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

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INTRODUCTION

The government and Twitter apparently agree, yet again, on their approach to censuring Dr. Colleen Huber's speech in violation of the First Amendment. In effect, Defendants are asking this Court to dismantle the mosaic of facts creating a plausible inference of an illegal conspiracy between the Biden administration and Twitter by taking the tack of most conspiracy defendants: divide and conquer. Rather than assessing the totality of facts in context, Twitter and the Biden administration are banking on the Court accepting their approach of singling out each fact, stripping it of its context, and concluding that this orphaned fact (or any other single and isolated fact) does not provide a reasonable inference of a conspiracy between the government and Twitter to have Twitter censor Dr. Huber's speech based upon her viewpoint.

In addition, Defendants are in effect asking this Court to ignore or to change the law in this Circuit in two fundamental ways. First, they suggest there is some kind of "heavy burden" to overcome the quite reasonable presumption that a private actor acts privately and not for the state. This is not the law. There is a presumption, as in every civil (and indeed criminal) case, that people in and out of government conduct their affairs legally. But this presumption operates *a priori* not *a posteriori*. A plaintiff overcomes that presumption by alleging facts in a complaint and explaining at the motion-to-dismiss stage why those facts, and any

reasonable inferences from those facts, make out a plausible case of wrongdoing. It is no different here. Dr. Huber's "burden" is to allege sufficient facts to provide a plausible claim that there was a conspiracy to have Twitter censor speech for the government in violation of the First Amendment.

Second, Defendants appear to want this Court to redefine what a "reasonable inference" is in the context of a motion to dismiss and the plausibility requirement. As we made clear in the opening brief, a "reasonable inference" need not be the only reasonable inference or the most reasonable inference in order to give rise to a plausible claim. Defendants argue that because they can articulate a benign inference flowing from the facts this somehow trumps the reasonable inferences of illicit conduct. Once again, that is not the law.

We address these points and others raised by Defendants below. We begin with the proper legal standards with reference, first, to the plausibility requirement in the context of a motion to dismiss and, second, to the conspiracy prong of the state action requirement. Following that discussion, we address the facts in context and Defendants' effort to segregate and to isolate individual facts from the totality of the circumstances. Next, we will address Defendants' arguments against § 230 of the Communications Decency Act as an independent basis for state action and, finally, we will turn to other miscellaneous, less substantive issues raised by Defendants' briefs and to the motion requesting leave to file an amicus curiae brief

(*see* Order, dated August 22, 2022 [Dkt. Entry No. 26]).

I. A Claim Is Plausible When Predicated Upon Reasonable Inferences.

Defendant Biden cites to *Capp v. County of San Diego*, 940 F.3d 1046, 1055 (9th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)), on four separate occasions to argue that when the facts allow for "an obvious alternative explanation" – one that provides a benign or legal basis for a defendant's behavior – a motion to dismiss is properly granted. (Bident Br. [Dkt. Entry No. 13] at 13-14, 16, 26, 28). In effect, the government wants this Court to ignore the long line of cases, cited in the opening brief, that make it clear that a plaintiff's claim remains plausible in the face of competing reasonable inferences. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017) ("If 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)."). Even at the summary judgement phase, when defendants may actually test the facts, "[t]he possibility that other inferences could be drawn that would provide an alternate explanation for [the defendants'] actions does not entitle them to summary judgment." *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1303 (9th Cir. 1999); *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); *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."); *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. The plausibility standard is not akin to a "probability requirement," ***but it asks for more than a sheer possibility*** that a defendant has acted unlawfully.") (cleaned up) (emphasis added).

As the discussions in *Iqbal* and *Twombly* make clear, an "obvious alternative explanation" is grounds for dismissal only if the allegations of the complaint provide the mere possibility of a conspiracy or facts merely consistent with liability. *Iqbal*, 556 U.S. at 677-84 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.") (cleaned up).

Indeed. in the *Capp* decision itself, this Court made clear – by rejecting the application of the "obvious alternative explanation" rule – that a competing reasonable inference drawn from circumstantial evidence of an illegal motive is

sufficient to overcome an obvious alternative explanation of a legal motive. Thus, in *Capp*, this Court recognized that there was an obvious alternative explanation for the alleged retaliatory motive of the social worker: her investigation of child abuse, rather than being retaliatory, was very much a part of her job requirements. But since a reasonable inference of an illicit motive in favor of plaintiff's complaint overcomes an obvious alternative benign explanation, this Court denied the motion to dismiss relative to plaintiff's First Amendment claim. *Capp*, 940 F.3d at 1055-56.

