

August 24, 2021

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
United States Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC 20528

Dear Secretary Mayorkas,

The undersigned organizations write to express our concerns with the Department of Homeland Security's new social media monitoring initiative as part of the Department's efforts to combat domestic terrorism. According to public reporting, this initiative — which will evidently be implemented through the Office of Intelligence & Analysis (I&A), potentially in cooperation with private partners — intends to identify online “narratives” that are likely to incite violence, as well as people who may be susceptible to those narratives based on their social media behavior.¹

Such surveillance of social media does not work to help detect threats, as the government's own assessments have shown. Instead, it conflates constitutionally protected political activity with genuine threats of violence — a line further blurred by conventions of social media communication that make it difficult to consistently interpret what is being said or why. Concerns regarding the suppression of civil rights and civil liberties are magnified by the lack of safeguards and the Department's documented track record of targeting dissent, particularly that of historically marginalized communities. And delegating to private companies tasks that the government could not do itself only deepens rather than ameliorates these concerns.

To be clear, the undersigned organizations agree that it is imperative to mount a robust response to the deadly violence aimed at racial, religious, ethnic, and LGBTQ minority communities around the nation. We further acknowledge that some of the “narratives” and false information in the cross-hairs of this DHS surveillance program scarcely advance the productive debate upon which our democracy relies, and indeed can be deeply offensive, including to the communities at whom they are aimed. But the Department's apparent scrutiny of constitutionally protected speech as a precursor to violence rests on an empirically flawed premise, and threatens to fuel the very climate of mistrust in government that makes it easier for such narratives to take hold, including by promoting the appearance that the federal intelligence apparatus is entangled in resolving political disputes. While violence merits DHS'

¹ *Racially and Ethnically Motivated Violent Extremism: The Transnational Threat*, Hearing Before the H. Comm. on Homeland Sec. Subcomm. on Intelligence and Counterterrorism, 117th Cong. (2021) (oral testimony of John Cohen, Assistant Secretary of Homeland Security for Counterterrorism and Threat Prevention); *Domestic Violent Extremism in America*, Hearing Before the S. Comm. on Appropriations, 117th Cong. (2021) (oral testimony of Alejandro N. Mayorkas, Secretary of Homeland Security); Department of Homeland Security, “National Terrorism Advisory System (NTAS) Bulletin,” August 13, 2021, <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-august-13-2021> (“DHS will continue to identify and evaluate calls for violence, including online activity associated with the spread of disinformation, conspiracy theories, and false narratives, by known or suspected threat actors and provide updated information, as necessary”); Ken Dilanian and Julia Ainsley, “DHS Weighing Major Changes to Fight Domestic Violent Extremism, Say Officials,” NBC News, March 25, 2021, <https://www.nbcnews.com/politics/national-security/dhs-weighing-huge-changes-fight-domestic-violent-extremism-say-officials-n1262047>; Rachael Levy, “Homeland Security Considers outside Firms to Analyze Social Media after Jan. 6 Failure,” *Wall Street Journal*, August 15, 2021, <https://www.wsj.com/articles/homeland-security-considers-outside-firms-to-analyze-social-media-after-jan-6-failure-11629025200>.

attention, its underlying political dimensions require our elected leaders to find a path forward for a deeply divided country.

DHS should stop this surveillance effort. Our concerns with this program, which are outlined below, are more fully described in a forthcoming white paper from the Brennan Center.

I. Social Media Monitoring Will Not Be Effective to Identify Threats

Communication on social media is different from speaking in person. It is governed by a diverse set of constantly evolving norms and conventions that can make it difficult for people who are on the outside looking in to determine what is being said or what it means. As a consequence, the federal government — whether acting through human agents or through automated tools attempting to identify particular narratives or content on social media — will find it difficult to separate the wheat from the chaff, and will mistakenly scrutinize as potential threats people who have done nothing wrong. The barriers to accurate interpretation of social media include the following:

