IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALEX BERENSON, **Plaintiff,** **v.** **JOSEPH R. BIDEN, JR., et al.,** **Defendants.**	Case No.: 1:23-cv-03048-JGLC

MEMORANDUM IN OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

JAMES R. LAWRENCE, III
NC State Bar No. 44,560*
ANTHONY J. BILLER
NC State Bar No. 24,117*
ENVISAGE LAW
2601 Oberlin Rd, Suite
Raleigh, NC 27608
Phone: 919.755.1317
Facsimile: 919.782.0452
Email: jlawrence@envisage.law

SEAN P. GATES (SBN 186247)*
Illovsky Gates & Calia LLP
155 N. Lake Avenue, Suite 800
Pasadena, CA 91101
Phone: 626.508.1715
E-mail: sean@illovskygates.com

DAVID J. HOFFMAN
Attorney at Law
254 W. 15th Street Apt 2C
New York, New York 10011
Phone: 917.701.3117
E-mail: djhoffman@djhoffmanlaw.com

* admitted pro hac vice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

On August 28, 2021, Twitter made international news by permanently suspending Alex Berenson. During the COVID-19 pandemic, Mr. Berenson emerged as a reporter who exposed the shortcomings in the public policy response to the virus. With Twitter's express approval, Mr. Berenson built a global audience, and he used his platform to report on these issues and eventually the COVID-19 vaccines.

But for the Biden White House, Mr. Berenson and his First Amendment rights were merely an annoyance. Defendants Rob Flaherty and Andrew Slavitt,[1] while serving in the White House, asked Twitter in April 2021 why it was giving Mr. Berenson, whom they branded as "ground zero" for COVID-19 misinformation, a platform. Even if they had done nothing more, they violated Mr. Berenson's First Amendment rights with this act alone. Although Twitter did not immediately ban Mr. Berenson in response to their April 2021 pressure, the company did tell them that it would examine his account. In other words, in that first meeting, the White House succeeded in forcing Twitter to subject Mr. Berenson's account to extra scrutiny, unconstitutionally hindering his speech. As the Second Circuit explained in 2019 in a case about then-President Trump's effort to keep users from commenting on his Twitter account, "burdens to speech as well as outright bans run afoul of the First Amendment." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 238 (2d Cir. 2019).

As Mr. Berenson continued his reporting through the spring and summer of 2021, the ire of the Federal Defendants grew. In July 2021, Surgeon General Murthy and President Biden pushed social media platforms to censor content, the latter charging the platforms and then their users with "killing people." Their pressure had an immediate impact on Twitter. Internally, Mr.

[1] President Biden, Surgeon General Murthy, Mr. Flaherty, and Mr. Slavitt are referred to here collectively as the "Federal Defendants."

O'Boyle and other Twitter executives who dealt with the White House discussed wanting to be "responsive" to the government in an effort to keep the "target" which had been put on Facebook off its back. Barely a month later, Twitter caved to the heightened pressure and delivered the Federal Defendants the censorship they longed for—violating the company's own policies, as its top executives privately explained.

Now the Federal Defendants maintain they should face no legal consequences. Standing, pleading sufficiency, and qualified immunity are all raised as barriers to accountability. To get there, the Federal Defendants consistently construe Mr. Berenson's first amended complaint against him at the Rule 12 stage, drawing inferences in their favor which are also unreasonable. Chief among those is the repeated assertion that Mr. Berenson, the only misinformation purveyor specifically identified in April 2021, was never mentioned again in the numerous other, sometimes "angry" interactions with Twitter.

Further, the Federal Defendants (as well as the private Defendants) misconstrue the Supreme Court's recent ruling in *National Rifle Association of America. v. Vullo*, 602 U.S. 175 (2024), seeking to turn the clear standard the Supreme Court set in that case on its head. In *Vullo*, judges from this circuit had found a New York State official did not violate the gun-advocacy group's First Amendment rights because she did not *openly* threaten to punish insurance companies doing business with the NRA. Upon appeal, the Supreme Court unanimously disagreed—and chided the Second Circuit for "taking the allegations in isolation and failing to draw reasonable inferences in the NRA's favor in violation of this Court's precedents." *Id.* at 194. As the Supreme Court did in *Vullo*, this Court should consider the entire pattern of conduct here.