As pointed out in the opening brief, this case presents a far stronger argument in favor of denying a motion to dismiss arguing an obvious alternative explanation. Here, we have explicit facts (*i.e.*, direct evidence) that Twitter was not censuring speech sufficiently for the Biden administration when left to its own legitimate business purposes of enforcing its own policies (the "obvious alternative explanation"). (FAC ¶ 42 at ER-32 ["The companies have repeatedly vowed to get rid of such material on their platforms ***but gaps remain in their enforcement efforts***."] [emphasis added]). We have explicit facts (*i.e.*, direct evidence) that, as a result, the Biden administration's "direct engagement" not only sought to have Twitter and the other social media companies "clamp[] down" on the unwanted speech, but also included instructions on exactly "***how they can get rid of it quickly***." *Id*. Defendants' efforts to spin the facts by arguing that the only

acceptable inference from the facts is that Twitter censored Dr. Huber's speech not because it was doing the government's bidding but because it was innocently effecting its own legitimate business purposes should fail precisely because this argument ignores the legal standards applicable to a motion to dismiss.

II. Plaintiff's Claim of State Action by Virtue of a Conspiracy Does Not Trigger Some Heightened Pleading Requirement.

Defendants argue, and this is especially true of Twitter, that an allegation of state action relying on the conspiracy prong of the joint action theory triggers some kind of heightened pleading requirement. This is not the law.

Twitter bases its argument on words or phrases taken out of context or words that Twitter literally inserts on its own by way of characterization of what this Court has held previously. Specifically, Twitter cites to language in *Prager Univ. v. Google LLC*, 951 F.3d 991, 996 (9th Cir. 2020) and *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011). (Twitter Br. [Dkt. Entry No. 14] at 15-16).

From *Prager*, Twitter grabs the phrase "formidable threshold requirement" to underpin its argument for a new pleading requirement. (Twitter Br. at 15). But *Prager* had nothing to do with joint action or conspiracy. Prager University simply argued that YouTube's hosting of a public forum on the internet was akin to a government forum. This Court quickly rejected the argument based on prior precedent. The specific reference this Court made to a "formidable threshold

requirement" simply referred to the fact that in order to sue a private entity for a First Amendment violation, a plaintiff must fit the state action allegation into one of the recognized rubrics. Prager University was attempting to argue simplistically that the Internet somehow avoids the traditional state action theories. *Prager*, 951 F.3d at 999 ("PragerU cannot avoid the state action question by calling YouTube a public forum."). In short, if you go to court as Prager University did and proffer a theory of state action already rejected by the courts, you most certainly do have a "formidable threshold requirement."

Twitter also takes language from *Florer* to make the unremarkable point that "[w]e start with the presumption that conduct by private actors is not state action. [Plaintiff] Florer bears the burden of establishing that Defendants were state actors. *Florer*, 639 F.3d at 922. Nothing at all unusual about this statement which is true about almost any claim pled under the notice pleading rule set out in Rule 8 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8 (a)(2) ("A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief."); *cf.* Fed. R. Civ. P. 9(b) (setting forth a heightened pleading requirement for fraud).

But notice what Twitter attempts here. Twitter's brief makes the statement that this is a "heavy burden" by slipping this phrase in between its quotes from *Florer*: "Courts therefore 'start with the presumption that conduct by private actors

is not state action,' and plaintiffs bear the ***heavy burden*** of 'establishing that [defendants] were state actors.'" (Twitter Br. at 15) (emphasis added). *Florer* stands for no such proposition. None of the other cases Twitter cites from the Supreme Court or from this Court mandate or even suggest a heightened pleading requirement. There is no heightened pleading requirement. Twitter is simply misleading the Court.

Similarly, based upon language from *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019), Twitter asserts that the private actor presumption is at its "zenith" when being applied to Twitter as a publisher. (Twitter Br. at 16). There are three problems with Twitter's self-proclaimed "zenith" rule. One, the Supreme Court made no such pronouncement in *Halleck*. Two, the Court in *Halleck* was specifically addressing the plaintiff's theory that private operators of public access cable channels were state actors merely by virtue of the regulations imposed by the government. In full context, the Court stated:

> Put simply, being regulated by the State does not make one a state actor. As the Court's cases have explained, the 'being heavily regulated makes you a state actor' theory of state action is entirely circular and would significantly endanger individual liberty and private enterprise. The theory would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms.

