No. _____

IN THE

Supreme Court of the United States

CHILDREN'S HEALTH DEFENSE,
Petitioner,

v.

META PLATFORMS, INC., MARK ZUCKERBERG, THE POYNTER INSTITUTE FOR MEDIA STUDIES, INC., SCIENCE FEEDBACK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The state-action doctrine limits the power of government to violate individual rights through coercion or inducement of, or close nexus with private intermediaries. Petitioner Children's Health Defense ("CHD") alleges that Executive Branch officials specifically targeted its viewpoint on vaccines, and its spokesman, Robert F. Kennedy, Jr., to Meta Platforms, Inc., ("Meta") which willfully cooperated by censoring CHD's protected speech and removing CHD, thereby dampening opposition to preferred official policies. The lower courts dismissed CHD's complaint, deciding that Meta is a private company entitled to work with Government as to what limits should apply to speech on its platforms. The questions presented are:

1. Does *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989), mandate that Meta, an interactive computer service provider which receives 47 U.S.C. § 230 immunity, become a state actor when it affirmatively engages with Executive Branch officials to exercise its State-created privilege to suppress particular viewpoints or speakers? If so, is the First Amendment implicated?

2. Does an interactive computer service provider transform private conduct into state action when it willfully conforms its content-moderation process or decisions to Executive Branch preferences to suppress particular protected third-party speech or cedes active, meaningful control of its process or decisions to the State?

CORPORATE DISCLOSURE STATEMENT

CHD is a non-profit organization with no parent corporation or issuance of stock.

STATEMENT OF RELATED PROCEEDINGS

The following federal trial and appellate court decisions are directly related to the case before the Court:

• *Children's Health Def. v. Meta Platforms, Inc., et al.,* No. No. 21-16210, 112 F.4th 742 (9th Cir. Aug. 9, 2024), reprinted in the Appendix ("App.") at 1a-94a.

• *Children's Health Def. v. Facebook Inc., et al.,* No. 20-cv-05787-SI, 546 F. Supp. 3d 909 (N.D. Cal. June 29, 2021), reprinted at App. 95a-165a.

The following federal trial and appellate court decisions involve parallel proceedings between CHD and the Executive Branch:

• *Kennedy, et al., v. Biden, et al.,* No. 24-30252, 2024 U.S. App. LEXIS 27886 (5th Cir. Nov. 4, 2024) (*per curiam*) (unpubl.) (*en banc* review requested).

• *Kennedy, et al., v. Biden, et al.,* No. 3:23-cv-00381, consolidated with *Missouri v. Biden,* No. 22-cv-01213, 2024 U.S. Dist. LEXIS 149217 (W.D. La. Aug. 20, 2024); and 2024 U.S. Dist. LEXIS 26751 (W.D. La. Feb. 14, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Children's Health Defense ("CHD") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case presents the Court with a major opportunity to address the perverse, and unintended, effects of Section 230 when Executive Branch officials target a particular viewpoint, speaker, or idea and a cooperative social media platform censors or adjusts its policies to proscribe such speech. In effect, the Ninth Circuit holds that a platform engaging in viewpoint censorship conclusively retains its private character unless the company acts under an "actionable," publicly-visible "rule of conduct [which it is] required to follow" by the government. App. 11a.

The Circuit's analysis of Section 230 is cursory and unsound. It relies on sterile formalisms that "the statute is entirely passive," was enacted "years before the government was concerned with speech related to vaccines," "makes no reference to that kind of speech," and merely "operates in the background." App. 29a-30a. Thus, it ignores the context here, and the perils elsewhere, when Executive Branch officials convey their particular interest in and directly benefit from Meta's exercise of § 230 immunized power to censor a disfavored speaker and viewpoint, and Meta cooperates with them to do so. App. 81a-84a & nn.9-10 (Collins, J., dissent). "[I]n this distinctive scenario, applying the

state-action doctrine promotes individual liberty by keeping the Government's hands away from the tempting levers of censorship on these vast platforms." App. 92a. This case's public importance cannot be overstated. *See* Ed Whelan, *Important Dissent on Social-Media Platform as State Actor*, NATIONAL REVIEW (Aug. 12, 2024), https://www.nationalreview.com/bench-memos/important-dissent-on-social-media-platform-as-state-actor/.

The Circuit does not want its decision to be taken as "an endorsement of Meta's policies," only that the judicial power to "supervise social media platforms" is limited, and thus "the necessary checks come from competition in the market—including, as we have seen, in the market for corporate control." App. 32a. But, as the dissent rightly points out, Meta is "a novel legal chimera" due in large part to § 230's immunizing power, and its "interactions with the Government as to how to exercise that power over [specifically-targeted] third parties' constitutional rights implicate constitutional standards." *Id.* at 89a.

No deep dive is needed into the "text in context," *Biden v. Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring), of Section 230 to know that Congress never intended it to be used this way: to enable the Executive to choose winners and losers in the marketplace of ideas by incentivizing the platforms to cooperate. Rather, in enacting § 230, Congress expressly found that "[t]he Internet and other interactive computer services offer a forum for a *true diversity of political discourse*[,]" and "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." 47 U.S.C.

§ 230(a)(3), (4) (findings) (emphases added); *see also* 141 Cong. Rec. 22,045 (June 9, 1995) (statement of Rep. Christopher Cox) ("we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet[.]"). Yet, under § 230, that is the world we live in, where the regulating occurs insidiously behind closed doors. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 n.5 (2021) (Thomas, J., concurring in vacatur) ("Threats directed at digital platforms can be especially problematic in the light of 47 U.S.C. § 230 . . . This immunity eliminates the biggest deterrent—a private lawsuit—against caving to an unconstitutional government threat.")[1]

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) frames the most relevant test for when government-induced platform exercise of § 230 censorship-immunized power implicates the affected speaker's First Amendment rights. Under that suitably "tailored inquiry," Meta does not have an unfettered right to work together with the government in deciding how to suppress the speech of millions to advance the government's preferred policies. App. 87a.

Reversal is urgent because this case stands at the confluence of two alarming trends: (1) the weaponization of online speech when platforms work with *any* administration to censor disfavored views; *see Murthy v. Missouri*, 603 U.S. 43, 79-80 (2024) (reversing and remanding preliminary injunction)

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[1] *See also Doe ex rel. Roe v. Snap, Inc.*, 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari) ("[the platforms] disclaim any obligations and enjoy greater protections from suit than nearly any other industry").

(Alito, J., dissent, joined by Thomas, J., and Gorsuch, J.) ("What the officials did . . . was blatantly unconstitutional, and the country may come to regret the Court's failure to say so"); and (2) social media platforms' incentives under § 230 -- their "get-out-of-jail free" card -- to cave to government threats or cooperate for their own ends. *See Doe*, 144 S. Ct. at 2494 (Thomas, J., statement); *Biden*, 141 S. Ct. at 1226 n.5 (Thomas, J., concurring in vacatur). At a time when the First Amendment is under widespread attack, *see Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring), this Court should find that CHD's pleadings state a free speech claim for equitable relief against Meta.[2]

Presidential transition neither moots this case nor diminishes its importance.[3] Ironically, Mr. Kennedy has been nominated to oversee the very agency that spearheaded censorship of him, and it remains to be seen whether he can disentwine the CDC agency's 5-year partnership with Meta. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) ("defendant's voluntary cessation of challenged practice does not deprive court of power to determine legality of the practice"). In parallel

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[2] CHD does not seek to revive its claims for RICO and Lanham Act fraud which were also dismissed below.

[3] Previously, President Trump declared that platforms which "stifle viewpoints with which they disagree" for "deceptive or pretextual reasons" should lose the § 230 immunity shield. Executive Order on Preventing Online Censorship, Executive Orders, The White House, § 2(a) (May 28, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-online-censorship/. But this statement of policy did not deter the CDC-Meta vaccine-speech partnership nor create any enforceable private rights.

litigation between CHD and the Executive Branch, *Kennedy v. Biden* (consolidated with *Missouri v. Biden*), "every judge that has examined the merits of this case has found a First Amendment violation." *Missouri*, Case No. 22-CV-01213, Dkt. #404 at 4-5 (W.D. La. Nov. 8, 2024).

Yet, the Ninth Circuit ignored the torrent of facts unearthed there and through congressional investigation and this Court's directive in *NRA of Am. v. Vullo*, 602 U.S. 175, 191-94, 197-98 (2024) (Sotomayer, J.) that First Amendment complaints be read "in context" and "assessed as a whole," *e.g.*, for how threats and enticements by government officials were "reasonably understood" by a speech-suppression intermediary such as Meta. *See also id.* at 200 (Gorsuch, J., concurring). Unlike the *Murthy* and *Kennedy plaintiffs*, CHD's requests for injunctive and declaratory relief were dismissed with prejudice, and CHD remains de-platformed under ongoing CDC-Meta partnership, and "a policy Meta adopted at the White House's behest." App. 83a-84a & nn.10, 11. The Fifth Circuit's Rule 65 finding of White House and CDC "significant encouragement" of Meta to censor Covid speech, *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), *rev'd on other grounds sub nom. Murthy v. Missouri*, 603 U.S. 43 squarely conflicts with the Ninth Circuit's Rule 12(b)(6) dismissal of CHD's case against Meta for suppressing its viewpoints on Covid and on vaccines, which remain officially-targeted, and for ceding active, meaningful control of its process to the State, thereby transforming its private conduct into state action.

The Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals and the dissenting opinion are reported at 112 F.4th 742 and reprinted in the Appendix ("App.") at 1a-94a. The opinion of the district court is reported at 546 F. Supp. 3d 909 and reprinted at App. 95a-165a.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2024. On October 18, 2024, Justice Kagan granted a 60-day extension of the deadline to file this petition for writ of certiorari from November 7, 2024 until January 6, 2025. (No. 24A368.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that: "Congress shall make no law … abridging the freedom of speech…." U.S. Const. amend. I.

Section 230 of Title 47 (47 U.S.C. § 230), commonly referred to as Section 230 of the Communications Decency Act of 1934 ("CDA"), *See* App. 166a.

STATEMENT OF THE CASE

A. State-Action Doctrine

1. The long-established rule is that constitutional guarantees reach only state action. *Peterson v. Greenville*, 373 U.S. 244, (1963) (*citing Civil Rights Cases*, 109 U.S. 3 (1883). "The need for governmental action is . . . explicit in the Free

Speech Clause." *Lindke v. Freed*, 601 U.S. 187, 195 (2024) (Barrett, J.). Thus, the gist of a state-action claim against a private party is its *"misuse* of power*" traceable* to state authority. *Lindke*, 601 U.S. at 199 (emphasis in original) (citation omitted). This Court has developed contextual tests for such matters of "normative judgment," *United Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001), weighing the "true significance of the State's non-obvious involvement." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (citation omitted); *see Lindke*, 601 U.S. at 188 ("the distinction . . . turns on substance, not labels").

State action has been found "when [the private party's conduct] results from the State's exercise of '*coercive power*,' when the State provides '*significant encouragement, either overt or covert*,' or when a private actor operates as a '*willful participant in joint activity*' with the government." *Brentwood*, 531 U.S. at 298 (emphases added). The courts below dismissed this case under a "threshold" "state policy" requirement instead.[4] App. 11a (*citing Lugar*, 457 U.S. at 937).

This Court has not decided whether *Skinner*, assessing a private search conducted under statutory privilege, frames the relevant test for state action by a platform censoring officially-disfavored content

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[4] Whether *Lugar*'s "state policy" threshold folds into the *Brentwood* tests or the proposed § 230/hybrid test is for this Court's review. *See also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (holding that private party's joint participation with state official in conspiracy to discriminate would constitute both "state action" and action 'under color' of law for 42 U.S.C. § 1983").

under § 230 immunity.[5] This important issue was raised and expressly denied by the district court and court of appeals, over dissent, and the resolution was outcome-dispositive of Meta's motion to dismiss. App. 29a-31a, 82a-94a.

B. Background and Purposes of Section 230

2. Section 230(c)(1) states that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(c)(2)(A) states that "No provider . . . of an interactive computer service shall be held liable on account of— any action voluntarily taken in good faith to restrict access to or availability of material . . . whether or not such material is constitutionally protected." Section 230(e)(3) provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." App. 166a.

While the primary purpose of Section 230 "was to protect children from sexually explicit internet content[,]" *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)), the lower courts have interpreted it to provide broad immunity and preemption of contrary state law for all manner of content-suppression. Nor

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[5] When a private party acts pursuant to statute, "something more" is needed to call them a "state actor." *Lugar*, 457 U.S. at 939. *Skinner* framed the inquiry as whether the statute and the government's interest render the private party an "instrument or agent of the State."

has any court found that a provider failed to act in "good faith" when it blocked or removed third-party content. Meta could rely on that prophylaxis in suppressing CHD's vaccine-related speech here. *See*, *e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (barring wide variety of causes of action); *FTC v. LeadClick*, 838 F.3d at 174 (§ 230(c)(1) includes decision to "withdraw" content); *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (platform's use of automated "tools" is included). Thus, due to § 230, CHD could not bring state law claims against Meta, *e.g.*, for defamation, tortious interference, or misrepresentation which, unlike federal law, do not require proof of commercial speech or fraud-scheme injury. *Cf.* App. 33a-40a (dismissing federal claims). In the 30 years since § 230's enactment, and despite the growth of "mega-platforms" such as Meta which it enables, App. at 71a, § 230 has not received the scrutiny of this Court. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., statement respecting denial of certiorari).

Yet, as Dissenting Judge Collins explains, the CDA has deleterious effects when the Executive Branch influences a platform's content moderation for an illegitimate purpose or when a platform willfully cooperates to censor content because it has "bigger fish to fry" -- as it will, with *every* Administration -- than hosting disfavored third-party speech. *See, e.g.*, *Vullo*, 602 U.S. at 198-99 ("intermediary strategy" highlights constitutional concerns). This case does not facially challenge § 230; rather, it raises a vehicle for deciding whether, under these circumstances, Meta's interactions with the Executive Branch to censor

CHD's protected speech under § 230 immunity implicate constitutional standards.

C. Factual Background

1. Overview

3. This case arises from a series of actions Meta took against CHD's posts and account beginning in May 2019, from takedowns and restrictions to an outright ban in August 2022, R.[6] Dkt. #68, that is still in effect. The complaint and judicially noticeable materials state that: (1) the CDC and Meta "partnered" together to "contain the spread of [vaccine] misinformation" in early 2019, after which Meta took action against CHD; (2) Meta supplied vaccine-safety language for the CDC agency's own website which Meta then sourced to CDC in Meta's new policy; (3) CDC provided Meta with a two-page table on particular vaccine-safety controversies[7] which Meta used for "debunking" across its platforms; (4) among many posts, Meta censored CHD spokesman Kennedy's[8] online eulogy of Justice Ruth Bader Ginsburg as a "medical

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[6] "R" refers to the Ninth Circuit record in Case 21-16210.

[7] *E.g.*, As for concern that "too many too soon" may overwhelm young immune systems, the CDC table states "[i]nfants have the theoretical capacity to respond to at least 10,000 vaccines at a time." Center for Disease Control, FOIA Response Document, icandecide.org, at 57-58 (Oct. 7, 2024) available at https://icandecide.org/wp-content/uploads/2023/10/23-01115-for-9-1-2023-Close.pdf.

[8] After his nomination to head HHS, Kennedy resigned from CHD on December 4, 2024. Robert F. Kennedy Jr., Letter of Resignation to Children's Health Defense (Dec. 4, 2024), available at https://childrenshealthdefense.org/wp-content/uploads/RFK-CHD-Resignation-letter.pdf.

freedom and environmental champion" for joining Justice Sotomayor's dissent in *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011). R. Dkt. #20-4 ¶¶ 194-95; *see also* Dkt. #20-5 ER 586.

Contrary to what this Court was told in *Murthy*, Meta's health misinformation policy did *not* address vaccines before it began its partnership with CDC. The Samoa and Pakistan measles incidents this Court referenced there occurred in late 2019, *not* 2018.[9] And, the CDC wound down its meetings with Meta in late 2022 only about Covid – no one has ever said that the CDC-Meta "vaccinate with confidence" partnership has ended.

Additionally, the complaint and materials recount that once Covid began, the White House under President Biden specifically targeted CHD and Kennedy to Meta as potent sources of "misinformation" about Covid vaccines and Covid itself. App. 46a-55a. They also targeted CHD's "vaccine hesitancy" viewpoint that Meta suppressed, though such speech did not violate its policies. Meta made a special portal for CDC requests to remove particular posts, and allowed CDC to decide, as they already did about vaccines, what Covid-posts pose a

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[9] *Compare Murthy*, 603 U.S. at 50 *with* Nick Clegg, *Combating COVID-19 Misinformation Across Our Apps*, META (Mar. 25, 2020), https://about.fb.com/news/2020/03/combating-covid-19-misinformation/; *see also* Taylor Telford, *Facebook will consider removing or demoting anti-vaccination recommendations amid backlash*, WASHINGTON POST (Feb. 15, 2019), https://www.washingtonpost.com/business/2019/02/15/facebook-will-consider-removing-or-demoting-anti-vaccination-recommendations-amid-backlash/Feb. 15, 2019 (Meta contends such speech did not violate its standards nor incite "real world harm").

risk of imminent harm. On August 17, 2022, Meta removed CHD's account and archived content altogether. *Id.* at 55a.

In internal emails, senior Meta executives lamented the "pressure" they felt under, the "incoherent" White House use of "misinformation," their perceived scapegoating for missed vaccination rates, and debated their options ("we could go public"), ("if Trump blamed a private company not himself and his govt., everyone would have gone nuts"), but ultimately determined to "be responsive to their concerns" . . . "[*g*]*iven the bigger fish we have to fry with the Administration – data flows, etc.*" R. Dkt. #92-1 at 7, Dkt. #105 at 5. More recently, CEO Mark Zuckerberg conceded that Meta bowed to the pressure, though he has kept mum on his company's willful participation for its own ends. Mark Zuckerberg, Letter to the House Judiciary Committee, X (Aug. 26, 2024), available at https://x.com/JudiciaryGOP/status/1828201780544504064; *Missouri*, No. 22-cv-01213, Dkt. #404 at 4 (letter "certainly does not inspire dismissal of this case").

2. CDC and Meta Form a Partnership to Censor Speech Contrary to CDC's "Vaccinate with Confidence" Policy

4. In March 2019, the CDC announced its ongoing "Vaccinate with Confidence" initiative with social media platforms to "stop myths" and "contain the spread of misinformation . . . about vaccines." R. Dkt. #20-4 ¶ 49-50, 52. Then, Meta added new language to its "community standards" which for the first time proscribed vaccine "misinformation" determined to be "harmful" by reference to a CDC 2-

page vaccine "controversies" table. Applying these new terms, Meta began censoring CHD's and Kennedy's vaccine posts and restricting CHD's account.[10] R. Dkt. #20-4 ¶¶ 115-21, 125-28, 129-30, 176-79, 186-87, 191-95; *see also* Dkt. #20-5 ER 584-86. CHD alleged that in 2019, CDC's vetting of Meta policy to suppress content it (CDC) deemed false and likely to lead to "vaccine hesitancy," and Meta's "total dependence" on CDC crossed the line between public and private action well before Covid's emergence in 2020.

Thus, relying on the CDC's "say-so," Meta censored scores of CHD's vaccine-posts in 2019-2020. During Covid, the CDC-Meta partnership expanded to target CHD's viewpoint there too. *See* R. Dkt. #20-4 ¶¶ 173-75, 180-85; R. Dkt. #20-5 ER 584-85. CHD was chilled from cross-posting other content from its online newsletter *The Defender* to its Meta page, as it had in 2017 and 2018, before Meta ceded control to CDC. Discovery in the *Missouri* cases showed a comparable close nexus between CDC and Meta to shape the public debate about Covid vaccines. R. Dkt. #20-4 ¶¶ 49-53, 58-59, 71-72; *see also Missouri*, 83 F.4th at 387-90.

CHD's allegation that CDC had already "entered the picture" by early 2019 (before Meta had

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[10] CDC FOIA releases since *Murthy* was handed down implicate CDC in Meta's 2019 policy formation, as CHD had alleged, while Meta attempted to "avoid[] FOIA and other sensitivities." Center for Disease Control, *FOIA Response* (Oct. 7, 2024), pp. 85, 92, avail. at https://icandecide.org/wp-content/uploads/2023/10/23-01115-for-9-1-2023-Close.pdf. CDC provided Meta with a "vaccine controversies" table to "debunk" contrary viewpoints. *Id.* at 18-19, 35-36, 39, 57-58, 63; *see* R. Dkt. #20-4 ¶¶ 70, 81-82.

its own policy) puts daylight between CHD and the *Murthy* plaintiffs, *cf. Murthy*, 603 U.S. at 68 n.8, and paints a more accurate picture of CDC's involvement with Meta than what was drawn for this Court in *Murthy*. On the backend, the CDC "vaccinate with confidence" partnership with Meta has never ended even as "CDC stopped meeting with platforms *about COVID-19-related falsehoods in March 2022*, C.A. ROA 19,598." (*Murthy* Defendants' March 4, 2024 reply brief at 9 (emphasis added); *cf. Murthy*, 603 U.S. at 72 (CDC continued to ask about "the most popular vaccine-related posts" *after* contacts about Covid-posts subsided). Meta's decision *not* to re-platform CHD or restore CHD's archival content reflects and perpetuates its close nexus with CDC.

3. Meta's Internal Communications Support an Inference of Scienter

5. CHD tendered salient evidence of Meta's scienter from its CEO Mark Zuckerberg's internal deliberation and decision to curry favor with the government on Covid-speech censorship to advance Meta's commercial and lobbying interests, which "knowingly and substantially assist[ed] the principal violation." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 486 (2023). This is far more than most plaintiffs have at the pleading stage and persuaded the district court on remand in *Murthy* to grant further jurisdictional discovery. *Missouri*, No. 22-cv-01213, Dkt. #404 at 4-5.

Dissenting in *Murthy*, Justices Alito, Gorsuch, and Thomas highlighted Meta's dependency on the White House in 2022-2023 to negotiate an agreement with the European Union to preserve its trans-Atlantic operations in the face of the EU user privacy policies. *Murthy*, 603 U.S. at 101, 107-08.

Thus, as Nick Clegg sized it up for Meta's leadership, "'[g]*iven the bigger fish we have to fry with the Administration*,' *such as the EU-US dispute over 'data flows,' that did not 'seem like a great place' for Facebook-White House relations 'to be.'*" *Id.* at 108 (emphasis added). Justice Alito concluded, quoting Meta COO Sheryl Sandberg, "[s]o the platform was motivated to 'explore some moves that we can make to show that we are trying to be responsive.'" *See also* R. Dkt. #92, R. Dkt. #105 at 5. Clegg sent his July 22, 2021 "*bigger fish to fry*" internal email the morning after *The Wall Street Journal* reported on the enormous costs and risks to Meta from the ongoing EU-U.S. data privacy dispute. *See* David Uberti, *EU-U.S. Data Privacy Talks Enter Second Year With No Timeline for Resolution*, THE WALL STREET JOURNAL (Jul. 21, 2021), https://www.wsj.com/articles/eu-u-s-data-privacy-talks-enter-second-year-with-no-timeline-for-resolution-11626859800. This manifests willful participation.

And, Meta will inevitably have "fish to fry" with every Administration. The "intermediary strategy" this Court called out in *Vullo,* 602 U.S. at 197-98, is as concerning when a platform knowingly wields its § 230 power to "fry" the little fish the regulator disdains in favor of the "bigger fish" the government can deliver in return.

In WhatsApp internal messages, Meta's CEO Zuckerberg and COO Sandberg weighed the company's alternatives with Clegg: a press release that "the WH put pressure on us to censor the lab leak theory"; [but] "[that] would supercharge the current cycle among conservatives that we are collaborating with the government to censor speech";

"if this is the way they want to play it we have little incentive to engage in good faith with them . . . We definitively need to reset our working relationship with them. (Zuckerberg)" U.S. House of Representatives, Committee on the Judiciary, *Final Report: The Weaponization of the Federal Government* Part 1, at 529-32 (2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2024-12/Part-1-Final-Weaponization-Report-Compilation.pdf. It is rare, at the pleading stage, to present evidence where conspirators weigh their options, and choose to "knowingly and substantially assist the principal violation," or agree "with the primary wrongdoer to commit wrongful acts," which Meta then sought to make succeed. *Cf. Taamneh*, 598 U.S. at 489-90. Meta's messages also show consciousness of guilt, *e.g.*, "[removing content would represent] a significant incursion into traditional boundaries of free expression in the US," and insight that mass censorship likely would not help the Administration bring Covid under control, although regrettably not that their own participation in censorship would cost lives.[11] Covid may be over, but

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[11] *See, e.g.*, Brief of Amicus Curiae Rep. Jim Jordan et al. in Support of Appellants, *Missouri v. Biden*, No. 23-30445, Dkt. #161 at 64-65, 88, 104 (5th Cir. 2023) ("have seen a lot of groups sharing individual stories about side effects or death after vaccination"). The U.S. had the highest mortality rate of any nation during Covid. WHO Covid-19 Dashboard, *Number of COVID-19 deaths reported to WHO*, World Health Organization, https://data.who.int/dashboards/covid19/deaths (last visited Dec. 28, 2024). CHD's point is that unfettered discussion of the benefits of natural immunity, alternative treatment with ivermectin and other protocols, and of the risks of Covid-vaccines, Remdesivir, and ventilation would have

speech about Covid is not.[12] This case offers accountability for Meta's role in this man-made disaster.

4. CDC-Meta's Covid Nexus

6. In *Murthy*, this Court observed that "the CDC *influenced* [Meta's] policy against false claims related to children and the [Covid] vaccine," and in November 2021, Meta *"worked with"* the CDC to update its policies. *Murthy*, 603 U.S. at 66-67. Briefly, CDC met with Meta secretly in 2021-2022 to censor Covid "misinformation." *Missouri v. Biden*, 680 F. Supp. 3d 630, 661-68 (W.D. La. 2023). In April 2021, Meta created a portal for CDC officials to submit specific Covid-vaccine posts for removal. *Id.* at 664. Meta relied on CDC to "debunk" Covid claims that Meta would then censor. *Id.* at 664-65. In October 2021, federal officials told Meta that the CDC was the health authority empowered to decide what content could be censored as "misinformation." *Id.* at 661. Thus, CDC and Meta partnered to remove or silence millions of protected posts that CHD (and many others) expressed concerning Covid and Covid-vaccine side effects, transmissibility, safety-data, natural immunity, alternative Covid treatments, and objections to vaccine mandates. *Id.* at 664-67.

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saved lives. To sacrifice basic freedoms in the name of judicial restraint, *see* App. 32a, echoes lapses of judgment of times past. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (anti-conscription leafleting); *Dennis v. United States*, 341 U.S. 494 (1951) (seditious speech).

[12] Meta's policy still enforces CDC's judgment that vaccine- or Covid-speech is too dangerous for the American people to discuss. *See Misinformation Policy*, Community Standards, META, https://transparency.meta.com/policies/community-standards/misinformation (last accessed July 18, 2024).

Unlike *Murthy*, CHD alleged further that this commingling of CDC-Meta teams, websites and policies were indicative of an ongoing vaccine-speech censorship "close nexus" under the "vaccinate with confidence" partnership. *Cf. Murthy*, 603 U.S. at 71 (CDC's Covid-related communications "slowed to a trickle" by August 2022, posing minimal risk of future harm). Refusing to consider this evidence on appeal, the Ninth Circuit dismissed CHD's claims for declaratory and injunctive relief that such conduct is illegal and must stop. *See* R. Dkt. ## 64, 70, 78, 86 & 92 (judicial notice motions).

5. The White House and Meta's "Hand in Glove" Relationship

7. Similarly, in *Murthy,* this Court canvassed Biden Administration interactions with Meta during 2021 and 2022. Reviewing that same record, the district court found in *Kennedy v. Biden* that "[t]here is not much dispute that both Kennedy and CHD were specifically targeted by the White House, the Office of Surgeon General, and CISA, and the content of Kennedy and CHD were suppressed." *Kennedy v. Biden*, 2024 U.S. Dist. LEXIS 149217 at **16-17 (W.D. La. Aug. 20, 2024), *vacated on other grounds sub nom. Missouri v. Biden*, No. 24-30252, 2024 U.S. App. LEXIS 27886 (5th Cir. Nov. 4, 2024) (per curiam) (unpubl.) (*en banc* requested). Indeed, the court posited that the "massive effort . . . to suppress speech based on its content . . . likely resulted in millions of free speech violations." *Kennedy*, 2024 U.S. Dist. LEXIS 26751 at *30. Yet, the Ninth Circuit refused to consider this evidence

on appeal as a proffer of how CHD could amend its complaint.[13]

Briefly, these disclosures show *three* facts of consequence. *First*, high-level Government officials made targeted private requests for Meta to take action *specifically* against CHD and Kennedy's Covid-vaccine speech, by name or pejorative.[14] *Second*, in its private reassurances to White House and other Executive Branch officials, Meta repeatedly and *specifically* touted the targeted actions it had taken against CHD and Kennedy.[15] *Third*, in framing its own options as to go public or to go along,[16] Meta executives willfully participated as accessories in government-censorship by choosing to go along.

D. Proceedings Below

8. In August 2020, CHD sought injunctive relief against Meta's violation of its free speech rights under state-action theories and declaratory

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[13] In *Murthy*, no Justice questioned the admissibility of White House-Meta emails and Meta call notes, even when those surfaced on appeal. *See, e.g.*, *Murthy*, 603 U.S. at 84 n.7 (Alito, J., dissent) (*citing* Fed. R. Evid. 201). The Ninth Circuit glossed over this evidence of how CHD could viably amend its complaint. *See also* Fed. R. Evid. 801(d)(2)(E) (coconspirator statements).

[14] "Disinfo Dozen," a term coined by CCDH.

[15] Justice Alito referenced this as "responsive" "brainstorming [within Meta which] resulted in the August 2021 rule changes" and included permanently de-platforming Kennedy, and later CHD. *Murthy*, 603 U.S. at 108 (Alito, J., dissent).

[16] A third path Meta could have pursued was to seek declaratory relief and uphold its independence and the rule of law.

judgment that Meta's conduct violates the First Amendment. R. Dkt. 20-4 ¶¶ 386-91. In December 2020, CHD filed its second amended complaint alleging, *inter alia*, that Meta was working in concert with or under compulsion from the Federal Government to suppress CHD's speech, along with a hybrid theory that § 230 immunity-power transformed Meta into a state actor for censoring officially-disfavored speech in these unique circumstances. In March, May and June 2021, CHD filed supplemental allegations about the CDC and White House under Rule 15(d). R. Dkt. #20-3 ER-152-58, 274-75, 303-06, 314-15 (Administration); R. Dkt. #20-4 ER-419, 433-439, 445, 447-448, 499, 508-509, 530, 532-534, 536 (CDC).

In June 2021, the district court dismissed CHD's case with prejudice. App. 165a. Applying *Lugar*'s "state policy" "requirement," the court found that "generalized statements about [Meta] 'working with the CDC' to 'remove misinformation'" [does not equate to] "adoption of a CDC 'standard of decision' about what content to remove." App. 131a. It also expressly rejected CHD's claim of government coercion and its "hybrid theory" that the unique grant of § 230 "conduit-like" immunity to Meta for censoring government-targeted speech is sufficient encouragement or inducement to create state action and trigger constitutional safeguards. *Id.* at 132a-135a. It found the *Skinner* analogy unpersuasive because, *on its face*, "§ 230 does not require private entities to do anything . . . [and] reflects a deliberate absence of government involvement in regulating online speech[.]" *Id.* at 134a (citation omitted).