Crucially, that pattern should include Mr. Slavitt's actions both before and after he left the White House. The Federal Defendants and Mr. Slavitt have both sought to hive off Mr. Slavitt's

conduct after he nominally resigned from the Biden Administration in mid-June 2021 from his behavior before. In fact, Mr. Slavitt served as a state actor at all times, as a "willful participant in joint activity" with the White House after he left. To conclude otherwise would be nonsensical in both fact and law, and many cases in this circuit have found private citizens to be state actors on the basis of far less engagement than Mr. Slavitt demonstrated with the Biden Administration in summer 2021. Mr. Slavitt's efforts to force Twitter to ban Mr. Berenson must be judged on that basis. He was the linchpin of the conspiracy to violate Mr. Berenson's rights, and he did so under color of law at all times.

Defendants also seek to defeat Mr. Berenson's First Amendment claims by arguing that this Court cannot grant him either declaratory or injunctive relief. To be sure, the Supreme Court raised high hurdles for future relief in its June ruling in *Murthy v Missouri*, 144 S. Ct. 1972 (2024). But this case—unlike *Murthy*—is not merely about protecting Mr. Berenson from potential future harm. He seeks money damages for the defendants' past conduct under both Section 1985(3) and *Bivens*. His compensatory claim reduces his burden for standing and will enable the case to move forward even if the court finds that injunctive relief is unavailable, After all, as the Supreme Court explained in *Murthy*, "[i]f the plaintiffs were seeking compensatory relief" in that case, then "traceability for their past injuries," which Mr. Berenson can show "would be the whole ball game." *Id.* at 1987.

Nor should this Court quickly rule out a *Bivens* claim. While the standard to extend *Bivens* is high, the Supreme Court has repeatedly refused to foreclose the possibility of such relief entirely by undoing that case. As the Court explained in 2022, though *Bivens* has not been extended to First Amendment claims, "we have assumed that such a damages action might be available." *Egbert v. Boule*, 596 U.S. 482, 498 (2022). Mr. Berenson's First Amendment

damages claims are distinguishable from other failed *Bivens* cases and reach the high standard the Supreme Court has set.

Mr. Berenson's Section 1985(3) claim should also proceed. The question of what groups qualify for Section 1985(3) protection is far from static, and courts in the Second Circuit have found many other classes of people worthy—recently including members of the Chinese religious cult Falun Gong—in the statute's ambit. People who chose not to be vaccinated against COVID-19 are a distinguishable class, and the conspirators' own words show the invidious animus in which they held the group, as when President Biden declared that "our patience [with COVID-19-unvaccinated people] is wearing thin. And your refusal has cost all of us."

While the Federal Defendants cite several cases to support their argument that Section 1985(3) does not extend to people unvaccinated against COVID-19, all are inapposite. The question Mr. Berenson raises in claiming the protection of Section 1985(3) extends to unvaccinated people is *not* whether the government can compel people to take a vaccine. It is whether unvaccinated people, including Mr. Berenson, have the same First Amendment rights to speak—and receive information—as the vaccinated. The Federal Defendants believed they did not. In a podcast in July 2021, as he stepped up his campaign to censor Mr. Berenson, Mr. Slavitt, the Federal Defendant's state actor collaborator, made this class-based distinction, explaining that he cared only about suppressing the First Amendment rights of unvaccinated people. He called for social media platforms to commit "to cut down on the amount of false information *that people who haven't been vaccinated* see." Andy Slavitt, *Is COVID Misinformation Killing People? (with Facebook's Nick Clegg)*, https://lemonadamedia.com/podcast/is-covid-misinformation-killing-people-with-facebooks-nick-clegg/ (emphasis added) (hereinafter "Clegg Podcast").

This Court should remedy this betrayal of the First Amendment rights of people who chose not to receive a COVID-19 vaccine by finding that they are indeed a class for the purposes of Section 1985(3). At this stage, and even without discovery, Mr. Berenson has surpassed the factual and legal standard required to reject a motion to dismiss. This case should move forward.

FACTUAL BACKGROUND

I. Journalist Alex Berenson uses Twitter to report on and ask questions regarding the public policy response to COVID-19 and ultimately the vaccines. Twitter initially resists third party censorship requests, backing Mr. Berenson's right to report.

