IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

MARK CHANGIZI, **MICHAEL P. SENGER,** **DANIEL KOTZIN,** *Plaintiffs,* v. **DEPARTMENT OF HEALTH AND HUMAN SERVICES;** **VIVEK MURTHY, United States Surgeon General, in his official capacity, and** **XAVIER BECERRA, Secretary of the Department of Health and Human Services in his official capacity,** *Defendants*.	)	**Civil Action No.: 2:22-cv-01776** **Oral Argument Requested**

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Table of Contents

INTRODUCTION AND SUMMARY OF ARGUMENT

At its core, this case is about free speech in the age of the internet. In one respect, the arguments put forth are novel—by necessity, due to the newly charted terrain resulting from technological innovation. Yet at the same time, the fundamental tenets brought to the fore are those that Americans have been navigating since this nation's founding: the right of private citizens to voice unpopular opinions on the most controversial topics of the day, and the dangers posed by the Government's attempts to assert itself as the sole authority on a given subject and to prohibit the dissemination of viewpoints with which it disagrees.

The First Amendment to the United States Constitution was predicated on an understanding 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.

> 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 in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

89

De Jonge v. State of Oregon, 299 U.S. 353, 365 (1937). *See New York Times v. United States*, 403 U.S. 713 (1971) (Black, J., concurring) ("Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints"); *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)).

In fact, the Executive Branch of the United States Government has demonstrated throughout this pandemic not only that it does not have a monopoly on the truth, but that it does not even have a particularly good handle on it. For example, President Joseph Biden and CDC Director Rochelle Walensky stated just last summer that the vaccinated will not contract COVID-19. Every American who lived through the past winter knows that these representations proved untrue; they could be catastrophic for vulnerable individuals who rely on these authority figures to provide accurate information. Just about a year ago, the theory that COVID-19 leaked from a Chinese lab was considered "misinformation" and censored as such on social media; the Biden Administration now acknowledges that the virus may indeed have originated in a lab in Wuhan, China. The refusal to acknowledge this possibility for over a year could have hampered scientific advances that likewise may have had life-or-death consequences. This illustrates the reason that the Framers of the Constitution abhorred Government-sponsored censorship, *particularly* when it comes to debate on the most controversial topics of our time.

Defendants' arguments, both opposing Plaintiffs' motion for a preliminary injunction and in support of a motion to dismiss, are premised upon a mischaracterization of the government action giving rise to Plaintiffs' claims: they attempt to recast the case as resting entirely upon the Surgeon General's July 2021 Advisory (Advisory) and March 3, 2022 Request for Information (RFI). Defendants conveniently ignore Plaintiffs' extensive discussion of threatening and coercive statements made by Biden Administration officials to hold Twitter and other social media companies accountable for "misinformation" about COVID-19 spread on their platforms. Indeed, it is unsurprising that the Surgeon General ensured that the written, formalized aspects of his

censorship campaign were cleansed of more obvious First Amendment, Fourth Amendment, and statutory violations. But it is crucial to recognize that the Government did not quietly send a reasonable request for information, or decry information it considered false; rather, it combined requests and denunciations with threats and dire warnings of "consequences" and "accountability" for offending people and companies.

Contrary to Defendants' claims, Plaintiffs have standing to bring this case. The timeline of events alone gives rise to the inference that Plaintiffs' Twitter accounts were suspended because of Government pressure upon the social media company. And Defendants' argument that social media companies were engaging in some censorship before the Government became involved is willfully obtuse. Members of the Biden Administration made repeated statements that tech companies were not doing enough and would be held accountable if they did not do more to stop the flow of so-called misinformation about COVID-19. The Government pressured the tech companies, with threats of regulatory or even legal consequences, to ramp up censorship, which they did in response.

But Plaintiffs need not demonstrate causality: they only must show that the Government's coordinated campaign was sufficiently intimidating that Plaintiffs self-censored for fear of repercussions. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) ("in the First Amendment context, litigants … are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."; internal quotations marks and citations omitted). Plaintiffs attested to the severe chilling effect that the Government's conduct had on their speech, an effect that was not only predictable but was and continues to be the Surgeon General's *aim*.

Defendants' contention that the declaratory and injunctive relief sought would not redress Plaintiffs for their injuries because Twitter could independently suspend their accounts is likewise misplaced. If the Government's actions are deemed unconstitutional by virtue of the chilling effect they are having, Plaintiffs "simply need not contend with them any longer," which satisfies the redressability component of the standing inquiry. *Harrell v. The Florida Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010).

Not only do Plaintiffs have standing to bring their claims, but they are likely to succeed on the merits. In addition to the obvious First Amendment violations, the Surgeon General is without statutory authority to direct social media companies to censor individuals or viewpoints that he, or others in the Biden Administration, consider problematic. Accordingly, this entire censorship effort is *ultra vires* and, for similar reasons, in violation of the standards of review required by the Administrative Procedure Act (APA). Finally, the demand that technology companies provide the Government with information about "sources" (individuals) of "misinformation" constitutes a warrantless search in violation of the Fourth Amendment.

Absent a preliminary injunction, Plaintiffs will suffer irreparable harm in the form of continued violations of their First Amendment and statutory rights, as well as the prospect of their private information being handed over to the Government by May 2 in violation of their Fourth Amendment rights to remain free from unreasonable searches and seizures. The balance of equities tilts heavily in their favor, as the Government does not have a valid interest in continuing its unlawful censorship campaign. Contrary to Defendants' claims that the equities favor them, the mere assertion that the RFI, Advisory, and threats to tech companies are needed to mitigate COVID-19 deaths is purely speculative. They have provided no evidence to support this position.

Nor have they adequately addressed the historically recognized danger posed by Government-sponsored censorship.

