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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THE INFORMED CONSENT ACTION NETWORK, and DEL BIGTREE,

Plaintiffs,

v.

YOUTUBE LLC and FACEBOOK, INC.,

Defendants.

Civil Action No.: 4:20-CV-09456-JST

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANTS

Before: Hon. Jon S. Tigar
Courtroom 6 – 2nd floor
Date:
Time:

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Plaintiffs, The Informed Consent Action Network ("**ICAN**") and Del Bigtree oppose the Motion to Dismiss filed by Defendants Facebook, Inc. ("**Facebook**") and YouTube, LLC ("**YouTube**").

PRELIMINARY STATEMENT

Plaintiffs' Amended Complaint describes a situation where Members of Congress repeatedly used the leverage they had over the Defendants to force them to censor their users in ways that the government could not do on its own. It also describes how the Defendants responded by willingly agreeing to censor any content that disagreed with the established government position on issues such as vaccines and COVID-19. In this way, Defendants and the government were acting jointly because Defendants relied on the government to decide what was true and what was misinformation. When this pressure campaign and the joint actions are viewed together, the Amended Complaint establishes that Defendants willingly became government actors, and as such violated Plaintiffs' First Amendment rights when they removed Plaintiffs' content because it contradicted the government's position.

The Amended Complaint explains how social media companies have little to no business reason to limit their users' speech. Nevertheless, it also describes how Section 230 of the Communications Decency Act is critical to Defendants' businesses, and how through the Russian election interference scandal, Members of Congress learned how to use Defendants' pressure point regarding Section 230 to get Defendants to act as the congresspersons wanted. The Amended Complaint then presents multiple examples where, those Members of Congress used implicit and explicit threats to Section 230 as a means to force Defendants to censor speech (*e.g.*, hate speech, census misinformation, and vaccine misinformation), and despite having no business incentive to comply with these requests, Defendants complied. When a company acts against its business interests, that is prima facie evidence that the company is acting as a result of coercion or some other outside pressures.

After COVID-19 hit, Chairman Schiff used this same playbook to get Defendants to censor speech that contradicted the government, and Defendants obliged. By this point he did not even

need to use direct threats, everyone involved knew the potential consequences for Section 230 if Defendants did not comply. Moreover, the Amended Complaint alleges that Defendants admitted to working closely with government officials in crafting their COVID-19 policies. Therefore, it should come as no surprise that rather than implement a nuanced approach whereby Defendants evaluated each claim on its merits, Defendants simply adopted the government's position on everything to do with COVID-19, and stated that any postings that contradicted the government were to be censored. The First Amendment would unquestionably have blocked Chairman Schiff from passing a law silencing these criticisms, thus, he had to use Defendants as his cats paw to accomplish this goal.

The State Action doctrine was developed specifically to prohibit such actions where a government actor uses a private entity to accomplish a goal the government is prohibited from accomplishing. Here, Defendants had no problem with Plaintiffs content until they were told to have a problem with it by Chairman Schiff. Therefore, by acceding to Chairman Schiff's wishes, and then willingly partnering with governmental entities to establish what was the truth, Defendants chose to become state actors and were obligated to respect Plaintiffs' First Amendment rights just as Chairman Schiff would have been.

Defendants attempt to undermine these strong claims by mischaracterizing them and then presenting a number of technical arguments intended to make those claims seem "improbable." However, when viewed in their totality, Defendants' actions were clearly attributable to the government. For these reasons, Defendants' motion to dismiss should be denied.

BACKGROUND

ICAN's Role in Disseminating Medical Information and its Web Content

Plaintiff Del Bigtree founded ICAN, a non-profit entity, in 2016 to disseminate medical information to the public that challenged governmental orthodoxy on health-related issues to allow citizens to make informed medical decisions. (First Am. Compl. ("FAC") ¶ 2.) Since its inception, ICAN has been instrumental in scrutinizing government policies in the health-care sector, and in lobbying for change in government policies regarding viruses and vaccines. Among other things,

ICAN has brought successful lawsuits against government agencies such as FDA, HHS, CDC, and NIH, and it has disseminated information gathered through numerous Freedom of Information Requests to these public health agencies. (FAC ¶ 2, ¶ 16.)

Since 2017, ICAN has used Defendants' platforms to broadcast episodes of its show, HighWire, through which ICAN disseminates, *inter alia*, the government information gathered from its lawsuits and FOIA requests. (FAC ¶¶ 3, 17.) In the beginning of 2020, as COVID-19 began spreading across the globe, ICAN commenced gathering and disseminating medical information related to the COVID-19 virus. (FAC ¶ 8.) ICAN submitted various FOIA requests to the CDC and the FDA, interviewed doctors treating COVID-19, and provided public access to medical opinions by scientists and other industry professionals, all intended to shed light on the pandemic. (FAC ¶¶ 8, 16.) Moreover, in furtherance of its mission to allow people to make informed medical decisions, ICAN worked to ensure that government agencies are not making false claims about COVID-19 vaccines. For example, it succeeded in having the New York State Department of Health remove false claims from its website that the COVID-19 vaccines have been "approved" by the FDA and that "no serious vaccine side effects have been reported." (FAC ¶ 16.) In addition ICAN was instrumental in petitioning the FDA to require that all clinical trials pertaining to COVID-19 vaccines include a placebo control group. (FAC ¶ 16.)

Defendants Do Not Question ICAN's Prior Postings

Although ICAN's web-content has always included challenging the government health guidance, pronouncement, science and claims, Defendants had never removed ICAN's content prior to the end of 2019. (FAC ¶ 78.) Moreover, until July 2020, ICAN had not received any complaints from Defendants about any of its videos on YouTube or posts on Facebook. (FAC ¶ 68, 75.)

This makes sense, social media companies like Defendants employ a business model that thrives on user traffic. The more people who come to the sites, the more information about users can be generated and the more advertising the companies can sell. (FAC ¶¶ 3, 78.) This business model meant that there was little incentive for Defendants to censor their users' free speech. (*Id.*)

Even if the Defendants disliked or disagreed with postings, Defendants could still make money selling ads on those disfavored postings. (*Id.*)

Members of Congress used Threats to "Pressure" Defendants to Censor Speech

Section 230 of the Communications Decency Act (47 U.S.C. § 230) ("**Section 230**") is a peculiar provision that grants "protection for 'Good Samaritan' blocking and screening of offensive material." (FAC ¶ 25.) Congress granted this immunity shield to providers of interactive computer services during the nascent days of the internet. (*Id.*) It protects tech companies, like Defendants, from being held liable for user activity on their platforms. (*Id.* ¶¶ 4, 26.) Defendants' representatives have routinely emphasized the importance of Section 230 for their businesses in that it plays a significant role in enabling Defendants to become the behemoths of the internet. (*Id.* ¶¶ 26, 28.)

