No. 22-3573

In the United States Court of Appeals for the Sixth Circuit

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

v.

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

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

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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RULE 35(b)(1) STATEMENT

The three-judge panel's decision in this case conflicts with clearly established precedent from both the United States Supreme Court and the Sixth Circuit Court of Appeals. In upholding the district court's grant of the motion to dismiss for lack of standing, the panel failed to make factual inferences in Plaintiffs' favor, as it was obliged to do. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) ("In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.").

In their Complaint, Plaintiffs set forth allegations that permitted the finder of fact to conclude that the Government was responsible for censorship of their Twitter accounts. That made dismissal inappropriate, particularly because the panel engaged in a factual determination, which it was not supposed to do at the motion-to-dismiss stage. *See DirectTV*, 487 F.3d at 476.

The ramifications of allowing this decision—which conflicts with clearly established, prevailing case law—to stand cannot be overstated. It will bar many plaintiffs who are entitled to relief from pursuing their claims in court, by imposing a

standard that is nearly impossible for most with legitimate grievances to meet. Accordingly, *en banc* and/or panel rehearing is warranted.

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III. Whether the Court erroneously assumed the standard for government action under the First Amendment is coercion.

STATEMENT OF FACTS AND DISPOSITION OF THE CASE

Plaintiffs in this case were three Twitter users who devoted their accounts during the Covid era to criticizing government responses to the pandemic and the safety and efficacy of Covid-19 vaccines. (Complaint, RE1.PageID#15). They accrued large followings but were suspended on the platform for various lengths of time and otherwise censored on multiple occasions between April of 2021 and March of 2022, despite not having encountered such problems prior to spring of 2021. (RE1.PageID##15–22). They were suspended for posts such as "every COVID policy … has been one, giant fraud" and stating that natural immunity is superior to that induced through vaccination. (RE1.PageID##16-18).

The Complaint alleged that the federal government, including members of the Biden Administration within the White House, the Department of Health and Human Services (HHS), and the Surgeon General's Office (OSG), bore ultimate responsibility for Plaintiffs' suspensions. (RE1.PageID##20–22). Plaintiffs cited numerous statements made by government officials threatening social media platforms with

adverse consequences if they did not censor government-identified "misinformation" about Covid-19 and the vaccines. (RE1.PageID##15–22). Former Press Secretary Jennifer Psaki made the first such public statement on May 5, 2021:

> The President's view is that the major platforms have a responsibility … to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to Covid19 vaccinations …. He also supports better privacy protections and a robust anti-trust program. So, his view is that there's more that needs to be done to ensure that this type of misinformation, disinformation, damaging, sometimes life-threatening information, is not going out to the American public.

(RE1.PageID#8).

The Complaint identifies several subsequent, similar public pronouncements by Psaki, the Surgeon General, and President Biden himself, culminating in a March 3, 2022 "Request for Information" (RFI) from the Surgeon General, which Plaintiffs alleged was coercive, especially given the Government's previous and contemporaneous threats to punish noncompliant companies. (RE1.PageID##7–15). The Complaint acknowledges that "the first public statement from someone in the Biden Administration blaming technology companies for 'misinformation,' instructing them to do more, and threatening action if they do not, occurred in May [2021]," *but it added that* "common sense dictates that discussions of this nature had occurred previously. In all likelihood, the technology companies were aware of the administration's position on the matter." (RE1.PageID#20 n.17).

Shortly after the RFI's issuance, the Complaint alleges, all three Plaintiffs were suspended for various lengths of time; Senger was permanently suspended on March 8, 2022.[1] (RE1.PageID##16–17). Changizi and Kotzin attested in the Complaint that they self-censored to avoid permanent suspension, which would result in losses of their large followings, the commensurate influence they enjoyed, and the communities they had established on Twitter. (RE1.PageID#20–21).

Plaintiffs filed suit (and shortly thereafter a preliminary injunction (PI) motion) in the United States District Court for the Southern District of Ohio on March 24, 2022, seeking injunctive and declaratory relief and arguing, *inter alia*, that the Government's threats to and coordination with social media companies turned Twitter's viewpoint-based censorship into state action, in violation of Plaintiffs' First Amendment rights. (RE1.PageID##23–27; PI Motion and Memo, RE9, 9-1).

