**No. 22-1200**

# In the United States Court of Appeals for the Sixth Circuit

MARK CHANGIZI, *ET AL.*,
*Plaintiffs-Appellants*,

v.

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

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

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## PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Oral Argument Requested

February 21, 2023

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## INTRODUCTION

This case is straightforward, as the crux of the quarrel between Plaintiffs and Defendants is discrete. The government contends that Plaintiffs pled insufficient facts to establish that the government Defendants coerced Twitter into censoring Plaintiffs. This argument underpins their claims that Plaintiffs lacked standing and failed to state a First Amendment claim upon which relief may be granted. In sum, Defendants ask this Court to hold that no amount of government coercion, pressure, or involvement in private companies' censorship activities, short of attaining complete control of those entities, suffices to entail state action and thus to state a claim. This position cannot be reconciled with the entire body of state action doctrine that has developed over the past decades.

First, whether or not Defendants' statements created a coercive atmosphere that prompted Twitter to escalate censorship on its platform was necessarily a fact-bound inquiry that made dismissal of the Complaint inappropriate. *See Mathis v. Pacific Gas & Elec. Co.*, 891 F.2d 1429, 1432 (9th Cir. 1989) ("Determining whether a private party is a governmental actor … is a 'necessarily fact-bound inquiry.'") (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)). Second, coercion is not the only type of governmental influence on private entities that can turn the actions of the latter into those of the state: encouragement, pressure, and entwinement are also bases for finding state action. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). Contrary to Defendants' depiction of the factual and legal landscape, the

question of whether the circumstances alleged by Plaintiffs created state action was hardly open and shut. Plaintiffs did not have to prove their case upon filing. They only needed to set forth sufficient facts that, viewed in the light most favorable to them, could support a claim entitling them to relief. *See DirecTV v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

Third, crucial communications between government and social media companies took place behind closed doors, warranting discovery to determine the extent of government involvement in censorship on Twitter. That assertion is not mere speculation, but, *inter alia,* a conclusion that reasonably follows from the words of the President's own press secretary, who publicly stated that the Administration was in contact with social media companies, telling them what type of posts to censor and even identifying specific individuals for removal from platforms. Media outlets such as *USA Today* also reported that relations between the Biden Administration and tech companies had become "tense" and the President was finding ways to hold the companies liable for the spread of misinformation on their platforms. Moreover, against the backdrop of this coercive scene, the Surgeon General repeatedly instructed social media platforms to censor "misinformation" about Covid-19, and then issued a "Request for Information" (RFI) demanding the companies turn over the identities of those spreading so-called misinformation, along with other data on the subject. Plaintiffs also submitted voluminous evidence that has surfaced since filing the Complaint showing the district court erred in dismissing this case; Defendants have

resisted Plaintiffs' attempts to use any of this publicly available evidence subject to judicial notice for that purpose.

Affirming the district court's dismissal order here would effectively bless the violation of Americans' First Amendment rights, so long as guilty government actors are adept at hiding their misdeeds. The stakes are high: social media, the "modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), has existed for under two decades, and the case law addressing the permissible bounds of viewpoint-based government censorship on these platforms is in a fledgling state. If the First Amendment is to protect free speech in the digital age, this Court must find that the district court erred and remand the case for further proceedings.

## ARGUMENT

### I. STANDING

In their opening brief, Plaintiffs contended that the district court erroneously concluded they lacked standing because they did not show they had been censored due to state action, as opposed to Twitter's independent decision-making process. (*See* App. Br. at 16-33). Contrary to the court's reasoning, they explained, the relevant precedent recognizes that direct, but-for causation is often impossible to prove in First Amendment cases—*i.e.*, that specific individuals were censored because of the government—and therefore precedent only requires Plaintiffs to plead that government, through coercive measures or other forms of entanglement with private companies' decision-making, transformed social media censorship into state action.

