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 16 UNITED STATES DISTRICT COURT  
 17 NORTHERN DISTRICT OF CALIFORNIA  
 18 SAN FRANCISCO DIVISION  
 19

20  
 21 JUSTIN HART,  
 22 Plaintiff,  
 23 v.  
 24 FACEBOOK, INC. et al.,  
 25 Defendants.

Case No. 3:22-cv-00737-CRB

**PLAINTIFF'S COMBINED  
 OPPOSITION TO DEFENDANTS'  
 MOTIONS TO DISMISS AND TO  
 DEFENDANT TWITTER'S  
 MOTION TO STRIKE**

Judge: Hon. Charles R. Breyer  
 Date: May 12, 2022  
 Time: 10:00 AM

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**TABLE OF AUTHORITIES**

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*Children’s Health Defense v. Facebook, Inc.*,  
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4 *United States ex rel. Newsham v. Lockheed Missiles & Space Co.,*  
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19 Donie O’Sullivan, “What you need to know about the board deciding Trump’s fate on  
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20 *In re Brazilian Medical Council,* 2021-008-FB-FBR (Meta Oversight Bd. Aug. 19,  
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21 *In re French user,* 2020-006-FB-FBR (Meta Oversight Bd. Jan. 28, 2021) ..... 24

22 Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General’s  
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23 *Watch: Biden delivers remarks on his administration’s coronavirus response,*  
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24 White House Press Briefing (July 15, 2021) ..... 6, 9, 10

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## INTRODUCTION

1  
2 When evaluating a motion to dismiss, the Court must accept all factual  
3 allegations pled in the complaint as true. *Godecke ex rel. United States v. Kinetic*  
4 *Concepts, Inc.*, 937 F.3d 1201, 1210 (9<sup>th</sup> Cir. 2019). Plaintiff, Justin Hart, pled that  
5 Defendants Facebook, Twitter, Biden, and Murthy (the “Defendants”) acted jointly to  
6 remove his social media posts because they disagreed with the viewpoint those posts  
7 espoused. Defendants dispute this factual allegation, and their motions to dismiss  
8 amount to an effort to wish away the facts that were properly pled. Because those  
9 facts must be accepted as true, this strategy of denial cannot succeed on a motion to  
10 dismiss.

11 Furthermore, Defendants the Department of Health and Human Services and  
12 the Office of Management and Budget have actively thwarted Hart’s efforts to  
13 receive further factual evidence through his Freedom of Information Act (“FOIA”)  
14 claim, Count II, which they did not move to dismiss. The remaining Defendants have  
15 not responded to Hart’s September 30, 2021, Rule 26(d)(2) Document Requests,  
16 which would further shed light on the nature of the legal violations he suffered. Yet  
17 they ask this Court to dismiss all his claims at the motion-to-dismiss stage. This  
18 they cannot do. At this stage, the Court must accept Hart’s factual allegations as  
19 true, and Hart has ably pled that Defendants acted jointly to deprive him of his right  
20 to free speech under the U.S. and California constitutions.

21 Additionally, Hart has pled a viable promissory estoppel claim against Facebook  
22 and Twitter and viable claims for intentional interference with a contract and  
23 negligent interference with a prospective economic advantage against Facebook.

24 For these reasons, this Court should deny Defendants’ motions to dismiss and  
25 motion to strike.



1 **LEGAL STANDARD**

2 “When ruling on a 12(b)(6) motion, the complaint must be construed in the light  
3 most favorable to the plaintiff. The court must accept as true all material allegations  
4 in the complaint, as well as reasonable inferences to be drawn from them.”  
5 *Renewable Land, Ltd. Liab. Co. v. Rising Tree Wind Farm, Ltd. Liab. Co.*, No. CV  
6 12-0809 RT, 2013 U.S. Dist. LEXIS 17500, at \*3 (E.D. Cal. Feb. 7, 2013) (quoting  
7 *Broom v. Bogan*, 320 F.3d 1023, 1028 (9<sup>th</sup> Cir. 2003). The Court “must determine  
8 whether the Complaint contains ‘sufficient factual matter’ that, taken as true, ‘state  
9 a claim for relief [that] is plausible on its face.’” *United States ex rel. Lee v.*  
10 *Corinthian Colleges*, 655 F.3d 984, 991 (9<sup>th</sup> Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556  
11 U.S. 662, 678 (2009)). Where such supporting factual allegations exist, a court  
12 “assume[s] their veracity and then determine[s] whether they plausibly give rise to  
13 an entitlement to relief.” *Id.* “A claim has facial plausibility when the plaintiff pleads  
14 factual content that allows the court to draw the reasonable inference that the  
15 defendant is liable for the misconduct alleged.” *Ashcroft*, 556 U.S. at 678.

16 **ARGUMENT**

17 **I. The federal free speech claim (Count I) should stand.**

18 **A. Twitter and Facebook are state actors when they act either as**  
19 **willing participants with the government or subject to**  
20 **government compulsion.**

21 Twitter and Facebook (the “Social Media Defendants”) argue that the First  
22 Amendment applies only to government actors (Twitter Mot. to Dismiss 7; Facebook  
23 Mot. to Dismiss 5, 7), but this is wrong as a matter of law. Private entities engage in  
24 state action when they work with government officials to deprive individuals of their  
25 constitutional rights. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 942 (1982). The  
26 extension of liability to private parties includes actions they take with the  
27

1 government to violate the First Amendment. *See, e.g., Janus v. AFSCME, Council*  
2 *31*, 138 S. Ct. 2448 (2018).

3 Defendants Biden and Murthy (the “Federal Defendants”) misstate Hart’s  
4 position when they allege that “Plaintiff contends that Facebook and Twitter were  
5 ‘subject to government compulsion.’” Federal Mot. to Dismiss 17 (quoting Compl. ¶  
6 61). The Complaint *actually* says that “Facebook and Twitter were *either* willful  
7 participants” in the censorship of Hart’s speech “*or* they were subject to government  
8 compulsion.” Compl. ¶ 61 (emphasis added). As Hart pled, (Compl. ¶ 55), the  
9 relevant Ninth Circuit test lists “governmental compulsion or coercion” and willing  
10 “joint action” as two of the four possible methods for proving state action. *Pasadena*  
11 *Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1167 (9<sup>th</sup> Cir. 2021); *Ohno v.*  
12 *Yasuma*, 723 F.3d. 984, 995 (9<sup>th</sup> Cir. 2013). Hart can succeed under either theory.

13 Defendants argue that Hart has not made a factual allegation demonstrating  
14 government coercion. Twitter Mot. to Dismiss 8-9; Facebook Mot. to Dismiss 5;  
15 Federal Mot. to Dismiss 17. That is untrue. Hart has alleged that senior White  
16 House officials regularly contact senior corporate executives to direct them to take  
17 down what they deem to be misinformation. Compl. ¶¶ 7-20 *bis*. Hart quoted White  
18 House Press Secretary Jen Psaki as saying, “We’re flagging problematic posts for  
19 Facebook that spread disinformation.” Compl. ¶ 10 *bis*. Psaki further revealed that  
20 the White House effort to suppress free speech reaches all the way to the level of  
21 senior staff: “[W]e are in regular touch with these social media platforms, and those  
22 engagements typically happen through members of our senior staff . . . .” Compl. ¶  
23 11 *bis*. She concluded with a clear directive from the president: “Facebook needs to  
24 move more quickly to remove harmful, violative posts[.]” Compl. ¶ 16 *bis*. Hart pled  
25 that this effort amounts to more than a simple request. Specifically supporting the  
26 government compulsion test, Hart alleged that “Biden . . . threatened social media  
27

1 companies who do not comply with his directives by publicly shaming and  
2 humiliating them, stating, “They’re killing people.” Compl. ¶ 19 *bis*. Social media is  
3 a highly regulated industry with public battles over the future of Section 230  
4 legislation and ongoing antitrust investigations, including by executive branch  
5 agencies. When the president of the United States himself shames the Social Media  
6 Defendants in public for not complying with his directives, such a statement  
7 amounts to what Hart pled is a “threat[ ],” taking place both in public and in private.  
8 *Id.* Thus, Hart has properly pled government compulsion.

9 The second legal theory for Hart’s success in pleading state action by the Social  
10 Media Defendants is much easier to meet: joint action. A private party’s actions  
11 amount to state action if “state officials and private parties have acted in concert  
12 effecting a particular deprivation of constitutional rights.” *Franklin v. Fox*, 312 F.3d  
13 423, 445 (9<sup>th</sup> Cir. 2002). “Joint action’ exists where the government affirms,  
14 authorizes, encourages, *or* facilitates unconstitutional conduct through its  
15 involvement with a private party.” *Ohno*, 723 F.3d at 996 (emphasis added).

16 In this case, Hart pled that the government has affirmed, authorized,  
17 encouraged, *and* facilitated the removal of social media posts by the Social Media  
18 Defendants. Despite Defendants’ denials (Twitter Mot. to Dismiss 11, Federal Mot.  
19 to Dismiss 12), Hart pled that the Biden Administration participated in joint action  
20 by being “in regular touch with these social media platforms” (Compl. ¶ 12 *bis*.) and  
21 by “flagging problematic posts for Facebook that spread disinformation.” Compl. ¶ 10  
22 *bis*. Such action constitutes both encouraging and facilitating the stifling of free  
23 speech, which also was publicly affirmed and authorized in the “22-page Advisory  
24 with instructions on how social media companies should remove posts with which  
25 Murthy and Biden disagree.” Compl. ¶ 18 *bis*. Thus, Hart has also pled that the  
26 Social Media Defendants participated in joint action with the government.