The Government opposed the PI motion and moved to dismiss the entire case on the grounds that Plaintiffs lacked standing and failed to state a claim upon which relief could be granted. (Def. MTD, RE31) (citing Fed. R. Civ. P. 12(b)(1), (6)). Plaintiffs opposed. (Plaintiffs' Opp., RE33). The court granted the Government's motion to dismiss on May 5, 2022, on both Fed. R. Civ. P. 12(b)(1) and 12(b)(6)

[1] Kotzin's account was permanently suspended not long after the Complaint was filed. Senger's and Kotzin's accounts were restored shortly following Elon Musk's purchase of Twitter, although Changizi alleges that he remains "shadowbanned," which means that his posts are downgraded by the algorithms employed by Twitter so that other users rarely see them.

grounds, and denied Plaintiffs' PI motion as moot. (Opinion and Order, RE37). Concluding that Plaintiffs inadequately alleged that the Government was responsible for their Twitter suspensions, the court stated it was at least equally plausible that the company's internal mechanisms and decision-making processes caused the censorship. (*Id.*).

On June 14, Plaintiffs moved to submit a first amended complaint which added among other things, newly discovered evidence about a "disinformation governance board" within the Department of Homeland Security (DHS), a plaintiff, and several defendants. (RE40, 40-1). The court denied the motion without prejudice, because more than 28 days had passed since entry of the final judgment. (Order, RE41). The court stated that Plaintiffs were free to file a motion to reopen based on newly discovered evidence under Fed. R. Civ. P. 60, which they did on June 24. (RE42.PageID##646–53). Plaintiffs filed a timely notice appealing dismissal of the Complaint to this Court on June 30, 2022. (RE43.PageID#690).

Defendants opposed the motion to reopen on July 14, 2022, both because the notice of appeal had been filed and, they argued, the new evidence did not change the state action analysis. (RE48.PageID##700–710).

In reply, Plaintiffs *inter alia* observed that a district court had granted a motion for expedited discovery in support of a preliminary injunction motion in *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. July 12, 2022), based on evidence similar to that in Plaintiffs' complaint and motion to reopen. (RE49.PageID#715). Before the court

ruled on the 60(b) motion, Plaintiffs moved to supplement it with yet more evidence that came to light as the result of discovery in *another* lawsuit, *Berenson v. Twitter*, No. 3:21-cv-09818 (N.D. Cal. 2021). (RE50.PageID##719–22). Defendants opposed this motion. (RE51.PageID##724–32). Eventually, the court denied Plaintiffs' motion to reopen. (Opinion and Order, RE52.PageID##733–34).

Plaintiffs appealed to this Court, and the three-judge panel affirmed dismissal of the case on September 14, 2023, on standing grounds. *Changizi v. HHS*, No. 22-3573, slip op. (6th Cir. Sept. 14, 2023). The decision concluded that Plaintiffs had failed to establish the traceability component of standing, relying heavily on Plaintiffs' suspensions from Twitter having partially preceded the public statements of government officials threatening social media companies with adverse consequences if they did not censor more "misinformation" about Covid-19. *Id.* at 496–98. That opinion failed to grant Plaintiffs the benefit of all reasonable inferences, including that their censorship on Twitter resulted from government action, and it ignored Complaint language specifically alleging that the Administration's social media censorship activity began around the time Plaintiffs' accounts were censored. (RE1.PageID#20 n.17).

For reasons detailed below, Plaintiffs submit *en banc*, and/or panel review is warranted.

ARGUMENT

I. THE COURT FAILED TO DRAW ALL INFERENCES IN PLAINTIFFS' FAVOR AND IGNORED ALLEGATIONS IN THE COMPLAINT THAT ESTABLISH PLAINTIFFS' STANDING

The Court's determination that Plaintiffs lacked standing because they "fail[ed] to establish traceability," *Changizi*, No. 22-3573, slip op. at * 5, was predicated on applying the wrong legal standard and an erroneous assessment of the Complaint's factual allegations.

