UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Mark Changizi, Michael P. Senger, Daniel Kotzin,

Plaintiffs,

v.

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

Defendants.

Civil Docket No. 2:22-cv-01776

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs allege that they have been, and will again be, injured by the decisions of an independent third party—Twitter—and that those injuries somehow are attributable to Defendants. In support, Plaintiffs rely on two non-binding documents issued by the Surgeon General, along with a few stray remarks made by other government officials who are not defendants in this action. Plaintiffs' theory of injury hinges on a strained attempt to show that documents and remarks that quite plainly impose no legal obligations or penalties on any party can somehow constitute *legal mandates* that *bind* Twitter and other social media companies. This theory, and all of their claims, lack merit, and the Court should grant Defendants' Motion to Dismiss in full.

To start, Plaintiffs lack standing. Plaintiffs assert two injuries: (i) they have been, and will again be, subject to remedial actions by Twitter, and (ii) Twitter, and perhaps other social media companies, may respond to a Surgeon General request for information ("RFI") by sending the Surgeon General allegedly confidential information about Plaintiffs. Neither alleged injury is sufficient. First, Plaintiffs cannot establish that any remedial measure Twitter has taken, or will take, against Plaintiffs is, or will be, caused by Defendants. In the Sixth Circuit, even if a plaintiff can show that the defendant is a "but for" cause of the plaintiff's injury, that alone is insufficient for standing if the causal chain includes an independent decision by a third party. Here, any injury Plaintiffs may suffer due to adverse actions by Twitter will, by definition, be caused by an independent decision of a third party: Twitter. Twitter controls which users, and what content, is allowed on its platform. In response, Plaintiffs simply rely—as they do repeatedly in their brief—on hyperbole concerning the Surgeon General's misinformation advisory ("Advisory") and RFI, and a few remarks by other government officials. Plaintiffs contend that those documents and remarks constituted "mandates," and thus Twitter's disciplinary measures are not taken

"independently." But Plaintiffs can cite to nothing in those documents or remarks imposing any legal obligation on Twitter, or threatening any consequences if Twitter does not take certain actions. Twitter's actions are independent, and they thus sever any causal link between Defendants and any adverse actions Plaintiffs suffer on Twitter.

Additionally, Plaintiffs cannot even establish that Defendants are the "but for" cause of any adverse actions Twitter takes against Plaintiffs. Plaintiffs do not dispute that there are several reasons why Twitter may have independently decided to take action against those who, in Twitter's view, are spreading misinformation on its platform. Twitter may independently believe that misinformation is harmful, and that it has a responsibility to contain it. Twitter may also independently believe that its users will flock to other platforms if Twitter is inundated with misinformation. Indeed, Twitter has been taking action against misinformation since early 2020—well before the current Administration began—and it has long been targeting posts similar to those made by Plaintiffs: posts that minimize the magnitude of the pandemic and posts that question the effectiveness of COVID-related preventative measures and treatments.

To establish causation, Plaintiffs principally rely on a "chilling effect" theory, asserting that they have refrained from posting on Twitter because they believe the government will otherwise cause Twitter to suspend them from the platform. As an initial matter, this theory of injury still relies on the independent decisions of a third party, Twitter. Plaintiffs are claiming their speech is chilled because they fear that Twitter will otherwise suspend them from the platform. Twitter, however, has ultimate discretion over that decision, and that discretion severs any causal link between Defendants and any "chilling effect" on Plaintiffs. Regardless, Plaintiffs cannot manufacture standing simply by engaging in self-censorship. Both the Supreme Court and the Sixth Circuit have made clear that self-censorship may be sufficient for standing only if a party

can show that, if it *did* engage in the speech at issue, it would certainly be subject to an injury inflicted by the government. Thus, here, Plaintiffs would have to show that if they did post on Twitter, they would be subject to adverse actions on Twitter that are caused by Defendants. But, as explained, Plaintiffs cannot make that showing. And their remaining causation arguments fail to demonstrate that any remedial actions taken by Twitter against Plaintiffs have been, or will be, caused by Defendants rather than Twitter's long-standing policies on misinformation.

Even if Plaintiffs could establish the requisite causal link, they cannot show that a favorable ruling would cause Twitter to abandon its anti-misinformation practices. Twitter has been taking action against misinformation for years now, and Plaintiffs cannot show that Twitter will suddenly cease those practices simply because Defendants are no longer allowed to propose strategies for addressing misinformation. To show otherwise, Plaintiffs hypothesize that Twitter may abandon its anti-misinformation practices to attract users that may have gone to other platforms that do not police misinformation. Plaintiffs provide no well-pled allegation or evidence to support its speculation about Twitter's motives, and regardless, that speculation is inconsistent with Twitter's long-standing efforts to minimize misinformation on its platform. Plaintiffs thus cannot establish standing based on any alleged adverse actions taken by Twitter against them.

Nor can Plaintiffs establish standing based on any response social media companies may provide to the Surgeon General's RFI. For one, Plaintiffs cannot show that any social media company is poised to produce, in response to the RFI, any information concerning *Plaintiffs* in particular, much less confidential information. In fact, the RFI explicitly instructs those who respond to produce information in a manner that protects privacy interests. Further, both Twitter and Facebook are unlikely to provide the Surgeon General with any of the information Plaintiffs are concerned about, including the content of Plaintiffs' private messages. Both platforms make

clear that they will not even provide that type of information to law enforcement personnel absent compulsory process, thus making it unlikely they would voluntarily produce that information in response to a non-binding request from the Surgeon General.