Plaintiffs urge the Court to "look through forms *to the substance*," *Bantam Books v. Sullivan*, 372 U.S. 58, 62 (1963) (emphasis added), and recognize what is going on here. The Government is exerting significant pressure on private tech companies to silence and intimidate Americans whose perspectives differ from those of the Government on the most crucial issues of our time. *See Wood v. Georgia*, 370 U.S. 375, 388 (1962) ("a broad conception of the First Amendment is necessary to supply the public need for information and education with respect to the significant issues of the times …. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"; internal citations and quotation marks omitted). Put differently, the Government is using these companies to do indirectly what it cannot do directly. This Government action is dangerous: left unchecked, it threatens the foundations of our Republic. At the very least, Plaintiffs and countless other Americans are afraid to voice their opinions—and often refrain from doing so—for fear of reprisal, whether by the loss of influential Twitter accounts that are of great value to them, or via their information being given to the Government. This is precisely the sort of dilemma that the First Amendment was designed to prevent. Only this Court can put an end to the ongoing invasion of Plaintiffs' constitutional and statutory rights and restore their ability to speak freely on matters of public significance.

BACKGROUND

In the interests of economy, Plaintiffs will not reiterate facts contained in previous filings, which lay out in detail the timeline and content of the Government's statements, demands, and threats directed at social media companies (*see* Complaint, ECF No. 1 at ¶¶ 10-101 [hereinafter

"Complaint"]; Memorandum in Support of Motion for Preliminary Injunction [hereinafter "PI Memo"], ECF No. 9-1 at pp. 4-10). Instead, Plaintiffs will include only new and additional information here.

Since filing of the motion for a preliminary injunction, Plaintiff Daniel Kotzin's Twitter account was once again locked for 7 days and he was threatened with permanent suspension, on Monday, April 11, 2022 for a Tweet reading:

> "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." Michael Senger was banned forever by Twitter for writing that, so it must be true. Pass it on.

(*see* 4/20/22 Declaration of Daniel P. Kotzin, attached as Exhibit A at ¶ 4(e)).

Plaintiff Mark Changizi is including an updated declaration that contains the following additional facts (*see* 4/20/22 Declaration of Mark Changizi, attached as Exhibit B). Despite having operated a Twitter account that criticized governmental and societal responses to COVID-19 since March of 2020, he was never suspended before April 20, 2021 (*id.* at ¶ 6). He had repeatedly tweeted, for instance, that lockdowns were: a hysterical reaction, a religious cult, ineffective, and harmful (*id.* at ¶¶ 9-11, 13). On many occasions, Mr. Changizi had tweeted that the infection fatality rates of COVID-19 and the flu were similar, that masks were ineffective, and that asymptomatic transmission of the virus was rare (*id.* at ¶¶ 12, 14-15).

Beginning in January of 2021, Mr. Changizi documented his belief that the government was behind big tech censorship. On January 5, 2021, he tweeted: "IT'S ACTUALLY GOVERNMENT CENSORSHIP. Much of the reason why big tech is engaged in censorship is pressure from the government itself … They're not acting as a private company, but are a de facto arm of the state" (*id.* at ¶ 31). Within hours of Press Secretary Psaki's May 5, 2021 speech, he tweeted: "FREE EXPRESSION ALERT! Amazing! She specifically threatens Big Tech here to

censor or risk greater regulation" (*id.* at ¶ 32). Mr. Changizi even penned an article in July of 2021 entitled "Big Tech Censorship is Actually Government Censorship" (*id.* at ¶ 33).[1] He concluded that "the draconian censorship we've been experiencing by Big Tech is not even censorship via a private company …. It's government censorship, plain and simple" (*id.*).

Mere days after the Surgeon General listed his "recommendations" for tech companies in mid-July 2021, Facebook Vice President of Integrity Guy Rosen authored a blog post on Facebook's official website stating that the company had "already taken action on all eight of the Surgeon General's recommendations on what tech companies can do to help."[2]

Recently, on a podcast, former White House Pandemic Advisory Andy Slavitt reminisced about how, in the summer of 2021 while still working for the Biden Administration, he had warned Facebook Vice President of Global Affairs, Nick Clegg, that "in eight weeks' time, Facebook will be the number 1 story of the pandemic."[3] Slavitt also made a comment about how he had been in contact with Clegg about which pieces of misinformation to take down.

LEGAL STANDARDS

On a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), "a trial court takes the allegations in the complaint as true." *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). One component of Article III subject matter jurisdiction is standing, which is satisfied where a plaintiff pleads: (1) an injury in fact that

[1] Dr. Mark Changizi, "Big Tech Censorship is Actually Government Censorship," *FreeX Newsletter* (July 5, 2021), *available at* https://www.getrevue.co/profile/markchangizi/issues/big-tech-censorship-is-actually-government-censorship-597190 (last visited Apr. 20, 2022).

[2] https://about.fb.com/news/2021/07/support-for-covid-19-vaccines-is-high-on-facebook-and-growing/

[3] https://podcasts.apple.com/us/podcast/is-covid-misinformation-killing-people-facebooks-nick/id1504128553?i=1000529558554

is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *DirecTV, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007), *quoting Ricco v. Potter*, 377 F.3d 599, 602 (6th Cir. 2004). In evaluating such a motion, 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.*, 487 F.3d at 476. The burden is on the defendant to show that the plaintiff has failed to state a claim for relief. *Id.*, *citing Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991). The court "need not accept as true legal conclusions or unwarranted factual inferences." *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000). This standard is, of course, lower than that used to grant a preliminary injunction. *See Arnold v. Heyns*, 2015 WL 4243269 (E.D. Michigan 2015), *citing Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) ("the proof required for a plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a dispositive motion."); *Merck Sharp & Dohme Corp. v. Conway*, 2012 WL 1029427, fn. 5 (E.D. Kentucky 2012) ("the standard for a motion to dismiss is much lower than that for a motion for a preliminary injunction.").

