November 4, 2019

Via Federal e-Rulemaking Portal

Acting Secretary
Department of Homeland Security
Washington, DC 20229

RE: Request for Comment on Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms, 84 Fed. Reg. 46557 (Sept. 4, 2019), Docket No. DHS–2019–0044

Dear Acting Secretary of the Department of Homeland Security:

The Harvard Law School Immigration Project ("HIP") and the Harvard Immigration and Refugee Clinical Program ("HIRC") at Harvard Law School write jointly in response to the Department of Homeland Security ("DHS") request for comments on Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms, 84 Fed. Reg. 46557 (Sept. 4, 2019) ("the Rule"). We, the signatories of this letter, are immigration lawyers and law students. HIP is a student-practice organization that represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylees who are seeking family reunification and legal residency. One of the first immigration and refugee clinics in the United States, HIRC has represented thousands of individuals from all over the world seeking humanitarian protection since its founding in 1984.

HIRC and HIP oppose the proposed rule for three main reasons: (1) it would impermissibly infringe upon the freedom of association protected by the First Amendment; (2) it would further enable discrimination and profiling based on social media vetting of young people and people of color; and (3) it would exacerbate the marginalization of certain groups through algorithmic bias that may arise from the mass collection of social media data.

I.   **The Rule violates the freedom of association protected by the First Amendment of the U.S. Constitution.**

First, the Department's proposed collection of social media identifiers and publicly available social media information would impermissibly infringe upon the freedom of association protected by the First Amendment to the U.S. Constitution. The U.S.
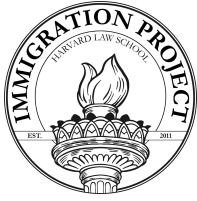
Supreme Court has stated unequivocally that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny"[1] and has emphasized that this freedom is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[2] In light of this principle, the Court has repeatedly invalidated under the First Amendment various government efforts to compel individuals to disclose information relating to their associations based on the concern that the fear of potential adverse consequences resulting from such disclosure would deter people from engaging freely in associational activity.[3] For example, the Court in *Shelton v. Tucker* struck down a policy requiring public school teachers to file affidavits listing any organizations they had been a part of in the past five years because such requirement impermissibly impaired the teachers' freedom of association.[4]

The proposed DHS policy in effect compels the disclosure of social media identifiers and information regarding social media use. Although the Notice states that disclosing social media information is not "mandatory," it acknowledges that failure to provide such information may lead Customs and Border Patrol ("CBP") or United States Citizenship and Immigration Services ("USCIS") to deny one's application for admission or immigration benefits.[5] Inevitably, applicants will feel compelled to disclose their social media information in response to the relevant questions on the forms if refusal to provide such information could result in a denial of admission or an immigration benefit.[6] Moreover, the majority of the data fields on these forms are mandatory, and without a specific indication to the contrary, applicants will likely presume the social media questions are mandatory as well.

The Department's proposed policy of collecting information relating to social media use by applicants for admission or certain immigration benefits seeks to do exactly what the Supreme Court has prohibited in cases such as *Shelton.* By compelling

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[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

[2] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see also Lyng v. Int'l Union, UAW*, 485 U.S. 360, 367 n.5 (1988) ("associational rights . . . can be abridged even by government actions that do not directly restrict individuals' ability to associate freely."); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) ("any deterrent effect on the exercise of First Amendment rights [that] arises . . . indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure" is subject to scrutiny).

[3] *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958) (NAACP membership list); *Shelton v. Tucker*, 364 U.S. 479 (1960) (every public school teacher's associational ties).

[4] *See* 364 U.S. 479, 486 (1960).

[5] *See* 84 Fed. Reg. 46557, 46559 (Sep. 4, 2019).

