No. 22-3573

In the United States Court of Appeals for the Sixth Circuit

MARK CHANGIZI, MICHAEL P. SINGER AND DANIEL KOTZIN,
Plaintiffs-Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Plaintiffs-Appellants' Opening Brief

Oral Argument Requested

November 28, 2022

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants Mark Changizi, Michael P. Senger, and Daniel Kotzin respectfully request oral argument because it will assist the Court in its review of the issues presented by this appeal.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1367, and 1402, because the United States is a defendant in this action. (RE 1, PageID#5). The district court entered final judgment on May 5, 2022. (RE 37, PageID #405; RE 38, PageID #1470). Plaintiffs filed a timely notice of appeal on June 30, 2022. (RE 43, PageID #690). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erroneously concluded that Plaintiffs lacked standing.
2. Whether Plaintiffs pled a colorable First Amendment claim.
3. Whether Plaintiffs pled colorable *ultra vires*, Fourth Amendment, and Administrative Procedure Act ("APA") claims.

STATEMENT OF THE CASE

I. INTRODUCTION

The First Amendment to the United States Constitution rests on the principle that no person or institution, including the Government, has a monopoly on the truth, and that viewpoint-based suppression of speech by the Government is dangerous and may even spell the death of a constitutional republic. *See Wood v. Georgia*, 370 U.S. 375, 388 (1962) ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political

truth." (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940))); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly.").

Plaintiffs in this case were active Twitter users who accrued large followings due to their reasoned criticism of Covid-19 restrictions. They alleged that censorship on the platform—including of their accounts—occurred because federal officials pressured social media companies to suppress expression of viewpoints about Covid-19 that diverged from the Government's. In their pleadings, they supplied public statements made by Defendants, as well as by President Joseph Biden and his Press Secretary, Jen Psaki, threatening social media companies with adverse consequences if they did not comply with government pressure. They also pled facts surrounding the timing of their suspensions, which corresponded to the Government's escalating demands. Accordingly, they claimed that Defendants had violated their First Amendment rights to free speech and expression, acted *ultra vires*, conducted an unlawful search, and failed to follow the APA.

In granting Defendants' motion to dismiss both on standing and substantive grounds, the court below erred. It explicitly disregarded statements of the President, who is in charge of all Defendants, threatening tech companies with adverse governmental action if they did not carry out his Covid-19 related censorship aims. The

court's reasoning, that the President had not been named as a defendant, so his statements could not be considered (nor could those of his press secretary) ignored the clear import of the President's role under Article II of the Constitution. His statements, documented in the Complaint, constituted facts tending to prove Defendants' attempts to obtain compliance with their demands.

The district court further erred by requiring, at the pleading stage, direct proof that absent government action, Plaintiffs would not have been censored. That is not the law. Plaintiffs had only to plead that the Government exerted coercive power over tech companies, a standard easily met since several federal officials publicly stated that they were doing just that. Subsequent discovery in similar cases, primarily in the form of written communications, uncovered yet more evidence that the Government has been using state power to browbeat social media companies into censoring those who express non-government-approved perspectives on Covid-19. Indeed, emails and text exchanges establish a previously unfathomable level of governmental entanglement in this viewpoint-based censorship scheme. *See* Joint Statement on Discovery Disputes at 3-19, *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. Aug. 31, 2022), Dkt. 71.

Plaintiffs respectfully request that this Court reverse the district court's clearly erroneous order dismissing the case and remand for further proceedings.

II. FACTUAL BACKGROUND

A. Twitter and Government Officials' Statements of Intent to Use Social Media Companies to Accomplish Governmental Objectives

Twitter is among the world's leading social media websites with a user base of hundreds of millions, endowing it with significant influence over public discourse. (Complaint, RE 1, PageID #6). When creating accounts, Twitter collects information, including that which is not otherwise public such as names, phone numbers, and email addresses. (Complaint, RE 1, PageID #7). Twitter can access direct messages and group messages (or group chats) that users consider private exchanges. (Complaint, RE 1, PageID #7). The following a user accrues is one indication of an account's impact and reach, while engagements (likes and retweets) and impressions (views) are likewise measures of influence. (Complaint, RE 1, PageID #6).

In March of 2020, formerly having eschewed censorship, Twitter announced that it was, "[b]roadening its definition of harm to address content that goes directly against guidance from authoritative sources of global and local public health information" and that it would censor posts that fell into this category. (Complaint, RE 1, PageID #7). On subsequent dates, Twitter continued to ramp up censorship efforts. (Complaint, RE 1, PageID #7).

In the spring of 2021, members of the Biden Administration, including officials within the Department of Health and Human Services ("HHS"), began openly threatening technology companies that did not censor "misinformation" about Covid-

19 to the Government's liking. On May 5, White House Press Secretary Jen Psaki gave a press conference where she stated that:

> The President's view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to Covid19 vaccinations …. He also supports better privacy protections and *a robust anti-trust program*. So, his view is that there's *more that needs to be done* to ensure that this type of misinformation, disinformation, damaging, sometimes life-threatening information, is not going out to the American public.

(Complaint, RE 1, PageID #8) (emphasis added).

On July 15, 2021, the Surgeon General released an advisory (hereinafter the advisory) aimed at censoring purported "misinformation" about Covid-19 (Complaint, RE 1, PageID #8). The advisory blamed social media companies for serving as hotbeds of "misinformation," which it alleged led "people to decline COVID-19 vaccines, reject public health measures such as masking and physical distancing. And use unproven treatments." (Complaint, RE 1, PageID #9).

The advisory, which appeared on the HHS website along with the claim that "American lives are at risk" so "tech and social media companies … must do more to address the spread on their platforms," instructed technology platforms to, *inter alia*, collect data on the spread and impact of misinformation; monitor "misinformation" more closely; weed out "misinformation 'super-spreaders' and repeat offenders"; and

amplify communications from trusted messengers and subject-matter experts. (Complaint, RE 1, PageID #9).

That day, Psaki gave a joint press briefing with U.S. Surgeon General Vivek Murthy, during which he castigated social media platforms:

> Modern technology companies have enabled misinformation to poison our information environment with little accountability to their users. They've allowed people who intentionally spread misinformation—what we call "disinformation"—to have extraordinary reach.

(Complaint, RE 1, PageID ##9-10).

Murthy continued:

> we expect more from our technology companies. We're asking them to operate with greater transparency and accountability. *We're asking them to monitor misinformation more closely. We're asking them to consistently take action against misinformation super spreaders* on their platforms.

(Complaint, RE 1, PageID #10) (emphasis added).

Ms. Psaki stated:

> *We've increased disinformation research and tracking within the Surgeon General's office. We're flagging problematic posts for Facebook that spread disinformation.*
>
> * * *
>
> There are also proposed changes that we have made to social media platforms, including Facebook, and those specifically are four key steps.
>
> One, that they measure and publicly share the impact of misinformation on their platform. Facebook should provide, publicly and transparently, data on the reach of COVID-

> 19—COVID vaccine misinformation. Not just engagement, but the reach of the misinformation and the audience that it's reaching.
>
> * * *
>
> Second, that we have *recommended—proposed that they create a robust enforcement strategy* that bridges their properties and provides transparency about the rules. So, about—I think this was a question asked before—there's about 12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms. All of them remain active on Facebook, despite some even being banned on other platforms, including Facebook—ones that Facebook owns.
>
> Third, it's important to *take faster action against harmful posts*. As you all know, information travels quite quickly on social media platforms; sometimes it's not accurate. And Facebook needs to move more quickly to remove harmful, violative posts—posts that will be within their policies for removal often remain up for days. That's too long. The information spreads too quickly.
>
> Finally, we have *proposed they promote quality information sources* in their feed algorithm.

(Complaint, RE 1, PageID ##10-11) (emphasis added).

On July 16, 2021, a reporter asked Ms. Psaki to elaborate on the Government's role in flagging Facebook "disinformation." Ms. Psaki responded:

> [I]t shouldn't come as any surprise that we're in regular touch with social media platforms … so we are regularly making sure social media platforms are aware of the latest narratives dangerous to public health … . And we work to engage with them to better understand the enforcement of social media platforms.

(Complaint, RE 1, PageID #11).

In response to a question posed by a reporter about Facebook's attempts to remove Covid misinformation, Ms. Psaki responded that the company's efforts were "[c]learly [insufficient], because we're talking about additional steps that should be taken." (Complaint, RE 1, PageID #12).