During its three-year odyssey at the Ninth Circuit, CHD sought seriatim judicial notice of

records from the *Missouri* and *Kennedy* parallel proceedings, House reports, and FOIA releases. R. Dkt. ## 64, 70, 78, 86, 92. Despite a cavalcade of new facts documenting "arguably . . . the most massive attack against free speech in United States' history," *Missouri v. Biden*, 680 F. Supp. 3d at 641, on August 9, 2024, the Ninth Circuit affirmed the dismissal of CHD's complaint with prejudice. At the threshold, it found that these records "cannot qualify for judicial notice," because the statements within them are "subject to varying interpretations." App. 17a (citation omitted). Relying on this Court's decision in *Murthy* – which adjudicated a different group of plaintiffs' standing under Rule 65 -- the Ninth Circuit opined that, "even if" notice were taken, the documents "indicate that Meta and the government have regularly disagreed about what policies to implement and how to enforce them[,] [and] [e]ven if Meta has removed or restricted some of the content of which the government disapproves, the evidence suggests that Meta 'had independent incentives to moderate content and . . . exercised [its] own judgment' in so doing." *Id.* (*quoting Murthy*, 603 U.S. at 60).

Next, the majority glossed over CHD's allegations that Meta turned over operational control of vaccine speech to the CDC on the front and back-ends of Covid under their "vaccinate with confidence" partnership to "tilt public debate in a preferred direction," *Moody v. NetChoice, LLC*, 603 U.S. 707, 722 (2024) (citation omitted), a subject on which government voices all pulled in the same direction. The complaint alleges that CDC's "partnership" with Meta to "stop myths" and "contain the spread of misinformation," R. Dkt. #20-4 ¶¶ 50-52, is not about government speech at all but,

rather involves Meta's ceding active, meaningful control, and therefore suspect. The timing of Meta's censoring CHD (May 2019) lines up with Meta-CDC partnership-formation, and later-acquired evidence shows Meta handing over operational control *sub rosa* to CDC on Covid.

The majority instead held that the *only* plausible source of CHD's alleged harm was Meta's own policy of censoring, not any provision of federal law or any close nexus with government. It found CHD's allegations about CDC-Meta joint action and conspiracy too "generic" and implausible "in light of the obvious alternative—that the government hoped Meta would cooperate because it has a similar view about the safety and efficacy of vaccines." *Id.* at 15a-16a.

The Circuit expressly rejected CHD's hybrid theory of state action based on the application of § 230 immunity to Meta's actions, which was outcome-dispositive. Even though Meta could not operate at scale without § 230, the statute is, "unlike the regulations in *Skinner,*" "entirely passive." *Id.* By giving providers freedom to suppress third-party speech without risking costly litigation, "the government has hardly expressed a 'strong preference' for the removal of speech critical of vaccines." *Id.* at 29a (*quoting Skinner* at 615-16). Section 230 was enacted years before the government was concerned with vaccine-speech, and makes no reference to that kind of speech. *Id.* Rather, § 230 serves as a "background" entitlement which does not transform Meta into a state actor even coupled with government pressure or encouragement. To hold otherwise would open the floodgates to "would-be purveyors of pornography" to

make the same claim. *Id.* at 31a. Instead, citing *Moody*, the Circuit concludes that limiting state-action doctrine protects Meta's expressive right to freely censor speech on its platform and its individual liberty to work with government. *Id.* at 21a, 32a.

Dissenting in part, Judge Collins wrote that CHD has plausibly alleged a First Amendment claim for declaratory and injunctive relief against Meta. *Id.* at 42a, 83a. At the threshold, he finds that the newly-available disclosures from parallel litigation, congressional investigation, and FOIA are highly-relevant, and their existence is noticeable as to new allegations of "behind-the-scenes interactions between Meta and the government" which CHD could plead on remand. *Id.* at 44a-45a.

In the dissent's view, CHD can adequately plead state action under the test articulated in *Skinner*. First, it recounts the history of government pressure, encouragement, and close nexus with Meta, targeting CHD's and Kennedy's speech and viewpoint, and ultimately leading to CHD's removal in August 2022. *Id.* at 46a-55a. Next, Judge Collins surveys the text and context of Section 230, and its broadly-construed immunity-privilege, which fundamentally enables Meta's "vast practical power . . . over the speech of millions." *Id.* at 60a-94a, 89a.

Viewed in this light, the dissent finds that: (1) § 230 confers on Meta a unique, government grant of censorship power without which Meta could not exist as a mega-platform; (2) as in *Skinner*, the Executive Branch conveyed its particular interest in and direct benefit from Meta's specific exercise of that power to censor CHD and Kennedy's viewpoints that the government does not like and to adjust its

algorithms; and (3) Meta cooperated extensively with the government to accomplish "the illegitimate purpose of dampening opposition to the Government's preferred vaccine policies."[17] *Id.* at 93a. This hybrid state-action theory "promotes individual liberty by keeping the Government's hands away from the tempting levers of censorship on these vast platforms." *Id.* at 92a. The combination of factors CHD has alleged "*implicate*[*s*]" the First Amendment and requires remand to determine whether CHD's speech rights were "*violated*." *Id.* at 93a (*emphases in original*).

E. Parallel Proceedings Consolidated with *Murthy*

9. On March 23, 2023, CHD and Kennedy filed a complaint for declaratory and injunctive relief against the Biden Administration and CDC, *inter alia*, in the W.D. La. district court hearing *Missouri v. Biden*. (*Kennedy v. Biden,* No. 23-CV-381.) That court granted the *Missouri* plaintiffs a preliminary injunction, consolidated the cases, and granted Kennedy the same relief. *See Missouri*, 83 F.4th 350 (5th Cir. 2023); *Kennedy*, 2023 U.S. Dist. LEXIS 127620 (W.D. La. July 24, 2023) (consolidation), 2024 U.S. Dist. LEXIS 26751 (preliminary injunction), 2024 U.S. Dist. LEXIS 149217 (W.D. La. Aug. 20, 2024) (standing after *Murthy*), *vacated by Missouri v. Biden*, 2024 U.S. App. LEXIS 27886 (5th Cir. Nov. 4, 2024) (per curiam) (unpubl.) (*en banc*

[17] In Judge Collins' view, CHD's "concededly truthful" vaccine-speech is likely protected, unlike purveyors of pornography or malign foreign actors as to whom the government may lawfully confer with Meta, though he would remand this issue and the scope of injunction as beyond the scope of the appeal. *Id.* at 86a, 93a & n.13.

requested). This Court denied CHD intervention in the *Murthy* appeal. *Murthy v. Missouri*, 144 S. Ct. 32 (2023) (Alito, J., dissent). On remand from this Court, the district court granted *Missouri* jurisdictional discovery because "evidence of coordination [between government and platform *ex ante* to censor a particular topic or speaker] would not be easy to find [and] every judge that has examined the merits of this case has found a First Amendment violation." *Missouri*, No. 22-01213, Dkt. #404 at 5.

This Court cast doubt on the accuracy of the district court fact-findings in *Murthy*, and rejected the Fifth Circuit's approach which, "by attributing every platform decision at least in part to the defendants, glossed over complexities in the evidence." *Murthy*, 603 U.S. at 60 & n.4. That complexity involves, in large part, the interplay of platform "independent incentives" and judgment with the often-hidden role that the government played in platform choices. *Id.* at 61-62. This Court also noted that *Missouri* faced challenges of proof due to the "one-step-removed" nature of their alleged injuries; their theories depend on platform actions, "yet the plaintiffs do not seek to enjoin the platforms from restricting any posts or accounts." *Id.* at 57. That is not so here.

Moreover, unlike *Murthy*, CHD's complaint against Meta states that Meta did *not* have policies against vaccine speech before CDC partnered with it in 2019. Additionally, the *Missouri* lower courts' findings that Meta's dependence on the CDC "at times was total," and its censorship decisions were "based entirely on the CDC's say-so" still stands, *Missouri*. 83 F.4th at 390, along with the extensive

record of White House communications with Meta directly targeting CHD and Kennedy.

REASONS FOR GRANTING THE PETITION

I. The Case Presents Two Questions of Great and Increasing Societal Importance Worthy of this Court's Review

A. *Skinner* Provides the Right Framework for Assessing Whether Meta's Exercise of Section 230 "Privilege" Implicates the First Amendment

10. Every internet user is affected by a constriction of the "true diversity of political discourse," which it was the express intent of Congress to let "flourish," § 230(a)(3), when that constriction occurs at the government's hands with the levers of censorship on the vast, highly-concentrated social media mega-platforms. Half of U.S. adults say they get news in general at least sometimes from social media. A 2023 Pew Research Center survey found that Meta outpaces all other social media sites as a news source for Americans, with 30% of U.S. adults saying they regularly get news there. Across sites, younger users are much more likely to see information about breaking news there. Elisa Shearer et al., *How Americans Get News on TikTok, X, Facebook and Instagram*, Pew Research Center (Jun. 12, 2024) https://www.pewresearch.org/journalism/2024/06/12/how-americans-get-news-on-tiktok-x-facebook-and-instagram/. Industry concentration makes all forms

of state-action transformation through coercion, close nexus or joint action both easier for the State to accomplish and more concerning for the security of individual rights and liberties. Judicial discernment is therefore necessary to ensure that the government does not encroach upon this vital virtual space for diverse public ideas and debate.

A state action determination is a "necessarily fact-bound inquiry," *Lugar*, 457 U.S. at 939. Against this industry backdrop, the Court should consider the unique role which § 230 censorship immunity plays in the reciprocal relationship between Meta and the Executive Branch, alongside time-tested state-action tests of coercion, close nexus, joint action and conspiracy.

1. Section 230 confers a special government-grant to Meta of immunized power over others' speech on a mass scale

The first point of Judge Collins's taxonomy is that Meta would not exist as a mega-platform without Section 230. The law provides a distinctive, government-conferred special power, a singular and broad immunity, which gives its beneficiaries the ability to censor other individuals' speech. App. 59a. That's why the majority's analogy of § 230 to generic laws of incorporation that do not disadvantage other people's speech-rights falls flat. Specifically, and "[i]n sharp contrast, both in its purpose and in its effect, § 230's immunity is entirely a speech-related benefit—it is, by its very design, an immunity created precisely to give its beneficiaries the practical ability to censor the speech of large numbers of other persons." App. 71a & n.7.

Secondly, the dissent rightly identifies Meta as a "novel legal chimera" with the immunity of a conduit for third-party speech based on the premise that it is not a publisher; "but Meta has, as a practical matter, a statutory freedom to suppress or delete any third-party speech while remaining liable only for its own affirmative speech[,]" *Id.* at 89a-90a. Thus, Meta differs from traditional publishers or distributors in a critical respect that is directly relevant to the state-action question and, in Judge Collins's view, decides that question without regard to Meta's invocation of its own speech right. *Id.* at 90a-91a.

In particular, if, armed with § 230 immunity, "Meta then affirmatively engages with the Government as to how to exercise its government-granted authority in order to widely suppress particular subjects or speakers on its mega-platforms, *that additional element suffices to cross over the state-action line* and to implicate the First Amendment's protections with respect to the targeted speakers." *Id.* at 91a-92a (emphasis added); *Lugar*, 457 U.S. at 939 (the "something more" which converts a private party's action pursuant to a statute into state action may "vary with the circumstances.")

2. The *Skinner*/§ 230 Theory of State Action As Applied Promotes Individual Liberty Where the Levers of Online Censorship Are Most Concentrated and Tempting to the Government

11. The closest precedent for such an analysis is *Skinner*, which held that a private railroad company becomes an "instrument or agent"

of the State when it conducts searches of its employees under an immunity statute, and "in light of all the circumstances," such searches implicate the Fourth Amendment. *Skinner*, 489 U.S. at 615-16. There, this Court ruled on the constitutionality of federal regulations concerning urine and breath-testing of private railway employees. *Id.* at 614–15. Subpart D of the regulations was "permissive," *i.e.*, did *not* require the railway companies to conduct such tests, but immunized them against liability if they did. *Id.* The government argued that these tests were not state action because the ultimate decision whether to test employees was left to the private companies. *Id.* This Court found instead that "specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct." *Id.* In practice, the government had (1) "removed all legal barriers to the testing" by immunizing the railways if they performed the tests; (2) "made plain . . . its strong preference for [the] testing"; and (3) expressed its "desire" to share in the fruits of the testing. *Id.* "These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment." *Id.* at 615–16.

Judge Collins emphasizes that those same three factors are implicated here by the co-actions of (1) § 230 immunity which removes all legal barriers to Meta's censorship of CHD's viewpoint on vaccines; (2) the Executive Branch's *uniform* expression of strong preference for such censorship (as found by every judge who has reached the merits in parallel proceedings); and (3) Meta willfully cooperated in such censorship that was compulsory against CHD. App. 76a. The Executive Branch singled out CHD

and Kennedy in covert communications with Meta, and Meta willfully facilitated the government's censorship preference (most clearly) to leverage its own interest in a favorable EU-U.S. data privacy treaty outcome. These facts, which include how its § 230 entitlement shapes the social media industry's "custom and practice in its relationship with the regulator," *Brentwood*, 531 U.S. at 301, meet *Skinner's* "clear indices" of official "encouragement, endorsement, and participation," 489 U.S. at 615-16, and plausibly transform Meta's conduct into state action.

Judge Collins concludes that "in this distinctive scenario, applying the state-action doctrine promotes individual liberty by keeping the Government's hands away from the tempting levers of censorship on these vast platforms." App. 92a. The Circuit's dystopian result "thwarts the First Amendment's core purpose" by permitting the government to "create a special immunized power for private entities to suppress speech on a mass scale and then request and receive, from those private entities, an ability to influence the exercise of those levers of censorship." *Id.*

As in *Skinner*, finding state action plausibly alleged here "is only to begin the inquiry into the standards governing such intrusions." 489 U.S. at 619. That is only to say that the First Amendment is "*implicated* [which is] not the same as saying it is *violated*." App. 93a (emphases in original). Judge Collins would remand to the district court for a determination whether CHD's rights were violated and equitable remedies apply. App. 42a, 94a.

This case goes to the heart of our constitutional design, raising critical questions in

the Internet Age about the availability of open debate free from government censorship-by-proxy. The practical consequences of leaving the decision below intact are enormous: the levers of censorship on the mega-platforms will always be sore temptation for executive office-holders – and not just about vaccines or Covid. The Biden Administration DHS's outline of priorities states that the department had plans to target "inaccurate information" "on a wide range of topics, including . . . racial justice, the United States' withdrawal from Afghanistan, and the nature of the United States' support of Ukraine." *Missouri*, 680 F. Supp. 3d at 683. And, regardless of the officeholder, executive agency action beyond delegated statutory authority poses a grave risk to free speech, as borne out here by CDC's censorship-by-proxy of CHD's viewpoint on vaccines in 2019 and 2020. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2268 (2024). Meta's "bigger fish to fry" bears out the sagacity of this Court's concern with government censorship through intermediaries who are "less invested in the speaker's message" and "less likely to risk the regulator's ire." *Vullo*, 602 U.S. at 197-98 (citation omitted). Meta will always have "bigger fish to fry" than protecting third-party speech and thus will be likely ever-willing to bend to the sovereign's will.

This case is a perfect vehicle for resolving the questions presented, which were outcome-determinative below. Further percolation is unnecessary. The district court and Ninth Circuit dismissed the case with prejudice. This Court should intervene now to establish the correct threshold standards for when private conduct transforms into state action in the context of government interactions with the mega-platforms.

3. Section 230 Also Meets the *Lugar* Test of a State-Created "Right or Privilege"

12. A subsidiary question fairly included within this issue that the Ninth Circuit got wrong is that § 230 immunity does meet the *Lugar* "state policy" test as a state-created "right or privilege" whose protection Meta avails itself of whenever it suppresses third-party speech. *See Lugar*, 457 U.S. at 937. This Court should affirm this principle which lower courts have applied inconsistently or dispensed with, *see, e.g.*, *O'Handley v. Weber*, 62 F.4th 1145, 1157 (9th Cir. 2023), and which split the court below. App. 12a-13a, 77a & n.8. The Executive Branch has shown a propensity for conveying its censorship preferences to mega-platforms "behind closed doors," making it nearly impossible for any litigant to show that a formal "rule of conduct" applies.

II. The Case Presents an Important Federal Question upon which the Fifth and Ninth Circuit Decisions Squarely Conflict

A. Meta's Willful Cooperation with the Executive Branch to Censor CHD's Viewpoint Plausibly Shows Close Nexus

13. A second important question presented by this case concerns the standard for assessing close nexus accessory or conspiracy liability. The Ninth Circuit held that CHD had not adequately alleged an agreement between the government and Meta to take "specific action" to censor speech, but only that "the government hoped Meta would

cooperate in its efforts to promote the safety and efficacy of vaccines." App. 21a. This reasoning conflicts with the Fifth Circuit's treatment of the same transactions and occurrences in the *Missouri* and *Kennedy* cases.

First, the court below ignored this Court's directive last Term in *Vullo* to accept plaintiffs' well-pleaded allegations as true, including the new evidence of covert White House and CDC encouragement, to assess the complaint "as a whole" and "in context," and to draw all reasonable inferences in CHD's favor as to coercion, close nexus, and joint action. *Vullo*, 602 U.S. at 191-94; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Second, in *Murthy*, this Court did not reach the merits of "whether the Fifth Circuit correctly articulated the standard for when the Government transforms private conduct into state action." *Murthy*, 603 U.S. at 55 & n.3. Under that standard, the government "significantly encourages a private party's choice when it exercises 'active, meaningful control, whether by entanglement in the party's decision-making process or direct involvement in carrying out the decision itself.'" *Id.* (*quoting Missouri*, 83 F.4th at 377). The Fifth Circuit explained that this "close nexus" test requires a "much narrower level of integration" [than joint action] "where the state is involved in only one facet of the private actor's operations—its decision-making process regarding the challenged conduct." 83 F.4th at 375 n.11. Applying that standard to the preliminary injunction evidence, which the Ninth Circuit refused to consider, the Fifth Circuit found that *both the White House and CDC* met the "close nexus" test by entangling themselves in Meta's

decision-making process during Covid. *Id.* at 387-88, 390. White House officials "imparted a lasting influence on [Meta's] moderation decisions without the need for any further input."[18] *Id.* at 388. Meta also "ma[d]e moderation decisions based entirely on the CDC's say-so. . . . That dependence, at times, was total." *Id.* The district court's Rule 65 fact-findings in the consolidated case involving CHD, *Kennedy v. Biden*, were, if anything, only stronger on both grounds. The Ninth Circuit and Fifth Circuit state-action "close nexus" analyses squarely conflict. This issue is urgent, important, and highly likely to recur, warranting this Court's reconciliation.

Finally, the Fifth Circuit could not assess Meta's scienter as an absent party because Meta's forum selection clause requires suit in California.[19] But neither did the Ninth Circuit properly assess Meta's culpability for knowingly providing substantial assistance to the government's free speech violation. *See Taamneh*, 598 U.S. at 489-90 (applying common law accessory liability to claim against platform under the Antiterrorism Act, 18 U.S.C. § 2333).

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[18] The government's role in formulating Meta's policies waives First Amendment protection of Meta's enforcement decisions as not truly an "expressive product of its own." *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707, 710 (2024).

[19] *See Murthy*, 603 U.S. at 73-74 ("The platforms are 'not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.'") (citations omitted). By contrast, CHD sued Meta directly for equitable relief from injuries which are firsthand, traceable and redressable, and CHD alleged a "close nexus" with CDC to suppress vaccine- speech which has no terminus.

The platforms maintain before this Court that they "do not become instruments of the state when they are compelled to remove content in response to government take-down requests"; "compulsion by the state negates the presence of willfulness," (citation omitted); and "[a]ny rule that suggests litigants may seek recourse from the digital services would mean they get hit coming and going." Netchoice amicus brief, *Murthy*, No. 23-411 at 9, 17, Dec. 21, 2023.[20]

Here, CHD pleaded alternatively that Meta was coerced or that it has acted as a willful participant and co-conspirator with the government. The common law linchpin of accessory liability is that defendant "knowingly and substantially assist the principal violation." Common law conspiracy requires that the defendant enter into an agreement "with the primary wrongdoer to commit wrongful acts" *Taamneh*, 598 U.S. at 489-90.[21] Meta's conduct

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[20] CHD disagrees that coercion is a defense or objection under Rule 12(b), or a bar to equitable remedies like declaratory and injunctive relief where no relief in damages is available. 28 U.S.C. § 2201(a); *Davis v. Passman*, 442 U.S. 228, 246 n.24 (1979) (reserving equitable reinstatement issue); *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1298 & n.1 (9th Cir. 1987) (Canby, J., dissent) (injunction should be modified or lifted only upon showing of true independence from the state under a burden-shifting framework); *but see* App. 23a (questioning whether Meta, as the *victim* of alleged coercion, would be the appropriate defendant).

[21] In *Taamneh*, this Court affirmed dismissal of a complaint against Twitter for accessory liability under 18 U.S.C. § 2333(d)(2), where "the only affirmative 'conduct' [Twitter] allegedly undertook was creating their platforms and setting up their [content-"agnostic"] algorithms to display content relevant to [ISIS] user inputs and user history[,]" which made

and scienter as alleged show substantial engagement with the government to accomplish its illegitimate purpose. This case is the perfect vehicle to apply these common law principles so that Meta may be held accountable when it knowingly conforms its content-moderation process and decisions, or cedes active, meaningful control, to the State's preference to suppress constitutionally-protected speech.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 6, 2025

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Twitter essentially "bystanders," *i.e.*, "arm's length [with], passive, and largely indifferent" to ISIS terrorist attacks. *Id.* at 498-500.

APPENDIX

TABLE OF APPENDICES

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16210
D.C. No. 3:20-cv-05787-SI

CHILDREN'S HEALTH DEFENSE, A GEORGIA NON-PROFIT ORGANIZATION,

Plaintiff-Appellant,

v.

META PLATFORMS, INC., A DELAWARE CORPORATION; MARK ZUCKERBERG, A CALIFORNIA RESIDENT; THE POYNTER INSTITUTE FOR MEDIA STUDIES, INC., A FLORIDA CORPORATION; SCIENCE FEEDBACK, A FRENCH CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted May 17, 2022
Pasadena, California

Filed August 9, 2024

Appendix A

Before: Eric D. Miller and Daniel P. Collins, Circuit Judges, and Edward R. Korman,* District Judge.

Opinion by Judge Miller;
Partial Concurrence and Partial Dissent by Judge Collins.

OPINION

MILLER, Circuit Judge:

Children's Health Defense (CHD) is a nonprofit advocacy organization dedicated to educating the public about what it sees as the dangers of vaccines. The organization regularly shares articles and videos on its Facebook page, but since 2019, Meta Platforms, Inc., the operator of Facebook, has restricted CHD's ability to do so, including by adding warning labels to alert users that, in Meta's view, the information that CHD shares is not accurate.

Believing that Meta was censoring its speech at the direction of the federal government, CHD brought this action against Meta; Mark Zuckerberg, Meta's CEO; and the Poynter Institute and Science Feedback, both of which contract with Meta to evaluate the accuracy of some Facebook content. It asserted claims under the First and Fifth Amendments as well as the Lanham Act, 15 U.S.C. § 1125(a), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. The district court dismissed the complaint. We affirm.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix A

I

Because this is an appeal from an order granting a motion to dismiss, we assume the truth of the facts alleged in the operative complaint—here, CHD's second amended complaint. *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1266 (9th Cir. 2022). After filing that complaint, CHD moved to "supplement" it with additional allegations, filed a motion for judicial notice that contained further allegations, and then moved to "further supplement" the complaint. The district court denied CHD leave to amend the complaint but considered the allegations within CHD's motions "as a further proffer of how CHD would amend the complaint if given leave to do so." We have likewise considered those allegations, and they are reflected in the description of the facts set out below.

CHD describes itself as an organization that seeks "to provide the public with timely and accurate vaccine and 5G and wireless technology safety information." To that end, CHD publishes articles and opinion pieces on its eponymous website and on its Facebook page. Those writings often describe purported links between vaccinations and various illnesses. CHD has posted articles that it claims show that "[u]nvaccinated kids are healthier" than their vaccinated counterparts. Sometimes, CHD posts messages from its founder, Robert F. Kennedy, Jr., in which he criticizes Dr. Anthony Fauci and Bill Gates and their efforts to encourage vaccinations.

Although public discussion of vaccines has taken on a new dimension as a result of the COVID-19 pandemic, some

lawmakers have expressed concern about the proliferation of "vaccine misinformation" on social media platforms for several years. In February 2019, Representative Adam Schiff of California sent a public letter to Zuckerberg, asking (1) whether "medically inaccurate information" violated Facebook's terms of service; (2) what steps Facebook took to address "misinformation related to vaccines" and whether it planned to take additional steps; (3) whether Facebook allowed anti-vaccine activists and organizations to advertise on its platform; and (4) what steps Facebook took to prevent its algorithm from recommending anti-vaccine content to users. After COVID-19 vaccines became widely available, some lawmakers expressed renewed concern that social media companies like Meta were not doing enough to slow the spread of false information about the virus and vaccines. For example, Senator Amy Klobuchar of Minnesota wrote to Zuckerberg, stating that Facebook's "policies must be strictly enforced to limit users' exposure to misinformation" and urging him to "take action against people that are spreading content that can harm the health of Americans."

For its part, Meta announced in early 2019 that it had begun to "tackle vaccine misinformation" on Facebook by making that content less prominent in search results, rejecting ads that included it, and "exploring ways to share educational information about vaccines when people come across misinformation on this topic." It promised to "take action" against posts that shared "verifiable vaccine hoaxes," as defined by the World Health Organization (WHO) and the U.S. Centers for Disease Control and Prevention (CDC).

After those policies were announced, CHD noticed changes to the functionality and appearance of its Facebook page. A banner was placed at the top of its page, with a message that read:

> This Page posts about vaccines
>
> When it comes to health, everyone wants reliable, up-to-date information. The Centers for Disease Control (CDC) has information that can help answer questions you may have about vaccines.
>
> Go to CDC.gov

Around the same time, Meta began flagging CHD's posts as containing factual inaccuracies. To identify content posted on Facebook that it considers inaccurate, Meta contracts with the Poynter Institute (which operates a website known as "PolitiFact") and Science Feedback. Specifically, Meta directs those services to review and classify content that its algorithms have identified as potentially containing "misinformation." If the reviewers determine that the content contains false or misleading information, it may appear under a grey overlay that informs readers that the post has been labeled false and refers them to a link so that they can "See Why." The link leads users to a new window that contains a short explanation of the classification—for example, that independent fact-checkers have determined that the information shared in the post is "factually inaccurate." The contents of the flagged post remain accessible, but

visitors must click a slightly less prominent link in order to view it. If Meta determines that the post violates Facebook's Community Standards, it may be removed entirely.

After identifying repeated factual inaccuracies in CHD's posts, Meta deactivated the "donate" button on CHD's page, telling the group that it had violated Facebook's "fundraising terms and conditions." Before this happened, CHD had received more than $40,000 in donations through its Facebook page in 2019. Meta also prohibited CHD, Kennedy, and an agency employed by the two from purchasing advertisements on Facebook because, it said, CHD had "repeatedly posted content that has been disputed by third-party fact-checkers [for] promoting false content."

As part of its response to the COVID-19 pandemic, Meta took further action against CHD. It updated Facebook's policies to prohibit users from sharing any "claims that COVID-19 vaccines are not effective in preventing COVID-19," and it created a "Coronavirus (COVID-19) Information Center," which links to the CDC's website and other "leading health organizations" for information on the pandemic. Meta then began displaying messages to CHD's followers encouraging them to unsubscribe from its posts and referring them to the WHO for facts about COVID-19.

CHD alleges that Meta has also limited the visibility of its content using processes known as "shadow-banning" and "sandboxing." With shadow-banning, Meta allows a post to remain visible to the poster, and in some cases

the poster's Facebook "friends," while hiding the post from other users. With sandboxing, Meta shows CHD's posts about vaccines to like-minded users but not to those who do not already share its views. CHD says that, as a result, traffic to its website from its Facebook page has declined significantly. Although CHD once had the ability to dispute the actions Meta took with respect to its page, Meta disabled that functionality, and it has not been restored.

In August 2020, CHD brought this action in the Northern District of California. It alleged that Meta, Zuckerberg, the Poynter Institute, and Science Feedback were working in concert with or, alternatively, under compulsion from the federal government to censor CHD's speech, in violation of the First Amendment, and to deprive it of its property right to fundraise on Facebook, in violation of the Fifth Amendment. Based on those alleged constitutional violations, CHD sought damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). It also sought injunctive and declaratory relief. CHD further claimed that the defendants violated the Lanham Act by labeling its posts as false, and that the defendants imposed those labels as part of a fraudulent scheme to divert donations away from CHD for the benefit of Meta's fact-checkers, in violation of RICO. CHD sought money damages as well as injunctive and declaratory relief for those claims too.

Meta, Zuckerberg, and the Poynter Institute moved to dismiss, and the district court dismissed the complaint without leave to amend. The court held that

CHD's constitutional claims failed because "CHD has not alleged that the challenged acts constitute federal action." Specifically, the court determined that "general statements by the CDC and Zuckerberg about 'working together' to reduce the spread of health or vaccine misinformation, or to promote universal vaccination do not show that the government was a 'joint participant in the challenged activity.'" It emphasized that CHD had not "alleged that the government was actually involved in the decisions to label CHD's posts as 'false' or 'misleading,' the decision to put the warning label on CHD's Facebook page, or the decisions to 'demonetize' or 'shadow-ban.'" The court further concluded that "CHD has not alleged facts showing government coercion sufficient to deem Facebook or Zuckerberg a federal actor."

The district court also rejected the Lanham Act claim. It explained that "the warning label and fact-checks are not disparaging CHD's 'goods or services,' nor are they promoting the 'goods or services' of Facebook, the CDC, or the fact-checking organizations such as Poynter." For those reasons, the court concluded that "CHD's alleged injuries are not within the Lanham Act's 'zone of interests' and that the warning label and fact-checks are not 'commercial advertising or promotion'" within the scope of the statute.

The district court rejected the RICO claim because CHD had not established a predicate act of wire fraud. The court stated that "CHD's allegations . . . do not constitute wire fraud because CHD has not alleged any facts showing that defendants engaged in a fraudulent

scheme to obtain money or property from Facebook visitors to CHD's page."

Science Feedback is a French nonprofit organization, and CHD was apparently unable to serve it with process. As a result, the district court dismissed all claims against Science Feedback without prejudice.

CHD appeals. We review the district court's grant of a motion to dismiss de novo. *Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1213 (9th Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

II

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Within its scope, the First Amendment provides robust protection for free speech. But it has an important limitation: It "prohibits only *governmental* abridgment of speech" and "does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019); *see Prager Univ. v. Google LLC*, 951 F.3d 991, 996 (9th Cir. 2020).

That limitation is itself an important protection for liberty. If the First Amendment were applied to private

actors, it would mean, for example, that a newspaper would be unable to choose to print the work of only those writers whose views were consistent with its editorial positions, and it could instead be forced by the federal courts to open itself to all writers on a nondiscriminatory basis. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). "By enforcing [the] constitutional boundary between the governmental and the private, the state-action doctrine" developed by the Supreme Court to distinguish government from private action "protects a robust sphere of individual liberty." *Halleck*, 587 U.S. at 808 ; *accord Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.").

To begin by stating the obvious, Meta, the owner of Facebook, is a private corporation, not a government agency. Although that fact is highly relevant here, it does not quite end our inquiry because, in certain "exceptional cases," a private party "will be treated as a state actor for constitutional purposes." *O'Handley v. Weber*, 62 F.4th 1145, 1155-56 (9th Cir. 2023). The private party must meet two distinct requirements: (1) the "state policy" requirement and (2) the "state actor" requirement. *Wright v. Service Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1121 (9th Cir. 2022); *see Lugar*, 457 U.S. at 937; *O'Handley*, 62 F.4th at 1156.

