UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTIAN W. SANDVIG *et al.*,

Plaintiffs,

v.

LORETTA LYNCH, in her official capacity as Attorney General of the United States,

Defendant.

Case No. 1:16-cv-1368 (JDB)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, prohibits visiting any website in a manner that "exceeds authorized access." Courts and prosecutors have endowed this vague edict with a broad scope: as interpreted, the CFAA transforms every violation of a website's terms of service into a federal crime punishable by a fine or imprisonment. This case asks whether the government may constitutionally criminalize terms-of-service violations that are defined by private parties, including when those terms of service restrict constitutionally protected speech. The CFAA is unlike a traditional trespass law, because the internet is different from physical property and because the CFAA enables website owners to burden visitors' access with near limitless conditions on their behavior, including those that explicitly restrict their speech rights. The CFAA also enables companies to make criminal a wide swath of behavior that is commonplace on the internet, thus creating the risk of arbitrary and discriminatory enforcement.

The plaintiffs are academic researchers and journalists who wish to record or preserve information to which they are given access on the internet, to engage in misrepresentation where necessary to test websites' treatment of different users, and to publish the results of their research. This protected speech activity aims to determine whether websites run by private parties discriminate among users, including on the basis of race or gender, and is therefore of great public concern. The plaintiffs have a credible fear of prosecution for engaging in their protected research activities, because the Department of Justice manual for CFAA prosecutions states that terms-of-service violations can be CFAA violations. The government is trying to have it both ways by arguing that the plaintiffs' actions are not likely to subject them to prosecution in

order to deny them standing, without actually disavowing prosecution in the clear and unequivocal terms that suffice to lift the threat of prosecution.

The government's Motion to Dismiss should be denied for the following reasons: First, the plaintiffs have adequately pled that their activities are protected by the First Amendment, and indeed constitute high-value speech critical to holding online companies accountable. Second, they have standing to bring their claims because the CFAA chills the exercise of their free speech rights and because the government has not sufficiently disavowed prosecution. Third, the plaintiffs have adequately stated claims that the CFAA violates the free speech and petition guarantees of the First Amendment, that it is impermissibly vague in violation of the Due Process Clause, and that it is an unconstitutional delegation of legislative authority.

FACTUAL BACKGROUND

Plaintiffs Christian Sandvig, Karrie Karahalios, Alan Mislove, and Christo Wilson are university professors who, among other things, study race- and gender-based discrimination on housing and employment websites. Complaint, ECF No. 1 ("Compl.") ¶¶ 82, 107. Plaintiff Media Works is a non-profit journalism organization that plans to investigate the discriminatory effects of websites' use of big data and algorithms. *Id.* ¶ 130. The plaintiffs' research, which may inform the public about a new form of online discrimination, and could expose Fair Housing Act and Title VII violations, is becoming increasingly important as more people turn to websites to look for housing and employment. *Id.* ¶ 55–69. However, conducting their research places the plaintiffs in fear of criminal liability under the CFAA. *Id.* ¶ 35.

The CFAA provides that "[w]hoever . . .intentionally accesses a computer"—which includes any website that is accessible on the internet—"without authorization or exceeds authorized access, and thereby obtains . . . information from a protected computer" has

committed a crime, punishable by a one-year maximum prison sentence and a fine for a first offense, and up to ten years and a fine for a second or subsequent violation. 18 U.S.C. § 1030 (a)(2)(C) (the "Challenged Provision"); *see also* Compl. ¶¶ 24–26, 33. The Challenged Provision's prohibition on "exceed[ing] authorized access" makes it a crime to visit a website and violate the terms of service or terms of use (hereinafter "terms of service" or "ToS") established by that website. *Id.* ¶¶ 4, 174–75. The Challenged Provision contains no requirement of intent to cause harm, or of actual resulting harm, before imposing criminal penalties. *Id.* ¶ 27.

Many websites, including housing and employment websites, have ToS that prohibit the automated recording of information from their sites (known as "scraping") and the provision of false information to the website. *Id.* ¶¶ 70–71. One housing website even prohibits manually copying any content or information displayed on its website. *Id.* ¶ 71. A private website can set conditions on when a visitor may speak about information learned by visiting the website, even if that speech is made subsequent to visiting the site and in other forums. *Id.* ¶¶ 72–73. This restriction can be accomplished by including a non-disparagement clause in ToS, like those often used in form contracts governing the sale of consumer goods or services, or by requiring advance permission to visit the website for research purposes. *Id*. ¶ 72–73. Websites frequently reserve the right to, and do, change their ToS at any time and without notifying users. *Id*. ¶ 74. It is burdensome for internet users to locate and read the contents of the lengthy ToS to which they are subject for each and every website they visit, on each occasion. *Id*.

The use of the CFAA to prosecute private ToS violations is more than a theoretical possibility. *See id.* ¶ 31. The U.S. Department of Justice ("DOJ") has brought at least two CFAA prosecutions based on ToS violations. *Id*. (citing *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009); *United States v. Lowson*, No. CRIM. 10-114 KSH, 2010 WL 9552416 (D.N.J. Oct.

12, 2010)). In its manual for CFAA prosecutions, the DOJ advises prosecutors that it is "relatively easy to prove that a defendant had only limited authority to access a computer in cases where the defendant's access was limited by . . . terms of service [or] a website notice . . . ." Compl. ¶ 30 (citing Office of Legal Education, Executive Office for United States Attorneys, Department of Justice, Prosecuting Computer Crimes, http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf) [hereinafter "DOJ Manual"]. In addition, the DOJ Manual directs prosecutors to case law that stands for the proposition that violating a website's ToS can suffice to prove the "exceeds authorized access" element of the Challenged Provision. *Id.* ¶ 30; *see also* DOJ Manual, at 8–9.

Professors Sandvig, Karahalios, Mislove, and Wilson have designed and initiated studies that violate the ToS of the websites that they are investigating. Compl. ¶¶ 98, 126. Specifically, Professors Sandvig and Karahalios, whose relevant work focuses on discrimination on housing websites, are designing a computer program that will create fictitious profiles referred to as "sock puppets." *Id.* ¶¶ 88–92. These sock puppets provide information to websites by browsing the internet and mimicking the behavior of real individuals searching for housing, including by exhibiting behaviors associated with a particular race. *Id.* ¶ 91. Professors Sandvig and Karahalios will use automated "scraping" to record the properties shown to each sock puppet on the websites they visit. *Id.* ¶ 92. Professors Sandvig and Karahalios will then compare the displayed properties to determine whether the supposed race or gender of a user affects the number and location of the housing options shown. *Id.* ¶ 93.

Professors Mislove and Wilson, who are investigating discrimination on employment websites, are similarly relying on a study design that violates websites' ToS. *Id.* ¶¶ 112, 124. Specifically, they will use an automated computer program to gather baseline demographic data

about a large random sample of users on the website. *Id.* ¶¶ 114–116. They will provide information to their target websites by creating fictitious employer accounts to run queries for job seekers. *Id.* They will then "scrape," or automatically record, the resulting rankings of candidates, which they will use to assess the impact of demographics like race on the candidates' rankings. *Id.* ¶ 115–117. For the experimental phase of their study, Professors Mislove and Wilson will post fictitious job opportunities on the websites but will proactively prevent real people from applying for the fictitious jobs by using titles like "This is not a real job, do not apply." *Id.* ¶¶ 119–120. They will create sock puppet job-seeker accounts that vary by race, gender, and age, which will then be used to search for the fictitious jobs they will post on the websites, and allow them to compare the rankings of their sock puppet candidates to the baseline candidates' rankings and determine how specific user attributes such as race impact search rank. *Id.* ¶¶ 121–122. They will delete all fictitious jobs and accounts once the study is completed. *Id.* ¶ 120.

Media Works similarly wishes to violate certain website ToS in order to investigate online discrimination. *Id.* ¶ 131. Specifically, Media Works intends to use automated "scraping" to record, or preserve, information displayed on websites in order to inform the public about online business practices. *Id.* ¶¶ 131–32.

The plaintiffs wish to disseminate and publish the results of their research on target websites. *Id.* ¶ 144. These results may identify discrimination on specific websites, which could form the basis for legislative and administrative advocacy or litigation. *Id.* ¶ 167.

