Attn: Jonathan R. Cantor, Acting Chief Privacy Officer Privacy Office, U.S. Department of Homeland Security 245 Murray Lane, SW, Mail Stop 0655 Washington, DC 20528-0655 Via U.S. Mail

October 16, 2017

Re: <u>82 Fed. Reg. 43556, Docket No. DHS-2017-0038; Notice of Modified Privacy Act System of Record</u>

Dear Mr. Cantor:

The undersigned organizations write to express our opposition to the U.S Department of Homeland Security's ("DHS's") *Notice of Modified Privacy Act System of Record*, published as docket number DHS-2017-0038 (the "Rule"). The Rule would require U.S. Citizenship and Immigration Services ("USCIS") to collect highly invasive and sensitive information from all visa-holders, lawful permeant residents ("LPRs") (i.e., "green card holders"), and naturalized U.S. citizens' via DHS's A-Files, USCIC Electronic Immigration System, Index, and National File Tracking System of Records (collectively the "Record"). Specifically, the Rule would require DHS to track the social media handles for all Immigrant Americans, even naturalized U.S. citizens.

The Rule is flagrantly unconstitutional, violating the First and Fifth Amendments to the U.S. constitution. The Rule would violate both the free speech and free association rights afforded to all Americans, including visa-holders and LPRs, under the First Amendment. A system that records immigrant Americans' social media accounts has a clear chilling effect on the ability of immigrant Americans to communicate and associate with others on these platforms. Moreover, the ongoing social media surveillance of naturalized U.S. Citizens, at a time when there is no equivalent monitoring of native-born U.S. Citizens, violates the guarantee of equal protection enshrined in our Fifth Amendment. Our constitution does not permit two-tiered citizenship; this is a bedrock guarantee that the Rule would clearly violate. Additionally, President Trump's documented history of Animus to Muslim Americans shows that the Rule is designed to enhance surveillance of Muslim Americans, violating their First Amendment right to free exercise of their religion.

The Rule, born of animus, operated to promote discrimination, and justified without any evidence of a national security benefit, is clearly arbitrary and capricious. As such, DHS must refuse to implement the Rule or any other measures that would have such an unlawful impact on immigrant Americans.

I. The Rule's Proposed Changes Go Beyond its Stated Purpose and Justification

The Rule is framed as a simple update to DHS's file retention systems, a modernization to better organize existing data held as part of multiple DHS records, including the DHS A-File. However, the operative language of the Rule goes far beyond the limited scope that its preamble would suggest. In addition to consolidating existing records, the Rule provides the novel and unprecedented

requirement that the Record now include: "social media handles, aliases, associated identifiable information, and search results." By including this sweeping and ever-growing pool of data as part of the Record, DHS is radically departing from the scope of information previously collected as part of a visa-holder or naturalized citizen's Record.

Collecting highly-sensitive social media and search information from the 76.8 million foreign visitors who annually visit the U.S. imposes a significant barrier to their travel. As a single person can have dozens of social media accounts and aliases. The Rule would enable DHS to obtain highly-invasive information about not just the individual visa-holder, LPR, or naturalized citizen, but also their friends, coworkers, and loved ones. This is not a modernization, this is the creation of an electronic dragnet that will require those making a short visit to the U.S. submit more personal information than required in the standard application for Top-Secret security clearance.²

The indefinite storage and collection of social media account information could produce one of the largest government-controlled databases in history, including millions of records on naturalized US citizens. The Rule would likely gather extensive records on all Americans, even native-born citizens, through their social media connections to immigrant Americans. This Orwellian effort comes at a moment when DHS has repeatedly failed to establish a rational basis for additional vetting of foreign travelers, let-alone U.S. Citizens. As the U.S. Court of Appeals for the Ninth Circuit recently ruled: there is "no finding that present vetting standards are inadequate, and no finding that absent the improved vetting procedures there likely will be harm to our national interests."