That day, a reporter asked President Biden, "[o]n Covid misinformation, what's your message to platforms like Facebook?" The President responded, "[t]hey're killing people." (Complaint, RE 1, PageID #13). That statement caused news outlets to conclude that the government "blamed" social media companies "for spreading misinformation about the coronavirus and vaccines" creating "stalling U.S. vaccine rates." (*Id.*).

Four days after President Biden's comments, *USA Today* reported that "[t]he White House is assessing whether social media platforms are legally liable for misinformation spread on their platforms." (*Id.*). The article noted: "[r]elations are tense between the Biden administration and social media platforms" and the government was "examining how misinformation fits into the liability protections granted by Section 230 of the Communications Decency Act, which shields online platforms from being responsible for what is posted by third parties on their sites." (*Id.*).

On October 29, 2021, the Surgeon General tweeted from his official account (as opposed to his personal one, which also remains active), in a thread:

> We must demand Facebook and the rest of the social media ecosystem take responsibility for stopping health misinformation on their platforms. The time for excuses and half measures is long past. We need transparency and accountability now. The health of our country is at stake.

(Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (PI Memo), RE 9-1, PageID #87). Then, in a January 2022 interview on MSNBC, Murthy stated that social media "platforms still have not stepped up to do the right thing[.]" (Complaint, RE 1, PageID ##13-14).

On March 3, 2022, the Surgeon General formally demanded that major tech platforms submit data about COVID-19 misinformation. (Complaint, RE 1, PageID #14). The "Request for Information" ("RFI") webpage asked for information from technology platforms, *inter alia*, about "sources of COVID-19 misinformation" including "specific, public actors that are providing misinformation[.]" (*Id.*). The broad request applied to "general search engines, content sharing platforms, social media platforms, e-commerce platforms, crowd sourced platforms, and instant messaging systems." (Complaint, RE 1, PageID #15).

B. *The Plaintiffs' Twitter Accounts*

Plaintiffs maintained active Twitter accounts since at least March of 2020. (Complaint, RE 1, PageID #15). While the content of each was unique, all regularly used their accounts to: (1) question the wisdom, efficacy, and morality of government responses to the pandemic, specifically lockdowns and mask and vaccine mandates; (2) read other users' views on the same or similar subjects; and (3) engage with other

users on the same or similar topics. (*Id.*).

Plaintiffs' accounts were influential, with tens of thousands of followers or, in Mr. Senger's case, over 100,000. (*Id.*). Mr. Senger was suspended twice for 12 hours, on October 27 and 29, 2021, before his permanent suspension on March 8, 2022, for a Tweet stating that, "the vast majority have realized that every COVID policy—from the lockdowns and masks to the tests, death coding, and vaccine passes—has been one, giant fraud." (Complaint, RE 1, PageID #16).

Twitter suspended Mr. Kotzin for 24 hours on September 24, 2021, because he posted, "[t]here is not now, nor has there ever been, evidence that the Covid shots reduce infection or transmission. Vaccine passports; vaccine mandates; vaccine requirements—they are all an abomination." (Complaint, RE 1, PageID #17). He then received a week-long suspension for a Tweet posted on March 7, 2022, that read, "[i]t is important to never lose sight of the fact that the global pandemic is ending not because of the vaccines, but because almost everyone on the planet got infected with covid." (*Id.*).

Mr. Changizi's first suspension occurred on April 20, 2021, for 12 hours, as a penalty for linking to and quoting an article finding that masks were "ineffective, harmful." (*Id.*). On June 25, 2021, Twitter again suspended Mr. Changizi for unknown reasons. (Complaint, RE 1, PageID #18).

Around December 1, 2021, Mr. Changizi learned, after followers alerted him, that his account was heavily censored and de-boosted (this means that the user's Tweets

appear much less frequently than others' and replies to posts may be hidden). (*Id.*). Mr. Changizi aggregated his monthly impressions and found that his engagements dropped precipitously around May 2021 and continued to decline after that. The only apparent explanation for this sudden change was the de-boosting to which Mr. Changizi was subsequently alerted. (*Id.*). Twitter permanently suspended Mr. Changizi on December 18, 2021, for tweeting:

> Covid is 10 to 20 times less dangerous than flu for kids. Get. A. Grip. There is NO long[-] term data for the shot. And even the short[-] and medium[-]term data for that age group are ambiguous at best.
>
> Asymptomatics rarely spread it ~ Vaccinations don't slow spread ~ unvaxed pose no threat to vaxxed ~ Risks are broadly flu like (and safer than flu for < 40) ~ Huge % of unvaxxed have superior natural immunity via recovery.

(*Id.*). Though Twitter reinstated his account on appeal without explanation, it remained de-boosted. (Complaint, RE 1, PageID #19).

Plaintiffs alleged that the timeline of the suspensions, which coincided with Defendants' and President Biden's threats, raised a strong inference that the censorship stemmed from the Government's initiative. (Complaint, RE 1, PageID #20). To the extent they remained on Twitter, Plaintiffs averred that they self-censored to avoid losing their accounts. (Complaint, RE 1, PageID #21). Plaintiffs also pled that Covid-related suspensions on Twitter were entirely one-sided, in favor of the government: there were no known examples of individuals being censored for spreading misleading or false information from the other side—by, for example, exaggerating the efficacy of

masks or the threat the virus poses to children, despite many such Tweets existing. (Complaint, RE 1, PageID #22).

III. PRIOR PROCEEDINGS

Plaintiffs filed suit in the United States District Court for the Southern District of Ohio on March 24, 2022, seeking injunctive and declaratory relief and arguing that: the Surgeon General lacked authority to issue the RFI or direct social media censorship so his action was *ultra vires*; the Government's threats to social media companies turned Twitter's viewpoint-based censorship into state action, in violation of Plaintiffs' First Amendment rights; by demanding information about users from tech companies, the RFI constituted an unlawful search under the Fourth Amendment; and the Surgeon General did not issue the RFI pursuant to proper APA procedure. (Complaint, RE 1). On March 30, Plaintiffs moved for a preliminary injunction to prevent tech companies from turning over their information by the May 2, 2022, deadline, arguing that the ongoing violation of their First and Fourth Amendment rights constituted an irreparable harm. (PI Memo, RE 9, 9-1).

The Government opposed the PI motion and moved to dismiss the entire case on the grounds that Plaintiffs lacked standing and failed to state a claim upon which relief could be granted. (Government's Opposition to Plaintiffs' Motion for a Preliminary Injunction and Motion to Dismiss (Def. MTD), RE 31) (citing Fed. R. Civ. P. 12(b)(1), (6)). Plaintiffs opposed. (Plaintiffs' Opposition to Motion to Dismiss (Plaintiffs' Opp.), RE 33). The court granted the Government's motion to dismiss on

May 5, 2022, on both 12(b)(1) and 12(b)(6) grounds and denied Plaintiffs' motion for a preliminary injunction as moot. (Opinion and Order, RE 37). The court concluded that Plaintiffs had failed to prove that the Government was responsible for censorship of their accounts on Twitter, and that it was at least equally plausible that the censorship occurred as a result of the company's internal mechanisms and decision making. (*Id.*).

In the last week of April 2022, new information about the existence of a "disinformation governance board" ("DGB") within the Department of Homeland Security ("DHS") came to light. (Motion for Leave to File Amended Complaint, RE 40, PageID ##490-92). Documents that were publicized at this time demonstrated that President Biden's executive agencies had been meeting with social media companies and directing them to censor "misinformation" about Covid-19 (as well as other topics). (*Id.*).

On June 14, 2022, Plaintiffs filed a motion for leave to file an amended complaint based on this new information, which bore directly on their ability to state a claim, because it established state action in social media censorship. (*Id.*). Plaintiffs sought to add President Biden, DHS, DHS Secretary Alejandro Mayorkas, and the DGB, as defendants. (*Id.*). The court denied this motion on June 20, 2022, because the time for filing a motion under Rule 59 had elapsed, while observing that relief under Rule 60 remained available. (Order, RE 41, PageID ##644-45). Plaintiffs moved to reopen the case on June 24, 2022, under Fed. R. Civ. P. 60, based upon the newly discovered evidence. (Motion for Relief from Judgment Under Fed. R. Civ. P. 60(b), RE 42,

PageID ##646-53). Plaintiffs filed a timely notice of appeal to this Court on June 30, 2022. (RE 43, PageID #690).