Although the plaintiffs do not intend to cause harm to any target websites' operations, and any harm that may result from their research would be de minimis, they face potential criminal liability under the CFAA for violating ToS. *Id.* ¶¶ 95–96, 125–126. To complete their

research plans, the plaintiffs must violate ToS prohibitions against automated methods of recording or preserving information, providing false information, and restrictions on publication stemming from non-disparagement terms or limitations on using a website for research purposes. *Id.* ¶¶ 71–73, 95, 124, 131. The plaintiffs fear prosecution under the Challenged Provision for engaging in research they believe to be socially valuable. *Id.* ¶¶ 97–99, 126, 132. Third parties who use the internet are also chilled from engaging in constitutionally protected speech when prohibited by website ToS. *Id.* ¶ 149.

LEGAL STANDARD

When reviewing a motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1), a court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). In addition to the complaint, a court may also consider "undisputed facts evidenced in the record." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

Similarly, in evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "the Court must construe the complaint 'in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged.'" *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)). In other words, the court must accept all factual allegations in the complaint as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Sissel v. U.S. Dep't of Health and Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014). "To survive a motion to dismiss, a complaint must have 'facial plausibility,' meaning it must 'plead[ ] factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged,'" *Hettinga*, 677 F.3d at 476 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (alteration in original), but a motion to dismiss under Rule 12(b)(6) does not test a plaintiff's ultimate likelihood of success on the merits, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Brewer v. District of Columbia*, 891 F.Supp.2d 126, 130 (D.D.C. 2012). The government does not dispute the plausibility of any of the plaintiffs' factual allegations in the instant motion. *See generally* Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, ECF No. 10–1 ("Def. Br.").

ARGUMENT

The Challenged Provision, as applied to the plaintiffs, restricts their constitutionally protected speech and triggers First Amendment scrutiny. The plaintiffs therefore have standing to bring their claims, because they have alleged that they fear prosecution for engaging in speech that violates the Challenged Provision and because the government disavowal of prosecution is not sufficient. Lastly, the plaintiffs have adequately stated claims to relief under the First Amendment, the Due Process Clause, and the non-delegation doctrine.

I. The Challenged Provision as applied to the plaintiffs restricts their speech, triggering First Amendment scrutiny.

The plaintiffs intend to engage in several activities that are protected by the First Amendment. These include: recording or preserving information that is otherwise available to them; engaging in false speech and misrepresentation of high social value, for the purpose of meaningfully testing for discrimination; and subsequently publishing research results based on knowledge gained from visiting a website. Compl. ¶¶ 70–74, 135.

The Challenged Provision operates in an unusual manner: the CFAA's "exceeds authorized access" language does not on its face prohibit visiting a website and recording the

information that is made available, or providing false information to a website owner, or publishing anything. But the content of the Challenged Provision's criminal prohibitions is supplied by website terms of service, and terms of service can directly target speech. Such a scheme is no less subject to scrutiny under the First Amendment than is a direct governmental prohibition on the speech at issue. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (holding, in civil libel case, that the First Amendment reaches private attempts to restrict speech under the aegis of government authority); *cf. Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (holding that the First Amendment prohibits government from incorporating private reaction to speech into regulation of speech). Given that judicial enforcement of common law libel claims is sufficient state action to bring the First Amendment into play, it cannot be seriously argued that the First Amendment does not apply where the state deploys the power of criminal law to enforce private restrictions on speech. Moreover, the First Amendment applies as robustly on the internet as it does elsewhere. *See generally Reno v. ACLU*, 521 U.S. 844 (1997) [hereinafter "*Reno*"].

The government bases its arguments on only *one* of the protected activities the plaintiffs wish to conduct: namely, recording or preserving by automated methods information to which they are otherwise given access. *See* Def. Br. at 21–22. But the plaintiffs have *also* alleged that they wish to communicate false information about themselves to websites in order to create artificial "tester" profiles that vary on the basis of, for example, race or gender, and that they wish to subsequently speak about or publish the results of their research. Compl. ¶¶ 70–74, 91, 114–115, 119–123, 131–32. Each of these activities is protected by the First Amendment, as described below, and each may be prohibited by website terms of service and thereby rendered criminal by the Challenged Provision.

A. The Challenged Provision is not a traditional trespass law.

The rights claimed by the plaintiffs are simply not equivalent to a right to trespass on private real estate, because the internet is not the equivalent of physical private property. The internet is open to the public in a way that private property is not, and viewing a website by accessing it on the internet through typing in a website address is not analogous to entering a physical space owned by a private party. *See* Orin S. Kerr, *Norms of Computer Trespass*, 166 Colum. L. Rev. 1143, 1162 (2016) ("If the [website] address entered is correct, the web server will respond with data that the user's browser then reassembles into a webpage. This process is open to all. The computer doesn't care who drops by. . . . The open nature of the Web is no accident; it is a fundamental part of the Web's technological design."). The Supreme Court has at times treated the internet as a medium of communication, like a newspaper or a TV station, *see Reno*, 521 U.S. 844, 852–53, which is completely unlike a physical piece of property. It is self-evident that a newspaper could not impose the kinds of conditions on its readers that many websites try to impose—such as injunctions that readers cannot repeat what they read, or comment on the articles subsequent to reading them—with the backing of a federal criminal law enforcing those conditions. While the analogy to a newspaper may not cover every use of a website (such as communicating with a website), it demonstrates that the analogy to property is also inaccurate. In this respect, the CFAA as a regulation of the internet is sui generis, and not subject to the flawed property analogy the government invokes. *See id*. at 851 (describing the internet as presenting "a wide variety of communication and information retrieval methods" that are "constantly evolving and difficult to categorize precisely" and which, "[t]aken together, constitute a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world").

Physical trespass is also an inapt analogy for every operation of the Challenged Provision because norms of trespass do not apply when, subsequent to leaving a property, a visitor violates a speech-restrictive condition on entry on that property. The Challenged Provision allows for conditions that are limitless in time and space, given that terms of service may govern behavior occurring subsequent to the website visit and in other physical or online spaces. It is as if a restaurant owner were to impose a condition on diners that no one can enter and dine with the intention of writing a restaurant review. Even if the police are called to remove the food critic discovered halfway through a meal, as part of enforcing a general trespass law, such enforcement would not typically extend to criminally prosecuting the food critic for trespass for later publishing a review. Any criminal prosecution triggered solely by such subsequent *publication*, rather than merely redressing the trespass itself, would be subject to First Amendment scrutiny. *See Smith v. Daily Mail Pub., Co.*, 443 U.S. 97 (1979) (applying the highest scrutiny before striking down a statute prohibiting disclosure of the name of an alleged juvenile assailant when the information had been lawfully obtained); *Houchins v. KQED, Inc.*, 438 U.S. 1, 9–10 (1978) (holding that the press has no special right of access to a state jail to gather information but distinguishing cases establishing a "right to publish information which has been obtained"). If the Challenged Provision operates in such a manner that subsequent publication *renders* the prior acquisition of information unlawful even though it was lawfully obtained at the time, such a scheme should be no less subject to First Amendment scrutiny.

B. The Challenged Provision implicates the right to record or preserve information on the internet.

The Challenged Provision, as applied to the plaintiffs, is a prohibition on recording or preserving information on the internet, and it therefore triggers First Amendment scrutiny. As a

baseline matter, the Supreme Court has held that a government restriction on a medium of communication implicates First Amendment rights. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that motion pictures are a protected form of speech). In *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), the Seventh Circuit considered a statute prohibiting audio recording unless all parties to the recording consented. The court observed that "[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are included within" the First Amendment. *Id*. at 595 (citations and quotation marks omitted).

