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

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INTRODUCTION

Every day, Facebook and a handful of other private companies decide for hundreds of millions of Americans what facts and opinions can be uttered, seen, and heard in the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). If the First Amendment is to survive in this Brave New World, government actors cannot be permitted to enter into clandestine censorship partnerships with these gatekeepers of the Internet, inducing them and working with them to suppress disfavored speech.

Taking CHD's allegations as true, with all reasonable inferences drawn, the core facts of this case are as follows. By express agreement with federal actors—coercively pressured by them, and working conjointly with them—Facebook has adopted a policy of censoring speech challenging governmental orthodoxy on COVID and the COVID vaccines. Such speech is euphemistically referred to as "COVID misinformation," even when it is provably true or protected opinion.[1] Federal actors tell Facebook what counts as "COVID misinformation," identifying specific individuals, posts or facts that the government wants to block, and Facebook then blocks them (as, for example, it blocked for months all content even

[1] As admitted by a senior Facebook executive and confirmed in leaked internal Facebook documents, Facebook knowingly censors true information and opinion when deemed capable of leading to "vaccine hesitancy." 2-ER-152-53, 160-179.

suggesting that COVID might have been created in a lab in China—a lab apparently funded in part by the same United States health authorities telling Facebook what information counts as "misinformation"). Pursuant to this policy, Facebook has engaged in pervasive censorship of CHD, and de-platformed CHD's chief spokesman and chairman, Robert F. Kennedy Jr., from Instagram, which Facebook owns (and where Mr. Kennedy had 800,000 followers). This censorship continues unabated today: Mr. Kennedy remains de-platformed, and CHD significantly self-censors on Facebook, prevented from posting basic scientific data, speculation, conjecture, or opinions about COVID and the COVID vaccines that are damning of the federal response to the pandemic, and which for that reason not only would be censored by Facebook, but would result in CHD's being de-platformed as well.

The stakes in this case are high. If government officials and social media companies can collaborate with impunity to censor dissident speech about COVID, they can suppress speech on any subject they choose, so long as they operate behind the screen of "content moderation" by nominally private platforms.

The sole question before this Court is whether CHD's allegations satisfy the *Twombly/Iqbal* pleading standard, and there can be no doubt that they do. CHD does not, like the plaintiffs in *Twombly*, assert mere conclusory allegations of

concerted action. Rather, as CHD alleges, Facebook and federal officials *have admitted* they are acting in concert to censor so-called COVID "misinformation":

- The CDC states that it has "engaged" private "*partners*" to "contain the spread of misinformation" online and that it *"work[s] with social media companies"* to achieve this goal. 3-ER-436-439, 447-448; 2-ER-152-158, 313-315.
- Defendant Zuckerberg has publicly acknowledged that Facebook *"work[s] with the CDC"* to remove COVID "misinformation." 3-ER-437-38; 2-ER-314.
- Facebook further states that it blocks content "which *public health experts have advised us* could lead to COVID-19 vaccine rejection." *COVID-19 and Vaccine Policy Updates & Protections*, FACEBOOK, https://www.facebook.com/help/230764881494641 (hereafter "Facebook Feb. 2021 Covid-19 policy") (emphasis added).
- In early February, 2021, by its own admission, the Biden Administration *"reach[ed] out" to Facebook to ask the company's [Facebook's] help in "clamp[ing] down" on so-called "COVID misinformation."* 2-ER-157. The admitted purpose of this *"direct engagement"* between the White House and Facebook was to *"get rid of"* such "misinformation." *Id*. *"We are talking to them,"* a senior White House official said, "*so they understand the importance of misinformation and disinformation and how they can get rid of it quickly.*"" *Id*.
- By its own admission, Facebook responded to this White House request by *agreeing to supply "any assistance we can provide"* to achieve this common objective. 2-ER-314-315.

These admissions are direct evidence of concerted action and an agreement between Facebook and federal officials to censor constitutionally protected COVID-related speech—an agreement that caught CHD and Mr. Kennedy in its crosshairs. Such evidence by itself satisfies the *Twombly/Iqbal* plausibility standard. "If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled." *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3rd Cir. 2010).[2] At a minimum these allegations entitle CHD to targeted discovery of the communications between Defendants and the relevant government officials, particularly at the CDC, and White House officials.

Moreover, these admissions of concerted action between Facebook and federal actors are strengthened by allegations of close temporal proximity between key events—for example, immediately after the White House's "direct engagement" with Facebook in early February 2021 to "get rid" of COVID misinformation, Facebook on February 8, 2021 adopted a new, stricter COVID censorship policy,[3] and on February 10, 2021 de-platformed Mr. Kennedy. 2-ER-

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[2] An agreement between a private party and government actors satisfies the "joint action" test for state action. *See infra* Point II(A)(1).

[3] *Removing More False Claims About COVID-19 and Vaccines*, META (February 8, 2021, update), https://about.fb.com/news/2020/04/covid-19-misinfo-update/#removing-more-false-claims. Among other things, the new policy adopted de-platforming as a punishment for posting so-called COVID 'misinformation.' *Id.*

314. They are also strengthened by specific allegations of a relentless coercive pressure campaign waged by prominent federal actors (including President Joseph Biden and prominent members of Congress) warning Facebook and Zuckerberg that they would be "held accountable" and subject to catastrophic legal consequences if they failed to censor ever more aggressively so-called "COVID misinformation." (AOB 26-30.)

In the face of this mounting evidence of joint action and coercion, Facebook maintains that the *only* inference to be drawn is that it is acting "independently" when it censors speech that federal actors want it to suppress, have asked it to suppress, have "worked with" it to suppress, and have pressured it to suppress. This self-serving assertion deserves no credence. When two parties say they are "working together" to censor "COVID misinformation," it is a reasonable inference that they are working together to censor COVID misinformation. It is a reasonable inference, when Facebook says public health experts are "advising" it about what content to block, that federal officials are authoritatively telling Facebook which content to block, and when Facebook says it agreed to supply "whatever assistance we could," it is a reasonable inference that Facebook agreed to block the content the government told it to. It is a reasonable inference, when Facebook de-platforms Mr. Kennedy for putatively publishing COVID misinformation immediately after the White House and Facebook have agreed to

work together on "get[ting] rid" of COVID misinformation, that the de-platforming was a result of their agreement. And it is a reasonable inference that repeated threats against Facebook by powerful federal officers have had the effect they were intended to have—*i.e.*, coercively pressuring Facebook into adopting ever more aggressive censorship policies.

