

# **Investigating the Rationales and Reactions to DHS and DOS Social Media Monitoring of U.S. Visa Applicants**

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## **Executive Summary**

As part of the Trump Administration's attempt to restrict immigration to the U.S., the Dept. of Homeland Security (DHS) and the Dept. of State (DOS) implemented a rule that requires visa applicants to the U.S. to submit any social media identifier used in the last five years. Free speech, privacy, and immigration advocates believe this policy is an egregious violation of civil liberties. National security hawks and immigration opponents believe the policy is a common sense solution that will make Americans safer from the possibility of an attack. Given the controversial nature of the policy, this paper assesses the justifications for as well as the oppositions to social media vetting.

In order to identify these nuanced and specific arguments, I conducted a content analysis of public statements. This content included news articles, articles posted by relevant interest groups, comments from elected officials, and public comments on the rules. In analyzing trends, I found a number of broad argument categories on both sides of the debate. However, this analysis will focus specifically on three primary rationales: that national security is a top priority, the policy is common sense, and that immigration is harmful; conversely the analysis will also focus on three primary dissenting reactions: that the policy is unconstitutional, ineffective, and contradicts American values.

Based on this analysis, I devised a set of recommendations culminating in an advocacy playbook for my client's objective to promote broader human rights protections. While there were many talking points that will prove useful, the most compelling is the suspect nature of the policy's effectiveness. When weighing the fact that the policy could be ineffective, along with all of the potential negative consequences—including infringements on civil liberties for visa applicants and U.S. citizens—the overall benefits seem dubious. More specifically, this policy damages our rights and our reputation, despite insufficient evidence that it will make us any safer.

## **Policy Question**

*What are the primary rationales for and reactions to the U.S. government's policy to collect the social media account usernames of visa applicants?*

I will be investigating this question on behalf of my client at an international human rights advocacy organization. Because the organization has a mission to protect human rights and human dignity around the world, this project is designed with that intention in mind.

## **Issue Background**

As of May 2019, the U.S. State Department (DOS) as well as the Department of Homeland Security (DHS) announced a new policy that requires visa applicants to the U.S. to list their social media information as part of their request.<sup>1</sup> The policy explicitly mandates that any social media username or handles used in the last five years be listed and identified, excluding password information. While prior iterations of the application under the Obama Administration merely requested social media information on a voluntary basis, it will now be an obligatory part

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<sup>1</sup> Sandra Garcia. "U.S. Requiring Social Media Information From Visa Applicants." *New York Times*, June 2, 2019. <https://www.nytimes.com/2019/06/02/us/us-visa-application-social-media.html>.

of the process.<sup>2</sup> The rule, that the State Dept. began to implement on May 31st, applies to virtually all visa applicants with only some diplomatic exceptions, including refugees and asylum seekers.<sup>3</sup> The Dept. of Homeland Security finalized its version of the rule in November of 2019.

These agency rules were developed in accordance with Section 5 of the Executive Order (E.O.) 13780, “*Protecting the Nation from Foreign Terrorist Entry into the United States*”.<sup>4</sup> EO 13780, created to replace EO 13769—colloquially referred to as President Trump’s “Muslim Ban”—requires agencies to establish a vetting standard that allows DHS to collect information that will be used to assess the eligibility of an individual to enter the U.S. for the purposes of national security.<sup>5</sup> The Department of Homeland Security and the Department of State released their rules for social media monitoring to inflate vetting standards in accordance with this directive, and both rules have since concluded the public comment period.

Both the rules and the executive order are a continuation of the Trump Administration’s efforts to intensify scrutiny of immigrants both legal and illegal. Proponents of the policy believe that monitoring social media will be a critical tool in identifying potential national security threats.<sup>6</sup> Opponents primarily question its effectiveness while also lamenting the potential infringement on rights to freedom of speech that are codified in U.S. law.<sup>7</sup> These critics feel especially justified in their concern because of the opportunities for policy overreach. Most prominently, monitoring does not necessarily cease once a visa is granted, evoking concerns that this surveillance will be used as a mechanism for social control.<sup>8</sup> Similarly, those associated with any social media profile of a visa applicant are also fair game for investigation, regardless of citizenship status or nationality.<sup>9</sup>

In light of these concerns, the Brennan Center for Justice, the Knight First Amendment Institute, and Simpson Thacher law firm have filed a lawsuit against the DoS collection of social media information and DHS retention of such data. This lawsuit is levied on behalf of two U.S. based

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<sup>2</sup> *Ibid.*

<sup>3</sup> “Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms.” *Federal Register*, September 4, 2019.

<https://www.federalregister.gov/documents/2019/09/04/2019-19021/agency-information-collection-activities-generic-clearance-for-the-collection-of-social-media>.

<sup>4</sup> *Ibid.*

<sup>5</sup> “Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States.” The White House. Accessed September 15, 2019. <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

<sup>6</sup> Department of Homeland Security. “Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms.” *Federal Register* 84, no. 171 (September 4, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-09-04/pdf/2019-19021.pdf>.

<sup>7</sup> Cope, Saira Hussain and Sophia. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. <https://www EFF.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>8</sup> Faiza Patel, Rachel Levinson-Waldman, Sophia DenUyl, and Raya Koreh. “Social Media Monitoring | Brennan Center for Justice.” Accessed September 14, 2019. <https://www.brennancenter.org/publication/social-media-monitoring>.

<sup>9</sup> *Ibid.*

filmmaker associations, the International Documentary Association and Doc Society.<sup>10</sup> These organizations represent more than 2,700 filmmakers from 53 countries.<sup>11</sup> This issue is especially salient for the plaintiffs, as they utilize social media to stay connected to filmmakers around the world.<sup>12</sup> These online conversations often center on social and political issues that are sensitive, and could in some cases express criticism of U.S. policy and politics.<sup>13</sup> What’s more, the organizations argue that this policy will chill free speech online—barring critical stories from being told—and could even discourage travel to the U.S. altogether.<sup>14</sup> According to the Brennan Center, “Because of the registration requirement, some Doc Society and IDA members and partners have stopped posting on social media, left online groups, stopped interacting with certain friends online, or deleted their social media posts or accounts completely.”<sup>15</sup> While the legality of the policy remains an open question, the debate around the merits of the policy wage on. This paper will focus on those conversations.

### **Survey of Policy Landscape**

For the purposes of this analysis I will be investigating work done in three primary fields of research:

1. The implications of surveillance and social media monitoring
2. The importance of national security and monitoring efforts
3. The immigration landscape under president Trump

By digging into these fields, this project can examine both the context in which this policy is taking place, as well as the ethics of social media surveillance for the purposes of national security. This analysis will set up the context in which both sides of the debate are arguing.

### ***Social Media Surveillance***

Given the tenuousness of the current immigration landscape, it is critical to assess the implications of social media surveillance earnestly. In a world where many authoritarian governments have begun to leverage social media surveillance against certain populations both

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<sup>10</sup> Brennan Center for Justice. “Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the State Department.” Accessed March 28, 2020. <https://www.brennancenter.org/our-work/research-reports/timeline-social-media-monitoring-vetting-department-homeland-security-and>.

<sup>11</sup> Kilmurry, Simon. “A New U.S. Visa Requirement Is Silencing Foreign Filmmakers.” Brennan Center for Justice. Accessed March 6, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/new-us-visa-requirement-silencing-foreign-filmmakers>.

<sup>12</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

<sup>13</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

<sup>14</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

<sup>15</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

inside and outside their borders, it is correct to have a healthy skepticism of the technique. While the U.S. currently uses social media monitoring to surveil immigrant populations in the name of national security, these same mechanisms can be used to shrink the scope and efficacy of speech online.

The foray into surveillance is contentious. In some cases, surveillance can encourage the demonization of certain communities—even groups that intend to promote good such as human rights defenders (HRDs). Once they are, “labeled as ‘foreign agents’, ‘anti-nationals’, or ‘terrorists’, states are often able to justify surveillance of HRDs in the name of ‘national security’...with the advent of new and more sophisticated technology, coupled with repressive laws, the threat of targeted surveillance has become even more urgent”.<sup>16</sup> These labels can be branded regardless of one’s citizenship status, or the legitimacy of the threat they pose to national security.

#### *Freedom of Speech Concerns with the Social Media Monitoring Rule*

With the unease about surveillance overreach in mind, it is important to understand what it is about this social media monitoring provision that infringes upon or discourages free speech. While the social media monitoring rule does not require users to give password information—and allows users to alter their privacy settings in advance—there is a concern about self-censorship. People are much less likely to express their beliefs on certain topics if the user believes that opinion will encourage the government to collect their Personally Identifiable Information (PII).<sup>17</sup> This is especially threatening for those who run anonymous social media sites who, “might be afraid that PII collected could lead to their true identities being unmasked, despite that the Supreme Court has long held that anonymous speech is protected by the First Amendment”.<sup>18</sup>

Self-censorship seems especially likely since the details that DHS and DOS are looking for are not disclosed. Specifically, DOS lists the following as the information they seek and what they intend to do with the information:

“We are looking solely for social media identifiers [i.e. social media handles]. Consular officers will not request user passwords. The information will be used, as all information provided during a visa interview and on the visa application, to determine if the applicant is eligible for a visa under existing U.S. law. Collecting this additional information from visa applicants will strengthen our process for vetting applicants and confirming their identity.”<sup>19</sup>

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<sup>16</sup> Likhita Banerji. “A Dangerous Alliance: Governments Collaborate with Surveillance Companies to Shrink the Space for Human Rights Work.” Common Dreams. Accessed September 15, 2019.

<https://www.commondreams.org/views/2019/08/19/dangerous-alliance-governments-collaborate-surveillance-companies-shrink-space>.

<sup>17</sup> Cope, Saira Hussain and Sophia. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. <https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>18</sup> *Ibid.*

<sup>19</sup> U.S. Dept. of State. “Frequently Asked Questions on Social Media Identifiers in the DS-160 and DS-260,” n.d. [https://travel.state.gov/content/dam/visas/Enhanced%20Vetting/CA%20-%20FAQs%20on%20Social%20Media%20Collection%20-%206-4-2019%20\(v.2\).pdf](https://travel.state.gov/content/dam/visas/Enhanced%20Vetting/CA%20-%20FAQs%20on%20Social%20Media%20Collection%20-%206-4-2019%20(v.2).pdf).

This statement is not detailed in the nuances of the social media analysis. By obfuscating the mechanics of the actual social media surveillance and the intelligence that law and immigration enforcement is looking to gather, people are left in the dark and hesitant to post anything that trips an invisible alarm wire. What's more, DOS and DHS could send this data to other agencies and law enforcement bodies, including Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). Because CBP does not notify users once their PII has been collected, the chilling effect on speech can be even more profound—especially as the threat of placement on government watch lists or other immigration consequences looms.<sup>20</sup>

These fears of social media surveillance evolving into other mechanisms of social control have come to fruition already. In March of 2019, NBC 7 News broke a story exposing a secret U.S. government database of activists, journalists, and social media influencers that had ties or affiliations with the migrant caravan that gained notoriety at the outset of the 2018-midterm elections.<sup>21</sup> In fact, some of these identified individuals were flagged at the border, having holds placed on their passports, despite being U.S. citizens.<sup>22</sup>

These chilling effects are not just well documented as they occur in real time, but academics have also focused research on this very phenomenon. In one particularly theoretical analogy, academics refer to modern day surveillance as a panopticon—based on philosopher Jeremy Bentham's panopticon structure that allows an observer to watch people as a means of enforcing obedience.<sup>23</sup> While subjects know that the capability exists, they do not necessarily know when specifically they will be watched. In many ways, this is an astute analogy that lends itself to the vast unknowns for social media users—if they are being watched and what their data is being used for.

This chilling phenomenon has real political consequences. One study found that when people were given a news story about government surveillance of online spaces, the following week they were less likely than those who did not receive the news to seek political information online at a statistically significant level.<sup>24</sup> This silencing of online political participation occurred even despite being in the midst of a presidential election season. The same study was then conducted on a group of Muslim-Americans, a community that will already have a heightened sensitivity to surveillance. The finding was consistent, and the chilling effect remained at a statistically

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<sup>20</sup> Cope, Saira Hussain and Sophia. "DEEP DIVE: CBP's Social Media Surveillance Poses Risks to Free Speech and Privacy Rights." Electronic Frontier Foundation, August 5, 2019. <https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>21</sup> Jones, Tom, Mari Payton, and Bill Feather. "Leaked Documents Show the Government Tracking Journalists." NBC 7 San Diego. Accessed September 19, 2019. <https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html>.

<sup>22</sup> *Ibid.*

<sup>23</sup> McMullan, Thomas. "What Does the Panopticon Mean in the Age of Digital Surveillance?" *The Guardian*, July 23, 2015, sec. Technology. <https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham>.

<sup>24</sup> Stoycheff, Elizabeth, Juan Liu, Kai Xu, and Kunto Wibowo. "Privacy and the Panopticon: Online Mass Surveillance's Deterrence and Chilling Effects." *New Media & Society* 21, no. 3 (March 1, 2019): 602–19. <https://doi.org/10.1177/1461444818801317>.

significant level.<sup>25</sup>

### ***National Security and Monitoring Efforts***

Conversely, social media monitoring is often pitched as a tool to protect national security. The impetus to scan social media to prevent domestic terrorism became popularized by elected officials in 2015 after the mass shooting in San Bernardino, CA. Because one of the shooters used social media to post about her support for violent jihad, policymakers were quick to push for policy that allows DHS to monitor immigrant social media forums.<sup>26</sup> As an additional layer of complexity, the shooter published these posts under a fake pseudonym account. Because of her more secret online identity, she was not only allowed entry into the country but she also passed multiple background checks to purchase firearms.<sup>27</sup>

The idea that monitoring social media can help protect national security has some grounding in non-partisan research. In a report conducted by RAND Corporation on the analytical tools most helpful to protecting national security, one of the key findings is that monitoring social media traffic will help U.S. forces preparedness to respond to threats and disinformation.<sup>28</sup> The same report indicates success, “Examining follower relationships on Twitter, [where] researchers were able to map opinion networks based on foreign policy discussions of the Iran-Israel confrontation over Iran’s nuclear program... This research has implications beyond simple opinion networks; it can also be used to identify individuals who are radicalizing or likely to commit a crime”.<sup>29</sup> Many would argue that, in order to provide for the common defense, our government should exhaust all resources and metrics at their disposal.

### ***Immigration Landscape***

The Trump Administration has drastically altered the U.S. immigration system in the last 3 years. These changes are not merely in response to undocumented immigration, but also *legal* immigration. Despite a, “longstanding general bipartisan consensus in the leadership of both major political parties viewing immigration as a net positive for society and the economy, the White House is framing immigrants, legal and unauthorized alike, as a threat to Americans’ economic and national security”.<sup>30</sup> Framing immigration in such a way has given rise to a number of constrictive policies that target primarily Muslim majority countries and Central American countries—areas where the populations are increasingly cast as national security threats under the Trump Administration.

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<sup>25</sup> *Ibid.*

<sup>26</sup> O’Neill, Patrick Howard. “U.S. Senators Look to Social-Media Surveillance after San Bernardino Attack | The Daily Dot.” Accessed October 28, 2019. <https://www.dailydot.com/layer8/tashfeen-malik-social-media/>.

<sup>27</sup> Kopan, Tal. “US to Require Would-Be Immigrants to Turn over Social Media Handles.” CNN. Accessed October 28, 2019. <https://www.cnn.com/2018/03/29/politics/immigrants-social-media-information/index.html>.

<sup>28</sup> Marcellino, William, Meagan L. Smith, Christopher Paul, and Lauren Skrabala. “Monitoring Social Media: Lessons for Future Department of Defense Social Media Analysis in Support of Information Operations.” Product Page, 2017. [https://www.rand.org/pubs/research\\_reports/RR1742.html](https://www.rand.org/pubs/research_reports/RR1742.html).

<sup>29</sup> *Ibid.*

<sup>30</sup> Selee, Sarah Pierce, Andrew. “Immigration under Trump: A Review of Policy Shifts in the Year Since the Election.” migrationpolicy.org, December 18, 2017. <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts>.

