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11 **IN THE UNITED STATES DISTRICT COURT**  
 12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 13 **SAN FRANCISCO DIVISION**

14 JUSTIN HART,  
 15  
 16 Plaintiff,  
 17  
 18 v.  
 19  
 20 FACEBOOK, INC., *et al.*,  
 21  
 22 Defendants.

No. 3:22-cv-00737-CRB

**DEFENDANTS' NOTICE OF MOTION  
 AND MOTION TO DISMISS;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

Date: April 21, 2022  
 Time: 2:00 p.m.

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25 [https://docs.house.gov/meetings/IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-](https://docs.house.gov/meetings/IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-DorseyJ-20210325.pdf)  
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 13 <https://about.fb.com/news/2018/05/hard-questions-false-news>..... 5  
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**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on Thursday, April 21, 2022, at 2:00 p.m., or as soon thereafter as counsel may be heard, before The Honorable Charles R. Breyer, in Courtroom 6, 17th Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the defendants will move, and hereby do move, to dismiss this action under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on the following Memorandum of Points and Authorities and any other written or oral argument that may be presented at or before the time this motion is heard by the Court.

**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

Social media companies have been fighting misinformation for some time, since at least 2018, and turned those efforts toward COVID-19 early in the pandemic, as early as February 2020. Under their respective community standards and misinformation policies, Facebook and Twitter allegedly disciplined Plaintiff due, in part, to posts they determined to contain COVID-19 misinformation, beginning in September 2020. Plaintiff now brings a First Amendment claim against U.S. Surgeon General Vivek Murthy and President Joseph R. Biden (for purposes of this motion, the “Federal Defendants”) based on general strategies for addressing COVID-related misinformation that Surgeon General Murthy recommended to the public in July 2021—more than a year *after* Facebook and Twitter began to address COVID-19 misinformation—and he argues that these private companies’ independent decisions to discipline him amount to state action attributable to the federal government. Plaintiff’s claim lacks merit and should be dismissed.

To start, Plaintiff lacks standing for three independent reasons. First, he seeks only prospective relief against the Federal Defendants, but alleges only past harm—not that he will certainly be subject to some imminent, future injury. While he alleges that Facebook and Twitter *previously* disciplined him, he fails to allege that he will soon be subject to similar remedial measures. He does not allege that he plans to soon post messages similar to those that previously resulted in discipline, or that he will necessarily be subject to remedial measures again if he does. Thus, Plaintiff fails to establish the certainly impending future injury necessary to obtain

1 prospective equitable relief.

2           Second, Plaintiff fails to establish a causal link between the Federal Defendants and any  
3 remedial measures that were taken by (or may be taken by) Facebook and Twitter against him.  
4 Multiple other factors may have led these companies to police misinformation on their platforms;  
5 *e.g.*, they may have independently decided that misinformation is detrimental to public health and  
6 safety, or they may have concluded that misinformation on their platforms may cause their users to  
7 move to competing platforms. The Complaint contains no well-pled allegations justifying the  
8 inference that Facebook and Twitter chose to target posts containing misinformation because of the  
9 Federal Defendants, rather than one or more of the other possible causes. As noted, the companies  
10 began policing misinformation, and disciplining Plaintiff, well before the Federal Defendants  
11 recommended anti-misinformation strategies to the public—suggesting that the former could not  
12 have caused the latter. Just recently, in *Association of American Physicians & Surgeons v. Schiff*,  
13 another district court dismissed an analogous suit for lack of standing based on the same reasoning.  
14 518 F. Supp. 3d 505 (D.D.C. 2021), *aff'd sub nom. Ass'n of Am. Physicians & Surgeons, Inc. v.*  
15 *Schiff*, 23 F.4th 1028 (D.C. Cir. 2022).

16           Third, Plaintiff cannot establish that the relief he seeks against the Federal Defendants  
17 would redress any alleged injury. Even if the Court enjoined the Federal Defendants from  
18 recommending anti-misinformation strategies, Facebook and Twitter could still independently  
19 decide to continue to take action against misinformation. There is no indication that they would  
20 withdraw their misinformation policies and allow any of their users to post messages discouraging  
21 COVID-19 safety precautions. Accordingly, Plaintiff cannot establish any standing requirement—  
22 injury, causation, or redressability—and the Court may dismiss their First Amendment claim  
23 against the Federal Defendants for that reason alone.

24           But even if Plaintiff could establish standing, his First Amendment claim would fail on the  
25 merits, as he cannot meet his high burden to show that the independent actions of Facebook and  
26 Twitter—two *private* companies—amount to state action. While a plaintiff may sometimes  
27 establish a Constitutional claim against the federal government based on actions taken by a private  
28

1 party, it is rare: He must show that the federal government “coerc[ed]” or “provided such  
2 significant encouragement” for the private party to take the precise action at issue “that the choice  
3 must in law be deemed to be that of the” government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).  
4 Where the federal government simply recommends approaches under which a private party retains  
5 discretion in deciding whether to take the action at issue, then the action is not attributable to the  
6 federal government. For three reasons, Plaintiff cannot establish a First Amendment claim under  
7 this standard.

8 First, Plaintiff’s allegations do not establish that the Federal Defendants either coerced  
9 Facebook or Twitter, or encouraged them to a degree effectively amounting to coercion, to take  
10 any particular action or adopt any particular policy. To the contrary, Plaintiff’s allegations  
11 demonstrate only that certain government officials proposed general strategies for combatting  
12 misinformation—strategies that private companies, including Facebook and Twitter, were free to  
13 adopt or disregard as they saw fit.

14 Second, Plaintiff does not allege that Federal Defendants called on Facebook or Twitter to  
15 specifically target any of *Plaintiff’s* posts. Although certain officials called on social medial  
16 platforms to address “misinformation,” there is no well-pled allegation indicating that any Federal  
17 Defendant specifically proclaimed that any of Plaintiff’s posts contain misinformation. Nor is there  
18 any allegation that Federal Defendants provided a definition of “misinformation” that would  
19 necessarily encompass any of Plaintiff’s posts. To the contrary, Federal Defendants indicated that  
20 there is no concrete definition of “misinformation,” leaving social media platforms with  
21 undisturbed discretion to decide whether any particular post contains misinformation. Facebook  
22 and Twitter therefore independently concluded that certain of Plaintiff’s posts included  
23 misinformation, a decision that cannot be attributed to the federal government. Recently, in  
24 *Children’s Health Defense v. Facebook Inc.*, Judge Illston dismissed a nearly identical suit for  
25 precisely this reason. No. 20-CV-05787-SI, 2021 WL 2662064, at \*1 (N.D. Cal. June 29, 2021).