1. Social media conversations are difficult to interpret because they are often highly context-specific and can be riddled with slang, jokes, memes, sarcasm, and references to popular culture. The former acting chief of DHS I&A recognized this when she noted that “actual intent to carry out violence can be difficult to discern from the angry, hyperbolic — and constitutionally protected — speech and information commonly found on social media.”² To take a real-life example, a woman sarcastically responded to a proposed law that could give women a death sentence for getting an abortion by writing, “all life is precious...we will kill you,” and was banned from Twitter for violating its policy against threats of violence.³ In light of the designation of “abortion-related violent extremism” as a threat category by DHS and the FBI, she could have conceivably found herself under DHS scrutiny as well. Slang and lingo used by some individuals from marginalized communities are especially susceptible to misinterpretation, heightening the risks of disparate impact or enforcement.⁴
2. The nature of social media also makes it difficult to attribute a specific view to a given person, even if their posts, activity, or connections appear to reflect or associate with a particular perspective. For example, people doing research on hate groups are known to join their online networks and be in contact with their members.⁵ Assigning meaning to online activity becomes even harder when much communication is non-verbal and does not have an agreed-upon meaning — “retweets” on Twitter or “likes” on Facebook, for example, could signify

² *Examining the January 6 Attack on the U.S. Capitol, Hearing Before the S. Comm. on Homeland Sec. and Gov't Affairs and S. Comm. on Rules and Admin*, 117th Cong. (2021) (testimony of Melissa Smislova, Acting Under Secretary for the Office of Intelligence and Analysis).

³ Ebony McKenna, “An Ironic Joke Got Me Kicked off Twitter. But Maybe It’s for the Best,” *Guardian*, June 11, 2020, <https://www.theguardian.com/commentisfree/2020/jun/12/an-ironic-joke-got-me-kicked-off-twitter-but-maybe-its-for-the-best>.

⁴ *See, e.g.*, this discussion of a study revealing the regularity with which court reporters in Philadelphia made transcription errors of African-American English. John Eligon, “Speaking Black Dialect in Courtrooms Can Have Striking Consequences,” *New York Times*, January 25, 2019, <https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html>.

⁵ *Doc Society v. Blinken*, No. 1:19-cv-03632-TJK (D.D.C. May 28, 2020).

endorsement or could simply signify that a particular post is of passing interest.⁶ Moreover, the networked nature of social media means that DHS officials will inevitably scrutinize the posts of people associated with individuals under surveillance and may attribute their views to the targets of surveillance, increasing the risk that they will be held to account for content that does not embody their views or intentions.⁷

3. Reporting has indicated that in addition to human reviewers, I&A is likely to employ automated tools that analyze social media content, which amplify many of the concerns articulated here. The most rudimentary of these tools look for specific words and then flag posts containing those words. Such flags are broadly overinclusive, and garden variety content will regularly be elevated. Consider how the word “extremism,” for instance, could appear in a range of news articles, be used in reference to a friend’s strict dietary standards,⁸ or arise in connection with discussion about U.S. politics. Even the best Natural Language Processing tools, which attempt to ascertain the meaning of text, misinterpret meaning about 20-30 percent of the time.⁹ The tools fare worse on speakers of non-Standard American English, who may more frequently be from minority communities, as well as speakers of languages other than English.¹⁰ Similar concerns apply to mechanisms used to flag images and videos, which generally lack the context to be able to differentiate a scenario in which an image is used for reporting or commentary from one where it is used by a group or person to incite violence.¹¹
4. The government’s own assessments, noting many of the problems mentioned in this section, have failed to show that social media review is of value in identifying threats within the context

⁶ See, e.g., Anne Johnson, “The Ethics of Retweeting and Whether It Amounts to Endorsement,” *NPR*, July 31, 2014, <https://www.npr.org/sections/publiceditor/2014/07/31/336921115/the-ethics-of-retweeting-and-whether-it-amounts-to-endorsement>.