Plaintiffs, moreover, cannot establish a causal link between Defendants and any information about Plaintiffs that social media companies may provide in response to the RFI. Again, a causal chain cannot include independent decisions by third parties, and social media companies maintain discretion over whether to respond to an RFI and what that response will consist of. Accordingly, Plaintiffs cannot establish standing based on either of their alleged injuries. The Court should dismiss Plaintiffs' claims on this basis alone.

But even if Plaintiffs could establish standing, their claims would fail on the merits. First, their *ultra vires* claim—that the Surgeon General's Advisory and RFI exceed his statutory authority—fails because, as Plaintiffs acknowledge, a government actor needs no statutory authority to issue non-binding documents. Plaintiffs' claim hinges on their repeated, but inaccurate, assertion that the Advisory and RFI impose legal mandates. But again, neither of those documents requires any party to do anything, or imposes any penalty on a party that simply ignores them. Plaintiffs, in response, assert that they are not only referring to the Advisory and RFI, but also to statements made by White House officials. But those officials are not defendants in this action, and Plaintiffs' *ultra vires* claim focuses on whether the *Surgeon General* has exceeded *his* authority. Regardless, the statements that Plaintiffs cite impose no obligations or penalties either. Plaintiffs' *ultra vires* claim thus fails. For the same reason, Plaintiffs fail to show that the Advisory and RFI constitute "final agency" action that is reviewable under the Administrative Procedure Act ("APA"). The Court should dismiss Plaintiffs' *ultra vires* and APA claims.

Plaintiffs' First Amendment claim likewise lacks merit. To establish a Constitutional claim against a government actor based on conduct by a private party, a plaintiff must show that the government actor coerced, or effectively coerced, the private party to engage in the precise conduct at issue. Here, the Surgeon General did not coerce, or effectively coerce, Twitter to engage in any particular conduct. He simply proposed general strategies that multiple actors, including Twitter, were free to adopt or ignore. Further, Plaintiffs do not dispute that the Surgeon General did not specifically call on Twitter to target *Plaintiffs* in particular. Although Plaintiffs allege that the Surgeon General called on Twitter to address "misinformation," they do not allege that the Surgeon General specifically indicated that Plaintiffs' posts contain misinformation, or that the Surgeon General defined "misinformation" in a manner that would necessarily include Plaintiffs' posts. To the contrary, Plaintiffs admit that the Surgeon General did not provide a specific definition of misinformation, and they instead argue that the lack of a concrete definition has chilled their speech because they cannot anticipate what speech will be permitted on Twitter. But Plaintiffs' concern is that they do not know how *Twitter* will define misinformation when *Twitter* decides which posts warrant remedial actions. Defendants, however, are not dictating those decisions, and are thus not responsible for them. The Court should dismiss Plaintiffs' First Amendment claim.

Finally, Plaintiffs' Fourth Amendment claim fails for a number of reasons. To start, the Supreme Court has made clear that the act of obtaining information, in itself, does not constitute a Fourth Amendment "search." The information must be obtained through some intrusion, such as a trespass on property. A simple information request, like the RFI, does not constitute an "intrusion" and Plaintiffs cite to no case indicating otherwise. But even if an information request could constitute a "search," Plaintiffs fail to show that the RFI constitutes a search for Plaintiffs' confidential information. The RFI, on its face, does not seek any confidential information, and

there is no indication that any social media company interprets the RFI to call for confidential information or will provide confidential information in response. In addition, even if Plaintiffs could overcome this hurdle, they cannot show that they have a reasonable expectation of privacy in information that they voluntarily exposed to a third-party. The Court should dismiss Plaintiffs' Fourth Amendment claim.

Plaintiffs lack standing and otherwise fail to state a plausible claim for relief. The court should grant Defendants' Motion to Dismiss in full.

ARGUMENT

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

To establish standing to "seek injunctive relief, a plaintiff must show that" it "is under threat of suffering" an "actual and imminent" injury caused by "the challenged action," and that "a favorable judicial decision will prevent" that injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).[1] The "threatened injury must be *certainly impending* to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added).

Further, in the Sixth Circuit, "harms result[ing] from the independent action of some third party not before the court are generally not traceable to the defendant." *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir.), *cert. denied*, 142 S. Ct. 225 (2021). A "third party's legitimate discretion breaks the chain of constitutional causation." *Id.* at 317; *see id.* ("an injury that results from the third party's *voluntary and independent actions* does not establish traceability" (emphasis in original)). Thus, even if a plaintiff establishes a "but for" causal link between the plaintiff's injury and the defendant, that still would not suffice for standing if the causal chain involves an independent

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

decision by a third party. In *Turaani*, for example, a dealer refused to sell a firearm to the plaintiff after an FBI agent "visited the dealer to 'speak with' him about" the plaintiff, "asked to see the information [the plaintiff] provided when he tried to purchase the gun," and stated "that he had concerns 'with the company' [the plaintiff] 'keeps.'" *Id.* at 316. Although it was clear that the dealer would have sold the firearm but for the FBI agent's actions,[2] the Sixth Circuit still concluded that the FBI did not "cause" the plaintiff's injury (the inability to procure the gun) for standing purposes because "[t]he dealer" had to ultimately "exercise[] his discretion" in deciding whether to sell the firearm. *Id.* at 317. Accordingly, here, to establish standing, Plaintiff must demonstrate some injury that does not hinge on a discretionary decision by any third party, including Twitter.

None of Plaintiffs' injury theories can satisfy this standard.

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

Plaintiffs cannot establish that any adverse action Twitter has taken, or may take, against Plaintiffs was, or will be, caused by Defendants. As an initial matter, even if Plaintiffs could somehow show that Twitter would not take action against Plaintiffs but for Defendants, that would be insufficient under *Turaani* given that Twitter ultimately decides, in its "discretion," whom it will suspend from its platform and what content it will allow. *Id.* at 317. That exercise of discretion "breaks the chain of constitutional causation." *Id.* at 317.