There are a number of metrics to substantiate the tangible impacts of these anti-immigration policies. To base these claims in the statistical realities of the Trump Administration's immigration agenda, since April 2018, "the U.S. granted 13 percent fewer visitor visas over the [previous] 12 months when compared with fiscal year 2016, according to State Department data".<sup>31</sup> These policy changes have had the most direct impact on Muslim majority countries, where there has been a 91% drop in Muslim refugees, with a 26% drop in immigrants from Muslim majority countries since FY 16.<sup>32</sup>

In addition to targeting visa applicants from Muslim majority countries, the Trump Administration is also cracking down on immigrants from Central America. However, this manifests much more on apprehensions and conflict along the Southern Border. Border, "apprehensions of Central Americans are on pace to outnumber permanent visas issued to Central Americans by more than 20 to one. For temporary work visas, the ratio is 78:1".<sup>33</sup> These figures are reflective of both the low number of visas extended to applicants from Central America, mainly Mexico, and the skyrocketing number of apprehensions.<sup>34</sup> As a result, tensions have flared over law enforcement—primarily CBP and ICE—at the Southern Border. The vigor with which these entities have pursued immigrants through raids, and other measures is a point of great controversy in U.S. politics today.

### **Summary**

Government use of social media surveillance can be a powerful tool to direct behavior and chill free speech. It can also be an important aid in defending the security of the nation. In a socio-political moment of great fear surrounding immigrant communities, these technological capabilities must be scrutinized especially closely. *This project will attempt to assess both the arguments for and against this policy, and evaluate them on their merits.*

### **Data and Methodology**

In order to answer this question, I will conduct a content analysis that examines the socio-political climate of the policy. More specifically, I will collect and analyze the content that expresses support of the policy (what I call the *rationale* group), contrasted with the arguments of those in opposition to the policy (the *reaction* group). Because there is little data since the rule has come into effect, I will need to be especially scrupulous in my examination of the rationale for the policy, and the fears and reactions that could manifest as a result. For the purposes of being specific about the timeline of social media surveillance policies as it relates to visa applicants, I will set the timeline of content to extend from the beginning of the Obama Administration to today. This will allow me to acknowledge conditions leading up to the start of social media vetting to its evolution now.

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<sup>31</sup> Nahal Toosi, Ted Hesson, and Sarah Frostenson. "Exclusive: Foreign Visas Plunge under Trump." POLITICO. Accessed September 18, 2019. <https://www.politico.com/interactives/2018/trump-travel-ban-visas-decline/>.

<sup>32</sup> David Bier. "U.S. Approves Far Fewer Muslim Refugees, Immigrants, & Travelers." Cato Institute, April 23, 2018. <https://www.cato.org/blog/us-approves-far-fewer-muslim-refugees-immigrants-travelers>.

<sup>33</sup> David Bier. "Legal Immigration Will Resolve America's Real Border Problems." Cato Institute, August 20, 2019. <https://www.cato.org/publications/policy-analysis/legal-immigration-will-resolve-americas-real-border-problems>.

<sup>34</sup> Burrows, Jie Zong, Jeanne Batalova Jie Zong, Jeanne Batalova, and Micayla. "Frequently Requested Statistics on Immigrants and Immigration in the United States." migrationpolicy.org, March 11, 2019. <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

## ***Defining the Rationale and Reaction Groupings***

### *The Rationales*

In my assessment of those rationalizing the rule, I will be examining public statements about why this rule is both good and necessary. This analysis will investigate statements by immigration and national security hawks both elected and not, and current Administration officials and staff. In order to conduct the policy trends analysis, I will pay special attention to State Dept. and DHS press releases, news about the rule, op-ed's, and blogs put forth by relevant mission-based organizations.

### *Rationale Actors*

The major players in advocating for this policy are Trump Administration officials and certain elected officials at the federal level. In my analysis of this group, I will look at statements from the White House, Dept. of State, Dept. of Homeland Security, and members of Congress, through select news sources. Thus far, I have seen at least one statement from Congressman Phil Roe (R-TN) expressing his support and justification for the rule.<sup>35</sup> This analysis will be interesting since support for the rule was bipartisan back in 2015, in the immediate aftermath of the San Bernardino mass-shooting incident, when Sen. Chuck Schumer (D-NY) expressed support for social media monitoring policies for immigrants.<sup>36</sup>

### *Rationale Sources*

On the anti-immigration and national security side, I will not only look at official statements put out by government officials, but at more conservative, national security publications that have a reputation for anti-immigration sentiments, or do work on the intersection of immigration and domestic terrorism. Relevant interest groups and think tanks include Federation for American Immigration Reform (FAIR), Center for Immigration Studies (CIS).

### *The Reactions*

Conversely, the reaction content will be public statements that discuss why this rule is harmful and unnecessary. This analysis will primarily dig into published information from critics of the Trump Administration's immigration agenda, as well as free speech, privacy, human rights, and immigrant advocates within the U.S. For this portion, I will also look to news and opinion pieces in mainstream media.

### *Reaction Sources*

I will be digging into the free speech, immigration and human rights advocacy spaces. I will focus primarily on the Electronic Frontier Foundation (EFF), the Brennan Center for Justice. However, there are a number of organizations doing work on this specific issue including the Electronic Privacy Information Center (EPIC) and the American Civil Liberties Union (ACLU). Additionally, because both DOS and DHS rules were subject to public comment, I will assess EFF and Brennan Center's letters for public comment especially acutely.

### *Reaction Actors*

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<sup>35</sup>Roe, Phil. "Illegal Immigration Is a Serious Threat to America's National Security." Accessed October 25, 2019. <https://roe.house.gov/news/email/show.aspx?ID=3ZEA0EXCBW2VHJBF54NWBJKB5A>.

<sup>36</sup>O'Neill, Patrick Howard. "U.S. Senators Look to Social-Media Surveillance after San Bernardino Attack | The Daily Dot." Accessed October 28, 2019. <https://www.dailydot.com/layer8/tashfeen-malik-social-media/>.

There have been few legislators to go on record denouncing this particular policy. This silence is likely because the rules are new and likely obscured by some of the broader immigration reforms under the Trump Administration. However, certain members of Congress have been on record to express concerns about DHS surveillance initiatives more broadly. For instance, Rep. Jackie Speier (D-CA) stated in a hearing that policies allowing agency analysts to collect personally identifiable information (PII) on Americans is, “deeply troubling”.<sup>37</sup>

*News Sources*

For the news, there are a number of publications that will be useful. I will initially be looking through more primary news sources as well as more partisan media. The following table specifies news sources and political bent:

<i>Left-Wing</i>	<i>Non-Partisan</i>	<i>Right Wing</i>
Huffington Post	NY Times	Breitbart

I will also look to see if there is any public opinion polling conducted by a range of news media outlets on both the rationale and reaction sides. I will rely mainly on Google to conduct my searches, but also my institution’s online library database, DukeLib.

*Key Search Terms*

I will use key terms such as: “Visa applicants to U.S. social media monitoring”; “Social media monitoring and national security in U.S.”; “DHS and DOS Social Media Screening”; “Immigration and National Security Threats”; “Social media screening and free speech concerns”; “Immigration and social media”; “immigration social media visas”; “social media screening visas”; and “social media visa extreme vetting”. Depending on which types of sources I am searching, different search terms may become more useful (for example, if I am on FAIR’s website, I will probably use search terms that focus on social media since the immigration piece is already accounted for in the scope of the organization).

***Concerns and Plans to Mitigate***

The greatest impediment to successfully conducting this analysis will likely be a lack of information to conduct an informed and balanced analysis. The immigration landscape in the U.S. is changing at an unprecedented pace, and it will be a challenge to hone in on the relevant information about this one piece of a larger tapestry. While information may be scarce about this particular policy, my hope is that by contextualizing it into a larger puzzle, it will be clear what the landscape looks like, and allow my client to proceed with a course of action that is in line with the organization’s mission. If nothing else, a goal of this methodology is to ensure that these two opposing ends of the spectrum are speaking directly to each other’s concerns.

**A Summary of Findings**

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<sup>37</sup>Gross, Grant. “Lawmakers Question DHS Monitoring of Social Media.” PCWorld, February 16, 2012. [https://www.pcworld.com/article/250124/lawmakers\\_question\\_dhs\\_monitoring\\_of\\_social\\_media.html](https://www.pcworld.com/article/250124/lawmakers_question_dhs_monitoring_of_social_media.html).

### *News and Advocacy: a Comparison*

Reporting and argumentation varied widely based on where the organization stood on the political spectrum. For example, Breitbart wrote similarly on the policy to FAIR and CIS and Huffington Post held similar arguments to the Brennan Center and EFF. As for the New York Times, the only source that is more centrist, the publication did a good job of creating content that represented both the rationale and reaction perspectives overall.

In the rationale grouping, both the advocacy sources—CIS and FAIR—as well as the news source, Breitbart, were consistently and transparently advocating for reduced immigration, oftentimes using some racialized dog whistles to do so. The immigration reduction is not surprising, necessarily as that is a fundamental part of both organizational missions and party platforms of the far right, but the racial language did stand out. In a cursory search of more moderate conservative advocacy groups, such as American Enterprise Institute (AEI) the arguments did not shift too dramatically, mostly emphasizing the need for more stringent vetting policies, but the language was slightly more tempered.

As for the reaction grouping, both news and advocacy sources discussed similar concerns regarding the policy. The biggest differences between news and advocacy coverage was the depth that the policy was investigated, and nuance to the arguments. EFF and the Brennan Center were able to get into the weeds of the policy in a way that most news sources did not. For example, across the board news sources—even many in the rationale group—indicated the potential for the policy to have a chilling effect on free speech. However, rationale advocacy sources were more adept at highlighting specific implications, and digging deep into the consequences of chilling free speech such as suppressing political activism by endangering anonymous free speech, restricting Americans' ability to engage with people from other countries, and deterring journalists, immigrant advocates and filmmakers.

Overall, there was much more published content expressing concerns about the policy, rather than support. To substantiate that finding, over the course of my data collection, the rationale advocates had a total of 158 arguments for the policy; conversely, reaction advocates had 422. The imbalance is especially profound, considering that I had to curtail data collection of reaction sources after a certain cutoff date, because of time constraints and an excess of content. This is especially surprising, given that one of the primary challenges I had identified at the drafting of the methodology was sparse data on both sides of the ideological spectrum. Instead, I found that the reaction side published extensively on the issue, while rationale advocates much more seldom indicated support for the policy. This trend could likely be explained by the lawsuit brought forth by reaction advocates. Additionally, this imbalance could simply be explained by the fact that it is more common to express concern about a policy rather than support. Sure enough, many of the rationale arguments came about during the Obama Administration, expressing criticism that his voluntary social media vetting policy was inadequate.

### **Emergent Argument Themes: Rationale**

Among the rationale sources, there were five different overarching themes—or what I will refer to as “narratives”—that I organized each argument code into. These themes, with the number of times an argument was coded for it in parentheses, included: *National Security is a Top Priority* (82), *Policy is Common Sense* (49), *Policy is Minimally Invasive and Should Go Further* (15),

*Immigrants and Immigration is Harmful* (10), and *Undocumented People do not Have Legal Protections* (6). Within each of these overarching categories, there are a number of nuanced arguments that have their own individual codes. While I will not detail the specific argument codes for each of these thematic narratives, it should be noted that the inadequacy of vetting standards was a code that fell under multiple narratives, including the national security and common sense narratives.

For time and space constraints, I will dig into three of the five themes:

1. National Security is a Top Priority
2. Policy is Common Sense
3. Immigrants and Immigration is Harmful

The decision to focus on these three themes is based on how frequently these particular arguments were cited, as well as which themes seem to speak directly to some of the reactions arguments.

### **National Security is a Top Priority**

Underlying many of the arguments in favor of a social media monitoring policy is the essential role it will play in keeping Americans safe. But national security is broad. Within the differing national security rationales, there are a number of nuanced arguments about the specific ways in which social media monitoring will help defend the country from outside threats. In this section, I will focus on two main components to the national security argument. The first part of this two-part argument is that domestic terrorism perpetrated by immigrants is a major threat to national security. The second part of this argument is that much of the radicalization of extremists either occurs, or is evident in social media spaces.

Immigration is increasingly a national security concern. Under the Trump Administration, the conversation about immigration has shifted precipitously towards a narrative of danger, rather than opportunity. Former Secretary of State Rex Tillerson sent out a cable entitled “Implementing Immediate Heightened Screening and Vetting of Visa Applications”, where he noted that, “All visa decisions are national security decisions”.<sup>38</sup> This sentiment has been echoed by the Department of State (DOS) at large, claiming in a statement that, “Maintaining robust screening standards for visa applicants is a dynamic practice that must adapt to emerging threats. We already request limited contact information, travel history, family member information, and previous addresses from all visa applicants. Collecting this additional information from visa applicants will strengthen our process for vetting these applicants and confirming their identity”.<sup>39</sup>

Conservative news outlets highlight the national security threat that immigrants pose to the U.S. Breitbart News in particular conducted a study that found, “Every year, more than 1.2 million legal immigrants are admitted to the U.S., with the current foreign-born population booming to an unprecedented high of roughly 44.5 million residents... since the September 11, 2001,

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<sup>38</sup> Shear, Michael D. “Trump Administration Orders Tougher Screening of Visa Applicants.” *The New York Times*, March 23, 2017, sec. U.S. <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>.

<sup>39</sup> Chan, Sewell. “14 Million Visitors to U.S. Face Social Media Screening.” *The New York Times*, March 30, 2018, sec. World. <https://www.nytimes.com/2018/03/30/world/americas/travelers-visa-social-media.html>.

terrorist attacks, there have been at least 580 individuals convicted of terrorism, with 380 of those individuals being foreign-born.”<sup>40</sup> Because of the proliferation of these kinds of figures, immigration and visa vetting specifically have come under intense scrutiny.

Overall, U.S. agencies involved in the initiative of “extreme vetting” of visa applicants, believe that social media is a crucial platform to screen. In several statements, DHS and DOS indicate that the collection of social media identifiers will be a boon to the national defense. In one CBP statement the agency asserts, “Collecting social media data will enhance the existing investigative process and provide Department of Homeland Security (DHS) greater clarity and visibility to possible nefarious activity and connections by providing an additional tool set which analysts and investigators may use to better analyze and investigate the case”.<sup>41</sup> While there is no tangible evidence that this is the case, the policy is still relatively new. Furthermore, it is likely that data on visa applicants who fail the screen based on social media content will not be publicized.

### ***Domestic Terrorism is a Major Threat to National Security***

The link between immigration and national security became especially ensconced after the terror attack in San Bernardino, CA in December of 2015. The mass shooting attack—carried out by Tashfeen Malik, a woman who came to the U.S. on a K-1 marriage visa, and her husband, U.S. born Rizwan Farook—was one of the deadliest attacks launched by a legal immigrant on U.S. soil. It was only after the shooting, once 14 people including the shooters were killed and 21 people were injured, that Malik’s radicalization was exposed in private messages on social media. In personal messages on Facebook, Malik pledged allegiance to ISIS and jihad. This incident encouraged increasing scrutiny on the visa vetting process on a bipartisan basis.

In the aftermath of the 2015 attack, there was a broad sense that more extensive vetting policy was overdue. While the evidence of Tashfeen Malik’s radicalization was hidden in private messages, there was outcry that foregoing an analysis of social media before extending immigration benefits was misguided.<sup>42</sup> The Center for Immigration Studies (CIS), an advocacy organization arguing for stricter immigration laws suggested, “This upgrade to visa vetting is long-overdue, and it’s appropriate to apply it to everyone seeking entry, because terrorism is a worldwide problem. The aim is to weed out people with radical or dangerous views.”<sup>43</sup> A bipartisan coalition of members of Congress echoed these sentiments in a joint letter to administration officials saying, “We believe these checks, focused on possible connections to

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<sup>40</sup> Binder, John. “Trump to Mandate Social Media Disclosure for Foreigners Seeking Visas.” Breitbart, May 31, 2019. <https://www.breitbart.com/politics/2019/05/31/trump-to-mandate-social-media-disclosure-for-all-foreign-nationals-seeking-visas-to-u-s/>.

<sup>41</sup> Mora, Edwin. “U.S. Border Patrol May Ask Visiting Foreigners to Voluntarily Disclose Social Media Info,” June 29, 2016. <https://www.breitbart.com/national-security/2016/06/29/u-s-border-patrol-may-ask-foreign-visitors-voluntarily-disclose-social-media-accounts/>.

<sup>42</sup> Nixon, Ron. “House Panel Faults Failure to Review Visa Applicants’ Social Media Use.” *The New York Times*, December 17, 2015, sec. U.S. <https://www.nytimes.com/2015/12/18/us/politics/house-panel-faults-failure-to-review-visa-applicants-social-media-use.html>.

