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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This case is about Free Speech under the First Amendment in the modern age of social media and the Internet. Specifically, this case is about whether the First Amendment allows federal officials to train social media companies in "misinformation" so they can do by proxy what they cannot do directly: censor Americans' speech on social media platforms and the Internet because of its topic or viewpoint.

Beginning in April 2021, during the COVID-19 global pandemic, Government officials from the U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention began jointly working with Facebook and Twitter to control the expression of information and viewpoints on COVID-19 on those platforms. At this time, the Government also began training private social media companies, including Facebook and Twitter, on content moderation of COVID Misinformation.

The CDC's Chief of Digital Media, Carol Crawford, was the primary Government official who conducted the content moderation training on COVID Misinformation. Facebook was represented at the Government training by Payton Iheme, a Facebook employee in charge of U.S. Public

Policy, and Twitter was represented by Todd O'Boyle, a top lobbyist in Twitter's Washington D.C. office and the White House's Twitter point of contact. Crawford later testified in another similar case 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." Along with Crawford, this overlap among officials in jointly participating with Facebook and Twitter to suppress the expression of disfavored viewpoints on COVID-19 included, Vivek Murthy, U.S. Surgeon General; Rob Flaherty, White House Director of Digital Strategy; and Joseph Biden, President of the United States.

Plaintiff-Appellant Justin Hart is an executive consultant with over 25 years' experience creating data-driven solutions for Fortune 500 companies and presidential campaigns alike. 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. He is known by some of the Social Media Defendants as a social media influencer who has over 100,000 Twitter followers.

In July of 2021, shortly after the CDC's Crawford began training social media companies in content moderation on COVID

Misinformation, Facebook and Twitter suspended Hart's accounts due to his posts on masking. His posts were deemed "misinformation" because of the Government training provided to Facebook and Twitter. Although Facebook and Twitter have restored Hart's privileges to post, they now require that he and other users in the future express a Government-approved viewpoint to use their platforms.

But the district court said it would be futile to allow Hart leave to amend to file his proposed Amended Complaint and Exhibits showing joint action to censor his speech by the Government, Facebook, and Twitter. The district court was wrong.

First, the court improperly denied leave to amend because Hart's First Amendment claim is plausible. Facebook and Twitter took their hands off the wheels and allowed the Government to control their content moderation policies and decisions on COVID Misinformation through the training they received. Their policies and decisions to suppress and restrict Hart's Free Speech rights are ongoing and may be fairly attributed to the Government.

Second, Hart's FOIA claim is not moot, and HHS and OMB failed to raise mootness as a defense in their unverified Answer.

ARGUMENT

I. The district court improperly denied leave to amend because federal officials jointly participated in decisions to restrict Hart's Free Speech by providing content moderation training to the Social Media Defendants.

The district court improperly denied leave to amend because federal officials jointly participated in decisions to restrict Hart's Free Speech by providing content moderation training to the Social Media Defendants. In other words, Facebook and Twitter restricted Hart's Free Speech rights on their private platforms and the Internet because of the training and slides on COVID Misinformation that they received from federal officials.

By authorizing and providing content moderation training on COVID Misinformation, Crawford, Murthy, Flaherty, and Biden so far insinuated the Government into a position of interdependence with Facebook and Twitter that it must be recognized as a joint participant in their decisions to restrict from their platforms Hart's valid public health messages on masking. Hart's First Amendment Free Speech claim in his Amended Complaint — and attached Exhibits that show joint action— was not futile. Rather, Hart's First Amendment claim in his Amended Complaint was plausible.

Hart did not merely recite conclusory allegations in his Amended Complaint. He produced the receipts. Indeed, Hart's Amended Complaint sets out detailed and specific factual allegations that establish Government officials and the Social Media Defendants acted jointly to restrict disfavored COVID-related speech from social media platforms—including Hart's disfavored speech on masking.

The Exhibits attached to Hart's Amended Complaint leave no doubt of this interdependence between the Government and the Social Media Defendants. Moreover, Hart established in his Amended Complaint that he has Article III standing to pursue his First Amendment claim.

