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March 19, 2023

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

Re: ***Children's Health Defense v. Meta Platforms, Inc.*, et al.**, 21-16210
Appellant's Rule 28(j) Letter
(Oral argument May 17, 2022, before Judges Miller, Collins, and Korman)

Dear Ms. Dwyer:

Appellant CHD responds to Meta's submission of *O'Handley v. Weber*, No. 21-15071 (9th Cir. Mar. 10, 2023). CHD's allegations of the deep involvement of federal actors in Meta's decision-making are light years removed from *O'Handley*.

First, *O'Handley* made no allegation that California officials ***"significantly involve[d themselves] in [Twitter's] actions and decisionmaking" in a "complex and deeply intertwined process."*** (Slip op. at 18.) Here, the factual materials (alleged and noticeable) show myriad Federal agents, including White House officials, involving themselves in a complex, deeply intertwined process of agreeing and deciding with Meta about what COVID-related posts Meta would censor — *jointly* devising a "vaccine hesitancy" policy which censored CHD's true content; telling Meta (often falsely) what specific COVID posts to censor as "false," and which specific speakers, *e.g.*, CHD's chairman and spokesman Robert F. Kennedy Jr., should be de-platformed.

Second, in *O'Handley*, the alleged state action consisted of a state agency "flagging" *one* post concerning O'Handley, with Twitter alone deciding whether it breached Twitter's pre-existing, independently arrived-at speech policy. Here, the factual materials show federal agents working closely with Meta ***to define and set***

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those very policies for COVID-related speech. Thus, Meta's COVID censorship decisions were applications of policies which Meta and the government jointly-devised, and jointly-revised as self-proclaimed "partners." Here, the facts allege an ongoing conspiracy in which public officials "'*dominate*' [private] decision making[.]" *Villegas v. Gilroy Garlic Festival Association*, 541 F.3d 950, 955 (9th Cir. 2008) (en banc).

Third, in *O'Handley*, there were no allegations of ***coercive threats***, nor could there be since California OEC lacks enforcement power. Here, CHD has alleged numerous threats from the Federal government to impose catastrophic consequences on Meta if it did not censor speech they disfavored – including plausible, aggressive threats from "the highest levels" of the White House. (Dkt. #76-1 at 5.)

Fourth, in *O'Handley*, California had not induced Twitter to censor by ***statutorily immunizing*** Twitter. Here, that is what the federal government has done through Section 230— a major state action factor under *Skinner*.

Fifth, *O'Handley* confirms that a showing under the second prong of the two-part *Lugar* test suffices for state action.

Sincerely,

Roger Teich
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Children's Health Defense

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing letter complies with the type-volume limitations of Fed. R. App. P. 28(j) and Ninth Circuit local rules because the body contains 350 words. This letter also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(A) because this letter was prepared in a proportionally space typeface using Word 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2023, I electronically filed the foregoing 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.

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