After Russian agents used Defendants' platforms to wage a political cyberattack on the United States, "Defendants' businesses faced immense scrutiny from Congress, law enforcement authorities, and the public in the Unites States." (FAC ¶ 33.) Members of Congress were deeply concerned and began to openly debate regulating the tech industry, including changing Section 230. (*Id.* ¶¶ 5, 33-34.) Members like Chairman Adam Schiff held hearings in their committees where they openly questioned removing the immunity provided by Section 230. (*Id.* ¶ 35.) To preserve Section 230, and generally avoid the specter of regulation, the social media companies conceded that they made errors in 2018, and introduced new policies aimed at preventing a repeat of the Russian interference in American politics. (*Id.* ¶ 6.) From this, individuals in the U.S. government learned that the social media companies could be manipulated through, *inter alia*, threats to Section 230.

Thereafter, individual members of the U.S. Government have used the implicit or explicit threat of regulatory change to coerce Defendants to do their bidding knowing that Defendants will comply as they had done in the past. (FAC ¶¶ 52, 55, 58.) Members of Congress knew that they could not implement censorship through legislation, but they discovered that pressuring Defendants could achieve a similar result. (*Id.* ¶ 55.) Therefore, what began as censoring illegal

speech online, quickly turned to censoring legal, but perhaps disfavored speech online. (*Id.* ¶¶ 5, 7, 40, 41.) Congress' use of this tactic is clear from statements made by Chairman Jerrold Nadler in 2019, when in advance of a Congressional hearing on hate crimes and the role of Defendants' platforms in proliferation of white nationalism online, he stated that he would rather pressure the tech companies before considering legislating. (*Id.* ¶ 53.)

In just one successful pressure campaign, in 2019, Roll Call reported that certain Members of Congress had successfully pressured Facebook and other social media giants to adopt stricter policies to contain census misinformation online. (FAC ¶ 56, 57.) Soon thereafter, Defendants updated their policies surrounding census misinformation. (*Id.* ¶ 57.)

Following suit, Chairman Schiff, one of the most powerful and influential lawmakers of the country, used this tool of regulatory threat to Defendants to pressure them in 2019 to crack-down on what he saw as vaccine misinformation online. (FAC ¶¶ 42, 43.) "What Chairman Schiff deemed 'misinformation' was not outright falsehoods, but rather any information that questioned the orthodoxy regarding vaccine safety promoted by the federal government's health agencies," even though such criticism was perfectly legal under the First Amendment. (*Id.* ¶ 42.) Nevertheless, knowing he could not directly censor such speech through legislation, he wrote to Defendants as a member of the federal government to "encourage further action [] be taken related to vaccine misinformation." (*Id.* ¶¶ 42, 43.)

Chairman Schiff's letters did not reference Section 230, but after the pressure he and others applied following the Russia scandal, he did not need to. (FAC ¶ 44.) Defendants knew the potential consequences of ignoring these requests. (*Id.*) This is evident because Chairman Schiff was successful in coercing Defendants to act in the way he wanted regarding vaccine information. (*Id.* ¶ 43.)

Where before Chairman Schiff's letters Defendants did not have policies regarding vaccine misinformation, shortly after Chairman Schiff's letters, Facebook's top officials issued a press release stating that Facebook would be removing "'anti-vaccine' information from its from software systems that recommend related content[.]" (FAC ¶¶ 45, 46.) YouTube similarly

responded to Chairman Schiff directly by telling him that it would "demonetize[e] anti-vaccination content[,]" it would "reduce the spread of inaccurate information about vaccines by reducing its distribution[,]" and it would remove "groups and pages that promote misinformation" from recommendations. (*Id.* ¶ 44.)

Further cementing the connection between Chairman Schiff's letters and Defendants actions, Defendants adopted Chairman Schiff's position with regard to defining so called "misinformation." (FAC ¶¶ 42, 46.) They declared that any position taken by government organizations like the Centers for Disease Control and Prevention ("**CDC**") and World Health Organization ("**WHO**") was the truth, and decided that any position that contradicted local or federal government positions was "misinformation." (*Id.* ¶ 46.) In just one example of Defendants' outsourcing to the government the responsibility to define what is the truth and what is "misinformation," Facebook's response to Chairman Schiff's letter specifically stated:

> global health organizations, such as the World Health Organization and the US Centers for Disease Control and Prevention, have publicly identified verifiable vaccine hoaxes. If these vaccine hoaxes appear on Facebook, we will take action against them.

(Id.)

Chairman Schiff further put Defendants on notice that adopting these policies alone was not sufficient and that he was working with the companies to implement his desired vaccine related policies as well. (FAC ¶¶ 44, 45.) He specifically said that he will be testing "whether the steps outlined by Google and Facebook do in fact reduce the spread of anti-vaccine content on their platforms," and he intended to "**continue working with the companies** on the issue of misinformation on their platforms and monitoring the effectiveness of the changes they are making." (*Id.* ¶¶ 44, 45 (see press release and twitter post cited therein) (emphasis added).)

Chairman Schiff Continues Pressure Tactics to Force Defendants to Censor COVID-19 Related Speech That Contradicted the Government

As the COVID-19 pandemic hit the nation in 2020, Chairman Schiff's agenda spread generally from vaccine misinformation to "COVID-19 misinformation." (FAC ¶¶ 44, 45.) Thus,

Chairman Schiff pushed the boundary of his pressure campaign against Defendants further to silence speech concerning one of the largest and most important public issues of the last decade. (*Id.* ¶ 48.)

At the time, the COVID-19 pandemic was in its early phase. (FAC ¶ 48.) There was no clear scientific consensus on all aspects of the virus and the government's response. (*Id.*) In fact, it was a hot-button political issue as well with Democrats and Republicans viewing the issue differently. (*Id.*) These are precisely the kinds of public debates that the First Amendment was designed to foster, where policy makers and the public are groping to understand an issue and all sides must be heard to ensure that good decisions can be made based on all the facts and opinions. (*Id.*) As such, this was exactly what Chairman Schiff knew he could not outright prohibit by law, and that was why he needed his cats paw of Defendants to do the censoring for him. (*Id.* ¶¶ 1, 48.)