Defendants opposed the motion to reopen the case on July 14, 2022, both on jurisdictional grounds because the Notice of Appeal had been filed and because, in their view, the new evidence did not change the court's state action analysis. (RE 48, PageID ##700-710).

In reply, Plaintiffs conceded that the district court lacked jurisdiction, but cited this Circuit's precedent establishing that it is nevertheless supposed to signal to the appellate court its intent (or lack thereof) to grant a motion to reopen, so that the Court of Appeals could remand to the district court or retain jurisdiction accordingly. (RE 49, PageID ##712-14). Plaintiffs also observed that a district court had granted a motion for expedited discovery in support of a motion for a preliminary injunction in *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. July 12, 2022), based on similar evidence that Plaintiffs presented in their complaint and motion to reopen. (RE 49, PageID #715).[1]

Before the court ruled on the Rule 60(b) motion, Plaintiffs filed a motion to supplement it with yet more new evidence that came to light as the result of discovery in *another* lawsuit, *Berenson v. Twitter*, No. 3:21-cv-09818 (N.D. Cal. 2021). (8/17/22 Motion to Supplement, RE 50, PageID ##719-22). Defendants opposed this motion

[1] Undersigned counsel also represent four plaintiffs in *Missouri*.

(9/2/2022 Defendants' Opposition, RE 51, PageID ##724-32), and eventually the court issued an order indicating that it would not grant Plaintiffs' motions even if it were to consider them on the merits. (10/18/22 Opinion and Order Denying Motion to Reopen, RE 52, PageID ##733-34). This appeal followed the final order dismissing the case.

STANDARD OF REVIEW

To survive a standing challenge, a plaintiff must demonstrate: (1) an injury-in-fact to a legally protected interest that is both concrete and particularized as opposed to conjectural or hypothetical; (2) a causal connection between the injury and conduct complained of; and (3) a likelihood that the injury will be redressed with a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing claims are reviewed *de novo*. *United States v. Pollard*, 215 F.3d 643, 646 (6th Cir. 2000).

On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff," *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007), but "need not accept as true legal conclusions or unwarranted factual inferences," *Gregory v. Shelby Cnty.*, 220 F.3d 433, 446 (6th Cir. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). The burden is on the defendant to show that the plaintiff has failed to state a claim for relief.

DirecTV, 487 F.3d at 476. Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Guzman v. DHS*, 679 F.3d 425, 429 (6th Cir. 2012).

This Court "review[s] de novo a motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6)," *Spurr v. Pope*, 936 F.3d 478, 482 (6th Cir. 2019), "using the same standards employed by the district court," *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 607 (6th Cir. 2012).

SUMMARY OF ARGUMENT

The district court premised its determination that Plaintiffs lacked standing to bring their claims on erroneous interpretations of the governing legal standards. It essentially required Plaintiffs to definitely prove that they had been censored because of the Government. But that is not the law, which recognizes that direct causation is often impossible to prove in First Amendment cases. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Thus, precedent holds that Plaintiffs had only to show that the Government, through coercive means or entanglement with private companies' decision-making, had turned Twitter's censorship into state action and that such action chilled Plaintiffs' speech. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *see also Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020) ("[C]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." (citations omitted) (internal quotation marks omitted)). Admissions made by Defendants and President Biden that they were telling social media companies what

and whom to censor unequivocally established these circumstances. But by declining to accept these statements as evidence of the Government's involvement in social media censorship, the court did not make factual inferences in Plaintiffs' favor, thus employing an incorrect legal analysis. *Iqbal*, 556 U.S. at 676.

The court also wrongly refused to contemplate statements made by the President and his press secretary on the ground he was not a defendant to this action. But the President controls his executive agencies, and Plaintiffs did not have to personally name the President for his statements to serve as proof that the Administration was (or is) unlawfully involved in social media companies' censorship machinations. *See Cook Cnty. v. Wolf*, 461 F. Supp. 3d 779, 792 (N.D. Ill. 2020) ("It necessarily follows that DHS cannot brush off the President's and Miller's statements regarding nonwhite immigrants as irrelevant to the motivation behind the Final Rule."). Not only did Plaintiffs plead just such control in their Complaint, but written communications and other facts came to light subsequently that provided further direct proof of the federal government's unlawful censorship enterprise. Yet the district court still indicated that it would not grant Plaintiffs' Rule 60(b) motion to reopen their case based on newly discovered evidence, which was an abuse of discretion. *See Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998).[2]

[2] Appellants did not appeal this ruling, but it is included to complete the record and because it demonstrates starkly the error of dismissing the initial Complaint.

Because Plaintiffs established that the federal executive played a significant role in viewpoint-based censorship on social media, they pled a plausible First Amendment claim. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 615 (1989). And, since the Surgeon General did not have the authority to direct social media censorship, and did not follow the APA procedure for enacting rules that affected substantive rights, Plaintiffs established colorable *ultra vires* and APA claims. *See Tiger Lily LLC v. HUD*, 525 F. Supp. 3d 850, 861 (W.D. Tenn.)), *aff'd*, 5 F.4th 666 (6th Cir. 2021); *Lasmer Indus., Inc. v. Def. Supply Ctr. Columbus*, No. 2:08-CV-0286, 2008 WL 2457704, at *6 (S.D. Ohio June 13, 2008). Finally, because the Surgeon General demanded non-public information that Plaintiffs had given to Twitter, they stated a plausible Fourth Amendment claim. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). The court wrongly dismissed all three of these claims on the grounds that compliance with the advisory and RFI on the part of the tech companies was purely voluntary, without regard to the coercive context in which they were issued.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT PLAINTIFFS LACKED STANDING

The district court's determination that Plaintiffs failed to establish standing because they did not demonstrate traceability and redressability was in error.

A. Traceability—The Complaint Established a Factual Basis from Which to Infer Twitter's Disciplinary Measures Constituted State Action

Plaintiffs' allegation that the Government was a driving force behind Twitter's censorship policy came in two forms: (1) public statements made by the Surgeon General, former White House Press Secretary Psaki, and President Biden, that the Administration was telling social media platforms to censor certain types of posts and even specific individuals, and threatening noncompliant companies with adverse legal action; and (2) the timing of their suspensions on Twitter, which coincided with these public threats. (Complaint, RE 1, PageID ##16, 17, 20); (Plaintiffs' Opp., RE 33, PageID ##253-55). Together, these circumstances raised the inference that Defendants, at the very least, had a hand in suppressing Plaintiffs' speech, fulfilling the traceability component of the standing analysis. (*Id.*).

Despite the requirement that "at the motion to dismiss stage … all inferences are to be drawn in the [non-movants'] favor," *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 797 (6th Cir. 2012), the district court rejected this claim, observing that "the entire administration is not a defendant here," (Opinion and Order, RE 37, PageID ##384-85). It also maintained that the timing of the suspensions did not *perfectly* correspond with the public statements in question, since one of Mr. Changizi's suspensions preceded the beginning of the public campaign by a few weeks, and Twitter had been censoring some Covid-19 misinformation since March of 2020.

Initially, the question of whether the timing of the suspensions corroborated the inference—one arising from Administration members' *own statements*—that the Government was behind social media censorship was a factual one. As Plaintiffs explained, to the extent the timeline did not precisely match, it was more than likely (not to mention "plausible"), *see Iqbal*, 556 U.S. at 678, that some behind-the-scenes communications between the tech companies and government took place prior to the Administration's public announcements. (Plaintiffs' Opp., RE 33, PageID #254).

While the court dismissed this as "bald speculation" (Opinion and Order, RE 37, PageID #385 n.1), Plaintiffs had no conceivable means of acquiring concrete information to corroborate their suppositions without a discovery order. Had the court appropriately drawn "all reasonable inferences in favor of [Plaintiffs]," *DirecTV*, 487 F.3d at 476—which merely required taking the Government at its word that it was directing social media censorship—it could not have dismissed the case. The court's assessment was, in short, based on an impermissible standard applied at the motion-to-dismiss stage. *See Iqbal*, 556 U.S. at 678 ("[F]or the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true[.]").

The court's premature dismissal of this case is further borne out by information that surfaced subsequently, proving Plaintiffs' well-founded allegations correct.[3] In

[3] Plaintiffs request that the Court take judicial notice of these facts, which are a matter of public record, and many of which were included in filings below. *See* Fed R. Evid. 201(b)(2), (c)(2).