To surmount a motion to dismiss, the complaint must contain sufficient factual matter which, accepted as true, "state[s] a claim to relief that is plausible on its face" and allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft*, 556 U.S. at 678. The plausibility standard is not akin to a "probability requirement," but demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* At the motion-to-dismiss stage, the court "must take all of the factual allegations in the complaint as true," *id.*, although it "need not accept as true legal conclusions or unwarranted factual inferences." *Gregory v. Shelby Cnty.*, 220 F.3d 433, 446 (6th Cir. 2000). *See also DirecTV*, 487 F.3d at 476 (holding that a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff."). The same standard applies when a court is ruling on a motion to dismiss for lack of standing. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

The three-judge panel failed to apply the appropriate analysis when assessing the Complaint's allegations. The Court concluded that because the first-cited statement of a government official demanding censorship of vaccine "misinformation" was made on May 5, 2021, and the complained-of Twitter suspensions began March 1, 2021, Plaintiffs did not "adequately plead[] that HHS compelled Twitter's chosen course of conduct[.]" *Changizi*, No. 22-3573, slip op. at * 9. While acknowledging that Plaintiffs had "a response to this timeline discrepancy," the Court rejected their assertion that behind-the-scenes communications must have occurred in the months leading up to the public censorship campaign, instead deeming the request for discovery a "fishing expedition." *Id.* Nevertheless, the Court "acknowledge[d] that a different result could be possible under different facts." *Id.*

The question of whether the suspensions' timing corroborated the inference—arising from Administration members' *own statements*—that the Government participated in social media censorship was a factual one. As Plaintiffs explained, it was more than likely (and certainly "plausible," *see Iqbal*, 556 U.S. at 678), that some covert communications between the tech companies and government took place prior to the Administration's public announcements. (Plaintiffs' Opp., RE 33.PageID#254). The Complaint alleged that in mid-July 2021, Psaki stated at a press conference that: "We've increased disinformation research and tracking within the Surgeon General's office. We're flagging problematic posts for Facebook" and "[t]here are proposed changes that we have made to social media platforms" including with respect to enforcement of their

misinformation policies. Psaki even mentioned 12 individuals that the Government had requested be removed from social media, and she demanded that companies take faster action against so-called harmful posts. The following day, Psaki boasted that the White House was in regular touch with social media companies and "work[ing] to engage with them[.]" (RE1.PageID##10–11).

It was hardly mere speculation to conclude that White House employees and other government actors had been doing *precisely what they boasted they had been doing*. Indeed, although Plaintiffs were not required to demonstrate such interactions were probable, *see Iqbal*, 556 U.S. at 678, they obviously were—given Defendants openly confessed to them, apparently disregarding the unconstitutional nature of their conduct. Defendants' actions had predictable and intended effects: increasing censorship of users who dissented from government Covid policy. *See Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2565–66 (2019) (finding standing to sue Government although injuries resulted directly from conduct of third parties, as those third parties "will likely react in predictable ways" to the Government action in question). The Court (like the one below it) simply failed to draw factual inferences in Plaintiffs' favor, as it was required to do at the motion-to-dismiss stage. *See also Ohio Stands Up! v. HHS*, 564 F.Supp.3d 605, 619 (N.D. Ohio 2021) ("'Traceability may be established based on 'the predictable effect of Government action on the decisions of third parties' as opposed to 'mere speculation about the decisions of third parties.'") (quoting *Dep't of Commerce*, 139 S.Ct. at 2566).

Corroborating evidence of Plaintiffs' plausible allegations came to light over the past 18 months through discovery in *Missouri v. Biden*, FOIA requests, and other means. This evidence demonstrated that—as Plaintiffs surmised—the White House, CDC, and the OSG were engaged in extensive, covert communications about content moderation with social media companies well before May, 2021. CDC's involvement began in 2020, during the Trump Administration. *See Missouri v. Biden*, __F.4th__, 2023 WL 4335270, at *18–20 (W.D. La. July 4, 2023), *aff'd in rel. part*. Once President Biden assumed office in January 2021, a concerted pressure campaign against social media companies began by the White House and OSG. *Id.* at *5–6.

The Fifth Circuit agreed with the lower court that the White House, CDC, and OSG, by coercing and significantly encouraging social media companies to censor certain viewpoints, had violated the individual plaintiffs' First Amendment rights. "[W]e do not take our decision today lightly," the court wrote, "But, the Supreme Court has rarely been faced with a coordinated campaign of this magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life." Therefore, the Fifth Circuit concluded, the district court was correct in its assessment: "'unrelenting pressure' from certain government officials likely 'had the intended result of suppressing millions of protected free speech postings by American citizens.'" *See*

Missouri v. Biden, 83 F.4th 350, 392 (5th Cir. 2023) (on Plaintiffs' motion for reconsideration).[2]

The panel's error was particularly egregious because Plaintiffs repeatedly sought to amend their complaint to explicitly allege new facts supporting their traceability claim. Under those circumstances, the panel should have vacated the decision below and remanded, with directions that Plaintiffs be permitted to allege these newly discovered facts, which demonstrate that the government's efforts to suppress their speech preceded censorship of their accounts.