Thus, CHD's allegations plausibly suggest state action, and the district court's dismissal of this case with prejudice must be reversed.

FACTUAL STATEMENT

Facebook[4] makes numerous misstatements of fact. Two are critical.

First, Facebook states that "the most recent conduct" complained of by CHD "dates from September 2020" and therefore evidence of collaboration between Facebook and federal officials (or of coercive pressure applied by federal actors) after that date is irrelevant. (Appellees' Brief (hereafter "AB") 28.) This is false.

CHD has specifically alleged (and indeed it is undisputed) that Facebook de-platformed Mr. Kennedy from Instagram on February 10, 2021. 2-ER-314-315. As CHD showed in its Opening Brief, CHD has standing to challenge Mr. Kennedy's de-platforming, which directly injures CHD; Facebook does not mention this or make any argument against it (thereby conceding the point). Thus the "direct

[4] As used herein, "Facebook" refers to Meta Platforms, Inc., the company; Facebook, the online platform; and Zuckerberg, its CEO and controlling shareholder.

engagement" and agreement to censor COVID "misinformation" reached between Facebook and the White House in early February 2021 is not only relevant, but pivotal evidence in this case.[5]

Moreover, Facebook's censorship of so-called COVID "misinformation" is *ongoing*. The chilling effect of this censorship, resulting in CHD's ongoing self-censorship, is specifically pleaded in CHD's complaint and supplements. 2-ER-145, 157, 3-ER-538-539, 565-566. As in *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), the threat of de-platforming "hangs over [CHD] like the sword over Damocles, creating a 'here-and-now subservience'" to Facebook. *Id*. at 265 n.13. Every day, CHD's followers continue to face censorship for posting CHD's content to their own Facebook pages, groups, or newsfeeds, 3-ER-451; every day, Facebook chooses to maintain Mr. Kennedy's de-platforming; and every day, the federal government's continuing pressure on and collaboration with Facebook contributes directly to these ongoing constitutional injuries. Thus, when on July 15, 2021 the White House called on Facebook to widen its de-platforming *specifically of Mr. Kennedy*,

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[5] *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1125-1126 (N.D. Cal. 2020), upon which Facebook relies, concerned state action allegations which "post-date[d] the relevant conduct which allegedly injured plaintiffs" and were "unconnected with" Facebook's decision to de-platform them. Here, the early 2021 joint action between Facebook and the White House *pre-dates* the de-platforming of Mr. Kennedy.

that evidence too is critically relevant here.[6]

Second, Facebook asserts that CHD has posted "false" or "misleading" information in violation of Facebook's terms of service. (AB 8-9.) In fact, every single post by CHD flagged as "false" by Facebook has been accurate or a valid hypothesis or expression of opinion, and CHD welcomes the opportunity to prove that in court. (A vivid example is Facebook's branding as "false" a CHD post linking to a Nobel Prize-winning scientist's statements favoring the lab-leak theory of COVID's origin. 3-ER-489-90, 539; 4-ER-655-60.) But such proof is unnecessary on this motion, where CHD's allegations must be taken as true, and Facebook's contrary assertions must be disregarded.

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[6] *See Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy,* THE WHITE HOUSE, Briefing Room (July 15, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021 (quoting White House Press Secretary Psaki as stating that "we have . . . proposed that" "social media platforms, including Facebook," "create a robust enforcement strategy" to eliminate "COVID vaccine misinformation" . . . "there's about 12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms. All of them remain active on Facebook, despite some even being banned on other platforms, including Facebook—ones that Facebook owns."). Psaki's "12 people" claim was a reference to the widely-publicized so-called "disinformation dozen," which famously includes Mr. Kennedy—a claim which Facebook itself concedes there "isn't any evidence to support." Samuel Chamberlain, *Facebook pushes back against WH over COVID vax 'disinformation dozen'*, NEW YORK POST (Aug. 18, 2021), https://nypost.com/2021/08/18/facebook-pushes-back-against-wh-over-covid-vax-disinformation-dozen. Psaki's reference to "some even being banned on other platforms, including Facebook—ones that Facebook owns" likely is a *specific reference to Mr. Kennedy*, who is banned from Facebook's Instagram but not from other Facebook platforms.

Indeed, Facebook's statement of the case ventures far beyond Fed. R. App. P. (28)(a)(6) propriety, offering Facebook's ipse dixit on a host of pivotal issues: that Facebook's actions against CHD were based wholly on its own internally-driven 'editorial discretion'; that in the course of its partnering with federal actors to help drive "vaccine uptake," Facebook does not also knowingly censor (and label "false") content that is accurate; that the CDC Foundation is a "private" entity; that Facebook's "fact-checkers" (like Poynter) are "independent" (rather than, as CHD alleges, Facebook's agents) and that they acted against CHD without content-based orders or direction from the CDC or Facebook; and that no visitor to CHD's page was diverted by Facebook's "false" flags to any "fact-checkers'" fundraising websites, or spent time or money there. (AB 14-21.) None of these assertions of disputed fact is proper on a Rule 12(b)(6) motion; all should be tested in targeted discovery to ferret out the truth.