Because the DHS contends the Rule is merely a limited modernization effort, it has failed to properly justify such expanded electronic monitoring, demonstrating that the Rule is both arbitrary and capricious.

a. Request for Social Media Platforms and Identifiers is Ambiguous and Broad

The Rule's request for social media information is as ambiguous as it is sweeping. The Rule fails to define crucial terms, such as "social media handle." While this language clearly extends to well-known platforms like Facebook and Twitter, it's unclear what else it encompasses. As an increasingly large number of applications, everything from cooking websites to fitness trackers, include chat and commenting functionality, it becomes unclear what qualifies as "social media." In the coming years, as the number and type of social media sites continue to grow, we could easily reach a point where all computer usage is framed as social media, even reading an online newspaper.

Additionally, it is unclear what portion of a social media profile will be included in the Record. The Rule includes not just social media handles, but "associated identifiable information" and "publicly available information obtained from the internet, public records, public institutions, interviewees, commercial data providers, and information obtained and disclosed pursuant to information sharing

¹ Privacy Act of 1974; System of Records, 82 Fed. Reg. 43556 (Sep. 18, 2017)

² Commentary, "Re: 82 Fed. Reg. 36180, OMB Control No. 1405-0226; Supplemental Questions for Visa Applicants" https://www.brennancenter.org/sites/default/files/StateDeptcomments-10.2.2017.pdf

³ See https://www.theguardian.com/world/2016/dec/26/us-customs-social-media-foreign-travelers

⁴ Hawaii v. Trump, 859 F.3d 741, 771 (9th Cir. 2017), cert. granted sub nom Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

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agreements " It is not clear if an individual's entire account and user history is being copied into the Record, or just their public profile. Will DHS track all "private" messages and tweets? Moreover, there is no information on which institutions participate with DHS in information sharing agreements, nor does the public know the scope of the information shared.

Alarmingly, this could mean that a human rights advocate who fights for government reform in their own country could see their digital life and the names of their colleagues shared with the very government that they are seeking to reform. The Rule directly undermines the U.S. Department of State's longstanding work to promote secure and confidential communication platforms for human rights advocates around the globe. Creating this massive pool of information, without any clear limitations on the way it can be used or shared with third parties, creates a significant information security risk for immigrant Americans.

The Rule's stated purpose is to streamline immigration recordkeeping; however, DHS failed to articulate any mechanism to make this data useful or accessible as part of DHS's ongoing operations. Coupled with extreme vetting policies, fewer travelers will come to the United States, either because the collection of information is too invasive, or for fear that the collection and retention will give rise to false suspicions.⁵ Therefore, the mere aggregation of this data provides no real security guarantee, certainly none that can justify the unconstitutional and discriminatory invasion of immigrant Americans' privacy rights.⁶

b. Data Mining and Algorithmic Analysis Amplify Discrimination Concerns

By aggregating large amounts of social media data, the Rule would enable DHS and unknown third parties to engage in extensive data mining, using complex algorithms to automatically search through the data in an effort to identify patterns and outliers. Unfortunately, there is no evidence such practices are effective in protecting national security or does anything more than automate religious profiling and discrimination. A February 2017 report by the DHS Office of Inspector General found that DHS's pilot programs for using social media to screen applicants for immigration benefits "lacked criteria to determine their efficacy." Similarly, DHS's prior effort to develop webcrawling/social media surveillance programs to enhance vetting have had unclear objectives and even more ambiguous results.⁸

⁵Carol Morello, "U.S. embassies start new vetting of visa applicants," The Washington Post, June 01, 2017, accessed September 27, 2017, <a href="https://www.washingtonpost.com/world/national-security/us-embassies-start-new-vetting-of-visa-applicants/2017/06/01/6b08c55a-46ec-11e7-bcde-624ad94170ab_story.html?utm_term=.f1a7d3c2c112.

