UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Mark Changizi, Michael P. Senger, Daniel Kotzin,

Plaintiffs,

v.

Department of Health and Human Services, Vivek Murthy, in his official capacity as United States Surgeon General, Xavier Becerra, in his official capacity as Secretary of the Department of Health and Human Services,

Defendants.

Civil Docket No. 2:22-cv-01776

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Social media companies have been fighting misinformation for years, since at least 2018, and turned those efforts toward COVID-19 early in the pandemic. In February 2020, for example, Facebook announced that it would remove posts that suggest that the virus was man-made. Likewise, in March 2020, Twitter—the focus of this suit—announced that it would take action against tweets claiming, for instance, that "social distancing is not effective." Within weeks, the company had removed over a thousand offending posts.

Plaintiffs here allege that they were targets of such discipline, beginning in April 2021, when Twitter temporarily suspended the lead Plaintiff, Mark Changizi, after he tweeted that "Masks [are] Ineffective, Harmful." But rather than suing Twitter—a private company that controls the editorial decisions on its platform—Plaintiffs have instead sued the U.S. Department of Health and Human Services, its Secretary, and the U.S. Surgeon General. Their central theory is that the actions of Twitter—one of the most dominant social media companies on the planet—are not its own, but instead are directed or coerced by Defendants. They claim to find support for this theory in two documents: First, a public health "advisory" issued by the Surgeon General in May 2021—more than a year after Twitter began taking action against COVID-19 misinformation, and a month after the company first disciplined Mr. Changizi—that contains general information on the effects of misinformation, and proposes strategies that individuals, governments, and organizations could, in their discretion, adopt to help address it (the "Advisory"). Second, Plaintiffs rely on a request for information issued by the Surgeon General in March 2022—after nearly *all* of the disciplinary actions cited in the complaint—seeking several categories of information from members of the public who wish to share it (the "RFI").

As a cursory review of those documents will show, neither the Advisory nor the RFI requires any person or entity to do anything. Nevertheless, Plaintiffs—three persons who allege that they have been, and may again be, injured by actions taken by Twitter—claim that those injuries are somehow tied to the Advisory and RFI. Their claims lack merit, and the Court should deny their motion for a preliminary injunction and dismiss this case.

To start, Plaintiffs lack standing. They rely on two theories of injury: (i) the Advisory and RFI allegedly have caused, and will continue to cause, Twitter to take remedial action against their Twitter accounts, and (ii) Twitter, in response to the RFI, may provide the Surgeon General with confidential information about them. Neither theory has merit. The first theory, concerning disciplinary actions by Twitter, fails for two reasons. First, Plaintiffs fail to establish a causal link between Defendants and any remedial measures that were taken by (or may be taken by) Twitter against Plaintiffs. Multiple other factors may have led Twitter to police misinformation on its platform; *e.g.*, it may have independently decided that misinformation is detrimental to public health and safety, or it may have concluded that misinformation on its platforms may cause its users to move to competing platforms. The Complaint contains no well-pled allegations justifying the inference that Twitter chose to target posts containing misinformation because of Defendants, rather than one or more of the other possible causes. As noted, Twitter began policing misinformation well before Defendants recommended anti-misinformation strategies to the public—suggesting that the former could not have caused the latter. Just recently, in *Association of American Physicians & Surgeons v. Schiff*, the D.C. Circuit found that plaintiffs in an analogous lawsuit lacked standing based on the same reasoning. 23 F.4th 1028 (D.C. Cir. 2022).

Further, Plaintiffs cannot establish that the relief they seek against Defendants would redress any alleged injury stemming from Twitter's disciplinary actions. Even if the Court enjoined

Defendants from recommending anti-misinformation strategies and seeking information from the public, Twitter could still independently decide to continue to take action against misinformation. There is no indication that it would withdraw its misinformation policies and allow any of their users to post messages discouraging COVID-19 safety precautions. Accordingly, Plaintiffs cannot establish causation or redressability for their first theory of injury.

Plaintiffs' second theory of injury—that Twitter, in response to the RFI, may provide the Surgeon General with Plaintiffs' confidential information—likewise fails. Most obviously, this alleged injury is entirely speculative: there is no indication that Twitter will provide *any* response to the RFI—which, again, requires no response from anyone—and even if Twitter provides some response, there is no indication that it will include any information concerning Plaintiffs in particular. But even assuming Twitter is poised to provide information concerning Plaintiffs, there is no indication that it would provide *confidential* information, rather than Plaintiffs' public posts. In fact, there is reason to believe that Twitter would *not* provide confidential information: the RFI, on its face, expressly states that those responding to the RFI should provide information "at a level of granularity that preserves the privacy of users."

In any event, even if Plaintiffs had shown that Twitter is set to provide the Surgeon General with their confidential information, they cannot show that Twitter's actions would be caused by the Surgeon General. Under Sixth Circuit precedent, a plaintiff cannot establish standing based on a causal chain that involves an independent, voluntary decision by a third party. Thus, any decision Twitter may make to produce information concerning Plaintiffs cannot be causally tied to Surgeon General. Accordingly, neither of Plaintiffs' theories of injury are sufficient to establish their standing to bring suit, and for that reason alone the Court should dismiss all of their claims for lack of jurisdiction.

But even if Plaintiffs could establish standing, their claims would fail on the merits. Plaintiffs' *ultra vires* claim—that the Advisory and RFI were issued without statutory authorization—is without merit. Although an agency generally may not issue binding rules that affect a party's rights and obligations in the absence of an enabling statute, there is no such prerequisite for a government official to make general, non-binding statements. Here, the Advisory and RFI are just that: general, non-binding statements. They do not require any party to do anything; no party is obligated to follow any recommendation in the Advisory or to provide any information in response to the RFI. If such routine communications from government officials required statutory authorization, government officials would be subject to *ultra vires* claims anytime they gave public speeches, participated in panel discussions or interviews, or published news articles. Unsurprisingly, Plaintiffs cite no authority indicating that these types of non-binding communications require Congressional authorization. Plaintiffs' Administrative Procedure Act ("APA") claim fails for similar reasons. The APA authorizes judicial review of only "final agency action" that is, action that, among other things, affects a party's rights or obligations. The Advisory and RFI, of course, do not affect any party's rights or obligations, and so neither is subject to APA review. Accordingly, the Court should dismiss the *ultra vires* and APA claims.

Plaintiffs' First Amendment claim also lacks merit. Plaintiffs contend that any disciplinary measures by Twitter against the Plaintiffs are attributable to Defendants, and constitute "state action" subject to the First Amendment. But they cannot meet the high burden of showing that the independent actions of Twitter—a *private* company—amount to state action. While a plaintiff may sometimes establish a Constitutional claim against the federal government based on actions taken by a private party, it is rare: he must show that the federal government "coerc[ed]" or "provided such significant encouragement" for the private party to take the precise action at issue "that the

choice must in law be deemed to be that of the" government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Where the federal government simply recommends approaches under which a private party retains discretion to decide whether to take the action at issue, then the action is not attributable to the federal government. For three reasons, Plaintiffs cannot establish a First Amendment claim under this standard.

First, Plaintiffs' allegations do not establish that Defendants either coerced Twitter, or encouraged Twitter to a degree effectively amounting to coercion, to take any particular action or adopt any particular policy. To the contrary, the materials cited in the Complaint show only that the Surgeon General simply proposed general strategies for combatting misinformation (strategies Twitter could adopt or disregard as it saw fit) and requested certain information (requests that Twitter could ignore). Although Plaintiffs repeatedly proclaim, in conclusory terms, that the Surgeon General "threatened" Twitter, and "forced" the company to take action against misinformation, there is no factual support for these rhetorical flourishes, and they are belied by the plain text of the Advisory and RFI.

