No. 23-15858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUSTIN HART,

Plaintiff-Appellant

v.

META PLATFORMS, INC., F/K/A FACEBOOK, INC.; X CORP., SUCCESSOR IN INTEREST TO TWITTER, INC.; VIVEK MURTHY IN HIS OFFICIAL CAPACITY AS UNITED STATES SURGEON GENERAL; JOSEPH R. BIDEN, JR. IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND THE OFFICE OF MANAGEMENT AND BUDGET,

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-00737

Hon. Charles R. Breyer

APPELLANT JUSTIN HART'S OPENING BRIEF

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INTRODUCTION

Congress determined that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). It is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet" that is "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

Congress spoke very clearly that the Internet is a marketplace of ideas *unfettered* by government regulation. This means Executive Branch officials cannot infringe upon speech that accesses the Internet — the most important place today in a spatial sense "for the exchange of views," *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997), "and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). It also means that Executive Branch officials cannot use private social media companies as proxies to have them do what the federal government cannot — restrict users' speech on their platforms that access the Internet. But that is what they did. And this case is about regulating free speech on the Internet.

Here, federal officials, Facebook, and Twitter violated Justin Hart's First Amendment right to speak about a matter of public concern — COVID-19. Federal officials at the Centers for Disease Control and Prevention provided social media companies with content moderation training on COVID-19 "misinformation," which Facebook and Twitter adopted to restrict Hart's speech on their platforms and the Internet.

Facebook and Twitter are private social media companies. But they become state actors when the government so far insinuates itself into a position of interdependence with them. The record shows substantial cooperation and interdependence between federal officials, Facebook, and Twitter. Their joint acts infringed upon Hart's Free Speech rights.

First, the district court was wrong to dismiss Hart's First Amendment Free Speech claim. His Amended Complaint and Exhibits plausibly show that the CDC Chief of Digital Media provided content moderation training and records on COVID-19 "misinformation" to Facebook and Twitter, which they adopted to restrict Hart's posts on masking on their platforms and the Internet. In other words, Facebook and Twitter restricted Hart's free speech rights because of the training on "misinformation" that they received from federal officials.

Second, the district court was wrong to grant Judgment in favor of HHS and OMB on Hart's Freedom of Information Act (FOIA) claim. The district court did not have an adequate factual basis to award judgment in their favor because the agencies did not move for summary judgment.

This Court should reverse the district court's decision.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over the claims pursuant to 28 U.S.C. § 1331 (federal claims) and 28 U.S.C. § 1367 (supplemental state claims).

On June 8, 2023, Appellant-Plaintiff Justin Hart filed a timely Notice of Appeal (4-ER-646), from the district court's Judgment entered on May 9, 2023 (1-ER-002), dismissing the case against him and in favor of Appellees-Defendants Meta Platforms, Inc., f/k/a Facebook, Inc.; X Corp., successor in interest to Twitter, Inc.; Surgeon General Vivek Murthy; President Joseph Biden; Department of Health and Human Services; and the Office of Management and Budget.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

The First Amendment to the United States Constitution states,

> Congress shall make no law . . . abridging the freedom of speech.

U.S. Const. amend. I.

47 U.S.C. § 230 states in relevant part:

> **(a) FINDINGS**
>
> The Congress finds the following:
>
> **(1)** The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> **(2)** These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> **(3)** The Internet and other interactive services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> **(4)** The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

(f) DEFINITIONS

As used in this section:

(1) INTERNET

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Are private social media companies state actors when federal officials provide them content moderation training and records on "misinformation," that companies adopt to restrict users' speech on their platforms that access the Internet?

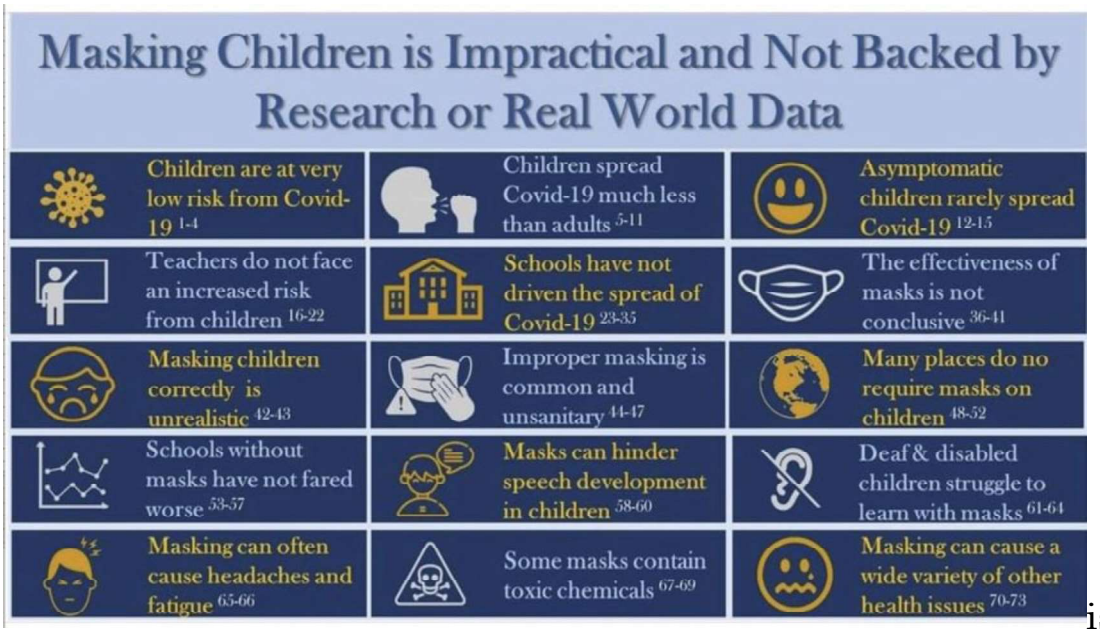
2. Does a federal agency's unverified Answer to a FOIA claim give district courts an adequate factual basis to award judgment in favor of the agency?

STATEMENT OF THE CASE

This case arises out of the federal government's collaboration with Facebook and Twitter to suppress Plaintiff Justin Hart's speech.

A. Defendants Censor Justin Hart's Facebook and Twitter Posts

On or around July 13, 2021, Hart posted the following graphic, entitled "Masking Children is Impractical and Not Backed by Research or Real World Data," to his personal Facebook page:



is

2-ER-048.