Plaintiffs try to overcome thus hurdle by repeatedly asserting that Twitter lacks discretion because Defendants, in combination with other government officials, have "command[ed]" Twitter to take action against persons posting misinformation. *See* Pls.' Resp. at 18-19. But there is no support for Plaintiffs' rhetorical gloss. They do not allege that any Defendant (or any other

[2] *See Turaani*, 988 F.3d at 315 (the "dealer explained that he had received a visit from the FBI" and was thus "no longer comfortable" selling the firearm to plaintiff).

government official) imposed a legal mandate on Twitter or indicated that Twitter would suffer some legal consequence if it did not take further action against misinformation. Although Defendants promoted anti-misinformation strategies, that does not constitute the type of "coercion" that would strip a third-party of its discretion. Indeed, as noted above, in *Turaani* the FBI agent personally visited the dealer and strongly encouraged him not to sell the plaintiff a firearm, and yet the Sixth Circuit found that even that did not strip the dealer of his discretion. *See supra* at 6-7. Accordingly, Twitter's discretion over its disciplinary decisions severs any causal chain between Defendants and any remedial action Twitter may take against Plaintiff.

Separately, Plaintiffs cannot even establish a "but for" causal link between Defendants and any adverse action Twitter has taken, or will take, against Plaintiffs. As Defendants argued, and Plaintiffs do not dispute, Twitter may have several independent reasons for wanting to take action against misinformation. It may independently believe that misinformation is harmful and that it has a duty to address it. It may also believe that users will flock to other platforms if they feel that misinformation is rife on Twitter. In fact, Twitter has been taking action against misinformation since early 2020—before the current Administration began—thus confirming that Twitter independently believes that it should minimize misinformation on its platform. Further, in 2020, Twitter expressly noted that it would take action against the precise types of posts identified in the Complaint: "misleading information about . . . [t]he efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease" and "[f]alse claims that COVID-19 is not real or not serious, and therefore that vaccinations are unnecessary." Twitter Safety, COVID-19: Our approach to misleading vaccine information (Dec. 16, 2020), https://blog.twitter.com/en_us/topics/company/2020/covid19-vaccine; *see also* Compl. ¶¶ 64, 69, 75 (describing Plaintiffs' Twitter posts which, among other things, criticize the effectiveness of

"masks" and "vaccine[s]"). Plaintiffs thus cannot show that any adverse action they have suffered, or will suffer, from Twitter flows from Defendants rather than Twitter's independent judgments.

In response, Plaintiffs first argue that they have been "chilled" from posting on Twitter due to the government's statements about misinformation. But, under *Turaani*, even this injury is not "caused" by Defendants. Plaintiffs are allegedly "chilled" from posting on Twitter because they fear they will be subject to disciplinary measures *by Twitter*—and those measures would be adopted, if at all, pursuant to Twitter's discretion. That "breaks the chain of constitutional causation." *Turaani*, 988 F.3d at 317.

In any event, Plaintiffs cannot manufacture standing by engaging in self-censorship based on speculation that Defendants will cause Twitter to take action against Plaintiffs. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 419 (2013) ("[P]laintiffs [cannot] establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part."). "[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled *directly by the government's actions*, instead of by his or her own subjective chill." *Am. C.L. Union v. Nat'l Sec. Agency*, 493 F.3d 644, 661 (6th Cir. 2007) (emphasis added). "[A] personal (self-imposed) unwillingness to communicate" based on "a subjective apprehension" of suffering some injury caused by the government is insufficient for standing. *Id.* at 662. Thus, a "chilling effect" injury suffices only if a party can demonstrate that, if it engages in the speech at issue, it certainly will suffer an injury inflicted by the government. *See id.*; *see also Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008) ("[W]hether plaintiffs have standing

. . . depends on how likely it is that the government will attempt to use the[] provisions against them . . . and not on how much the prospect of enforcement worries them" (quoting *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992)). Here, that means Plaintiffs can only rely on a "chilling effect" injury if they can show that, if they *do* make further posts on Twitter, they *certainly will* suffer some adverse action because of the Defendants. As explained above, Plaintiffs cannot establish that any adverse action Twitter may take against them will be caused by Defendants.[3]

Plaintiffs also note that Twitter took disciplinary actions against Mr. Senger and Mr. Kotzin days after the RFI was released, but had not done so beforehand. *See* Pls.' Resp. at 9. But this does not justify an inference that Twitter took action against them because of Defendants. Twitter has been taking action against users that spread misinformation since early 2020, including users that post messages similar to those posted by Plaintiffs. *See supra* at 8-9. That Plaintiffs have only recently been subject to disciplinary actions, but were not among those subject to disciplinary actions earlier, is as likely to be attributable to chance. Further, Mr. Senger and Mr. Kotzin may have been subject to disciplinary actions in or around March of 2022 because Twitter may have then independently decided to ramp up its anti-misinformation efforts due to the continuing harms of COVID-19. The coincidental timing of their suspensions does not show that they were caused by Defendants rather than Twitter's longstanding efforts to combat misinformation.

[3] Plaintiffs' reliance on *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), is misplaced. There, the plaintiff organization showed that, if its members engaged in the speech at issue, the defendant university's policy would call for that speech to be "referr[ed]" for a "formal investigative process" which would understandably "chill[] speech." *Id.* at 765. Here, by contrast, Plaintiffs cannot show that if they continue to post on Twitter, they will be subject to *any* remedial actions at the behest of Defendants.

