San Francisco
1458 Howard Street
San Francisco, CA 94103

Washington, D.C.
600 14th Street, NW
Suite 502
Washington, D.C. 20005

San Antonio
10127 Morocco Street
Suite 149
San Antonio, TX 78216

Houston
540 Heights Blvd
Suite 205
Houston, TX 77007

ilrc@ilrc.org
www.ilrc.org

May 5, 2025
Samantha Deshommes
Chief, Regulatory Coordination Division
U.S. Citizenship and Immigration Services Office of Policy and Strategy
20 Massachusetts Ave., NW
Mailstop #2140
Washington, D.C. 20429-2140

Re: Proposed Rule – U.S. Citizenship and Immigration Services Generic Clearance for the Collection of Social Media Identifier(s) on Immigration Forms

Dear Ms. Deshommes,

The Immigrant Legal Resource Center ("ILRC") submits these comments on the U.S Citizenship and Immigration Services Generic Clearance for the Collection of Social Media Identifier(s) on Immigration Forms (OMB Control Number 1615-NEW, Docket ID USCIS-2025-0003) (the "Social Media Collection") urging that this rule be abandoned.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship.

Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by vulnerable immigrant communities – including Black and Brown communities, survivors of intimate partner violence, sexual violence, human trafficking, or other forms of trauma and low-income communities – seeking to

access immigration benefits. The recommendations that follow are gleaned from the experiences of many communities who we and our partners serve.

I. The Social Media Collection Is Not Within the Scope of the Executive Branch's Powers.

The Social Media Collection is not within the scope of the Executive's power and these rules violate Federal law, including the First and Fifth Amendments of the Constitution, the Administrative Procedure Act, and the Privacy Act.

The Social Media Collection is not within the scope of the Executive's power. The President does not have inherent powers to be exercised in the public interest, rather the President's power to issue executive orders must stem either from an act of Congress or from the Constitution itself. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Where an executive order purports to create a requirement, a penalty, or a right, which is outside the scope of their powers, these orders "encroach on Congress's constitutional authority to make the law, thereby violating" the Separation of Powers doctrine.[1] The basis of the power to promulgate the Social Media Collection is stated to stem from Executive Order 14161, *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats*, (the "EO 14161").[2] An executive order is not one of the bases for which the executive branch derives their power.

The Social Media Collection violates Federal law. The President can implement executive orders within the constitutional authority of the executive branch, so long as they do not violate any federal laws.[3] Thus, the Social Media Collection, even if legitimately passed, cannot violate Federal law. The Social Media Collection infringes on the First and the Fifth Amendment, the Administrative Procedure Act, and the Privacy Act, as identified in their respective sections below. Given these identified violations of Federal law, the Social Media Collection should be abandoned.

II. The Social Media Collection Violates the First Amendment.

The First Amendment states that:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[4]

---

[1] Christopher Wright Durocher, What is an Executive Order and What Legal Weight Does it Carry?, In Brief (Mar. 19, 2025), https://www.acslaw.org/inbrief/what-is-an-executive-order-and-what-legal-weight-does-it-carry/#:~:text=The%20Legal%20Effect%20of%20Executive%20Orders&text=This%20would%20encroach%20on%20Congress's,authority%20to%20issue%20the%20order.

[2] Executive Order 14161, *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats*, (Jan. 20, 2025), https://public-inspection.federalregister.gov/2025-02009.pdf.

[3] Christopher Anders, *What is an Executive Order and How Does it Work*, ACLU (Feb. 4, 2025), https://www.aclu.org/news/privacy-technology/what-is-an-executive-order-and-how-does-it-work; Christopher Durocher, *What is an Executive Order and What Legal Weight Does it Carry?*, In Brief, (Mar. 19, 2025), https://www.acslaw.org/inbrief/what-is-an-executive-order-and-what-legal-weight-does-it-carry/

[4] U.S. Const., First Amendment.

The First Amendment only applies where there has been governmental action, broadly inclusive of all governmental agencies.[5] The United States Citizenship and Immigration Services, Department of Homeland Security (the "USCIS") is a governmental entity. This entity will be reviewing applications based on the requirements set forth in the Social Media Collection.

The Social Media Collection by USCIS is a governmental action infringing on the First Amendment rights to freedom of speech and the freedom of association. The Social Media Collection states that USCIS "identified the need to collect social media identifiers and associated social media platform names from applicants" and their households.[6] These social media identifiers and associated social media platform names (the "Social Media Information") are stated to be one of the bases for the inadmissibility or denial of immigration-related benefits.[7] The Social Media Collection states that the Social Media Information is being reviewed to "help inform identity verification, national security and public safety screening, vetting, and related inspections."[8] The Social Media Collection also states that this information "will be collected from certain populations of individuals," implying it will not be required of all applicants.[9] The Social Media Collection violates the First Amendment because it infringes on freedom of speech, and freedom of association, and thus chills the interconnected freedom of assembly.

a. The Social Media Collection Violates Freedom of Speech Protections.