Second, Plaintiffs do not allege that Defendants called on Twitter to specifically target any of *Plaintiffs'* Twitter posts. Although the Surgeon General called on social medial platforms to address "misinformation," there is no well-pled allegation indicating that any Defendant specifically identified any of Plaintiffs' posts as containing misinformation. Nor is there any allegation that Defendants provided a definition of "misinformation" that would necessarily encompass any of Plaintiffs' posts. To the contrary, the Advisory makes clear that there is no concrete definition of "misinformation," leaving social media platforms with undisturbed discretion to decide whether any particular post contains misinformation. Twitter therefore independently concluded that certain of Plaintiffs' posts included misinformation, a decision that

cannot be attributed to the federal government. Recently, in *Children's Health Defense v. Facebook Inc.*, the Northern District of California dismissed a nearly identical First Amendment claim for precisely this reason. No. 20-CV-05787-SI, 2021 WL 2662064, at *1 (N.D. Cal. June 29, 2021).

Third, even if Plaintiffs had adequately alleged that Defendants encouraged Twitter to target Plaintiffs' posts in particular, there is no well-pled allegation indicating that Defendants encouraged either platform to take any specific *remedial action* against Plaintiffs, much less to disable their accounts. The materials the Complaint relies upon suggest only that Defendants proposed potential actions that social media companies could take against those spreading misinformation, leaving it to the companies to decide what actions, if any, they found proper. Once more, Twitter thus independently decided to discipline Plaintiffs, and that action cannot be attributed to the Defendants. Plaintiffs' First Amendment claim should be dismissed.

Finally, Plaintiffs' Fourth Amendment claim—that the RFI somehow constitutes an unconstitutional "search"—also fails. To start, there has been no "search." The Supreme Court has made clear that a "search" does not occur simply because the government receives information; it must actually conduct a *search*—a trespass onto, or inspection of, some property—to collect that information. Here, the RFI is a passive request. The Surgeon General is not actively entering, or inspecting, any property to seek out information. Notably, Plaintiffs cite no case indicating that a simple information request can constitute a "search."

Regardless, Plaintiffs cannot show that they have a reasonable expectation of privacy in any information they transmit on Twitter. For one, Twitter is a public platform whose principal function is to spread information, not conceal it. Indeed, that is the precise reason Plaintiffs claim they wish to continue posting on Twitter: to share their posts with a large number of viewers.

Further, the Supreme Court has noted that once a party voluntarily transmits information to a third party, he or she generally cannot claim a legitimate expectation of privacy over it. If Plaintiffs wanted to keep all of their information private, they could have, and should have, refrained from providing that information to a third party (Twitter) that could, in its discretion, share that information. Accordingly, the Court should dismiss Plaintiffs' Fourth Amendment claim as well.

The Court should deny Plaintiffs' Motion for a Preliminary Injunction and dismiss this case in full.

BACKGROUND

I. For years, social media companies have sought to identify and contain misinformation on their platforms.

Misinformation is a challenge that social media companies have been dealing with for some time. Several features unique to social media "contribute to the amplification and spread of potential misinformation," including "(1) the use of data mining and algorithms to sort, prioritize, recommend, and disseminate information," and "(2) the maximization of user engagement"—and often "online advertising revenue"—"as the foundation of social media companies' business models." CRS Report, *Social Media: Misinformation and Content Moderation Issues for Congress* (Jan. 27, 2021), at 2, https://crsreports.congress.gov/product/pdf/R/R46662. To address this problem, social media platforms have developed "a range of content moderation practices," which they have "altered . . . over time." *Id*. at 2, 7. For example, in 2018, Facebook stated that "[f]alse news has long been a tool for economic or political gains"—used, for instance, "by adversaries in recent elections and amid ethnic conflicts around the world"—and detailed its "Strategy for Stopping False News." Tessa Lyons, Hard Questions: What's Facebook's Strategy for Stopping False News? (May 23, 2018), https://about.fb.com/news/2018/05/hardquestions-false-news. Likewise, in 2019, Twitter announced that it was "working on a new policy to address synthetic

and manipulated media." @TwitterSafety, Twitter, (Oct 21, 2019, 6:07 pm), https://twitter.com/TwitterSafety/status/1186403736995807232.

Social media platforms turned their efforts to combat misinformation toward COVID-19 early in the pandemic. For example, the Complaint itself refers to articles demonstrating that Twitter has been taking action against those who post misinformation since early 2020. According to these sources, Twitter "introduc[ed] . . . policies on March 18," 2020, to "address content that goes directly against guidance from authoritative sources of global and local public health information." Vijaya Gadde & Matt Derella, *An update on our continuity strategy during COVID-19* (Mar. 16, 2020; updated Apr. 1, 2020), https://blog.twitter.com /en_us/topics/company/2020 /An-update-on-our-continuity-strategy-during-COVID-19.[1] Twitter explained that it would "require people to remove tweets that include," for example, the "[d]enial of global or local health authority recommendations to decrease someone's likelihood of exposure to COVID-19 with the intent to influence people into acting against recommended guidance, such as: 'social distancing is not effective.'" *Id*. The company reported that, within two weeks, it had "removed more than 1,100 tweets containing misleading and potentially harmful content" and "challenged more than 1.5 million accounts which were targeting discussions around COVID-19 with spammy or manipulative behaviors." *Id*.

On May 11, 2020, Twitter reiterated that its "goal is to make it easy to find credible information on Twitter and to limit the spread of potentially harmful and misleading content." Yoel Roth & Nick Prickles, *Updating our approach to misleading information* (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information. Twitter confirmed that posts containing "statements or assertions that have been

[1] Plaintiffs refer to this article in footnote 5 of their Complaint.

confirmed to be false or misleading by subject-matter experts, such as public health authorities," would be subject to "[r]emoval." *Id.* A few months later, on December 16, 2020, Twitter noted that "vaccine misinformation" in particular "presents a significant and growing public health challenge," and that "[u]nder [its] current policy, [Twitter] already require[s] the removal of Tweets that include false or misleading information about," among other things, "[t]he efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease" and "[t]he prevalence or risk of infection or death." Twitter Safety, COVID-19: Our approach to misleading vaccine information (Dec. 16, 2020), https://blog.twitter.com/en_us/topics/company/2020/covid19-vaccine. Twitter also stated that it planned to "expand[] [its] policy and may require people to remove Tweets which advance harmful false or misleading narratives about COVID-19 vaccinations," including "[f]alse claims that COVID-19 is not real or not serious, and therefore that vaccinations are unnecessary." *Id.*[2]

Additionally, on March 25, 2021, Twitter's CEO, Jack Dorsey, testified before Congress about the company's "COVID-19 and vaccine misinformation policies," noting that it "use[s] a combination of machine learning and human review to assess potential violations of the Twitter Rules," and that "[i]f an account owner breaks our Rules," its "Tweet" may be "delete[d]." Testimony of Jack Dorsey, Hearing Before the U.S. House of Reps., Comm. on Energy & Commerce, https://docs.house.gov/meetings /IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-DorseyJ-20210325.pdf, at 1-2 (Mar. 25, 2021).[3] Thus, from the start of 2020, Twitter had

[2] Plaintiffs refer to the two articles cited in this paragraph in footnote 6 of their Complaint.

[3] "[I]f public records refute a plaintiff's claim . . . a court can then consider them in resolving the Rule 12(b)(6) motion without converting the motion to dismiss into a Rule 56 motion for summary judgment." *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421, 425 (6th Cir. 2018). The Court "may take judicial notice of generally known information or government websites." *Kentucky v. Biden*, 23 F.4th 585, 601 n.8 (6th Cir. 2022).

independently begun developing policies and initiatives to identify, and take action against, COVID-19 misinformation on its platform.

II. To help educate, and, learn from, the public, the Surgeon General issued a non-binding advisory on misinformation, and later issued a public request for information.

In July 2021, long after Twitter began targeting COVID-19 misinformation, the Surgeon General issued an advisory discussing the role of misinformation in the pandemic and offering "recommendations" to address it. Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment, https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf, at 3 (July 15, 2021) ("Advisory").[4] As the Advisory explains, health "[m]isinformation has caused confusion and led people to decline COVID-19 vaccines, reject public health measures such as masking and physical distancing, and use unproven treatments." *Id*. at 4. And as the Surgeon General noted at a press briefing announcing the Advisory's release, "polls" showed that, at one point, "two thirds of people who [were] not vaccinated either believe[d] in common myths about the COVID-19 vaccine or [thought] some of those myths might be true." Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy, https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021, at 5 (July 15, 2021) (hereinafter, "7-15 Press Briefing"). Health misinformation "has [thus] led to avoidable illness and death." *Id.* at 2. Indeed, "99.5 percent of people who are in hospitals because of COVID are unvaccinated." Press Briefing by Press Secretary Jen Psaki, https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021, 22 (July 16,

[4] Internal citations and quotation marks are omitted throughout this brief, unless otherwise stated.

