No. 22-3573

In the United States Court of Appeals for the Sixth Circuit

MARK CHANGIZI, ET AL.

Plaintiffs-Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Ohio, The Hon. Edmund A. Sargus, Jr.
(Dist. Ct. No. 2:22-cv-1776)

BRIEF OF AMICI CURIAE INSTITUTE FOR FREE SPEECH AND MANHATTAN INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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December 5, 2022

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-3573 Case Name: Changizi v. HHS

Name of counsel: Alan Gura

Pursuant to 6th Cir. R. 26.1, Institute for Free Speech
Name of Party
makes the following disclosure:

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s/Alan Gura

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-3573 Case Name: Changizi v. HHS

Name of counsel: Alan Gura

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Name of Party
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s/Alan Gura

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TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

INTEREST OF AMICI CURIAE 1

Introduction and Summary of Argument 2

Argument 5

I. Twitter engaged in state action when it removed public comments deemed "misinformation" at the direction of HHS 5

A. Pre-internet law prohibits informal government pressure 7

B. Twitter succumbed to HHS pressure 12

II. Discovery would allow Plaintiffs to verify their credible claim: that HHS engaged in censorship by proxy 14

Conclusion 20

Certificate of Compliance 21

Certificate of Service 22

TABLE OF AUTHORITIES

Cases

Backpage.com, LLC v. Dart,
807 F.3d 229 (7th Cir. 2015) 10, 14

Bantam Books v. Sullivan,
372 U.S. 58 (1963) .... passim

Blum v. Yaretsky,
457 U.S. 991 (1982) .... passim

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 5

Carlin Commc'ns, Inc. v. Mountain States Telephone & Telegraph,
827 F.2d 1291 (9th Cir. 1987) 8, 9

Ctr. for Effective Gov't v. U.S. Dep't of State,
7 F. Supp. 3d 16 (D.D.C. 2013) 17

Hardie v. Nat'l Collegiate Athletic Assoc.,
No. 13-cv-346, 2013 U.S. Dist. LEXIS 49714 (S.D. Cali. April 5, 2013) 15

Jackson v. Metro. Edison Co.,
419 U.S. 345 (1974) 5, 6

Manhattan Cmty. Access Corp. v. Halleck,
139 S. Ct. 1921 (2019) 7

Missouri v. Biden,
No. 3:22-cv-1213, 2022 U.S. Dist. LEXIS 131135 (W.D. La. July 12, 2022) 15, 16, 19

Missouri v. Biden,
No. 3:22-cv-1213, 2022 U.S. Dist. LEXIS 160743 (W.D. La. Sept. 6, 2022) 16

Moose Lodge No. 107 v. Iris,
407 U.S. 163 (1972) 5

Norwood v. Harrison,
413 U.S. 455 (1973) 6

Packingham v. North Carolina,
137 S. Ct. 1730 (2017) 19

Rendell-Baker v. Kohn,
457 U.S. 830 (1982) 6

S.H.A.R.K. v. Metro Parks Serving Summit County,
499 F.3d 553 (6th Cir. 2007) 7

Serra Spring & Mfg., LLC v. Ramnarine,
No. 22-cv-10530, 2022 U.S. Dist. LEXIS 84976 (E.D. Mich. May 22, 2022) 15

United States v. Kettering Health Network,
No. 1:14-cv-345, 2014 U.S. Dist. LEXIS 192808 (S.D. Ohio Dec. 5, 2014) 14

Other Authorities

Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51 (2015) 7, 10

Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. Rev. 503 (1985) 6

Greg Price (@greg_price11), Twitter (Nov. 28, 2022, 3:55 PM), https://bit.ly/3gQWaLb 2

Jacob Sullum, *These Emails Show How the Biden Administration's Crusade Against 'Misinformation' Imposes Censorship by Proxy*, Reason, Sept. 1, 2022, https://bit.ly/3up0cxf 17, 18

Ken Klippenstein & Lee Fang, *Truth Cops: Leaked Documents Outline DHS's Plan to Police Disinformation*, The Intercept, Oct. 31, 2022, https://bit.ly/3B5X6Cm 3