And the truth is that much of what Facebook called "misinformation" less than a year ago—and in many cases still today—is now recognized as fact or valid conjecture supported by scientific data. For over a year, Facebook has banned as "false" all "[c]laims that social/physical distancing" or mandatory mask-wearing policies did "not help prevent the spread of COVID-19."[7] But just two weeks ago a

[7] Facebook Feb. 2021 Covid-19 policy, *supra*, https://www.facebook.com/help/230764881494641.

study led by a Johns Hopkins professor found exactly that.[8] A year ago, when federal health authorities were insisting that COVID's infection mortality rate (IFR) was ten times higher than the flu's, Facebook prevented anyone from saying, even for certain age groups, that "the mortality rate of COVID-19 is the same or lower than seasonal influenza."[9] But published studies have found that COVID's IFR is in fact lower than the flu's 0.1% IFR (as estimated by the WHO) for everyone below the age of 45.[10] For months, hundreds of millions of Americans on Facebook were banned from uttering or hearing about the gain-of-function lab-leak theory of COVID's origin;[11] now it's on the cover of Newsweek. A year ago, Facebook silenced any claim "that COVID-19 vaccines kill or seriously harm

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[8] J. Herby et al., *A Literature Review and Meta-Analysis of the Effects of Lockdowns on COVID-19 Mortality*, STUDIES IN APPLIED ECON., Jan. 2022, https://sites.krieger.jhu.edu/iae/files/2022/01/A-Literature-Review-and-Meta-Analysis-of-the-Effects-of-Lockdowns-on-COVID-19-Mortality.pdf.

[9] Facebook Feb. 2021 Covid-19 policy, *supra*, https://www.facebook.com/help/230764881494641.

[10] *See* R. Brown, *Public Health Lessons Learned From Biases in Coronavirus Mortality Overestimation*, DISASTER MEDICINE AND PUBLIC HEALTH PREPAREDNESS vol. 14,3 (Aug. 12, 2020): 364-371, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7511835; T. Levin et al., *Assessing the age specificity of infection fatality rates for COVID-19: systematic review, meta-analysis, and public policy implications*, EUR J EPIDEMIOL 35**,** 1123–1138, Dec. 8, 2020, https://link.springer.com/article/10.1007/s10654-020-00698-1#Tab3 (table 3).

[11] *See* Facebook Feb. 2021 Covid-19 policy, *supra*, https://www.facebook.com/help/230764881494641.

people;"[12] now we know they can.[13] Such is the classic vice of all censorship—and the reason why the remedy for disfavored speech in this country is supposed to be "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

ARGUMENT

I. LIKE THE DISTRICT COURT, FACEBOOK APPLIES THE WRONG STANDARD OF REVIEW.

As noted in CHDs' Opening Brief, the district court held five times in its opinion that CHD's allegations failed to "establish" or "show" certain facts. (AOB 8-9.) This was error. *See Winter v. Gardens Regional Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1122 (9th Cir. 2020) ("We remind the district court … [that a] complaint needs only to allege facts supporting a plausible inference."); *Pinnacle Armor, Inc., v. United States*, 648 F. 3d 708, 721 (9th Cir. 2011) (reversing dismissal where lower court ruled that allegations failed "to demonstrate" element of the claim, and holding that a plaintiff "is not required to 'demonstrate' anything to survive a Rule 12(b)(6) motion"). In its brief, Facebook doubles down on this error, arguing repeatedly that CHD's allegations fail to "establish" elements of its

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[12] *Id*.

[13] *See Selected Adverse Events Reported after COVID-19 Vaccination*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html (acknowledging that COVID vaccines have caused serious harm and death). As of February 3, 2022, the federal Vaccine Adverse Event Reporting System (VAERS) reports 12,122 deaths "among people who received a COVID vaccine." *Id.*

claims. (AB 28-31.)

In support of this novel Rule 12(b)(6) standard, Facebook cites a single case, which it argues holds that a plaintiff's alleged facts "must 'establish' a claim for relief." (AB 30 n.6 (purporting to quote *Moss v. U.S. Secret Service*, 572 F.3d 962, 967-68 (9th Cir. 2009).) In fact, in the passage at issue, the *Moss* Court was reiterating the familiar two-step pleading requirement for overcoming qualified immunity. *See Moss*, 572 F.3d at 967-68 ("If the facts alleged establish a constitutional violation, the next step is to determine whether the right at issue was clearly established at the time of the violation."). The *Moss* Court then carefully reviewed *Twombly* and *Iqbal*, concluding: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be *plausibly suggestive* of a claim entitling the plaintiff to relief." *Id*. at 969 (emphasis added). CHD's allegations surpass this standard.

II. CHD'S ALLEGATIONS OF JOINT ACTION, COERCION, AND SIGNIFICANT ENCOURAGEMENT, BOTH SINGLY AND EVEN MORE POWERFULLY WHEN TAKEN TOGETHER, PLAUSIBLY SUGGEST STATE ACTION.

State action exists when private-party 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 State or its agents.'" *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (citations omitted). In combination with

other factors, a statutorily-granted immunity for private conduct also weighs heavily toward a state action finding. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989). So too does a "symbiotic relationship" between governmental and private parties. *See, e.g.*, *Pasadena Republican Club v. Western Justice Ctr.*, 985 F.3d 1161, 1168 (9th Cir. 2021).

"Satisfaction of any one test is sufficient to find state action," *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020), but as in *Rawson*, the Court may also find state action where, as here, a number of different factors weighing in favor come together in a given case. *Id*. at 754-56. A state action determination is a "necessarily fact-bound inquiry," *Brentwood*, 531 U.S. at 298, and "fact-bound inquir[ies]" are generally "ill-suited to resolution at the motion to dismiss stage." *Bozzio v. EMI Grp. Ltd.*, 811 F.3d 1144, 1153 (9th Cir. 2016).

Facebook seeks to mislead this Court by claiming—for the first time, on this appeal—that the familiar state action tests and factors referred to above are merely the second prong of a two-prong inquiry, with the first prong requiring that the private party's conduct "'must be caused by the exercise of some right or privilege created by the [government] or a rule of conduct imposed by the [government].'" (AB 21.) There is no such requirement.[14] But if there were, it would be satisfied

[14] Facebook has failed to quote the relevant case language in full: "the deprivation must be 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*

here because CHD alleges: (1) that Facebook is following a "rule of conduct" (censoring all COVID content identified as "misinformation" by federal actors) "imposed" on it by federal actors; and (2) in censoring CHD and Mr. Kennedy, Facebook is exercising a right or privilege (of censoring constitutionally protected speech with immunity from legal liability) created by Section 230(c)(2).