2021) (hereinafter, "7-16 Press Briefing"). Further, "[m]isinformation has also led to harassment of and violence against public health workers, health professionals, airline staff, and other frontline workers tasked with communicating evolving public health measures." Advisory, at 4. "[D]octors and nurses across our country," consequently, "are burning out." 7-15 Press Briefing, at 4.

The 22-page Advisory offers a variety of "recommendations" about what various segments of society "can do" to slow the spread of health misinformation—including "individuals, families, and communities," "educators and educational institutions," "health professionals and health organizations," "journalists and media organizations," "researchers and research institutions," and "governments." Advisory, at 3. On the single page addressing "technology platforms," the Advisory proposes a number of general strategies. For example, the Advisory notes that technology platforms may (i) help researchers "properly analyze the spread and impact of misinformation" by "[g]iv[ing] researchers access to useful data," (ii) counter misinformation by "[d]irect[ing] users to a broader range of credible sources," and (iii) "build 'frictions' . . . to reduce the sharing of misinformation," which may include "suggestions and warnings" on certain posts. *Id*. at 12.

As the Advisory notes, it serves as "a public statement that calls the American people's attention to a public health issue and provides recommendations for how that issue should be addressed." *Id*. at 3. While it proposes various strategies for containing misinformation, it does not purport to impose any obligations on social media companies, nor to displace their discretion to decide whether any particular post contains misinformation, and if so, what remedial action may be proper. The Advisory explicitly notes that "[d]efining 'misinformation' is a challenging task," and that there is no "consensus definition of misinformation." *Id*. at 17; *see also id.* at 4 ("any definition" of "misinformation will have "limitations"). It also cautions against the use of an overly

stringent definition of "misinformation," noting that "it is important to be careful and avoid conflating controversial or unorthodox claims with misinformation" since "[t]ransparency, humility, and a commitment to open scientific inquiry are critical." *Id*. at 17. The Advisory likewise encourages social media companies to consider "potential unintended consequences of content moderation, such as migration of users to less-moderated platforms." Advisory, at 12. It stresses that, in considering "[w]hat kinds of measures" they may "adopt to address misinformation," social media companies should consider the importance of "safeguarding . . . free expression." *Id*. at 7.

In press briefings surrounding the Advisory's release, the White House Press Secretary stated that certain government officials are "in regular touch with social media platforms . . . about areas where [the Administration has] concern" and that the discussions are aimed at "better understand[ing] the enforcement of social media platform policies." 7-16 Press Briefing, at 6; *see also* 7-15 Press Briefing, at 9. She did not, however, suggest that these officials promoted any particular definition of "misinformation," or that they pressured social media platforms to take any particular action with respect to posts containing misinformation. To the contrary, the Press Secretary stated that "Facebook and any private-sector company" ultimately "makes decisions about what information should be on their platform." 7-16 Press Briefing, at 12; *see also id.* at 7 ("They're . . . private-sector compan[ies]. They're going to make decisions about additional steps they can take.").

Several months later, in early March 2022, the Surgeon General issued a public request for information concerning "the impact and prevalence of health misinformation in the digital information environment during the COVID-19 pandemic." Impact of Health Misinformation in the Digital Information Environment in the United States Throughout the COVID–19 Pandemic

Request for Information, 87 Fed. Reg. 12712 (Mar. 7, 2022) ("RFI"). The RFI seeks multiple categories of information, including "[i]nformation about how . . . misinformation has affected quality of patient care," "how . . . misinformation has impacted healthcare systems and infrastructure," and "how . . . misinformation has impacted individuals and communities." *Id.* at 12713-14. The RFI also seeks information on "how widespread COVID-19 misinformation is on individual technology platforms including: General search engines, content sharing platforms, social media platforms, e-commerce platforms, crowd sourced platforms, and instant messaging systems." *Id.* 12713. The RFI states that the request includes, among other things, "[i]nformation about sources of COVID-19 misinformation" on technology platforms, but it stresses that "[a]ll information should be provided at a level of granularity that preserves the privacy of users." *Id.* at 12713-14. The RFI provides that those who intend to provide responsive information should do so by May 2, 2022. *See id.* at 12713.

Like the Advisory, the RFI imposes no requirement on any party; responses are voluntary, and the RFI imposes no penalty on those who choose not to respond.

III. Twitter's Alleged Responses to Plaintiffs' Social Media Posts.

Plaintiffs claim that Twitter has disciplined them for posts that violate the company's misinformation policy. Plaintiff Mark Changizi alleges that, in a tweet linking to an article about masks, he wrote that "Masks [are] Ineffective and Harmful," and as a result, Twitter suspended him for twelve hours on April 20, 2021—*before* the Advisory and RFI were released—for "'violating the Twitter rules' by 'spreading misleading and potentially harmful information related to COVID-19.'" Compl. ¶¶ 75-76. Mr. Changizi alleges that Twitter later suspended him permanently for a post where he stated, among other things, that "Covid is 10 to 20 times less dangerous than flu for kids" and that "[t]here is no long[-]term data for the shot." *Id.* ¶ 80. Mr.

Changizi protested his suspension, however, and Twitter allowed him back onto the platform. *See id.* ¶ 83. Mr. Changizi is currently able to post on Twitter. *See id.* ¶ 83.

Plaintiff Daniel Kotzin alleges that Twitter temporarily suspended him twice for posts that violated its misinformation policy. *See id.* ¶ 70. Mr. Kotzin alleges that he was first suspended for twenty-four hours for a post criticizing "covid shots" and calling "vaccine requirements" an "abomination." *Id.* ¶¶ 68-69. He alleges that he was later suspended for seven days for another post criticizing the effectiveness of vaccines. *See id.* ¶¶ 72-73. These suspensions, however, have lapsed, and like Mr. Changizi, Mr. Kotzin is currently able to post on Twitter.

Plaintiff Michael Senger likewise alleges that Twitter suspended him multiple times for repeatedly violating its misinformation policy. *See* Senger Decl. ¶¶ 4-7. Mr. Senger was ultimately suspended permanently for a post stating "that every COVID policy—from the lockdowns and masks to the tests, death coding, and vaccine passes—has been one giant fraud." *Id.* ¶ 7.

IV. This Action.

Plaintiffs brought suit, asserting four claims against the Advisory and RFI: (i) the Advisory and RFI—non-binding documents that impose no legal obligations—are *ultra vires*, (ii) Twitter's past and potential future decisions to take disciplinary actions against Plaintiffs are attributable to Defendants, and are thus "state actions" that violate the First Amendment, (iii) the RFI constitutes an unconstitutional "search" in violation of the Fourth Amendment, and (iv) the Advisory and RFI are procedurally and substantively infirm under the APA. Plaintiffs moved for a preliminary injunction based on the first three claims. Defendants now move to dismiss all four claims in full.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy reserved only for cases where it is necessary to preserve the status quo until trial." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878

F.3d 524, 526 (6th Cir. 2017). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). "[T]he public-interest factor 'merge[s]' with the" equities "factor when the government is the defendant." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020).

A motion to dismiss under Rule 12(b)(1) challenges the Court's subject matter jurisdiction. In reviewing a facial challenge to subject matter jurisdiction, the Court accepts the well-pled allegations of the complaint as true, and determines whether those allegations are sufficient to establish jurisdiction. *See Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). However, in assessing its jurisdiction, the Court may consider extra-pleading facts, such as those set forth in declarations, and if necessary may resolve disputed jurisdictional facts, without converting the motion to one for summary judgment. *See id.* ("the district court" may "weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist").

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The necessary facts "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the pleadings." *FW/PBS Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Bare "conclusions" are "not entitled to the assumption of truth," and so a complaint does not "suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678-69. The "complaint must" establish "a right to relief above the speculative level," and the Court "need not accept conclusory allegations or legal conclusions

masquerading as factual allegations." *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 435 (6th Cir. 2016). Under Rule 12(b)(6), the Court may consider materials incorporated into the complaint by reference, as well as judicially noticeable materials, without converting the motion into one for summary judgment. *See Frank v. Dana Corp.*, 547 F.3d 564, 570 (6th Cir. 2008).