The graphic makes various statements about whether requiring children to wear facemasks is effective to protect children from COVID-19 and prevent transmission of the disease, such as "Children are at very low risk from Covid-19," "Masking can often cause headeaches and fatigue," and "Masks can hinder speech development." The graphic also includes footnotes with scientific support for each of its claims. 2-ER-048.

On or about the same day, Facebook sent Hart the following notice:

> **You can't post or comment for 3 days.**
>
> This is because you previously posted something that didn't follow our Community Standards.
>
> This post goes against our standards on misinformation that could cause physical harm, so only you can see it.
>
> **Learn more about updates to our standards.**

2-ER-048.

On or about July 18, 2021, Hart posted the following commentary on masking to his personal Twitter account:

> So the CDC just reported that 70% of those who came down with #COvId19 symptoms had been wearing a mask. We know that masks don't protect you… but at some point you have to

> wonder if they are PART of the problem.

2-ER-048. Later that same day, Twitter locked Hart's account and sent him the following notice: email

> **Hi Justin Hart,**
>
> **Your Account, @justin_hart has been locked for violating the Twitter Rules.**
>
> Specifically for: Violating the policy on spreading misleading and potentially harmful information related to COVID-19.

2-ER-049.

B. The Federal Government Works with Facebook and Twitter to Censor Social Media Posts About COVID-19

In the months preceding the censorship of Hart's posts, the federal government worked closely with Facebook and Twitter to censor messages about COVID-19 that it disfavored. 2-ER-049. The Biden Administration publicly revealed this at a July 15, 2021, White House press conference, announcing that a team of government employees was actively researching and tracking social media posts with which it disagreed and relaying those posts to the social media companies with instructions to take them down. 2-ER-049. At that press conference, Defendant Surgeon General Vivek Murthy stated: "We're asking [our

technology companies] to consistently take action against misinformation super-spreaders on their platforms." 2-ER-049.

White House Press Secretary Jen Psaki gave further details. 2-ER-049. "We've increased disinformation research and tracking within the Surgeon General's office," she said. 2-ER-049. "We're flagging problematic posts for Facebook that spread disinformation." 2-ER-049. Psaki added: "[W]e are in regular touch with these social media platforms, and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team . . . ." 2-ER-050. The next day, Psaki revealed that the far-reaching effort targeted multiple posts on multiple social media sites: "You shouldn't be banned from one platform and not the others." 2-ER-050.

At the January 15, 2021, press conference Psaki explained that President Biden and Surgeon General Murthy had directed four key changes for social media platforms. 2-ER-050. First, social media companies were to "measure and publicly share the impact of misinformation on their platform." 2-ER-050. Second, the companies were to "create a robust enforcement strategy that bridges their properties and provides transparency about the rules." 2-ER-050. Third,

Psaki stated that "it's important to take faster action against harmful posts" because "information travels quite quickly on social media platforms; sometimes it's not accurate," adding "Facebook needs to move more quickly to remove harmful, violative posts." 2-ER-051. Finally, Biden and Murthy directed Facebook to "promote quality information in their feed algorithm." 2-ER-051.

At Biden's direction, Murthy created and published a 22-page Advisory with instructions on how social media companies should remove posts with which Biden and Murthy disagree. 2-ER-051. Biden further threatened social media companies that do not comply with his directives by publicly shaming and humiliating them, saying "They're killing people." 2-ER-051.

Moreover, since April, the Department of Health and Human Services ("HHS") and the Centers for Disease Control and Prevention ("CDC") had been working with Facebook and Twitter to further control the expression of information and viewpoints on COVID-19 on those platforms.

1. *April 1, 2021* – HHS accepts $15 million in ad-credit from Facebook "to extend the [CDC's] reach of COVID-19-related Facebook content."

Available evidence of that collaboration begins with an April 2021 agreement between HHS and Facebook, under which HHS accepted a $15,000,000 "gift" in advertising credits to be used by the CDC "to extend the reach of COVID-19-related Facebook content." 2-ER-082.

On April 5, 2021, Taylor emailed a copy of the signed agreement to Payton Iheme, a Facebook employee in charge of U.S. Public Policy. 2-ER-081. The subject line of Taylor's email says, "Acceptance of in-Kind Services." 2-ER-081. On April 8, 2021, on the same email chain, Iheme sent emailTaylor an email and provided "a signed copy" of the agreement for Taylor's files. 2-ER-081.

2. *April 23, 2021* – CDC Chief of Digital Media Carol Crawford emails Iheme regarding Facebook's algorithms' restriction of valid public healthmessages.

On April 23, 2021, CDC Chief of Digital Media Carol Crawford emailed Iheme and said that the Wyoming Department of Health had contacted her to let her know that Facebook's algorithms, as well as other social media platforms' algorithms, were restricting valid public

health messages and communications, including those made by the Wyoming Department of Health. 2-ER-235-36.

3. *April 29, 2021* – Iheme emails Crawford "to schedule a training with CDC" on "Community Standards, COVID-19 misinformation and harm policies."

CDC then began arranging training sessions with Facebook and Twitter on the suppression of disfavored viewpoints on COVID-19, and began identifying specific examples of posts that should be censored.

On April 29, 2021, Iheme emailed Crawford, according to Crawford's sworn testimony that she gave in another case.[1] During her deposition, Crawford was asked to read Iheme's email to her, and Crawford testified as follows:

> Q. All right. Let's take a look at the next one. Payton to you on April 29 at 6:23. Can you read her response to you?
>
> A. (As read) Thank you, Carol. Regarding vaccines.gov -- or vaccine.gov -- we haven't had any specific requests from the White House on this. We've been working at the state level on our

[1] Crawford's deposition transcript from that case, *Missouri v. Biden,* No. 3:22-cv-1213-TAD-KDM (W.D. La.), is part of the record in this case. 3-ER-511. Crawford testified in a videotaped deposition at the CDC's Office of General Counsel in Atlanta, Georgia on November 15, 2022. 2-ER-277. A Georgia Certified Court Reporter certified on November 18, 2022, to a true record and transcript of Crawford's sworn testimony. 3-ER-547.

> vaccine finders tools and promotions. I also want to followup on our COVID-19 misinfo reporting. Our team is looking to schedule a training with CDC and Census colleagues who will be reporting content through the tool. It will cover Community Standards, COVID-19 misinformation and harm policies and a walkthrough of the reporting tool.