⁷ For example, in 2019 DHS officials barred a Palestinian student arriving to study at Harvard from entering the country, based on their scrutiny of his friends’ social media posts. The student had neither written nor engaged with the posts, which were critical of the U.S. government. He was eventually admitted into the U.S. after public outcry, but a person’s political views are not an appropriate reason in any event to stop them from entering the country. Anemona Hartocollis, “Palestinian Harvard Student Blocked from Coming to U.S. Is Allowed to Enter,” *New York Times*, September 3, 2019, <https://www.nytimes.com/2019/09/03/us/palestinian-harvard-student.html>.

⁸ Jaroslava Belkova, “Sugar and Nutritional Extremism,” *Critical Reviews in Food Science and Nutrition* 57 (2017): 933-936; Jennifer Rollin, “Food and Fitness: The Case for Letting Go of Extremism,” *Psychology Today*, January 26, 2016, <https://www.psychologytoday.com/us/blog/mindful-musings/201601/food-and-fitness-the-case-letting-go-extremism>.

⁹ See e.g., Shervin Malmasi and Marcos Zampieri, “Challenges in Discriminating Profanity from Hate Speech,” *Journal of Experimental & Theoretical Artificial Intelligence* 30 (2018): 187-202; Irene Kwok & Yuzhou Wang, “Locate the Hate: Detecting Tweets against Blacks,” *Proceedings of the Twenty-Seventh AAAI Conference on Artificial Intelligence*, Bellevue, Washington, July 2013, <https://www.aaai.org/ocs/index.php/AAAI/AAAI13/paper/view/6419>; Bo Han, *Improving the Utility of Social Media with Natural Language Processing*, University of Melbourne (2014): 28. See also Aaron Cantú & George Joseph, “Trump’s Border Security May Search Your Social Media by ‘Tone,’” *Nation*, August 23, 2017, <https://www.thenation.com/article/archive/trumps-border-security-may-search-your-social-media-by-tone/>.

¹⁰ Su Lin Blodgett and Brendan O’Connor, “Racial Disparity in Natural Language Processing: A Case Study of Social Media African-American English,” *Proceedings of the Fairness, Accountability, and Transparency in Machine Learning Conference*, Halifax, Canada, 2017, 2, <https://arxiv.org/pdf/1707.00061.pdf>.

¹¹ Carey Shenkman, Dhanaraj Thakur and Emma Llansó, *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Center for Democracy and Technology, May 2021, 29-30, <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf>; Ángel Díaz and Laura Hecht-Felella, *Double Standards in Social Media Content Moderation*, Brennan Center for Justice, August 4, 2021, 11, <https://www.brennancenter.org/our-work/research-reports/double-standards-social-media-content-moderation>.

of screening individual people coming into the United States. Among other observations, DHS officials piloting social media screening programs for certain immigrant populations pointed out the difficulty of understanding “with any level of certainty” the context and reliability of what they were reviewing. They concluded that “mass social media screening” was a poor use of resources, taking people away from “the more targeted enhanced vetting they are well trained and equipped to do.”¹² Earlier this year, the Office of Information and Regulatory Affairs (OIRA), the White House office that reviews federal regulations, rejected DHS’ proposal to collect social media identifiers on travel and immigration forms because DHS did not “adequately demonstrate[] the practical utility of collecting this information.”¹³

II. Social Media Monitoring Raises Serious Civil Rights and Civil Liberties Concerns

DHS’ social media surveillance scrutinizes reams of constitutionally protected speech, proceeding in part in this case on the flawed premise that a person’s views predict whether they will commit violence. It chills free expression and causes significant harms to political dissent and to the communities that have traditionally been the targets of government overreach. The risks of this type of surveillance are multiple:

1. If DHS classifies certain viewpoints as promoting violence, without regard to actual indications of violence, and scrutinizes individuals or online activity on the grounds that they are ostensibly connected to that viewpoint, it will be difficult or impossible for the Department to distinguish the potentially violent adherents to that viewpoint, who are far outnumbered by the non-violent ones.¹⁴ Millions of people, for example, oppose COVID-19 containment measures, dispute the results of the 2020 elections, or follow QAnon — all of which have been identified as markers of potential violent behavior¹⁵ — but almost none of these individuals will go on to commit a violent crime.
2. The federal government has a history of targeting abusive surveillance practices at marginalized communities and political dissent, and even a well-intentioned program aimed at stopping far-right violence can easily be turned against the very communities and political participation it is intended to protect. In the civil rights era, the federal government targeted activists such as Martin Luther King, Jr. More recently, it created a specious threat category called “Black Identity Extremism” — which includes activism against police brutality — and

¹² U.S. Citizenship and Immigration Services, “Social Media,” in *U.S. Citizenship and Immigration Services Briefing Book*, 181, <https://www.dhs.gov/sites/default/files/publications/USCIS%20Presidential%20Transition%20Records.pdf>.

