THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE DAILY WIRE, LLC, *ET AL.*,
PLAINTIFFS,

v.

DEPARTMENT OF STATE, *ET AL.*,
DEFENDANTS.

CASE NO. 6:23-CV-00609-JDK

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' RULE 12(H)(3) MOTION TO DISMISS, ALTERNATIVELY MOTION TO RECONSIDER (DKT. 53)

Plaintiffs file this Response in Opposition to Defendants' Rule 12(h)(3) Motion to Dismiss (Dkt. 72) or, Alternatively, Motion to Reconsider Memorandum Opinion and Order Granting in Part and Denying in Part Motion to Dismiss and Motion to Transfer (Dkt. 53).

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INTRODUCTION

Plaintiffs, The Daily Wire, LLC ("The Daily Wire"), FDRLST Media, LLC ("The Federalist"), (jointly "Media Plaintiffs"), and the State of Texas (collectively, "Plaintiffs"), filed the Complaint in this action to halt Defendants' *ultra vires* and unlawful censorship enterprise. Defendants, the State Department, its Global Engagement Center ("GEC"), and these agencies' officials, agents, and employees, effectuate this scheme by funding, testing, promoting, and marketing technologies that downgrade ostensibly unreliable news outlets, with the intent and effect of decreasing online circulation and other types of support for material from those outlets. This scheme denigrates Media Plaintiffs' reputations and reduces the visibility of their content on the internet, in violation of the First Amendment's free speech and free press guarantees, injures Texas's sovereign interests, exceeds Defendants' congressionally delegated authority, and also violates the Administrative Procedure Act. *See* Complaint, ECF 1 ¶¶ 272-313.

Defendants now seek reconsideration of parts of this Court's prior Order denying their Motion to Dismiss for lack of standing. *See* Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, (hereinafter "Opinion") ECF 53. Their motion is primarily based on Defendants' erroneous claim that the Supreme Court's June 26, 2024, decision in *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), warrants revisitation of this Court's prior ruling.

As explained in greater detail below, *Murthy* neither calls for reconsideration nor justifies dismissing Plaintiffs' claims at this stage for several reasons. First, Defendants State Department and GEC seek dismissal of this case at the pleadings stage, although this Court has already determined that the Complaint, read in the light most favorable to Plaintiffs, plausibly alleges their standing to bring *ultra vires* and First Amendment claims against Defendants.

But *Murthy* concerned solely the question of whether the plaintiffs in that case had presented sufficient *evidence*, after preliminary injunction-related discovery, to establish their standing to obtain that emergency relief. *Murthy* did *not* address whether the plaintiffs had alleged facts sufficient for standing at the pleadings stage. The standard for demonstrating standing to obtain a preliminary injunction is much higher than it is to survive a motion to dismiss. Thus, Defendants' reliance on *Murthy* is inapposite.

Second, the theories of harm and unlawful government action in the two cases are distinct. Plaintiffs in this case do not allege unlawful government involvement in private companies' content moderation decisions. Rather, they contend that the State Department and GEC *funded* and *promoted* tools and technologies that resulted in suppression of Media Plaintiffs' content, and that such action therefore not only violated their First Amendment rights, but also exceeded the bounds of the agencies' congressionally delegated authority. Because the illicit government conduct differed in nature from that alleged in *Murthy*, the traceability and redressability analyses are not the same.

Finally, the standing and merits inquiries in this case are inextricably intertwined, because the question of whether the government's conduct caused the harm Plaintiffs allege cannot be extricated from the question of whether the government's conduct was unlawful. As the Fifth Circuit holds, in such circumstances a court must not dismiss the complaint prior to discovery, so that Plaintiffs have the opportunity to obtain evidence to demonstrate that Defendants are responsible for their injuries. In sum, the Supreme Court's decision in *Murthy* does not warrant reconsideration of this Court's denial of components of Defendants' first motion to dismiss.

STATEMENT OF ISSUES

1. Should Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(h) be treated as a Motion for Reconsideration?

   Yes. Because this Court previously addressed and partially denied Defendants' motion to dismiss, Defendants seek reconsideration.

2. Does the Supreme Court's decision in *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), justify the extraordinary remedy of reconsideration.

   No. *Murthy* involved the question of standing at the preliminary injunction stage, after Plaintiffs had engaged in limited discovery. The burden is much higher when seeking a preliminary injunction than it is at the pleadings phase, where plaintiffs must only allege facts that, if proven true, establish their entitlement to the relief sought. This motion applies to the adequacy of Plaintiffs' pleadings, rendering *Murthy* inapplicable. Further, the *Murthy* Court's decision did not alter established standing rules and thus it does not constitute an intervening change in controlling law. Finally, *Murthy* involved only First Amendment claims and thus its holding is not dispositive of this Court's analysis of Plaintiffs' *ultra vires* claims.

3. If this Court reconsiders its previous decision, should it dismiss the Complaint?

   No. Plaintiffs' Complaint alleges that Defendants engaged in *ultra vires* actions that injured them and violated Media Plaintiffs' First Amendment rights. Their allegations are sufficient at the pleadings stage.

