



COMMONWEALTH of VIRGINIA
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May 5, 2022

Hon. Alejandro Mayorkas
Secretary of Homeland Security
Washington, D.C. 20528

Via Email and U.S. Mail

Re: DHS's Disinformation Governance Board Must Be Disbanded.

Dear Secretary Mayorkas:

As the chief legal officers of our respective States, we the undersigned Attorneys General are tasked not just with enforcing the laws, but with protecting the constitutional rights of all our citizens. Today we write you to insist that you immediately cease taking action that appears designed exclusively for the purpose of suppressing the exercise of constitutional rights.

Every American knows that the Constitution forbids the government to "abridg[e] the freedom of speech." U.S. Const. Amend. I. As Justice Robert Jackson wrote nearly eighty years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Your recent testimony before the U.S. House Appropriations Subcommittee on Homeland Security,¹ however, indicated that the Department of Homeland Security, under your leadership, is doing exactly that: prescribing orthodoxy by slapping a federal-government label of "disinformation" or "misinformation" on speech that government bureaucrats, operating behind closed doors, decree to be improper. This is an unacceptable and downright alarming encroachment on every citizen's right to express his or her opinions, engage in political debate, and disagree with the government. The Biden Administration's

¹ *Fiscal Year 2023 Budget Request for the Department of Homeland Security: Hearing Before the Subcomm. on Homeland Security of the H. Appropriations Comm.*, 117th Cong. (Apr. 27, 2022), <https://tinyurl.com/2p96f7pt>.

latest effort to decide what speech is “acceptable” and “orthodox” combines McCarthyite speech policing with the secrecy of the English Star Chamber. In short, you seem to have misunderstood George Orwell: the “Ministry of Truth” described in *1984* was intended as a warning against the dangers of socialism, not as a model government agency. “MiniTru” and its thuggish apparatchiks are the villains in that story, not the heroes. For the sake of our democracy, you must immediately disband the “Disinformation Governance Board” and cease all efforts to police Americans’ protected speech.

The existence of the Disinformation Governance Board will inevitably have a chilling effect on free speech. Americans will hesitate before they voice their constitutionally protected opinions, knowing that the government’s censors may be watching, and some will decide it is safer to keep their opinions to themselves. The resulting damage to our political system and our culture will be incalculable: as a democracy, our political debates and decisions are supposed to take place in the public square, where every citizen can participate, rather than in government office buildings where hand-picked and unaccountable partisan committees are insulated from public supervision and criticism.

The timing of the Disinformation Governance Board’s creation is also highly suspect. For years, many have defended Twitter’s open censorship of voices hostile to the elite consensus by arguing that private companies enjoy the right to determine what is said on their platforms. This argument only works, however, if those private companies are not censoring on the government’s behalf. By its own admission, the Biden Administration has been “flagging problematic posts” on social media and coordinating with the private sector to regulate Americans’ free speech.² The President of the United States publicly urged social media companies to police “misinformation and disinformation” on their platforms.³ Suddenly, just as Elon Musk prepares to acquire Twitter with the stated purpose of correcting the platform’s censorship of free speech, you announce the creation of the Disinformation Governance Board. As the Biden Administration apparently loses a critical ally in its campaign to suppress speech it deems “problematic,” you have created a new government body to continue that work within the federal government. The contemporaneous occurrence of these two events is hard to explain away as mere coincidence. It instead raises serious questions about the extent of the Biden Administration’s practice of coordinating with private-sector companies to suppress disfavored speech.

² Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy, July 15, 2021, The White House (July 15, 2021), <https://tinyurl.com/bdsc4jhh> (“[W]e are in regular touch with these social media platforms, and those engagements typically happen through members of our senior staff . . .”).

³ Remarks by President Biden at Virtual Meeting on Military Deployments Supporting Hospitals for the COVID-19 Response, The White House (January 13, 2022), <https://tinyurl.com/45ezsejt> (“I make a special appeal to social media companies and media outlets: Please deal with the misinformation and disinformation that’s on your shows. It has to stop.”).

Virginia, like many other States, is preparing to conduct federal, state, and local elections beginning with early primary voting this week. Virginians are evaluating candidates and their platforms, trying to persuade their friends and neighbors, and debating the merits of innumerable political and moral questions, from international conflicts to local disputes. And just like always, the public conversation will include disputes over facts, and potentially even intentional misstatements of fact. But as Justice Brandeis explained long ago, “the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Your censorship will not drown out misinformation; it will suppress the lawful speech of well-meaning but unpopular speakers, and it will turn bad actors into martyrs with far more influence than if you simply allowed “more speech” to combat their alleged misinformation.

No statutory authority exists to support your creation of a board of government censors. Although Congress has considered a variety of measures to address the perceived dangers of “disinformation” in the United States, none has passed.⁴ Instead, while the people’s elected representatives continue to debate this issue, you have arrogated to yourself the power to address it without congressional authorization, despite the far-reaching effects of the Disinformation Governance Board on Americans and our political process. “It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). By flouting that essential check on the power of the Executive Branch, you undermine the separation of powers and dramatically overstep your authority and the jurisdiction of your agency.