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING THESE CLAIMS

Defendants contend that Plaintiffs lack standing to bring their claims because they cannot establish that "remedial actions that Twitter has taken (or may take) against Plaintiffs were (or will) be attributable to Defendants, rather than the 'independent' judgment and 'legitimate discretion' of Twitter" (*see* Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Defendants' Motion to Dismiss, [hereinafter "Gov. Opp."] EF No. 31). Defendants also assert that Plaintiffs cannot show that the RFI will impact them. Defendants' standing claims are grounded in misrepresentations of both the facts and the law.

A. Plaintiffs Have Standing to Challenge the Government's Role in Twitter Censorship

Initially, Defendants' portrayal of the pertinent facts is inaccurate. Contrary to their claims, the timeline of events gives rise to an inference of causality. As explained more thoroughly in the Complaint and PI Memo, the commencement of Plaintiff Mark Changizi's suspensions and de-boosting occurred right around the time the Government began its public campaign. Plaintiff Michael Senger was permanently suspended from Twitter, and Plaintiff Daniel Kotzin temporarily suspended, just *days* after the Surgeon General's RFI launched (Complaint ¶¶ 55-96; PI Memo at 4-10). None of them was ever suspended before the Biden Administration began its public campaign to combat "misinformation" about COVID-19 last spring.

Furthermore, as Plaintiffs explained (and contrary to Defendants' position), the fact that Twitter engaged in some censorship in an ostensible effort to combat COVID-19 "misinformation" prior to the Government's involvement does not negate Plaintiffs' state action theory (*see* Gov. Opp. at 18). Biden Administration officials have repeatedly said that Twitter and other social

media companies are not doing enough to stop the dissemination of "misinformation" and, if they do not do more—in other words, censor much more—they will be held accountable (Complaint, ¶¶ 22 (May 5, 2021—"more needs to be done"), ¶¶ 23 to 25 (July 15, 2021—Twitter was a major source of "misinformation", and had to "strengthen the monitoring of misinformation"), ¶ 30 (July 15, 2021—"Modern technology companies have enabled misinformation to poison our information environment … We're asking them to monitor misinformation more closely"), ¶ 44 and ¶ 46). *See Community Financial Services Association of America*, 132 F.Supp.3d 98, 111 (D.D.C. 2015) ("Plaintiffs have alleged sufficient facts that, if proven true, could show that the Defendants' conduct was a substantial factor motivating the decisions of third parties that were the direct source of Plaintiff's injuries"; internal quotation marks and citations omitted). They have even admitted to instructing social media companies to remove certain posts (Complaint ¶¶ 32-33; *supra* at 6), and a Facebook official is on the record stating that they have responded to eight of the Surgeon General's requests. Though Plaintiffs all posted similar, controversial tweets beginning in March of 2020, none was suspended until the spring of 2021.

Defendants also contend that the numerical increase in suspensions that Plaintiffs posit began in March of 2021 belies their claims, because the Advisory did not come out until July of 2021 and the RFI was not issued until March of 2022 (Gov. Opp. at 17-19). As explained, however, Press Secretary Psaki began making public statements threatening tech companies in May of 2021 (Complaint ¶ 22). There is no doubt, from a commonsense perspective, that the Government had internal discussions, and likely communicated with social media platforms, in the months preceding this open campaign. In short, no further information is needed from which

to conclude that the Government bears responsibility for censorship of Plaintiffs' accounts.[4] *See Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003) (holding that letter written by city borough president to billboard company criticizing display of religious organization's signs proclaiming homosexuality to be a sin and requesting removal of the signs, which were then removed, could be found to contain implicit threat of retaliation in violation of the First Amendment). In addition, Defendants have not contradicted Plaintiffs' contention that pro-Government "misinformation" on COVID-19 is not being deleted or de-platformed. At the very least, whether the Government drove Twitter's actions is a factual issue to be resolved by the jury. That the issue has been pleaded properly and merits a jury's review is beyond dispute.

But this is all a mere distraction when it comes to evaluating Plaintiffs' First Amendment claim, because they need not show causation. As the Supreme Court has held many times, standing requirements are relaxed in this 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).

Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956 (1984); *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) ("in the First Amendment context, litigants … are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very

[4] To the extent that the Court may wish to obtain additional information regarding the Government's involvement in Twitter's actions, discovery is warranted (including requests Plaintiffs made via Motion for Expedited Discovery, *see* ECF No. 27), rendering dismissal at this phase of proceedings inappropriate. And it is the Government that has continually resisted providing any of the requested information that would assist in this inquiry.

existence may cause others not before the court to refrain from constitutionally protected speech or expression"; internal quotations marks and citations omitted). *See also Speech First v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020) ("chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement"; internal citations and quotation marks omitted); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("when a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements"; internal quotation marks and citation omitted); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) ("First Amendment cases raise unique standing considerations that tilt dramatically toward a finding of standing"; internal quotation marks and citations omitted).

In other words, Plaintiffs need not even show that they were adversely impacted by the Government's action (although as discussed, they have provided a sufficient factual basis from which to conclude that they have shown it). They need only show that they (or others) curtail their speech for fear of the repercussions. *See MedImmune v. Genentech*, 549 U.S. 118, 128-29 (2007) ("Where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat[.]"); *Guadalupe Police Officer's Association v. City of Guadalupe*, 2011 WL 13217672 (C.D. Ca. 2011) ("[Plaintiff] has also alleged that he has self-censored his speech in the past, and will continue to self-censor in the future, regarding the issues identified above. This adequately alleges an injury-in-fact sufficient to support standing."). *See also First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) ("Even if an official

lacks actual power to punish, the threat of punishment from a public official who appears to have punitive authority can be enough to produce an objective chill"); *Community Service Broadcasting of Mid-America, Inc. v. F.C.C.*, 593 F.2d 1102, 1116-17 (D.C. Cir. 1978) ("In seeking to identify the chilling effect of a statute our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation.").