The Social Medial Collection is a violation of the freedom of speech because it is a content-based restriction that fails to satisfy strict scrutiny, is impermissibly broad and vague, provides Reviewing Officers (as defined below) with unfettered discretion which allows for viewpoint discrimination, violates a speaker's right to anonymity, and chills protected speech.

i. The First Amendment Applies to Speech and Expressive Conduct on Social Media.

The First Amendment prohibits the government from abridging freedom of speech.[10] The First Amendment covers a wide range of speech, including expressive conduct, or conduct that is done with the "intent to convey a particularized message" such that the "message would be reasonably understood" by those who viewed it.[11] The protections of the First Amendment "look beyond written or spoken words as mediums of expression."[12] Speech on the internet is protected under the First Amendment, which includes speech on social media.[13] Therefore, the First Amendment protects speech on social media, such

[5] *State Action Doctrine and Free Speech*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE_00013541/#ALDF_00025559, citing to *Herbert v. Lando*, 441 U.S. 153 (1979).
[6] Generic Clearance for the Collection of Social Media Identifier(s) on Immigration Forms, https://www.govinfo.gov/content/pkg/FR-2025-03-05/pdf/2025-03492.pdf.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] U.S. Const., First Amendment.
[11] § 2:9.Expressive conduct and symbolic speech, Legal Almanac: The First Amendment: Freedom of Speech § 2:9 citing to *Texas v. Johnson*, 491 U.S. 397 (1989).
[12] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).
[13] *Reno v. ACLU*, 521 U.S. 844 (1997).

as expressive conduct documented in photographs or videos, artistic creations (such as memes or other expressive art), and written or spoken speech.[14]

ii. The Social Media Collection is a Content-Based Restriction.

The First Amendment ensures the government does not have "power to restrict expression because of its message, its ideas, its subject matter, or its content."[15] An analysis of a First Amendment violation largely hinges on whether a regulation is content-neutral or content-based. A content-neutral regulation is one which applies to expression without regard to substance.[16] A government regulation is content-based "if a law applies to particular speech because of the topic discussed or the idea or message expressed."[17] A content-based restriction is one that defines speech by "particular subject matter" or by "its function or purpose."[18] Content-based restrictions are presumptively unconstitutional, and subject to strict scrutiny.[19]

The Social Media Collection states that Social Media Information will be collected from certain populations for the purpose of determining whether the applicant poses a security or public-safety threat to the United States and uses the Social Media Information to deny applicants immigration benefits. The Social Media Collection is not a content-neutral restriction because it does not apply to expression without regard to substance. The Social Media Collection only applies to certain groups of applicants and, further, denials will be based on speech that is viewed as a security or public-safety threat to the United States. Therefore, it does not apply to all speech of all applicants for immigration benefits, without regard to substance. The very purpose of the collection of Social Media Information, as presented by the rule, is to monitor for any type of speech deemed unsavory to the federal government.

The Social Media Collection must satisfy strict scrutiny. Strict scrutiny starts from a presumption of unconstitutionality, shifting the burden of persuasion to the government to prove the order is constitutional.[20] The government must demonstrate that the order is "narrowly tailored" to further a "compelling government interest," and that the rule is the "least restrictive means" to further that interest."[21] A government restriction is narrowly tailored "so long as the means chosen are not substantially broader than necessary to achieve the government's interest."[22]

---

[14] While the Supreme Court has yet to rule on whether all photographs are protected by the First Amendment, it is likely that this would be the case, given that paintings, which similarly are a still-form of expression, are protected by the First Amendment. *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) ("…a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message" … would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll").

[15] *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) citing to *Cohen v. California*, 403 U.S. 15, 403 U.S. 24 (1971).

[16] David L. Hudson, Content-Based, Free Speech Center at Middle Tennessee State University (Jul. 2, 2024), https://firstamendment.mtsu.edu/article/content-based/#:~:text=A%20content%2Dbased%20law%20or,what%20is%20said%20or%20expressed..

[17] *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

[18] *Id.*

[19] *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (citing to *Cohen v. California*, 403 U.S. 15, 403 U.S. 24 (1971)).

[20] *Strict Scrutiny*, Cornell Law School, https://www.law.cornell.edu/wex/strict_scrutiny.

[21] *Id.*

[22] *Ward v. Rock Against Racism,* 491 U.S. 781, 800 (1989).