In April 2020, Chairman Schiff sent Defendants letters to remind them of the action they must take – instructing them to remove any content that contradicts recommendations made by bodies such as the WHO and to "inform and direct" recipients of medical "misinformation" to "authoritative" sources. (FAC ¶ 47.) Beyond just these letters, Chairman Schiff continued to engage "directly with the companies" to help them censor vaccine misinformation. (*Id.* ¶¶ 45, 50.) Plaintiffs believe a significant amount of these additional communications occurred, which Plaintiffs will only uncover in discovery.

As Chairman Schiff had asked, Defendants changed their policies again to prohibit so called COVID-19 misinformation. Just like Defendants did in response to Chairman Schiff's 2019 vaccine misinformation letter, in 2020 Defendants adopted policies that prohibited their users from posting anything that contradicted approved governmental information. (FAC ¶ 59.) According to Defendants, what is considered "misinformation" is based exclusively on what the government and governmental related authorities say is correct. (*Id.*) In short, Defendants perceived "vaccine misinformation" or "coronavirus misinformation" as anything that contradicts government policy. (*Id.*)

YouTube's policy, for example, prohibits "content about COVID-19 that . . . spreads medical misinformation that contradicts local health authorities' or the [WHO's] medical information about COVID-19." (FAC ¶ 60; Dkt. No. 47 p. 18.) Facebook similarly says that it removes content that has "been flagged by leading global health organizations and local health authorities that could cause harm to people who believe them." (*Id.*) Moreover, in fact checking articles that supposedly direct users to authoritative, medically accurate sources, Defendants and their agents use information supplied by these governmental organizations as the authoritative and established sources, thereby making the governmental organizations the ultimate arbiters of the truth. (*Id.* at ¶ 61.)

If the timing of these changes, and the use of government policy as the truth, was not sufficient to draw the connection between Chairman Schiff's actions and Defendants' policy changes, YouTube's CEO made the connection clear in a May 13, 2020, letter to Chairman Schiff where she stated:

> We also partner closely with researchers and elected officials from around the world to better understand the challenges of online misinformation and take their recommendations for improvement seriously. **We are committed to working with Members of Congress** as well as health experts around the world to better understand these challenges as we continue developing robust policy and product improvements that help keep people safe. I hope you will continue to share with me your views about our work.

(FAC ¶ 49 (letter available at https://schiff.house.gov/imo/media/doc/20200513fromYouTuberecoronavirusmisinformation.pdf) (emphasis added).)

Defendants Removed Plaintiffs' Accounts Due to Chairman Schiff's Requested Policy Changes

ICAN highly valued its YouTube Channel. (FAC ¶ 68.) Thus, Plaintiffs always strove to abide by YouTube's Terms of Service and Community Guidelines, and prior to when Chairman Schiff sent his letter, ICAN never received a single complaint from YouTube regarding any of its videos. (*Id.*)

Despite this spotless history, starting July 3, 2020, just a few weeks after its CEO had responded to Chairman Schiff's letter, YouTube took down several of ICAN's videos regarding

COVID-19 and ultimately terminated ICAN's YouTube channel on July 29, 2020. (FAC ¶ 69.) YouTube's abrupt termination was particularly unexpected because ICAN had been broadcasting information contradicting government positions since the beginning of the COVID-19 pandemic, but YouTube had not removed any of those videos when they were posted. (*Id.* ¶¶ 8, 68.) YouTube's actions caused ICAN to lose all of its 250,000 subscribers who regularly watched the weekly episodes. (*Id.* ¶ 70.) It also locked ICAN out of accessing any of the content it had uploaded to YouTube and preventing ICAN from posting any new content on the site. (*Id.* ¶¶ 69, 70.)

ICAN maintained two pages on Facebook, one for ICAN and the other for "The HighWire with Del Bigtree." (FAC ¶ 72.) The HighWire Facebook page had a following of over 360,000 users with over 30 million views on its videos. (*Id.*) Nevertheless, at nearly the same time YouTube started to de-platform Plaintiffs, Facebook began to do the same. On or about July 7, 2020, Facebook began flagging and/or removing ICAN's posts and videos regarding vaccinations and COVID-19. (*Id.* ¶ 73.) Thereafter, on November 21, 2020, Facebook unpublished ICAN's webpage on its platform. (*Id.* ¶ 74.) Again, prior to July 2020, Plaintiffs had posted content concerning the pandemic, but Facebook did not have a problem with that content until after Chairman Schiff's letters. (*Id.* ¶¶ 8, 75.)

Status of the Case

On December 30, 2020, Plaintiffs filed the complaint alleging violations of the First Amendment and breach of the implied covenants of good faith and fair dealing. (Dkt. No. 1.) Defendants responded by filing a motion to dismiss. (Dkt. No. 40.) Facebook also filed a motion under California's anti-SLAPP statute regarding the implied covenant claims. (Dkt. No. 41.) Thereafter, Plaintiffs filed an Amended Complaint. (Dkt. No. 44.) Plaintiffs continue to believe that their original claims were meritorious, but they withdrew the claims for breach of the implied covenant because they could achieve their goals without them, and as a small non-profit ICAN could not afford any unnecessary litigation costs from Facebook's anti-SLAPP motion. Defendants then filed the instant motion. (Dkt. No. 47.)

ARGUMENT

A motion to dismiss, pursuant to FRCP 12(b)(6), tests "the legal sufficiency of the claims stated in the complaint." *Cal. Sportfishing Prot. Alliance v. Shamrock Materials, Inc.*, No. C11-2565 MEJ, 2011 WL 5223086, at *6 (N.D. Cal. Nov. 2, 2011). At the pleading stage, Plaintiffs need only to allege facts that are "sufficient to 'raise a right to relief above the speculative level.'" *Brown v. Brown*, No. CV 13-03318 SI, 2013 WL 5947032 at *2 (N.D. Cal. Nov. 5, 2013) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). They need only "'nudge[ ] their claims across the line from conceivable to plausible.'" *Craig v. City of King City*, No. C-11-04219 EDL, 2012 WL 1094327, at *3 (N.D. Cal. Mar. 29, 2012) (*quoting Twombly*, 550 U.S. at 570). Furthermore, the Court must accept all allegations as true, draw reasonable inferences in favor of the plaintiff, and construe the allegations "in the light most favorable to the plaintiff." *Id.* "[S]o long as [Plaintiffs allege] facts to support a theory that is not facially implausible, the court's skepticism is best reserved for later stages of the proceeding[.]" *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787, 791 (9th Cir. 2011).