Critically, courts have held that the predicate act of making a recording is protected as well. *Alvarez* noted that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording" because "the right to publish . . . an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected." *Alvarez*, 679 F.3d at 595; *see also id.* at 596 ("Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording."). The Seventh Circuit relied on the principle articulated in *Citizens United v. FEC* that "laws enacted to control or suppress speech may operate at different points in the speech process." *Alvarez*, 679 F.3d at 596 (quoting 130 S. Ct. 876, 896 (2010)). The *Alvarez* court went on to hold that the law could not be enforced against individuals recording police officers engaged in their duties in public. 679 F.3d at 596. In *Gericke v. Begin*, the First Circuit recognized that "it is firmly established that the First Amendment protects 'a range of conduct' surrounding the gathering and dissemination of information" before concluding the right to videotape police officers in public was clearly

established. 753 F.3d 1, 7 (1st Cir. 2014) (citing *Glik v. Cunliffe*, 655 F.3d 78, 82 (1st Cir. 2011)); *see also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) ("[W]e have never seriously questioned that the processes of writing words down on paper [and like activities] . . . are purely expressive activities entitled to full First Amendment protection").

Other cases have recognized the right to record—separate from any dissemination of information—as an activity protected by the First Amendment in a variety of contexts. *See, e.g.*, *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (noting a "First Amendment right to film matters of public interest"); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94 (D. Mass. 2002) (recognizing "constitutionally protected right to record matters of public interest"); *Cirelli v. Town of Johnston Sch. Dist.*, 897 F. Supp. 663, 665–68 (D.R.I. 1995) (First Amendment protected teacher's use of video camera to record school environmental conditions and possible health and safety violations, noting health and safety of public school staff and students is "matter of public concern"); *Connell v. Town of Hudson*, 733 F. Supp. 465, 473 (D.N.H. 1990) (upholding freelance reporter's First Amendment right to photograph vehicle accident scene "from positions that did not interfere with police activity"); *Lambert v. Polk Cty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (noting "First Amendment rights to make and display videotapes of events" such as street fight at issue). Indeed, were the government simply to outlaw the use of scraping to record information on the internet altogether, it would undoubtedly implicate First Amendment rights the same way that a tax on ink and paper "burden[s] rights protected by the First Amendment." *See Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S.

575, 582 (1983). For the same reason, a law that prohibits certain instances of scraping implicates First Amendment rights.

In this case, the plaintiffs do not assert a right to "collect corporate data" where that data would otherwise be unavailable to them, or a general "right to gather information," as the government asserts. Def. Br. at 12, 22. The plaintiffs assert that, after being given access to information by visiting a publicly accessible website, they are under a specific prohibition not to record or retain the information through automated means. Compl. ¶¶ 71–73. In some instances, they may even be prohibited by website terms of service from manually recording any of the information they see, which presumably means they are prohibited from copying any portion of text—either digitally or by hand—that appears on the site, including the terms of service themselves. *Id*. ¶ 71. The restriction is targeted at the speech activity itself. The plaintiffs' claim is thus unlike that made in *Zemel v. Rusk*, 381 U.S. 1 (1965), contrary to the government's argument, *see* Def. Br. at 22. *Zemel* involved a claim that the First Amendment was implicated in the refusal to issue a passport, because of a right to travel abroad to gather information firsthand. The restriction in that case was not targeted at speech, such as a direct restriction on reporting about information learned abroad: the "decreased data flow" was an incidental effect of the restriction on travel. *See Zemel*, 381 U.S. at 17; *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

Similarly, *Houchins*, in which the Supreme Court held that the press had no special "right of access" to inspect and photograph conditions in a jail beyond the rights accorded the general public, is inapposite. 438 U.S. at 16. *Houchins* emphasized that it was dealing only with whether

the press had a "special privilege of access" to government property to *acquire* particular information, and the Court took care to distinguish its holding from prior precedents that dealt with "the freedom of the media to *communicate* information once it is obtained." *Id*. at 9. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 841 (6th Cir. 2000), was also about access to government information and held that an individual was not entitled to public records in electronic form as opposed to hard copy, so long as the information sought was made available as required by the First Amendment. The plaintiffs here are not asserting a right to particular information that is not being provided to them, but rather the right to record or preserve the information that is made available to them.

The government's invocation of *United States v. O'Brien*, 391 U.S. 367, 376 (1968), to suggest that anything but searching First Amendment scrutiny should apply, is also inapt. *See* Def. Br. at 21. That case concerned restrictions on conduct with "incidental limitations" on First Amendment freedoms, because the conduct might be expressive in certain circumstances, *id*. at 376–77, whereas here the plaintiffs assert that, as applied to them, the Challenged Provision prohibits conduct that is *inherently* expressive—recording information—and therefore protected by the First Amendment.

C. The Challenged Provision implicates the right to engage in false speech or misrepresentation.

The Challenged Provision, as applied to the plaintiffs, constitutes a prohibition on engaging in high-value false speech or misrepresentation, which is speech protected by the First Amendment. The plaintiffs have alleged that, as part of their research activities, they need to provide false information or misrepresentations to websites in order to test whether they discriminate on the basis of, for example, race or gender. Compl. ¶¶ 86, 118–119. The false

speech or misrepresentations the plaintiffs wish to deploy are akin to the long-running, government- and court-approved practice of "paired testing" in the offline world to enforce civil rights laws. In paired testing of housing, testers of different races may attempt to secure the same rental property; in employment, one technique is to submit for a job opening identical resumes that vary only with respect to a salient characteristic, such as gender. Compl. ¶ 50; *see also* 42 U.S.C. §§ 3616a (b)(1), (b)(2)(A), (c) (creating "Fair Housing Initiatives Program" to fund "testing and other investigative activities" by private nonprofit groups). When terms of service prohibit engaging in false speech or misrepresentation, such as through requirements that website users provide only truthful information, *see* Compl. ¶ 71, the Challenged Provision renders such speech criminal.

False speech and misrepresentation enjoy First Amendment protection. In *United States v. Alvarez*, 132 S. Ct. 2537 (2012) [hereinafter "*United States v. Alvarez*"], the Supreme Court struck down the Stolen Valor Act, a federal statute that criminalized lying about having received military decorations or medals. Six justices agreed that falsity alone will not deprive noncommercial speech of First Amendment protection, and a plurality applied strict scrutiny to the law. 132 S. Ct. at 2544–45 (plurality opinion); *id*. at 2554–55 (Breyer, J., concurring). The justices split on whether strict or intermediate scrutiny should apply to restrictions on false speech, with certain factors playing a role, including the purpose of the speech (such as whether it was for material gain or to engage in fraud or defamation), the social value of the speech, and any cognizable harms resulting from such speech. *See, e.g.*, *id.* at 2547 (considering that the Stolen Valor Act applied "entirely without regard to whether the lie was made for the purpose of material gain") (plurality opinion); *id.* at 2553 (applying only intermediate scrutiny because of the low value of the speech at issue, but acknowledging that in some cases, "[f]alse factual

statements can serve useful human objectives") (Breyer, J., concurring); *id*. at 2554–55 (surveying contexts in which restrictions on false and misleading speech are permissible because they "tend to be narrower" and lead to cognizable harms, including fraud, defamation, intentional infliction of emotional distress, perjury, lying to a government official, and trademark infringement).

While the *United States v. Alvarez* concurrence did not articulate a bright-line rule governing when to apply intermediate versus strict scrutiny in evaluating restrictions on false speech, courts have focused on two factors: (1) the value of the expression at issue and (2) the likelihood that the targeted expression will result in significant harms. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014) (applying strict scrutiny to Minnesota Fair Campaign Practices Act because political speech "occupies the core of the protection afforded by the First Amendment"); *United States v. Williams*, 690 F.3d 1056, 1063–64 (8th Cir. 2012) (upholding conviction for making false bomb threats because charged offenses "criminalize only those lies that are particularly likely to produce harm" and do not chill valuable speech, without deciding level of scrutiny); *United States v. Chappell*, 691 F.3d 388, 392, 395–96 (4th Cir. 2012) (upholding ban on impersonating a law enforcement officer because it targeted dangerous conduct and was unlikely to chill valuable communication). In *Animal Legal Defense Fund v. Otter*, 118 F. Supp. 3d 1195, 1203 (D. Idaho 2015) (appeal pending), the court found that a so-called "ag-gag" law criminalizing misrepresentations made in the course of gaining access to an agricultural facility—intended to prevent undercover investigators from reporting on such facilities—covered protected speech. The court considered that the purpose of any lies by plaintiffs would be "to expose any abuse or other bad practices" and not "for the purpose of material gain." *Id*. at 1204. Applying strict scrutiny to the law, the court further noted that "the

lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest." *Id*.