To satisfy the state policy requirement, the alleged constitutional deprivation must result from "the exercise

of some right or privilege created by the State" or "a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. To satisfy the state actor requirement, the party must "fairly be said to be a state actor," *id.*, which requires that it meet one of four tests: (1) the private actor performs a traditionally public function, *Halleck*, 587 U.S. at 804; (2) the private actor is a "willful participant in joint activity" with the government, *Lugar*, 457 U.S. at 941 (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)); (3) the government compels or encourages the private actor to take a particular action, *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); or (4) there is a "sufficiently close nexus" between the government and the challenged action, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

This test for state action "ensures that not all private parties 'face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.'" *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989) (quoting *Lugar*, 457 U.S. at 937). At bottom, both components of the test ask us to evaluate whether the nature of the relationship between the private party and the government is such that "the alleged infringement of federal rights is fairly attributable to the [government]." *Pasadena Republican Club v. Western Just. Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021) (alteration in original) (quoting *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999)). In other words, a plaintiff must allege facts supporting

an inference that the government "is *responsible* for the specific conduct of which the plaintiff complains." *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013) (quoting *Blum*, 457 U.S. at 1004).

A

We first look to whether the "'source of the alleged constitutional harm'" is "a state statute or policy." *Belgau v. Inslee*, 975 F.3d 940, 947 (9th Cir. 2020) (quoting *Ohno*, 723 F.3d at 994). This requirement is satisfied when a private institution "enforce[s] a state-imposed rule" instead of "the terms of its own rules." *O'Handley*, 62 F.4th at 1156.

CHD's state-action theory fails at this threshold step. We begin our analysis by identifying the "specific conduct of which the plaintiff complains." *Wright*, 48 F.4th at 1122 (quoting *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)). CHD challenges Meta's "policy of censoring" posts conveying what it describes as "accurate information . . . challenging current government orthodoxy on . . . vaccine safety and efficacy." But "the source of the alleged . . . harm," *Ohno*, 723 F.3d at 994, is Meta's own "policy of censoring," not any provision of federal law. The closest CHD comes to alleging a federal "rule of conduct" is the CDC's identification of "vaccine misinformation" and "vaccine hesitancy" as top priorities in 2019. But as we explain in more detail below, those statements fall far short of suggesting any actionable federal "rule" that Meta was required to follow. And CHD does not allege that any specific actions Meta took on its

platforms were traceable to those generalized federal concerns about vaccine misinformation.

In *O'Handley*, we rejected a claim similar to CHD's asserted by a Twitter user who objected to Twitter's decision to limit access to his tweets and suspend his account. *See* 62 F.4th at 1156. The user alleged that Twitter's actions were prompted by a message from the California Secretary of State identifying one of the user's tweets as spreading election-related "disinformation." *Id.* at 1154. But because "the company acted under the terms of its own rules, not under any provision of California law," we rejected the argument that Twitter "ceded control over [its] content-moderation decisions to the State and thereby became the government's private enforcer[]." *Id.* The same is true here.

B

CHD's failure to satisfy the first part of the test is fatal to its state action claim. *See Lindke v. Freed*, 601 U.S. 187, 198, 201, 144 S. Ct. 756, 218 L. Ed. 2d 121 (2024); *but see O'Handley*, 62 F.4th at 1157 (noting that our cases "have not been entirely consistent on this point"). Even so, CHD also fails under the second part. As we have explained, the Supreme Court has identified four tests for when a private party "may fairly be said to be a state actor": (1) the public function test, (2) the joint action test, (3) the state compulsion test, and (4) the nexus test. *Lugar*, 457 U.S. at 937, 939.

CHD invokes two of those theories of state action as well as a hybrid of the two. First, it argues that Meta and

the federal government agreed to a joint course of action that deprived CHD of its constitutional rights. Second, it argues that Meta deprived it of its constitutional rights because government actors pressured Meta into doing so. Third, it argues that the "convergence" of "joint action" and "pressure," as well as the "immunity" Meta enjoys under 47 U.S.C. § 230, make its allegations that the government used Meta to censor disfavored speech all the more plausible. CHD cannot prevail on any of these theories.

1

The joint action test asks "whether the government has so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant in the challenged activity." *Pasadena Republican Club*, 985 F.3d at 1167 (quoting *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1210 (9th Cir. 2002)). Our cases require a plaintiff to plead facts that give rise to an inference that the private entity's "particular actions are 'inextricably intertwined' with those of the government." *Id.* (quoting *Brunette*, 294 F.3d at 1211).

Crucially, it is not enough to show an agreement to do *something*; the private party and the government must also have agreed on what the something is. "The generalized allegation of a wink and a nod understanding . . . does not amount to an agreement or a conspiracy to violate [the plaintiff's] rights in particular." *Brunette*, 294 F.3d at 1212. Thus, a plaintiff must show some specificity to the understanding between the private actor and

the government. *See Dennis v. Sparks*, 449 U.S. 24, 25-28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980) (agreement between litigants and judge to issue an illegal injunction preventing production on oil leases); *Adickes*, 398 U.S. at 152 (agreement between store employee and police officer to arrest the plaintiff); *Swift v. Lewis*, 901 F.2d 730, 731-32 & n.2 (9th Cir. 1990) (agreement between prison and contractor to remove petitioner's religious classification), *superseded by statute on other grounds*, 42 U.S.C. § 2000cc-1(a); *Howerton v. Gabica*, 708 F.2d 380, 384-85 (9th Cir. 1983) (agreement between landlord and police officer to evict plaintiffs).

CHD has not done so. In an effort to show an agreement, CHD points to various statements from Meta and government officials, but they suffer from a critical lack of specificity. For example, CHD highlights the CDC's statement that it has "engaged" social media companies to "contain the spread of misinformation." That could mean many different things, thanks to ambiguity in both the verb ("Containing" misinformation by removing it entirely? By making it less prominent on the site? By leaving it as is but countering it with different information?) and its object (What counts as "misinformation"?). The "generic promotion of a public purpose" falls far short of establishing that Meta's "particular actions are inextricably intertwined with those of the government." *Pasadena Republican Club*, 985 F.3d at 1167, 1170 (internal quotation marks omitted). Without plausible allegations of an agreement to take specific action, we cannot say that Meta's conduct is fairly attributable to the government.

CHD asks us to infer a more specific agreement among Meta, the Biden Administration, the CDC, and the WHO, in which Meta took direction from those entities about what content to censor. But the facts that CHD alleges do not make that inference plausible in light of the obvious alternative—that the government hoped Meta would cooperate because it has a similar view about the safety and efficacy of vaccines. *See Twombly*, 550 U.S. at 556-57. Links between a social media company's communications with the government and its decisions about what content to permit "must be evaluated in light of the platform's independent incentives to moderate content." *Murthy v. Missouri*, 144 S. Ct. 1972, 1988, 219 L. Ed. 2d 604 (2024) (rejecting similar claims that government officials and agencies pressured platforms to unconstitutionally suppress COVID-19 misinformation). Statements that government officials "engaged" with social media companies to ensure that those companies "understand the importance of misinformation and disinformation and how they can get rid of it quickly" are consistent with the explanation of parallel objectives and do not show the specific agreement that CHD suggests. As for the WHO, it is an intergovernmental agency, not part of the federal government, so its meeting with Meta in which it "discussed" Meta's "role in spreading 'lifesaving health information'" is irrelevant to the state-action inquiry.

In a belated attempt to bolster its theory, CHD asks us to take judicial notice of various documents showing that the government works with social media companies to educate them about what it considers to be misinformation on their platforms. "[W]e rarely take judicial notice of

facts presented for the first time on appeal." *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011). We do not think it is appropriate to do so here, especially because the facts CHD presents are not free from "reasonable dispute." Fed. R. Evid. 201(b). To be sure, it would be proper to take judicial notice of the fact that the documents exist. *Cf. Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). But CHD's allegations rely on the *substance* of the documents and what the statements in them establish. Because those statements are "subject to varying interpretations," they cannot qualify for judicial notice. *Reina-Rodriguez*, 655 F.3d at 1193.

In any event, even if we were to consider the documents, they do not make it any more plausible that Meta has taken any specific action on the government's say-so. To the contrary, they indicate that Meta and the government have regularly disagreed about what policies to implement and how to enforce them. *See Murthy*, 144 S. Ct. at 1987 (highlighting evidence "that White House officials had flagged content that did not violate company policy"). Even if Meta has removed or restricted some of the content of which the government disapproves, the evidence suggests that Meta "had independent incentives to moderate content and . . . exercised [its] own judgment" in so doing. *Id.*

That the government submitted requests for removal of specific content through a "portal" Meta created to facilitate such communication does not give rise to a plausible inference of joint action. Exactly the same was

true in *O'Handley*, where Twitter had created a "Partner Support Portal" through which the government flagged posts to which it objected. 62 F.4th at 1160. Meta was entitled to encourage such input from the government as long as "the company's employees decided how to utilize this information based on their own reading of the flagged posts." *Id.* It does not become an agent of the government just because it decides that the CDC sometimes has a point.

The circumstantial evidence that CHD proffers does not nudge its claims into the realm of plausibility either. CHD alleges, for example, that when Meta deactivated the "donate" button on CHD's page in May 2019, it must have done so because of the letter Representative Schiff sent to Meta that February. In the letter, Schiff expressed concern that misleading or incorrect information about vaccines was leading to a decline in vaccine uptake. He asked Meta to explain how it dealt with such content on its platform, and he "encourage[d] [Meta] to consider . . . additional steps." It is simply not reasonable to infer from those two events that Meta "takes direction from the federal government about what COVID-related speech to censor," as CHD would have it.

Failing to allege a plausible agreement between Meta and the government, CHD seeks to fill the gap by arguing that the CDC supplied Meta with a "standard of decision" by which allegedly unconstitutional actions were taken. Pointing to statements from Zuckerberg announcing that Meta defers to the CDC for "authoritative information," CHD asserts that the algorithms Meta implemented

to flag misinformation apply "agreed-to, government-provided standards of decision."

CHD invokes *Mathis v. Pacific Gas & Electric Co.* (*Mathis I*), in which we allowed a *Bivens* action to proceed against PG&E, a public utility company, because we concluded that a former employee of a PG&E contractor had plausibly alleged that PG&E denied him access to a nuclear power plant "on the basis of some rule of decision for which the State is responsible." 891 F.2d 1429, 1432 (9th Cir. 1989) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 843, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982) (White, J., concurring in the judgments)). Specifically, Mathis had been denied access to the plant and then fired because he was suspected of selling or using illegal drugs. *Id.* at 1430, 1432-33. He alleged that PG&E denied him access because the Nuclear Regulatory Commission had pressured and encouraged PG&E to adopt a policy of excluding from nuclear power facilities anyone who sold or used drugs. *See id.* at 1433; *see also Mathis v. Pacific Gas & Elec. Co.* (*Mathis II*), 75 F.3d 498, 502-03 (9th Cir. 1996) (requiring a showing that a "standard compelled" a certain decision). If that allegation were true, we reasoned, it would establish that PG&E's decision to exclude Mathis was fairly attributable to the government. *Mathis I*, 891 F.2d at 1434.

The allegations here are far different from those in *Mathis I*. Mathis alleged the existence of an informal government policy that required the utility to take a *specific action* in response to certain events. CHD has alleged that Meta banned "vaccine misinformation" and

that it defers to the CDC for "authoritative information" on that topic. It has failed, however, to allege any facts that would allow us to infer an agreement between the government and Meta that required Meta to take a particular action in response to misinformation about vaccines. Further, as we have already explained, "misinformation" is far too amorphous a concept to serve as the type of "standard" contemplated by *Mathis I. See* 891 F.2d at 1433-34. And without a standard that can plausibly be said to require a specific outcome, it is not fair to say that Meta's "choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

Finally, CHD argues that financial benefits flowing from Meta to the government support an inference that Meta's conduct constitutes state action. In so doing, it invokes the Supreme Court's observation that a plaintiff may "sometimes" be able to prove government responsibility for a nominally private action if the government "knowingly accepts the benefits derived from unconstitutional behavior." *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988). The putative "benefits" here are $35 million Zuckerberg and Meta have donated to the CDC Foundation and the "millions of dollars in free advertising" and reputational benefits Meta has given the CDC. But those benefits are not directly tied to the specific action being challenged in this case: restricting CHD's Facebook posts. CHD therefore has not alleged the kind of "significant financial integration" that we have found probative in determining whether the joint-action test is satisfied. *Pasadena Republican Club*, 985

F.3d at 1168 (quoting *Brunette*, 294 F.3d at 1213). To the contrary, Zuckerberg and Meta's donations to the CDC Foundation make the innocent alternative—that Meta adopted the policy it did simply because Zuckerberg and Meta share the government's view that vaccines are safe and effective—all the more plausible.

We acknowledge that there is a degree of uncertainty in determining how specific the details of an agreement must be before a plaintiff can be said to have plausibly alleged joint action. The Supreme Court has remarked that the state-action inquiry is a "matter of normative judgment" whose "criteria lack rigid simplicity," so some uncertainty is inherent in the doctrine. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). But wherever the line may be, CHD is far from it. Rather than pleading facts that allow us to infer that the government and Meta agreed to censor speech on Facebook, CHD has alleged that the government hoped Meta would cooperate in its efforts to promote the safety and efficacy of vaccines.

Meta has a First Amendment right to use its platform to promote views it finds congenial and to refrain from promoting views it finds distasteful: "Like . . . editors, cable operators, and parade organizers," social media companies make "choices about whether—and, if so, how—to convey posts having a certain content or viewpoint" that "rest on a set of beliefs about which messages are appropriate and which are not." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2405, 219 L. Ed. 2d 1075 (2024). Even though companies like Meta "happily convey the lion's share of

posts submitted to them," it remains "as much an editorial choice to convey all speech except in select categories as to convey only speech within them." *Id.* at 2406. "When the platforms use their Standards and Guidelines to decide which third-party content [their] feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection." *Id.*

Meta evidently believes that vaccines are safe and effective and that their use should be encouraged. It does not lose the right to promote those views simply because they happen to be shared by the government.

2

A private party may also be considered a state actor if it has acted because the government coerced or compelled it to do so. Under the coercion test, the government must have "exercised coercive power or . . . provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. The government's "[m]ere approval of" private initiatives, however, "is not sufficient to justify holding the State responsible for those initiatives." *Id.* at 1004-05. Instead, the government must "convey a threat of adverse government action," *National Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 191, 144 S. Ct. 1316, 218 L. Ed. 2d 642 (2024), or otherwise impose incentives that "overwhelm" and "essentially compel" the party to comply with its requests, *O'Handley*, 62 F.4th at 1158.

Appendix A

At the outset, we note that there is reason to doubt that a purely private actor like Meta, which was the *victim* of the alleged coercion, would be the appropriate defendant, rather than the government officials responsible for the coercion. In *Sutton v. Providence St. Joseph Medical Center*, for example, we said that "only the state actor, and not the private party, should be held liable for the constitutional violation that resulted from the state compulsion." 192 F.3d at 838 (quoting Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1067 (1990)). *But see generally Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987). We need not resolve that question here because CHD has not adequately pleaded facts supporting a coercion theory of state action.

CHD's theory of coercion turns on statements made by lawmakers threatening to hold social media companies "accountable" for failing to police "misinformation" on their platforms. Those statements do not meet the standard we have articulated for finding state action. Here again, the key case arises from the *Mathis* litigation, this time *Mathis II*. In his second appeal, Mathis argued that he had proved his claim that PG&E excluded him from the power plant because it applied a "standard of decision" imposed on the utility by the government. *Mathis II*, 75 F.3d at 502 (quoting *Mathis I*, 891 F.2d at 1434). But rather than demonstrating that the government pressured the utility into adopting a specific policy requiring his exclusion, Mathis showed only that PG&E "was aware of

a generalized federal concern with drug use at nuclear power plants" and that PG&E "was looking to score Brownie points" with the government by adopting a policy to address that concern. *Id.* Mathis argued that he came "close enough" to proving coercion because his evidence gave rise to the inference that PG&E implemented a drug-use policy to "allay [the government's] concerns." *Id.* at 503. But we rejected that argument. We explained that Mathis "asks us to hold that regulatory interest in a problem transforms any subsequent private efforts to address the problem (even those expressly designed to obviate the need for regulation) into state action." *Id.* We refused to do so, adding that "[i]f the government is considering regulation, affected private parties can try to convince it there's no need to regulate without thereby transforming themselves into the state's agents." *Id.*

CHD has not alleged facts that allow us to infer that the government coerced Meta into implementing a specific policy. Instead, it cites statements by Members of Congress criticizing social media companies for allowing "misinformation" to spread on their platforms and urging them to combat such content because the government would hold them "accountable" if they did not. Like the "generalized federal concern[s]" in *Mathis II*, those statements do not establish coercion because they do not support the inference that the government pressured Meta into taking any specific action with respect to speech about vaccines. *Mathis II*, 75 F.3d at 502. Indeed, some of the statements on which CHD relies relate to alleged misinformation more generally, such as a statement from then-candidate Biden objecting to a Facebook

ad that falsely claimed that he blackmailed Ukrainian officials. All CHD has pleaded is that Meta was aware of a generalized federal concern with misinformation on social media platforms and that Meta took steps to address that concern. *See id.* If Meta implemented its policy at least in part to stave off lawmakers' efforts to regulate, it was allowed to do so without turning itself into an arm of the federal government. *See id.* at 503.

CHD argues that the letters sent to Meta by Senator Klobuchar and Representative Schiff demonstrate the necessary coercion. In one of Klobuchar's letters, she urged Meta to "take action" against prominent anti-vaccine influencers such as Kennedy. In another letter, she asked Meta a series of questions about its handling of "vaccine-related misinformation," told it that transparency was "imperative," and said that "policies must be strictly enforced to limit users' exposure to misinformation." Schiff's letter was along similar lines. But in contrast to cases where courts have found coercion, the letters did not require Meta to take any particular action and did not threaten penalties for noncompliance. *See National Rifle Ass'n of Am.*, 602 U.S. at 193 (agency superintendent promising to "ignore" insurance-law violations if insurer "ceased underwriting NRA policies and disassociated from gun-promotion groups"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 62 n.5, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963) (state commission notifying book distributor of the names of "obscene publications" that were "objectionable for sale" and implying that the Attorney General would prosecute if the bookseller did not cooperate); *Carlin Commc'ns*, 827 F.2d at 1295 (county attorney threatening to prosecute if

a utility did not terminate plaintiff's service); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015) (county sheriff demanding that credit card companies "immediately cease and desist" from allowing their cards to be used to purchase advertisements on an adult website); *Okwedy v. Molinari*, 333 F.3d 339, 341-42 (2d Cir. 2003) (per curiam) (city borough president objecting to a message on a billboard designed by a media company and directing the company to contact his counsel).

Moreover, "[t]he power that a government official wields . . . is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive." *National Rifle Ass'n of Am.*, 602 U.S. at 191. "[D]irect regulatory and enforcement authority," such as the ability to "initiate investigations and refer cases for prosecution," makes coercion more likely. *Id.* at 192. By contrast, "[a] letter from a single Senator backed by no statutory mandate is far afield from [a] system of 'effective state regulation'" that would suggest coercion. *Kennedy v. Warren*, 66 F.4th 1199, 1210 (9th Cir. 2023) (quoting *Bantam Books*, 327 U.S. at 69). Unlike "an executive official with unilateral power that could be wielded in an unfair way if the recipient did not acquiesce," a single legislator lacks "unilateral regulatory authority." *Id.* A letter from a legislator would therefore "more naturally be viewed as relying on her persuasive authority rather than on the coercive power of the government." *Id.*

The statements here are firmly on the constitutional side of the sometimes "fine lines between permissible

expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech." *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983); *see O'Handley*, 62 F.4th at 1158 (holding that Twitter's compliance with a particularized government "request with no strings attached" was the product of the company's "own independent judgment").

3

CHD also advances a hybrid theory of joint action and coercion that focuses on section 230 of the Communications Decency Act, 47 U.S.C. § 230. That provision states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1). It also immunizes providers of interactive computer services from civil liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.* § 230(c)(2)(A).

The immunity from liability conferred by section 230 is undoubtedly a significant benefit to companies like Meta that operate social media platforms. It might even be the case that such platforms could not operate at their present scale without section 230. But many companies rely, in one way or another, on a favorable regulatory environment or the goodwill of the government. If that were enough for

state action, every large government contractor would be a state actor. But that is not the law.

CHD seeks to analogize section 230 to the regulatory scheme that the Supreme Court considered in *Skinner v. Railway Labor Executives' Ass'n*, but the analogy is inapt. 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). That case involved Federal Railroad Administration (FRA) regulations authorizing railroads to conduct drug tests on employees suspected of violating certain safety rules. *Id.* at 606, 611. The FRA argued that because the regulations merely permitted testing, but did not require it, the tests would not constitute state action and would not implicate the Fourth Amendment. *Id.* at 614. The Court rejected that argument, reasoning that the "specific features of the regulations" demonstrated that "the Government did more than adopt a passive position toward the underlying private conduct." *Id.* at 615. In particular, the regulations preempted state laws, superseded "any provision of a collective bargaining agreement," and prohibited a railroad from "divest[ing] itself of" or "otherwise compromis[ing] by contract" the ability to conduct the tests. *Id.* (citation omitted). In addition, the regulations gave the FRA "the right to receive certain biological samples and test results"—the "fruits" of the searches—and mandated that any employee who refused to undergo a test "be withdrawn from covered service." *Id.* Those features, considered together, made the Court "unwilling to accept" the argument that any searches would be "primarily the result of private initiative." *Id.*

CHD argues that because the immunity in section 230, like the regulatory regime in *Skinner*, "removed

all legal barriers" to the censorship of vaccine-related speech, Meta's restriction of that content should be considered state action. *See* 489 U.S. at 615. But section 230 is fundamentally unlike the regulations in *Skinner*. The statute is entirely passive—a provider can leave content on its platform without worrying that the speech of the poster will be imputed to it, or it may choose to restrict content it considers "objectionable" without the threat of lawsuits. Significantly, in *Skinner*, the removal of "legal barriers" was just one among several facets of the regulatory scheme that the Court cited in finding state compulsion. *Id.* Under that scheme, the government sought to encourage railroads both to test their employees and to share the "fruits" of those tests with the government. *Id.* As evidence of such encouragement, the Court noted that the government imposed on railroads a "duty to promote the public safety" and "mandated" that they fulfill that duty by preserving their state-conferred "authority to perform tests." *Id.* (citation omitted).

Such "indices of the Government's encouragement, endorsement, and participation" to promote particular private conduct are absent here. *Id.* at 615-16. Section 230 is just as protective of a provider's right to maintain "objectionable" content on its platform as it is of a provider's right to delete such content. The "legislative grace" providers enjoy under Section 230 merely affords them the ability to *choose* whether to suppress certain third-party speech without risking costly litigation. By giving companies like Meta that freedom, the government has hardly expressed a "strong preference" for the removal of speech critical of vaccines. *Id.*

It would be exceptionally odd to say that the government, through section 230, has expressed any preference at all as to the removal of anti-vaccine speech, because the statute was enacted years before the government was concerned with speech related to vaccines, and the statute makes no reference to that kind of speech. Rather, as the text of section 230(c)(2)(A) makes clear—and as the title of the statute (*i.e.*, the "Communications Decency Act") confirms—a major concern of Congress was the ability of providers to restrict sexually explicit content, including forms of such content that enjoy constitutional protection. It is not difficult to find examples of Members of Congress expressing concern about sexually explicit but constitutionally protected content, and many providers, including Facebook, do in fact restrict it. *See, e.g.*, 141 Cong. Rec. 22,045 (1995) (statement of Rep. Wyden) ("We are all against smut and pornography . . . ."); *id.* at 22,047 (statement of Rep. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet."); Shielding Children's Retinas from Egregious Exposure on the Net (SCREEN) Act, S. 5259, 117th Cong. (2022); *Adult Nudity and Sexual Activity*, Meta, https://transparency.fb.com/policies/community-standards/adult-nudity-sexual-activity [https://perma.cc/ SJ63-LNEA] ("We restrict the display of nudity or sexual activity because some people in our community may be sensitive to this type of content."). While platforms may or may not share Congress's moral concerns, they have independent commercial reasons to suppress sexually explicit content. "Such alignment does not transform private conduct into state action." *O'Handley*, 62 F.4th at 1157.

CHD insists that it "is *not* arguing that Section 230 turns *all* content moderation by all websites into state action," but rather that "Section 230(c)(2), in combination with . . . sustained federal pressure" and "statements of strong preference" and "encouragement," turns Meta's handling of vaccine-related content into state action. As we have explained, those statements and requests do not establish either coercion or joint action. That Section 230 operates in the background to immunize Meta if it chooses to suppress vaccine misinformation—whether because it shares the government's health concerns or for independent commercial reasons—does not transform Meta's choice into state action.

If we were to accept CHD's argument, it is difficult to see why would-be purveyors of pornography would not be able to assert a First Amendment challenge on the theory that, viewed in light of section 230, statements from lawmakers urging internet providers to restrict sexually explicit material have somehow made Meta a state actor when it excludes constitutionally protected pornography from Facebook. So far as we are aware, no court has ever accepted such a theory.

* * *

CHD's inability to establish state action is fatal to all of its First Amendment claims—for damages under *Bivens*, for declaratory relief, and for an injunction. And to the extent that CHD continues to argue on appeal that Meta's disabling of its donation button was a "taking" under the Fifth Amendment, that claim fails for the same reason.

Meta identifies several other hurdles to CHD's damages claims. For example, it argues that CHD cannot hold Meta, a private corporation, liable under *Bivens, see Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); that CHD has not adequately alleged that Zuckerberg was personally involved in any alleged constitutional violation, *see Iqbal*, 556 U.S. at 677; and that it would be inappropriate to extend *Bivens* to this context, *see Egbert v. Boule*, 596 U.S. 482, 491-93, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022); *Pettibone v. Russell*, 59 F.4th 449, 454-55 (9th Cir. 2023). Because the state-action inquiry resolves all of the constitutional causes of action, we need not reach those issues.

Our decision should not be taken as an endorsement of Meta's policies about what content to restrict on Facebook. It is for the owners of social media platforms, not for us, to decide what, if any, limits should apply to speech on those platforms. That does not mean that such decisions are wholly unchecked, only that the necessary checks come from competition in the market—including, as we have seen, in the market for corporate control. If competition is thought to be inadequate, it may be a subject for antitrust litigation, or perhaps for appropriate legislation or regulation. But it is not up to the courts to supervise social media platforms through the blunt instrument of taking First Amendment doctrines developed for the government and applying them to private companies. Whether the result is "good or bad policy," that limitation on the power of the courts is a "fundamental fact of our political order," and it dictates our decision today. *Lugar*, 457 U.S. at 937.

III

CHD claims that "the warning label and fact-checks" Meta placed on its posts violated the Lanham Act. The district court dismissed that claim because it held that (1) CHD's alleged injuries did not fall within the zone of interests that the Lanham Act protects and (2) the fact-checking labels were not statements made in "commercial advertising or promotion." We agree with the district court on the latter ground, so we need not reach the former.

As relevant here, the Lanham Act provides a cause of action against any person who, "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1)(B). We have defined "commercial advertising or promotion" to encompass "(1) commercial speech, (2) by a defendant who is in commercial competition with [the] plaintiff, (3) for the purpose of influencing consumers to buy [the] defendant's goods or services, . . . (4) that is sufficiently disseminated to the relevant purchasing public." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021). "Commercial speech," we have explained, generally refers to speech that "'does no more than propose a commercial transaction.'" *Id.* (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)).

By that definition, Meta did not engage in "commercial speech"—and, thus, was not acting "in commercial advertising or promotion"—when it labeled some of CHD's posts false or directed users to fact-checking websites.

Meta's commentary on CHD's posts did not represent an effort to advertise or promote anything, and it did not propose any commercial transaction, even indirectly.

In arguing to the contrary, CHD emphasizes that we have looked to the "economic motivation" of the speaker in assessing whether speech is commercial in nature. *Ariix*, 985 F.3d at 1116 (quoting *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011)). According to CHD, Meta placed labels on its posts in order to "promot[e]" Meta's fact-checkers, who compete with CHD "in the nonprofit health information market." It also says that Meta sought to fact-check CHD's posts to ensure that it continued to receive advertising revenue from vaccine manufacturers and to dissuade lawmakers from repealing section 230—"which is worth billions of dollars" to Meta. But economic motivation is a factor we consider "[w]here the facts present a close question," which the facts here do not. *Hunt*, 638 F.3d at 715; *see Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012) (explaining that an "economic motive in itself is insufficient to characterize a publication as commercial"). More importantly, the economic-motivation test asks "whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had *any* economic motivation." *Ariix*, 985 F.3d at 1116. As we have explained, "[a] simple profit motive to sell copies of a publication or to obtain an incidental economic benefit, without more, does not make something commercial speech. Otherwise, virtually any newspaper, magazine, or book for sale could be considered a commercial publication." *Id.* at 1117.

Under any of CHD's theories, the allegations suggest at most that Meta acted with *an* economic motivation "to obtain an incidental economic benefit." *Ariix*, 985 F.3d at 1117. As described in the complaint, Meta's economic interests are far too remote from the challenged speech for it to be plausible that "the economic benefit was the primary purpose for speaking." *Id.* The district court therefore correctly concluded that the complaint did not state a claim under the Lanham Act.

IV

CHD also asserts a civil RICO claim. RICO makes it a crime for a person employed by or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity, and it allows "[a]ny person injured in his business or property by reason of a violation" to bring a civil damages action. 18 U.S.C. § 1964(c); *see id.* § 1962(c). As relevant here, the "racketeering activity" covered by RICO includes "any act which is indictable under" the federal wire fraud statute, 18 U.S.C. § 1343. *Id.* § 1961(1)(B). That statute, in turn, prohibits the use of electronic communications for the purpose of executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* § 1343.

To survive a motion to dismiss, CHD needed to plead facts that would support a plausible inference that the defendants had engaged in a scheme or artifice to defraud

and that it suffered injury by reason of that scheme. It did not do so. In the complaint, CHD described a scheme whereby Meta placed warning labels on CHD's posts with the intent to "clear the field" of CHD's alternative point of view, thus keeping vaccine manufacturers in business so that they would buy ads on Facebook and ensure that Zuckerberg obtained a return on his investments in vaccine technology. CHD has now abandoned that theory and instead focuses on a different theory that it advanced for the first time in response to the motion to dismiss. Under that theory, the object of the scheme was "to deceive visitors to CHD's Facebook page into giving their charitable dollars not to CHD, but to other, competing nonprofit organizations." The district court might have deemed that theory to be forfeited, but because it addressed the theory on the merits, we will do so as well.

CHD emphasizes that a RICO plaintiff alleging fraud need not show that it relied on any false statements by the defendant but can in some cases allege that the defendant harmed it by deceiving third parties. For example, in *Bridge v. Phoenix Bond & Indemnity Co.*, the Supreme Court held that losing bidders in a tax-lien auction could bring a RICO action against rival bidders who engaged in a fraudulent scheme to win auctions by deceiving the seller. 553 U.S. 639, 649-50, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008). The Court offered an example to illustrate the point: "[S]uppose an enterprise that wants to get rid of rival businesses mails misrepresentations about them to their customers and suppliers . . . . If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business

'by reason of' a pattern of mail fraud." *Id.* (quoting 18 U.S.C. § 1964(c)).