3-ER-511.

4. *May 6, 2021* – Crawford sends an email to Iheme with 16 "example posts" of "Misinfo on two issues."

On May 6, 2021, Crawford sent an email to Iheme with the subject line "Misinfo on two issues," which included 16 "example posts" from Facebook users who had posted on their platforms (Facebook and Instagram) messages related to COVID-19. 2-ER-084-86. emailCrawford's email explained to Iheme that the CDC had concluded that 16 specific posts made by users on Facebook platforms were "misinfo." 2-ER-084. These 16 posts that Crawford and the CDC had identified as "misinfo" included a screenshot of the "Post text" and a hyperlink to the posts themselves, communicated by users on either Facebook or Instagram platforms. 2-ER-084-86.

5. *May 10, 2021* – Iheme sends an email to Crawford on "CV19 misinfo reporting channel" to discuss "scheduling training for the government case work project."

On May 10, 2021, Iheme emailed Crawford—subject line (subject "CV19 misinfo reporting channel"—and notified emailher about "scheduling training for the government case work project." 2-ER-229.

6. *May 14, 2021* – Crawford conducts first BOLO training meeting with Iheme and Boyle.

On May 14, 2021, Crawford sent an email to social media companies including Facebook and Twitter with the subject line "Follow up info from BOLO meeting." 2-ER-088. BOLO stands for "Be on the lookout." 2-ER-091. Crawford then said, "Thank you for attending. Here are the slides." 2-ER-088. The nine-page pdf attachment, entitled "CDC Working Group Meeting," included the full set of CDC Working Group Meeting slides from the first BOLO training meeting. 2-ER-088-97. Facebook was represented at this BOLO meeting by Iheme. 2-ER-088. Twitter was represented at this BOLO meeting by Todd O'Boyle, a top lobbyist in Twitter's Washington D.C. office and the White House's Twitter point of contact. 2-ER-065, 088.

In her email, Crawford gave Iheme and O'Boyle training and instruction and used VAERS as an example to make a point she had been discussing with them on a previous call.[2] 2-ER-088. And she said,

> Also, as mentioned on the call, any contextual information that can be added to posts about VAERS could be very effective in education [sic] the public about what VAERS is. CDC.gov includes authoritative information about VAERS, such as the following taken from this page: *"VAERS accepts reports from anyone, including patients, family members, healthcare providers and vaccine manufacturers. VAERS is not designed to determine if a vaccine caused or contributed to an adverse event. A report to VAERS does not mean the vaccine caused the event."*

2-ER-088. Crawford's email to Iheme and O'Boyle included her position that she held with the CDC, her government issued email address of ccrawford@cdc.gov, and her telephone number. 2-ER-088.

The CDC's slides provided to Iheme and O'Boyle contained a formal "Agenda" on COVID-related "Misinformation" "Hot Topics" as determined by Crawford and the CDC. 2-ER-088-89. Two specific "Example posts" were included in the slides and records as instructions and warnings to which Facebook and Twitter should be-on-the-lookout

[2] VAERS stands for Vaccine Adverse Event Reporting System. 2-ER-092.

on their platforms, according to the CDC and Crawford. 2-ER-091. Juxtaposed side-by-side were two illustrative posts, one labeled "*Example post spreading false claim*," the other labeled "*Example post with correct information*." 2-ER-092.

The slides included a section called "Logistics." 2-ER-090. Under "Logistics," the CDC instructed participants like Iheme and O'Boyle to contact Crawford as the "Point of Contact" if they wanted "a follow-up meeting to discuss information presented" and included a different government issued email address for Crawford – cjy1@cdc.gov. 2-ER-090. The CDC further informed participants like Iheme and O'Boyle that the "Next Meeting Date" would be announced. 2-ER-090.

And highlighted in bold at the bottom of each of the slides — except the first and last pages — it said, "DRAFT – THIS INFORMATION IS NOT FOR FURTHER DISTRIBUTION." 2-ER-090-96.

7. *May 28, 2021* – Crawford conducts second BOLO training meeting with Iheme and O'Boyle and provides COVID Misinformation training slides.

On May 28, 2021, the CDC's Crawford sent an email regarding a second BOLO meeting that day with representatives from social media platforms, including Iheme and O'Boyle, on COVID-19

"Misinformation." 2-ER-099. The subject line of Crawford's email said, "Follow up info from BOLO meeting on 5/28." 2-ER-099. Crawford's email to participants included her position that she held with the CDC, her government issued email address of ccrawford@cdc.gov, and her telephone number. 2-ER-099. The pdf attachment containing the slides and records said, "CDCboloslides528." 2-ER-099.

The CDC's slides provided to Iheme, and O'Boyle contained a formal "Agenda" on COVID-related "Misinformation" "Hot Topics" as determined by Crawford and the CDC. 2-ER-100-01. Specific "Example posts" were discussed and highlighted for participants as determined by Crawford and the CDC. 2-ER-102-04.

As in the First BOLO Meeting, the second meeting's slides included a section called "Logistics." 2-ER-101. Under "Logistics," the CDC instructed participants to contact Crawford as the "Point of Contact" if they wanted "a follow-up meeting to discuss information presented" and included a different government issued email address for Crawford – cjy1@cdc.gov. 2-ER-101. The slides informed participants that the "Next Meeting Date" would be announced. 2-ER-101.

In her email, Crawford instructed participants to not disclose the BOLO slides, and she said, "Please do not share outside your trust and safety teams." 2-ER-099. Crawford concluded her email: "Let us know if you have any questions." 2-ER-099.

And like the First BOLO Meeting's slides, the second meeting's slides highlighted in bold at the bottom of each page of the slides (except the first and last): "DRAFT – THIS INFORMATION IS NOT FOR FURTHER DISTRIBUTION." 2-ER-101-05.

8. *June 17, 2021* – Crawford cancels third BOLO training meeting scheduled for the following day and provides Iheme and O'Boyle COVID Misinformation training slides.

On June 17, 2021, Crawford sent another email regarding a third BOLO training meeting to Iheme and O'Boyle, on COVID-19 "Misinformation, with the subject line "In lieu of a BOLO meeting tomorrow." 2-ER-108. Crawford noted in her email that she had to cancel the BOLO meeting scheduled for the following day because of a new federal holiday, but she was still providing the BOLO slides (entitled "CDC Working Group Meeting") to Iheme and O'Boyle for their reference. 2-ER-108.