The government's interest with the collection of Social Media Information is stated as "helping to validate an applicant's identity" and determining "whether such grant of a benefit poses a security or public-safety threat to the United States."[23] While these interests may be compelling government interests, this order is substantially broader than necessary to achieve both of those interests. As part of the naturalization process, USCIS conducts thorough criminal background and security checks on all applicants, without broadly over encompassing, and thus stifling, protected speech. The type of speech which could be captured under the umbrella of speech that may pose a security or public-safety threat includes both protected and unprotected speech, without accomplishing a result that the USCIS review process does not already accomplish in its current state. The background checks run by USCIS are adequate existing means of determining whether an applicant is a risk to the United States. These background checks are sufficient to establish an applicant's eligibility for a benefit, such that collection of Social Media Information is a broad overreach for additional information on an applicant. Additionally, the risk of the agency relying on false information is high, given that widely used social media platforms such as Facebook, Instagram, Tik Tok, and X, do not require identity verification to hold an account on these platforms, this Social Media Information should not be a legitimate basis for verifying anything about an applicant. In fact, if this Social Media Information is being used to confirm an applicant's identity, this requirement could have the inverse effect: if an applicant were to lie about their identity and Social Media Information was used to identify this applicant, wouldn't this applicant benefit from creating a series of social media platforms which corroborate their false identity, given that none of those platforms mandate identity verification? Finally, the collection of Social Media Information begs the question of what role this analysis of Social Media Information plays in adjudicating an immigration benefit. If the same sentence said by two different applicants may go unreviewed in one application and yet be the basis of denial in the other application, then it appears that the collection of this information is only a tool to deny certain populations of people who speak on certain topics rather than a tool to identify applicants and to screen applicants as threats. The collection of Social Media Information is not narrowly tailored, nor the least restrictive means to achieve the USCIS' interest.

iii. The Social Media Collection is Impermissibly Broad and Vague.

A law may violate the First Amendment if it is overly broad such that it curtails unprotected speech, as well as protected speech.[24] Further, a law may violate the First Amendment where the law is vague such that "people don't know when their expressive conduct or speech might violate the law."[25]

The Social Media Collection is impermissibly broad, in that it reviews Social Media Information for any speech that could constitute a threat to security or public safety. This broadly applies to both protected and unprotected speech. The Supreme Court has stated that the government may not prohibit

[23] Generic Clearance for the Collection of Social Media Identifier(s) on Immigration Forms, https://www.govinfo.gov/content/pkg/FR-2025-03-05/pdf/2025-03492.pdf.

[24] *Reno v. ACLU*, 521 U.S. 844 (1997); *see also Thornhill v. Alabama*, 310 U.S. 88 (1940); *see also Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[25] § 2:8.Vagueness, Legal Almanac: The First Amendment: Freedom of Speech § 2:8

the expression of an idea simply because society finds the idea itself offensive or disagreeable."[26] Unsavory speech is still protected by the First Amendment, so long as it does not arise to the level of a true threat, incite imminent lawless action, or constitute fighting words.[27] As aptly put, "one citizen's hateful screed is another's religious text, one citizen's slur is another's term of endearment; or as the Court put it [in *Cohen v. California*], "one man's vulgarity is another's lyric."[28] While some speech that would be flagged under the Social Media Collection could *sometimes* qualify as unprotected speech, such as where it constitutes a true threat, incites imminent lawless action, or constitutes fighting words, the broad language used in the Social Media Collection also encompasses protected speech – albeit speech that is potentially offensive or disagreeable. The broad targeting of speech that "threatens security" or "public safety" found in an applicant, or household member's Social Media Information, gives any USCIS officer reviewing the applicant (a "Reviewing Officer") extensive discretion in rejecting an applicant. A poorly made joke, a statement baked in cultural context, a sarcastic post, a mistranslated statement, or an allegorical commentary on social, political, or cultural issues, all may be subjectively interpreted by a Reviewing Officer as qualifying as a threat to security or public safety, despite the fact that the flagged speech does not constitute a true threat, incite imminent lawless action, nor constitute fighting words. A person's views on different topics, from communism, to socialism, to theocracy, to religion, etc., can influence whether an individual qualifies a range of speech as threatening public safety or security.

The Social Media Collection is impermissibly vague. In *Smith v. Goguen*, the Court stated that "where a statute's literal scope, unaided by a narrowing [state] court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."[29] The Social Media Collection highlights that Social Media Information will be collected to aid in identifying threats to security and public safety, but it does not define the type of speech that constitutes such threats. Would a statement made in jest, such that the average reader of this statement understands it as nothing more than a joke, result in the applicant being flagged as a security threat or a threat to public safety? What constitutes a "security threat" or a "public safety" threat? Unaided by interpretation, this Social Media Collection is impermissibly vague.

---

[26] *Texas v. Johnson*, 491 U.S. 397 (1989) citing to *Hustler Magazine v. Falwell*, 485 U.S. at 485 U. S. 55-56*; City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 466 U. S. 804 (1984); *Bolger v. Youngs Drug Products Corp*., 463 U. S. 60, 463 U. S. 65, 463 U. S. 72 (1983); *Carey v. Brown*, 447 U. S. 455, 447 U. S. 462-463 (1980); *FCC v. Pacifica Foundation*, 438 U.S. at 438 U. S. 745-746; *Young v. American Mini Theatres, Inc*., 427 U. S. 50, 427 U. S. 63-65, 427 U. S. 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U. S. 1, 424 U. S. 16-17 (1976); *Grayned v. Rockford*, 408 U. S. 104, 408 U. S. 115 (1972); *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 408 U. S. 95 (1972); *Bachellar v. Maryland*, 397 U. S. 564, 397 U. S. 567 (1970); *O'Brien*, 391 U.S. at 391 U. S. 382; *Brown v. Louisiana*, 383 U.S. at 383 U. S. 142-143; *Stromberg v. California*, 283 U.S. at 283 U. S. 368-369.