I. PLAITNIFFS STATE A CLAIM FOR VIOLATION OF THE FIRST AMENDMENT

A. When the Full Involvement of the Government is Viewed in its Totality There are More than Sufficient Allegations to Establish State Action

Defendants' first line of attack is to point out that they are private entities and therefore are not libel for a constitutional violation. Plaintiffs do not dispute that Defendants are private entities, however, this status does not preclude Defendants from being held liable as state actors. In fact, the Ninth Circuit has "recognized at least four different general tests that may aid us in identifying state action: '(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.'" *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020) (internal quotations omitted). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." *Id.*

Defendants concede that private entities can be liable for constitutional violations under the state action test, but they try to argue for a rigid test that permits only a narrow band of state action. (Dkt. No. 47 pp. 10-12.) Nevertheless, in this Circuit "'[w]hat is fairly attributable [as State action] is a matter of normative judgment, and the criteria lack rigid simplicity.... [No] one fact can function as a necessary condition across the board ... nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason[.]'" *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002) (*quoting Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001)). In this way, the Ninth Circuit recently reiterated that when viewing the state action test, the entire involvement of the government in various ways must be viewed in totality. *Rawson*, 975 F.3d at 757 (holding that even though some of the specific factors, such as the exercise of professional judgment and the lack of a statutory mandate to commit individuals to a mental hospital, weigh against finding state action, "on balance, the facts weigh toward a conclusion that [the private actor defendants] were nevertheless state actors").

Here Defendants' conduct qualifies under two of these tests, and when all of the activity is viewed together it easily creates a plausible claim of state action. First, by threatening Defendants' immunity under Section 230, and providing significant encouragement to Defendants, Chairman Schiff was able to compel Defendants to adopt his desired policies for censoring what he thought was misinformation regarding vaccines and COVID-19. (*Infra* Sec. I.A.1.) Second, when Defendants chose to implement Chairman Schiff's requested censorship, they adopted his position that any information that contradicted the Government was "misinformation." They also admitted that when confronting this supposed misinformation they were "partner[ing] closely with" government entities and Members of Congress. (Am. Comp. ¶ 49.) By choosing to include those government entities as active partners in determining the "truth" and deciding what should and should not be censored, Defendants willingly entered into joint action with the Government. (*Infra* Sec. I.A.2.)

1. Defendants Actions were a result of Governmental Coercion

Even though a private party is usually not constrained by the First Amendment, "it is if the government coerces or induces it to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint." *Biden v. Knight First Amendment Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (J. Thomas concurring). This is so because "[t]he government cannot accomplish through threats of adverse government action [against a private party] what the Constitution prohibits it from doing directly." *Id.* In this context, "[g]overnmental compulsion or coercion may exist where the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Rawson*, 975 F.3d at 748 (*quoting Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).[1]

This type of governmental compulsion or coercion is precisely what Plaintiffs allege occurred here. The Amended Complaint describes how censorship runs contrary to Defendants' economic interests because their business models are premised on making content "go viral" and then selling advertising with that content. (FAC ¶ 88.) The companies spoke about free speech and minimal censorship in their mission statements and what censorship occurred was previously "largely limited to true violations of law (*e.g.*, child pornography, copyright violations, or clearly libelous statements)." (*Id.* ¶ 31.) Consistent with this approach, before Chairman Schiff started to pressure Defendants in 2019 and 2020, Defendants almost never censored any of Plaintiffs' content. (*Id.* ¶¶ 3, 88.) In fact YouTube's terms of service never even mentioned so called "misinformation" until 2020, it just was not something they were concerned about. (*Id.* ¶ 31.) They were able to continue with this free speech business model because Section 230 immunized

[1] Even though cases like *Rawson* cited herein address claims under Section 1983 against state actors, those same holdings apply in the instant matter that concerns violations by federal actors. "[T]o determine where the governmental sphere ends and the private sphere begins in cases alleging constitutional violations by non-government employees, courts have applied the same jurisprudence of state action regardless of whether the challenged conduct is alleged to have occurred under color of state law (and therefore challenged under § 1983) or federal law." *Hernandez v. Dixon*, No. 5:12-CV-00070-BG, 2012 WL 6839329, at *3 (N.D. Tex. Dec. 12, 2012).

Defendants against suits regarding that content, going so far as to tell Congress that the "shield" created by Section 230 was "absolutely essential" to Defendants' work. (*Id.* ¶¶ 25-26 (describing how the importance of Section 230 "cannot be overstated").)

However, during the Russian election interference scandal, Members of Congress, including Chairman Schiff, used threats and pressure to force Defendants to change their policies regarding censoring foreign influence in elections. (FAC ¶¶ 32-38.) From this, those Members of Congress learned just how important Section 230 was to Defendants business, and that Defendants "would bend to any request if they thought that Section 230 was in danger." (*Id.* at ¶¶ 37-40.) The Amended Complaint then describes how those Members of Congress used this pressure point "to compel those social media companies to censor speech that Congressional members disagreed with – speech that was legal and protected by the First Amendment." (*Id.* ¶ 41.)

Plaintiffs present multiple examples of the pattern, whereby Members of Congress successfully pressured the Defendants to change policies regarding censoring information on their websites. For instance, after the successful pressure campaign regarding Russian interference, Members of Congress pressured Defendants to change their policies regarding census misinformation, and "[s]hortly thereafter, Defendants updated their polices surrounding census misinformation." (FAC ¶¶ 55-57.) Likewise, before the COVID-19 situation, in 2019 Chairman Schiff successfully pressured Defendants to change their policies regarding "vaccine misinformation" generally, and a month later, the Defendants adopted policies that utilized information from government entities, like the WHO and CDC to limit the "spread [of] misinformation about vaccinations." (*Id.* ¶¶ 44-46.)

That same pattern continued in April 2020 when Chairman Schiff wrote to Defendants and described what he saw as a need to expand their censorship of "vaccine misinformation" to also include "coronavirus misinformation." (FAC ¶ 47.) Again, the pressure worked, Defendants changed their policies to prohibit misinformation about COVID-19. (*Id.* ¶ 49.) In fact, the connection between Chairman Schiff's influence and Defendants' policy change is made clear by Defendants' decision to adopt Chairman Schiff's definition of "misinformation" for vaccines and

COVID-19. (FAC ¶ 42 (describing Chairman Schiff's definition).) Defendants adopted policies that explicitly labeled anything that contradicted governmental health authorities like the WHO or other local authorities as misinformation. (FAC ¶¶ 48, 60; Dkt. No. 47 p. 18.)