Plaintiffs also argue that the Surgeon General called on social media companies to do "more," and that at least Facebook stated that it was following certain of the Surgeon General's recommendations. Pls.' Resp. at 9-10. But this case concerns Twitter, not Facebook. Regardless, Plaintiffs' argument raises the same causation issue: they fail to show that their prior suspensions, and any future suspensions they may suffer, were (or will be) caused by the Surgeon General's call for social media companies to do "more" rather than Twitter's independently developed anti-misinformation practices. Furthermore, the article Plaintiffs cite to support their assertion that Facebook has already taken action against certain of the Surgeon General's recommendations *undermines* their causation argument. In particular, in that article, Facebook states that it was already taking certain measures the Surgeon General proposed, even before he proposed them. For example, Facebook noted that "*[s]ince the beginning of the pandemic* [Facebook has] removed over *18 million* instances of COVID-19 misinformation" and have "labeled and reduced the visibility of more than *167 million* pieces of COVID-19 content debunked by [Facebook's] network of fact-checking partners so fewer people see it and — when they do — they have the full context." *See* https://about.fb.com/news/2021/07/support-for-covid-19-vaccines-is-high-on-facebook-and-growing/ (accessed Apr. 27, 2022) (emphasis added).

Plaintiffs finally argue that Twitter has not been targeting "pro-government" comments, which Plaintiffs define to mean comments that, in the government's view, do not contain "misinformation." *See* Pls.' Resp. at 11. But this argument, at most, shows only that Twitter shares certain views with the government concerning what constitutes "misinformation." It does not mean Twitter adopted its views *because* of the government. And again, since 2020, Twitter has been taking action against posts akin to those at issue in this case: posts that downplay the magnitude of the pandemic and minimize the effectiveness of COVID-related precautions and treatments. *See*

supra at 8-9. Thus, Plaintiffs fail to show that any adverse actions Twitter has taken, or will take, against Plaintiffs flows from Defendants rather than Twitter independent judgment.

But even if Plaintiffs could establish causation, they cannot establish that a favorable decision will redress their alleged injury. Plaintiffs make no allegation, and supply no evidence, suggesting that if the Court enjoins Defendants from promoting anti-misinformation strategies, Twitter will abruptly change course and cease policing misinformation on its platform. In their response brief, Plaintiffs speculate that, with a favorable ruling here, it is "substantially likely" that Twitter will abandon its anti-misinformation efforts because "[a]s criticisms of its viewpoint-based censorship have escalated, social media users have turned to alternative platforms such as Gab, Gettr, and Parlor." Pls.' Resp. at 16-17. But Plaintiffs supply no evidence for this assertion, and it is belied by Twitter's longstanding efforts to combat misinformation—efforts that, once more, pre-date the current Administration.

Plaintiffs therefore do not have standing based on any alleged injury concerning adverse actions that Twitter has taken, or may take, against Plaintiffs.

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

Nor do Plaintiffs have standing based on their speculation over what Twitter (or any other social media company) may provide in response to the Surgeon General's RFI. Plaintiffs make no attempt to show that, in response to the RFI, any social media company will turn over any information—much less confidential information—concerning Plaintiffs in particular. The RFI does not specifically call for any confidential information; to the contrary, it specifically calls on those responding to provide information at a level of generality that preserves personal privacy. *See* Impact of Health Misinformation in the Digital Information Environment in the United States

Throughout the COVID–19 Pandemic Request for Information, 87 Fed. Reg. 12712, 12713 (Mar. 7, 2022) ("RFI").

Further, the policies of Twitter and Facebook confirm that they are unlikely to respond to the RFI with confidential information. For example, Twitter publishes Law Enforcement Guidelines which state that "[n]on-public information about Twitter users will not be released to law enforcement except in response to *appropriate legal process*, such as a subpoena," and that this restriction applies to "[r]equests for the contents of communications" including "Direct Messages." Law Enforcement Guidelines, https://help.twitter.com/en/rules-and-policies/twitter-law-enforcement-support (accessed Apr. 24, 2022) (emphasis added). Facebook maintains a similar policy. *See* Information for Law Enforcement Authorities, https://www.facebook.com/safety/groups/law/guidelines/ (accessed Apr. 24, 2022). If Twitter and Facebook would not provide confidential information to law enforcement absent "legal process," it appears unlikely they would provide this information in response to a voluntary information request from the Surgeon General. Plaintiffs thus cannot show that a disclosure of Plaintiffs' confidential information by a social media company is "certainly impending." *Whitmore*, 495 U.S. at 158.

In response, Plaintiffs first assert that Facebook plans to respond to the RFI, and claim that Twitter likely will as well. *See* Pls.' Resp. at 17-18. But they still fail to demonstrate that either company will provide the Surgeon General with any confidential information pertaining to them in particular. Plaintiffs also argue that "[i]f the Government is not seeking private messages, email addresses and telephone numbers of account holders, or planning to collect information to create files on users it deems problematic, then the onus is on the Government to explicate that." Pls.' Resp. at 17. But *Plaintiffs* have the burden of establishing standing, and they fail to show that,

absent further "explicat[ion]" from the Surgeon General regarding the scope of the RFI, a social media company will necessarily send the Surgeon General confidential information concerning Plaintiffs. Plaintiffs thus fail to establish any "certainly impending" injury relating to any forthcoming RFI response.