In *Schlissel*, 939 F.3d at 764-65, the plaintiffs alleged that the University of Michigan's policy prohibiting bullying and harassing behavior—violations carried "interventions" and "sanctions" ranging from formal reprimand to expulsion enforced by a "Response Team"—was overbroad and vague, thereby encompassing protected speech. *Id.* at 761-62. The Sixth Circuit held that the district court wrongly denied the plaintiffs' motion for a preliminary injunction for lack of standing "because [plaintiffs] face an objective chill based on the functions of the Response Team." *Id.* at 765. Notably, the Response Team had "no direct punitive authority," although it could make referrals, and typically merely offered to meet with the reporting individual and the alleged offender. *Id.* at 762. Agreeing with the plaintiffs that accordingly, the Response Team "act[ed] by way of implicit threat of punishment and intimidation to quell speech" the court noted that the "ability to make referrals … is a real consequence that objectively chills speech." *Id.* at 765. *See also Dambrot v. Central Michigan University*, 55 F.3d 1177, 1182, 1192 (6th Cir. 1995) (although students had not yet been punished under the policy, nor had the university acted concretely by threatening them with punishment, students had standing).

These cases recognize that the "implicit threat and intimidation" on the part of government officials to eradicate speech constitutes a First Amendment violation. Those are exactly the circumstances presented here. Plaintiffs have explicitly stated in their declarations (*see* Ex. A ¶¶

7-12; 4/20/22 Declaration of Mark Changizi, attached as Ex. B at ¶¶ 26-29) and will testify at the upcoming hearing that they self-censor on Twitter for fear of losing their accounts. They reasonably perceive that the likelihood of suspension is significantly higher than it was before the Biden Administration began its public campaign to coerce social media companies into censoring the perspectives of those with whom it disagreed on COVID-19 policy. Indeed, Mr. Changizi has documented since January of 2021 his belief that the United States Government is behind big tech censorship, even writing articles about it (Exhibit B at ¶¶ 30-34). That alone establishes a First Amendment violation. *See Council for Periodical Distributors Ass'n v. Evans*, 642 F.Supp.552, 559 (M.D. Ala. 1986), *aff'd in rel. part* 827 F.2d 1483 (11th Cir. 1987) ("when a system of informal prior restraint restricts the flow of presumptively protected materials along a chain of distribution, all persons along that chain are affected."); *National Rifle Association of America v. Cuomo*, 350 F.Supp.3d 94 (N.D.N.Y. 2018) ("targeted entities' reactions to the perception of an implicit threat is a factor the Court should consider. Defendants argue that no individual company was singled out or coerced as a result of Defendants' public statements … but such specific targeting is not required in order to make out a First Amendment claim in these circumstances.").

Defendants maintain that *Association of American Physicians & Surgeons, Inc. v. Schiff*, 518 F.Supp.3d 505 (D.D.C. 2021), *aff'd* 23 F.4th 1028 (D.C. Cir. 2022) "closely resembles" this case and militates in favor of finding that Plaintiffs lack standing (*see* Gov. Opp. at 19). But *Schiff* (which is not binding on this Court) was crucially different. The *Schiff* court even expressly stated 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." Nor had they shown a concrete harm.

Here, Plaintiffs established both, although they need only show one: they have all had their accounts suspended either temporarily or permanently, and Mr. Changizi and Mr. Kotzin, who

may still operate their accounts, have explained that they self-censor on Twitter for fear of additional and permanent suspensions. Mr. Changi even has evidence that he believes the Government is behind censorship of his account and operates accordingly. Furthermore, *Schiff* involved the actions of a single congressman who had no authority, on his own, to enact any sort of law or policy. By contrast, Plaintiffs' allegations in this case are about the actions and words of several members of the executive branch, who have not only explicitly threatened to penalize tech companies for refusing to comply with their demands, but also have the authority (or at least the apparent authority) to do so.

Defendants posit that another indication Plaintiffs lack standing is that they cannot show that the equitable relief they seek would redress their injuries, because Twitter could independently take disciplinary action against Plaintiffs. This is the wrong way to look at the issue. If the Government's actions are deemed unconstitutional by virtue of the chilling effect they entail, Plaintiffs "simply need not contend with them any longer," which satisfies the redressability component of the standing inquiry. *Harrell v. The Florida Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010).

In *Evans*, the Court held:

> 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). In other words, that any subsequent decision to censor would be made free of government involvement satisfied the redressability prong. That is

precisely the situation presented here. *See also Turner v. U.S. Agency for Global Media*, 502 F.Supp.3d 333. 361 (D.D.C. 2020) ("an order enjoining defendants from further interference with [Plaintiff's] First Amendment rights would restore her editorial discretion and eliminate any chilling effects.").

Courts have also found that the redressability component of the standing inquiry is satisfied where it is highly likely that the private actor would refrain from the censorship in question absent the government's action. *See Dept. of Commerce v. New York*, __U.S.__, 139 S.Ct. 2551, 2566 (2019) ("Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties …. Because Article III requires no more than *de facto* causality … traceability is satisfied here"; internal citations and quotation marks omitted). *See also Teton Historic Aviation Foundation v. DoD*, 785 F.3d 719 (2015) ("We have previously found standing in cases where a third party would very likely alter its behavior based on our decision, even if not bound by it.").