BACKGROUND

Because the Court is familiar with the facts of this case, Plaintiffs will reiterate them only in brief. In denying Defendants' first Motion to Dismiss, this Court explained that Plaintiffs alleged in their Complaint that both the State Department and GEC, its subsidiary, engaged in *ultra vires* activities that harmed Plaintiffs. *See* Opinion, ECF 53. Specifically, Plaintiffs alleged that Defendants exceeded the authority that Congress granted the Secretary of State because the applicable enabling statute limits the State Department to matters "respecting foreign affairs," 22 U.S.C. § 2656. Complaint, ECF 1 ¶ 226. Thus, the State Department's funding, testing, and/or promotion of tools and technologies—with the intent and effect of harming Media Plaintiffs'

reputation, reducing their circulation, and negatively affecting their advertisement opportunities—is *ultra vires* action. *Id.* ¶¶228-30. Defendants' *ultra vires* activities also harm Texas's sovereign interests by interfering with the state's ability to enforce H.B. 20, which among other things, mandates that social media companies disclose the government's role in censorship on their websites. *Id.* ¶¶ 234-39.

The Complaint further alleges that Defendant GEC, which is housed within the State Department and tasked with countering foreign malign influence operations, likewise exceeded its congressionally delegated authority by participating in this censorship scheme. *Id.* ¶¶ 48-104. As the Complaint explains, GEC's conduct violated Congress's mandate that "'[n]one of the funds authorized to be appropriated or otherwise made available to carry out this section shall be used for purpose other than countering ***foreign*** propaganda and misinformation that threatens United States national security[.]" Complaint, ECF 1 ¶ 53 (emphasis in original).

The Complaint identifies particular instances in which GEC's activities and initiatives targeted Americans' speech, including that of Media Plaintiffs. *Id*. ¶ 54. The Complaint further details how Defendants' *ultra vires* activities injured and continue to injure Media Plaintiffs, providing as specific examples Defendants' funding and promotion of two media-rating companies: Global Disinformation Index ("GDI") and NewsGuard Technologies, Inc. ("NewsGuard"). Opinion, ECF 53 at 5 (citing Complaint, ECF 1 ¶¶ 3, 72–73, 101). The Complaint alleges, "[t]hese entities generate blacklists of ostensibly risky or unreliable American news outlets for the purpose of discrediting and demonetizing [them] and redirecting money and audiences to news organizations that publish favored viewpoints." Opinion, ECF 53 at 5 (quoting Complaint, ECF 1 ¶ 3). NewsGuard and GDI brand Media Plaintiffs as risky or unreliable, which

has the intended effect of driving down circulation and visibility of their content and damaging their reputations. Opinion, ECF 53 at 5 (citing Complaint, ECF 1 ¶ 3). Plaintiffs allege that this harm is traceable to government action, a fact-specific inquiry. Additionally, the Complaint emphasizes that GEC highlights on its .gov webpage several "counter-disinfo resources," Opinion, ECF 53 at 6 (quoting Complaint, ECF 1 ¶ 174), including ones that promote "NewsGuard and GDI, . . ." Opinion, ECF 53 at 6 (citing Complaint, ECF 1 ¶ 174)—as this Court previously recognized.

The Complaint further alleges that GEC, as part of its U.S.-Paris Tech Challenge, awarded GDI $100,000. GDI stated that its goal was to "disrupt the funding of so-called disinformation by steering away 'ad dollars' from disfavored media outlets." Opinion, ECF 53 at 7 (quoting Complaint, ECF 1 ¶ 128). The State Department also co-sponsored a "COVID-19 misinformation and disinformation" tech challenge," Opinion, ECF 53 at 7 (quoting Complaint, ECF 1 ¶ 142), and identified three winners of the contest: "NewsGuard, Peak Metrics, and Omelas—'all American companies which offer censorship technologies that target Americans' speech broadcast to Americans.'" Opinion, ECF 53 at 7 (quoting Complaint, ECF 1 ¶ 143). The Complaint then alleges that the $25,000 State Department-funded awards, Opinion, ECF 53 at 7-8 (citing Complaint, ECF 1 ¶ 144), were given to NewsGuard to help the State Department "identify[] and flag[]" those spreading alleged COVID disinformation and hoaxes, and that Peak Metrics' technology entered in the COVID challenge 'monitors American speech, including that of the American press.'" Opinion, ECF 53 at 8 (quoting Complaint, ECF 1 ¶¶ 147, 150).

The Complaint alleges that Defendants' *ultra vires* actions detailed above have harmed and continue to harm the Media Plaintiffs in a variety of ways, including by causing reputational damage, reduced circulation, and diminished advertising opportunities. Complaint, ECF 1 ¶ 275.

Additionally, Media Plaintiffs allege that Defendants' *ultra vires* actions abridge their rights to free speech and free press. *Id.* ¶¶ 1–3, 38. The State of Texas alleges that Defendants' *ultra vires* actions harm its sovereign interests in enforcing Texas House Bill 20. Complaint, ECF 1 ¶ 5; TEX. CIV. PRAC. & REM. CODE § 143A.002(a).

ARGUMENT

I. THE SUPREME COURT'S DECISION IN MURTHY DOES NOT JUSTIFY RECONSIDERATION

A. Defendants' Motion is Best Construed as a Motion for Reconsideration

Defendants' Rule 12(h)(3) Motion seeks to relitigate its Rule 12(b)(1) Motion to Dismiss, which this Court denied in part this past May. *See* Opinion, ECF 53. Accordingly, the current Motion is properly conceived of as a Motion to Reconsider under Fed. R. Civ. P. 54(b), as Defendants impliedly acknowledge by requesting relief under Rule 54(b). *See U.S. ex rel McLain v. Fluor Enters., Inc.,* 60 F. Supp.3d 705, 711 (E.D. La. 2014) ("[S]ince this Court denied the defendants' motion to dismiss once already …, defendants' motion to dismiss is more properly characterized as a motion for reconsideration under Rule 54(b)") (internal citation omitted); *see also Adams v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus.*, 495 F. Supp.3d 392, 395 (2020).