Additionally, under *Turaani*, any RFI response would not be "caused" by Defendants. Any social media company that chooses to respond to the RFI will determine, in its discretion, the content of that RFI response, including whether that RFI response will contain Plaintiffs' confidential information. That independent discretion "breaks the chain of constitutional causation." *Turaani*, 988 F.3d at 317 (6th Cir.). In response, Plaintiffs again resort to hyperbole, and claim that the RFI, combined with supposed (but generally unspecified) "pressure" from the government, amount to "coerci[on]." Pls.' Resp. at 18.[4] But as explained above, there is no basis for this assertion. No party has a legal obligation to respond to the RFI, and Plaintiffs do not allege that any government official has indicated that any party will suffer legal consequences if it does not respond to the RFI. Although the Surgeon General has asked parties to respond, that pales in comparison to conduct of the FBI agent in *Turaani*, a law enforcement officer who personally visited the firearm dealer and made clear that, in his view, the dealer should not sell a firearm to the plaintiff there. *See supra* at 6-7. If the FBI agent's conduct in *Turaani* did not amount to coercion, neither do the government statements at issue here. Thus, there is no causal link between Defendants and any information that social media companies provide in response to the RFI.

[4] Plaintiffs' brief refers to "mounting pressure . . . to comply with Defendants' demands," giving as the sole example a purported "threat of lawsuits against tech companies." Pls.' Resp. at 18. But as "evidence" of this supposed threat, they cite only Paragraph 20 of their Complaint, which says nothing of the kind.

Plaintiffs therefore cannot establish standing based on any of their theories of injury. The Court should dismiss Plaintiffs' claims for this reason alone.

II. Plaintiffs' claims all fail on the merits.

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

Plaintiffs do not dispute that an agency only needs Congressional authorization to "promulgate *legislative* regulations," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (emphasis added), and that "an agency without legislative rulemaking authority may" still "issue . . . non-binding statements," *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980). A "legislative-type rule," or "substantive rule," is one that is "binding" or has the "force of law," and "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

Here, of course, neither the Advisory nor the RFI "bind[s]" any party, or alters any party's "rights and obligations." They provide information, propose strategies that parties can adopt (or disregard) as they see fit, and request information that parties can provide if they so choose. *See* Defs.' MTD at 10-13. They are thus the equivalent of routine government speech whereby a government official expresses views on policy issues. Indeed, the Surgeon General has been engaging in this type of speech—through public health advisories—for decades now. *See* Defs.' MTD at 24.

In response, Plaintiffs first urge to Court to focus not on the Advisory and RFI at the crux of their Complaint, but instead on various statements from White House officials that they claim suggest that the government has imposed "obligations" on social media companies. *See* Pls.' Resp. at 22. Plaintiffs misread those statements. But regardless, the Defendants in this action are the Department of Health and Human Services ("HHS"), the Secretary of Health and Human Services, and the Surgeon General. And Plaintiffs' frame their *ultra vires* claim as one asserting that "The

Surgeon General's Initiative Constitutes Ultra Vires Action." Compl., at 23 (emphasis added). Plaintiffs fail to explain how statements made by other government officials have any bearing on whether the *Surgeon General* has exceeded *his* authority. The only actions by the Surgeon General that Plaintiffs reference are the issuance of the Advisory and RFI, and a stray tweet concerning the need for social media companies to "take responsibility for stopping health misinformation on their platforms." Pls.' Resp. at 25. These non-binding actions required no Congressional authorization, and thus they fall within the Surgeon General's authority. *See supra* at 15.

Plaintiffs then argue that the Advisory and RFI do affect "rights and obligations" by infringing upon Plaintiffs' Fourth Amendment rights. *See* Pls.' Resp. at 22. As explained below, however, Plaintiffs' Fourth Amendment claim lacks merit. *See infra* at 24-27. In any event, to constitute a "legislative rule," an agency action must *directly* affect a private party's rights and obligations; a downstream effect on a party's rights is insufficient. In particular, the rule must "*bind* private parties." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (emphasis added). It must "regulate[]" those parties and "change the[ir] legal status." *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022). Here, Plaintiffs refer to nothing the Surgeon General has done that binds them, or any other party, and changes their "legal status" through direct regulation.

Accordingly, Plaintiffs have referred to no "legislative rule" adopted by the Surgeon General that required Congressional authorization, and thus their *ultra vires* claim should be dismissed.

For the same reason, the Court should also dismiss Plaintiffs' APA claim. "The APA" applies only to "*final agency action*," *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (emphasis added), which is defined as an agency action "by which rights or obligations have been determined, or from which legal consequences will flow," *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 167

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

Here, the arguments demonstrating that the relevant actions by the Surgeon General are not "legislative rules"—*e.g.*, they do not alter any party's rights or obligations, or have a direct legal consequence on any party—also demonstrate that they are not "final agency action." *See supra* at 15. Plaintiffs, in response, reiterate their argument that the Surgeon General has infringed upon their Fourth Amendment rights. But as explained above, Plaintiffs' Fourth Amendment claim lacks merit, and regardless, Plaintiffs do not allege that the Surgeon General has done anything that will have a "direct and immediate impact" on them. *Parsons*, 878 F.3d at 167. Any impact upon Plaintiffs will "stem from independent actions taken by third parties" (social media companies). *Id.* at 168.

Plaintiffs also cite to *Air Brake Sys., Inc. v. Mineta*, but that case undermines their claim. 357 F.3d 632 (6th Cir. 2004). There, the plaintiff was challenging "two opinion letters" issued by the National Highway Traffic Safety Administration ("NHTSA") Chief Counsel advising that the brake system manufactured by the plaintiff did not comply with agency regulations. *Id.* at 634–35. The "NHTSA posted the letters on its website (with negative consequences for [the plaintiff's] business), but" the letters were not "binding on" plaintiff and had no direct legal effect on Plaintiff. *Id.* at 635. The Sixth Circuit found that "[t]he essential content of each letter, explaining why [the plaintiff's] product generally does not comply with [the regulations], is not final agency action."