And thus the district court was wrong to deny Hart leave to amend. In denying leave to amend on futility grounds, the court seized upon one of the Exhibits attached to Hart's Amended Complaint — Crawford's deposition transcript and testimony she gave in a similar federal court case in Louisiana. Ironically, her testimony in that case does not cut against Hart. Instead, Crawford's deposition testimony *supports* Hart's First Amendment claim in his Amended Complaint. The district court's failure to construe Crawford's testimony in the light most favorable to Hart as it was required to do as a matter of law was a fatal error.

A. Hart has standing to seek prospective relief because courts can redress his injury by stopping federal officials from providing content moderation training on "misinformation" to the Social Media Defendants.

Hart has standing to seek prospective relief because courts can redress his injury by stopping federal officials from providing content moderation training on "misinformation" to the Social Media Defendants. Stated another way, Hart demonstrated in his Amended Complaint that his First Amendment deprivation and injury is continuous and ongoing to support forward-looking equitable relief.

A plaintiff has Article III standing to pursue claims if 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). 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). Federal courts enjoy broad discretion in

fashioning suitable equitable relief and defining the terms of a permanent injunction. *Church of the Holy Light of the Queen v. Holder*, 443 Fed. Appx. 302, 303 (9th Cir. 2011) (citing *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991).

Here, the Government broadly asserts that Hart failed to establish Article III standing to seek prospective relief against federal officials. Gov. Br., p.14. But none of the cases cited involve facts similar to Hart's First Amendment Free Speech injury — ongoing content moderation *training* provided by Government officials to social media platforms. Gov. Br., p.14-23. In fact, nowhere in its argument section on standing is the word "training" ever uttered or acknowledged by the Government. Gov. Br., p.14-23.

Instead, the Government prefers to dance around Hart's argument in his opening brief that "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." Hart Br., p. 24. And remarkably when it bothers to inch a little closer to the elephant in the room — federal officials training Facebook and Twitter on content moderation of "misinformation" — the

Government completely distorts the record by saying that Hart's proposed Amended Complaint "pleads no concrete basis to believe that plaintiff will in the future be subjected to content moderation that is attributable to the government." Gov. Br., p.16. That is simply not true, and Hart established he has Article III standing.

First, Hart sufficiently alleged his First Amendment deprivation and injury is ongoing to support forward-looking equitable relief by courts. Hart Br., p. 39-49. Hart alleges in his 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. Hart Br., p. 48; 2-ER-068, ¶173. 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. Hart Br., p. 48; 2-ER-068, ¶173. And that such social media 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. Hart Br., p. 48-49; 2-ER-068, ¶173. Moreover, Hart alleges that Facebook adjusts and deviates from its voluntary submission to its independent Oversight

Board on COVID-19 public health misinformation and instead follows the direction of Murthy, Biden, Crawford, and Flaherty's recommendations. 2-ER-068, ¶174.

Second, Hart more than adequately cleared the low bar of Article III traceability and established his ongoing First Amendment Free Speech injury is fairly traceable to Facebook, Twitter, Crawford, Murthy, Flaherty, and Biden. *See Maya*, 658 F.3d at 1070; Hart Br., p. 40-48. There is a clear causal line from Crawford's content moderation training and slides on COVID Misinformation that she provided to Facebook's Iheme and Twitter's O'Boyle, to Facebook and Twitter later restricting and suppressing Hart's speech on masking deemed "misinformation." *See O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023). In addition to the content moderation training that she provided to Facebook and Twitter, Crawford testified that CDC, HHS, and the White House were "collaboratively working on" COVID-related communications with platforms and there was "overlap from time to time." 3-ER-509. There is a reasonable inference that this overlap and collaboration among Government officials according to Crawford's testimony included Surgeon General Murthy, Flaherty, and President

Biden, particularly with the additional communication and actions by those officials in the record. There is a reasonable inference that Surgeon General Murthy, Flaherty, and President Biden knew of, or should have known of, Crawford's content moderation training on COVID Misinformation that she was providing Facebook and Twitter. And there is a reasonable inference that Surgeon General Murthy, Flaherty, and President Biden sanctioned Crawford's COVID Misinformation training that she provided to Facebook and Twitter.