⁶ Lily Hay Newman, "Feds monitoring social media does more harm than good," Wired, September 28, 2017, accessed October 11, 2017, https://www.wired.com/story/dhs-social-media-immigrants-green-card/

⁷ Adolfo Flores, "People Are Worried About DHS Plans To Gather Social Media Info," BuzzFeed, September 28, 2017 accessed October 11, 2017, https://www.buzzfeed.com/adolfoflores/people-are-worried-about-dhs-plans-to-gather-social-media?utm_term=.ejk1wa4VD#kgxxp7qbZ

⁸ In a question and answer period at the U.S. Immigration and Customs Enforcement's Homeland Security Investigations division "industry day" where it hosted technology companies interested in building a social media tool for mining through social media information collected by the Homeland Security, the agency lamented that its "biggest

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Since the new pool of social media information will be far too broad for individual analysts to manually review, DHS will have to resort to algorithms that automatically detect "suspicious behavior." Without proper safeguards, there's no way to know if DHS's program is evaluating an individual's threat, or merely their race, religion, or political beliefs. Moreover, as DHS officials have previously conceded, poorly executed automation would likely be unable to differentiate satire from true threats, subjecting individuals to heightened scrutiny or even the loss of admission to the U.S. for nothing more than a joke.⁹

We are additionally concerned that the information capture through the Rule may be integrated as part of an "Extreme Vetting Initiative." DHS reportedly intends to "establish an overarching vetting [system] that automates, centralizes and streamlines the current manual vetting process," driven by the mandates in President Trump's Muslim Bans, including Executive Order 13780. This system would attempt to "continuous[ly] vet" visitors within the country using information including "media, blogs, public hearings, conferences, academic websites, social media websites...radio, television, press, geospatial sources, [and] internet sites." Extreme vetting" would be targeted at "evaluat[ing] an applicant's probability of becoming a positively contributing member of society as well as their ability to contribute to national interests." Additionally, the program would seek to predict whether those entering the U.S. intended to commit a crime in the U.S. ¹⁴

Not only are these standards impossible to administer, but algorithms are only as good as the choices that their programmers make. Recent efforts to employ predictive algorithms throughout

constraint, because we are a vetting/screening operation, is that we are required to work with what is publically [sic] available."

Sam Biddle & Spencer Woodman, "These are the technology firms lining up to build Trump's "Extreme Vetting" program", The Intercept, accessed August 7, 2017, https://theintercept.com/2017/08/07/these-are-the-technology-firms-lining-up-to-build-trumps-extreme-vetting-program/

https://www.federalregister.gov/documents/2017/08/03/2017-16343/60-day-notice-of-proposed-information-collection-supplemental-questions-for-visa-applicants ("Consular posts worldwide regularly engage with U.S. law enforcement and partners in the U.S. intelligence community to identify characteristics of applicant populations warranting increased scrutiny"); Department of Homeland Security, Presolicitation Notice, ICE-HSI- Data Analysis Service Amendment: Solicitation Number: HSCEMD-17-R-00010 (June 12, 2017),

https://www.fbo.gov/index?s=opportunity&mode=form&id=3abbda0ebcab146118a6f6a0ec44c2b4&tab=core&_cvie w=1 (background document, section 3.2: "[T]he contractor shall...have the ability to ingest and screen against large volumes of visa electronic applications efficiently and at high speed in regard worldwide social media and open source holdings and domains relevant to person centric derogatory and threat information assessment information, adjudication recommendation to the Department of State and notification to other government equites when warranted.").

11 Ibid.

https://www.fbo.gov/index?s=opportunity&mode=form&id=3abbda0ebcab146118a6f6a0ec44c2b4&tab=core& cview=1 (Statement of Objectives, 1).

⁹ Ron Nixon, "U.S. to Further Scour Social Media Use of Visa and Asylum Seekers," The New York Times, February 23, 2016, accessed October 11, 2017, https://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html

¹⁰ See, e.g. State Department, 60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants, 82 FR 36180, 36181 (Aug. 3, 2017)

¹² Ibid. at Attachment 2: Background, 5.