Alex Berenson is an independent journalist and former *New York Times* reporter who previously broke many front-page stories about questionable practices in the pharmaceutical industry. (Dkt. 80-1 ¶¶ 53-54.) In 2020, Mr. Berenson emerged as a vocal critic of the public policy response to COVID-19, questioning the underlying evidentiary basis for business and school closures. (*Id.* ¶¶ 63-64.) Like the Federal Defendants, (*id.* ¶ 61), Mr. Berenson used Twitter, a self-proclaimed "public square" for journalism and debate, to inform and engage Americans and people around the world on matters of public concern, including COVID-19 and cannabis legalization, (*id.* ¶¶ 59-60, 70-71). As he reported on COVID-19, Mr. Berenson's Twitter following grew from around 7,000 followers in January 2020 to more than 229,000 in March 2021. (*Id.* ¶¶ 71, 112.) In 2021 alone, Mr. Berenson's Twitter feed received well over one billion impressions. (*Id.* ¶ 9.)

Early in the COVID-19 pandemic, third parties began objecting to Mr. Berenson's reporting and the platform Twitter was giving him. Despite the complaints, Twitter declined to censor Mr. Berenson. (*Id.* ¶ 75.) This was the case even though, at the time, Twitter publicly proclaimed its content moderation policy was being "enforce[d] . . . in close coordination with trusted partners, including public health authorities and governments." Vijaya Gadde & Matt Derella, *An update on our continuity strategy during COVID-19*, Twitter (Mar. 16, 2020, updated

Apr. 1, 2020), https://blog.twitter.com/en_us/topics/company/2020/Anupdate-on-our-continuity-strategy-during-COVID-19 (cited at Dkt. 80-1 ¶ 76.) In May 2020, after the company revised its content moderation policy, a Twitter executive, who acknowledged Mr. Berenson was raising "nuanced points," personally assured Mr. Berenson that the company was working to allow "factual debate." (*Id.* ¶¶ 80-81.)

In November 2020, Mr. Berenson welcomed the initial reports emerging from clinical trials for the COVID-19 mRNA vaccines. He pointed to reporting from clinical trials on the Pfizer and BioNTech shot as well as the Moderna vaccine as "legitimately good news" and "good topline vaccine news," respectively. (*Id.* ¶¶ 84-85.) Nevertheless, he raised questions about the details of the clinical trials for the vaccines. The same Twitter executive who had previously contacted Mr. Berenson assured him in December 2020 that these questions "should not be an issue at all." (*Id.* ¶ 89.) When Twitter announced its five-strike COVID-19 misleading information policy in March 2021, the executive told Mr. Berenson, "your name has never come up in the discussions around these policies." (*Id.* ¶ 93.)

After another journalist complained about Mr. Berenson's reporting, Twitter did a "deep dive" into his account in March 2021, and concluded "he avoids making demonstrably false or misleading claims about COVID-19 vaccines." (*Id.* ¶¶ 94-95.) The company "took action" against one of Mr. Berenson's tweets that argued the mRNA shots are "more properly described as a gene therapy," but Twitter gave him no notice this was a "strike" under the COVID-19 misleading information policy, and Mr. Berenson did not lose access to his account or his audience. (*Id.* ¶ 95.)[2] What is more, as late as either late April or early May 2021, despite

[2] The lack of notice also meant that the Twitter executive who previously promised Mr. Berenson to "try to ensure you're given a heads up before an action is taken," (*id.* ¶ 93), never gave Mr. Berenson notice, further indicating the anomalous nature of the strike against Mr. Berenson's account. In his correspondence with Mr. Berenson, the executive mentioned that "I am not always made aware of [an enforcement action] before they're executed." (*Id.*

Twitter's increasingly restrictive COVID-19 misinformation policies, Twitter had concluded that "Mr. Berenson had not violated any Twitter policies at that time." (*Id.* ¶ 113.)

II. President Biden takes office and the White House targets constitutionally protected speech about the COVID-19 vaccines. Then, in April 2021, the White House and an employee within the same Department of Health and Human Services division as the Surgeon General's office, targets Alex Berenson's journalism, causing him immediate injury, as the Federal Defendants exert pressure on other social media platforms.

Even before taking office, President Biden referred to the decision to get a COVID-19 shot as one of "life and death," promising to "confront this historical challenge with the full strength of the federal government." (*Id.* ¶ 96.) Consistent with this promise, the Biden Administration began pressing social media companies to remove posts that raised questions about mRNA shots within days of President Biden's inauguration. (*Id.* ¶ 107.) Shortly afterwards, the White House asked Twitter to meet. Lauren Culbertson, Twitter's head of government affairs for the United States and Canada, who wrote later that "one of the first meeting requests from the Biden White House was about COVID-19 misinformation . . . Biden's staff focused on vaccines and high-profile anti-vaxxer accounts, including Alex Berenson." (*Id.* ¶ 115.) Upon information and belief, the Surgeon General was involved in those initial meetings.