Missouri v. Biden, emails released pursuant to the court's discovery order revealed the existence of

> a massive, sprawling federal Censorship Enterprise, which includes dozens of federal officials across at least eleven federal agencies and components identified so far, who communicate with social media platforms about misinformation, disinformation, and the suppression of private speech on social media—all with the intent and effect of pressuring social media platforms to censor and suppress private speech that federal officials disfavor.

See Joint Statement on Discovery Disputes at 3-4,, *Missouri v. Biden*, No. 3:22-cv-01213, Dkt. 71. Defendants had initially identified 45 federal officials involved in the enterprise. But through third-party discovery on the social media companies, the plaintiffs learned of many more agencies and officials—including very senior White House officials—enmeshed in this unlawful endeavor. *Id.* at 5-6.

Moreover, that discovery established that the Center for Disease Control and Prevention ("CDC") (a sub-agency within HHS) had been working with social media companies—unbeknownst to the public—to censor people for spreading "misinformation" since January of 2020. *See* Joint Statement Regarding Witness Depositions at 28, *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. Oct. 14, 2022), Dkt. 86. This fact explained Twitter's policy, beginning in early 2020, of policing Covid-19 "misinformation" spread on its platform. (Complaint, RE 1, PageID #7). As evidenced by emails made public in recent months, high-ranking CDC officials had been telling social media companies what, and in some cases even whom, to censor; held frequent

"Be on the Lookout for Misinformation" meetings with those companies to instruct them on these topics; and received detailed reports from social media companies about "misinformation" and "disinformation" online. *See* Joint Statement on Discovery Disputes at 9-10, *Missouri v. Biden*, No. 3:22-cv-01213, Dkt. 71.

Internal communications corroborated the inference of unlawful coercion, or at least pressure. After President Biden publicly stated that tech companies were "killing people" by not adequately censoring vaccine "misinformation," a very senior executive at Meta reached out to Surgeon General Murthy to engage in damage control. *See id.* at 6-7. Shortly thereafter, the executive texted the Surgeon General, "it's not great to be accused of killing people" and expressed his desire to "find a way to deescalate and work together collaboratively." *See id.* at 7.

A week later, on July 23, 2021, the same Meta executive sent an email to Murthy stating, "I wanted to make sure you saw the steps we took just this past week to adjust policies on what we are removing with respect to misinformation, as well as steps taken to further address the 'disinfo dozen': we removed 17 additional Pages, Groups, and Instagram accounts tied to the disinfo dozen[.]" *Id.* Again, on August 20, 2021, the Meta executive emailed Murthy to assure him that Facebook "will shortly be expanding our COVID policies to further reduce the spread of potentially harmful content on our platform." These changes included "increasing the strength of our demotions for COVID and vaccine-related content," and "making it easier to have Pages/Groups/Accounts demoted for sharing COVID and vaccine-related

misinformation." *Id.* In addition, the executive sent a "Facebook bi-weekly covid content report" to Murthy and White House official Andrew Slavitt to comply with these federal officials' demands for suppression of Facebook's Covid-19 "misinformation." *Id.*

In another, similar exchange, on October 31, 2021, Deputy Assistant to the President Rob Flaherty emailed a contact at Meta with a link to a *Washington Post* article that complained about the spread of Covid-19 "misinformation" on Facebook. The email contained only the link to that story with the subject line, "not even sure what to say at this point." *Id.* at 7-8. The Facebook employee assured Mr. Flaherty Facebook had, in fact, "improved our policies," *i.e.*, increased censorship of online speech. *Id.* at 8.

Likewise, DHS's involvement in the censorship enterprise, and the existence of the DGB—formed to centralize the federal government's censorship activities—only became known to the American public on April 27, 2022. (*See* 6/14/22 Motion to File an Amended Complaint, RE 40, PageID #491). Documents leaked through a whistleblower, and others obtained through discovery in *Missouri*, revealed that DHS officials had been meeting in secret with Twitter executives to coordinate online censorship of disfavored perspectives. The declassified documents showed that DHS considered "disinformation relating to the origins and effects of Covid-19 vaccines or the efficacy of masks" a "serious homeland security risk." (*See id.*).

Like many of the other emails, they demonstrated that government agencies exerted pressure on social media companies to censor disfavored viewpoints. Cybersecurity and Infrastructure Security Agency ("CISA") Director Jen Easterly texted another CISA official (who left CISA to work at Microsoft where he may have been when the exchange occurred) about "trying to get us in a place where Fed can work with platforms to better understand the mis/dis trends so relevant agencies can try to prebunk/debunk as useful." Joint Statement on Discovery Disputes at 8-9, *Missouri v. Biden*, No. 3:22-cv-01213, Dkt. 71. The CISA/Microsoft employee agreed, "Platforms have got to get more comfortable with gov't. It's really interesting how hesitant they remain." *Id.*; *see* Ken Klippenstein & Lee Fang, *Leaked Documents Outline DHS's Plans to Police Disinformation*, INTERCEPT (Oct. 31, 2022, 5:00 AM), *available at* https://theintercept.com/2022/10/31/social-media-disinformation-dhs/ (last visited Nov. 17, 2022).[4]

Additional, crucial facts came to light in August of 2022, the discovery of which prompted Plaintiffs to file a motion to supplement their Rule 60(b) motion to reopen

[4] Addressing the *Missouri* case, former ACLU president Nadine Strossen remarked, "[i]f a foreign authoritarian government sent these messages … there is no doubt we would call it censorship." Klippenstein & Fang, *supra*. The same information led law professor and First Amendment scholar Jonathan Turley to comment, "There is growing evidence that the legislative and executive branch officials are using social media companies to engage in censorship by surrogate … It is axiomatic that the government cannot do indirectly what it is prohibited from doing directly. If government officials are directing or facilitating such censorship, it raises serious First Amendment questions." *Id.*

the case. Former *New York Times* reporter Alex Berenson, who had acquired a very large following on Twitter relentlessly critiquing government Covid restrictions, was permanently suspended from the platform in July 2021, ostensibly for tweeting that the available vaccines do not stop infection or transmission of the virus. The suspension occurred mere days after Dr. Anthony Fauci publicly castigated Berenson, calling him a threat to public health, and hours after President Biden publicly blamed social media companies for "killing people" by not censoring those who expressed doubts about the safety and efficacy of the vaccines. Through the discovery process in his lawsuit against Twitter, Berenson obtained, among other things, Slack messages exchanged between Twitter employees, which described the White House's "really tough" and "pointed" questions about "why Alex Berenson hasn't been kicked off the platform" during a meeting. "[M]ercifully we had the answers," stated a Twitter employee, apparently one of which was to yield to governmental pressure and boot Berenson off the platform.[5] The communications bore precisely on the question at hand: whether Twitter was acting of its own volition in censoring Plaintiffs, or whether the Government was driving that censorship by making social media companies so fearful of repercussions

[5] At the same time, Twitter's employees were unconvinced that Berenson had violated any of Twitter's rules. "I've taken a pretty close look at [Berenson's Twitter] account and I don't think any of it's violative," stated one Twitter employee in a Slack conversation a few minutes following the Government's "really tough question about why Alex Berenson hasn't been kicked off." Alex Berenson, *The White House Privately Demanded Twitter Ban Me Months Before the Company Did So*, UNREPORTED TRUTHS (Aug. 12, 2022), *available at* https://alexberenson.substack.com/p/the-white-house-privately-demanded.

in the form of regulation or other legal action that the company suspended them, as it did Berenson. While he was not party to this lawsuit, the treatment of his Twitter account indicates a broader pattern of government-induced censorship, which makes Plaintiffs' allegations all the more plausible. Berenson would never have obtained conclusive proof that the Government perpetuated censorship of his account had the judge thrown his case out prior to discovery, as the court below did here.

In sum, the allegations were sufficient to state a claim. Plaintiffs did not have to prove their case upon filing. They only needed to provide sufficient facts which, viewed in the light most favorable to them, could support a claim that would entitle them to relief. *DirecTV*, 487 F.3d at 476.