The rule in *Bridge* does not help CHD because the key deficiency in CHD's claims of wire fraud is not that the alleged deception targeted third parties; it is the disconnect between the alleged deception and the asserted injury to CHD. The statutory phrase "by reason of" requires proximate cause. *Holmes v. Securities Inv. Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). For RICO purposes, that means the plaintiff must allege "some direct relation between the injury asserted and the injurious conduct alleged." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010) (quoting *Holmes*, 503 U.S. at 268). For example, in *Bridge*, the bidders adequately pleaded proximate cause because their auction losses were the "direct result" of the alleged fraud. 553 U.S. at 658. The rival bidders deceived the seller about the share of tax liens for which they were eligible, thereby reducing the losing bidders' share. *Id.* at 643-44, 658. "[N]o independent factors" accounted for the plaintiffs' loss. *Id.* at 658.

More recently, in *Hemi Group, LLC v. City of New York*, the Supreme Court held that a RICO plaintiff failed to plead proximate cause where a direct link was lacking. 559 U.S. at 10. The City claimed that a cigarette vendor committed fraud by neglecting to file required reports listing its purchasers with the State, obstructing the City's efforts to collect taxes from the unidentified purchasers. *Id.* at 5-6. The Court rejected the claim because the conduct "directly responsible" for the City's injury—the

purchasers' failure to pay taxes—was "distinct from the conduct giving rise to the fraud"—the vendor's failure to file the purchaser reports. *Id.* at 11; *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006). Unlike in *Bridge*, the losses to the City flowed from the "independent actions" of purchasers to withhold the taxes they owed. *Hemi Grp.*, 559 U.S. at 15.

The causal chain that CHD proposes is, to put it mildly, indirect. CHD contends that Meta deceived Facebook users who visited CHD's page by mislabeling its posts as false. The labels that Meta placed on CHD's posts included links to fact-checkers' websites. If a user followed a link, the fact-checker's website would display an explanation of the alleged falsity in CHD's post. On the side of the page, the fact-checker had a donation button for the organization. Meanwhile, Meta had disabled the donation button on CHD's Facebook page. If a user decided to donate to the fact-checking organization, CHD maintains, that money would come out of CHD's pocket, because CHD and fact-checkers allegedly compete for donations in the field of health information.

The alleged fraud—Meta's mislabeling of CHD's posts—is several steps removed from the conduct directly responsible for CHD's asserted injury: users' depriving CHD of their donation dollars. At a minimum, the sequence relies on users' independent propensities to intend to donate to CHD, click the link to a fact-checker's site, and be moved to reallocate funds to that organization. This causal chain is far too attenuated to establish the direct relationship that RICO requires. Proximate cause

"is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Anza*, 547 U.S. at 460.

CHD's theory also strains credulity. It is not plausible that someone contemplating donating to CHD would look at CHD's Facebook page, see the warning label placed there, and decide instead to donate to . . . a fact-checking organization. *See Twombly*, 550 U.S. at 555. The district court noted that CHD did not allege that any visitors to its page had in fact donated to other organizations because of Meta's fraudulent scheme. CHD is correct that an actual transfer of money or property is not an element of wire fraud, as "[t]he wire fraud statute punishes the scheme, not its success." *Pasquantino v. United States*, 544 U.S. 349, 371, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) (alteration in original) (quoting *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000)). But the fact that no donations were diverted provides at least some reason to think that no one would have expected or intended the diversion of donations.

If that were not enough, the Supreme Court has cautioned us to ensure that fraud offenses be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)); *see McDonnell v. United States*, 579 U.S. 550, 576, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016) (noting a due-

process concern with the prospect of "prosecution, without fair notice, for the most prosaic interactions"). In seeking to hold the defendants liable for statements on matters of public concern, CHD ignores that caution. For example, under CHD's view, it would seem that a political party could bring a RICO claim against a rival political party on the theory that its allegedly false statements were part of a fraudulent scheme to divert political contributions from the plaintiff party to its rival. Such an application of the fraud statutes would raise serious First Amendment concerns. We reject CHD's invitation to construe fraud so broadly.

V

We affirm the district court's dismissal of CHD's claims against Science Feedback for insufficient service of process. Although the dismissal was without prejudice, we have jurisdiction over CHD's appeal. Unlike a dismissal with leave to amend, which permits further proceedings and therefore is not final, *see WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc), the dismissal here means that the case "is over as far as the district court is concerned," so it is final and appealable, *De Tie v. Orange County*, 152 F.3d 1109, 1111 (9th Cir. 1998); *see Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010) ("[D]ismissal without prejudice for failure of service is a dismissal of the action and not just the complaint because no amendment of the complaint could cure the defect.").

We review the district court's assessment of the adequacy of service for abuse of discretion, and we find none. *See Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). CHD made two efforts to serve Science Feedback, but both were unsuccessful. It then asked the district court to let it serve Meta's counsel instead, arguing that the contractual relationship between Meta and Science Feedback made such service appropriate. The district court denied that motion but stated that CHD could renew it if further efforts to serve proved ineffective. CHD never did so. Although it made another unsuccessful attempt at service, it did nothing else until after the district court entered judgment.

CHD argues that Science Feedback has had actual notice of this litigation, but that is not a substitute for service of process under Federal Rule of Civil Procedure 4. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). It also contends that the district court should have applied Rule 4(m), which requires that a court provide notice to the plaintiff before dismissing the action on its own motion when service has not been timely made. But Science Feedback is domiciled in France, and by its terms, Rule 4(m) "does not apply to service in a foreign country."

The motions for judicial notice (Dkt. Nos. 64, 70, 78, 86, 92) are **DENIED**.

AFFIRMED.

COLLINS, Circuit Judge, concurring in part, concurring in the judgment in part, and dissenting in part:

I believe that Children's Health Defense ("CHD") has shown that it could plausibly allege a First Amendment claim for injunctive relief against Defendant Meta Platforms Inc. ("Meta"), [1] and I therefore respectfully dissent from the majority's contrary conclusion. However, I agree that all of CHD's other claims were properly dismissed, and I therefore concur in the judgment as to those remaining claims and in Parts III, IV, and V of the majority opinion.

I

A

Before sketching the facts that I take as true for purposes of this appeal, I first address an important threshold question concerning what factual allegations we may properly consider.

Because this appeal arises from a district court order granting a motion to dismiss for failure to state a claim, we must take the well-pleaded allegations of the operative complaint as true and draw all reasonable inferences in favor of CHD. *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1220 (9th Cir. 2022). We must "likewise take

1. Meta was known as "Facebook, Inc." until October 2021. For convenience, I will refer to it consistently as "Meta," even with respect to events before that date.

as true for purposes of this appeal the additional well-pleaded contentions" contained in any materials that were submitted to the district court as reflecting the substance of a proposed amendment to the complaint. *Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 586 (9th Cir. 2020).

However, CHD has also submitted certain additional materials for the first time in *this* court, and the parties sharply disagree as to whether, and to what extent, we may consider these materials in assessing the legal sufficiency of CHD's claims. Under the unique circumstances of this case, I agree with CHD that we should take judicial notice of the existence of certain new, highly relevant documents that have only recently become available and that, like the materials submitted by CHD to the district court, effectively reflect specific additional factual allegations that CHD proposes to plead if it is given leave to amend on a remand.

I recognize that, on appeal from the dismissal of a complaint, a plaintiff generally cannot suggest new grounds for amending the complaint for the first time in this court. *See, e.g., Riggs v. Prober & Raphael*, 681 F.3d 1097, 1104 (9th Cir. 2012). However, CHD does not purport to add wholly new legal theories or claims, but rather only additional factual allegations in support of its existing claims. Moreover, its newly suggested amendments are limited to factual allegations based on documents that were concededly unavailable to CHD at the time of the district court proceedings and that have only become subsequently available through compulsory

processes employed in other litigation or in legislative investigations or through Freedom of Information Act requests. We can take judicial notice of the limited fact that these documents exist and have become available to CHD during the course of this appeal. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). While their contents cannot be judicially noticed for their truth, *see id.*, CHD may properly draw on them in sketching the additional factual *allegations* that it could now make if it is given leave to amend.

I disagree with Meta's suggestion that this court's only procedurally proper option is to order a limited remand to the district court so that *that* court can first consider the wholly legal question of the viability of CHD's claims in light of these new potential allegations, after which we would then review the matter de novo. *Cf.* FED. R. CIV. P. 62.1; FED. R. APP. P. 12.1. While we could certainly insist that CHD proceed in that fashion, it is within our discretion, under these unique circumstances, to simply consider the legal sufficiency of such additional allegations ourselves in evaluating whether CHD can state a claim on which relief may be granted. The limited remand suggested by Meta here would be a pointless waste of time and judicial resources and would needlessly further postpone our obligation to decide the novel, difficult, and important legal questions raised by this appeal. In my view, given the weighty First Amendment interests at stake in this case and the considerable difficulties inherent in attempting to uncover facts concerning alleged behind-the-scenes interactions between Meta and Government personnel, we should exercise our discretion in favor of

considering the significance of the additional allegations CHD could make in light of these newly available documents.

B

With these principles in mind, I take the following factual contentions as true for purposes of this appeal from the district court's order dismissing CHD's claims at the pleadings stage.

1

CHD is a Georgia-based non-profit membership organization founded in 2015 by Robert F. Kennedy, Jr. ("Kennedy"), who remains its chairman. Its professed mission is "to educate the public about the risks and harmful effects of chemical exposures upon prenatal and children's health, including from particular vaccines and environmental health hazards, such as 5G and wireless networks and products, and to advocate for social change both legislatively and through judicial action." "CHD's primary sources of revenue derive from membership dues and donations that CHD solicits on its website and, formerly, on its Facebook page."

With respect to vaccines, "CHD advocates for open and honest public debate on the efficacy and safety of the . . . entire Child and Adolescent Immunization Schedule" of the Centers for Disease Control and Prevention ("CDC"). CHD is sharply critical of the CDC's vaccine policies, stating on its website that "the CDC has become

a mouthpiece for [the pharmaceutical] industry and has protected the 'all vaccines for all children' policy despite peer-reviewed science to the contrary." Indeed, CHD argues that the CDC has become so plagued by conflicts of interest that the subject of "vaccine safety should be taken from the CDC" altogether. CHD's website contains links to numerous articles concerning vaccines and other topics, including both advocacy pieces and scientific studies from "peer-reviewed, published journals."

Meta is a California-based corporation that operates, among other things, two large social media platforms, namely, Facebook and Instagram. According to the operative complaint, Facebook has "214 million users in the United States and 2.2 billion worldwide." Mark Zuckerberg is Meta's co-founder and its chairman, CEO, and controlling shareholder. As relevant here, Facebook enables users to create webpages on which they can share information, engage in advocacy, and solicit donations. Facebook users can also choose to "follow" other users' Facebook pages that are of interest to them. In November 2017, CHD agreed to Facebook's terms of service and created its own Facebook page. By late 2020, CHD's Facebook page, which it used to promote its views on vaccines and other matters, had more than 122,000 followers.

2

CHD alleges that, even before the Covid pandemic and the development of Covid vaccines, CHD's general advocacy concerning vaccine safety drew the attention of Government officials, who sought to pressure Meta

to delete, or at least to reduce the visibility of, what those officials contended was "vaccine misinformation." In particular, CHD points to a February 14, 2019 letter from Congressman Adam Schiff to Meta asking it to identify what measures it currently took to address "misinformation related to vaccines on [its] platforms" and "encourag[ing] [it] to consider what additional steps [it] can take to address this growing problem." CHD alleges that, while ostensibly a strictly informational inquiry, Congressman Schiff's letter must be understood against a larger backdrop in which various legislators, through hearings and public statements, sought to pressure social media companies to delete or restrict a variety of different categories of disfavored content. CHD points, in particular, to April 2019 public remarks by House Speaker Nancy Pelosi in which she raised the possibility of removing the immunity for hosting third-party content that is granted to social media platforms by § 230 of the Communications Act of 1934. [2] In those remarks, the Speaker noted that, when the subject of § 230 is raised with social media companies, "you really get their attention," and she stated that it was "not out of the question" that § 230's immunity "could be removed" by Congress. As she explained, "for the privilege of 230, there has to be a bigger sense of responsibility" on the part of social media companies.

Three weeks after Congressman Schiff's letter, Meta announced it was taking a variety of steps to reduce

2. I discuss in detail below the nature of this immunity and the critical practical role it plays in making possible the sorts of gigantic platforms operated by Meta. *See infra* section III.

the visibility of "misinformation about vaccinations." On April 26, 2019, Meta also announced that it would remove "fundraising tools" from "Pages that spread misinformation about vaccinations on Facebook." In accordance with that policy, Meta deactivated the fundraising function on CHD's Facebook page six days later. Around the same time, Meta "permanently disabled the 'dispute' function on CHD's account so that neither CHD" nor Kennedy "could challenge," "through direct submission," Meta's actions against CHD. Although CHD and Kennedy, of course, could still send "written requests" to Meta objecting to its actions, Meta consistently "ignored" these requests. Meta also took steps to block the posting of some vaccine-related content, including on CHD's Facebook page. For example, on June 9, 2019, Meta blocked CHD from displaying, on its Facebook page, a videotape of an interview in which Kennedy "discuss[ed] a pending lawsuit against Merck & Co." concerning its Gardasil vaccine. On September 4, 2019, Meta also added warnings directly onto CHD's Facebook page, stating that "[t]his Page posts about vaccines" and that those who want "reliable, up-to-date information" about vaccines should "[g]o to CDC.gov," the webpage of the CDC.

3

After the growing Covid pandemic resulted in widespread lockdowns and societal disruption beginning in March 2020, many public officials began to express a focused concern over Covid-related "misinformation" on social media. For example, in early June 2020, the House Speaker sharply criticized social media platforms for

failing to halt the spread of "COVID-19 disinformation." Later that month, two subcommittees of the House Committee on Energy and Commerce held a joint hearing on "Disinformation Online." In his opening remarks, the chairman of one subcommittee stated that social media platforms had "become awash in disinformation," including "lies about COVID 19." He stated that the "status quo is unacceptable," and that, "[w]hile Section 230 has long provided online companies the flexibility and liability protections they need to innovate and to connect people from around the world, it has become clear that reform is necessary if we want to stem the tide of disinformation rolling over our country." The chair of the other subcommittee stated, in her opening remarks, that "Section 230" had come to effectively "protect[] business models that generate profits off scams [and] fake news"; that this was "never the intent" of Congress; that, "since both courts and industry refuse to change, Congress must act"; and that she "look[ed] forward to working with [her] colleagues to modernize Section 230."

In September 2020, Zuckerberg stated in an interview that Meta was actively working with the CDC and the World Health Organization ("WHO") "to remove clear misinformation about health-related issues that could cause an imminent risk of harm." In October 2020, Zuckerberg and the then-CEOs of Twitter, Inc. and Alphabet Inc. (which operates the various Google products) were subpoenaed to testify at an October 28 hearing of the Senate Commerce Committee entitled, "Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?"

Appendix A

In early 2021, as Covid vaccines were first becoming widely available, various Executive Branch officials took steps to address a specific concern about what they considered to be "misinformation" about these new Covid vaccines, as well as about Covid more generally. These officials included Robert Flaherty, Deputy Assistant to the President and White House Director of Digital Strategy, and Andrew Slavitt, who served as a White House Senior Advisor for the COVID-19 Response. Shortly after joining the new Administration, Flaherty reached out to Meta to inquire about its policies concerning Covid-related information on its platforms. On February 9, 2021, Meta responded by email to Flaherty with its "responses to [his] initial questions." In response to Flaherty's specific inquiry as to how Meta handled Covid-related claims "that are dubious, but not provably false," Meta stated that, while its practice was to "remove claims public health authorities tell us have been debunked or are unsupported by evidence," it also took measures to limit the distribution of content that "contributes to unfounded hesitancy towards the COVID-19 vaccine," even if such content "does *not* qualify for removal" (emphasis added). Meta also stated that, where information *did* warrant removal under its policies, "multiple violations" would lead to restrictions on the relevant Facebook account, including "suspend[ing] the entire Page, Group, or account." The email assured Flaherty that Meta "will begin enforcing this policy immediately." The next day, February 10, Meta took down Kennedy's Instagram account.

In a March 21, 2021 email to Slavitt, Meta confirmed that it would make a specific named employee "available

on a regular basis" to interface with the White House, noting that the employee had already "been coordinating the product work that matters most to your teams." In that same email, Meta confirmed that, in response to Slavitt's prior inquiry about the available "levers for reducing virality of vaccine hesitancy content," Meta would make "additional changes that were approved late last week and that [it would] be implementing over the coming weeks." These included "reducing the virality of content discouraging vaccines that does not contain actionable misinformation" and removing "Groups, Pages, and Accounts" that posted vaccine-related content that, while truthful, was "sensationalized."

Four days later, two subcommittees of the House Energy and Commerce Committee again held a joint hearing on "disinformation" on social media platforms, and Zuckerberg and the CEOs of Alphabet and Twitter all testified at this hearing. In his opening remarks, one of the subcommittee chairs stated that he was concerned about, among other things, "antivaxxers, COVID deniers, QAnon supporters, and Flat earthers." *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation, Virtual Joint Hearing Before the Subcomm. on Commc'ns & Tech. & the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 117th Cong., SERIAL NO. 117-19, at 2 (Mar. 25, 2021). The chairman of the full committee, in his opening statement, stated that "it is now painfully clear that neither the market nor public pressure will force these social media companies to take the aggressive action they need to take to eliminate disinformation and extremism

from their platforms" and that "therefore, it is time for Congress and this committee to legislate and realign these companies' incentives." *Id.* at 12.

On April 13, 2021, Meta emailed Flaherty and Courtney Rowe, another White House official, to follow up concerning various questions they had raised about Meta's treatment of posts that might promote vaccine hesitancy. Attached to this email were "Vaccine Hesitancy Examples," including one specifically from CHD's Facebook page. The email defined "vaccine hesitancy" content as including, *inter alia* , truthful content that "discuss[es] the choice to vaccinate in terms of personal and civil liberties or concerns related to mistrust in institutions or individuals." Meta explained that it "utilize[s] a spectrum of levers for this kind of content," including "reducing the posts' distribution, not suggesting the posts to users, [and] limiting their discoverability in Search."

On May 6, 2021, Flaherty emailed Meta to complain about the inadequacy of Meta's efforts to demote truthful vaccine-hesitant content. He specifically complained that Meta's vaccine hesitancy policy was not "stopping the disinfo dozen"—a group of 12 individuals, including Kennedy, who were identified as spreading Covid "misinformation" online. On May 12, Flaherty followed up and complained that, as compared with other social media platforms, he thought that Meta was doing an inadequate job in downgrading "anti-vaccine" content. He elaborated:

> But "removing bad information from search" is one of the easy, low-bar things you guys do to

> make people like me think you're taking action. If you're not getting *that* right, it raises even more questions about the higher bar stuff. . . .
>
> Youtube, for their warts, has done pretty well at promoting authoritative info in search results while keeping the bad stuff off of those surfaces. Pinterest doesn't even show you any results other than official information when you search for "vaccines." I don't know why you guys can't figure this out.

Meta's interactions with the Government extended beyond the White House. In particular, on June 1, 2021, Meta emailed the CDC, explaining that it had established a "misinfo claims portal" in which selected CDC personnel who had been "whitelisted" for access to the portal could submit requests to have particular posts taken down from Facebook. The cover email explained that Meta wanted to ensure that "everyone who had been whitelisted" had "all the info they need to start submitting claims." The email included an attached file explaining, in a set of slides, how the "Facebook Content Request System: Government Reporting System" worked. An authorized CDC employee would use the designated URL for accessing the system—www.facebook.com/xtakedowns/login—and then enter his or her credentials. Once the user was logged into the system, he or she could select from a menu of pre-programmed reasons for requesting removal of the offending content, such as "Covid Misinformation," "Vaccine Discouragement," and "Covid Vaccine Misinformation." After selecting from among these options, the user would be directed to

submit "the relevant violating URLs" that the user wanted taken down, up to a maximum of 20 in a single report. After submitting the request, the user would receive a confirmation email with a reference number to allow for tracking and follow-up.

On July 15, 2021, Surgeon General Vivek Murthy and White House Press Secretary Jen Psaki appeared at a joint press briefing concerning the Government's response to Covid. Among other things, Surgeon General Murthy asked social media companies "to consistently take action against misinformation super-spreaders on their platforms." In an apparent specific reference to the so-called disinformation dozen—which specifically includes Kennedy—Psaki referred to "12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms." In an apparent reference to Kennedy—who had been banned from Meta's Instagram platform—Psaki noted that these 12 "remain[ed] active on Facebook, despite some even being banned on other platforms" that "Facebook owns."

The next day, July 16, Meta employees had a call with the Surgeon General's office to discuss Meta's actions against "health misinformation." During the call, Meta specifically touted its earlier enforcement against Kennedy, claiming that, after he was banned from Instagram, "[h]e then stopped posting on [Facebook] about vaccines at all."

One week later, on July 23, Meta sent an email to various persons in the Department of Health and Human

Services ("HHS"), following up on a meeting with them earlier that day to "take stock after the past week." In particular, the email summarized "steps taken to further address the 'disinfo dozen,'" including removing 17 additional "Pages, Groups, and [Instagram] accounts tied to the disinfo dozen," with the result that "every member of the disinfo dozen . . . had at least one such entity removed." Meta reiterated that it had heard HHS's "call for us to do more," and it said that it would reach out "to schedule the deeper dive on how to best measure Covid related content." Meta underscored that it and HHS had "a strong shared interest to work together" and that it would "strive to do all [it] can to meet our shared goals."

On August 6, 2021, Meta employees stated, in an internal email, that Meta was moving forward with a number of recommendations for dealing with posts with Covid-related "misinfo" or posts that were "misinfo adjacent." The first, listed as "Option 1a", was to remove "assets linked to Groups / Pages / Profiles / Accounts that have been removed for COVID misinfo violations" from users' recommendations. As an example, Meta stated "RFK Jr.'s [Instagram] Account is removed, so his [Facebook] Page will be non-recommendable." This option was recommended as a "stop-gap measure specifically targeting Disinfo Dozen assets."

On August 17, 2022, Meta ultimately removed CHD from its Facebook and Instagram platforms entirely.

C

CHD filed this action in August 2020. On December 4, 2020, CHD filed its second amended complaint, alleging violations of the First and Fifth Amendments, along with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Lanham Act. The complaint named as Defendants Meta, Zuckerberg, and two of Meta's so-called "fact-checking" organizations, Science Feedback and the Poynter Institute for Media Studies, Inc. ("Poynter Institute"). Seeking declaratory, injunctive, and monetary relief, CHD alleged, *inter alia*, that Defendants were either working in concert with, or under compulsion from, the Federal Government to suppress CHD's speech on Meta's platforms and to prevent CHD from fundraising on those platforms.

On June 29, 2021, the district court dismissed the operative complaint, and the court entered final judgment the next day. The district court dismissed Science Feedback without prejudice for lack of service, and it dismissed the remaining Defendants with prejudice for failure to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6). With respect to CHD's constitutional claims, the district court held that CHD had failed to allege sufficient facts to raise a plausible inference that Meta or Zuckerberg had "worked in concert with the CDC to censor CHD's speech, retaliate against CHD, or otherwise violate CHD's constitutional rights," nor had CHD "alleged facts showing government coercion sufficient to deem [Meta] or Zuckerberg a federal actor." Absent state action, the district court held, any

constitutional claims necessarily failed. The district court dismissed the remaining claims in the case on a variety of other grounds.

CHD timely appealed the district court's dismissal of its suit. We have jurisdiction under 28 U.S.C. § 1291.

II

I agree that CHD cannot assert a *Bivens* claim against Defendants for monetary damages based on alleged violations of its First Amendment rights. *See Egbert v. Boule*, 596 U.S. 482, 498-99, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022) (generally declining to extend a *Bivens* remedy "to alleged First Amendment violations"). But as we have recognized, claims for injunctive and declaratory relief, unlike claims for damages, do not rely on the *Bivens* cause of action. *See Ministerio Roca Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016) ("The only remedy available in a *Bivens* action is an award for monetary damages from defendants in their individual capacities." (citation omitted)). Rather, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015). Indeed, in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001), the Supreme Court declined to recognize a *Bivens* remedy against "a private corporation operating a halfway house under contract with the Bureau of Prisons," but it then

went on to note that "suits in federal court for injunctive relief" remained available, because "injunctive relief has long been recognized as the proper means for preventing entities"—presumably including private parties that qualify as state actors—"from acting unconstitutionally." *Id.* at 63, 74; *see also Lima v. U.S. Dep't of Educ.*, 947 F.3d 1122, 1127-28 & n.6 (9th Cir. 2020) (rejecting, based on *Malesko*, a *Bivens* damages claim against the private corporate defendant, but then rejecting on the merits the plaintiff's claim for equitable relief against that defendant as an alleged state actor acting unconstitutionally).

Of the various grounds for dismissal given by the district court, the only one that would support rejecting CHD's claim for injunctive and declaratory relief concerning alleged First Amendment violations is the district court's conclusion that Meta and Zuckerberg were not state actors for purposes of the First Amendment.[3] As the Supreme Court has squarely held, the First Amendment's "Free Speech Clause prohibits only *governmental* abridgment of speech" and "does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808, 139 S. Ct. 1921, 204 L.

3. The district court dismissed the claims against Poynter solely on the ground that it (like Meta) was a private corporation that, under *Malesko*, could not be sued in a *Bivens* action. The district court also recognized, however, that CHD's allegations against Poynter were very limited and that most of the challenged conduct was allegedly committed by Meta. Against this backdrop, I think it is fair to say that the logic of the district court's no-state-action ruling as to Meta and Zuckerberg would necessarily extend to Poynter as well, even if the district court does not itself appear explicitly to have made this point.

Ed. 2d 405 (2019). To qualify as a *constitutional* violation, therefore, a particular deprivation of a constitutional right must be "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); *see also Lindke v. Freed*, 601 U.S. 187, 198, 144 S. Ct. 756, 218 L. Ed. 2d 121 (2024). The Court has articulated a number of alternative formulas under which conduct may be fairly attributable to the state, with the details of those various tests reflecting the relevant features of some of the distinct specific contexts in which the state-action question has often arisen. *See Lugar*, 457 U.S. at 938-39 (noting, for example, the "public function test," the "state compulsion test," the "nexus test," and the "joint action test" (citations and internal quotation marks omitted)). The ultimate inquiry, however, remains whether the challenged acts are "attributable to the State" in the sense that they are "traceable to the State's power or authority." *Lindke*, 601 U.S. at 198.

Because—as the variety of alternative formulas underscores—the state-action inquiry often depends upon specific features of the context at issue, I think it is important to begin by first setting out in some detail the unique legal context that provides the backdrop for this case. Although the majority deems the entirety of a massive platform such as Facebook as being in all respects the equivalent to a big newspaper, *see* Opin. at 22, the analogy is not entirely apt. As I shall explain in Section III, Meta's truly gargantuan platforms simply could not exist in anything resembling their current form without the legal immunity that the Federal Government has afforded to internet platforms under § 230 of the Communications

Act of 1934, as added by the Communications Decency Act of 1996. Thereafter, in Section IV, I will explain how that context-specific feature factors into the overall question of whether, on the specific facts at issue here, CHD can adequately plead the requisite state action.

III

Meta is in the business of transmitting, on a vast scale, the publicly available speech of others, primarily through its Facebook and Instagram platforms. As quickly became apparent in the early days of the internet, operating any such open platform for the speech of third parties presents very substantial liability risks that, if the platform became large enough, would be practically impossible to manage or to effectively mitigate. Congress's solution was § 230, which we have construed to provide broad immunity to internet platforms hosting third-party speech.

A

In assigning liability for transmitting defamatory communications, the common law generally distinguishes among different classes of persons based on their role in creating, or their knowledge of, the contents of those communications. The greatest level of responsibility applies to the "composer or original publisher of a defamatory statement, such as the author, printer or publishing house," because that person "usually knows or can find out whether a statement in a work produced by him is defamatory or capable of a defamatory import." RESTATEMENT (SECOND) OF TORTS § 581 cmt. c. A lesser

degree of responsibility is applied to those, such as newsstands, bookstores, and libraries, who are in the business of distributing large volumes of expressive content prepared exclusively by third parties. Because such persons cannot be expected to screen in advance the content of every book, periodical, and article they distribute, the common law assigns them liability for defamation only if "there are special circumstances that should warn the dealer that a particular publication is defamatory." *Id.* cmt. d. But no liability for defamation is assigned to a person or entity, such a "telephone company," that "merely makes available to another equipment or facilities that he may use himself for general communication purposes." *Id.* cmt. b. These three categories of persons have sometimes been respectively referred to as "publishers," "distributors," and "conduits," *see, e.g., Austin v. CrystalTech Web Hosting*, 211 Ariz. 569, 125 P.3d 389, 392 (Ariz. Ct. App. 2005); Eugene Volokh, *Treating Social Media Like Common Carriers*?, 1 J. OF FREE SPEECH L. 377, 455 (2021), and I will use that same shorthand here.

Meta and others operating social media platforms do not fit neatly into this taxonomy. Although in one sense they merely provide "equipment or facilities" that third parties may use "for general communication purposes," the facilities at issue here voluntarily disseminate those communications in many cases *to the world at large*. Because Meta knows, or can readily know, the content of those communications, and is under no legal obligation to transmit them, it cannot be classified as a mere conduit. *Cf.* RESTATEMENT (SECOND) OF TORTS § 581 cmt. f (stating

that a person or entity (such as a telegraph company) that provides communication-specific assistance in transmitting a particular statement whose contents are known or accessible to it may be liable for defamation if "he knows or has reason to know that the message is libelous"); *see also id.* § 612 (providing, however, a limited privilege that further limits liability for such transmitters).

In many senses, Meta most resembles a distributor, because it transmits a truly enormous volume of third-party content that could not feasibly be reviewed in advance and that it plays no role in creating. But, as this case illustrates, Meta (like many other platform operators) also manages the content on its websites in ways that arguably go beyond that of a traditional distributor, such as a bookstore or newsstand, and that begin to resemble the actions of a publisher. It is perhaps therefore unsurprising that, even in the early days of the internet, at least one court concluded that a company operating a "computer bulletin board" could be classified as a "publisher," rather than a "distributor," if it "h[o]ld[s] itself out to the public and its members as controlling the content" of that platform and "implement[s] this control through [an] automatic software screening program" or through "Guidelines" that it uses to remove content. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, at *1, 4 (N.Y. Sup. Ct. May 24, 1995). By opting for the "benefits" of this heightened degree of "editorial control," *Stratton Oakmont* held, the platform at issue there "ha[d] opened it up to a greater liability" than a mere distributor. *1995 N.Y. Misc. LEXIS 229*, [WL] at *5. Such a rule, of course, would likely spell the end of the internet as we know it: for

a variety of reasons, virtually no one operating (or using) a platform would want there to be *no* controls over what content may be posted, but under *Stratton Oakmont*, the use of such controls could result in crushing publisher-level liability for all third-party content on the platform.

B

Congress promptly acted to resolve this problem by adding a new § 230 to the Communications Act of 1934, which has been classified as § 230 of the unenacted title 47 of the United States Code. [4] Section 230 accomplishes that goal by first establishing certain rules limiting internet platforms' liability for posting or removing third-party content and then expressly preempting any contrary state or local law. *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). Section 230's general rules for limiting liability are contained in subsection (c), which provides as follows:

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4. Although we have frequently referred to the statute as "Section 230 of the Communications Decency Act," *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 69 F.4th 665, 670 (9th Cir. 2023); *see also Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc), that is a misnomer. Title V of the Telecommunications Act of 1996 is captioned as the "Communications Decency Act of 1996," *see* Pub. L. No. 104-104, § 501, 110 Stat. 56, 133 (1996), and § 509 of that title added § 230 to the Communications Act of 1934, which has been classified to the unenacted 47 U.S.C. § 230. *See id.* § 509, 110 Stat. at 137. The statute can thus properly be referred to either as § 230 of the Communications Act of 1934 or as § 230 of Title 47, but not as § 230 of the Communications Decency Act.