ARGUMENT

I. Plaintiff lacks standing to assert any of their claims against Defendants.

To establish standing, a plaintiff must show that "[he] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Moreover, to obtain prospective equitable relief—the only type of relief that Plaintiffs can seek here[5]—it is not enough to allege a *past* injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1973) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Rather, Plaintiffs must demonstrate that they face a "real and immediate threat" of *future* harm. *Lyons*, 461 U.S. at 102. The "threatened injury must be *certainly impending*" to suffice; allegations of "*possible* future

[5] Although Plaintiffs, in passing, request "[n]ominal damages," Compl. at 37, they cite to no waiver of sovereign immunity that would entitle them to damages from the federal government. A damages award against the government must be based on "[a] waiver of the Federal Government's sovereign immunity" that is "unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). "A waiver of sovereign immunity cannot be implied." *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 (1990). Here, Plaintiffs cite to no statute authorizing any damages award; indeed, their only statutory cause of action is the APA, which expressly disallows damage awards. *See* 5 U.S.C. § 702 (disallowing "money damages").

injury do not satisfy . . . Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). In addition, where, as here, "the plaintiff[s] [are] not [themselves] the object of [a] government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

Here, Plaintiffs rely on two theories of injury: (i) Twitter has allegedly taken, and may again take, disciplinary action against them based on their Twitter posts, and (ii) Twitter allegedly may disclose, in response to the RFI, certain information concerning them. Neither theory is sufficient to establish Plaintiffs' standing.

A. Plaintiffs cannot establish standing based on any alleged past, present, or hypothetical future disciplinary actions by Twitter.

Plaintiffs' first theory of injury—based on alleged disciplinary actions by Twitter—fails for two reasons. First, the Plaintiffs fail to establish that any disciplinary actions that have been taken, or will be taken, by Twitter—an independent, private company—were (or will be) caused by the Defendants, rather than the company's independent decisions. To establish standing, a plaintiff must show that a "defendant's actions have a causal connection to the plaintiff's injury," and "[i]ndirect harms typically fail to meet this element . . . because harms result[ing] from the independent action of some third party not before the court are generally not traceable to the defendant." *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir.), *cert. denied*, 142 S. Ct. 225 (2021). "Courts should not presume either to control or to predict the unfettered choices made by independent actors not before the courts," and so a "third party's legitimate discretion breaks the chain of constitutional causation." *Id.* at 317; *see id.* ("an injury that results from the third party's *voluntary and independent actions* does not establish traceability" (emphasis in original)).

Here, the Complaint is bereft of factual support for the conclusory allegation that any remedial actions that Twitter has taken (or may again take) against Plaintiffs were (or will) be

attributable to Defendants, rather than the "independent" judgment and "legitimate discretion" of Twitter. Many other factors may have led Twitter to decide to combat misinformation, irrespective of the Surgeon General's Advisory or RFI. For example, Twitter may have independently concluded that misinformation in general—and misinformation concerning COVID-19 in particular—is harmful to the public, and that its platform should adopt measures to address it. Likewise, the company may have concluded that the rampant spread of misinformation on its platform would drive their users towards other platforms that employ superior quality-control measures. Plaintiffs submit no evidence, nor make any well-pled allegation, to suggest that the disciplinary actions Twitter took against Plaintiffs were driven, not by these independent considerations, but rather by Defendants' mere suggestions or requests.

To the contrary, the chronology of events, as informed by sources cited by Plaintiffs themselves, firmly *undermines* any inference of a causal link. Plaintiffs allege that Defendants recommended anti-misinformation strategies beginning in or around mid-2021. *See supra* at 7-8. Yet public statements from Twitter show that it has been addressing misinformation in general since at least 2019 and began targeting COVID-related misinformation as early as March of 2020—long before Plaintiff alleges that the Surgeon General called attention to the problem. *See supra* at 7-10. Critically, in 2020, Twitter expressly noted that it would take action against the precise types of posts identified in the Complaint: "misleading information about . . . [t]he efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease" and "[f]alse claims that COVID-19 is not real or not serious, and therefore that vaccinations are unnecessary." Twitter Safety, COVID-19: Our approach to misleading vaccine information (Dec. 16, 2020), https://blog.twitter.com/en_us/topics/company/2020/covid19-vaccine. Thus, the chronology shows that Twitter began taking action against misinformation long

before the Surgeon General started recommending anti-misinformation strategies, refuting any suggestion that the latter caused the former.

This case thus closely resembles *Association of American Physicians & Surgeons ("AAPS") v. Schiff*, where the U.S. District Court for the District of Columbia dismissed an analogous lawsuit for lack of standing. 518 F. Supp. 3d 505 (D.D.C. 2021), *aff'd*, 23 F.4th 1028 (D.C. Cir. 2022). There, the plaintiff alleged that Congressman Adam Schiff sent letters and made public statements "encourag[ing]" certain technology companies—including Facebook and Twitter—to "prevent . . . inaccurate information on vaccines," and that these companies "took several adverse actions against [the plaintiff] because of Congressman Schiff's statements." *Id.* at 510. The court ultimately found that the plaintiff failed to establish standing, in part because its allegations did not show that its "alleged harms stem[med] from . . . Congressman Schiff." *Id.* at 515. The court noted that the plaintiff "ignore[d] the innumerable other potential causes for the actions taken by the technology companies," and that the alleged "statements made by Congressman Schiff" did "not mention [the plaintiff]" and did "not advocate for any specific actions." *Id.* at 515-16. The court further noted that the relevant statements by "Congressman Schiff" occurred "after the technology companies took many of the actions" at issue, and thus the plaintiff "fail[ed] to establish a chronological chain of causation between" Congressman Schiff's statements and the "actions taken by the technology companies." *Id.* at 516 n.12. The D.C. Circuit affirmed the district court's reasoning, confirming that "[t]he timeline of events in the . . . complaint . . . undermine[d] any possibility that the companies acted at Representative Schiff's behest in particular" because "Facebook announced its new policy of prioritizing government-sponsored vaccine information in search results in March 2019 . . . and Twitter introduced its" similar policy "in May 2019."*AAPS*, 23 F.4th at 1034.

The *AAPS* court's reasoning applies equally here: (i) Plaintiffs likewise ignore the "innumerable other potential causes for the actions taken by" Twitter, (ii) there is no well-pled allegation that Defendants "mention[ed] [the Plaintiff]" or "advocate[d] for any specific actions" against Plaintiff, and (iii) Twitter was already policing misinformation before Defendants allegedly started recommending the anti-misinformation strategies at issue.

Plaintiffs seek to establish causation by asserting that Twitter began suspending more users under its misinformation policy in the spring of 2021, around the time government officials allegedly started making public remarks on the need for social media companies to address misinformation. *See* Compl. ¶¶ 17-19; *id.* at 2. But this argument does not establish a causal link between Twitter's misinformation initiatives and the Defendants. As an initial matter, there is no factual support for the conclusory allegation that, in the spring of 2021, Twitter suddenly began suspending more users based on its misinformation policy. Plaintiffs never explain how they—three individual Twitter users—have data on the total number of suspensions, over time, of other Twitter users. Thus, the Court should not credit this allegation. *See Iqbal*, 556 U.S. at 678-69 (a complaint does not "suffice if it tenders naked assertion[s] devoid of further factual enhancement"). Furthermore, even assuming this allegation were true, it would not mean Twitter's decision to suspend more users was caused by Defendants. Twitter made numerous public remarks in 2020 about the harms of misinformation, *see supra* at 7-10, suggesting that it independently concluded that, as the pandemic wore on and the problem of misinformation grew, it needed to take additional action.[6]

[6] Regardless, this argument cannot show that Twitter began taking more enforcement actions because of the *Advisory and RFI* in particular. Plaintiffs allege that Twitter began suspending more users after "March 1, 2021," months before the Advisory was released (July 2021) and over a year before the RFI was released (March 2022).

