No. 21-16210

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHILDREN'S HEALTH DEFENSE,
a Georgia non-profit organization,
Plaintiff-Appellant,

v.

META PLATFORMS, INC., a Delaware corporation;
MARK ZUCKERBERG, a California resident;
SCIENCE FEEDBACK, a French corporation;
THE POYNTER INSTITUTE FOR MEDIA STUDIES, INC.,
a Florida corporation; and DOES 1-20,
Defendants-Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California, Case No. 3:20-cv-05787-SI
Honorable Susan Illston, United States District Judge

APPELLANT'S THIRD MOTION FOR JUDICIAL NOTICE

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OVERVIEW

Last week's public disclosure of previously secret 2021 emails between the White House, Meta Platforms, Inc. ("Meta" or "Facebook"), Twitter, and Google prove that Appellant Children's Health Defense's ("CHD's") claim of state action censorship is not only plausible, it has already actually occurred. At the behest of the White House, Facebook and other social media platforms censored CHD and its chairman, Robert F. Kennedy, Jr. ("RFK, Jr."). It is beyond plausible – it is recognition of proven fact -- to infer that such censorship continues to this day, and will persist, unless there is a day of judicial reckoning to stop this unlawful, deceitful, and dangerous conduct.[1]

SUMMARY OF NEWLY-DISCOVERED EVIDENCE

By this motion, CHD seeks judicial notice of recent deposition testimony of a CDC official and electronic correspondence between the White House and social media employees.[2] There is no challenge to the authenticity of these documents

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[1] The district court recognized that CHD operates a social media page on Facebook's platform, for which CHD seeks declaratory judgment of its right to post articles and opinion pieces about the harms of Covid-19 vaccines, inter alia, freed of the burdens of censorship by Executive Branch coercion of, and joint action with, Meta. 1-ER-6-7. Government communications to Twitter specifically demanding censorship of Mr. Kennedy are material because they plausibly suggest the likelihood that governmental agents were making similar demands of Meta.

[2] These materials are drawn from exhibit #71-7 in *Missouri, et al., v. Biden, et*

revealed through current litigation in *Missouri v. Biden*, No. 3:22-CV-01213 (W.D. La. May 5, 2022). Among relevant disclosures:

- On January 22, 2021, a White House official requested Twitter to remove RFK, Jr.'s tweet about the death of baseball hero Hank Aaron "ASAP." Twitter replied that they "escalated this" the next day, meaning that they removed the tweet, as requested.[3] (Item 1.)

- On February 9, 2021, Facebook wrote to Robert Flaherty, White House digital media director, about Facebook's new enforcement policy against misinformation, stating that "we'll continue to expand our enforcement over the coming weeks." (Item 2.)

- On February 10, 2021, Facebook deplatformed RFK, Jr.'s Instagram account of over 800,000 followers.

- On February 11, 2021, Facebook invited Flaherty to "speak to our misinformation team reps about the latest updates." (Item 3.)

- On February 18, 2021, Facebook wrote that it looked forward to a "deeper discussion of what more we can do" with Flaherty and discussed a number of ways Facebook could cooperate, concluding: "We are excited to explore partnering with the US government on this and [to] make a significant

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al., No. 3:22-CV-01213 (W.D. La. May 5, 2022), and from case-discovery posted to the websites of the Missouri Attorney General's office and of the New Civil Liberties Alliance, counsel for the individual plaintiffs in that case. *See* OFFICE OF MISSOURI ATTORNEY GENERAL, https://ago.mo.gov/home/news/2023/01/09/missouri-attorney-general-releases-more-documents-exposing-white-house's-social-media-censorship-scheme; NEW CIVIL LIBERTIES ALLIANCE, https://nclalegal.org/state-of-missouri-ex-rel-schmitt-et-al-v-biden-et-al/.

[3] The White House's January 23, 2021 email expressly demanded that Twitter remove RFK, Jr.'s January 22, 2021 tweet questioning "suspicious" deaths of elderly individuals, including Hank Aaron, after receiving Covid-19 vaccines and seeking a good faith investigation into the true causes of the deaths. Shortly thereafter, Meta deplatformed RFK, Jr.'s 800,000 follower Instagram account.

difference around vaccination intent domestically. We can move as fast as needed to activate this campaign." (Item 4, p. 6.)