The Amended Complaint explains that Chairman Schiff's letters did not need to explicitly reference changes of Section 230 as a threat, because after openly discussing such changes in order to pressure Defendants regarding Russia and census misinformation (*Id.* ¶¶ 32-37, 55-57), Defendants understood "that these officials hold the proverbial Sword of Damocles over the social media companies' heads, and if the companies did not comply with the demands made by the government officials . . . they would lose the current legal regime that they deem essential to their continued growth." (*Id.* ¶¶ 38, 44.)

At the very least, when combined with the prior threats to Section 230 and his reported direct engagement with Defendants on the issues of vaccine misinformation, Chairman Schiff's letters show that he was significantly encouraging Defendants to take actions to censor speech like Plaintiffs. (FAC ¶¶ 35, 50-51.) This type of significant encouragement falls well within the state action test. *Mathis v. Pac. Gas and Elec. Co.*, 891 F.2d 1429, 1434 (9th Cir. 1989) (holding that, where the government may have had negotiations with the private power plants regarding their drug use policy, that along with other factors was sufficient to establish that the government "exercised coercive power and provided significant encouragement"); *see also United States v. Stein*, 541 F.3d 130, 146-47 (2d Cir. 2008) (finding state action where KPMG agreed to not pay attorneys' fees for employees after receiving "significant encouragement" from the U.S. Attorney's Office to cut off such payments).

Courts have long recognized similar implicit and explicit threats as constituting a form of coercion or significant encouragement worthy of transforming private actors into state actors. The Supreme Court first recognized the pernicious nature of threats in its holding in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), where a commission would issue notices when it thought books were obscene, and even though private actors were free to ignore such notices, it was understood that to ignore such a threat was to invite an obscenity investigation by police. *Id.* at

68; *Knight First Amendment Inst.*, 141 S. Ct. at 1226 (2021) (J. Thomas concurring) ("'People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings'" (*quoting Bantam Books, Inc.*)). Similarly, in *Carlin Communications, Inc. v. Mountain States Tel.*, 827 F.2d 1291 (9th Cir. 1987), the Ninth Circuit applied *Bantam Books*' concept of government official's threats to find state action where an official threatened a private telephone company with prosecution unless it stopped carrying certain content. *Id.* 1295 (*citing Bantam Books, Inc.*, 372 U.S. at 68).

Plaintiffs try to downplay the threats made by Chairman Schiff, and others, by claiming that each individual Member of Congress did not "have any actual legal force" because a single Member of Congress did not speak for all of Congress.[2] However, the test for whether a threat establishes state action "is objective: whether the official's comments 'can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Zieper v. Metzinger*, 392 F. Supp. 2d 516, 525 (S.D.N.Y. 2005) (*quoting Rattner v. Netburn*, 930 F.2d 204, 208 (2d Cir. 1991) and *Bantam Books, Inc.*). This objective test is easily met here by viewing the history between Chairman Schiff and Defendants.

As discussed, here before Chairman Schiff began to complain about vaccine and COVID-19 related misinformation, Defendants never had a problem with Plaintiffs' content. (FAC ¶¶ 8,

[2] Contrary to Defendants' assertions, this matter is not similar to *Abu-Jamal v. Natl. Pub. Radio*, No. CIV. A. 96-0594(RMU), 1997 WL 527349 (D.D.C. Aug. 21, 1997), *affd,* 159 F.3d 635 (D.C. Cir. 1998). There, the plaintiff argued that National Public Radio's ("NPR") decision to not air his commentary, was made because Senator Bob Dole and the Fraternal Order of Police made public and private exhortations to NPR to not run the commentary. *Id.* at *5-6. The only evidence of government action was this single incident and supposed threats to withhold funding for NPR. *Id.* Whereas here there is a history that shows Members of Congress successfully using threats to Section 230 to get Defendants to act. (FAC ¶¶ 44-46, 53-57.) The history also shows that, before any pressure from Chairman Schiff, Defendants had little to no problems with Plaintiffs' content, but after the Chairman complained, Defendants changed their policies and ultimately removed Plaintiffs from their sites. (*Id.*) Moreover, *Abu-Jamal*, did not include any allegations of joint action. *Abu-Jamal*, 1997 WL 527349 at * 5 ("There is no suggestion of joint action here[.]"). On the other hand, as discussed in the next section, this matter includes significant joint action between the government and Defendants. (*Infra* Sec. I.A.2.)

75.) However, after Chairman Schiff's statements, Defendants created misinformation policies that mirrored his desires, and used those policies to de-platform Plaintiffs. The Amended Complaint also provides other examples where other Members of Congress successfully pressured Defendants into changing their policies. At bottom, whether Chairman Schiff's statements were the actual motivating factor to get Defendants to change their policies is information exclusively within Defendant's knowledge. For now, the history and pattern presented in the Amended Complaint is more than sufficient to make Plaintiffs' claim of at least plausible. Furthermore, a plaintiff need not prove that the official's threat "was the real motivating force" behind the private party's conduct. *Carlin*, 827 F.2d at 1295. State action still exists even if the private party "**would have acted as he did independently**" of the official's threat. *Id*. (emphasis in original). Thus, "[t]he mere fact that [a defendant] might have been willing to act without coercion makes no difference if the government did coerce." *Mathis v. Pac. Gas and Elec. Co.*, 891 F.2d 1429, 1434 (9th Cir. 1989). It is the act of coercion that transforms the private act into a state action.

Plaintiffs further assert that the government compulsion test can only be applied to hold a government official liable for a private party's actions, but this is simply incorrect. *Blum v. Yaretsky*, the Supreme Court opinion that first articulated the compulsion test "turned not on who was sued—i.e., whether the named defendant was a public official or a private entity—but on who took the constitutionally impermissible action." *Paige v. Coyner*, 614 F.3d 273, 279 (6th Cir. 2010). For example, *Carlin Communications,* was a seminal case regarding official threats, and it held that the private telephone company was a state actor and therefore could be held libel under Section 1983. 827 F.2d at 1295; *see also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840-43 (9th Cir. 1999) (cited by Defendants) (collecting and discussing various cases where a private party was held libel under a government compulsion test).