Yet the three-judge panel here refused to take judicial notice of the above-described material, misconstruing the nature of Plaintiffs' request on that count. *Changizi*, No. 22-3573, slip op. at * n. 7. Of course, the First Amendment implications of the communications revealed in *Missouri*'s discovery was a mixed question of law and fact, and not an appropriate subject for judicial notice. But Plaintiffs were asking that the Court recognize that Defendants and the social media companies *had extensive communications on the topic of content moderation* during the timeframe they had initially posited such communications took place. In other words, the Complaint's allegations

[2] The Fifth Circuit upheld much of the District Court's injunction on September 8, excluding some agencies the lower court enjoined. *Missouri v. Biden*, 80 F.4th 641 (withdrawn and superseded on rehearing). It then issued a revised decision, upon Plaintiffs' motion for reconsideration, *expanding* the injunction to include another agency (the Cybersecurity and Infrastructure Security Agency) on October 3. *Missouri*, 83 F.4th at 399 (on Plaintiffs' motion for reconsideration). The Supreme Court has now granted *certiorari* on the question. *See Murthy v. Missouri*, 601 U.S. __, No. 23A243 (Oct. 20, 2023).

were not merely plausible, but were borne out by later developments. Plaintiffs did not ask the Court to take judicial notice of the truth of the information contained in the cited documents. *See Platt v. Bd. Of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 894 F.3d 235, 245 (6th Cir. 2018) (explaining that judicial notice is proper "for the fact of the documents' existence, and not for the truth of the matters asserted therein.").

Finally, the Court's decision was partially predicated upon a factual error. The panel's decision included a footnote attempting to distinguish the Fifth Circuit's standing analysis from its own. The panel said the constitutional violations took place "on a more comprehensive scale," rather than constituting "actions with respect to discrete individual plaintiffs, as in the case we have before us." *Changizi*, No. 22-3573, slip op. at * n. 8.

On this point the Court was mistaken. In addition to the plaintiff states, Missouri and Louisiana, there are five individual plaintiffs in *Missouri*, four of whom are represented by undersigned counsel: Drs. Jayanta Bhattacharya, Martin Kulldorff, and Aaron Kheriaty, and Ms. Jill Hines. The district court and Fifth Circuit addressed actions with respect to them and concluded they possessed standing based on extremely similar factual allegations. *See Missouri*, 83 F.4th at 366-371; *Missouri*, 2023 WL 4335270, at *56–59. Thus, the key ostensible difference the panel invoked to justify inconsistent outcomes in *Missouri* and *Changizi* did not exist. Because there is no pertinent difference between the *Missouri* Plaintiffs and *Changizi* Plaintiffs when it comes to assessing standing, the panel's error has effectively created a circuit split.

Moreover, Plaintiffs did their best to supplement the Complaint with facts that surfaced after its filing. First, they attempted to amend the Complaint with new evidence. When the court denied that motion because 28 days had elapsed—though it had the discretion to permit amendment—they tried to reopen based on newly discovered evidence. *See James v. City of Detroit*, 2021 WL 5463778, at *3 (6th Cir. Nov. 23, 2021) ("[d]elay by itself is not a sufficient reason to deny a motion to amend.") (citation omitted). When yet *more* evidence surfaced to substantiate their claims of unconstitutional government censorship, the court denied their motion to supplement. At every turn, the district court deprived Plaintiffs of the opportunity to provide facts *they could not have known when filing the initial complaint* that went to the very heart of the matter in question: state action. It was a classic case of "heads the government wins, tails you lose." *See James*, 2021 WL 5463778 (court abused its discretion when it denied leave to amend after initially granting it; no "manifest injustice" to government would come from granting motion to amend). As a matter of pleading under the proper standard, the initial Complaint should have survived a motion to dismiss. Instead, no inferences were made in Plaintiffs' favor; rather, the opposite. This significant error must be corrected, or many potential plaintiffs with legitimate legal claims will be wrongfully prevented from pursuing redress in court.