- On March 21, 2021, Facebook sought the White House's good graces by outlining how it would share "new internal analytics," boasting that "[t]his is a top priority for us." Facebook's email also reviewed its "Levers for Tackling Vaccine Hesitancy Content," acknowledging that Facebook removes "Groups, Pages and Accounts" with "*often-true content*" if these accounts are "disproportionately promoting…sensationalized content." (emphasis added) (Item 5.)

- Flaherty responded the next day that Facebook's actions were insufficient. "[W]hat we are looking for is the universe and scale of the problem….This is a really tricky problem [combating "misinformation"]." He exhorted Facebook to give the White House more information about Facebook's interventions and effectiveness. At the end, Flaherty was pointed: "You've given us a commitment to honest, transparent conversations about this. We're looking for that, and **hoping we can be partners here, even if it hasn't worked so far**. And I know Andy [a White House colleague] is willing to get on the phone with [redacted name of Facebook employee] **a couple of times per week** if its necessary to all of this." (Emphases added) (Item 6.)

- On April 9, 2021, Flaherty let Facebook know that its efforts were still inadequate: "I still don't have a good, empirical answer on how effective you've been at reducing the spread of vaccine-skeptical content and misinformation…." Flaherty concluded more threateningly, noting that "an insurrection…was plotted, in large part, on your platform.…I want some assurances, based in data, that you are not doing the same thing again here." The next day, Facebook's staffer attempted to placate Flaherty, writing "I will make sure we're more clearly responding to your questions below." (Item 7.)

- On April 13, 2021, Facebook sent Flaherty and other White House staff a CHD post entitled "Scientists Warn of Potential COVID Vaccine-Related 'Ticking Time Bomb,'" highlighting it as an example of content that "did not violate our Misinformation and Harm policy" but nonetheless contributed to "vaccine hesitancy." Facebook detailed the "spectrum of levers" it uses to downgrade and deceitfully hide unwanted content without users' or poster's knowledge while not eradicating such content altogether,

remarking, without irony, that "healthy debate and expression is important" – at least if curated by the White House.[4] (Item 8.)

- On April 14, 2021, Flaherty chided Facebook that its top post was that vaccines "don't work." He questioned whether Facebook was actually reducing content leading to hesitancy. He again ended his email on an ominous note: "Not for nothing but last time we did this dance, it ended in an insurrection." (Item 9.)

- On April 22, 2021, Flaherty browbeat Google – "Youtube is 'funneling' people into hesitance and intensifying people's hesitancy." Flaherty underscored that **"[t]his is a concern that is shared at the highest (and I mean highest) levels of the WH**." (Emphasis added.) He sought the same detailed information from Google that he demanded from Facebook, i.e., how they are censoring "misinformation" and how effective their efforts were. He needled Google that "in a couple weeks when we're having trouble getting people to get vaccinated, we'll be in the barrel together," implying that both Google and he would be in an unpleasant and dangerous situation with the White House if they did not reduce hesitancy. Flaherty commented that his White House team speaks frequently with other platforms and urged Google to meet with them twice per week. (Item 10.)

- On May 6, 2021, Flaherty was dismayed with Facebook – he queried "how does something like that happen?," referring to three offending vaccine posts. He scolded that the Facebook policy "isn't stopping the disinfo dozen," in which RFK, Jr. was given the number two slot. (Item 11.)

- On May 12, 2021, Flaherty escalated his rhetoric – "'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." Flaherty then admonished that Facebook's competitors Youtube and Pinterest were more

[4] Facebook told the White House that "[w]e utilize a spectrum of levers for this kind of content[.] Actions may include reducing the posts' distribution, not suggesting the posts to users, limiting their discoverability in Search, and applying Inform Labels and/or reshare friction to the posts."

responsive to White House demands to censor, concluding: "I don't know why you guys can't figure this out." (Item 12.)