2. Plaintiffs Have Alleged Facts Sufficient to Show Joint Action Between Defendants and Government Officials

"The joint action test asks whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Tsao v. Desert Palace, Inc.*, 698 F.3d

1128, 1140 (9th Cir. 2012) (internal quotations omitted). Under this test, a private party may be found to have acted "under color of state law when the state significantly involves itself in the private parties' actions and decision[ ]making at issue" such that the state can be considered a joint actor. *Rawson*, 975 F.3d at 753. In reviewing this issue, courts will look to all the interactions between the government and the private parties. *Id.* at 753-56 (examining all the defendant's interactions with the government).

Defendants try to dismiss the joint actions between Defendants and the government actors by simply saying that nothing in the Amended Complaint supports such a theory, and that the government was not involved in the specific decisions challenged here. However, that is not true at all. Plaintiffs alleged in their Amended Complaint, and then Defendants confirmed in their motion to dismiss brief, that:

> YouTube, and Facebook's determinations of what is considered "misinformation" is based exclusively on what the government and governmental related authorities tell them to allow. In short, Defendants perceive "vaccine misinformation" or "coronavirus misinformation" as anything that contradicts government policy.

(FAC ¶ 59; *see also* Dkt. No. 47 p. 18.) Specifically YouTube and Facebook's policies regarding vaccine and COVID-19 misinformation both label as misinformation any information that contradicts government entities such as local health authorities like the CDC, or the WHO. (*Id.* at ¶¶ 60-61; Dkt. No. 47 p. 18 (citing White Exhibits 10 at p. 1 and 16 at p. 51 (Dkt. No. 47-17)).)

This direct connection between what Defendants label as misinformation and what the government says is the truth can be seen in a recent decision by Facebook regarding a fact it previously identified as misinformation. Facebook previously removed any content asserting that the COVID-19 virus was man-made, but on or about May 26, 2021, Facebook decided it would no longer label such claims as misinformation because President Biden had ordered an investigation into that question.[3] *See, e.g., Facebook no longer treating 'man-made' Covid as a*

[3] Given that Facebook's decision occurred after Plaintiffs filed their Amended Complaint, they obviously did not include it in their pleading. However, given the relevance of this event to this matter, if the Court views it as assisting it in reaching its conclusion, Plaintiffs ask permission to file a supplemental complaint pursuant to Rule 15(d) to add this event to their pleading. *Keith*

crackpot idea, Politico (May 26, 2021) *available at* https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053.

By choosing to use governmental sources as the authoritative truth, or rule of decision, against which all postings were measured, Defendants created a "system of cooperation and interdependence" with the government where Defendants explicitly chose to involve the government in nearly every one of its censorship decisions. *Tsao*, 698 F.3d at 1140 (finding that because the Las Vegas police had deputized certain private security people to write trespassing summonses there existed a "system of cooperation and interdependence" such that the private defendants and the police were acting jointly). In this way, Defendants were "willful participant[s] in joint action with the [government] or its agents." *Hernandez v. AFSCME California*, 424 F. Supp. 3d 912, 921 (E.D. Cal. Dec. 20, 2019) (internal quotations omitted). Thus, the fact that Chairman Schiff's letters did not reference Plaintiffs specifically is not determinative of the state action question because the governmental entities were still the ones who decided whether what Plaintiffs said was or was not misinformation. *Mathis*, 891 F.2d at 1434 n. 10 (holding that just because the government did not specifically command Mr. Mathis' termination was immaterial because the criteria used to fire him was allegedly created by the government).

The Ninth Circuit has held that this type of involvement satisfies the joint action test for state action. As the Ninth Circuit acknowledged in *Mathis v. Pac. Gas and Elec. Co.*, 891 F.2d 1429, when reviewing the state action question "[t]he crucial question is whether the government or someone independent of the government provides the 'rule of decision.'" *Id.* at 1434 n.7 (quoting *Rendell–Baker v. Kohn,* 457 U.S. 830, 843 (1982) (White, J., concurring)) (citing *West v. Atkins,* 487 U.S. 42 (1988)). In *Mathis*, because the Nuclear Regulatory Commission was potentially establishing the "standard of decision for the exclusion of illegal drug users from access to protected areas," the fact that those standards did not mention the Plaintiff by

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v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988) ("Rule 15(d) is intended to give district courts broad discretion in allowing supplemental pleadings. . . . The rule is a tool of judicial economy and convenience. Its use is therefore favored.").

name was immaterial, because the government established the standard for who to exclude.[4] The Ninth Circuit recently re-iterated this position in *Rawson v. Recovery Innovations, Inc*. 975 F.3d at 755. That case concerned decisions made by private doctors regarding recommendations to commit individuals to involuntary in-patient care. *Id.* at 745-46. The Appellate court found that the private doctors were state actors in part because the state established the "protocols and criteria [used] in making evaluation and commitment recommendations[.]" *Id.* at 755.

Said another way, the deprivation of Plaintiffs' first amendment rights at issue here could not have happened without both Defendants and the government's actions. The governmental entities determined what they believed was the truth, Facebook then chose to declare any contrary posts to be "misinformation" and removed those posts. *See Hernandez,* 424 F. Supp. 3d at 922 (finding joint action where the private union asked the state to withhold certain dues and the state then withheld them, either of those acts the deprivation of plaintiff's rights could not have occurred).

However, the interdependent system for determining what was misinformation was not the only allegation of joint action in the Amended Complaint. In addition, Chairman Schiff stated that he would be "monitoring the effectiveness of the changes" in policies made by Defendants. (FAC ¶¶ 44, 45 (see press release and twitter posted cited therein).) Likewise, Defendants publicly stated that they were "committed to working with Members of Congress" on the vaccine misinformation issue (FAC ¶ 49), and news reports discussed how Chairman Schiff "continually engaged 'directly with the companies' on the issue of vaccine misinformation." (*Id.* ¶ 50.) Plaintiffs do not know the extent of those engagements at this time, but when viewed with the other joint activity alleged,

[4] The Ninth Circuit remanded the *Mathis* matter, and in a decision cited by Defendants, the Ninth Circuit eventually decided that Mr. Mathis failed to establish state action before the jury because he could not show that the NRC's regulations were used as the rules of decision in his particular case. *Mathis v. Pac. Gas and Elec. Co.*, 75 F.3d 498, 502 (9th Cir. 1996). However, like the first *Mathis* decision, the instant case is on a Motion to Dismiss where the Plaintiffs must receive all reasonable inferences in their favor, as such the latter *Mathis* decision cited by Defendants is not relevant here.

the foregoing is more than sufficient to at least make the allegation on joint activity plausible, if not even probable.