¹³ Department of Homeland Security, Presolicitation Notice, ICE-HSI- Data Analysis Service Amendment: Solicitation Number: HSCEMD-17-R-00010 (June 12, 2017),

¹⁴ Ibid.

the criminal justice system have been shown to reflect unconstitutional biases, including racial bias.¹⁵ We have no reason to believe that the data mining tools used in secret by DHS, without any mechanism for correction or redress, will be better.

c. The Rule is a Distraction from Evidence-Based Security Measures

Even if the discrimination embodied in the Rule were lawful, there simply is no reason to treat visaholders, LPRs, or naturalized U.S. citizens as a heightened threat to the U.S. DHS has provided no evidence that these citizens pose greater risk to the country than native-born citizens. To the contrary, DHS's own evaluation found that citizenship status cannot predict the likelihood an individual will commit terrorism. This is why when DHS previously conducted pilot programs to evaluate the practicality of such social media monitoring, it didn't even include naturalized citizens in the pool of individuals subject to additional scrutiny. Moreover, the Rule does nothing to protect the U.S. from the leading source of terrorism in the U.S.: right-wing extremists and white supremacists. 18

A policy based on prejudiced does little more than fan the flames of extremism. Pro-ISIS social media accounts used the Muslim Bans to advance the inaccurate belief that the U.S. is at war with Islam and to galvanize anti-American sentiments.¹⁹ Despite US-policy makers acknowledging there are no tell-tale signs of who is likely a terrorist, policies such as the Rule justify encroachments to liberty, as if there are visible flags that demonstrate a propensity towards terrorism, but counterterrorism research has not been able to identify these traits.²⁰

II. The Rule Unconstitutionally Creates Tiers of Citizenship

As noted above, the Rule would not only apply to visa-holders and LPRs, it would also apply to those individuals who, after immigrating to the U.S., became naturalized citizens. However, the Rule would not extend to native-born U.S. Citizens, those born on U.S. soil and/or to at least one

¹⁵ See, e.g., Aaron Shapiro, "Reform predictive policing," Nature, January 25, 2017, http://www.nature.com/news/reform-predictive-policing-1.21338; Logan Koepke, "Predictive Policing Isn't About the Future," Slate, November 21, 2016,

http://www.slate.com/articles/technology/future tense/2016/11/predictive policing is too dependent on historical data.html; William Isaac and Andi Dixon, "Column: Why big data analysis of police activity is inherently biased," PBS NewsHour, May 10, 2017, http://www.pbs.org/newshour/rundown/column-big-data-analysis-police-activity-inherently-biased/.

¹⁶ Department of Homeland Security, "Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States," Draft Report Obtained by *Associated Press*, February 24, 2017, https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf.

¹⁷ Office of Inspector General, Department of Homeland Security., OIG-17-40, "DHS' Pilots for social media screening need increased rigor to ensure scalability and long-term success," February 27, 2017, accessed October 11, 2017, https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf

¹⁸ *Publication*, "Murder and extremism in the united states in 2016", Anti- Defamation League 2017, accessed October 11, 2017, https://www.adl.org/sites/default/files/documents/MurderAndExtremismInUS2016.pdf

¹⁹ Joby Warrick, "Jihadist groups hail Trump's travel ban as a victory," *Washington Post*, January 29, 2017, <a href="https://www.washingtonpost.com/world/national-security/jihadist-groups-hail-trumps-travel-ban-as-a-victory/2017/01/29/50908986-e66d-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.b834ad9dbe23.

²⁰ See, e.g. Faiza Patel and Meghan Koushik, Countering Violent Extremism, Brennan Center for Justice, 2017, 10-11, https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report.pdf.

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U.S. citizen parent. This policy, which treats naturalized citizens as a threat, and subjects them to heightened surveillance for no other reason than the fact that they were born abroad, is a fatally-defective assault on the equal protection guarantees of our constitution.²¹

Apart from serving as President, the U.S. government may not confer or deny any privilege of citizenship simply because an individual is naturalized or native born. The equal status of naturalized citizens has long been a cornerstone of our identity as an immigrant nation, and it has been a vital safeguard against discriminatory policies born of fear and bigotry.

Heightened surveillance, and the corresponding chill in protected expressive and associational activity, suppresses the right of naturalized citizens to fully engage in the political and civic life of our country. The Rule paves the way for policies that drive naturalized citizens into the shadows, for fear of being falsely labeled as a "threat." Policies that stigmatize and denigrate naturalized U.S. citizens by treating them as a threat to their own country are repugnant to our values and a distraction from evidence-based policies designed to improve safety and not merely spread prejudice.