[6] The Supreme Court has focused its First Amendment inquiry on the effect, not intent, of the regulation or policy at issue. *See NAACP v. Alabama*, 357 U.S. at 460-61 ("state action which may have the *effect* of curtailing the freedom to associate is subject to the closest scrutiny" (emphasis added)).
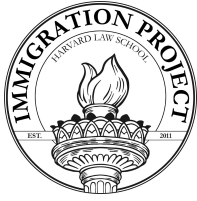
disclosure of social media information, the Rule would impermissibly burden numerous noncitizens' First Amendment right of free association.[7] Even if the collection of such information may serve important purposes—like vetting national security risks—the sheer breadth of the proposed policy, like the disclosure requirement struck down in *Shelton*, is overly sweeping. It applies to an extremely broad range of noncitizens—including applicants for admission, visa waivers, naturalization, lawful permanent status, asylum, and refugee resettlement—and asks them to provide identifiers and information relating to *any* social media platforms used in the past five years.[8] Fearing that the disclosure of their social media information may cause their applications for admission or an immigration benefit to be rejected, many noncitizens will refrain from engaging freely in associational activity on social media (e.g. joining certain groups or "following" certain individuals), or they may choose to delete their existing social media accounts or refrain from making accounts in the first place.[9]

In fact, the pernicious effects of DHS' use of social media information—that of noncitizens in particular—became part of the national consciousness this fall. In early September, Ismail Ajjawi, a Palestinian student at Harvard College, was initially denied entry to the U.S. News reports indicate that this denial of entry was

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[7] Under Supreme Court precedents, the First Amendment's protection would apply with full force to noncitizens residing in the U.S. who apply for admission (for the first time or for adjustment of status/ naturalization) or an immigration benefits subject to the proposed policy. According to the Federal Register notice, the proposed collection of social media information would apply to applications for naturalization (Form N-400), lawful permanent resident status through adjustment of status (Form I-485), advance permission to enter as a nonimmigrant (I-192), and asylum, withholding of removal, or protection under the Torture Convention (Form I-589). *See* 84 Fed. Reg. at 46560. Most applicants for any of these benefits, by definition, are physically present and residing in the U.S. already. The Supreme Court has held that the First Amendment applies with full force to noncitizens lawfully residing in the country. *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945); *Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953). Although technically an unsettled issue, the First Amendment most likely protects undocumented immigrants in the U.S. as well, given that the Court in *Zadvydas v. Davis* held that federal plenary power over immigration "is subject to important constitutional limitations." 533 U.S. 678, 695 (2001).

[8] The list of 19 global social media platforms provided on the DHS forms does not limit the scope of the Department's request for social media information, as the relevant questions would also give the applicants the option to select "Other" from the drop-down list and enter information into a free text field below. *See* 84 Fed. Reg. at 46559.

[9] The Department's commitment to reviewing social media information "in a manner consistent with the privacy settings the applicant has chosen to adopt for those platforms[,]" *see id.* at 46558, does not resolve the constitutional problem. Choosing particular privacy settings on a social media platform is itself an integral part of online associational activity, as it reflects each user's decision regarding which information to share with the public. Therefore, the proposed policy will still impose an unconstitutional burden on the freedom of association if it pressures noncitizens to adopt privacy settings that are more restrictive than what they would otherwise use.
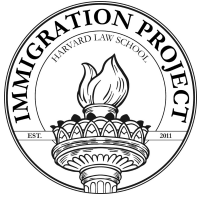
based on his friends' Facebook posts exhibiting political views against the U.S.[10] According to these same reports, Ajjawi had not expressed any political views on his own timeline.[11] This example illustrates the potential dangers of the Department's proposed policy as well as its implemented policy of collecting social media identifiers from applicants for immigrant or nonimmigrant visas.[12] If noncitizens can be denied admission or an immigration benefit based on their friends' social media activity over the past five years, many would likely refrain from engaging in associational activity freely on social media or even from using social media at all— which in turn would seriously and impermissibly burden their First Amendment right of free association.

II. The Rule will authorize discrimination and profiling of vulnerable groups and young people.

Second, the Rule is likely to enable discrimination and profiling. In the United States, DHS is already in the business of using social media to falsely accuse Black and Latinx youth of gang membership. These allegations have materially affected the lives of school-aged children— "leading to their detention, deportation, and/or denial of immigration benefits."[13] It is reasonable to believe that the Rule, which will give DHS access to a wider berth of social media information, will authorize the agency to engage in even more extreme discriminatory vetting that disproportionately harms vulnerable groups.