(*See* App. Br. at 19-32); *see also Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("[I]t is … axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish."); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020) ("[C]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." (internal citations and quotation marks omitted)).

Defendants, on the other hand, argue that the court appropriately dismissed the complaint because Plaintiffs did not show their injury (censorship of their accounts) resulted from government action. (*See* Def. Br. at 15-16). According to Defendants' reasoning, Plaintiffs were required to show—moreover, prior to any discovery—that the government was the *sole* force behind censorship of their accounts. Because Twitter had a Covid-19 misinformation policy before members of the Biden Administration made statements that Plaintiffs alleged coerced Twitter into ramping up censorship, and because there was no direct evidence at the pleading stage that government officials demanded Plaintiffs' accounts be censored, Defendants claim Plaintiffs lacked standing. (*See* Def. Br. at 15-25). Defendants' arguments misconstrue both the facts and the law.

### A. The Government's Depiction of the Law in First Amendment Cases, for Purposes of Assessing Standing, Is Gravely Mistaken

Defendants primarily rely on a non-First Amendment case to support their position that "jurisdiction is proper only if the plaintiff can show that the 'defendant's actions had a determinative or coercive effect upon the third party.'" (Def. Br. at 15)

(quoting *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021)). But standing requirements are relaxed when plaintiffs allege First Amendment violations. As the Supreme Court has explained:

> 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.

*Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984). Furthermore, this concept is not limited to First Amendment challenges to statutes; government policies and conduct can also be subject to First Amendment challenges due to their chilling effect. *See Fenves*, 979 F.3d at 330-31 (holding that "chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement" in a challenge to campus policies regulating speech (internal citations and quotation marks omitted)); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (upholding challenge to community college sexual harassment policy, as "First Amendment cases raise unique standing considerations … that tilt[] dramatically toward a finding of standing" (internal quotation marks and citations omitted)); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1183 (10th Cir. 2010) (holding that plaintiff teachers had standing to challenge policies that prohibited them from meeting to discuss school matters and

requiring them to sign a code of conduct in which they promised to refrain from gossip due to the chilling effect these policies had on their speech).

In other words, Plaintiffs did not even need to show that they were adversely impacted by the government's action (although they provided an adequate factual basis from which to conclude that they had been) to establish an injury. They only had to provide sufficient facts from which to infer that they (or others) curtailed their speech for fear of the repercussions. *See Speech First, Inc. v. Schlissel*, 939 F. 3d 756, 764 (6th Cir. 2019) ("the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill."); *Nat'l Rifle Ass'n of Am. v. Cuomo*, 350 F. Supp. 3d 94, 115 (N.D.N.Y. 2018) ("A plaintiff has standing if he can show either that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm.") (quoting *Dorsett v. Cty. of Nassau*, 732 F.3d 157 (2d Cir. 2013)). Plaintiffs alleged those circumstances in the Complaint, as they attested that they began to self-censor on Twitter once it became evident that their accounts would be in danger if they continued to speak freely. (*See* Complaint, RE 1, PageID##15-21).

In *Schlissel*, 939 F.3d at 764-65, the plaintiffs alleged that a university policy prohibiting bullying and harassing behavior violated their First Amendment rights. *Id.* at 761-62. This Court held that the district court wrongly found the plaintiffs lacked standing "because [they] 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 762-63. Agreeing with the plaintiffs that accordingly, the Response Team "act[ed] by way of implicit threat of punishment and intimidation to quell speech" this Court noted that the "ability to make referrals … is a real consequence that objectively chills speech." *Id.* at 765; *see also Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182, 1192 (6th Cir. 1995) (finding standing even though students had not yet been punished under the policy, nor had the university acted concretely by threatening them with punishment).