The plaintiffs here have alleged that the purpose of their false speech or misrepresentations is to engage in research of great public concern and that their activities will not cause operational damage to the target websites. Compl. ¶ 136.[1] Given the lack of intended or actual material harm, and the high social value of the plaintiffs' speech, the Challenged Provision as applied to them restricts their First Amendment rights.

D. The Challenged Provision implicates the right to publish.

The plaintiffs allege that they wish to publish the results of their research about websites even though terms of service may impose restrictions on their ability to do so. Some of their target websites have terms of service that require advance permission to visit for research purposes (thus indirectly limiting the publication of research that was not pre-cleared), while others may have non-disparagement clauses that restrict the substance of what can be subsequently published. Compl. ¶¶ 72–73. The right to publish and disseminate truthful information, particularly truthful information of public concern, "implicates the core purposes of the First Amendment." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (noting that a prohibition on the disclosure of information is a speech restriction, because "if the acts of disclosing and publishing information do not constitute speech, it is hard to imagine what does fall within that

[1] To the extent any target websites may face public criticism as a result of the publication of truthful research findings, such publicity harms are not cognizable as material harms under the *United States v. Alvarez* analysis in light of the First Amendment interests at stake. *See Animal Legal Def. Fund*, 118 F. Supp. 3d at 1204. *See also infra* Part III.

category" (internal quotation marks omitted)); *see also Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (holding that a statute criminalizing the disclosure of confidential judicial proceedings could not be applied against a newspaper for publishing an article containing "accurate factual information" that "clearly served . . . interests in public scrutiny").

Notably, the restriction imposed by the Challenged Provision on the right to publish is not about how much information the plaintiffs are entitled to access, unlike the restriction at issue in *Houchins*. Indeed, the Supreme Court in *Houchins* particularly noted that while the press had no special right of access to a jail, those "[e]ditors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire." 438 U.S. at 14. But in this case, the plaintiffs may *not* decide what to publish about the information they already have, because publication in violation of a website's terms of service is criminally prohibited. To the extent the Challenged Provision incorporates terms of service that prohibit subsequent publication, it operates as a classic prior restraint of the kind rejected in *Near v. Minnesota*, 283 U.S. 697 (1931). The Challenged Provision thus operates as a government restriction on the plaintiffs' First Amendment rights to publish their research findings.

II. The plaintiffs have standing to raise their claims.

In a pre-enforcement challenge claiming that a statute abridges First Amendment rights, plaintiffs can establish the requisite "injury-in-fact" required for Article III standing "where [they] allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)). The plaintiffs have standing to raise their claims because they have alleged that they intend to engage in

behavior that violates the Challenged Provision, and because the government's half-hearted disavowal of prosecution is not sufficient to deprive them of standing.

A. The plaintiffs have alleged that they intend to engage in constitutionally protected speech that violates the Challenged Provision.

The plaintiffs allege that they intend to violate website terms of service during the course of conducting research on whether websites engage in discrimination. To have standing to raise a First Amendment claim, in particular, plaintiffs need do no more than allege that their actions are constitutionally protected, and that the challenged law would prohibit or chill them from engaging in those actions. *See Driehaus*, 134 S. Ct. at 2342. For the reasons discussed above, the plaintiffs have adequately pled that their activities are constitutionally protected by the First Amendment. *See supra* Part I.

It is not necessary for a plaintiff to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The required "credible threat of prosecution," *Driehaus*, 134 S. Ct. at 2342 (internal quotation marks omitted), exists for laws arguably burdening expressive rights so long as there is "'only a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law.'" *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016) (pet'n for reh'g en banc pending) (quoting *A.N.S.W.E.R. v. D.C.*, 589 F.3d 433, 435 (D.C. Cir. 2009)); *see also N.H.R.L.P.A.C. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) (the "credible threat of prosecution" standard is "quite forgiving"). With those two elements, a plaintiff has alleged more than a "subjective chill." *A.N.S.W.E.R.*, 589 F.3d at 435 (internal quotation marks omitted). In this case, the existence of the DOJ Manual, which states that it is "relatively easy to prove that a

defendant had only limited authority to access a computer in cases where the defendant's access was limited by restrictions that were memorialized in writing, such as terms of service [or] a website notice . . . ," Compl. ¶ 30, provides the plaintiffs with a reason to fear prosecution.

Nor do plaintiffs lose standing simply because defendants offer during litigation a different interpretation of what the challenged law requires. In *Virginia v. American Booksellers Association*, the Supreme Court held that, for standing purposes, the plaintiffs had shown the requisite "'threatened or actual injury'" because the "plaintiffs, . . . *if their interpretation of the statute is correct*, will have to take significant and costly compliance measures or risk criminal prosecution." 484 U.S. 383, 392 (1988) (emphasis added). Similarly, the district court's standing analysis in *ACLU v. Reno*—an analysis that the Third Circuit explicitly relied on in review and which the Supreme Court did not subsequently disturb—noted that plaintiffs could bring a First Amendment challenge to a federal statute because they "offer[ed] an interpretation of the statute which is not unreasonable," and that, if they were correct, they could "potentially" face prosecution. *See* 31 F. Supp. 2d 473, 481 (E.D. Pa. 1999); *see also ACLU v. Reno*, 217 F.3d 162, 171 (3d Cir. 2000) (agreeing with district court's standing analysis), *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) [hereinafter "*Ashcroft*"].

Courts are especially lenient in evaluating standing when First Amendment claims are at stake. The D.C. Circuit has emphasized that "[i]n order 'to avoid the chilling effects that come from unnecessarily expansive proscriptions on speech,' 'courts have shown special solicitude' to such claims." *United States Telecom Ass'n*, 825 F.3d at 740. Indeed, "pre-enforcement review is at its peak when claims are rooted in the First Amendment." *New York Republican State Committee v. SEC*, 799 F.3d 1126, 1135 (D.C. Cir. 2015). Furthermore, "in the First Amendment context, litigants . . . are permitted to challenge a statute not because their own rights of free

expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Am. Booksellers Ass'n*, 484 U.S. at 392–93 (internal quotation marks omitted). In *American Booksellers*, the Supreme Court, as part of its standing analysis, considered that "the alleged danger of [the] statute [was] in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.* at 393; *see also* Compl. ¶¶ 139, 149 (alleging that third parties may alter research plans or refrain from conducting them to avoid violating website terms of service, and that internet users may refrain from speech for the same reason).

The government articulates some additional conditions on when it says it would prosecute under the law, *see* Def. Br. at 2, but these statements of counsel in a brief are not binding on federal prosecutors. In any event, the relevant inquiry is whether the plaintiffs intend to violate the law as they reasonably fear it will be interpreted. Here, the plaintiffs allege that the Challenged Provision has been interpreted by courts, and by the federal government, to prohibit violating the terms of service of websites. Compl. ¶¶ 29–32. The government acknowledges that the "scope of the term[] . . . 'exceeds authorized access' has been the subject of extensive litigation," Def. Br. at 4, and that the "D.C. Circuit has not ruled on the issue," *id*. at 5. The plaintiffs' interpretation of the statute is further supported by the DOJ Manual stating that "restrictions that were memorialized in writing, such as terms of service [or] a website notice . . ." can be a basis for liability. Compl. ¶ 30.

The plaintiffs have alleged that they intend to violate website terms of service that 1) prohibit recording or preserving information, including by automated methods; 2) prohibit providing false information; 3) do not allow use of the website for research purposes without advance permission (a restriction that could preclude subsequent publication based on

information learned from visiting the website); and 4) prohibit disparagement of the website or business. Compl. ¶¶ 70–74, 144–47. The plaintiffs have therefore alleged that they intend to engage in a course of conduct that directly contravenes the Challenged Provision, thereby subjecting them to the risk of prosecution. As discussed below, the government's non-binding disavowal of prosecution is not sufficient to strip the plaintiffs of standing. *See infra* Part II.B.