[27] *Virginia v. Black*, 538 U.S. 343 (2003) (defining a true threat as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) ("Freedom of speech and press do not permit a State to forbid advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (defines 'fighting words' as "those which, by their very utterance, inflict injury or tend to incite an immediate breach of peace").

[28] *Is Hate Speech Legal?,* The Fire Organization, https://www.thefire.org/research-learn/hate-speech-legal.

[29] *Smith v. Goguen*, 415 U.S. 566 (1974).

iv. The Social Media Collection Impermissibly Allows for Unfettered Discretion in Determining Which Applicants Are Suited for Immigration Benefits. This Unfettered Discretion Poses a Risk of Impermissible Viewpoint Discrimination.

The Social Media Collection allows for unfettered discretion on behalf of a Reviewing Officer in determining whether an applicant's Social Media Information necessitates a denial of their application for immigration benefits. This unfettered discretion allows for impermissible viewpoint discrimination, given that the Reviewing Officer is not beholden to standards or guidelines which limit their ability to categorize certain viewpoints gleaned from the Social Media Information as necessitating a rejection of the applicant's application.

Broad discretion, unfettered by standards or guidelines, impermissibly infringes on freedom of speech. The Supreme Court in *Lakewood v. Plain Dealer Publ. Co*. stated that, in regards to a licensing statute, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[30] Standards are necessary for limiting discretion and such standards allow courts to easily determine whether this discretion is being used to discriminate against disfavored speech.[31] Every law involving discretion does not fall under the First Amendment, however, laws with "a close enough nexus to expression, or to conduct commonly associated with expression" and which "pose a real and substantial threat of censorship risks," should not allow for unfettered discretion in application.[32] Viewpoint discrimination is a free speech violation. A First Amendment issue arises "whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."[33]

While a visa, a green card, a grant of citizenship, or other similar immigration benefits, are not a license as in *Lakewood*, the process here is similar, given that the applicants request a grant of permission (such as permission to live in the United States under a specific status) and such request can be denied based on the applicant's speech or expressive conduct. The Social Media Collection has a close enough nexus to speech because a Reviewing Officer will reject an applicant for immigration benefits where they view an applicant's speech, included in their provided Social Media Information, to be a threat to public safety or security. Therefore, the Social Media Collection controls the speech of these applicants by requiring their speech conform to specific standards, or else face rejection of their application. Concerningly, the Social Media Collection does not actually provide any standards for permissible versus impermissible speech, nor any limitations on discretion, when reviewing applicants seeking immigration benefits. This allows a Reviewing Officer to reject an applicant for traditionally protected speech.

An official using their discretion to discriminatorily reject applicants due to viewpoints expressed in their otherwise protected speech is viewpoint discrimination in violation of the First Amendment. Without controlling standards, a Reviewing Officer will be able discriminate arbitrarily and freely, based on viewpoints they themselves carry, and reject an applicant by framing their protected speech as speech

[30] *Lakewood v. Plain Dealer Publ. Co*., 486 U.S. 750 (1988).
[31] *Id.*
[32] *Id.*
[33] *Id.*

that threatens security or public safety. Like in *Lakewood,* without standards controlling the Reviewing Officer as to what constitutes impermissible and unprotected speech, challenges in reviewing the Reviewing Officer's decisions render their actions effectively unreviewable.

v. The Social Media Collection Violates Applicant's and Household's Right to Publish Anonymously.

Anonymity in speech is protected by the First Amendment [34] and the Social Media Collection obliviates that right. In *McIntyre*, the Court cites the proposition that "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind…an author generally is free to decide whether or not to disclose his or her true identity."[35] Anonymity in speech is important and may be motivated "by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[36] *McIntrye* stands for the proposition that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[37]

The Social Media Collection is the functional equivalent of a law that prohibits the anonymous distribution of literature, in violation of the First Amendment. Individuals have a right to post on social media anonymously, given that "the freedom to publish anonymously extends beyond the literary realm."[38] Requiring the disclosure of Social Media Information will necessarily mandate the disclosure of otherwise anonymous publishing. Applicants who publish content under an alias would be required to turn over protected speech and upend their anonymity.

The destruction of the right to anonymity will be felt most heavily by applicants from oppressive regimes. As aptly stated in *Talley v. California,* "persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[39] The Social Media Collection poses a particularly worrisome harm towards persecuted applicants who are rejected based on their speech. The Social Media Collection does not state how USCIS will protect against data leaks based on the data they receive on each applicant. Rejected applicants who anonymously vocalized dissent against their regimes over social media may be persecuted if this disclosed information falls into the wrong hands.

