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 REPLY IN SUPPORT OF THIRD MOTION FOR JUDICIAL NOTICE

ROGER I. TEICH
Cal. State Bar No. 147076
290 Nevada Street
San Francisco, CA 94110
Telephone: (415) 948-0045
rteich@juno.com

JED RUBENFELD (*pro hac vice*)
1031 Forest Road
New Haven, CT 06515
Telephone: (203) 387-2505
rubenfeldjed@gmail.com

ROBERT F. KENNEDY, JR. (*pro hac vice*)
MARY HOLLAND (*pro hac vice*)
Children's Health Defense
1227 North Peachtree Parkway
Suite 202
Peachtree City, GA 30269
Telephone: (917) 743-3868
mary.holland@childrenshealthdefense.org

Counsel for Appellant

With virtually every passing week come fresh disclosures of secret communications between federal officials and social media platforms, including Facebook, working together to suppress constitutionally protected speech—in the words of one eminent constitutional scholar, "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. For obvious reasons, Facebook hopes this Court will not notice what the rest of the world is seeing.

In this motion, Appellant Children's Health Defense ("CHD") asks the Court to take judicial notice of a handful of newly revealed communications. In these communications, (1) both the White House and Facebook expressly refer to themselves as "***partners***" in the effort to remove or suppress disfavored speech (Items 5, 8 (emphasis added)); (2) government officials repeatedly urge Facebook to censor speech; and (3) the parties confer in detail about what speech Facebook should censor. Moreover, in these communications, CHD itself is singled out as a target of this public-private censorship partnership, as is CHD's chairman, Robert F. Kennedy, Jr. (Items 1, 8, 11.)

By itself, this evidence of state action would be sufficient to defeat a motion to dismiss. *See, e.g.*, *United States v. Rosenow*, 202 250 F.4th 715, 733 (9th Cir. 2022) (search by private party; state action claim can be stated if plaintiff can plausibly allege "active participation or encouragement" by government agents);

Crowe v. County of San Diego, 608 F.3d 406, 440 (9th Cir. 2010) (state action claim can be stated if evidence suggests even a "*tacit* 'meeting of the minds'") (emphasis added); *Rimac v. Duncan*, 319 F. Appx. 535, 537 (9th Cir. 2009) (state action claim stated where plaintiff "alleged that [private party and government official] met, agreed to remove the trees, and came to a plan"); *United States v. Davis*, 482 F.2d 893, 898 (9th Cir. 1973) (state action shown where "[t]he FAA and the airlines worked together to put the system into operation at the nation's airports" as part of a "cooperative effort"). When these materials are coupled with the pre-existing allegations and judicially noticeable facts in this case, there can be no doubt that CHD has pleaded a plausible state action claim.

CHD and the American public have a right to discover the full extent of the censorship collaboration between the federal government and Facebook. The lower court's pre-discovery dismissal of this case must therefore be reversed.

ARGUMENT

I. *Facebook misrepresents the applicable legal standard.*

Facebook asserts that judicial notice on appeal is appropriate only to prevent "a miscarriage of justice." (Dkt #79 at 1.) This badly misrepresents the law.

Federal Rule of Evidence 201, which governs judicial notice, is mandatory: at "any stage of the proceeding," a court "***must*** take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c),

(d) (emphasis added). As this Court has expressly stated, while "We '***may*** judicially notice a fact'" sua sponte when appropriate, "We '***must*** take judicial notice if a party requests it and the court is supplied with the necessary information.'" *Kismet Acquisition, LLC v. Diaz-Barba*, 755 F.3d 1130, 1142 (9th Cir. 2014) (quoting F.R.E. 201(c)) (emphasis added).

This Court routinely takes judicial notice on appeal.[1] Facebook itself has no difficulty asking this Court for judicial notice when that suits its interest.[2] In any event, it is well established that "new developments" in a case are especially appropriate for appellate judicial notice. *See, e.g., Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 151 (3d Cir. 1973) ("normal rule" limiting appeal to existing record "is subject to the right of an appellate court in a proper case to take judicial notice of new developments"); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971) ("we take judicial notice of a number of developments since the taking of this appeal,

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[1] In just the last seven days, see *Sekerke v. City of Nat'l City*, No. 21-56062, 2023 U.S. App. LEXIS 2047, at *2 (9th Cir. Jan. 26, 2023); *Athena Cosmetics, Inc. v. Amn Distrib., Inc.*, No. 22-55159, 2023 U.S. App. LEXIS 1734, at *1 n.2 (9th Cir. Jan. 24, 2023); *Capistrano Unified Sch. Dist. v. S.W.*, No. 22-55295, 2023 U.S. App. LEXIS 1620, at *1 n.1 (9th Cir. Jan. 23, 2023).