(c) Protection for "Good Samaritan" Blocking and Screening of Offensive Material

(1) Treatment of Publisher or Speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access

> to material described in paragraph [(A)]. [5]

47 U.S.C. § 230(c). [6]

Section 230(c)(1) squarely rejects *Stratton Oakmont* by flatly providing that no "interactive computer service shall be treated as the publisher or speaker" of third-party content that it hosts or transmits. 47 U.S.C. § 230(c)(1); *see also id.* § 230(f)(2) (broadly defining an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server"). By its terms, this categorical rule applies regardless of whether the platform uses the sort of controls to screen and remove content that were at issue in *Stratton Oakmont*. But to be sure that platforms would have the ability, *inter alia*, to use "blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material," *id.* § 230(b)(4) (declaring the statute's "policy"), § 230 goes further and prohibits platforms from being held liable "on account of . . . any action voluntarily

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5. The statute actually says "paragraph (1)," but that is obviously a scrivener's error. *See U.S. Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993).

6. In its current form, the statute carves out certain specified exceptions from its limitation on civil liability, such as for conduct that violates "any law pertaining to intellectual property" or that violates certain sex-trafficking laws. *See* 47 U.S.C. § 230(e)(2), (5)(A).

taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.* § 230(c)(2)(A).

This court has construed the resulting immunity conferred by § 230 very broadly. We have held that subsection (c)(1)'s rule that a platform operator shall not be "treated as the publisher or speaker of any information provided" by a third party does not merely prohibit the sort of *publisher*-liability that was at issue in *Stratton Oakmont. See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1104 (9th Cir. 2009) (expressly rejecting the argument that, "because Congress enacted section 230 to overrule *Stratton Oakmont*, which held an internet service provider liable as a primary publisher, not a distributor, the statute does no more than overrule that decision's application of publisher liability" and that § 230 therefore leaves distributor liability intact). Rather, we have held, § 230(c)(1) broadly "precludes courts from treating internet service providers as publishers not just for the purposes of defamation law, with its particular distinction between primary and secondary publishers, but in general." *Id.* As we explained:

> [W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of

> content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230 (c)(1) precludes liability.

Id. at 1101-02.

Under this reading of § 230, we held that a plaintiff's cause of action impermissibly treats an internet service provider as the "publisher or speaker" of third-party content if it necessarily rests on a duty concerning "reviewing, editing, [or] deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102. As noted above, the paradigmatic example of "a cause of action that treats a website proprietor as a publisher" within the meaning of § 230 "is a defamation action founded on the [proprietor's] hosting of defamatory third-party content," *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016), including hosting undertaken as a traditional "publisher" or as a "distributor," *Barnes*, 570 F.3d at 1104. But under the analysis we adopted in *Barnes*, § 230(c)(1)'s immunity also extends to any duty that "would necessarily require an internet company to *monitor* third-party content," *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (emphasis added), or to remove such content, *Barnes*, 570 F.3d at 1103. As we stated in *Barnes*, "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to

remove." *Id.* "Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, *to remove*, or to post, with respect to content generated entirely by third parties." *Id.* at 1105 (emphasis added).

Barnes rejected the argument that, by construing subsection (c)(1)'s immunity as extending to actions concerning the monitoring and removal of content, we had rendered superfluous the distinct immunity set forth in subsection (c)(2), which directly concerns potential liability for "restrict[ing] access to or availability of material." 47 U.S.C. § 230(c)(2); *see Barnes*, 570 F.3d at 1105. We explained that, unlike the immunity granted by § 230(c)(1), the further immunity conferred by § 230(c)(2) would apply to content that was partly created by the internet provider itself and to access restrictions that went beyond what could fairly be characterized as "publishing or speaking." *Barnes*, 570 F.3d at 1105.

Our broad construction of § 230 has been subject to substantial criticism in a number of specific respects, but I am bound by our settled precedent, and I do not question it here. Moreover, regardless of any criticisms about the precise scope of that immunity, the central point, for present purposes, remains indisputable: § 230 confers a statutory immunity without which Meta could not practicably operate gigantic platforms such as Facebook and Instagram. The potential liability for defamatory content alone—not to mention other theories of platform host liability—would be so crushing as to preclude the operation of these platforms in anything resembling their current form. And, importantly, the immunity granted by

§ 230 is purely an act of congressional grace, because Meta has no plausible claim to a constitutional *entitlement* to full immunity for publishing or distributing constitutionally unprotected defamatory content. *Cf. Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1299, 461 U.S. App. D.C. 425 (D.C. Cir. 2023) (holding that Congress's denial of § 230 immunity to internet-provider conduct that amounts to aiding and abetting sex trafficking is not overbroad or facially unconstitutional).

In this respect, Meta's position stands in sharp contrast to that of a traditional publisher, such as a newspaper. A newspaper publisher's editorial decisions over the third-party content published in that paper are not broadly immunized by statute from constitutionally permissible liability. And because newspaper editors must, as a consequence, consider the potential liability associated with each third-party piece they publish, they necessarily limit and individually select the third-party speech that they are willing to include. In the absence of § 230's immunity, Meta would have to take comparable steps to manage and limit the enormous potential liability that could arise from its platforms' hosting of third-party speech by behaving more like a traditional newspaper. (At the very least, it would have to behave more like a traditional newsstand or bookstore, if one assumes, contrary to *Stratton Oakmont*, that the use of algorithmic tools and of other content-management measures is consistent with being a mere distributor rather than a publisher.) But in all events, in a world without § 230, Meta would almost certainly have to substantially reduce the massive *scale* of its third-party content hosting; it would

presumably be *much* more pro-active than it already is about screening out content; and it would be much more selective about who it lets use its platforms and under what conditions. But with § 230's singular and broad immunity in place, Meta is freed up to exercise practical—and potentially arbitrary—control over the hosted content of the speech of more than 100 million people in the United States alone. In effect, by virtue of the special treatment afforded under § 230 to its massive platforms, Meta has been given the immunity of a *conduit* for the billions of postings that (in conduit-like fashion) it hosts, but that conduit-type immunity is coupled with what, in many respects, is functionally the editorial power of a *publisher* over everything on the platform.

The truly gigantic scale of Meta's platforms, and the enormous power that Meta thereby exercises over the speech of others, are thus direct consequences of, and critically dependent upon, the distinctive immunity reflected in § 230. That is, because such massive third-party-speech platforms could not operate on such a scale in the *absence* of something like § 230, the very ability of Meta to exercise such unrestrained power to censor the speech of so many tens of millions of other people exists *only* by virtue of the legislative grace reflected in § 230's broad immunity. Moreover, as the above discussion makes clear, it was Congress's declared *purpose*, in conferring such immunity, to allow platform operators to exercise this sort of wide discretion about what speech to allow and what to remove. In this respect, the immunity granted by § 230 differs critically from other government-enabled benefits, such as the limited liability associated with the corporate

form. The generic benefits of incorporation are available to all for nearly every kind of substantive endeavor, and the limitation of liability associated with incorporation thus constitutes a form of generally applicable non-speech regulation. In sharp contrast, both in its purpose and in its effect, § 230's immunity is entirely a *speech-related* benefit—it is, by its very design, an immunity created *precisely* to give its beneficiaries the practical ability to censor the speech of large numbers of other persons. [7] Against this backdrop, whenever Meta selectively censors the speech of third parties on its massive platforms, it is quite literally exercising a government-conferred special power over the speech of millions of others. The same simply cannot be said of newspapers making decisions about what stories to run or bookstores choosing what books to carry.

I do not suggest that there is anything inappropriate in Meta's having taken advantage of § 230's immunity in building its mega-platforms. On the contrary, the fact that it and other companies have built such widely accessible platforms has created unprecedented practical opportunities for ordinary individuals to share their ideas

7. The majority suggests that if § 230 were "enough for state action, every large government contractor would be a state actor." Opin. at 27. However, as I shall explain below, I do not contend that § 230 alone suffices to establish state action here. *See infra* at 85. But the majority is also wrong in suggesting that the Government-conferred benefit here is comparable to the others that it cites. Companies that are dependent on a "favorable regulatory environment" or on significant Government contracts do not rely on a *speech-related* benefit that was purposely created to facilitate the suppression of third parties' speech.

with the world at large. That is, in a sense, exactly what § 230 aimed to accomplish, and in that particular respect the statute has been a success. But it is important to keep in mind that the vast practical power that Meta exercises over the speech of millions of others ultimately rests on a government-granted privilege to which Meta is not constitutionally entitled.

IV

In my view, this key fact—*viz.*, that Meta is effectively exercising a distinctive government-conferred power over others' speech when it decides whether and how to censor third-party speech on its vast platforms—makes a crucial difference in the state-action analysis. As I shall explain, the particular state-action test that is most relevant here is the one applied in *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). As relevant here, *Skinner* establishes that, where a private party exercises a distinctive government-conferred immunized power that is specifically targeted at particular rights of third parties, and those particular rights are ones that are protected from governmental infringement by the Constitution, then that private party's interactions with the Government as to how to exercise that power over those third parties' constitutional rights implicate constitutional standards and must comply with those standards. And under that analysis, CHD can adequately plead state action here.

Appendix A

A

Skinner involved two sets of regulations that were adopted to address the serious safety concerns presented by intoxicated railroad workers. 489 U.S. at 608-09. The first set, contained in "Subpart C" of the applicable regulations, imposed *mandatory* drug testing on employees involved in specified types of train accidents. *Id.* at 609. The second set, in "Subpart D," created a "*permissive*" regime of drug testing that was available against persons who were not covered by the mandatory provisions of Subpart C. *Id.* at 611 (emphasis added). Specifically, Subpart D authorized railroads to require drug testing of (1) an employee as to whom one or two supervisors had a "reasonable suspicion" that the employee was under the influence; or (2) an employee as to whom a supervisor had a reasonable suspicion that the employee contributed to an accident's "occurrence or severity." *Id.* Various organizations representing railroad workers challenged these regulations as a violation of the Fourth Amendment. *Id.* at 612. The district court rejected these challenges, but we reversed. *Id.* We concluded that, with the exception of the portion of Subpart D that authorized drug tests upon reasonable suspicion of impairment, the regulations did not require the "showing of individualized suspicion" that we held was "essential" to conducting such a search under the Fourth Amendment. *Id.* at 613. The Supreme Court then reversed our judgment to the extent that it had invalidated Subpart D.

At the outset, the Court had to address the threshold question whether drug tests conducted under these

regulations implicated the protections of the Fourth Amendment. As the Court explained, "the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative," but "the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." *Skinner*, 489 U.S. at 614. In applying this overall standard, the Court first noted that the answer was easy as to the mandatory testing requirements in Subpart C: "A railroad that complies with the provisions of Subpart C of the regulations does so by compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment." *Id.* By contrast, the state-action issue with respect to Subpart D required a more extensive analysis.

As an initial matter, the Court explicitly rejected the defendants' argument that "the Fourth Amendment is not implicated by Subpart D of the regulations, as nothing in Subpart D *compels* any testing by private railroads." 489 U.S. at 614 (emphasis added). As the Court explained, "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id.* at 615. Even in the absence of compulsion, a private party might be "deemed an agent or instrument of the Government for Fourth Amendment purposes" if the "degree of the Government's participation in the private party's activities" was sufficient, "in light of all the circumstances," to trigger the Constitution's protections. *Id.* at 614-15.

In concluding that "tests conducted by private railroads in reliance on Subpart D" should not be viewed

as being "primarily the result of private initiative," the Court emphasized several considerations. First, the regulations in Subpart D broadly preempted "state laws, rules, or regulations covering the same subject matter," including rights recognized in collective bargaining agreements. 489 U.S. at 615. Indeed, the regulations specifically stated that railroads could "not bargain away the authority to perform tests granted by Subpart D." *Id.* By these measures, "[t]he Government ha[d] removed all legal barriers to the testing authorized by Subpart D." *Id.* Second, the regulations gave the Government "the right to receive certain biological samples and test results procured by railroads pursuant to Subpart D." *Id.* The Government had thereby "made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions." *Id.* Third, the regime created by Subpart D was compulsive vis-à-vis the employee: "a covered employee" was *not* "free to decline his employer's request to submit to breath or urine tests under the conditions set forth in Subpart D." *Id.* These three considerations—the Government's conferral of a special private power against others that was broadly immunized; the Government's interest in, and benefit from, the exercise of that power; and the compulsive nature of that power when wielded against other private parties—led the Court to conclude that a railroad's invocation of that power against its employees was sufficiently done with "the Government's encouragement, endorsement, and participation" to "implicate the Fourth Amendment." *Id.* at 615-16.

Having found that the Fourth Amendment applied to searches conducted under Subpart D, the Court then

concluded that the regulations did not violate the Fourth Amendment. *Id.* at 633-34.

B

Consideration of the same key three factors discussed in *Skinner* strongly supports the view that Meta's alleged interactions with the Government here are sufficient to implicate the First Amendment rights of CHD and those it represents, including Kennedy.

As I have explained, Meta here was *not* simply exercising the normal editorial control that goes with being an ordinary publisher who sifts through pre-publication submissions and affirmatively decides what to include in its publication. There are many such websites, and their exercise of such conventional editorial judgment and responsibility means that, from a practical point of view, their very ability to exist and to operate does not *depend* upon § 230's grace (even if they are a beneficiary of it). By contrast, Meta's construction of massive and widely available platforms for the hosting of the speech of enormous numbers of third parties *necessarily* means that those platforms exist and operate *only* by virtue of the immunity conferred by § 230. Thus, the authority to manage content on such mega-platforms is, in a very real sense, a government-conferred power, and the Government, through its broad preemption of "state laws, rules, or regulations covering the same subject matter," has intentionally "removed all legal barriers" to Meta's exercise of that power over the speech of others. *Skinner*, 489 U.S. at 615. And, as in *Skinner*,

that government-conferred power is one that, by its very design, is *specifically directed* at third-party rights that are protected under the Constitution from encroachment by the Government. In that sense, the immunized power conferred is not akin, for example, to the generic benefits of the liability limitations of the corporate form. Section 230, by its structure and design, grants an immunized power specifically directed at censoring the speech of others. [8]

Moreover, Meta's exercise of that power is clearly coercive from the point of view of the third parties whose speech is targeted. Like the railway employees in *Skinner*, they are not "free to decline" to have their speech removed from the platform if Meta chooses to do so. *Skinner*, 489 U.S. at 615.

The central question, then, is whether *Skinner*'s last remaining factor—namely, governmental interest in, and direct benefit from, specific exercises of that power—is satisfied here. In addressing this factor, I think it is important to note a critical difference between this case and *Skinner*. In *Skinner*, the Government's interest in, and benefit from, the testing power conferred in Subpart

8. Meta is therefore wrong in suggesting that this case does not involve the "exercise of some right or privilege created by the State." *O'Handley v. Weber*, 62 F.4th 1145, 1156 (9th Cir. 2023) (stating that a threshold question in the state-action inquiry is "whether the alleged constitutional violation was caused by the 'exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible'" (citing *Lugar*, 457 U.S. at 937)).

D was built into the regulations themselves, because those regulations expressly gave the Government the right to obtain certain results of those tests. *Id.* The same cannot be said of the regime created by § 230, which provides for no formal governmental role in the exercise of the powers that it makes possible. Accordingly, unlike in *Skinner*, this important state-action factor is not *automatically* satisfied simply by virtue of the structure of the legal regime that the Government has created. On that basis, the district court below distinguished *Skinner* and held that it did not support a finding of state action here. The majority relies on similar reasoning, noting that § 230 neutrally protects whatever editorial decisions Meta makes with respect to third-party speech on its platforms. *See* Opin. at 29. But this reasoning overlooks the possibility that, even though a governmental benefit is not directly built into § 230's legal regime, the same relevant sort of governmental interest and benefit may be supplied with respect to *particular* communications and speakers by virtue of *specific interactions* between Meta and the Government concerning such communications or speakers. In view of the factual contentions summarized earlier, that line has plainly been crossed here. In particular, three distinct types of specific alleged interactions between Meta and the Government, taken together, strongly confirm the Government's interest in, and benefit from, many of the particular challenged exercises of that power. *Skinner*, 489 U.S. at 615.

First, the above-described allegations confirm that high-level Government officials made targeted requests, both publicly and privately, for Meta to take action

specifically against the speech of CHD and Kennedy. In a private email, Flaherty pointedly complained that Meta was not doing enough to "stop[] the disinfo dozen," which was a clear reference to CHD and Kennedy. Psaki and Murthy likewise publicly called for Meta and other platforms to target the same "12 people who are producing 65 percent of anti-vaccine misinformation." In its private reassurances to White House and other Executive Branch officials, Meta repeatedly and specifically touted the targeted actions it had taken against CHD and Kennedy. For example, in an email to Flaherty, Meta attached a CHD Facebook post as an example of the sort of truthful "vaccine hesitan[t]" speech that it was targeting, just as it knew Flaherty wanted it to do. The day after Murthy's and Psaki's press conference, Meta followed up with Murthy's office and, during that conversation, specifically noted its targeted actions against Kennedy's vaccine-related speech. The following week, it again emphasized, in discussions with HHS, the additional steps it was taking against "the disinfo dozen." On this record, the Government expressed its specific interest in suppressing particular speech of particular speakers—including CHD and Kennedy—and Meta responded by underscoring the steps it had taken, and planned to take, to accomplish just that.

Second, under the allegations here, Meta worked extensively with Executive Branch officials to adjust and refine its criteria and practices with respect to limiting or suppressing vaccine-related speech. These were not simply informational exchanges in which Meta passed along its internal criteria for addressing such speech. Rather, Meta

engaged in a dialogue with Executive Branch officials to develop and "begin enforcing" new policies with respect to Covid-vaccine-related speech. In particular, there was extensive discussion with Government officials about what "levers" to exercise against truthful "vaccine hesitancy content." And the Government was hardly a passive participant in these discussions. On the contrary, Flaherty and others repeatedly chastised Meta for not doing enough to suppress anti-vaccine content, unfavorably comparing Meta to other social media companies and underscoring the importance of Meta "mak[ing] people like me think you're taking action." The allegations here raise a plausible inference that Meta responded to such jawboning with appeasing efforts at modifying its policies and practices with respect to such speech.

Third, Meta went so far as to create an actual portal in which pre-selected Government officials could log in and then submit targeted requests for specific Covid-vaccine-related posts to be taken down. On its face, this system extended to truthful speech that the "whitelisted" Government officials nonetheless deemed to promote "Vaccine Discouragement."

It is also important to note that all of these actions took place against a backdrop of continuous legislative threats, at multiple levels, to limit or abolish the § 230 immunity upon which Meta's very ability to operate its mega-platforms critically depends. These included congressional hearings in both houses, at which Zuckerberg and other social media CEOs were called to testify, as well as statements from high-ranking officials including the House Speaker and relevant committee chairs in both

houses. Although, by constitutional design, the legislative process is cumbersome, and legislative threats are therefore harder to carry out than others, the Speaker trenchantly observed that, when legislators raise the subject of § 230 reform with social media companies, "you really get their attention." While I agree that these various legislative comments and actions, taken in isolation, do not themselves constitute governmental compulsion of action under the traditional "'state compulsion' test," *Lugar*, 457 U.S. at 939; *cf. Kennedy v. Warren*, 66 F.4th 1199, 1207-12 (9th Cir. 2023), that is not dispositive. The Supreme Court held that state action was present in *Skinner* even though compulsion was concededly *absent* in that case. *See Skinner*, 489 U.S. at 615 (finding state action even while agreeing that the governmental regulations in Subpart D did *not* "compel[] a private party to perform a search"). And these frequent and high-level threats are certainly relevant in considering whether, "in light of all the circumstances," Meta's challenged actions here "are attributable to the Government or its agents" under *Skinner*'s standards. *Id.* at 614 (citation omitted).

Taking these considerations together, the Government "made plain" its "strong preference" for particular exercises of Meta's § 230-immunized power over third-party speech on its mega-platforms. *Skinner*, 489 U.S. at 615. The Government directly communicated to Meta its specific interest in Meta acting to limit or remove (1) content that expressed particular Government-disfavored viewpoints on a specific subject (*viz.*, vaccines in general and the Covid vaccines in particular), and (2) the speech of CHD and Kennedy on that subject in particular. With awareness of that focused interest, and

of the benefits that the Government hoped to obtain if such speech were suppressed, Meta then *affirmatively* worked with the Government to refine Meta's policies and practices concerning such speech in a way that would be satisfactory to the Government, and it repeatedly touted to the Government its specific actions directly targeted against CHD and Kennedy. On these situation-specific facts, I think that *Skinner*'s last remaining factor—a governmental interest in, and benefit from, particular exercises of the immunized power—is satisfied here. [9]

Accordingly, I would hold that, considered "in light of all the circumstances," Meta's interactions with the Government with respect to the suppression of specific categories of vaccine-related speech, and in particular the speech of CHD and Kennedy, "suffice to implicate the [First] Amendment." *Skinner*, 489 U.S. at 614, 616 (citation omitted). Moreover, that conclusion makes perfect sense when viewed from the converse perspective of what the *Government* must not do when it interacts with such mega-platforms. Having specifically and purposefully created an immunized power for mega-platform operators to freely censor the speech of millions of persons on those platforms, the Government is perhaps unsurprisingly tempted to then try to influence *particular* uses of such dangerous levers against protected speech expressing viewpoints the Government does not like. The *Skinner*-based analysis set forth above properly recognizes that,

9. A different and much more difficult state-action question would be presented if Meta had refrained from such affirmative interactions with the Government and instead was merely the passive recipient of criticism or haranguing from Government officials.

when the Government does so, and the platform operator responds accommodatingly, the First Amendment is *implicated*. Whether First Amendment standards have been *violated* was not reached by the district court and therefore is not squarely before us. [10]

Because I think that CHD could amend its complaint in a manner that states a cause of action for injunctive and declaratory relief based on the theory that Meta's above-described interactions with the Government implicate the First Amendment rights of CHD, Kennedy, and CHD's other members, I would reverse the district court's judgment in favor of Meta to the extent it held to the contrary. [11] Because, however, CHD's showing on

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10. As I note below, however, CHD's allegations raise a plausible inference that the Government sought to restrict CHD's protected speech for the illegitimate purpose of suppressing disfavored speech that interfered with its policy objectives. *See infra* at 87.

11. For many of the same reasons discussed above, CHD is clearly able to plead sufficient facts to assert Article III standing to seek injunctive and declaratory relief against Meta. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (noting that, at the pleading stage, the plaintiff may rely on "mere allegations" to establish the core elements of standing, which are (1) an injury in fact (2) that is fairly traceable to the defendant's challenged conduct and (3) that would be redressed by the requested relief); *cf. Murthy v. Missouri*, 144 S. Ct. 1972, 1986, 219 L. Ed. 2d 604 (2024) (holding that, at the preliminary injunction stage, where "the parties have taken discovery," the plaintiff "must instead point to factual evidence"). CHD has properly rested its standing both on injuries to itself and injuries to members that it represents (such as Kennedy). *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S.

this score extends only to Meta and not to Zuckerberg personally or to the Poynter Institute, I would affirm the dismissal of the *direct* injunctive claims against those two defendants. [12] Of course, to the extent that CHD were to establish an ultimate entitlement to injunctive relief,

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333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). In contrast to *Murthy*, CHD has identified specific alleged instances in which Government interaction with Meta led to "discrete instance[s]" of censorship of CHD's and Kennedy's content. *See Murthy*, 144 S. Ct. at 1987. In February 2021, Meta responded to Slavitt's inquiry about restrictions on vaccine-hesitant content by stating that it would "begin enforcing" a new "policy" on that score, and it then proceeded to take down Kennedy's Instagram account the very next day. Two months later, Meta expressly reassured White House officials about the steps it was taking against vaccine-hesitant content, and it specifically attached, as an example, a post from CHD's Facebook page. A month later, a White House official complained that Meta was still not doing enough to stop the vaccine-hesitant speech of the "disinfo dozen," which included Kennedy. Murthy and Psaki then singled out the same dozen speakers, and Kennedy in particular, in their July 2021 press conference. That was followed by Meta informing HHS officials, a week later, that it had taken specific action against each one of the "disinfo dozen," including Kennedy, and thereafter Meta continued evaluating additional restrictions on Kennedy. And because, in contrast to *Murthy*, CHD seeks to enjoin the platform operator directly, it has "satisf[ied] traceability" by alleging that Meta continues to exclude CHD's and Kennedy's posts "under a policy that it adopted at the White House's behest," and an injunction directed at Meta will redress that injury. *See Murthy*, 144 S. Ct. 1996-97 & n.11.

12. I would likewise affirm the dismissal of CHD's claim under the Takings Clause. CHD has made no comparable showing of state action with respect to its assertion that the disabling of its donate button on its Facebook page was somehow a violation of the Takings Clause.

Zuckerberg, the Poynter Institute, and others working in concert with Meta might nonetheless be incidentally covered by an injunction against Meta. And I would affirm, under *Egbert*, CHD's First-Amendment-based *Bivens* claim for monetary damages.

C

None of the additional contentions raised by the majority or by Defendants supports a contrary view with respect to the state-action issue.

Defendants rely heavily on our decision in *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023), in which we held that state action was not present when a state election official submitted a request to Twitter to remove a particular post questioning the integrity of California's elections. *Id.* at 1154, 1160-61. But *O'Handley* was not presented with, and did not consider, the points addressed here about the significance of § 230 immunity under *Skinner*. Indeed, *O'Handley* never even cited either § 230 or *Skinner*. As such, *O'Handley* is distinguishable and not controlling here. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (citation omitted)); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007) (holding that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions" (citation omitted)).

The majority concludes that the overall facts alleged here do not plausibly reflect the sort of compulsion that the caselaw typically requires to establish state action under the state compulsion test. *See* Opin. at 22-27; *cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963) (holding that actions of Rhode Island state commission, which "exhort[ed] booksellers" not to carry disfavored non-obscene titles, violated the First Amendment where the commission's communications were "phrased virtually as orders," were "invariably followed up by police visitations," and led distributor to acquiesce in a manner that the lower courts found "was not voluntary"). I am not entirely sure whether the majority is correct on this point, but I need not decide the issue, because it is ultimately irrelevant. As noted earlier, *Skinner* squarely held that state action was present there even in the *absence* of state compulsion. 489 U.S. at 615. And for the reasons that I have explained, the same is true here. [13]

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13. Although I thus do not reach the question of whether compulsion has been shown here, I note parenthetically that I am also not sure that the majority is correct in suggesting that, if compulsion *had* been established, Meta would not be a proper defendant for such a claim. *See* Opin. at 23. It may perhaps be true that the government-compelled private party is not the proper defendant in a suit for *damages* or in a suit challenging "governmental compulsion in the form of a generally applicable law." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 841 (9th Cir. 1999). And I recognize that the distributor was not named as a defendant in the suit for injunctive relief in *Bantam Books*. *See Bantam Books*, 372 U.S. at 60-61 (describing procedural history); *see also Bantam Books, Inc. v. Sullivan*, 93 R.I. 411, 176 A.2d 393, 395 (R.I. 1961) (noting that "[t]he distributor did not object to the commission's action and is not a party to the instant

Likewise, it does not matter whether the majority is correct in contending that the allegations here would not suffice to establish state action under the traditional "joint action test," *Lugar*, 457 U.S. at 939. That test, according to the majority, requires a showing that Meta agreed to take a "*specific* action on the government's say-so." *See* Opin. at 18 (emphasis added). Once again, the point is ultimately irrelevant. In *Skinner*, there was no such alleged agreement to violate any specific person's "rights in particular," *see* Opin. at 16 (citation omitted), and yet the Court found that state action was present. At most, the majority has established that particular alternative formulations of the state-action test, which were developed with different contexts in mind, are ill-suited to the unique circumstances presented here. That calls, as in *Skinner*, for a more tailored inquiry into whether, in light of those unique circumstances, state action is nonetheless present. As in *Skinner*, it is present here.

The majority also raises a broader concern that a finding of state action here would interfere with Meta's exercise of its own independent judgment over its platforms. Opin. at 18-19. Given that Meta may happen

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proceedings"). But I am not sure that the same conclusion follows if the compulsion test is applied in the unique context presented here, *i.e.*, a suit for injunctive relief against a private party who, *while exercising a government-granted ability to engage in mass censorship*, is allegedly the subject of particularized coercive tactics from the Government. An injunction aimed at keeping the Government's coercive efforts away from such dangerous levers might conceivably be addressed either to the target of those efforts (thus counteracting them) or to the Government (or both). But, like the majority, I need not ultimately decide this issue.

to share the Government's views that anti-vaccine speech and speakers should be limited or blocked on its platforms, the majority argues that Meta should not be disabled from implementing "those views simply because they happen to be shared by the government." *See* Opin. at 22. According to the majority, "Meta has a First Amendment *right*" to censor any speech on its platform with which it disagrees, *see* Opin. at 22 (emphasis added), and that it is solely up to Meta "to decide what, if any, limits should apply to speech on those platforms," *see* Opin. at 31. Indeed, Meta contends—and the majority appears to agree—that, under the Supreme Court's recent decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 219 L. Ed. 2d 1075 (2024), "*all* of the actions challenged here are protected under the First Amendment" (emphasis added). In light of these considerations, the majority suggests that the various state-action tests should be narrowly construed so as to preserve Meta's asserted First-Amendment-based right to freely censor speech on its platform. These arguments rest, in my view, on an overstated view of Meta's relevant First Amendment rights, which do not give Meta an unbounded freedom to *work with the Government* in suppressing speech on its platforms.

It may well be true that an ordinary publisher or distributor would have a First Amendment right to acquiesce, if persuaded, in governmental requests not to publish or distribute particular works or speakers. The Court in *Bantam Books* put loadbearing weight on the fact that the Rhode Island courts had specifically found that the distributor's acquiescence in that case "was not voluntary." 372 U.S. at 68. It is therefore plausible

to suppose that *Bantam Books* might have come out differently if the distributor had instead stated that it was *persuaded* by the state commission's views concerning what materials were worth distributing and that, agreeing with those views, the distributor affirmatively did not wish to promote the particular works at issue. Likewise, if a newspaper affirmatively chooses to be, in effect, a mouthpiece for a particular government or a particular official it supports, it may well have an absolute First Amendment *right* to do so. And to that extent, the majority would perhaps be correct in suggesting that a newspaper's constitutional right to *opt* to kill whatever article it wants cannot be overcome by relabeling, as "joint action," the newspaper's discussions with government officials over whether to bury a story.

But it does not follow from any of this that Meta has the exact same scope of constitutional freedom with respect to the speech of others on its mega-platforms. As I have repeatedly explained, when it comes to the operation of the sort of platforms at issue here, Meta simply does not occupy the same position as a traditional newspaper publisher or a book distributor. Rather, because its ability to operate its massive platform rests dispositively on the immunity granted as a matter of legislative grace in § 230, Meta is a bit of a novel legal chimera: it has the immunity of a conduit with respect to third-party speech, based precisely on the overriding legal premise that it is *not* a publisher; its platforms' massive scale and general availability to the public further make Meta resemble a conduit more than any sort of publisher; but Meta has, as a practical matter, a statutory freedom to

suppress or delete any third-party speech while remaining liable only for its *own* affirmative speech. And, as the Supreme Court recently recognized, Meta is engaged in expressive activity protected by the First Amendment when it "curat[es]" Facebook's "NewsFeed" in a way that "create[s] a distinctive expressive offering." *Moody*, 144 S. Ct. at 2405. But I am aware of no historical precedent that meaningfully corresponds to such a hybrid entity, and I do not think we should simply assume that it has *exactly* the same constitutional rights with respect to third-party speech on its platforms as a newspaper publisher, a book distributor, or a parade organizer. *Moody* did not address the precise scope of Meta's First Amendment rights over its platform, *see id.* at 2407 (finding it unnecessary to resolve what level of scrutiny applied to the restrictions at issue there), and *Moody* did not confront or decide any question as to whether Meta has an absolute constitutional right to coordinate with the Government to suppress third-party speech on its platforms.