<sup>43</sup> Fox News. “Some Visa Applicants May Have to Fork over Social Media Information to State Dept. | Fox News,” March 30, 2018. <https://www.foxnews.com/politics/some-visa-applicants-may-have-to-fork-over-social-media-information-to-state-dept>.

terrorist activity, should be incorporated into D.H.S.'s vetting process for visa determinations, and that this policy should be implemented as soon as possible."<sup>44</sup>

### ***Learning from History***

The justification for greater screening often appeals to a sense that without an extreme vetting policy, American lives will be endangered.<sup>45</sup> Advocates in favor of greater immigration restrictions express disbelief, querying, "What could these 'immigration, civil liberties, and other groups' be thinking? Apparently in their fantasy world 9/11 never happened and would-be jihadist martyrs have never used social media to declare their allegiance to various and sundry militant Islamic terror groups before carrying out horrific attacks."<sup>46</sup> Many of the arguments clearly express frustration at what anti-immigration advocacy groups characterize as a head-in-the-sand situation, or paralysis by political correctness.

When it comes to policies that curb domestic terrorism, learning from history remains a theme. CIS advocates note that authorities have allowed a number of dangerous foreign visitors through including, "Quazi Mohammad Rezwanaul Ahsan Nafis, an unsuccessful college student arrested in 2012 for plotting to bomb the Federal Reserve; Umar Farouk Abdulmutallab, the 2009 Nigerian underwear bomber; and Thomas E. Duncan, an apparent visa overstayer from Liberia who died of Ebola in Texas in 2014, and also infected a Dallas nurse."<sup>47</sup>

Because of these incidents, much of the discourse indicates that these policies are a necessity. A prominent author on the subject at CIS wrote, "It seems to me that *not* checking everyone out would be by far the greater sin, one approaching the level of misfeasance, given past history — and I believe this to be true even knowing that some people will alter or delete messages and profiles in light of this new vetting check."<sup>48</sup> He goes on to inquire, "After all, how stupid are you if you fail to learn from history? We have an entire new global regimen at airports that was derived solely from the events of September 11, 2001, because we were determined not to let the lessons of that day go unheard."<sup>49</sup>

Finally, there is frustration at the double standard in the public discourse around vetting policies. Because social media screening policies have undergone intense scrutiny for its privacy and free speech concerns, many groups express irritation that national security policies are only popular when a violent incident occurs. As one author put it, "this is part of the 'gotcha either way' mentality of many journalists these days, because you can bet sure as the sun will rise that if another terrorist managed to come to our shores and wreak death and havoc, and it was revealed

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<sup>44</sup> Nixon, Ron. "U.S. to Collect Social Media Data on All Immigrants Entering Country." *The New York Times*, September 28, 2017, sec. U.S. <https://www.nytimes.com/2017/09/28/us/politics/immigrants-social-media-trump.html>.

<sup>45</sup> Cadman, Dan. "'Extreme Vetting' and Social Media Inquiries." CIS.org. Accessed February 10, 2020. <https://cis.org/Cadman/Extreme-Vetting-and-Social-Media-Inquiries>.

<sup>46</sup> Cadman, Dan. "More Nonsense About Aliens' Faux 'Privacy Rights.'" *CIS.Org*. Accessed February 10, 2020. <https://cis.org/Cadman/More-Nonsense-About-Aliens-Faux-Privacy-Rights>.

<sup>47</sup> Vaughan, Jessica. "Immigration 'Law and Order' Starts at State Department." *CIS.Org*, November 22, 2016. <https://cis.org/Immigration-Law-and-Order-Starts-State-Department>.

<sup>48</sup> Cadman, Dan. "'Extreme Vetting' and Social Media Inquiries." CIS.org. Accessed February 10, 2020. <https://cis.org/Cadman/Extreme-Vetting-and-Social-Media-Inquiries>.

<sup>49</sup> *Ibid.*

afterward that he (or she) had exhibited extremist views online, the press... would be merciless.”<sup>50</sup>

### ***Social Media is a Source of Radicalization and Extremism***

Because social media is such a hub for modern discourse, it provides insight into its users. To this end, social media is useful in its promise on two fronts. Because so much information is readily available in the public sphere, social media can be a tool that enables the *identification* people who express anti-American sentiments. But in addition to purely identifying extremists, it gives authorities insights into *radicalization practices*, as social media is often used as a recruitment tool for extremist groups.<sup>51</sup>

The use of social media as a screening source to identify potential extremists seems intuitive. Online spaces are ripe for radicalizing impressionable Internet users. Senior officials are aware of this trend noting, “As we’ve seen around the world in recent years, social media can be a major forum for terrorist sentiment and activity... This will be a vital tool to screen out terrorists, public safety threats, and other dangerous individuals from gaining immigration benefits and setting foot on U.S. soil.”<sup>52</sup> These, “potential insights into whether somebody was an extremist or potentially connected to a terrorist organization or a supporter of the movement,” would help officials discern who poses a public safety threat.<sup>53</sup>

The social media evidence is not purely theoretical, and Tashfeen Malik is not the only example of a violent actor posting about extremist ideologies online before levying an attack. In December 2019, Mohammed Saeed Alshamrani, a Saudi national who had defended jihad and expressed support for 9/11 on social media, opened fire in a classroom on a Naval base in Pensacola Florida, killing three.<sup>54</sup> Incidents like this create outrage that social media is not scanned more scrupulously for warning signs of terrorist activity, or proclivity to act in such a way before making it to the U.S.

What’s more, social media can be a source of many anti-American sentiments. After the San Bernardino shooting, FBI Director James Comey was quoted as saying, “Twitter works as a way to sell books, as a way to promote movies, and it works as a way to crowdsource terrorism — to

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<sup>50</sup> Cadman, Dan. “‘Extreme Vetting’ and Social Media Inquiries.” CIS.org. Accessed February 10, 2020. <https://cis.org/Cadman/Extreme-Vetting-and-Social-Media-Inquiries>.

<sup>51</sup> Nixon, Ron. “U.S. to Further Scour Social Media Use of Visa and Asylum Seekers.” *The New York Times*, February 23, 2016, sec. U.S. <https://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>52</sup> Binder, John. “Trump to Mandate Social Media Disclosure for Foreigners Seeking Visas.” Breitbart, May 31, 2019. <https://www.breitbart.com/politics/2019/05/31/trump-to-mandate-social-media-disclosure-for-all-foreign-nationals-seeking-visas-to-u-s/>.

<sup>53</sup> May, Caroline. “Report: Immigration Officials Blocked from Reviewing Visa Applicants’ Social Media Posts.” Breitbart, December 14, 2015. <https://www.breitbart.com/politics/2015/12/14/report-immigration-officials-blocked-reviewing-visa-applicants-social-media-posts/>.

<sup>54</sup> Furr, Amy. “Pensacola Shooter Posted ‘Countdown Has Started’ on 9/11.” Breitbart, December 14, 2019. <https://www.breitbart.com/crime/2019/12/14/report-pensacola-shooter-posted-countdown-has-started-to-social-media-on-9-11/>.

sell murder.<sup>55</sup> Because of these radicalization trends online, it makes sense for authorities to have a more active presence online, monitoring discourse and using these analyses to determine immigration benefits.

Because online spaces have a history of pushing people towards extremism, the impetus to *continue monitoring* the social media accounts of immigrants is intensified. Officials with DHS acknowledge that it is possible for people to slip through the cracks and pass vetting checks, but, “their biggest worry was the radicalization of immigrants after their arrival in the United States”.<sup>56</sup> As a senior intelligence official noted, “I can tell you who a person is today but I can’t tell you who they will become tomorrow.”<sup>57</sup> These realities highlight the increasing pressure for law enforcement to intensify their efforts, as the scope of technology expands and its effectiveness as a recruitment tool continues.<sup>58</sup>

### ***Vetting Standards are Inadequate; Terrorists can “Go Dark”***

Social media radicalization is of increasing concern as the ability of potential bad actors to go off the technological grid widens. More specifically, the “going dark problem”, according to the FBI, is a phenomenon in which law enforcement is given appropriate legal authority to access stored data and communications, but does not have the technological capacity to do so.<sup>59</sup>

Acknowledging this emerging disadvantage for law enforcement, the Obama Administration’s refusal to access publicly available social media information was all the more confounding to rationale advocates. As Senator John McCain (R-AZ) put it, “This purposeful refusal to examine publicly available information defies belief, especially as we grapple with complex technical questions to address the problem of criminals and terrorists ‘going dark,’ or utilizing readily available encryption to escape court-ordered government search.”<sup>60</sup> As Sen. McCain’s colleague Rep. Rep. Vern Buchanan (R-FL) said, “Voluntary disclosure won’t keep anyone safe. If we want to win on the digital battlefield, mandatory screening is required.”<sup>61</sup>

These gaps in the collection of data, and more specifically the voluntary nature under the Obama Administration created some inclinations towards religion-based screening. As a major part of President Trump’s presidential campaign, “Mr. Trump accused the Obama administration of failing to properly screen people coming into the United States...As a candidate, Mr. Trump

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<sup>55</sup> Baker, Al, and Marc Santora. “San Bernardino Attackers Discussed Jihad in Private Messages, F.B.I. Says.” *The New York Times*, December 16, 2015, sec. U.S. <https://www.nytimes.com/2015/12/17/us/san-bernardino-attackers-discussed-jihad-in-private-messages-fbi-says.html>.

<sup>56</sup> Nixon, Ron. “Arrest of Refugee Fuels U.S. Debate on Immigration Policy.” *The New York Times*, February 19, 2016, sec. U.S. <https://www.nytimes.com/2016/02/20/us/politics/us-immigration-policy-screening.html>.

<sup>57</sup> *Ibid.*

<sup>58</sup> Nixon, Ron. “U.S. to Further Scour Social Media Use of Visa and Asylum Seekers.” *The New York Times*, February 23, 2016, sec. U.S. <https://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>59</sup> Federal Bureau of Investigation. “Going Dark.” Page. Accessed March 28, 2020. <https://www.fbi.gov/services/operational-technology/going-dark>.

<sup>60</sup> Hayward, John. “GOP Pushes Social Media Check on Prospective Immigrants.” *Breitbart*, December 16, 2015. <https://www.breitbart.com/national-security/2015/12/16/republicans-push-require-social-media-check-prospective-immigrants/>.

<sup>61</sup> Nixon, Ron. “Visitors to the U.S. May Be Asked for Social Media Information - The New York Times.” Accessed April 17, 2020. <https://www.nytimes.com/2016/06/29/us/homeland-security-social-media-border-protection.html?searchResultPosition=8>.

vowed to ban all incoming Muslims until leaders could ‘figure out what the hell is going on.’ Later, he backed away from a total ban on Muslims but promised ‘extreme vetting’ of those trying to come to the United States.”<sup>62</sup> Put more acutely, President Trumps promises of extreme vetting resonated among rationale advocates who believe that, “if they’re coming to the U.S. for a selfie in front of Mount Rushmore, they’ll probably comply. But the people who have been working with ISIS, who come to the United State to carry out some maniacal plan to murder as many people as possible, will probably not be so forthcoming.”<sup>63</sup>

### ***Summary of National Security Findings***

The national security narrative hinges on anecdotal evidence of our vulnerability to domestic terrorism attacks. These prior terrorist incidents reinforce the need to expand security measures, especially when it comes to immigration. Rationale advocates believe that we need to learn from our history, and stop letting political correctness impede our ability to protect American lives. This is especially salient because online spaces are such a hub for extremist activity. Extreme online vetting can help confirm the identities of people looking to come to the U.S. but can also provide insights into potential radicalization processes online. Finally, with concerns about the ability of domestic terrorists to go dark, refusing mandatory social media screening intensifies the burden on law enforcement.

### **Policy is Common Sense**

Much of the discourse surrounding this policy, from the rationale side, is simply that the policy is common sense. It should be uncontroversial, an obvious step towards securing the homeland. According to rationale advocates, the policy is useful on several fronts, even discounting the most obvious national security motivations. First, collecting the additional social media information could help to confirm a visa applicant’s identity.<sup>64</sup> Second, the policy could help immigration officials determine evidence for fraud, especially by requiring the submission of fake account identifiers.<sup>65</sup> Third, the screening can be used to determine who ought to be screened more. As former Secretary of State, Rex Tillerson, described in a set of cables that certain populations should be designated as, “warranting increased scrutiny,” and that those groups may be subject to a decision made only after more rigorous screening”.<sup>66</sup>

Many of these arguments express disbelief at the outrage at this policy. Policy rationale advocates tout this social media vetting policy as nothing more than an additional investigative tool. In an official CBP announcement, it was made clear that, “Collecting social media data will enhance the existing investigative process and provide Department of Homeland Security (DHS) greater clarity and visibility to possible nefarious activity and connections by providing an

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<sup>62</sup> Shear, Michael D. “Trump Administration Orders Tougher Screening of Visa Applicants.” *The New York Times*, March 23, 2017, sec. U.S. <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>.

<sup>63</sup> FAIR Staff. “DHS Finally Thinks to Check Twitter.” *ImmigrationReform.Com* (blog), July 5, 2016. <https://www.immigrationreform.com/2016/07/05/dhs-finally-thinks-to-check-twitter/>.

<sup>64</sup> Chan, Sewell. “14 Million Visitors to U.S. Face Social Media Screening.” *The New York Times*, March 30, 2018, sec. World. <https://www.nytimes.com/2018/03/30/world/americas/travelers-visa-social-media.html>.

<sup>65</sup> AP. “US to Use Fake Social Media to Check People Entering Country.” *Breitbart*. Accessed March 5, 2020. <https://www.breitbart.com/news/us-to-use-fake-social-media-to-check-people-entering-country/>.

<sup>66</sup> Shear, Michael D. “Trump Administration Orders Tougher Screening of Visa Applicants.” *The New York Times*, March 23, 2017, sec. U.S. <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>.

additional tool set which analysts and investigators may use to better analyze and investigate the case.”<sup>67</sup>

The common sense argument proliferated most in the aftermath of the San Bernardino, CA shootings, and was initially framed as negligence on the part of the Obama Administration. Senate Republicans were especially critical of this perceived gap in immigration screening. Then presidential candidate Marco Rubio (R-FL) was quoted as saying, “This is exactly why the American people increasingly have zero confidence that this administration has any idea on how to keep our country safe. To not look at that as a factor and determining whether someone should be allowed to travel here just defies all explanation.”<sup>68</sup> Sen. Rubio’s colleague, Sen. McCain echoed these sentiments, “It is unacceptable that Congress has to legislate on this, and that it wasn’t already the Department of Homeland Security’s practice to take such commonsense steps when screening individuals entering this country.”<sup>69</sup>

What’s more, rationale advocates are quick to remind reaction advocates—who tend to exist on the liberal spectrum of American politics—that this policy garnered bipartisan support after San Bernardino. Congressman Stephen Lynch (D-MA) was one of the first Democrats on record saying, “I think it’s entirely reasonable to ask people who are coming from troubled areas or countries that support terrorism for their social media accounts.”<sup>70</sup> Additionally, a bicameral group of lawmakers joined in co-signing a letter to Jeh Johnson, the then Secretary of Homeland Security under President Obama, saying, “We believe these checks, focused on possible connections to terrorist activity, should be incorporated into D.H.S.’s vetting process for visa determinations, and that this policy should be implemented as soon as possible.”<sup>71</sup> These statements underscore some of the incredulousness of rationale advocates at the resistance on the left today.

Not only is the resistance of reaction advocates confounding, it is also actively inhibiting, according to rationale sources. In one example of the Obama Administration’s aversion to social media, “One source with knowledge of DHS screening said that, for years, employees were prevented from even accessing social media sites because of government firewalls designed to

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<sup>67</sup> Mora, Edwin. “U.S. Border Patrol May Ask Visiting Foreigners to Voluntarily Disclose Social Media Info.” Breitbart, June 29, 2016. <https://www.breitbart.com/national-security/2016/06/29/u-s-border-patrol-may-ask-foreign-visitors-voluntarily-disclose-social-media-accounts/>.

<sup>68</sup> Hayward, John. “GOP Pushes Social Media Check on Prospective Immigrants.” Breitbart, December 16, 2015. <https://www.breitbart.com/national-security/2015/12/16/republicans-push-require-social-media-check-prospective-immigrants/>.

<sup>69</sup> Hayward, John. “GOP Pushes Social Media Check on Prospective Immigrants.” Breitbart, December 16, 2015. <https://www.breitbart.com/national-security/2015/12/16/republicans-push-require-social-media-check-prospective-immigrants/>.