Third, Hart's ongoing First Amendment injury may be properly redressed and adjudicated by a court. *See O'Handley*, 62 F.4th at 1162. In his Amended Complaint, Hart requested declaratory and injunctive relief against Murthy, Biden, Crawford, and Flaherty for violating his right to free speech under the First Amendment 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. 2-ER-068, ¶175. Hart also requested declaratory and injunctive relief against Facebook and Twitter for violating his right to free speech under the First Amendment and to stop them from

adjusting their algorithms and policies to align with the federal Government's COVID-19 "misinformation" policies. 2-ER-068, ¶176.

A court may further tailor equitable relief to redress Hart's ongoing injury by stopping Crawford, Murthy, Flaherty, and Biden from providing content moderation training on COVID Misinformation in the future to the Social Media Defendants because federal courts enjoy broad discretion in fashioning suitable equitable relief and defining the terms of a permanent injunction. *See Holder*, 443 Fed. Appx. at 303.

B. Federal officials violate the Free Speech Clause by training the Social Media Defendants in content moderation so they can restrict speech the Government deems "misinformation."

Federal officials violate the Free Speech Clause when they train the Social Media Defendants in content moderation so they can restrict speech the Government deems "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). When it regulates 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).

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 that 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).

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 v. Rainey*, 326 F.3d 1088, 1092 (9th Cir, 2003) (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).[1]

Private entities and parties can be state actors if they are "willful participant[s] in joint action with the state or its agents." *Dennis v.*

[1] 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).

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 also Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 532 U.S. 288, 296 (2001); *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 754 (9th Cir. 2020). This requires "a substantial degree of cooperative action." *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989). This Court has specifically recognized that the requisite substantial cooperation and interdependence exist, and give rise to state action, when government officials provide a private party with training and records, and that party commits a constitutional deprivation as a result of such training. *See Tsao v. Desert Palace*, 698 F.3d 1128, 1140 (9th Cir. 2012).

Here, as in *Tsao*, 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 social media platforms. *See id.*

Moreover, in the record before this Court, construed in the light most favorable to Hart, there are no allegations from which one could reasonably infer that federal officials have *stopped* training Facebook and Twitter in content moderation on COVID Misinformation *See Tsao*, 698 F.3d at 1140. Thus, the Government's training in content moderation on COVID Misinformation is continuous and ongoing, and Facebook and Twitter remain free to restrict speech on their platforms — such as Hart's future public health messages— that the Government deems "misinformation." *See Tsao*, 698 F.3d at 1140. The Government fails to come forward with a compelling reason why federal officials continue to train Facebook and Twitter in content moderation on COVID Misinformation to overcome strict scrutiny. *See generally Turner Broadcasting System,* 512 U.S. 622.

Additionally, the Government is again wrong when it says that "no assertion of coercion or significant encouragement is properly before the Court." Gov. Br., p. 30. Hart argued that Executive Branch officials engaged in viewpoint discrimination by directing Facebook and Twitter to follow the Government's 4 specific recommendations for improvement, holding BOLO meetings to target opposing messages,

directing the Social Media Defendants to design algorithms to target such messages, and receiving a $15 million advertising credit from Facebook for the Government to promote its own unchallenged messages on COVID-19. Hart Br., p. 33; 2-ER-065-66.

C. Joint action between the Government and Social Media Defendants exists due to the BOLO Meetings and training sessions on content moderation conducted by the CDC's Carol Crawford.

Joint action between the Government and Social Media Defendants exists due to the BOLO Meetings and training session on content moderation conducted by the CDC's Carol Crawford.