[2] S*ee, e.g., Havensight Capital LLC v. Facebook*, 776 F. Appx. 420, 421 (9th Cir. 2019). Indeed, outrageously, in this very motion, Facebook asserts that the so-called "Disinformation Dozen" (a group including Mr. Kennedy) are "recognized as responsible for the majority of online vaccine misinformation," citing a discredited Internet source. (Dkt. #79 at 9-10 & n.1.) This is nothing more than a ploy to have the Court take judicial notice of an obviously non-noticeable, extra-record fact—in a brief arguing against judicial notice on appeal.

called to our attention by the parties, since such circumstances may affect our consideration of the various issues presented") (emphasis added).

The "miscarriage of justice" standard referenced by Facebook was set forth in *Bolker v. Commissioner of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985). *Bolker*, however, concerned not ***judicial notice***, but rather consideration of a ***new issue on appeal***. *See id*. ("As a general rule, we will not consider an issue raised for the first time on appeal," but "exceptions" exist such as when "review is necessary to prevent a miscarriage of justice"). The instant motion raises no new issues. Thus *Bolker* is inapplicable, and Facebook's asserted "miscarriage of justice" standard simply misstates the law.

II. *The Materials Submitted Are Judicially Noticeable*.

Where the authenticity of documents is not in dispute—and Facebook raises no disputes about authenticity—judicial notice of such documents is proper at a minimum "for purposes of establishing when and by whom certain contentions" were made, as opposed to "the truth of the matters discussed in the documents." *Kurtz v. Goodyear Tire & Rubber Co.*, No. 19-16544, 2020 U.S. App. LEXIS 27059, at *2 (9th Cir. Aug. 25, 2020).

CHD is ***not*** submitting the materials here to prove the truth of the matters asserted therein, but rather to show, as in *Kurtz*, who made certain contentions and when—facts that, in themselves, plainly bolster the plausibility of CHD's state

action claims. For example, in April, 2021, a White House official emailed Facebook complaining that "the top post about vaccines today is tucker [sic] Carlson saying they don't work" and "[y]esterday was Tomi Lehren saying she won't take one." (Item 9.) CHD does not submit this email to show the truth of these statements. In the same exchange, the official goes on to complain that "[t]here's 40,000 shares on the video" and adds, "Not for nothing but last time we did this dance, it ended in an insurrection." (Item 9.) Again, this email is not submitted for the truth of the matters asserted.

Instead, CHD submits these emails simply to show that a White House official made these statements to Facebook, because that fact—*whether the statements are true or false*—is evidence of the government urging and pressuring Facebook to censor COVID-related speech, and of the government and Facebook working closely together to censor such speech. Because Facebook has not disputed the authenticity of the emails, and because CHD has not submitted them to prove the truth of the matters asserted, judicial notice is proper—indeed mandatory under Rule 201(c).[3]

[3] Similarly, CHD does not submit the proffered deposition testimony by a CDC official (Item 14) to prove the truth of the matter asserted. When a CDC official reads into the record at a deposition an email the government has received from Facebook stating that Facebook has censored content "as the result of our work together" (Item 14), that statement is of course not self-proving, but the fact that Facebook wrote such an email is again evidence of, and adds to the plausibility of, joint action.

III. *The Submitted Communications Are Material to, and Add Further Plausibility to, CHD's State Action Claims*

Finally, Facebook argues that the submitted materials have "no bearing on the issues raised in this appeal." (Dkt. #79 at 2.) That contention is absurd on its face, and Facebook's arguments on this point are disingenuous at best.

A. *The emails do not "post-date" the allegations in this case.*

Facebook asserts that the communications "post-date[] all of the allegations in the complaint." (*Id*.) This is false and deceptive for two different reasons.

