No. 23-___

IN THE
Supreme Court of the United States

MARK CHANGIZI, MICHAEL SENGER,
AND DANIEL KOTZIN,
Petitioners,
v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
VIVEK MURTHY, AND XAVIER BECERRA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are three individual users of a social-media platform who allege that federal officials violated their First Amendment rights by inducing the platform to suspend and censor them for making posts that criticize the government's public health policies.

The question presented is:

1. Whether Petitioners have Article III standing.

PARTIES TO THE PROCEEDING

Petitioners are Mark Changizi, Michael Senger, and Daniel Kotzin.

Respondents are the U.S. Department of Health and Human Services, Surgeon General Vivek Murthy, and Secretary of Health and Human Services Xavier Becerra, in their official capacities.

RELATED PROCEEDINGS

Changizi v. HHS, No. 22-3573 (6th Cir.). Dismissal of complaint affirmed for lack of standing September 14, 2023.

Changizi v. HHS, No. 2:22-cv-1776 (S.D. Ohio). Complaint dismissed for lack of standing and failure to state a claim May 5, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. Assuming the Court finds standing for the individual plaintiffs in *Murthy v. Missouri*, No. 23-411, it should grant this cert petition, vacate the decision below, and remand this case for further consideration on the standing question in light of this Court's ruling in *Murthy*. Or the Court should grant review to clarify the pleading standard necessary to allege a First Amendment injury by government for third-party censorship.

OPINIONS AND ORDERS BELOW

The panel opinion of the Sixth Circuit (App.1a) is reported at 82 F. 4th 492. The per curiam decision of the Sixth Circuit denying rehearing (App.76a) is not reported in the Federal Reporter, but is reported on Westlaw at 2023 WL 8947130. The opinion and order of the U.S. District Court for the Southern District of Ohio (App.18a) is reported at 602 F.Supp.3d 1031.

JURISDICTION

The Sixth Circuit entered judgment on September 27, 2023, and denied rehearing on December 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Relevant provisions of the Constitution and the Federal Rules of Civil Procedure are reproduced at App.78a-79a.

INTRODUCTION

Petitioners here allege the same First Amendment government censorship claims as the individual plaintiffs in *Murthy v. Missouri*, No. 23-411, *i.e.*, government officials engaged in non-public communications to induce a social-media platform to censor their speech. Whereas the Fifth Circuit held individual plaintiffs in *Murthy* had standing to bring their First Amendment claim against government officials, *Missouri v. Biden*, 83 F.4th 350, 366-71 (5th Cir. 2023), *cert. granted sub nom. Murthy v. Missouri*, 144 S.Ct. 7 (Mem.) (2023), the court below held that similarly situated Petitioners in this case lacked standing to sue the same officials for the same First Amendment-violating conduct.

The government agrees with Petitioners that the standing question in this case is identical to the questioned presented with respect to the individual plaintiffs in *Murthy*. Indeed, the government's Opening Brief (at 18) (Dec. 19, 2023) (*citing Changizi v. HHS*, 82 F.4th 492, 497 (2023)) and Reply Brief (at 3) (Mar. 4, 2024) (same) in *Murthy* cited the opinion below to support its argument that individual plaintiffs there lacked standing. Because this case is on all fours with *Murthy*, the Court should at least hold this petition until it decides *Murthy*.

The only entity that found any distinction between this case and *Murthy* is the court below. But that is only because it erroneously and inexplicably believed that *Murthy* did not involve individual plaintiffs, even though the Fifth Circuit's opinion in that case devoted many pages to analyzing the standing of individual plaintiffs. The Sixth Circuit's error did not end there.

It also misapplied the pleading standard needed to establish standing by requiring Petitioners here to supply non-public government communications that they could not have had access to before there was an opportunity for discovery. If that were the pleading standard, then no allegation of censorship based on non-public communications could ever survive a motion to dismiss. When copious non-public communications targeting social-media platforms came to light—through voluntary disclosure, congressional subpoena, and discovery in *Murthy*—the court below refused to consider it before ruling that Petitioners' allegations of non-public communications were implausible. The Sixth Circuit's ruling demonstrates considerable confusion regarding the pleading standard for claims of government-induced censorship by social-media platforms. The Court should grant this petition for a writ of certiorari to clarify this vital question of First Amendment law.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioners are three active users of Twitter (now formally known as "X" but still colloquially known as Twitter, which will be used here) who devoted their accounts to criticizing the government's Covid-19 policy. Complaint, RE 1, at 15. Starting in March and April 2021, Twitter began to suspend them for various lengths of time and otherwise to censor their posts, despite not having done so in the past. These adverse actions became more severe and frequent over the next year, and Petitioners began to self-censor to avoid them. Petitioners filed suit in March 2022, before *Murthy* was filed, alleging that federal officials

at the White House, the Department of Health and Human Services (HHS), and the Surgeon General's Office (OSG), were ultimately responsible for their suspensions and censoring. *See Id.*