But even if Plaintiffs had shown that they currently are, or will be, subject to some disciplinary measure by Twitter that is, or will be, causally linked to the Defendants, they would still lack standing since they cannot show that equitable relief would redress those injuries. Were the Court to enter the equitable relief that Plaintiffs request—*e.g.*, "[i]njunctive relief" against the Advisory and an order "setting aside the RFI," Compl. at 37—Twitter could still *independently* conclude that it is in its interest to take remedial action against Plaintiffs, as the sequence of events indicates the company has been doing all along. *See supra* at 5-8. Thus, Plaintiffs cannot show that the equitable relief they seek would redress their alleged injuries. *See Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 715 (6th Cir. 2015) ("Redressability is typically more difficult to establish where the prospective benefit to the plaintiff depends on the actions of independent actors.").

Again, *AAPS* is instructive. The court there found that the plaintiff lacked standing not only because it failed to establish causation, but also because "[i]t [was] pure speculation that any order directed at Congressman Schiff . . . would result in the [technology] companies changing their behavior" towards the plaintiff. *AAPS*, 518 F. Supp. 3d at 516. The court stressed that it was "not plausible" that Facebook or Twitter would suddenly "revise their policies on medical misinformation" as a result of an injunction restraining Congressman Schiff's activities. *Id.* So too here. Accordingly, Plaintiffs cannot establish standing based on any alleged remedial action that Twitter is currently taking, or may take, against any of the Plaintiffs.

B. Plaintiffs cannot establish standing based on any alleged information Twitter may provide in response to the RFI.

Plaintiffs also cannot establish standing based on their theory that, in response to the RFI, Twitter may send the Surgeon General confidential information pertaining to them. First, Plaintiffs cannot establish that this alleged injury is "*certainly impending*." *Whitmore*, 495 U.S. at 158 (emphasis added). "[T]he Supreme Court has been reluctant to endorse standing theories that

require guesswork as to how independent decisionmakers . . . would exercise their judgment." *Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 546 (6th Cir. 2021). Here, Plaintiffs' theory of injury requires significant "guesswork as to how" Twitter—an "independent" company—will respond to the RFI. For one thing, Twitter may not respond to the RFI at all. If it does, it may not provide any information concerning Plaintiffs. And if it provides a response containing some information about Plaintiffs, it is unclear whether that will include non-public information. As noted above, the RFI specifically notes that "[a]ll information should be provided at a level of granularity that preserves the privacy of users." 87 Fed. Reg. at 12713. This lengthy chain of "what ifs" is far too speculative to support standing.

But even if Plaintiffs had shown that Twitter will produce non-public information concerning them in response to the RFI, under Sixth Circuit law that production would not be traceable to the Defendants. As noted above, "harms result[ing] from the independent action of some third party not before the court are generally not traceable to the defendant." *Turaani*, 988 F.3d at 316; *see also id.* at 317 (a "third party's legitimate discretion breaks the chain of constitutional causation" and so "an injury that results from the third party's *voluntary and independent actions* does not establish traceability"). If Twitter sends the Surgeon General any information about Plaintiffs, its decision will be "voluntary and independent," and will thus "break[] the chain" of causation. *Id.* at 317. Accordingly, Plaintiffs lack standing to assert claims concerning Twitter's hypothetical response to the RFI. The Court should thus dismiss Plaintiffs' claims in full under Rule 12(b)(1).

II. Plaintiffs' claims all fail on the merits, and cannot survive a motion to dismiss, much less justify a preliminary injunction.

A. Plaintiffs fail to state plausible ultra vires and APA claims.

Plaintiffs argue that the Surgeon General's Advisory and RFI—non-binding documents that impose no legal obligations on any party—are unlawful because they were not expressly authorized by statute. Government officials, however, need no express statutory authorization to simply convey or request information, or to engage in any other form of standard public speech.

Although "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (emphasis added), "an agency without legislative rulemaking authority may" still "issue . . . non-binding statements," *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980). A "legislative-type rule," or "substantive rule," is one that is "binding" or has the "force of law," and "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see also Dyer v. Sec'y of Health & Hum. Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) (contrasting "legislative-type rule[s] affecting individual rights and obligations" with mere "policy statement[s]").

Here, the Advisory and the RFI are not "legislative" or "substantive" rules that require Congressional authorization. Both are non-binding documents that impose no obligations, and confer no rights, on any person. The Advisory simply provides information to the public, and proposes strategies that individuals, governments, and organizations may follow, or disregard, as they see fit. *See supra* at 10-12. Likewise the RFI is simply a request for information addressed to any person or organization that may have responsive information and wishes to share it. *See supra* at 12-13. No person or organization is obligated to provide any information, and the RFI imposes no consequence on those who choose to share no information at all. Thus, the Advisory and RFI

are not legislative or substantive rules that require Congressional authorization. They amount to routine government speech conveying a policy view, akin to public remarks made by any other government official. Indeed, the Surgeon General has been issuing public health reports and advisories on a range of issues for more than five decades—since at least 1964, when the first Surgeon General's report detailing the health risks of smoking was published. *See*, *e.g.*, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, (1964), https://profiles.nlm.nih.gov/spotlight/nn/catalog/nlm:nlmuid-101584932X814-img; *Youth Violence*, A Report of the Surgeon General (2012), https://www.ncbi.nlm.nih.gov/books/NBK44294/; *U.S. Surgeon General's Advisory on Naloxone and Opioid Overdose*, Surgeon General Advisory (2018), https://www.hhs.gov/surgeongeneral/priorities/opioids-and-addiction/naloxone-advisory/index.html. And while Plaintiffs repeatedly assert that the Advisory "commands" certain behavior, and that the RFI "demand[s]" information, Compl. ¶¶ 26, 47, they provide no factual support for these conclusory allegations. Neither the Advisory nor the RFI, by its plain text, requires anything from any private party. And neither document imposes any penalty on any party that declines to adopt the Surgeon's General's recommendations, or opts not to provide any requested information.

Plaintiffs spill much ink arguing that the Advisory and RFI fall outside the scope of 42 U.S.C. § 264(a), which authorizes the adoption of "regulations" for "prevent[ing] the introduction, transmission, or spread of communicable diseases." But the Surgeon General did not invoke section 264(a) as authority to adopt the Advisory or RFI—nor need he have, as neither document purports to "regulat[e]" any member of the public in any way.

Plaintiffs' attempt to analogize this case to *Tiger Lily, LLC v. United States Department of Housing & Urban Development*, which concerned the Centers for Disease Control and

Prevention's ("CDC's") eviction moratorium, 5 F.4th 666 (6th Cir. 2021), is thus profoundly misplaced. Unlike the Surgeon General's Advisory and RFI, the CDC's eviction moratorium was an "Order" that provided—in unambiguously mandatory language—that landlords "shall not evict any covered person from any [covered] residential property," 85 Fed. Reg. 55292 (Sept. 4, 2020), on pain of "Criminal Penalties," *id*. at 55296 (noting, *e.g.*, that "a person violating this Order may be subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both"); *see also Tiger Lily*, 5 F.4th at 668 (the "eviction moratorium . . . *prohibited* eviction of all 'covered persons'" (emphasis added)). Thus, in *Tiger Lily*, there was no dispute that the CDC's order had the force of law, and *did* affect landlords' rights and obligations (notably, the right to evict a tenant in arrears), so the central question was whether the order was authorized by statute. *See id.* at 669 (analyzing whether the eviction moratorium exceeded the scope of 42 U.S.C. § 264(a)). By contrast, the Surgeon General's Advisory and the RFI neither compel nor prohibit any conduct.

Plaintiffs cite to no case indicating that government actors need statutory authorization to simply communicate with the public.[7] Accordingly, Plaintiffs have failed to state a plausible *ultra vires* claim.

For similar reasons, Plaintiffs have also failed to state an APA claim. "The APA, by its terms, provides a right to judicial review of . . . *final agency action*." *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (emphasis added). To constitute "final agency action," the "action must be one by which rights or obligations have been determined, or from which legal consequences will flow."

[7] To support their reading of 42 U.S.C. § 264(a), Plaintiffs invoke the non-delegation and "major questions" doctrines. However, because the Surgeon General did not issue the Advisory and RFI pursuant to that statutory provision, Plaintiffs' reliance on those doctrines is misplaced, and Defendants do not address them here.