First, as Facebook well knows, the complaint in this case states a claim of "***ongoing***" state-action censorship by Facebook. (*See* 3-ER-437 (alleging a "close and ***ongoing*** working relationship" between federal government and Facebook "to censor, flag, or demote" content) (emphasis added); 3-ER-439.) The complaint seeks a declaratory judgment of the unlawfulness of this ***ongoing*** censorship (3-ER-565), and hence communications between Facebook and the government post-dating the complaint remain centrally relevant.

Even more fundamentally, and again as Facebook well knows, CHD twice filed below F.R.C.P. 15(d) supplemental pleadings adding allegations of facts that occurred after the filing of the complaint. (2-ER-303-308, 2-ER-138-147.) All the communications submitted in the instant motion are relevant to these subsequently-added allegations.

For example, CHD alleged below that on February 11, 2021, at the behest of the White House, Facebook terminated Robert F. Kennedy, Jr.'s 800,000-follower Instagram account. (2-ER-304.) Item 1 of the materials submitted with the instant motion ***pre-dates*** that de-platforming and is highly material thereto. Item 1 contains a January 22, 2021 email from a White House official to Twitter stating, "Hey folks—Wanted to flag the below tweet and am wondering if we can get moving on the process for having it removed ASAP," referencing a particular post by Mr. Kennedy. To be sure, this communication was made to Twitter, not Facebook, but it directly supports CHD's allegation that "the White House is 'specifically pushing' Facebook, Twitter, and Google to suppress or prevent from reaching wide audiences 'chatter that deviates from officially distributed COVID-19 information,' or both." (2-ER-315.) It also adds plausibility to CHD's claim that in late January, 2021, the White House was specifically targeting Mr. Kennedy for censorship, lending further credence to CHD's allegation that the White House was pressuring Facebook to censor Mr. Kennedy around the same time—which was only two weeks before Facebook deplatformed his Instagram account.

Similarly, CHD's 2021 supplemental pleadings alleged an intensifying, ongoing campaign of state action censorship by Facebook of so-called "vaccine hesitancy" content even when that content was factually true, causing CHD to increasingly self-censor its own Facebook posts. (2-ER-139; see also 2-ER-152-

158.) The new emails make reference to that very vaccine-hesitancy censorship campaign, including its application to true information. (Items 2, 4, 5.) Here again, Facebook's claim that the newly revealed emails have "no bearing" on this case attempts to sweep discrediting information under the rug.

B. *The materials add further plausibility to CHD's claims of state action.*

Arguing that the submitted materials do not "support an inference" of state action, Facebook begins by repeating the canard that, in addition to satisfying any one of the well-known state action tests set forth in *Brentwood Acad. v. Tenn. Sec. Sch. Athl. Ass'n,* 531 U.S. 288 (2001), CHD must also satisfy a separate, extra "rule of conduct" requirement. (Dkt. #79, at 4-6.) This is false.

There is no such extra "rule of conduct" requirement in state action analysis. It is well established that "[s]atisfaction of any one [*Brentwood*] test is sufficient to find state action." *Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021); *see also, e.g., Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1169 (9th Cir. 2022) (same); *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020) (same). This issue has been briefed twice before, and Facebook has never refuted (nor could it refute) *Pasadena*'s holding, so CHD will not belabor the point here.[4]

[4] Suffice it to say that the "rule of conduct" language Facebook cites is an incomplete quotation from the Supreme Court's pre-*Brentwood* decision in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). But as this Court expressly

The remainder of Facebook's brief is primarily devoted to showing that the materials submitted with this motion do not contain a "smoking gun" establishing coercion or joint action. (Dkt. #79 at 1, 6-11.) But CHD is not required to establish anything at this stage of the proceedings. All CHD must show to survive Rule 12(b)(6) dismissal is that the allegations in the complaint and the two supplemental pleadings, as well as the judicially noticeable material, together with all reasonable inferences drawn in CHD's favor, plead a "plausibly suggestive" claim of state action. *Disability Rights Mont., Inc. v. Batista*, 930 F.3d 1090, 1096 (9th Cir. 2019).