The government attempts to discount the chilling effect of the Challenged Provision by arguing against the merits of the plaintiffs' claims that research activities on the internet are protected by the First Amendment. *See* Def. Br. at 11 (arguing that the "First Amendment does not create an *unrestrained* right to acquire information for the purpose of subsequently conveying it"). For purposes of standing, a plaintiff does not need to prove the ultimate merits of a claim of constitutional injury; merely plausibly alleging that their conduct is "affected with a constitutional interest" is sufficient. *See Babbitt*, 442 U.S. at 298 (emphasis added); *see also Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008) ("In any event, the Government is mixing a merits question into the standing analysis, which is improper. In considering standing, we must assume the merits in favor of the party invoking our jurisdiction."). Nonetheless, in this case, the plaintiffs have adequately pled that the Challenged Provision restricts their speech rights—including recording or preserving information that is made available to them, engaging in false speech in order to conduct meaningful tests of whether certain websites discriminate, and disseminating or publishing information about certain websites—and triggers First Amendment scrutiny. *See supra* Part I.

They have also adequately stated claims to relief on the merits under the First Amendment, the Due Process Clause, and for an unconstitutional delegation. *See infra* Part III.[2]

B. The plaintiffs have standing because the government has not sufficiently disavowed prosecution for terms-of-service violations.

The government argues that the plaintiffs do not have standing because they can point to no enforcement action against them. Def. Br. at 9. Yet there is no requirement that the plaintiffs show a credible threat of "imminent" prosecution to have standing. Def. Br. at 14. The relevant standard in the D.C. Circuit, as the government implicitly acknowledges, comes from *A.N.S.W.E.R.*, 589 F.3d at 435, which addressed a pre-enforcement challenge to a statute burdening expressive rights. *A.N.S.W.E.R.* itself distinguishes two earlier D.C. Circuit decisions discussing pre-enforcement challenges to statutes not alleged to burden expressive rights. *Id.* (discussing *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997) and *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005)). Under *A.N.S.W.E.R.*, while "imminent threats [of prosecution] commonly suffice" to give plaintiffs standing, they are not strictly necessary; where expressive rights are burdened, standing requires "only a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law." 589 F.3d at 435 (citation and internal quotation marks omitted).

[2] The plaintiffs have standing to raise their Due Process Clause and unconstitutional delegation claims for the same reasons they have standing to raise their First Amendment claims. The claimed injury-in-fact is identical: the plaintiffs face a credible threat of prosecution under the Challenged Provision—which they contend violates the First Amendment and the Due Process Clause, and is an unconstitutional delegation—for engaging in research activities that they plausibly allege are constitutionally protected. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 15–16 (2010) (finding standing for First and Fifth Amendment claims when injury was the credible threat of prosecution for violating the law at issue).

Although the government can disavow prosecution of plaintiffs so clearly that the disavowal defeats the default expectation of enforcement, *see Johnson v. D.C.*, 71 F. Supp. 3d 155, 160 (D.D.C. 2014), the government's statements here fall short—especially against the backdrop of recent enforcement of the Challenged Provision and the DOJ Manual currently in force describing how to bring terms-of-service prosecutions. *See Babbitt*, 442 U.S. at 302 (credible fear of prosecution exists although statute has never been enforced in certain circumstances, if government "has not disavowed any intention of invoking the criminal penalty provision" in those circumstances).

1. The plaintiffs have an objectively reasonable fear of prosecution where the DOJ Manual confirms their interpretation of the Challenged Provision and the government has recently brought terms-of-service prosecutions.

Although plaintiffs alleging an intent to violate a statute burdening their expressive rights may rely on the "conventional background expectation" of enforcement, *United States Telecom Ass'n*, 825 F.3d at 739, the plaintiffs here do not rely on that expectation alone to demonstrate the risk of prosecution. They allege that the Department of Justice's manual for prosecuting computer crimes specifically instructs prosecutors on how to bring charges under the Challenged Provision based on terms-of-service violations. Compl. ¶ 30. The DOJ Manual articulates no restrictions beyond statutory requirements on when misdemeanor prosecutions under 18 U.S.C. § 1030(a)(2)(C) are permitted or desirable. DOJ Manual, at 16–22. The government does not suggest that the DOJ Manual is out-of-date or no longer in circulation, nor does it mention plans to alter the DOJ Manual to discourage prosecutions under the Challenged Provision except in certain narrow circumstances identified in its brief. *See* Def. Br. at 2. In fact, the government's brief does not mention the DOJ Manual at all.

Instead, the government's brief seeks to distinguish the two recent prosecutions that it has pursued under the Challenged Provision based on terms-of-service violations. Def. Br. at 14–17; Compl. ¶ 31. But the government points to no official policy or statement in the DOJ Manual distinguishing those prosecutions from the kind the plaintiffs fear. Regardless of the circumstances of those prosecutions, that they were brought at all makes clear that the statute is not "moribund or of purely 'historical curiosity.'" *Johnson*, 71 F. Supp. 3d at 160 (quoting *Navegar*, 103 F.3d at 1000). The *Johnson* court found that the "presumption of enforcement" was overcome where affidavits proved that the statute had "gone unenforced for nearly four decades" and likely had never been enforced "*at all*." 71 F. Supp. 3d at 161. Because the government's statements and actions outside of this case make clear that terms-of-service prosecutions under the Challenged Provision are very much possible, the government would have to forcefully disavow prosecution here in order to render the plaintiffs' fear of prosecution unreasonable. *See Unity08 v. FEC*, 583 F. Supp. 2d 50, 59 (D.D.C. 2008), *rev'd on other grounds*, 596 F.3d 861 (D.C. Cir. 2010) ("A credible threat of prosecution exists where a plaintiff's desired course of action is covered by a statute that is generally enforced.")

2. The government has not disavowed prosecution in a manner sufficient to negate the credible threat of prosecution.

The government's brief suggests that the plaintiffs lack standing because they do not allege that the government has taken steps to enforce the law against them, Def. Br. at 9, 14, but this argument improperly shifts the burden to the plaintiffs. The plaintiffs need not prove the "conventional background expectation" that the Challenged Provision will be enforced, *United States Telecom Ass'n*, 825 F.3d at 739, especially where it has been enforced in recent years and current government documents suggest continued enforcement. Rather, should the government

seek to defeat that expectation, it must establish that prosecution is not "remotely possible." *Babbitt*, 442 U.S. at 299 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). To properly disavow prosecution where the statutory terms at issue are actively enforced, the government must tell this Court "that plaintiffs will not be prosecuted if they do what they say they wish to do." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010). The government's brief does not provide such a disavowal, and it points to nothing that would authoritatively bind it against bringing such a prosecution. *See Am. Booksellers Ass'n, Inc*., 484 U.S. at 395.

First, the brief fails to assert that the government views the plaintiffs' interpretation of the law to be incorrect—that is, it does not contend that the plaintiffs' research and investigations are not prohibited by the Challenged Provision. *Cf. Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 477 (2014) (disavowal sufficient where, among other things, "[t]he Government has affirmatively represented that it does not intend to prosecute such conduct because it does not think it is prohibited by the statute").[3] The government has not foresworn "any intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of the plaintiff's interpretation as unreasonable." *Johnson*, 71 F. Supp. 3d

[3] Although the First Circuit held in *Blum* that plaintiffs lacked standing to challenge the Animal Enterprise Terrorism Act ("AETA"), its outcome is distinguishable for several reasons beyond the full-throated disavowal absent in this case. First, AETA itself contained a rule of construction stating that it should not be interpreted to prohibit any expressive conduct. Second, *Blum* relied on a view that *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), "may have adopted a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds." 744 F.3d at 798. The Supreme Court's subsequent decision in *Driehaus* clarifies that this is not the case. 134 S. Ct. at 2341; *see* Marty Lederman, *Commentary:* Susan B. Anthony List, Clapper *footnote 5, and the state of Article III standing doctrine*, SCOTUSblog.com (Jun. 17, 2014, 4:34 PM), http://www.scotusblog.com/2014/06/commentary-susan-b-anthony-list-clapper-footnote-5-and-the-state-of-article-iii-standing-doctrine.

at 160; *see United States v. Stevens*, 559 U.S. 460, 480 (2010) ("The Government's assurance that it will apply [the statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.").