In April 2021, Andrew Slavitt, the Senior Advisor to the White House's COVID-19 Response Coordinator, and Rob Flaherty, Director of Digital Strategy at the White House, met with representatives of Twitter. The meeting invitation, shown below, includes Mr. Flaherty, Mr. Slavitt, another White House official, and an employee of "HHS/OASH," the division within the Department of Health and Human Services ("HHS") which houses the Surgeon General's office.

¶ 93.) Not only did Mr. Berenson not know about the first strike against his account, but neither apparently did the Twitter executive.

(*Id.* ¶ 116.)[3] Mr. Flaherty recounted that "he believes, but is not sure, that Lauren Culbertson from Twitter attended the meeting." (Dkt. 80-3 at 58.)

During that meeting, "they," including Mr. Flaherty and Mr. Slavitt, targeted Mr. Berenson by asking "one really tough question about why Alex Berenson hasn't been kicked off from the platform." (Dkt. 80-1 ¶ 117.) The Twitter employee who reported on this conversation did not say the White House targeted any other user by name. The employee distinguished the question about Mr. Berenson from other questions, which were "pointed but fair—and mercifully we had answers." (*Id.*) The employee recounted that "they," meaning Mr. Flaherty, Mr. Slavitt, and the HHS employee, "allege that they've done some data visualization that show [Mr. Berenson]'s . . . ground zero for covid misinformation that radiates outward." (*Id.* ¶ 118.) In a separate internal discussion, a Twitter employee noted "they really wanted to know about Alex Berenson" because "he was the epicenter of disinfo that radiated outwards to the persuadable public." (*Id.* ¶ 119.) In this regard, the concern was plausible vaccine skepticism like Mr. Berenson's, not more bizarre claims about microchips in the COVID-19 vaccines. (*Id.* ¶ 111.)

To deflect the White House's pressure, Twitter promised it would perform an in-depth review of Mr. Berenson's account. (*Id.* ¶ 122.) As a result, Mr. Berenson, the journalist whose name a Twitter executive said "has never come up in the discussions around these policies" as late as early March 2021, (*id.* ¶ 93), faced an extra layer of scrutiny, a government-coerced violation of his rights.

[3] The Surgeon General's Office was and remains within the Office of the Assistant Secretary for Health within the Department of Health and Human Services. *Office of the Assistant Secretary for Health Organizational Chart*, Dep't Health & Human Servs., https://www.hhs.gov/ash/about-ash/organizational-chart/index.html (content last reviewed Aug. 1, 2024); *Office of the Assistant Secretary for Health Organizational Chart*, Dep't Health & Human Servs., http://web.archive.org/web/20210508070051/https://www.hhs.gov/ash/about-ash/organizational-chart/index.html (archival version from May 8, 2021).

As Mr. Slavitt and his White House colleagues pressed on Twitter, they were also in communication with Facebook. Three days before the April 2021 meeting with Twitter, Facebook executive Nick Clegg, who previously served as Deputy Prime Minister of the United Kingdom, reported that Mr. Slavitt was "outraged—not too strong a word to describe his reaction—that we did not remove" a meme featuring Leonardo DiCaprio. (*Id.* ¶ 125.) Mr. Clegg "countered that removing content like that would represent a significant incursion into traditional boundaries of free expression in the US," but Mr. Slavitt rejected that position. (*Id.* ¶ 126.) In other words, another social media company explicitly warned Mr. Slavitt the White House might be violating the First Amendment with its censorship demands just three days before he pushed Twitter for Mr. Berenson's removal. Reflecting on these and other contacts with the federal government in 2021, Mark Zuckerberg, the chief executive officer of Meta, the company that owns Facebook, later wrote that "senior officials from the Biden Administration, including the White House, repeatedly pressured our teams for months to censor certain COVID-19 content." (*Id.* ¶ 129.)

Meanwhile, the pressure on Twitter continued. The White House held "several other calls" that were "very angry in nature" with Twitter about the company's refusal to deplatform users. (*Id.* ¶ 115.) Mr. Berenson continued reporting on Twitter, criticizing President Biden while accusing the CDC of "l[ying] when it said myocarditis wasn't a risk." (*Id.* ¶¶ 131-33.)

III. The federal government's efforts to control social media platforms' content moderation policies escalates in July 2021 and Twitter responds to quell the threat by establishing a "positive partnership" with Surgeon General Murthy's Office and "aiming to be productive, responsive, and honest partners to the Biden Administration."