The training slides contained a formal "Agenda" on COVID-related "Misinformation" "Hot Topics" as determined by Crawford and the CDC. 2-ER-109-10. Again, specific "Example posts" were discussed and highlighted for participants as determined by Crawford and the CDC. 2-ER-111-13.

Again, the slides included a section called "Logistics." 2-ER-110. Under "Logistics," the CDC instructed participants like Iheme and O'Boyle to contact Crawford as the "Point of Contact" if they wanted "a follow-up meeting to discuss information presented" and included a different government issued email address for Crawford – cjy1@cdc.gov. 2-ER-110.

The CDC further informed participants like Iheme and O'Boyle that the "Next Meeting Date" would be announced. 2-ER-110. Like the first two BOLO training meetings, highlighted in bold at the bottom of each page of the slides (except the first and last) it said, "DRAFT – THIS INFORMATION IS NOT FOR FURTHER DISTRIBUTION." 2-ER-110-14.

9. *July 23, 2021* – Ten days after Hart was censored, Facebook's Nick Clegg emails Murthy to report on the steps Facebook "took just this past week to adjust policies on what [it was] removing with respect to misinformation."

Shortly after the censorship of Hart's Facebook and Twitter posts, on July 23, 2021, Facebook's Nick Clegg emailed Surgeon General Murthy with a report to make sure Murthy saw the steps Facebook "took just this past week to adjust policies on what [it was] removing with respect to misinformation." 2-ER-238.

10. *August 20, 2021* – One month after Hart was censored, Clegg emails Murthy with a report that to date Facebook had "removed over 20 million pieces of content for COVID-and vaccine-related misinformation."

On August 20, 2021, one month after Hart was censored, Clegg sentemail Murthy an email with the subject line email"Facebook Covid actions." 2-ER-241. Clegg's email stated that to date Facebook had "removed over 20 million pieces of content for COVID-and vaccine-related misinformation." 2-ER-241.

C. Procedural History

On August 31, 2021, Hart filed a complaint against the Defendants. 4-ER-622-45. The complaint included two federal claims, a Free Speech claim in Count I and a FOIA claim in Count II, and it included four

additional state claims. 4-ER-622-45. On May 5, 2022, the district court entered an Order granting Defendants' motions to dismiss as to the Free Speech claim and declined to exercise supplemental jurisdiction over the state claims. 1-ER-010-27.

But the district court said, "Hart still has a FOIA claim against HHS and OMB as to his request for information about the Federal Defendants' supposed communications with Facebook and Twitter about his accounts." 1-ER-027. And the district court said that it would permit Hart to amend his complaint if he were to learn plausible facts that show federal officials, Facebook, and Twitter acted jointly in removing Hart's social media posts. 1-ER-027. On August 9, 2022, HHS and OMB filed an unverified five-page Answer to Hart's remaining FOIA claim, which the district court left open and active. 3-ER-616-20. HHS and OMB never moved for summary judgment, nor did they file any declarations or affidavits in defense of Hart's FOIA claim. 4-ER-651-66.

On February 15, 2023, Hart filed a motion for leave to amend his complaint. 2-ER-029-37. Hart's proposed Amended Complaint (2-ER-038-74) and supporting Exhibits (2-ER-075-3-ER-615) were included

with the motion. Hart sought to add additional facts uncovered such as the BOLO training meetings, and to add two additional parties as defendants: CDC Chief of Digital Media Carol Crawford, who provided training and records to Iheme and O'Boyle on COVID Misinformation; and Rob Flaherty, White House Director of Digital Strategy, based on additional emails uncovered between Flaherty and Facebook officials as alleged in the Amended Complaint. 2-ER-038-74.

On May 9, 2023, the district court entered an order denying Hart's motion for leave to amend his complaint "on futility grounds." 1-ER-003-09. In that order, the district court concluded that the BOLO meetings and slides provided by the CDC's Crawford to Facebook's Iheme and Twitter's O'Boyle did not meet the joint action test and said,

> That government officials asked Facebook and Twitter to generally be on the lookout for COVID-related misinformation and contacted the platforms about the prevalence of misinformation do not show that the government exercised dominant control over the social media companies' action in temporarily restricting Hart's accounts.

1-ER-007. The district court further addressed Crawford's deposition testimony that she gave in another case. 1-ER-007-08. And the district court opined on Crawford's deposition and said, "In any event, Hart

misconstrues Crawford's testimony." 1-ER-008. The same day on May 9, 2023, the district court entered a Judgment "in favor of the Defendants and against the Plaintiff." 1-ER-002.

SUMMARY OF THE ARGUMENT

First, the district court was wrong in denying Hart's First Amendment Free Speech claim. The district court erred by applying an incorrect legal standard because the court said, "Hart misconstrues Crawford's testimony." At the Rule 12(b)(6) stage — the proper test when amendment is denied "on futility grounds" — the district court must accept all factual allegations in Hart's proposed Amended Complaint as true and *construe* the pleadings in the light most favorable to *Hart*.

And Crawford testified under oath that Iheme wanted "to schedule a training with CDC" on "Community Standards, COVID-19 misinformation and harm policies." The district court was clearly wrong to construe Crawford's testimony against Hart because her testimony — along with her emails, BOLO training meetings, and slides — plausibly establish that Crawford provided training and records on COVID Misinformation to Iheme, and O'Boyle just prior to Facebook and

Twitter restricting Hart's ability to speak on their platforms and the Internet about his views on COVID-related masking.

Consider these questions: Why do Facebook and Twitter need training and records on COVID-19 Misinformation from the CDC's "Chief of Digital Media?" Aren't Facebook and Twitter the experts on Misinformation? If not, why did they tell Hart that he violated *their own* misinformation and harm policies, community standards, and rules? The record before this Court provides the answers. When they restricted Hart's posts on their platforms that accessed the Internet, Facebook and Twitter followed the government's misinformation and harm policies, community standards, and rules from the training and records Crawford provided Iheme, and O'Boyle — not their own.

Second, the district court was wrong to enter Judgment in favor of HHS and OMB on Hart's pending FOIA claim because their unverified Answer did not give the court an adequate factual basis to render judgment in their favor as a matter of law. Allowing FOIA claims to be resolved in favor of agencies absent a motion for summary judgment properly supported by declarations or affidavits — which the district court allowed — turns the Freedom of Information Act on its head.