Anonymity extends beyond situations where an applicant publishes under an alias, or has their account on private settings, or refuses to disclose identifying information of themselves online. In *Watchtower Bible and Tract Society of New York v. Village of Stratton,* an ordinance required individuals to obtain a license to engage in advocacy in public and the Supreme Court held this ordinance unconstitutional, as a violation of the First Amendment.[40] The Court reasoned that despite the advocates

[34] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Talley v. California*, 362 U.S. 60 (1960).
[40] *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

revealing their identities willingly when appearing at someone's doorsteps, that "the fact that circulators revealed their physical identities" does not foreclose consideration "of the circulator's interest in maintaining their anonymity."[41] The court further stated that despite their faces being visible when knocking on doors, "strangers to the residents [of the Village] certainly maintain their anonymity."[42] An applicant may have an account that is public but their identity is revealed only to strangers, such as where an applicant blocked any individual they know who also have an account on the platform. In these situations, the Social Media Collection still threatens the applicant's right to speak anonymously.

vi. The Social Media Collection Will Have a Chilling Effect on Free Speech, in Violation of the First Amendment.

Even though some speech that likely would be flagged under the Social Media Collection could qualify as traditionally unprotected speech, the Social Media Collection has the "incidental effect of deterring or chilling benign activity," including protected expression.[43] Given the impermissible breadth and vagueness of the rule, covering both protected and unprotected speech, combined with the unfettered discretion given to a Reviewing Officer in determining when speech would qualify as a threat to security or public safety, the Social Media Collection will have a chilling effect on protected free speech.

Immigration is of vital importance to applicants and their families, offering opportunities for a better life, access to educational and career prospects, asylum, safety, and freedom. With this importance comes the anxiety and fear of being denied for the benefits the applicant is applying for and being exposed to immigration enforcement as a result. This anxiety and fear, combined with the arbitrary and broad manner in which the Social Media Collection can be applied, and the uncertainty of what speech the order encapsulates, will lead to self-censorship. Applicants will feel pressured to preemptively limit forms of protected speech out of the fear of rejection. Alternatively, would-be applicants will refrain from applying for benefits for which they are eligible for fear that any past speech would lead to the denial of the benefit and detention and removal from the United States.

b. The Social Media Collection Infringes on the Freedom of Association.

The freedom of association is protected by the First Amendment, with such right being "an indispensable means of preserving other individual liberties" protected by the First Amendment such as "speech, assembly, petition for the redress of grievances, and the exercise of religion."[44] The Social Media Collection threatens the freedom of association, in requiring the turnover of Social Media Information. Social media gives broad insight into the associations of an individual, whether that be by content the applicant posts, those they follow, or posts they are tagged in.

The Social Media Collection is the functional equivalent of compelled disclosure of association. The Supreme Court in *NAACP v. Alabama*, stated that compelled disclosure of affiliation with groups engaged in advocacy constitutes a restraint on the freedom of association, given that the Supreme Court

[41] *Id.*
[42] *Id.*
[43] Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1649 (2013).
[44] *Roberts v. United States*, 468 U.S. 609 (1984).

"has recognized the vital relationship between freedom of association and privacy in one's associations."[45] Applicants who have private accounts, or who publish content anonymously, and whose platforms indicate the individual's associations, would be required to turn over this information as a condition for applying for, and thus receiving, immigration benefits. Given the vital importance of these immigration benefits for the applicant's safety, livelihood, and freedom, there is no true consent in this process. Disclosure hinged on the acceptance of an application where such application carries such significant weight and purpose, is compelled disclosure. Like in *NAACP v. Alabama*, where a law required the disclosure of the identities of a group, the Social Media Collection similarly would result in the disclosure of identities of those associating with certain groups. This could extend far beyond the applicant or their household, implicating the First Amendment rights of non-applicants as well. If an association's affiliated social media account is private, with its only followers being those who are members of the association, then the group maintains their anonymity within that account. Where an applicant, or their household member, controls this account and is required to turn over Social Media Information, they are being forced to provide the identities of all of those who associate with the group that the account represents, contrary to their freedom to associate anonymously.

In *Doc Soc'y v. Blinken*, plaintiffs highlight that the disclosure requirement of social media for purposes of visa applications erases anonymity and thus discourages both speech and associations. The plaintiffs allege that applicants preemptively "deleted past posts, altered or limited their speech, or entirely dropped out of certain groups on social media."[46] The same preemptive conduct will likely be taken by applicants as a result of the Social Media Collection.

c. **The Social Media Collection Violates the Unconstitutional Conditions Doctrine.**

The Unconstitutional Conditions Doctrine stands for the proposition that "even though a person has no 'right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."[47] The Court in *Perry v. Sindermann* goes on to state that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited," and this denial "would allow the government to produce a result which it could not command directly."[48]

The Social Media Collection mandates that certain applicants, or their households, turn over their Social Media Information as a condition for the review of their application for immigration benefits, and subsequent approval or rejection thereof. While these applicants have no 'right' to these immigration benefits, and even though the government may deny the applicant the benefit for a number of reasons, the government may not deny these benefits to applicants on a basis that infringes on their constitutionally protected interests. The requirement for providing Social Media Information, despite the constitutionally protected freedom of anonymity in both speech and association, mandates that an

[45] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).
[46] *Doc Society, et al. v. Blinken*, No. 1903632, 2023 WL 5174304, at *16 (D.D.C. 2023).
[47] *Perry v. Sindermann*, 408 U.S. 583 (1971).
[48] *Id.*

applicant give up a right in order to be reviewed for a government benefit. The exercise of anonymous speech or anonymous association are in effect penalized and inhibited as a result of the Social Media Collection.

d. The Social Media Collection Implicates Freedom of Assembly.