The court's opinion was also flawed because it refused to consider the statements of Psaki, Biden, and other non-defendant federal government officials, which Plaintiffs contended constituted additional evidence that the Administration played a direct role in censoring those who aired disfavored views. (Opinion and Order, RE 37, PageID ##384-85, 393). The district court premised its refusal on the fact that Plaintiffs did not name President Biden as a defendant. However, under Article II, the President of the United States is head of his executive agencies, including HHS, and exercises ultimate control over them. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) ("[A]gencies … are subject to the supervision of the President[.]"); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496-97 (2010) ("Article II 'makes a single President responsible for the actions of the Executive Branch.'" (quoting *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer,

J., concurring in judgment))). Plaintiffs did not have to personally name the President to use his statements as proof that the Administration is unlawfully entangled in social media companies' censorship machinations. *See Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("We think it is now well established that '[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.'" (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992) (Scalia, J., concurring in part and concurring in the judgment))); *see also Cook Cnty.*, 461 F. Supp. 3d at 792 (considering President's statements to establish agency's motive in suit that did not name President as defendant).[6]

The court cited *Iqbal*, 556 U.S. at 676, to support its determination, quoting a portion of the decision noting "a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." The court misconstrued *Iqbal* on this point, which held that Government officials may not be held liable for unconstitutional conduct of their subordinates, which is not the issue here. Rather, Plaintiffs argued that the statements of the President—those made

[6] Indeed, given that Plaintiffs sought injunctive relief, naming the President may well be inappropriate. *See, e.g.*, *McCray v. Biden*, 574 F. Supp. 3d 1, 8 (D.D.C. 2021) ("'[I]n general,' a court 'has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (plurality opinion)); CHRISTOPHER H. PYLE & RICHARD M. PIOUS, THE PRESIDENT, CONGRESS, AND THE CONSTITUTION 170 (1984) ("No court has ever issued an injunction against the president himself or held him in contempt of court.").

by him, as well as through his press secretary—provided corroborating evidence of an intent to use the federal government's power—*including* that of Defendants HHS and the Surgeon General—to coerce social media companies into carrying out their viewpoint-based censorship aims.

The court's dismissal order was predicated on the misconception that Plaintiffs needed to show that Defendants had a direct hand in censorship of their accounts. (*See* Plaintiffs' Opp., RE 33, PageID #255). That is a nearly impossible hurdle to surmount without gaining access to discovery. As the Supreme Court has held many times, for this reason standing requirements are relaxed in the First Amendment context:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged (emphasis added).

Munson, 467 U.S. at 956; *see also Speech First*, 979 F.3d at 330-31 ("[C]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." (citations omitted) (internal quotation marks omitted)).

That the district court was dismissive of this entire body of case law, focusing instead on *Association of American Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028 (D.C. Cir. 2022), is telling (*see* Opinion and Order, RE 37, PageID ##385-87). Putting aside that *Schiff* is not binding on courts within the Sixth Circuit, that case expressly stated,

contra the matter *sub judice*, that the plaintiffs had "alleged not a general chilling effect but rather an intentional effort by a government official to limit their speech in particular." *Schiff*, 23 F.4th at 1032-33. It is therefore not surprising that the *Schiff* court required a more particularized allegation as to causation. But Plaintiffs here alleged both. Second, and perhaps most importantly, the *Schiff* plaintiffs had not alleged a concrete harm, whereas the current Plaintiffs had—withdrawal or limitation of their Twitter accounts as well as self-censorship of future tweets for fear of additional and permanent suspensions. Thus, *Schiff* is inapposite.

Moreover, *Schiff* involved the actions of a single congressman who had no authority, on his own, to enact any sort of law or policy. Plaintiffs' allegations in this case are about the actions and words of entire agencies and the head of the Executive Branch, which, through the actions of high-ranking officials ultimately responsible to the President, not only explicitly threatened to penalize tech companies for refusing to comply with their demands, but also possesses the authority (or at least the apparent authority) to do so through Federal Trade Commission ("FTC") antitrust regulation.[7]

The court considered Plaintiffs' claim that the RFI and Surgeon General's censorship efforts were *ultra vires* to belie their contention that Defendants had the ability to make good on their threats. (*See* Opinion and Order, RE 37, PageID #359).

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[7] *See, e.g.*, Lauren Feiner, *FTC Chair Lina Khan Says Agency Won't Back Down in the Face of Intimidation from Big Tech*, CNBC (Jan. 19, 2022, 2:31 PM), *available at* https://www.cnbc.com/2022/01/19/ftc-chair-lina-khan-says-agency-wont-back-down-in-the-face-of-intimidation.html (last visited Nov. 20, 2022).

That was error for several reasons. First, it is well established that a plaintiff can plead his case in the alternative, utilizing contradictory legal theories. *See Johnson v. Blendtec, Inc.*, 500 F. Supp. 3d 1271, 1293 (D. Utah 2020) ("It is a general principle that a party may plead claims in the alternative, even if the claims appear to be facially contradictory." (internal quotations omitted)); *see also* Fed. R. Civ. P. 8(d)(2).

Second, the arguments Plaintiffs raise are not contradictory. To be sure, the Government's threats to punish social media companies were illegal. Unfortunately, a company wishing to avoid a protracted legal battle with the government may choose to submit to an unlawful demand. *Nat'l Rifle Ass'n of Am. v. Cuomo*, 350 F. Supp. 3d 94, 115 (N.D.N.Y. 2018) ("Further, the government actor need not have direct power to take adverse action over a targeted entity for comments to constitute a threat, provided the government actor has the power to direct or encourage others to take such action."). Indeed, the entire doctrine of "chilled speech" is predicated on this very idea—the government is not permitted to even *threaten* negative consequences for speech *even if* the courts would reject an attempt to carry the threats out. The First Amendment does not require one to wait until the full force of the government crashes upon one's head prior to challenging government's threats, in light of the fact that vindication in a court of law can take time. *See Okwedy v. Molinari*, 333 F.3d 339, 340–41 (2d Cir. 2003) ("[A] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights *even if the public-official*

defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech." (emphasis added)).

The court declined to follow *Munson*, ostensibly because that case involved a statute, whereas here Plaintiffs "are challenging HHS' alleged influence over a private social media company." (Opinion and Order, RE 37, PageID #387 n.2). But at no point did the Court's language limit *Munson* to cases involving First Amendment challenges to statutes, as opposed to regulations or threats and practices of public officials. Corroborating the inference that *Munson* intended plaintiffs raising First Amendment claims to face no such constriction, there are numerous cases (many of which Plaintiffs cited below (*see, e.g.*, Plaintiffs' Opp., RE 33, PageID ##256-57)) where courts have found First Amendment violations or potential violations based on the chilling effect of a policy or government action that did *not* involve a statute. *See Speech First*, 939 F.3d at 765 (holding that district court wrongly found plaintiffs lacked standing to challenge university policy prohibiting bullying and harassment, as the "ability to make referrals … is a real consequence that objectively chills speech"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182, 1192 (6th Cir. 1995) (holding that, although students had not yet been punished under the policy, nor had the university acted concretely by threatening them with punishment, students had standing to pursue claims); *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 559 (M.D. Ala. 1986), *aff'd in relevant part*, 827 F.2d 1483 (11th Cir. 1987) (finding publishers had

standing to bring claim based on district attorney's informal system of prior restraint on distribution and sale of explicit material).

B. Redressability

The district court's redressability analysis mirrored its traceability analysis, so was erroneous for similar reasons. (*See* Opinion and Order, ECF 37, PageID ##388-90). In reaching its conclusion, the court disregarded ample precedent establishing that so long as the Government's actions are deemed unconstitutional by virtue of the chilling effect they cause, Plaintiffs "simply need not contend with them," *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010), and redressability has been established.

As *Council for Periodical Distributors Ass'n v. Evans* explains:

> The precise injury alleged is unlawful prior restraint on the distribution and sale of sexually explicit magazines. That injury would indeed be remedied by a declaratory judgment stating that Evans's actions imposed an unlawful prior restraint on the sale of such magazines and an injunction halting his efforts to coerce and extort self-censorship from local merchants. These remedies, of course, *would not ensure that the distributor or any of the retailers would choose to resume trade in sexually explicit magazines*. However, such relief *would ensure that the decision whether to do so would be made free of coercion and without prior restraint*.

642 F. Supp. at 560 (emphasis added). Hence, *even if* Twitter continued to censor Plaintiffs' accounts, so long as the calculus for any future censoring decisions omits government's "cajol[ing], coerc[ion], [or] command[s]," *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021), their First Amendment injury has been redressed, *see also Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 361 (D.D.C. 2020) ("[A]n order

enjoining defendants from further interference with [plaintiff's] First Amendment rights would restore her editorial discretion and eliminate any chilling effects.").