As detailed in Hart's opening brief and supporting documentation, the CDC arranged a series of training sessions with Facebook and Twitter in April and May 2021, *before* taking action against Hart. *See* Hart Br., pp. 12-19, 31-39; 2-ER-065-66, 084-86, 088-90, 092, 096-97, 099-105, 108, 110-14, 229; 3-ER-511. And it is important to remember that, by turning the Rule 12(b)(6) dismissal standard on its head—construing facts *against* Hart and in favor of the Social Media Defendants as discussed below—the district court denied Hart the opportunity to conduct discovery that could have proven just how

intertwined and interdependent the Federal Defendants and the Social Media Defendants were.

Hart was afforded only a limited and incomplete[2] document production from the Federal Defendants via his FOIA request. For example, he never had the opportunity to depose Crawford, Iheme, or O'Boyle as to the nature of the BOLO meetings and training sessions. So, when the Social Media Defendants complain, for example, that "Hart did not . . . propose to plead how or when the [government's] recommendations were . . . converted into a mandate" (Twitter Br. 38), or that Facebook "simply exercised its own contractual rights under the Terms of Service" (Facebook Br. 23), they are essentially trying to reward themselves for short-circuiting the discovery process.

Facebook bizarrely tries to argue that the Government content moderation training it received did not constitute a "delegation of core state functions," as if Facebook—a private social media company—were the expert on Government-related duties and functions. Facebook Br., 17. But of course, censoring disfavored speech is not a "core state function." Trawling the Internet for speech that threatens Biden's and

[2] *See* Dkt. 118 in 3:22-cv-737-CRB (N.D. Cal) at 5:1-15.

Murthy's COVID-19 policy objectives is not a "core state function." Hart's entire point is that the Government had *no business* getting involved in Facebook's content moderation policies. But since it did, and since Facebook later deprived Hart of his First Amendment rights as a result of the Government training it received, Facebook's content moderation decision to restrict Hart's speech may fairly be attributed to the Government. See *Tsao*, 698 F.3d at 1140.

1. Even Hart's limited fact-finding at this stage of the case belies the notion that the BOLO Meetings and training consisted of "one-way communications."

Even Hart's limited fact-finding at this stage of the case belies the notion that the so-called "be-on-the-lookout" or BOLO meetings and training consisted of "one-way communications."

Facebook argues, citing only a single email as proof, that the BOLO meetings O'Boyle participated in with the CDC "pertain[ed] exclusively to vaccine-related rumors," Facebook Br., p. 25 (citing 2-ER-094). Facebook also self-servingly asserts that the Government's "recommendations" (which, again, were recommendations about *how to censor speech it disagreed with,* recommendations the Government had *no* business making at the high level of training and specificity it

provided social media companies) "were merely broad suggestions," Facebook Br., p. 25; *see also id.* at p. 9. Of course, Hart was never afforded the opportunity to conduct discovery in this case as discussed to determine whether that assertion is true. Even so, the record before this Court in the light most favorable to Hart shows Facebook's own interactions and communications with the Government were not intended to merely give Facebook "broad suggestions."

For example, prior to the training sessions, Facebook's Iheme emailed the CDC's Crawford and others, saying that Facebook "wanted to make sure you saw our announcements . . . expanding our efforts to remove false claims." 2-ER-225. In the months following the content moderation training sessions, Facebook employee Nick Clegg reported to Surgeon General Murthy that Facebook had adjusted its policies — and that Clegg wanted Murthy to see it had done so, because, as Clegg said in that email, "[w]e hear your call for us to do more." Hart Br., p. 20; 2-ER-238. An anonymous Facebook employee told Flaherty, "I'll expect you to hold me accountable." 3-ER-612-15. Facebook's disingenuous assertion that the CDC merely gave it "broad suggestions" is refuted by Facebook's own employee, Clegg, who acknowledged to

Surgeon General Murthy that he had "identified 4 *specific* recommendations for improvement." 2-ER-239 (emphasis added).

The reasonable inference from these exchanges between Facebook's Iheme, Clegg, anonymous Facebook employee, the CDC's Crawford, Surgeon General Murthy, and the White House's Flaherty is that Facebook had been following, and would continue to follow, the Government's 4 specific recommendations for improvement regarding COVID-related "misinformation" as defined by the Government. And Facebook expected the Government to hold it accountable for implementing these areas of improvement in its future content moderation decisions.