Id at 1932. The fact that the Supreme Court recognized a particularly problematic outcome if it were to accept a new theory of state action that was entirely circular

hardly imposes a new pleading requirement when pleading state action under long-accepted jurisprudence.

Finally, the third problem with Twitter's "zenith" rule is that it is a corruption of the true zenith rule: "We have long recognized that when government regulates political speech or the expression of editorial opinion on matters of public importance, First Amendment protection is at its zenith." *R. A. V. v. St. Paul*, 505 U.S. 377, 429 (1992). The First Amendment protection at its zenith here applies to Plaintiff not to a corporation that has conspired with the government to censor speech in violation of the First Amendment. At best, Twitter might argue down the road post-discovery that it was not acting as a conspiratorial *de facto* government censor but rather a publisher intent on exercising its First Amendment rights. At that point, we would have two claims of First Amendment protection, both at their zenith – one by Dr. Huber and one by Twitter. At this pleading stage, however, there is but one claim at its zenith – Dr. Huber's.

Defendants' efforts to shield either Twitter or the government from traditional state action claims by crafting a new heightened pleading requirement are without legal precedent. Plaintiff respectfully asks this Court to reject these efforts.

III. Defendants' Interpretation of the Facts and their Reasonable Inferences Is Both Corrupted and Slanted and Fails to Provide Grounds for Dismissal.

As noted earlier, Defendants utilize an old ploy often employed by defendants in a conspiracy action – whether criminal or civil: segregate and isolate each fact and argue that no individual fact is sufficient – either as direct or circumstantial evidence – to make out a claim of an illicit conspiracy. (Biden Br. at 21-32; Twitter Br. at 17-27). This is a common defense tactic in conspiracies precisely because conspiracies are covert for the obvious reason that the parties agree to engage in illegal behavior and disclosing that fact publicly would most likely defeat the criminal purpose of the conspiracy. *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, to establish a plausible claim of a conspiracy, Dr. Huber's FAC relies on Defendants' publicly disclosed statements (*i.e.*, direct evidence) that give rise to reasonable inferences (*i.e.*, indirect or circumstantial evidence) of an illicit conspiracy. As pointed out in Dr. Huber's opening brief, the FAC provides direct evidence establishing (for present purposes) direct and circumstantial evidence of social media giants, including Twitter, that had not censored viewpoint-disfavored speech sufficiently for government purposes. As a result, the Biden administration stepped up its direct engagement with these companies to achieve the government's "wartime effort." And this engagement included instructions on exactly "how [these companies] can get rid of it [i.e., the viewpoint-disfavored speech]." But even more than that, the government actually instructed these companies on how to censor the speech "quickly." The arguments presented by Defendants in their briefs in an effort to claim that none of these facts standing alone provides a "plausible" claim of a conspiracy is nothing short of a corruption

of the factual context provided by all of the facts, and the reasonable inferences that flow from those facts, taken as a whole.

One specific and noteworthy example is the treatment by Defendants of the news article published in *The Verge* that provides Twitter's public statement that it had entered into a "partnership" (*i.e.*, meeting of the minds) with the Biden administration. (Twitter Br. at 8, 20, 22-24, 27; Biden Br. at 23-24, 30-32). Defendants segregate this fact from all of the other facts and inferential context noted above and then argue that this singular, isolated factual statement is not relevant to any conspiracy to censor speech. They make this argument by pointing out that the partnership statement occurred one month after Twitter terminated Dr. Huber's account. They also point out that the specific public disclosure by Twitter was that its "partnership" with the Biden administration was "to elevate authoritative information in regard to COVID-19." (FAC ¶ 52 at ER-33). Defendants finally note that the article was mainly about the government's effort to promote vaccine eligibility. These observations about the article are all correct. But their recitation by Defendants is simply an attempt to rip the fact of a partnership out of the factual context in which it occurs.