¹³ Office of Information and Regulatory Affairs, “Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms,” No. 202007-1601-001, April 2, 2021, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202007-1601-001.

¹⁴ Federal Bureau of Investigation, “Adherence to QAnon Conspiracy Theory by Some Domestic Violent Extremists,” June 4, 2021, <https://int.nyt.com/data/documenttools/fbi-bulletin-on-q-anon-and-domestic-violent-extremism-june-4-2021/e587368b36687b6e/full.pdf>; Department of Homeland Security, Office of Intelligence and Analysis, “Heightened Domestic Violent Extremist Threat to Persist in 2021,” March 1, 2021, 2 (courtesy of Jana Winter, investigative journalist); Department of Homeland Security, NTAS Bulletin (“There are also continued, non-specific calls for violence on multiple online platforms associated with DVE ideologies or conspiracy theories on perceived election fraud and alleged reinstatement, and responses to anticipated restrictions relating to the increasing COVID cases.”).

¹⁵ *See, e.g.*, Carrie Dan, “Meet the Press Blog: Latest News, Analysis and Data Driving the Political Discussion,” NBC News, May 13, 2021, <https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-%20driving-political-discussion-n988541/ncrd1261306#blogHeader> (“The survey, conducted February 25 – March 1, found that 65 percent of Republicans believe that Biden’s win was solely the result of voter fraud.”).

categorized it as a potential national security threat,¹⁶ using the classification to justify surveillance of Black activists.¹⁷ Other contemporary examples of authorities treating political dissent as terrorism include the targeting of environmental activists engaged in nonviolent protests.¹⁸

3. Finally, when people know they are being watched by the government, they refrain from speaking — due to reasonable fears that their activity will be misinterpreted or that the government will retaliate against them for their speech, especially when it is critical of the state.¹⁹ That DHS views a broad spectrum of political speech as potentially connected to violence threatens to chill significant segments of the population from speaking on core topics of political discourse.

III. DHS Should Not Have a Sweeping Mandate Given Its Track Record of Targeting Dissent and Eroding Civil Rights and Civil Liberties

DHS I&A has a troubling track record when it comes to respecting civil rights and civil liberties. It has surveilled journalists and people engaged in peaceful political dissent, and has weakened safeguards applicable to its intelligence activities. Examples include the following:

1. In 2020, pursuant to an executive order aimed at undermining anti-racism protests and the movement to remove Confederate statues, I&A issued guidance directing that “threats to damage ... any public monument, memorial, or statue” would justify the broad-based collection of intelligence about the individuals and groups involved.²⁰ This led to surveillance, including likely through social media, of people based upon the exercise of their constitutionally protected right to peacefully protest rather than any suspicion they were linked to violent activity or groups.
2. DHS has also targeted those shining a light on its activities. The *Washington Post* reported that the Department compiled intelligence reports about journalists who were reporting on its surveillance of protestors and distributed them through a system typically reserved for national

¹⁶ Sam Levin, “Black Activist Jailed for His Facebook Posts Speaks Out about Secret FBI Surveillance,” *Guardian*, May 11, 2018, <https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance>.

¹⁷ Alice Speri, “The FBI Spends a Lot of Time Spying on Black Americans,” *Intercept*, October 29, 2019, <https://theintercept.com/2019/10/29/fbi-surveillance-black-activists/>; George Joseph and Murtaza Hussain, “FBI Tracked an Activist Involved with Black Lives Matter as They Traveled across the U.S., Documents Show,” *Intercept*, March 19, 2018, <https://theintercept.com/2018/03/19/black-lives-matter-fbi-surveillance/>.