B. Contrary to Defendants' Argument, *Murthy v. Missouri* Does Not Merit Reconsideration of this Court's Prior Ruling

The circumstances presented here are not of the exceptional nature that warrant reconsideration. Rather, Defendants are plainly seeking a second bite at the apple without good cause to do so. *See, e.g., Richardson v. Avery*, No. 16-cv-2631, 2017 WL 2817427, at * 1-2 (N.D. Tex. June 5, 2017) (citing *SGC Land, LLC v. La. Midstream Gas Serv.*, 939 F. Supp.2d 612 (W.D. La. 2013)) (denying Rule 54(b) motion for reconsideration as the plaintiff failed to show such

reconsideration was necessary to "correct manifest errors of law or fact, to present new evidence, to prevent manifest injustice, or because of an intervening change in law"). While Defendants contend that *Murthy* constitutes an intervening change in controlling law, *see* Defendants' Motion to Reconsider, ECF 72 at 14-15, *Murthy* is inapposite to the present procedural stage as well as to the facts of this case and in any event, did not change the prevailing law.

Interlocutory orders, such as those on a motion to dismiss, are reconsidered under Rule 54(b). Reconsideration under Rule 54(b), while available at the court's discretion, provides an "extraordinary remedy and should be used sparingly" in the interest of finality and conservation of judicial resources. *Henry v. Maxum Indem. Co*., No. 20-2995, 2022 WL 1223701, at *3 (E.D. La. Apr. 26. 2022) (assessing the defendants' motion for reconsideration under Rule 54(b)); *see Austin v. Kroger Tex.*, LP, 864 F.3d 326, 336 (5th Cir. 2017) (reconsideration of interlocutory orders is at court's discretion). A ruling should be reconsidered only where the moving party presents "'substantial reasons'" for requesting such relief. *Adams*, 495 F. Supp.3d at 396 (quoting *Broyles v. Cantor Fitzgerald & Co.*, No. 10-854, 2015 WL 500876, at *1 (M.D. La. Feb. 5, 2015)); *accord Allied Petroleum, Inc. v. Gradney*, No. 16-cv-1453, 2018 WL 2321897, at * 3 (N.D. Tex. May 2, 2018).

Further, although "'the standard for evaluating a motion to reconsider under Rule 54(b) would appear to be less exacting than that imposed by Rules 59 and 60, considerations similar to those under Rules 59 and 60 inform the court's analysis.'" *Goosehead Ins. Agency, LLC v. Williams Ins. & Consulting*, 533 F. Supp.3d 367, 380 (N.D. Tex. 2020) (quoting *Dall. Cnty. v. MERSCORP, Inc.*, 2 F. Supp.3d 938, 950 (N.D. Tex. 2014), *aff'd sub nom. Harris Cnty. v. MERSCORP, Inc.*, 791

F.3d 545 (5th Cir. 2015)). Thus, courts within the Fifth Circuit typically "'evaluate Rule 54(b) motions to reconsider interlocutory orders under the same standards that govern Rule 59(e) motions to alter or amend a final judgment.'" *McLain*, 60 F. Supp.3d at 711 (quoting *Lightfoot v. Hartford Fire Ins. Co.*, No. 07-4833, 2012 WL 711842, at *2 (E.D. La. Mar. 5, 2012)). *See e.g., Joseph v. Evonik Corp.*, No. 22-1530, 2022 WL 16712888, at * 9-10 (E.D. La. Nov. 4, 2022) (citing *Ha Thi Le v. Lease Fin. Grp., LLC*, No. 16-14867, 2017 WL 2911140, at *2 (E.D. La. July 7, 2017)). "'A Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence[,]"'" *Factor King, LLC v. Block Builders, LLC,* 192 F. Supp.3d 690, 692 (M.D. La. 2016) (quoting *Advocare Int'l LP v. Horizon Labs., Inc.*, 524 F.3d 679, 691 (5th Cir. 2008)), and "is also appropriate when there has been an intervening change in the controlling law." *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003).

Initially, the Supreme Court's decision in *Murthy* is not grounds for reconsideration of this Court's previous Opinion and Order denying Defendants' Motion to Dismiss. That is because *Murthy* addressed the adequacy of the plaintiffs' evidence at the post-discovery preliminary injunction stage. In that procedural posture, the plaintiffs had a burden of *proof* that does not exist at the pleadings stage. In *Murthy*, the Court considered solely the question of whether plaintiffs adequately established (not merely pleaded) standing to obtain a preliminary injunction. At no time did the *Murthy* Court determine that plaintiffs there did not have standing to proceed with prosecuting their claims.

As the Fifth Circuit in *Texas Alliance for Retired Americans v. Hughs*, 976 F.3d 564, 567 n.1 (5th Cir. 2020), made clear, there is a significant difference between the "minimal showing of standing that a plaintiff must show to overcome a motion to dismiss" and "'clear showing' of

standing required to maintain a preliminary injunction." (quoting *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017)). Thus, the *Murthy* plaintiffs had a much higher burden to sustain the preliminary injunction than Plaintiffs currently do in this case. Accordingly, *Murthy* does not warrant dismissal of Plaintiffs' claims, which are presented by entirely different plaintiffs against a different and narrower set of defendants, predicated on distinct legal theories, and dispositively for purposes of this motion, remain at the pleadings stage. *See e.g., Greater New Orleans Fair Hous. Action Ctr. v. Kelly*, 364 F. Supp.3d 635, 647-48 (E.D. La. 2019) (rejecting defendants' reliance on case determining plaintiff lacked standing because the decision cited involved a "different procedural posture" and not one at the pleading stage which merely required plaintiff to "allege facts demonstrating each element of standing."). *Cf. H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172, 177-78 (5th Cir. 1988) (quoting *Comm'ns Maint., Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1205 (7th Cir. 1985) ("[I]t is a 'risky approach' to assume that the often incomplete evidence adduced at a preliminary injunction hearing is sufficient to determine whether a claimant is entitled to judgment as a matter of law.")).