26 Third, even if Plaintiff had adequately alleged that some federal government official  
27 encouraged Facebook or Twitter to target Plaintiff’s posts in particular, there is no well-pled  
28



1 allegation indicating that Federal Defendants encouraged either platform to take any specific  
2 remedial action against him, much less to temporarily disable his account. The materials the  
3 Complaint relies upon suggest only that Federal Defendants simply proposed several potential  
4 actions that social media companies could take against those spreading misinformation, leaving it  
5 to the companies to decide what actions, if any, they found proper. Once more, Facebook and  
6 Twitter thus independently decided to discipline Plaintiff, and that action therefore cannot be  
7 attributed to the federal government. Plaintiff's First Amendment claim thus fails on the merits.

8 The Court should dismiss the First Amendment claim against the Federal Defendants.

### 9 **BACKGROUND**

#### 10 **I. Misinformation on Social Media.**

11 Misinformation is a challenge that social media companies have been dealing with for some  
12 time. Several features unique to social media “contribute to the amplification and spread of  
13 potential misinformation,” including “(1) the use of data mining and algorithms to sort, prioritize,  
14 recommend, and disseminate information,” and “(2) the maximization of user engagement”—and  
15 often “online advertising revenue”—“as the foundation of social media companies’ business  
16 models.” CRS Report, *Social Media: Misinformation and Content Moderation Issues for Congress*  
17 (Jan. 27, 2021), at 2, <https://crsreports.congress.gov/product/pdf/R/R46662>.

18 To address this problem, social media platforms have developed “a range of content  
19 moderation practices,” which they have “altered . . . over time.” *Id.* at 2, 7. For example, in 2018,  
20 Facebook stated that “[f]alse news has long been a tool for economic or political gains”—used, for  
21 instance, “by adversaries in recent elections and amid ethnic conflicts around the world”—and  
22 detailed its “Strategy for Stopping False News.” Tessa Lyons, *Hard Questions: What’s Facebook’s*  
23 *Strategy for Stopping False News?* (May 23, 2018), [https://about.fb.com/news/2018/05/hard-](https://about.fb.com/news/2018/05/hard-questions-false-news)  
24 [questions-false-news](https://about.fb.com/news/2018/05/hard-questions-false-news). Facebook explained that it would: (i) “Remove accounts and content that  
25 violate our Community Standards” and “polices in other categories, such as spam, hate speech or  
26 fake accounts”; (ii) “partner[] with third-party fact-checkers to review and rate the accuracy of  
27 articles and posts on Facebook,” and “[w]hen these organizations rate something as false, . . . rank

1 those stories significantly lower” in users’ news feeds; and (iii) “Inform people by giving them  
2 more context on the posts they see,” such as by directing users to other reporting on the subject. *Id.*  
3 Similarly, in 2019, Twitter announced that it was “working on a new policy to address synthetic  
4 and manipulated media.” @TwitterSafety, Twitter, (Oct 21, 2019, 6:07 pm),  
5 <https://twitter.com/TwitterSafety/status/1186403736995807232>.

## 6 **II. Social Media Companies’ Efforts to Stem COVID-19 Misinformation.**

7 Social media platforms turned their efforts to combat misinformation toward COVID-19  
8 early in the pandemic. For example, Plaintiff himself alleges that “in February 2020, Facebook  
9 announced it would remove posts that suggested the virus was man-made” because it then believed  
10 “the theory had been debunked” based on the findings of “public health officials.” Compl. (Facts)  
11 ¶ 40. Likewise, Twitter “introduc[ed] . . . policies on March 18,” 2020, to “address content that  
12 goes directly against guidance from authoritative sources of global and local public health  
13 information.” Vijaya Gadde & Matt Derella, *An update on our continuity strategy during COVID-*  
14 *19* (Mar. 16, 2020; updated Apr. 1, 2020), [https://blog.twitter.com/en\\_us/topics/company/2020](https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19)  
15 */An-update-on-our-continuity-strategy-during-COVID-19*. Twitter explained that it would “require  
16 people to remove tweets that include,” for example, the “[d]enial of global or local health authority  
17 recommendations to decrease someone’s likelihood of exposure to COVID-19 with the intent to  
18 influence people into acting against recommended guidance, such as: ‘social distancing is not  
19 effective.’” *Id.* The company reported that, within two weeks, it had “removed more than 1,100  
20 tweets containing misleading and potentially harmful content” and “challenged more than 1.5  
21 million accounts which were targeting discussions around COVID-19 with spammy or  
22 manipulative behaviors.” *Id.*

23 Additionally, on March 25, 2021, the CEOs of both Facebook and Twitter testified before  
24 Congress about the initiatives their respective platforms had independently developed to combat  
25 COVID-related misinformation. Mark Zuckerberg—Chief Executive Officer (“CEO”) of  
26 Facebook’s parent company, Meta Platforms—testified that Facebook has “made fighting  
27 misinformation and providing people with authoritative information a priority, and has developed  
28

1 an “industry-leading fact-checking program” that involves “80 independent third-party fact-  
2 checkers.” Testimony of Mark Zuckerberg, Hearing Before the United States House of  
3 Representatives, Committee on Energy and Commerce, Subcommittees on Consumer Protection &  
4 Commerce and Communications & Technology, [https://docs.house.gov/meetings/IF/IF16/  
5 20210325/111407/HHRG-117-IF16-Wstate-ZuckerbergM-20210325-U1.pdf](https://docs.house.gov/meetings/IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-ZuckerbergM-20210325-U1.pdf), at 2 (Mar. 25,  
6 2021).<sup>1</sup> Mr. Zuckerberg testified that these initiatives have specifically targeted COVID-related  
7 misinformation. *See id.* at 3 (Facebook works to “keep harmful misinformation about Covid-19  
8 from spreading on” its platform). Mr. Zuckerberg also stated that when “content” on Facebook “is  
9 rated false, [Facebook] significantly reduce[s] its distribution.” *Id.* at 2. Thus, he testified that as of  
10 March 2021, Facebook had “remov[ed] over 12 million pieces of false content” involving “Covid-  
11 19 misinformation.” *Id.* at 3. Facebook also “enhanced [its] recidivism policies” to target repeat  
12 offenders, and also “use[s] information from fact-checkers to improve [its] technology so [it] can  
13 identify misinformation faster in the future.” *Id.* at 2; *see also id.* at 3 (Facebook “barr[ed] entities  
14 that have repeatedly shared false information” concerning COVID-19). Twitter CEO Jack Dorsey  
15 similarly discussed Twitter’s “COVID-19 and vaccine misinformation policies,” noting that it  
16 “use[s] a combination of machine learning and human review to assess potential violations of the  
17 Twitter Rules,” and that “[i]f an account owner breaks our Rules,” its “Tweet” may be “delete[d].”  
18 Testimony of Jack Dorsey, Hearing Before the United States House of Representatives, Committee  
19 on Energy and Commerce, [https://docs.house.gov/meetings /IF/IF16/20210325/111407/HHRG-  
20 117-IF16-Wstate-DorseyJ-20210325.pdf](https://docs.house.gov/meetings/IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-DorseyJ-20210325.pdf), at 1-2 (Mar. 25, 2021). Thus, from the start of 2020, both  
21 Facebook and Twitter had independently begun developing policies and initiatives to identify, and  
22 take action against, misinformation on their platforms.