Twitter's arguments fare no better. Twitter tries to disguise its joint participation in the Government's censorship scheme as merely "one party supplying information to another." Twitter Br., p. 27-28 (citations omitted); *see also id.* at p. 34. According to Twitter, "the Federal Government provided one-way communications to Twitter," but Twitter acted independently of those communications. Twitter Br., p. 28. *False*. Unless Twitter wants to argue that the Rules of Civil Procedure should now be summarily overturned to construe Hart's allegations in the light

most favorable to Twitter, its argument that it merely received "one-way communications" must fail. Twitter then engages in *reductio ad absurdum* by arguing that it is somehow Hart's position that "joint action exists any time private citizens act on government requests to 'be-on-the-lookout.'" Twitter Br., p. 34. But Twitter was far more interconnected with the Government than that as the Exhibits clearly show, and Hart has never argued that point.

2. The Social Media Defendants' arguments with respect to *O'Handley* and *Biden* fail.

The Social Media Defendants' arguments with respect to *O'Handley* and *Biden* fail.

First, the Social Media Defendants' reliance on *O'Handley* is flawed. Twitter Br., p. 28; *see also* Facebook Br., pp. 20, 22-25. In that case, a California agency used Twitter's Partner Support Portal to send a single message to Twitter about the plaintiff's speech. *O'Handley,* 62 F.4th at 1154. Twitter then acted against the plaintiff. But there were no Government training sessions in content moderation. There was no back-and-forth collaborative communication among Government officials and the Social Media Defendants. Here, unlike in *O'Handley*, there was not an arm's-length relationship between Hart and the Social

Media Defendants because Facebook and Twitter "took [their] hands off the wheel[s]" and allowed the Government to determine content moderation policies and decisions through its training. *See id*. at 1160.

And while Twitter in *O'Handley* might not have "avail[ed] itself of any government-created procedure or privilege" (Facebook Br., p. 23), here we know that Facebook and Twitter availed themselves at the very least of Government training in the area of content moderation and censorship of disfavored COVID-related speech. Twitter observes that in *O'Handley,* "in every case the company's employees decided how to utilize this information [from the Partner Support Portal] based on their own reading of the flagged posts and their own understanding of the Twitter Rules." *O'Handley,* 62 4th at 1160; Twitter Br., p. 28. But Hart alleges that his social media posts and viewpoints that he posts in the future are now subject to the COVID-19 public health policies and control of the federal Government and are no longer subject to Twitter's and Facebook's policies. Hart Br., p. 48-49; 2-ER-068, ¶173.

Of course, by holding content moderation training sessions, the Government has influenced the Social Media Defendants' employees' "understanding of the Twitter [or Facebook] Rules." And Facebook's

argument that "a private policy that agrees with the government is not the same as a state-imposed rule" (Facebook Br., p. 24) fails for the same reason. As Hart explained in his opening brief, *Tsao* is a much better fit for this fact pattern than *O'Handley*. Hart Br., p. 31-39.

Twitter attempts to dodge *Tsao* by arguing that that there was no "system of cooperation and interdependence" between itself and the Federal Defendants. Twitter Br., pp. 32, 34. This, of course, ignores the Western District of Louisiana's finding that the government imposed "unrelenting pressure" on the Social Media Defendants. *Missouri v. Biden*, No. 3:22-cv-01213, 2023 U.S. Dist LEXIS 114585 at *121-22 (W.D. La. Jul. 4, 2023), rev'd in part, aff'd in part *Missouri v. Biden,* 2023 U.S. App. LEXIS 23965 (5th Cir., Sept. 8, 2023); substitute op. at 2023 U.S. App. LEXIS 26191 (5th Cir., Oct. 3, 2023); cert granted *Murthy v. Missouri,* 2023 U.S. LEXIS 4210 (U.S., Oct. 20, 2023); Hart Br., p. 38.[3]

Second, the Social Media Defendants' attempts to ignore *Biden* are equally flawed. Facebook points out that coercion is not at issue, that

[3] According to Twitter, this did not constitute a "directive of threat" in support of "a coercion theory of state action." Twitter Br., p. 33.