The White House was not alone in pressuring Facebook to censor alleged misinformation. The Centers for Disease Control and Prevention ("CDC") also played a central role, as explained by Carol Crawford, CDC digital media director, in her deposition of November 15, 2022. (Item 13.) Crawford testified that:

- CDC was in touch with Facebook "about ways that **we** could address misinformation" (p.87, emphasis added)
- "potentially removing posts was something that they [Facebook] might do." (p.155)
- "as a result of our work together," social media platforms collaborated to "remove false claims" that vaccines were unsafe for children (p. 157)
- "our work together" with social media platforms was effective on several occasions (pp. 166-67)
- Regarding CDC's communications with social media platforms, "it is helpful to know that they're actually using the responses that we have in some form or fashion because it takes time to put them together." (p.171)
- CDC had a practice of "Facebook weekly sync," meaning weekly meetings to "synchronize" or closely harmonize and unify Facebook's and CDC's misinformation policies. (pp. 221, 223)

ARGUMENT

These emails and recent testimony go beyond plausibility of joint action between Facebook and the federal government to censor COVID-related content – they establish joint action, in jaw-dropping, Orwellian detail. They also fully support CHD's claims of government coercion and undermine critical assumptions that underpin the lower court's order. In light of this new evidence, the lower court dismissal can no longer withstand this Court's scrutiny. Discovery is necessary to explore the full extent of this monstrous – and clandestine -- partnership in violation of the First Amendment.

At its core, the lower court's opinion elevates Meta's assertion of private action into the certitude that the government's hydra-headed relationship with Meta is constitutionally-benign. The district court explained its now-implausible premise in this way:

> [W]hat 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. [. . .] As the Ninth Circuit held in *Mathis*, there is a 'missing link' connecting the government 'standard of decision' to the allegedly unconstitutional act.

1-ER-26-27 (emphasis added); *see also* 1-ER-46-47 (dismissing RFK, Jr.'s February 2021 deplatforming from Instagram (a Meta product) as "very similar" and therefore "insufficient.") But the district court's paradigm – that the government merely provides "information about vaccines," and then Meta alone decides for itself what to do with it – is now wholly untenable.

The newly-discovered evidence confirms that the White House, CDC, Twitter, Google and Meta have ongoing partnerships to censor Covid-19 speech, in which CDC gives content instructions and the White House cajoles and coerces, such as requesting removal of specific posts by CHD and RFK, Jr. In such circumstances, Meta acted as a government partner and surrogate to accomplish what the government itself may not do – censor governmentally disfavored content

and viewpoints.

The newly-revealed emails supply the district court's 'missing link' connecting Executive Branch cajolery and bullying, manipulation and operational involvement in a partnership with Meta to censor – i.e., remove, reduce, and label "false" – specific posts by CHD and RFK, Jr. *Cf.* 1-ER-27 (opining that CHD has not alleged that government was "actually involved" in such decisions). The government's role is far more than "informational." Rather, the government itself is the primary driver to censor CHD and RFK, Jr., directing and sanctioning Meta to engage in various forms of censorship.

With respect to coercion, the district court held that "CHD does not allege that [Rep.] 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." 1-ER-30-31 (emphasis added) & n.10 (finding CHD's supplemental allegations of such direction from the White House "too general and amorphous"). But it is now revealed that the White House directed Twitter to remove an RFK, Jr. tweet "ASAP." It is further revealed that the concern about Covid misinformation is "shared at the highest (and I mean highest) levels of the WH," as Flaherty emphasized in his email to Google. Given the chronology of facts above, it is implausible that the White House did not give a similar direction to Facebook to censor RFK, Jr. Discovery should be allowed in order to permit

Appellant to find out exactly who directed Facebook to remove RFK, Jr.'s Instagram account and all the circumstances surrounding the "eradication" of CHD's Facebook page and RFK Jr.'s Instagram account.