### 23 **III. The Surgeon General’s Advisory on Building a Healthy Information Environment.**

24 In July 2021, long after Facebook and Twitter began targeting COVID-19 misinformation,  
25 the recently confirmed U.S. Surgeon General issued an “Advisory” discussing the role of  
26 misinformation in the pandemic and offering “recommendations” to address it. *Confronting Health*

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27 <sup>1</sup> “[A] court may take judicial notice of matters of public record.” *Lee v. City of Los Angeles*, 250  
28 F.3d 668, 689 (9th Cir. 2001).

1 Misinformation: The U.S. Surgeon General’s Advisory on Building a Healthy Information  
2 Environment, [https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-](https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf)  
3 [advisory.pdf](https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf), at 3 (July 15, 2021) (hereinafter, “Advisory”).<sup>2</sup> As the Advisory explains, health  
4 “[m]isinformation has caused confusion and led people to decline COVID-19 vaccines, reject  
5 public health measures as masking and physical distancing, and use unproven treatments.” *Id.* at 4.  
6 And as the Surgeon General noted at a press briefing announcing the Advisory’s release, “polls”  
7 showed “that [at one point,] two thirds of people who [were] not vaccinated either believe[d] in  
8 common myths about the COVID-19 vaccine or [thought] some of those myths might be true.”  
9 Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy,  
10 [https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-](https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021)  
11 [secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021](https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021), at 5 (July 15, 2021)  
12 (hereinafter, “7-15 Press Briefing”). Health misinformation “has [thus] led to avoidable illness and  
13 death.” *Id.* at 2. Indeed, “99.5 percent of people who are in hospitals because of COVID are  
14 unvaccinated.” Press Briefing by Press Secretary Jen Psaki, [https://www.whitehouse.gov/briefing-](https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021)  
15 [room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021](https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021), 22  
16 (July 16, 2021) (hereinafter, “7-16 Press Briefing”). Further, “[m]isinformation has also led to  
17 harassment of and violence against public health workers, health professionals, airline staff, and  
18 other frontline workers tasked with communicating evolving public health measures.” Advisory, at  
19 4. “[D]octors and nurses across our country,” consequently, “are burning out.” 7-15 Press Briefing,  
20 at 4.

21 The 22-page Advisory offers a variety of “recommendations” about what various segments  
22 of society “can do” to slow the spread of health misinformation—including “individuals, families,  
23 and communities,” “educators and educational institutions,” “health professionals and health  
24 organizations,” “journalists and media organizations,” “researchers and research institutions,” and  
25 “governments.” Advisory, at 3. On the single page addressing “technology platforms,” the  
26 Advisory proposes a number of general strategies. For example, the Advisory notes that technology

27 \_\_\_\_\_  
28 <sup>2</sup> Internal citations and quotation marks are omitted throughout this brief, unless otherwise stated.

1 platforms may (i) help researchers “properly analyze the spread and impact of misinformation” by  
2 “[g]iv[ing] researchers access to useful data,” (ii) counter misinformation by “[d]irect[ing] users to  
3 a broader range of credible sources,” and (iii) “build ‘frictions’ . . . to reduce the sharing of  
4 misinformation,” which may include “suggestions and warnings” on certain posts. *Id.* at 12.

5 As the Advisory notes, it serves as “a public statement that calls the American people’s  
6 attention to a public health issue and provides recommendations for how that issue should be  
7 addressed.” *Id.* at 3. While it proposes various strategies for containing misinformation, it does not  
8 purport to impose any obligations on social media companies, nor to displace their discretion to  
9 decide whether any particular post contains misinformation, and if so, what remedial action may  
10 be proper. The Advisory explicitly notes that “[d]efining ‘misinformation’ is a challenging task,”  
11 and that there is no “consensus definition of misinformation.” *Id.* at 17; *see also id.* at 4 (“any  
12 definition” of “misinformation will have “limitations”). It also cautions against the use of an overly  
13 stringent definition of “misinformation,” noting that “it is important to be careful and avoid  
14 conflating controversial or unorthodox claims with misinformation” since “[t]ransparency,  
15 humility, and a commitment to open scientific inquiry are critical.” *Id.* at 17. The Advisory likewise  
16 encourages social media companies to consider “potential unintended consequences of content  
17 moderation, such as migration of users to less-moderated platforms.” Advisory, at 12. It stresses  
18 that, in considering “[w]hat kinds of measures” they may “adopt to address misinformation,” social  
19 media companies should consider the importance of “safeguarding . . . free expression.” *Id.* at 7.

20 In press briefings surrounding the Advisory’s release, the White House Press Secretary  
21 stated that certain government officials are “in regular touch with social media platforms . . . about  
22 areas where [the Administration has] concern” and that the discussions are aimed at “better  
23 understand[ing] the enforcement of social media platform policies.” 7-16 Press Briefing, at 6; *see*  
24 *also* 7-15 Press Briefing, at 9. She did not, however, suggest that these officials promoted any  
25 particular definition of “misinformation,” or that they pressured social media platforms to take any  
26 particular action with respect to posts containing misinformation. To the contrary, the Press  
27 Secretary stated that “Facebook and any private-sector company” ultimately “makes decisions  
28

1 about what information should be on their platform.” 7-16 Press Briefing, at 12; *see also id.* at 7  
2 (“They’re . . . private-sector compan[ies]. They’re going to make decisions about additional steps  
3 they can take.”).