A. CHD Has Sufficiently Pleaded Joint Action.

1. Applicable Legal Standards.

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). An "allegation of implicit agreement" between governmental and private actors to achieve a common goal is "sufficient to support state action." *Rimac v. Duncan*, 319 Fed. Appx. 535, 537 (9th Cir. 2009) (describing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). *See also, e.g.*, *Atkinson v. Meta Platforms, Inc.*, No. 20-17489**,** 2021 U.S. App. LEXIS 34632 at *3 (9th Cir. Nov. 22, 2021) (unpublished)

State is responsible." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (emphasis added). The familiar state action tests and factors determine whether the government is "responsible" for a nominally private party in the circumstances of a given case. Thus, when in *Brentwood* and *Rawson* those tests or factors were deemed satisfied, neither the Supreme Court nor this Court required any additional *Lugar* showing. *See Brentwood*, 531 U.S. at 302 (finding state action under "entwinement" test; no discussion of whether conduct was caused by governmental right, privilege, or rule of conduct); *Rawson*, 975 F.3d at 757 (finding state action due to combined presence of numerous factors; no further discussion of whether conduct was caused by governmental right, privilege, or rule of conduct).

("Atkinson does not offer other facts that would make a joint action claim plausible, *such as an agreement between state governments and Meta Platforms*") (emphasis added); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) ("An agreement between government and a private party can create joint action."). In addition, "if the state 'knowingly accepts the benefits derived from unconstitutional behavior,' … then the conduct can be treated as state action." *Tsao*, 698 F.3d at 1140 (citations omitted).

2. The Acknowledged CDC-White House-Facebook Agreements Are Specific Enough to Encompass CHD's Pleaded Posts and to Chill CHD's Ongoing Free Expression on COVID and Vaccine Injury.

As detailed above, CHD has alleged—based on non-conclusory specific facts, including direct evidence—an agreement between Facebook and federal actors to censor so-called COVID "misinformation." Pursuant to this agreement, CDC[15] and White House officials: (1) target *by name* specific posts, assertions, viewpoints, or users such as CHD and Mr. Kennedy (both among the most prominent dissenters in the country against the government's COVID and vaccine orthodoxy) for Facebook to censor, and Facebook complies; and (2) have participated with Facebook in the creation of a "vaccine hesitancy" program for

[15] At CDC's request, the WHO undertook "several months of discussion" with Facebook in 2019 "to ensure" Facebook would "reduce the spread of [vaccine-related] inaccuracies," e.g., by censoring CHD posts, and redirecting users to "go to CDC." *See* 3-ER-437, 447.

censoring online speech, including true information and opinion, deemed capable of interfering with vaccine uptake. 2-ER-152-153, 314-315; 3-ER-437-439, 448, 451, 461-462, 465-466, 482-483, 488-489, 492, 498, 503, 517, 533-534. This agreement and joint action to censor so-called COVID or vaccine "misinformation" has resulted in the censorship of CHD's and its users' speech, ongoing self-censorship, and the de-platforming of Mr. Kennedy.

Facebook argues—and the district court held—that an agreement to censor "COVID misinformation" or "vaccine misinformation" is somehow too vague or too "general" to count as joint action. (AB 36, 39.) But the vagueness of the term "misinformation" is itself a censorship weapon. All who wish to give voice online today to dissident opinion or disfavored facts about COVID know that their speech—indeed their continued existence on social media—is subject to the dictatorial yet arbitrary, ever-shifting definition of "misinformation" applied, at governmental behest, by Facebook and the other mega-platforms, for whom, like Humpty Dumpty, the word "means just what [they] choose it to mean—neither more nor less." Lewis Carroll, *Through the Looking Glass* 124 (1882). There can be no doubt that Facebook's policy of censoring "misinformation" was specific enough to be applied to CHD and Mr. Kennedy, because Facebook expressly defended its censorship of both precisely on the ground that they were disseminating COVID and vaccine "misinformation."

Facebook cites *Blum v. Yaretsky*, 457 U.S. 991 (1982), likening their censorship of CHD to the nursing home physicians' exercise of "independent judgment," which (in *Blum*) was uninfluenced by the state in any degree. But CHD alleges that Facebook adopted, and still adopts, the CDC's censorial judgment as its own, and willingly executes a jointly-conceived algorithm which obviates any later, separate judgment on its part. At the pleading stage, Facebook's contrary assertion that it exercises wholly "independent judgment" uninfluenced by the State is improper and unpersuasive.[16]

Accepting CHD's allegations as true, Facebook's enforcement actions do not "begin" when or where federal actors' involvement "ends," nor do they require Facebook's autonomy. Rather, as alleged, Facebook's online policing is the last (visible) step in an ongoing (hidden) collaboration with federal actors. Facebook's enforcement action is more akin (with roles reversed) to 42 U.S.C. § 1983 speech cases in which a police officer makes an illegal arrest to "enforce" a public-private agreement, plan, or policy to quell particular protests or protestors. *Forbes v. Lincoln Center*, No. 05 Civ. 7331, 2008 U.S. Dist. LEXIS 63021 (S.D.N.Y. 2008) (denying Rule 12(b)(6) motion and instead granting targeted discovery of public-

[16] Facebook also relies on *Mathis v. PG&E*, 75 F.3d 498 (9th Cir. 1996) (*Mathis II*), but the bottom line on *Mathis II* is that *Mathis v. PG&E*, 891 F.2d 1429 (9th Cir. 1989) (*Mathis I*) held that a well-pleaded joint action set of facts comparable to CHD's could not be dismissed, while *Mathis II* simply found that joint action had not been proven after full discovery and trial. *Mathis II*, 75 F.3d at 504.

private shared desire to chill speech, and any agreement to enforce it).

3. Allegations of Substantial Mutual Benefits from the Specific Unconstitutional Actions Strongly Support the Inference of Joint Action.