STANDARD OF REVIEW

A. Rule 15 Motion to Amend – Futility Grounds – Rule 12(b)(6)

A trial court should give leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). The purpose of Rule 15 is to favor decisions on the merits, rather than on the pleadings or technicalities. *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). "Accordingly, Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality." *Id.*

Although a district court's denial of a motion to amend a complaint is generally reviewed for an abuse of discretion, *see AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012), an appellate court reviews de novo a district court's denial of leave to amend on futility grounds, *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010).

A proposed amended complaint is futile if it would be immediately "subject to dismissal." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998). Thus, the "proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading

challenged under Rule 12(b)(6)." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

Under the Rule 12(b)(6) standard, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 561-63 (2007)).

"A claim has facial plausibility when the plaintiff pleads the factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Caviness v. Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806, 812 (9th Cir. 2010). (internal quotation marks omitted). Courts must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. FOIA Claim

An appellate court first reviews a FOIA judgment as if it were a bench trial and determines de novo, "whether an adequate factual basis exists to support the district court's decisions." *Lane v. Dep't of Interior*,

523 F.3d 1128, 1135 (9th Cir. 2008). If an adequate factual basis does not support the district court's decision in awarding judgment, an appellate court must remand for further development of the record. *See Fiduccia v. Dep't of Justice*, 185 F.3d 1035, 1040 (9th Cir. 1999). The facts must be viewed in the light most favorable to the requestor requesting the documents from an agency under FOIA. *See Zemansky v. EPA,* 767 F.2d 569, 571 (9th Cir. 1985).

ARGUMENT

The district court erred in denying Hart leave to amend his complaint because the allegations of his proposed Amended Complaint—drawing all reasonable inferences in his favor—state a plausible claim that the federal government acted jointly with Facebook and Twitter to censor his posts and thus violate his First Amendment right to free speech. *See Knievel*, 393 F.3d at 1072.

The district court also erred in entering judgment against Hart on his FOIA claim because HHS and OMB never moved for or showed that they were entitled to summary judgment. *See Lane*, 523 F.3d at 1135.

I. Hart's First Amendment Free Speech claim is plausible.

Hart plausibly alleged a First Amendment Free Speech claim against Facebook, Twitter, Crawford, Murthy, Flaherty, and Biden in his proposed Amended Complaint. He alleged that the Facebook's and Twitter's removal of Hart's posts from their platforms violate the First Amendment. And the allegations of his proposed Amended Complaint and Exhibits show that federal officials insinuated themselves into a position of interdependence with Facebook and Twitter by providing them content moderation training and records on COVID-19 Misinformation, which Facebook and Twitter adopted to restrict Hart's speech on their platforms and the Internet.

A. Suppression of "misinformation" is an unconstitutional content-based restriction on speech.

Hart's proposed Amended Complaint states a viable First Amendment claim by alleging that Defendants targeted social media posts, including Hart's, for containing supposedly harmful "misinformation."

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Under

the Free Speech Clause of the First Amendment, "discrimination against speech because of its message is presumed to be unconstitutional." *Id.* "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion).

Thus, when regulating speech, the government must be neutral as to both viewpoint and subject matter. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). The general rule on content-based restrictions is that they must meet strict scrutiny. *See generally Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994).

To be sure, the Supreme Court has identified narrow categories of content-based unprotected speech where the government may regulate, such as obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography. *See*

Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011); *see also United States v. Stevens*, 559 U.S. 460, 468-69 (2010). But "misinformation" — the reason given to regulate Hart's speech — is not one of the narrow and limited categories of speech where government may regulate. And the Supreme Court has made clear that its past decisions "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 469, 472 (rejecting argument that "depictions of animal cruelty" should be added to the narrow list of unprotected speech).

Facebook stated that it censored Hart's Facebook post because it contained "misinformation that could cause physical harm." 2-ER-048. Similarly, Twitter stated that it restricted Hart's speech on its platform for allegedly "spreading misleading and potentially harmful information related to COVID-19." 2-ER-049. But the government's belief that a statement is "misinformation"—and its belief that the speech, if acted on, could cause "harm"—cannot bring that speech within one of the First Amendment's limited exceptions. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (setting forth the "clear and present danger" test).

B. Facebook and Twitter were state actors because federal officials provided them with content moderation training and records on COVID Misinformation.

Hart has also alleged facts that, if proven, would establish that Facebook and Twitter were state actors because federal officials urged and participated in their censorship.

A "private entity is not ordinarily constrained by the First Amendment." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). But a private party's actions may be recognized as those of the state's in certain limited circumstances. *See Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003).

This Court has "recognize[d] at least four different criteria, or tests, used to identify state action: (1) public function; (2) joint action; (3) government compulsion or coercion; and (4) governmental nexus." *Kirtley*, 326 F.3d at 1092. (internal quotation marks and citation omitted). Determining whether a private entity is acting through the state is "necessarily fact-bound." *Lugar v. Edmonson Oil Co.*, 457 U.S.

922, 939 (1982). "[T]here is no specific formula for defining state action." *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983).[3]

Private entities can be state actors if they are "willful participant[s] in joint action with the state or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). "[J]oint action exists when the state has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989); *see Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 532 U.S. 288, 296 (2001); *see also Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 754 (9th Cir. 2020). This type of action requires "a substantial degree of cooperative action." *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989).

Here, Plaintiff has alleged facts that, if proven, would establish that Facebook and Twitter were willful participants acting jointly with the federal government when they censored Hart's posts. The proposed

[3] The standard for demonstrating whether a private entity's actions constituted federal, or state action is identical, and a court may rely on precedent in either context to inform a state action analysis. *See Kitchens v. Bowen*, 825 F.2d 1337, 1340 (9th Cir. 1987).

Amended Complaint alleges that "Murthy and Biden knowingly engaged in viewpoint discrimination when they directed Facebook and Twitter to remove from the Internet social media posts and valid public health messages like those of Hart's that contained a viewpoint on COVID-19 that did not fit with their own political public health narrative." 2-ER-065. It further alleges that Murthy, Biden, and Executive Branch officials engaged in viewpoint discrimination by directing Facebook and Twitter to follow the federal government's "4 specific recommendations for improvement, holding BOLO meetings to target opposing public health messages, directing Facebook and Twitter to design algorithms to target such messages, and receiving a $15 million advertising credit to advertise the government's own unchallenged messages. 2-ER-065-66.