For example, we already know that that the government was working directly with Twitter to censor speech expressing viewpoints critical of COVID-19 vaccines. We also know that the Biden administration did not just articulate this as

a concern to Twitter, but rather elevated it to a wartime effort. And we know that the Biden administration's wartime effort included actually instructing Twitter on how to get rid of the disfavored speech and, more particularly, how to do so quickly. Immediately after we learn of this effort by the Biden administration to have Twitter do that which the government could not do, Dr. Huber's account is terminated. Then, just one month later, while the wartime effort is still very much front and center, Twitter admits that it indeed had agreed to enter into a partnership to "elevate" speech favored by the government with regard to COVID-19 generally.

First, in context, and as pointed out in the opening brief, Twitter's public admission that it had entered into a partnership with the Biden administration to elevate government-favored speech regarding COVID-19 just one month after we learned of the ongoing wartime effort to censor speech critical of the vaccines (*i.e.*, Dr. Huber's speech), quite obviously leads to a very reasonable inference that Twitter's partnership included more than just promoting in some positive fashion government-favored speech. Second, it is simply naive to think (or rather a corruption of the factual context to argue) that elevating government-favored speech on social media platforms during a wartime effort to censor disfavored speech does not include the natural inverse of elevating the favored viewpoint – the demotion of the disfavored speech by algorithmic design. (For a detailed

discussion of the impact of algorithms and how demotion of speech is the flipside of elevating speech, *see Force v. Facebook, Inc*., 934 F.3d 53, 76-89 (2d Cir. 2019) (Katzman, C.J., dissenting). Twitter's admission of a partnership to elevate government-favored speech about COVID-19 in an article about promoting the government's favorable view of COVID-19 vaccines in and of itself would almost certainly be relevant evidence at a trial in this matter. Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). *A fortiori*, Twitter's timely public disclosure of a partnership to elevate government-favored speech bears directly on the facts that establish that the Biden administration directly engaged with Twitter just one month earlier on how to censor disfavored speech and how to do so quickly.

Much of Defendants' remaining arguments attempting to undermine the factual context is transparently an effort to slant the factual implications in Defendants' favor. Thus, Defendants characterize most of the facts or the reasonable inferences from those facts as conclusory. This is also quite typical of conspiracy defendants. But the following facts are neither conclusory or circumstantial: (1) the wartime effort to engage directly with Twitter, (2) made necessary precisely because Twitter had not done enough to censor speech, and

(3) a direct engage by the Biden administration to instruct Twitter about what kind of information it should censor and (4) just how to censor that disfavored speech and (5) how to do so quickly. Each of these facts are based upon specific statements by government officials published in widely distributed news articles. Further, the fact of a partnership between Twitter and the Biden administration to elevate government-favored speech is also not conclusory or circumstantial. What is circumstantial, and what is most certainly a reasonable and thus plausible inference from this direct evidence, is that Twitter had agreed with the Biden administration previously to censor speech the Biden administration disfavored and Twitter did so notwithstanding the fact that Twitter would not have done so on its own based upon its own commercial interests. To argue, as Defendants do, that the FAC does not make out a plausible claim of a conspiracy by and among Defendants to violate Dr. Huber's First Amendment rights is nothing short of asking this Court to engage in a patently biased and slanted treatment of the alleged facts. We ask the Court to decline this invitation.

Before moving on to the discussion of Section 230, we address here some mischaracterizations by Defendants of the law regarding state action and conspiracy. Defendants appear to argue that this Court's decisions in *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020), *Florer*, 639 F.3d at 924, and *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999), impose

some additional requirement for a showing of state action beyond satisfying the conspiracy prong of the joint action theory set out in *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). (*See, e.g*., Twitter Br. at 16, 28-30; Biden Br. at 14, 18, 29-32). Thus, Defendants seem to argue that beyond a reasonable and plausible inference of an illicit conspiracy, Dr. Huber must establish a "close nexus" and "something more" to establish that the private company's acts are "fairly attributable to the state." *Id*.

To the extent that Defendants are making this argument they are wrong. First, none of the cases cited for this proposition are conspiracy cases. Indeed, throughout their briefs, Defendants cite to cases that have nothing to do with the conspiracy prong of the joint action theory of state action. Second, these cases in fact stand for the proposition that the "close nexus" and "something more" to establish that the private company's acts are "fairly attributable to the state" are met entirely by alleging sufficient facts to infer a conspiracy. *Sutton*, 192 F.3d at 840 ("By allowing the plaintiff to pursue this claim, the Court merely applied the well-accepted principle that a private party's joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party responsible as a governmental actor."). A conspiracy is the "close nexus" and the "something more" that is otherwise missing in all of the cases Defendants rely upon.