Petitioners' Complaint cited public statements made by federal officials threatening social-media platforms with adverse consequences if they did not do more to censor what the government deemed to be "misinformation" about Covid-19 and policies addressing it. *Id.* at 15-22. The earliest of these public statements known to them was made by then-Press Secretary Jennifer Psaki on May 5, 2021. *Id.* at 8. The Complaint cited subsequent, similar public pronouncements by Psaki, the Surgeon General, and President Biden, culminating in a March 3, 2022 "Request for Information" (RFI) issued by the Office of the Surgeon General seeking information from social-media platforms and others about the spread of misinformation. *Id.* at 7-15. The Complaint alleged that the RFI was unlawful, especially in light of the government's *previous* and contemporaneous threats to punish noncompliant companies. *Id.* at 15.

In addition to these public statements starting in May 2021, the Complaint explained that "common sense dictates that [non-public] discussions of this nature had occurred previously. In all likelihood, the technology companies were aware of the administration's position on the matter" before May 2021. *Id.* at 20 n.17. Indeed, federal officials boasted of having prior, non-public discussions with social-media companies, including making successful requests to take down posts that those officials disfavored. *Id.* at 10-11.

The Complaint's allegations regarding earlier, non-public discussions were further corroborated by discovery in another case in which five individuals and two States sued federal officials for inducing social-media platforms (including Twitter) to censor posts. *Missouri v. Biden*, No. 22-cv-01213, 2023 WL 4335270, at *18–20 (W.D. La. July 4, 2023), *aff'd in rel. part.*, 83 F.4th 350 (5th Cir. Oct. 3, 2023), *cert. granted sub nom. Murthy v. Missouri*, 144 S.Ct. 7 (Mem.) (2023). Summarizing this evidence, the Fifth Circuit explained: "Officials from both [the White House and the Surgeon General's Office] began communicating with social-media companies—including Facebook, Twitter (now known as 'X'), YouTube, and Google—in early 2021. From the outset, that came with [non-public] requests to take down flagged content." *Missouri v. Biden*, 83 F.4th at 360. In addition, "the officials—via [non-public] meetings and emails—pressed the platforms to change their moderation policies." *Id.* at 361. The White House and Surgeon General later escalated their efforts to include public statements. *Id.* at 363. "The platforms responded with total compliance," including by "taking down content and deplatforming users they had not previously targeted." *Id.*

II. PROCEEDINGS BELOW

Petitioners filed suit in the United States District Court for the Southern District of Ohio on March 24, 2022, seeking injunctive and declaratory relief and alleged, *inter alia*, that Respondents induced Twitter to suspend Petitioners and censor their posts, in violation of their First Amendment rights. They filed a motion for preliminary injunction shortly thereafter. Respondents opposed and moved to dismiss on the

grounds that Petitioners lacked standing and failed to state a claim upon which relief could be granted. The district court granted the motion to dismiss on May 5, 2022, both for lack of standing and for failure to state a claim.

The Sixth Circuit affirmed the dismissal of Petitioners' case solely on standing grounds on September 14, 2023. It held that Petitioners failed to establish the traceability component of Article III standing because of a supposed "timeline discrepancy." App.11a-12a. The court acknowledged that "between April 2021 and March 2022, [Petitioners] suffered multiple temporary suspensions" from Twitter "for violating the platform's COVID-19 policy." App.4a. But it held that such suspensions and other censorship were not traceable to the government because the "first-cited government 'action' was a statement made on May 5, 2021," which occurred after the Petitioners began to experience censorship. App.11a.