Biden "relie[d] exclusively on the coercion" test, and concludes that *Biden* "is inapposite." Facebook Br., p. 27 n. 3. But the facts revealed in *Biden* are equally relevant here. Here, as there, "White House officials . . . started monitoring the platforms' moderation activities . . . ask[ing] for – and receiv[ing] – frequent updates from the platforms." *Missouri v. Biden,* No. 23-30445, 2023 U.S. App. LEXIS 23965 at *8 (5th Cir. September 8, 2023). And here, as there, "the platforms cooperated with the White House." *Id.* at *9 (emphasis added).

3. The Government and Social Media Defendants further reached a "meeting of the minds" to use algorithms to censor speech on the Internet.

The Government and Social Media Defendants further reached a "meeting of the minds" to use algorithms to censor speech on the Internet.

Twitter argues that Hart never showed that the Federal Defendants "exerted 'control' over or reached a 'meeting of the minds'" with Twitter. Twitter Br., p. 29; *see also* Facebook Br., p. 35. Facebook likewise complains that Hart did not "allege facts showing that the government dictated Facebook's decision to block Hart's post." Facebook Br., p. 2. And yet the record shows that federal officials provided the

encouragement, motivation, and training for the Social Media Defendants to act as proxies to censor speech deemed "misinformation" by the Government. Facebook contorts itself by characterizing the Government's interference and control as "high-level policy recommendations" to which Facebook agreed. Facebook Br., p. 25. And as Twitter reluctantly acknowledges, it received the BOLO materials and Government training (like Facebook) months prior to removing Hart's Tweet. Twitter Br., p. 34. Facebook implicitly acknowledges that Hart would have a case if the Government "participate[d]" in the Social Media Defendants' "ultimate moderation decisions." Facebook Br., p. 28. Precisely. And the record before this Court shows that is exactly what the Government did by the training it provided Facebook and Twitter.

But Facebook also wants this Court to believe that "high-level policy recommendations" (Facebook Br., p. 25) that included "4 *specific* recommendations for improvement" (2-ER-239, emphasis added), along with content moderation training conducted by Government officials, miraculously had no effect on Facebook's "ultimate moderation decisions." (Of course, Facebook *has* to make this argument; to say

otherwise would concede that its blocking of Hart's post resulted from "a rule of conduct imposed by the state." *Lugar*, 457 U.S. at 937).

Finally, Facebook observes that "[a] conspiracy only exists when both parties have a wrongful purpose," and "the complaint does not plausibly allege any wrongful purpose here." Facebook Br., p. 35. This would be a legal conclusion masquerading as a fact. Again, construing the record in the light most favorable to Hart, as the Court must at this stage, does not yield the "factual result" that Facebook desires. And only robust discovery could determine Facebook's purpose. Hart is entitled to all reasonable inferences at this stage of the case as previously discussed.

The Social Media Defendants further observe that there never was a Government directive specific to Hart. Facebook Br., p. 25; Twitter Br., p. 29. That is a red herring. And inapplicable when the Government provides training on content moderation like it provided to Facebook and Twitter, followed by the Social Media Defendants violating Hart's Free Speech rights as a result of such training. *See Tsao*, 698 F.3d at 1140. Facebook admits that the Government did, in fact, make recommendations regarding Facebook's algorithms. Facebook Br., p. 25. Did Facebook implement those recommendations? Yes, as previously

discussed since reasonable inferences are credited in Hart's favor. And from the record, it is plausible that Facebook implemented the Government's specific recommendations.

Twitter's argument that Hart has no right to post on Twitter yet again is a self-serving argument that Twitter acted of its own accord – an argument disproven by the Exhibits attached to Hart's Amended Complaint and the content moderation training by the Government. Twitter Br., p. 42.

D. The district court was wrong as a matter of law to construe Crawford's testimony against Hart.

The district court was wrong as a matter of law to construe Crawford's testimony against Hart.

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).