The government's testimony to Congress that it lacks interest in prosecuting "harmless violations of use restrictions" merely confirms that the Government agrees that the statute allows for such prosecutions. Def. Br. at 18 (quoting Def. Br., Ex. 2, ECF No. 10–3, at 6). Moreover, the government's suggestion that the Ninth Circuit's decision in *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012), diminishes the prospect that the government would bring prosecutions for terms-of-service violations, Def. Br. at 15–16, is unpersuasive. Although *Nosal* held that "exceeds authorized access" could not properly be read to encompass violations of computer use restrictions, other circuits have reached the opposite conclusion. *See, e.g.*, *EF Cultural Travel BV v. Zefer Corp.*, 318 F.3d 58, 62 & n.3 (1st Cir. 2003); *CollegeSource, Inc. v. AcademyOne, Inc.*, 597 F. App'x 116, 129–30 (3d Cir. 2015); *see also* Def. Br., Ex. 2 at 5 & n.2 (pointing to Congressional testimony stating the Department of Justice views *Nosal* and similar decisions as having "limited the Government's ability to prosecute such cases *in large parts of the country*") (emphasis added). Because the government has not adopted the *Nosal* court's construction in the DOJ Manual, *see* Compl. ¶ 30, that decision is not relevant in considering the plaintiffs' standing.

Second, the government does not state clearly that it will not prosecute the plaintiffs—or others—for terms-of-service violations under the Challenged Provision. The closest it comes is the tepid statement that "the Department of Justice has publicly stated that it 'has no interest in prosecuting harmless violations of use restrictions.'" Def. Br. at 18.

But the examples of "harmless" conduct that the government presented to Congress do not cover the research at issue here—it mentioned lying about height on a dating website, Def. Br., Ex. 2 at 6, which is different from providing false information and using an automated tool for recording a website's responses to investigate whether it discriminates. And "harmless," of course, is a deeply subjective term: the plaintiffs are given no assurances that, were they to discover discriminatory algorithms during the course of their research and to disseminate those results widely, the Department of Justice would not consider the resulting publicity to have caused "harm" to the website owner, even though consideration of harm stemming from the publication of truthful information is not constitutionally proper. *See infra* Part III.A.

Perhaps recognizing the weakness of its statement, the government adds that it has advocated for a proposal that would amend the CFAA so that, where a protected computer is not a government computer, obtaining information in violation of written restrictions would be a crime only if the information obtained is worth $5,000 or more, or if the access is in furtherance of a separate felony offense. Def. Br. at 18 (citing Def. Br., Ex. 2 at 7). This advocacy does not represent a binding statement that the government will prosecute only CFAA violations that meet those requirements. Indeed, if Congress fails to amend the statute in this manner, the government may argue that its current broad construction has been confirmed. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952). Moreover, the value of information is inherently difficult to quantify. The DOJ Manual itself states that "[a]ny reasonable method can be used to establish the value of the information obtained. For example, the research, development, and manufacturing costs or the value of the property in the thieves' market can be used to meet the $5,000 valuation." DOJ Manual at 20 (citation and internal quotation marks omitted). Without further clarity, it is not at all certain that the plaintiffs could not be said to have obtained

information worth that amount if competitors would be willing to pay $5,000 or more for information about discrimination that the plaintiffs uncover.

Third, rather than adequately disavowing prosecution, the government has stated, essentially, that the plaintiffs and this Court should trust that it will exercise its prosecutorial discretion to bring only really serious cases. *See* Def. Br. at 14 (distinguishing earlier terms-of-service prosecutions on the basis that they concerned "conduct that occurred in furtherance of a separate crime or tortious act or that resulted in substantial harm to the target, which is a context substantively dissimilar to the allegations in the instant matter"). But the plaintiffs' standing cannot be defeated by a claim that prosecutors will act with restraint or common sense. *See Stevens*, 559 U.S. at 480 (government's assertion that it would "use [the statute] responsibly" is insufficient because the Constitution "does not leave us at the mercy of *noblesse oblige*"); *cf. Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) (prosecution under Sarbanes–Oxley Act for harvesting undersized fish); *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014) (prosecution under chemical warfare treaty for spreading irritating chemicals on a doorknob). So long as the government remains unconstrained in its ability to prosecute the plaintiffs and has declined even to state clearly that it will not prosecute them in its brief, the threat of prosecution remains. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (standing exists where enforcement not immediately likely because "[n]othing . . . prevents the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners").

In sum, the government is trying to deny the plaintiffs' standing by discounting their fear of prosecution, without making the clear and unequivocal disavowal that suffices to lift the threat of prosecution. This Court should not allow the government's hedge, which imperils the

plaintiffs' exercise of their First Amendment rights. Because the Challenged Provision chills First Amendment activity, the government would have to present a far stronger disavowal to strip the plaintiffs of standing. The government simply has not provided this Court with anything that negates the "conventional background expectation" that the statute will be enforced. *United States Telecom Ass'n*, 825 F.3d at 739. The plaintiffs therefore continue to credibly fear that the government will one day find their terms-of-service violations worthy of prosecution. For all of the above reasons, they have standing to bring their claims.[4]

III. The plaintiffs have stated a claim under the First Amendment to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

A. The Challenged Provision as applied to the plaintiffs cannot survive strict or intermediate scrutiny.

The Challenged Provision, as applied to the First Amendment-protected activities of the plaintiffs, cannot survive either strict or intermediate scrutiny. The government does not offer any purported justification for the restrictions applied to the plaintiffs, and any consideration of facts outside the complaint is premature at the motion to dismiss stage. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). The government cannot carry that burden here.

As described above, *see* Part I, the Challenged Provision targets several activities in which the plaintiffs intend to engage that are protected by the First Amendment. To the extent the law restricts the publication of truthful information of public concern, it is subject to strict

[4] The government argues that the plaintiffs are not entitled to tester standing under the Fair Housing Act, recognized by the Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See* Def. Br. at 19. The plaintiffs do not claim tester standing.

scrutiny. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (such a restriction must "further a state interest of the highest order"). Laws limiting a medium of expression or its creation—such as the recording of information on the internet—have also been subject to strict scrutiny. *See Minneapolis Star & Trib.*, 460 U.S. at 582–83 (analyzing whether a law taxing ink and paper used by certain publications, which burdened First Amendment rights, is "necessary to achieve an overriding governmental interest"); *cf. Alvarez*, 679 F.3d at 604 (declining to resolve whether strict or intermediate scrutiny applies, because an eavesdropping law restricting audio recording of police officers in public would likely fail even intermediate scrutiny). Strict scrutiny should also apply to the restrictions on the plaintiffs' ability to engage in false speech or misrepresentation in order to conduct meaningful tests for discrimination, given the purpose and high value of their speech, per the plurality opinion in *United States v. Alvarez*. Even if the court were to evaluate whether restrictions on recording information on the internet are "reasonable time, place, or manner" restrictions, any such restrictions must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Should the court apply intermediate scrutiny, however, the Challenged Provision's restrictions as applied to the plaintiffs still fail to pass constitutional muster, because no state interest can justify them, and they are not tailored to any legitimate interest. The state interest in the CFAA is to protect against theft of information from computers, and the history of the CFAA shows that it was intended to protect against activities akin to stealing information. *See Nosal*, 676 F.3d at 863. That interest does not justify terms-of-service restrictions incorporated into the Challenged Provision that address how people preserve, use, or disseminate information to which they have been given access, with *no* requirement of intent to defraud or cause harm, and no

requirement that any damage or harm actually occur. This is markedly in contrast to other provisions in the CFAA which do contain such requirements. *See* 18 U.S.C. §§ 1030(a)(4), (5), and (6) (creating separate prohibitions under the CFAA requiring either "intent to defraud" or "damage").

Any interest the government might assert in protecting entities that operate online from being researched, tested, or subjected to the negative publicity that might flow from dissemination of information about their practices would likewise fail to justify the Challenged Provision. Such an interest is not compelling or important; indeed, such an interest is little more than an interest in obstructing First Amendment activity and is therefore no legitimate interest at all. By contrast, speech of "public concern" is the highest value speech and entitled to the greatest protection under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation marks omitted). Additionally, courts have recognized that in the context of civil rights testing, traditional ideas of harm to private parties stemming from misrepresentation or false statements should not apply. *See, e.g.*, *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373 (1982); *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983) ("It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions. . . . Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination."). By restricting speech activities at the behest of private parties who run websites, without even any requirement of harm to such parties, the Challenged Provision is not tailored to any government interest.