#### 4 **IV. Facebook’s and Twitter’s Alleged Responses to Plaintiff’s Social Media Posts.**

5 Plaintiff alleges that Facebook has been taking action against his posts since at least  
6 September 2020, whether for violating its Community Standards or its COVID-related  
7 misinformation policies. In mid-September 2020, Facebook issued a “warning” against a July 2020  
8 post for containing “[f]alse information about COVID-19.” Compl. (Facts) ¶ 35. Later that month,  
9 it banned him from advertising and “going live” for 30 days for a post referencing Joseph Goebbels  
10 that violated its Community Standards. *Id.* ¶ 36. In April 2021, Facebook “restricted [Plaintiff’s]  
11 ability . . . to post or comment for 24 hours” because three posts “violated its Community  
12 Standards”—one suggesting that a “co-founder” of the Black Lives Matter movement was a  
13 “trained Marxist” siphoning donations; another post not described in the Complaint; and a third  
14 stating: “This is the truth: Covid is almost gone in America” and “[h]ospitals are literally empty.”  
15 *Id.* ¶ 37. And on July 13, 2021, Facebook “flagged” Plaintiff’s post containing a chart titled  
16 “Masking Children is Impractical and Not Backed by Research or Real World Data,” *id.* ¶¶ 1-2,  
17 noting that it “goes against [Facebook’s] standards on misinformation,” and prohibited Plaintiff  
18 from “post[ing] or comment[ing] for 3 days” in view of his “previous post[s] that didn’t follow [its]  
19 Community Standards.” *Id.* ¶ 4.

20 Plaintiff alleges that Twitter similarly took action against one of his posts. On July 18, 2021,  
21 Plaintiff posted on Twitter that “the CDC just reported that 70% of those who came down with  
22 #COvId19 [sic] symptoms had been wearing a mask,” “masks don’t protect you,” and “you have  
23 to wonder if [masks] are part of the problem.” Compl. (Facts) ¶ 5. Twitter, in response, “locked  
24 [Plaintiff’s] account” because his post “[v]iolat[ed] [Twitter’s] policy on spreading misleading and  
25 potentially harmful information related to COVID-19.” *Id.* ¶ 6. (For simplicity, the aforementioned  
26 enforcement actions taken by Facebook and Twitter against Plaintiff are referred to as the  
27 “Remedial Measures.”).

1 Plaintiff does not allege that he made any other, similar COVID-related posts on Facebook  
2 or Twitter, and if so, whether the companies took any action in response. Plaintiff also does not  
3 allege that he plans to make similar posts in the future on either Facebook or Twitter.

4 **V. This Action.**

5 Plaintiff brings six claims, only two of which concern the federal government defendants.  
6 In Count II, Plaintiff asserts a Freedom of Information Act (“FOIA”) claim against the Department  
7 of Health and Human Services and the Office of Management and Budget. That claim is not further  
8 addressed here. In Count I—the subject of this motion—Plaintiff asserts a First Amendment claim  
9 against Surgeon General Murthy and President Biden (for purposes of this motion, the “Federal  
10 Defendants”), arguing that because the Surgeon General and certain unnamed White House staff  
11 recommended general strategies to stem misinformation, they are responsible for the independent  
12 decisions by Twitter and Facebook to take the Remedial Measures. Plaintiff seeks only prospective,  
13 equitable relief against the Federal Defendants based on this claim. *See* Compl., at 21-22 (seeking  
14 a declaratory judgment and injunction against the Surgeon General and President). The Federal  
15 Defendants now move to dismiss the First Amendment claim.

16 **STANDARD OF REVIEW**

17 A motion to dismiss under Rule 12(b)(1) challenges the Court’s subject matter jurisdiction.  
18 In reviewing a facial challenge to subject matter jurisdiction, the Court accepts the well-pled  
19 allegations of the complaint as true, and determines whether those allegations are sufficient to  
20 establish jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014). However, in  
21 assessing its jurisdiction, the Court may consider extra-pleading facts, such as those set forth in  
22 declarations, and if necessary may resolve disputed jurisdictional facts, without converting the  
23 motion to one for summary judgment. *See id.*

24 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient  
25 factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*  
26 *Iqbal*, 556 U.S. 662, 678 (2009). The necessary facts “must affirmatively appear in the record” and  
27 “cannot be inferred argumentatively from averments in the pleadings.” *FW/PBS Inc. v. Dallas*, 493  
28



1 U.S. 215, 231 (1990). Bare “conclusions” are “not entitled to the assumption of truth,” and so a  
2 complaint does not “suffice if it tenders naked assertion[s] devoid of further factual enhancement.”  
3 *Iqbal*, 556 U.S. at 678-69. “While the pleading standard for Rule 8(a) is liberal, the [f]actual  
4 allegations must be enough to raise a right to relief above the speculative level.” *Cook v. Brewer*,  
5 637 F.3d 1002, 1006 (9th Cir. 2011). Under Rule 12(b)(6), the Court may consider materials  
6 incorporated into the complaint by reference, as well as judicially noticeable materials, without  
7 converting the motion into one for summary judgment. *See Skilstaf, Inc. v. CVS Caremark Corp.*,  
8 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).

### 9 ARGUMENT

#### 10 **I. Plaintiff lacks standing to assert its First Amendment claim against the Federal Defendants.**

11 Plaintiff lack standing to seek relief against the Federal Defendants on his First Amendment  
12 claim. To establish standing, a plaintiff must show that [he] is under threat of suffering ‘injury in  
13 fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or  
14 hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a  
15 favorable judicial decision will prevent or redress the injury.” *Summers v. Earth Island Inst.*, 555  
16 U.S. 488, 493 (2009).

17 Moreover, to obtain prospective equitable relief—the only type of relief that Plaintiff  
18 seeks—it is not enough to allege a *past* injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102  
19 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1973) (“Past exposure to illegal conduct does  
20 not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by  
21 any continuing, present adverse effects.”). Rather, Plaintiff must demonstrate that he faces a “real  
22 and immediate threat” of *future* harm. *Lyons*, 461 U.S. at 102. The “threatened injury must be  
23 *certainly impending*” to suffice; allegations of “*possible* future injury do not satisfy . . . Art. III.”  
24 *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added).