In his proposed Amended Complaint, Hart alleged that CDC Chief of Digital Media "Crawford testified that the federal government had insinuated itself into a position of interdependence with the Social Media Defendants by holding regular BOLO meetings to assist them with implementing their misinformation policies." 2-ER-061. Crawford

testified that the federal Government had not only held BOLO meetings, but had also helped the Social Media Defendants implement their policies: "to assist them [the platforms] in whatever they were going to do with their policy or not do." 2-ER-061-62; 3-ER-431. The district court examined the Exhibits to Hart's Amended Complaint, including Crawford's deposition transcript, and said, "In any event, Hart misconstrues Crawford's testimony." Hart Br., p. 22-23; 1-ER-008.

Notably, the district court and the Social Media Defendants ignored this critical admission by Crawford. The district court further ignored Crawford's deposition transcript, in which it shows she testified to providing training sessions to social media platforms. Hart Br., p. 6-20.

Instead of accepting all factual allegations in Hart's Amended Complaint and attached Exhibits as true, and construing the pleadings in the light most favorable to Hart as it was required to do, *see Knievel*, 393 F.3d at 1072, the district court construed Crawford's statements *against* Hart. And the district court essentially "argued" that "Crawford testified . . . that Twitter made its own content-moderation decisions 'based on whatever policy they had.'" 1-ER-008. The district court also argued that Crawford testified that "the CDC 'did not discuss the

development of [content-moderation] policies, or the enforcement of [those] policies" with the companies. *Id.* The district court concluded that "Crawford's deposition testimony . . . does not show that the Federal Defendants exerted control over social media companies." *Id.*

But the district court did not apply the appropriate standard in deeming Hart's proposed amendment futile, and this Court should reject the Social Media Defendants' encouragement to repeat that error. Twitter Br., p. 30; Facebook Br., p. 14.

As to Facebook and the district court's assertions that the CDC did not discuss content-moderation policies (Facebook Br., p. 14, 1-ER-007-08 (quoting 3-ER-382)), that seems difficult to square with Facebook's various other admissions, and the evidence gleaned from the *Biden* litigation which were part of the Exhibits of Hart's Amended Complaint. For example, Facebook's Iheme told Crawford that she "wanted to make sure you saw our announcements . . . expanding our efforts to remove false claims." 2-ER-225. Or consider Facebook's Clegg's acknowledgement to Murthy that the latter had made 4 "specific" policy recommendations. 2-ER-239. And Crawford testified under oath in her deposition that Iheme wanted "to schedule a training

with CDC" on "Community Standards, COVID-19 misinformation and harm policies." Hart Br., p. 23. Facebook and Twitter have no answer to square that circle because these facts and Crawford's testimony should have been construed in Hart's favor as a matter of law, not against him. S*ee Knievel*, 393 F.3d at 1072.

E. Twitter's Section 230 defense is unavailing and fails.

Twitter's Section 230 defense is unavailing and fails.

"[T]he Ninth Circuit has not interpreted Section 230 to grant immunity for causes of action alleging constitutional violations." *Fed. Agency of News LLC v. Facebook, Inc.,* 432 F. Supp. 2d 1107, 1116 (N.D. Cal. 2020).

So Twitter's attempt to hide behind Section 230 must fail. And Twitter's second argument, that Section 230(c)(2) prohibits liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene or otherwise objectionable" (Twitter Br., p. 44, quoting *Barnes v. Yahoo!, Inc.,* 570 F.3d 1100, 1105 (9th Cir. 2009)) is irrelevant. Twitter's actions to restrict Hart's posts were not voluntary nor were they based on what Twitter considered "objectionable." Rather, Twitter restricted Hart's

posts because the Government considered such posts "objectionable" pursuant to the COVID Misinformation content moderation training that Crawford provided the Social Media Defendants. And as this Court has recognized in another context, "[t]he psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness." *United States v. Rothman,* 492 F.2d 1260, 1265 (9th Cir. 1973). "Where the consent is obtained . . . under inherently coercive pressure and the color of the badge, such content is not voluntary." *Id.*