The Sixth Circuit reasoned that federal officials could not be responsible for Twitter's censorship because "Twitter created and enforced its first COVID-19 policy long before the [officials] made any public statements … that purportedly coerced Twitter to censor Plaintiffs." App.11a-12a. It further held that Petitioners' allegation that "senior officials from the Trump or Biden Administrations engaged in 'behind the scenes communications' at some undisclosed point before the first public statements," was speculative, after refusing to take judicial notice of the widely reported existence of such communications. App.12a (quoting Appellants' Br. at 20).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO RESOLVE A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS

The court below held Petitioners lack standing to bring a First Amendment claim against federal officials for inducing a social-media platform to censor their posts. This holding directly conflicts with the Fifth Circuit's decision in *Missouri v. Biden* that similarly situated social-media users there have standing to bring the same First Amendment claim against the same officials for remarkably similar censorship conduct. 83 F.4th at 366-71.

The court below distinguished its holding from the Fifth Circuit in a footnote that mistakenly asserts that *Missouri* addressed government-induced social-media censorship "on a more comprehensive scale, not based on actions with respect to individual plaintiffs, as in the case we have before us." App.14a-15a n.8. But *Missouri v. Biden* explicitly addressed such censorship with respect to five individual plaintiffs:

> (1) Jayanta Bhattacharya and Martin Kulldorff, two epidemiologists who co-wrote the Great Barrington Declaration, an article criticizing COVID-19 lockdowns; (2) Jill Hines, an activist who spearheaded 'Reopen Louisiana'; (3) Aaron Kheriaty, a psychiatrist who opposed lockdowns and vaccine mandates; [and] (4) Jim Hoft, the owner of the Gateway Pundit, a once-deplatformed news site.

83 F.4th at 359 n.1.[1]

Like Petitioners here, the individual plaintiffs in *Missouri*, "had posts and stories removed or downgraded by the platforms" and alleged that "although the platforms stifled their speech, the government officials were the ones pulling the strings." *Id.* at 359. The Fifth Circuit devoted multiple pages to analyzing the standing of the "Individual Plaintiffs." *Id.* at 366-71. It held that the individuals suffered injuries-in-fact because their social-media posts were removed or downgraded and because their speech was chilled by government-induced censorship. *Id.* at 367-68. *Missouri* further held that the individuals "continue to face the very real and imminent threat of government-coerced social-media censorship." *Id.* at 369. These injuries are redressable by an order that "restrain[s] the officials from unlawfully interfering with the social-media companies' independent application of their content-moderation policies." *Id.* at 371.

Importantly, *Missouri* held that First Amendment injuries of "Individual Plaintiffs" in that case are "fairly traceable" to federal officials, including Respondents here. *Id.* at 370 (quoting *Dep't of Com. v. New York*, 139 S.Ct. 2551, 2565-66 (2019)). In doing so, the Fifth Circuit rejected the very same "matter of timing" traceability argument that the decision below adopted. *Id.*

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[1] NCLA represents, and undersigned counsel John J. Vecchione is Counsel of Record for, all individual Plaintiffs-Respondents in *Murthy* except Jim Hoft.

The officials in *Missouri* argued that "social-media platforms implemented [Covid-19-related] content-moderation policies in early 2020 and therefore the Biden Administration—which took office in January 2021—'could not be responsible for [any resulting] content moderation.'" *Id.* (second alteration in original) (citation omitted). The identical "timeline" argument carried the day in the decision below, where the Sixth Circuit agreed with Respondents that Petitioners' alleged injures here are not traceable to government officials because "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." App.11a.

Unlike the Sixth Circuit below, the Fifth Circuit recognized that the pre-existence of some moderation policies does not sever the connection between government coercion and the enforcement of those policies against individual plaintiffs. As it explained:

> [T]he fact that the Individual Plaintiffs' censorship can be traced back, at least in part, to third-party policies that pre-date the current presidential administration is irrelevant. The dispositive question is whether the Individual Plaintiffs' censorship can also be traced to government-coerced enforcement of those policies. We agree with the district court that it can be.

Missouri v. Biden, 83 F.4th at 370. Relying on the reasoning in *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2555-56 (2019), the Fifth Circuit emphasized "that social-media platforms have engaged in

censorship of certain viewpoints on key issues and that the government has engaged in a years-long pressure campaign designed to ensure that the censorship aligned with the government's preferred viewpoints." *Id*. It thus "credit[ed] the Individual Plaintiffs' theory that the social-media platforms' censorship decisions were likely attributable at least in part to the platforms' reluctance to risk the adverse legal or regulatory consequences that could result from a refusal to adhere to the government's directives." *Id*.