Id. at 639. The Court reasoned that the opinion letters did "not determine rights or obligations" because they did not "stem[] from an agency action that is *directly binding* on the party seeking review, such as an administrative adjudication . . . or legislative rulemaking." *Id.* at 641. Importantly, the Court emphasized that the opinion letters were non-final agency actions even if they had downstream effects on the plaintiffs because "adverse . . . effects accompany many forms of indisputably non-final government action." *Id.* at 645. Here, likewise, Plaintiffs refer to nothing the Surgeon General has done that is "directly binding" on them or any other party. Thus, Plaintiffs have failed to establish that the Surgeon General has engaged in any final agency action, even if the Surgeon General's actions allegedly have a downstream effect on Plaintiffs.

Plaintiffs rely on a portion of *Air Brake* where the Court noted that a predicate question—"whether the Chief Counsel has authority to issue advisory opinions in the first instance"—could be "final agency action." *Id.* at 646. Importantly, the Court did not conclude that the specific opinion letters at issue there were "final agency actions," but rather that the Transportation Secretary's decision to delegate, to the Chief Counsel, the authority to issue opinion letters at all was "final agency action." *See id.* at 646 ("The Secretary has delegated" the "power" to interpret the relevant provisions "to the Chief Counsel in concrete and unconditional terms," and that delegation may constitute final agency action). Here, of course, Plaintiffs are not disputing the Surgeon General's general authority to issue public health advisories—he has been doing so for decades now, *see* Defs.' MTD at 24—nor are they disputing that the Surgeon General generally can make non-binding information requests. Rather, Plaintiffs are arguing that a *specific* advisory, and a *specific* information request, are unlawful. Under *Air Brake*, they are thus challenging "[t]he essential content" of two specific, non-binding agency documents that do not constitute "final agency action[s]." *Id.* at 639.

Accordingly, the Court should dismiss Plaintiffs' ultra vires and APA claims.

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

Plaintiffs cannot establish a First Amendment claim based on any remedial actions that Twitter—a private company—may take, or has taken, against Plaintiffs. The government "can be held responsible for a private decision *only* when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the" government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the" government "responsible for those initiatives." *Id.* Additionally, for the government to be responsible for private conduct, the government must call on the private party to take the *precise action* at issue—*i.e.*, by "dictat[ing] the decision" made "in [that] particular case," *id.* at 1010, or insisting that the private party follow a "rule of decision" that would have *required* that action, *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988). It is not enough to show that the government recommended a general policy under which the private party retained discretion over whether to take the particular action at issue. *See West*, 487 U.S. at 52 n.10 (a "private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible," however, private party "decisions . . . based on independent professional judgments" would not constitute state action); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (the "exercise of choice allowed by" a government policy "where the initiative comes from [the private party] and not from the [government], does not make [the] action in doing so 'state action'" under the Constitution).

Under this standard, Plaintiffs cannot establish that any remedial actions taken by Twitter against Plaintiff are attributable to Defendants. First, Plaintiffs cannot show that Defendants

"coerced" Twitter, or "encouraged" the company to a degree approaching coercion, to take any action against any party. The Surgeon General merely proposed certain strategies and requested certain information; he imposed no mandate on any social media company. *See* Defs.' MTD at 10-13. And to the extent Plaintiffs refer to statements made by White House personnel, those individuals are not defendants in this action, and regardless, they imposed no "mandate" on any social media company either. *See* Defs.' MTD at 12. The Surgeon General, and other White House officials referenced by Plaintiffs, simply did what government officials do routinely: express their views on important issues of public policy. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J. concurring) ("It is the very business of government to favor and disfavor points of view on . . . innumerable subjects").

Plaintiffs' attempt to analogize this case to *National Rifle Association of America ("NRA") v. Cuomo*, 350 F. Supp. 3d 94, 104 (N.D.N.Y. 2018), falls short. There, the NRA alleged that the defendants, including the New York State Department of Financial Services ("DFS"), sought to "deprive the NRA of its freedom of speech by threatening with government prosecution services critical to the survival of the NRA and its ability to disseminate its message." *Id.* at 111. The court reasoned that defendants, including DFS, had the "power to effectuate regulatory action against entities doing business with the NRA," and that "DFS communicated to banks and insurers . . . that they would face regulatory action if they failed to terminate their relationships with the NRA." *Id.* at 115-16. Here, Plaintiffs do not argue that any Defendant has the "power to effectuate," and has issued an express threat of, "regulatory action" against Twitter. Plaintiffs thus fail to show that Defendants have coerced, or effectively coerced, Twitter to take any action.

Further, Plaintiffs also fail to show that Defendants specifically called on Twitter to take action against *Plaintiffs* in particular. Although Plaintiffs assert that Defendants called on Twitter

to take action against misinformation on its platform, Plaintiffs do not allege that any Defendant either told Twitter that Plaintiffs' posts in particular contain misinformation, or defined "misinformation" in a manner that would necessarily include Plaintiffs' posts. To the contrary, as Plaintiffs do not dispute, the Surgeon General made clear that there is no precise definition of "misinformation," and that social media companies must use their judgment in deciding whether any particular post contains misinformation. *See* Defs.' MTD at 11-12 (the Surgeon General noted that "[d]efining 'misinformation' is a challenging task," and that there is no "consensus definition of misinformation"). Thus, Twitter must independently decide, in its discretion, whether Plaintiffs' posts contain misinformation, and thus whether any action against Plaintiffs is warranted. Twitter's actions are therefore not attributable to Defendants.