Second, not only is *Murthy*'s preliminary injunction analysis procedurally inapplicable to this case, but the Supreme Court's decision did not *change* the controlling law. To the contrary, the six-member majority clearly understood its holding to constitute an *application* of existing law to a novel fact-pattern, *see* 144 S. Ct. at 1986-1997, as demonstrated, for instance, by its reliance upon *Department of Commerce v. New York*, 588 U.S. 752 (2019). Defendants inadvertently acknowledge as much by describing the decision as an application of "well-established principles." *See* Defendants' Motion to Reconsider, ECF 72 at 15. *Murthy*, accordingly,

did not change the prevailing law and thus does not present grounds for reconsideration of the Court's Order.

Third, *Murthy* also fails to support reconsideration of the Defendants' Motion to Dismiss because the legal claims and theories analyzed in that case differ from those presented here, making the Supreme Court's traceability and redressability analyses inapplicable to the case at hand. Plaintiffs in this case present both First Amendment and *ultra vires* claims, while *Murthy* addressed solely First Amendment claims alleging unlawful government interference in social media censorship.[1] *Murthy* did not address—and so did not touch upon, let alone change the law governing—*ultra vires* claims predicated on an agency exceeding its congressionally delegated authority. Accordingly, even if *Murthy* had dealt with the adequacy of allegations for standing at the pleadings stage—it did not—its analysis would not be dispositive of Plaintiffs' *ultra vires* claims. In fact, Defendants' Motion for Reconsideration completely ignores Plaintiffs' *ultra vires* claims, leaving this Court's denial of those parts of Defendants' first Motion to Dismiss unchallenged.

Fourth, Plaintiffs' harm here is not limited to third-party acts of censorship. Their injuries also arise from Defendants' placing an official imprimatur on some media sources and endorsing third parties' evaluations that other sources, such as the Media Plaintiffs, are unreliable and should be muffled and defunded. Thus, *Murthy*'s holding—that to obtain a preliminary injunction, plaintiffs in that case were required to trace specific censorship decisions by specific

[1] The *Murthy* Plaintiffs did make *ultra vires* claims in their Complaint but chose not to pursue those theories for purposes of obtaining emergency relief. *See* Second Amend. Compl., ECF 84 ¶¶ 488-570, *Missouri v. Biden*, No. 22-cv-01213 (W.D. La.) (filed Oct. 6, 2022).

social media companies directly to conduct by a specific government defendant—is inapplicable here. Also, with only the State Department and its subsidiary as Defendants here, Plaintiffs do not have the traceability difficulties that the *Murthy* Court identified based on the number of different federal agencies involved. *See Murthy*, 144 S. Ct. at 1988 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)) ("The Fifth Circuit also erred by treating the defendants, plaintiffs, and platforms each as a unified whole. Our decisions make clear that 'standing is not dispensed in gross.'").

The facts in *Murthy* are further distinguishable because the proof available for briefing on the motion for preliminary injunction indicated that when the government began its influence campaign on social media companies, the platforms already had various content-moderation policies in place. The Supreme Court suggested those policies—as opposed to censorship induced by the government—might have driven the platforms' independent decision-making processes. Here, by contrast, the tools and technologies the Defendants promoted and continue to promote, with no indication they plan to cease, are new products funded, expanded, or endorsed by Defendants. Indeed, the evidence Plaintiffs have obtained through the expedited discovery process thus far indicates that GEC's efforts exposed third parties to new technologies of which they were previously unaware and that GEC's campaign resulted in their adoption of those new technologies. Thus, the traceability concern in *Murthy* is absent in this case. At very least, it is clear that this is a question of fact that requires further discovery to fully resolve.

The traceability and redressability analyses also are crucially different from *Murthy* because there, the plaintiffs' conception of harm rested on the government defendants inducing social media companies to censor speech. Given that theory, the Supreme Court held that to

demonstrate standing for purposes of obtaining a preliminary injunction, "the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them." *Id.* at 1993. That meant demonstrating "a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant." *Id.* at 1986. Since the censorship that the *Murthy* plaintiffs alleged pertained in large part to Covid-19 matters (and the plaintiff whom the Court determined had most persuasively alleged *past* harm traceable to government had been censored solely on Covid-related issues), the Supreme Court was skeptical that there was adequate risk of ongoing or future censorship, *particularly given the plaintiffs' burden of proof at the preliminary injunction stage. Cf. Murthy*, 144 S. Ct. at 1990 ("Of all the plaintiffs, Hines makes the best showing … That said, most of the lines she draws are tenuous, *particularly given her burden of proof at the preliminary injunction stage*—recall that she must show that her restrictions are *likely* traceable to the White House and the CDC.") (emphasis added). By contrast, here, Media Plaintiffs' claims are not focused primarily on harm that has already occurred, but rather on the governments' ongoing promotion of tools and technologies that denigrate the Media Plaintiffs' credibility. *See Gonzalez v. Blue Cross Blue Shield Ass'n*, 62 F.4th 891, 902 (5th Cir. 2023) (a continuing injury may create standing for purposes of obtaining injunctive relief).