CHD alleges a "symbiotic relationship" of substantial mutual benefit between Facebook and federal actors, including the CDC. *See Atkinson*, 2021 U.S. App. LEXIS 34632 at *3 (stating that "financial ties between . . . governments and Meta Platforms" "would make a joint action claim plausible"); *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 997 (9th Cir. 2013) (weighing as a "joint action consideration [whether] the federal . . . government in any meaningful way accepts benefits derived from the allegedly unconstitutional actions"). Facebook's denial that federal actors benefit from its platform censorship and related acts of patronage verges on the absurd. (AB 41.) Zuckerberg's donations—$30 million and counting—to the CDC Foundation are (a) effectively to the CDC itself (not to a private entity) since the CDC Foundation exists solely to fund the CDC,[17] and (b) no mere bagatelle. In addition, the CDC and the White House have benefited from their partnerships with Facebook because that partnership has directly furthered these federal actors' policy goals (while also preserving "plausible deniability" of their role in censoring constitutionally protected speech). Thus CHD has plausibly alleged that federal actors knowingly accept substantial benefits from partnering

[17] *See Who We Are*, CDC FOUNDATION, https://www.cdcfoundation.org/our-story.

with Facebook to censor specific online content. At a minimum, CHD's allegations warrant targeted discovery to ascertain the additional, tangible values of the advertising credits Facebook gives to the CDC, as well as the number of CHD users Facebook diverts to the CDC and its "fact-checkers," and the monetary value of users' misdirected attention or spending on those rival sites.[18]

Facebook's cases finding no mutual public-private benefits pale by comparison. *Cf. Brunette v. Humane Soc'y*, 294 F.3d 1205, 1212-14 (2002) (private news company did not render any service indispensable to Humane Society in executing a search warrant, both performed separate and distinct tasks); *Pasadena Republican Club*, 985 F.3d at 1171 (city did not participate in, or know in advance about the initiation or cancellation of the club's speaking event). Unlike *Brunette*, CHD plausibly alleged that federal actors exercise dominating influence

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[18] Government emails, disclosed last month pursuant to FOIA requests, confirm the close, symbiotic interrelationship between Facebook, federal health agents, and the CDC Foundation concerning online COVID information. These documents are not in the record, and CHD does not ask that this Court rely on them, but CHD briefly summarizes them here (a) in case this Court would like to see them formally submitted in a motion for judicial notice; and (b) as a proffer of the kind of further evidence CHD would bring before the district court as part of a request for targeted discovery. On July 15, 2021, Facebook solicited the involvement of federal Health and Human Services and other administrative officials in an ongoing Facebook-Merck-CDC Foundation initiative to "use social media and digital platforms to build confidence in and drive uptake of vaccines" building "on some of our campaigns with partners to date" that could involve "synergies with [HHS] efforts." OMB Response to FOIA Request No. 2021-420, Jan. 14, 2022. In another email, federal actors ask Facebook to post designated messages on users' pages "when you flag something as related to COVID-19." *Id.*

and control over Facebook's censorship criteria, planning and execution to control the online debate on vaccines and COVID.

Facebook's ipse dixit that it makes its own independent editorial judgment about what COVID-related content to block (AB 32-33) is implausible – or, at most, no more plausible than the pleaded alternatives: that it works with, and takes direction from, the government to accomplish their common goal. Targeted discovery of what the CDC and Facebook do "behind the curtain," and when and why they censor, is warranted.

B. CHD Has Adequately Pleaded Coercion, and Facebook's Arguments to the Contrary Misrepresent the Case Law.

It is settled law that state action exists and the First Amendment is violated when a private party censors a plaintiff's speech due to threats made by government officials. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (finding state action and First Amendment violation where book distributors stopped selling plaintiff's books because of "veiled threats" by government actors); *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003); *Carlin Comms., Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987). CHD has alleged, in detail, exactly such coercion here. (AOB 26-30.) Facebook attempts to evade these well-pleaded allegations by misrepresenting the case law.

1. Facebook Wrongly Asserts that Prior Cases Involved Officials with "Power to Impose Sanctions."

First, Facebook attempts to distinguish *Bantam Books*, *Backpage.com*, and *Okwedy* on the ground that "each case" involved "a government official *with power to impose sanctions if the plaintiff failed to comply*." (AB 37 (emphasis added).) In fact, all three cases expressly state (1) that the threat-issuing officials there did ***not*** have the power "to impose sanctions" on the threatened parties; and (2) that the lack of such authority did not render the officials' conduct any less coercive or unconstitutional. *See, e.g.*, *Bantam Books*, 372 U.S. at 68 (observing officials' "want of power to apply formal legal sanctions"); *Backpage.com*, 807 F.3d at 230 ("'the fact that a [governmental actor] lacks direct regulatory or decision making authority over a plaintiff, or a third party that is publishing or otherwise disseminating the plaintiff's message'" is not "'dispositive'") (quoting *Okwedy*, 333 F.3d at 344). Indeed, the Second Circuit in *Okwedy* specifically held, for this very reason, that a plaintiff can state a First Amendment claim when the governmental actor issuing the threat is a "*member of the House of Representatives*." *Okwedy*, 333 F.3d at 343 (emphasis added).

Facebook insists—and the District Court essentially found—that despite being hit with repeated demands to censor so-called COVID "misinformation" or face catastrophic legal consequences by the Speaker of the House, the Chair of the Senate Antitrust Committee, the Co-Chairs of the House Commerce Committee,

the entire Senate Commerce Committee, and the President of the United States, Facebook wholly "voluntarily" chose to censor speech challenging the government's COVID orthodoxy. (AB 13, 28.) But this claim of voluntariness is simply an assertion of disputed fact, inappropriate on a Rule 12(b)(6) motion; on the contrary, CHD is entitled to the reasonable inference that threats from such powerful officers achieved their purpose. *See, e.g., Bantam Books*, 362 U.S. at 68 ("[p]eople do not lightly disregard public officers' thinly veiled threats.").