Twitter had long been considered a free speech haven, and much of its success was premised upon that reputation. As criticisms of its viewpoint-based censorship have escalated, social media users have turned to alternative platforms such as Gab, Gettr, and Parlor. Driving users away *en masse* is typically not a profitable business strategy. It is "substantially likely" that absent pressure from the Government, Twitter would be censoring far fewer accounts and would not have suspended those belonging to Plaintiffs. *See Community Financial Services Association of America*, 132 F.Supp.3d at 112 ("Although invalidation of the Agency Documents would not necessarily lead to restoration of banking relationships, it may certainly affect Defendants' ability to pressure banks in the future …. Plaintiffs are not required to show to a certainty that a favorable

decision will redress their injury"; internal citations and quotation marks omitted); *CEI v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990) (holding that consumer organization had standing to challenge fuel-efficiency regulations as non-party manufacturers, if given the choice, would be "substantially likely to respond to market forces" by producing larger vehicles desired by its members).

B. Plaintiffs Have Standing to Challenge the Request for Information

Defendants claim that Plaintiffs do not have standing to challenge the RFI because they cannot show that Twitter will respond to the RFI, so their theory of injury entails "significant guesswork," and "if it provides a response containing some information about Plaintiffs, it is *unclear* whether that will include non-public information" (*See* Gov. Opp. at 21-22) (emphasis added). This contention is as far off the mark as those discussed above.

The Fourth Amendment does not contain an exception for Government-ordered searches that only "may" result in turning over private, protected information. *See* U.S. Const. amend IV. While it is true that the RFI instructs social media companies to provide information "at a level of granularity that preserves the privacy of users," the meaning of this clause is not at all evident. If the Government is not seeking private messages, email addresses and telephone numbers of account holders, or planning to collect information to create files on users it deems problematic, then the onus is on the Government to explicate that.

Defendants also assert that, even if Twitter were to produce non-public information of its users, the production "would not be traceable to the Defendants" because, if Twitter sends any such information to the Surgeon General, it will be "voluntary and independent," which would "thus break[] the chain of constitutional causation" (Gov. Opp. at 22).

Once again, Defendants are being willfully obtuse. Facebook has already said that it intends to obey the RFI, demonstrating that Plaintiffs' concerns are valid.[5] And there is little "guesswork" that Twitter, too, will comply given its recent history of capitulating to Government coercion by suspending users' accounts. Put otherwise, Twitter's imminent release of its users' private information is far from "pure speculation," particularly considering the Government's mounting pressure, including the threat of lawsuits against tech companies, to comply with Defendants' demands (Complaint ¶ 22).

Defendants cite *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021) in support of their argument. *Id*. But that case actually bolsters Plaintiffs position: *Turaani* stated that injury is "traceable" to a defendant's actions where the defendants' actions had a "'determinative or coercive effect' upon the third party." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997)). Traceability can also be found in cases where the government "cajole[s], coerce[s], [or] command[s]" a third party. *See Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017).

Finally, Defendants attempts to de-contextualize the RFI by portraying it as stand-alone agency action should be rejected. The RFI is simply the latest initiative in a campaign of intimidation designed to coerce social media companies to censor individual users whose views on COVID-19 and related matters differ from those of the Government. Twitter, along with other social media platforms, is under significant pressure to comply with the RFI for fear that the consequences Defendants and others have threatened will become reality. In light of the pressure and coercion imposed by Defendants, Twitter's actions cannot by any reasonable standard be

[5] *See* Hiawatha Bray, "Lawsuit challenges federal crackdown on COVID-19 misinformation on social media," *The Boston Globe* (Mar. 31, 2022), *available at* https://www.bostonglobe.com/2022/03/31/business/lawsuit-challenges-federal-crackdown-internet-misinformation/ (last visited Apr. 19, 2022).

considered "voluntary and independent." Defendants' actions have had, and will continue to have, a "coercive effect" on Twitter. *See Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991) (finding that letter from local government member to others about decision to run Plaintiff's ad in newspaper could be viewed as a threat as the letter stated that the ad: "raise[ed] significant questions and concerns about the objectivity and trust which we are looking for from our business friends," asked *who wrote the questions*, and *requested a list of members* who supported inclusion of the article) (emphasis added). Plaintiffs face an impending threat of injury unless and until the Government's coercive actions are checked. Accordingly, Plaintiffs have established standing with regard to the information that Twitter may provide in response to the RFI.

II. PLAINTIFFS' CLAIMS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS, WARRANTING ISSUANCE OF A PRELIMINARY INJUNCTION; THESE CLAIMS CERTAINLY SURVIVE A MOTION TO DISMISS

A. Plaintiffs Have Established Plausible Ultra Vires and APA Claims

Defendants contend that Plaintiffs have failed to state a plausible claim that the Surgeon General's RFI initiative constitutes unlawful, *ultra vires* action beyond the scope of 42 U.S.C. § 264(a). According to Defendants, the Government "need[s] no express statutory authorization to simply convey or request information," as the RFI is merely a "non-binding document[]" that "imposes no consequence on those who share no information at all" (Gov. Opp. at 23-26).

Non-binding agency action "merely expresses an agency's interpretation, policy, or internal practice or procedure" and is "not determinative of issues or rights addressed." *See Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) ("[The Court's] task is … that of characterizing the product of agency action to determine its legal status and effect"). Indeed, 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 citation omitted). Thus, Defendants' characterization of the RFI as "non-binding" does not shield it from judicial review—particularly when, as Plaintiffs have shown, the RFI is far from "routine government speech" that does not affect the rights or conduct of third parties.

