UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTIAN W. SANDVIG, et al., **Plaintiffs,** **v.** **WILLIAM P. BARR,[1] in his official capacity as Attorney General of the United States,** **Defendant.**	**Civil Action No. 16-1368 (JDB)**

MEMORANDUM OPINION

Plaintiffs are academic researchers who intend to test whether employment websites discriminate based on race and gender. In order to do so, they plan to provide false information to target websites, in violation of these websites' terms of service. Plaintiffs bring a pre-enforcement challenge, alleging that the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, as applied to their intended conduct of violating websites' terms of service, chills their First Amendment right to free speech. Without reaching this constitutional question, the Court concludes that the CFAA does not criminalize mere terms-of-service violations on consumer websites and, thus, that plaintiffs' proposed research plans are not criminal under the CFAA. The Court will therefore deny the parties' cross-motions for summary judgment and dismiss the case as moot.

[1] Pursuant to Fed. R. Civ. P. 25(d), William P. Barr, the current Attorney General of the United States, is automatically substituted as the defendant in this matter.

BACKGROUND

A. Research Plans

Christopher Wilson and Alan Mislove are professors of computer science at Northeastern University. Decl. of Pl. Christopher "Christo" Wilson ("First Wilson Decl.") [ECF No. 48-1] ¶ 1; Decl. of Pl. Alan Mislove ("First Mislove Decl.") [ECF No. 48-2] ¶ 1. For their research, Wilson and Mislove "intend to access or visit certain online hiring websites for the purposes of conducting academic research regarding potential online discrimination." Pls.' Statement of Undisputed Material Facts ("SMF") [ECF No. 47-2] ¶ 61. Their plans include "audit testing" to examine whether various hiring websites' proprietary algorithms discriminate against online users "based on characteristics, such as race or gender, that constitute a protected class status under civil rights laws." Id. ¶¶ 64, 66. To conduct these audit tests, plaintiffs "will create profiles for fictitious job seekers, post fictitious job opportunities, and compare their fictitious users' rankings in a list of candidates for the fictitious jobs" in order to see "whether [the] ranking is influenced by race, gender, age, or other attributes." Id. ¶ 71.

Wilson and Mislove state that they will take steps to minimize the impact of their research both on the targeted websites' servers and on other users of those websites. Id. at ¶¶ 75–78. For instance, they will make it apparent to real job seekers and employers that their postings are fake by "stat[ing] in any fictitious job posting, or in any fictitious job seeker profile, that the job or the job seeker is not real." Id. at ¶¶ 75–78. Both researchers also intend to "comply with the payment requirement" of certain employment websites. Decl. of Pl. Christopher "Christo" Wilson ("Second Wilson Decl.") [ECF No. 65-1] ¶ 5; Decl. of Pl. Alan Mislove ("Second Mislove Decl.") [ECF No. 65-2] ¶ 5. But Wilson and Mislove acknowledge that their research plan will violate the target websites' terms of service prohibiting the provision of false information and/or creating fake

accounts. SMF ¶ 86.

B. Procedural History

In June 2016, Wilson and Mislove, as well as two other researchers (Christian W. Sandvig and Kyratso Karahalios) and the nonprofit journalism group First Look Media Works, Inc., brought a pre-enforcement constitutional challenge to a provision of the CFAA. Compl. [ECF No. 1] ¶¶ 180–202. The provision at issue, 18 U.S.C. § 1030(a)(2)(C), or the "Access Provision," makes it a crime to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby obtain[] . . . information from any protected computer." Plaintiffs argue that this provision violates the First and Fifth Amendments. Compl. ¶¶ 180–202. Specifically, they claim that the Access Provision (1) is overbroad and chills their First Amendment right to freedom of speech; (2) as applied to their research activities, unconstitutionally restricts their protected speech; (3) interferes with their ability to enforce their rights and therefore violates the Petition Clause; (4) is void for vagueness under the Fifth Amendment Due Process Clause; and (5) unconstitutionally delegates lawmaking authority to private actors in violation of the Fifth Amendment Due Process Clause. See id. On March 30, 2018, this Court partially granted the government's motion to dismiss. See Sandvig v. Sessions, 315 F. Supp. 3d 1, 34 (D.D.C. 2018). The Court dismissed all but the as-applied First Amendment free speech claim brought by Wilson and Mislove. Id.

Now before the Court are the parties' cross-motions for summary judgment. Wilson and Mislove renew their pre-enforcement challenge to the Access Provision of the CFAA, alleging that it unconstitutionally restricts their First Amendment rights to free speech by criminalizing their research plans and journalistic activities that involve violating websites' terms of service. Pls.' Mem. P. & A. in Supp. of Mot. for Summ. J. ("Pls.' Mem.") [ECF No. 48] at 1. The government, for its part, argues that plaintiffs have failed to establish standing and that the First Amendment's

protections do not shield plaintiffs from private websites' choices about whom to exclude from their servers. Def.'s Mem. in Supp. of Cross-Mot. for Summ. J. & in Opp'n to Pls.' Mot. for Summ. J. ("Gov't's Opp'n") [ECF No. 50-1] at 1–4. The Court held a motions hearing on November 15, 2019, and subsequently ordered another round of briefing to clarify plaintiffs' specific research plans and both parties' understanding of particular terms within the CFAA. See November 26, 2019 Order [ECF No. 63] at 1–2. The parties each responded, see Def.'s Resp. to Court's Order for Clarification ("Def.'s Resp. for Clarification") [ECF No. 64]; Pls.' Mem. in Resp. to Court's Order [ECF No. 65], and the matter is now ripe for consideration.

LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . demonstrat[ing] the absence of a genuine issue of material fact." Celotex Corp. v. Cartrett, 477 U.S. 317, 323 (1986); see Fed. R. Civ. P. 56(c)(1)(A) (explaining that a moving party may demonstrate that a fact is undisputed or not by citing "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials").

In determining whether a genuine issue of material fact exists, the Court must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the motion." Scott v. Harris, 550 U.S. 372, 378 (2007) (internal quotation marks and alteration omitted). But a non-moving party must establish more than the "mere existence of a scintilla of evidence" in support of its position. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). To avoid summary judgment, "there must be evidence on which the jury could reasonably find for the [non-moving

party]." Id.

ANALYSIS

I. Jurisdictional Standing

To have Article III standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). This Court previously concluded that plaintiffs had plausibly alleged standing on their First Amendment claims at the motion-to-dismiss stage, Sandvig, 315 F. Supp. 3d at 16–22, but plaintiffs must now demonstrate standing "with specific facts set out by affidavit or other admissible evidence," In re Navy Chaplaincy, 323 F. Supp. 3d 25, 39 (D.D.C. 2018) (internal quotation marks omitted).

There are two ways in which litigants like plaintiffs here may establish the requisite ongoing injury when seeking to enjoin a statute alleged to violate the First Amendment. First, plaintiffs may show that they intend "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, 573 U.S. 149, 159 (2014) (quoting Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979)). Second, they may refrain from exposing themselves to sanctions under the statute, making a sufficient showing of self-censorship—i.e., they may establish a chilling effect on their free expression. See Laird v. Tatum, 408 U.S. 1, 11–14 (1972). In either case, a constitutionally affected interest and a credible threat of enforcement are required; without them, plaintiffs can establish neither a realistic threat of legal sanction for engaging in protected speech nor an objectively good reason for self-censoring by not conducting their planned research. Here, plaintiffs take the first path and argue that they intend to engage in conduct

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