Moreover, Defendants erroneously assume that because Plaintiffs have not alleged facts that demonstrate government coercion, or pressure, on third parties to adopt the tools and technologies in question, they cannot show standing. But the *Murthy* decision did not limit the theories of unlawful government action to coercion or pressure. Indeed, the majority specifically

stated, "[b]ecause we do not reach the merits, we express no view as to whether the Fifth Circuit correctly articulated the standard for when the Government transforms private conduct into state action." 144 S. Ct. at 1985 n. 3. For that reason, the Court did not have the opportunity to determine what sort of government conduct is unlawful when it comes to inducing or influencing third parties to censor speech.

The Fifth Circuit below held that when the government coerces or "significantly encourages" a third party to censor speech, that constitutes a First Amendment violation, and the Supreme Court did not address that component of the court's decision. *See Missouri v. Biden*, 83 F.4th 350, 374-77, 381-82 (5th Cir. 2023), *reversed and remanded on other grounds sub nom. Murthy v. Missouri*, 144 S. Ct. 1972 (2024). Ultimately, the Fifth Circuit enjoined the Centers for Disease Control (CDC) and Cybersecurity and Infrastructure Security Agency (CISA), on the ground that their regular involvement (entanglement) with social media companies for purposes of directing content moderation on the platforms—even when the relationship appeared cooperative as opposed to coercive—constituted "significant encouragement" and thereby violated the First Amendment. *See Missouri v. Biden*, 83 F.4th at 390-91. Thus, *Murthy* does not invalidate the various theories of liability the Media Plaintiffs allege in the Complaint to state a First Amendment claim that their speech and press rights were abridged. Defendants' assumption that, because Plaintiffs did not allege facts giving rise to an inference of coercion or pressure, they lack standing to bring their claims, is meritless.

In sum, this Court should summarily deny Defendants' Motion to Reconsider because *Murthy* is irrelevant at the pleadings stage, did not change the controlling law on standing, concerned differing legal theories, and is inapplicable to the factual circumstances presented

here. Thus, *Murthy* neither constitutes a change in prevailing law justifying reconsideration, nor otherwise calls into question this Court's holding at the pleading stage.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

In the event the Court revisits the question of standing, it should nevertheless deny Defendants' Motion because Plaintiffs present facts sufficient to allege *ultra vires* and First Amendment free speech and press claims, and their standing to bring those claims.

A. Legal Standards

"'[W]hen considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.'" *N. Cypress Med. Ctr. Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 191 (5th Cir. 2015) (quoting *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007)). Thus, a defendant "cannot dispute that [plaintiff] suffered an Article III injury by arguing that [plaintiff]'s claims fail on the merits." *RLI Ins. Co. v. Roberts*, 819 F. App'x 227, 229 (5th Cir. 2020). Further, "in analyzing a facial attack on standing"—such as Defendants make here—"the court assesses whether the plaintiff has sufficiently alleged standing in the complaint and accepts as true the complaint's well-pleaded, non-conclusory factual allegations." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). Thus, dismissal for lack of standing is only appropriate "if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *E.g., Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

B. Plaintiffs' Standing to Bring *Ultra Vires* Claims

Both the Media Plaintiffs and Texas allege *ultra vires* claims against Defendants. As the Fifth Circuit recently held in *Apter v. Department of Health & Human Services*, 80 F.4th 579, 589

(5th Cir. 2023), "when a plaintiff uses the APA to assert a 'non-statutory cause of action'—such as an *ultra vires* claim," the agency action need not be final. Plaintiffs need only identify "some agency action affecting him in a specific way" and that "he has been adversely affected or aggrieved by that action." *Id.* (cleaned up). As discussed below and in Plaintiffs' previous briefing, the Complaint easily satisfies that pleading standard to state their *ultra vires* claims.

First, Media Plaintiffs plausibly allege an "injury-in-fact," arising from Defendants' *ultra vires* action. In creating GEC, Congress explicitly provided that "[n]one of the funds authorized to be appropriated or otherwise made available to carry out this section shall be used for purposes other than countering foreign propaganda and misinformation that threatens United States national security." 22 U.S.C. § 2656 note (i). Likewise, the State Department lacks the authority to fund endeavors targeting domestic affairs. *See* 22 U.S.C. § 2656.

Plaintiffs adequately allege injury resulting from Defendants' use of taxpayer money to research, test, and develop tools and technologies that they then promote to the private sector (hereinafter, "censorship scheme"). The censorship scheme has harmed Media Plaintiffs' and other news sources' reputations, circulation, and revenue opportunities. Further, and contrary to Defendants' claim that the censorship scheme is over, as this Court recognized in its Order denying Defendants' first Motion to Dismiss, ECF 53, Media Plaintiffs allege ongoing *ultra vires* activities that continue to harm them. Specifically, this Court summarized the numerous allegations in the Complaint of ongoing *ultra vires* activities that include:

- Defendants regularly meeting "with social media platforms to market and promote censorship tools" that harm Media Plaintiffs;

- Defendants maintaining live posts on the GEC-funded Twitter account that promote GDI and NewsGuard and also link to the Disinfo Cloud Digest that promotes NewsGuard;

- Defendants using GEC-funded reports "about … censorship tools and technologies, including ones that target [Media Plaintiffs];"

- Defendants "host[ing] [] tech challenges [that] award grants to fund the development of censorship technology or censorship enterprises that target the American press and Americans' speech;"

- Defendants operating a testbed that "test[s] and/or develop[s] censorship technology that targets the American press and Americans' speech;"

- Defendants maintaining "a platform of censorship technology and tools, including those that target segments of the American press and Americans' speech"; and

- Defendants using a Silicon Valley liaison "to promote and market censorship tools and technology that target segments of the American press and Americans' speech to the tech industry, the private sector, and academia."