Kevin M. Spivak, *The Biden Administration Is Engaged in a Massive Censorship Campaign*, Nat'l Rev., Sept. 11, 2022, https://bit.ly/3VqRf2A; *How the Feds Coordinate with Facebook on Censorship*, Wall St. J., Sept. 9, 2022, https://on.wsj.com/3iwIWn4 .... 4, 17

Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 Harv. C.R.-C.L. L. Rev. 145 (2017) 6

Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, Cato Inst. Policy Analysis No. 934, Sept. 12, 2022, https://bit.ly/3F2SiyS 2, 7, 9, 10

INTEREST OF AMICI CURIAE[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to securing the First Amendment rights of free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Securing access to courts, protecting people from compelled speech, and preserving free expression are core aspects of the Institute's mission.

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting the freedom of speech and against government attempts to interfere with the marketplace of ideas.

This case interests *amici* because it involves the collusion of big government with big business to the detriment of individual liberty.

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to its preparation or submission. All parties have provided written consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is axiomatic that government censorship violates the First Amendment. But does anything short of a government official's commanding law enforcement to shut down a publisher or arrest a speaker qualify as censorship? What about government threats, inducements, or plain-old "jawboning"? *See generally* Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, Cato Inst. Policy Analysis No. 934, Sept. 12, 2022, https://bit.ly/3F2SiyS. It all comes down to the "state action" doctrine.

Standard jurisprudence holds that state action exists when government threats—some not-so-loosely veiled, *see, e.g.,* Greg Price (@greg_price11), Twitter (Nov. 28, 2022, 3:55 PM), https://bit.ly/3gQWaLb (video showing White House Press Secretary Karine Jean-Pierre saying, "We're all keeping an eye on [Elon Musk's Twitter].")—affect the decisions of private entities such that their actions effectively become those of the state. The same state action occurs when, in lieu of coercion, the government colludes with private actors.

We face untold regulatory challenges in adapting to the digital age, particularly with the explosion of social-media platforms as forums for expressing political ideas, but there's little difference between 21st-century censorship and that which came before. Censorship by a government-coerced or -induced or -collaborating agent violates the First Amendment no less than an official order to "stop the presses." *See*, *e.g.*, Ken Klippenstein & Lee Fang, *Truth Cops: Leaked Documents Outline DHS's Plan to Police Disinformation*, The Intercept, Oct. 31, 2022, https://bit.ly/3B5X6Cm.

Alas, the district court did not appreciate the all-too-real prospect that government can drive social-media censorship. But Plaintiffs Mark Changizi, Daniel Kotzin, and Michael P. Senger are entitled to prove that this possibility in fact came to fruition.

Here, it seems that they would stand a good chance of succeeding. By many accounts, social-media companies like Twitter followed the U.S. government's direction and began heavily censoring, or entirely banning, users for their allegedly misleading posts about the COVID-19 pandemic. Indeed, recent reporting confirms that federal agencies colluded with and coerced platforms to suppress Covid-related

"misinformation." *See* Kevin M. Spivak, *The Biden Administration Is Engaged in a Massive Censorship Campaign*, Nat'l Rev., Sept. 11, 2022, https://bit.ly/3VqRf2A; *How the Feds Coordinate with Facebook on Censorship*, Wall St. J., Sept. 9, 2022, https://on.wsj.com/3iwIWn4 (discussing emails that show tech companies working with public officials). The government justifies its speech suppression by calling it a fight against "domestic terrorism," but the posts at issue are either factually accurate or simply state disagreements with government policy—not that "fake news" wouldn't be protected speech either.

Plaintiffs seek to hold the government liable for its transgressions. Supreme Court jurisprudence prohibits the type of pressure applied by the federal officials to compel speech suppression by private actors. Twitter is of course at least somewhat free to apply whatever terms of service it likes—whether we should regulate Big Tech as we did railroads or other common carriers is a subject for another day, another lawsuit, another piece of legislation—but Plaintiffs assert no legal claim against Twitter here. Instead, they credibly allege that Twitter became a government tool and thus seek redress from the government.

