

Submitted via email: Racism@ohchr.org

Re: Comments submitted to the Special Rapporteur on contemporary forms of racism, xenophobia and related intolerance: Race, Borders, and Digital Technologies

To Whom It May Concern:

We welcome the opportunity to provide brief comments in response to the call for information on how digital technologies deployed in the context of border enforcement and immigration determinations reproduce, reinforce, and compound racial discrimination. We specifically write to discuss how the United States' recent embrace of social media screening to inform who receives an immigration benefit and who is permitted to enter and stay in the United States has had a discriminatory impact on racial, ethnic, and religious minorities (in particular the Black, Latinx, Arab, and Muslim communities), and has impinged upon the rights of free association and free speech protected by the U.S. Constitution. The solicitation of social media identifiers and subsequent scrutiny of public social media profiles invite opportunities for mistaken inferences and allow racial bias and ideology to drive decision making.

Over the past two years, the United States has dramatically expanded and formalized social media disclosure requirements for noncitizens. As of April 2019, the U.S. State Department has required visa applicants to disclose social media accounts and identifiers used on a range of platforms, including Twitter and Facebook, in the preceding five years.¹ Then, in September 2019, the U.S. Department of Homeland Security ("DHS") proposed to compel such disclosures from noncitizens already physically present and even residing in the United States who apply for immigration benefits including naturalization, legal permanent residence, and asylum.² These efforts systematize the prior ad hoc approach to social media screening, as a result of which noncitizens would, for example, be questioned in immigration court and at ports of entry about photos and postings on social media. This expanded approach to social media screening and vetting is highly problematic because U.S. immigration enforcement has a demonstrated track record of utilizing social media information in a manner that disproportionately harms members of minority racial, ethnic, and religious groups.

Of particular concern, DHS has exploited social media connections 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

¹See Mana Azarmi, "The U.S. Government is Demanding Social Media Information From 14.7 Million Visa Applicants – Congress Should Step In," Center for Democracy & Technology, (July 3, 2019), <https://cdt.org/insights/the-u-s-government-is-demanding-social-media-information-from-14-7-million-visa-applicants-congress-should-step-in/>.

²See 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, 46560 (Sept. 4, 2019).

benefits.”³ A recent report by the Immigrant Legal Resource Center sheds light on how DHS has exploited social media surveillance to erroneously deprive Black and Latinx youth of legal process.⁴ Immigration and Customs Enforcement, a constituent agency of DHS, frequently combs social media to uncover flimsy ‘evidence,’ often minimally-informative material, such as a teenager’s Facebook friends or a photo of him wearing clothing related to a popular sports team or recording artist, to support its accusations that the teenager is a gang member.⁵ In one notable case, DHS evidenced its allegation of gang affiliation with a photo posted to Facebook of a high school student wearing a Chicago Bulls hat. The immigration court denied him bond and rejected his application for immigration relief, deporting him back to a country where he feared for his life.⁶

Of additional concern, people of, or presumed to be of, Muslim faith or Arab descent already face a disproportionate risk of religious and ethnic profiling while traveling, including enhanced TSA screening measures, wrongful inclusion on national security watchlists, and discriminatory complaints.⁷ Social media screening has compounded and magnified this problem by creating an infrastructure rife with mistaken inference and guilt-by-association. For example, in September 2019, Customs and Border Protection (CBP) denied Ismail Ajjawi, a Palestinian student at Harvard College, entry to the United States. News reports indicate that CBP denied his entry based on his friends’ Facebook posts exhibiting political views against the United States, even though Ajjawi had not expressed any political views on his own social media.⁸ Including travelers’ usernames, posts, and social media affiliations in the TSA screening process will increase the dangers of “flying while Muslim,” particularly where cultural and linguistic barriers create an elevated risk of misunderstanding. Moreover, to the extent that a ‘flagged’ immigrant or traveler’s social media network overlaps with her religious and ethnic community, individuals in that community will also be exposed to increased scrutiny with significant consequences for safety and privacy.

Thus, beyond the direct burdens they place on travelers and other noncitizens, the expanded social media disclosure requirements imposed by the U.S. government have the foreseeable and direct consequence of chilling both associational activity on social media (e.g. joining certain groups or “following” certain individuals) and speech, even as the U.S. Supreme Court has counseled that these freedoms are “protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”⁹

³ Laila Hlass and Rachel Prandini, “Deportation By Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members,” Immigrant Legal Resource Center, 2 (2018), <https://www.ilrc.org/deportation-by-any-means-necessary>.

⁴ *See generally id.*

⁵ *See id.* at 3.

⁶ *See id.*

⁷ *See, e.g.,* Michael Luongo, “Traveling While Muslim Complicates Air Travel,” *N.Y. Times* (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html>.

⁸ *See* 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>.

⁹ *See 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

For additional information on this subject, please see the comment letter submitted by the Harvard Immigration and Refugee Clinical Program¹⁰ opposing DHS's proposal to add social media disclosures to immigration benefit applications.

If you have any questions, please contact us at the information provided above. We thank you for your consideration in this matter.

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).

¹⁰ Harvard Immigration & Refugee Clinical Program and Harvard Immigration Project, 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; <http://harvardimmigrationclinic.org/files/2019/11/HIP-HIRC-84-Fed.-Reg.-46557-Comment.pdf>.