Defendants also argue that the FAC does not sufficiently allege that the Biden administration was actively involved in the acts conducted in furtherance of the conspiracy. Along these lines, they argue that there is no evidence that the government actually singled out Dr. Huber. Or, that the government actually instructed Twitter to terminate offending accounts. (*See, e.g*., Biden Br. at 24). First, as a factual matter this is not true. The direct evidence establishes that the Biden administration actually instructed Twitter "how to get rid of" this disfavored speech and how to do so "quickly." From any reasonable observer's viewpoint, that is fairly hands-on. Moreover, given the fact that Twitter terminated Dr. Huber's account soon after the public reporting of the government's instruction to Twitter, there necessarily is a strong and quite plausible inference that the Biden administration instructed Twitter to terminate accounts of those speakers with whom the government disagreed. Second, and as pointed out in the opening brief, the law of conspiracy does not require that all co-conspirators actually engage in the illegal behavior. What is required is a meeting of the minds of the co-conspirators to engage in illicit behavior and that at least one of the co-conspirators acts in furtherance of the conspiratorial goal. (Op. Br. at 32-33). *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008) ("*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.") (cleaned up).

The facts as alleged in the FAC make clear by direct and circumstantial evidence that there was an agreement between the Biden Administration and Twitter for Twitter to censor speech. Further, Twitter had not been willing to censor this speech on its own but was willing to do so on behalf of the government. This conspiracy to violate Dr. Huber's First Amendment rights constitutes state action by Twitter. For all of the reasons set out above, and as articulated in the opening brief, Dr. Huber respectfully requests that this Court reverse the lower court's dismissal and remand the matter back to the district court for further proceedings.

IV. Section 230 Provides an Independent Basis to Conclude that the FAC Raises Justiciable First Amendment Issues.

Defendants take issue with Dr. Huber's argument that by enacting § 230 of the Communications Decency Act, the government has conferred broad powers of censorship upon Twitter and has preempted and thus removed state law protections of Dr. Huber's speech, thereby giving rise to a justiciable First Amendment issue. (Biden Br. at 35-49; Twitter Br. at 32-40).

Most of the arguments raised by Defendants go to the substance of the theory of justiciability (*i.e.*, state action). (Biden Br. at 43-49; Twitter Br. at 37-40 [challenging Dr. Huber's reading of *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)), *Railway Employees' Dep't*, 351 U.S. at 231-32, and *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)]). We believe that the opening brief anticipated and sufficiently counters Defendants arguments, but we address here one substantive issue and three procedural arguments raised by Defendants.

The one substantive issue is that Defendants appear to have missed the import of this Court's reading of *Denver Area* in *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 841 (9th Cir. 2017). As this Court points out in *Roberts*, while *Denver Area* was indeed a splintered opinion, it did present a "controlling state action analysis" based upon Justice Kennedy concurring opinion – to wit, "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.'" *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 840-41 (9th Cir. 2017) (quoting *Denver Area*, 518 U.S. at 782 [Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part]). That predicate for state action applies here insofar as § 230 singles out speech on Twitter and other social media

platforms for vulnerability to Twitter's censorship that otherwise would run afoul of the Unruh Act.

This leads invitingly to several procedural arguments about Unruh's applicability raised by Defendants. First, the Biden administration argues that Unruh is not extraterritorial and only applies to the Internet when a non-California resident accesses a website or service while sitting in California. (Biden Br. at 36-39). This is not quite the law. Specifically, the Unruh Act's operative jurisdictional language is as follows: "*All persons within the jurisdiction of this state* are free and equal . . .." Cal. Civ. Code § 51(b). What actually constitutes a person being "within the jurisdiction" of California is the operative question. The California Court of Appeal case and the federal district court decisions cited in the Biden brief do not require a physical presence within California borders. Physical presence is a sufficient but not a necessary condition. Rather, the law requires that the acts giving rise to the Unruh Act violation occur within California or that the parties are subject to California's jurisdiction. *Archibald v. Cinerama Hawaiian Hotels, Inc.*, 140 Cal. Rptr. 599, 604 (Cal. Ct. App. 1977) ("[The Unruh Act] applies only within California."); *see, e.g., Gomez v. Tribecca, Inc.*, No. CV 20-06894 DSF (AFMx), 2022 U.S. Dist. LEXIS 84695, at *13 (C.D. Cal. May 10, 2022) ("Although the statute applies broadly to all business establishments of every kind whatsoever, it also specifies its application to persons within the

jurisdiction of the state. Gomez was not physically 'within the jurisdiction' of California when he attempted to access the website ***and he likely would not be subject to California's jurisdiction if another party were to bring a suit against him***.") (emphasis added); *Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083, 1099 (C.D. Cal. 2015) (collecting cases that held that Unruh applies when the discrimination occurs within California's jurisdiction not necessarily within its borders).