In sum, since *Turaani* was not a First Amendment case, it does not control the standing inquiry. Moreover, *Turaani*'s reasoning, applied here, *supports* Plaintiffs' standing, because the Court stated that an injury is "traceable" to a defendant's actions not only when those actions had a "'determinative or coercive effect' upon the third party," 988 F.3d at 316 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997), but also where the government "cajole[s], coerce[s], [or] command[s]" a third party, as opposed to "[v]enturing vague concerns," *see Turaani*, 988 F.3d at 316 (citing *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017)). Plaintiffs explicitly alleged that Defendants "coerce[d]" and "command[ed]" Twitter to escalate censorship of Covid-19 "misinformation," not that they merely "[v]entur[ed] vague concerns." (*See* Complaint, RE 1, PageID ##8-22). And whether or not Defendants cajoled, coerced, or commanded Twitter and other social media companies to carry out their censorship aims was a question of fact. *See Brentwood Acad.*, 531 U.S. at 296.

### B. The Government's Comprehensive Effort to Rebut Plaintiffs' Interpretation of the Facts Demonstrates Dismissal Was Inappropriate

Defendants' extensive refutation of Plaintiffs' rendition of the facts that go to the question of standing further establishes that dismissal was inappropriate. (*See* Def. Br. at 16-25). Put otherwise, the government's quibbles show the existence of a robust factual dispute that warrants development via discovery.

For example, Defendants allege that Twitter's adoption of Covid "misinformation" policies before Plaintiffs took office means there was no state action. (*See* Def. Br. at 18). Plaintiffs, on the other hand, asserted that open threats by members of the Biden Administration to hold tech companies accountable for refusing to censor "misinformation" permitted an inference of state action. The fact that censorship on Twitter increased simultaneously with the Administration's public efforts to induce it in the spring of 2021 shows that the companies responded to the pressure. Plaintiffs further contended that discovery was warranted to find out whether behind-the-scenes communications between government actors and tech companies took place prior to President Biden's assuming office (discovery in *Missouri v. Biden* later corroborated these well-founded and specifically pled suspicions; the CDC—a sub-agency of HHS—in particular had extensive communications with tech company executives in an effort to direct censorship on social media platforms). (*See* App. Br. at 20). Indeed, Plaintiffs sued HHS and did not limit their claims to the agency's actions after President Biden took office in January of 2021.

Defendants cite *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007), to support their argument that Plaintiffs provided insufficient facts from which to conclude state action existed. They contend that the cases are similar because Plaintiffs posited the timeline of their suspensions corresponded with the Administration's threats to retaliate if social media platforms did not escalate censorship.

But *Twombly* is crucially different. The *only* circumstances the plaintiffs there provided to support their theory of a conspiracy was a pattern of "parallel conduct." In contrast, Plaintiffs supplied myriad statements from Surgeon General Vivek Murthy, President Biden, and then-White House Press Secretary Jennifer Psaki stating that social media platforms would be held accountable if they did not escalate censorship of Covid-19 "misinformation." The fact that Twitter (and other social media companies) began increasing censorship—including Plaintiffs' accounts—around the time the government leveled its threats was simply corroborating evidence. Put otherwise, Defendants' analogy would be apropos if the *only* facts Plaintiffs set forth were the timing of the threats and their Twitter suspensions. In sum, Plaintiffs' argument was simple: government Defendants were doing what they said they were doing publicly—"flagging" posts for social media companies to take down and exerting significant pressure on them to comply. As discussed in Plaintiffs' opening brief, subsequent

information revealed through discovery in other cases, via FOIA requests, and from the publicly disclosed Twitter files show these suspicions were extremely well-founded.[1]

True, the case law in this area is underdeveloped because social media is a relatively new technology. Courts have thus had few occasions on which to delineate the boundaries between private and government action in this context. Still, the prevailing case law refutes the contention that under no theory of the First Amendment could the alleged conduct be unlawful. Quite the contrary. (*See* App. Br. at 33-42). *Norwood*, 413 U.S. at 465 ("[I]t is … axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish."); *Mathis*, 891 F.2d at 1432 ("Determining whether a private party is a governmental actor … is a 'necessarily fact-bound inquiry.'").