We likewise need not, and should not, decide in this case exactly what degree of First Amendment protection, if any, Meta has with respect to working with the Government to censor particular viewpoints or speakers on its platforms. It suffices for purposes of this case to note that the mega-platforms at issue here differ from traditional publishers or distributors in a critical respect that is *directly* relevant to the state-action question and that, in my view, warrants a different result—and that does so regardless of Meta's own invocation of the First Amendment. As I have explained, Meta would be better positioned to argue for the full constitutional freedom

of a traditional publisher—including the freedom to agree to, and implement, the Government's censorship preferences—if it operated its website in all respects like a traditional publisher by individually reviewing, selecting, and limiting exactly what third-party speech it will publish. In such a circumstance, it would *happen* to have § 230 immunity, but (as with a newspaper) that immunity would not be essential to its very existence or ability to operate its platforms.

But in critical reliance on the Government's creation of an immunized censorship power, Meta instead chose to scale up its operations in a way that has produced gigantic platforms that comprise a unique assemblage of features that make it part conduit, part distributor, and part publisher. This central fact makes a difference. That is, I do not think that Meta's critical reliance on the *government-created* ability to engage in mass censorship is a factor that can properly be ignored either in the state-action inquiry or in assessing whether, like the above-described acquiescing newspaper publisher, Meta has, so to speak, a constitutional *right* to suppress third-party speech that the Government "persuades" it to censor. Although Meta's operational reliance on § 230's immunity is *not* alone enough to render Meta a state actor, that factor contributes positively towards a finding of state action when combined with other considerations. In particular, with this critical factor in place, if Meta then affirmatively engages with the Government as to how to exercise its government-granted authority in order to widely suppress particular subjects or speakers on its mega-platforms, that additional element suffices to

cross over the state-action line and to implicate the First Amendment's protections with respect to the targeted speakers. And for that reason, I perceive no basis for concluding that Meta, in operating such unprecedented legally-hybrid platforms, has any sort of supervening constitutional *right to team up with the Government* to suppress the speech of particular speakers, or on particular topics, on such immunized mega-platforms.

The majority worries that treating Meta as a state actor here would contravene the underlying purpose of the state-action doctrine, which is to "protect[] a robust sphere of individual liberty" within which private actors may operate. *See* Opin. at 12 (quoting *Halleck*, 587 U.S. at 808). But in this distinctive scenario, applying the state-action doctrine *promotes* individual liberty by keeping the Government's hands away from the tempting levers of censorship on these vast platforms. To be sure, it means that Meta does not have the "liberty" to work together with the Government in deciding how to suppress the speech of millions of people, but Meta otherwise retains its full authority to operate its platform within the bounds of the law. A contrary rule would mean that the Government can create a special immunized power for private entities to suppress speech on a mass scale and then request and receive, from those private entities, an ability to influence the exercise of those levers of censorship. That would thwart the First Amendment's core purpose to "prevent[] *the government* from tilting public debate in a preferred direction." *Moody*, 144 S. Ct. at 2407 (simplified).

The majority suggests that finding state action here would produce a parade of horribles, because it would

supposedly hamper the Government's ability to work with platform operators to restrict minors' access to pornographic speech or to address other types of speech as to which the Government has legitimate concerns. *See* Opin. at 30-31. But saying that the First Amendment is *implicated* is not the same as saying that it is *violated*. Where the category of speech at issue is either unprotected (*e.g.*, child pornography, fraudulent advertising) or is otherwise subject to legitimate *direct* regulation by the Government, *see Reno v. ACLU*, 521 U.S. 844, 869, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (reaffirming that the Government has "'a compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards" (citation omitted)), or where the Government's interest involves, for example, malign foreign actors operating outside the United States, *see Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 439, 140 S. Ct. 2082, 207 L. Ed. 2d 654 (2020) (holding that "foreign organizations operating abroad do not possess constitutional rights"), the Government may also properly seek to achieve its legitimate ends *indirectly*, through consultation with operators of mega-platforms. What allegedly occurred here, however, is quite different, because Meta and the Government worked cooperatively together to suppress the concededly *truthful* speech of Americans concerning vaccines, and the Government sought to do so for the illegitimate purpose of dampening opposition to the Government's preferred vaccine policies. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("The government must abstain from regulating speech when the specific

motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Here, it is alleged, the Government worked with "private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973) (citation omitted); *see also NRA of Am. v. Vullo*, 602 U.S. 175, 190, 144 S. Ct. 1316, 218 L. Ed. 2d 642 (2024) (stating that "a government official cannot do indirectly what she is barred from doing directly").

V

I concur in the majority's opinion to the extent that it upholds the district court's dismissal of CHD's Lanham Act claim, its RICO claim, and its claims against additional Defendant Science Feedback. For the reasons I have explained, I would affirm the dismissal of the Takings Clause claim; the dismissal of the First Amendment claims against Zuckerberg and the Poynter Institute; and the *Bivens* First Amendment claim for monetary damages against Meta. But I would reverse as to CHD's First Amendment claim for injunctive and declaratory relief against Meta, and to that extent, I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JUNE 29, 2021

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 20-cv-05787-SI

CHILDREN'S HEALTH DEFENSE,

Plaintiff,

v.

FACEBOOK INC., *et al.*,

Defendants.

Decided June 29, 2021 Filed June 29, 2021

SUSAN ILLSTON, *United States District Judge.*

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT, DENYING PLAINTIFF'S MOTION TO SUPPLEMENT AND DENYING LEAVE TO AMEND

Re: Dkt. Nos. 68, 69, 75, 76, 103

On May 5, 2021, the Court held a hearing on defendants' motions to dismiss the second amended complaint and plaintiff's motion to supplement the complaint. After the hearing, plaintiff filed a request for judicial notice

and another motion to further supplement the second amended complaint and for *in camera* inspection under the All Writs Act.

For the reasons set forth below, the Court GRANTS the motions to dismiss without leave to amend, GRANTS the request for judicial notice, DENIES the motions to supplement the second amended complaint as futile and DENIES the motion for an *in camera* inspection.

INTRODUCTION

On August 17, 2020, plaintiff Children's Health Defense ("CHD") filed this lawsuit against defendants Facebook, Inc. ("Facebook"), Facebook CEO Mark Zuckerberg ("Zuckerberg"), The Poynter Institute for Media Studies, Inc. ("Poynter"), and Science Feedback[1] alleging four causes of action: (1) violation of the First and Fifth Amendments pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); (2) false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a); (3) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), 1964(c); and (4) declaratory relief.

CHD operates a social media page on Facebook's platform. CHD posts articles and opinion pieces about the harms of vaccines, including COVID-19 vaccines,

1. Science Feedback is a French non-profit organization providing fact-checking services for Facebook. *Id.* ¶ 20. It appears from the docket that Science Feedback has not yet been served.

as well as the dangers of pesticides and wireless technologies such as 5G. CHD alleges that the United States government — through Congressman Adam Schiff, the Centers for Disease Control ("CDC"), and the World Health Organization ("WHO"), as the CDC's "proxy" — has "privatized" the First Amendment by "teaming up" with Facebook to censor CHD's vaccine safety speech. Second Amended Compl. ("SAC") ¶ 1, Dkt. No. 65-1. CHD alleges that defendants have implemented this campaign by "purporting to flag misinformation" by identifying certain information on CHD's Facebook page as "false" or "misleading" when that information is, in fact, "valid and truthful," and through the posting of a Facebook advisory comment that is affixed to CHD's Facebook page which informs visitors that they can visit CDC.gov to obtain information about vaccines. *Id.* CHD alleges that Facebook, Zuckerberg, and the fact-checking organizations have engaged in a "smear campaign" and "multiple acts of fraud and deception in furtherance of their aggressive and heavy-handed campaign of censorship against Plaintiff's Facebook page" with the purpose of "stigmatizing CHD and its content regarding vaccines, and discouraging users from accessing this content." *Id.* ¶ 4.

CHD alleges it has suffered monetary and reputational harm, and CHD seeks damages and declaratory and injunctive relief, including an order directing Facebook to "remove its warning labels and misclassification of all content on [CHD's] Facebook page, and to desist from any further warnings or classifications" and an order "requiring defendants to make a public retraction of their false statements." *Id.* Prayer for Relief.

Appendix B

BACKGROUND

The following facts are drawn from the SAC.[2] Plaintiff CHD is a not-for-profit "child health protection and advocacy group" incorporated under the laws of the State of Georgia. *Id.* ¶¶ 14, 25. CHD is an "advocate for complete candor as to the risks of environmental toxins, vaccines, 5G and wireless networks, and the conflicts of interest that have compromised government oversight of those products and services." *Id.* ¶ 6. CHD operates the website, https://childrenshealthdefense.org, where it publishes research articles and opinion pieces. *Id.* ¶ 15. CHD receives all of its financial support from contributions, membership fees, and gross receipts from activities related to its taxexempt functions. *Id.* Robert F. Kennedy, Jr. founded and leads CHD. *Id.* ¶ 14.

Defendant Facebook, Inc. is a Delaware corporation with its principal place of business in Menlo Park, California. *Id.* ¶ 16. Facebook operates an online social media and social networking platform on which users like CHD can gather, advocate, and fundraise. *Id.* Facebook users' utilization of Facebook is governed by Facebook's Terms of Service that, if violated, may result in the deletion of users' Facebook account and pages. *Id.* ¶¶ 36-39. Facebook's Terms of Service "permit it to 'detect misuse of [its] Products, harmful conduct towards others

2. Plaintiff has twice amended the complaint in response to motions to dismiss filed by defendants and pursuant to stipulation. With each amendment, the complaint has grown in length, if not substance. The original complaint was 95 pages; the first amended complaint was 148 pages; the second amended complaint is 151 pages.

and situations where [it] may be able to help support or protect [its] community.' Facebook retains limited rights, e.g., 'offering help, removing content, blocking access to certain features, disabling an account or contacting law enforcement[.] [and] shar[ing] data with other Facebook companies when [it] detect[s] misuse or harmful conduct[.]'" *Id.* ¶ 37 (citing Terms ¶¶ 1, 3(2)(3)).

Defendant Mark Zuckerberg is a co-founder of Facebook and serves as Facebook's chairman, CEO, and controlling shareholder. *Id.* ¶ 17. In December 2015, Zuckerberg and his wife, Dr. Priscilla Chan, co-founded the Chan Zuckerberg Initiative ("CZI") to "donate" 99 percent of their Facebook shares in an effort to "develop new drugs, diagnostic tests and vaccines." *Id.* ¶ 281. Plaintiff alleges that both Zuckerberg and Facebook have significant financial interests in the vaccines programs that CHD warns against. *Id.* ¶¶ 274-91.

Defendant The Poynter Institute for Media Studies, Inc. ("Poynter") is a Florida non-profit organization. *Id.* ¶ 21. Poynter also operates a branded news fact-checking service, PolitiFact. *Id.* PolitiFact contracts with social media companies, such as Facebook, to fact-check content shared on social media platforms. *Id.* The SAC also alleges that International Fact-Checking Network ("IFCN"), a unit of Poynter, certifies Facebook's fact-checking "partners," including Science Feedback. *Id.* ¶¶ 105-06, 109.

On February 14, 2019, Congressman Adam Schiff, identifying himself as "a Member of Congress who is deeply concerned about declining vaccination rates around

the nation," wrote a public letter addressed to Zuckerberg. *Id.* ¶ 60. In that letter, Rep. Schiff "urge[] that Facebook implement specific algorithms to identify, censor and remove all so-called 'vaccine misinformation.'" *Id.* Because the SAC repeatedly quotes portions of this letter, the Court has reproduced the entirety of the letter here:

> February 14, 2019
> Mark Zuckerberg
> Chairman and Chief Executive Officer
> Facebook Inc.
> 1 Hacker Way
> Menlo Park, CA 94025
> Dear, Mr. Zuckerberg:
>
> As more Americans use the Internet and social media platforms as their primary source of information, it is important that we explore the quality of the information that they receive, particularly on issues that directly impact the health and well-being of Americans, as well as the billions who use your site around the world. Accordingly, I am writing out of my concern that Facebook and Instagram are surfacing and recommending messages that discourage parents from vaccinating their children, a direct threat to public health, and reversing progress made in tackling vaccine-preventable diseases.
>
> The scientific and medical communities are in overwhelming consensus that vaccines are

both effective and safe. There is no evidence to suggest that vaccines cause life-threatening or disabling diseases, and the dissemination of unfounded and debunked theories about the dangers of vaccinations pose a great risk to public health. In fact, the World Health Organization listed vaccine hesitancy - the reluctance or refusal to vaccinate despite the availability of vaccines - as one of the top threats to global health in 2019. In a dramatic demonstration of the dangers, Washington state declared a public health emergency due to a measles epidemic in Clark County, signaling the resurgence of a potentially fatal disease that was effectively eliminated from the United States decades ago by vaccines.

There is strong evidence to suggest that at least part of the source of this trend is the degree to which medically inaccurate information about vaccines surface on the websites where many Americans get their information, among them Facebook and Instagram. As I have discussed with you in other contexts, and as you have acknowledged, the algorithms which power these services are not designed to distinguish quality information from misinformation or misleading information, and the consequences of that are particularly troubling for public health issues. I acknowledge that it may not always be a simple matter to determine when information is medically accurate, nor do we

ask that your platform engage in the practice of medicine, but if a concerned parent consistently sees information in their Newsfeed that casts doubt on the safety or efficacy of vaccines, it could cause them to disregard the advice of their children's physicians and public health experts and decline to follow the recommended vaccination schedule. Repetition of information, even if false, can often be mistaken for accuracy, and exposure to anti-vaccine content via social media may negatively shape user attitudes towards vaccination.

Additionally, even parents and guardians who seek out accurate information about vaccines could unwittingly reach pages and videos with misinformation. A report by the Guardian found that on both Facebook and YouTube, suggested searches related to vaccines often led users to pages or groups providing medically and scientifically inaccurate information. Finally, I am concerned by the report that Facebook accepts paid advertising that contains deliberate misinformation about vaccines.

As a Member of Congress who is deeply concerned about declining vaccination rates around the nation, I am requesting additional information on the steps that you currently take to provide medically accurate information on vaccinations to your users, and to encourage

you to consider additional steps you can take to address this growing problem. I was pleased to see YouTube's recent announcement that it will no longer recommend videos that violate its community guidelines, such as conspiracy theories or medically inaccurate videos, and encourage further action to be taken related to vaccine misinformation.

Specifically, I request that you provide answers on the following questions:

- Does content which provides medically inaccurate information about vaccines violate your terms of service?

- What action(s) do you currently take to address misinformation related to vaccines on your platforms? Are you considering or taking additional actions?

- Do you accept paid advertising from anti-vaccine activists and groups on your platforms? How much has been spent in the past year on advertising on this topic?

- What steps do you currently take to prevent anti-vaccine videos or information from being

> recommended to users, either algorithmically or as a suggested search result?
>
> I appreciate your timely response to these questions and encourage you to consider what additional steps you can take to address this growing problem. As more Americans rely on your services as their primary source of information, it is vital that you take that responsibility with the seriousness it requires, and nowhere more so than in matters of public health and children's health. Thank you for your attention to this important topic.
>
> Sincerely,
>
> Adam B. Schiff/Member of Congress

Id. ¶¶ 60, 62-63; https://schiff.house.gov/news/press-releases/schiff-sends-letter-to-google-facebook-regarding-anti-vaccine-misinformation.

The SAC alleges,

> The term "vaccine misinformation" (as Rep. Schiff defined it, and as Facebook implemented it) is a euphemism for *any* expression of skepticism toward government and industry pronouncements about vaccine safety and efficacy, or of reasons why parents or their children's physicians might decline to follow the

> CDC's full "recommended vaccine schedule," regardless of whether those expressions are true or not. Thus, Rep. Schiff provided a substantive standard - deference to CDC/WHO pronouncements conclusively presumed to be "authoritative" - by which Facebook should identify and censor vaccine "misinformation" on its platform. The term "vaccine misinformation" does not, for example, include erroneous, misinformed or fraudulent statements made by pharmaceutical companies, or the CDC, to promote vaccines.

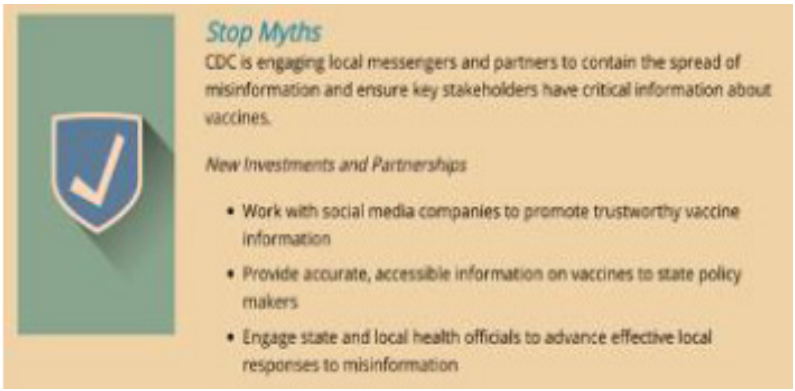
Id. ¶ 61.

Rep. Schiff subsequently made public statements that "if the social media companies can't exercise a proper standard of care when it comes to a whole variety of fraudulent or illicit content, then we have to think about whether [Section 230] immunity still makes sense." *Id.* ¶ 64.

In March 2019, Facebook officially announced it would "reduce the ranking of groups and Pages that spread misinformation about vaccinations in News Feed and Search" and "remove access to [] fundraising tools for Pages that spread misinformation about vaccinations." *Id.* ¶ 68. On September 4, 2019, the WHO Director-General issued a statement "welcom[ing] the commitment by Facebook to ensure that users find facts about vaccines across Instagram, Facebook Search, Groups, Pages and

forums where people seek out information and advice."[3] *Id.* ¶ 69.

In 2020, Zuckerberg announced that Facebook would donate $10 million to the CDC Foundation's Combat Coronavirus Fundraiser, and $10 million to the WHO. *Id.* ¶ 46. As such, Facebook is listed as a "partner" on the CDC Foundation's website under the "partners." *Id.* ¶ 48. The CDC specifies its work with "social media partners" in its "*Vaccine With Confidence*" initiative:



Id. ¶ 49.

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3. The statement further read:

> Facebook will direct millions of its users to WHO's accurate and reliable vaccine information in several languages, to ensure that vital health messages reach people who need them the most. The World Health Organization and Facebook have been in discussions for several months to ensure people can access authoritative information on vaccines and reduce the spread of inaccuracies on Facebook and Instagram.

Id. ¶ 69.

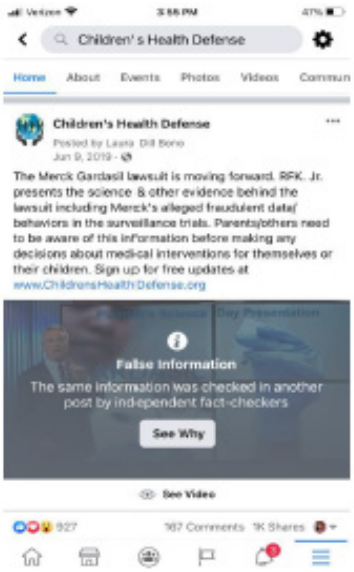
Appendix B

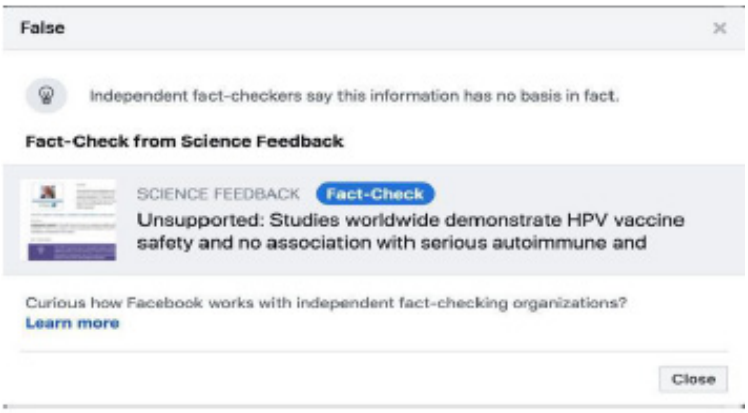
On or about November 2017, CHD agreed to Facebook's Terms of Service to create its Facebook page. *Id.* ¶ 33. CHD has since actively maintained its Facebook page. *Id.* On a daily (or more frequent) basis, CHD uploads articles and video posts on its Facebook page to "expose truths" about the severe health dangers of certain vaccines and technologies. *Id.* ¶ 26. Before publication, CHD conducts an internal fact-check to "ensure that every article cites sources for every fact it asserts." *Id.* ¶ 30. CHD currently has a Facebook community of 122,830 followers. *Id.* ¶ 33.

Beginning on or around January 15, 2019, Facebook began labeling certain content posted to CHD's Facebook page as "false," out of date, or unreliable. *Id.* ¶¶ 78-79, 115-18, 126, 131, 141, 157. The labels indicate that these determinations are reached by "independent," "third-party" "factcheckers" who review potentially misleading information and rate it as false, altered, partly false, missing context, satire, or true. *Id.* ¶¶ 78, 217-218.

The SAC contains some examples of these labels:

Appendix B





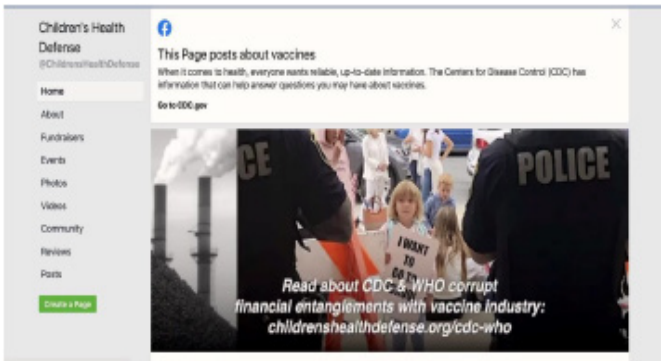
8

On or around May 1, 2019, Facebook permanently disabled the "dispute" function on CHD's account, barring CHD from challenging any actions taken by Facebook. *Id.* ¶ 200. Facebook also began to "demote and/or ban

content ('shadow-ban') that CHD posted to its Facebook page" using its "patent on social media shadowbanning." *Id.* ¶ 201.

On or around May 2, 2019, Facebook deactivated the "donate" button on CHD's page and barred CHD from buying new Facebook advertisements. *Id.* ¶¶ 198-99. From January 2019 to May 2019, CHD generated $41,241 in user donations through its Facebook page. *Id.* ¶ 223. After Facebook's deactivation of CHD's donate function, CHD has not received any further donation revenue through Facebook. *Id.*

On September 4, 2019, after repeated violations, Facebook acted against CHD at the account level, posting a Warning Label at the top of CHD's Facebook page. *Id.* ¶ 81. The warning label, which remains on CHD's Facebook today, states, "This Page posts about vaccines. When it comes to health, everyone wants reliable, up-to-date information. The Centers for Disease Control (CDC) has information that can help answer questions you may have about vaccines. Go to CDC.gov." *Id.*



Poynter's inclusion in this lawsuit largely stems from one fact-check of content appearing on CHD's Facebook page.[4] On April 16, 2020, CHD shared on its Facebook page an article written by Collective Evolution, a third-party website. *Id.* ¶ 151. PolitiFact labeled the title of Collective Evolution's article as "false," noting that the title is "ambiguous and misleading." *Id.* Collective Evolution accepted PolitiFact's conclusion, correcting the article's title from "*New Study: The Flu Vaccine is 'Significantly Associated' With An Increased Risk of Coronavirus*" to "*Study: The Flu Vaccine Is 'Significantly Associated' With An Increased Risk of Coronaviruses*— **Not COVID 19**." Dkt. No. 65-4 at 60 (emphasis added).

LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and a complaint that fails to do so is subject to dismissal pursuant to Rule 12(b)(6). Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556

4. CHD's opposition to Poynter's motion to dismiss states that Facebook added a Politifact fact-check to a January 21, 2021 CHD post. CHD's Opp'n to Poynter's Mtn. at 4 n.4 (Dkt. No. 70). However, CHD's motions to supplement the SAC do not address the January 21, 2021 fact-check.

U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679.

In reviewing a Rule 12(b)(6) motion, courts must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the non-moving party. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, courts are not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

If a court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has repeatedly held that "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations and internal quotation marks omitted).

Appendix B

DISCUSSION

I. First Cause of Action: Violations of First and Fifth Amendments Pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)

Plaintiff alleges defendants have violated its First and Fifth Amendment rights and seeks damages for those violations pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 395-96, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). In *Bivens*, the Supreme Court recognized an implied right of action for damages against federal officers for violating an individual's rights under the Fourth Amendment to be free from unreasonable searches and seizures. "In making this finding, the United States Supreme Court 'created a remedy for violations of constitutional rights committed by federal officials acting in their individual capacities.'" *Life Savers Concepts Ass'n of California v. Wynar*, 387 F. Supp. 3d 989, 997 (N.D. Cal. 2019) (quoting *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007)).

The SAC alleges that "the corporate and individual defendants have acted in concert with Rep. Schiff, federal officials at the CDC and the CDC Foundation, and under the CDC's express consent, the WHO, a United Nations specialized agency, to deprive Plaintiff of its constitutional free expression rights." SAC ¶ 308. The SAC alleges that "Facebook willfully participated in joint action with Rep. Schiff, CDC and CDC Foundation, and/or WHO officials or their agents to enforce CDC and WHO policies through

Facebook's signature algorithms and machine learning to define, identify, label as 'false news' and/or censor Plaintiff's speech with respect to vaccine-related speech." *Id.* ¶ 309.[5] The SAC alleges that "Facebook and the other defendants violated Plaintiff's First Amendment rights by labeling CHD's content 'False Information,' and taking other steps effectively to censor or block content from users. . . . Facebook took these actions against Plaintiff in an effort to silence and deter its free speech solely on account of their viewpoint." *Id.* ¶ 318. CHD also asserts a First Amendment retaliation claim, alleging that after it filed this lawsuit, Facebook notified CHD that it "would modify the parties' contractual term of service § 3.2, effective October 1, 2020, to read: 'We also can remove or restrict access to your content, services, or information if we determine that doing so is reasonably necessary to avoid or mitigate adverse legal or regulatory impacts to Facebook.'" *Id.* ¶ 324.

CHD alleges that defendants violated the Fifth Amendment by permanently disabling the "donate" button on CHD's Facebook page and by refusing "to carry CHD's advertising of its fundraising campaigns." *Id.* ¶ 319.[6] CHD alleges that "Defendants' actions amount to an unlawful deprivation or 'taking' of Plaintiff's property

5. Although the SAC contains references to CHD's speech about 5G technology, the gravamen of CHD's complaint relates defendants' alleged censorship of CHD's vaccine-related speech.

6. As Poynter notes, although the SAC alleges that "defendants" engaged in various actions, most of the allegations, such as the disabling of the "donate" button, relate to acts taken by Facebook, not Poynter.

interests in its own fundraising functions. . . . without just compensation or due process." *Id.* ¶¶ 320, 322.

Defendants move to dismiss CHD's *Bivens* claims on several grounds. Facebook and Poynter contend that private entities cannot be held liable under *Bivens*. Defendants also contend that there are no allegations supporting a plausible inference of federal action by any defendant, and that allowing CHD's *Bivens* claims to proceed would run afoul of the Supreme Court's admonition that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017), because no court has recognized a *Bivens* damages remedy against a social media company, a corporate CEO, or fact-checking organizations for violations of the First or Fifth Amendments.

As set forth below, the Court concludes that CHD's claims against Facebook and Poynter are foreclosed as a matter of law because a *Bivens* action may only be brought against individual federal actors and cannot be brought against private entities such as corporations or nonprofits. In addition, the SAC fails to allege that Zuckerberg engaged in federal action, a necessary element of a *Bivens* claim. As such, the Court finds it unnecessary to address the parties' arguments about the expansion of *Bivens*.

A. Private Entities Such as Facebook and Poynter May Not Be Sued Under *Bivens*

In *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001), the Supreme Court held that a plaintiff could not bring a

Bivens action against a private corporation operating a halfway house under contract with the Bureau of Prisons. The Court stated that "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations," and that "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*." *Id.* at 71; *see also Minneci v. Pollard*, 565 U.S. 118, 127, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012) (explaining that the holding in *Malesko* was based in large part on "the nature of the defendant, i.e., a corporate employer rather than an individual employee"); *see also Reid v. United States*, 825 F. App'x 442, 444 (9th Cir. 2020) (unpublished) ("A claim for damages based on individualized mistreatment by rank-and-file federal officers is . . . what *Bivens* was meant to address.").

CHD contends that "*Malesko* doesn't apply" "because no other law permits suit against Facebook [or Poynter] for its past acts of viewpoint discrimination against CHD." CHD's Opp'n to Facebook's Mtn. at 9 (Dkt. No. 71); CHD's Opp'n to Poynter's Mtn. at 11 (Dkt. No. 70). However, CHD does not cite any post-*Malesko* cases in which courts have permitted *Bivens* actions against private entities. To the contrary, after *Malesko* courts have consistently held that plaintiffs may not pursue *Bivens* actions against private entities. *See, e.g., Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) ("[T]o the extent that Agyeman sought to hold Corrections Corporation itself liable, the case could not be brought under *Bivens* . . . since Corrections Corporation is a private corporation."); *Riggio v. Bank of America Nat'l Trust & Saving Ass'n*, 31 Fed. App'x. 505, 505-06 (9th Cir. 2002) (unpublished) ("There is no private right of action for damages against private

entities that are alleged to have engaged in constitutional deprivations, even if they are acting under color of federal law."); *Rabieh v. Paragon Sys.*, 316 F. Supp. 3d 1103, 1107 (N.D. Cal. 2018) (citing *Malesko* and dismissing *Bivens* claim against private corporation that contracts with federal government to provide security for offices); *Bender v. General Services Admin.*, 539 F. Supp. 2d 702, 708 (S.D.N.Y. 2008) (same).

Accordingly, the Court concludes that as a matter of law, CHD cannot bring a *Bivens* action against Facebook and Poynter because they are private entities.

B. *Bivens* Allegations against Zuckerberg

The Court now turns to CHD's *Bivens* claims against Zuckerberg. As the Ninth Circuit has recognized, the Supreme Court has yet to "completely foreclose applying *Bivens* to private actors." *Vega v. United States*, 881 F.3d 1146, 1153 (9th Cir. 2018). "[T]he private status of [a] defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action." *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987). However, "[w]e start with the presumption that conduct by private actors is not state action." *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011).

The Ninth Circuit applies "similar tests to determine whether federal action exists to support a *Bivens* claim or to determine whether State action will permit a § 1983 cause of action." *Morse v. N. Coast Opportunities, Inc.*,

118 F.3d 1338, 1343 (9th Cir. 1997). In either scenario, a private actor's conduct must be "fairly attributable" to the government. *Id.* at 1340. The Ninth Circuit has "recognize[d] at least four different criteria, or tests, used to identify state action: '(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.'" *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (quoting *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999)).