Contrary to Defendants' assertions otherwise, the RFI is not an instance of the Government "simply communicat[ing] with the public" like "any other form of standard public speech" (Gov. Opp. at 23, 25). The RFI covers a broad array of technology companies, and includes "general search engines, content sharing platforms, social media platforms, e-commerce platforms, crowd sourced platforms, and instant messaging systems" (Complaint ¶ 52). Further, the RFI webpage asks for "sources of COVID-19 misinformation" including "specific, public actors that are providing misinformation" (Complaint ¶ 50). The RFI is plainly not a mere information-gathering initiative, which "neither compel[s] nor prohibit[s] any conduct" (Gov. Opp. at 25). Rather, it is a *de facto* demand by Government that tech companies either turn over private information gathered from users or face the consequences.

Defendants contend that the Government can wield this heavy-handed tactic freely and without statutory authority. But no source authorizes Government actors to coerce third parties into taking actions that result in the violation of private citizens' constitutional rights, whether through viewpoint-based censorship or seizure of personal information. Nor can Defendants insulate or separate the RFI from the pressure, coercion, and threats (including threats of lawsuits) that were contemporaneously made by the Surgeon General, White House Press Secretary Jennifer Psaki, the Surgeon General and various members of the Biden Administration (Complaint ¶ 22).

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, 70 S. Ct. 357, 94 L. Ed. 401 (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") (citing *United States v. Pretty Prod., Inc*., 780 F. Supp. 1488, 1504 (S.D. Ohio 1991)). The RFI is plainly not a "reasonable request," given its chilling and coercive effects, and the concomitant violations of private citizens' First and Fourth Amendment rights.

Thus, it comes as no surprise that Defendants cited no statutory authority for the RFI: no such authority exists. Even assuming that § 264(a) is the relevant statute that governs the Surgeon General's issuance of RFIs generally, § 264(a) plainly does not (and cannot) empower the Surgeon General to direct social media companies to censor individuals or suppress viewpoints that are deemed problematic, whether by the Surgeon General or others in the Biden Administration. *See Tiger Lily v. U.S. Dep't of Housing and Urban Development*, 5 F.4th 666, 671 (6th Cir. 2021) ("We 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*, __F.Supp.3d__, 2021 WL 5587446 (E.D. Kentucky 2021) ("[N]either OSHA nor the executive branch is permitted to exercise statutory authority it does not have."), *aff'd* 23 F.4th 585 (6th Cir. 2022). *State v. Becerra*, 544 F. Supp. 3d 1241, 1295, 1298, fn. 43 (M.D. Fla. 2021) (rejecting CDC's argument that § 264(a) "places virtually no restraint" on government agencies).[6]

[6] Ironically, Defendants implicitly fault Plaintiffs for "spill[ing] much ink arguing that the Advisory and RFI fall outside the scope of 42 U.S.C. § 264(a)" while not having evidence that this was the statute from which the Surgeon General drew his authority to issue the RFI (Gov. Opp. at 24). In the Complaint, the undersigned counsel, Jenin Younes, explained that she attempted to clarify the basis upon which the Surgeon General thought he had the authority, but received no response despite two separate inquiries to his office (*see* Complaint ¶¶ 99-101). The Government had ample opportunity to clarify the basis for its authority, then, but chose not to engage with Ms. Younes.

Defendants also argue that Plaintiffs fail to state a valid APA claim in their Complaint (¶¶ 161-177) because the Advisory and RFI are too contingent, indefinite, and without any direct or legal consequence to constitute final agency action (Gov. Opp. at 25-26). 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 if, first, it "marks the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chicago & Southern 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.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Here, the Advisory and RFI (especially read in the context of the censorship campaign) both mark the consummation of the agency's decision-making process and determine "rights or obligations." As discussed extensively, Plaintiffs' constitutional rights have been implicated by this action. Moreover, the Surgeon General and others in the Biden Administration have instructed social media companies to censor those who propagate "misinformation" related to COVID-19. That constitutes an "obligation." *See Bennett*, 520 U.S. at 178. Lest there be any doubt, consider the following statements pertaining to the Surgeon General's initiative:

1) "We're asking [tech companies] to consistently take action against misinformation superspreaders." (Murthy).

2) "We've increased disinformation research and tracking within the Surgeon General's office. We're flagging problematic posts for Facebook that spread disinformation." (Psaki).

3) "There are proposed changes that we have made to social media platforms," including "a robust enforcement strategy" and taking "faster action against harmful posts." (Psaki).

4) "Tech and social media companies must do more[.]" (Murthy).

5) "Clearly [they haven't done enough], because we're talking about additional steps that should be taken." (Psaki).

6) Social media companies are "killing people." (Biden).

7) "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." (Murthy).

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

Furthermore, the Surgeon General's initiative is substantive, because it affects constitutional rights, as discussed *supra*. Substantive policies must undergo notice and comment, but the Surgeon General has not subjected the Advisory or the RFI to that process. And the Surgeon General's initiative is arbitrary and capricious because it is being deployed to favor the Government's viewpoints.

To advance their argument that the Advisory and RFI are not final agency action, Defendants misconstrue the Sixth Circuit's precedent on agency finality. Although an agency's advisory 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." *Lasmer Industries, Inc. v. Defense Supply Center Columbus*, 2008 WL 2457704, at 6 (S.D. Ohio 2008).

In *Air Brake Systems*, relied upon in *Lasmer*, the Sixth Circuit reviewed whether the opinions expressed by an agency's counsel in an opinion letter constituted "final agency action."

The Court distinguished between the two "finality" questions that, on the facts presented, had different answers:

> Although the letters do not constitute final agency action with respect to the opinions expressed in them, they do represent final agency action in another respect—namely, as to whether the Chief Counsel has authority to issue advisory opinions in the first instance. In contrast to the contents of the letters, all of the finality factors point to the conclusion that the agency's view regarding the Chief Counsel's authority to issue them is 'final' agency action under the APA.