25 In addition, where, as here, “the plaintiff is not [himself] the object of [a] government  
26 action,” standing “is ordinarily ‘substantially more difficult’ to establish.” *Lujan v. Defs. of Wildlife*,  
27 504 U.S. 555, 562 (1992). Here, Plaintiff cannot satisfy any of these standing requirements.  
28



1           Prospective Injury. Plaintiff fails to show that he will be subject to a “certainly impending”  
2 future injury. Although he claims that *prior* posts he made on Facebook and Twitter resulted in  
3 remedial action, he alleges no facts establishing that he will *again* post such messages on Facebook  
4 or Twitter. Additionally, Plaintiff provides no details concerning any hypothetical, future posts that  
5 would allow the Court to infer that those would be the types of posts against which Facebook and  
6 Twitter would inevitably take action. Thus, Plaintiff has failed to establish the “certainly  
7 impending” injury necessary for prospective relief. *Cf. Lyons*, 461 U.S. at 105-06 (although the  
8 plaintiff “may have been” subject to unlawful conduct, that “does nothing to establish a real and  
9 immediate threat that he would again be” subject to the same conduct in the future).

10           Causation. Plaintiff also fails to establish that any hypothetical future injury—or, for that  
11 matter, any of his alleged past injuries—will be (or were) caused by the Federal Defendants, rather  
12 than the independent decisions of Facebook and Twitter. To satisfy the causation requirement, a  
13 plaintiff “must show that the injury is causally linked or fairly traceable to the [defendants], and  
14 not the result of independent choices by” other parties. *Nw. Requirements Utilities v. F.E.R.C.*, 798  
15 F.3d 796, 806 (9th Cir. 2015); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508,  
16 1517–18 (9th Cir. 1992) (“[T]he causation question . . . concern[s] only whether the Plaintiff’s]  
17 injury . . . is dependent upon [the defendant’s] policy, or is instead the result of independent  
18 incentives governing [other parties’] decisionmaking process[es].”). The Ninth Circuit has  
19 described the Article III causation requirement as a “‘*but for*’ causation” requirement. *Phiffer v.*  
20 *Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980) (emphasis added).

21           Here, the Complaint is bereft of factual support for the conclusory allegation that any  
22 remedial actions that Facebook and Twitter have taken (or may again take) against Plaintiff were  
23 (or will) be attributable to the Federal Defendants rather than the companies’ independent  
24 judgment. Many other factors may have led Facebook and Twitter to decide to combat  
25 misinformation, irrespective of the Surgeon General’s recommendations. For example, Facebook  
26 and Twitter may have independently concluded that misinformation in general—and  
27 misinformation concerning COVID-19 in particular—is harmful to the public, and that their  
28

1 platforms should adopt measures to address misinformation. Likewise, they may have concluded  
2 that the rampant spread of misinformation on their platforms would drive their users towards other  
3 platforms that employ superior quality-control measures. The Complaint does nothing to suggest  
4 that the disciplinary actions Facebook and Twitter took against Plaintiff were driven, not by these  
5 independent considerations, but rather by the Federal Defendants' mere suggestions. For example,  
6 Plaintiff does not allege that either Facebook or Twitter stated that, but for the Surgeon General's  
7 Advisory, they would not attempt to counter COVID-related misinformation on their platforms.

8 To the contrary, the chronology of events, as reflected in Plaintiff's own allegations, firmly  
9 *undermines* any inference of a causal link. Plaintiff alleges that the Federal Defendants  
10 recommended anti-misinformation strategies beginning in or around mid-July 2021. *See supra* at  
11 7-8. Yet public statements from Facebook and Twitter show that they have been addressing  
12 misinformation in general since at least 2018, and began targeting COVID-related misinformation  
13 as early as February 2020—long before Plaintiff alleges that Federal Defendants called attention to  
14 the problem. *See supra* at 5-7. Those statements are consistent with Plaintiff's own allegations,  
15 which indicate that Facebook started taking action against his posts, whether for violating its  
16 Community Standards or COVID-related misinformation policies, in September 2020—again, well  
17 before the Federal Defendants' alleged involvement. Specifically, Plaintiff alleges that “[o]n or  
18 around September 15, 2020, Facebook issued [him] a warning regarding a post he had made in July  
19 2020,” and that “the warning claimed, ‘False information about COVID-19 found in your post.’”  
20 Compl. (Facts) ¶ 35. Plaintiff also alleges that, “[o]n April 23, 2021, Facebook restricted the ability  
21 of [Plaintiff] to post or comment for 24 hours” in part because of a post he made stating that “Covid  
22 is almost gone in America.” Compl. (Facts) ¶ 37. Thus, the chronology shows that Facebook and  
23 Twitter began taking action against misinformation long before the Federal Defendants allegedly  
24 started recommending anti-misinformation strategies, refuting any suggestion that the latter caused  
25 the former.

26 This case thus closely resembles *Association of American Physicians (“AAPS”) &*  
27 *Surgeons v. Schiff*, where the U.S. District Court for the District of Columbia dismissed an

1 analogous lawsuit because the plaintiff lacked standing. 518 F. Supp. 3d 505 (D.D.C. 2021), *aff'd*  
2 *sub nom. Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028 (D.C. Cir. 2022).  
3 There, the plaintiff alleged that Congressman Adam Schiff sent letters and made public statements  
4 “encourag[ing]” certain technology companies—including Facebook and Twitter—to “prevent . . .  
5 inaccurate information on vaccines,” and that these companies “took several adverse actions against  
6 [the plaintiff] because of Congressman Schiff’s statements.” *Id.* at 510. The court ultimately found  
7 that the plaintiff failed to establish standing, in part because its allegations did not show that its  
8 “alleged harms stem[med] from . . . Congressman Schiff.” *Id.* at 515. The court noted that the  
9 plaintiff “ignore[d] the innumerable other potential causes for the actions taken by the technology  
10 companies,” and that the alleged “statements made by Congressman Schiff” did “not mention [the  
11 plaintiff]” and did “not advocate for any specific actions.” *Id.* at 515-16. The court further noted  
12 that the relevant statements by “Congressman Schiff” occurred “after the technology companies  
13 took many of the actions” at issue, and thus the plaintiff “fail[ed] to establish a chronological chain  
14 of causation between” Congressman Schiff’s statements and the “actions taken by the technology  
15 companies.” *Id.* at 516 n.12. The D.C. Circuit affirmed the district court’s reasoning, confirming  
16 that “[t]he timeline of events in the . . . complaint . . . undermine[d] any possibility that the  
17 companies acted at Representative Schiff’s behest in particular” because “Facebook announced its  
18 new policy of prioritizing government-sponsored vaccine information in search results in March  
19 2019 . . . and Twitter introduced its” similar policy “in May 2019.” *Ass'n of Am. Physicians &*  
20 *Surgeons, Inc. v. Schiff*, 23 F.4th 1028, 1034 (D.C. Cir. 2022).