**C. This Case Is Not Moot**

Defendants contend that because Elon Musk has taken over Twitter since the Complaint was filed, and the company under his leadership has stated that it will no longer enforce its "COVID-19 misleading information policy," this case has become moot and should be remanded to the district court to make that determination. (Def.

[1] Defendants fault Plaintiffs for not timely amending their complaint—within 28 days of dismissal—to include the new information. (*See* Def. Br. at 21). But the new information came to light more than 28 days after dismissal. And, while Defendants likewise complain that Plaintiffs filed a notice of appeal, divesting the district court of jurisdiction (*id.*), Plaintiffs were between a rock and a hard place because if they did not file a timely notice of appeal, they would have forever lost the ability to challenge the district court's erroneous ruling.

Br. at 25) (quoting *COVID-19 Misinformation*, Twitter, https://perma.cc/Y2B9-QCBM). This argument contains several fatal flaws.

First, Twitter's ceasing enforcement of its misinformation policy does not mean that Plaintiffs' accounts have been fully restored to the size and influence they had before the government began its pressure campaign. Indeed, their accounts continue to be shadow-banned. That fact alone precludes a finding of mootness.

Second, the mootness inquiry does not turn on the Court's view of Elon Musk's fortitude in the face of continuing government pressure. This suit is about the *government's* action, not the company's conduct; likewise, the declaratory and injunctive relief sought is against the government. Defendants have provided no evidence that their efforts to censor the voices of Americans who dissent from the Administration's favored policies has ceased. Quite the contrary, prominent members of the Administration continue to induce censorship of disfavored views through various backdoor channels. *See* Ben Domenech, *How Taxpayer Money Was Used to Silence Speech*, SPECTATOR (Feb. 10, 2023), https://thespectator.com/topic/how-taxpayer-money-was-used-to-silence-speech/.

Third, Plaintiffs sought retrospective relief in their Complaint, in the form of nominal damages, for violations of their rights that are already complete, and that Defendants played a significant role in inflicting. For that reason alone, the claims are not moot. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("[N]ominal damages provide the necessary redress for a completed violation of a legal right.").

Fourth, *even if* Defendants' framing of the inquiry were correct—it is not—and the pertinent question was whether Plaintiffs were still affected by Twitter's policies, this case still would not be moot. Defendants ignore two exceptions to the mootness doctrine, both of which are predicated on the idea that the conduct in question will recur: (1) voluntary cessation; and (2) capable of repetition, yet evading review. *See, e.g.*, *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528-30 (6th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 372 (Oct. 31, 2022); *Beemer v. Whitmer*, No. 22-1232, 2022 WL 4374914, at *4 (6th Cir. Sept. 22, 2022), *petition for cert. filed*, No. 22-586 (U.S. Dec. 21, 2022). To moot this case, the government bears the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (alteration in the original) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)); s*ee also W. Va. v. E.P.A.*, 142 S. Ct. 2587, 2607 (2022) ("[T]he Government, not petitioners, bears the burden to establish that a once-live case has become moot.").

Defendants do not claim that Twitter has discarded or revised its Covid-19 "misinformation" policy. (*See* Def. Br. at 25). Instead, Twitter has paused enforcement of the policy against users like Plaintiffs, which is quintessential voluntary cessation *by Twitter*. *See Friends of the Earth*, 528 U.S. at 174; *Beemer*, 2022 WL 4374914, at *4. Further, as the alleged voluntary cessation is that of a private, third party, the government does not receive the typical presumption of good faith for self-correction. *See Fenves*, 939 F.3d at 767. At best, "*significantly more* than … bare solicitude … is necessary to show

that the voluntary cessation moots the claim" because Mr. Musk alone has discretion to resume enforcement of the policy. *Id.* at 768 (emphasis added).