Currying favor to escape adverse regulatory action or prosecution translates to state action, as does colluding with the government to advance mutual goals. At the very least, additional discovery is warranted so that Plaintiffs can show (or not) that the government engages in censorship by proxy. This Court should reverse the district court's dismissal of their First Amendment claim and remand for further proceedings.

Argument

I. Twitter engaged in state action when it removed public comments deemed "misinformation" at the direction of HHS

A public actor is constitutionally liable for a private entity's actions when "the action of the private entity may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 176 (1972)). Courts historically questioned a private entity's state-action status in cases concerning schools, prisons, healthcare providers, and utilities.[2] Now, a growing trend of litigation involves social-media platforms.

[2] *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (finding interscholastic sport-association that regulated sports in state schools to be a state actor); *Rendell-Baker v. Kohn*, 457

The state-action analysis is fact-driven, with courts finding that both direct and indirect threats can amount to state action. In the social-media context, state actors try to avoid First Amendment scrutiny by working with outside private entities. But the Supreme Court has warned against such a public-private relationship, cautioning that it is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (cleaned up). Leading scholars have likewise questioned the state-action doctrine for decades, noting the consequential effects of state entities' dodging liability by directing their policies through private actors. *See, e.g.*, Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 Harv. C.R.-C.L. L. Rev. 145 (2017); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. Rev. 503 (1985).

U.S. 830, 839-43 (1982) (private school that received funding from public sources is not a state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1005-12 (1982) (transfer of a patient receiving public-health benefits from a private institution does not involve state action); *Jackson*, 419 U.S. at 350-54 (finding that state's sanctioning a private utility does not constitute state action when the utility terminated electricity supply without notice).

Of course, "merely hosting speech by others . . . does not alone transform private entities into state actors subject to First Amendment constraints." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). "On the other hand, a private entity can be held to constitutional standards when its actions so approximate state action that they may be fairly attributed to the state." *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 564 (6th Cir. 2007) (internal quotation marks omitted). Here, Twitter effectively became a state actor by succumbing to pressure to censor at the behest of the Department of Health and Human Services (HHS), trying to curry the agency's favor and avoid regulatory sanction.

A. PRE-INTERNET LAW PROHIBITS INFORMAL GOVERNMENT PRESSURE

Informal pressure and veiled threats by government officials (up to and including presidents) is often referred to as "jawboning," a term coined in the 1960s and 1970s. *See* Duffield, *supra*, at 2; Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 57 (2015). The pre-internet cases of *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Carlin Commc'ns, Inc. v.*

Mountain States Telephone & Telegraph, 827 F.2d 1291 (9th Cir. 1987), are oft-cited examples of courts addressing these types of claims.

Bantam Books involved threats of prosecution by a Rhode Island regulatory commission if wholesale book distributors failed to restrict circulation of publications labeled "obscene." 372 U.S. at 60-63, 66-68. The threats manifested as notices prematurely thanking distributors for their cooperation, and included a reminder "of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity." *Id.* at 62 (footnote omitted). Local police officers also frequented businesses to "learn what action [was] taken" shortly after delivery of these notices. *Id.* at 63. From a distributor's point of view, he would likely be prosecuted if he did not comply. The Supreme Court found the commissions' informal threats—of legal sanctions and other means of coercion—to constitute informal censorship sufficient to warrant injunctive relief. *Id.* at 67. The book distributor's decision to remove from circulation certain publications were deemed involuntary, because they were made at the commission's direction to avoid prosecution. *See id.* at 68. The government violated the First

Amendment with its "system of informal censorship" aimed at speech intermediaries. *Id. at* 71.