The First Amendment prohibits the government from infringing on "the right of the people to peacefully assemble."[49] Assembly is a fundamental right on its own, but it is also "a right cognate to those of free speech and free press, and is equally fundamental."[50] The right to speech and association are deeply interconnected with the right to assemble, and the infringements on the rights to speech and association implicate the freedom of assembly.[51]

The chilling effects of the Social Media Collection on free speech and free association will have a chilling effect on the interconnected right to assemble and petition the government. Social media has become a major route for mobilizing movements, including mobilizing associations to assemble and petition the government for change. With the Social Media Collection requiring the turnover of Social Media Information - coupled with the existing efforts and enforcement actions taken against individuals engaging in protected free speech and assembly activity - evidence of the applicant engaging in this freedom could be categorized as speech or association viewed as a threat to security or public safety, and result in the denial of benefits. As a result, applicant's and their households may choose to forgo their right to assemble, in fear of associated expressions memorialized on social media being negatively held against them in the applicant's request for immigration benefits.

III. The Social Media Collection Violates the Due Process Clause of the Fifth Amendment.

The Fifth Amendment's Due Process Clause applies to immigration proceedings insofar as those proceedings must comport with general principles of procedural due process. The Social Media Collection flouts those requirements.

Non-citizens are entitled to due process under the Fifth Amendment in various ways depending on the type of immigration relief sought and the stage of the proceedings at which they are situated. For example, "[non-citizens] in removal proceedings are entitled to due process of law under the Fifth Amendment." *Karroumeh v. Lynch*, 820 F.3d 890, 896 (7th Cir. 2016). Even absent a constitutional right to remain in the United States, non-citizens who entered unlawfully are nevertheless entitled to due process. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036 (5th Cir. Unit B 1982). Pursuant to Fifth Amendment principles, agencies are permitted to change their procedures, "even without notice, *so long as there is no due process loss of substantive rights.*" *Colby-Bates-Bowdoin Educ. Telecasting Corp. v. FCC*, 534 F.2d 11, 13 (1st Cir. 1976). Due process protects against the unfair deprivation of substantive rights, like the right to free expression, and interests in non-discretionary immigration relief, such as naturalization, *see Conn.*

[49] U.S. Const. amend. I.
[50] *DeJonge v. Oregon*, 299 U.S. 353 (1937).
[51] *Thomas v. Collins*, 323 U.S. 516 (1945).

Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (noting that an individual has no due process right to *discretionary* immigration relief); *see also* 8 U.S.C. § 1427 (governing naturalization, which is a non-discretionary form of relief).

IV. If Adopted as Proposed, The Social Media Collection Would Violate the Administrative Procedure Act Because it is Arbitrary and Capricious and Not Adequately Justified.

As an administrative agency housed within the Executive Branch, the Department of Homeland Security ("DHS") and its divisions, including the United States Citizenship and Immigration Services ("USCIS"), are subject to the mandates of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 701(b)(1) (defining "agency" for purposes of the APA); *see also, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (assessing whether action taken by DHS and USCIS violated the APA). The APA sets out 1) procedures that administrative agencies must follow when engaging in certain actions, and 2) standards of judicial review that apply if those actions are subsequently challenged in court.

The Social Media Collection runs afoul of the APA and would not withstand APA scrutiny if challenged in court. The APA establishes a "basic presumption of judicial review for one 'suffering a legal wrong because of agency action.'" *Regents*, 591 U.S. at 16; *see also* 5 U.S.C. § 702 ("A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *id*. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

Where judicial review is permitted, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are determined to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

The APA compels courts to set aside agency action that is "arbitrary and capricious." *See id*. "A rule may be arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Immigrant Legal* Res*. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 539 (N.D. Cal. 2020) (quoting *Motor Vehicle Mfr. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Moreover, the agency may not bury its head in the sand when faced with uncertainty or contrary evidence; rather, "[a]gencies are required to 'reflect upon the information contained in the record and grapple with contrary evidence'" and "'rationally explain why the uncertainty' supports the chosen approach." *San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1104 (N.D. Cal. 2019) (first quoting *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017); and then quoting *Grater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011)). Additionally, the APA "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

In *Wolf*, the court concluded, at the preliminary injunction phase, that parts of a final rule promulgated by DHS and USCIS were arbitrary and capricious because they 1) failed to disclose the data on which the agency relied in promulgating the rule, relied on unexplained data, or ignored relevant data; 2) failed to consider certain important elements of the problem purportedly addressed by the rule; 3) failed to justify a shift in policy; and 4) relied on factors Congress did not wish DHS to consider. 491 F. Supp. 3d at 539–44. Similarly, in *San Francisco*, the court held that the plaintiffs were likely to succeed on the merits of their claim that a rule promulgated by DHS and USCIS was arbitrary and capricious because they failed to consider the costs and benefits of the rule. 408 F. Supp. 3d at 1105.