See Opinion, ECF 53 at 23-24 (citing Complaint, ECF 1 ¶¶ 84-86, 161-62, 165, 170-73, 175). These allegations of ongoing activities satisfy the injury-in-fact requirement of standing—as this Court previously found. *See Jackson v. Wright*, 82 F.4th 362, 369 (5th Cir. 2023) (holding plaintiff established injury-in-fact for standing purposes by alleging "a continuing (*i.e.*, ongoing) or 'imminent' future injury"). To the extent Defendants contest the factual accuracy of these allegations, that underscores Plaintiffs' point that dismissal at the pleadings stage is inappropriate, as further discovery may be needed to determine whether and the extent to which Defendants' conduct has harmed and continues to harm Plaintiffs.

Media Plaintiffs' Complaint also plausibly alleges traceability, which requires "a causal connection between the injury and the conduct complained of." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Two examples prove the point: Defendants funding of the testing and

promotion of tools and technologies that disparage Media Plaintiffs and the State Department's grant to Media Literacy Now.

First, the Complaint alleges that GEC funded the research, testing, analysis, and promotion of what Defendants call Countering Propaganda and Disinformation or "CPD" tools and technologies—including tools and technologies that targeted the domestic press and domestic speech. Opinion, ECF 53 at 4-5 (citing Complaint, ECF 1 ¶¶ 65-66, 68-71, 73-74, 76, 81). The Complaint also alleges that GEC promoted both NewsGuard and GDI, that both of those companies include "Media Plaintiffs on their lists of disfavored news outlets," Opinion, ECF 53 at 6 (citing Complaint, ECF 1 ¶¶ 116, 122), and that GDI and NewsGuard "operate 'to defund, deplatform, and discredit . . . Media Plaintiffs.'" Opinion, ECF 53 at 6 (ellipsis in original) (quoting Complaint, ECF 1 ¶¶ 3, 84, 114).

The Complaint also highlights a video—that remains available—from the GEC-funded U.S.-Paris Tech Challenge that further establishes Defendants' initiatives are not limited to foreign propaganda and disinformation. Opinion, ECF 53 at 7 (citing Complaint, ECF 1 ¶ 99, 128). That tech challenge featured GDI, which downranks media companies—including the American press—for ostensible disinformation. A video of GDI's presentation includes a summary of the organization's technology, marketed as allowing advertisers to "steer[] away 'ad dollars' from disfavored news outlets[,]" with a link to GDI's webpage. Opinion, ECF 53 at 7 (citing Complaint, ECF 1 ¶ 128). The online video also includes a GEC-paid Director encouraging listeners to engage with GDI, claiming its counter-disinformation work "benefits us all in building a better information environment." Complaint, ECF 1 ¶ 132. GDI ranks both *The Daily Wire* and *The Federalist* as among the top ten riskiest online American outlets, with the explicitly stated

purpose of causing advertisers to avoid them. Complaint, ECF 1 ¶¶ 115-16. The above-descrbied GEC-funded promotion of censorship technology that targets Media Plaintiffs remains public to this day, and thus the injury is ongoing.

Defendants again maintain Media Plaintiffs cannot establish causation because their alleged injuries are the result of the independent actions of third parties not before the Court. First, however, Defendants' official endorsement and promotion of the view that Media Plaintiffs are unreliable and should be defunded, not only by media companies, but by advertisers, causes direct harm. Second, contrary to Defendants' characeterization of the traceability standard, "the causation element of standing does not require the challenged action to be the sole or even immediate cause of the injury." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018). Further, that the causal relationship between the challenged action and injury depends on the conduct of a third party does not preclude a finding of traceability. *California v. Texas*, 593 U.S. 659, 675 (2021). Rather, a Plaintiff satisfies the traceability requirement by "showing that third parties will likely react in predictable ways." *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019). And traceability is satisfied when Plaintiffs can point to the "predictable effect of Government action on the decisions of third parties," rather than "mere speculation." *Id.*

In this case, Media Plaintiffs' injuries are the predictable result of Defendants' deliberate efforts to market and promote the CPD tools and technologies that label them unreliable. Common sense dictates that promoting tools and technologies that brand certain news outlets risky or unreliable will harm the reputation and circulation of those news outlets—and in this case, Media Plaintiffs are among the injured. Indeed, harming their reputation and diminishing

their circulation is the *purpose* of developing and promoting these tools and technologies. *See generally*, *Gully v. Nat'l Credit Union Admin.*, 341 F.3d 155, 161 (2d Cir. 2003) ("The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing.") (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951)). In fact, evidence discovered after Plaintiffs filed their complaint confirms that Defendants funded Media Literacy Now, at which American teachers were shown Ad Fontes's unfavorable ratings of *The Federalist* and *The Daily Wire* as part of a training on media literacy. *See* Plaintiffs' Reply in Support of Motion for Preliminary Injunction, ECF 43 at 8-9. It is entirely predictable that participants in that seminar and other similar events, sponsored by Defendants, would avoid those news outlets as a result of attending the seminar. Indeed, that is the *purpose* of holding such events. And, the State Department-funded training material in question remains available on the internet to this day. *Id.* This ongoing reputational harm to Media Plaintiffs is directly attributable to Defendants, satisfying the traceability requirement at the pleadings phase.

Finally, Media Plaintiffs' allegations are sufficient to satisfy the "redressability" requirement, because enjoining Defendants from engaging in *ultra vires* testing, funding, developing, and promotion of CPD tools and technologies that target the domestic press and domestic speech, and requiring them to take down endorsements of these tools and technologies, will prevent Defendants from further damaging Media Plaintiffs' reputations, reducing their reach, and limiting their advertising opportunities. Such an injunction would, therefore, redress the harm to Plaintiffs because it would "lessen" their injury to a meaningful degree. *Inclusive Cmtys. Proj., Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (quoting *Sanchez v. R.G.L.*, 761 F.3d 496, 506 (5th Cir. 2014)); *Texas v. United States*, 40 F.4th 205, 219

(5th Cir. 2022) (quoting *Sanchez*, 761 F.3d at 506). That other third parties may independently discover, research, evaluate, and adopt the tools and technologies does not alter that conclusion. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself.").