At the other end of the spectrum, *Blum* rejected the notion that private conduct could be considered state action for which the state might be held responsible, even if those private actors are heavily regulated and the state otherwise reacts to their actions. In *Blum*, private nursing homes decided that patients should receive different levels of care, and the state accordingly reduced their benefits. The patients sued, seeking damages and injunctive relief ordering officials to further regulate the nursing homes' care decisions. But the Supreme Court rejected arguments that the nursing homes' fundamentally private care decisions constituted state action merely because the state responded to those decisions by adjusting its benefit payments. "There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." *Blum*, 457 U.S. at 1005.

Bantam Books and *Blum* are considered the prevailing Supreme Court standards to determine the constitutionality of internet jawboning claims. *See* Duffield, *supra*, at 19. *Carlin Communications*

applied both cases to a dispute about a county attorney's prosecutorial threats directed at a telephone provider for hosting a sex line. The county attorney wrote the telephone provider, Mountain Bell, stating that the sex line "violated an Arizona statute prohibiting the distribution of sexually explicit material to minors." *Carlin Commc'ns*, 827 F.2d at 1293. Mountain Bell in turn terminated the service. *Id.*

Citing *Bantam Books* and *Blum*, the Ninth Circuit found that the county attorney "exercised coercive power" in his written demands and threats of prosecution, amounting to state action. *Id.* at 1295. Although Mountain Bell could exclude the sex line independently of the state's action under its new policy barring such services, the "*state* may never *induce* Mountain Bell to do so." *Id.* at 1297 (emphasis in original). After the Ninth Circuit released Mountain Bell from the county's threat, the company was free to resume its dealings with its former customer, in the event it wanted to revert its policy concerning such services.

Over the past few decades, jawboning claims have risen exponentially due to the expansion of digital platforms. *See* Duffield, *supra*, at 3-5; *see also* Bambauer, *supra* at 61-66. Most recently, in *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015), the Seventh

Circuit halted the government's campaign of shutting down a provider of online classifieds for jobs, rentals, real estate, and other "adult" activities. In his quest to "crush Backpage's adult section," the local sheriff "demand[ed] that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage, since the ads might be for illegal sex-related products or services, such as prostitution." *Id.* at 230. The sheriff's threats included notes on official letterhead requesting the companies to "cease and desist" payments for ads, citing federal money-laundering laws. *Id.* at 231-32. Visa and Mastercard got the message, suspending Backpage ad transactions.

The Seventh Circuit found the sheriff's actions to be coercive, amounting to a First Amendment violation even though it was Visa and Mastercard that directly harmed Backpage. *Id.* at 239. The sheriff "has a First Amendment right to publicly criticize credit card companies for any connection to illegal activity, as long as he stops short of threats." *Id.* at 238 (emphasis omitted).

This case fits neatly into the state-action sweet spot wherein—if we treat Plaintiffs' allegations in their strongest light—the government

strongly suggested that Twitter needed to censor speech and Twitter carried out those wishes.

B. TWITTER SUCCUMBED TO HHS PRESSURE

Removal of Plaintiffs' tweets amounted to unconstitutional state action. Like the *Bantam Books* censors, HHS and various government officials effectively coerced Twitter to censor criticism of the government's pandemic response—and to chill further such speech. This conclusion emerges from the public comments stressing the platform's need to censor "misinformation," as well as threats of regulatory action should Twitter not comply. First, the government publicly criticized social media platforms for the spread of COVID-19 "misinformation." (Complaint, RE 1, PageID## 8-15). Defendants actively "engag[ed]" with the companies and declared that "there's *more that needs to be done*" to curb the spread of "misinformation" on their platforms. (Complaint, RE 1, PageID# 8). When asked what message he wants to send social media platforms about the spread of COVID-19 "misinformation," President Biden responded: "They're killing people." (Complaint, RE 1, PageID# 13).

Second, four days after President's Biden's comment, reports emerged that the White House was assessing whether social media platforms are legally liable for the spread of misinformation on their platforms. (Complaint, RE 1, PageID # 13). Per *USA Today*, "[r]elations are tense between the Biden administration and social media platforms," as the government examined the liability protections under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c). (Complaint, RE 1, PageID# 13). Repealing or somehow limiting that provision's reach could expose Twitter to liability for its users' speech.