Again, the Supreme Court's decision in *Blum v. Yaretsky* is instructive. 457 U.S. 991 (1982). There, a regulation required nursing homes to transfer patients to lower cost facilities if the higher cost facilities were not "medically necessary." *See id.* at 994, 1008. The Supreme Court held that even though the nursing homes were required, by law, to transfer certain patients, those transfers were not attributable to the government because the nursing home doctors—private parties—had to make the factual determination of whether the transfer was "medically necessary." *Id.* at 1006-08. The government thus did not "dictate the decision to . . . transfer in" any "particular case." *Id.* at 1010. Here, similarly, even if Plaintiffs can show that Defendants exerted a requisite degree of pressure on Twitter to take action against those spreading "misinformation," Twitter ultimately has to decide whether any particular post contains "misinformation." Plaintiffs protest that *Blum* concerned Medicaid, whereas this case concerns the First Amendment. *See* Pls.' Resp. at 27. In *Blum*, however, the Supreme Court set forth general principles for when private conduct may be attributable to the government, and said nothing to suggest that those principles were

limited to the precise factual context present there. *See* 457 U.S. at 1004 (explaining when the government "normally can be held responsible for a private decision").

Further, the Northern District of California recently dismissed a nearly identical suit. In *Children's Health Defense v. Facebook*, the plaintiff asserted a First Amendment claim based on its allegation that Congressman Schiff and the Centers for Disease Control ("CDC") encouraged Facebook to "censor [the plaintiff's] vaccine safety speech." 546 F. Supp. 3d 909, 915 (N.D. Cal. 2021). In particular, the plaintiff alleged that Congressman Schiff "urge[d] that Facebook . . . censor and remove all so-called 'vaccine misinformation,'" and that the CDC "works with 'social media partners,'" including Facebook, "in its 'Vaccine with Confidence' initiative." *Id.* at *2-4. The court, however, found that neither Congressman Schiff nor the CDC was responsible for the disciplinary actions Facebook took against the plaintiff because "the phrase 'vaccine misinformation' is a general one that could encompass many different types of speech and information about vaccines," and thus the "general statements" by Congressman Schiff and the CDC concerning "vaccine misinformation" did not "mandate[] the *particular actions* that Facebook took with regard to [the plaintiff's] Facebook page." *Id.* at 926, 930 (emphasis added). The same, of course, is true here.

Plaintiffs attempt to distinguish *Children's Health* by pointing to immaterial differences. Plaintiffs, for example, argue that "the case was not brought against the Government." Pls.' Resp. at 27. But the case still presented the same legal question: whether the relevant actions by Facebook were attributable to the government and therefore constitute "state action." *Children's Health*, 546 F. Supp. 3d at 924. The Court thus had to assess whether state actors—Congressman Schiff and the CDC—directed the conduct at issue there. *See id.* at 926, 930. Plaintiffs also argue that "unlike the federal executive branch, a single congressperson has no authority to regulate or to carry out

other retaliatory action." Pls.' Resp. at 27. But the relevant portion of the Court's analysis—that neither Congressman Schiff nor the CDC were responsible for the relevant actions by Facebook because neither "mandated th[ose] *particular actions*"—did not hinge on the level of Congressman Schiff's authority. *Children's Health*, 546 F. Supp. 3d at 930. Further, that case did not concern only Congressman Schiff, but also the CDC (a "federal executive branch" agency). *Children's Health* is thus applicable here, and further supports Defendants' position

Defendants thus did not specifically call on Twitter to take action against Plaintiffs, and so any remedial action by Twitter against Plaintiffs is not attributable to Defendants. Critically, Plaintiffs do not dispute that Defendants did not specifically instruct Twitter to target Plaintiffs. In fact, to the contrary, Plaintiffs admit that the Surgeon General provided no concrete definition of misinformation that would necessarily include any of Plaintiffs' Twitter posts. *See* Pls.' Resp. at 25. Instead, Plaintiffs argue that the lack of a concrete definition of "misinformation" has chilled their speech because they cannot predict what will be considered "misinformation" (and thus what will result in remedial actions). *See id.* This alleged "chilling effect," however, is based on Plaintiffs' uncertainly over how *Twitter* will define "misinformation" when deciding which accounts *Twitter* will suspend. As explained above, Defendants do not dictate, and are thus not responsible for, those decisions.

Finally, even if Plaintiffs could show that Defendants called on Twitter to target Plaintiffs in particular, their First Amendment claim fails for a separate reason: they cannot show that Defendants called on Twitter to take any particular *remedial action* against Plaintiffs. Again, to the contrary, the Surgeon General proposed a number of strategies for addressing misinformation, including just labeling misinformation on its platform, or promoting superior information. *See* Defs.' MTD at 32-33.

Plaintiffs thus cannot show that Defendants specifically directed Twitter to suspend Plaintiffs from its platform. The Court should dismiss Plaintiffs' First Amendment claim.

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

Plaintiffs' Fourth Amendment claim fails because they fail to allege there has even been a "search," much less one that is unlawful under the Fourth Amendment. To establish a Fourth Amendment claim, a plaintiff must demonstrate that there was a "'search,'" which is "defined . . . to mean a government *intrusion* into a person's expectation of privacy that society is prepared to consider reasonable." *United States v. Miller*, 982 F.3d 412, 426 (6th Cir. 2020) (emphasis added), *cert. denied*, 141 S. Ct. 2797 (2021). Plaintiffs' claim fails for several reasons.