III. The Rule Unconstitutionally Discriminates against Muslim Americans

Were the Rule being proposed in a vacuum, it would still be unconstitutional, but the Rule is also part of an ongoing and systematic effort to attack the rights of Muslim Americans, stigmatizing those who practice Islam. As a candidate for the Republican presidential nomination, Mr. Trump called for a "total and complete shutdown of Muslims entering the United States." After securing the nomination. Mr. Trump proposed "extreme vetting" for Muslims entering the United States. After who share our values and respect our people." One campaign official explained that people who have "attitudes about women or attitudes about Christians or gays that would be considered oppressive" would be barred. DHS officials have indicated that visa applicants could be queried about honor killings, the role of women in society, though there is no connection between such views and the threat of terrorism.

²¹ The 14th Amendment provides that "all persons born *or* naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" and that they will not be denied by the State "the *equal protection* of the laws." The Supreme Court held in *Bolling v. Sharpe* that the due process clause of the 5th Amendment imposes the equal protection requirements on the federal government as well as the individual states.

²² Andrew Rafferty, "Trump Calls for 'Complete Shutdown' of Muslims Entering the U.S.," NBC News, December 7, 2015, accessed October 11, 2017, https://www.nbcnews.com/politics/2016-election/trump-calls-complete-shutdown-muslims-entering-u-s-n475821

²³ Jeremy Diamond, "Trump Proposes Values Test for Would-be Immigrants in Fiery ISIS Speech," *CNN*, August 15, 2016, http://www.cnn.com/2016/08/14/politics/donald-trump-isis-fight/.
²⁴ Ibid.

²⁵ Laura Meckler, "Trump Administration Considers Far Reaching Steps for 'Extreme Vetting'," *Wall Street Journal*, April 4, 2017, https://www.wsj.com/articles/trumpadministration-considers-far-reaching-steps-for-extremevetting-1491303602.

²⁶ Meckler, "Trump Administration Considers Far Reaching Steps for 'Extreme Vetting."

²⁷ Faiza Patel, "Reflections on the Prejudice in the Draft Exec Order's Vetting of 'Prejudice'," *Just Security* (blog), January 27, 2017, https://www.justsecurity.org/36898/reflections-prejudice-draftexec-orders-vetting-prejudice/; Faiza Patel and Erica Posey, "Beware Trump's Phony 'Terror' List," *Daily Beast*, March 22, 2017, http://www.thedailybeast.com/articles/2017/03/22/ beware-trump-s-phony-terror-list.html.

In office, President Trump implemented Executive Orders 13769 and 13780 and the *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats* (collectively, the "Muslim Bans"). These measures are a transparent attempt to carry-out President Trump's campaign promise of a ban on Muslim entry to the U.S. In this context, the Rule appears to further DHS's ongoing efforts to target and surveil Muslim Americans. Such surveillance chills protected expressive and religious activity, forcing individuals to self-censor on controversial topics or stop practicing their faith. Such discriminatory, anti-Muslim motivations for the Rule separately establish that the Rule is unconstitutional, arbitrary, and capricious.

a. Collecting Social Media Information is Grounded in Islamophobia

Leaked documents show that DHS subjectively categorizes social media activity by its emotional tone, leaving much room for error, stereotyping, and religious profiling. Similarly, DHS border inspections often use innocuous Islamic practices as the basis for additional scrutiny and/or detention. Given DHS's pattern of systematically mistreating Muslim travelers, we have added reason to question whether DHS will have appropriate internal policies and controls to prevent investigations premised solely on social media posts about protected religious conduct.

Beginning in 2016, DHS began to prompt travelers to "voluntarily" provide social media information. Though the disclosure of social media information was not compulsory, U.S. Customs and Border Protection ("CBP") officials used their discretion over alien admission to coerce travelers to acquiesce. Later, CBP officers began to demand the passwords to access the content of these social media accounts. Expanding the scope of social media information saved in the Record will only expand the frequency and scale of these abuses. In the context of "extreme vetting" of Muslims and DHS's policy of "cooperate or go home," these policies likely will have a discriminatory impact on the Muslim community.