Assuming these allegations are true—and drawing all inferences in Hart's favor—they establish the elements of a joint action between the federal government and Facebook and Twitter.

Moreover, this Court has specifically recognized that the substantial cooperation and interdependence exist, and give rise to state action, when the government provides a private entity with training and

records. *Tsao v. Desert Palace*, 698 F.3d 1128, 1140 (9th Cir. 2012). In *Tsao*, private casino security guards had attended a training course given by the Las Vegas Municipal Police Department ("LVMPD"). *Id*. After participating in this training, the security guards were permitted to issue summons to trespassers at the casino, a power normally held exclusively by the state. *Id*. The LVMPD also frequently shared records regarding suspected trespassers with casino security they had trained. *Id*.

Following her arrest for trespass by casino security guards trained by the LVMPD, Laurie Tsao, a professional card counter, sued the casino for wrongful arrest. *Id*. at 1131 n. 1, 1138. The Ninth Circuit applied *Gorenc*, 869 F.2d at 507, and held that, "[b]y training [casino] security guards, providing information from the records department, and delegating the authority to issue citations," LVMPD had "so far insinuated itself into a position of interdependence with [the casino] that it must be recognized as a joint participant in the challenged activity." *Tsao*, 698 F.3d at 1140.

Here, as in *Tsao*, by training Iheme and O'Boyle in content moderation on COVID-19 Misinformation, providing CDC slides and

records on "authoritative information," and authorizing Facebook and Twitter to use specific CDC-approved language as "contextual information" to add "to posts" when making moderation decisions, Crawford, Murthy, Flaherty, and Biden so far insinuated the federal government into a position of interdependence with Facebook and Twitter that it must be recognized as a joint participant in the decisions to restrict Hart's valid public health messages on private platforms that accessed the Internet. *See id*.

The emails between Iheme and Crawford and her sworn testimony about Iheme reaching out to her on April 29, 2021, "to schedule a training with CDC" on "Community Standards, COVID-19 misinformation and harm policies," establish that Facebook received COVID Misinformation training from the CDC. 3-ER-511. Just a few days later on May 6, 2021, Crawford followed-up with Iheme in response to her request to commence this training. Crawford's email to Iheme said, "Misinfo on two issues." 2-ER-084. And Crawford proceeded to train Iheme on 16 specific posts made by users on Facebook and Instagram platforms that were "misinfo." 2-ER-084.

Then on May 10, 2021, Iheme emailed Crawford again to request further training, with the subject line "CV19 misinfo reporting channel." 2-ER-229. Iheme discussed with Crawford about "scheduling training for the government case work project." 2-ER-229.

On May 14, 2021, Crawford began the BOLO training meetings and proceeded to train social media companies on COVID Misinformation. Twitter's O'Boyle joined the First and Second BOLO training meetings along with Iheme. By attending and participating in the First and Second BOLO meetings, there is a meeting of the minds between Twitter and the CDC, as well as Facebook and the CDC, that Crawford would train O'Boyle and Iheme on COVID Misinformation.

Second, Crawford provided records and CDC "authoritative information" to Iheme and O'Boyle by providing them with three different sets of BOLO training slides on COVID Misinformation. The BOLO training slides show a remarkably high degree of detail and specificity. For example, in the First BOLO slides, juxtaposed side-by-side were two illustrative posts, one labeled "*Example post spreading false claim*," the other labeled "*Example post with correct information*." 2-ER-092.

And it is plain that the purpose of these trainings was censorship. In Crawford's email on the First BOLO Meeting, she expressly instructed Iheme and O'Boyle on how to make content moderation decisions on COVID-19 misinformation more "effective." 2-ER-088.

Crawford also explained to Iheme and O'Boyle that, in addition to simply censoring information, Facebook and Twitter could add "contextual information" "to posts." 2-ER-088. Crawford uses VAERS as an example to illustrate this point and explain this concept to Iheme and O'Boyle when Facebook and Twitter are confronted with content moderation decisions in the future. 2-ER-088. Crawford provided a hyperlink to a government CDC webpage and quoted specific "contextual information" in quotation marks and *italics* for Iheme and O'Boyle to use when Facebook and Twitter make content moderation decisions. 2-ER-088. And Crawford advised Iheme and O'Boyle to use this specific CDC-approved language that she highlighted in her email in quotation marks and *italics* — "contextual information" — to add "to posts" by users on their platforms that access the Internet.

Indeed, the same district court where Crawford gave her deposition testimony under oath, that the *Hart* district court relied on in error in

construing Crawford's testimony against Hart, just found that some of these same government defendants — with a similar record as this case —imposed "unrelenting pressure" on the social media companies to violate the First Amendment's guarantee of free speech. *Missouri v. Biden,* No. 3:22-cv-01213, 2023 U.S. Dist LEXIS 114585 at *121-22 (W.D. La. Jul. 4, 2023).

Further, the federal government received a benefit from having CDC officials train Facebook and Twitter on COVID-19 Misinformation for the purpose of moderating content on social media platforms that access the Internet. When the state knowingly accepts the benefits derived from unconstitutional behavior, the challenged action "can be treated as state action." *Tsao*, 698 F.3d at 1140; *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

By training Iheme and O'Boyle in COVID Misinformation content moderation and the regulation of so-called "misinformation" speech on platforms that access the Internet, federal officials could advance the government's views on COVID-19 and what the government deemed "misinformation," without the threat of competing, alternative views and public health messages on the Internet, such as Hart's. HHS and

CDC also received a financial benefit with the $15,000,000 "gift" from Facebook "to extend the [CDC's] reach of COVID-19-related Facebook content." By contrast, Hart has spent tens of thousands of dollars of his own money over the years purchasing advertising from Facebook and Twitter to promote his consulting business. 2-ER-057, 60.

Facebook and Twitter also benefited from having CDC officials train Iheme and O'Boyle and provide them with records on COVID-19 Misinformation. The government training and records provided to Facebook and Twitter employees on COVID-19 Misinformation allowed their team members exclusive access to public health information and materials unavailable to the general public during a global pandemic. Crawford made this exclusive use of the BOLO training slides clear by directing Iheme and O'Boyle to not share the slides outside of their "trust and safety teams." 2-ER-099.