In July 2021, the federal government's pressure campaign intensified. On July 15, Surgeon General Murthy published an advisory on health misinformation. (*Id.* ¶ 142.) Dr. Murthy called on social media companies, including Twitter, to "[i]mpose clear consequences for

accounts that repeatedly violate platform policies." (*Id.*) The same day, at a press conference with Dr. Murthy, White House Press Secretary Jen Psaki stated "we are in regular touch with these social media platforms." (*Id.* ¶ 146.) Ms. Psaki also said the federal government "recommended—proposed that they [(the companies)] create a robust enforcement strategy that bridges their properties and provides transparency." (*Id.*)

Though she called for "transparency" from the platforms the previous day, Ms. Psaki did not reveal that White House officials had asked Twitter a "really tough" question regarding Mr. Berenson's continued access to the platform. (*Id.*)

Hours after Ms. Psaki's remarks, President Biden added his perspective. After a reporter asked "[o]n COVID-19 misinformation, what's your message to platforms like Facebook," President Biden said "[t]hey're killing people." (*Id.* ¶ 148.)[4] President Biden's remarks were not limited to Facebook, and media reporting on his comments noted that immediately with headlines like "'They're killing people': Biden blames Facebook, *other social media* for allowing COVID-19 misinformation." (*Id.* (emphasis added).) Less than four hours after President Biden's comments and Ms. Psaki's press briefing, Twitter locked Mr. Berenson out of his account for the first time. (*Id.* ¶ 149.) Shortly after President Biden's comments, media reported that "[t]he White House is assessing whether social media platforms are legally liable for misinformation spread on their platforms." (*Id.* ¶ 150.) The White House also publicly pondered changes to Section 230 of the Communications Decency Act, which provides crucial and extremely valuable lawsuit protection to social media companies. (*Id.* ¶ 151.)

[4] The Federal Defendants insist that this Court takes judicial notice of President Biden's clarification that "people spreading misinformation about COVID-19 vaccines on Facebook (and not Facebook itself) were killing people." (Dkt. 99 at 17.) This is tantamount to President Biden accusing Mr. Berenson of the same.

Twitter acted to quell the threat. On July 20, Lauren Culbertson, the company's top U.S. lobbyist, wrote that she and her team "met with the Surgeon General's Office ahead of his announcement," an apparent reference to Dr. Murthy's July 15 health misinformation advisory, "and have established a positive partnership," (*id.* ¶ 153.), adding that she hoped "*to further distinguish us from Facebook*," (*id.* (emphasis added).) As noted above, by that time, as Mark Zuckerberg recounted, the White House pressured Facebook "for months" to censor COVID-19 content. (*Id.* ¶ 129.)

Ms. Culbertson reported further that her team was working "on a playbook in case the White House decides to turn on Twitter." (*Id.* ¶ 153.) Though the lobbyist said she "ha[d] no indication that will happen right now, the politics are ripe as the Administration struggles to hit their vaccination goals and Delta rages." (*Id.*) Describing Twitter's "**overall strategy**," Ms. Culbertson explained that "we're aiming to be productive, responsive, and honest partners to the Biden Administration and keeping this under the radar and behind the scenes as much as possible given the heated political landscape and litigation risks." (*Id.*) Two days later, Ms. Culbertson flagged a proposed bill introduced by Senator Amy Klobuchar on section 230, asking Twitter's Vice President of Global Public Policy to "give a heads up to" Vijaya Gadde, Twitter's general counsel, and the company's deputy general counsel Sean Edgett. (*Id.* ¶ 155.)

IV. Against the backdrop of the federal government's general efforts to include moderation of disfavored speech on COVID-19, the targeting of Alex Berenson's journalism goes to another level. Andrew Slavitt and Dr. Scott Gottlieb play critical roles in this regard, with Twitter viewing their outreach as joint with the federal government.