²⁸ Aaron Cantu & George Joseph, "Trump's Border Security May Search Your Social Media by 'Tone'," The Nation, August 23, 2017, accessed October 11, 2017, https://www.thenation.com/article/trumps-border-security-may-search-your-social-media-by-tone/

²⁹ "A similar procedure approved in December 2016 prompted Visa Waiver Program travelers to provide their social media information upon entering the country using a drop-down menu that lists platforms including Facebook, Google+, Instagram, LinkedIn and YouTube, and a space to input their account names on those sites." Tony Romm, "U.S. government begins asking foreign travelers about social media," Politico, December 22, 2016, accessed October 11, 2017, http://www.politico.com/story/2016/12/foreign-travelers-social-media-232930

³⁰ Andrew Lindsay, "Trump's 'Extreme Vetting' Could Criminalize Islam," HuffPost, March 22, 2017, accessed October 11, 2017, https://www.huffingtonpost.com/entry/trumps-extreme-vetting-could-criminalize-islam_us_58d2aaece4b02d33b747b398

³¹ Sam Blewett, "Donald Trump 'Muslim ban': Iran-born BBC journalist detained at Chicago airport under new immigration policy," January 30, 2017, accessed October 11, 2017, https://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-bbc-journalist-iran-born-ali-hamedani-chicago-airport-immigration-travel-a7552866.html

³² Kelly: "We may want to get on their social media, with passwords. It's very hard to truly vet these people in these countries, the seven countries," Kelly <u>said</u> to the House's Homeland Security Committee, <u>adding</u>, "If they don't cooperate, they can go back." Aaron Cantu & George Joseph, "Trump's Border Security May Search Your Social Media by "Tone'," The Nation, August 23, 2017, accessed October 11, 2017, https://www.thenation.com/article/trumps-border-security-may-search-your-social-media-by-tone/

III. CONCLUSION

DHS's role in diligently protecting our country must be balanced against the constitutional protections against racial and religious discrimination, as well as the guarantee of equal protection for all U.S. citizens. We urge DHS not to implement the Rule, a misguided and discriminatory effort, which overreaches its purpose and chills free speech and the free exercise of religion.

Please do not hesitate to let us know if we can provide any further information regarding our concerns. We may be reached at ACahn@cair.com or 646-665-7599.

Sincerely,

National Organizations

Asian American Legal Defense and Education Fund (AALDEF)

Association of Research Libraries

CAIR

Defending Rights & Dissent

Franciscan Action Network

Immigrant Legal Resource Center

Islamic Civic Association

Islamic Society of Washington Area

Japanese American Citizens League

LatinoJustice PRLDEF

Muslims for Liberty

NAACE

National Association of Social Workers

National Center for Transgender Equality

National Education Association

National Immigration Law Center

National Organization for Women

National Religious Campaign Against Torture

Northern Borders Coalition

Project South

Unitarian Universalist Service Committee

Yemen Peace Project

State Organizations (states listed for identification purposes only)

CAIR San Francisco Bay Area (California)

CAIR-Cincinnati (Ohio)

CAIR-CT (Connecticut)

CAIR-MA (Massachusetts)

CAIR-NY (New York)

CAIR-SA (Texas)

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Common Cause/NY (New York)

Illinois Coalition for Immigrant and Refugee Rights (Illinois)

Immigrant Law Center of Minnesota (Minnesota)

Islamic Civic Association of Staten Island (New York)

Islamic Society of Boston Cultural Center (Massachusetts)

New York Immigration Coalition (New York)

Queens Solidarity Coalition (New York)

Showing Up for Racial Justice - Montgomery County, MD (Maryland)

South Asian Fund For Education, Scholarship and Training (SAFEST) (New York)

Turning Point for Women and Families (New York)

Elected Officials

California State Assembly Member Bill Quirk (California)

New York City Council Member Helen Rosenthal (New York)