C. Hart has Article III standing.

Justin Hart has Article III standing to pursue claims against Facebook, Twitter, Crawford, Murthy, Flaherty, and Biden because he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant[s], and (3) that is likely to be

redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Injury in fact. Justin Hart is an executive consultant with over 25 years' experience creating data-driven solutions for Fortune 500 companies and presidential campaigns alike. 2-ER-056. He is the Chief Data Analyst and founder of RationalGround.com, which helps companies, public policy officials, and parents gauge the impact of COVID-19 across the country. 2-ER-056. Hart suffered a concrete injury in fact when Facebook and Twitter harmed his online business by restricting and limiting his ability to educate and inform others, and by limiting other users' ability to access his valid public health messages and posts on the Internet, and then later by suspending his accounts. 2-ER-057-60. *See O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023).

Because Facebook and Twitter restricted Hart's Free Speech rights based on the content moderation training and records that they received from Crawford, federal officials Crawford, Murthy, Flaherty, and Biden are jointly liable to Hart along with Facebook and Twitter.

Traceability. Article III's traceability requirement is less demanding than the proximate causation regime. The traceability "causation chain

does not fail solely because there are several links" or because a single third party's actions intervened. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citation and internal quotation marks omitted); *see also Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014).

Drawing all reasonable inferences in his favor, Hart can establish his First Amendment Free Speech injury is fairly traceable to Facebook, Twitter, Crawford, Murthy, Flaherty, and Biden.

Facebook

There is a clear and direct causal line from Facebook flagging Hart's post on July 13, 2021, and its notice to Hart acknowledging that it suspended his account for his valid public health message about masking children, deemed to be "misinformation." Facebook restricted Hart's speech on its platform that accessed the Internet.

Twitter

There is a clear and direct causal line from Twitter flagging Hart's post on July 18, 2021, and its notice to Hart acknowledging that it locked his account for his valid public health message about masking,

deemed to be "misleading." Twitter restricted Hart's speech on its platform that accessed the Internet.

CDC's Carol Crawford / Facebook

There is a clear and direct causal line from Crawford directly overseeing and providing the training meetings and records on COVID-related Misinformation to Facebook's Iheme in May and June of 2021, and Facebook flagging Hart's post shortly thereafter on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

Further, there is an additional clear and direct causal line from Crawford directly negotiating with Iheme for $15 million dollars in free advertising credit to benefit the HHS/CDC, and Facebook flagging Hart's post shortly thereafter on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

CDC's Carol Crawford / Twitter

There is a clear and direct causal line from Crawford directly overseeing and providing the BOLO training meetings and records on COVID-related Misinformation to Twitter's O'Boyle in May and June of

2021, and Twitter flagging Hart's post on July 18, 2021, and its notice to Hart acknowledging that it locked his account for his valid public health message about masking, deemed to be "misleading."

Surgeon General Murthy / Facebook

There is a clear and direct causal line from Murthy to Facebook and his direct communications with Facebook's Nick Clegg on or about July 23, 2021, in an email, with a report from Clegg to Murthy, who told Surgeon General Murthy that Facebook took steps "just this past week to adjust policies on what [it was] removing with respect to misinformation," and Facebook flagging Hart's post approximately one week prior on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

Additionally, Crawford testified that CDC, HHS, and the White House were "collaboratively working on" COVID-related communications with social media platforms and there was "overlap from time to time" (3-ER-509), so there is a clear and direct causal line from Murthy to Crawford directly overseeing and providing the BOLO training meetings and records on COVID-related "misinformation" to

Facebook's Iheme in May and June of 2021, and Facebook flagging Hart's post shortly thereafter on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

Surgeon General Murthy / Twitter

As both the CDC's Crawford and Surgeon General Murthy work within the same agency, HHS, and there was "overlap from time to time," there is a clear and direct causal line from Murthy to Crawford directly overseeing and providing the BOLO training meetings and records on COVID-related Misinformation to Twitter's O'Boyle in May and June of 2021, and Twitter flagging Hart's post on July 18, 2021, and its notice to Hart acknowledging that it locked his account for his valid public health message about masking, deemed to be "misleading."

Rob Flaherty / Facebook

There is a clear and direct causal line from Flaherty directly to an anonymous Facebook official's report to Flaherty in an email on March 15, 2021 (3-ER-612-15), in which he affirmed his cooperation with Flaherty and the White House and said to Flaherty, "I'll expect you to hold me accountable," and Facebook flagging Hart's post on July 13,

2021, and its notice to Hart acknowledging that it suspended his account for his valid public health message about masking children, deemed to be "misinformation."

Additionally, because both Flaherty and Crawford had worked on behalf of the government to gain and earn the cooperation of social media companies regarding COVID-19 borderline content and there was "overlap from time to time," there is a clear and direct causal line from Flaherty to Crawford directly overseeing and providing the BOLO training meetings and records on COVID-related Misinformation to Facebook's Iheme in May and June of 2021, and Facebook flagging Hart's post shortly thereafter on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

Rob Flaherty / Twitter

Because both Flaherty and Crawford had worked on behalf of the government to gain and earn the cooperation of social media companies regarding COVID-19 borderline content and there was "overlap from time to time," there is a clear and direct causal line from Flaherty to Crawford directly overseeing and providing the BOLO training

meetings and records on COVID-related Misinformation to Twitter's O'Boyle in May and June of 2021, and Twitter flagging Hart's post on July 18, 2021, and its notice to Hart acknowledging that it locked his account for his valid public health message about masking, deemed to be "misleading."

This causal line from White House Director of Digital Strategy Flaherty to O'Boyle is further strengthened by the fact that O'Boyle was the top lobbyist in Twitter's Washington D.C. office and the White House's Twitter point of contact.

President Biden / Facebook

There is a clear and direct causal line from Biden to Murthy to Facebook and his direct communications with Facebook's Nick Clegg on or about July 23, 2021 in an email, with a voluntary and cooperative report from Clegg to Murthy, who said to Surgeon General Murthy that Facebook took steps "just this past week to adjust policies on what [it was] removing with respect to misinformation," and Facebook flagging Hart's post approximately one week prior on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

Moreover, as Biden oversees both Crawford and Murthy within the Executive Branch, and Crawford testified that CDC, HHS, and the White House were "collaboratively working on" COVID-related communications with social media platforms and there was "overlap from time to time," there is a clear and direct causal line from Biden to Crawford directly overseeing and providing the BOLO training meetings and records on COVID-related Misinformation to Facebook's Iheme in May and June of 2021, and Facebook flagging Hart's post shortly thereafter on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

Additionally, there is a clear and direct causal line from Biden to Crawford directly negotiating with Iheme for $15 million dollars in free advertising credit to benefit the CDC and HHS, both within the Executive Branch, and Facebook flagging Hart's post shortly thereafter on July 13, 2021, and suspending his account for his valid public health message about masking children, deemed to be "misinformation."