One leading constitutional authority has characterized the phenomenon before this Court as "the most massive system of censorship in the nation's history." Phillip Hamburger, Is Social-Media Censorship a Crime?, WALL ST. J., Dec. 14, 2022, at A17. Indeed, as Professor Hamburger concluded, "If the gov-tech partnership to suppress speech isn't a conspiracy to interfere in the enjoyment of the freedom of speech, what is?" *Id.*

The tests of state action set forth in *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) are additive and overlapping. Surely these recent revelations should be definitive enough to survive Meta's Rule 12(b)(6) motion. What's more, these disclosures go well beyond plausible inference of government coercion.

The newly-discovered emails and testimony provide direct evidence of the very element that the district court found lacking: "an agreement or meeting of the minds between Facebook and the government [in particular, WH, CDC and HHS] relating to deletion [or restriction] of [CHD or Mr. Kennedy's] Facebook page" 1-ER-27 (quoting *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1126 (N.D. Cal. 2020)). The new disclosures also furnish compelling

circumstantial evidence of unlawful White House coercion to ensure that Americans be exposed almost exclusively to state-sponsored information about Covid-19. As a result of that unconstitutional state action, Americans received the dangerous and false impression of a scientific "consensus" on critically important Covid-19 issues.

Meta's deceit before this tribunal provides another basis for reversal of the lower court's decision. Throughout this litigation, Meta has asserted that it acted independently from the government, merely relying on the CDC's credible content. These newly-released emails make perfectly clear that those repeated representations were knowingly false. Meta appears to have been communicating with the White House and CDC on a bi-weekly basis and assuring the White House that Facebook was complying with the White House's demands.

The duty of litigants before this Court "is best met with candor, not misdirection." *Russell v. Rolfs*, 893 F.2d 1033, 1038 (9th Cir. 1990). "Something has gone wrong when a [district] court learns of relevant information first from another court, let alone material, case-dispositive information." *First Amendment Coalition v. United States DOJ*, 878 F.3d 1119, 1142 (9th Cir. 2017).

Meta breached its duties of good faith and candor by arguing that RFK, Jr.'s Instagram deplatforming was not the result of collusion with any federal actor. Similarly, Meta argued -- and the district court accepted -- that Dr. Fauci and Mark

Zuckerberg communicated only about "promoting authoritative information about COVID-19, not suppressing or even factchecking any other information, let alone any posts by CHD." (USDC Dkt. #104 at 5; see also 1-ER-46.) Based on these previously secret emails, it is clear that Meta has consistently engaged in misdirection, obfuscation and even lies with the Appellant, the lower court, and now this Court.

The newly-discovered evidence of Meta's entwinement with the White House and CDC to censor CHD, RFK, Jr., and all critics of Covid-19 policy lays bare Meta's evasions and denials. Based on Meta's deceptions, the district court concluded that CHD was not entitled to 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" [because] "that is not how federal litigation operates." 1-ER-47-48. The secret emails elucidate that Meta's practices have seriously undermined -- and delayed -- the necessary judicial process for ascertaining truth and rendering justice. But for the fortuitous disclosure of these emails at this time, Meta's dishonesty and constitutional violations might have gone without remedy.

Finally, these new revelations bolster CHD's fraud claims (Lanham Act and RICO) based on Meta's repeated labeling of CHD content as "false" and public assertions that all CHD (and other Covid-19-related) censored content was "false"

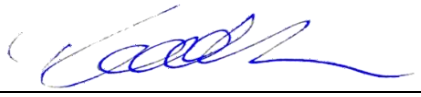
even though Meta knew and confided to the government that CHD's content was *not false*. A reckoning for Meta's unlawful, deceitful, and dangerous conduct is urgently needed through complete reversal of the district court's dismissal.

CONCLUSION

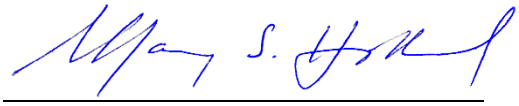
For all of these reasons, this Court should grant Appellant CHD's third motion for judicial notice, reverse the district court's judgment, and set the case for expedited trial on CHD's significant, and well-pleaded, claims for relief.

Dated: January 16, 2023

Respectfully submitted,



ROBERT F. KENNEDY, JR.
Founder and Chairman
Children's Health Defense



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