The "capable of repetition, yet evading review" exception to the mootness doctrine also applies here. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72 (1983) (per curiam). Under this exception, plaintiffs must "make a reasonable showing that [they] will again be subjected to the alleged illegality." *In re Flint Water Cases*, 53 F.4th 176, 189 (6th Cir. 2022)(quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)), *reh'g denied*, No. 22-1353, 2023 WL 370653 (6th Cir. Jan. 5, 2023). However, such repetition "need not be more probable than not" it merely "must be capable of repetition." *Id.* (quoting *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016)).

As discussed above, the government has made no admission of wrongdoing nor indicated any intent to cease its unlawful activities. Quite the opposite: the federal government continues to openly and flagrantly use its clout to censor perspectives it disfavors. Further, as argued herein, the government was and remains in an exceptional position to pressure social media companies such as Twitter to take down disfavored speech.[2] Hence, the controversy is not just reasonably capable of repetition but "demonstrably probable." *Honig v. Doe*, 484 U.S 305, 318 n.6 (1988).

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[2] Moreover, Twitter's new owner has a history of changing his mind, another indication that finding this case moot would be a mistake. *See* Matt Levine, *Elon Gets Three Weeks to Change His Mind*, BLOOMBERG: MONEY STUFF (Oct. 7 2022, 10:07 AM), www.bloomberg.com/opinion/articles/2022-10-07/matt-levine-s-money-stuff-elon-musk-has-three-weeks-to-change-his-mind; Matt Levine, *Musk Gets Away with Mischief*,

After showing a "reasonable expectation or a demonstrated probability that the same controversy will recur," the party claiming the exception must show that "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *Fed. Elec. Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (internal quotation marks and citations omitted). The nature of these suspensions and de-boostings—short-term punishments that may be reversed at the click of a button—make them perfectly capable of evading review. "An action is too short if it is impossible 'to obtain complete judicial review,' including 'plenary review' by the Supreme Court." *In re Flint Water Cases*, 53 F. 4th at 189 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978)). Their duration is substantially shorter than the two years the Supreme Court has previously found "'too short' to obtain full review." *Id.* (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016)). Moreover, Twitter's leadership could change hands again, to someone more susceptible than Musk to government pressure.

In sum, the claims here are not moot. Plaintiffs' accounts have not been restored, as they are still shadow-banned, and the question is whether government Defendants have altered their conduct, which they have not. Moreover, Plaintiffs sought nominal damages for completed violations of their constitutional rights. Thus,

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BLOOMBERG: MONEY STUFF (Feb. 6 2023, 2:24 PM), https://www.bloomberg.com/opinion/articles/2023-02-06/musk-gets-away-with-mischief.

the mootness doctrine does not apply here. And if it were applicable, the conduct of which Plaintiffs complain falls into both the voluntary-cessation and capable-of-repetition-but-evading-review exceptions to the mootness rule. At least Plaintiffs and Defendants agree that resolution of the issue at the court of appeals level is inappropriate. In the event the Court determines there are mootness concerns, which it should not, the case must be remanded to the district court for further proceedings.

## II. PLAINTIFFS PLED A COLORABLE FIRST AMENDMENT CLAIM

Plaintiffs argued that Defendants and their leader, the President of the United States, violated their First Amendment rights by pressuring, cajoling, coercing and/or commanding Twitter to censor their posts about Covid-19. (*See* App. Br. at 33-42). In response, Defendants contend that the facts Plaintiffs put forth are insufficient to establish state action. (*See* Def. Br. at 26-36).