By contrast, the decision below refused to give Petitioners the same credit. Its analysis of traceability therefore irreconcilably conflicts with the Fifth Circuit's. Even Respondents must acknowledge that the two cases are not distinguishable. Indeed, the Solicitor General's brief in *Murthy* cites the Sixth Circuit decision below—and no other authority—to rebut the Fifth Circuit's traceability analysis. Pet. Br., *Murthy v. Missouri*, No. 23-411, at 18 (Dec. 19, 2023) (*citing Changizi v. HHS*, 82 F.4th 492, 497 (2023)). Review is warranted to resolve this intractable circuit split on an important question of federal standing law.

II. PETITIONERS RAISED FIRST AMENDMENT AND RELATED STANDING ISSUES AND HAVE A SIGNIFICANT INTEREST IN THEIR RESOLUTION

As the Solicitor General's brief in *Murthy v. Missouri* indicates, whether individual social-media users have standing to challenge government-induced censorship is an issue of exceptional importance. Petitioners have a significant stake in the Court's resolution of the question presented.

Throughout these proceedings, Petitioners have claimed that Respondents violated their First Amendment rights by inducing Twitter to suspend or otherwise take adverse actions against them for criticizing the government's Covid-19 policies. The district court held that Petitioners lack standing to bring this First Amendment censorship claim, and the appeals court agreed. *See* App.1a, 18a.

The decision below held that Petitioners' injuries are not traceable to government action because such injuries began before the government began to *publicly* direct social-media platforms to censor Covid-19 criticism. App. 11a-12a. The Solicitor General relies on that decision below to argue that the similarly situated individuals in *Murthy* likewise cannot trace adverse actions taken with respect to their social-media accounts to government action because "the content moderation [policies] that injured them began long before most of the government conduct at issue here." Pet. Br., *Murthy v. Missouri*, 23-411, at 18 (Dec. 19, 2023). A ruling rejecting the Solicitor General's and Sixth Circuit's traceability analysis and finding that individual social-media users have Article III standing would enable Petitioners to pursue their First Amendment claims against government censorship.

III. THE DECISION BELOW IS WRONG

Review is also warranted because the decision below is incorrect. Its determination that Plaintiffs lacked standing because they had "fail[ed] to establish traceability," App.9a, was based on the wrong motion-to-dismiss standard. The court below compounded this error by refusing to assess the plausibility of

Petitioners' allegations regarding the existence of non-public communications in light of the undisputed existence of such communications.

A. The Court Below Misapplied the Motion to Dismiss Standard

To survive 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). This is not akin to a "probability requirement," but demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (first quotation citing *Twombly*, 550 U.S. at 556). The same standard applies on a motion to dismiss for lack of standing. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "For standing purposes," courts must also "accept as valid the merits of [a party's] legal claims." *FEC v. Cruz*, 596 U.S. 289, 298 (2022).

The panel below failed to apply the appropriate standard when assessing Petitioners' allegations. It concluded that because the public statement of a government official demanding social-media censorship of Covid-19 "misinformation" was made on

May 5, 2021, and the complained-of Twitter suspensions began earlier, Petitioners did not "adequately plead[] that HHS compelled Twitter's chosen course of conduct[.]" App.13a.

While acknowledging that Petitioners have "a response to this timeline discrepancy," App.12a, the Court rejected their allegation that behind-the-scenes communications had taken place in the months leading up to the public censorship campaign, instead deeming the request for discovery for such communications to be a "fishing expedition." App.13a.

This is not like *Bell Atlantic Corp. v. Twombly*, where this Court held "a conclusory allegation of [a secret price-fixing] agreement at some unidentified point does not supply facts adequate" to survive a motion to dismiss. 550 U.S. 544, 557 (2007). Rather, it would be as though the companies in *Twombly* publicly announced a price-fixing scheme, and plaintiffs in that case merely alleged the existence of a non-public agreement that predates the public statements. That is not speculative; nor would it be a fishing expedition to seek the non-public agreement in discovery.