<sup>70</sup> Nixon, Ron. “House Panel Faults Failure to Review Visa Applicants’ Social Media Use.” *The New York Times*, December 17, 2015, sec. U.S. <https://www.nytimes.com/2015/12/18/us/politics/house-panel-faults-failure-to-review-visa-applicants-social-media-use.html>.

<sup>71</sup> Nixon, Ron. “U.S. to Collect Social Media Data on All Immigrants Entering Country.” *The New York Times*, September 28, 2017, sec. U.S. <https://www.nytimes.com/2017/09/28/us/politics/immigrants-social-media-trump.html>.

prevent staff from engaging in personal social networking on the job.”<sup>72</sup> This is more than an oversight, according to rationale advocates; it also strains other aspects of the process. By deeming online forums off-limits, government officials are forcing other vetting operations to make determinations without adequate information. As one rationale advocate noted, “If the U.S. government is so politically correct, that they won’t even review their social media, how do we think they’re going to find in a one hour or half hour interview at a consulate the true intentions of these people?”<sup>73</sup>

### ***Arguments Against Social Media Vetting Fall Flat***

The flipside of the commonsense argument is that counterarguments are insufficient to overwhelm the policy’s utility. Charles Krauthammer, a conservative political pundit agreed that the lack of vetting social media is incomprehensible, and moreover, “The argument against it, which apparently prevailed a few years ago, within DHS, is ridiculous. Number one, is that we don’t want to invade their privacy. Well, it’s absurd to say that looking at a public posting, as an invasion of privacy, and it’s doubly absurd if that’s done in the case of a non-American, outside the country, who possesses zero constitutional rights.”<sup>74</sup>

If not the privacy arguments, rationale advocates posit that bad PR is the prevailing inhibitor of implementing the screening policy. These assertions are not unfounded, especially since the acting under-secretary of Homeland Security, John Cohen, admitted on record, “The primary concern was that it would be viewed negatively if it were disclosed publicly and there were concerns that it would be embarrassing.”<sup>75</sup> As a result, “immigration officials have been secretly barred from looking at the social media posts of prospective immigrants, due to political correctness.”<sup>76</sup> This revelation was met by outrage, especially since the PR would be much more severe in the case of another attack levied by an immigrant that was not vetted on social media. More forcefully put, “Deliberately ignoring social media led to much more than bad public relations in San Bernardino, where Islamist Tashfeen Malik was allowed to immigrate, despite Facebook activity showing violent jihad support. She and her husband Syed Farook went on to murder 14 people at a Christmas party in the name of the Islamic State.”<sup>77</sup>

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<sup>72</sup> May, Caroline. “Memo: Obama Admin. Rejected Plan to Screen Social Media Use in 2011.” Accessed April 17, 2020. <https://www.breitbart.com/politics/2015/12/17/memo-obama-admin-rejected-plan-screen-social-media-use-2011/>.

<sup>73</sup> Fields, Michelle. “Blackwater Founder: U.S. Government Doesn’t Vet Immigrants, Outsources To Other Countries.” Accessed April 17, 2020. <https://www.breitbart.com/politics/2015/12/18/blackwater-founder-u-s-government-doesnt-vet-immigrants-outsources-countries/>.

<sup>74</sup> Hanchett, Ian. “Krauthammer: DHS’ Lack of Vetting of Social Media Posts For Visas Is ‘Incomprehensible.’” Breitbart, December 18, 2015. <https://www.breitbart.com/clips/2015/12/17/krauthammer-dhs-lack-of-vetting-of-social-media-posts-for-visas-is-incomprehensible/>.

<sup>75</sup> Hayward, John. “GOP Pushes Social Media Check on Prospective Immigrants.” Breitbart, December 16, 2015. <https://www.breitbart.com/national-security/2015/12/16/republicans-push-require-social-media-check-prospective-immigrants/>.

<sup>76</sup> Hayward, John. “GOP Pushes Social Media Check on Prospective Immigrants.” Breitbart, December 16, 2015. <https://www.breitbart.com/national-security/2015/12/16/republicans-push-require-social-media-check-prospective-immigrants/>.

<sup>77</sup> Hayward, John. “GOP Pushes Social Media Check on Prospective Immigrants.” Breitbart, December 16, 2015. <https://www.breitbart.com/national-security/2015/12/16/republicans-push-require-social-media-check-prospective-immigrants/>.

Yet, even with these fervently commonsense arguments, there is a sense that the policy still does not go far enough. Even with the social media vetting, there are serious gaps and the policy should go further to maximize its effectiveness. These concerns are not overwhelming enough to dismantle the justification for a less invasive policy altogether. Rationale advocates still believe the policy will be somewhat effective, even if, “some people will alter or delete messages and profiles in light of this new vetting check.”<sup>78</sup> Though even with espousal of support, rationale advocates do not mince words in their identification of the gaps, noting, “So, all you refugees and immigrants out there, you've been warned. You'd better have a "clean" official Facebook account under your real name if you want to make it into the United States. But no worries, you have time to get your act together. Though if you're using a pseudonym, you may not need to bother...”<sup>79</sup>

### ***Summary of Common Sense Findings***

Rationale advocates are adamant that social media is an obvious source of information to make determinations about who should be entering the country. Social media provides an open hub of sociological information, and neglecting to analyze social media information burdens other aspects of the immigration screening process. Because a bipartisan agreement about the utility of this policy used to exist, resistance is especially confusing to rationale advocates. This is especially true since rationale advocates claim that the benefits outweigh the dangers of foregoing such a policy. Privacy infringements of people who do not have U.S. constitutional rights and bad press should not get in the way of protecting the American people. While rationale advocates acknowledge that the policy is not perfect, neglecting to implement it would be a dangerous oversight.

### **Immigrants and Immigration is Harmful**

A few of the arguments that emerged in favor of the social media monitoring policy were slightly more transparent in their disdain for immigrants. In most of these arguments, immigrants are referred to as “aliens” and conflated with terrorists more broadly. Within this narrative, arguments fell into three main themes—restricting all legal immigration from travel ban countries, scrutinizing access to public benefits and likelihood to stay, and the inability of immigrants to assimilate.

### ***Travel Ban Countries***

In many cases, discourse around immigration from Muslim majority countries is explicitly referred to as a danger. Under President Obama, the emphasis of immigration policy was to admit some refugees fleeing from violent contexts while still protecting national security and curbing terror incidents. This proved to be a challenging balance to strike, and more conservative officials and advocates criticized him harshly for it. As Breitbart reported, “The Obama administration says it plans to admit at least 10,000 Syrian refugees to the U.S. despite concerns

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<sup>78</sup> Cadman, Dan. “‘Extreme Vetting’ and Social Media Inquiries.” CIS.org. Accessed February 10, 2020. <https://cis.org/Cadman/Extreme-Vetting-and-Social-Media-Inquiries>.

<sup>79</sup>Rush, Nayla. “Attention Syrian Refugees: U.S. Is Looking into Your Facebook Accounts.” CIS.org. Accessed March 5, 2020. <https://cis.org/Rush/Attention-Syrian-Refugees-US-Looking-Your-Facebook-Accounts>.

raised by top national security officials and Republicans that the government lacks the information to fully vet refugees from the terror hot-spot”.<sup>80</sup>

Rep. Michael McCaul was one of the conservative voices pushing for the expansion of social media vetting under President Obama, in light of the refugee numbers being reported. He has since maintained his stance on restricting legal immigration from “terror hot-spots”. In fact, in a statement responding to SCOTUS upholding President Trump's “Proclamation 9645: Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats”, he asserted that, “We should not allow people from adversarial states or conflict zones into America until they have been vetted to the fullest extent possible”.<sup>81</sup> This statement reflects the skepticism of any immigrant fleeing a travel ban country—even though the likelihood of someone seeking asylum within the U.S. would be doing so in an attempt to flee one of these violent contexts.

In these cases, the vision of America’s role in harboring immigrants is not as a destination of refuge, but rather a vulnerability that is likely to be exploited. It is through this lens that president Trump’s “extreme vetting” measures are lauded. As Breitbart frames it, “Already, the Trump administration’s travel ban from eight countries that sponsor terrorism has been effective in ending nearly all legal immigration to the U.S. from those regions”.<sup>82</sup> This is a shift from more common discourse around curbing illegal immigration to actively attempting to limit legal immigration from countries that have been deemed as sponsoring terrorism.

### ***Likelihood to Stay and Public Benefits***

The concerns that dangerous actors may come to the U.S. are coupled with fears that those same dangerous actors will *remain* in the U.S. Because the scope of interest within the rationale perspective is less to provide refuge, and more to protect the homeland from potential threats from specific countries, many social media vetting advocates also encourage the continuous re-vetting of refugees. The rationale behind a re-vetting is to ensure that immigrants are indeed “fleeing” for a finite timeframe. Effectively, “A re-vetting of aliens who have received refugee or asylee status is particularly important to examine whether they return to the country from which they claimed to fear persecution.”<sup>83</sup> There is a relatively blatant skepticism that refugees and asylum seekers are in fact gravely under threat in their home countries. While the refugee and asylum admittance process is detailed and scrupulous, these fears are relatively consistent among advocates of social media vetting policies.

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<sup>80</sup> May, Caroline. “Obama Admin. Not Currently Screening Social Media of All Syrian Refugees.” Breitbart, February 3, 2016. <https://www.breitbart.com/politics/2016/02/03/obama-admin-not-currently-screening-social-media-of-all-syrian-refugees/>.

<sup>81</sup> McCaul, Michael. “McCaul Statement on Supreme Court Ruling on Enhanced Vetting.” Congressman Michael McCaul, June 26, 2018. <https://mccaul.house.gov/media-center/press-releases/mccaul-statement-on-supreme-court-ruling-on-enhanced-vetting>.

<sup>82</sup> Binder, John. “Trump to Mandate Social Media Disclosure for Foreigners Seeking Visas.” Breitbart, May 31, 2019. <https://www.breitbart.com/politics/2019/05/31/trump-to-mandate-social-media-disclosure-for-all-foreign-nationals-seeking-visas-to-u-s/>.

<sup>83</sup> CIS Staff. “Revisiting ‘A Pen and a Phone’: A Midterm Assessment.” CIS.org. Accessed February 17, 2020. <https://cis.org/Report/Revisiting-Pen-and-Phone-Midterm-Assessment>.

The skepticism of immigrants and the likelihood of overstays is so entrenched that there is ensuing criticism of foreign student visas. According to those in favor of more restrictive immigration policies, “[The Dept. of] State, like Congress, has been extraordinarily deferential to the higher education industry in setting policies, even to the point where now our consular officers overseas are required to help staff college fairs to assist U.S. schools in recruiting foreign students.”<sup>84</sup> While the argument for this kind of behavior is that it will help to make the U.S. more competitive, there is also an assertion that “These visas are frequently overstayed or used as a pretext for entry, and are coveted by terrorists because they allow a long duration of stay.”<sup>85</sup>

The length of stay is a particular point of contention within the context of student visas. There are a number of claims that the Obama Administration is not nearly discerning enough about the who should receive student visas and if they are likely to return to their country of origin. This is information that could feasibly be determined by content posted on social media. Instead, under Obama’s visa vetting process allegedly, “officers are told to ignore the section of the law that says applicants must show a likelihood to return home, and suspend all judgment on applicant credibility.”<sup>86</sup> In the eyes of conservative immigration advocates, this is a massive unforced vulnerability, “to allow hundreds of thousands of unattached young foreigners into the country to take classes at community colleges, marginal schools, or vocational programs like dog grooming academies, especially when terrorist groups are promising to infiltrate our visa programs.”<sup>87</sup>

Concerns about legal immigration do not stop at terrorism and overstays. There are many arguments that express anxiety about immigrants receiving public benefits. Extreme vetting is popular in these contexts not only for its potential to root out possible terrorists, but to keep, “other dangerous individuals from gaining immigration benefits and setting foot on U.S. soil”.<sup>88</sup> Some rationale advocates claim that these vetting measures are critical for both national and economic security. Specifically that, “the goal of the vetting is not just to detect those who pose a threat, but also to prevent more illegal immigration, which displaces Americans and legal immigrants from job opportunities and burdens taxpayers with the cost of welfare services for the illegal aliens and their children.”<sup>89</sup> President Trump has proposed a number of policy initiatives that target the public benefit fear. Specifically, the proposal to screen immigrants who are likely to become a public charge is often applauded in rationale circles. While this policy is outside the scope of the social media vetting standard, it is worth contextualizing these fears in other policy proposals from the Trump Administration.

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<sup>84</sup> Vaughan, Jessica. “Immigration ‘Law and Order’ Starts at State Department.” CIS.org. Accessed February 17, 2020. <https://cis.org/Immigration-Law-and-Order-Starts-State-Department>.

<sup>85</sup> Vaughan, Jessica. “Immigration ‘Law and Order’ Starts at State Department.” CIS.org. Accessed February 17, 2020. <https://cis.org/Immigration-Law-and-Order-Starts-State-Department>.

<sup>86</sup> Vaughan, Jessica. “Immigration ‘Law and Order’ Starts at State Department.” CIS.org. Accessed February 17, 2020. <https://cis.org/Immigration-Law-and-Order-Starts-State-Department>.

<sup>87</sup> Vaughan, Jessica. “Immigration ‘Law and Order’ Starts at State Department.” CIS.org. Accessed February 17, 2020. <https://cis.org/Immigration-Law-and-Order-Starts-State-Department>.

<sup>88</sup> Binder, John. “Trump to Mandate Social Media Disclosure for Foreigners Seeking Visas.” Breitbart, May 31, 2019. <https://www.breitbart.com/politics/2019/05/31/trump-to-mandate-social-media-disclosure-for-all-foreign-nationals-seeking-visas-to-u-s/>.

<sup>89</sup> Vaughan, Jessica. “Immigration ‘Law and Order’ Starts at State Department.” CIS.org. Accessed February 17, 2020. <https://cis.org/Immigration-Law-and-Order-Starts-State-Department>.

### ***Incapable of Assimilation***

In some contexts, social media vetting is thought to predict whether or not someone is likely to assimilate into American culture. While there is much guesswork involved in such an endeavor, social media can give profound insight into a person's beliefs and plans. To this end, it is not enough that, "aliens applying for resident status are again vetted against national crime and security information databases when they seek to adjust status"<sup>90</sup>. Instead, these advocates encourage an, "examination of social media and other indices of one's eligibility to adjust, and perhaps for a limited pool of applicants based on statistical sampling methods, in-depth examination of their bona fides and eligibility to adjust."<sup>91</sup>

This leaves the question of what specifically the U.S. government would need to look for in order to make these determinations. However, in some of the more conservative punditry, these red flags will not be difficult to discern. As Dan Cadman with CIS puts it:

"But even stopping short of that, when people go online to express their hatred of the West, and Western ways of living— or, more specifically, American cultural values and mores — is it unfair to conclude that they are almost certainly incapable of assimilation into the body politic... and ask why we would wish to grant them permission to enter or reside here? Again, given past history, doesn't that represent an unnecessary clear and present danger to our communities?"<sup>92</sup>

As clear and forceful as Cadman's opinion may be on the issue, there is still ambiguity in some of these determinations. Where would one draw a distinction between expressing hate towards the West and expressing a constructive criticism? Should anyone who expresses any disagreement with U.S. politics, policy, or Western constructs automatically be barred from entry? Should these determinations be made by individuals and subject to human error, or automated and subject to misinterpretation of tone or sarcasm?

In one response to some of these ambiguities, rationale advocates drew a comparison to more benign realities of everyday life. In this analogy, admitting visa applicants into the country is akin to dating, and most people would not agree to date someone without thoroughly investigating their social media presence. The fact that immigration officers do not take such precaution is seen as negligent. As staff at FAIR asserted, "Most of my friends wouldn't agree to meet somebody for coffee until they've thoroughly checked all of their social media accounts, found their Myspace page from middle school, and read their college senior thesis online. *That* is

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<sup>90</sup> CIS Staff. "Revisiting 'A Pen and a Phone': A Midterm Assessment." CIS.org. Accessed February 17, 2020. <https://cis.org/Report/Revisiting-Pen-and-Phone-Midterm-Assessment>.

<sup>91</sup> CIS Staff. "Revisiting 'A Pen and a Phone': A Midterm Assessment." CIS.org. Accessed February 17, 2020. <https://cis.org/Report/Revisiting-Pen-and-Phone-Midterm-Assessment>.