In sum, the court's overly rigid standing analysis not only failed to draw all inferences in Plaintiffs' favor, but also refused to take government actors at their word when they admitted—even boasted—that they were telling social media companies what, whom, and how to censor. It appears *no amount* of evidence would have swayed the court. Had additional evidence been relevant to the court's determination, it would have granted Plaintiffs' Rule 60 motion. That it declined to do so strongly suggests that the district court believes (contrary to this Court's admonition) that no amount of government "cajol[ing], coerc[ion], [or] command[s]," *Turaani*, 988 F.3d at 316, would confer standing on Plaintiffs. Plaintiffs established every component of standing in this case, and the district court erred to hold otherwise.

II. PLAINTIFFS PLED A COLORABLE FIRST AMENDMENT CLAIM

A. The First Amendment

Under the First Amendment, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). "The First Amendment gives freedom of mind the same security as freedom of conscience. … And the rights of free speech and free press are not confined to any field of human interest." *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *see also Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) ("As a general matter, social media is entitled to the same First Amendment

protections as other forms of media."), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend, Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (mem). Courts have long recognized that "[d]ebate on public issues should be uninhibited, robust, and wide-open[.]" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters[.]"). This "profound" commitment to the principle of free speech is even more necessary when, as here, the debate may include critical or "unpleasantly sharp attacks" on the government or its policies. *Sullivan*, 376 U.S. at 270. As Judge Learned Hand explained, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If 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.").

Labeling speech "misinformation" does not strip it of First Amendment protection. That is so even if the speech is false. *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality op.) ("[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."). In refusing to recognize a First

Amendment exception for "false" speech, the Framers of our Constitution recognized that concept is impossible to define, and the significant danger in making the Government arbiter of the truth. *See id.* at 752 (Alito, J., dissenting) ("Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken.").

The First Amendment also protects the right to receive information. *See Martin v. EPA*, 271 F. Supp. 2d 38, 47 (D.D.C. 2002) ("Where a speaker exists …, the protection afforded is to the communication, to its source and to its recipients both.") (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976)). This right is "an inherent corollary of the rights to free speech and press that are explicitly guaranteed by the Constitution" because "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original).

B. State Action

It is "axiomatic" that the Government may not "induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465. Private conduct may be considered state action when private and government officials are jointly engaged to deprive an individual of his constitutional rights, *Dennis v. Sparks*, 449 U.S. 24 (1980), or where the state compels the act or controls the private actor, *see Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)

(state action can be found where the state exercises coercive power on the private actor, provides "significant encouragement," or transfers into private hands traditionally state powers); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("[T]he conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.").

"[T]here is no single test to identify state actions and state actors," and the Supreme Court's "cases have identified a host of facts that can bear on the fairness of such an attribution" of state action. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 294, 296 (2001). The question of state action is a "necessarily fact-bound inquiry," and "the criteria lack rigid simplicity." *Id.* at 295, 298. State action may be found when: (1) a challenged activity results from the State's exercise of "coercive power," *id.* at 296 (quoting *Blum*, 457 U.S. at 1004); (2) the state has provided "significant encouragement, either overt or covert," to private conduct, *id.* (quoting *Blum*, 457 U.S. at 1004); (3) "a private actor operates as a 'willful participant in joint activity with the State or its agents,'" *id.* (quoting *Lugar*, 457 U.S. at 941); and (4) the private action "is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control,'" *id.* (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)). Further, "specific features" of the government's action may "combine" to create a compelling case for state action, especially where a federal statute has immunized private conduct. *Skinner*, 489 U.S. at 615.

Significant Encouragement. It does not matter whether government action is "the real motivating force behind" the suppression of speech—that question is

"immaterial." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987); *see also Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (finding state action "even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance"). "Further, the government actor need not have direct power to take adverse action over a targeted entity for comments to constitute a threat, provided the government actor has the power to direct or encourage others to take such action." *Nat'l Rifle Ass'n of Am.*, 350 F. Supp. 3d at 115. Where the government encouraged and pressured private actors "into adopting" the government's preferred policy (here, censorship), there is "significant encouragement, overt or covert[,]" constituting government action. *Mathis v. Pacific Gas & Elec. Co.*, 891 F.2d 1429, 1431 (9th Cir. 1989).

Plaintiffs pled sufficient facts from which to infer that the federal Defendants engaged in a continuous, systematic campaign of "significant encouragement," both "overt" and "covert," demanding censorship of disfavored speakers, viewpoints, and content. *See* Factual Background, *supra*, pages 4-9. Publicly, President Biden, Press Secretary Psaki, and Surgeon General Murthy demanded that tech companies censor individuals who expressed certain perspectives on social media—including criticizing mask and social distancing requirements—and more aggressively censor these viewpoints, with the threat of adverse consequences if they did not comply. According to Psaki, the Administration was flagging posts for the companies to censor, asking that users banned on one platform be prohibited from all of them, and demanding that

twelve specific individuals apparently responsible for the majority of "misinformation" on social media be banished. Incidentally, not long afterward, a Meta executive assured Murthy that the "disinformation dozen" had been removed from the platform.[8]

Emails from CDC and DHS proved beyond any doubt that government was intimately involved in social media censorship policies, including those of Twitter, Google, and Facebook (Meta). CDC and DHS employees gave examples of posts that ought to be censored, held regular meetings to train tech workers to censor in accordance with the government's chosen policies, and sought greater involvement in social media censorship. Although the degree of coordination was unknown to Plaintiffs at the time they filed their Complaint, the internal documents demonstrated that the officials named above were not grandstanding, but behaving behind the scenes precisely as they claimed to be in their public statements.

Coercion. "Under [the Supreme Court's] cases," "when the government compels the private entity to take a particular action," that constitutes government action. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *see also Blum*, 457 U.S. at 1004 (government action where the government "has exercised coercive

[8] At argument on Psaki's motion to quash a deposition order in *Missouri*, the Magistrate Judge noted that some of her statements, including those cited here, "could suggest pressure; the companies know–when we ask that, they know exactly what we're asking for." Transcript of Motion Hearing at 17, *Psaki v. Missouri*, No. 1:22-mc-00028 (E.D. Va. Nov. 18, 2022) (attached as Addendum). The court rejected Psaki's argument that the statements were not "representations of any direct knowledge whatsoever," explaining "that's an argument for the trier of fact. That's not a basis to disallow discovery." *Id.* at 18.

power"). The First Amendment is implicated "if the government coerces or induces [a private entity] to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint." *Knight First Amend.*, 141 S. Ct. at 1226 (Thomas, J., concurring). "The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly." *Id.* Coercion includes "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 67 (1963). After all, "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68.

For this reason, "a public official who tries to shut down an avenue of expression of ideas and opinions through 'actual or threatened imposition of government power or sanction' is violating the First Amendment." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (Posner, J.) (quoting *Am. Fam. Ass'n v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002)). "Threatening penalties for future speech goes by the name of 'prior restraint,' and a prior restraint is the quintessential first-amendment violation." *Id.* at 235 (quoting *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009)).

Simply put, the government "is not permitted to employ threats to squelch the free speech of private citizens." *Id.* "The mere fact that [the private party] might have been willing to act without coercion makes no difference if the government did coerce." *Mathis*, 891 F.2d at 1434. Further, even a vaguely worded threat can constitute

government coercion. *See Okwedy*, 333 F.3d at 341-42. But here, the threats have been repeated and explicit, and "the threats ha[ve] worked." *Backpage.com*, 807 F.3d at 232.

Defendants, and their boss, the President, have made clear that they blame social media companies for American deaths *because of what users have said on their platforms* and have threatened the companies with consequences—implying even *criminal prosecution* as well as regulatory and antitrust enforcement—unless those companies censor the views of individuals determined to be spreading what the *Government* deems to be "misinformation." *See* Factual Background, *supra*, pages 4-9.