Parsons v. U.S. Dep't of Just., 878 F.3d 162, 167 (6th Cir. 2017). The "[l]egal consequences, in particular, must be direct and appreciable"; the agency action "must have a sufficiently direct and immediate impact on the aggrieved party and a direct effect on [its] day-to-day business." *Id.* Critically, "harms caused by agency decisions are not legal consequences if they stem from independent actions taken by third parties." *Id.* at 168. Thus, "[a]n agency action is not final if it does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future . . . action." *Id.*

Here, neither the Advisory nor the RFI constitutes "final agency action." As explained above, neither document imposes any requirement on any party, and so does not "determine[]" any "rights or obligations." *Id.* at 167. Nor do any direct and appreciable legal consequences flow from those documents. To the extent they affect Plaintiffs at all, those effects would stem from "independent actions taken by [a] third part[y]": Twitter. *Id.* at 168. The Advisory and RFI therefore do not constitute "final agency actions," and so Plaintiffs' APA claim should be dismissed. *See id.* ("[R]epercussions from the dissemination of information designed to provide [an] industry with up-to-date safety recommendations do not convert [a report] into a reviewable rule or sanction.").

B. Plaintiffs have failed to state a plausible First Amendment claim.

Plaintiffs claim that their speech was censored by Twitter (a *private* company). But the First Amendment "safeguard[s] the rights of free speech" by imposing "limitations on *state action*, not on action by" private parties. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972) (emphasis added). While a plaintiff may sometimes establish a First Amendment claim based on private conduct if it "can fairly be seen as state action," *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982), those circumstances are extraordinarily narrow: the government "can be held responsible for a

private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the" government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the" government "responsible for those initiatives." *Id.*

In addition to establishing coercion or a degree of encouragement approaching it, a plaintiff must also show that the government called on the private party to take the *precise action* at issue—*i.e.*, by "dictat[ing] the decision" made "in [that] particular case," *id.* at 1010, or insisting that the private party follow a "rule of decision" that would have *required* that action, *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988). It is not enough to show that the government recommended a general policy under which the private party retained discretion over whether to take the particular action at issue. *See West*, 487 U.S. at 52 n.10 (a "private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible," however, private party "decisions . . . based on independent professional judgments" would not constitute state action); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (the "exercise of choice allowed by" a government policy "where the initiative comes from [the private party] and not from the [government], does not make [the] action in doing so 'state action'" under the Constitution).

These standards present a formidable bar to a plaintiff attempting to show that private conduct should be considered state action for First Amendment purposes. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (courts should generally "avoid[] the imposition of responsibility on [the government] for conduct it could not control"). Plaintiff falls well short of that bar here.

i. Plaintiffs fail to show coercion or a similar degree of encouragement.

To start, Plaintiffs contend that, through the Advisory and RFI, Twitter was subject to "pressure, coercion, and threats," Compl. ¶137, but they allege no well-pled factual material to substantiate that claim—and it is plainly incorrect. The Advisory consists merely of "recommendations," Advisory at 3, only a single page of which addresses "technology platforms," *id*. at 12. Those recommendations, of course, are not binding on anyone. *See supra* at 10-12. Likewise, the RFI is just that: a *request* for information, responses to which are entirely voluntary. And it is difficult to fathom how Twitter, one of the most dominant social media companies on the planet, could have been "coerc[ed]" by these recommendations and RFIs, *Blum*, 457 U.S. at 1004—a term that is commonly understood to mean compulsion by threat, which there is no factual support for here. Thus, the Court need not accept Plaintiffs' conclusory allegations of "pressure, coercion, and threats."[8] *See Mulbarger v. Royal All. Assocs.*, Inc., 10 F. App'x 333, 335 (6th Cir. 2001) (The Court "is not bound to accept . . . unwarranted inferences, including allegedly inferable 'facts' or conclusions which contradict documentary evidence appended to, or referenced within, the plaintiff's complaint.").

[8] Plaintiffs contend that, based "[o]n information and belief," certain "technology companies . . . fear . . . adverse action against them by the Government." Compl. ¶ 54. But Plaintiffs refer to nothing in the Advisory or RFI, nor any other source, threatening an "adverse action" if Twitter does not take certain measures. Plaintiffs cite only to one line in a press briefing where the White House Press Secretary stated that President Biden "supports better privacy protections and a robust anti-trust program." White House Press Briefing (May 5, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/05/05/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-agriculture-tom-vilsack-may-5-2021/. But this general comment does not constitute a *specific* threat requiring Twitter to engage in any *specific* action. Further, it is unclear how this comment shows that the Defendants here—Surgeon General Murthy, Secretary Becerra, and the Department of Health and Human Services—made any threat to Twitter.

Nor do Plaintiffs allege facts establishing that Defendants provided "such significant encouragement" that "the choice must in law be deemed to be that of the" government. *Blum*, 457 U.S. at 1004. To be sure, the Advisory sets out various recommendations that the Surgeon General hopes will be adopted. But there is nothing unusual about using the bully pulpit to press for change on important issues, and doing so hardly converts private choices into state action. Just like the educators, journalists, and health professionals who were also addressed in the Advisory, Twitter was free to adopt or ignore the Surgeon General's recommendations, with no threat of punishment. After all, as the Press Secretary noted during the Advisory's rollout, it is "any private-sector company" that ultimately "makes decisions about what information should be on their platform." 7-16 Press Briefing, at 12. Similarly, although the Surgeon General hopes to receive valuable information in response to his RFIs, that does not constitute "such significant encouragement" analogous to coercion. And it is unclear how the RFIs—which seek information, but do not propose any actions Twitter should take against its users—can somehow constitute "such significant encouragement" for Twitter to take disciplinary action against Plaintiffs. Thus, Plaintiffs have failed to establish any coercion or significant encouragement necessary to convert Twitter's remedial measures against Plaintiffs into state action.

ii. Plaintiffs fail to show that Defendants dictated Twitter's actions.

Even if Plaintiffs had shown coercion or the like, their First Amendment claim against Defendants would still fail because their allegations do not show that Defendants dictated the precise actions that Twitter took here—*i.e.*, by specifically targeting any of *Plaintiffs'* posts on the grounds that they contain "misinformation," or by imposing a definition of "misinformation" that would *necessarily* encompass any of Plaintiffs' posts. To the contrary, the Surgeon General acknowledged that there was no concrete definition of "misinformation," *see supra* at 8-9, and that

when companies are deciding whether particular posts contain misinformation, they should "avoid conflating controversial or unorthodox claims with misinformation," Advisory, at 17. Likewise, the Press Secretary repeatedly clarified that social media companies must make the ultimate decision over how they will address misinformation. *See supra* at 8-9.

Accordingly, the strategies recommended by the Surgeon General did nothing to disturb Twitter's discretion to determine which posts contained "misinformation," and consequently which posts may warrant remedial action. Twitter therefore necessarily exercised its independent judgment to conclude that certain of Plaintiffs' social media posts contained misinformation, and that remedial measures were appropriate. Those actions are attributable to Twitter, not the Defendants.

Blum is instructive. In that case, the plaintiffs—Medicaid recipients in nursing homes—asserted constitutional claims against a state government based on the decisions of *private* physicians to transfer the plaintiffs to lower cost nursing homes. 457 U.S. at 991. The plaintiffs argued that they were transferred only because of government regulations requiring nursing homes to transfer patients to lower cost facilities when the higher cost facilities are not "medically necessary." *See id.* at 994, 1008. The plaintiffs thus argued that the government was ultimately responsible for the transfer decisions made by the plaintiffs' private physicians. But the Supreme Court rejected this argument, noting that although the government imposed a general "medical necessity" transfer requirement, the factual determination of "whether [a] patient's care is medically necessary"—and thus whether the patient will ultimately be transferred—is "made by [a] private part[y]" (the physician). *Id.* at 1006-08. Thus, the government "regulations themselves d[id] not dictate the decision to . . . transfer in a particular case." *Id.* at 1010. The Court further explained:

> [A]lthough . . . transfers are made possible and *encouraged* [by the government regulations] for efficiency reasons, they can occur only after the decision is made that the patient does not need the care he or she is currently receiving. The [government] is simply not responsible for *that* decision . . . [and] if a particular patient objects to his transfer to a different nursing facility, the 'fault' lies not with the [government] but ultimately with the judgment, made by concededly private parties, that he is receiving expensive care that he does not need.