1 Hart has sufficiently alleged that the Social Media Defendants are “willing  
2 participants” in the scheme. They have not refused the White House’s phone calls, or  
3 publicly insisted on an internet free from government interference. Instead, they  
4 have established “dedicated reporting pathways” for government officials to identify  
5 what needs to be taken down. *O’Handley v. Padilla*, No. 21-cv-07063-CRB, 2022 U.S.  
6 Dist. LEXIS 4491, at \*9 (N.D. Cal. Jan. 10, 2022). This is textbook willing  
7 participation and substantial coordination.

8 Defendants’ responses amount to what should have been pled as denials of the  
9 factual allegations in an Answer. For example, Facebook claims, “Plaintiff must  
10 point to a statement from the government ‘direct[ing] Facebook to adopt [a] specific  
11 standard to follow.’” Facebook Mot. to Dismiss 5. Not only did Hart point to a  
12 statement from the government, but he also pointed to an “entire 22-page Advisory  
13 with instructions” on the specific standard for Facebook to follow. Compl. ¶ 18 *bis*.  
14 Facebook can deny the truth of the factual allegation, but it cannot deny that the  
15 allegation exists.

16 Similarly, Twitter claims Hart has “not alleged any direct communication  
17 between the Federal Defendants and Twitter.” Twitter Mot. to Dismiss 10. On the  
18 contrary, Hart pled that “Murthy and Biden engaged in viewpoint discrimination  
19 when they directed Facebook and Twitter to remove social media posts . . . .” Compl.  
20 ¶ 53. Further, Twitter acknowledges that Hart pled that Biden and Murthy  
21 “directed Defendants Facebook and Twitter to remove Hart’s social media posts,”  
22 (Twitter Mot. to Dismiss 9 (quoting Compl. ¶ 20 *bis*)), but Twitter tries to  
23 characterize this statement as “conclusory.” Twitter Mot. to Dismiss 9. On the  
24 contrary, the statement is supported by the numerous statements made by Jen  
25 Psaki and President Biden above. Twitter continues that Hart “does not allege any  
26 conspiratorial objective” for suppressing his free speech. On the contrary, Hart pled  
27

1 that Twitter and Facebook acted jointly with Biden and Murthy to further the  
2 conspiratorial objective to remove posts that “contained a viewpoint on COVID-19  
3 that did not fit with their own political narrative.” *Id.* As with Facebook, Twitter  
4 may deny the truth of the factual allegations in the Complaint, but it may not deny  
5 that they were made in the Complaint.

6  
7 **B. Hart properly pled that Facebook and Twitter targeted him specifically.**

8 Defendants argue that Hart must plead that Defendants Biden and Murthy  
9 called on the Social Media Defendants to take action against him *specifically*.  
10 Federal Mot. to Dismiss 16, 20-21; Facebook Mot. to Dismiss 5-6. Hart did: “On  
11 information and belief, Defendants Biden and Murthy directed Defendants Facebook  
12 and Twitter to remove Hart’s social media posts because they disagreed with the  
13 viewpoints he espoused in them and conspired with Facebook and Twitter to do so.”  
14 Compl. ¶ 20 *bis*.

15 Furthermore, the government’s own citations undermine their argument. The  
16 Federal Defendants acknowledge that a plaintiff can meet his burden by showing  
17 that the government “insist[ed] that the private party follow a ‘standard that would  
18 have required’” the action they took. Federal Mot. to Dismiss 16 (quoting *Mathis v.*  
19 *Pac. Gas & Elec. Co.*, 75 F.3d 498, 503 (9<sup>th</sup> Cir. 1996)). This the Complaint plainly  
20 alleges. Hart pled that Murthy asked social media companies to “consistently take  
21 action against misinformation super-spreaders on their platforms.” Compl. ¶ 8 *bis*  
22 (quoting Defendant Murthy).<sup>1</sup> The Biden Administration “increased disinformation  
23 research and tracking” and was “flagging problematic posts for Facebook that spread

24  
25 <sup>1</sup> All direct quotations of Defendant Murthy and Press Secretary Psaki in this  
26 paragraph are from the White House Press Briefing (July 15, 2021), transcript  
27 available at <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/> (last visited Apr. 17, 2022)

1 disinformation.” Compl. ¶ 10 *bis* (quoting Press Secretary Psaki). “[M]embers of [the  
2 Administration’s] senior staff” were “in regular touch with these social media  
3 platforms.” Compl. ¶ 12 *bis* (quoting Press Secretary Psaki). The government  
4 directed social media companies to “create a robust enforcement strategy that  
5 bridges their properties and provides transparency about the rules.” Compl. ¶ 15 *bis*  
6 (quoting Press Secretary Psaki). The government specifically exhorted Facebook to  
7 “move more quickly to remove harmful” posts. Compl. ¶ 16 *bis* (quoting Press  
8 Secretary Psaki). Biden publicly shamed and humiliated social media companies  
9 that did not comply with his censorship. Compl. ¶ 19 *bis*. And Defendant Murthy  
10 created and published a document instructing social media companies to remove  
11 posts with which Murthy and Biden disagree. Compl. ¶ 18 *bis*. This Advisory,  
12 referenced in the Complaint, proffers itself as “a public statement that calls the  
13 American people’s attention to a public health issue and provides recommendations  
14 for how that issue should be addressed” and dictates that social media platforms  
15 “make meaningful long-term investments to address misinformation.”<sup>2</sup> In other  
16 words, “the government called on the private party to take the *precise action* at  
17 issue”—the suppression of Hart’s speech. Federal Mot. to Dismiss 16 (emphasis in  
18 original).

19 In the alternative, even if Hart were required to prove at this stage that the  
20 Federal Defendants conspired with the Social Media Defendants with respect to him  
21 specifically—and, again, he is not—his failure to do so is due to the actions of the  
22 Federal Defendants and Defendants HHS and OMB, and defendants may not reap a  
23 legal benefit from their own bad acts. Count II, which no party has moved to dismiss,  
24

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25 <sup>2</sup> Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General’s*  
26 *Advisory on Building a Healthy Information Environment* (2021) 3, 12, available at  
27 <https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf>  
(last visited Apr. 17, 2022)

1 asserts that Defendants HHS and OMB have failed to respond to Hart’s FOIA  
2 request within the required 20 business days after they were submitted on July 22,  
3 2021. Compl. ¶¶ 67-73. The request specifically sought “[a]ll records of  
4 communications . . . between the White House or HHS and any social media  
5 company related to Justin Hart or his social media posts.” It is attached as Exhibit A  
6 to Exhibit 1 to this Response; the OMB denial of expedited processing is attached as  
7 Exhibit B to Exhibit 1; and Hart’s appeal is attached as Exhibit 1. Hart asked for  
8 similar information from Defendants Facebook, Twitter, HHS, and Biden on  
9 September 30, 2021 in his Rule 26(d)(2) Document Requests, attached as Exhibits 2-  
10 5; thus far, Defendants have not responded. Without this information that  
11 Defendants are withholding, Hart is being stymied from proving his case thus far.  
12 But at this stage, he must only plead it, and he has with sufficiency.

13 **C. Hart properly pled that Defendants are regularly working jointly**  
14 **to censor speech and were doing so at the time of his free speech**  
15 **violation.**

16 Defendants mistakenly make much of the timeline of events in the Complaint.  
17 They argue that the government statements Hart “relies on” were made after  
18 Facebook took down his posts or made efforts to curb COVID-19-related  
19 “misinformation.” Facebook Mot. to Dismiss 4, 6; Federal Mot. to Dismiss 13. Even  
20 Twitter attempts to argue likewise (Twitter Mot. to Dismiss 9, 11), ignoring the fact  
21 that Twitter locked Hart’s account three days *after* Defendant Murthy publicly  
22 announced that the government was asking social media companies to engage in  
23 censorship. Compl. ¶¶ 5, 6, 8 *bis*. Defendants ask this Court to read Defendant  
24 Murthy’s statement as proof that a new policy of censorship was being inaugurated  
25 at the July 15, 2021, press conference and as proof that the Federal Defendants had  
26 not coerced or cooperated with the Social Media Defendants when Hart’s Facebook  
27 account was locked on or around July 13, 2021. Not so. Press Secretary Jen Psaki

1 admitted at the same press conference that “we [the Biden Administration] *are* in  
2 regular touch with these social media platforms.” Compl. ¶ 12 *bis* (emphasis added).  
3 This is not a prospective statement, as Defendants wish to portray it. If the Press  
4 Secretary was announcing a new policy, she would have said “we *will be* in regular  
5 touch.” Instead, she described an already-existing, ongoing policy. As further proof  
6 that it was not a prospective statement, the Court can take judicial notice that the  
7 Press Secretary went further, listing a score of actions “that we *have taken*”: “We’ve  
8 increased disinformation research and tracking. . . . We’re flagging problematic  
9 posts. . . . We also created . . . the COVID Community Corps. . . . You saw an  
10 example of that yesterday.”<sup>3</sup> Psaki continued, “There are also proposed changes that  
11 *we have made* to social media platforms . . . we *have recommended* – proposed that  
12 they create a robust enforcement strategy.”<sup>4</sup> None of these statements support the  
13 Defendants’ thesis that the timing of the press briefing is detrimental to Hart’s  
14 claims.

15  
16 **D. Biden and Murthy’s motion to dismiss fails because it asserts  
countless facts that this Court cannot consider at this stage.**

17 The best evidence that the motions to dismiss should fail at this stage is the  
18 sheer number of facts asserted by Biden and Murthy to try to bolster their motion to  
19 dismiss. Instead of accepting Hart’s factual allegations as true, the Federal  
20 Defendants offered their own set of countervailing facts in an effort to disprove  
21 Hart’s facts. The Court cannot consider these disputed, material facts at this stage of  
22 the pleadings.

23  
24 \_\_\_\_\_  
25 <sup>3</sup> Jen Psaki, White House Press Briefing (July 15, 2021), transcript available at  
26 <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/>  
(last visited April 17, 2022) (emphasis added).

27 <sup>4</sup> *Id.* (emphasis added).