<sup>92</sup> Cadman, Dan. "'Extreme Vetting' and Social Media Inquiries." CIS.org. Accessed February 17, 2020. <https://cis.org/Cadman/Extreme-Vetting-and-Social-Media-Inquiries>.

the kind of dedication we should be seeing from immigration officers, whose job it is to ensure those coming to the U.S. are not threats to safety.”<sup>93</sup>

### ***Racism Claims are Baseless***

Rationale advocates also assert that these kinds of targeted vetting measures are not racist. The broader claim is that, decisions about more intense scrutiny will be determined based on regions that have more terrorist activity, not on the national identity of the applicant. While this may be a difficult distinction to divorce, rationale advocates allege that despite the, “near-obligatory reference to ‘discriminatory denials’ that will ‘unfairly target immigrants and travelers from Muslim-majority countries’...the policy applies to everyone and could just as easily result in detection of a Sikh separatist from India who advocates violence, or a member of one of Colombia's rebel splinter groups who have refused to go along with the negotiations between the government and FARC (Armed Revolutionary Forces of Colombia)”.<sup>94</sup>

### ***Summary of Immigration is Harmful Findings***

Within this narrative, there is a great amount of fear both about national security as it relates to domestic terrorism, but also as it relates to economic security, and sociological concerns. First, it is clear that closely scrutinizing people coming from regions that are deemed “terror hot spots” is a high priority. Rationale advocates believe that immigration from these countries, including legal immigration, should be curbed. In addition to vetting for potential threats to society, the government should screen for the likelihood to overstay a visa. This is especially critical for student visas that provide a long length of stay and are a vulnerability to be exploited. In general, rationale advocates believe that it is bad practice to let people into the country who cannot assimilate or who have anti-Western views. However, rationale advocates are also adamant that these assertions and policies are not racist, rather they are forensic about where government invests the majority of its scrutiny.

### **Emergent Argument Themes: Reaction**

The reaction sources had many varied and frequently cited themes. Overall there were eight different overarching categories. These themes, with the number of times an argument was coded for it in parentheses, included: *Policy Infringes on Constitutional Protections* (79), *Policy Contradicts American Values* (92), *Policy is Ineffective* (62), *Policy is Illegal* (30), *Policy is Unnecessary* (23), *Policy is Unduly Invasive* (83), *Policy is Vague* (18), and *Policy Harms American Competitiveness* (35). Again, each of these categories has a number of varied and nuanced arguments that fall within its scope.

For time and space constraints, I will dig into three of the eight themes:

1. Policy Infringes on Constitutional Protections
2. Policy is Ineffective
3. Policy Contradicts American Values

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<sup>93</sup> FAIR Staff. “DHS Finally Thinks to Check Twitter.” *ImmigrationReform.Com* (blog), July 5, 2016. <https://www.immigrationreform.com/2016/07/05/dhs-finally-thinks-to-check-twitter/>.

<sup>94</sup> Cadman, Dan. “‘Extreme Vetting’ and Social Media Inquiries.” CIS.org. Accessed February 17, 2020. <https://cis.org/Cadman/Extreme-Vetting-and-Social-Media-Inquiries>.

These three themes were selected because they were frequently referenced more so than other argument categories. Additionally, these themes address the rationale stances more head on, which will help create cohesion in the recommendations.

### **Policy Infringes on Constitutional Protections**

Many arguments in opposition to this policy express concern regarding its constitutional implications. It is critical to note that these arguments embody two fundamental premises. First, that even if non-citizens are not afforded constitutional protections, it is an inherently American ideal to value those constitutional protections that this country espouses. Second, that this policy does not exist in a vacuum and could very well impede upon the constitutional protections of *American citizens* as well.

### ***Infringements on Free Speech***

Reaction advocates are unyielding about the role social media plays in free speech. In order to understand why reaction groups are distraught by the policy, it is important to contextualize the centrality of these online forums to modern discourse. This is a fact that even the Supreme Court of the United States (SCOTUS) recognizes; that, “social media platforms offer the most important spaces for people to participate in the ‘modern public square’ or otherwise explore ‘the vast realms of human thought and knowledge.’ This digital forum is interconnected and international in ways that profoundly benefit American cultural life.”<sup>95</sup> In a worst-case scenario, this policy could discourage engagement in a foundational element of relational society.

But even if users do not opt out of social media platforms altogether, there is a concern that there will be severe self-censorship. Even though speech and freedom of religion are constitutionally protected, the expression of either could raise red flags for immigration officials depending on the content and identity of the individual posting online. In this vein, “protected speech, particularly of the political or religious variety which might raise red flags with U.S. officials, will inevitably be chilled.”<sup>96</sup> This reality increases the likelihood that, “many will surely sanitize their own postings and Internet presence to ensure that nothing online would provide cause for further scrutiny or suspicion by a rushed CBP officer.”<sup>97</sup> Again, these chilling effects are not confined to visa applicant non-citizens. Americans with connections to people internationally that may apply for a visa could be aware of CBP’s policy and how it may compromise free speech, and anonymous free speech.<sup>98</sup> Because of this, there is a fear that, “many Americans—

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<sup>95</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

<sup>96</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>97</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>98</sup> Buttar, Shahid. “U.N. Joins Critique of Proposed CBP Social Media Questions.” Electronic Frontier Foundation, October 18, 2016. <https://www.eff.org/deeplinks/2016/10/un-joins-critique-proposed-cbp-social-media-questions>.

especially those familiar with our country’s history of suppressing dissent—may rationally decide to limit their online speech to avoid controversial topics that might invite scrutiny.”<sup>99</sup>

Further, the uncertainty about the specific types of speech that will raise alarm bells with immigration authorities can exacerbate the chilling effect on speech. In reaction to the announcement of the policy, some non-citizen social media users wondered, “Does it mean someone’s visa application will likely be rejected if he/she has been critical of the U.S.? What about your sacred ‘freedom of speech?’”<sup>100</sup> This sentiment not only indicates the possible reality of a chilling effect on free speech, but also the hypocrisy of the United States betraying one of its foremost values. Additionally, these stakes seem especially high because CBP does not notify users if their personally identifiable information (PII) is collected, and there are no restrictions on information sharing between U.S. agencies, or in some cases foreign governments.<sup>101</sup>

### ***Infringements on Anonymous Free Speech***

Just as free speech is a value widely held by our founding documents and more broadly, our cultural ethos, so too is the value of anonymous free speech. Anonymity is essential in contributing to a free discourse.<sup>102</sup> In fact, “anonymity was used by the founding fathers – including Alexander Hamilton and James Madison – to debate the theories underpinning the U.S. Constitution”.<sup>103</sup> This anonymity can be utilized through the creation of pseudonym social media accounts. These can be useful for a number of reasons, including the ability to, “conduct research in sensitive online communities, to avoid stalkers and trolls in public forums, to promote or participate in political demonstrations, or to speak out against their own governments.”<sup>104</sup>

Reaction advocates argue that by requiring visa applicant to submit the handles of pseudonym accounts, the government is asking, “these individuals to surrender their anonymity and accept the risk that their handles will end up in the hands of rights-abusing governments, hackers, and others.”<sup>105</sup> Additionally, users may be concerned that giving the U.S. government their

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<sup>99</sup> Buttar, Shahid. “U.N. Joins Critique of Proposed CBP Social Media Questions.” Electronic Frontier Foundation, October 18, 2016. <https://www.eff.org/deeplinks/2016/10/un-joins-critique-proposed-cbp-social-media-questions>.

<sup>100</sup> Chan, Sewell. “14 Million Visitors to U.S. Face Social Media Screening.” *The New York Times*, March 30, 2018, sec. World. <https://www.nytimes.com/2018/03/30/world/americas/travelers-visa-social-media.html>.

<sup>101</sup> Cope, Sophia and Saira Hussain. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. <https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>102</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>103</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>104</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

<sup>105</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

anonymous account information could mean that, “PII collected could lead to their true identities being unmasked, despite that the Supreme Court has long held that anonymous speech is protected by the First Amendment”.<sup>106</sup> This is especially dangerous for visa applicants that are attempting to flee authoritarian regimes. Further, because, “[n]o assurance of confidentiality is provided,” collection of anonymous social media handles tied to their real-world identities could present a dangerous situation for individuals living under oppressive regimes who use such accounts to criticize their government or advocate for the rights of minority communities.”<sup>107</sup>

### ***Freedom of Association***

While often not defended as vehemently by reaction advocates as speech, the freedom of association is also jeopardized. Free speech advocates make it clear that, “It is also a violation of the First Amendment right of Americans to hear from and engage with the citizens of other nations.”<sup>108</sup> Again, this would be harmful to the, “the civil liberties and human rights—free speech and privacy, specifically—of not only the visa applicants themselves, but also those of their American contacts.”<sup>109</sup> Reaction advocates believe this policy would, “have a wide-ranging impact on freedom of expression—all while doing little or nothing to protect Americans from terrorism.”<sup>110</sup>

Furthermore, this policy could dampen international online relationships, limit travel, and limit cultural engagement. In some cases, reaction advocates warn that visa applicants may be, “disassociating from online connections for fear that others’ postings may endanger the applicant’s immigration benefit.”<sup>111</sup> Additionally, some visa applicants may forego the process entirely and choose not to travel to the U.S., despite the connections they might have there, “out of concern their information will be collected and mishandled, and some are scared to speak publicly for fear their information will be collected and misused.”<sup>112</sup> Finally, the cultural implications are of distinct concern—especially given that the pending lawsuit surrounding these policies is being brought to court by filmmakers. They posit that, “By conditioning the ability of foreign documentary filmmakers to travel to the United States on their willingness to submit to

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<sup>106</sup> Cope, Sophia and Saira Hussain. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. <https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>107</sup> Hussain, Saira and Sophia Cope. “DEEP DIVE: EFF to DHS: Stop Mass Collection of Social Media Information.” Electronic Frontier Foundation, November 25, 2019. <https://www.eff.org/deeplinks/2019/11/deep-dive-eff-dhs-stop-mass-collection-social-media-information>.

<sup>108</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

<sup>109</sup> Cope, Sophia. “State Dept. Wants to Expand Social Media Collection to All Visa Applicants.” Electronic Frontier Foundation, April 3, 2018. <https://www.eff.org/deeplinks/2018/04/state-dept-wants-expand-social-media-collection-all-visa-applicants>.

<sup>110</sup> Cope, Sophia. “U.S. Customs and Border Protection Wants to Know Who You Are on Twitter—But It’s a Flawed Plan.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/deeplinks/2016/08/us-customs-and-border-protection-wants-know-who-you-are-twitter-its-flawed-plan>.

<sup>111</sup> Hussain, Saira and Sophia Cope. “DEEP DIVE: EFF to DHS: Stop Mass Collection of Social Media Information.” Electronic Frontier Foundation, November 25, 2019. <https://www.eff.org/deeplinks/2019/11/deep-dive-eff-dhs-stop-mass-collection-social-media-information>.

<sup>112</sup> AP. “New LawsUIT Challenges Trump Admin’s Social Media Disclosure Rule For Visas.” HuffPost, 51:41 500. [https://www.huffpost.com/entry/new-lawsuit-challenges-trump-admins-social-media-disclosure-rule-for-visas\\_n\\_5de92fa7e4b0d50f32b0239d](https://www.huffpost.com/entry/new-lawsuit-challenges-trump-admins-social-media-disclosure-rule-for-visas_n_5de92fa7e4b0d50f32b0239d).

surveillance of their social media activities, the registration requirement makes it more difficult for Doc Society and IDA to recruit these filmmakers to share their work and their experiences with U.S.”<sup>113</sup>

These concerns are not siloed, and they have anecdotal basis. Freedom of association can be especially prescient as it related to education and the exchange of ideas from other cultures. In one highly reported incident, a Palestinian Harvard student had his visa cancelled by CBP and was subsequently deported to Lebanon.<sup>114</sup> As details of the story emerged, it became clear that this student was denied entry, “allegedly based on the social media postings of his online connections.”<sup>115</sup> This case gives particular ammunition to reaction advocates concerns that the chilling effect of free speech can extend well past the social media user and visa applicant in question.

### ***Infringements on Privacy***

Even though the policy only applies to public posts, reaction advocates’ fears about the detrimental impact on privacy persist. Much of this concern is due to the fact that many social media users do not know how much information can be determined from a public post. In fact, “A recent study demonstrated that using embedded geolocation data, researchers accurately predicted where Twitter users lived, worked, visited, and worshipped—information that many users hadn’t even known they had shared.”<sup>116</sup> Using mosaic information from public posts, “The proposed rule’s collection of public social media information may allow the government to piece together and document users’ personal lives.”<sup>117</sup>

The infringement on privacy extends past mere user error as well. There is uncertainty within the reaction advocate community about the scope of the liberties afforded immigration authorities. While there is some indication that CBP, “may conceal their identity when viewing social media for operational security purposes,” or essentially, allowing CBP to create fake accounts, this is in direct conflict with a 2012 DHS directive that requires DHS officials to indicate their affiliation with the agency when using social media for official purposes.<sup>118</sup> This tension garners skepticism from reaction advocates who ask, “why would a CBP agent need to create a fake account? Public

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<sup>113</sup> Panduranga, Harsha. “Social Media Vetting of Visa Applicants Violates the First Amendment.” Brennan Center for Justice. Accessed March 5, 2020. [https://www.brennancenter.org/our-work/analysis-opinion/social-media-  
vetting-visa-applicants-violates-first-amendment](https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment).

<sup>114</sup> Hussain, Saira and Sophia Cope. “DEEP DIVE: EFF to DHS: Stop Mass Collection of Social Media Information.” Electronic Frontier Foundation, November 25, 2019. [https://www.eff.org/deeplinks/2019/11/deep-  
dive-eff-dhs-stop-mass-collection-social-media-information](https://www.eff.org/deeplinks/2019/11/deep-dive-eff-dhs-stop-mass-collection-social-media-information).

<sup>115</sup> Hussain, Saira and Sophia Cope. “DEEP DIVE: EFF to DHS: Stop Mass Collection of Social Media Information.” Electronic Frontier Foundation, November 25, 2019. [https://www.eff.org/deeplinks/2019/11/deep-  
dive-eff-dhs-stop-mass-collection-social-media-information](https://www.eff.org/deeplinks/2019/11/deep-dive-eff-dhs-stop-mass-collection-social-media-information).

<sup>116</sup> Hussain, Saira and Sophia Cope. “DEEP DIVE: EFF to DHS: Stop Mass Collection of Social Media Information.” Electronic Frontier Foundation, November 25, 2019. [https://www.eff.org/deeplinks/2019/11/deep-  
dive-eff-dhs-stop-mass-collection-social-media-information](https://www.eff.org/deeplinks/2019/11/deep-dive-eff-dhs-stop-mass-collection-social-media-information).

<sup>117</sup> Hussain, Saira and Sophia Cope. “DEEP DIVE: EFF to DHS: Stop Mass Collection of Social Media Information.” Electronic Frontier Foundation, November 25, 2019. [https://www.eff.org/deeplinks/2019/11/deep-  
dive-eff-dhs-stop-mass-collection-social-media-information](https://www.eff.org/deeplinks/2019/11/deep-dive-eff-dhs-stop-mass-collection-social-media-information).

<sup>118</sup> Cope, Sophia and Saira Hussain. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. [https://www.eff.org/deeplinks/2019/08/deep-  
dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy](https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy).

posts or information are equally available to all social media users on a platform. Why would CBP personnel need to conceal their identity before viewing a publicly available post if they are not attempting to engage with a user?”<sup>119</sup> These unanswered questions leave reaction advocates concerned about the scope of surveillance in the social media vetting scans.

### ***Summary of Unconstitutional Findings***

Social media is a major hub of discourse around the world. Reaction advocates claim that this policy will make people self-censor, chilling free speech and inhibiting a forum for idea sharing across the world. This policy would impede both free speech and the freedom of association for both visa applicants and U.S. citizens—not just by dampening speech, but also discouraging travel and obstructing storytelling and filmmaking. What’s more, reaction advocates believe the policy will further endanger people who use anonymous or pseudonym accounts—especially those that may be trying to flee an authoritarian regime. Finally, due to ambiguity about the scope of the policy, social media user error, and invasiveness of mosaic data, there is a sense that there will be an increase in the likelihood of privacy infringements.