Comparable bases apply to the Social Media Collection, too. First, USCIS has not provided any data or other concrete evidence on which the substance of the proposed collection is based. It refers to EO 14161 generally, but it does not demonstrate that USCIS undertook to methodically analyze the ways in which this proposed collection would further the mandates of EO 14161 or the burdens and costs associated with expanding the information gathered from applicants for immigration relief. For example, nothing in either EO 14161 or the Social Media Collection explains how the social media handle used by a family member will facilitate the identification of individuals who intend to commit terrorist attacks or threaten our national security. USCIS cites to no data indicating that this kind of information has been linked to the successful apprehension of bad actors.

Second, USCIS failed to account for certain critical elements of the impact of the proposed collection altogether, and its attempts to assess other factors are entirely unreasonable. For instance, the Social Media Collection applies to numerous application forms for vastly different types of immigration

relief. The proposed collection makes no mention of the fact that the costs of collecting and providing this information may vary widely depending on the form of relief sought. For instance, asylum-seekers—among the most vulnerable subpopulations of non-citizens—may be unable to obtain this information because they have been estranged from their homes, cut off from their families, and divorced from their previous forms of communication. Asylum-seekers may also fear endangering their loved ones by providing their identifying and contact information on immigration applications. Nowhere in the proposed collection are these critical considerations addressed.

Relatedly, USCIS's attempts at estimating the likely time and financial costs of compliance are the definition of arbitrary. It is unreasonable to conclude that collecting this additional information will require less than an hour of an applicant's time. Tracking down the requested information will force applicants to do any combination of the following: contact service providers to verify past contact information, reach out to family members to obtain information about loved ones, and review their own records and past communications to identify data points such as previously used social media handles. And the time that this will require could be amplified by language barriers, unreliable access to the internet, and a host of other factors that disproportionately affect non-citizens. Yet none of these crucial variables appear to have been considered by USCIS, and they certainly are not reflected in the absurd estimate of the time that it will take applicants to comply with this proposal. The representation that compliance will have no financial cost is equally asinine.

Each of these factors—and this is a non-exhaustive list of the proposal's flaws—demonstrates the shoddy work done by USCIS in putting this proposed collection together. The Social Media Collection is a text-book example of arbitrary agency behavior: USCIS clearly did not examine relevant data and consider the costs and benefits of this proposed collection before suggesting it, and the result is a poorly reasoned set of new requirements that will be burdensome for applicants and boast no discernible coincident benefit to the national security of the United States. If adopted as proposed, the Social Media Collection would not survive judicial review.

Moreover, as a general matter, the Social Media Collection is not adequately justified. The APA's "arbitrary and capricious" standard compels agencies to provide reasons supporting an agency action. *See Prometheus Radio*, 592 U.S. at 423. Indeed, courts have determined that the "arbitrary and capricious" standard is not a difficult one to satisfy:

> so long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned.

Karpova v. Snow, 497 F.3d 262, 268 (2d Cir. 2007). And yet, USCIS comes nowhere close to satisfying it. It has made no attempt to demonstrate that the proposed collection is reasonable or well-reasoned. It provides no "facts" that it has found that compel these new requirements, and it makes no effort to include "a rational connection between the facts found and the choice made." *Id*.

Here again, these flaws are compounded by the fact that the proposed collection applies with equal force to numerous application forms for several different types of immigration relief. This is true despite the fact that, typically, the contents of each individual form are tailored to the type of relief sought. For example, Form I-589 is the form non-citizens use to apply for asylum. It asks questions that are clearly related to the ground for relief sought by the applicant, such as the basis upon which the applicant's asylum claim is founded. Logically, for instance, Form I-485 (the application for permanent resident status or adjustment of status) does not include a similar question. Here, much of the requested information has no relation whatsoever to the type of immigration relief sought. In this way, the proposed collection is doubly irrational, bolstering our position that it could be set aside as arbitrary and capricious if it is ultimately adopted in its current form. Accordingly, USCIS has failed to discharge its obligations on two levels: the proposal is not adequately justified as a global matter, and it is certainly not adequately justified as it applies to each individual application form.

For these reasons, the proposed information collection is arbitrary and capricious and, as proposed, would not withstand judicial review under the APA.

V. The Proposed Collection and Uses in the Social Media Collection are Inconsistent With the Privacy Act of 1974.

a. The Proposed Information Collection has not Been Sufficiently Demonstrated as Relevant or Necessary to Meet the Stated Goal.

