any or all of their social media "friends", friends-of-friends, associates, contacts, and/or commenters.

The possibility that, at some unknown future time, any individual social media user might be required to disclose her identity to the U.S. government, and have it passed on by the U.S. to

unknown third parties including other governments around the world, is already exerting a profound chilling effect on the exercise of rights to freedom of speech, freedom of the press, and freedom of assembly by individuals around the world who think they might someday wish to visit the U.S. and by U.S. citizens who wish to associate with them online and/or in person. In the absence of publicly-defined criteria for what speech on social media or association with which other individuals might lead to denial of admission to the U.S., people who want to visit the U.S. and associate with U.S. persons are afraid to say anything on social media.

VI. THE DEPARTMENT OF STATE GROSSLY UNDERESTIMATES THE DIFFICULTY OF COMPLETING THE PROPOSED FORM AND THE TIME REQUIRED TO ATTEMPT TO DO SO.

In the notice, the Department of State estimates that "in the range of 65,000 individuals per annum" will be asked to answer some or all of the questions on Form DS-5535.

As other commenters have noted, and we concur:

The *Federal Register* notice does not indicate the basis of this estimate.... It is reasonable to infer, however, that this number is based on the number of individuals who apply for nonimmigrant visas from the six Muslim [majority] countries designated in the President's Executive Order 13780, which banned travel to the United States from Iran, Libya, Somalia, Sudan, Syria and Yemen. The ICR explicitly states that it implements that order, key portions of which have been enjoined by federal courts. Tellingly, in fiscal year 2015, approximately 65,000 nonimmigrant visas were issued to citizens from these six countries. In other words, it appears that the administration – stymied in its efforts to directly ban travel from these countries on constitutional grounds – may have decided to implement the same policy through its vetting procedures.⁶

6 Comments to the Office of Management and Budget and the Department of State of the Brennan Center for Justice at New York University, et al., May 18, 2017, available at <https://www.brennancenter.org/sites/default/files/State%20Dept%20Information%20Collection%20Comments%20-%2051817_3.pdf>

The notice also estimates that it will require, on average, 60 minutes for each respondent to obtain and provide the requested information. But the notice provides absolutely no basis for this estimate, and we believe that it is much too low.

Many people do not know the answers to all of the questions on Form DS-5535. Consider, for example, the first item on the form: "Travel history during the last fifteen years, including source of funding for travel." The question is vague and ambiguous: At what level of granularity is each respondent expected to answer this question? Are they expected to obtain and provide cellphone tower location tracking logs? Public transit or road-toll RFID-chip movement logs? License-plate reader motor vehicle movement logs? In-vehicle GPS logs? Or "merely" airline, train, intercity bus, and/or hotel reservation and ticketing records?

Who keeps any of these records for 15 years – far longer than required for tax purposes? Even for those few who do keep records of this sort for that long, how long would it take to locate these records in the attic and compile whatever details turn out to be required?

What about the requirement to identify the "source of funding for travel"? A contractor, freelancer, or self-employed professional may be reimbursed separately by a different client for almost every trip they take, and may have no idea, and no right to know, what the ultimate "source" of the funds may be. A typical answer might be, "My client sent me a ticket, and paid the bill for my services. It's none of my business how they got the money to pay me."

How about "Employment history during the last fifteen years". How is someone who worked in the "informal" economy – the majority of economic activity in many countries – or as a casual laborer for a different employer each day expected to be able to answer this question?

The request for "Social media platforms and identifiers, also known as handles, used during the last five years," is both vague and overbroad. Similar statutory mandates for persons convicted of specified sexual offenses to register with police all "social media identifiers" they use have been found to be unconstitutionally vague and overbroad.

Is a respondent expected to remember every Web site on which they have registered as a commenter, what pseudonym or handle they chose, or what auto-generated handle they were assigned? What are the chances that they will remember or reconstruct these all correctly?

Many people contribute to group blogs or to the social media profiles and message feeds of corporations, clubs, non-profit organizations, and other informal groupings. These may have multiple contributors, without contributions being individually attributed. This makes them useless for associating applicants for visas with specific statements.

The converse of the organizational social media account with multiple users is the individual with multiple social media identifiers, whether simultaneous (some people have different pseudonyms for different circles of associates) or sequential (some people are constantly forgetting their user IDs and/or passwords, and routinely sign up for one new account after another with different IDs rather than bother to try to recover their old IDs or passwords).

A public relations professional may have been one of the users of dozens or hundreds of social media accounts of her clients over the course of five years.

There are similar problems with "email addresses used during the last five years". For security or tracking or spam filtering purposes, some people use a unique "throwaway" email address each time they fill out a Web form or provide their address to a third party. They may neither remember nor keep records of most of these addresses, nor have any reason to do so.

We believe that 60 minutes is a gross underestimate of the time that is typically required to complete form DS-5535, even for those respondents who are eventually able to complete it.

Respectfully submitted,

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

_____/s/_____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

Restore The Fourth, Inc.

<<https://www.restorethe4th.com>>

Alex Marthews, National Chair

October 2, 2017