Moreover, federal officials' *own statements* make clear that it was more than likely (not to mention "plausible"), *see Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570)), that behind-the-scenes communications between the government and social-media companies took place prior to those officials' public announcements ratcheting up the pressure. 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. Complaint at 35. She even mentioned 12 individuals that federal officials had requested be removed from social media, and she demanded that companies take "faster action" against so-called harmful posts. *Id.* at 11. The following day, Psaki boasted that the White House was in regular touch with social-media companies and "work[ing] to engage with them[.]" *Id.* In other words, she admitted that federal officials previously had engaged in non-public discussions with social-media platforms to censor "misinformation."

It is not speculative to conclude that federal officials had been doing *precisely what they boasted they were doing*. Indeed, in most areas of the law, actors are deemed to have caused the intended effects of their actions. Here the intended effect of the government's actions was to silence messages like Petitioners'. Although Petitioners were not required to establish that such prior, non-public interactions were probable, *see Iqbal*, 556 U.S. at 678, they obviously were—given that Respondents openly confessed to them. Nor is it speculative to believe such interactions had predictable and intended effects: increased censorship of users who dissented from the government's viewpoint. *See Dep't of Commerce*, 139 S.Ct. at 2565–66. As reflected in oral argument in *Murthy*, the specific evidence, which was only unearthed by discovery, was denied Petitioners' here. Oral Arg. Tr., *Murthy* at 99-100.

The Sixth Circuit below (like the court below it) simply failed to draw factual inferences in Petitioners'

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 Com.*, 139 S.Ct. at 2566).

B. The Court Below Wrongly Ignored Facts that Corroborate Petitioners' Allegations

The court below also erred by assessing the plausibility of Petitioners' allegations without considering corroborating evidence that came to light in *Missouri v. Biden*, FOIA requests, and other ways. Such evidence demonstrates that—as Petitioners surmised—the White House, the CDC, and the Surgeon General's Office engaged in *extensive* behind-the-scenes communications about content moderation (censorship) with social-media companies well before May 2021, precisely as Petitioners alleged in their Complaint below. CDC's involvement began in 2020. *See Missouri v. Biden*, 2023 WL 4335270, at *18–20. Once President Biden assumed office in January of 2021, a concerted pressure campaign began against the social-media companies, exerted by the White House and Surgeon General's Office. *Id.* at *5–6. *Murthy* unearthed a huge number of efforts to silence people like Petitioners and the government's response is "you can't tell whether it was us or social media." But the government admitted in that case that the issues were not moot. Oral Arg. Tr., *Murthy* at 43. The blithe judicial assumption, without facts, that social media censored in the exact same way to the exact

same extent it would have done in the absence of government coercion or significant encouragement, flies in the face of the motion-to-dismiss standard (and indeed the factual record).

The refusal to take judicial notice of the above-described material was an error. According to the panel below, "judicial notice is available only for facts that are not subject to reasonable dispute … . 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." App.13-14a at n.7 (emphasis added) (internal citations and quotation marks omitted).

The panel misconstrued the request for judicial notice. Petitioner merely requested notice "for the fact of the documents' existence, and not for the truth of the matters asserted therein." *See Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 894 F.3d 235, 245 (6th Cir. 2018) (quoting *Passa v. City of Columbus*, 123 F.App'x 694, 697 (2005)). To be sure, the court below should not take judicial notice of facts found in a parallel proceeding as being true. *Id.* But it must take notice of the existence of records showing federal officials engaged in non-public communications with Twitter when assessing the plausibility of Petitioners' allegations that such communications took place. Faced with knowledge of records showing officials routinely engaged in non-public communications with Twitter, it is not enough for the Court to say that Petitioners' allegations regarding such communications are "not phantasmagorical." App.14a. Rather, the existence of

those records demonstrates Petitioners' allegations are plausible.

The widely reported and undisputed non-public emails, messages, and other communications corroborates Petitioners' allegation that federal officials began to induce Twitter to censor viewpoints they disfavored before those officials' first public statements in May 2021. While the Sixth Circuit need not accept the truth of the matters asserted in those documents, it must accept that the documents exist. Petitioners' request for discovery regarding similar documents in this case is not a "fishing expedition" when a party has so clearly shown that there are many, many fish to be found and where to find them.

CONCLUSION

For all of these reasons, this petition for a writ of certiorari should be granted. Or, assuming the Court finds standing for the individual plaintiffs in the *Murthy* case, it should grant this petition, vacate the decision below, and remand this case for further consideration on the standing question in light of this Court's ruling in *Murthy v. Missouri*.

Respectfully,

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