Last, and in tandem with public comments, a government request for information ("RFI") signified an informal threat of regulatory action. (Complaint, RE 1, PageID## 14-15). The district court noted that the RFI is just one part of a larger "information-gathering initiative" led by the Surgeon General, but that's the point. (*See* Opinion and Order, RE 37, PageID #380). HHS is collecting data from private entities, signaling that it's on the lookout for "misinformation." The RFI left Twitter exposed to adverse regulatory action if it does not comply.

The district court erred in construing *Blum* in HHS's favor, holding that HHS's public comments and other efforts to confront COVID-19

"misinformation" do not "'reasonably' constitute an exercise of 'coercive power' over Twitter." (Opinion and Order, RE 37, PageID# 396) (quoting *Blum*, 457 U.S. at 1004). *Bantam Books* and *Blum* certainly don't limit the government's ability to criticize Twitter and other platforms, but governmental threats of retaliation pushed Defendants' actions into the realm of unconstitutional jawboning.

The upward trend of government coercion of private speech intermediaries has no end in sight. As detailed in *Backpage.com*, the potential implications of adverse regulatory action may compel private action as much as "affirmative commands" would. *See Backpage.com*, 807 F.3d at 237-38 (citing *Bantam Books*, 372 U.S. at 66-67); *see also Blum*, 457 U.S. at 1005. The government's repeated admonitions to root out "misinformation" were similarly no mere hortatory expressions of policy preference.

II. DISCOVERY WOULD ALLOW PLAINTIFFS TO VERIFY THEIR CREDIBLE CLAIM: THAT HHS ENGAGED IN CENSORSHIP BY PROXY

Courts routinely permit expedited discovery during the pendency of a motion for a preliminary injunction. *See, e.g.*, *United States v. Kettering Health Network*, No. 1:14-cv-345, 2014 U.S. Dist. LEXIS 192808, at *4 (S.D. Ohio Dec. 5, 2014) ("Good cause [for expedited discovery] is often

found when there is a request for preliminary injunction."); *see also Missouri v. Biden*, No. 3:22-cv-1213, 2022 U.S. Dist. LEXIS 131135, at *12-19 (W.D. La. July 12, 2022) (finding "good cause" for expedited discovery in resolving a motion for preliminary injunction regarding social media censorship). Discovery may also proceed while a motion to dismiss is pending. *See Hardie v. Nat'l Collegiate Athletic Assoc.*, No. 13-cv-346, 2013 U.S. Dist. LEXIS 49714, at *7-8 (S.D. Cali. April 5, 2013) (citation omitted).

In considering whether to grant expedited discovery, courts consider "(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose of the request; (4) the burden to comply; and (5) how far in advance of the typical discovery process the request was made." *Serra Spring & Mfg., LLC v. Ramnarine*, No. 22-cv-10530, 2022 U.S. Dist. LEXIS 84976, at *4-5 (E.D. Mich. May 22, 2022) (citation omitted). In aid of the preliminary injunction hearing, Plaintiffs sought:

(1) Correspondence from the Surgeon General's office to Twitter pertaining to the RFI, including other information or actions regarding COVID-19 "misinformation" that was sent to Twitter; and

(2) Statements regarding "whether or not any Defendant ordered[,] removed, objected to, identified, or 'flagged' specific posts on Twitter."

(Motion for Limited Expedited Discovery, RE 27, PageID## 144-45).

This Court need not speculate as to the utility of these requests. In an analogous case, a similar expedited discovery request produced meaningful evidence that the government indeed engages in censorship by proxy in jawboning social media platforms.