II. THE COURT ERRONEOUSLY FAILED TO ADDRESS PLAINTIFFS' RIGHT TO RECEIVE INFORMATION

In *Island Trees Sch. Dist. v. Pico by Pico*, 457 U.S. 853 (1982), the Supreme Court recognized that under the First Amendment, readers can challenge government censorship that restricts their right to read or receive information. Just as the plaintiffs in *Island Trees* were library users within the school district, Plaintiffs were users on Twitter's platform. Plaintiffs claimed in their second count that the Government's action had deprived them of their First Amendment right to receive information, including from each other. (RE1.PageID#31).

The Court's stated concerns about *when* Plaintiffs' speech was suppressed—the basis of its ruling on standing—is not applicable to this claim about their being denied the freedom to read. Nonetheless, the Court affirmed dismissal without addressing Plaintiffs' right to receive information.

III. THE COURT ERRONEOUSLY ASSUMED THE STANDARD FOR GOVERNMENT ACTION UNDER THE FIRST AMENDMENT IS COERCION

The First Amendment bars laws "prohibiting" the free exercise of religion. In contrast, it bars merely "abridging," or reducing, the freedom of speech or the press. The Constitution's text thus indicates that coercion is not required for speech violations under the First Amendment. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (regarding proof of state action through proof of "significant encouragement"); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (regarding joint participation). The

Court below, however, did not recognize these lesser alternatives to coercion, let alone the First Amendment's abridgment standard. *Changizi*, No. 22-3573 slip op. at * n.8.

CONCLUSION

The three-judge panel, in an apparent effort to cabin its decision, indicated that the "concerns raised" were "not phantasmagorical" and "on a different set of allegations might survive" a motion to dismiss. That is hard to believe in the wake of the panel's decision. As discussed, the district court and Fifth Circuit in *Missouri* found that the allegations had been proven true, to a degree of confidence sufficient to pass the high standard for obtaining a preliminary injunction. And yet this Court did not even allow largely identical factual allegations to survive the motion-to-dismiss stage. It will be the rare future litigant who can surmount the practically impossible bar erected by this Court to challenge surreptitious federal government censorship. Furthermore, the Court treats the execrable behavior of the federal agencies being sued here as though it is standard-issue bully pulpit activity directed at people's or companies' conduct. Not so. As the Twitter files and discovery from *Missouri* prove, the government speech at issue was directed specifically and purposefully at abridging the speech of those whose views contradicted the government, often with significant success; it went far beyond the mere expression of frustration or displeasure. Allegations of such blatant First Amendment violative conduct—conduct alleged to have preceded the censoring of Plaintiffs' speech—must at least suffice to allege Article III standing. *See Thomas v. Collins*, 323 U.S. 516 (1945) (Jackson, J., concurring) ("The very purpose of the First

Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

The Court should grant Plaintiffs' petition for *en banc* rehearing and panel rehearing.

October 30, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,661 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Sheng Li

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/ Sheng Li

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 22-3573*, Changizi, et al v. HHS, et al.*
Originating Case No. : 2:22-cv-01776

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's published opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Laurie A Weitendorf
Deputy Clerk

cc: Mr. Richard W. Nagel

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0214p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK CHANGIZI; MICHAEL P. SENGER; DANIEL KOTZIN,

Plaintiffs-Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES; VIVEK MURTHY, in his official capacity as U.S. Surgeon General; XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services,

Defendants-Appellees.

No. 22-3573

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 2:22-cv-01776—Edmund A. Sargus, Jr., District Judge.

Argued: June 15, 2023

Decided and Filed: September 14, 2023

Before: BOGGS, WHITE, and BUSH, Circuit Judges.

COUNSEL

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OPINION

JOHN K. BUSH, Circuit Judge. Several Twitter users were temporarily or permanently banned from the platform for posting alleged COVID-19 misinformation. Rather than sue Twitter, these users chose to sue the United States Department of Health and Human Services, its Secretary, and the United States Surgeon General (collectively, HHS). Though these users asserted claims under the First Amendment, Fourth Amendment, and Administrative Procedure Act, the district court dismissed their complaint for lack of jurisdiction and failure to state a claim. On appeal, we ask: are Twitter's actions traceable to the federal government? Based on the facts alleged in the complaint, no. We affirm.

I.

Twitter[1] is a ubiquitous social-media platform that allows users to electronically communicate by posting and engaging with limited-length messages called "tweets." This marketplace of ideas has historically avoided censorship, but shortly after the COVID-19 pandemic began, Twitter announced that it was broadening its definition of censorable, harmful information to include "content that goes directly against guidance from authoritative sources of global and local public health information" (COVID-19 policy). R1, PageID 7. Over the next year, "Twitter . . . ramp[ed] up [its] efforts to quell the spread of 'misleading' COVID-19 information" several times, but few users were suspended until Twitter upped the ante on March 1, 2021. *Id.* From then on, Twitter announced that it would permanently suspend any user who received five or more infractions for violating the platform's COVID-19 policy.