### **Policy is Ineffective**

The reaction arguments surrounding the effectiveness of the policy are diverse. Reaction advocates indicate challenges with the effectiveness of social media interpretation, effectiveness given bandwidth, and subsequently—given that limited bandwidth—the effectiveness of automation. In fact, in some cases rationale advocates harmonized with reaction advocates, indicating their own concerns with the effectiveness of this policy.

Before launching into the specific arguments detailing specific areas of ineffectiveness, it is important to understand the most cited oversight with this policy: the most dangerous people are unlikely to comply. For a policy implemented in the name of national security, evasion seems too simple. One would merely need to refuse to disclose account details (in breach of the law, but likely an unverifiable one at that), create an anonymous account, sanitize existing accounts, or delete existing accounts altogether. Plainly, “it is doubtful that an individual who promotes terrorism online will disclose information about the social media profile he is using to do so, or will retain postings that might get flagged as problematic.”<sup>120</sup> What’s more, “It is far more likely that terrorists would create secondary social media profiles that contain benign public posts, and share those handles when applying to enter the U.S.—or share none at all.”<sup>121</sup>

Moreover, the justification for this policy—aside from national security broadly—was brought about most fervently in light of the San Bernardino shooting. But even in that case, “Ms. Malik, who was in the U.S. on a fiancée visa, expressed such sentiments in private messages to her

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<sup>119</sup> Cope, Sophia and Saira Hussain. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. <https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>120</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>121</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

Facebook friends... The government would not have access to private messages and posts by simply knowing applicants' social media handles."<sup>122</sup> This fact was repeated by many reaction advocates including the late Representative Elijah E. Cummings (D-MD) who posited, "The question is if the search of social media wouldn't have prevented the attacks, what else should be done to identify foreign nationals entering the U.S. who pose a risk to our national security."<sup>123</sup>

Even assuming that this flaw was not a problem for national security, there was also some evidence that the policy could *harm* national security. That is, by relying on the social media screen to yield legitimate results, immigration officials may soften their opinion of someone who should deserve greater scrutiny. As reported by the New York Times, "False negatives were a problem too. One program for vetting refugees found that social media did not 'yield clear, articulable links to national security concerns,' even for applicants who were identified as potential threats based on other types of screening."<sup>124</sup>

### ***Even Immigration and Homeland Security Agencies Are Unable to Prove Effectiveness***

The skepticism about effectiveness is further intensified by DHS's own inability to prove its efficacy. Reaction advocates believe the burden of proof falls on the shoulders of the government, and thus far it has insufficiently justified the policy. Evidence suggests that the policy will not work. In fact, "While no public audits have yet been released for State Department social media collection, a February 2017 Inspector General audit of DHS's existing social media pilot programs found that insufficient metrics were in place to measure the programs' effectiveness, and concluded that existing pilots had provided little value in guiding the rollout of a department-wide social media screening program."<sup>125</sup> In other words, the government cannot even come up with a sufficient metric to test whether the program is working.

Even with that being the case, "There is no evidence that the social media registration requirement serves the government's professed goals. Despite the State Department's bare assertion that collecting social media information will "strengthen" the processes for "vetting applicants and confirming their identity," the government has failed — in numerous attempts — to show that social media screening is even effective as a visa-vetting or national security tool."<sup>126</sup> While many policies are implemented before they are tested, reaction advocates believe that, "Before adopting a new policy with significant privacy and free speech implications, a

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<sup>122</sup> Cope, Sophia. "CBP Social Media Comments FINAL Aug 22 2016." Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>123</sup> Nixon, Ron. "House Panel Faults Failure to Review Visa Applicants' Social Media Use." *The New York Times*, December 17, 2015, sec. U.S. <https://www.nytimes.com/2015/12/18/us/politics/house-panel-faults-failure-to-review-visa-applicants-social-media-use.html>.

<sup>124</sup> Patel, Faiza. "Opinion | Stop Collecting Immigrants' Social Media Data." *The New York Times*, June 30, 2019, sec. Opinion. <https://www.nytimes.com/2019/06/30/opinion/immigrants-social-media.html>.

<sup>125</sup> Ruiz, David. "EFF and Other Groups Fight State Department Collection of Social Media Information ... Again." Electronic Frontier Foundation, May 30, 2018. <https://www.eff.org/deeplinks/2018/05/eff-and-other-groups-fight-state-department-collection-social-media-information>.

<sup>126</sup> Panduranga, Harsha. "Social Media Vetting of Visa Applicants Violates the First Amendment." Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>.

federal agency should provide the public with the evidence supporting the agency’s claims of efficacy.”<sup>127</sup>

### ***Difficulties with Interpretation***

Furthermore, much of the effectiveness arguments highlight the vast challenges with interpretation of online media. According to CBP, “Highly trained CBP personnel will independently research publicly available social media information and will be able to recognize factors such as context. CBP will make case-by-case determinations based on the totality of the circumstances.”<sup>128</sup> However, this inspires little confidence for reaction advocates for two reasons. First, this statement provides very little, if any, guidance about how to evaluate the social media posts without making ideologically, religiously, or otherwise identity-based exclusions.<sup>129</sup> Second, CBP already has a demonstrated track record of misinterpreting social media posts. In one particularly applicable example, “Irish national Leigh Van Bryan was denied entry into the U.S. because he tweeted to a friend: ‘Free this week, for quick gossip/prep before I go and destroy America.’ Apparently it was lost on border agents that Mr. Van Bryan was using slang and humor to convey his hope that he would have a good time visiting Los Angeles.”<sup>130</sup>

Social media posts are notoriously difficult to contextualize and interpret, especially when analysts do not personally know the user in question. Slang, sarcasm, and language differences can all add extreme complexity to the interpretation process.

Additionally, this difficulty is heightened even further by social media symbols. In the past Facebook only had one “like” button; now, “Recent updates allow users to react to a posting with emojis signaling “like,” “love,” “funny,” “wow,” “sad,” or “angry.” The actual meaning of these emojis is still highly contextual.”<sup>131</sup> But this forces officials to make split determinations about what a specific reaction really means. For example, “If a Facebook user posts an article about the FBI persuading young, isolated Muslims to make statements in support of ISIS, and another user “loves” the article, what does that mean? Is he sending appreciation that the article was posted, signaling support for the FBI’s practices, or sending love to a friend whose family has been affected? Or some combination of the above?”<sup>132</sup> These concerns, similarly apply to “liking” a

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<sup>127</sup> Cope, Sophia. “CBP Fails to Meaningfully Address Risks of Gathering Social Media Handles.” Electronic Frontier Foundation, September 14, 2016. <https://www.eff.org/deeplinks/2016/09/cbp-fails-meaningfully-address-risks-gathering-social-media-handles>.

<sup>128</sup> Cope, Sophia. “CBP Fails to Meaningfully Address Risks of Gathering Social Media Handles.” Electronic Frontier Foundation, September 14, 2016. <https://www.eff.org/deeplinks/2016/09/cbp-fails-meaningfully-address-risks-gathering-social-media-handles>.

<sup>129</sup> Cope, Sophia. “CBP Fails to Meaningfully Address Risks of Gathering Social Media Handles.” Electronic Frontier Foundation, September 14, 2016. <https://www.eff.org/deeplinks/2016/09/cbp-fails-meaningfully-address-risks-gathering-social-media-handles>.

<sup>130</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>131</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>132</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

tweet.<sup>133</sup> Without digging deeper into someone’s social media history, it is likely that these essential meanings will be indeterminable.

This becomes especially problematic when considering that “likes” do not always in fact convey a users agreement or affirmation of a post. In some cases, people might “like” something so they can more easily find it. Reaction advocates argue that, “This may be an especially serious issue for journalists, particularly those writing on conflict zones: when a foreign journalist “hearts” a provocative tweet from an ISIS follower to be able to find it again more easily for a piece of writing, will that be taken as support for the follower’s positions?”<sup>134</sup> Because of these ambiguities and, “In light of the multitude of possible interpretations of both speech and non-verbal communication, DHS will be able to exercise enormous, unchecked discretion when it comes to allowing travelers and immigrants into the country.”<sup>135</sup>

### ***Difficulties with Bandwidth and Oversight***

The interpretive challenges indicated above are concerning even if immigration authorities had infinite time and resources to analyze an applicants social media. But the ability to execute this policy effectively seems even more dubious to reaction advocates when considering the strain this puts on agency bandwidth. Opponents of the policy believe, “the problem will become simply unmanageable in the context of the 38 Visa Waiver Program countries, many of which do not use English. Government agents and courts have erroneously interpreted tweets repeating American rap lyrics as threatening messages in several previous cases, a problem that will only be exacerbated when they are asked to decode messages in Slovenian, Taiwanese, and Dutch.”<sup>136</sup>

These bandwidth challenges extend past interpretation but also include technical, logistical, and language barriers.<sup>137</sup> These hurdles occur with tens of millions of visa applicants that need to be screened. This strain on bandwidth, “will increase the likelihood of denial for those seeking to come to America, and will further slow down a bureaucratic approval process that can already take months or even years for those flagged for extra investigation.”<sup>138</sup> What’s more reaction

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<sup>133</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>134</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>135</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>136</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>137</sup> Nixon, Ron. “U.S. to Further Scour Social Media Use of Visa and Asylum Seekers.” *The New York Times*, February 23, 2016, sec. U.S. <https://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>138</sup> Shear, Michael D. “Trump Administration Orders Tougher Screening of Visa Applicants.” *The New York Times*, March 23, 2017, sec. U.S. <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>.

advocates believe that, “In light of the significant discretion accorded to CBP officers in determining whom to investigate, this is a recipe for abuse; at the very least, both the rules for utilizing social media and the mechanisms for oversight and accountability should be clarified.”<sup>139</sup>

### ***Difficulties Brought on by Automation***

Given the clear bandwidth issues presented by this additional social media screening, immigration authorities have indicated that they are looking to automate. In fact, “Immigration and Customs Enforcement (ICE) has explored using applicant data as an input into technological tools using machine learning to ‘establish an overarching vetting [system] that automates, centralizes and streamlines the current manual vetting process,’ driven by the mandates in President Trump’s immigration Executive Orders, including Executive Order 13780.”<sup>140</sup>

However, this move towards automation makes reaction advocates even more nervous about the application of this policy. They believe that automation will not assuage interpretive challenges; in fact, to the contrary, there is reason to believe that automation could exacerbate existing challenges. One expert, “David Heyman, a former assistant secretary of Homeland Security for policy, agrees. ‘You have to be careful how you design the proposal to screen people,’ he said. ‘Artificial intelligence and algorithms have a poor ability to discern sarcasm or parody.’”<sup>141</sup> In addition to AI’s struggle with interpreting tone, “Social media comments, by themselves... are not always definitive evidence. In Pakistan — as in the United States — there is no shortage of crass and inflammatory language. And it is often difficult to distinguish Islamist sentiments and those driven by political hostility toward the United States.”<sup>142</sup> This would likely be hard for an automated system to detect.

Additionally, the way automated systems are devised leave many necessary questions unanswered. First, automated systems are only as good as their inputs.<sup>143</sup> Therefore, it is nearly impossible to determine things like, the, “likelihood that an applicant will ‘positively contribute’ to society or to the national interest.”<sup>144</sup> Additionally, since algorithms are designed by humans

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<sup>139</sup> Levinson-Waldman, Rachel. “Re: Docket Number DHS-2016-0054.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/sites/default/files/Civil%20Liberties%20Coalition%20-%20Final%20Comments%20to%20DHS%20re%20SORN.pdf>

<sup>140</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>141</sup> Nixon, Ron. “U.S. to Further Scour Social Media Use of Visa and Asylum Seekers.” *The New York Times*, February 23, 2016, sec. U.S. <https://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>142</sup> Apuzzo, Matt, Michael S. Schmidt, and Julia Preston. “U.S. Visa Process Missed San Bernardino Wife’s Online Zealotry.” *The New York Times*, December 12, 2015, sec. U.S. <https://www.nytimes.com/2015/12/13/us/san-bernardino-attacks-us-visa-process-tashfeen-maliks-remarks-on-social-media-about-jihad-were-missed.html>.

<sup>143</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>144</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020.

that are susceptible to prejudices, so too are the algorithms themselves more likely to exhibit racial and other prejudices.<sup>145</sup> Finally, because crimes and terror attacks, “occur too rarely to afford a computer sufficient data to make accurate predictions about who will commit them. Indeed, a group of over 50 scientists, engineers, mathematicians, and other experts in the field of machine learning wrote to then-Acting Secretary of Homeland Security Elaine Duke voicing these concerns and warning that such a system ‘would be inaccurate and biased.’”<sup>146</sup>

The move towards automation makes rational sense to reaction advocates, but is ultimately misguided. This is because, “computers are even worse than humans in making sense of what is said on social media, particularly when it comes to nuance and context. Even the best natural language processing program generally achieves 70 percent to 75 percent accuracy, which means more than a quarter of posts would be misinterpreted.”<sup>147</sup> Moreover, “Tone and sentiment analysis, which D.H.S. officials have floated as an option, is even less accurate. According to one study, it had a 27 percent success rate in predicting political ideology based on what people post on Twitter.”<sup>148</sup>

### ***Even some Rationale Sources are Uncertain about Policy Effectiveness***

Rationale advocates also have concerns about current policy effectiveness—even if these discussions transpired under the guise of pushing the policy further. First, rationale advocates admit that potential terrorists are unlikely to have publicly available information that incriminates them. Specifically, “Allowing people who vet visa applicants to review social media postings is no guarantee that a would-be immigrant who has radicalized views will be discovered considering they might need cooperation from social media companies. Facebook and Twitter users can make their pages private and aliases are routinely employed.”<sup>149</sup> Even the most fervent rationale advocate of all, “The Trump administration has acknowledged the obvious problems with current vetting practices – the lack of information available on some travelers and the unwillingness of certain governments to share intelligence with the United States.”<sup>150</sup>

Additionally, rationale advocates acknowledge the strains on bandwidth. They note that, “Without effective computer networks and easily accessible database systems, it would be utterly

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<https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>145</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020.

<https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>146</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020.

<https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>147</sup> Patel, Faiza. “Opinion | Stop Collecting Immigrants’ Social Media Data.” *The New York Times*, June 30, 2019, sec. Opinion. <https://www.nytimes.com/2019/06/30/opinion/immigrants-social-media.html>.

<sup>148</sup> Patel, Faiza. “Opinion | Stop Collecting Immigrants’ Social Media Data.” *The New York Times*, June 30, 2019, sec. Opinion. <https://www.nytimes.com/2019/06/30/opinion/immigrants-social-media.html>.

<sup>149</sup> Fox News. “Lawmakers Push to Lift ‘absurd’ Ban on Vetting Social Media for Visa Seekers.” Text.Article. Fox News, December 15, 2015. <https://www.foxnews.com/politics/lawmakers-push-to-lift-absurd-ban-on-vetting-social-media-for-visa-seekers>.

<sup>150</sup> O’Brien, Matt. “Extreme Vetting or Extremely Poor Vetting?” *ImmigrationReform.Com* (blog), October 13, 2017. <https://www.immigrationreform.com/2017/10/13/extreme-vetting-extremely-poor-vetting/>.

impossible to screen the over 300 million short-term visitors, and one million plus immigrants, who come to the United States each year. If President Trump really wants to implement extreme vetting, then he needs to lead an extreme change in the way DHS maintains its information systems.”<sup>151</sup> While rationale advocates believe the policy should continue despite these challenges, it is worth noting that doubts about the effectiveness of this policy exist across the rationale to reaction spectrum.

### ***Summary of Ineffective Findings***

The clearest ineffectiveness argument—across both reaction and rationale advocates—is that the people who are most likely to be dangerous will not comply with the policy. Instead, these individuals will either refuse to submit the information, delete their accounts, or operate only under a pseudonym. Additionally, no governmental agency has provided any data to indicate that this policy would be at all effective in keeping Americans safe. Part of these challenges are centered on the subjectivity of interpreting social media posts, especially when authorities are forced to contextualize “likes”, emojis, different languages, tone, and sarcasm. These issues will intensify as the process overburdens immigration officials, who are already extensively backlogged; this could potentially lead to greater abuse. While some rationale advocates have pushed for automation to solve bandwidth issues, reaction advocates are skeptical. According to opponents of automation, the system is likely to be even more fraught, as automated systems are not equipped to make these types of subjective determinations. Again, it is worth noting that even rationale advocates are skeptical about the policy’s effectiveness; the difference is that rationale advocates still believe that even if it is only somewhat effective in screening visa applicants, it is worth implementing. Conversely, reaction advocates believe it is too harmful for potentially no gain.