More specifically, the Supreme Court has held that false speech cannot be restricted where there is no harm. *See United States v. Alvarez*, 132 S. Ct. at 2547. Yet the Challenged Provision imposes criminal penalties for violations of terms of service *without* any requirement

of harm, or even intent to cause harm. *See* 18 U.S.C. § 1030(a)(2)(C). Nor should any harm analysis take account of reputational or business harm to a company that may occur from the publication of truthful information of public concern, such as the publication of research findings adverse to a company's interests, because of the First Amendment rights at stake. *See NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 934 (1982) (holding that boycotters were not responsible for business damages resulting from their nonviolent, protected civil rights boycott); *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1204 (declining to consider the harm from any truthful dissemination of undercover investigative findings as being relevant to whether misrepresentation can be constitutionally prohibited). The Challenged Provision thus does not comport with even the minimum constitutional limitations set out in *United States v. Alvarez* when applied to false speech.

Lastly, the government's argument that the plaintiffs' free speech claims fail because they do not contend that the Challenged Provision "regulates their activities in a free speech forum" is wide of the mark. *See* Def. Br. at 22. As the government itself acknowledges, forum analysis is "traditionally applied to tangible property *owned by the government*." *Putnam Pit, Inc.*, 221 F.3d at 842 (emphasis added); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (noting the Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property . . . outweighs the interest of those wishing to use the property"). *Putnam* considered whether forum analysis should be extended to the internet in the case of a *government* website, and in particular, whether an individual had a right to the placement of certain content on that government website. *See Putnam Pit, Inc.*, 221 F.3d at 841–43. Forum analysis is inapplicable here because the plaintiffs do not claim the right to speak on any government website.

For the reasons stated above, the plaintiffs have adequately stated a freedom of speech claim under the First Amendment.

B. The plaintiffs have stated a claim that the Challenged Provision is overbroad in violation of the First Amendment.

The plaintiffs have adequately stated a claim that the Challenged Provision is overbroad in violation of the First Amendment. A law may be invalidated if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The Challenged Provision allows websites to *explicitly* target speech or expressive activities through their terms of service. *See* Compl. ¶ 141. Because the Challenged Provision incorporates websites' terms of service into the federal criminal code, its applications are virtually infinite; any speech or expressive activity that a private website has prohibited as a condition of access to its website becomes a crime. The plaintiffs have alleged that in a good number of cases, terms of service will prohibit speech that cannot constitutionally be proscribed by the government. *Id*. ¶ 142. Accordingly, although the Challenged Provision may have legitimate applications, its unconstitutional applications are substantial in relation to its legitimate scope.

The claim here can be distinguished from that in *Virginia v. Hicks*, 539 U.S. 113, 122–23 (2003), where the Supreme Court rejected an overbreadth challenge to a municipal housing trespass law that allowed for the arrest of any nonresident without a "legitimate business or social purpose" for being on the grounds. The Court stated that an overbreadth challenge will rarely succeed against a law "that is not specifically addressed to speech," and that as-applied challenges to the trespass policy could address any First Amendment violations. *Id*. at 124. But

while the Challenged Provision, which prohibits "exceed[ing] authorized access," does not on its face target speech, private parties can impose terms of service that *do* explicitly target speech. As described above, this feature of the Challenged Provision, which allows for nearly limitless substantive lawmaking by private parties, goes well beyond traditional trespass laws such as the one in *Hicks*. Nor is the Challenged Provision a "neutral" regulation like the one upheld in *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973)— considering an Oklahoma statute prohibiting state employees from engaging in partisan political activities—because websites can dictate restrictions on speech based on viewpoint.

The plaintiffs acknowledge that the overbreadth problem could be addressed were the statute to be construed not to reach terms-of-service violations alone—a construction that would leave intact the legitimate applications claimed by the government. *See* Def. Br. at 2; *see also United States v. Williams*, 553 U.S. 285, 309 (2008) (Stevens, J., concurring) (adopting a narrowing construction of the statute's criminal prohibitions in order to save it from facial invalidation). In the absence of such a limiting construction, however, the infinite applications of the Challenged Provision to speech that violates any website's terms of service render the law overbroad and therefore facially unconstitutional.

IV. The plaintiffs have stated a claim that the Challenged Provision is void for vagueness under the Fifth Amendment.

The plaintiffs have adequately stated a claim that the Challenged Provision is void for vagueness in violation of the Due Process Clause, because it fails to give the required notice that the prohibition on "exceed[ing] authorized access" requires adhering to website terms of service in every instance, regardless of substance, and because it risks arbitrary and discriminatory enforcement by criminalizing a wide swath of behavior that is commonplace on the internet.

The Due Process Clause requires that laws meet two requirements to avoid fatal vagueness. The first is that a law must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," as opposed to being "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). The second requirement is that the law must "define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (courts must consider whether the "law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

The Supreme Court has repeatedly emphasized that the vagueness doctrine is most critical in the First Amendment context because speakers "sensitive to the perils posed by . . . indefinite language[] avoid the risk . . . only by restricting their conduct to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *see also Reno*, 521 U.S. at 871–72 ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect"). The requirement of clarity is therefore at its height when the government is regulating speech. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("Because First Amendment freedoms need

breathing space to survive, government may regulate in the area only with narrow specificity.") (quotation marks omitted). Because the plaintiffs have alleged that the Challenged Provision impacts their protected speech, and that third parties will be chilled from exercising those same speech rights, *see supra* Parts I and II.A, their claim of vagueness necessitates the most exacting scrutiny.[5]

The government acknowledges that a circuit split exists regarding the meaning of the phrase "exceeds authorized access" and the extent to which it applies to website terms-of-service violations. *See* Def. Br. at 4–5. Courts on one side of the split have held that the Challenged Provision should not be applied to terms-of-service violations, in some cases through an exercise of the rule of lenity necessitated by the ambiguity of the law. *See Nosal*, 676 F.3d at 863 (applying the rule of lenity and holding that a criminal conviction under the Challenged Provision could not be sustained for terms-of-service violations); *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015) (declining to interpret the Challenged Provision to cover "every violation of a private computer use policy"); *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012). Other courts have sustained the application of the Challenged Provision to terms-of-service violations in civil cases. *See EF Cultural Travel*, 318 F.3d at 62 & n.3 (1st Cir.);

[5] The plaintiffs can bring a facial vagueness challenge because they have alleged that the Challenged Provision regulates "a recognized liberty interest," *see supra* Part I, contrary to the government's assertion, *see* Def. Br. at 30. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Supreme Court considered and rejected a facial vagueness challenge to a statute that criminalized introducing alcohol into "Indian country," which was not defined. The Supreme Court explained that where a vagueness challenge is asserted against a statute which "do[es] not involve First Amendment freedoms," the challenge "must be examined in the light of the facts of the case." *Id.* at 550.

CollegeSource, Inc., 597 F. App'x at 129–30 (3d Cir.). As the government notes, the D.C. Circuit has yet to weigh in on the issue. Def. Br. at 5.

The plaintiffs agree with the government that the cases rejecting a vagueness challenge to the Challenged Provision were decided because of "the particular facts at issue." *Id*. at 30. But the existence of the circuit split demonstrates the lack of clarity about the law's requirements, and the fact that it fails to give "fair notice" to ordinary people of what is required. The plaintiffs need not wait to be prosecuted first before raising their vagueness claims, especially where First Amendment rights are at stake. It is the very risk of prosecution that can impose a First Amendment harm, by leading to self-censorship. *See Ashcroft*, 542 U.S. at 671–72.