Mark Changizi, Michael Senger, and Daniel Kotzin (collectively, Plaintiffs) are Twitter users who, by March 2020, began to use their accounts to question responses to the COVID-19

[1]Twitter is rebranding as "X." Consistent with the complaint, we continue to refer to the entity as "Twitter."

pandemic. This activity earned them many followers, but between April 2021 and March 2022, they suffered multiple temporary suspensions. Twitter suspended Changizi three times, Senger twice, and Kotzin twice for violating the platform's COVID-19 policy.[2] Plaintiffs also allege that, as early as May 2021, Twitter began to "de-boost" Changizi's tweets, meaning that his tweets appeared less often on users' Twitter feeds and that his replies to other posts were hidden.

According to the complaint, the Biden administration first entered the fray on May 5, 2021. That day, White House Press Secretary Jen Psaki stated that "[t]he President's view is that the major [social-media] platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19 vaccinations," and "there's more that needs to be done to ensure that this type of misinformation . . . is not going out to the American public." *Id.* at PageID 8.

Two months later, the Surgeon General released an advisory statement, the "July Advisory," related to COVID-19 misinformation. In it, he discussed the problems that COVID-19 misinformation had caused, identified social-media platforms as a source of this misinformation, and (according to Plaintiffs) "command[ed] technology platforms" to take several steps. *Id*. at PageID 9. This included collecting data on the spread of misinformation, improving misinformation monitoring, imposing clear consequences for accounts that repeatedly violate platform policies, and amplifying communications from COVID-19 subject-matter experts.

Later that day, the Surgeon General held a press conference with the Press Secretary and said that technology companies "have enabled misinformation to poison our information environment with little accountability" by "allow[ing] people who intentionally spread misinformation . . . to have extraordinary reach." *Id.* at PageID 10. On behalf of HHS, he asked social-media platforms "to operate with greater transparency and accountability[,] . . . monitor misinformation more closely[,] . . . [and] consistently take action against misinformation super spreaders on their platforms." *Id.* The Press Secretary added that the federal government had "increased disinformation research and tracking within the Surgeon General's office . . . [and

[2]One of Changizi's suspensions was not explicitly linked to a violation of Twitter's COVID-19 policy.

had] flagg[ed] problematic posts for Facebook that spread disinformation." *Id.* The administration had also "proposed changes . . . to social media platforms[,]" including recommendations that they (1) "publicly share the impact of misinformation on their platform[,]" (2) "create a robust enforcement strategy[,]" (3) "take faster action against harmful posts[,]" and (4) "promote quality information sources in their feed algorithm." *Id.* at PageID 10–11.

The next day, July 16, 2021, the Press Secretary clarified that the Biden administration was "in regular touch with social media platforms . . . about areas where we have concern [and] information that might be useful." *Id.* at PageID 11. This included engaging with platforms "to better understand" their enforcement policies. *Id.* President Biden later told reporters that social media platforms are "killing people" with COVID-19 misinformation. *Id.* at PageID 13. Several days later, *USA Today* reported that the "[t]he White House is assessing whether social media platforms are legally liable for misinformation spread on their platforms." *Id.* (citation omitted)

Six months later, in January 2022, the Surgeon General said, social media "platforms still have not stepped up to do the right thing" and control COVID-19 misinformation. *Id.* And on March 3, 2022, the Surgeon General issued a request for information (RFI) asking "technology platforms" to provide the Department of Human Health and Human Services with data concerning "sources of COVID-19 misinformation" by May 2, 2022. *Id.* at PageID 14. Technology platforms faced no penalty for declining to share information, and the RFI warned companies against submitting any "personally identifiable information" related to their users.[3]

Particularly relevant for this appeal are the dates of Plaintiffs' most recent disciplinary actions. On September 24, 2021, Kotzin received a 24-hour suspension for violating Twitter's COVID-19 policy. On December 18, 2021, Changizi's account was permanently suspended for violating Twitter's COVID-19 policy. It was reinstated nine days later, but remains "heavily censored" by the platform, according to Changizi. *Id.* at PageID 18–19. Several months later, Kotzin received his second temporary suspension, this time for seven days, on March 7, 2022, and Senger was permanently suspended on March 8, 2022.