1 First, Biden and Murthy offered two pages of facts regarding social media  
2 companies' efforts to stem COVID-19 misinformation. Federal Mot. to Dismiss 5-6.  
3 The Federal Defendants discuss at length prior efforts by the Social Media  
4 Defendants to curb COVID-19 misinformation to suggest that the Social Media  
5 Defendants were simply acting in accordance with preexisting policy. Federal Mot.  
6 to Dismiss 2, 5-6, 12-13, 18-19. But these allegations are belied by Defendant  
7 Murthy's own words at the Press Briefing referenced in Hart's Complaint: "we're  
8 saying *we expect more* from our technology companies."<sup>5</sup> Although the Social Media  
9 Defendants were already censoring alternative viewpoints, the Biden  
10 Administration felt that they were not going far enough. Furthermore, state action  
11 can exist "regardless of whether [the private person] was motivated by the  
12 command" of the government or would have done the same thing on his own volition.  
13 *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 192 (1970) (Brennan, J., concurring)  
14 (describing the holding of *Peterson v. City of Greenville*, 373 U.S. 244 (1963)).<sup>6</sup>

15 Second, the Federal Defendants characterize the Surgeon General's Advisory as  
16 containing purely "recommendations" that do "not purport to impose any obligations  
17 on social media companies." Federal Mot. to Dismiss 8, 17. But this sleight of hand  
18 obscures the broader picture alleged by Hart: multiple statements by the White  
19 House Press Secretary as to the President's policy and admissions that senior White  
20 House officials regularly call senior corporate executives to hound them on posts.

21 Third, the Federal Defendants argue that the Social Media Defendants could  
22 have independently concluded it was in their best interest to censor Hart's speech.

23 \_\_\_\_\_  
24 <sup>5</sup> *Id.* (emphasis added).

25 <sup>6</sup> *Adickes* and *Peterson* both arose in the context of the Civil Rights Era, and their  
26 holding makes sense. Racial discrimination by private parties undertaken at the  
27 state's behest constitutes state action even if the private parties were themselves  
of the state's direction.

1 Federal Mot. to Dismiss 15, 19, 21. The Complaint belies this possibility, too, by  
2 demonstrating a pattern of the Social Media Defendants following the Biden  
3 Administration’s lead on viewpoint suppression. The Complaint details how  
4 Facebook originally censored the claim that COVID-19 was man-made but reversed  
5 course after President Biden acknowledged the possibility of that theory.  
6 Compl. ¶ 40. Facebook can attempt to prove otherwise after the discovery process,  
7 but the facts that Hart has alleged suggest that Facebook is indeed following the  
8 federal government’s instructions on whom to censor. And again, the Federal  
9 Defendants should not be allowed to argue that Hart has been unable, at this early  
10 stage, to *prove* that the Social Media Defendants’ actions were “driven . . . by the  
11 Federal Defendants’ mere suggestions” rather than by independent considerations  
12 (Federal Mot. to Dismiss 13) when the Federal Defendants themselves and their  
13 employees and departments have withheld from Hart information that would prove  
14 precisely that. Compl. ¶¶ 67-73.

15  
16 **E. The cases Defendants rely on do not stand for the propositions  
they assert.**

17 Defendant Facebook argues that it cannot be a state actor absent a financial  
18 benefit to the government. Facebook Mot. to Dismiss 7. But the primary case  
19 Facebook relies on is inapposite. *Pasadena Republican Club v. Western Justice*  
20 *Center*, 985 F.3d 1161 (9<sup>th</sup> Cir. 2021), used financial benefit as one of several factors  
21 to determine a “significant degree of integration, dependency, and coordination” to  
22 establish joint action. 985 F.3d at 1169. Indeed, the other factor *Pasadena* identified  
23 as a “hallmark of a symbiotic relationship” between a public authority and a private  
24 entity was “substantial coordination,” *id.* at 1168, which Hart has certainly alleged  
25 exists here. Moreover, *Pasadena* relies on the Ninth Circuit’s decision in *Rawson v.*  
26 *Recovery Innovations*, 975 F.3d 742 (9<sup>th</sup> Cir. 2020), which found state action even  
27

1 though “the record . . . [did] not indicate whether [the state actor was] in any sense  
2 financially dependent upon the business of [the private actor].” 975 F.3d at 756  
3 (emphasis added). Facebook’s other case observed that a financial “relationship *may*  
4 be sufficient to establish state action.” *Kinderstart.com LLC v. Google, Inc.*, No. 06-  
5 CV-2057, 2006 U.S. Dist. LEXIS 82481 at \*15 (N.D. Cal. Nov. 7, 2006). In fact,  
6 *Kinderstart* treated “significant financial benefits” (*Id.*; Facebook Mot. to Dismiss 7)  
7 as an entirely separate way of determining state action than “joint action” (2006  
8 U.S. Dist. LEXIS 82481 at \*13-14).

9 The Federal Defendants also seek succor in *Association of American Physicians &*  
10 *Surgeons v. Schiff*, 518 F. Supp. 3d 505 (D.D.C. 2021) (Federal Mot. to Dismiss, Dkt.  
11 69 at 14), and Defendant Facebook cites *Children’s Health Defense v. Facebook, Inc.*,  
12 546 F. Supp. 3d 909 (N.D. Cal. 2021) (Facebook Mot. to Dismiss 6). Both of those  
13 cases concerned calls for censorship from a single Congressman (the same  
14 Congressman, in fact)—1/435th of one-half of the legislative branch. The court in  
15 *Schiff* found that the Congressman did “not advocate for any specific actions,” and  
16 made his statements “after the technology companies took many of the actions at  
17 issue.” *Schiff*, 518 F. Supp. 3d at 515-16; Dkt. 69 at 14. Likewise, the court in  
18 *Children’s Health Defense* found that the Congressman’s statements did not  
19 “mandate[] the particular actions that Facebook took.” 546 F. Supp. 3d at 930. Rep.  
20 Adam Schiff does not have the power to effect executive action like the President of  
21 the United States. The Congressman’s conduct—“sen[ding] letters and ma[king]  
22 public statements” (Federal Mot. to Dismiss 14) is also not comparable to “being in  
23 regular touch with these social media platforms” via “engagements” with “members  
24 of [the Administration’s] senior staff.” Compl. ¶ 12 *bis* (quoting Press Secretary  
25 Psaki). Further unlike those cases, where the Congressman “did not advocate for  
26 any specific actions,” Defendants Murthy and Biden did just that. Compl. ¶¶ 14-17.

1           **F. This Court has jurisdiction to issue the relief requested for a First**  
2           **Amendment violation.**

3           The Social Media Defendants argue that Count I should be dismissed because it  
4 alleges a direct violation of the First Amendment rather than a *Bivens* action, but  
5 then they undermine that argument by asserting *Bivens* actions cannot be brought  
6 against corporations. Twitter Mot. to Dismiss 6-7 and n.7, Facebook Mot. to Dismiss  
7 7. As Defendants know, a *Bivens* action exists as a workaround to sovereign  
8 immunity for the federal government, and it allows, instead, individual federal  
9 officials to be held liable in their official capacity. See, e.g., *FDIC v. Meyer*, 510 U.S.  
10 471, 485-86 (1994); *Bush v. Lucas*, 462 U.S. 367, 374-75 (1983). Therefore, it was not  
11 designed to be brought against a private corporation. This “heads I win, tails you  
12 lose” argument should not be taken seriously.

13           Instead, Hart pled jurisdiction under *Free Enterprise Fund v. Public Co.*  
14 *Accounting Oversight Board*, 561 U.S. 477, 491 n.2 (2010), which held that courts  
15 may safeguard constitutional rights directly under the Constitution, even in the  
16 absence of an explicit private right of action. Compl. ¶ 20 *bis*; see also *Bell v. Hood*,  
17 327 U.S. 678, 684 (1946) (“it is established practice” to “sustain the jurisdiction of  
18 federal courts to issue injunctions to protect rights safeguarded by the  
19 Constitution”).

20           The Defendants also incorrectly argue that Hart has not alleged any ongoing or  
21 future injury. Federal Mot. to Dismiss 11, Facebook Mot. to Dismiss 7-8. Hart  
22 alleged his First Amendment injury is ongoing: “Facebook and Twitter now require  
23 that Hart and other users express a government-approved viewpoint to use their  
24 platforms.” Compl. ¶ 63. Additionally, Hart alleged future injury from Facebook in  
25 Count VI, in which he alleged negligent interference with a *prospective* economic  
26 advantage. Compl. ¶¶ 103-09.

1       Moreover, the Advisory has not been withdrawn and the Federal Defendants  
2 have not changed their policy of coercion or cooperation with the Social Media  
3 Defendants to censor opposing points of view. After this lawsuit was filed, Defendant  
4 Biden continued to exhort social media companies to “please deal with the  
5 misinformation and disinformation that’s on your shows [sic]. It has to stop.”<sup>7</sup>  
6 Contra the Federal Defendants’ assertions, Hart continues to face a “real and  
7 immediate threat’ of future harm.” Federal Mot. to Dismiss 11 (quoting *L.A. v.*  
8 *Lyons*, 461 U.S. 95, 102 (1983)).

9       **II. Hart’s California free speech count (Count III) should stand because**  
10       **the California Constitution is even more protective of free speech**  
11       **than the U.S. Constitution.**

12       For all the reasons presented in Section I, Hart’s violation of the California  
13 Constitution’s free speech clause is also well pled. Indeed, the standard for applying  
14 a free speech violation to a private actor is even more liberal under the California  
15 Constitution than under the U.S. Constitution. The California Supreme Court has  
16 explicitly held that private parties violate the California Constitution’s free speech  
17 clause when they prohibit individuals from speaking in their venues, when such  
18 venues are otherwise open to the public. *Robins v. Pruneyard Shopping Center*, 23  
19 Cal. 3d 899 (1979).