C. Standing to Bring First Amendment Claims

Media Plaintiffs also have standing to pursue their First Amendment claims. As this Court recognized, to establish an injury, a plaintiff must allege that "he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). In this case, the allegations detailed above plausibly allege Defendants' ongoing abridgement of Media Plaintiffs' First Amendment rights. Specifically, the Complaint alleged Defendants' funding, testing, and promotion of censorship tools and technologies lessen Media Plaintiffs' circulation and advertising opportunities in violation of their free speech and free press rights. *See* Complaint, ECF 1 ¶ 101. Those allegations are likewise sufficient to establish traceability because, as this Court previously recognized, "their First Amendment injuries are the predictable result of Defendants' deliberate efforts to market and promote the censorship tools and technologies to 'the tech industry, the private sector, and academia.'" Opinion, ECF 53 at 27 (quoting Complaint, ECF 1 ¶ 175). As this Court noted in denying Defendants' first Motion to Dismiss, "the complaint identifies those efforts and alleges that the third parties deplatformed and demoted Media Plaintiffs as a result," and "[t]hat is sufficient to allege traceability." Opinion, ECF 53 at 27 (*citing Dep't of Com. v. New York*, 588 U.S. at 768).

Finally, Media Plaintiffs' alleged injury is redressable because an injunction prohibiting Defendants from continuing to market and promote censorship tools that limit *The Federalist* and *The Daily Wires'* circulation and advertising opportunities would "lessen" the injury to Media Plaintiffs to a meaningful degree. *Inclusive Cmtys. Proj.*, 946 F.3d at 655; *Texas v. United States*, 40 F.4th at 219. Defendants will continue to issue grants, test and recommend products, and engage in other conduct that harms Plaintiffs absent a court order prohibiting them from doing so. Should Defendants be enjoined from interfering in the domestic sphere or from funding or promoting tools meant to hobble certain American press outlets, their ongoing conduct will not further harm the Media Plaintiffs. Plaintiffs' relief does not depend upon the actions of third parties not before the Court. *Cf. Murthy*, 144 S. Ct. at 1986 (quoting *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976)) ("a federal court cannot redress 'injury that results from the independent action of some third party not before the court.'").

D. Texas's Standing

The Complaint, read in the light most favorable to Texas, likewise sufficiently alleges that Texas suffered a cause-in-fact injury to its sovereign interest which "is fairly traceable to Defendants' actions and is likely to be redressed by a favorable decision." Opinion, ECF 53 at 12. Specifically, Texas plausibly alleged an injury to its sovereign interest in enforcing H.B. 20, which is a state law that regulates social media platforms. While the Supreme Court in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), upheld a preliminary injunction against the enforcement of portions of H.B. 20, the Complaint in this case alleges Defendants' *ultra vires* conduct interferes with the totality of that statute—including, for example, H.B.20's transparency requirements, which remain in force. *See* H.B.20 § 120.053.

Specifically, H.B. 20 requires covered social media platforms to report biannually on the instances in which content was removed, deprioritized, or demonetized, and social media platforms must disclose if the alert came from "a government" or "an internal automated detection tool." *Id.* (b)(2)(A), (C) . Such a policy protects Texans from behind-the-scenes censorship schemes, such as the one challenged here, by informing consumers not only about the number of times the platform acted against illegal or policy-violating content, but also the source of the alert. *See id.*

The State Department's unlawful and *ultra vires* censorship scheme interferes with Texas's consumer protection statute by obscuring the inquiry into whether the censorship resulted from the government's promoting the adoption of a tool used to negatively impact Texans' speech. Discovery will likely reveal additional injuries to Texas's sovereign interests. But at this point, the evidence is sufficient to show that the State Department's activities interfere with Texas's enforcement of H.B.20's transparency provisions. Thus, Defendants' *ultra vires* conduct harms Texas's sovereign interest in enforcing its laws.

Texas can also demonstrate traceability to the government's conduct. Defendants assert Texas has not shown that media companies were induced to violate H.B.20 by the challenged agency action. Defendants' Motion to Dismiss, ECF 33 at 21. But this is not the standard. Again, while there must be "a causal connection between the plaintiff's injury and the defendant's challenged conduct, [traceability] doesn't require a showing of proximate cause or that 'the defendant's actions are the very last step in the chain of causation.'" *Inclusive Cmtys. Proj.*, 946 F.3d at 655 (*quoting Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Rather, a plaintiff can satisfy traceability when the challenged act "does not rest on mere speculation about the decisions of

third parties" but instead "on the predictable effect of [g]overnmental action on the decisions of third parties." *Dep't of Com. v. New York*, 588 U.S. at 768. The harm caused here by the actions of social media companies is a "predictable effect of [g]overnmental action on the decisions of third parties." *Id*.

Moreover "[i]t bears repeating: Plaintiff, at this stage, is under no obligation to prove its injury actualized or to define and eliminate all possible factors contributing to it." *Texas v. Mayorkas*, No. 22-CV-094-Z, 2024 WL 455337, at *3 (N.D. Tex. Feb. 6, 2024). That is because, "the injury required for standing need not be actualized." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). At this phase of proceedings, since the allegations are taken as true because the alleged factual attack is intertwined with the merits, Texas is not required "to produce specific evidence to counter" the argument raised by Defendants on the merits. *Gen. Land Off. v. Biden*, 71 F.4th 264, 274 (5th Cir. 2023). Thus, Defendants' actions harm Texas's sovereign interest, and Texas has established traceability.