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[3]Dep't of Health and Hum. Servs., Impact of Health Misinformation in the Digital Information Environment in the United States Throughout the COVID-19 Pandemic Request for Information (Mar. 10, 2022), https://www.regulations.gov/document/HHS-OASH-2022-0006-0001.

Plaintiffs sued HHS, seeking injunctive relief, declaratory relief, and nominal damages to remedy HHS's unlawful efforts to "instrumentalize[] Twitter" to "silenc[e] opinions that diverge from the White House's messaging on COVID-19." *Id.* at PageID 4, 30. The district court dismissed their complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[4] This appeal followed.

II.

Article III of the United States Constitution limits "[t]he judicial Power" of the federal courts to cases and controversies. U.S. Const. art. III, § 2. One prerequisite for a cognizable case or controversy "is that the parties have standing to bring it." *Hagy v. Demers & Adams*, 882 F.3d 616, 620 (6th Cir. 2018). As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing the "irreducible constitutional minimum" of standing: (1) they suffered an injury in fact, (2) caused by HHS, (3) that a judicial decision could redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). And when, as here, Plaintiffs' alleged injury "arises from the government's allegedly unlawful regulation . . . of *someone else*, much more is needed [to establish standing]." *Id.* at 562; *see also Allen v. Wright*, 468 U.S. 737, 757–58 (1984) (noting that it is "substantially more difficult" to establish standing when plaintiffs are not themselves the object of government action), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Plaintiffs allege several direct and indirect injuries flowing from HHS's alleged coercion, some of which are insufficiently particularized to establish injury-in-fact. But even if we assume that Plaintiffs have satisfied the injury-in-fact element of Article III standing through their allegation of threatened and actual censorship, *see California v. Texas*, 141 S. Ct. 2104, 2114 (2021), Plaintiffs fail to establish traceability.[5]

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[4]On review of a dismissal order for facial lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), we are limited to only the facts as alleged in the complaint. *See Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

[5]HHS filed a motion for the panel to take judicial notice of certain facts not in the record that may have mooted most, if not all, of Plaintiffs' claims and requested relief. But we have discretion to choose the order in which we address non-merits grounds for dismissing a suit. *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 536 (6th Cir. 2021) (citing *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007)). Because we affirm the district court's dismissal of Plaintiffs' complaint for lack of standing, we deny HHS's motion as moot.

Traceability looks to whether a defendant's actions have a causal connection to a plaintiff's injuries. *Lujan*, 504 U.S. at 560. Causation need not be proximate, so an indirect injury can support standing. *Lexmark Int'l, Inc.*, 572 U.S. at 134 n.6; *see United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 688-89 (1973). But "'an injury that results from [a] third party's voluntary and independent actions' does not establish traceability." *Turaani v. Wray*, 988 F.3d 313, 317 (6th Cir. 2021) (quoting *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017)). Thus, a plaintiff must show that the defendant's actions had a "determinative or coercive effect" on the third party such that the actions of the third party can be said to have been caused by the defendant. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also Turaani*, 988 F.3d at 316 (explaining "[a]n indirect theory of traceability requires that the government cajole, coerce, [or] command"). That the defendant is the federal government does not change this assessment. *See, e.g.*, *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989) ("Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.").

By this metric, Plaintiffs' complaint falls short. Plaintiffs maintain that the timing of Twitter's actions related to the RFI and the July Advisory as well as the public statements made by the Surgeon General, Press Secretary, and President Biden all support an inference that Twitter's disciplinary measures are state action attributable to HHS. But Plaintiffs fail to adduce facts demonstrating that the decisions Twitter made when it enforced its own COVID-19 policy did not result from its "broad and legitimate discretion" as an independent company. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989).

Consider first the timeline. According to the complaint, Twitter created and enforced its first COVID-19 policy long before the Biden Administration made any public statements and, in fact, before there was a Biden Administration. Indeed, Twitter first announced that it "would censor" COVID-19 misinformation in March 2020, but Plaintiffs' first-cited government "action" was a statement made on May 5, 2021, by Press Secretary Psaki. R1, PageID 8. And over the next year, Twitter "continued to ramp up efforts to quell the spread of 'misleading'

COVID-19 misinformation," by creating additional warnings for misleading tweets and removing tweets with false or misleading information about COVID-19 and COVID-19 vaccinations.[6] *Id.* Accepting Plaintiffs' allegation that Twitter "rarely suspended users" for spreading misleading information about COVID-19 before March 1, 2021, that was still two months before any alleged government action, and four months before HHS made its first statement. *See id.* at PageID 7–9. Thus, many of Twitter's changes to its own COVID-19 policy and enforcement policy preceded the government actions that purportedly coerced Twitter to censor Plaintiffs.