Here, in addition to the content moderation training the Government provided, we know that high-level Government officials were telling the Social Media Defendants, both privately and publicly, to take down COVID-related posts like Hart's. Even if the particular post in question was identified by a lower-level censor, the top-level direction was made at the highest levels of corporate and Governmental leadership in joint participation, as alleged in Hart's Amended Complaint and further supported by the attached Exhibits. In such a case, for a highly regulated entity like Twitter, such "inherently coercive pressure" renders its decision no longer voluntary. *Rothman,* 492 F.2d at 1265. Similarly, platforms cannot be said to be acting "in good faith"—or any

faith at all—when they act jointly with the government, because they are merely acting as tools of their government masters. Besides, the last clause of the *Barnes* language – ". . . that the *provider* considers to be obscene or otherwise objectionable" (570 F.3d at 1105) – defeats Twitter's argument. Twitter's Terms of Service did not prohibit posts like Hart's; Government policy did, and still does looking forward.

To be sure, Section 230's immunity cloak would protect Twitter from a lawsuit seeking to hold it "liable for its exercise of a publisher's traditional editorial functions," *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997). But the Amended Complaint makes clear that Twitter did not exercise traditional editorial discretion when it censored Hart; it implemented the Government's editorial discretion based on the training it received. 2-ER-046-47 (BOLO meetings); 2-ER-049-51 (within two days of Hart's deplatforming, the White House revealed that it had been pressuring the Social Media Defendants to suppress free speech on the Internet); 2-ER-064-65 (the Twitter Files "revealed that the US government pressured Twitter and other social media platforms to elevate certain content and suppress other content").

"Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum." *Batzel v. Smith,* 333 F.3d 1018, 1027 (9th Cir. 2003). In other words, "Section 230 is designed to keep the federal government removed from the editorial decision-making process of internet companies." *Newman v. Google, LLC,* No 20-CV_04011-LHK, 2021 U.S. Dist. LEXIS 119101, at *30 (N.D. Cal. June 25, 2021). But here we have the exact opposite: Internet companies like Facebook and Twitter making editorial decisions as a result of the Government's content moderation training. This undercuts the very purpose of Section 230: to see the Internet "flourish[], to the benefit of all Americans," "unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(4) & (b)(2).

This Court must honor Congress's aim by not allowing Twitter to misuse Section 230 as a shield for its tortious and unconstitutional deprivation of Hart's Free Speech rights in the future, based on the Government's content moderation training and policies on "misinformation," which are ongoing and continuous.

II. The stipulation to vacate case management deadlines did not moot Hart's FOIA claim, and HHS and OMB failed to raise mootness as a defense in their unverified Answer filed two months after the stipulation was filed.

The stipulation to vacate case management deadlines did not moot Hart's FOIA claim, and HHS and OMB failed to raise mootness as a defense in their unverified Answer filed two months after the stipulation was filed.

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 basis 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 seeking documents from an agency under FOIA. *See Zemansky v. EPA,* 767 F.2d 569, 571 (9th Cir. 1985).

Without citing any supportive case law, the Government contends that a "stipulation" by the parties to postpone various case management deadlines mooted Hart's FOIA claim. Gov. Br., p. 36-37. But the Government failed to mention that it filed its unverified Answer *two*

months after this "stipulation" was filed with the district court, and the Government never raised mootness as a defense in its unverified five-page Answer to Hart's remaining FOIA claim. 3-ER-616-20. Nor did the district court reference this "stipulation" in its final Judgment in favor of HHS and OMB on Hart's FOIA claim on May 9, 2023. 1-ER-002.

Moreover, 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 unverified 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.

There are genuine issues in dispute on Hart's FOIA claim, requiring remand to further develop the record. *See Fiduccia*, 185 F.3d at 1040.

CONCLUSION

For the foregoing reasons, and in accordance with the relief Hart requested in his opening brief, the district court should be reversed.

Date: October 27, 2023

Respectfully submitted,

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FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE

No. 23-15858

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

This brief contains 6,759 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:** October 27, 2023