2. CHD Was Not Required to Allege that the Government Directed Facebook to Take Specific Action "Against CHD."

Facebook also repeats the canard that CHD has failed to allege that the government mandated "any specific action *against CHD*." (AB 34 (emphasis added).) But under this Court's clear case law, CHD was required only to allege that the government caused Facebook to adopt the "policy" or "guidelines" or "type" of action pursuant to which CHD was harmed. *See, e.g., Mathis I*, 891 F.2d at 1443 (reversing 12(b)(6) dismissal where employee alleged that privately owned nuclear plant excluded him pursuant to an "informal policy" pushed on the nuclear plant by federal officials; no claim that the officials had specifically ordered plaintiff's exclusion or were even aware of plaintiff's existence); *United States v. Ross*, 32 F.3d 1411, 1413-14 (9th Cir. 1994) (search of passenger's luggage in conformity with FAA "guidelines" was "governmental action"; no claim that FAA had mandated the specific search of this particular passenger or was even aware of

his existence); *United States v. Walther*, 652 F.2d 788, 793 (9th Cir. 1981) ("While the DEA had *no prior knowledge that this particular search would be conducted* and had not directly encouraged Rivard to search *this* overnight case, it had certainly encouraged Rivard to engage *in this type of search*.") (emphasis added); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (finding state action in search conducted by private airline where U.S. president and FAA had informally directed private airlines to adopt policy of searching all passengers fitting a certain profile; no claim that federal actors had specifically directed the particular search at issue).

If Facebook's canard were the law, state officials could with impunity coerce private schools to exclude all children of a certain religion; according to Facebook's argument, no one would have a constitutional claim because the officials did not order any "specific" child to be excluded. Moreover, CHD *has* alleged that federal actors specifically directed Facebook to de-platform Mr. Kennedy. 2-ER-277; *supra* n.6.

3. CHD Has Not Sued the "Wrong Party."

Finally, Facebook contends that CHD has sued "the wrong party," claiming that CHD's constitutional claim lies only against the threat-issuing officers. (AB 35.) Controlling case law holds the contrary. *See, e.g.*, *Adickes*, 398 U.S. at 148 (upholding suit against private party defendant); *Mathis I*, *supra* (permitting suit against private company where plaintiff alleged that government had coerced

company into adopting policy pursuant to which plaintiff lost his job); *Carlin*, *supra* (upholding claim against private telephone company that suspended plaintiff's service due to government threats).

Facebook argue that *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999), bars suit against a private party that was governmentally coerced into taking action (AB 35), but *Sutton* stands for no such broad holding, which would contravene *Adickes*, *Mathis*, and *Carlin*. What *Sutton* actually holds is that "governmental compulsion in the simple form of a generally applicable statutory requirement, without more," is insufficient "to hold a private [party] responsible as a governmental actor." 192 F.3d. at 837, 839. This holding makes perfect sense—if obeying a generally applicable statute were sufficient, every driver would be a state actor when stopping at a red light—but it has no applicability to the instant case, which involves no "generally applicable statutory requirement." The *Sutton* Court carefully stated that its holding did not apply where (as here) government actors coerce private party conduct through other means, or where (as here) there are in addition to elements of coercion also elements of "willful participa[tion] in joint activity." *Id*. at 842. Thus *Sutton* has nothing to do with the allegations here.

C. This Court Can and Should Consider Section 230(c)(2)'s Grant of Immunity as an Additional Factor Favoring a State Action Finding Here.

Contrary to Facebook's assertions, CHD does not argue that Section 230 turns all online content moderation into state action. CHD simply argues that under *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, the immunity conferred by Section 230(c)(2) can and should be viewed as an additional factor weighing significantly in favor of a state action finding where (as here) that immunity is accompanied by the other critical factors and "strong preferences" identified by the Court in *Skinner*.

In *Skinner*, the Court found that private railways' urine and breath tests for their employees were state action because the federal government had: (1) enacted regulations "remov[ing] all legal barriers to the testing;" (2) "made plain . . . its strong preference for [the] testing;" and (3) "made plain . . . its desire to share in the fruits" of such testing. 489 U.S. at 615; *see* AB 40 (acknowledging that these were the key factors on which the Court relied in *Skinner*). All three of those factors are equally present here.

First, Section 230(c)(2) "remove[s] all legal barriers" in exactly the same way the regulations in *Skinner* did. The *Skinner* regulations immunized railroads from legal liability if they conducted the designated tests. *See Skinner*, 489 U.S. at 615. Section 230(c)(2) immunizes social media companies from liability if they

censor "constitutionally protected" speech. 47 U.S.C. § 230(c)(2)(A). Second, the federal government has repeatedly "made plain a strong preference" for social media companies to censor so-called COVID "misinformation"; indeed, the torrent of demands on Facebook to censor such content goes much further in making plain this "strong preference" than did anything in *Skinner*. Finally, the government is, *by its own admissions*, "shar[ing] in the fruits" of this censorship: the CDC furthers its own policy goals by working with Facebook to combat "vaccine hesitancy," and the White House similarly reaps benefits from Facebook's censorship, which stifles dissent challenging the Administration's COVID policies.

Where (as here) a plaintiff alleges that not only all three *Skinner* factors, but also strong evidence of joint concerted action and coercive pressure, have come together, *Skinner* dictates—and axiomatic constitutional principles demand—that plaintiff be found to have adequately pleaded state action. Otherwise the government could use immunity statutes to eviscerate any constitutional right. Surely no court would permit federal lawmakers to exclude everyone of a given race from air travel through the simple expedient of passing a statute immunizing airlines that adopt this policy, while summoning airline CEO's to hearing after hearing demanding that they do so, and then working together with them to achieve this result. *See Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("it is … axiomatic that [the government] may not induce, encourage or promote private

persons to accomplish what it is constitutionally forbidden to accomplish."); *Davis*, 482 F.2d at 904 ("Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by 'private' persons or entities that is prohibited to the government itself."). On exactly the same grounds, the federal government cannot be permitted to achieve the censorship of constitutionally protected dissent through a combination of immunity, pressure, threats, symbiosis, and joint action, and a complaint so alleging must be found to have adequately pleaded state action.