In addition, the fact that Defendants only implemented this new policy of removing anything that contradicted government entities after they received threats and significant encouragement from Chairman Schiff and other Members of Congress further weighs in favor of finding joint action. This is similar to what the Second Circuit found in *United States v. Stein*. 541 F.3d at 147-48. There, KPMG agreed to not indemnify employees who refused to cooperate with the government investigation, but only after the U.S. attorney's office told "KPMG that its survival depended on its role in a joint project with the government." *Id.* at 147. The U.S. Attorneys' office also told KPMG who was and was not cooperating with them. *Id.* As such, even though KPMG ultimately made the decision to not indemnify the employees, the Second Circuit found that the firms actions were rightly attributable to the government. *Id.* at 148. Here, Defendants implemented their vaccine and COVID-19 misinformation policies only after they were threatened, and the government entities told Defendants what was or was not misinformation.

B. This Matter is Distinguishable From the State Action Cases Cited by Defendants

Defendants try to confuse the issues here by citing a number of cases where courts have held that private activities did not constitute state action. However, each case is easily distinguishable from the instant matter and none provide any basis for the Court to grant the instant motion.

For example, Defendants point to *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020), and a number of similar cases where courts in this Circuit have held that social media companies are not state actors under the "public function test." *Id.* at 997 (explaining why YouTube does not perform a public function).[5] In all these cases, the plaintiffs advanced the theory

[5] *Fed. Agency of News, LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1308- 1314 (N.D. Cal. 2020) (rejecting the public function theory of state action as applied to the defendant); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (same); *Ebeid v. Facebook, Inc.*, No. 18-cv-07030-PJH, 2019 WL 2059662, at *6 (N.D. Cal. May 9, 2019) (same); *Green v. YouTube, LLC*, No. 18-cv-203-PB, 2019 WL 1428890, at *4 (D.N.H. Mar. 13, 2019) (same); *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018)

that because defendants provide essential public services or the new "public square[,]" they should be treated as the government. That is not what Plaintiffs allege in this case, the argument here for state action is much different.

Defendants further point to *Sutton v. Providence St. Joseph Med. Ctr.*, to claim that for a private entity to be found libel under a government compulsion test there must be "'something more'" than just bare compulsion, something that Plaintiffs' very narrow reading of the Amended Complaint does not find. (Dkt. No. 47 p. 11.) However, when viewed in totality, the Amended Complaint alleges far more government involvement. In *Sutton*, the Ninth Circuit required that beyond just state compulsion:

> the plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity. Typically, the nexus has consisted of participation by the state in an action ostensibly taken by the private entity, through conspiratorial agreement (*Adickes*), official cooperation with the private entity to achieve the private entity's goal (*Lugar*), or enforcement and ratification of the private entity's chosen action (*Moose Lodge*).

Sutton, 192 F.3d at 841. As discussed in detail above, the Amended Complaint shows a record of extensive joint participation between the government and Defendants in the implementation of Defendants' policies. (FAC ¶¶ 49, 50.) *Cf. Sutton*, 192 F.3d at 842 (distinguishing the holding in *Mathis* because in that matter not only did the plaintiff allege coercion and encouragement, but he also alleged that the private companies and government were "willful participants in joint activity" (internal quotations omitted)). Furthermore, the Amended Complaint also alleges that Chairman

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(same); *Quigley v. Yelp, Inc.*, No. 17-cv-03771-RS, 2018 WL 7204066, at *3 (N.D. Cal. Jan. 22, 2018) (same); *Young v. Facebook, Inc.*, No. 5:10–cv–03579–JF/PVT, 2010 WL 4269304, at *2 (N.D. Cal. Oct. 25, 2010) (same); *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *13-14 (N.D. Cal. Mar. 16, 2007) (same); *Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000) (same). Defendants also cite *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621 (E.D. Va. 2019), which denied the argument that the defendant was a state actor because it could control government Facebook pages. Furthermore, many of the cases Defendants cite were brought by *pro se* plaintiffs who never asserted theories to support state action. *Fehrenbach v. Zeldin*, No. 17-CV-5282 (JFB)(ARL), 2018 WL 4242452, at *2-3 (E.D.N.Y. Aug. 6, 2018); *Shulman v. Facebook.com*, No. 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017); *Forbes v. Facebook, Inc.*, No. 16 CV 404 (AMD), 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016); *Kim v. Apple, Inc.*, No. 14–1034 (ABJ), 2014 WL 3056136, at *2 (D.D.C. July 7, 2014).

Schiff and others knew that Defendants were fearful of losing the protection provided by Section 230, and they "would bend to any request if they thought that Section 230 was in danger." (*Id.* at ¶ 40.) Plaintiffs allege multiple examples where Defendants did bend to requests from Members of Congress. (*Id.* at ¶¶ 43-45, 52-58.) Thus, the Amended Complaint alleges far more than bare compulsion, and easily satisfies the standard articulated in *Sutton*.[6] *See Sutton*, 192 F.3d at 841 (discussing *Mathis where* the court found state action because the private parties and the NRC agreed to avoid additional regulations).

Defendants further try to claim that *Daniels v. Alphabet Inc.*, No. 20-CV-04687-VKD, 2021 WL 1222166 (N.D. Cal. Mar. 31, 2021), is "nearly identical" to this matter, but that is incorrect. Even though that case involved YouTube removing a posting, referenced Section 230, and tried to apply a joint action theory of state action, the allegations in *Daniels* were significantly different than those at issue here. Among other things, Mr. Daniels relied on a broader argument for government coercion, claiming that the defendant could be exposed to some vague "peril if they ignored" Congressional requests. *Id.* at *6. In contrast here, Plaintiffs show a pattern and history going back to the Russian interference scandal where Members of Congress made requests for changes in Defendants' policies that Defendants then complied with. (FAC ¶¶ 35-37.) Likewise, the instant matter is distinguishable from *Daniels* because Mr. Daniels did not have the same long history that Plaintiffs here have of posting similar content specifically regarding vaccines that Defendants had no issues with before Chairman Schiff's letters. (*Id.* at ¶¶ 8, 68, 75, 78.) In fact, the Court noted that the removal of one of Mr. Daniels' postings occurred *before* Chairman Schiff's 2020 letter. *Id.* at *7 n.5. Mr. Daniels' theory regarding joint action was also different than the one at issue here. Mr. Daniels relied only on public comments by elected officials and on certain political contributions to show the connection. *Id.* at *7. Here, Plaintiffs

[6] Similarly, this matter is also distinguishable from *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1014 (9th Cir. 2020), which Plaintiffs also cite. There, the Ninth Circuit arrived at the unremarkable decision that Santa Clara University could not be a state actor simply because it complied with generally applicable discrimination laws and received funding from the federal government. That is not the claim Plaintiffs are making here, Defendants did far more than comply with the law.

allege far more information regarding Defendants' decision to work with government entities to identify misinformation, in addition to reports and admissions of direct communications between Chairman Schiff and Defendants. (FAC ¶¶ 44,45.)