CHD asserts that Zuckerberg has engaged in federal action under the following theories: (1) that Facebook/Zuckerberg and the federal government engaged in joint action based on, *inter alia*, statements by the CDC, the WHO (as the CDC's "proxy"), and Zuckerberg that they were "in discussion" or "working together" to remove vaccine "misinformation" and (2) that the immunity provided by Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(2), in combination with pressure from Congressman Schiff, coerced and/or encouraged Facebook/Zuckerberg to take the challenged actions against CHD's Facebook page.

1. No plausible allegations of personal involvement

As an initial matter, Zuckerberg contends that the SAC does not plausibly allege that he was personally involved in or directed the acts challenged in this lawsuit, namely the posting of the warning label on CHD's Facebook page, the fact-checks of specific CHD posts, and the decision to "demonetize" and "shadow-ban" CHD. The Court agrees.

The SAC alleges that Zuckerberg "is sued individually, and under theories of respondeat superior, alter ego, and agency liability." SAC ¶ 17. However, "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own* actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (emphasis added). Thus, CHD must allege that Zuckerberg himself has taken actions that violate CHD's constitutional rights. *See id.*

The SAC alleges that "[i]t is highly probable that Zuckerberg has participated in, and personally directed 'vaccine misinformation' policy decisions at Facebook which directly harmed CHD" and that "[t]he decision to demonetize advertising and donations for organizations like CHD related to 'vaccine misinformation' is a decision that Zuckerberg likely would have known about, and approved, given his historical prominence in decisions related to content management generally, and vaccine information specifically." SAC ¶ 260. The SAC also alleges that after Congressman Schiff's February 14, 2019 public letter to Facebook and Zuckerberg urging Facebook to remove "vaccine misinformation," "[o]n information and belief, Zuckerberg met personally with Rep. Schiff . . . to discuss, *inter alia*, Facebook's compliance with Rep. Schiff's February 19, 2019 public letter and press release, and those specific standards which were or would be used to identify and censor vaccine 'misinformation.'" *id.* ¶ 64. CHD also alleges that on March 4, 2019, CHD's president sent a letter to Zuckerberg offering a "rebuttal" of Rep. Schiff's letter, and:

> From his public statements and adverse motives . . . it may be reasonably inferred that Zuckerberg was personally and directly involved in decisions and actions which Facebook took to censor and/or "fact-check" CHD's individual posts, and knowingly mislead users about the truthfulness of CHD's posts, and on the CHD account level, deliberately mislead users about CHD's page's reliability, and remove its advertising and fundraising tools. Zuckerberg and/or the Doe defendants responsible for those actions either read CHD's March 4, 2019 letter or rejected it without reading, but in either event, they did no investigation of it and proceeded within days to publish their warning label and "fact-checks" [with knowledge that the warning label and factchecks were false, or with reckless disregard as to the truth of the warning label and fact-checks].

Id. ¶ 65.

Similarly, in CHD's opposition to Facebook's motion, CHD asserts that "[s]hortly after Schiff's pressure on Zuckerberg, Facebook initiated its censorship and demonetization campaign against CHD" and "[t]he timing of this comprehensive campaign against CHD plausibly indicates that it was initiated in response to pressure that Congressman Schiff brought to bear in the course of personal communications with Zuckerberg." CHD's Opp'n to Facebook's Mtn. at 28. CHD's opposition brief also

emphasizes that Zuckerberg is a "hands-on" CEO and "the public face of Facebook." *Id.* at 27-28. CHD's opposition cites Zuckerberg's testimony before Congress in which he stated that "what we do is try to focus on misinformation that has the potential to lead to imminent or physical harm," expressed his belief that "it's important that people get their vaccines," and that "If someone wants to post anti-vaccination content or they want to join a group where people are discussing that, we don't stop them from doing that . . . But . . . we don't go out of our way to make sure our group recommendation systems show people or encourage people to join these groups. We discourage that." SAC ¶ 268. CHD argues that "[t]hese statements leave little doubt that Zuckerberg is personally involved in Facebook's campaign." CHD's Opp'n to Facebook's Mtn. at 28.

Alleging that it is "highly probable" and "likely" that Zuckerberg participated in, personally directed, and approved the specific acts challenged in this lawsuit is not sufficient. Similarly, it is not sufficient to allege that based on Zuckerberg's "public statements and adverse motives . . . it may be reasonably inferred that Zuckerberg was personally and directly involved." CHD is required to allege facts showing that Zuckerberg actually participated in, directed, or approved any of the alleged constitutional violations. At best, CHD has alleged that Zuckerberg has made general statements about removing "misinformation that has the potential to lead to imminent or physical harm" and discouraging "anti-vaccine" content on Facebook, and that "on information and belief" Zuckerberg met with Congressman Schiff to

discuss the issue of vaccine misinformation on Facebook's platform. CHD speculates that Zuckerberg and Schiff discussed "specific standards" that would be used to identify and censor vaccine "misinformation," and CHD speculates that "Zuckerberg and/or the Doe defendants either read CHD's March 4, 2019 letter or rejected it without reading." None of these allegations contain facts showing personal involvement by Zuckerberg in deciding to post the warning label on CHD's Facebook page, the decisions to post fact-checks to particular CHD posts, or the decisions to "demonetize" or "shadow-ban" CHD.

Throughout the SAC, the briefing, and the hearing on these motions, CHD and its counsel repeatedly equate any references to "vaccine misinformation" with CHD's content, and therefore that any statements by Facebook, Zuckerberg, the CDC, or any other entity about removing "vaccine misinformation" from Facebook should be interpreted as statements about censoring CHD's vaccine-related speech. The Court cannot make such an inferential leap, as the phrase "vaccine misinformation" is a general one that could encompass many different types of speech and information about vaccines. Indeed, it is undisputed that there are numerous posts on CHD's Facebook page that are not flagged as "false" or "misleading" by Facebook or the fact-checkers, and thus that CHD is able to post some articles and other information about vaccines without those articles being deemed "vaccine misinformation" by Facebook or the fact-checkers.

Because CHD's bald and conclusory allegations regarding Zuckerberg's personal involvement in the

decisions about CHD's Facebook page are unsupported by facts they "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680-81; *see also Soto-Torres v. Fraticelli*, 654 F.3d 153, 159-60 (1st Cir. 2011) (holding insufficient allegations in support of *Bivens* claim against FBI agent that agent "was the officer in charge during the incident," that he "participated in or directed the constitutional violations" and that defendant "knew of the violation[s] and failed to act to prevent them"); *see also OSU Student Alliance v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012) ("[A]llegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments"; student newspaper adequately stated § 1983 claims against state college president and vice-president where newspaper alleged, *inter alia*, that president and vice-president oversaw subordinate's decisionmaking process and was kept informed of controversy and allegedly unconstitutional decisions through multiple emails).

Accordingly, the Court concludes that CHD's *Bivens* claim against Zuckerberg fails because CHD has not alleged any facts showing Zuckerberg's personal involvement in the alleged constitutional violations. As discussed below, the Court concludes that the *Bivens* claims fails for the additional and independent reason that CHD has not alleged that the challenged acts constitute federal action.

2. No Federal Action

a. Joint Action

The joint action test asks "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (internal quotation marks omitted). This requirement can be satisfied "by showing that the private party was a willful participant in joint action with the State or its agents." *Id.* "Ultimately, joint action exists when the state has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Id.*

CHD contends that it has demonstrated joint action because it has alleged,

> [T]hat (1) the CDC, a federal agency, the WHO, as its proxy, and Zuckerberg stated repeatedly that they were "in discussion" or "working together" to "reduce [contain, or remove] the spread of [vaccine-related] inaccuracies, or "misinformation," and "reach individuals with [] targeted health information," which resulted in Facebook's actions against CHD (SAC ¶¶ 49-52, 69-70, 308); (2) Facebook promotes its "Preventive Health App" for universal vaccination as another form of ongoing collaboration with the CDC (*id.*

> ¶¶ 56-58); (3) Defendants are contributors to and partners with the CDC Foundation, a quasi-agency proxy that serves as the CDC's fundraising arm (*id.* ¶¶ 40-48); (4) under the Global Health Security Agenda ("GHSA"), the State Department recruits private sector partners - Facebook - to "neutralize vaccine hesitancy," and funds, through intermediaries both Poynter, and its IFCN (*id.* ¶¶ 98-101); (5) the FBI and its entity, InfraGard, and federal agents acting "in conjunction with" the British Government, actively encourage Facebook's participation in the GHSA to shape the public debate on vaccines through censorship and demonetization of CHD (*id.* ¶¶ 102-04); and (6) federal actors and Facebook benefit from these actions.

CHD's Opp'n to Facebook's Mtn. at 7-8.

These allegations are insufficient. First, allegations involving non-federal actors, such as the WHO,[7] the British government, and government-affiliated nonprofits such

7. The Court takes judicial notice of the fact that the WHO is an international organization comprised of representatives from 194 member states. *See* "Our Structure," World Health Organization, https://www.who.int/about/who-we-are. The United States' membership in the WHO does not transform the WHO into a federal entity, and CHD does not provide any authority holding otherwise. *See NCAA v. Tarkanian*, 488 U.S. 179, 183, 193, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) (holding *inter alia* that state university's membership in NCAA did not make the NCAA's conduct state action).

as the CDC Foundation and InfraGard,[8] are irrelevant to determining whether CHD has plausibly alleged joint action.

Second, general statements by the CDC and Zuckerberg about "working together" to reduce the spread of health or vaccine misinformation, or to promote universal vaccination do not show that the government was a "joint participant in the challenged activity," specifically the decision to put the warning label on CHD's Facebook page, the fact-checks, and Facebook's "demonetization" and "shadow-banning" of CHD's content and page. For example, one of the allegations CHD relies upon is contained in Paragraph 52 of the SAC, which alleges, "Zuckerberg has stated publicly that Facebook is working with both the CDC and the WHO: 'We work with the [Centers for Disease Control and Prevention] and we work with [the World Health Organization] and trusted health organizations to remove clear misinformation about health-related issues that could cause an imminent risk of harm.'" SAC ¶ 52. This statement (and similar general statements by Zuckerberg, Facebook, the CDC, or other

8. The SAC alleges that the CDC Foundation is a nonprofit, SAC ¶ 40, and that InfraGard was formed in 1996 by the FBI's Office of Private Sector as part of a "public-private partnership." *Id.* ¶ 103; *see also* "About Us," InfraGard National, https://infraguardnational.org/aboutus/ overview/ (stating InfraGard "is an FBI-affiliated nonprofit organization"). Government-affiliated nonprofits are considered private entities. *See Lansing v. City of Memphis*, 202 F.3d 821, 825, 828 (6th Cir. 2000) (applying state-action test to determine whether government-affiliated nonprofit "can be held to constitutional standards when its actions so approximate state action that they may be fairly attributed to the state.").

entities within the federal government about "working to remove misinformation") does not support the inference that Facebook (or Zuckerberg) worked in concert with the CDC to censor CHD's speech, retaliate against CHD, or otherwise violate CHD's constitutional rights.

The SAC's allegations about the State Department recruiting "private sector partners" are similarly devoid of any facts showing joint action: the SAC alleges that President Obama's 2016 Executive Order, *Advancing the Global Health Security Agenda [GHSA] to Achieve a World Safe and Secure from Infectious Disease Threats* "authorized the State Department to recruit private corporations - including social media platforms and their enablers, such as Facebook and Poynter/Science Feedback - to suppress speech such as Plaintiff's solely because," and thus the CDC had provided the "standard of decision" for censorship of CHD's speech.it is critical of GHSA's agenda, or the risks that agenda poses to public health." SAC ¶ 100. That allegation is conclusory, and moreover, CHD does not actually allege that the State Department has a relationship with Facebook, much less that the State Department and Facebook have acted together to censor CHD's speech.

At the hearing on this matter, CHD's counsel asserted that under the Ninth Circuit's decision in *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498 (9th Cir. 1966), CHD had adequately alleged joint action because Facebook is "deferring to the CDC" about what constitutes "vaccine misinformation," and thus the CDC has provided the "standard of decision" for censorship of CHD's speech.

Appendix B

In *Mathis*, PG&E terminated employee Mathis after an undercover investigation revealed that Mathis had, in workplace conversations, agreed to sell marijuana offsite. *Id.* at 501. Mathis sued PG&E under *Bivens*[9] alleging that his firing violated his constitutional rights because PG&E terminated him pursuant to a Nuclear Regulatory Commission policy, and alleging the same constitutional violations under 42 U.S.C. § 1983 on the theory that PG&E had conducted the undercover investigation in close partnership with a county narcotics task force. The district court dismissed the case and the Ninth Circuit reversed, holding that Mathis should be permitted to proceed and that "to prove federal action for his *Bivens* claim, Mathis needed to show PG&E decided to exclude him pursuant to an NRC 'standard of decision for the exclusion of illegal drug users from protected areas.'" *Id.* at 502 (quoting *Mathis v. Pacific Gas & Elec. Co.*, 891 F.2d 1429, 1434 (9th Cir. 1989)). The NRC pressure must so have influenced PG&E's decision "that the choice must in law be deemed to be that of the [agency]." *Mathis*, 75 F.3d at 502.

On remand, the case went to trial and the district court granted judgment in favor of PG&E. On the second appeal, the Ninth Circuit held that Mathis failed to show that PG&E had engaged in federal or state action. On the *Bivens* claim, Mathis contended that although there was no published NRC policy that compelled PG&E's decision to fire him, there was an informal policy that

9. *Mathis* was decided before the Supreme Court's decision in *Malesko* holding that a private entity could not be sued under *Bivens*.

controlled. *Id.* Mathis had submitted evidence that "the NRC was directly pressuring PG&E to adopt strong anti-drug policies," including that "PG&E was seeking permission to start up its Diablo Canyon reactor and was consequently trying to please the NRC," as well as documents showing that an NRC inspector who visited Diablo Canyon "urged on PG&E a rule that would have excluded for offsite drug involvement only '[p]eople in key assignments,' and then only until the company was satisfied they wouldn't present a hazard on the job or otherwise affect the company." *Id.* The Ninth Circuit held this evidence was insufficient because Mathis failed to show that "the NRC was promoting a rule that would have excluded someone involved in the type of conduct he was suspected of." *Id.* The court rejected Mathis' argument that his evidence showed that "any measures PG&E took against drug involvement at Diablo Canyon were designed to allay NRC concerns." *Id.* at 503.

> In essence, he asks us to hold that regulatory interest in a problem transforms any subsequent private efforts to address the program (even those expressly designed to obviate the need for regulation) into state action. There was no hint of any such notion in *Mathis I* and we reject it now. If the government is considering regulation, affected private parties can try to convince it there's no need to regulate without thereby transforming themselves into the state's agents.

Id. The court further noted, "[t]he government policy doesn't have to be formal, but it does have to compel the

challenged action." *Id.* at 503 n.2. As to the plaintiff's claim that PG&E engaged in "joint action" with the government task force, the Ninth Circuit held that Mathis "needed to prove not merely that PG&E had a close relationship with the Task Force, but also that the relationship encompassed PG&E's plant-access decisions." *Id.* at 504. The Ninth Circuit held that Mathis has failed to do so because he only showed that PG&E conducted its investigation "in close cooperation" with the task force but did not have any evidence that the task force was involved in the decision to exclude Mathis from the plant. *Id.*

Mathis does not support CHD. Relying on Congressman Schiff's February 2019 letter to Zuckerberg, CHD contends that Congressman Schiff "provided a substantive standard - deference to CDC/WHO pronouncements conclusively presumed to be 'authoritative' - by which Facebook should identify and censor vaccine 'misinformation' on its platform." SAC ¶ 61. However, nowhere in the letter does Rep. Schiff direct Facebook to adopt any *specific* standard to follow when it determines what speech constitutes vaccine misinformation or whether particular posts are false or misleading. Instead, Rep. Schiff's letter expressed his concern about the existence of "medically inaccurate information about vaccines" on Facebook and other social media platforms, and he asked Facebook for information about whether content that "provides medically inaccurate information about vaccines" violates Facebook's terms of service and what actions Facebook "currently take[s] to address misinformation related to vaccines on your platforms" and whether Facebook was "considering or taking additional actions?" https://schiff.house.gov/news/press-releases/schiffsends-letter-to-google-facebook-

regarding-anti-vaccine-misinformation. None of the general statements or questions in Representative Schiff's letter can be interpreted as providing a specific standard of decision that mandated the particular actions that Facebook took with regard to CHD's Facebook page. *See Mathis*, 75 F.3d at 502 ("It wasn't enough to show that PG&E was aware of a generalized federal concern with drug use at nuclear power plants, or even that specific government standards would have required exclusion on some materially different set of facts. The NRC pressure must so have influenced PG&E's decision 'that the choice must in law be deemed to be that of the agency.'"). Indeed, the Court notes that the SAC alleges that Facebook began censoring its speech starting on January 15, 2019, which was prior to Rep. Schiff's letter. *See* SAC ¶ 78.

Nor does the fact that Facebook directs users to the CDC website for information about vaccines mean that the CDC has supplied the "standard of decision" for Facebook's regulation of content on its platform. Similarly, simply alleging that Facebook and the CDC are "working together" or "partnering" to curb the spread of "vaccine misinformation" does not allege that the specific acts challenged in this lawsuit were made pursuant to a CDC policy. Instead, what CHD has plausibly alleged is that Facebook created its own algorithms and standards for detecting "vaccine misinformation," and that in doing so, Facebook may have relied on CDC information about vaccines to determine what information is "misinformation." That is not enough to show that Facebook's actions were "compelled" by any particular CDC "standard of decision." *See Mathis*, 75 F.3d at 502.

CHD equates generalized statements about "working with the CDC" to "remove misinformation" or "vaccine misinformation," with the adoption of a CDC "standard of decision" about what content to remove. CHD's argument is akin to the plaintiff's losing assertion in *Mathis* that "any measures PG&E took against drug involvement at Diablo Canyon" were as a result of a federal policy. *Id.* As the Ninth Circuit held in *Mathis*, there is a "missing link" connecting the government "standard of decision" to the allegedly unconstitutional act.

Nor has CHD alleged that the government was actually involved in the decisions to label CHD's posts as "false" or "misleading," the decision to put the warning label on CHD's Facebook page, or the decisions to "demonetize" or "shadow-ban." In *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020), Judge Koh addressed a similar *Bivens* claim challenging Facebook's removal of the Facebook account and page of Federal Agency of News ("FAN"). Judge Koh held that "there was no joint action because Plaintiffs fail[ed] to allege specific facts establishing the existence of an agreement or a meeting of the minds between Facebook and the government relating to Facebook's deletion of FAN's Facebook page or restriction of FAN's access to its Facebook account." *Id.* at 1126. Here too, CHD has failed to allege specific facts showing that Zuckerberg, or indeed anyone at Facebook, jointly acted with the federal government when Facebook took various actions regarding CHD's Facebook page. Such a "bare allegation of . . . joint action will not overcome a motion to dismiss." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th

Cir. 2008); *see DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (holding that bare allegations of joint action between private persons and state officials will not overcome a motion to dismiss).

b. Encouragement Through Section 230 of the CDA Coupled with Government Pressure

CHD also alleges that "government immunity [under Section 230 of the CDA] plus pressure (Rep. Schiff) . . should turn Facebook and Zuckerberg's private-party conduct into state action." SAC ¶ 300. CHD asserts that Section 230, "by immunizing private parties against liability if they engage in conduct the government seeks to promote, constitutes sufficient encouragement to turn private action into state action." CHD's Opp'n to Facebook's Mtn. at 6. With regard to coercion, CHD alleges that Congressman Schiff pressured Facebook and Zuckerberg to remove "vaccine misinformation" through his February 2019 letter and his subsequent public statement that "if the social media companies can't exercise a proper standard of care when it comes to a whole variety of fraudulent or illicit content, then we have to think about whether [Section 230] immunity still makes sense." SAC ¶ 64.

CHD relies on *Skinner v. Railway Labs Executives' Association*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), as support for its contention that the immunity provided by Section 230 is sufficient encouragement to convert private action into state action. In *Skinner*,

railway labor organizations challenged two sets of Federal Railroad Administration ("FRA") regulations: (1) "Subpart C" regulations that required private railroad companies to administer blood and urine tests to employees involved in certain train accidents, and (2) "Subpart D" regulations that authorized, but did not require, railroads to administer breath and urine tests to employees who violate certain safety rules. *Id.* at 606. The Supreme Court held that both regulations constituted government action and were therefore subject to the Fourth Amendment. The Court held that the Subpart C regulations requiring testing constituted government action because "[a] railroad that complies with the provisions of Subpart C of the regulations does so by compulsion of sovereign authority." *Id.* at 614. Regarding the Subpart D regulations which allowed but not mandate testing, the Court noted that there were "special features" that demonstrated that the government "did more than adopt a passive position toward the underlying private conduct." *Id.* at 615. Those "special features" included the facts that the regulations preempted all state laws and collective bargaining agreements covering the same subject matter; the FRA had the right to receive certain test results; railroads were prohibited from divesting themselves of the authority conferred by Subpart D; and covered employees were not free to decline an employer's request to submit to breath or urine tests under the conditions set forth in Subpart D. *Id.* The Court concluded,

> In light of these provisions, we are unwilling to accept petitioners' submission that tests conducted by private railroads in reliance

> on Subpart D will be primarily the result of private initiative. The Government has removed all legal barriers to the testing authorized by Subpart D and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.

Id. at 615-16.

Skinner does not aid CHD. "Unlike the regulations in *Skinner*, Section 230 does not require private entities to do anything, nor does it give the government a right to supervise or obtain information about private activity." *Divino Grp. LLC v. Google LLC*, No. 19-CV-04749-VKD, 2021 U.S. Dist. LEXIS 3245, 2021 WL 51715, at *6 (N.D. Cal. Jan. 6, 2021). In *Divino Group*, the plaintiffs asserted that the "the availability of protections under Section 230 of the CDA amounts to government endorsement of defendants' alleged discrimination," and thus that YouTube should be considered a state actor. Judge DeMarchi rejected that contention, stating, "nothing about Section 230 is coercive" and "Section 230 reflects a deliberate absence of government involvement in regulating online speech: 'Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government

interference in the medium to a minimum.'" *Id.* (quoting *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003)); *see also* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."). The court held, "[a]t most, Section 230 provides protection from civil liability for interactive computer service providers who elect to host information provided by another content provider, or who in good faith act to restrict materials that the provider or user considers 'obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,' regardless of whether that material is constitutionally protected." 2021 U.S. Dist. LEXIS 3245, [WL] at *7 (quoting 47 U.S.C. § 230(c)(2)(A)). The Court agrees with Judge DeMarchi's analysis and concludes that the immunity provided by Section 230 does not provide sufficient "encouragement" to convert Facebook's private acts into state action.

CHD also relies on the coercion test. Under the coercion test, state action is found "when the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 840, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982). CHD alleges that Congressman Schiff's February 2019 letter to Zuckerberg and subsequent public statements coerced Facebook to take action on vaccine misinformation or risk losing certain immunities under Section 230 of the CDA. SAC ¶ 64. CHD contends that Schiff's statements could reasonably be interpreted as

intimating that some form of adverse regulatory action would follow Facebook's refusal to suppress CHD's so-called "vaccine misinformation." CHD's Opp'n to Facebook's Mtn. at 6.

As support, CHD cites *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987). In *Carlin*, Carlin Communications supplied "salacious telephone messages to the public," and Mountain Bell telephone company carried Carlin's messages on its "dial-a-message network." *Id.* at 1292-93. A deputy county attorney wrote a letter to Mountain Bell threatening to prosecute the company for violating an Arizona statute prohibiting the distribution of sexually explicit material to minors if the phone company continued to provide services to Carlin. *Id.* at 1293. Mountain Bell terminated Carlin's services, and Carlin sued Mountain Bell under 42 U.S.C. § 1983 alleging a violation of its First Amendment rights. The Ninth Circuit held, "[w]ith this threat, Arizona 'exercised coercive power' over Mountain Bell and thereby converted its otherwise private conduct into state action." *Id.* at 1295; *see also Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (holding that letter written by city borough president to billboard company criticizing billboards displaying religious organization's signs proclaiming homosexuality to be a sin and requesting removal of the signs, resulting in signs being removed, could be found to contain implicit threat of retaliation and therefore could support First Amendment Free Speech claim).

The Court concludes that CHD has not alleged facts showing government coercion sufficient to deem Facebook

or Zuckerberg a federal actor. As a later Ninth Circuit decision noted, "[i]n *Carlin*," "the government directed a specific entity to take a specific (allegedly unconstitutional) action against a specific person." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 843 (9th Cir. 1999). CHD does not allege that Schiff (or anyone from the government) directed Facebook or Zuckerberg to take any specific action with regard to CHD or its Facebook page. *See* SAC ¶¶ 60-64. Instead, CHD alleges that Schiff pressured to Facebook remove "vaccine misinformation" and later told reporters that "if the social media companies can't exercise a proper standard of care when it comes to a whole variety of fraudulent or illicit content, then we have to think about whether [Section 230] immunity still makes sense." *Id.* ¶ 64. These allegations are a far cry from the specific threats in *Carlin* or *Okwedy; see also Daniels v. Alphabet Inc.*, No. 20-CV-04687-VKD, 2021 U.S. Dist. LEXIS 64385, 2021 WL 1222166, at *6 (N.D. Cal. Mar. 31, 2021) (holding "Mr. Daniels does not plead any facts that support his argument that that the federal government 'coerced' or 'significantly encouraged' defendants to remove his specific Fauci and George Floyd videos from YouTube's platform" because "Mr. Daniels does not allege the federal government directed a particular result with respect to his Fauci and George Floyd videos.").[10] Further,

10. As discussed *infra* in Section V, many of CHD's proposed supplemental allegations involve similarly general statements by other politicians, such as Speaker Pelosi stating in June 2020 that Facebook had failed to remove "COVID-19 disinformation" from its platform and that Congress needed to "send a message to social media executives: You will be held accountable for your misconduct," or broader statements that Section 230 immunity could be "removed"

"[i]f the government is considering regulation, affected private parties can try to convince it there's no need to regulate without thereby transforming themselves into the state's agents." *Mathis*, 75 F.3d at 503.

Accordingly, the Court concludes that CHD has failed to allege the necessary elements of a *Bivens* claim and DISMISSES the first cause of action.

C. "Takings Claims"

CHD also contends that, notwithstanding the fact that the SAC frames the Fifth Amendment claim as a *Bivens* claim, *see* SAC ¶¶ 303-05, 319-22, "Facebook's assertion that it cannot be sued for First Amendment damages under *Bivens* . . . has nothing to do with CHD's takings claims, because takings claims are not *Bivens* claims." CHD's Opp'n to Facebook's Mtn. at 9 n.8.

However, regardless of how CHD chooses to characterize its Fifth Amendment claim, CHD still needs to establish "sufficient government action" to assert a takings claim. *Broad v. Sealaska Corp.*, 85 F.3d 422, 430-31 (9th Cir. 1996) (holding that "takings generally require some government regulation," and "[w]ithout governmental encouragement or coercion, actions taken

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if social media companies did not do more to restrict "dangerous" or "harmful" content — such as content related to white nationalism — from their platforms. As with Congressman Schiff's statements, these statements are too general and amorphous to constitute coercive action with respect to the specific challenged actions in this case.

by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment"). For the reasons stated *supra*, CHD has not done so.

II. Second Cause of Action: Lanham Act

The second cause of action alleges false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a). To state a false advertising claim under the Lanham Act, a plaintiff must allege "a 'false or misleading representation of fact' 'in commercial advertising or promotion' that 'misinterprets the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.'" *Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (quoting *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 & n. 2 (9th Cir. 1997)). The Lanham Act does not define "commercial advertising or promotion," but the Ninth Circuit has adopted the following definition: "(1) commercial speech, (2) by a defendant who is in commercial competition with plaintiff, (3) for the purpose of influencing consumers to buy defendant's goods or services, and (4) that is sufficiently disseminated to the relevant purchasing public." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021).[11] "Commercial

11. In *Ariix*, the Ninth Circuit noted that the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392, (2014), "likely abrogated" the element of "commercial competition." *Ariix*, 985 F.3d at 1120. This Court's analysis does not turn on whether the parties are in "commercial competition."

speech is 'usually defined as speech that does no more than propose a commercial transaction.'" *Id.* (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)). "Courts view 'this definition [as] just a starting point,' however, and try to give effect to 'a common-sense distinction' between commercial speech and other varieties of speech.'" *Id.* (internal citations omitted).

The SAC alleges that defendants "made, authored, and published warning label[s] and 'fact-checks' on CHD's page in order to deter Plaintiff's followers and other consumers from listening to, trusting, and relying on Plaintiff's content, and donating or contributing to Plaintiff." SAC ¶ 330. "By warning consumers instead to 'go to CDC.gov' for 'reliable and up-to-date [vaccine] information,' defendants intend to persuade consumers instead to follow CDC's recommendations to get the vaccines produced by its major advertisers, Merck, GSK, Sanofi, and Pfizer, who buy $1 billion per annum in advertisements from Facebook." *Id.*[12] CHD alleges that "Facebook and CHD

12. The SAC challenges as false and misleading the following specific statements which comprise the "warning label" that Facebook has posted on CHD's Facebook page: "This page posts about vaccines. When it comes to health, everyone wants reliable, up-to-date information. The Centers for Disease Control (CDC) has information that can help answer questions you may have about vaccines. Go to CDC.gov." *Id.* ¶¶ 347-51. The SAC alleges that "the context in which Facebook's Warning Label on CHD's page would ordinarily be seen and read includes: CHD's own mission statement on the same page that vaccine safety should be taken away from the CDC; CHD's message, 'Read about the CDC & WHO corrupt financial entanglements with vaccine industry,

may reasonably be considered commercial competitors with respect to the messaging regarding vaccines and 5G that they promulgate to Facebook users," *id.* ¶ 333, and "Facebook is engaged in promoting competitive products through its pharmaceutical manufacturer advertisers, and competitive services through its affiliation with the CDC and WHO." *Id.* ¶ 331.

Defendants contend, *inter alia*, that CHD's Lanham Act fails because CHD's alleged injuries are not within the Lanham Act's "zone of interests" and because the warning label and fact-checks are not "commercial advertising or promotion." "[T]o come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014). "Conduct that is not commercial, and does not involve the sale of goods and services, is outside the 'dangers that the Lanham Act was designed to address,' and consequently not actionable under Section 43(a)." *Maffick LLC v. Facebook, Inc.*, Case No. 20-cv-05222-JD, 2021 U.S. Dist. LEXIS 89930, 2021 WL 1893074, at *3 (N.D. Cal. May 11, 2021) (citing *Bosley Med. Inst., Inc., v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005)).

Here, CHD alleges that Facebook's "warning label" and the third-party fact-checks have caused injury to

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childrenshealthdefense.org/cdc-who'; and that context incorporates by reference numerous articles on CHD's page which call out and criticize the CDC's continued adherence to its 'all vaccines for all children' policy." *Id.* ¶ 346.

its "messaging" about vaccines and 5G technology, SAC ¶ 333, and CHD explicitly frames this case as one about censorship of its speech. *See id.* ¶ 1 ("This case is about how an officer and an agency within the U.S. Government 'privatized' the First Amendment by teaming up with Facebook to censor speech which, under the Bill of Rights, the Government cannot censor."). CHD attempts to fit its claims under the rubric of the Lanham Act by arguing that "Defendants were seeking to influence consumers to buy the goods and/or services of Facebook's fact-checking partners." CHD's Opp'n to Facebook's Mtn. at 19 n.18.