20       In *Pruneyard*, a group of high school students set up a card table in the courtyard  
21 of a privately owned shopping center to gather signatures for a petition to the  
22 government opposing an anti-Israeli resolution at the United Nations. *Id.* at 902.  
23 Security guards informed them of the shopping center’s policy against petitions and  
24 suggested they relocate to the public sidewalk at the center’s perimeter. *Id.* The  
25 Court overturned a prior ruling and concluded that prior case law does not prevent

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26       <sup>7</sup> *Watch: Biden delivers remarks on his administration’s coronavirus response,*  
27       YouTube (Jan. 13, 2022) <https://www.youtube.com/watch?v=pOowEhwlsXE>, at  
28       35:12.

1 California’s constitution from “providing greater protection than the First  
2 Amendment . . . .” *Id.* at 910. The Court held that Article I, Secs. 2 and 3 of the state  
3 constitution protect speech even in privately owned shopping centers. *Id.* The Court  
4 found that hundreds of thousands of adults in the San Jose area visited shopping  
5 centers, *id.* at 907, and reasoned that because the “public is invited[, they] provide  
6 an essential and invaluable forum for exercising [free speech] rights.” *Id.*

7 Hart has pled a credible claim that this same reasoning applies today to the  
8 internet. Because the public is invited and hundreds of millions of Americans visit,  
9 social media sights also “provide an essential and invaluable forum for exercising  
10 [free speech] rights” under the California Constitution even when they are privately  
11 owned. *Id.*

12 Although the Social Media Defendants wish to curb *Pruneyard Shopping Center*  
13 (Facebook Mot. to Dismiss, Dkt. 73 at 9; Twitter Mot. to Dismiss, Dkt. 70 at 15), the  
14 Complaint points out that the U.S. Supreme Court has held that the internet is a  
15 “quintessential forum.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).  
16 Congress has said the same, describing the internet in Section 230 as “a forum for a  
17 true diversity of political discourse.” 47 U.S.C. § 230(a)(3). California courts also  
18 refer to social media platforms as fora for discussion of public issues. *Daniel v.*  
19 *Wayans*, 8 Cal. App. 5th 367, 387, 213 Cal. Rptr. 3d 865 (Ct. App. 2017).

20 The Social Media Defendants insist that *Pruneyard* can apply to private  
21 companies “only if the property is freely and openly accessible to the public.” Twitter  
22 Mot. to Dismiss 15; Facebook Mot. to Dismiss 9. Facebook argues that this exception  
23 never applies to “virtual spaces,” *id.*, while Twitter argues that its Terms of Service  
24 distinguish it from “public streets or open air malls” and it is therefore not “freely  
25 and openly accessible.” Twitter Mot. to Dismiss 16. Neither argument is  
26 compelling—and certainly not at this stage of the pleadings. Facebook’s contention  
27

1 flies directly in the face of all the law calling social media a public forum, and  
2 Twitter’s terms of service are no different from the posters at the entrance to many  
3 shopping malls setting rules for speech and other activities.

4 The Social Media Defendants cite *Zimmerman v. Facebook, Inc.*, No. 19-CV-4591,  
5 2020 WL 5877863 (N.D. Cal. Oct. 2, 2020) for the assertion that they can *never* be  
6 sued under California’s free speech clause, apparently regardless of whether they  
7 committed joint action with the government. Facebook Mot. to Dismiss 9; Twitter  
8 Mot. to Dismiss 16. But that was not the *Zimmerman* court’s holding. In fact, it even  
9 acknowledged the possibility of joint action in a separate order. *Zimmerman*, No. 19-  
10 CV\_4591, 2020 U.S. Dist. LEXIS 183323 at \*6 (N.D. Cal. Oct. 2, 2020) (“These  
11 allegations of joint action between Facebook and the Trump administration . . .  
12 pertain to the privacy-related claims brought in the Facebook MDL . . .”).

13 Alternatively, Facebook defends its Community Standards as “precisely the kind  
14 of ‘reasonable regulation’ that *Pruneyard* endorsed.” Facebook Mot. to Dismiss 10.  
15 But the Complaint alleges that Facebook’s Community Standards are *not* reasonably  
16 applied. Compl. ¶¶ 27-28 (Facebook’s Community Standards state that it “do[es] not  
17 remove false news from Facebook” and do not “prohibit viewpoints that oppose  
18 making children wear masks”), 39-40 (Facebook’s standard of “false news” changes  
19 based on what the government says). Whether these standards are reasonable turns  
20 on the factual circumstances of their application to Hart, and that is yet to be  
21 determined.

22  
23 **III. Hart has adequately pled the elements of a promissory estoppel claim  
(Count IV).**

24 The fourth count of Hart’s Complaint seeks to hold the Social Media Defendants  
25 liable based on promissory estoppel by alleging that they breached a “clear and  
26 unambiguous promise” to him that he could use their services and that he engaged  
27

1 in “reasonable, foreseeable and detrimental reliance” on that promise. Compl. ¶¶ 80-  
2 87 (quoting *Bushell v. JPMorgan Chase Bank, N.A.*, 163 Cal. Rptr. 3d 539, 550 (Cal.  
3 Ct. App. 2013) (“The elements of promissory estoppel are (1) a clear and  
4 unambiguous promise by the promisor, and (2) reasonable, foreseeable and  
5 detrimental reliance by the promisee.”)).

6 First, the Social Media Defendants falsely argue that Hart has not pled a  
7 “specific representation” made “directly to” him that they would not remove his  
8 content. Facebook Mot. to Dismiss 10-11; Twitter Mot. to Dismiss 17. On the  
9 contrary, Hart pled that, through its terms of service, Facebook invited him to  
10 “connect with [other people], build communities, and grow [his] business[.]” See  
11 Compl. ¶ 25. Furthermore, he pled that Facebook promised him, “[W]e do not remove  
12 false news from Facebook . . . .” Compl. ¶ 26. Similarly, he pled that Twitter  
13 promised him, “Twitter’s purpose is to serve the public conversation.” *Id.* ¶ 44  
14 (quoting “The Twitter Rules”). And he pled that, by its silence on the matter among  
15 other topics for removal, Twitter implicitly promised him that it does not “prohibit  
16 viewpoints that oppose wearing masks . . . .” *Id.* ¶ 46. Finally, if this were not  
17 enough, Hart pled explicitly, “Facebook and Twitter made ‘a clear and unambiguous  
18 promise’ to Hart that he could use their services to communicate and network with  
19 other Facebook and Twitter users.” *Id.* ¶ 81 (quoting *Bushell*, 163 Cal. Rptr. 3d at  
20 550). Also, they “did not caveat this promise by announcing that they would censor  
21 speech opposing masks.” *Id.* ¶ 82; see also *id.* ¶ 27. Thus, Hart properly pled that the  
22 Social Media Defendants made a promise to him.

23 Moreover, as explained below in Section VI.B., the manner in which the Terms of  
24 Service were presented to Hart is a matter of factual dispute to be determined at a  
25 later stage of the proceedings.



1 Second, the Social Media Defendants argue that “Plaintiff’s reliance on that  
2 promise to post whatever he wished would have been unreasonable.” Facebook Mot.  
3 to Dismiss 11; *see also* Twitter Mot. to Dismiss 18. But Hart never interpreted their  
4 promises as invitations to post “whatever he wished.” For example, he did not post  
5 “Child Sexual Exploitation,” “Violent [or] Graphic Content,” “Adult Nudity,” “Spam,”  
6 or “Inauthentic Behavior” (Compl. ¶ 27; *see also* Compl. ¶ 45), and he did not read  
7 the Social Media Defendants’ promises as an invitation to post such material. Hart  
8 very reasonably relied on the promise made—the definition of objectionable  
9 material—to make posts that complied with the Social Media Defendants’ terms,  
10 which did not prohibit viewpoints opposing masking. Compl. ¶¶ 28, 45. It was the  
11 Social Media Defendants’ changes in policy that were unreasonable and  
12 unforeseeable—not Hart’s expectation that they would remain consistent. His  
13 reliance was reasonable.

14 Facebook further argues that Hart’s prior violations of Facebook’s Terms of  
15 Service and Community Standards put him on notice as to its content moderation  
16 policy, and he cannot now claim ignorance of it. Facebook Mot. to Dismiss 11. But as  
17 Hart explained in the Complaint, Facebook’s content moderation policies “are  
18 constantly shifting.” Compl. ¶ 39. Hart pled that Facebook is not following its own  
19 policies. *See* Compl. ¶ 27. He pled the example of Facebook removing “posts that  
20 suggested the [COVID-19] virus was man-made” for over a year and a half before it  
21 reversed course at the direction of President Biden. *Id.* ¶ 40. Therefore, far from  
22 claiming ignorance of Facebook’s content moderation policy, Hart is well-versed in  
23 its inconsistent and unreasonable application. This haphazard policy does not  
24 provide proper notice to anyone. Thus, Hart has properly pled a claim for promissory  
25 estoppel.

1 **IV. Hart’s claim of intentional interference with a contractual**  
2 **relationship (Count V) must stand because Facebook seeks to apply**  
3 **an evidentiary standard inappropriate for a motion to dismiss and**  
4 **because Facebook misstates the law.**

5 To properly plead a claim of intentional interference with a contractual  
6 relationship, Hart must allege (1) a valid contract between a claimant and a third  
7 party (Compl. ¶¶ 91-92); (2) defendant’s knowledge of this contract (Compl. ¶ 93); (3)  
8 defendant’s intentional acts designed to induce a breach or disruption of the  
9 contractual relationship (Compl. ¶¶ 94-95); (4) an actual breach or disruption of the  
10 contractual relationship (Compl. ¶ 96); and (5) resulting damage (Compl. ¶ 97).  
11 Compl. ¶ 89 (citing *Davis v. Nadrich*, 94 Cal. Rptr. 3d 414, 421 (Cal. Ct. App. 2009)).  
12 Of the five elements, Facebook takes issue with three: the existence of a valid  
13 contract; the defendant’s knowledge of the same; and its intent to induce a breach of  
14 the contract.