There can be no doubt that this standard is met here. Indeed, the emails submitted with this motion by themselves are sufficient. If express statements by a private party and federal agents in secret communications that they are "partners," coupled with numerous emails, some of which specifically target Plaintiff, showing them working closely together toward a common goal, do not plausibly suggest an inference of "willful participa[tion] in joint activity with the State or its agents," *Brentwood*, 531 U.S. at 296, it is hard to know what would.

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recognized in 2008, *Brentwood*'s "multi-factored" test is now the operative state action doctrine, replacing the *Lugar* test. *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 955 (9th Cir. 2008). Literally dozens of post-*Brentwood* cases have found state action pleaded or proven by applying the well-known *Brentwood* state action tests without reference to an additional "rule of conduct" requirement. This Court itself did so only a few months ago in *Garnier*, 41 F.4th at 1170-71.

In an analogous context—searches effected by private parties—this Court recently held that a claim of state action can be stated when there is "*active participation or encouragement*" by the government. *Rosenow*, *supra*, 250 F.4th at 733. The emails here come close to proving such "active participation and encouragement"; at a minimum, they raise a plausible inference thereof.

Facebook argues that the emails show Facebook disagreeing with some governmental censorship demands and this disagreement somehow negates any possible inference of joint action. (Dkt. #79 at 10.) The argument is specious. Parties to joint activity can of course differ as to particulars without changing the fact that they are by agreement working together to achieve a common objective. "[I]t is not at all uncommon for disagreements to occur in a common enterprise," and such disagreements do "not negate the existence of a single conspiracy." *United States v. Nersesian*, 824 F.2d 1294, 1304 (2d Cir. 1987); *cf. United States v. Upton*, 559 F.3d 3, 15 (1st Cir. 2009) ("mere disagreement" among conspirators fails to show withdrawal from conspiracy).

Finally, Facebook cites *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001) for the proposition that information exchange between private parties and governmental agents is insufficient—in Facebook's words, not *Radcliffe*'s—to "suggest state action." (Dkt. #79, at 8.) But *Radcliffe* was decided on summary judgment after two years of discovery, 254 F.3d at 779, not on a Rule 12(b)(6)

motion. And the *Radcliffe* Court found that the only private-public contact in that case was an "unremarkable exchange" between complainants and a district attorney. *Id*. at 783 ("[the DA] said she knew nothing about the matter, but would look into it"). Here, there is vastly more, including substantial evidence of agreement to work together toward a common objective (censoring speech), of joint decision-making about what speech to censor, and of active governmental participation and encouragement.

Under bedrock 12(b)(6) law, all of CHD's factual allegations must be accepted as true, and "all factual inferences" must be drawn "in the light most favorable to the plaintiff." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1221 (9th Cir. 2020). Under this standard, it is frankly inconceivable that the materials before the Court do not support a plausible inference of state action—whether through joint activity, government pressure, inducement through immunity, entwinement, symbiotic relationship, knowing acceptance of benefits, or a combination thereof—entitling CHD to discovery. For the foregoing reasons, CHD respectfully asks this Court to grant its judicial notice motion and to reverse the District Court's dismissal of this case.[5]

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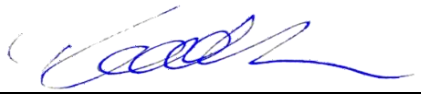
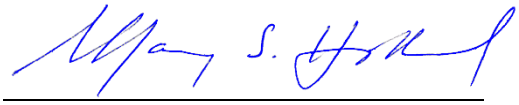
[5] CHD alleges that Poynter acted as a "fact-checker" agent or "spoke" in Facebook's "hub-and spoke" censorship enterprise with the government. Therefore, it matters not that Poynter's name does not appear in the newly-released documents (cf. Dkt. #80 at 2), where the role of "fact-checkers" in demoting content not provably false is laid out as part of that enterprise. (Item 2.)

Dated: February 2, 2023

Respectfully submitted,



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



MARY S. HOLLAND
General Counsel
Children's Health Defense

ROGER I. TEICH

Counsel for Appellant
Children's Health Defense

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply complies with the type-volume limitations of Circuit Rule 32-3(2) because the body of this Reply contains 2,756 words, which, when divided by 280, does not exceed the designated page limit of 10 pages.

This Reply also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(A) and was prepared in a proportionally spaced typeface using Word 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, I electronically filed the foregoing Reply with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Roger Teich
Counsel for Appellant
Children's Health Defense