D. CHD Has Adequately Pleaded Claims Against Mark Zuckerberg and Should Be Permitted to Proceed to Discovery and Trial.

Facebook concedes, as it must, that CHD has plausibly alleged that Zuckerberg personally approved and was responsible for Facebook's policy of censoring "COVID misinformation" and for Facebook's decision to "work with" federal actors to achieve that goal. (AB 44.) But Facebook contends that, in addition, CHD was required to allege Zuckerberg's personal involvement in Facebook's specific censorship of CHD or Mr. Kennedy. (*Id*.) This is mistaken.

An official has sufficient personal involvement in the "deprivation of plaintiff's constitutional rights" if he "set 'in motion a series of acts by others,' or 'knowingly refus[ed] to terminate a series of acts by others." *Smith v. Gaffney*, No. CV 18-4366-CJC, 2020 U.S. Dist. LEXIS 81145 at *12 (C.D. Cal. Jan. 7, 2020) (quoting *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir. 2011)). This standard is

satisfied here. Through his approval of Facebook's partnership with the federal government to censor COVID "misinformation," Zuckerberg "set in motion" the censorship and ongoing self-censorship of CHD's speech. At a minimum, Zuckerberg, as Facebook's notoriously hands-on CEO and controlling shareholder, "knowingly refus[ed] to terminate" the acts of censorship his company took. In addition, on the basis of Zuckerberg's well-publicized personal involvement with major user de-platforming decisions at Facebook, CHD has plausibly alleged that Zuckerberg himself approved, or at a minimum, "knowingly refus[ed] to terminate" Facebook's de-platforming of Mr. Kennedy. This allegation too is sufficient to make Zuckerberg individually liable here.

III. CHD'S STATUTORY CLAIMS ARE WELL-PLEADED.

A. Facebook's Arguments Against CHD's RICO Claims Are Baseless.

Facebook argues that wire fraud cannot be committed unless the perpetrators intend to obtain money for *themselves*. (*See* AB 54 ("CHD did not allege that Facebook intended to acquire those donations *for themselves*.") (emphasis added)). According to Facebook, "the wire fraud statute" does not "encompass the diversion of money or property to third parties." (*Id.*)

This is simply a misstatement of law. *See, e.g.*, *United States v. Gatto*, 986 F.3d 104, 125 (2d Cir. 2021) (wire fraud committed where defendant seeks to "deceive[] a victim into providing money or property to the defendant's relative,

friend, or favorite charity, rather than directly to defendant himself"); *United States v. Levy*, 513 Fed. Appx. 858, 860 (11th Cir. 2013) ("a party is no less culpable for a fraudulent scheme if he intends the benefits of the fraud to accrue to third parties"); *United States v. Sorich*, 523 F.3d 702, 709-10 (7th Cir. 2008) ("defendants . . . contend that fraud exists when private gain goes … to the [fraud's perpetrators], … but not when it goes to *third parties*. We disagree.").

As the Second Circuit put it last year, "there is no [mail fraud or wire fraud] precedent mandating that the victim's property flow directly to the defendant." *Gatto*, 986 F.3d at 125. The Supreme Court itself has indicated that there is no such requirement. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649-50 (2008) (mail fraud where "an enterprise that wants to get rid of rival businesses mails misrepresentations about them to their … suppliers … [and] the rival businesses lose money as a result"; no suggestion that the enterprise must be seeking to divert suppliers' property *to itself*).

Defying all this authority, Facebook cites a single case, *Monterey Plaza Hotel L.P. v. Local 483*, 215 F.3d 923 (9th Cir. 2000) (decided eight years before *Bridge*), in which this Court, in passing, commented that the wire fraud statute is intended to "punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings." *Id.* at 927. But CHD does not allege "wounded feelings"; it alleges concrete losses of donations of at least $25,000 a

month since May, 2019. 3-ER-503. The Court's remark in *Monterey*, distinguishing cases of concrete property loss from cases of subjective affront, cannot be taken as a considered, foursquare holding that wire fraud does not exist when the victim is deceived into giving his property to a third party. If *Monterey* were so read, the Ninth Circuit would be in conflict with every other circuit to have considered the question, and *Monterey* would no longer be good law, because the Supreme Court in *Bridge* undercut its (supposed) holding. *Cf., e.g., LeVick v. Skaggs Cos.*, 701 F.2d 777, 778 (9th Cir. 1983) ("[W]hen existing Ninth Circuit precedent has been undermined by subsequent Supreme Court decisions, this court may reexamine that precedent without the convening of an *en banc* panel.").[19]

Facebook further calls CHD's wire fraud "speculative." (AB 55, 56.) Not true. CHD alleges a fraudulent scheme by Facebook to deceive CHD's visitors into believing that CHD content is untrustworthy, to stop donating to CHD, to go to other competitor websites for supposedly more "reliable" health information, and to donate to those organizations instead. Facebook is correct that CHD has no way of knowing whether CHD's visitors actually donated to CHD's competitors as a result of this scheme, but CHD was not required to plead that Facebook's

[19] In addition, unmentioned by Facebook, CHD has alleged that victims of Facebook's fraud gave money or were intended to give money to Facebook's "fact-checkers," which satisfies even the (erroneous) *Monterey* dictum —because CHD also plausibly alleges that Facebook's fact-checkers are not independent third parties, but in fact Facebook's agents and confederates in the fraudulent scheme.

fraudulent scheme succeeded in obtaining donations for Facebook's fact-checkers. It is hornbook law that "[t]he wire fraud statute punishes the scheme, *not its success*." *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (emphasis added). To prove "wire fraud, *it is not necessary to show that … the intended victim suffered a loss or that the defendant secured a gain*." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986) (emphasis added).

Moreover, regardless of the donations, CHD has alleged with specificity that Facebook's misrepresentations to CHD's visitors fraudulently deprived those individuals of their right to control their own assets, which by itself is sufficient to state a RICO wire fraud claim. *See, e.g.*, *Gatto*, 986 F.3d at 126 ("Because one has a right to control one's property, 'a wire fraud charge under a right-to-control theory can be predicated on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information.'").