First, the FAC alleges plainly that Twitter's principal place of business is in California. (FAC ¶ 11 at ER-26). Importantly, the FAC also alleges that the acts giving rise to the claims of viewpoint discrimination took place within the Northern District of California. (FAC ¶ 8 at ER-25). More importantly, Twitter itself asserts that it entered into the contractual relationship with Dr. Huber in California at its San Francisco offices. (SER-100 ["These Terms are an agreement between you and Twitter, Inc., 1355 Market Street, Suite 900, San Francisco, CA 94103 U.S.A."]). Yet even more important, Twitter demands that all of its users, including Dr. Huber, submit to the jurisdiction of California, agree to apply California law, and agree to litigate all disputes in California. (SER-99). It can hardly be disputed that this matter is subject to the jurisdiction of the state of California and its laws. Indeed, given Twitter's insistence that its relationship to its users is subject to California law and jurisdiction, it should not go unnoticed

that Twitter does not argue that California's Unruh Act does not apply in this instance as a matter of jurisdictional propriety.

Defendants also argue that the Unruh Act does not apply to the discrimination against Dr. Huber based upon her statements about the COVID-19 vaccination. Within this argument is the claim, contradicted by the California Supreme Court, that "personal beliefs" are not covered under the Unruh Act. (Biden Br. at 41-42). *But cf. 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).

Defendants try to excise "personal beliefs" from the protection of the Unruh Act by suggesting that the explicit mention of "personal beliefs" in *Harris* was *dicta* and thus not to be recognized by a federal court. But the rule is that a federal court looking to state law must interpret the state law consistent with the holding of the highest court of the state. And, if the highest court has not provided an explicit holding on the state law issue at hand, the federal court's duty is to predict as best it can how the highest court would hold. As this Court has explained,

> When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.

Lewis v. Tel. Emples. Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996) (cleaned up). Albeit dicta, the highest court made it clear enough that it considered "personal beliefs" within the Unruh Act's protections. Moreover, a perusal of Justice Broussard's dissent in *Harris* and his reference to the majority's inclusion of "personal beliefs" within the Unruh Act's protections provides yet additional evidence that a justice who sat in on the court's deliberations understood quite well the status of personal beliefs per the *Harris* majority. *Harris*, 278 Cal. Rptr. at 637-38 (Broussard, J. dissenting).

The Biden administration attempts yet another approach to the argument that the Unruh Act does not apply to the discrimination against Dr. Huber. Here, the government argues that if there is a claim of discrimination, it is claim that Dr. Huber's speech (and not her personal beliefs about COVID vaccines) was discriminated against and speech is not protected under the Unruh Act. (*See* Biden Br. at 41-42). As part of this argument, the government fatuously argues that Dr. Huber's offending tweet was not a personal belief. The government makes this argument notwithstanding the fact that the offending tweet quoted from and linked to an article that discussed a claim by researchers that "Pfizer's experimental shot"

causes a much higher mortality rate in young people than the virus itself. (FAC ¶¶ 34-35 at ER-29). More to the point, the article quoted from and linked to did not express the view (*i.e.*, personal belief) that Pfizer's vaccine was an "experimental shot." This was bracketed commentary supplied by Dr. Huber – that is, a personal belief.

Before turning to the various miscellaneous issues raised by Defendants' briefing and the motion requesting leave to file an amicus brief, we turn to Twitter's final argument. (Twitter Br. at 41-44). Here, Twitter argues that as a publisher it has First Amendment rights that preclude and trump any claim that it has acted as a co-conspirator with the Biden administration to censor Dr. Huber's speech in violation of her First Amendment rights. This position by Twitter would be humorous if the liberty stakes in this case were not so serious. To be sure, if Twitter is acting as publisher, it has First Amendment rights. But the entire point of this litigation is that Twitter was not acting as a publisher. Indeed, before the government's conspiratorial machinations with Twitter, when Twitter was presumably acting as a publisher, Twitter had chosen not to censor Dr. Huber's speech. After Twitter entered into the conspiracy to do that which the government could not do itself without violating the First Amendment, Twitter was not acting as a publisher but as a state actor.