¹⁸ Adam Federman, “Revealed: How the FBI Targeted Environmental Activists in Domestic Terror Investigations,” *Guardian*, September 24, 2019, <https://www.theguardian.com/us-news/2019/sep/23/revealed-how-the-fbi-targeted-environmental-activists-in-domestic-terror-investigations>; Michael German and Sara Robinson, *Wrong Priorities on Fighting Terrorism*, Brennan Center for Justice, August 2019, 2, https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf.

¹⁹ See Complaint, *Doc Society*, No. 1:19-cv-03632-TJK, <https://www.brennancenter.org/sites/default/files/2019-12/Complaint%20Doc%20Society%20v%20Pompeo.pdf>. See also Alex Marthews and Catherine E. Tucker, “The Impact of Online Surveillance on Behavior,” in *Cambridge Handbook of Surveillance Law*, ed. David Gray and Stephen E. Henderson (Cambridge: Cambridge University Press 2017), 437-454, <https://ssrn.com/abstract=3167473>.

²⁰ Steve Vladeck and Benjamin Wittes, “DHS Authorizes Domestic Surveillance to Protect Statues and Monuments,” *Lawfare*, July 20, 2020, <https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>.

security threats.²¹ Additionally, I&A published a nationwide bulletin falsely claiming that a journalism nonprofit was a “criminal hacking” organization after the nonprofit published thousands of documents lawfully obtained under the First Amendment, including those bearing on fusion centers, which facilitate I&A information-sharing.²²

3. In 2020, DHS I&A cut meaningful civil rights and civil liberties oversight of its intelligence preparation and reporting process.²³ These changes essentially narrowed the conditions under which intelligence needed to be reviewed by DHS’ Office of Privacy and Office of Civil Rights and Civil Liberties and moved decisions resolving disputes on such matters to inside I&A and down the chain of command. The effect was to substantially loosen the reins on I&A at precisely the moment when the office was using its authorities to target Americans for engaging in constitutionally protected activity.

IV. Conclusion

DHS’ social media surveillance program is not an appropriate or effective method for preventing violence, whether administered by the Department or third parties. Social media is difficult to interpret, and there is no evidence to suggest that such social media surveillance will be an effective means of identifying threats. Any unproven security benefit of social media surveillance cannot justify the serious civil rights and civil liberties concerns that follow from its implementation. We urge DHS to drop this social media surveillance effort, full stop. We would greatly appreciate your confirmation that this letter has been received, and we respectfully request a meeting to discuss our concerns. We may be reached at levinsonr@brennan.law.nyu.edu (Rachel Levinson-Waldman, Brennan Center for Justice), pandurangah@brennan.law.nyu.edu (Harsha Panduranga, Brennan Center for Justice), and rt4chair@protonmail.com (Alex Marthews, Restore the Fourth).

Sincerely,

Brennan Center for Justice
International Refugee Assistance Project (IRAP)
The Leadership Conference on Civil and Human Rights
Muslim Justice League
Open The Government
Restore The Fourth

²¹ Shane Harris, “DHS Compiled ‘Intelligence Reports’ on Journalists Who Published Leaked Documents,” *Washington Post*, July 30, 2020, https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html.

²² Ali Winston, “Feds Are Treating BlueLeaks Organization as ‘a Criminal Hacker Group,’ Documents Show,” *Verge*, August 13, 2020, <https://www.theverge.com/2020/8/13/21365448/blueleaks-dhs-distributed-denial-secrets-dds-ddosecrets-police>.

²³ Tia Sewell and Benjamin Wittes, “The Evolution of DHS Intelligence Review Policy,” *Lanfare*, August 14, 2020, <https://www.lawfareblog.com/evolution-dhs-intelligence-review-policy>. See also Benjamin Wittes, “How the DHS Intelligence Unit Sidelined the Watchdogs,” *Lanfare*, August 6, 2020, <https://www.lawfareblog.com/how-dhs-intelligence-unit-sidelined-watchdogs>.

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