Once again, Defendants' lengthy argument about what the facts show contradicts their claim that dismissal was appropriate. Defendants argue, for instance, that to prove a First Amendment violation based on state action theory, "the plaintiff must show not just that the government coerced a private entity in some fashion but that the government was 'responsible for the *specific* conduct of which the plaintiff complains.'" *Id.* at 26 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

But whether or not the government's statements and conduct were coercive or sufficiently intertwined with Twitter's to constitute state action is the principal factual

dispute in this case. *See Mathis*, 891 F.2d at 1432 ("Determining whether a private party is a governmental actor … is a 'necessarily fact-bound inquiry.'" (quoting *Lugar*, 457 U.S. at 939)). Plaintiffs allege that the totality of circumstances created a coercive environment that caused social media platforms to cave to government demands, as demonstrated through public statements as well as the very reasonable inference that backroom conversations were taking place. This was not sheer speculation, given that former Press Secretary Psaki openly acknowledged that the Administration was in regular touch with social media companies to direct their censorship activities. The Complaint merely took government officials at their word that they were doing what they claimed to be doing. (*See* Complaint, RE 1, PageID ## 6-22). *See Consumers Petrol. Co. v. Texaco, Inc.*, 804 F.2d 907, 914 (6th Cir. 1986) ("We cannot conclude from reviewing the record that [Plaintiff] could not have developed facts to support its assertion[.]"). And, Plaintiffs sought to supplement these factual allegations with scads of evidence that came to light (and entered the public domain) after the filing of this Complaint, though the court denied their motions to reopen the case and supplement that motion. (10/18/22 Opinion and Order Denying Motion to Reopen, RE 52, PageID ##733-34).

Defendants go to great lengths to argue that information revealed subsequent to filing of the Complaint in this case—including discovery in Alex Berenson's lawsuit and in *Missouri ex rel. Schmitt v. Biden* (in which undersigned counsel also represents plaintiffs)—should not be considered, because judicial notice does not permit

considering the material for its truth. (*See* Def. Br. at 20-23). But Plaintiffs are not asking the Court to assess the new material for its truth *per se*. Rather, they argue that it substantiates their position that the district court was wrong to consider the pleadings insufficient and shows that the factual dispute was not fanciful. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."). Put otherwise, while Defendants may disagree with Plaintiffs about whether the new information suffices to establish state action, that the information exists and bears on Plaintiffs' state-action claims is self-evident, and at the very least warrants remanding this case to district court.

In truth—by Defendants' own implicit admissions—this case boils down to a debate about *how to interpret the facts* and what was going on behind the scenes, which yields the conclusion that the judge erred in granting the motion to dismiss. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974) ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the [state action] test is met."); *NLRB v. Gissel Packing, Co.*, 395 U.S. 575 (1969) (holding that an employer threatening to retaliate if employees unionized was unduly coercive, and that the inquiry was heavily fact-based, as it must take the power dynamic into account); *Hart v. Hillsdale Cnty.*, 973 F.3d 627, 636 (6th Cir.

2020) ("[O]ur court is rarely the appropriate forum in which to resolve factual disputes regarding intent."); *Mathis*, 891 F.3d at 1434 (reversing district court's dismissal of the case for lack of subject-matter jurisdiction as "if [Plaintiff] can prove his allegations … he may be able to establish that [Defendant's] action can 'be ascribed to a governmental decision.'" (quoting *Lugar*, 457 U.S. at 938)); *McNally v. Kingdom Trust Co.*, No. 21-cv-0068, 2022 WL 248094, at *10 (W.D. Ky. Jan. 25, 2022) ("Resolving this factual dispute on a motion to dismiss would be inappropriate.").

Moreover, Defendants' rendition of the law is inapt, since they insist that coercion is the only theory that permits a finding of state action. But as discussed extensively in the opening brief, other types of governmental influence, including pressure, encouragement, and entwinement, can create state action. (App. Br. at 35-42). In *Brentwood*, the Court explained:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), when the State provides "significant encouragement, either overt or covert," *ibid.,* or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar*, [457 U.S.] at 941. We have treated a nominally private entity as a state actor when … it is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton*, 382 U.S. 296, 299 (1966).

