United States Senate

WASHINGTON, DC 20510

April 29, 2022

The Honorable Alejandro Mayorkas Secretary of Homeland Security Department of Homeland Security 2707 Martin Luther King Jr. Ave. SE Washington, D.C. 20528

Dear Secretary Mayorkas:

On April 27, 2022 at a House Appropriations Committee hearing, you announced the creation of a "Disinformation Governance Board" that will focus on "countering misinformation and disinformation" in America. Separately, Nina Jankowicz announced that she will be employed as the board's Executive Director. I write today because these actions merit review by Congress, both as a general matter, as well as under the Congressional Review Act and because the actions may be in violation of provisions of the Antideficiency Act.

Establishment of this board will significantly impact Americans' free speech rights and cuts across numerous areas of government and society. It will change the relationship between the government and the governed to whom it answers. It will also substantially increase administrative costs for the number of different federal agencies engaged in this effort, which will impose increased costs on the American taxpayer.

Given this broad impact, Congress should be setting American policy in this area and certainly reviewing executive action impacting such fundamental rights, and therefore, it is imperative that this action receive congressional review.

Additionally, I write to confirm that you will comply with the requirements of the Congressional Review Act (CRA) in taking this action. Under the CRA, an agency action that falls within the definition of a "rule" must be submitted to Congress for review before it can take effect. 5 U.S.C. § 801(a)(1)(A). "The definition of a rule under the CRA is very broad." Government Accountability Office B-323772, at 3 (Sept. 4, 2012), available at https://www.gao.gov/assets/b-323772.pdf. In pertinent part, the CRA defines a rule as: "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). This is not limited to directives requiring notice, public comment, or similar Administrative Procedure Act procedures.

Further, this action may also be a direct violation of provisions of the Antideficiency Act (31 U.S.C. § 1341(a)(1)(A)), which prohibits "making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law."

In this case, it appears that the amount available for this action is "none" and that Congress explicitly defunded it, just weeks ago. Section 513 of Division F of the Fiscal Year 2022 Omnibus Appropriations Act (P.L. 117-103) specifically prohibits the Secretary of Homeland Security from using any funds provided by Congress to carry out Section 872 of the Homeland Security Act of 2002, which means it defunded any action to "allocate or reallocate functions among the officers of the Department of Homeland Security or to establish, consolidate, or alter organizational units within the Department of Homeland Security."

As you know, an officer or employee, including you, who violates the Antideficiency Act "shall be subject to appropriate administrative discipline," and, for willful violations, faces a criminal fine, imprisonment, or both. A federal employee who willfully violates the Antideficiency Act, "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." A federal employee who "knowingly and willfully" violated it "shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both."

Plainly, this DHS Disinformation Governance Board imposing significant constraints on the bedrock of American values and freedoms and new costs on the American people requires congressional review and may be a violation of the Antideficiency Act. So that Americans' elected representatives may timely review the rules and policies implementing this action as required under federal law, please confirm by Monday, May 16, that you will submit it to Congress before it purports to take effect. Further, in order to comply with the Antideficiency Act, you will need to submit a letter to the Director of the Office of Management and Budget, the President, the Congress, and the Comptroller General of the United States providing specific information on the violation if it has indeed occurred.

Thank you, and I look forward to your prompt reply.

Sincerely,

Bill Hagerty

United States Senator