Id. at 1008 n.19 (emphasis added); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (noting that the Court found state action lacking in *Blum* even though "[b]oth state and federal regulations encouraged the nursing homes to transfer patients to less expensive facilities when appropriate").

The same reasoning applies even more forcefully here: unlike in *Blum*, where the decisions of private parties were governed by federal regulation, here, the Surgeon General's recommendations are entirely voluntary. But even putting that aside, much as in *Blum*, where private parties had to apply the regulatory "medical necessity" standard, here, the Surgeon General allegedly called on social media platforms to address "misinformation." However, the ultimate decision of whether a particular social media post contains "misinformation" (or sufficient "misinformation" to merit some disciplinary action) is left to the social media companies. *See supra* at 8-9. The Surgeon General thus did not "dictate the decision" over whether misinformation was present "in [Plaintiffs'] particular" posts. *Blum*, 457 U.S. at 1010.

For similar reasons, the Northern District of California recently dismissed a nearly identical suit. In *Children's Health Defense v. Facebook*, the plaintiff claimed that Facebook violated the First Amendment by "censor[ing] [the plaintiff's] vaccine safety speech" on the platform at the encouragement of Congressman Schiff and the Centers for Disease Control ("CDC"). No. 20-CV-05787-SI, 2021 WL 2662064, at *1 (N.D. Cal. June 29, 2021). In particular, the plaintiff alleged that Congressman Schiff "urge[d] that Facebook implement specific algorithms to identify, censor

and remove all so-called 'vaccine misinformation,'" and that the CDC "works with 'social media partners,'" including Facebook, "in its 'Vaccine with Confidence' initiative." *Id.* at *2-4. The plaintiff alleged that, as a result of governmental pressure, Facebook took action against certain posts by the plaintiff identifying alleged "severe health dangers of certain vaccines and technologies." *Id.* at *4. The court, however, found that neither Congressman Schiff nor the CDC was responsible for the disciplinary actions Facebook took against the plaintiff. It explained: "the phrase 'vaccine misinformation' is a general one that could encompass many different types of speech and information about vaccines," and thus the "general statements" by Congressman Schiff and the CDC concerning "vaccine misinformation" did not "mandate[] the *particular actions* that Facebook took with regard to [the plaintiff's] Facebook page." *Id.* at *9, 12 (emphasis added). The court further noted that Facebook took those "particular actions" based on "its *own* algorithms and standards for detecting 'vaccine misinformation.'" *Id* at *12 (emphasis added). The same is true here, as Plaintiffs similarly fail to show that Defendants dictated a finding that any of Plaintiffs' specific posts constituted misinformation warranting any remedial action.

Moreover, even if Plaintiffs had shown otherwise, their claim would still fail for a separate reason: they do not adequately allege that Defendants encouraged Twitter to take any particular remedial action against Plaintiffs, much less the precise remedial measures at issue here (suspension from Twitter). As explained above, social media companies had to exercise independent judgment in settling on any particular enforcement action. The Advisory, for example, proposes a range of potential remedies—including just labeling posts that contain misinformation—and cautions that companies should assess those remedies, both to determine whether there may be "unintended consequences" and to ensure that the remedies would not unjustifiably impede "free expression." *See supra* at 8; Advisory at 12 (noting that offending

content may be "labeled" or "downranked," and that social media companies may address misinformation by "[p]rovid[ing] information from trusted and credible sources"). Further, the Press Secretary also reiterated that although government officials endorsed several strategies for containing misinformation, social media companies ultimately had to make the *independent* decision of which strategies (if any) to adopt. *See supra* at 8-9. She further explained:

> [T]o be crystal clear: Any decision about platform usage and who should be on the platform is orchestrated and determined by private-sector companies. Facebook is one of them . . . [a]nd there are a range of media who are—also have their own criteria and rules in place, and they implement them. And that's their decision to do. That is not the federal government doing that.

7-16 Press Briefing, at 30. Thus, Twitter independently chose to adopt remedial measures against Plaintiffs, permanently suspending Senger, and temporarily suspending Changizi and Kotzin—decisions that were neither "coerc[ed]" nor taken only upon "such significant encouragement" that they "must in law be deemed to be that of the" Defendants. *Blum*, 457 U.S. at 1004.

To support their claim, Plaintiffs analogize this case to *Bantam Books, Inc. v. Sullivan*. 372 U.S. 58 (1963). There, a Rhode Island commission was empowered "to investigate and recommend the prosecution of all violations of" certain laws concerning printed materials "containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* at 59-60. The commission notified a distributor "that certain designated books or magazines distributed by him"—including, specifically, a "paperback book . . . published . . . by [the plaintiff] Bantam Books"—was "objectionable for sale, distribution or display to youths under 18 years of age." *Id.* at 61-62. The notice expressly stated that the commission could "recommend to the Attorney General prosecution of purveyors of obscenity," and a "local police officer . . . visited [the distributor] shortly after his receipt of [the] notice to learn what action he had taken." *Id.* at 62-63. The distributor thus ceased distributing the relevant publications, and the Supreme Court found

that the distributor's decision—which occurred by "means of coercion"—supported a First Amendment claim against the State. *Id.* at 67-69.

Bantam is nothing like the case at bar. First, unlike the Rhode Island commission's express threats of criminal prosecution, with a police officer's subsequent visit to the relevant distributor, the Advisory and RFI include no threat of any legal penalty for those who do not follow the Surgeon General's proposals or respond to his RFIs. Second, in *Bantam*, the commission specifically flagged the plaintiff's book, and coerced the distributor to stop selling it. *See id.* at 71 (the commission sought "the complete suppression of the listed publications"). Here, as noted above, there is no allegation that Defendants specifically pressured Twitter to take action against Plaintiffs in particular, or pressured Twitter to adopt a definition of misinformation that necessarily included Plaintiffs' Twitter posts. *See supra* at 30-31. Nor is there any well-pled allegation that Defendants pressured Twitter to take the precise remedial actions at issue here—*i.e.*, to suspend the Plaintiffs, or delete any of their posts. *See supra* at 33. Plaintiffs tellingly cite to no case with facts comparable to those here where a court has found that private conduct is attributable to the government.

Accordingly, Plaintiffs fail to state a First Amendment claim against Defendants.

C. Plaintiffs fail to state a plausible Fourth Amendment claim.

Plaintiffs' Fourth Amendment claim is equally meritless. To establish a Fourth Amendment claim, a plaintiff must demonstrate that there was a "'search,'" which is "defined . . . to mean a government intrusion into a person's expectation of privacy that society is prepared to consider reasonable." *United States v. Miller*, 982 F.3d 412, 426 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2797 (2021). Plaintiffs have failed to establish a Fourth Amendment claim under this standard for two reasons.

First, Plaintiffs have failed to show that there was any "intrusion" at all. The Supreme Court has made clear that "the obtaining of information is not alone a search unless it is achieved" by some intrusion, such as "a trespass" onto property. *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012); *see also Hotop v. City of San Jose*, 982 F.3d 710, 720 (9th Cir. 2020) (Bennett, J., concurring) ("the Supreme Court's Fourth Amendment jurisprudence has consistently found that government collection of information effects a search only when it involves some physical intrusion or its functional equivalent"), *cert. denied*, 142 S. Ct. 335 (2021). Here, the Surgeon General simply requested information; he did not conduct a "search" to retrieve it. Although certain cases have found that "[t]he government may . . . conduct a constructive search by collecting information through . . . *compulsion of process*," a basic "information *request* without inspection" does not constitute "a search." *Hotop*, 982 F.3d at 721, 723 n.5 (Bennett, J., concurring) (emphases added). "Allowing a Fourth Amendment claim to proceed . . . with no plausible allegation of an actual Fourth Amendment search, [could] subject government at every level to inappropriate judicial scrutiny of its actions." *Id.* at 723.