15 First, Facebook argues that Hart has failed to “allege” the existence of the  
16 contract (Facebook Mot. to Dismiss 12), but this is plainly false. Hart alleged that he  
17 “maintains a valid employment contract with Donorbureau, LLC” (“Donorbureau”)  
18 and that he serves “as an Administrator on the Donorbureau Facebook account, so  
19 he can post content to the site . . . .” Compl. ¶ 91-92. Thus, Hart properly pled the  
20 existence of the contract.

21 Second, Facebook jumps the gun in expecting Hart to *prove* facts about  
22 knowledge of the contract at the motion-to-dismiss stage. Facebook argues that  
23 Count V fails because Hart “has not shown” that Facebook had knowledge of his  
24 contract with Donorbureau. Facebook Mot. to Dismiss 12. But the correct standard  
25 for evaluating a motion to dismiss is not whether the plaintiff has *shown* the  
26 defendant’s knowledge of the contract but whether he has *alleged* it. In evaluating a  
27 motion to dismiss, “[w]hen there are well-pleaded factual allegations, a court should

1 assume their veracity and then determine whether they plausibly give rise to an  
2 entitlement to relief.” *Ashcroft*, 556 U.S. at 679 (2009). In this case, Hart alleged  
3 knowledge of the contract, and that is sufficient. Specifically, Hart alleged that  
4 Facebook has actual knowledge of the existence of a contractual relationship  
5 between Hart and Donorbureau because it knows that Hart serves as an  
6 Administrator for the Donorbureau Facebook account. Compl. ¶ 93.

7 The cases Facebook cites to argue that Hart has insufficiently alleged the tort are  
8 inapposite. Facebook selectively quotes out-of-context language from *United*  
9 *National Maintenance, Inc. v. San Diego Convention Ctr., Inc.* 766 F.3d 1002, 1009  
10 (9<sup>th</sup> Cir. 2014). Facebook Mot. to Dismiss 12, 9-11. *United National Maintenance*  
11 concerned facts established at a jury trial, not the sufficiency of facts alleged in a  
12 complaint. *Id.* (“For *the jury* to understand whether [plaintiff]’s performance was  
13 disrupted required the district court to determine what contractual rights [the  
14 plaintiff] possessed.”) (emphasis added). Facebook’s other case, an unpublished  
15 decision, is likewise unavailing, concerning the insufficiency of a record on appeal  
16 and not the allegations in a complaint. *See Bechard v. Broidy*, No. B293997, 2020  
17 Cal. App. Unpub. LEXIS 3969, \*15 (Cal. Ct. App. June 24, 2020). At the motion-to-  
18 dismiss stage, the Court may weed out only complaints with factual allegations that,  
19 *even if they are all true*, do not amount to a cause of action. *Bell Atl. Corp. v.*  
20 *Twombly*, 550 U.S. 544, 570 (2007). In this case, Hart has pled sufficient factual  
21 allegations to establish the cause of action.

22 Third and finally, Facebook argues that Count V fails because Facebook did not  
23 have the specific intent to interfere. Facebook Mot. to Dismiss 13. That is irrelevant.  
24 As Hart pled, California law does not require that the defendant act with specific  
25 intent to interfere. Compl. ¶ 90 (citing *Davis*, 94 Cal. Rptr. at 421; *Quelimane Co. v.*  
26 *Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 56 (1988)). Hart need only show that the  
27

1 defendant knew “that the interference [was] certain or substantially certain to occur  
 2 as a result of his action.” *Quelimane Co.*, 19 Cal. 4th at 56 (cleaned up). This Hart  
 3 has done. Compl. ¶¶ 94-95 (“Facebook . . . intended that such action would prevent  
 4 Hart from doing his work as an Administrator on the Donorbureau account. . . .  
 5 Facebook intentionally interfered with Hart’s contract with Donorbureau . . .”).  
 6 Thus, Hart’s claim should survive.

7  
 8 **V. Hart’s negligent interference claim (Count VI) should stand because  
 he has alleged a prospective economic advantage.**

9 Facebook self-servingly attempts to transform the Complaint’s final count into a  
 10 tort that does not exist: negligent interference with a contract. Facebook Mot. to  
 11 Dismiss 13-14. But negligent interference with a prospective economic advantage,  
 12 which is what Hart pled, does exist under California law. *Nelson v. Tucker Ellis,  
 13 LLP*, 262 Cal. Rptr. 3d 250, 264 n.5 (Cal. App. Ct. 2020). As Hart pled, *Nelson*  
 14 requires a plaintiff to allege “the existence of a valid contractual relationship  
 15 between the plaintiff and a third party containing the probability of future economic  
 16 benefit to the plaintiff.” Compl. ¶ 100 (quoting *Nelson* at 264 n.5). Facebook argues  
 17 that Hart has not pled a “prospective economic advantage” outside of his contract  
 18 with Donorbureau. Facebook Mot. to Dismiss 13. But Hart alleged in his Complaint  
 19 that he has a probability of future economic benefit if he successfully fulfills the  
 20 terms of his Donorbureau contract. Thus, he has alleged the necessary facts  
 21 sustaining the elements of the claim.

22  
 23 **VI. Defendants’ catchall defenses fail.**

24 **A. Section 230 is not a defense to Hart’s claims.**

25 First, Facebook and Twitter fallaciously argue that Section 230 of the  
 26 Communications Decency Act, 47 U.S.C. § 230 et seq., bars all the claims against  
 27 them. Facebook Mot. to Dismiss 14-17; Twitter Mot. to Dismiss 20-21. But Section

1 230 is a defense only against Hart’s state-law claims, not against Hart’s First  
2 Amendment claim, for the First Amendment trumps federal statutes. *Fed. Agency of*  
3 *News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116 (N.D. Cal. 2020) (“the Ninth  
4 Circuit has not interpreted Section 230 to grant immunity for causes of action  
5 alleging constitutional violations.”) (citing *Fair Hous. Council v. Roommates.com,*  
6 *LLC*, 521 F.3d 1157, 1169 (9<sup>th</sup> Cir. 2008)); *id.* at 1119 (“the Court does not broach  
7 Count I, Plaintiffs’ *Bivens* claim for violation of the First Amendment, because as  
8 discussed above, Section 230 does not immunize a defendant from constitutional  
9 claims.”). Thus, Section 230 does not bar Hart’s First Amendment claims as to any  
10 Defendants.

11 Second, Section 230 provides a liability shield only for “any action voluntarily  
12 taken in good faith to restrict access to or availability of material that the provider  
13 or user considers to be obscene, lewd, lascivious, filthy, excessively violent,  
14 harassing, or otherwise objectionable . . .” § 230(c)(2). Hart has alleged that this  
15 action was not taken voluntarily, in good faith, or upon consideration by Twitter and  
16 Facebook but rather was taken at the behest of the Federal Defendants.

17 This action was not taken voluntarily by the platforms but under pressure from  
18 the government. As the Ninth Circuit has recognized in another context, “The  
19 psychological atmosphere in which the consent is obtained is a critical factor in the  
20 determination of voluntariness.” *United States v. Rothman*, 492 F.2d 1260, 1265 (9<sup>th</sup>  
21 Cir. 1973). “Where the consent is obtained through a misrepresentation by the  
22 government, or under inherently coercive pressure and the color of the badge, such  
23 consent is not voluntary.” *Id.*

24 That is the situation in which Twitter and Facebook found themselves in this  
25 case. According to the White House Press Secretary, as alleged in the Complaint,  
26 senior officials of the White House were calling and telling the platforms to take  
27

1 down posts like Mr. Hart’s. Compl. ¶ 12. Even if the particular post in question was  
2 identified by a lower-level censor in the Surgeon General’s office, the top-level  
3 direction was made at the highest levels of corporate and governmental leadership.  
4 In such a case, for a highly regulated entity like the platforms, such “inherently  
5 coercive pressure” renders their decision no longer voluntary. *Rothman*, 492 F.2d at  
6 1265. Similarly, when platforms act jointly with the government, they do not act “in  
7 good faith.” That is not to say they are acting in “bad faith” but that they are acting  
8 out of no faith at all. They are neither benevolent or malevolent but rather are  
9 acting as tools of their governmental puppeteers. Alternatively, if the platforms have  
10 a consistent pattern of suppressing similar information from political viewpoints  
11 with which they disagree, such censorship is not undertaken in good faith.

12 Or, put differently, this was not material “the *provider* or user considers to be”  
13 objectionable, but rather material the *government* considers to be objectionable.  
14 § 230(c)(2) (emphasis added). Section 230 protects against “lawsuits seeking to hold  
15 a service provider liable for its exercise of a publisher’s traditional editorial  
16 functions—such as deciding whether to publish, withdraw, postpone or alter  
17 content.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997). Here, the  
18 Complaint alleges it was not the platform but the government that made the  
19 determination in the first instance that the material was objectionable. Compl. ¶¶ 7-  
20 20. Facebook and Twitter did not exercise the publisher’s editorial discretion; they  
21 implemented the government’s editorial discretion.