21 The *AAPS* court’s reasoning applies equally here: (i) Plaintiff likewise ignores the  
22 “innumerable other potential causes for the actions taken by” Facebook and Twitter, (ii) there is no  
23 well-pled allegation that the Federal Defendants “mention[ed] [the Plaintiff]” or “advocate[d] for  
24 any specific actions” against Plaintiff, and (iii) the companies were already policing misinformation  
25 before the Federal Defendants allegedly started recommending the anti-misinformation strategies  
26 at issue. Accordingly, Plaintiff fails to establish a causal link between the Federal Defendants and  
27 any adverse actions that Facebook or Twitter have taken, or will take, against Plaintiff.  
28

1           Redressability. Even if Plaintiff had shown that that he would again post information that  
2 violates the policies of Facebook and Twitter; that the companies would certainly take remedial  
3 action against him; and that they would do so because of the Federal Defendants, rather than as an  
4 exercise of their independent judgment, he would still lack standing, as he cannot show that  
5 equitable relief would redress those injuries. Were the Court to enter the equitable relief that  
6 Plaintiff requests—*e.g.*, to “[e]njoin Murthy and Biden from [allegedly] directing social media  
7 companies to censor information with which Murthy and Biden disagree,” Compl. at 22 ¶ B,  
8 Facebook and Twitter could still *independently* conclude that it is in their interest to take those  
9 remedial steps—as the sequence of events indicates they have been doing all along. *See supra* at 5-  
10 8. Thus, Plaintiff cannot show that the equitable relief he seeks would redress his alleged injuries.

11           Again, *AAPS* is instructive. The court there found that the plaintiff lacked standing not only  
12 because it failed to establish causation, but also because “[i]t [was] pure speculation that any order  
13 directed at Congressman Schiff . . . would result in the [technology] companies changing their  
14 behavior” towards the plaintiff. *AAPS*, 518 F. Supp. 3d at 516. The court stressed that it was “not  
15 plausible” that Facebook or Twitter would suddenly “revise their policies on medical  
16 misinformation” as a result of an injunction restraining Congressman Schiff’s activities. *Id.* So too  
17 here. Accordingly, Plaintiff fails to establish any of the requirements for standing to seek injunctive  
18 relief against the Federal Defendants, and Count I should be dismissed against them for lack of  
19 jurisdiction.

## 20   **II. Plaintiff fails to state a First Amendment claim against the Federal Defendants.**

21           Even if Plaintiff could establish standing, his First Amendment claim against the Federal  
22 Defendants would fail on the merits. Plaintiff claims injury based on remedial actions taken by  
23 Facebook and Twitter—both *private* companies. But the First Amendment “safeguard[s] the rights  
24 of free speech” by imposing “limitations on *state action*, not on action by” private parties. *Lloyd*  
25 *Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972) (emphasis added). While a plaintiff may sometimes  
26 establish a First Amendment claim based on private conduct if it “can fairly be seen as state action,”  
27 *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982), those circumstances are extraordinarily narrow:  
28

1 the government “can be held responsible for a private decision only when it has exercised coercive  
2 power or has provided such significant encouragement, either overt or covert, that the choice must  
3 in law be deemed to be that of the” government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).  
4 “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify  
5 holding the” government “responsible for those initiatives.” *Id.*

6 In addition to establishing coercion or a degree of encouragement approaching it, a plaintiff  
7 must also show that the government called on the private party to take the *precise action* at issue—  
8 *i.e.*, by “dictat[ing] the decision” made “in [that] particular case,” *id.* at 1010, or insisting that the  
9 private party follow a “standard that would have *required*” that action, *Mathis v. Pac. Gas & Elec.*  
10 *Co.*, 75 F.3d 498, 503 (9th Cir. 1996) (emphasis added). It is not enough to show that the  
11 government recommended a general policy under which the private party retained discretion over  
12 whether to take the particular action at issue.<sup>3</sup> *Mathis*, 75 F.3d at 502 (“It wasn’t enough to show  
13 that [the private party]” was driven by “a generalized federal concern” or “standards [that] would  
14 have required” action “on some materially different set of facts.”); *Jackson v. Metro. Edison Co.*,  
15 419 U.S. 345, 357 (1974) (the “exercise of choice allowed by” a government policy “where the  
16 initiative comes from [the private party] and not from the [government], does not make [the] action  
17 in doing so ‘state action’” under the Constitution).

18 These standards present a formidable bar to a plaintiff attempting to show that private  
19 conduct should be considered state action for First Amendment purposes: “While [courts]  
20 sometimes treat acts of private parties as public, [they] do so sparingly.” *Mathis*, 75 F.3d at 501;  
21 *see also Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) (courts  
22

23 \_\_\_\_\_  
24 <sup>3</sup> This specificity requirement applies regardless of how Plaintiff tries to frame his claim. For  
25 example, Plaintiff asserts not only that the Federal Defendants “encouraged” Facebook and Twitter  
26 to address misinformation, but also that the Federal Defendants “conspired” with Facebook and  
27 Twitter. *See* Compl. (Facts) ¶ 59. But to attribute private conduct to the government based on an  
28 alleged conspiracy, a plaintiff must still show that the government entered into “an agreement or a  
conspiracy to violate [*the plaintiff’s*] rights in particular.” *See Brunette v. Humane Soc’y of Ventura*  
*Cty.*, 294 F.3d 1205, 1212 (9th Cir. 2002) (emphasis added), *as amended on denial of reh’g and*  
*reh’g en banc* (Aug. 23, 2002).

1 must “start with the presumption that conduct by private actors is not state action”). Plaintiff falls  
2 well short of that bar here.

3 **A. Plaintiff fails to show coercion or a similar degree of encouragement.**

4 To start, Plaintiff contends that Facebook and Twitter were “subject to government  
5 compulsion,” Compl. ¶ 61, but he alleges no well-pled factual material to substantiate that claim—  
6 and it is plainly incorrect. While he claims that the Surgeon General “created and published an  
7 entire 22-page Advisory with *instructions* on how social media companies should remove [certain]  
8 posts, *id.* ¶ 18 (emphasis added), in fact the Advisory consists merely of “recommendations,”  
9 Advisory at 3, only a single page of which addresses “technology platforms,” *id.* at 12. Those  
10 recommendations, of course, are not binding on anyone. And it is difficult to fathom how Facebook  
11 and Twitter, two of the most dominant social media companies on the planet, could have been  
12 “coerc[ed]” by these recommendations, *Blum*, 457 U.S. at 1004—a term that is commonly  
13 understood to mean compulsion by threat, which there is no allegation of here.