On July 10, the Saturday before President Biden accused social media companies of "killing people" for not censoring speech about COVID-19, Mr. Berenson commented on the federal government's failure to persuade Americans to take a COVID-19 vaccine during the Conservative Political Action Conference. (*Id.* ¶¶ 136–37.) The next day, Dr. Anthony Fauci,

President Biden's Chief Medical Advisor, called Mr. Berenson's comments "horrifying," and described Mr. Berenson as "someone saying that it's a good thing for people not to try and save their lives." (*Id.* ¶ 137.) (At deposition in *Missouri v Biden*, Dr. Fauci did not deny further discussing Mr. Berenson, but testified that such discussions "may have occurred, I don't recall." (*Id.* ¶ 125.)) The day after Dr. Fauci's nationally televised criticism of Mr. Berenson, Andrew Slavitt took his colleague's remarks a step further. On July 12, appearing on MSNBC, Mr. Slavitt, described his desire to "get rid of all this garbage coming out of CPAC," a reference to Mr. Berenson's remarks which the host had played for Mr. Slavitt. (*Id.* ¶¶ 139.)

By July 2021, Mr. Slavitt was purportedly out of the White House and the federal government, though he remained in close contact with his former colleagues, a fact he made public. During a podcast he hosted that month, Mr. Slavitt spoke of his continued contacts with government personnel, such as White House Press Secretary Jen Psaki and CDC Director Dr. Rochelle Walensky. (*Id.* ¶ 141.) In an interview published in late July 2021, Mr. Slavitt referenced being "on the phone with and talking to the White House and the CDC . . . as often as people need me and usually that's on a daily basis when things get to crunch time." (*Id.* ¶ 157.)

Privately, Mr. Slavitt continued to push platforms to censor constitutionally protected speech about COVID-19, leveraging his government connections. On July 19, three days after President Biden's "killing people" remark, Facebook's Nick Clegg wrote that "I've spent the last several days pretty well non stop on this Covid/Biden furore, including tel cals with Andy Slavitt on several occasions." (*Id.* ¶ 156.) Mr. Clegg reported that Mr. Slavitt related "overnight advice on how to understand where the White House is coming from and that Mr. Slavitt "claims he is trying to be helpful by passing on our POV to the Surgeon General before" a scheduled meeting. (*Id.*) Mr. Slavitt complained about COVID-19 vaccine content, citing the White House's

interests. "The WH wants FB to come clean with how many people see these posts and what it's doing about them," he said. (*Id.* ¶ 157.) "I want to really stay out of the middle and want you guys to communicate." (*Id.*)

As he cloaked himself in the authority of the White House during his discussions with Facebook, Mr. Slavitt pressed Twitter to act against Mr. Berenson. Late in the evening on July 18, Mr. Slavitt asked for an audience with Twitter lobbyist Todd O'Boyle to discuss "a policy matter." (*Id.* ¶ 166.) The proposed "[f]ully bipartisan convo" was to feature Mr. Slavitt, whose White House e-mail was listed in the signature block of the e-mail, and Dr. Scott Gottlieb, M.D., former FDA Commissioner under President Trump. (*Id.* ¶ 166.)

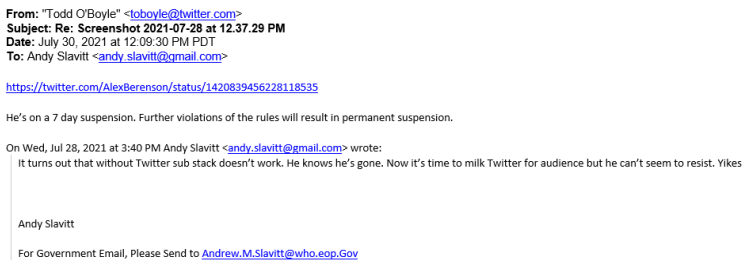
The following day, Dr. Gottlieb wrote to Mr. O'Boyle regarding "a handful of accounts on Twitter that are fueling dangerous and false narratives on key public health issues related to the pandemic." (*Id.* ¶ 167.) Dr. Gottlieb took direct aim at "a subset of accounts that are being frequently cited to me as authoritative sources by conservatives, even members of Congress, because they are verified accounts—even if those accounts are spreading clearly false information." (*Id.*) Though he did not mention Mr. Berenson by name, Dr. Gottlieb's description fit the journalist's account. (*Id.* ¶ 168.) Mr. O'Boyle responded within the hour, noting he had "suggested the three of us," i.e., himself, Mr. Slavitt, and Dr. Gottlieb, "talk." (*Id.* ¶ 170.)