Air Brake Systems, Inc. v. Mineta, 357 F.3d 632, 646 (2004). Likewise, in this case, Plaintiffs challenge the Surgeon General's authority to issue both the Advisory and the RFI. For purposes of that inquiry at the very least, the Advisory and RFI constitute final agency action.

B. Plaintiffs Have Established that Defendants Violated and Continue to Violate Their First Amendment Rights

Here, too, Defendants' arguments are based upon a mischaracterization of Plaintiffs' First Amendment claims: they repeatedly refer only to the Surgeon General's July 2021 Advisory and March 2022 Request for Information (RFI) (*see* Gov. Opp. at 28). In this vein, they claim that *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) is "nothing like the case at bar" because the Advisory and RFI contain no threat of legal penalty, and Plaintiffs have made no allegation that Defendants specifically pressured Twitter to take action against them (Gov. Opp. at 34).

But Plaintiffs clearly and unequivocally explained that the constitutional and statutory violations alleged are based upon an atmosphere of Government censorship created by the statements of White House Press Secretary Jennifer Psaki, Surgeon General Vivek Murthy, and other members of the Biden Administration. While the Advisory and RFI contribute to that environment, they are not the sole bases for the lawsuit. To the contrary, it is predictable that those written, formalized components of the Biden Administration's public campaign would seek to

cleverly evade liability by tempering language, as the Government has done. *See New York Times v. United States*, 403 U.S. 713 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"; internal citations and quotation marks omitted).

No more persuasive is Defendants' argument that they should not be held responsible because neither the Advisory nor RFI (again, which constitute discrete components rather than the totality of Plaintiffs' case) define "misinformation" (*see* Gov. Opp. at 11). Naturally, the Government would have a difficult time coming up with a definition that did not also implicate its own frequent instances of purveying misinformation. But more to the point, the paucity of defining terms merely creates a broader chilling effect, since Plaintiffs do not know precisely what may lead to suspension of their accounts.

Defendants claim that there is no basis from which to conclude that members of the Biden Administration threatened tech companies with adverse action if they did not censor purveyors of "misinformation" about COVID-19 (*see* Gov. Opp. at 28, fn. 8). This is flatly untrue. Defendants simply ignore many statements and Tweets contained in Plaintiffs' Complaint and PI Memo that were provided to substantiate their argument. For example, as they explain in the PI Memo, Defendant Murthy used his *official* Twitter account (he has a personal account that he could have chosen to Tweet from instead, rendering his decision to use his official, government platform telling) to "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*" (emphasis added).[7] This is a direct—not a

[7] Dr. Vivek Murthy, U.S. Surgeon General (@Surgeon_General), Twitter (October 29, 2021, 4:19PM), https://twitter.com/Surgeon_General/status/1454181191494606854.

veiled—threat and would constitute one taken alone. In conjunction with many similar statements made by himself, White House Press Secretary Jen Psaki, and other members of the Biden Administration, there is no question that the message conveyed to tech companies is that if they do not "do more" (words members of the Administration have also uttered) they will suffer consequences.

National Rifle Association of America v. Cuomo, 350 F.Supp.3d 94 (N.D.N.Y. 2018) is very similar to this case. There, the NRA alleged that the defendants' conduct—including issuance of guidance letters to insurance companies and financial institutions threatening adverse regulatory action if they did not terminate their relationships with the NRA—amounted to violations of the NRA's First Amendment free speech and other constitutional rights. The district court declined to grant the defendants' motion to dismiss, explaining that "oral or written statements made by public officials could give rise to a valid First Amendment claim where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow *the failure to accede to the official's request*" (emphasis added). *Id.* at 114 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003)). *See also Rattner v. Netburn*, 930 F.2d 204, 209-10 (2d Cir. 1991) (declining to dismiss Plaintiff's First Amendment claim as the record viewed in the light most favorable to him "reveal[ed] statements by [Defendant] that a reasonable factfinder could … interpret as intimating some form of punishment or adverse regulatory action w[ould] follow" if the local newspaper continued to air Plaintiff's views.).

Not only are Plaintiffs not required to show that Defendants dictated Twitter's actions. They need not even show that Defendants *could* have dictated Twitter's actions: "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." *NRA*, 350 F.Supp.3d at 115. That is because the government taking such a position frightens people into silence. *See also Wrobel v. Cnty. Of Erie*, 692 F.3d 22, 32 (2d Cir. 2012) ("A causal relationship can be demonstrated either indirectly by means of circumstantial evidence, including that the protected speech was followed by adverse treatment, or by direct evidence of animus.").

Defendants' reliance upon *Children's Health Defense v. Facebook*, 546 F.Supp.3d 909 (N.D. Ca. 2021) is misplaced. In addition to not constituting binding authority, the case was not brought against the Government, and the primary holding was that private entities cannot be sued on First Amendment grounds. Furthermore, the constitutional violations alleged in *Children's Health Defense* were based upon the same letter sent by Congressman Schiff that underpinned the claims in *Association of American Physicians & Surgeons, Inc. v. Schiff*, 518 F.Supp.3d 505. As discussed, unlike the federal executive branch, a single congressperson has no authority to regulate or to carry out other retaliatory action. Finally, *Children's Health Defense* was decided in June 2021, and almost certainly briefed before the campaign of public intimidation that included explicit threats began and possibly before the Government's actual involvement in big tech censorship.

Contrary to Defendants' claims, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) is *not* instructive (*see* Gov. Opp. at 30-31). That case did not involve the First Amendment, which as discussed, entails implementation of a unique standard. And *Blum* was about whether private facilities had been converted into State ones by virtue of receipt of Medicare benefits. Here, the question is whether the government is coercing private companies to effectuate its aims. Those are two different inquiries.