In addition, CHD has alleged that Facebook deliberately sought to deceive CHD's visitors into *clicking through* to, and thus giving their online *attention* to, CHD's competitors. This is critical because under just-decided case law (law that Facebook knows well but hasn't seen fit to mention), individuals' online "attention"—which is precisely the product Facebook monetizes —is itself a protected form of "property" with "material value." *See Klein v. Facebook, Inc.*,

No. 20-CV-08570, 2022 U.S. Dist. LEXIS 8081 at **126-28 (N.D. Cal. Jan. 14, 2022) ("'property' is a 'broad and inclusive' term that includes 'anything of material value owned or possessed'" and "there is no doubt that Consumers' 'information *and attention*' has 'material value'") (emphasis added). Thus, in addition to the loss of donations, CHD's allegations plausibly suggest that Facebook has deliberately sought to "obtain[] property" from CHD's visitors through fraudulent misrepresentations, in the form of their valuable online attention, and to divert that valuable property from CHD itself to CHD's competitors, thus stating a claim of wire fraud. 18 U.S.C. § 1343.[20]

B. Facebook's Arguments for Dismissal of CHD's Lanham Act Claims Are Erroneous.

Facebook repeats the district court's erroneous assertion that CHD, as a nonprofit, does not fall "within the Lanham Act's 'zone of interests.'" 1-ER-37. Numerous courts have permitted nonprofits to assert Lanham Act claims for loss of donations. *See Committee for Idaho's High Desert v. Yost,* 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), *aff'd*, 92 F.3d 814 (9th Cir. 1996); *United We Stand America, Inc. v. United We Stand America New York, Inc.*, 128 F.3d 86, 90 (2d Cir. 1997); *Brach Van Houten Holding, Inc. v. Save Brach's Coalition for Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994); *Birthright v. Birthright, Inc.*, 827 F.

[20] CHD could not have cited *Klein* in its Opening Brief because *Klein* had not yet been decided.

Supp. 1114, 1138-39 (D.N.J. 1993).

Facebook tries to claim that these cases involved trademark infringement, not false advertising, but Facebook itself concedes that the often-cited *Birthright* decision upheld a Lanham Act false advertising claim. (AB 50.) In any event, a plaintiff alleging "an injury to a commercial interest in reputation" unquestionably comes within the "zone of interests" protected by the Lanham Act's false advertising provision. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32 (2014). CHD is plainly alleging damage to its reputation and its constituent right to benefit financially from the attention of its followers, and such injury is "commercial" for Lanham Act purposes where (as here) the allegation is that damage to the nonprofit's reputation causes losses of donation revenue. *See Birthright*, 827 F. Supp. at 1138-39; *Valley Forge Military Acad. Found. v. Valley Forge Old Guard, Inc.*, 24 F. Supp. 3d 451, 459 (E.D. Pa. 2014) ("the Lanham Act false advertising provision 'is broad enough to support, in the context of non-profit fundraising, a claim of false and misleading statements'") (citation omitted).

Facebook argues in addition that the false "warning labels and fact-checks" Facebook applied to CHD's content, as well as Facebook's repeated false touting of its "fact-checkers" as providing services superior to CHD's, are not "commercial speech." But as this Court recently made clear, while commercial speech "usually" "does no more than propose a commercial transaction," that is

"just a starting point" of the analysis. *Ariix, LLC v. NutriSearch, Corp*., 985 F.3d 1107, 1115 (9th Cir. 2021). Whether speech is "commercial" is a fact-driven determination in which the key factor is "economic motivation" – i.e., whether "economic benefit was the primary purpose for speaking." *Id.* at 1117. Economic motivation, moreover, "is not limited simply to the expectation of a direct commercial transaction with consumers," but may also include "indirect benefits." *Id*. (citations omitted).

Here, CHD has alleged Facebook's "economic motivation" in elaborate detail. First, CHD alleges that Facebook censors so-called "COVID misinformation" in order to avoid the catastrophic consequences threatened by federal actors—elimination of its Section 230 immunity or an antitrust break-up, or both–consequences that would potentially threaten Facebook's survival. Second, as set forth in the Complaint, Facebook has at least a fifty-billion dollar interest in vaccine programs, in the form of Zuckerberg's personal investments in for-profit vaccine development and Facebook's ad revenue derived from vaccine producers. 3-ER-521-25. These financial interests plausibly suggest that Facebook's "primary purpose" was economic benefit when it wrongly branded the opinions and accurate data posted on CHD's pages as "false". At the very least, this "fact driven" issue should not be resolved against CHD on a Rule 12(b)(6) motion. *See, e.g., P&G v. Amway Corp*., 242 F.3d 539, 552-53 (5th Cir. 2001) (remanding to trier of fact to

determine if speech was economically motivated and thus "commercial speech" based on all relevant evidence).

C. Facebook's Claim that the First Amendment Protects Its RICO And Lanham Act Violations Makes No Legal Sense.

Finally, Facebook argues "the First Amendment bars CHD's statutory claims." (AB 57.) This assertion makes no legal sense. A Lanham Act disparagement violation exists only where there is false commercial speech, and "false commercial speech cannot qualify for the heightened protection of the First Amendment." *P&G v. Amway*, 242 F.3d at 561. Similarly, a RICO wire fraud violation exists only where there is fraud, and "[t]he First Amendment does not protect fraud." *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1239 (9th Cir. 1997). Facebook cites not a single case holding that an otherwise well-pleaded RICO or Lanham Act claim is barred by the First Amendment. The reason is simple. Where (as here) a plaintiff has otherwise properly alleged a RICO wire fraud or Lanham Act disparagement violation, the First Amendment does not apply. As Judge William Alsup observed in *Dreamstime.com, LLC v. Google, LLC*, No. C 18-01910, 2019 U.S. Dist. LEXIS 94573 at *4-5 (N.D. Cal. Jun. 5, 2019), "[j]ust [as] a fast-talking con-artist cannot hide behind the First Amendment, neither can Google." Or Facebook.

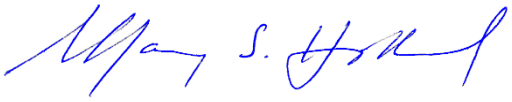
CONCLUSION

For all these reasons, this Court should reverse the district court's dismissal order and remand for further proceedings.

Dated: February 17, 2022

Respectfully submitted,

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



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