Five minutes later, Mr. O'Boyle forwarded his response to Ms. Culbertson. (*Id.*) Ms. Culbertson rapidly forwarded Mr. O'Boyle's note to Twitter's Vice President of Public Policy for the Americas. "Heads up that ***we could*** be next." (*Id.*) "Todd and I are triaging," Ms. Culbertson wrote. (*Id.*) She next drew a direct parallel to Facebook. "The other backchanneling suggest that we're on much better footing that FB but need to keep the responsiveness. I'll let you know if we think it's going to go sideways. Hopefully, we can keep us in a good place." (*Id.*) Ms. Culbertson

made no distinction between the pressure from Mr. Slavitt and Dr. Gottlieb's efforts and the overall pressure from the White House and the Surgeon General. (*See id.*) And Ms. Culbertson's reference to "other backchanneling" should be read in conjunction with the Facebook emails discussing Mr. Slavitt's backchannel communications to the White House.

On July 23, Mr. O'Boyle worked on scheduling a conference call with Mr. Slavitt and Dr. Gottlieb. (*Id.* ¶ 171.) Mr. O'Boyle reported that he spoke with the White House's Rob Flaherty the same day. (*Id.* ¶ 173.) Mr. O'Boyle told Mr. Flaherty that Twitter would follow a "whole-of-society" approach to COVID-19 misinformation, echoing Surgeon General Murthy's demands. (*Id.*) Mr. O'Boyle noted that Mr. Flaherty "acknowledged the steps we're taking and asked for time to meet soon." (*Id.*) Mr. O'Boyle did not state that Mr. Flaherty mentioned Mr. Berenson. Mr. Flaherty stated elsewhere that "the last time" he "recalls discussing Mr. Berenson with employees from Twitter" was a conversation with someone he "thinks was Todd O'Boyle" after a meeting "in or around the Spring of 2021, at which Alex Berenson was mentioned." (Dkt. 80-3 at 58.) Like Dr. Fauci's deposition answers, Mr. Flaherty's words fall short of a denial that Mr. Flaherty discussed Mr. Berenson with Twitter in the summer of 2021, including on July 23.

Mr. Slavitt held a conference call with Mr. O'Boyle on July 26. (*Id.* ¶ 171.) The next day, Twitter issued its third COVID-19 strike against Mr. Berenson. On July 28, Mr. Slavitt contacted Mr. O'Boyle again, targeting Mr. Berenson in a message which again included Mr. Slavitt's White House e-mail address. Mr. Slavitt claimed the journalist "knows he's gone" and was "milk[ing] Twitter for audience." On July 30, Mr. O'Boyle responded to Mr. Slavitt's e-mail by sending Mr. Slavitt a link to Mr. Berenson's fourth strike. "He's on a 7 day suspension," Mr. O'Boyle explained. "Further violations of the rules will result in permanent suspension."



From: "Todd O'Boyle" <toboyle@twitter.com>
Subject: Re: Screenshot 2021-07-28 at 12.37.29 PM
Date: July 30, 2021 at 12:09:30 PM PDT
To: Andy Slavitt <andy.slavitt@gmail.com>

https://twitter.com/AlexBerenson/status/1420839456228118535

He's on a 7 day suspension. Further violations of the rules will result in permanent suspension.

On Wed, Jul 28, 2021 at 3:40 PM Andy Slavitt <andy.slavitt@gmail.com> wrote:
> It turns out that without Twitter sub stack doesn't work. He knows he's gone. Now it's time to milk Twitter for audience but he can't seem to resist. Yikes
>
> Andy Slavitt
>
> For Government Email, Please Send to Andrew.M.Slavitt@who.eop.Gov

Twitter's in-house counsel later wrote "one of our employees [(Todd O'Boyle)] shared information about the account they probably should not have, informing the external party that Berenson was on his last strike and would be suspended if he violated again." (Dkt. 50-1 at 2.) Mr. O'Boyle broke the company's rules to provide this update to Mr. Slavitt. With four strikes under Twitter's COVID-19 misleading information policy, Mr. Berenson's account was on the verge of a fifth strike and permanent suspension. (Dkt. 80-1 ¶ 202.)

V. Twitter violates its own rules to permanently suspend Alex Berenson.

As Twitter began to action Mr. Berenson's reporting, there was resistance at the highest levels of the company. On July 16, Twitter Chief Executive Officer Jack Dorsey objected to Mr. Berenson's second strike. "Doesn't seem right to me. These are queries," Mr. Dorsey wrote to Twitter's general counsel Vijaya Gadde. (*Id.* ¶ 183.) Within Twitter's trust and safety department, the unit tasked with enforcing the company's misinformation rules, it was understood that Mr. Berenson's account would not be actioned without "sign off from leadership." (*Id.* ¶ 184.)