C. Plaintiffs Have Stated a Plausible Fourth Amendment Claim

Defendants argue that the RFI is not an "intrusion," and they cherry-pick misleading portions of a footnote from *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012), to substantiate their assertion that "'the obtaining of information is not alone a search unless it is achieved' by some intrusion, such as 'a trespass' onto property" (*see* Gov. Opp. at 35). But read in its entirety, the quoted segment of *Jones* says nothing about an "intrusion." Instead, it explains that "the obtaining of information is not alone a search unless it is achieved by such a trespass *or invasion of privacy*." *Id.* (emphasis added). While *Jones* held that a physical intrusion may serve as the basis for a Fourth Amendment search, it is not a precondition: an invasion of the reasonable expectation of privacy also qualifies as a search. *Id.* at 409 ("the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test"). The question in this case is therefore not whether the RFI is an intrusion, but rather whether it demands information from Twitter in which Plaintiffs maintain a reasonable expectation of privacy.

Defendants' contention that "Plaintiffs cannot claim a reasonable expectation of privacy in information posted on Twitter" is a red herring (*see* Gov. Opp. at 35). Plaintiffs' Fourth Amendment claim is explicitly *not* predicated on such information being given to the Government, but rather on that "not made public" including personal identifiers such as email addresses and phone numbers, and messages that users exchange privately or in group chats through Twitter's platform (*see* Complaint ¶ 159).

The RFI's broad demand for "information about sources of misinformation" plainly sweeps in such personal identifiable information, and as discussed earlier, Defendants even acknowledge that whether or not private information will be included is "unclear" (*see* Gov. Opp. at 22). If "the RFI does not request [personal identifiable] information," such as "phone numbers and email

addresses," as Defendants purport to be the case, and they concede they lack authority to demand non-public information, then they should revise the RFI to clearly say so (*see* Gov. Opp. at 35).

In any event, Defendants do not dispute that the request for information concerning "specific, public actors that [Defendants deem to be] providing misinformation," *id.*, includes or could include direct or group messages that Plaintiffs and others exchange on Twitter and are intended to be private. The Government's attempt to gain access to such electronic information from a third-party company constitutes a search under the Fourth Amendment. *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010).

Defendants' claims that "Plaintiffs voluntarily 'revealed' their information—both allegedly confidential and not—to Twitter (a third party), and thus that information is not protected by the Fourth Amendment" (citing *United States v. Miller*, 425 U.S. 435, 443 (1976)) are misleading (Gov. Opp. at 34). The Supreme Court limited *Miller*'s third-party doctrine in *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018), where it held that a search occurs where, as here, the government obtains an individual's private data from a third-party company. Contrary to Defendants' assertions, *Carpenter*'s reasoning is not limited to cell phone location data (*see* Gov. Opp. at 36). *See also City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015) (invalidating Los Angeles ordinance permitting warrantless police inspections of hotel guest records).

Indeed, the Sixth Circuit concluded years before *Carpenter* that, notwithstanding *Miller*, a search occurs when the government obtains from a third-party company electronic communications sent through that company's server. *Warshak*, 631 F.3d at 288. In that case, the Government collected emails of a subscriber from a third-party company. The Sixth Circuit held that *Miller* did not apply because it (1) "involved simple business records, as opposed to the potentially unlimited variety of 'confidential communications'"; and (2) the third-party company

"was an intermediary, not the intended recipient of the emails." *Id.* at 288. Both circumstances apply to Plaintiffs' direct messages, which they understood to be confidential. Moreover, like the company in *Warshak,* Twitter is a mere intermediary rather than the intended recipient of direct messages. Thus, using Twitter's platform to exchange direct message does not diminish Plaintiffs' reasonable expectations of privacy in their messages, and Defendants' demand, which may lead to their obtaining such messages from Twitter, constitutes a warrantless search in violation of the Fourth Amendment.

III. PLAINTIFFS HAVE DEMONSTRATED THEY WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION, AND THE BALANCE OF EQUITIES FAVORS THEM

Plaintiffs need not reiterate the irreparable harm that they have previously established will result in the absence of a preliminary injunction (*see* PI Memo at 22-23).

Defendants provide no proof to support their contention that the balance of equities weighs in the Government's favor because "[a]n injunction against the Advisory, for example, would deprive the public of the Surgeon General's recommendations for addressing misinformation." There is simply no evidence that the censorship orchestrated by the Administration, or the initiative to gather information about "sources of misinformation" from tech companies has been helpful in mitigating COVID-19 deaths or any other type of problem. Indeed, among the principles upon which the First Amendment is premised is an acknowledgment that suppression of ideas typically is not effective at eradicating them and at the same time is extraordinarily dangerous and harmful. *See New York* Times, 403 U.S. at 718 (Black, J., concurring) (rejecting notion that the Government can abridge freedom of the press in the name of "national security."); *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)). The Government's misguided apparent belief that eliminating ideas with which it disagrees from major social media platforms will solve any misinformation problem demonstrates a gross lack of historical knowledge.

The United States Government does not have a monopoly on the truth. As discussed earlier, the First Amendment was predicated precisely on this concept. The Framers of the Constitution understood that when the Government decides what is "misinformation" and what is not, we are in dangerous territory. Yesterday's "misinformation" has turned out to be today's reality throughout this pandemic.

In sum, it is ironic indeed that Defendants accuse Plaintiffs of alleging merely "speculative" harms. To the contrary, Plaintiffs have alleged and established that they have suffered, and continue to suffer, grave injury in the form of violations of their constitutional rights. It is the harm to Defendants, not to Plaintiffs, that is purely speculative.

CONCLUSION

For the reasons cited herein, along with those provided in the Complaint and PI Memo, Plaintiffs' request for a preliminary injunction should be granted, the motion to dismiss for lack of subject matter jurisdiction should be denied, and Plaintiffs should be permitted to prosecute their claims.

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Respectfully submitted,

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