Written communications between employees at Twitter brought to public attention through Alex Berenson's lawsuit prove that the White House exerted its power to achieve compliance with its viewpoint-based censorship goal. *See supra*, Argument, Part II, pages 24-25. People do not employ the word "mercifully"—which was used by a Twitter employee to describe gratitude that he or she had answers for the White House about why Berenson remained on the platform—to describe a relationship between equals. Use of that term revealed Twitter felt the need to appease the White House. Nor would a Microsoft employee (notably, one who had recently worked in CISA) have mentioned tech platforms' hesitation to work with government in a text to Jen Easterly, if those companies were, indeed, eager and willing to engage. Texts between the Surgeon General and a Meta executive provided yet another glimpse into the coercive nature of this relationship: the executive explicitly stated that he felt "aggrieved," and then that the company had kowtowed to pressure and increased

censorship, including by removing specific individuals known as the "disinformation dozen" a mere week after the Surgeon General called for banning misinformation "super spreaders" on social media. If this correspondence—the fruit of limited pretrial discovery that may well be the tip of the iceberg—does not prove government-induced censorship, it is hard to imagine just what would. But none of this should have been necessary: the pleadings alleged this pattern of censorship by the Government, and Plaintiffs should not have had to prove their case prematurely to avoid dismissal.

Joint Participation and Government Entwinement. Even if there had been no threats, pressure, or encouragement of any kind, Plaintiffs have pled facts that would permit the inference of government action here. "[A] private entity can qualify as a state actor … when the government acts jointly with the private entity." *Halleck*, 139 S. Ct. at 1928 (citing *Lugar*, 457 U.S. at 941–942). "Private persons [who are] jointly engaged with state officials in the prohibited action, are acting 'under color' of law … It is enough that he is a willful participant in joint activity with the State or its agents." *Lugar*, 457 U.S. at 941. Where a government official was "heavily involved in the decisionmaking process" of the private actor, *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020), or "where the State has so far insinuated into a position of interdependence with the private party that it was a joint participant in the enterprise," *id.* at 748 (cleaned up), government action occurs. At bare minimum, federal officials are "joint participant[s] in the enterprise" of social-media censorship. *Id.*; *see also Brentwood*, 531 U.S. at 294, 296 (holding that state action exists when there is "a

symbiotic relationship between the [government] and the [private party]," or when the private entity is "entwined with governmental policies").

Federal officials made public threats on the record and demanded censorship by private entities. They established an elaborate set of working groups and other formal and informal methods of communication to enable direct, ongoing collaboration and collusion via the censorship program. By their own admission and as pled in the Complaint, federal officials met with social media companies and "flag[ged] problematic posts" for censorship. They demanded the de-platforming of specific disfavored speakers. And they set up an elaborate censorship apparatus of ongoing government-private collaboration to achieve greater online censorship. This is unquestionably "joint participation with [federal] officials" in violation of the First Amendment. *See* Factual Background, *supra* at 4-9. In sum, there was "pervasive entwinement of … public officials" in the practice of viewpoint-based social-media censorship, constituting "entwinement from top down." *Brentwood*, 531 U.S. at 298, 300.

III. PLAINTIFFS PLED COLORABLE *ULTRA VIRES*, APA, AND FOURTH AMENDMENT CLAIMS

The district court dismissed Plaintiffs' *ultra vires*, APA, and Fourth Amendment claims on the grounds that the RFI was non-binding, so the Surgeon General did not need statutory authority to issue it, and was not final agency action for purposes of assessing the APA claim. (Opinion and Order, RE 37, PageID ##401-02). Likewise,

the court held, because the RFI was nothing more than a request, it was not a search, and so Plaintiffs had not made out a plausible Fourth Amendment claim. (*Id.* at PageID ##398-99).

But the court was wrong. As explained throughout, the RFI—which was far-reaching in nature as it included search engines, content-sharing platforms, instant messaging systems, and e-commerce websites—should not have been viewed in isolation. Rather, the demand that tech companies turn over the "specific, public actors that are providing misinformation" assessed in the context of the coercive environment Defendants created, including issuance of the advisory, established that it was one among many pressure tactics aimed to browbeat technology companies into compliance with the Administration's censorship demands. (Complaint, RE 1, PageID #15).

A. Defendants' Initiative to Suppress Free Speech on Social Media Platforms and to Collect Data about "Misinformers" Was Unlawful Ultra Vires Action

"[A]gency actions beyond delegated authority are *ultra vires* and should be invalidated." *Detroit Int'l Bridge Co. v. Canada*, 192 F. Supp. 3d 54, 65 (D.D.C. 2016). Courts look to an agency's enabling statute and subsequent legislation to determine whether the agency has exceeded its authority. *See Tiger Lily*, 525 F. Supp. 3d at 861 (determining that CDC eviction moratorium was unlawful, as "to hold otherwise would be to construe the statute so broadly as to grant this administrative agency unfettered power to prohibit or mandate anything, which would ignore the separation of powers and violate the non-delegation doctrine"). "A reviewing court owes no deference to

the agency's pronouncement on a constitutional question and must instead make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." *Poett v. United States*, 657 F. Supp. 2d 230, 241 (D.D.C. 2009) (internal quotation marks omitted).

The *only* statute which empowers the Surgeon General and HHS to make rules and regulations authorizes these entities to promulgate ones that:

> in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 U.S.C. § 264(a). Plaintiffs argued below that nothing in this statute permitted the Surgeon General to determine what constituted health "misinformation"; to direct social media companies to censor ostensible "misinformation"; to work with social media companies to censor this material and silence or de-boost accounts with whom he disagreed; or to demand that these companies turn over to the Government private (or public) information collected from users. *See Tiger Lily*, 5 F.4th at 670 ("[W]e cannot read § 264(a) to grant the CDC the power to insert itself into the landlord-tenant relationship without clear textual evidence of Congress's intent to do so."); *Kentucky v. Biden*, 571 F. Supp. 3d 715, 729 (E.D. Ky. 2021) ("[N]either OSHA nor the executive

branch is permitted to exercise authority it does not have."), *aff'd*, 23 F.4th 585 (6th Cir. 2022).

In fact, in the eviction moratorium cases, *e.g.*, *Tiger Lily* and *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021), CDC attempted to use the same statute at issue here to halt evictions nationwide. In *Alabama Ass'n*, the Supreme Court held that CDC's claim that this statute granted it this authority "strain[ed] credulity." 141 S. Ct. at 2486. If it "strain[ed] credulity" that this statutory language authorizes a nationwide eviction moratorium, *a fortiori*, it "strain[ed] credulity" to interpret the language of 42 U.S.C. § 264(a) to authorize the Surgeon General to direct Twitter and other platforms to take down speech with which the government disagreed in violation of Plaintiffs' First Amendment rights.

Contrary to the district court's reasoning, that the RFI purported to be non-binding was not dispositive of the matter. (*See* Opinion and Order, RE 37, PageID #402). As the Supreme Court has observed, the validity of an administrative agency's request for information typically turns on the reasonableness of the request. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652–53 (1950) ("The gist of the protection is … that the disclosure sought shall not be unreasonable."); *see also United States v. Gurley,* 384 F.3d 316, 321 (6th Cir. 2004) (observing that EPA's information request would only be enforced where: "(1) the investigation is within EPA's authority; (2) the request is not too indefinite; and (3) the information requested is relevant to legislative purposes" (quoting *United States v. Pretty Prod., Inc.*, 780 F. Supp. 1488, 1504 (S.D. Ohio 1991))).

The "most important factor in differentiating between binding and nonbinding actions is the actual legal effect (or lack thereof) of the agency action in question." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (internal quotation marks omitted). The court's characterization of the RFI as "non-binding" did not shield it from judicial review—particularly when, as Plaintiffs have explained throughout, the Surgeon General issued the RFI in the midst of a campaign to intimidate and coerce tech companies into censoring speech that he deemed "misinformation." *See Florida v. Becerra*, 544 F. Supp. 3d 1241, 1298 (M.D. Fla. 2021) ("CDC's informal, quasi-notice-and-comment 'interaction' amounts to an extended monologue, supported by the unconvincing veneer of a 'request for information,' after which the agency failed to account to the cruise industry, to the states, and to the public."). In short, merely framing the RFI as voluntary did not shield in from judicial review or mean that it could not be *ultra vires*—particularly when the rights of third parties were affected. *See Nat'l Ass'n of Letter Carriers, AFL-CIO v. USPS*, 604 F. Supp. 2d 665, 672-73 (S.D.N.Y. 2009) ("Plaintiffs' *ultra vires* claim is plausible. The claim adequately alleges that OIG exceeds its authority by requesting protected health information directly from employees' health care providers without their knowledge or consent."). At the very least, the degree to which the RFI was a coercive measure rather than a mere request was a factual question that meant dismissal at the pleadings stage was inappropriate.