First, Plaintiffs have failed to show that there was any "intrusion" at all. The Supreme Court has made clear that "the obtaining of information is not alone a search." *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012). "[T]he Supreme Court's Fourth Amendment jurisprudence has consistently found that government collection of information effects a search only when it involves some physical intrusion or its functional equivalent." *Hotop v. City of San Jose*, 982 F.3d 710, 720 (9th Cir. 2020) (Bennett, J., concurring), *cert. denied*, 142 S. Ct. 335 (2021). Although certain cases have found that "[t]he government may . . . conduct a constructive search by collecting information through . . . *compulsion of process*," a basic "information *request* without inspection" does not constitute "a search." *Id.* at 723 n.5 (Bennett, J., concurring) (emphases added). Here, the Surgeon General simply requested information; he did not conduct a "search" to retrieve it. *See* Defs.' MTD at 10-13.

In response, Plaintiffs indicate that "an invasion of the reasonable expectation of privacy also qualifies as a search." Pls.' Resp. at 28. But this begs the question: what constitutes an "*invasion*" of a reasonable expectation of privacy? *Jones* makes clear that the simple act of

"obtaining . . . information" is insufficient. 565 U.S. at 408 n.5. Rather, the information must be obtained from some form of "intrusion," which includes either a trespass onto physical property, or its "functional equivalent." *Hotop*, 982 F.3d at 720 (Bennett, J., concurring). Tellingly, Plaintiffs do not cite to a single case indicating that information obtained through a voluntary information request constitutes a "search."

And even if Plaintiffs had shown that an information request can constitute a search, they fail to show that the RFI would constitute a search for any of Plaintiffs' confidential information. The RFI does not specifically call for any confidential information concerning Plaintiffs. Again, it asks those providing responses to protect privacy interests. *See* RFI at 12713. Plaintiffs offer no reason to believe that Twitter (or any other social media company) interprets the RFI to call for confidential information, much less that any will actually provide the Surgeon General with confidential information. Indeed, as explained above, the policies of Twitter and Facebook—which make clear that neither company will provide confidential information to law enforcement without legal process—suggest that Twitter and Facebook are unlikely to respond to the RFI by providing any of Plaintiffs' confidential information. *See supra* at 13. Thus, Plaintiffs have failed to show that the RFI constitutes a "search," let alone a "search" for any of Plaintiffs' confidential information.

Plaintiffs also fail to demonstrate that they have a reasonable expectation of privacy over information they voluntarily exposed to Twitter. The Supreme Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976); *see also Smith v. Maryland*, 442

U.S. 735, 743-44 ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). When a person "reveal[s] his affairs to another," he "takes the risk . . . that the information will be conveyed by that [party] to the Government." *Miller*, 425 U.S. at 442. Here, of course, all of the information Plaintiffs are concerned about—their contact information and certain unspecified private messages—were willingly "revealed to a third party" (Twitter), and so Plaintiffs assumed "the risk" that their "information [would] be conveyed by" Twitter "to the Government. *Id.* at 442-43.

Plaintiffs, in response, first argue that "[t]he Supreme Court limited *Miller*'s third-party doctrine in *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018)." Pls.' Resp. at 29. This is patently false. As explained in Defendants' motion to dismiss, the Supreme Court reaffirmed the "third-party doctrine" in *Carpenter*, noting that "the Government is typically free to obtain" information "voluntarily turn[ed] over to third parties" without "triggering Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2216. The Court noted that the doctrine did not apply there because (i) the location data at issue was not "voluntarily" given to the third-party cell phone providers since "a cell phone logs" a user's location "by dint of its operation, without any affirmative act on the part of the user beyond powering up," and (ii) the Supreme Court has historically "shown special solicitude for *location information* in the third-party context." *Id.* at 2219-20 (emphasis added). Here, Plaintiffs *did* affirmatively expose their information to Twitter, and they cite no case indicating that information on social media sites is "shown special solicitude" in "the third-party context."

Plaintiffs also argue that, under *United States v. Warshak*, the third-party doctrine does not apply to the private messages they send over Twitter. 631 F.3d 266 (6th Cir. 2010). But, like *Carpenter*, *Warshak* involved a unique context. There, the government "obtained a subpoena . . .

compel[ing]" an internet service provider ("ISP") to turn over a number of Warshak's e-mails. *Id.* at 283 (6th Cir. 2010). The Sixth Circuit held that users have a reasonable expectation of privacy over the contents of their e-mails, reasoning that "[e]mail is the technological scion of tangible mail" and "[l]etters" have historically received significant "protection" and cannot be intercepted by "the police" without "a warrant based on probable cause" even though they "are handed over to perhaps dozens of mail carriers." *Id.* at 285-86. The Sixth Circuit concluded that "trusting a letter to an intermediary does not necessarily defeat a reasonable expectation that the letter will remain private," and thus, a party likewise maintains a reasonable expectation of privacy over e-mail—the electronic equivalent of letter mail—even though e-mail also travels through an intermediary (the ISP). *Id.* at 285-88; *see also id.* at 286 ("email has become so pervasive that some persons may consider [it] to be [an] essential means or necessary instrument[] for self-expression, even self-identification" and "[i]t follows that email requires strong protection under the Fourth Amendment"). Plaintiffs cite to no authority indicating that social media messages are given similar treatment, or that every communication sent over the internet—regardless of the precise medium—is similarly insulated from the third-party doctrine.

Accordingly, Plaintiffs have failed to establish that Defendants conducted any "search" under the Fourth Amendment (or any search for Plaintiffs' confidential information), nor have they shown that they have a reasonable expectation of privacy over any information they expose to Twitter. The Court should dismiss Plaintiffs' Fourth Amendment claim.

CONCLUSION

The Court should grant Defendants' Motion to Dismiss.

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Respectfully submitted,

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