22 One way this is seen is by asking whether the platforms would have taken the  
23 material down of their own accord but for the governmental pressure. The  
24 Defendants say in their submissions that they would have (Federal Mot. to Dismiss  
25 12; Facebook Mot. to Dismiss 5-6; Twitter Mot. to Dismiss 9-10), but those factual  
26 allegations are outside the record for this motion. However, there is good reason to  
27

1 believe that they would not have done so, given recent decisions from Meta's  
2 Oversight Board.<sup>8</sup> In one of its first cases, the Oversight Board considered an  
3 instance in which "Facebook [had] removed the content for violating its  
4 misinformation and imminent harm rule, . . . finding the post contributed to the risk  
5 of imminent physical harm during a global pandemic." *In re French user*, 2020-006-  
6 FB-FBR (Meta Oversight Bd. Jan. 28, 2021).<sup>9</sup> The Oversight Board instructed  
7 Facebook to restore the post, reasoning, "In this case, a user is questioning a  
8 government policy and promoting a widely known though minority opinion of a  
9 medical doctor. The post is geared towards pressuring a governmental agency to  
10 change its policy; the post does not appear to encourage people to buy or take certain  
11 drugs without a medical prescription. Serious questions remain about how the post  
12 would result in imminent harm." *Id.* at 8.1. Hart stands in a similar stead: he was  
13 questioning governmental policy on masking children and citing numerous peer-  
14 reviewed studies on the topic; he was not urging people to undertake actions that  
15 would lead to "imminent harm." *Id.*

16 In its second case dealing with COVID-19, the Oversight Board upheld  
17 Facebook's decision to leave in place "a post by a state-level medical council in Brazil  
18 which claimed that lockdowns are ineffective and had been condemned by the World  
19 Health Organization." *In re Brazilian Medical Council*, 2021-008-FB-FBR (Meta

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21 <sup>8</sup> The Meta (Facebook) Oversight Board is "an independent body often described as a  
22 kind of Supreme Court for Facebook." "The board is an independent, court-like entity  
23 for appealing content decisions on Facebook-owned platforms. It's made up of 20  
24 experts in areas like free expression, human rights, and journalism. Content  
25 moderation decisions made by Facebook and Instagram—for instance, removing or  
26 not removing a particular post—can be appealed to the board once users have gone  
all the way through the company's internal review process." Donie O'Sullivan, "What  
you need to know about the board deciding Trump's fate on Facebook," CNN.com  
(May 4, 2021), [https://www.cnn.com/2021/05/04/tech/what-is-facebook-oversight-  
board/index.html](https://www.cnn.com/2021/05/04/tech/what-is-facebook-oversight-board/index.html).

27 <sup>9</sup> <https://www.oversightboard.com/decision/FB-XWJQBU9A>.

1 Oversight Bd. Aug. 19, 2021).<sup>10</sup> Though the Oversight Board found that “the content  
2 contained some inaccurate information,” it nonetheless concluded that the post “did  
3 not create a risk of imminent harm and should, therefore, stay on the platform.” *Id.*  
4 Additionally, the Oversight Board emphasized that when Facebook encounters  
5 health misinformation, its response should be to provide a fact-check or contextual  
6 information alongside a post rather than to take down the post or suspend the user.  
7 *Id.* at 8.3.III (“Facebook should consider less intrusive measures than removals for  
8 misinformation that may lead to forms of physical harm that are not imminent,”  
9 such as “referring content that comes to its attention to its fact-checking partners  
10 where a public position on debated health policy issues (in particular in the context  
11 of a pandemic) is presented . . .”). The Oversight Board’s two decisions specific to  
12 medical disinformation both provide good reason to believe that the platforms were  
13 not acting voluntarily or in good faith when they suspended Hart because a fair  
14 application of their existing standards would not have compelled his suspension. It  
15 was the U.S. Government’s pressure that tipped the scales from free speech to  
16 censorship.

17 In sum, far from posing “the classic kinds of claims that have been found to be  
18 preempted by section 230,” (Facebook Mot. to Dismiss 24 (cleaned up)), this is a  
19 unique case with a novel circumstance where the U.S. Government has leaned on  
20 platforms to censor content. This makes all the difference because, while normally  
21 broad immunity serves the purposes of Section 230 to protect publishers, *see*  
22 *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413 (1<sup>st</sup> Cir. 2007), here narrow  
23 immunity serves the purposes of Section 230 to stop governmental interference with  
24 the internet: “Section 230 was enacted, in part, to maintain the robust nature of  
25 Internet communication, and accordingly, to keep government interference in the

26 \_\_\_\_\_  
27 <sup>10</sup> <https://www.oversightboard.com/decision/FB-B6NGYREK/>.



1 medium to a minimum.” *Batzel v. Smith*, 333 F.3d 1018, 1027 (9<sup>th</sup> Cir. 2003). In  
2 other words, “Section 230 is designed to keep the federal government removed from  
3 the editorial decision-making process of internet companies like YouTube and  
4 Google.” *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 U.S. Dist. LEXIS  
5 119101, at \*30 (N.D. Cal. June 25, 2021). Here we have the exact opposite: internet  
6 companies are making editorial decisions at the behest of the federal government.  
7 This undercuts the very purpose of Section 230, which Congress said was to see the  
8 internet “flourish[], to the benefit of all Americans,” “unfettered by Federal or State  
9 regulation.” 47 U.S.C. § 230(a)(4) & (b)(2). Thus, a narrow reading of the immunity,  
10 and not a broad one, promotes one of “the [two] primary purpose[s] of Section 230”:  
11 “the free exchange of information and ideas over the Internet.” *Kifle v. YouTube*  
12 *LLC*, No. 21-cv-01752-CRB, 2021 U.S. Dist. LEXIS 193604, at \*8 (N.D. Cal. Oct. 5,  
13 2021) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9<sup>th</sup> Cir.  
14 2003)). This Court must honor Congress’s aim and the Ninth Circuit’s instruction by  
15 not allowing the Social Media Defendants to misuse Section 230 as a shield for their  
16 tortious and unconstitutional cooperation in governmental censorship of the  
17 internet.

18 **B. Facebook and Twitter’s defenses based on their terms of service**  
19 **require the introduction of factual evidence not allowed at this**  
20 **stage of the pleadings.**

21 Facebook claims its terms of service bar the promissory estoppel claim (Facebook  
22 Mot. to Dismiss 10-11), and Twitter claims its terms of service bar all Hart’s claims  
23 (Twitter Mot. to Dismiss 21-22), but this defense fails at this stage because it  
24 requires the Court to consider factual evidence not in the record. When reviewing a  
25 motion to dismiss a complaint, a Court may consider only the facts contained in the  
26 complaint and any matters properly subject to judicial notice. *Bozzio v. EMI Grp.*  
27 *Ltd.*, 811 F.3d 1144, 1154 n.2 (9<sup>th</sup> Cir. 2016).

1 The terms of service asserted by Facebook and Twitter are adhesion contracts,  
2 and their validity is determined by a factual inquiry into how they were presented to  
3 the user. “California law treats contracts of adhesion, or at least terms over which a  
4 party of lesser bargaining power had no opportunity to negotiate, as procedurally  
5 unconscionable to at least some degree.” *In re Juul Labs, Inc.*, No. 20-cv-02345-  
6 WHO, 2021 U.S. Dist. LEXIS 157126, at \*39-40 (N.D. Cal. Aug. 19, 2021) (quoting  
7 *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9<sup>th</sup> Cir.  
8 2010), superseded by statute on other grounds). The degree to which adhesion  
9 contracts are procedurally unconscionable is determined by their presentation; for  
10 example, “*Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454, 466-67 (S.D.N.Y. 2017) . . .  
11 reject[ed] enforcement of [an] arbitration agreement where the “I agree to Lyft’s  
12 Terms of Service” is in the smallest font on the screen, dwarfed by the jumbo-sized  
13 pink “Next” bar at the bottom of the screen and the bold header “Add Phone  
14 Number” at the top,’ all of which would mislead[ ] consumers even if the hyperlinked  
15 Terms of Service was easier to identify . . . .” *In re Juul Labs, Inc.*, 2021 U.S. Dist.  
16 LEXIS 157126, at \*38. Therefore, before this Court may rule on this defense, a  
17 factual inquiry is required not only into the words used in the terms of service but  
18 also into how they were presented to Hart. Because such a factual inquiry has not  
19 yet occurred, the Court should deny the motions to dismiss at this stage.

20 Twitter asks this Court to take judicial notice of its terms of service, as they  
21 currently exist. Twitter Req. for Jud. Notice 1-2. But at this stage, the Court may not  
22 take Twitter’s word that its current terms of service represent the terms of service  
23 *as they existed at times relevant to the complaint.* See *Gardner v. CafePress Inc.*, No.  
24 3:14-cv-0792-GPC-JLB, 2014 U.S. Dist. LEXIS 173726, at \*5-6 (S.D. Cal. Dec. 16,  
25 2014) (refusing to take notice of the terms of service, stating “Documents on  
26 CafePress’s website are not public documents and thus can be changed at any  
27

1 moment by CafePress.”). Because they can be—and are—changed on a regular basis,  
2 there must be a factual inquiry into which particular version of the terms of service  
3 were in effect at the time of Hart’s relevant actions, including joining Twitter and  
4 Facebook, purchasing specific advertisements, and having specific posts removed.  
5 This factual dispute distinguishes this case from others in which courts took judicial  
6 notice of terms of service and plaintiffs did not dispute which version was in effect at  
7 a particular time. *See, e.g., O’Handley*, 2022 U.S. Dist. LEXIS 4491, at \*4 n.3; *Coffee*  
8 *v. Google, LLC*, No. 20-cv-03901-BLF, 2021 U.S. Dist. LEXIS 26750, at \*11 (N.D.  
9 Cal. Feb. 10, 2021).

10 Furthermore, Twitter and Facebook argue that Hart incorporated the terms of  
11 service into his Complaint by citing them. Twitter Req. for Jud. Notice 2; Facebook  
12 Mot. to Dismiss 3. But Hart disputes which version of them applies to each illegal  
13 act that Defendants took, and there is no evidence in the record of how they were  
14 presented to this specific plaintiff. For these reasons, the terms of service as noticed  
15 by Twitter are of no value in determining a motion to dismiss based on the  
16 sufficiency of the pleadings.

17 Finally, even if the terms of service were relevant at this stage, the motions to  
18 dismiss would still fail because the adhesion contracts are unconscionable.  
19 Unconscionability has two components, procedural and substantive. As mentioned,  
20 all adhesions contracts are “procedurally unconscionable to at least some degree.” *In*  
21 *re Juul Labs, Inc.*, 2021 U.S. Dist. LEXIS 157126, at \*39-40. In deciding the  
22 existence of procedural unconscionability, “the Ninth Circuit has ‘consistently  
23 followed the [California] courts that reject the notion that the existence of  
24 “marketplace alternatives” bars a finding of procedural unconscionability.” *In re:*  
25 *Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1137 (N.D. Cal.  
26 2018) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 985 (9<sup>th</sup>  
27

1 Cir. 2007)). Therefore, without factual evidence that the terms of service were  
2 presented to Hart in a fair way, the Twitter and Facebook motions to dismiss fail to  
3 disprove allegations of procedural unconscionability.

4 The second part of the inquiry is into the substantive unconscionability: “The  
5 substantive unconscionability inquiry looks to whether the *actual terms* of the  
6 agreement create overly harsh or one-sided results.” *In re: Yahoo! Inc. Customer*  
7 *Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1137 (N.D. Cal. 2018) (emphasis in  
8 original) (citing *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 808, 49 Cal. Rptr.  
9 3d 555, 564 (2006)). In this instance, the terms of the agreement led to a violation of  
10 Hart’s First Amendment rights; therefore, they are substantively unconscionable, as  
11 well.

12 **C. California’s anti-SLAPP statute is inapplicable in federal court and**  
13 **in this case.**

14 Under the Supreme Court’s test in *Shady Grove*, California’s anti-SLAPP statute  
15 is inapplicable in federal court. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*  
16 *Co.*, 559 U.S. 393, 398 (2010) (reaffirming *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)  
17 (“When a situation is covered by one of the Federal Rules,” a federal court must  
18 apply the Federal Rule, notwithstanding the existence of a conflicting state statute.).  
19 Under *Shady Grove*, if a federal rule of civil procedure “answers the question in  
20 dispute,” then it governs—notwithstanding a state-law procedure to the contrary. *Id.*  
21 In this instance, the question in dispute is whether the Social Media Defendants  
22 may dismiss or strike Hart’s claims by motion. Because Federal Rule of Civil  
23 Procedure 12 allows them to do so and they have not challenged the applicability or  
24 validity of Rule 12, it trumps California’s anti-SLAPP statute. Therefore, the Social  
25 Media Defendants’ anti-SLAPP claim is inapplicable in this Court. *See* Twitter Mot.  
26 To Strike; Facebook Mot. to Dismiss 17-19.

1           **1. The Second Circuit applied the *Shady Grove* test in *La Liberte v. Reid* and held that California’s anti-SLAPP statute conflicts with Rule 12 and is inapplicable in federal court.**

2  
3           The Second Circuit applied the *Shady Grove* test in a case of first impression  
4 recently and held that “California’s anti-SLAPP statute is inapplicable in federal  
5 court because it increases a plaintiff’s burden to overcome pretrial dismissal, and  
6 thus conflicts with Federal Rules of Civil Procedure 12 and 56.” *La Liberte v. Reid*,  
7 966 F. 3d 79, 83 (2<sup>nd</sup> Cir. 2020).<sup>11</sup> The court’s persuasive analysis and rejection of  
8 California’s anti-SLAPP statute’s application in federal court is instructive here.

9           In *La Liberte*, the plaintiff, Roslyn La Liberte, sued MSNBC personality Joy Reid  
10 for defamation. *Id.* Reid mistakenly tweeted that La Liberte had called a 14-year-old  
11 boy an invective and screamed at him that he was going to be deported. *Id.* at 84.  
12 The tweet was false, but it went viral, and La Liberte received physical and  
13 emotional threats as a result. *Id.* In defense, Reid filed a motion to dismiss under  
14 Federal Rule of Civil Procedure 12(b)(6) and a motion to strike under California’s  
15 anti-SLAPP law. *Id.* at 83.

16           The Second Circuit acknowledged a circuit split as to whether anti-SLAPP  
17 statutes apply in federal courts, with the Fifth, Eleventh, and D.C. Circuits holding  
18 them inapplicable, *id.* at 86 (citing *Klocke v. Watson*, 936 F. 3d 240, 242 (5<sup>th</sup> Cir.  
19 2019) (Texas statute); *Carbone v. Cable News Network, Inc.*, 910 F. 3d 1345, 1350  
20 (11<sup>th</sup> Cir. 2018) (Georgia statute); *Abbas v. Foreign Policy Grp., LLC*, 783 F. 3d 1328,  
21 1335 (D.C. Cir. 2015) (D.C. statute), and the First Circuit applying them. *Id.* (citing  
22 *Godin v. Schencks*, 629 F. 3d 79, 86-7 (1<sup>st</sup> Cir. 2010) (Maine statute)). The Second  
23 Circuit noted that the Ninth Circuit decision *United States ex rel. Newsham v.*  
24 *Lockheed Missiles & Space Co.*, 190 F. 3d 963, 972 (9<sup>th</sup> Cir. 1999) (California

25 \_\_\_\_\_  
26 <sup>11</sup> Additionally, the court rejected defendant’s argument that she enjoyed Section 230  
27 immunity, a defense the Social Media Defendants have also asserted in this case, to  
which Hart responds, *supra*, Section VI.A. See *La Liberte*, 966 F. 3d at 89.

1 statute), which had applied the California anti-SLAPP law, predated *Shady Grove*  
2 and was no longer controlling law. *Id.* at 87 (citing *Makaeff v. Trump Univ., LLC*,  
3 736 F. 3d 1180, 1188 (9<sup>th</sup> Cir. 2013) (Watford, J., joined by Kozinski Ch. J., Paez J.,  
4 and Bea, J., dissenting from denial of rehearing en banc) (“Just as the New York  
5 statute in *Shady Grove* impermissibly barred class actions when Rule 23 would  
6 permit them, so too California’s anti-SLAPP statute bars claims at the pleading  
7 stage when Rule 12 would allow them to proceed.”).<sup>12</sup>

8 The Second Circuit explained that under Rule 12, “a well-pleaded complaint may  
9 proceed even if it strikes a savvy judge that actual proof of those facts is  
10 improbable.” *Id.* (quoting *Twombly*, 550 U.S. at 570). In contrast, the California  
11 anti-SLAPP statute “require[es] the plaintiff to establish that success is not merely  
12 plausible but probable.” *Id.* (cleaned up). The court found that the California anti-  
13 SLAPP statute “establishes the circumstances under which a court must dismiss a  
14 plaintiff’s claim before trial, a question that is already answered (differently) by  
15 Federal Rules 12 and 56.” *Id.* Thus, it concluded “federal courts must apply Rule 12  
16 and 56 instead of California’s special motion to strike.” *Id.* at 88.

17 This Court should follow the reasoning of *Shady Grove* and *La Liberte* to deny the  
18 Social Media Defendants’ motions to strike under the California anti-SLAPP law. In  
19 addition, it should deny their requested relief of attorneys’ fees because California’s  
20 anti-SLAPP statute “does not purport to make attorney’s fees available to parties  
21 who obtain dismissal by other means, such as under Federal Rule 12(b)(6).” *La*  
22 *Liberte*, 966 F. 3d at 88; *Abbas*, 783 F. 3d at 1337 n.5; *see also Klocke*, 936 F. 3d at  
23 247 n.6.

24 \_\_\_\_\_  
25 <sup>12</sup> In the underlying opinion, the Ninth Circuit panel reversed the denial of the anti-  
26 SLAPP motion and held the nonmoving party was a limited public figure. The panel  
27 remanded to the district court for a determination of whether the nonmoving party  
could prevail on the merits of its defamation claim when it was a limited public  
figure. *Makaeff v. Trump Univ., LLC*, 715 F. 3d 254, 271-72 (9<sup>th</sup> Cir. 2013).

1                   **2. In the alternative, if this Court applies *Planned Parenthood***  
2                   ***Federation of America*, it should still deny the anti-SLAPP**  
3                   **motions because Hart has pled plausible claims under Rule 12.**

4           In the alternative, the Rule 12 plausibility pleading standard applies even to an  
5 anti-SLAPP motion when the SLAPP proponent challenges the legal sufficiency of a  
6 claim. See *Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F. 3d 828,  
7 834 (9<sup>th</sup> Cir. 2018).

8           In *Planned Parenthood*, the Ninth Circuit adopted a compromise framework in  
9 which federal courts review anti-SLAPP motions to strike under different standards,  
10 depending on the motion's basis. If the proponent of the anti-SLAPP motion makes a  
11 legal challenge to the sufficiency of a claim, Rule 12 governs. And if the party  
12 asserting the anti-SLAPP motion makes a factual challenge to the sufficiency of the  
13 claim, Rule 56 governs, and the party opposing the anti-SLAPP motion is entitled to  
14 conduct discovery. *Id.* at 833-34. The *Planned Parenthood* court did not address nor  
15 cite *Shady Grove*, leaving the applicability of that decision an open question in the  
16 Ninth Circuit.

17           Here, the Social Media Defendants rely on *Planned Parenthood* and acknowledge  
18 that their anti-SLAPP motions “must be treated in the same manner as a motion  
19 under Rule 12(b)(6).” Facebook Mot. to Dismiss 26; see also Twitter Mot. to Strike 5-  
20 6. Thus, they abandon the “probability” and burden-shifting regime under  
21 California's anti-SLAPP statute. Facebook Mot. to Dismiss 26; Twitter Mot. to Strike  
22 6. Therefore, even under *Planned Parenthood*, the anti-SLAPP regime does not  
23 apply, and the Court should deny the motions to strike under Rule 12 because Hart  
24 has stated a plausible claim on which relief can be granted.