A recent report by the Immigrant Legal Resource Center (ILRC) sheds light on how social media surveillance has affected the lives of Black and Latinx youth.[14] In one instance, a high school student with a mental disability was apprehended in his own home, where he was living with his father, solely on the basis of his alleged gang membership.[15] As evidence of David's alleged gang membership, DHS produced a Homeland Security Investigations (HSI) report and a series of Facebook pictures. The HSI report summarized "the existence of a police report" and a school incident report with "details" of gang membership;[16] and the Facebook pictures showed David wearing a Chicago Bulls cap (a gift from his cousin), a pair of Nike

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[10] Karen Zraick and Mihir Zaveri, "Harvard Student Says He Was Barred From U.S. Over His Friends' Social Media Posts," *N.Y. Times*, Aug. 27, 2019, https://www.nytimes.com/2019/08/27/us/harvard-student-ismail-ajjawi.html.
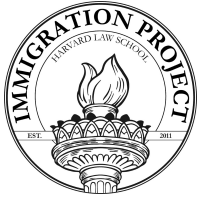
[11] *Id.*

[12] CBP collected Ajjawi's social media information as part of this program. *See id.*

[13] Immigrant Legal Resource Center (ILRC), *Deportation By Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members*, 2018, https://www.ilrc.org/deportation-by-any-means-necessary, p. 2.

[14] *Id.*

[15] *Id.*

[16] *Id.*

shoes, and blue clothes. An unidentified source had scribbled "MS-13 Gang apparel 'Bulls' hat" on the photo. This "evidence" was then used to detain David and deny his request to set a bond so he could be released.[17] David was not able to contest this evidence and was labeled a danger to the community.[18] He was eventually denied his lawful permanent resident application and his application for asylum, and was deported back to a country where he feared for his life—solely on the basis of these false allegations of gang involvement.[19]

This nefarious use of social media is consistent with what HIRC has observed in Massachusetts in our representation of Central American asylum seekers. In fact, David's case is not unique, but rather emblematic of an increasing trend towards governmental use of flimsy, discretionary evidence—like pictures posted on Facebook and Snapchat—to deny noncitizens the immigration relief they merit or keep them in jail. Through a point system maintained by the Boston Regional Intelligence Center ("BRIC)," a person is designated a "Gang Associate" if allocated six or more points and a "Gang Member" if allocated ten or more points.[20] The point system makes it possible to designate someone a Gang Associate or Gang Member for wearing clothing typically worn by youth from certain communities, like a rosary, without any allegation that he engaged in violence or criminal activity.[21] A recent lawsuit filed by the American Civil Liberties Union (ACLU) of Massachusetts alleges that Boston Police Department and BRIC visit social media sites like Facebook to assign points to individuals based on their pictures and posts. Most people in the Gang Assessment Database are Black or Latinx.[22]

There is a growing awareness that gang databases are not effective at achieving their stated purpose of reducing gang violence and, quite possibly, exacerbate the problem. In 2017, the city of Portland, Oregon decided to abandon any gang database tags founded on anything other than a criminal conviction.[23] New York City has halved the size of its database in the last four years by checking entries for accuracy at regular intervals.[24] A study found that Chicago's gang database was highly racialized and failed to include many whites involved in violent gangs—70% of people on the database are Black, and 25% are Latinx while less than 5% are

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Complaint, *American Civil Liberties Union of Massachusetts (ACLUM) v. Boston Police Department (BPD)* (Suffolk Superior Court 2018), p. 5, https://www.aclum.org/en/cases/aclu-massachusetts-v-boston-police-department.

[21] *Id.*

[22] *Id.*

[23] Anne Teigen, *The Controversy over Gang Databases*, The NCSL Blog, Dec. 20, 2018, http://www.ncsl.org/blog/2018/12/20/the-controversy-over-gang-databases.aspx.
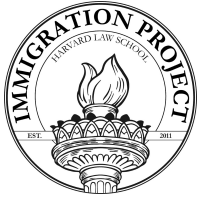
[24] *Id.*

white.[25] There are also real concerns that gang databases informed solely by social media presence threaten the work of activists working within communities affected by gang violence. The California database, CalGang, for example, was criticized for including "associating with gang members" and "frequenting gang areas" as sufficient grounds for inclusion, predictably criminalizing the work of many community workers for whom both of those characteristics are foundational to their efforts to counter gangs.[26] The adoption of the proposed rule will likely further authorize discrimination against Black and Latinx youth that is already taking place.