The Challenged Provision also fails the second prong of the vagueness analysis, because it invites arbitrary or discriminatory enforcement by criminalizing "a broad range of day-to-day activity." *United States v. Kozminski*, 487 U.S. 931, 949 (1988). Website terms of service can prohibit behavior that is commonplace on the internet, from overstating one's height on a website, to copying information from real estate or job listings to be shared with others, to using pseudonyms instead of real names in social media profiles. Compl. ¶¶ 143, 149. By prohibiting a wide range of behaviors that are both commonplace and innocuous, the Challenged Provision criminalizes the activities of innumerable internet users. In *United States v. Valle*, the Second Circuit imposed a limiting construction on the meaning of the term "exceeds authorized access" not only because lenity required it for the particular defendant but because any interpretation adopted by the court would "impact[] many more people." 807 F.3d at 528. The Second Circuit declined to find that a violation of a computer use policy could impose liability, so as not to "unintentionally turn ordinary citizens into criminals" and thereby "delegate to prosecutors and juries the inherently legislative task of determining what type of . . . activities are so morally

reprehensible that they should be punished as crimes." *Id*. (internal quotation marks omitted). The court concluded that "[w]hile the Government might promise that it would not prosecute an individual for checking Facebook at work . . . [a] court should not uphold a highly problematic interpretation of a statute merely because the Government promises to use it responsibly." *Id*.; *see also McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will use it responsibly.").

The risk of arbitrary or discriminatory enforcement is doubly present with the Challenged Provision, which allows the same private parties who have an interest in the enforcement of the law to *define* the content of the law by setting terms of service that privilege their interests. *See United States v. Nosal*, 828 F.3d 865, 897 (9th Cir. 2016) [hereinafter "*Nosal II*"] (Reinhardt, J., dissenting) (pet'n for reh'g en banc pending) (describing prosecution as having been initiated after private company took on the expense of building a civil case before referring it to federal prosecutors and noting that "prosecutors cannot help but be influenced" by such actions when choosing CFAA cases to prosecute). This power of definition infuses the law's operation with viewpoint discrimination, because website terms of service can explicitly forbid speech that is critical of a private party (such as "disparaging" speech or research findings, which, presumably, the private party does not want disseminated). The Challenged Provision in some sense delegates a "heckler's veto" to private parties to decide which speech by visitors to prohibit. This type of viewpoint discrimination compounds the due process and First Amendment problems with the Challenged Provision.

Without a binding interpretation on the scope of the Challenged Provision, the plaintiffs and other third parties cannot be sure whether their protected speech activities might subject them to prosecution or not, and the consequent self-censorship is a harm of constitutional

magnitude. For this reason, the plaintiffs have adequately stated a claim of vagueness in violation of the Due Process Clause.

V. The plaintiffs have stated a claim that the Challenged Provision represents an unconstitutional delegation of authority to private entities.

The Supreme Court has held that delegation of legislative power to private parties is unconstitutional "delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others" impacted by those decisions. *Carter v. Carter Coal Co*., 298 U.S. 238, 311 (1936). This principle is straightforwardly implicated here, where the Challenged Provision allows website operators to create terms of service restricting recording, false speech or misrepresentation, publication of research results, and even disparagement—with the force of federal criminal law behind them. Compl. ¶ 173. It is hard to imagine a statute that delegates power to private parties with fewer limitations or less public accountability. *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984) (per curiam) (delegation harms "principles of political accountability"). By drafting terms of service that are incorporated into the Challenged Provision, website operators effectively make law, without any limits on the kind of conduct they can render criminal. Compl. ¶¶ 175–76. There is also no requirement that terms of service be drafted in a manner clear enough to notify the public of what conduct is criminal. *Id.* ¶ 178. Terms of service are frequently revised, and the public has no control—democratic or otherwise—over this unilateral process. *Id.* ¶ 176.

Although the government suggests that the private nondelegation doctrine is somehow defunct, that is far from the reality. The D.C. Circuit struck down a statute on nondelegation

grounds several years ago, ruling that a railroad regulatory scheme delegated too much power to Amtrak, a private entity. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 674 (D.C. Cir. 2013). The Supreme Court subsequently vacated the D.C. Circuit's decision, but it did so on the ground that Amtrak was, in fact, a public entity. *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1233 (2015). In remanding for a ruling on other constitutional claims, it nowhere suggested that delegation to a private entity could not present a constitutional problem. Moreover, concurrences from Justices Alito and Thomas each highlighted the continuing importance of nondelegation doctrine. *Id.* at 1237 ("When it comes to private entities, . . . there is not even a fig leaf of constitutional justification [for legislative delegation].") (Alito, J., concurring); *id.* at 1252 ("'[P]rivate nondelegation doctrine' is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.") (Thomas, J., concurring).

The government also suggests that invalidating the Challenged Provision as an unconstitutional delegation of power to private entities would necessarily mean invalidating large swaths of criminal law that consider whether a private party has authorized some conduct. *See* Def. Br. at 32–33.[6] This is simply not the case. The nondelegation doctrine is not violated where a statute "limits the private party's discretion and the private party operates within the established limitations." *Biener v. Calio*, 361 F.3d 206, 216 (3d Cir. 2004). Physical trespass law

[6] The Government attempts to rely on *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), for the proposition that "a generally applicable statute does not violate the non-delegation doctrine simply because its application depends on the actions of private citizens." Def. Br. at 32. But the brief discussion of the private nondelegation doctrine in that opinion stands for the very different, and much narrower, point that "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection." *New Motor Vehicle Bd.*, 439 U.S. at 109.

allows a private party to regulate only conduct connected to a physical trespass. *See supra* Part I.A (discussing why the CFAA is unlike a traditional trespass law). Intellectual property and trade secrets law allows the holder of the property the right to control only use of the particular property in question. In contrast, the Challenged Provision allows a website operator to define an infinite range of crimes for an individual who has visited that website. *See Nosal*, 676 F.3d at 860 ("[T]he government's proposed interpretation of the CFAA allows private parties to manipulate their computer-use and personnel policies so as to turn these [employer-employee and company-consumer] relationships into ones policed by the criminal law."). The nondelegation doctrine is amply equipped to distinguish between the Challenged Provision, which allows website owners to write into federal criminal law site-visitation conditions with whatever breadth and level of detail they please, and the much more ordinary examples cited by the government.

As the D.C. Circuit made clear in its recent nondelegation decision, when a statute delegating power to a private party lacks an antecedent in history, that novelty alone may be "reason to suspect its legality." *Ass'n of Am. Railroads*, 721 F.3d at 673. There is no precedent for a statute like the Challenged Provision, which renders criminal the violation of *any* term of service—no matter how idiosyncratic, arcane, or arbitrary. As such, the Challenged Provision represents an unconstitutional delegation of the power to make law, and the plaintiffs have adequately stated their claim.

VI. The plaintiffs have stated a claim that the Challenged Provision violates the Petition Clause of the First Amendment.

The First Amendment right to petition the government for redress of grievances encompasses both the right to attempt to persuade the legislative and executive branches and the

right to access the courts. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The plaintiffs allege that the Challenged Provision prevents them from engaging in either form of petition where a website's terms of service prohibit the speech necessary to engage in such petitioning, such as through a non-disparagement clause. Compl. ¶¶ 72–73. Such terms of service can prevent any petition to the government related to a finding about a website's algorithmic discrimination, which can be uncovered only through the kind of audit testing of outcomes that the plaintiffs wish to perform. *Id.* at ¶¶ 164–67.

The government, apparently misunderstanding the plaintiffs' Petition Clause claim to complain of restrictions on newsgathering, Def. Br. at 28, provides no response to the plaintiffs' actual claim: because terms of service can and do explicitly contain non-disparagement clauses or prohibit subsequent publication based on information learned from visiting a website, the plaintiffs cannot, on pain of criminal sanctions, petition the legislative and executive branches or access the courts with respect to discrimination occurring on such websites.

The government also cites case law demonstrating that the Petition Clause does not guarantee to individuals that their petition activity will produce results, Def. Br. at 29, but the plaintiffs allege that the Challenged Provision prohibits them from bringing petitions in the first place, and that is the Petition Clause's core concern. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). The plaintiffs have described both the "official acts frustrating" their access to courts—the Challenged Provision—and "the underlying cause[s] of action" that the Challenged Provision prevents them from bringing to court—Fair Housing Act and Title VII claims related to online discrimination. Compl. ¶ 168; *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). There is no additional

requirement, in *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 464 (1979), or elsewhere, *see* Def. Br. at 28, that the plaintiffs identify a specific petition attempt that has been rebuffed.

The same mechanism that prevents the plaintiffs from accessing the courts also prevents them from lobbying the other branches of government to address housing or employment discrimination. Accordingly, they have adequately stated a Petition Clause claim.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that this Court deny the defendant's Motion to Dismiss.

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Respectfully submitted,

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