531 U.S. at 296; *see Norwood*, 413 U.S. at 465 ("[I]t is … axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish."); *Mathis*, 891 F.2d at 1434 ("[W]e cannot agree with the

conclusion that [Plaintiff's] allegations of governmental coercion or encouragement are frivolous or wholly without substance. The mere fact that [Defendant] might have been willing to act without coercion makes no difference if the government did coerce."); *see also Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020) ("[P]rivate parties may act under color of state law when the state significantly involves itself in the private parties' actions and decisionmaking at issue."); *Jensen v. Lane Cnty.*, 222 F.3d 570, 575 (9th Cir. 2000) ("We are convinced that the state has so deeply insinuated itself into [the process of involuntary commitment] that there is 'a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action of the latter may be fairly treated as that of the State itself.'" (quoting *Jackson*, 419 U.S. at 350)).

Defendants' depiction of the state-action question as settled is an astonishing spin, given that social media has been in existence for just over 15 years, and case law demarcating the constitutional bounds of government involvement in content modulation (often a euphemism for censorship) remains in its infancy. *See Brentwood*, 531 U.S. at 295 ("What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity …. [N]o one fact can function as a necessary condition across the board for finding state action."); *Jackson*, 419 U.S. at 349-50 ("[T]he question whether particular conduct is 'private' on the one hand or 'state action' on the other, frequently admits of no easy answer." (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961)). This is all the more so given the complexity of the circumstances here and the heavily fact-specific nature of the state-action inquiry.

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

### A. Defendants' Request for Information Was *Ultra Vires*

Plaintiffs argued that Defendants lacked the statutory authority to issue a Request for Information about Covid-19 misinformation from tech companies. (*See* App. Br. at 43-45). Defendants counter that because the RFI is nonbinding and imposed no obligation on the tech companies, the claim is "meritless." (Def. Br. at 36-37).

But, as Plaintiffs pointed out in their opening brief, an ostensibly non-binding RFI is subject to judicial challenge, including on the question of the requesting agency's authority to issue it. *See Nat'l Ass'n of Letter Carriers, AFL-CIO v. USPS*, 604 F. Supp. 2d 665, 672-73 (S.D.N.Y. 2009) ("Plaintiffs' *ultra vires* claim is plausible. The claim adequately alleges that [Office of Inspector General] exceeds its authority by requesting protected health information directly from employees' health care providers without their knowledge or consent."). Defendants attempt to distinguish *National Association of Letter Carriers* on the ground that there, the RFI was "alleged to have been unlawful because it violated a legal requirement," as opposed to the facts presented here. (Def. Br. at 37).

This purported distinction ignores Plaintiffs' argument that the RFI here was also unlawful for reasons apart from being *ultra vires*: (1) it was part of an intimidation campaign to coerce tech companies into doing the government's bidding when it came to censorship of dissenting viewpoints on Covid-19 in violation of Plaintiffs' First

Amendment rights; and (2) it constituted an unlawful search in violation of their Fourth Amendment rights. (*See* App. Br. at 33-41, 47-50). Defendants cite no authority to support their assertion that courts are without power to address an *ultra vires* claim premised on an agency's RFI. That is not surprising, since no such authority exists. *Cf. N. Oaks Med. Ctr., LLC v. Azar*, ___F. Supp. 3d___, No. 18-9088, 2020 WL 1502185, at *2 (E.D. La. Mar. 25, 2020) (explaining that agency action is presumptively judicially reviewable, though that presumption "may be overcome by specific language that is a reliable indicator of congressional intent"). Since there are cases in which courts have deemed an RFI *ultra vires*, Defendants are simply wrong on the law here. *See Nat'l Ass'n of Letter Carriers*, 604 F. Supp. 2d at 672-73.

Moreover, the paucity of directly on-point case law is indicative of the fact that the conduct of which Plaintiffs complain rarely occurs. It is simply unprecedented for the Surgeon General, whose prerogative is to prevent "introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), to demand that technology companies hand over data about their users. And as discussed herein and in the main brief, that demand implicated Plaintiffs' constitutional rights. (*See* App. Br. 43-46).