There is perhaps no clearer illustration of the folly of the Disinformation Governance Board than the consistently poor judgment of the person you have made its executive director, Nina Jankowicz.⁵ Ms. Jankowicz—the self-styled “Mary Poppins of disinformation”⁶—is like so many who complain about misinformation and disinformation: she is often in error but never in doubt. She has previously suggested news that Hunter Biden’s laptop had been compromised was the product of a foreign disinformation campaign.⁷ She asserted that the theory tracing COVID-19 to a lab

⁴ See, e.g., COVID-19 Disinformation Research and Reporting Act of 2021, S. 913, 117th Cong. (2021); A Bill To Amend the Communications Act of 1934, S. 2448, 117th Cong. (2021).

⁵ Nina Jankowicz, The Wilson Center (last accessed May 1, 2022), <https://tinyurl.com/4xc7evwh>.

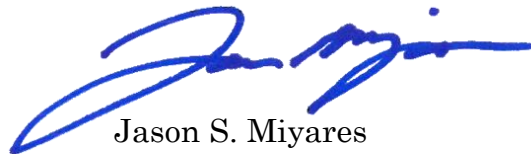
⁶ Nina Jankowicz (@wiczipedia), Twitter (Feb. 17, 2021, 4:35 PM), <https://tinyurl.com/5amkbaa9>.

⁷ See, e.g., Nina Jankowicz (@wiczipedia), Twitter (Oct. 22, 2020, 8:15 AM), <https://tinyurl.com/bddj7t5e>; Nina Jankowicz (@wiczipedia), Twitter (Oct. 22, 2020, 10:18 PM), <https://tinyurl.com/53yfzyym>. But see Katie Benner, Kenneth P. Vogel, Michael S. Schmidt, *Hunter Biden Paid Tax Bill, but Broad Federal Investigation Continues*, N.Y. Times (Mar. 16, 2022), <https://tinyurl.com/yn6cptyt> (describing emails obtained from the laptop as “authenticated”).

leak in China was invented because it was “politically convenient for Trump,”⁸ although the intelligence community now assesses that this theory may very well be correct.⁹ She has even praised Christopher Steele, the discredited author of the infamous false “dossier” about President Trump, and one of the most notable peddlers of disinformation in recent memory.¹⁰ It would be amusing that a self-proclaimed expert in disinformation like Ms. Jankowicz has proven to be so bad at identifying it, except that you have placed her in charge of doing so on behalf of the United States government.¹¹ It is also extremely troubling that Ms. Jankowicz has described parents in Loudoun County, Virginia who object to the indoctrination of their children with Critical Race Theory as “disinformers” engaged in “disinformation for profit.”¹²

The Disinformation Governance Board, by its very existence, and almost certainly by design, threatens to “enforce silence” when Americans wish to express views disfavored by the Administration. It is therefore *already* chilling free speech and impeding the political process in Virginia and every other State. This is unconstitutional, illegal, and un-American. Unless you turn back now and disband this Orwellian Disinformation Governance Board immediately, the undersigned will have no choice but to consider judicial remedies to protect the rights of their citizens.

Sincerely,



Jason S. Miyares
Attorney General of Virginia

⁸ Ryan Broderick, *Scientists Haven’t Found Proof the Coronavirus Escaped from a Lab in Wuhan. Trump Supporters Are Spreading the Rumor Anyway.*, BuzzFeed News (April 22, 2020), <https://tinyurl.com/ytfmthpe>.

⁹ Michael R. Gordon, Warren P. Strobel, Drew Hinshaw, *Intelligence on Sick Staff at Wuhan Lab Fuels Debate on Covid-19 Origin*, Wall Street Journal (May 23, 2021), <https://tinyurl.com/ytesmtbd>.

¹⁰ Nina Jankowicz (@wiczipedia), Twitter (Aug. 7, 2020, 7:06 AM), <https://tinyurl.com/yc3asr89>; Marshall Cohen, *The Steele dossier: A Reckoning*, CNN (Nov. 18, 2021), <https://tinyurl.com/3wwmyhet>.

¹¹ See also Nina Jankowicz (@wiczipedia), Twitter (Apr. 25, 2022, 1:29 PM), <https://tinyurl.com/3r93he5p> (“I shudder to think about if free speech absolutists were taking over more platforms . . .”).

¹² Harriett Alexander, *Biden’s New Disinformation Czar Said Fears About CRT in Loudoun County Schools Are “Disinformation For Profit”—Despite Entire School Board Now Facing Being Voted Out Over Woke “Equity” Seminars For Teachers*, Daily Mail Online (May 5, 2022), <https://tinyurl.com/2p9yw7ur>.

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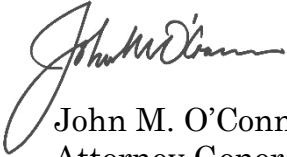
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CC: Hon. Joseph R. Biden Jr., President of the United States
Ms. Nina Jankowicz, Executive Director, Disinformation Governance Board
Hon. Charles E. Schumer, Majority Leader, United States Senate
Hon. Mitch McConnell, Republican Leader, United States Senate
Hon. Nancy Pelosi, Speaker of the United States House of Representatives
Hon. Kevin McCarthy, Minority Leader, United States House of
Representatives