Defendants also make hyperbolic claims that, if the Court denies the instant motion, then any time a single congressperson expresses a preference for an online platform to limit content, the platform will be unable to act due to a fear of a constitutional claim. (Dkt. No. 47 p. 15.) This claim is overblown for two reasons. First, as discussed above, the instant matter was not a situation where one congressperson expressed a preference, rather there is a pattern of behavior and Defendants chose to act jointly with government entities. It is the totality of those circumstances that created the state action here, not a single preference from a single individual. Second, the Ninth Circuit dismissed a similar argument in *Carlin*, stating that the telephone company there was free to make its own decision because the holding there merely "immunize[d]" the company "from state pressure to" make a particular decision. 827 F.2d at 1297. The only thing prohibited here is the government pressuring Defendants or supplying the rules by which Defendants would determine which postings to remove. *Id.* Defendants are free to make editorial decisions regarding Plaintiffs' postings. However, again it is important to note that, prior to Chairman Schiff's letters, Defendants never felt the need to censor Plaintiffs' posting because it was not in their economic interest to do so. (FAC ¶¶ 68, 75, 78.)

C. Plaintiffs' Claim for Injunctive Relief is Not Foreclosed Against State Actors

Defendants argue that Plaintiffs cannot assert a *Bivens* claim against a private entity, and rely heavily on the Supreme Court's decision in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). Nevertheless, the *Malesko* decision shows the flaw in Defendants' argument.

Plaintiffs' Amended Complaint dropped Plaintiffs' request for damages, and now Plaintiffs only seek injunctive relief. (FAC ¶ 14, p. 32.) The Supreme Court in *Malesko* specifically acknowledged that "unlike the *Bivens* [damages] remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Malesko*, 534 U.S. at 74.

Since at least the time of *Bell v. Hood*, 327 U.S. 678 (1946), federal courts have recognized that 28 U.S.C. § 1331 provides them the authority and jurisdiction to issue such injunctions to prevent unconstitutional behavior as part of their exercise of the traditional powers of an equity court. *Bell*, 327 U.S. at 684 ("is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"); *Stine v. Von Blanckensee*, No. CV 20-00187-TUC-DCB, 2020 WL 8482972, at *7 (D. Ariz. July 7, 2020), *affd. sub nom. Stine v. Blankensee*, 834 Fed. Appx. 424 (9th Cir. 2021) ("although Plaintiff cannot seek monetary damages pursuant to *Bivens*, he may still seek declaratory or injunctive relief pursuant to 28 U.S.C. § 1331" for violation of his First Amendment rights). Furthermore, federal courts have had no problem in holding that the authority discussed in *Bell v. Hood* extends to issuing injunctions to private entities who are found to have acted as stated actors. *E.g., De Malherbe v. Intl. Union of El. Constructors*, 438 F. Supp. 1121, 1135 (N.D. Cal. 1977) ("If plaintiff proves that [the private] defendants, acting in a governmental capacity, excluded him from [defendants' organization] because he is an alien, the Court has the power to award him equitable relief." (*citing Bell v. Hood*, 327 U.S. at 684)); *see also Hernandez v. Dixon*, No. 5:12-CV-00070-BG, 2012 WL 6839329, at *2 (N.D. Tex. Dec. 12, 2012) (holding that the court had authority to issue injunction against a private prison warden if it found the warden had violated the plaintiff's Eighth Amendment Rights).

Defendants may note on reply that the Amended Complaint specifically references *Bivens* in one paragraph of its First Cause of Action, which it styles as a claim for "*Bivens* Violations[.]" (FAC ¶ 86.) This was merely a minor drafting mistake, and those references to *Bivens* should have been removed from the Amended Complaint. However, those mistaken references are immaterial because the substance of Plaintiffs' claim remains the same, and the references to *Bivens* can easily be removed through a minor amendment to the complaint if the Court so wishes. *See Wilkey v. County of Orange*, No. SACV1601168CJCKSX, 2017 WL 11447980, at *4 (C.D. Cal. Mar. 1, 2017) (holding that where the plaintiff had labeled his cause of action under the wrong title of the

Americans with Disabilities Act, the plaintiff would be allowed to amend to correct this minor and immaterial error).

II. DEFENDANTS' EDITORIAL RIGHTS DO NOT BAR PLAINTIFFS' CLAIM

Defendants' last argument is that affirming a claim against them for violation of Plaintiffs' first amendment rights would limit Defendants' own First Amendment rights to control what is on their websites. Initially, such editorial rights will not apply if Defendants are found to be state actors because by acting jointly and on behalf of members of the federal government Defendants would not be permitted to limit Plaintiffs' right to free speech. In this way, the instant matter is distinguishable from the other cases Defendants cite to in their brief because in those cases the private actors were not state actors. *E.g., Assoc. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971) (holding that the defendant was not a state actor);[7] *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (same); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (never considering whether the search engine was a state actor, and stating that it was not deciding "whether or not the First Amendment shields all search engines from lawsuits based on the content of their search results").

Moreover, as discussed above, the Ninth Circuit in *Carlin* found that affirming a claim for injunctive relieve against a private party who was threatened by a state prosecutor did not limit the private company's free speech rights, but rather "immunize[d]" the private actor "from state pressure to" make a particular decision free from government coercion. 827 F.2d at 1297 (addressing first amendment claims). (*Supra* Sec. I.A.1, I.B.)

CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court deny Defendants' motion to dismiss.

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[7] The Ninth Circuit in *Assoc. & Aldrich Co.* mentioned that it believed a state-run newspaper could make editorial decisions without offending the First Amendment. 440 F.2d at 135. However, that comment was made in dicta. *Id.* In addition, the factual situation here – where a Member of Congress used Defendants to censor speech that contradicted the government on an issue of national importance – is far different from the hypothetical newspaper editorial choice referenced in *Assoc. & Aldrich Co.* Furthermore, the Ninth Circuit's dicta would appear to contradict the later holding in *Carlin*, which is far more on point than the newspaper hypothetical in *Assoc. & Aldrich Co.*

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