However, the warning label and fact-checks are not disparaging CHD's "goods or services," nor are they promoting the "goods or services" of Facebook, the CDC, or the fact-checking organizations such as Poynter. In addition, the warning label and fact-checks do not encourage Facebook users to donate to the CDC, the fact-checking organizations, or any other organization. Instead, the warning label informs visitors to CHD's Facebook page that they can visit the CDC website to obtain "reliable up-to-date information" about vaccines, and the fact-checks identify that a post has been fact-checked, with a link to an explanation of why the post/article has been identified as false or misleading. For example, the Poynter fact-check identified in the SAC consisted of an explanation of why the title of an article written by third party Collective Evolution and posted to CHD's Facebook page was "false." Thus, all of the alleged misrepresentations — the warning label and the fact-checks — are simply providing information, albeit information with which CHD disagrees.

Indeed, CHD expressly equates "goods" and "services" with information: CHD argues, "In particular, false fact-check labels expressly tout Poynter's *putatively superior information*, thus competing with CHD for donation revenue by actively 'promoting' their competing 'products and services.'" CHDs Opp'n to Poynter's Mtn. at 17 (emphasis added). Under CHD's expansive and novel theory of false advertising, any Facebook warning label identifying an alternative source of information and any fact-check with an explanation would constitute false advertising under the Lanham Act because of an injury to "messaging."

Judge Donato recently dismissed a similar Lanham Act false advertising claim challenging advisory comments posted by Facebook on a company's Facebook page. In *Maffick LLC v. Facebook*, the plaintiff ran three social media pages on Facebook's platform focusing on "stories about social justice" "environmental issues and sustainability" and "political opinion and . . . expos[ing] hypocrisy across the political spectrum." *Maffick LLC*, 2021 U.S. Dist. LEXIS 89930, 2021 WL 1893074, at *1. Facebook determined that Maffick was under the editorial control of the Russian government, and posted an advisory comment on the pages identifying them as "Russia state-controlled media." *Id.* Maffick alleged that the advisory was false and that it was injuring Maffick's reputation, ongoing business relationships, and the viability of current business development opportunities. *Id.* Maffick also alleged that "monetization of its social media content (through advertising, e-commerce and otherwise) is down" and that its "'reach,' a metric that measures the number

of people who encounter its social media content, is down." 2021 U.S. Dist. LEXIS 89930, [WL] at *4.

After noting that the Lanham Act prohibits false advertising in connection with the sale of goods or services, Judge Donato stated that "[t]here is no obvious connection between [Maffick's] content and the sale of goods or services" and that "Maffick has not alleged that Facebook attached the 'Russia state-controlled media' label to 'penetrate the relevant market,' whatever that may be, not has Maffick alleged any facts that overcome the 'commonsense conclusion' that neither the label itself nor Facebook's 'campaign' around it constituted an advertisement or promotion as required by Section 43(a)(1)(B)." 2021 U.S. Dist. LEXIS 89930, [WL] at *3-4 (quoting *Prager Univ.*, 951 F.3d at 1000); *see also Prager Univ.*, 951 F.3d at 1000 (dismissing Lanham Act false advertising claim challenging YouTube's act of tagging PragerU's videos as appropriate for Restricted Mode because "PragerU did not allege any facts to overcome the commonsense conclusion that representations related to Restricted Mode, such as those in the terms of service, community guidelines, and contracts are not advertisements or a promotional campaign"); *see also Ariix*, 985 F.3d at 1119 (holding "informational part" of guide to nutritional supplements "that describes the benefits and science of nutritional supplements" was "fully protected speech" and not commercial speech, while "alleged rigged ratings" portion of guide was actionable as a "paid promotion" under the Lanham Act where nutritional supplement company alleged that "the defendants conceived the Guide to juice sales of

[competitor] Usana products, actively misled the public about their supposed independence, and fiddled with their own ratings criteria to boost a favored company that lavishes them with hundreds of thousands of dollars in compensation").

Unsurprisingly, CHD does not cite any authority for the proposition that its "messaging" constitutes "goods" or "services" for purposes of the Lanham Act. Nor does CHD cite any support for its assertion that a defendant can be held liable under the Lanham Act based on speech that is untethered to the sale of goods or services. To the contrary, courts have held that "[t]he mere fact that the parties may compete in the *marketplace of ideas* is not sufficient to invoke the Lanham Act." *Farah v. Esquire Mag.*, 736 F.3d 528, 541, 407 U.S. App. D.C. 208 (D.C. Cir. 2013) (emphasis in original). In *Farah*, the D.C. Circuit dismissed a Lanham Act claim brought by a book publisher based on a satirical article posted on Esquire's politics blog. The court noted that "Farah and Corsi do not allege that *Esquire* is selling or promoting a competing book. Instead, they assert that 'generally' Esquire is their competitor, and maintain that they too 'write frequently about the birth certificate and 'natural born citizen' issues,' and that 'readers frequently [] read publications that contain 'points' and 'counterpoints.'" *Id.* The court held these allegations were insufficient to state a claim because they did not involve commercial speech actionable under the Lanham Act. *Id.; see also Bosley*, 403 F.3d at 679 (holding there was no liability under the Lanham Act where an unsatisfied hair transplant customer used Bosley's marks for criticism because the

customer's "use of the Bosley mark [was] not in connection with a sale of goods or services—it [was] in connection with the expression of his opinion *about* Bosley's goods and services."); *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 950-52 (11th Cir. 2017) (holding author's blog posts, which contained allegedly false and defamatory statements about physician's medical practice, did not constitute commercial speech subject to the Lanham Act where posts did not propose commercial transactions and where stated purpose of the blog was to provide objective analysis of questionable or controversial medical claims); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1054 (10th Cir. 2008) (dismissing Lanham Act claims against the creators of a parody website that criticized religious bookstore's views because "[u]nless there is a competing good or service labeled or associated with the plaintiff's trademark, the concerns of the Lanham Act are not invoked.").

The cases CHD does cite are readily distinguishable in that they involve commercial speech and alleged misrepresentations made about products or services. *See, e.g., Ariix*, 985 F.3d at 1119; *Mimedx Group, Inc. v. Osiris Therapeutics, Inc.*, 16 Civ. 3645, 2017 U.S. Dist. LEXIS 114105, 2017 WL 3129799, at *1 (S.D.N.Y. July 1, 2017) (plaintiff and defendant were "rivals in the wound care biologics market" and plaintiff alleged defendant issued false and misleading statements that its tissue-graft product was better in various ways than the plaintiff's). In addition, CHD cites a number of cases for the general proposition that a non-profit can sue under the Lanham Act. However, in each of those cases, the non-profit alleged

an injury to a commercial interest in sales or reputation. *See Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 818-19 (9th Cir. 1996) (nonprofit sued defendants for infringement of protected tradename under Lanham Act); *Birthright v. Birthright, Inc.*, 827 F. Supp. 1114, 1123 (D.N.J. 1993) (Canadian nonprofit provider of services to pregnant women sued American affiliate for false advertising in fundraising letters after organizations were disaffiliated because "the fundraising letters confused or were likely to confuse a potential donor as to the use of a contribution to Birthright, Inc., and this confusion was material in that the potential donor may not have wished to contribute to an entity no longer connected to the Birthright movement."); *Cal Pure Pistachios, Inc. v. Primex Farms, LLC*, No. CV 09-7874-GW(RCX), 2010 U.S. Dist. LEXIS 148263, 2010 WL 11523590, at *1 (C.D. Cal. Jan. 7, 2010) (nonprofit processor of pistachio nuts sued competitor under Lanham Act for false statements made by competitor about prices it would pay for nuts in order to attract business away from the plaintiff).

For these reasons, the Court concludes CHD's alleged injuries are not within the Lanham Act's "zone of interests" and that the warning label and fact-checks are not "commercial advertising or promotion." Accordingly, the Court DISMISSES the Lanham Act claim.

III. Third Cause of Action: RICO

The third cause of action asserts a claim under RICO's civil enforcement provision, 18 U.S.C. § 1964(c). To state a civil RICO claim, a plaintiff must allege: "(1) conduct (2)

of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005). "Racketeering activity," within the RICO context, "is any act indictable under several provisions of Title 18 of the United States Code, and includes the predicate acts of mail fraud, wire fraud, and obstruction of justice." *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010).

CHD alleges that "the Facebook content management team is an associated-in-fact enterprise," SAC ¶ 374, and that "all named defendants both inside Facebook's formal structure (Zuckerberg, Does 1-10) and out (Science Feedback, Poynter, Does 1-10) aided in one or another aspect of their common fraud scheme: to label Plaintiff's page 'unreliable' and 'out-of-date' and redirect users to the CDC; to label Plaintiff's speech-content 'False' when it is critical of vaccine or 5G network safety, accomplishing this censorship through the sham machinations of 'content moderators' and 'independent fact-checkers'; and to conceal their true purposes of profiting from vaccine manufacturer advertising and from their own vaccine and 5G network development, all of which would be negatively affected by Plaintiff's ongoing public health-related speech." *Id.* ¶ 377. CHD alleges that defendants have violated RICO by committing a pattern of racketeering activity through wire fraud in violation of 18 U.S.C. § 1343. *Id.* ¶¶ 378-79, 381.

Defendants contend, *inter alia*, that CHD has failed to state a civil RICO claim because CHD has failed to identify

any predicate acts of wire fraud. "The federal wire fraud statute makes it a crime to effect (with use of the wires) 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Kelly v. United States*, 140 S. Ct. 1565, 1571, 206 L. Ed. 2d 882 (2020) (quoting 18 U.S.C. § 1343)). "The wire fraud statute . . . prohibits only deceptive 'schemes to deprive [the victim of] money or property.'" *Id.; see also Monterey Plaza Hotel Ltd. P'ship v. Loc. 483 of Hotel Emps. & Rest. Emps. Union, AFL-CIO*, 215 F.3d 923, 926 (9th Cir. 2000) ("[T]he mail and wire fraud statutes . . . prohibit the use of the mails and wire to *obtain* money or property *from the one who is deceived*.") (emphasis in original). As such, "to avoid a dismissal where the RICO claim is based on predicate acts of mail or wire fraud, the plaintiff must allege the defendant used the mails or wires to obtain money or property from the plaintiff or a non-party." *Sugarman v. Muddy Waters Capital LLC*, No. 19-CV-04248-MMC, 2020 U.S. Dist. LEXIS 17368, 2020 WL 633596, at *3 (N.D. Cal. Feb. 3, 2020).

CHD asserts that it has alleged "at least fifteen predicate acts of wire fraud, including Defendants' posting of false fact-checking labels on CHD content, Facebook's fraudulent deactivation of CHD's donate button and ads, deceptive demotion of content, and concealment through material omission." CHD's Opp'n to Facebook's Mtn. at 11 (citing SAC ¶¶ 79(A)-(J), 222-26, 322-33, 374-78, 383-85). For example, CHD alleges that defendants have engaged in wire fraud by:

- "Misrepresenting as fact to CHD that CHD's fundraising function was deactivated because CHD violated its terms of service with Facebook by posting 'false information' with respect to vaccines."

- "Misrepresenting as fact to CHD's outside ad agency that CHD's fundraising advertisements were rejected because CHD violated its terms of service with Facebook by posting 'false information' with respect to vaccines."

- "Misrepresenting as fact to all third-party Facebook users by means of a 'warning label' on CHD's page that the CDC has 'reliable, up-to-date information about vaccines,' and that such users should 'go to CDC.gov,' and, by classic imputation of dishonesty, falsely suggesting that the vaccine-related content on CHD's page is not reliable, up-to-date information."

- "Misrepresenting as facts to all third-party Facebook users that particular enumerated CHD-, RFK, Jr.- and third party-content posted on the CHD page contains 'False Information Checked by independent fact-checkers,' and to 'see why' users should instead accept the opposition content posted by Facebook's 'fact-checkers' on CHD's page as 'true' information on the same subjects."

- "Engaging in deceptive mechanisms and machine-learning algorithms, which secretly demote, hide, and/or limit the visibility and reach of CHD vaccine- and 5G network-related content (practices known as 'shadow-banning' or 'deboosting') from third party users whom Facebook psychologically profiles as 'undecided' (a practice known as 'sandboxing') in order to hide content from those it might sway, while misrepresenting to CHD and all third-party Facebook users that no such artificial processes or limitations have occurred."

- "Misrepresenting as fact to all third-party Facebook users that Facebook relies upon 'independent fact-checkers' to identify and tag 'false information' on CHD's Facebook page based on a set of objectively neutral, reliable, and up-to-date factual criteria, when the criteria that is applied is neither neutral, reliable, nor up-to-date, and the 'fact-checkers' are in privity with, and controlled by Facebook. The absurdity of these misrepresentations hits home when one considers that Facebook and Science Feedback created a 'fact-checking' exemption for climate science deniers by deeming climate disinformation ineligible for 'fact-checking,' because it is 'opinion.' . . ."

- "Misrepresenting as fact to third-party Facebook users that CHD's 5G-related

> content was demoted because it poses an 'imminent risk of physical harm,' when Facebook took this action solely to advance its own economic interests in 5G development and deployment."
>
> - "Misrepresenting as fact to all third-party Facebook users that users such as CHD who have had content removed from or tagged on its platform can appeal that decision either to Facebook's content moderator panel, or to an 'independent' Oversight Board, and that in making such determinations, Facebook does not have any conflicts of interest that compromise its judgment. . . ."
>
> - "Concealing the extent to which Facebook actively collaborated with Rep. Schiff, the CDC and the WHO, inter alia, to implement their overall scheme."
>
> - "Concealing their overall scheme by these and other deceptions, including false and disparaging statements about CHD to users of CHD's Facebook page, and to other third parties."

SAC ¶ 79(A)-(J). With regard to Poynter specifically, CHD asserts that Poynter engaged in wire fraud by fact-checking the post alleged in the SAC as well as by certifying other fact-checking organizations, including Science Feedback, thus "creating the impression that

these organizations are 'independent,' trustworthy experts, to further enable Defendants' scheme of censorship, deception and destruction." CHD's Opp'n to Poynter's Mtn. at 13.

Defendants contend that these alleged misstatements, omissions, and acts do not constitute wire fraud because CHD has not alleged how defendants are alleged to have obtained "money or property" from anyone who was allegedly deceived. Defendants argue that nowhere in the SAC does CHD allege that defendants obtained money or property from third-party Facebook users who were deceived by any alleged misstatements, nor does the SAC allege that CHD or its ad agency were somehow deceived by defendants' misrepresentations and defrauded of their property or money.

In response, CHD asserts that defendants intended to "defund and damage" CHD and "sought to deceive visitors to CHD's Facebook page into giving their charitable dollars not to CHD, but to other competing nonprofit organizations," such as fact-checkers like Poynter. *See* CHD's Opp'n to Facebook's Mtn. at 12-13; CHD's Opp'n to Poynter's Mtn. at 12-13. CHD argues that defendants pursued their fraudulent scheme by "(a) convincing users that CHD was not deserving of donation dollars by falsely labeling CHD content as 'false'; (b) fraudulently deactivating CHD's donation button; (c) diverting CHD visitors through its false 'fact-checking' click-through screens to web pages of organizations that compete directly with CHD for donations and whose pages prominently invite visitors to make donations;

and (d) fraudulently promoting those competitor entities as champions of children's health, superior sources of health information, and hence more deserving recipients of donation dollars." CHD's Opp'n to Facebook's Mtn. at 13. CHD also asserts that defendants "sought to obtain property from the victims of their deception (visitors to CHD's Facebook page) by taking from them the right to control whether or how much of their property to spend on CHD." *Id.* Finally, CHD argues that "while Facebook's services are free to its users . . . Facebook profits directly, and in intangible goodwill and partner brand protection, by misleading visitors to CHD's page to click through its false labels and fact-checks to view new prompts and impressions under the deception that CHD's page contains false, unreliable, and out-of-date information." *Id.* at 14.

The Court concludes that CHD's allegations of wire fraud — both those actually plead in the SAC and those unpled but asserted in CHD's opposition briefs — do not constitute wire fraud because CHD has not alleged any facts showing that defendants engaged in a fraudulent scheme to obtain money or property from Facebook visitors to CHD's page (or anyone else, including CHD[13]). Assuming *arguendo* that the various alleged misrepresentations, omissions and acts could constitute a fraudulent "scheme," neither the SAC nor CHD's oppositions asserts that any Facebook users actually donated to any other organization, much less donated to another organization because they were deceived by

13. Indeed, as to CHD, the SAC alleges that CHD was prevented from giving Facebook money because Facebook rejected CHD's fundraising advertising. SAC ¶ 79(B).

defendants' scheme. Instead, CHD advances a speculative theory that defendants engaged in wire fraud by deceiving visitors to CHD's Facebook page through the "false" fact-check labels, diverting those visitors to the websites of other organizations, and that those individuals, once diverted, *may* have donated to CHD's competitors as a result of defendants' deception. CHD's theory of wire fraud is unsupported by any factual allegations that "defendant[s] used the . . . wires to obtain money or property from the plaintiff or a non-party." *Sugarman*, 2020 U.S. Dist. LEXIS 17368, 2020 WL 633596, at *3. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

In *Sugarman*, Judge Chesney dismissed a similar RICO claim for failure to allege wire fraud. There, the plaintiffs alleged that defendants "conspired to publish, and caused to be published on a 'blog,' false statements about plaintiffs." *Sugarman*, 2020 U.S. Dist. LEXIS 17368, 2020 WL 633596, at *1. As a result, plaintiffs alleged "some readers"—not the plaintiffs themselves—were defrauded and "ceased to do business with Sugarman." 2020 U.S. Dist. LEXIS 17368, [WL] at *2. However, the court concluded that the alleged conduct did not constitute RICO wire fraud because "the complaint include[d] no facts to support a finding that the [m]oving [d]efendants, or any of them, obtained money or property from [the readers]." 2020 U.S. Dist. LEXIS 17368, [WL] at *3; *see also Monterey Plaza Hotel*, 215 F.3d at 926 (affirming dismissal of civil RICO claim where plaintiff hotel alleged defendant union engaged in mail and wire

fraud by making misrepresentations about the hotel to its customers because "[t]he Union did not *obtain* property by deceiving the Hotel or its customers; the Union was simply carrying on a strategy in a protracted labor dispute."); *see also United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 2019) (reversing conviction for mail fraud where there was no evidence defendant obtained money or property from "one who [was] deceived" by his allegedly false statements).

The cases upon which CHD relies are inapposite and unavailing. CHD argues that a person could still be guilty of wire fraud even if the money fraudulently obtained went to "third parties" or "associates." *See United States v. Sorich*, 523 F.3d 702, 709 (7th Cir. 2008) (holding that the "private gain" criterion of "honest services mail fraud" "simply mean[s] illegitimate gain," which does not necessarily have to go to defendant, but may instead go to another party); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (holding that "[a] participant in a scheme to defraud is guilty [of honest services mail fraud] even if he is an altruist and all the benefits of the fraud accrue to other participants"); *United States v. Rezko*, No. 05 CR 691, 2007 U.S. Dist. LEXIS 73517, 2007 WL 2904014, at *5 (N.D. Ill. Oct. 2, 2007) (rejecting the defendant's argument that indictment for mail and wire fraud was insufficient because it did not allege defendant personally gained where indictment alleged defendant's associates benefitted from fraud). However, CHD has not alleged any facts to establish that defendants, their associates, or any third party obtained money or property from deceived Facebook users or from CHD.

IV. Fourth Cause of Action: Declaratory Relief

CHD asserts that even if its *Bivens* claims for damages are dismissed, it can still pursue claims for injunctive relief against defendants "for their ongoing First Amendment violations" through its fourth cause of action for declaratory relief. CHD's Opp'n to Facebook's Mtn. at 9.

While CHD is correct that "money damages is the remedy under *Bivens*," *Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016), claims for injunctive or declaratory relief based on a violation of the Constitution necessarily must be predicated on state or federal action because "[a] private party is generally not bound by the First Amendment, unless it has acted 'in concert' with the state 'in effecting a particular deprivation of constitutional right.'" *Labarrere v. Univ. Pro. & Tech. Emps.*, 493 F. Supp. 3d 964, 970 (S.D. Cal. 2020) (citing *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 121 n.16, 102 S. Ct. 2339, 72 L. Ed. 2d 707 (1982), and *Tsao*, 698 F.3d at 1140). CHD's reliance on *AFGE Local 1 v. Stone*, 502 F.3d 1027 (9th Cir. 2007), is unavailing, as the plaintiffs in that case sought injunctive relief based on alleged First Amendment violations resulting from federal action, namely decisions made by the Transportation Security Administration.

Here, for all of the reasons stated *supra*, CHD has not plausibly alleged that defendants engaged in federal action and thus CHD may not seek injunctive relief based

on alleged First Amendment violations. In addition, as CHD has failed to state a claim under the Lanham Act or RICO, there is no "case or controversy" necessary to support a claim for declaratory relief.

V. Plaintiff's Motion to Supplement Its Second Amended Complaint, Request for Judicial Notice, and Motion to Further Supplement Its Second Amended Complaint and for *In Camera* Inspection Under the All Writs Act

On March 8, 2021, CHD filed a Motion to Supplement its Second Amended Complaint. Dkt. No. 76 (Motion to Supplement). CHD's motion seeks to add supplemental allegations regarding: (i) a January 20, 2021 Executive Order by President Joseph Biden directing efforts to "deter the spread of misinformation and disinformation," *see id.* at 4; (ii) the February 10, 2021 removal of Robert F. Kennedy, Jr.'s Instagram account, *id.* at 2-3; (iii) a February 19, 2021 statement by a Facebook spokesperson stating, "the company has reached out to the White House to offer 'any assistance we can provide,'" *id.* at 3; (iv) a February 19, 2021 White House press briefing stating that the administration is "committed to working with state and local public health partners, as well as partners in the private sector, to support getting people vaccinated as quickly and as safely as possible," *id.* at 21; (v) a February 19, 2021 report that the Biden Administration was "talking to" social media companies so "they understand the importance of misinformation and disinformation and how they can get rid of it quickly," *id.* at 36; and (vi) a March 5, 2021 screenshot of a "warning label" on an unidentified

third-party user's Facebook account which noted that the user can "Unfollow Children's Health Defense," *id.* at 4.

After the hearing on defendants' motions to dismiss, CHD filed a request for judicial notice seeking judicial notice of 27 "facts" that CHD asserts are relevant to its claims. Defendants object to this filing, arguing that although it is styled as a request for judicial notice, CHD's submission appears to be another effort to bolster the SAC and CHD's briefing in opposition to the motions to dismiss. While the Court agrees that the filing is procedurally improper, the Court will consider it as a further proffer of how CHD would amend the complaint if given leave to do so. CHD's filing requests judicial notice of various congressional committee hearings from 2019-2021,[14] and statements made by different members of Congress in connection with those hearings, in which some members of Congress stated, *inter alia*, that social media companies, including Facebook, needed to "restrict" "harmful" and "dangerous" content and "misinformation" — or risk losing Section 230 immunity and/or being subject to regulation. *See generally* Plaintiff's Request for Judicial Notice (Dkt. No. 97). CHD also seeks judicial notice of a June 2020 statement by Speaker Nancy Pelosi about Facebook failing

14. Based on the Court's review of the cited materials, the Congressional hearings, some of which predated the COVID-19 pandemic, focused on a variety of topics related to social media companies, including *inter alia*, competition, consumer privacy, and regulation of hate speech, white nationalist groups, political advertising. Thus, many of the quoted statements about the need to regulate "harmful" or "dangerous" content do not relate to "vaccine misinformation" but other types of speech.

to stop the spread of "COVID-19 disinformation" on its platform and the need for Congress to "send a message to social media executives: You will be held accountable for your misconduct." *Id.* at 3. CHD also seeks judicial notice of the fact that on April 19, 2021, Senators Klobuchar and Lujan wrote a letter to Zuckerberg that — in CHD's characterization — demanded that Facebook do more to censor and silence "anti-vaccine" influencers, including Robert F. Kennedy Jr.[15]

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15. The full text of the letter can be found at https://www.klobuchar.senate. gov/public/index.cfm/2021/4/klobuchar-lujan-urge-tech-ceos-to-take-action-against-disinformation-dozen-combat-coronavirus-vaccine-disinformation. In that letter, which was addressed to Zuckerberg and Twitter CEO Jack Dorsey, the senators ask that Twitter and Facebook "step up and take action against people that are spreading content that can harm the health of Americans" and they ask the CEOs the following four questions:

> 1. Are your platforms aware of these twelve sources that appear to be repeatedly spreading false or misleading information about the coronavirus vaccine efficacy?
>
> 2. What are your specific standards for removing accounts that repeatedly violate your policies on vaccine misinformation? Please address specifically whether the content shared on each of those twelve accounts violate those standards.
>
> 3. Who at your company is responsible for (a) setting vaccine disinformation policies and (b) enforcing those policies? Please provide specific name(s).
>
> 4. How are you ensuring your content moderation policies are effective for rural, minority, and non-English communities? Please provide proof of

CHD also requests that the Court take judicial notice of the facts that Senator Klobuchar has introduced antitrust legislation that could negatively impact Facebook; that on February 8, 2021, Facebook issued its "COVID-19 and Vaccine Policy Updates & Protections" which prohibit users from posting "any claims that COVID-19 vaccines are not effective in preventing COVID-19"; that Facebook maintains a "Coronavirus (COVID-19) Information Center" that contains links to the CDC website and "cross-links with posts from the CDC"; and that a "high-ranking Facebook officer" recently "admitted" that Facebook is "removing groups, pages and accounts that deliberately discourage people from taking vaccines, regardless of whether the information can bee verified as false or not." Plaintiff's Request for Judicial Notice at 9 (citing a May 10, 2021 bbc.com article).

Finally, on June 7, 2021, CHD filed a motion to "further supplement" the SAC and for *in camera* inspection under the All Writ's Act. This filing again cites the May 10, 2021 bbc.com article, and cites a May 24, 2021 Project Vertitas article for the assertion that a Facebook "whistleblower" went public with Facebook documents "showing that, notwithstanding the company's public declarations that it censored only 'false' vaccine-related claims, Facebook was (and is) in fact systematically and

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> investment in these programs in terms of resource allocation, specific data on campaign efficacy, and number of full & contract level employees allocated exclusively to those efforts.

Id.

covertly censoring *true* vaccine-related content, as well as mere expressions of *opinion*, provided such content was (or is) deemed capable of leading to 'vaccine hesitancy.'" Plaintiff's Motion to Further Supplement at 3 (Dkt. No. 103). CHD also requests the Court to consider: (1) on or about May 25, 2021, Facebook reversed its pre-existing ban on content suggesting that COVID was "manmade or manufactured"; (2) on or about June 3-4, 2021, Zuckerberg and Facebook Vice-President Heidi Swarz "essentially admitted" that the whistleblower-leaked documents were authentic; (3) on or about June 1-5, 2021, a large number of previously undisclosed emails by or to Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, were released to the public pursuant to a third party Freedom of Information Act request; those emails include an email from Zuckerberg to Fauci proposing a collaboration related to a COVID information "hub" on Facebook, as well as an "offer" by Zuckerberg, the details of which are redacted. *See id.* at 5; Schreffler Decl., Ex. 3. CHD requests that the Court order Facebook to produce the unredacted emails for *in camera* review.[16]

The Court concludes that none of the proposed supplemental allegations would cure the deficiencies in CHD's claims, and thus that leave to amend would be

16. According to Facebook, public statements from Facebook's Policy Communications Director explain that the redacted portions of the emails do not relate to misinformation or factchecking, but rather that "Zuckerberg told Dr. Fauci of [Facebook's] plan ... to share Facebook ad credits with government agencies to help them run coronavirus PSAs." *See* Facebook's Opp'n to CHD's Mtn. to Further Supplement at 5 (quotingTwitter, Andy Stone on Twitter (June 9, 2021), tinyurl.com/andystonetwitter.)).

futile. Many of the supplemental allegations — such as the allegation that the Biden Administration was "talking to" social media companies so "they understand the importance of misinformation and disinformation and how they can get rid of it quickly" — are very similar to allegations already contained in the SAC, and for the reasons discussed *supra*, they are insufficient.

As relevant to the *Bivens* claim against Zuckerberg, none of the proposed new allegations show that Zuckerberg was personally involved in any decisions regarding CHD's Facebook page. Nor do any of the supplemental allegations show any joint action with the federal government with regard to CHD's Facebook page. Instead, some of the new allegations mention Robert F. Kennedy, Jr.'s Instagram account, but Mr. Kennedy is not a plaintiff in this litigation. E-mails between Zuckerberg and Dr. Fauci about a COVID information "hub" on Facebook do not relate to any actions taken regarding CHD's Facebook page. The allegations about other members of Congress making statements about the need for social media companies to remove harmful or dangerous content from their platforms, including "vaccine misinformation," or about the possibility of legislation to remove Section 230 immunity are too general to support a claim of governmental coercion, as there are no allegations that any public official pressured Facebook to take any specific actions regarding CHD's page.

Similarly, none of the proposed supplemental allegations would enable CHD to state claims under the Lanham Act or RICO. The supplemental allegations do not show that CHD has suffered an injury within the Lanham

Act's "zone of interests" or that defendants have engaged in commercial speech actionable under that statute. Nor do any of the proposed supplemental allegations establish the elements of wire fraud as is necessary for the RICO claim.

Thus, even if it were true that Facebook "embarked on a campaign to block speech and information according to a COVID 'vaccine hesitancy' algorithm regardless of the truth or falsity of that speech," CHD's Mtn. to Further Supplement at 2, those allegations do not address the necessary elements of any of CHD's causes of action.

CHD argues that its allegations are sufficient at the pleadings stage, and that it should be permitted to engage in discovery to explore issues such as Zuckerberg's personal involvement, government contact with Facebook, and whether Facebook users were deceived by the warning label and fact-checks. *See* CHD's Opp'n to Facebook's Mtn. at 6, 7 n.3, 12 n.10, 28. Similarly, invoking the All Writs Act, CHD asserts that this is an "extraordinary" situation where the Court should lift the stay on discovery and order Facebook to produce unredacted emails between Zuckerberg and Dr. Fauci about Zuckerberg's "offer" to determine if there is any factual support for CHD's allegations. However, that is not how federal litigation operates. A plaintiff must plausibly allege a claim at the pleadings stage in order for the case to proceed. *See Maffick*, 2021 U.S. Dist. LEXIS 89930, 2021 WL 1893074, at *5 (rejecting the plaintiff's argument that "Facebook's commercial motivations and the issue of whether the Notice and the promotion of the SCME policy of which it is a part constitute commercial speech are fact questions, on which Maffick is entitled to take discovery and present

evidence before they are resolved on the merits" because "the Lanham Act does not confer a special license to shoot first, and ask questions later.").

Accordingly, because CHD has already amended the 151-page complaint three times in response to motions to dismiss filed by defendants, and because none of the proposed supplemental allegations (as articulated in the motion to supplement, the request for judicial notice, and the motion to further supplement) would cure the deficiencies in plaintiff's claims, the Court GRANTS defendants' motions to dismiss and DENIES plaintiff leave to amend.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants' motion to dismiss and DENIES plaintiff leave to amend. CHD's claims against Facebook, Zuckerberg, and Poynter are DISMISSED WITHOUT LEAVE TO AMEND. CHD's claims against Science Feedback, which has not yet been served and has not appeared in this action, are DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Dated: June 29, 2021

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX C — 47 U.S.C. 230

Section 230 of Title 47 (47 U.S.C. § 230), commonly referred to as Section 230 of the Communications Decency Act of 1934, provides, in pertinent part:

(c) Protection for "Good Samaritan" Blocking and Screening of Offensive Material

(1) Treatment of Publisher or Speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph [(A)].

Appendix C

(e) Effect on other laws

(3) State law

[. . .] No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(c), (e)(3).