### **Policy Contradicts American Values**

The reaction advocates have myriad concerns about the policy’s rejection of American values. Aside from the perceived inconsistencies between the U.S. championing free speech and free expression on one hand, while implementing policy that will dampen both on the other, the reaction advocates have other additional apprehensions.<sup>152</sup> These concerns include the suffocation of journalism and journalism adjacent activities like filmmaking; the unfair punishment of innocent people; the targeting of those with differing political views; the application of racialized ideology in the screening process; and the undermining of geopolitical standing.

### ***Suffocates Journalism and Expression through Film***

Journalism is lauded in the United States as the fourth estate of the political process and government. Despite media’s essential role, reaction advocates argue that this policy will discourage, even punish journalists. This can apply to all kind of issues but is especially salient given, “increased scrutiny by border officials could have a chilling effect on freelance journalists

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<sup>151</sup> O’Brien, Matt. “Extreme Vetting or Extremely Poor Vetting?” *ImmigrationReform.Com* (blog), October 13, 2017. <https://www.immigrationreform.com/2017/10/13/extreme-vetting-extremely-poor-vetting/>.

<sup>152</sup> Navarro, Mireya. “Documentary Film Organizations Sue Over U.S. Government’s Social Media Registration Requirement for Visa Applicants.” Brennan Center for Justice. Accessed March 6, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/documentary-film-organizations-sue-over-us-governments-social-media>.

covering the border.”<sup>153</sup> Reaction advocates warn against the quickness with which the news of this policy will spread among all travelers—this effect would likely be even more pronounced among a small, plugged-in network of journalists.<sup>154</sup>

Additionally, because the pending lawsuit against this policy was brought forth by a coalition of filmmaker advocates, many of the criticisms center on the discouragement of filmmaking. According to reaction advocates, “Many of the filmmakers, who are invited to the U.S. to participate in screenings and industry events, pursue their work at immense risk to themselves and their families. They tackle the most pressing issues of the day, from government and corporate malfeasance, immigration and the environment to matters of war and peace.”<sup>155</sup> Because of the sensitivity of their work, filmmakers often need to maintain anonymity online, in many cases to protect their own lives.<sup>156</sup> Ultimately, this is a choice that the government should not be forcing; filmmakers should not have to “choose between free online expression and their own security. The U.S. government should be championing freedom of expression, not taking actions which will inhibit it.”<sup>157</sup>

Concerns about the impact on journalists and filmmakers are compounded by the lack of transparency about the specifics of the policy. Some have indicated that, “new vetting procedures — including reviewing social media information from visa applicants — have been “a black box.”<sup>158</sup> With very little information about protocol and the ways in which the data will be used and collected, “This data collection could therefore vacuum up a significant amount of data about Americans’ associations, beliefs, religious and political leanings, and more, chilling First Amendment freedoms.”<sup>159</sup>

### ***Punishment of Innocent People Often Seeking Help***

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<sup>153</sup> Cope, Saira Hussain and Sophia. “DEEP DIVE: CBP’s Social Media Surveillance Poses Risks to Free Speech and Privacy Rights.” Electronic Frontier Foundation, August 5, 2019. <https://www.eff.org/deeplinks/2019/08/deep-dive-cbps-social-media-surveillance-poses-risks-free-speech-and-privacy>.

<sup>154</sup> Cope, Saira Hussain and Sophia. “Harvard Student’s Deportation Raises Concerns About Border Device Searches and Social Media Surveillance.” Electronic Frontier Foundation, August 30, 2019. <https://www.eff.org/deeplinks/2019/08/harvard-students-deportation-raises-concerns-about-border-device-searches-and>.

<sup>155</sup> Kilmurry, Simon. “A New U.S. Visa Requirement Is Silencing Foreign Filmmakers.” Brennan Center for Justice. Accessed March 6, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/new-us-visa-requirement-silencing-foreign-filmmakers>.

<sup>156</sup> Navarro, Mireya. “Documentary Film Organizations Sue Over U.S. Government’s Social Media Registration Requirement for Visa Applicants.” Brennan Center for Justice. Accessed March 6, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/documentary-film-organizations-sue-over-us-governments-social-media>.

<sup>157</sup> Navarro, Mireya. “Documentary Film Organizations Sue Over U.S. Government’s Social Media Registration Requirement for Visa Applicants.” Brennan Center for Justice. Accessed March 6, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/documentary-film-organizations-sue-over-us-governments-social-media>.

<sup>158</sup> Zraick, Karen. “Iranian Students Set to Start at U.S. Universities Are Barred From Country.” *The New York Times*, September 22, 2019, sec. U.S. <https://www.nytimes.com/2019/09/20/us/iranian-students-visas.html>.

<sup>159</sup> Levinson-Waldman, Rachel. “Re: Docket Number DHS-2016-0054.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/sites/default/files/Civil%20Liberties%20Coalition%20-%20Final%20Comments%20to%20DHS%20re%20SORN.pdf>

Reaction advocates are highly aware of the increased scrutiny of immigration under the Trump Administration. In some cases, their arguments against this policy take the form of affirming the humanity of immigrants. As one reaction advocate noted, “Immigrants today are just like their predecessors of centuries past, who come to America seeking freedom and a better life, and who aspire to fulfill the duties of citizenship. Our government should not single them out for invasive social media surveillance.”<sup>160</sup>

The underlying assertion here is that the majority of immigrants are not threatening. Yet this policy will likely keep non-threats—even those seeking refuge—from finding comfort on or shores.<sup>161</sup> Advocates argue that something as benign as, “An errant Facebook comment flagged by an algorithm can mark someone as a security risk, barring the door to a refugee fleeing war or a mother seeking to visit her American children.”<sup>162</sup> While this seems fundamentally inhumane to reaction advocates, they argue that it is contrary to American values as well, noting, “Even if these travelers do not have First Amendment rights, a system that penalizes people for statements they make online, simply because they are susceptible to misinterpretation, is profoundly incompatible with core American constitutional values”.<sup>163</sup>

These concerns are magnified by the lack of transparency about how the data is interpreted and stored. Because there is little information about, “what standards the government would use to evaluate public social media posts and ensure that innocent travelers are not denied entry into the U.S.,” there is a general feeling that people might be screened out somewhat indiscriminately or with other political or social motives.<sup>164</sup> This could mean that, “While unlikely to uncover those with actual malevolent intent, the vague and over broad proposal would result in innocent travelers disclosing a whole host of highly personal details,”<sup>165</sup> that could potentially be stored, with continued monitoring even after naturalization.<sup>166</sup>

Furthermore, some reaction advocates believe this policy is a sly iteration of a family separation policy: using bureaucracy to keep people apart. The Trump Administration has seemingly given some basis to this concern. For instance, “The State Department also urged its embassy officials to delay or reschedule interviews if an applicant was unable to provide all of the information

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<sup>160</sup> Schwartz, Sophia Cope and Adam. “DHS Should Stop the Social Media Surveillance of Immigrants.” Electronic Frontier Foundation, October 3, 2017. <https://www.eff.org/deeplinks/2017/10/dhs-should-stop-social-media-surveillance-immigrants>.

<sup>161</sup> Nixon, Ron. “U.S. to Further Scour Social Media Use of Visa and Asylum Seekers.” *The New York Times*, February 23, 2016, sec. U.S. <https://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html>.

<sup>162</sup> Patel, Faiza. “Opinion | Stop Collecting Immigrants’ Social Media Data.” *The New York Times*, June 30, 2019, sec. Opinion. <https://www.nytimes.com/2019/06/30/opinion/immigrants-social-media.html>.

<sup>163</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

<sup>164</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>165</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>166</sup> Nixon, Ron. “U.S. to Collect Social Media Data on All Immigrants Entering Country.” *The New York Times*, September 28, 2017, sec. U.S. <https://www.nytimes.com/2017/09/28/us/politics/immigrants-social-media-trump.html>.

demanded,” including social media identifiers.<sup>167</sup> What’s more, “Mr. Tillerson acknowledged in the cables that the extra scrutiny would cause ‘backlogs to rise,’ even as he recommended that officials should each interview no more than 120 visa applicants each day.”<sup>168</sup> As one reaction advocate put it, this type of behavior, “reminds us that mind-numbing bureaucracy can be an effective family-separation tool if that’s your game.”<sup>169</sup>

### ***Targeting Those Who Express Political Opposition***

These fears about punishing innocent people include screenings based on political ideology. In fact, according to, “Sarah McLaughlin, the director of targeted advocacy for the Foundation for Individual Rights in Education... there had been ‘numerous recent accusations that U.S. immigration officials are denying visas on the basis of political viewpoints’.”<sup>170</sup> This is all the more distressing, since examining one’s political and religious affiliation to determine propensity for terrorism has no empirical grounding.<sup>171</sup>

Reaction advocates are quick to point out that these allegations are not without historical precedent; “The U.S. has a disturbing history of ideological exclusion and the proposal does nothing to ensure that this would not happen in the future.”<sup>172</sup> In one poignant case, “civil rights activist Shaun King was detained by U.S. Customs and Border Protection and interrogated about his online presence and involvement with Black Lives Matter. Though King was never accused of posing a security risk and, as an American citizen, was eventually allowed into the country, this case is among those that suggest enforcement authorities are attentive to the political views of those seeking entry to the U.S.”<sup>173</sup>

The implications of these trends are hard to determine. In some more outraged reactions, advocates wonder if, “Maybe that’s the point. President Trump has relentlessly attacked and threatened people who criticize him. Now his administration is creating a sprawling social media surveillance scheme that will mute dissent in other countries around the world.”<sup>174</sup>

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<sup>167</sup> Shear, Michael D. “Trump Administration Orders Tougher Screening of Visa Applicants.” *The New York Times*, March 23, 2017, sec. U.S. <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>.

<sup>168</sup> Shear, Michael D. “Trump Administration Orders Tougher Screening of Visa Applicants.” *The New York Times*, March 23, 2017, sec. U.S. <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>.

<sup>169</sup> Schulman, Moshe. “Opinion | Who Needs a Border Wall When You Have DS-5535?” *The New York Times*, October 24, 2018, sec. Opinion. <https://www.nytimes.com/2018/10/24/opinion/schulman-immigration-extreme-vetting-ds5535.html>.

<sup>170</sup> Zraick, Karen, and Mihir Zaveri. “Harvard Student Says He Was Barred From U.S. Over His Friends’ Social Media Posts.” *The New York Times*, August 28, 2019, sec. U.S. <https://www.nytimes.com/2019/08/27/us/harvard-student-ismail-ajjawi.html>.

<sup>171</sup> Levinson-Waldman, Rachel. “Re: Docket Number DHS-2016-0054.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/sites/default/files/Civil%20Liberties%20Coalition%20-%20Final%20Comments%20to%20DHS%20re%20SORN.pdf>

<sup>172</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>173</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>174</sup> Kilmurry, Simon. “A New U.S. Visa Requirement Is Silencing Foreign Filmmakers.” Brennan Center for Justice. Accessed March 6, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/new-us-visa-requirement-silencing-foreign-filmmakers>.

### ***Policy Lends itself to Racism***

One of the more recurring concerns is that, for a country that espouses values of equality of all humankind, the policy lends itself to racist application. There is no indication that there are safeguards to prevent vetting based on race or religious affiliation. Reaction advocates think that, “The proposal undermines civil liberties for everyone, unjustifiably burdening Muslims in particular... ‘Policies should be based on proof, not prejudice’.”<sup>175</sup> Despite this belief, there is evidence to suggest that implementation of the policy is already conducted in a racist manner. In fact, “According to the State Department, from March to July of 2018, 44 K-1 visas were issued to people of Moroccan nationality. During that same period, more than 10 times as many people from Britain were granted the visa. Britain is 87 percent white; Morocco isn’t.”<sup>176</sup>

To reaction advocates, these findings are unsurprising given the history of Trump Administration policies. Indeed it was a, “sequence of ‘Muslim ban’ executive orders that tie national origin to a terror threat, and which were initially enjoined by federal courts for reflecting religious animus.”<sup>177</sup> Even in some of the minutia of the directives, there is an encouragement to base screening decisions on factors irrelevant to national security considerations. President Trump himself proposed that, “the United States admit only those “who share our values and respect our people.” One [Trump] campaign official explained that people who have ‘attitudes about women or attitudes about Christians or gays that would be considered oppressive’ would be barred.”<sup>178</sup> Further, while, “It is difficult to see the connection between a visitor’s view of the role of women in society and terrorism... the connection between such questions and criticisms of the rights of women in Muslim societies is plain.”<sup>179</sup> Despite the fact that there is, “no evidence that an applicant’s national origin or religion reflects a propensity for terrorism,” a fact that more than 40 national security experts of differing political ideologies attested to, stereotyping seems to be a consistent vetting mechanism.<sup>180</sup>

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<sup>175</sup> Ruiz, David. “EFF and Other Groups Fight State Department Collection of Social Media Information ... Again.” Electronic Frontier Foundation, May 30, 2018. <https://www.eff.org/deeplinks/2018/05/eff-and-other-groups-fight-state-department-collection-social-media-information>.

<sup>176</sup> Schulman, Moshe. “Opinion | Who Needs a Border Wall When You Have DS-5535?” *The New York Times*, October 24, 2018, sec. Opinion. <https://www.nytimes.com/2018/10/24/opinion/schulman-immigration-extreme-vetting-ds5535.html>.

<sup>177</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>178</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>179</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>180</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

The Trump Administration has attempted to deny these allegations, by claiming there is no overt discrimination within the vetting process. The Dept. of States has said that, “[t]he 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.”<sup>181</sup> However, to reaction advocates, “that assurance rings hollow, in light of the context in which this [policy] arises and because it is part of the broader “extreme vetting” framework that appears aimed at Muslims.”<sup>182</sup>

### ***Policy Risks Geopolitical Standing***

Reaction advocates are also concerned about how this policy will impact America’s global reputation. On an ideological level, the U.S. government has a history of promoting Internet freedom around the world.<sup>183</sup> In this vein, “it is troubling that another arm of the federal government (CBP, under the Department of Homeland Security) has proposed a policy that would not only undermine the Internet freedom of innocent visitors to the U.S., but do little or nothing to actually protect Americans from terrorism and other threats to homeland security.”<sup>184</sup>

But even on a practical level, aside from impacting American credibility geopolitically, this policy could have tangible consequences for travelling American citizens. Some reaction advocates assert that, “the proposal would spur other countries to demand the same information from American travelers, which would put Americans at risk overseas...the agency [CBP] failed to recognize that seeking social media handles, including from people who have legitimate reasons for being pseudonymous online yet publicly vocal, is particularly intrusive and so may incite certain foreign governments to demand the same information from American travelers.”<sup>185</sup>

This especially distressing, because the consequences of authoritarian regimes intercepting social media information can have life or death consequences. In fact, “In recent months, authoritarian and other rights-abusing regimes, including some U.S. allies, have used information gleaned from social media to identify, locate and detain human rights advocates, journalists, and political dissidents, and even, in some instances, to have them killed.”<sup>186</sup> Reaction advocates believe this to be horrifying enough on its own, but it is even more deeply worsened by the fact that the

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<sup>181</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020.

<https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>182</sup> Brennan Center Coalition. “Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants.” Brennan Center for Justice. Accessed March 5, 2020.

<https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>183</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>184</sup> Cope, Sophia. “CBP Social Media Comments FINAL Aug 22 2016.” Electronic Frontier Foundation, August 22, 2016. <https://www.eff.org/document/cbp-comments-final-aug-22-2016>.

<sup>185</sup> Cope, Sophia. “CBP Fails to Meaningfully Address Risks of Gathering Social Media Handles.” Electronic Frontier Foundation, September 14, 2016. <https://www.eff.org/deeplinks/2016/09/cbp-fails-meaningfully-address-risks-gathering-social-media-handles>.

<sup>186</sup> AP. “New LawsUIT Challenges Trump Admin’s Social Media Disclosure Rule For Visas.” HuffPost, 51:41 500. [https://www.huffpost.com/entry/new-lawsuit-challenges-trump-admins-social-media-disclosure-rule-for-visas\\_n\\_5de92fa7e4b0d50f32b0239d](https://www.huffpost.com/entry/new-lawsuit-challenges-trump-admins-social-media-disclosure-rule-for-visas_n_5de92fa7e4b0d50f32b0239d).