Texas can also show redressability. Redressability requires a plaintiff to show that a favorable decision "is *likely*" to redress its injury, as opposed to such relief being "merely speculative." *Inclusive Cmtys. Proj.*, 946 F.3d at 655 (emphasis in original) (*quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). A plaintiff demonstrates redressability if "the desired relief would lessen" the injury—a "complete[] cure" is unnecessary. *Id.* That is, the injunction need not alleviate all harms. *Cf. Texas v. United States*, 40 F.4th at 219 (vacatur order that applies to some, but not all, aliens still redressed Texas's injuries). It must only "'potentially lessen its injury.'" *Consumer Data Indus. Ass'n v. Texas through Paxton*, No. 21-51038, 2023 WL 4744918, at *6 (5th Cir. July 25, 2023) (quoting *Sanchez*, 761 F.3d at 506). Here,

Plaintiffs have indicated that the injuries to Texas would be "eased," demonstrating that the relief requested in this suit "would naturally redress Texas's harm to a meaningful degree." *Texas v. United States*, 40 F.4th at 219. An injunction would put an end to Defendants' actions and redress the harm to Texas's sovereign interests in enforcing H.B.20's transparency mandate.

In sum, then, because Texas has established (1) Defendants' actions interfere with Texas's sovereign interest in enforcing H.B.20; (2) that sovereign interest encompasses preventing Defendants from aiding common carriers in violating H.B.20 and the interests it intends to protect; and (3) an injunction against Defendants' actions would redress that injury, Texas has standing to sue.

CONCLUSION

The Fifth Circuit (along with a number of other circuits), frowns upon dismissal based on lack of standing prior to plaintiffs having an opportunity to obtain discovery, especially where Defendants' jurisdictional attack is intertwined with the merits of a claim. *See* Opinion, ECF 53 at 11-12, 28 (internal citations and quotation marks omitted) ("If … the defendant's jurisdictional attack is 'intertwined with the merits of a claim,' then the court should defer ruling on the motion until summary judgment or trial[]" and "a court may not resolve disputed facts on a Rule 12(b)(1) motion where issues of fact are central both to subject matter jurisdiction and the claim on the merits."). *See Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981) ("Insofar as the defendant's motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence"); *Kipp Flores Architects, LLC v. Mid-Continent Cas. Co.*, No. 4:14-cv-02702, 2015 WL 10557922, at

*8 (S.D. Tex. Mar. 13, 2015) ("Among the justifications for postponing the jurisdictional question in this case, is the fact that the parties have not yet engaged in discovery, if necessary.").

Further, a district court must not "den[y] 'an opportunity for discovery ... that is appropriate to the nature of the motion to dismiss.'" *MCG, Inc. v. Great W. Energy Corp.,* 896 F.2d 170, 176 (5th Cir.1990) (quoting *Williamson*, 645 F.2d at 414). For this reason, it may be "more appropriate to address the jurisdictional question on a motion for summary judgment or at trial," as opposed to at a pretrial evidentiary hearing to "ensure[] not only that a plaintiff may present his case in a coherent, orderly fashion … but also that adequate time is given to complete discovery and all the jurisdictional facts are fully developed[.]" *Wiltz v. Am. Sec. Ins. Co.*, No. 10-635, 2010 WL 4668355, at * 6 (E.D. La. Nov. 9, 2010) (citing *Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 219 (5th Cir. 1989)) (cleaned up). *See Kennedy v. Biden*, No. 23-cv-00381, 2024 WL 3879510, at *3 (W.D. La. Aug. 20, 2024) (footnote omitted) ("[I]n a case … where the alleged Government coercion or involvement came from numerous people at numerous Federal agencies and/or the White House, it is almost impossible for most plaintiffs to prove standing without conducting discovery. Much of the alleged pressure asserted by Plaintiffs came through meetings, private conversations, and emails.").

Here, the question of merits and standing are intertwined, because whether or not Defendants' conduct harmed Plaintiffs cannot be separated from the question of whether or not Defendants' conduct was unlawful. Put otherwise, part of the harm lies in the fact that it occurred due to an illicit censorship scheme. For that reason, jurisdiction and merits are "intertwined."

Likewise, the nature of the allegations here warrant discovery prior to a final determination of jurisdiction. In *Kennedy*, which has been consolidated at the merits stage with

Missouri v. Biden, the district court upheld its earlier grant of a preliminary injunction on the plaintiffs' behalf on the rationale that the case was factually distinct from *Murthy*. In doing so, the court observed that "in a case like this, where the alleged Government coercion or involvement came from numerous people at numerous Federal agencies and/or the White House, it is almost impossible to for most plaintiffs to prove standing without conducting discovery. Much of the alleged pressure asserted by Plaintiffs came through meetings, private conversations, and emails." 2024 WL 3879510, at * 3 (footnote omitted). Although Plaintiffs here do not allege the involvement of "numerous Federal agencies and/or the White House," they do allege a censorship scheme that took place largely behind closed doors and that Defendants have intentionally kept out of the public eye. Thus, just as in *Kennedy*, Plaintiffs here are entitled to discovery in order to prove both standing and the merits of their claims.

Therefore, rather than dismiss this case, the Court should permit Plaintiffs to continue with Rule 26 discovery.

Date: September 20, 2024 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on September 20, 2024 and that all counsel of record were served by CM/ECF.

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