B. *The RFI Constituted an Unreasonable Search and Seizure of Plaintiffs' Personal Information*

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures," and provides that "no warrants shall issue, but upon probable cause" as it "seeks to secure the privacies of life against arbitrary power." *Carpenter*, 138 S. Ct. at 2214 (internal quotation marks omitted). A search occurs when an individual has a subjective expectation of privacy, and that expectation of privacy is one that society recognizes is reasonable. *See California v. Ciraolo*, 476 U.S. 207 (1986); *United States v. Jacobsen*, 466 U.S. 109 (1984).

Individuals have a reasonable expectation of privacy in digital records, including those given to private companies. *See Carpenter*, 138 S. Ct. at 2217. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Id.* On the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351-52 (1967). Nor does the fact that the information in question may have been voluntarily given to third parties mean that the Fourth Amendment is inapplicable when the Government seeks that data. *See Carpenter*, 138 S. Ct. at 2219 (rejecting Government's contention that cell-site records are "fair game" because they are "business records" created and maintained by wireless carriers and finding that a warrant is needed for such a search); *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (invalidating Los Angeles ordinance permitting warrantless police inspections of hotel guest records). Searches

conducted by administrative agencies constitute significant intrusions upon interests protected by the Fourth Amendment, requiring the safeguard of a warrant. *Camara v. Mun. Ct. of the City & Cnty. of S.F.*, 387 U.S 523, 534 (1967).

Here, Defendants demanded that Twitter (and other social media companies) provide them with "sources of misinformation" by May 2, 2022 without a warrant or probable cause. *See Carpenter*, 138 S. Ct. at 2221. Plaintiffs had a reasonable expectation of privacy in the non-public information they provided and continue to provide to and on Twitter—information they did not agree to make available to the United States Government. Such information included private phone numbers and email addresses connected to their accounts, as well as private messages and group chats. *See Riley v. California*, 573 U.S. 373, 403 (2014) ("The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.").

As before, the purportedly non-binding nature of the RFI did not preclude a finding that it constituted a search. *See Nat'l Ass'n of Letter Carriers*, 604 F. Supp. 2d at 675-76 (finding that USPS employees' allegation that the Office of the Inspector General, by instituting policy of obtaining their medical records without consent, had stated plausible Fourth Amendment claim.). The district court clearly engaged in a factual inquiry in determining that compliance with the RFI was voluntary. (*See* Opinion and Order, RE 37, PageID ##397-99). Once again, that demonstrated that

the court was not making all factual inferences in Plaintiffs' favor and thus did not employ the correct standard of review. *See DirecTV*, 487 F.3d at 476.

C. Defendants Did Not Follow APA Procedure in Issuing the Advisory or the RFI

Under the APA, agency actions for which no other adequate remedies exist are subject to judicial review. 5 U.S.C. § 704. Agency action is final first, if it "marks the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chi. & S, Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103. 113 (1948)). Second, the action must be one by which "rights or obligations have been determined,' or from which 'legal consequences will flow." *Id.* (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Here, the Advisory and RFI (especially read against the backdrop of the coercive tactics wielded by Defendants and others in the federal government) both marked the consummation of the agency's decision-making process and determined "rights or obligations." As discussed extensively, Plaintiffs' constitutional rights were implicated by this action. Moreover, the Surgeon General and others in the Biden Administration instructed social media companies to censor those who propagate "misinformation" related to Covid-19, effectuating an "obligation." *See id.*

For similar reasons, this action clearly constituted "consummation" of the agency's decision-making process; it was not tentative or interlocutory. *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that

will directly affect the parties."); *see also Lasmer Indus.*, 2008 WL 2457704, at *6 (holding that "even though an agency opinion may not be sufficiently final for purposes of the opinions contained in it, it can still be considered final for determining whether the agency had the authority to take the action in the first instance.").

The court's determination that the RFI and advisory did not constitute final agency action and therefore Plaintiffs were not entitled to relief stemmed from the court's flawed assumption that: (1) their argument was not premised on the Surgeon General's authority to issue advisories and requests for information, and (2) any harms to Plaintiffs stemmed from Twitter's independent actions. (*See* Opinion and Order, RE 37, PageID ##401-02). But first, Plaintiffs *did* challenge the Surgeon General's authority to instigate this action. *See supra*, Argument Part III(A), pages 44-47. Moreover, Plaintiffs established a plausible theory according to which Defendants *were* responsible for their injuries. *See supra*, Argument Part I, pages 18-32. In any event, the court's conclusion involved a factual assessment that was improper at the motion to dismiss stage: the court was obliged to accept Plaintiffs' factual allegations as true and make all inferences in their favor, which it obviously did not. *See DirecTV*, 487 F.3d at 476.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand this case to the district court so that Plaintiffs may prosecute their claims. Alternatively, this Court should reverse the judgment of the district court and remand so that Plaintiffs may amend their complaint to address any alleged deficiencies.

November 28, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28(a) and 32(a)(7)(B)(i) because it contains 12,768 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Jenin Younes

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2022, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/ Jenin Younes

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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52	Opinion and Order Denying Plaintiffs Rule 60(b) Motion (Oct. 18, 2022)	733–734

ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JENNIFER R. PSAKI, Movant, v.	:	Civil Case No. 1:22-mc-00028-PTG-IDD
STATE OF MISSOURI, et al., Respondents.	:	November 18, 2022 11:20 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE IVAN D. DAVIS
UNITED STATES MAGISTRATE JUDGE

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COMPUTERIZED TRANSCRIPTION OF FTR RECORDING

in that press briefing? You know what I meant by that? What I meant was...

They don't do that. Because judicial experience suggests the otherwise; that that's exactly what people do.

MS. RHEE: But, Your Honor --

THE COURT: In fact, smart people, it can be argued, from years of experience, do that and that only because they don't want written evidence of what may not have been appropriate. Because that can come back to bite them.

MS. RHEE: That's not even, though, the theory by which the plaintiffs are operating.

THE COURT: Their theory -- they say they want to know what she meant when she made those statements. Let's look at one statement that I believe was -- that I may have tagged. I can't...

There was something in one of these briefs about, "And those companies know what we mean by that," something to that effect. Because, you know, from a layperson's standpoint, like a trier of fact, that could have certain connotations. That could suggest pressure; the companies know -- when we ask that, they know exactly what we're asking for.

Our job is not to try cases in the discovery process, it's to authorize parties to request information that is reasonably calculated to lead to the discovery of admissible evidence. Their requests don't even have to lead to admissible

evidence; their requests only have to be reasonably calculated to do so.

They gave bases for which they are seeking her information, what she meant by certain things. The meaning of terms may be deemed important by the trier of fact in determining whether a conspiracy existed. Because it's an agreement, and that agreement normally isn't written down between two parties to conduct an act that the law says is unlawful.

The meaning of words go a long way in doing that. We, in this courtroom, see that all the time. Drug dealers have an innate ability to utilize phrases other than "the drugs" to talk about the drugs. The government puts on FBI, DEA agents to say: What that meant was cocaine. So the meaning is important in defining a conspiracy.

So it seems that requesting the meaning from the person who actually stated the phrases may go a long way in proving that element of the conspiracy.

So it appears, at least at first glance, to be reasonably calculated to lead to the discovery of admissible evidence; whether you want it to or not is another issue.

MS. RHEE: Your Honor, again, just to take a step back, this is a White House spokesperson who is, from the podium, paraphrasing/making broad statements that are not direct quotes of anyone or anything, and, by the plaintiffs' own admission, is

not making any statements that are representations of any direct knowledge whatsoever.

THE COURT: That is your interpretation of what her statements mean. The other side has an absolute right to their own interpretation. That's argument for the trier of fact. That's not a basis to disallow discovery, simply because your interpretation of what she says is different than the other side's.

MS. RHEE: Your Honor, at least --

THE COURT: That happens often in civil litigation.

MS. RHEE: Your Honor, at least according to their own papers, they are not claiming that she has direct knowledge. They're saying that they are --

THE COURT: Direct knowledge of what?

MS. RHEE: That she had direct communications with the social media companies. They are claiming that they want to take her deposition --

THE COURT: And is that an element --

MS. RHEE: -- about --

THE COURT: -- of what claims they need to prove in this case?

They're saying this whole thing -- my understanding, which we'll get to in a little while, maybe not with you. Because the intricacies of this case and the elements of what have to be proven is what strongly suggests that this motion and