In *Missouri v. Biden*, the Western District of Louisiana granted a motion for expedited preliminary injunction-related discovery permitting plaintiffs to collect, *inter alia*, correspondence between the government defendants—including various members of the current administration—and "up to five social-media platforms" on topics such as "misinformation" and/or censorship of speech on social media. 2022 U.S. Dist. LEXIS 131135, at *18-19. The government defendants raised executive privilege and presidential communications privilege, *Missouri v. Biden*, No. 3:22-cv-1213, 2022 U.S. Dist. LEXIS 160743, at *9 (W.D. La. Sept. 6, 2022), but the court determined that the plaintiffs were entitled to any external communications from the said defendants to third-party social media platforms. *Id.* at *9-10 (citing *Ctr. for Effective*

Gov't v. U.S. Dep't of State, 7 F. Supp. 3d 16, 25, 27 (D.D.C. 2013)) ("The White House has waived its claim of privilege in relation to specific documents that it voluntarily revealed to third parties.").

The decision forced the government to reveal evidence that it does, in fact, engage in censorship by proxy, pressuring social media companies to suppress speech in a manner that would be equally unconstitutional had the government decreed as much directly. *See* Jacob Sullum, *These Emails Show How the Biden Administration's Crusade Against 'Misinformation' Imposes Censorship by Proxy*, Reason, Sept. 1, 2022, https://bit.ly/3up0cxf. Responses to the Freedom of Information Act requests and emails produced show that HHS and White House officials flagged certain posts as "misinformation" for censorship purposes—including factually accurate dissenting views—and justified its actions as suppressing "domestic terrorism." *See* Spivak, *supra*; *see also How the Feds Coordinate with Facebook on Censorship*, *supra*. More than 80 senior officials—nine of which (including one White House official) were identified by Twitter alone—have been cited as participating in this "concerted federal enterprise involving at least eleven federal agencies," including HHS. Spivak, *supra*. Recently disclosed emails confirm that

these senior officials colluded with various social-media platforms, including Twitter. Sullum, *supra*.

Twitter eagerly fell in line. There is evidence that federal officials reported COVID-19 "misinformation" to Twitter. *How the Feds Coordinate with Facebook on Censorship*, *supra*. Twitter then swiftly responded by writing "super helpful," and adding that "some of these [posts] have been previously reviewed and actioned," but that they "will now ask the team to review the others." *Id.* "Internal Twitter communications" indicate senior White House officials "specifically pressured Twitter to deplatform" a vaccine skeptic, the investigative journalist Alex Berenson, "which Twitter did." Sullum, *supra*.

An April 2021 email by a Deputy Assistant to the President reported that "Twitter will inform 'White House staff' about 'the tangible effects seen from recent policy changes . . ., and ways the White House (and [White House] COVID experts) can partner in product work." *Id.* Another April 2021 message reported Twitter's desire to "set[] up regular chats" with federal officials regarding COVID-19 censorship, stating: "[The Twitter team] has asked for examples of problematic content so [they] can examine trends. All examples of misinformation

are helpful, but in particular, if you have any examples of . . . fraudulent covid cures, fraudulent vaccine cards, etc, that would be very helpful." *Id.*

Like the *Missouri* plaintiffs, Plaintiffs here have not set sail on a "fishing expedition." *Missouri*, 2022 U.S. Dist. LEXIS 131135, at *16. Additional discovery requests here, which are reasonably targeted toward only one platform and certain officials, would help the district court resolve the pending motion for preliminary injunction on remand.

The social-media and other internet companies' impact on society—and on social and institutional trust—cannot be understated. Platforms that once served primarily as mechanisms for sharing personal photos and fostering friendships have become vital spaces for expressing ideas, including core political speech. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal quotation marks omitted).

Given what is already known, Plaintiffs should be able to pursue their claims that they have been jawboned off these "most important places for the exchange of views," in violation of their First Amendment rights. Evidence of coercion and collusion revealed in other cases already raises questions about the relationship between government officials and social media platforms, buttressing Plaintiffs' claims that they were censored by a public-private partnership. Discovery would help answer legitimate questions of whether the government here has engaged in censorship by proxy.

CONCLUSION

The Court should reverse the district court's judgment and remand the case to allow for additional discovery.

Dated: December 5, 2022

Respectfully submitted,

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/s/ *Alan Gura*
December 5, 2022

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I hereby certify that on December 5, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will effect service of such filing on all counsel.

/s/ *Alan Gura*
December 5, 2022