Under the Privacy Act of 1974 ("Privacy Act"), information collected by an agency must be relevant and necessary.[52] EO 14161 does not justify the expansion of the currently collected information to include social media details.

Social media identifiers, accounts, and content may easily be made private in most instances, including retroactively. The requirement to provide handles and other information to enable USCIS to link social media accounts to individuals as part of a review process is inherently flawed as use of the provided information largely or exclusively requires the link to individuals where there is little to no content that may remain to be used. Logically, any person seeking to avoid historical or present-day content from being accessed would simply disable their account, render it private, or delete particular content upon knowledge that they must provide the name they use on such an account.

Noting the ease with which a change to the account availability could be made, the likelihood that reasonably helpful information would be collected is highly unlikely on a regular basis. As it would be unlikely to yield anything helpful, it is not relevant or necessary for the stated purpose.

b. The Proposed Information Collection Does Not Indicate That There Will Be Appropriate Information Provided to Individuals at or Before the Time of Collection.

[52] 5 U.S.C. § 552a(e)(1).

The Privacy Act requires that the agency "inform each individual whom it asks to supply information…(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and (D) the effects on him, if any, of not providing all or any part of the requested information."[53]

The intended use of social media account information is not clear on its face. While generally it is being aligned with the concept of vetting individuals, there isn't specific detail of what information would be sought from social media. The use of social media differs across people. Some have barely touched it in a decade and have a list of "friends" that is in no way reflective of reality. Further, statements and relationships may be extremely dated and unaligned with anything the person actually feels or believes. Relationships founded entirely on social media are further complicated, as they may be based on a whole or partial degree of anonymity. Assessing with whom someone is connected on social media may then be problematic if not clear whether and how that information will be used. Cases have previously found that a level of inference was acceptable where it was clear how the information would be used could be reasonably inferred.[54] However, in this instance, it isn't clear whether there are purposes for the information beyond the immediate reason of vetting and, within that, against what criteria the individual is being vetted.

VI. Recommendations

In light of the myriad deficiencies inherent in the Social Media Collection, we respectfully request that the entire collection be rescinded. If it is not rescinded, we make the following recommendations to improve the proposed collection and ensure it comports with relevant legal principles.

1. **The Social Media Collection cannot violate rights to anonymity**. The Social Media Collection cannot mandate applicants, or their households turn over anonymous Social Media Information, and should be amended to be limited to publicly available information.

2. **The Social Media Collection requires standards, guidance, and limitations**. Reviewing Officers must be limited in the amount of discretion they may use in determining the group of applicants that must turn over Social Media Information, as well as in determining the type of speech or conduct that would result in the denial of immigration benefits. The Social Media Collection must define what information gleaned from Social Media Information would constitute a threat to security or public safety and limit this categorization to speech that would also constitute a true threat, incitement, or fighting words.

3. **The Social Media Collection should be tailored to each individual application form, and the information sought should correspond with the requirements for each different type of immigration relief.** It is arbitrary to impose blanket data collection requirements on all applicants for immigration relief without explaining how each data point is relevant to a given type of applicant or application. USCIS already promulgates individualized forms for each type of relief;

[53] 5 U.S. § 552a(e)(3).
[54] Thompson v. State, 400 F. Supp. 2d 1, 17 (D.D.C. 2005).

there is no reason that the proposed collection could not similarly be adapted and changed to better address the wide variation in backgrounds, lifestyles, needs, and access to information that is ubiquitous among non-citizens applying for immigration relief.

4. **Several of the terms in the Social Media Collection should be defined more clearly to avoid issues such as vagueness.**

5. **Information that is not patently relevant to the national security interests of the United States should be collected only on a case-by-case basis as needed.** For example, data may indicate—notwithstanding that the Social Media Collection does not currently contain any such data—that social media information can facilitate the identification and capture of bad actors who pose a threat to the United States. If that is indeed the case, and USCIS discharges its obligation to demonstrate as much, then it is more appropriate to seek this information 1) in a form that is narrowly tailored to the information required for each specific type of relief (see Recommendation 1, above) or 2) at a later stage in the process, after concerning information about the applicant has been uncovered. For the reasons discussed throughout this comment, it is inappropriate and impermissible to seek this information from every single applicant for any type of immigration relief. Doing so flouts the values upon which this country was built, and it flies in the face of the freedom that makes the United States an attractive emigration destination in the first place.

6. **The Social Media Collection should incorporate a grace period to allow current or near-future applicants to complete the application process and provide time for other non-citizens to understand what may be required of them should they choose to apply for relief.**

7. **The Social Media Collection should address data security.** As it currently stands, there is no guarantee that the sensitive and vast information that will be provided pursuant to this collection will be protected from misuse or data breaches. Many applicants and their loved ones could experience retaliation or harassment as a result of their attempts to obtain immigration relief in the United States. It is imperative that USCIS safeguard this data to the maximum possible extent.

Yours truly,

Elizabeth Taufa
Senior Policy Attorney & Strategist