Second, Plaintiffs cannot claim a reasonable expectation of privacy in information posted on Twitter. Most obviously, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Florida v. Riley*, 488 U.S. 445, 449 (1989). Here, the whole point of making posts on Twitter is to "expose[] [them] to the public." That is precisely why Plaintiffs themselves explain they want access to Twitter: because it "allows . . . users to electronically send messages . . . to the public." Compl. ¶ 10. Although Plaintiffs contend that Twitter collects some confidential information—*e.g.*, phone numbers and e-mail addresses—the RFI does not request this information. To the contrary, it explicitly notes that any responses should "preserve[] the privacy of users." 87 Fed. Reg. at 12713.

Plaintiffs lack a reasonable expectation of privacy in any information posted on, or provided to, Twitter for a separate reason: "[the Supreme Court] has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976); *see also Smith v. Maryland*, 442 U.S. 735, 743-44 ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). When a person "reveal[s] his affairs to another," he "takes the risk . . . that the information will be conveyed by that [party] to the Government." *Miller*, 425 U.S. at 442. Here, 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, even if Plaintiffs "assum[ed] that [their information would] be used only for a limited purpose." *Id.* at 443.

Plaintiffs erroneously rely on *Carpenter v. United States*, which addressed an entirely different context. 138 S. Ct. 2206 (2018). There, the government secured a court order requiring two cell phone companies to turn over phone location records that "provide[d] an all-encompassing record of" Carpenter's "whereabouts" for an extended period of time. *Id.* at 2217. The Supreme Court concluded that Carpenter had a reasonable expectation of privacy in those records given the "unique nature of cell phone location information," and that the government intruded upon that privacy interest. *Id.* at 2220; *see also id.* 2215 (stating that "longer term . . . monitoring" of a person's movements "impinges on expectations of privacy"). The Court also made clear that its "decision . . . is a narrow one," and is based on the unique context before it: cell phone location

monitoring for an extended period of time. *Id.* at 2220; *see also id.* (the Court did "not express a view on matters not before" it). *Carpenter* is distinguishable for at least four reasons.

First, unlike here, *Carpenter* involved a *search*. The location information was obtained through a court order, which, as noted above, constitutes a "constructive search." *Supra* at 35. By contrast, this case involves a simple information request, which does not constitute a search. Second, in *Carpenter*, the Court noted that cell phone location monitoring raises unique privacy considerations because it provides a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years," *id.* at 2220, which in turn "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations," *id.* at 2217. Plaintiffs provide no binding precedent indicating that information posted on, or provided to, a social media site raises analogous privacy concerns.

Third, the information retrieved in *Carpenter* was not truly "public." Historically, monitoring an individual's movements "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.* Thus, "society's expectation has been that law enforcement . . . would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement" of an individual "for a very long period." *Id.* Here, by contrast, Plaintiffs' posts on Twitter are intended to be, and are, viewable by the public. And fourth, *Carpenter* did not involve information that was voluntarily given to a third-party. There, the Court first reiterated that "the Government is typically free to obtain" information "voluntarily turn[ed] over to third parties" without "triggering Fourth Amendment protections." *Id.* at 2216. The Court, however, noted that Carpenter's location data was not "voluntarily" given to his cell phone providers since "a cell phone logs" a user's location "by dint of its operation, without any affirmative act on the part of

the user beyond powering up." *Id.* at 2220. The Court also noted that it has historically "shown special solicitude for location information in the third-party context." *Id.* at 2219. Here, Plaintiffs *did* affirmatively give their information to Twitter, and they cite no case indicating that information on social media sites is "shown special solicitude" in "the third-party context." Thus, *Carpenter* does not support Plaintiffs' Fourth Amendment claim.

Accordingly, Plaintiffs have failed to state a viable Fourth Amendment claim, and that claim should be dismissed.

III. Plaintiffs fail to establish irreparable harm.

A preliminary injunction is an "extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). The Sixth Circuit has long held that "[a] district court abuses its discretion when it grants a preliminary injunction without making *specific findings* of irreparable injury." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) (emphasis added).

Here, Plaintiffs cannot establish any irreparable harm that may be redressed by a preliminary injunction. *See D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 326-27 (6th Cir. 2019) ("If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit."). Contrary to Plaintiffs' suggestion, their mere incantation of meritless constitutional claims does not entitle them to a presumption of irreparable harm. *See McNeilly v. Land*, 684 F.3d 611 (6th Cir. 2012) (where plaintiff failed to show a likelihood of success on the merits, "his argument that he is entitled to a presumption of irreparable harm based on the alleged constitutional violation is without merit"). Moreover, with respect to the allegations concerning disciplinary actions by Twitter, Mr. Changizi and Mr. Kotzin acknowledge that they are able to

post on Twitter today, and even though Mr. Senger is still allegedly suspended from the platform, there is no evidence that a preliminary injunction would cause Twitter to unblock his account. *See supra* at 13-14, 21. Additionally, with respect to the allegations concerning the RFI, Plaintiffs have provided no evidence allowing the Court to make a "specific finding[]" that Twitter will soon provide any information at all, much less confidential information concerning Plaintiffs in particular. *Friendship Materials*, 679 F.2d at 105. And Plaintiffs fail to identify any truly sensitive, confidential information that Twitter could provide. To the extent Plaintiffs identify any of their supposedly confidential information with specificity, they allege only that Twitter collects information such as "a user's 'name and phone number or email address,'" Compl. ¶ 15, which amount to standard identification and contact information. Plaintiffs thus fail to show that there is a meaningful probability that they will be subject to any material, irreparable harm. They cannot show that the circumstances "clearly demand" the "extraordinary" relief they seek here. *Overstreet*, 305 F.3d at 573.

IV. The balance of the equities counsels against Plaintiffs' requested preliminary injunction.

At the same time, Plaintiffs' requested preliminary injunction—which would enjoin the Advisory and RFI, *see* PI Mot. at 24—would impose material harms on Defendants and the public at large. An injunction against the Advisory, for example, would deprive the public of the Surgeon General's recommendations for addressing misinformation—recommendations that, in the Surgeon General's judgment, can help contain the harmful health effects of misinformation. *See supra* at 10-11. Multiple federal courts have recognized the paramount public interest in helping to contain the harmful effect of COVID-19. *See*, *e.g.*, *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 840-41 (W.D. Tenn. 2020) (refusing to enter an injunction because it "would not be in the public interest" and would "present a risk of serious public harm and foster the continued spread [of the]

COVID-19 virus"); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 228 (D. Conn. 2020) ("given the nature of this pandemic, the balance of the equities and the public interest favor denying a preliminary injunction"); *Tigges v. Northam*, 473 F. Supp. 3d 559, 574 (E.D. Va. 2020) ("The Court cannot understate the public interest at stake here. The public interest in protecting human life—particularly in the face of a global and unpredictable pandemic—would not be served by enjoining state officials from" trying to "slow the spread of COVID-19."). Relatedly, an injunction against the RFI would deprive the Surgeon General of useful information that could "help inform future pandemic response[s]." RFI at 12713.

Accordingly, in light of the speculative harms asserted by Plaintiffs, the balance of the equities counsels against Plaintiffs' requested preliminary injunction.

V. Plaintiffs' requested relief is overbroad.

Although preliminary relief is unwarranted here, to the extent the Court is inclined to grant it, it must be no broader than is necessary to address any harm established by Plaintiffs, consistent with the limitations of Article III and longstanding principles of equity. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (when "the relief sought produces a confrontation with one of the coordinate branches of the Government," the "framing of relief" may be "no broader than required by" the "the discrete factual context within which the concrete injury occurred or is threatened"). Thus, if the Court grants relief, it should not enjoin the Advisory and RFI as a whole—which would amount to a disfavored nationwide injunction—but rather should enjoin them only insofar as they affect Plaintiffs' Twitter posts and call for Plaintiffs' confidential information. *See Arizona v. Biden*, No. 22-3272, 2022 WL 1090176, at *10 (6th Cir. Apr. 12, 2022) (Sutton, J.)

("question[ing]" the legitimacy of "nationwide (or universal) injunctions (or remedies) that bar the federal government from enforcing a law or regulation anywhere and against anyone").

CONCLUSION

The Court should deny Plaintiffs' Motion for a Preliminary Injunction, and grant Defendants' Motion to Dismiss.

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Respectfully submitted,

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