President Biden / Twitter

Because there was "overlap from time to time," there is a clear and direct causal line from Biden to Crawford directly overseeing and providing the BOLO training meetings and records on COVID-related Misinformation to Twitter's O'Boyle in May and June of 2021, and Twitter flagging Hart's post on July 18, 2021, and its notice to Hart acknowledging that it locked his account for his valid public health message about masking, deemed to be "misleading." This causal line from Biden to Crawford to Twitter is further strengthened since O'Boyle was the top lobbyist in Twitter's Washington D.C. office and the White House's Twitter point of contact.

Redressability. Hart's injury may be redressed by a judicial decision.

Hart alleges in his proposed Amended Complaint that, after his accounts were temporarily suspended, he remains active on Facebook and Twitter in an attempt to rebuild his brand and continue to post valid public health messages. 2-ER-068. But he further alleges that Facebook and Twitter now require that Hart and other users in the future express a government-approved viewpoint to use their platforms that reach the Internet. 2-ER-068. And such posts are subject to the

COVID-19 public health policies and control of the federal government and are no longer subject to Facebook's or Twitter's policies. 2-ER-068.

Hart seeks declaratory and injunctive relief against Crawford, Murthy, Flaherty, and Biden for violating his First Amendment Free Speech rights to speak on the Internet, and to stop them from directing Facebook and Twitter to utilize the federal government's policies on what constitutes COVID-19 "misinformation" on their platforms that access the Internet. 2-ER-072. Thus, Hart's injury may be properly redressed and adjudicated by a court. *See O'Handley*, 62 F.4th at 1162.

II. The district court was wrong to enter Judgment in favor of HHS and OMB on Hart's pending FOIA claim because their unverified Answer did not give the court an adequate factual basis to render judgment in their favor.

HHS and OMB failed to move for summary judgment and did not file any supporting declarations or affidavits in accordance with Rule 56. The district court erred in granting Judgment in their favor where they had only filed an unverified Answer to Hart's FOIA claim.

The FOIA's "core purpose" is to inform citizens about "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773-75 (1989) (cleaned up). Such access, in turn, will "ensure an informed citizenry, vital to the functioning of a

democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (cleaned up).

An appellate court first reviews a FOIA judgment as if it were a bench trial and determines de novo, "whether an adequate factual basis exists to support the district court's decisions." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008). If no adequate factual supports the district court's judgment, an appellate court must remand for further development of the record. *See Fiduccia v. Dep't of Justice*, 185 F.3d 1035, 1040 (9th Cir. 1999). The facts must be viewed in the light most favorable to the requestor requesting the documents from an agency under FOIA. *See Zemansky v. EPA,* 767 F.2d 569, 571 (9th Cir. 1985).

FOIA cases are resolved by the district court on summary judgment, and the district court enters judgment as a matter of law. *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc); *see also Cameranesi v. United States DOD*, 856 F.3d 626, 636 (9th Cir. 2017) ("We have now overruled [the] FOIA specific summary judgment standard, and instead apply our usual summary judgment standard.").

Summary judgment is only appropriate if, after viewing the evidence in the light most favorable to the non-moving party, there are no genuine disputes of material fact, and the moving party is entitled to judgment as a matter of law. Genuine issues of material fact in a FOIA should proceed to a bench trial or adversary hearing. *Animal Legal Def. Fund*, 836 F.3d at 990.

In his FOIA claim in his original complaint, Hart alleged that he had submitted FOIA requests to HHS and OMB on July 22, 2021. 4-ER-637, ¶67. Hart further alleged that HHS and OMB had not timely responded by submitting the requested documents to him. 4-ER-637, ¶69. Hart also requested his attorneys' fees in accordance with the FOIA statute on his FOIA claim. 4-ER-643.

In their Answer to Hart's FOIA claim, HHS and OMB "Admitted" that Hart had requested certain FOIA documents on July 22, 2021. 3-ER-618, ¶67. But HHS and OMB "deny" the averments in paragraph 69 of Hart's original complaint and "deny" that they have failed to submit the documents to Hart in accordance with their obligations under the FOIA statute. 3-ER-618, ¶69. Thus, there are genuine issues of material fact in dispute on Hart's FOIA claim in his original complaint.

CONCLUSION

For the foregoing reasons, the district court should be reversed.

First, under Issue One presented to this Court for review, Hart requests that the Court reverse the district court's denial of Hart's First Amendment Free Speech Claim as set forth in his Amended Complaint because Hart plausibly pled facts to support his claim.

Second, under Issue Two presented to this Court for review, to the extent this Court rules in favor of Hart on Issue One and grants his requested relief, that would moot Issue Two because Hart did not plead a FOIA claim in his Amended Complaint. But if the Court denies Hart's requested relief in Issue One on his First Amendment Free Speech claim as pled in his Amended Complaint, then this Court should remand to the district court for further development of his FOIA claim in Hart's original complaint because the district court did not have an adequate factual basis to award Judgment in favor of HHS and OMB.

Date: August 7, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Statement of Related Cases Pursuant to Circuit Rule 28-2.6

No. 23-15858

The undersigned attorney or self-represented party states the following:

[x] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

However, while there are no related cases currently pending in *this* court, Appellant Hart believes that the following cases in other courts are related to this case because they deal with substantially similar subject matter and facts and claims under the First Amendment:

O'Handley v. Weber, No. 22-1199 (S. Ct.);

Rogalinski v. Meta Platforms, Inc., No. 22-cv-02482-CRB (N.D. Ca.);

State of Missouri v Biden, No. 23-30445 (5th Cir).

Signature: /s/ M. E. Buck Dougherty III **Date:** August 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance

No. 23-15858

I am the attorney on behalf of the Appellant Justin Hart.

This brief contains 9,384 words, excluding the items exempted by Fed R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 3d(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature: /s/ M. E. Buck Dougherty III **Date:** August 7, 2023