**B. The Surgeon General's RFI Violated the Fourth Amendment**

Plaintiffs argued that the Surgeon General's Request for Information from technology companies constituted a warrantless search, in violation of the Fourth Amendment. (*See* App. Br. at 47-48). Defendants respond that "obtaining of

information is not alone a search unless it is achieved by … a trespass or invasion of privacy." (Def. Br. at 38-39) (quoting *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012)).

But Plaintiffs *do* allege that the RFI invaded their privacy. As argued, third parties turning over non-consenting individuals' information to the government can violate those individuals' Fourth Amendment rights. *See City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (invalidating Los Angeles ordinance permitting warrantless police inspections of hotel guest records). A Fourth Amendment violation may occur in such circumstances even when the government merely requests the information (although, as Plaintiffs have argued extensively, the coercive environment carried this scenario far beyond a polite, innocent "request"). *See Nat'l Ass'n of Letter Carriers*, 604 F. Supp. 2d at 675-76 (finding that USPS employees' allegation that the Office of the Inspector General, by instituting policy of obtaining their medical records without consent, had stated plausible Fourth Amendment claim.). In any event, whether or not the RFI, and social media companies' compliance with it, constituted a search was a fact-bound inquiry that made dismissal of the Complaint inappropriate, and that is particularly so given the unprecedented nature of this action. (*See* App. Br. at 47-48).

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

In their opening brief, Plaintiffs argued that in issuing the Advisory and RFI, the Surgeon General and HHS did not follow the appropriate APA procedure. (*See* App. Br. at 49-50). Because the action implicated Plaintiffs' constitutional rights and made

demands of social media companies, the Advisory and RFI implicated "rights" and effectuated "obligations," and thus this violation is judicially reviewable. (*See* App. Br. at 49-50); *Bennett*, 520 U.S. at 178 (holding that, in order to constitute final agency action reviewable by a court, the action must be one by which "rights or obligations have been determined" and from which "legal consequences will flow.").

Defendants assert that this agency action does not implicate rights or obligations, citing *Parsons v. DOJ*, 878 F.3d 162, 167 (6th Cir. 2017), which stated that "[l]egal consequences" imposed by an agency action "must be direct and appreciable," such as giving rise to "criminal or civil liability." (Def. Br. at 37-38).[3] Defendants' argument here is based on sleight of hand. In order to be judicially reviewable, the action must be one "by which rights or obligations have been determined, *or* from which legal consequences will flow." *Parsons*, 878 F.3d at 167 (emphasis added). Both of these circumstances need not be shown. Plaintiffs' argument is predicated on the fact that this *ultra vires* agency action (*see supra*, Part III.B.) violated their rights and imposed an obligation on tech companies, which in turn led to further violation of their constitutional rights. Thus, the action was one "by which rights or obligations have been determined." (*See* App. Br. at 49-50).

Defendants claim that the "assertion that these two specific actions, without more, violated the First Amendment would be even weaker than the meritless First

[3] Defendants do not appear to contest that the RFI and Advisory marked consummation of the agency's decision-making process. (*See* Def. Br. at 38).

Amendment claim that plaintiffs have actually pleaded, and plaintiffs do not appear to offer any basis on which the APA claim could proceed independent of the First Amendment theory." (Def. Br. at 38). As argued extensively, Plaintiffs' First Amendment claim was hardly meritless, and in any event, the district court's conclusion was predicated on conducting a factual analysis that was improper at the motion to dismiss stage. (*See* App. Br. at 50). *See DirecTV*, 487 F.3d at 476.

## CONCLUSION

For the foregoing reasons, as well as those in Appellants' Opening Brief, this Court should find that Plaintiffs have standing to bring these claims, and that they set forth facts, which viewed in the light most favorable to them, establish colorable First and Fourth Amendment, *ultra vires*, and APA claims. Thus, the judgment of the district court should be reversed, and the matter remanded for further proceedings.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,113 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced serif typeface.

*/s/ Jenin Younes*

## CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

*/s/ Jenin Younes*