United States instigated the, “race to the bottom,” with other countries intensifying online scrutiny.<sup>187</sup>

Ultimately, one of the confounding elements of the policy is that, its entire foundation is built upon a false narrative. The appetite for this policy was inspired by the terrorist attacks at San Bernardino, CA. Subsequently, “Early media reports in the immediate aftermath of the attack indicated that one of the shooters, Tashfeen Malik, had broadcast her intentions and her allegiance to the Islamic State on Facebook prior to entering the United States and prior to the attack. Sen. Ted Cruz and others used this reporting to suggest that DHS had erred in not examining Malik’s social media accounts before allowing her to enter the United States and gain citizenship. The reports were false.”<sup>188</sup> Reaction advocates are left wondering, why would the United States compromise some of its most deeply held values to uphold a policy that likely will not protect national security, and was born under false pretenses?

### ***Summary of Contradictory to American Values Findings***

This narrative attempts to catalogue some of the ways in which reaction advocates feel the policy betrays our claimed fundamental values. First, reaction advocates believe that a policy that goes after social media will inevitably hurt journalism, and other forms of storytelling. Additionally, the policy could unfairly bar individuals from seeking refuge on our shores, even though we are a nation of immigrants. Additionally, reaction advocates fear that this policy could be used as a tool to deny people who express political opposition—not just individuals that may pose a security threat. What’s more, given existing precedent with the Trump Administration’s immigration rhetoric and agenda, there is grave concern that the policy will be applied in a racist fashion. Finally, by betraying some of the very values our country espouses, reaction advocates believe we are more vulnerable to lose respect and credibility geopolitically, and may even face backlash in the form of other countries levying similar immigration policies against U.S. citizens.

### **Analysis of Rationale and Reaction Argumentation**

Comparing narratives, this analysis will group and interpret conflicts between the following sections: national security and constitutional protections; common sense and ineffectiveness; and immigration is harmful and contrary to American values. These pairings speak most directly to each other, and hinge on different interpretations of values-based concepts.

### ***National Security v. Constitutional Protections***

In analyzing both the national security and constitutional protections sections, it is clear that both narratives prioritize security. The distinction is that rationale advocates perceive national security to refer exclusively to preventing domestic terrorism and physical attacks on U.S. soil—as well as some concerns about economic security. Conversely reaction advocates believe that security is more based in the security of our basic civil liberties, including the right to free speech,

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<sup>187</sup> Buttar, Shahid. “U.N. Joins Critique of Proposed CBP Social Media Questions.” Electronic Frontier Foundation, October 18, 2016. <https://www.eff.org/deeplinks/2016/10/un-joins-critique-proposed-cbp-social-media-questions>.

<sup>188</sup> Patel, Faiza, and Rachel Levinson-Waldman. “Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program.” Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

association, privacy, and expression. Oftentimes, in security and privacy circles, these debates are characterized as a fundamental disagreement between civil rights and security, but this section makes it clear that instead, the debate is about which type of security should be prioritized. Rationale advocates believe terrorist organizations and dangerous individuals coming across U.S. borders is the greatest threat. Reaction advocates believe that the greatest threat is a rejection of our most fundamental laws, leaving everyone, including Americans vulnerable.

To expand on reaction advocates belief in the danger of eroding our constitutional protections, there is an underlying belief that these values can inform the physical safety of the U.S. While there is certainly a primary concern about the immediate danger to the rights of Americans and those around the world, there are also the reputational ripple effects. Upholding our values factors into national security. The U.S. is historically looked to as a leader in democratic values. This policy is viewed as widely hypocritical and likely to dampen not just freedom of association for Americans, but also the U.S. standing in the world. In implementing such a policy, we limit our global acculturation, become more isolated, and open ourselves up to graver international threats.

Thus, the fundamental disagreement between rationale and reaction advocates centers on which security threat is the most immediate. Rationale advocates believe that the civil rights impacts on American citizens will be negligible, and the reputational consequences minor in contrast to the scale of the threats posed by immigrants to the U.S. The most immediate danger is foreign born individuals coming into our country and levying an attack. Reaction advocates, conversely, believe that the U.S. would be unwise to erode its own fundamental protections for security purposes, especially when such a policy could undermine the U.S. standing in the global sphere. In this case, the most immediate threat is the thinning of our constitutional protections, leaving Americans and their contacts vulnerable, and straining diplomatic relationships.

### ***Common Sense v. Ineffective***

In contrasting these two narratives, the value-based disagreement hinges on efficiency. More specifically, rationale advocates see this policy as an obvious means of gaining intelligence—an additional tool that harnesses modern technology to paint a more robust picture of visa applicants. Reaction advocates, however, believe that this additional tool will not actually provide useful insights; instead it will overwhelm our already overburdened immigration screening process, prevent good people from coming in, and all the while it will infringe on our civil liberties. Even by some rationale sources' own admission, this policy has the potential to be ineffective. While these sources frame this as justification for pushing the policy to be more invasive and expansive, it is telling that this weakness is acknowledged by the policy's own advocates.

Both the ineffective and common sense narratives encounter contradictions within rationale and reaction arguments. On the common sense side, it is hard to earnestly say the policy is absolutely pivotal to ensuring greater national security, as well as a mere additional tool that would need to be built upon for full functionality. If it is in fact an essential piece of the puzzle, critical to making immigration screening more efficient and effective, rationale advocates need to clarify why this one step is worth undermining certain constitutional protections. These faults destabilize the foundation of the rationale advocates arguments. If it is common sense, then

indicate when it has given actionable intelligence, how many attacks it prevented or terrorists it denied. Without this data, the common sense argument is at best theoretical, and at worst not believable.

Similarly, reaction advocates have their own contradictions to contend with. On the ineffective side, it is hard to simultaneously argue that, “this won’t work because most dangerous individuals can and will maintain a pseudonym account”, as well as “this is devastating for activists fleeing authoritarian regimes using anonymous accounts.” These two concepts seem to be in many cases conflicted. If it were so easy to withhold a pseudonym account, then why would anyone in danger from their own government associate their identity with that account? More likely, is that an individual would submit their personal social media handles, without disclosing the pseudonym account while still operating it. If it is so easy to withhold account information, or delete account information prior to submitting a visa application, then the likelihood that anonymous free speech will be in such grave danger seems overstated. That being said, there are still a number of people who could be adversely impacted, but reaction advocates would need to clarify this tension.

As far as the fundamental disagreement about efficiency goes, reaction advocates should highlight that it is only a common sense measure if it works. While rationale advocates may counter that it is relatively harmless to implement, and it may as well be added into the process, reaction advocates have a ready response. Specifically, the stakes are high not only because we are undermining certain constitutional protections—of American citizens who are promised such rights—but we are also doing reputational damage that could have global consequences that could put Americans at risk. Reaction advocates are clear in their assertions that we should not be flippant about this policy, and with little evidence indicating that it makes us safer, the danger is simply too great to continue running the social media screening program.

### ***Immigration is Harmful v. American Values***

These two narratives are in the most direct fundamental contrast with each other. Rationale advocates that appeal to the immigration is harmful narrative have fundamentally different values and beliefs about immigration—and how it factors into our national identity—from reaction advocates. This disagreement between rationale and reaction advocates is as such: reaction advocates believe that the United States is a nation of immigrants that is strong because of its diversity, not in spite of it; rationale advocates, conversely believe in an America first framework, in which government should serve the needs of citizens, and keep foreign born people out as much as possible. Reaction advocates believe anti-immigrant rhetoric is un-American, while rationale advocates believe that allowing immigrants to come onto our shores takes opportunities away from Americans and makes them fundamentally less safe. These two warring beliefs are seemingly impossible to reconcile.

To be clear, there were many racist overtones in some of the rationale arguments in the immigration is harmful narrative. This was clear especially in the vernacular of “alien” vs. the language of “immigrant”. Interestingly, I coded all reaction arguments that contended that the policy was racist in the “Contrary to American Values” section. Without getting into greater depths about modern and historical racism in the U.S., it is worth noting that, to me, contrary to American values appealed to the aspirational elements of our policy framework (i.e. all men are

created equal, liberty and justice for all, etc.). However, our American values are also expressed vis-à-vis the sentiments of its citizens, and to be sure, it is not an entirely un-American concept to espouse racist beliefs, or to use racist arguments to achieve a policy goal. In this way, even in my own analysis, I needed to challenge my own conceptions of what is and is not a fundamentally “American” value.

### ***Direct Dialogue or Siloed Talking Points?***

One of the many goals of this content analysis is to determine the extent to which rationale and reaction advocates directly address each other. Politically controversial issues so typically evolve into two opposing sides reciting talking points that fail to fully acknowledge and address their counterpart’s concerns. This issue is not entirely different. However, while there are plenty of examples of peripheral argumentation, there are some cases of direct dialogue between rationale and reaction advocates within the narratives that I detail in this paper.

First, the narratives that speak the least directly to each other are the national security and unconstitutional arguments. This is not surprising, given that both narratives serve as the primary basis for either support of or opposition to this policy. While both rationale and reaction advocates are clearly concerned about security, there is very little consensus about what kind of security, and how to ensure it. Moreover, there is very little direct dialogue between the two camps about mitigating these two opposing concerns. Rather, both sides elaborate about why their particular security concern is more important.

As for the ineffective and common sense narratives, there is at least some indication of direct communication. Ineffective seems to be a direct response to common sense, yet common sense does not have a good retort. Aside from some common sense sources arguing that something is still better than nothing, even if that something is not always going to be effective, there is not an expansion on why that may be the case. Even more damning for the common sense narrative, is the fact that such a flippant reply about a policy that could have serious dire consequences can come across as harsh. Common sense arguments typically expand on all the theoretical reasons that the policy is a “no brainer”. Yet, because there is no data to support the claims of effectiveness, it is hard to have a direct dialogue about the underlying truth behind the theoretical assertions.

Finally, the contrary to American values section seems to be the area that has the most explicitly direct dialogue. Unfortunately, that direct dialogue also belies the most fundamental disagreement—where the two sides assign opposing value judgments about the role the U.S. plays in the world. Reaction advocates believe that this policy is racist, discriminatory, and betrays the U.S. history as a melting pot that provides a place of refuge. Conversely, the rationale advocates who have spoken on this issue believe that immigrants hurt Americans—either by upping the chance of domestic terrorism, stealing jobs and economic opportunities, and diluting American culture. Because these disagreements are so fundamental, it is hard for the conversation to extend past these disagreements.

### **Advocacy Recommendations**

The following recommendations should serve as an advocacy playbook, designed for my client specifically. Based on the argumentation and sources detailed above I will enumerate potentially coalition allies and sympathetic elected officials.

### *Coalition Building*

In addition to the two primary reaction advocacy sources cited in this report, there are a number of engaged advocacy groups in the privacy, free speech, and civil liberties space that have spoken out on this issue. Among them are the American Civil Liberties Union (ACLU), Coalition for Humane Immigrant Rights (CHIRLA), Electronic Privacy Information Center (EPIC), Center for Democracy & Technology, Human Rights Watch, and many others.<sup>189</sup> These organizations, while having a diverse set of missions, are all in agreement about the threats this policy poses to immigrants and American citizens alike. These groups, with entirely different sets of grassroots support, and connections among lawmakers, could be essential in pushing elimination of the policy.

### *Elected Officials to Garner Support*

Over the course of my research, I found a number of elected officials that spoke on issues similar to the collection of visa applicants' social media handles. Based on prior statements, Sen. Tom Carper (D-DE) has expressed disbelief that refugees pose a threat, given the hurdles of the system under President Obama. He said on record that, "Terrorists would be crazy to wait 18 to 24 months while undergoing a rigorous screening process to get into the country."<sup>190</sup> Given this position, it is likely he would oppose some of the more extreme vetting measures that the Trump Administration implemented. Additionally, Senators Blumenthal, Udall, Warren, and Harris all co-signed a letter expressing opposition to DHS collection of social media information for "situational awareness" purposes.<sup>191</sup> Given the nature of these complaints, it is likely that these members would be sympathetic to reducing the collection of social media information for screening visa applicants as well. While this list of legislators is by no means exhaustive, it could be a good place to begin advocacy efforts.

### *Elected Officials to Convince*

Given the hyper-partisan nature of American politics, it is unlikely that any advocacy agenda could convince immigration hawks and far right hardliners. That being said, there will likely be many elected officials who are on the fence about this policy. The talking points listed below will likely be compelling to a more moderate legislator, and should be used as persuasion points for those that do not already share my client's view on the issue.

## **Recommended Talking Points**

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<sup>189</sup> For a list of organizations (in addition to Amnesty International) that cosigned a Brennan Center letter to DOS urging them to stop the collection of social media identifiers, see this source: Brennan Center Coalition. "Brennan Center Urges State Department to Abandon the Collection of Social Media and Other Data from Visa Applicants." Brennan Center for Justice. Accessed March 5, 2020. <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-state-department-abandon-collection-social-media-and>.

<sup>190</sup> Nixon, Ron. "Arrest of Refugee Fuels U.S. Debate on Immigration Policy." *The New York Times*, February 19, 2016, sec. U.S. <https://www.nytimes.com/2016/02/20/us/politics/us-immigration-policy-screening.html>.

<sup>191</sup> Tom Udall, Elizabeth Warren, Kamala Harris, and Richard Blumenthal. "Concerns about CBP Social Media Monitoring and Situational Awareness Initiative," n.d. <https://www.tomudall.senate.gov/imo/media/doc/CBP%20Surveillance%20letter%20signed%5b2%5d%5b3%5d.pdf>

The following recommended talking points are based primarily on the content that was analyzed in this project. The arguments for each side were chosen intentionally based on frequency and compatibility conversing with the opposing side. However, there are a number of arguments that could be used that fall outside the scope of this project—not least of which is the question of the rule’s lawfulness, pending litigation that could determine the fate of the policy. While the recommendations will largely avoid discussing these more technical, legal nuances, it is worth noting that such controversies are being settled in court. These talking points will be helpful in executing the aforementioned advocacy objectives—either in lobbying elected officials, or building a diverse coalition of immigration and civil liberties advocates.

**1. Even to its proponents, social media screening is an insufficient policy.**

Ultimately, the greatest finding is that this policy as a standalone is not entirely satisfactory to either the proponents or the dissenters. In this vein, one of the most compelling arguments would be “is the relative gain of *potentially* improving screening worth compromising our values and sacred constitutional protections?” The evidence that this policy is effective is shaky at best, and the privacy and free speech implications are dramatic. It would be a heavy sacrifice for an uncertain benefit. My client, as a champion of human rights—especially the rights to speech and political dissent—should highlight that sacrificing these protections for a flawed, potentially ineffective, policy is a bad gamble of which Americans will find themselves on the losing end.

**2. The screening rigor that rationale advocates want is highly infeasible.**

As one rationale advocate argued, we should vet visa applicants with the same rigor we would vet a date we meet online. The problem is that the U.S. government resources cannot apply that level of scrutiny to every visa applicant. It’s possible that part of the appeal of the policy is that it would slow down the process so much. Bureaucracy can be a powerful means of curbing immigration. However, my client should highlight the dangers of overburdening our immigration system in such a way, including impacts on American freedom of association and international competitiveness.

**3. Betraying our values is a bigger risk to national security than our current immigration system.**

My client should make it clear that national security is dynamic and nuanced. While it is important to be discerning about who enters the country, the more overtly discriminatory those immigration policies become, the more likely it is to radicalize more individuals around the world—even within our own borders. Betraying our own American values hurts the U.S. on the world stage, promotes terrorism by enhancing recruitment, and incentivizes other countries to limit American travelers.

**4. A policy is only common sense if it works.**

My client should push back on the common sense notion. These arguments are based on theoretical guesswork. Social media is a hub of voluntarily produced information; that is irrefutable. However, whether or not it provides immigration with useful intelligence is suspect at best. In fact, there is much more evidence suggesting that the implementation of this policy could keep innocent people out, screen non-threats, and over-burden immigration officials to the point of near paralysis. Therefore, this policy is only

commonsense if it works—to which there is no evidence that it does, and even some evidence to suggest that it does not.

**5. This will not only hurt immigrants; it will hurt Americans too.**

While it is hard to contend with some of the more fundamental disagreements about immigration and how immigrants are perceived, discussing harms to American citizens could be effective. My client may not be able to overcome some of the racialized perceptions of immigrants coming into the country, but protecting U.S. citizens is an ideal that both rationale and reaction advocates can agree upon. This policy could chill Americans' free speech, infringe on Americans' privacy, limit Americans' connections across the globe, or potentially inspire more restrictive immigration policies around the world.