But Plaintiffs have a response to this timeline discrepancy—senior officials from the Trump or Biden Administrations engaged in "behind the scenes communications" at some undisclosed point before the first public statements. Appellant's Br. at 20. But lacking any details in the complaint of any purported communications, let alone specific allegations of the content of behind-the-scenes communication, this "bare assertion of conspiracy" alone cannot remedy their timeline discrepancy. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007). Plaintiffs reply that they "had no conceivable means of acquiring concrete information to corroborate [this] supposition[] without a discovery order." Appellant's Br. at 20. But federal courts will not "unlock the doors of discovery" for a fishing expedition based on a plaintiff's speculative assertions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

Because Plaintiffs have not adequately pleaded that HHS compelled Twitter's chosen course of conduct, we are left with a "highly attenuated chain of possibilities" that is too speculative to establish a traceable harm. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Therefore, the district court must be affirmed.

In reaching this conclusion, we acknowledge that a different result could be possible under different facts. This would be a different case if, for example, additional facts were alleged in the complaint that would allow a conclusion that, under the totality of the circumstances, Twitter's actions were compelled or coerced by the federal government. *See,*

[6]Twitter amended its policies on May 11, 2020, and again on December 16, 2020, by "broadening the definition [of harmful information] and explaining that [misleading COVID-19 information] could be labeled or even removed."

e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Skinner*, 489 U.S. at 614–15. But as befits this stage of the litigation, our review is confined to the allegations as they appear in the complaint. *See Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016). Plaintiffs' bare-bones request in a footnote that we take judicial notice of the existence of evidence that arose in cases not before us does not alter this standard.[7]

III.

For all these reasons we AFFIRM the district court's judgment.[8]

[7]Moreover, judicial notice is available only for facts that are not subject to "reasonable dispute." Fed. R. Evid. 201(b). While we could conceivably take judicial notice of the fact that an analogous case is ongoing in another circuit, Plaintiffs ask us to take judicial notice of the truth of assertions detailed in various judicial filings. *See Davis v. City of Clarksville*, 492 F. App'x 572, 578 (6th Cir. 2012). Judicial notice is not a work-around for Plaintiffs' untimely motion to amend their complaint, so we deny their footnote request. *See In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 467 (6th Cir. 2014).

[8]This opinion should be understood as dealing only with the particular case before us. The general concerns raised by the appellants here are not phantasmagorical, and on a different set of allegations might survive at the motion-to-dismiss stage. It may be difficult to draw a line between government actions where allegations might survive dismissal under the standard of actions that would "coerce or compel private actors" and those that are simply the policy or political statements of an administration. In some circumstances that question might require determination by a finder of fact.

On the other hand, we should be mindful that throughout history, in the course of ordinary political discourse, our government has made quite clear its displeasure with actions taken by private parties, whether President Kennedy's pointing out government actions against steel executives because of their economic decisions, The President's News Conference of April 11, 1962, 1 PUB. PAPERS 315–17 (Apr. 11, 1962), or President George Bush's press secretary telling reporters in the wake of 9/11 that "all Americans . . . need to watch what they say," White House Office of the Press Secretary, Press Briefing by Ari Fleischer (Sept. 26, 2001).

And, of course, the larger and more powerful government becomes, with the ability to affect more and more aspects of private life, the more porous the boundary between government speech and coercion might become.

In *Missouri v. Biden*, No. 23-30445, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), these issues were addressed on a more comprehensive scale, not based on actions with respect to discrete individual plaintiffs, as in the case we have before us. We express no opinion as to how these principles that we have laid out in this opinion would apply to different factual allegations.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3573

FILED
Sep 14, 2023
DEBORAH S. HUNT, Clerk

MARK CHANGIZI; MICHAEL P. SENGER; DANIEL KOTZIN,

Plaintiffs - Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES; VIVEK MURTHY, in his official capacity as U.S. Surgeon General; XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services,

Defendants - Appellees.

Before: BOGGS, WHITE, and BUSH, Circuit Judges.

JUDGMENT

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

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk