No. 22-15443

In the United States Court of Appeals
for the Ninth Circuit

COLLEEN HUBER,
Plaintiff-Appellant,
v.
JOSEPH R. BIDEN, in his official capacity as President of the United States of America; TWITTER, INC.; JACK DORSEY, in his official capacity as Chief Executive Officer of Twitter and in his individual capacity,
Defendants - Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:21-cv-06580-EMC
United States District Court Edward M. Chen

OPENING BRIEF OF APPELLANT

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INTRODUCTION

This case presents a constitutional challenge that asks how far may the government go utilizing private actors to censor speech of which the government disapproves. In contemporary times, this question takes on enormous consequences for liberty in general, political freedom in particular, and free speech most particularly. Large social media platforms and their concentration of economic power are relatively new to the law. Their unique ability to control the social and political messaging of public sentiment through hidden algorithms and even outright censorship has become a battleground for those in different and even adversarial political camps. Some advocate for greater control of public speech while others worry aloud about a dystopian world in which powerful corporate interests align with a political power elite determined to silence criticism. This case is not the first of its kind challenging the government's use of the dominant social media companies for its own political ends.

This litigation, however, is unlike earlier and other cases that have alleged that Twitter, Facebook, or Google suspended or otherwise censored a plaintiff's speech by suspending or terminating access to an account and did so as a *de facto* state actor evidenced by cooperation with, or coercion by, the government. The allegations in Dr. Colleen Huber's First Amended Complaint ("FAC") uniquely, explicitly, and in a deliberate fashion focus on facts setting forth a conspiracy—*i.e.*, a meeting of the

minds—between the Biden administration and Twitter to censor Plaintiff's speech on Twitter critical of the government's COVID-19 vaccine policies and to do so ***for the purpose of government censorship*** in violation of the First Amendment. What makes this case especially unique is that the allegations of the FAC further evidence in clear and no uncertain terms that, prior to the conspiracy, Twitter and the other social media platforms were not sufficiently censoring such speech on their own accord and for their own business purposes (*i.e.*, pursuant to their "Terms of Service"). As a result, the Biden administration pronounced publicly that it sought a ***direct engagement*** with Twitter not merely to censor speech, the viewpoint of which the Biden administration disapproved, but also to instruct Twitter exactly ***how to censor*** the objectionable speech and how to do it ***quickly***.

To be sure, the district court below gave lip service to the proper legal standard to apply to the respective motions to dismiss filed by Twitter and President Biden, and also seemed to recognize that this case focuses on the conspiracy prong of the joint action theory of state action. In real terms, however, the lower court ignored the procedural posture of this case and misapplied the law of conspiratorial joint action. Specifically, and in the first instance, the district court patently rejected the non-conclusory allegations of the FAC (and the reasonable inferences drawn from those allegations) setting forth a *prima facie* case of conspiratorial state action and did so in large part by weighing them against Twitter's claim of innocence presented

simply as legal argument in its memoranda of law supporting its motion—in effect rejecting the reasonable factual inferences in favor of Plaintiff and accepting only those in favor of Defendants. In the second instance, the lower court misconstrued the law of conspiracy as it applies to the conspiracy prong of the joint action theory.

The lower court's dismissal of the FAC based upon these reversible errors and on errors in the other matters raised in this appeal require this Court to reverse the dismissal in its entirety and remand for further proceedings.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment (ER-3) dismissing Plaintiff Dr. Colleen Huber's First Amended Complaint, filed October 25, 2021 (ER-24–45), alleging violations of her First Amendment rights to freedom of speech and of the Equal Protection Clause of the Fourteenth Amendment. In addition, Dr. Huber challenges the constitutionality of section 230 of the Communications Decency Act. The following federal statutes conferred jurisdiction of the claims set forth in the FAC upon the district court: 28 U.S.C. § 1331 (constitutional claims); 28 U.S.C. §§ 2201-02 (declaratory and injunctive relief). (FAC ¶¶ 6-7 at ER-25). The district court dismissed the First Amendment and Equal Protection Clause causes of action with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and rejected the challenge to the constitutionality of section 230 with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) on March 18, 2022. (ER-4–23). Plaintiff timely filed her notice of appeal on March 24, 2022. (ER-46–47). This Court has jurisdiction to review the final judgment under 28 U.S.C. § 1291.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE ISSUES FOR REVIEW

(1) Whether the allegations in the First Amended Complaint sufficiently allege a conspiracy giving rise to state action and thus triggering Dr. Huber's claims arising under the First and Fifth Amendments.

(2) Whether § 230 of the Communication Decency Act provides an independent basis for finding state action in this case.

(3) Whether § 230 is unconstitutional.[1]

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[1] We enumerate this issue here and provide this footnote for the sake of transparency and prudence although we do not argue the matter in the brief. We do so to avoid any assertion of an intentional waiver or an unintentional forfeiture of the issue. *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (cleaned up). As the district court's order indicates, while the parties raised and briefed the constitutionality of § 230 below, the court declined to address the issue and dismissed this claim presumably for lack of standing because the court had found no state action and thus no First or Fifth Amendment violations and thus no basis for Dr. Huber to challenge the constitutionality of § 230. (Order at ER-21–22). We recognize that as a general rule, and indeed as a general practice, this Circuit hues fairly closely to the rule that "a federal appellate court does not consider an issue not passed upon below." *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *see also Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094 (9th Cir. 2014) (same); *Davita Inc. v. Va. Mason Mem'l Hosp.*, 981 F.3d 679, 696 (9th Cir. 2020) (same). As such, we do not wish to be presumptuous and brief this issue without direction from this Court, especially insofar as a reversal by this Court of the lower court's order as to state action does not ultimately resolve the state action question—rather, it allows the parties to engage in discovery to provide a more full-throated evidentiary context for the district court to re-examine the claim of state action based upon the developed evidence of a conspiracy between Twitter and the Biden White House. To the extent this Court believes the matter is ripe and appropriate to consider on this appeal, Dr. Huber respectfully requests the opportunity to provide supplemental briefing.

STATEMENT OF THE CASE

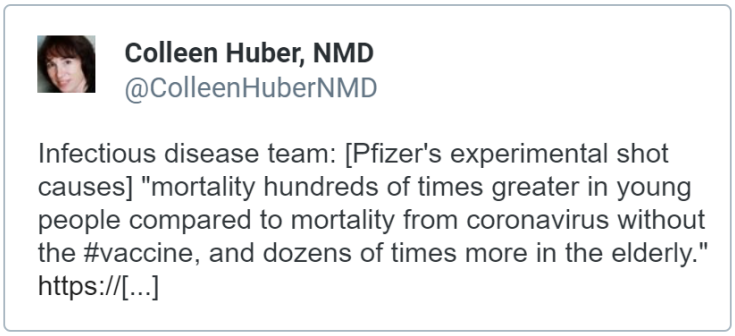
I. PREFATORY STATEMENT

This case, at its core, is a civil conspiracy between and among President Biden (including White House officials acting on his behalf) and Twitter to deprive Dr. Huber and a class of citizens who are similarly situated of their fundamental rights protected by the U.S. Constitution. Defendants conspired to violate the First Amendment and the Equal Protection Clause of the Fifth Amendment by agreeing to have Twitter suspend and terminate Twitter accounts. The purpose and effect of this conspiracy is to censor speech critical of COVID-19 vaccines on behalf of the government. Plaintiff was one of the targets of this conspiracy. The conspiracy converted Twitter from a private actor to a state actor and, as a result, its censorship of Dr. Huber was unconstitutional.

II. RELEVANT FACTS

Dr. Huber is a licensed naturopathic medical doctor who resides in Arizona. (First Amended Complaint ["FAC"] ¶ 9 at ER-26). Prior to Defendants' illegal actions as set forth in the FAC, Dr. Huber used Twitter, a hugely popular online social networking platform, to communicate with others about a variety of matters, which included her viewpoints on current events and politics with a special emphasis on matters that touched upon her medical expertise. (*Id.* ¶¶ 32-33 at ER-28).

On or about February 19, 2021, Dr. Huber posted a quote from a news article to her Twitter account. The Tweet was as follows:



The Tweet contained a quote from a news article from a reputable Israeli news source, Arutz Sheva (Israel National News). The article is available at https://www.israelnationalnews.com/News/News.aspx/297051 (last visited May 18, 2022). (*Id*. ¶¶ 34-35 at ER-29).

Shortly after the posting, Dr. Huber received an e-mail from Twitter informing her that her account had been suspended indefinitely for "[v]iolating [Twitter's] policy on spreading misleading and potentially harmful information related to COVID-19" that "goes directly against guidance from authoritative sources of global and local public health information." (*Id*. ¶¶ 36-37 at ER-30–31).

It is important to note here that there is no evidence in the record that either Dr. Huber's tweet or the information in the linked news article is in fact misleading, false, or harmful.

On April 14, 2021, while she was attempting to appeal the Twitter suspension, Dr. Huber received an e-mail from Twitter notifying her that her Twitter account

was permanently suspended and that Twitter would entertain no appeals. The termination of Dr. Huber's Twitter account prevents her from posting messages or sharing content using the Twitter platform. (*Id*. ¶¶ 39-40 at ER-31). This censorship remains in place to this day.

The FAC specifically alleges that White House officials, in their official capacities and on behalf of President Biden (*Id.* ¶¶ 15, 42 at ER-26, 32), conspired with Twitter by entering into an agreement to censor speech they considered critical of COVID-19 vaccinations, including Dr. Huber's speech on Twitter. (*Id.* ¶¶ 42-43 at ER-32). These allegations are based in large part on published news reports:

- "The White House has been reaching out to social media companies including Facebook, Twitter and Alphabet Inc's Google ***about clamping down*** on COVID misinformation and getting their help to stop it from going viral, a senior administration official said." (*Id*. ¶ 42 at ER-32) (emphasis added).[2]
- "President Joe Biden, who has raced to curb the pandemic since taking office, has made inoculating Americans one of his top priorities and called the move 'a wartime effort.'" (*Id*.).

[2] This quote, and the following ones, are found in the news reporting referenced in and linked by hypertext to the FAC. *Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 762 (9th Cir. 2013) (explaining that courts may consider facts contained in materials appended to, or referenced in, a complaint in deciding a motion to dismiss predicated on a failure to state a claim for relief).

- "But tackling public fear about taking the vaccine has emerged as a major impediment for the administration." (*Id.*).
- "'Disinformation that causes vaccine hesitancy is going to be a huge obstacle to getting everyone vaccinated and there are no larger players in that than the social media platforms,' said the source, who has direct knowledge of the White House's efforts." (*Id.*).
- "'We are talking to them ... so they understand the importance of misinformation and disinformation ***and how they can get rid of it quickly***.'" (*Id.*) (emphasis added).
- "The Biden White House is especially trying to make sure such material 'does not start trending on such platforms and become a broader movement,' the source said." (*Id.*).
- "The companies have repeatedly vowed to get rid of such material on their platforms ***but gaps remain in their enforcement efforts***." (*Id.*) (emphasis added).
- "***The White House's direct engagement with the companies*** to mitigate the challenge has not been previously reported. Biden's chief of staff Ron Klain has previously said the administration will try to work with Silicon Valley on the issue." (*Id.*) (emphasis added).
- "A Twitter spokesman said the company is 'in regular communication

with the White House on a number of critical issues including COVID-19 misinformation.'" (*Id*.).

The factual representations included in the news reports make the express point that prior to the Biden administration's direct "engagement" with the social media giants, including Twitter, otherwise legal speech on social media platforms critical of COVID-19 vaccinations was impeding government policy efforts to effect mass inoculations of Americans. Twitter and the other social media platforms were not censoring this speech on their own accord and for their own business purposes sufficiently for government purposes. The White House felt it important not only to engage directly with these companies, but also to instruct them how to censor this speech.

The Biden administration described its efforts to inoculate the population a "wartime effort."[3] A "wartime effort" carries with it the very clear inference that

[3] Indeed, it is common knowledge that the Biden administration has blamed the economic woes of the country, crime, and the public's dissatisfaction with President Biden's job performance on the pandemic and the concomitant failure to fully implement the government's COVID-19 vaccination policy. *See* Zeke Miller, *High Inflation? Low Polling? White House Blames the Pandemic*, AP NEWS, Nov. 27, 2021, https://apnews.com/article/coronavirus-pandemic-joe-biden-business-lifestyle-health-c6c9d651f631464e168f7a47b6e353bf (last visited May 18, 2022); *see also Press Briefing by Press Secretary Jen Psaki*, December 2, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/12/02/press-briefing-by-press-secretary-jen-psaki-december-2-2021/ (last visited May 18, 2022) ("MS. PSAKI: I think a root cause [of crime] in a lot of communities is the pandemic, yes.").

the Biden administration considered its policy of mass inoculation an existential priority—not merely an important policy objective among other important policy objectives. The objective of these direct communications with Twitter and the other social media giants was not merely to have these companies "clamp down" on what the Biden administration considers bad speech, but also to tell them exactly "how they can get rid of it quickly." Further, these news reports make the point through a strong inference that this "direct engagement" with Twitter and the other social media giants was necessary because previous efforts at simply "try[ing] to work with" these companies was not effective. In short, the Biden administration declared "war" on certain viewpoints, and it enlisted Twitter to silence those viewpoints *to promote a government objective*.

Finally, as part of the effort to push the vaccination policies of the Biden administration, Twitter publicly admitted that it was "working in partnership with the White House to elevate authoritative information in regard to COVID-19." (*Id*. ¶ 52 at ER-33).

III. PROCEDURAL HISTORY

Dr. Huber filed her FAC on October 25, 2021 (ER-24–45), alleging violations of her First Amendment rights to freedom of speech and of the Equal Protection Clause of the Fourteenth Amendment. In addition, the FAC challenges the constitutionality of section 230 of the Communications Decency Act. The district

court dismissed the First Amendment and Equal Protection Clause causes of action with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and rejected the challenge to the constitutionality of section 230 with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) on March 18, 2022. (ER-4–23). Plaintiff timely filed her notice of appeal on March 24, 2022. (ER-46–47).

SUMMARY OF THE ARGUMENT

This case, at its core, is a civil conspiracy between and among President Biden (and White House officials acting on his behalf) and Twitter to deprive Dr. Huber (and a class of citizens similarly situated) of their fundamental rights protected by the U.S. Constitution. The purpose and effect of this conspiracy is to censor speech critical of COVID-19 vaccines on behalf of the government and to promote a governmental objective and policy. This conspiracy converted Twitter from a private actor to a state actor and thus its censorship of Dr. Huber was unconstitutional.

Beyond the conspiracy, however, Twitter's reliance on § 230 of the Communications Decency Act provides an independent basis for state action insofar as the federal statute permits Twitter to deprive Dr. Huber of state law protections of her speech.

The lower court, however, adopted the approach inferentially suggested by Defendants to ignore the inconvenient and non-conclusory factual allegations setting forth the conspiracy and to draw only those inferences from the facts in favor of Defendants. Having cherry-picked the facts and having adopted only the reasonable inferences in favor of Defendants, the district court concluded there was no conspiracy and thus no state action. In other words, the court ignored the relevant procedural standards governing Defendants' respective motions to dismiss and thus

committed reversible error.

Substantively, the district court rendered two rulings. First, the court held there were no facts to allege a conspiracy to support the claim that Twitter terminated Dr. Huber's account as a state actor and without state action there can be no claim of a constitutional violation arising under the First or Fifth Amendments. But, of course, the contrary is true. A finding of state action triggers constitutional protections such that Defendants' viewpoint-based censorship runs afoul of these protections. Accordingly, this case will ultimately be decided by the question of state action. If there was a conspiracy giving rise to state action by Twitter, as the alleged facts and their reasonable inferences demonstrate, or if § 230 provides an independent basis for state action, Defendants have violated Plaintiff's free speech and equal protection rights protected by the First and Fifth Amendments.

Second, the district court concluded that § 230 does not provide an independent basis for state action. In essence, the lower court concluded that California's Unruh Act does not protect speech (*i.e.*, political or personal beliefs) and as such § 230 was of no import. The lower court, however, was wrong about the protections afforded to speech regarding political and personal beliefs under the Unruh Act. Section 230 fundamentally changes the legal relations between the parties in that it immunizes Twitter's otherwise unlawful conduct by stripping Dr. Huber of her civil rights protections under California law.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review by this Court of a dismissal pursuant to either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) is *de novo*. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) ("We review *de novo* a district court's order dismissing a complaint for lack of jurisdiction under Rule 12(b)(1) or for failure to state a claim under Rule 12(b)(6).").

More specifically, the district court dismissed the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) by concluding that Plaintiff had not adequately pled the factual basis for state action to support her First and Fifth Amendment claims. (Order at ER-9–17). As is well known, Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009). Further, "[i]n reviewing the plausibility of a complaint, courts accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *J.B. v. G6 Hosp., LLC*, No. 19-cv-07848-HSG, 2021 U.S. Dist. LEXIS 170338, at *12-13 (N.D. Cal. Sep. 8, 2021).

Courts must give more than lip service to this rule that facts are to be construed in a light most favorable to the nonmoving party. As this Court has stated unequivocally:

> On a motion to dismiss for failure to state a claim, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. On appeal, the court reviewing a grant of a motion to dismiss must also presume the truth of the allegations of the complaint. The issue is not whether the plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim. The trial court may not grant a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Usher v. Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (cleaned up) (cited by *Rock the Vote v. Trump*, No. 20-cv-06021-WHO, 2020 U.S. Dist. LEXIS 202069, at *16 (N.D. Cal. Oct. 29, 2020)).

Finally, courts may consider facts contained in materials appended to, or referenced in, a complaint in deciding a motion to dismiss predicated on a failure to state a claim for relief. *Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 762 (9th Cir. 2013).

While it is not entirely clear, arguably the lower court also dismissed the FAC in part pursuant to Rule 12(b)(1) by holding that the Plaintiff lacked standing to allege that § 230 provides an independent basis of state action. (Order at ER-17–21). To the extent the district court relied upon 12(b)(1) and a lack of jurisdiction and not 12(b)(6), it is clear from its discussion of this issue that it reached its conclusion based upon the allegations of the FAC. As such, the standard of review is no different than the standard applied under 12(b)(6):

> A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are insufficient "on their face" to invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve a facial challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inferences in favor of the party opposing dismissal.

Rock the Vote, 2020 U.S. Dist. LEXIS 202069, at *15-16.

II. LEGAL ARGUMENTS

Twitter is a private entity. As such, the First and Fifth Amendments are not implicated in this litigation unless (1) there is a sufficient factual predicate to argue that Twitter is a state actor insofar as it entered into a conspiracy with the Biden White House to censor Dr. Huber's otherwise legal and protected speech on behalf of the government or (2) there is state action and a justiciable First Amendment issue by virtue of Congress enacting a federal statute purporting to provide Twitter with

immunity by preempting state law that would otherwise protect Plaintiff's speech on Twitter. We address both of these approaches in turn below.

A. The FAC Adequately Alleges a Conspiracy Between Twitter and the Government for Twitter to Censor Dr. Huber's Speech on Behalf of the Government.

We begin by noting that "[t]he Supreme Court has articulated four tests for determining whether a private [party's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (quoting *Franklin v. Fox*, 312 F.3d 423, 444-45 (9th Cir. 2002)) (brackets in the original). The only test at issue in this case is the joint action test. We further note that the joint action test has two distinct and disjunctive prongs. "The joint action test asks whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights. This requirement can be satisfied ***either*** ***by proving the existence of a conspiracy*** ***or*** by showing that the private party was a willful participant in joint action with the State or its agents." *Id.*; *see also Collins v. Womancare*, 878 F.2d 1145, 1154-55 (9th Cir. 1989) (making clear that the conspiracy prong of the joint action test stands on its own as sufficient for state action and distinguishing a joint action argument predicated upon the second prong wherein the private actor is a "willing participant" and the analysis "focuses on whether the state has so far insinuated itself into a position of

interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity") (cleaned up).

It is important to address preliminarily the factual implications of the Twitter admission that it was partnering with the White House to promote its vaccination policies. To begin, a partnership necessarily means and certainly implies a meeting of the minds—an agreement to work together to achieve a joint goal. As will be addressed more fully below, this is an important issue because an agreement between Twitter and the Biden administration to have Twitter engage in censorship of otherwise protected speech is a conspiracy. By definition, a conspiracy is a partnership. *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 153-54 (1940); *United States v. Heck*, 499 F.2d 778, 787 (9th Cir. 1974) ("A conspiracy is defined as a combination of two or more persons to accomplish some unlawful purpose, or some lawful purpose by unlawful means. It is a partnership for criminal purposes in which each member becomes the agent for every other member [. . .], when the conspiracy has been proven to exist, and that the person charged was one of its members.").

While it is certainly true that most partnerships are legal and not conspiracies, a partnership between a private party and the government to have the private party do that which would be unconstitutional if carried out by the government is by definition a conspiracy and thus creates state action. *Tsao v. Desert Palace, Inc*.,

698 F.3d at 1140 ("The joint action test . . . can be satisfied ***either*** ***by proving the existence of a conspiracy*** ***or*** by showing that the private party was a willful participant in joint action with the State or its agents.") (cleaned up) (emphasis and underlining added); *see also Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) ("To prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown."); *see also Dennis v. Sparks*, 449 U.S. 24 (1980) (holding that private parties conspiring with a judge, who had absolute immunity from suit, were acting under color of state law for purposes of a civil conspiracy claim brought pursuant to 42 U.S.C. § 1983).

Further, each participant in the conspiracy "need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002). What this means in practice is that the private actor must be acting in part to obtain the unconstitutional goal of censoring speech on behalf of the government. *Id.* ("To be liable as a co-conspirator, a private defendant must share with the public entity the goal of violating a plaintiff's constitutional right."). *Id.* But precisely because conspiracies are by definition secretive, "[p]roof of a conspiracy can be provided by either direct or circumstantial evidence." *United States v. Loveland*, 825 F.3d 555, 561 (9th Cir. 2016); *Blumenthal v. United States*, 332 U.S. 539, 557 (1947)

("Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity."); *Souza v. Estate of Bishop*, 821 F.2d 1332, 1335 (9th Cir. 1987) (observing that "conspiracy cannot usually be established by direct proof"); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671 (9th Cir. 1980) ("Because a conspiracy is rarely susceptible of direct proof, [the plaintiff] may properly rely upon circumstantial evidence from which a violation may be inferred."); *United States v. Smith*, 609 F.2d 1294, 1298 (9th Cir. 1979) ("[B]ecause conspiracies by their nature tend to be secretive, the government may prove its case through circumstantial as well as direct evidence.").

Thus, the *issue* is whether the Court may ***reasonably infer from circumstantial evidence*** that the partnership Twitter referenced was relating to an ***undisclosed*** (*i.e.*, secret) agreement with the Biden administration for Twitter to do that which the Biden administration could not do overtly: to censor speech illegally in violation of the First Amendment. Thus, the proper question becomes whether

there is a reasonable inference that the statement by Twitter, vetted by countless securities lawyers to be sure, that it had finally entered into a partnership with the Biden administration "to elevate authoritative information in regard to COVID-19" relates back a mere month to the news reports quoting and paraphrasing Biden administration officials' explicit statements that it had "engaged directly" with Twitter and the other social media companies to "clamp[] down" on disfavored speech as part of its "wartime effort." But more than simply encouraging such behavior, the White House actually instructed Twitter exactly "how to get rid of it [the disfavored speech] quickly" and to do so to achieve the government's goal of censorship. And, quite tellingly, the reason the Biden White House had to directly engage with Twitter and the other social media giants is because, on their own, Twitter and the other social media companies were simply not doing enough and as a result "gaps remain[ed] in their enforcement efforts." In other words, driven by their own business interests, Twitter *et al*. were not prepared to censor legal speech on their platforms pursuant to their respective "Terms of Service" agreements. As such, the Biden administration felt it necessary to "directly engage" these companies, to instruct them exactly "how" to censor the disfavored speech "quickly" and to do so as part of the government's "wartime effort"—irrespective of the business interests of these companies, which quite apparently had not provided

sufficient motivation for Twitter and the other social media companies to satisfy the government's interest in censorship.

Dr. Huber respectfully suggests that the direct and circumstantial evidence presented in the allegations of the FAC not only permits a reasonable inference of a conspiracy to have Twitter violate her constitutional rights on behalf of the government (which is all that is needed under Rule 12(b)(6)), but it is also the most reasonable inference one could draw from the allegations. Of course, it is not her burden to establish the existence of an illicit conspiracy as the most reasonable of reasonable inferences. *Mendocino Env't Ctr. v. Mendocino Cty*., 192 F.3d 1283, 1303 (9th Cir. 1999) (making clear that a plaintiff need only provide evidence of a reasonable inference among other competing reasonable inferences). Ultimately, of course, the evidentiary facts set forth in the record post-discovery will be tested against the standards applicable for a motion for summary judgment and, if they survive that scrutiny, at trial by the trier-of-fact. But at this stage, all non-conclusory allegations and ***all*** reasonable inferences in favor of Plaintiff hold sway.

Specifically, the test is whether the inference of a conspiracy is sufficiently reasonable as to be "plausible on its face." *Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."); *see also United States v.*

Brady, 579 F.2d 1121, 1127 (9th Cir. 1978) ("In determining the sufficiency of circumstantial evidence, ***the question is not whether the evidence excludes every hypothesis except that of guilt but rather whether the trier of fact could reasonably arrive at its conclusion***.") (cleaned up) (emphasis added); *see also Twombly*, 550 U.S. at 555, 570; *Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Moreover, among competing reasonable inferences, "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Park v. Thom*pson, 851 F.3d 910, 918 (9th Cir. 2017).[4]

[4] This point bears repeating and emphasis. In fact, even at the summary judgment stage when the defendant has the opportunity to challenge the plaintiff's facts with counter facts, the judge is not permitted to weigh one reasonable inference over another. This point has been made by this Court relying on the seminal Supreme Court decision in this area of the law. *Corcoran v. CVS Health Corp.*, 779 F. App'x 431, 432-33 (9th Cir. 2019) ("We review the grant of summary judgment *de novo*. The district court erred in granting summary judgment to CVS, because, having found plaintiffs' evidence 'relevant' but 'inconsequential' or 'unavailing,' the district court nonetheless placed CVS's and plaintiffs' evidence on equal footing and impermissibly weighed the evidence and failed to credit and draw all reasonable inferences from the evidence in plaintiffs' favor.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," and "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

Unfortunately, while the lower court appears to have recognized the rules of judicial engagement at the motion-to-dismiss stage, it proceeded to place itself in the jury box as the trier-of-fact. Examples abound. Thus, after referencing only some of the alleged facts of the FAC relevant to the conspiracy element, the district court remarked: "Defendants deny that they formed a partnership to conspire against Plaintiff." (ER-9–10). The first obvious question that comes to mind is how the court could draw this conclusion. At best, and without crediting non-evidentiary statements in Defendants' legal memorandum as cognizable evidence, the court could only have understood that Defendants deny that Plaintiff had made out a case for conspiracy—not that a conspiracy did not in fact exist. This is not mere semantics as evidenced by the lower court's other factual assertions.

For example, after a somewhat extended (albeit misdirected) discussion of *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1289–1302 (9th Cir. 1999) (Order at ER-10–11), a case we shall address in detail below, the court makes these three factual pronouncements: "Plaintiff does not allege that President [sic] and Twitter worked hand-in-hand to suspend her Twitter account. She does not even allege that Twitter would not have suspended her Twitter account absent an improper motive or conspiracy. And she does not allege that Twitter failed to exercise independent judgment when it suspended her account." (Order at ER-11).

Each of these statements, independently and certainly collectively, demonstrates beyond cavil that the lower court either made a conscious decision to ignore the reasonable inferences one might draw from the non-conclusory factual allegations, or implicitly credited the reasonable inferences in favor of Defendants to a greater degree than the reasonable inferences in favor of Plaintiff. To flesh out this point further we address each of these statements in turn.

- "Plaintiff does not allege that President [sic] and Twitter worked hand-in-hand to suspend her Twitter account." (*Id*.).

This is quite clearly not the case. In addition to the overall context of the White House "wartime effort" to enlist Twitter and other social media companies to "clamp[] down" on what the White House considered misinformation that would detract from its "wartime effort," the FAC quotes White House officials stating that not only had the White House reached out to Twitter about clamping down on disfavored speech about vaccines, but ***directly engaged*** Twitter on "***how to get rid of it [the disfavored speech] quickly***." (FAC ¶¶ 42-43, 48 at ER-32, 33) (emphasis added). A "direct engagement" that gets into the nitty-gritty of exactly how to censor speech is most certainly a sufficiently explicit allegation of the government and Twitter working "hand-in-hand." But beyond the explicit nature of this allegation, given the overall context of the "wartime effort" and the statement by Twitter itself that it is "in regular communication with the White House on a number of critical

issues including COVID-19 misinformation" (*id*.), along with Twitter's subsequent statement of a "partnership" "to elevate" government favored speech (FAC ¶ 52 at ER-33), the allegation that the Biden administration was actually instructing Twitter as to how to censor speech quite reasonably gives rise to the inference of a hand-in-hand working conspiratorial relationship.

- "She does not even allege that Twitter would not have suspended her Twitter account absent an improper motive or conspiracy." (Order at ER-11).

Here the lower court ignores the explicit factual allegations that demonstrate that Twitter, left to its own agenda and devices, was not doing enough to censor the speech disfavored by the government: "The companies have repeatedly vowed to get rid of such material on their platforms ***but gaps remain in their enforcement efforts***." (FAC ¶ 52 at ER-33) (emphasis added). Again, in context, this explicit factual allegation would certainly allow someone to conclude that but for the unconstitutional conspiratorial agreement for Twitter to censor speech on behalf of the government, Twitter would not have acted (precisely because it had not previously acted—at least not sufficiently for government censorship purposes). And while it is certainly the case that one might reasonably conclude that Twitter could very well have decided on its own to terminate Plaintiff's account without the conspiracy, the lower court's rejection of the inference in favor of an illicit

conspiracy amounts to an improper weighing of the evidence. Indeed, the whole point of discovery is to allow the parties—both Plaintiff and Defendants—the opportunity to support their preferred reasonable inferences or to disprove them altogether. The district court took that opportunity away from Plaintiff by fiat in violation of the rules applicable to Rule 12(b)(6).

- "And she does not allege that Twitter failed to exercise independent judgment when it suspended her account." (Order at ER-11).

We needn't spend much time here. This statement rings hollow when one combines the allegations that Twitter had not done enough prior to the White House's "direct engagement" with the fact that Twitter had to be shown "how" to censor and how to do it "quickly." Once again, the court ignores the reasonable inference that Twitter had no appetite for censorship—or at least not a sufficient appetite for the government's illicit purposes—and that it was so unwilling or inept that government technocrats had to tutor the Silicon Valley whiz kids on the proper technique for exactly how to achieve the unconstitutional ends sought by the Biden White House.

No doubt we will likely hear from Defendants' respective corners that there are other more pallid and innocent inferences one might draw from these facts. As far as it goes this could likely be the case, but that does not advance their argument nor does it go any distance to undermine the patent observation that the lower court improperly ignored or implicitly rejected the reasonable inferences in favor of

Plaintiff. The district court's turning a blind eye to the reasonable inferences evidencing an illegal conspiracy was error, and its order dismissing the FAC for failing to set forth sufficient facts of a conspiracy establishing state action should be reversed.

The lower court took one more step in its role as a trier-of-fact to improperly weigh the evidence. (Order at ER-11–12). To begin, the court notes that Twitter could have terminated Plaintiff's account quite legally based upon its rather draconian Terms of Service. True enough, but as noted above, the allegations and the reasonable inferences drawn from those allegations lead to the conclusion that Twitter had chosen not to terminate Plaintiff's account until after the conspiracy and the government's explicit instructions as to how to achieve the government's end—not Twitter's. The reasonable inference that Twitter was acting in furtherance of the government's censorship agenda and not pursuant to its strictly business purposes is palpable.

But here the district court goes further and literally imports facts not of record in favor of Defendants. Specifically, the court reasoned:

> Twitter suspended Plaintiff's account for violating its express Terms of Service, namely its COVID-19 Policy, which provides that users may not share or post content "that may mislead people about . . . the efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease . . .." Docket No. 49-3 at 2; FAC ¶¶ 34, 36. In short, Twitter had clear independent grounds for suspending Plaintiff's account. It took no action out of the ordinary or in contravention of its clear established authority which have would

> [sic] suggested influence or facilitation by President Biden. There is no showing here that the action taken by Twitter on Plaintiff's account was not an independent one.

(Order at ER-11). To begin, the court makes a factual assumption that because Twitter claimed (contrary to the allegations of the FAC) to be enforcing its Terms of Service and not operating pursuant to a conspiracy with the Biden administration, that must be the case. But as the factual allegations previously discussed demonstrate, this is very much in dispute insofar as prior to the news reports of the Biden administration's "direct engagement" with Twitter, not only had Twitter not taken any action against Dr. Huber's Twitter account, but also the Biden White House complained of Twitter's failure to fill the "gaps in their enforcement efforts." (FAC ¶ 52 at ER-33).

Further, there is absolutely nothing in the record to evidence that Twitter's statement regarding a violation of its Terms of Service is in fact the case. Indeed, the opposite is true. (*See, e.g.*, FAC ¶ 44 at ER-32 [alleging in pertinent part that "pursuant to the agreement entered into between and among Defendants, Twitter only bans speech addressing the topic of COVID-19, including COVID-19 vaccines, that is contrary to the political agenda of the Biden administration."].

In addition, the lower court's reliance on Twitter's Terms of Service that permit Twitter to suspend service for "any or no reason" does not provide Twitter with immunity to engage in a conspiracy with the government to violate Plaintiff's

constitutional rights nor does it somehow remove the taint of an illegal conspiracy. (Order at ER-11). This should be obvious to all for no less than two reasons. One, a constitutional violation is not made wholesome because a contract permits any and all sorts of illicit behavior. If the Biden administration had conspired with Twitter to terminate the accounts of all Jews or Blacks or women, no court, not even the most zealous protectors of the social media oligarchs or the most ardent supporters of President Biden would whitewash such a grotesque constitutional violation. Two, California courts routinely hold contracts providing for, or permitting, illegal conduct by the parties void as against public policy and unenforceable. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 137-39, (1998) ("The law of contract severability is stated in Civil Code section 1599, which defines partially void contracts: 'Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.'").

Finally, in addition to throwing around the word "conclusory" in flippant fashion with no analysis (Order at ER-12–13), the district court finds fault in that the government itself did not flag Plaintiff's account for suspension or actually do the dirty work to identify which accounts should be terminated. (Order at ER-11–14). But that is simply not the law of conspiracy. A successful prosecution of a drug dealer (in this case Twitter) who was enlisted into a conspiracy with a drug cartel (in

this case the Biden White House) to distribute illicit drugs within the Ninth Circuit does not require the drug cartel to identify the actual retail buyers of the drugs nor to do anything but to enter into an agreement with the dealer to effect the illicit purposes of the conspiracy. Indeed, the drug dealer may be convicted of conspiracy without even knowing the identity of his other co-conspirators (*United States v. Smith*, 609 F.2d 1294, 1297-99 (9th Cir. 1979)) and may also be convicted even though the drug cartel itself engaged in no act in furtherance of the conspiracy but instead relied upon the drug dealer—or vice versa (*United States v. Hernandez-Orellana*, 539 F.3d 994, 996-97 (9th Cir. 2008)). In fact, this Court has made clear the following:

> [W]e have held that the agreement need not be explicit; it is sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture. Similarly, *Pinkerton v. United States,* 328 U.S. 640, 647 (1946), renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not.

United States v. Hernandez-Orellana, 539 F.3d 994, 1007 (9th Cir. 2008) (cleaned up). In other words, it is more than sufficient that Twitter understood there was a partnership with the administration for Twitter to censor speech on behalf of the Biden White House even if the Biden administration was unaware and even uninvolved in the particulars of Twitter's censorship.

Beyond citing to a handful of decisions rendered by fellow district court judges sitting in the backyard of the social media giants (*i.e.*, the Northern District of California), the lower court in this case oddly relied principally on this Court's decision in *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1289–1302 (9th Cir. 1999) to anchor its contrary-to-law ruling that the FAC must allege facts of the Biden administration officials' direct involvement in the acts of censorship. This citation is odd precisely because *Mendocino* points in exactly the opposite direction. (Order at ER-10–11).

In short, *Mendocino* stands for the commonsense proposition that for conspiracies not evidenced by any direct agreement between the co-conspirators, but rather by circumstantial evidence that puts the co-conspirators together in various acts that might be understood to further the conspiracy, the more evidence of these common acts that show a working relationship, the better the case to make out for an undisclosed agreement (*i.e.*, a secret agreement). *Mendocino*, 192 F.3d at 1302-03. Nothing in *Mendocino*, and we mean literally nothing, leads to the conclusion reached by the district court in this case.

In *Mendocino*, a bomb exploded in the car of two environmental activists on the way to an event to publicize and to attract protests against the logging industry. The FBI handled most of the crime scene investigation while the local police were the ones who obtained search warrants and made the arrests. The FBI's operative

theory, embraced by the police, was that the environmental activists opposed to logging had hidden the bomb in the car to use later but it exploded early. As it turns out, there was no real evidence to support this theory and the prosecutor refused to pursue charges. The two activists sued both the police and the FBI for civil rights violations. Since the FBI agents were not the ones who committed the alleged unjustified and unlawful arrests or obtained the search warrants under false pretenses, the plaintiffs alleged the FBI agents were liable for the wrongful acts of the police by virtue of a conspiracy. The matter came to this Court at the summary judgement stage. *Id*. at 1287-1302.

This Court began its discussion of the sufficiency of the conspiracy evidence with the fundamental proposition (as we have addressed above) that conspiracies are typically secretive and the evidence to establish them is circumstantial and mostly the preserve of the jury:

> Direct evidence of improper motive or an agreement among the parties to violate a plaintiff's constitutional rights will only rarely be available. Instead, it will almost always be necessary to infer such agreements from circumstantial evidence or the existence of joint action. Moreover, questions involving a person's state of mind are generally factual issues inappropriate for resolution by summary judgment.
>
> In the instant case, the appellees have presented sufficient circumstantial evidence that the appellants intended to inhibit their First Amendment activities, and that they entered a conspiracy to further this goal, to survive a motion for summary judgment.

Id. at 1283, 1302. This proposition was especially important in the case because

there was literally no direct evidence of a conspiratorial meeting-of-the-minds, but rather evidence that the police and FBI worked closely together on the investigation.

Several critical points are in order here. **One**, the *Mendocino* conspiracy case is quite different from the present one precisely because our facts demonstrate a "partnership" connected in context and in time to the earlier pronouncements by the White House that it had begun a "direct engagement" to enlist Twitter and company to do its "wartime effort" bidding to censor speech on behalf of the government and to do so, in part, by instructing them "how to get rid of [the disfavored speech] quickly." **Two**, nothing in conspiracy law requires a plaintiff to utilize circumstantial evidence that all the co-conspirators were active in a "hand-in-hand" relationship. (Order at ER-11). While the district court below utilized the circumstantial facts found by this Court in *Mendocino* to be sufficient facts to survive a motion for summary judgment, these facts were by definition not some requisite listing of facts that must appear in all conspiracy cases. The very reason why circumstantial evidence of a conspiracy belongs with the trier-of-fact is because every case is different. Secret criminal agreements are proven or not by the evidence at hand. **Three**, our case in fact includes evidence not only of an agreement (a "partnership to elevate" government approved speech), but also evidence that (1) Twitter was previously unwilling to censor speech sufficiently ***for government purposes***, (2) the government considered the censorship to be a very real existential

"wartime effort," and (3) this motivation was sufficient for the government to actually instruct Twitter on "how to get rid of it quickly." The lower court, however, simply waived its magic wand of "conclusory facts" and dismissed this circumstantial evidence and the reasonable inferences that quite obviously flow therefrom, and then attempted to use *Mendocino* in an overworked fashion to support its pre-cooked conclusion. **Four**, and as noted, *Mendocino* came to this Court at the summary judgment stage where the parties put in play their own evidence so that the trial court could assess the claim of conspiracy in a more balanced fashion. But even then, this Court made absolutely clear:

> The possibility that other inferences could be drawn that would provide an alternate explanation for the appellants' actions does not entitle them to summary judgment. *See* [*United Steelworkers of America v.*] *Phelps Dodge* [*Corp.*, 865 F.2d [1539,]1542 [(9th Cir. 1989)] (inference need not be most likely but merely a "rational" or "reasonable" one); *Hampton* [*v. Hanrahan*], 600 F.2d [600,]621 [(7th Cir. 1970)] ("The fact that 'all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it' does not justify judicial intrusion into the jury's role in determining whether a civil conspiracy existed.") (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 700-01 [] (1962)).

Mendocino, 192 F.3d at 1303. Given these instructions, given our current procedural posture, and given the facts before the court below, it is incomprehensible that the district court could have come to the conclusion that the FAC fails to allege sufficient facts of a conspiracy.

Beyond *Mendocino*, the lower court attempts to find refuge for its erroneous ruling in the decisions of other fellow judges in the district. Specifically, the court cites to *Informed Consent Action Network v. Youtube LLC*, No. 20-cv-09456-JST, 2022 U.S. Dist. LEXIS 18377 (N.D. Cal. Jan. 31, 2022), *O'Handley v. Padilla*, No. 21-cv-07063-CRB, 2022 U.S. Dist. LEXIS 4491 (N.D. Cal. Jan. 10, 2022), *Doe v. Google LLC*, No. 20-cv-07502-BLF, 2021 U.S. Dist. LEXIS 201377 (N.D. Cal. Oct. 19, 2021), and *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020). (Order at ER-11–13). This attempt fails for several reasons on the merits. Moreover, any attempt by Defendants to utilize these cases for support has the added burden that these cases do not amount to precedent for this Court. *United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) (citing several cases for the propositions that "a district court opinion does not have binding precedential effect . . . . The general rule is that a district judge's decision neither binds another district judge nor binds him, although a judge ought to give great weight to his own prior decisions.") (cleaned up).

As to the merits of these district court cases, we begin with the most obvious of the shortcomings. First, in two of the cases, the district court did not even deal with the conspiracy prong of the joint action theory of state action. Rather, the court was assessing the "willful participant" prong, which requires an evidentiary showing of a more interdependent relationship (cooperatively or coercively) between the state

and the private actor than the conspiracy prong. *See Tsao v. Desert Palace, Inc.*, 698 F.3d at 1140. Thus, neither *Informed Consent Action Network* nor *Doe v. Google* is even relevant to the conspiracy prong.

The *O'Handley* court did include an assessment of the conspiracy prong by pointing out that there was no evidence of any kind of agreement to censor speech, but rather a single message from a state actor to Twitter identifying plaintiff's tweet as factually false and a generalized agreement to work closely together to counter misinformation about elections. This alone distinguishes *O'Handley* from the present case. *O'Handley*, 2022 U.S. Dist. LEXIS 4491 at *32-36. Specifically, *O'Handley* did not include a "partnership," which is in fact an agreement and not simply working together. *O'Handley* did not include a pronouncement by the state actors that precisely because Twitter was not doing enough to counter election misinformation, the state must utilize a more "direct engagement," which goes beyond mere government jawboning, and actually instructed Twitter "how to get rid of it quickly."

Finally, the district court's reliance on *Federal Agency of News LLC v. Facebook, Inc.* is also misplaced and distinguishable from the facts here. Specifically, in *Federal Agency of News LLC*, the court mostly relied on its earlier opinion dismissing the original complaint based in part on a failure to allege facts that would give rise to an inference of a conspiracy. *Fed. Agency of News LLC,* 432

F. Supp. 3d at 1126 ("The Court previously dismissed this claim, and in the FAC, Plaintiffs add a single conclusory allegation that Facebook's work with the U.S. government concerning Russian interference in U.S. elections is a 'conspiracy to deny FAN its free speech rights guaranteed under the U.S. Constitution.' FAC ¶¶ 74-75. Such a bare allegation of joint action will not overcome a motion to dismiss.") (cleaned up).

Thus, we turn to the court's earlier ruling. There the court explained why it dismissed the original complaint:

> However, the case law is unequivocal that supplying information [to the state] alone does not amount to conspiracy or joint action. Indeed, the complaint does not even allege that the government was aware that Facebook removed FAN's account and page. Moreover, the allegation that Facebook acted "at the behest of the government" is entirely conclusory and fails to meet the pleading standard set forth in *Twombly* and *Iqbal*. A "bare allegation of . . . joint action will not overcome a motion to dismiss." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th Cir. 2008).

Fed. Agency of News LLC, 395 F. Supp. 3d 1295 at 1312. The dearth of facts supporting a conspiracy in *Federal Agency of News LLC* simply has no application in or to this case.

The remainder of the lower court's opinion (§ III.A.2. at ER-12–14) expressly addresses the "willful participant" prong of the joint action theory to establish state action. We need not address this part of the lower court's order because it is not

relevant to this appeal, which relies exclusively on the conspiracy prong of the joint action theory.

In sum, the question before this Court is a legal one. Do the allegations of the FAC sufficiently allege facts of a conspiracy? As noted, conspiracies (*i.e.*, partnerships to engage in illegal behavior or to achieve illegal ends) are rarely, if at all, carried out in public view. Indeed, doing so would doom the conspiracy from the start. As such, conspiracies are typically not proven by direct evidence but by circumstantial evidence. *Souza v. Estate of Bishop*, 821 F.2d 1332, 1335 (9th Cir. 1987) (observing that "conspiracy cannot usually be established by direct proof"); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671 (9th Cir. 1980) ("Because a conspiracy is rarely susceptible of direct proof, [the plaintiff] may properly rely upon circumstantial evidence from which a violation may be inferred."). The employment of circumstantial evidence to prove an ultimate fact is precisely the application of reasonable inferences drawn from known facts (or facts assumed true for present purposes) to conclude that an ultimate fact (*i.e.*, conspiracy) is true. *See, e.g.*, *United States v. Kaplan*, 554 F.2d 958, 964 (9th Cir. 1977) ("An inference of criminal intent [an ultimate fact at issue] can be drawn from circumstantial evidence.").

Thus, it is hardly fatal in this case that neither Twitter nor President Biden has admitted publicly and expressly to having entered into an unlawful conspiracy to

suppress disfavored speech, thus giving rise to state action. It is also hardly surprising that Twitter simply informed Dr. Huber that her account was permanently suspended with no opportunity to appeal due to her violation of its Terms of Service. Indeed, it would have been shockingly stupid of Twitter to have sent Dr. Huber a message informing her that Twitter was terminating her account because Twitter had entered into an unlawful agreement with the government to censor speech, the viewpoint of which the Biden White House disapproved.

More, and as noted above, the circumstantial evidence alleged in the FAC and as laid out above provide ample circumstantial evidence that the Biden administration was absolutely desperate to bring the social media giants to heel and to get them to do the administration's bidding. Specifically, the Biden administration's bidding was a "wartime effort" to have the social media giants do that which the government could not do alone: "clamp down" on disfavored speech and "get rid of it quickly."

Further, as part of the same general effort to promote vaccinations, Twitter issued a public statement that it had reached a meeting-of-the-minds (*via* a partnership) with the Biden administration to promote the government-favored speech about vaccinations. While it is true that this statement occurred after Twitter terminated Dr. Huber's account, the statement left open how long the partnership had been in place and exactly how Twitter would "elevate" government-favored

speech over government disfavored speech. Given the Biden administration's earlier conceded "wartime effort" to curb disfavored speech by having the social media giants "clamp down" on such speech and going so far as to tell the social media giants "how to get rid of" that speech, there is a reasonable inference that the partnership statement is circumstantial evidence that Twitter and the Biden administration had earlier agreed that government-favored speech would "trend" more widely on Twitter and the government-disfavored speech would either trend less widely or not at all by suspending and terminating accounts. *See Twitter, Inc. v. Skootle Corp*., No. C 12-1721 SI, 2012 U.S. Dist. LEXIS 87029, at *2-7 (N.D. Cal. June 22, 2012) (discussing Twitter's tweets, trending tweets, and algorithms that control what does and does not trend).

The ultimate question then is whether the circumstantial evidence of a conspiracy set out in the FAC and the reasonable inferences drawn from that evidence provide a plausible case for a conspiracy triggering state action. Given the life and death urgency of implementing the Biden administration's vaccine policy, at least as understood by the Biden administration itself, and given its view that Twitter and the other social media giants needed to be directly engaged to do that which they (the social media companies) had not been prepared to do on their own and pursuant to the authority they had by virtue of their respective Terms of Service, the lower court's ruling is plainly wrong. As such, Dr. Huber respectfully requests

that this Court reverse the district court's holding that the FAC fails to allege sufficient facts of a conspiracy giving rise to state action on behalf of Twitter.

B. Section 230 Provides an Independent Basis to Conclude that the FAC Raises Justiciable First Amendment Issues.[5]

The Government, by enacting § 230 of the Communications Decency Act, has conferred broad powers of censorship upon Twitter and has preempted and thus removed state law protections of Dr. Huber's speech. As a result, state action exists on grounds distinct from Twitter acting as a state actor via conspiracy with the government such that there is a justiciable First Amendment issue presented to this Court. Specifically, as a California corporation doing business in California, Twitter must comply with the California Unruh Civil Rights Act (California Civil Code § 51). Dr. Huber entered into a business relationship with Twitter and as a result is subject to the jurisdiction of California law. (*See also* Twitter Terms of Service, referenced in the Order at ER-11). California courts have interpreted § 51 to go beyond the explicit list of prohibitive forms of discrimination in the statute to include any arbitrary discrimination by a business based upon personal characteristics identified by the court, including political affiliation and personal beliefs. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 725-26, (1982) ("Whether the exclusionary

[5] The district court, we believe, properly characterized this argument as "novel" and recognized its provenance. (Order at ER-17). Novelty, of course, and especially in this instance, does not speak to weakness or lack of persuasive authority. Rather, it bespeaks of a new way of looking at old things to accommodate new realities.

policy rests on the alleged undesirable propensities of those of a particular race, nationality, occupation, ***political affiliation***, or age, in this context the Unruh Act protects individuals from such arbitrary discrimination.") (emphasis added); *see also Harris v. Capital Growth Inv'rs XIV*, 52 Cal. 3d 1142, 1160, -63, -69 (1991) (acknowledging that the California legislature had amended the Unruh Act to limit "all forms of arbitrary discrimination" to the listed statutory categories, but including previously judicially determined categories found in the court's earlier decision in *Marina* and expressly holding that the Unruh Act forbids discrimination based upon "***personal beliefs.***") (emphasis added). Expressing an opinion opposed to the Biden administration's vaccine agenda is quintessentially expressing a personal belief.

Moreover, the Unruh Act applies to the provision of Internet services. *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (applying the Unruh Act to a business providing Internet services to consumers in California based on allegations "that defendants' refusal to offer same-sex domestic partners the adoption-related services on ParentProfiles.com, on the same terms and conditions offered married couples, constitutes unlawful discrimination on the basis of marital status, sexual orientation, and sex, in violation of the Unruh Act"). As such, Twitter violated the Unruh Act by discriminating against Plaintiff based upon her political and personal views critical of the Biden administration's vaccination policy.

Congress enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial functions. *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006). By its plain language, § 230 would apply to preclude Plaintiff from successfully suing Twitter for violating the Unruh Act based on Twitter's discrimination against her (*i.e.*, terminating her account) based upon her political views. The legal principle at work here is as follows: state action exists and questions under the First Amendment are presented when Congress preempts state law that protects speech against private action, because the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 n.5 (2021) (Thomas, J., concurring) (citing *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956)).

The structure of the legal principle begins with *Railway Employees' Dep't*. In 1943, Nebraska enacted a state constitutional provision that provided that employers and unions may not require employees to join unions. In the Railway Labor Act of 1951, Congress preempted such state statutes, permitting (but not requiring) railroad employers and railroad unions to demand union membership as a condition of employment. Employees sued a railroad and a union under the Nebraska state provision for imposing a union contract. The defendants raised the federal statute as a defense, arguing that it preempted the state provision. The Supreme Court found

state action and justiciable First and Fifth Amendment issues before the Court. The Court explained:

> The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska nevertheless took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States. The Supreme Court of Nebraska said, [s]uch action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein. We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. ***In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.***

Railway Employees' Dep't, 351 U.S. 225, 231-32 (1956) (emphasis added) (cleaned up).

While issuing a fractured ruling, the Supreme Court in *Denver Area Educational Telecommunications Consortium* reinforced the operating principle developed in *Railway Employees' Dep't* (*i.e.*, state action is triggered when a federal statute permits but does not require a private entity to censor speech otherwise protected by state law). Specifically, a plurality of justices concluded that state action existed creating a justiciable case to be adjudicated under the First Amendment because a federal statute provided permissive cover for cable operators

to refuse to broadcast sexually offensive material (*i.e.*, in the First Amendment context, a content-based censorship) in violation of local contractual and franchise rules that otherwise controlled. *Denver Area Educ. Telcomms. Consortium v. FCC*, 518 U.S. 727, 782 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The plurality at least recognizes this as state action, *ante*, at 737, avoiding the mistake made by the Court of Appeals. State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.") (cleaned up) ("*Denver Area*"); *see Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 841 (9th Cir. 2017) (adopting Kennedy's statement in his concurrence agreeing with the plurality opinion that "state action exists when Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted.").

Specifically, in *Denver Area* petitioners challenged three provisions of the Cable Television Consumer Protection and Competition Act of 1992 that related to the broadcasting of "patently offensive" sex-related material on cable television. Specifically, the first challenged provision, § 10(a), *permitted* cable operators to

decide whether or not to broadcast such programming on leased access channels.[6] The second challenged provision, § 10(b), required leased channel operators to segregate and to block that programming if allowed. And the third challenged provision, § 10(c), applied to public, educational, and governmental channels. The Court upheld the first provision in the context of its First Amendment analysis because of the government's strong (*i.e.*, compelling) interest in protecting children from sexually explicit material, the permissive aspect of the statute, and the nature of the medium. However, the Court concluded that the second and third provisions violated the First Amendment because they were not appropriately tailored to achieve the compelling interest of protecting children. *Denver Area*, 518 U.S. at 736.

[6] A "leased channel" is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. About 10 to 15 percent of a cable system's channels would typically fall into this category. *See* 47 U.S.C. § 532(b). "Public, educational, or governmental channels" . . . are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way. *See* 47 U.S.C. § 531; *see also* H.R. Rep. No. 98-934, p. 30 (1984) (authorizing local authorities to require creation of public access channels). Between 1984 and 1992, federal law (as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels. *See* 47 U.S.C. §§ 531(e) (public access), 532(c)(2) (leased access). *Denver Area*, 518 U.S. at 734.

The district court made two arguments against this theory of state action. First, the court did not believe the Unruh Act protected personal beliefs. (Order at ER-21). This error is corrected by taking seriously the California Supreme Court holdings in *Marina* and *Harris* cited above. Second, the lower court, relying on the analysis in *Divino Group LLC v. Google LLC*, No. 19-cv-04749-VKD, 2021 U.S. Dist. LEXIS 3245, at *15-22 (N.D. Cal. Jan. 6, 2021), attempts to distinguish this case from *Denver Area* by noting that § 230 does not single out a particular type of speech. (Order at ER-20). The problem with the court's reasoning however is that the argument against state action in *Divino* is not the argument presented in the FAC or detailed here. *Divino* addresses the argument that § 230 somehow converts Twitter into a state actor. *Divino Grp LLC*, 2021 U.S. Dist. LEXIS 3245, at *15-22. That is not the argument presented here. The argument presented here, based on both *Railway Employees' Dep't* and *Denver Area* is that a permissive federal statute that preempts state law claims prohibiting content-based speech restrictions creates a justiciable First Amendment claim because the Act of Congress provides the state action. *See Roberts v. AT&T Mobility LLC*, 877 F.3d at 841 (adopting Kennedy's statement in his concurrence agreeing with the plurality opinion that "state action exists when Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted.").

In the context of putative state law claims (the Unruh Act, for example) prohibiting Twitter's discriminatory censorship of Dr. Huber's speech, § 230 facially provides the same kind of federal statutory immunity as was relevant in *Railway Employees' Dep't* and *Denver Area*. As such, § 230 triggers state action and presents the Court with a justiciable First Amendment case.

CONCLUSION

For all the reasons set forth above, Dr. Huber respectfully requests that this Court reverse the district court's dismissal of the FAC and remand to permit discovery to move forward.

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STATEMENT OF RELATED CASES

The undersigned attorney states the following:

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

Dated: May 25, 2022

AMERICAN FREEDOM LAW CENTER

s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(f) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,127 words and complies with the word limit of Cir. R. 32-1.

2. This brief complies with the typeface and type size requirements of Fed. R. App. P.32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

Dated: May 25, 2022

AMERICAN FREEDOM LAW CENTER

s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2022, I filed the foregoing Opening Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 25, 2022

AMERICAN FREEDOM LAW CENTER

s/ David Yerushalmi
David Yerushalmi, Esq.

ADDENDUM

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47 USCS § 230

Current through Public Law 117-120, approved May 10, 2022, with a gap of P.L. 117-103.

United States Code Service > TITLE 47. TELECOMMUNICATIONS (Chs. 1 — 16) > CHAPTER 5. WIRE OR RADIO COMMUNICATION (§§ 151 — 646) > COMMON CARRIERS (§§ 201 — 276) > COMMON CARRIER REGULATION (§§ 201 — 231)

§ 230. Protection for private blocking and screening of offensive material

(a) Findings. The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

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

(b) Policy. It is the policy of the United States—

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

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

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act [47 USCS § 223 or 231], chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code [18 USCS §§ 1460 et seq. or §§ 2251 et seq.], or any other Federal criminal statute.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law. Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title [18 USCS § 1591];

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code,

and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions. As used in this section:

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

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

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

History

HISTORY:

June 19, 1934, ch 652, Title II, Part I, § 230, as added Feb. 8, 1996, P. L. 104-104, Title V, Subtitle A, § 509, 110 Stat. 137; Oct. 21, 1998, P. L. 105-277, Div C, Title XIV, § 1404(a), 112 Stat. 2681-739; April 11, 2018, P. L. 115-164, § 4(a), 132 Stat. 1254.

End of Document

Cal Civ Code § 51

Deering's California Codes are current through Chapter 16 of the 2022 Regular Session.

Deering's California Codes Annotated > CIVIL CODE (§§ 1 — 7021) > Division 1 Persons (Pts. 1 — 4) > Part 2 Personal Rights (§§ 43 — 53.7)

§ 51. Citation of section; Civil rights of persons in business establishments; Definitions

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2)

(A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (i) of Section 12926 of the Government Code.

(4) "Religion" includes all aspects of religious belief, observance, and practice.

(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) "Sexual orientation" has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

History

Added Stats 1905 ch 413 § 3. Amended Stats 1919 ch 210 § 1; Stats 1923 ch 235 § 1; Stats 1959 ch 1866 § 1; Stats 1961 ch 1187 § 1; Stats 1974 ch 1193 § 1; Stats 1987 ch 159 § 1; Stats 1992 ch 913 § 3 (AB 1077); Stats 1998 ch 195 § 1 (AB 2702); Stats 2000 ch 1049 § 2 (AB 2222); Stats 2005 ch 420 § 3 (AB 1400), effective January 1, 2006; Stats 2011 ch 261 § 3 (SB 559), effective January 1, 2012, ch 719 § 1.5 (AB 887), effective January 1, 2012; Stats 2015 ch 282 § 1 (SB 600), effective January 1, 2016 (ch 282 prevails), ch 303 § 25 (AB 731), effective January 1, 2016.

End of Document

Cal Civ Code § 51.5

Deering's California Codes are current through Chapter 16 of the 2022 Regular Session.

Deering's California Codes Annotated > CIVIL CODE (§§ 1 — 7021) > Division 1 Persons (Pts. 1 — 4) > Part 2 Personal Rights (§§ 43 — 53.7)

§ 51.5. Discrimination by business establishment prohibited

(a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

(b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company

(c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

History

Added Stats 1976 ch 366 § 1. Amended Stats 1987 ch 159 § 2; Stats 1992 ch 913 § 3.2 (AB 1077); Stats 1994 ch 1010 § 28 (SB 2053); Stats 1998 ch 195 § 2 (AB 2702); Stats 1999 ch 591 § 2 (AB 1670); Stats 2000 ch 1049 § 3 (AB 2222); Stats 2005 ch 420 § 4 (AB 1400), effective January 1, 2006.

End of Document

Cal Civ Code § 52

Deering's California Codes are current through Chapter 16 of the 2022 Regular Session.

Deering's California Codes Annotated > CIVIL CODE (§§ 1 — 7021) > Division 1 Persons (Pts. 1 — 4) > Part 2 Personal Rights (§§ 43 — 53.7)

§ 52. Actions for damages and other relief for denial of rights

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.

(3) Attorney's fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

(i) Subdivisions (b) to (f), inclusive, shall not be waived by contract except as provided in Section 51.7.

History

Added Stats 1905 ch 413 § 2. Amended Stats 1919 ch 210 § 2; Stats 1923 ch 235 § 2; Stats 1959 ch 1866 § 2; Stats 1974 ch 1193 § 2; Stats 1976 ch 366 § 2, ch 1293 § 2.5; Stats 1978 ch 1212 § 1; Stats 1981 ch 521 § 1, effective September 16, 1981; Stats 1986 ch 244 § 1; Stats 1987 ch 159 § 4; Stats 1989 ch 459 § 1; Stats 1991 ch 607 § 2 (SB 98), ch 839 § 2 (AB 1169); Stats 1992 ch 913 § 3.6 (AB 1077); Stats 1994 ch 535 § 1 (SB 1288); Stats 1998 ch 195 § 4 (AB 2702); Stats 1999 ch 964 § 2 (AB 519); Stats 2000 ch 98 § 2 (AB 2719); Stats 2001 ch 261 § 1 (AB 587); Stats 2005 ch 123 § 1 (AB 378), effective January 1, 2006; Stats 2014 ch 910 § 3 (AB 2617), effective January 1, 2015.

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