III.   The Rule may fall prey to algorithmic bias.

Finally, the application of potentially-biased algorithmic analyses in the Homeland Security context could have pernicious consequences. It is reasonable to assume that DHS will need to employ automated data analysis techniques in order to make practicable the mass data collection and vetting that the proposal entails; however, the Rule does not include any proposed oversight procedures or safeguards against bias in data collection and analysis. DHS' use of algorithmic "tone" analysis of social media datasets has already demonstrated the perils of failing to implement such safeguards.[27,28]

Algorithmic bias can take many forms. Bias can be found in automated decision-making systems spanning employment, education, criminal justice, internet search, and financial markets.[29] COMPAS, a tool intended to measure recidivism risk, shows the risks inherent in machine learning without safeguards against racial bias: a third-party study demonstrated that this tool has both high false-positive rates for black defendants, and high false-negative rates for white defendants.[30]

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[25] The UIC Policing in Chicago Research Group, *Expansive and Focused Surveillance: New Findings on Chicago's Gang Database*, June 2018.

[26] Katie Flaherty, "He's a gang intervention worker. But California police call him a gang member," *NBC News*, Aug. 18, 2019, https://www.nbcnews.com/news/us-news/he-s-gang-intervention-worker-california-police-call-him-gang-n1043666.

[27] Aaron Cantú and George Joseph, "Trump's Border Security May Search Your Social Media by 'Tone,'" *The* Nation, 2017, https://www.thenation.com/article/trumps-border-security-may-search-your-social-media-by-tone.

[28] James Ball, *'You're the Bomb!' Are You at Risk from the Anti-terrorism Algorithms?*, *The Guardian*, Dec. 2, 2014, https://www.theguardian.com/uk-news/2014/dec/02/youre-the-bomb-are-you-at-risk-from-anti-terrorism-algorithms-automated-tracking-innocent-people.

[29] Osonde A. Osoba and William Welser IV, *An Intelligence in Our Image: The Risks of Bias and Errors in Artificial Intelligence*, Rand Corporation, 2017.

[30] Jeff Larson, Surya Mattu, Lauren Kirchner and Julia Angwin, "How We Analyzed the COMPAS Recidivism Algorithm," *ProPublica*, May 23, 2016, https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.
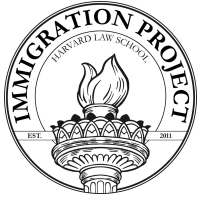
The automated analysis of social media data could disparately impact users of different languages and dialects.[31] The lack of diverse language datasets can potentially cause dramatically reduced accuracy for the analysis of non-English data.[32] In 2017, for example, a Palestinian man was arrested and questioned by Israeli police after posting "good morning" in Arabic on Facebook because the website's algorithms mistranslated the phrase to mean "attack them" in Hebrew, and no one checked the translation with a native Arabic speaker.[33]

The Rule infringes upon the freedom of association protected under the First Amendment, authorizes DHS officials to probe the public's personal data at the cost of discriminating against vulnerable groups, and in its current form, and provides no safeguards against potential algorithmic bias. HIP and HIRC thus urge DHS to reconsider the expansion of the scope of social media surveillance of marginalized groups by withdrawing its current proposal.

Thank you for your consideration.

Sincerely,

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[31] Center for Democracy and Technology, "Today's Tools for Automating Social Media Content Analysis Have Limited Ability to Parse the Nuanced Meaning of Human Communication." *Mixed Messages?: The Limits of Automated Social Media Content Analysis*, 2017, p. 4, https://cdt.org/files/2017/11/Mixed-Messages-Paper.pdf.

[32] "Tools that have lower accuracy when parsing non-English text—due to a lack of resources in other languages—can lead to disproportionately harmful outcomes for nonEnglish speakers." Center for Democracy and Technology, *Mixed Messages?: The Limits of Automated Social Media Content Analysis* (2017), p. 15, https://cdt.org/files/2017/11/Mixed-Messages-Paper.pdf.

[33] Alex Hern, "Facebook Translates 'Good Morning' into 'Attack Them', Leading to Arrest," *The Guardian*, Oct. 24, 2017, https://www.theguardian.com/technology/2017/oct/24/facebook-palestine-israel-translates-good-morning-attack-them-arrest.