14 Nor does Plaintiff allege facts establishing that the Federal Defendants provided “such  
15 significant encouragement” that “the choice must in law be deemed to be that of the” government.  
16 *Blum*, 457 U.S. at 1004. To be sure, the Advisory sets out various recommendations that the  
17 Surgeon General hopes will be adopted. But there is nothing unusual about using the bully pulpit  
18 to press for change on important issues, and doing so hardly converts private choices into state  
19 action. Just like the educators, journalists, and health professionals who were also addressed in the  
20 Advisory, Facebook and Twitter were free to adopt or ignore the Surgeon General’s  
21 recommendations, with no threat of punishment. After all, as the Press Secretary noted during the  
22 Advisory’s rollout, it is “Facebook and any private-sector company” that ultimately “makes  
23 decisions about what information should be on their platform.” 7-16 Press Briefing, at 12.

24 **B. Plaintiff fails to show that the Federal Defendants dictated Facebook’s or  
25 Twitter’s actions.**

26 Even if Plaintiff had shown coercion or the like, his First Amendment claim against the  
27 Federal Defendants would still fail because his allegations do not show that the Federal Defendants  
28 dictated the precise actions that Facebook and Twitter took here—*i.e.*, by specifically targeting any

1 of *Plaintiff's* posts on the grounds that they contain “misinformation,” or by imposing a definition  
2 of “misinformation” that would *necessarily* encompass any of Plaintiff’s posts. To the contrary, the  
3 Surgeon General acknowledged that there was no concrete definition of “misinformation,” *see*  
4 *supra* at 8-9, and that when companies are deciding whether particular posts contain  
5 misinformation, they should “avoid conflating controversial or unorthodox claims with  
6 misinformation,” Advisory, at 17. Likewise, the Press Secretary repeatedly clarified that social  
7 media companies must make the ultimate decision over how they will address misinformation.<sup>4</sup> *See*  
8 *supra* at 8-9.

9 Accordingly, the strategies recommended by the Federal Defendants did nothing to disturb  
10 Facebook’s and Twitter’s discretion to determine which posts contained “misinformation,” and  
11 consequently which posts may warrant remedial action. Facebook and Twitter therefore necessarily  
12 exercised their independent judgment to conclude that certain of Plaintiff’s social media posts  
13 contained misinformation, and that remedial measures were appropriate. Those actions are  
14 attributable to Facebook and Twitter, not the Federal Defendants.

15 *Blum* is instructive. In that case, the plaintiffs—Medicaid recipients in nursing homes—  
16 asserted constitutional claims against a state government based on the decisions of *private*  
17 physicians to transfer the plaintiffs to lower cost nursing homes. 457 U.S. at 991. The plaintiffs  
18 argued that they were transferred only because of government regulations requiring nursing homes  
19 to transfer patients to lower cost facilities when the higher cost facilities are not “medically  
20 necessary.” *See id.* at 994, 1008. The plaintiffs thus argued that the government was ultimately  
21 responsible for the transfer decisions made by the plaintiffs’ private physicians. But the Supreme  
22 Court rejected this argument, noting that although the government imposed a general “medical  
23 necessity” transfer requirement, the factual determination of “whether [a] patient’s care is  
24

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25 <sup>4</sup> To be sure, the Complaint does include a conclusory allegation that “[o]n information and belief,  
26 Defendants Biden and Murthy directed . . . Facebook and Twitter to” take action against  
27 “[Plaintiff’s] social media posts.” Compl. (Facts) ¶ 20. The Complaint, however, lacks any “factual  
28 enhancement” for this allegation, and thus it is “not entitled to the assumption of truth.” *Iqbal*, 556  
U.S. at 679. Indeed, the Complaint provides no basis for inferring that any Federal Defendant was  
even aware of Plaintiff in particular, or the precise social media posts at issue in this litigation.



1 medically necessary”—and thus whether the patient will ultimately be transferred—is “made by  
2 [a] private part[y]” (the physician). *Id.* at 1006-08. Thus, the government “regulations themselves  
3 d[id] not dictate the decision to . . . transfer in a particular case.” *Id.* at 1010. The Court further  
4 explained:

5 [A]lthough . . . transfers are made possible and *encouraged* [by the government  
6 regulations] for efficiency reasons, they can occur only after the decision is made  
7 that the patient does not need the care he or she is currently receiving. The  
8 [government] is simply not responsible for *that* decision . . . [and] if a particular  
9 patient objects to his transfer to a different nursing facility, the ‘fault’ lies not with  
10 the [government] but ultimately with the judgment, made by concededly private  
11 parties, that he is receiving expensive care that he does not need.

12 *Id.* at 1008 n.19 (emphasis added); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982)  
13 (noting that the Court found state action lacking in *Blum* even though “[b]oth state and federal  
14 regulations encouraged the nursing homes to transfer patients to less expensive facilities when  
15 appropriate”).

16 The same reasoning applies even more forcefully here: unlike in *Blum*, where the decisions  
17 of private parties were governed by federal regulation, here the Federal Defendants’  
18 recommendations are entirely voluntary. But even putting that aside, much as in *Blum*, where  
19 private parties had to apply the regulatory “medical necessity” standard, here the Federal  
20 Defendants allegedly called on social media platforms to address “misinformation.” However, the  
21 ultimate decision of whether a particular social media post contains “misinformation” (or sufficient  
22 “misinformation” to merit some enforcement action) is left to the social media companies. *See*  
23 *supra* at 8-9. The Federal Defendants thus did not “dictate the decision” over whether  
24 misinformation was present “in [Plaintiff’s] particular” posts. *Blum*, 457 U.S. at 1010.

25 *Mathis* is similarly instructive. There, the plaintiff claimed that a government agency was  
26 responsible for the decision of a private company to terminate the plaintiff’s employment. In  
27 particular, the plaintiff—an employee at a nuclear power plant—claimed that “in workplace  
28 conversations, [he] agreed to sell marijuana offsite,” and was consequently fired because the  
Nuclear Regulatory Commission (“NRC”) had informally pressed the employer to adopt a policy  
of “exclud[ing]” employees for “offsite drug involvement.” *Id.* at 501-02. The Ninth Circuit



1 concluded, however, that the NRC was not responsible for the plaintiff's loss of employment. Even  
2 assuming the agency had generally promoted an anti-drug policy, it did not specifically call for the  
3 policy to apply to employees such as the plaintiff (who "was essentially a messenger"), nor did it  
4 specifically target "the type of conduct [the plaintiff] was suspected of." *Id.* at 502. Thus, there was  
5 "no indication that the NRC had proposed a standard that would have required [the employer] to  
6 exclude [the plaintiff]." *Id.* at 503. Here, similarly, the Federal Defendants' proposed "standard"  
7 (that social media platforms address "misinformation") did not necessarily "require[]" Facebook  
8 and Twitter to target or "exclude" any of Plaintiff's specific posts.