1                   **3. If this Court does reach the merits of the anti-SLAPP motions,**  
2                   **it should still deny them because they attempt to turn the**  
3                   **statute on its head.**

4           Even if this Court were to conclude that it had to apply the SLAPP standard  
5           proposed by Defendants instead of the standard under the Federal Rules, this Court  
6           should still conclude SLAPP does not apply on its own merits. “Analysis of an anti-  
7           SLAPP motion is a two-step process. In the first step, the moving defendant bears  
8           the burden of identifying all allegations of protected activity, and the claims for  
9           relief supported by them. At this stage, the defendant must make a threshold  
10          showing that the challenged claims arise from protected activity, which is defined in  
11          Code of Civil Procedure section 425.16, subdivision (e).” *Dae v. Traver*, 69 Cal. App.  
12          5th 447, 455, 284 Cal. Rptr. 3d 495 (2021) (cleaned up). In the second stage, “the  
13          burden shifts to the plaintiff to demonstrate that each challenged claim based on  
14          protected activity is legally sufficient and factually substantiated.” *Id.*

15          The Social Media Defendants’ motions do not succeed at either stage. First, the  
16          moving defendants have not shown their activity of removing Hart’s posts is  
17          protected activity under the anti-SLAPP statute. The anti-SLAPP statute covers  
18          four types of activity: “(1) any written or oral statement or writing made before a  
19          legislative, executive, or judicial proceeding, or any other official proceeding  
20          authorized by law, (2) any written or oral statement or writing made in connection  
21          with an issue under consideration or review by a legislative, executive, or judicial  
22          body, or any other official proceeding authorized by law, (3) any written or oral  
23          statement or writing made in a place open to the public or a public forum in  
24          connection with an issue of public interest, or (4) any other conduct in furtherance of  
25          the exercise of the constitutional right of petition or the constitutional right of free  
26          speech in connection with a public issue or an issue of public interest.” Cal. Civ.  
27          Proc. Code § 425.16(e).



1 Here, it is Hart who made the written or oral statement in a public forum, not  
2 Facebook or Twitter, so prongs 1-3 clearly do not apply. Thus, Twitter and Facebook  
3 must argue that removing Hart’s speech is “other conduct in furtherance of the  
4 exercise of . . . the constitutional right of free speech.” § 425.16(e)(4). This fails. First,  
5 in the most obvious of ways, removing Hart’s post is *not* an act in furtherance of free  
6 speech, but an act to censor free speech.

7 Second, content moderation is not “any other conduct” as contemplated in the  
8 Act. “Any other conduct” is conduct similar to an oral or written statement.  
9 *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 144, 246 Cal. Rptr. 3d 591, 597,  
10 439 P.3d 1156, 1161 (2019) (“this provision encompasses conduct and speech similar  
11 to what is referenced in section 425.16, subdivision (e)(1) through (3).”). The  
12 California Supreme Court has cautioned that “courts should engage in a relatively  
13 careful analysis of whether a particular statement falls within the ambit of ‘other  
14 conduct’ encompassed by subdivision (e)(4).” *Id.* at \*145.

15 The term “any other conduct” was primarily intended to “shield[] expressive  
16 conduct—the burning of flags, the wearing of armbands, and the like—that,  
17 although not a ‘written or oral statement or writing’ (§ 425.16, subd. (e)(1)–(3)), may  
18 similarly communicate views regarding ‘matters of public significance.’” *Wilson v.*  
19 *Cable News Network, Inc.*, 7 Cal. 5th 871, 893 (2019). “[T]he legislative history  
20 suggests expressive conduct was foremost in the Legislature’s thinking when  
21 subdivision (e)(4) was added.” *Id.*

22 However, the California Supreme Court has subsequently said that it may also  
23 cover “ancillary acts alleged to facilitate a defendant’s speech or petitioning rights.”  
24 *Id.* The question, then, is whether content censorship is an “ancillary act that  
25 facilitates a defendant’s speech rights.” This Court should conclude that it is not.

1 That answer is evident by looking to two recent California Supreme Court cases:  
2 *Wilson v. CNN* (2019) and *Bonni v. St. Joseph's Health System* (2021).

3 In *Wilson*, CNN asserted an anti-SLAPP motion against an employee who alleged  
4 he'd been wrongfully terminated because of discrimination. CNN filed an anti-  
5 SLAPP motion on the grounds that its termination decision was "other conduct in  
6 furtherance of" its free speech rights. The California Supreme Court recognized that  
7 news organizations like CNN have free speech rights to report the news with their  
8 editorial judgment and that this reporting and judgment are exercised through  
9 employees, such that "the decision to hire or fire an employee who is vested with  
10 ultimate authority to determine a news organization's message" may rise to other  
11 conduct that facilitates CNN's speech. *Wilson*, 7 Cal. 5th at 896. Because CNN did  
12 not show that Wilson was such an employee, the anti-SLAPP motion failed.

13 *Wilson* teaches that organizations can discipline the individual bearers of their  
14 corporate message. But no one here thinks Hart is bearing Facebook or Twitter's  
15 organizational message. Facebook and Twitter are public fora that host a variety of  
16 viewpoints, including many viewpoints in direct conflict with one another. In this  
17 instance, they are not organizational speakers who are entitled to rely on employees  
18 to effectively communicate their institutional message like a corporation,  
19 government, or religious institution. Instead, they are open public fora, and no one  
20 would attribute Hart's speech to Facebook or Twitter as the platforms'; they would  
21 see only him as the speaker. *See Price v. City of N.Y.*, 2018 U.S. Dist. LEXIS 105815,  
22 at \*35-36 (S.D.N.Y. June 25, 2018) (noting people attribute speech to the account of  
23 the commentator, not the social media account of the person whose original post is  
24 being commented upon).

25 In *Bonni*, the California Supreme Court rejected a hospital's anti-SLAPP motion  
26 against a doctor challenging a disciplinary decision. "[D]isciplining a doctor based on  
27

1 the view that the doctor’s skills are deficient is not the same thing as making a  
2 public statement to that effect. The latter is, or may be, speech on a matter of public  
3 concern. The former is not speech at all.” *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th  
4 995, 1021 (2021). The court rejected the idea “that if stating a given viewpoint would  
5 warrant constitutional and anti-SLAPP protection as an exercise of free speech  
6 rights, the same protection should extend equally to any actions motivated by that  
7 viewpoint.” *Id.* The court declined the suggestion that “the suspensions advanced the  
8 Hospitals’ ability to speak or to petition on matters of public concern in any  
9 substantial way.” *Id.* at 2022.

10 That is precisely what happened here. The Social Media Defendants are arguing  
11 that Hart’s stating a given viewpoint means any action taken in response to that  
12 viewpoint, here removing the content, is entitled to equal protection. Put differently,  
13 the platforms must argue that their free speech was facilitated by removing Hart’s  
14 speech. These are exactly the propositions rejected in *Bonni*.

15 Third, granting Twitter and Facebook’s motions would turn the anti-SLAPP law  
16 on its head, undermining instead of advancing its original purpose. “The anti-SLAPP  
17 law was enacted to protect nonprofit corporations and common citizens from large  
18 corporate entities and trade associations in petitioning government.” *FilmOn.com*  
19 *Inc.*, 7 Cal. 5th at 143. Here, two large corporate entities are trying to punish a  
20 common citizen who questioned the conventional wisdom of the medical and  
21 governmental establishments in a social media post. In adopting the anti-SLAPP  
22 law, the Legislature sought “to encourage continued participation in matters of  
23 public significance.” Cal. Civ. Proc. Code § 425.16(a). Permitting the platforms to  
24 impose tens of thousands of dollars of legal costs on a common citizen for his speech  
25 in a generally accessible public forum is the exact opposite of what the California  
26 Legislature intended in enacting the anti-SLAPP law.

1 Finally, even if content censorship is itself protected speech activity, Hart has  
2 demonstrated in this motion that “each challenged claim based on protected activity  
3 is legally sufficient and factually substantiated.” *Dae*, 69 Cal. App. 5th at 455. “In  
4 this step, a plaintiff need only establish that his or her claim has minimal merit to  
5 avoid being stricken as a SLAPP.” *Id.* (cleaned up). “A plaintiff prevails in the second  
6 step by demonstrating that the complaint is both legally sufficient and supported by  
7 a sufficient prima facie showing of facts to sustain a favorable judgment if the  
8 evidence submitted by the plaintiff is credited.” *Id.*

9 Hart has clearly passed the threshold of “minimal merit,” as demonstrated in this  
10 response. Hart has shown the Complaint is legally sufficient and has provided  
11 sufficient facts from the public record to sustain his Complaint. Hart will not repeat  
12 his entire response brief here but incorporates it to show the sufficiency of his claims  
13 to avoid being stricken as a SLAPP.

14 The anti-SLAPP law’s purpose is in its name: to stop strategic litigation against  
15 public participation. Hart did not bring this lawsuit to stop Facebook or Twitter’s  
16 participation in the public sphere. On the contrary, the Social Media Defendants  
17 brought this anti-SLAPP motion as strategic litigation against *Hart’s* public  
18 participation. Under Hart’s Complaint, Facebook and Twitter will be just as free  
19 after this case as before to say whatever they wish about COVID-19, masking, or  
20 Hart. He brought this case to encourage and protect public participation against  
21 government censorship applied to him through corporate joint actors. For that  
22 reason, the Court should deny the anti-SLAPP motions.

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**CONCLUSION**

For the foregoing reasons, the Court should deny Defendants’ Motions to Dismiss and to Strike.<sup>13</sup>

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Respectfully submitted,

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<sup>13</sup> In the alternative, the Court should grant Hart leave to amend his Complaint. If a Rule 12(b)(6) motion prevails, a district court should freely grant a plaintiff leave to amend the complaint “when justice so requires.” Fed. R. Civ. P. 15(a). In general, leave to amend should be given with “extreme liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). When granting a Rule 12(b)(6) motion, “a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).