Notwithstanding the seriousness of the liberty at stake here, we might place

Twitter's argument in a setting for comic relief. Per Twitter's argument, it has an absolute First Amendment right to conspire with the government to censor speech that might remotely criticize President Biden or his opportunities for re-election. Clearly, without the conspiracy, Twitter as a private commercial enterprise may promote the political party and the candidates of its choosing. But that claim to First Amendment protection does not and cannot extend to Twitter when it steps out of its role as a publisher and into the role of a covert co-conspirator with the government to silence that which the government considers bad speech. The cases cited by Twitter do not say otherwise. This argument is just foolish.

V. Miscellaneous Issues and the Proposed Amicus Brief.

A. Miscellaneous Issues of Waiver.

Twitter argues that Dr. Huber has waived certain arguments she relied upon in the district court. (Twitter Br. at 13-14). We address each in turn. First, we agree that this appeal does not challenge Defendant Dorsey's dismissal from this lawsuit.

Second, Dr. Huber does not seek leave to amend. Quite frankly, if this Court concludes that the facts as set out in the FAC do not satisfy the conspiracy prong of state action, we are of the view that any additional facts we might muster at this time given the Rule 11 requirements would be to no end. Fed. R. Civ. P. 11.

Third, Twitter argues that Dr. Huber has waived her equal protection claim

to the extent that it is predicated upon a claim of disparate treatment. This argument is flawed for three reasons. One, the district court did not ultimately rule on the merits of the equal protection claim. Two, what the court did was to post a short footnote consisting of dicta expressing an observation that the FAC does not actually allege that other Twitter users were treated better than Dr. Huber. (Order, n.5 at ER-22). On its face, the short footnote is not a holding; it does not even assert that the equal protection claim should be dismissed for failure to allege disparate treatment; and it cites to no legal principle supporting a dismissal but is merely an observation about what facts have been alleged. And three, as to the factual observation, Dr. Huber's opening brief and indeed almost the entire argument set out in the opening brief underscores the factual allegations that speech aligned with the government's view about vaccines was to be "elevated" by Twitter and that speech expressing a view critical of the vaccines was to be censored – all on behalf of the government. Those facts appear to us to be asserting disparate treatment and serve to counter the lower court's observational dicta tucked into a short footnote. Twitter itself makes no argument for dismissal of the equal protection claim on its merits. Its waiver argument on this point is misguided.

Fourth, Twitter argues that Dr. Huber waives state action based upon the "willful participant" prong of the joint action theory. To the extent that this prong

remains distinct from the conspiracy prong, we agree. To the extent that it does not, then quite obviously this appeal argues that Twitter was a "willful participant" in a joint action by virtue of the conspiracy.

And, finally, Twitter argues that Dr. Huber has waived any argument that § 230 is unconstitutional. As we explained in a lengthy footnote in the opening brief, there is nothing to argue before this Court – and thus no waiver – of an issue not addressed by the lower court. (Op. Br., n.1 at 6). Quite frankly, Twitter's claim of waiver here is lost on us.

B. The Proposed Amicus Brief Is of No Value.

The proposed amicus brief (Prop. ACB [Dkt. No. 23-2]) is of no value for three reasons. One, it proposes an entirely new framework to analyze state action for the social media giants without any legal or precedential support. (Prop. ACB at 4-8). Two, it proposes an unworkable conditional bar to liability for the *de facto* state actor (*i.e.*, Twitter) that applies in no other arena. (Prop. ACB at 8-12). And, three, it ignores the reality of the allegations in this case: Twitter knowingly and wittingly conspired with the Biden administration to violate Dr. Huber's First Amendment rights. The possibility that in other circumstances Twitter is acting as a publisher with its own First Amendment rights is ultimately not relevant. If state action is found in this case (or in any other), Twitter is wearing the garb of Uncle Sam, not Penguin Random House.

CONCLUSION

For all the reasons set forth above and in her opening brief, 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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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 6,628 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: September 16, 2022

AMERICAN FREEDOM LAW CENTER

s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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: September 16, 2022

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