9 For similar reasons, Judge Illston recently dismissed a nearly identical suit. In *Children's*  
10 *Health Defense v. Facebook*, the plaintiff claimed that Facebook violated the First Amendment by  
11 "censor[ing] [the plaintiff's] vaccine safety speech" on the platform at the encouragement of  
12 Congressman Schiff and the Centers for Disease Control ("CDC"). No. 20-CV-05787-SI, 2021 WL  
13 2662064, at \*1 (N.D. Cal. June 29, 2021). In particular, the plaintiff alleged that Congressman  
14 Schiff "urge[d] that Facebook implement specific algorithms to identify, censor and remove all so-  
15 called 'vaccine misinformation,'" and that the CDC "works with 'social media partners,'" including  
16 Facebook, "in its 'Vaccine with Confidence' initiative." *Id.* at \*2-4. The plaintiff alleged that, as a  
17 result of governmental pressure, Facebook took action against certain posts by the plaintiff  
18 identifying alleged "severe health dangers of certain vaccines and technologies." *Id.* at \*4. The  
19 court, however, found that neither Congressman Schiff nor the CDC was responsible for the  
20 disciplinary actions Facebook took against the plaintiff. It explained: "the phrase 'vaccine  
21 misinformation' is a general one that could encompass many different types of speech and  
22 information about vaccines," and thus the "general statements" by Congressman Schiff and the  
23 CDC concerning "vaccine misinformation" did not "mandate[] the *particular actions* that Facebook  
24 took with regard to [the plaintiff's] Facebook page." *Id.* at \*9, 12 (emphasis added). The court  
25 further noted that Facebook took those "particular actions" based on "its *own* algorithms and  
26 standards for detecting 'vaccine misinformation.'" *Id.* at \*12 (emphasis added). The same is true  
27  
28

1 here, as Plaintiff similarly fails to show that the Federal Defendants dictated a finding that any of  
2 Plaintiff’s specific posts constituted misinformation warranting any remedial action.

3 Moreover, even if Plaintiff had shown otherwise, his claim would still fail for a separate  
4 reason: he does not adequately allege that the Federal Defendants encouraged Facebook or Twitter  
5 to take any particular remedial action against Plaintiff, much less the precise Remedial Measures  
6 at issue here (temporarily suspending Plaintiff from the platforms). As explained above, social  
7 media companies had to exercise independent judgment in settling on any particular enforcement  
8 action. The Advisory, for example, proposes a range of potential remedies—including just labeling  
9 posts that contain misinformation—and cautions that companies should assess those remedies, both  
10 to determine whether there may be “unintended consequences” and to ensure that the remedies  
11 would not unjustifiably impede “free expression.” *See supra* at 8; Advisory at 12 (noting that  
12 offending content may be “labeled” or “downranked,” and that social media companies may  
13 address misinformation by “[p]rovid[ing] information from trusted and credible sources”). Further,  
14 the Press Secretary also reiterated that although government officials endorsed several strategies  
15 for containing misinformation, social media companies ultimately had to make the *independent*  
16 decision of which strategies (if any) to adopt. *See supra* at 8-9. She further explained:

17 [T]o be crystal clear: Any decision about platform usage and who should be on the  
18 platform is orchestrated and determined by private-sector companies. Facebook is  
19 one of them . . . [a]nd there are a range of media who are—also have their own  
20 criteria and rules in place, and they implement them. And that’s their decision to  
21 do. That is not the federal government doing that.

22 7-16 Press Briefing, at 30. Thus, Facebook and Twitter independently chose to adopt the Remedial  
23 Measures, temporarily suspending Plaintiff’s accounts due to his anti-mask posts—a decision that  
24 was neither “coerc[ed]” nor taken only upon “such significant encouragement” that it “must in law  
25 be deemed to be that of the” government. *Blum*, 457 U.S. at 1004.<sup>5</sup> Plaintiff therefore fails to state  
26 a First Amendment claim against the Federal Defendants.

27 \_\_\_\_\_  
28 <sup>5</sup> Plaintiff again alleges, in conclusory fashion, that “Biden and Murthy directed Defendants  
Facebook and Twitter to *remove* [Plaintiff’s] social media posts.” Compl. (Facts) ¶ 20 (emphasis  
added). The Court, however, need not credit this allegation. First, there is no factual support for  
this allegation, and thus it is not and thus the Court need not “entitled to the assumption of truth.”  
*Iqbal*, 556 U.S. at 679. Second, as explained above, this allegation contradicts statements in the

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**CONCLUSION**

The Court should grant the Federal Defendants’ Motion to Dismiss Plaintiff’s First Amendment claim against them (Count I). At a minimum, the Court should dismiss the First Amendment claim insofar as it applies to, and is used a justification for injunctive relief against, the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (a “grant of injunctive relief against the President himself [would be] extraordinary,” and “in general,” courts have “no jurisdiction of a bill to enjoin the President in the performance of his official duties”).

Dated: March 17, 2022

Respectfully submitted,

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Advisory along with the Press Briefing referenced in the Complaint, *see supra* at 8-9, and the Court “need not accept as true allegations contradicting documents that are referenced in the complaint,” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

JUSTIN HART,

Plaintiff,

v.

FACEBOOK, INC., *et al.*,

Defendants.

No. 3:22-cv-00737-CRB

**[PROPOSED] ORDER ON  
DEFENDANTS' MOTION TO DISMISS**

**[PROPOSED] ORDER**

For the reasons set forth in the Memorandum of Points and Authorities submitted by Defendants Vivek Murthy in his official capacity as the United States Surgeon General and Joseph R. Biden, Jr. in his official capacity as President of the United States, the Court GRANTS their Motion to Dismiss Count 1 of Plaintiff's Complaint insofar as it applies to them.

It is **SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 2022.

\_\_\_\_\_  
The Honorable Charles R. Breyer  
United States District Judge