In other words, Twitter's leaders were trying to balance the company's prior commitment to protect free speech and Mr. Berenson's account with the rising government pressure it faced, But its lobbyists, who faced the Biden Administration's anger directly, were primarily concerned about assuaging the White House. On July 30, Ms. Culbertson, who previously discussed Twitter being "productive, responsive, and honest partners to the Biden Administration," (*id.* ¶ 153), stated that "it would be ideal to move fast" to issue a fourth strike against Mr. Berenson's

account, (*id.* ¶ 187). Mr. O'Boyle continued managing Mr. Slavitt's expectations. On July 31, the day after Ms. Culbertson advised swift action against Mr. Berenson's account, Mr. O'Boyle told Mr. Slavitt "[o]ur process takes time, but it catches malactors." (Dkt. 80-4 at 16.)

In early and into late August 2021, Twitter took no further direct action against Mr. Berenson's account. (Dkt. 80-1 ¶ 191.) On August 24, after FDA's decision to approve a full Biologics License Application for Pfizer's COVID-19 vaccine, Mr. O'Boyle reported to Ms. Culbertson that he "fielded inquiries from the WH as well as former WH advisor (and frequent cable talker) Andy Slavitt about our approach." (Dkt. 80-4 at 26.) "I sent WH, Andy [Slavitt], and Scott Gottlieb (former Trump admin covid advisor and frequent cable talker) notes to this effect." (*Id.*) By grouping the three together, Mr. O'Boyle again suggested he viewed Mr. Slavitt and Dr. Gottlieb's nominally private approaches as part of the federal government's outreach. (Dkt. 80-2 ¶ 193.) "This Administration has said repeatedly they feel FB under communicates and has been less than forthcoming when they do talk," Mr. O'Boyle wrote, again comparing Twitter's position to Facebook. (Dkt. 80-4 at 26.) "I'm leaning into overcommunicating Twitter's covid work *to keep the target off our back*." (*Id.* (emphasis added).)

Dr. Gottlieb reached out the same day, complaining about Mr. Berenson's reporting, claiming his journalism "is whats promoted on Twitter" and "why Tony," meaning Dr. Fauci, "needs a security detail." (Dkt. 80-2 ¶ 194.) Mr. O'Boyle scheduled a call with Dr. Gottlieb and Ms. Culbertson to discuss. (*Id.* ¶ 196.) The call quickly turned to Mr. Berenson. (*Id.* ¶ 198.)

The following day, Saturday, August 28, Dr. Gottlieb sent an e-mail to Mr. O'Boyle flagging one of Mr. Berenson's tweets, which started with "[i]t doesn't stop infection. Or transmission" and ended with "[a]nd we want to mandate it? Insanity." (*Id.* ¶ 200.) The company initially only labeled the tweet as misleading, and Mr. Berenson clarified that he was not

"suggesting that anyone specific not be vaccinated, only that mandates don't make sense." (*Id.* ¶ 202.) But Mr. O'Boyle personally shepherded Dr. Gottlieb's report, repeatedly pressing a junior member of Twitter's "Strategic Response Team" to issue a strike against the tweet, which would lead to the immediate and permanent suspension of Mr. Berenson's account. (*Id.* ¶ 204.) That night at 4:36 p.m. Pacific time, the junior employee did so. (*Id.* ¶ 205.) Mr. O'Boyle then flagged the suspension for Twitter's legal department, and the company later issued a public statement confirming the suspension. (*Id.* ¶¶ 206, 208.)

Despite Twitter's policy of requiring leadership approval of actions against Mr. Berenson's account, Mr. O'Boyle did not notify any executives of his efforts to force Mr. Berenson's suspension, and Twitter general counsel Vijaya Gadde was surprised by the ban. That night, she wrote to managers in Twitter's trust and safety division, "Hi all – did we perm suspend Alex berenson? Typically these are flagged to me first? Did I miss something?" (*Id.* ¶ 209.) The next morning, Sunday, August 29, Ms. Gadde reported that she "had a chance to discuss" the action with Mr. Dorsey "and he doesn't believe we made the right decision here." (*Id.* ¶ 210.) "I'd like to reconsider our action here," she continued. (*Id.*) "From the beginning, we wanted to leave room for people to have discussion in this space, and certainly discussion around vaccine mandates feels like an area we should allow to happen," concluding "I don't believe a perm suspension in warranted." (*Id.*) Ms. Gadde also stated Mr. Berenson's account should be reinstated on appeal, (*id.*), but the company did not officially notify him of his fifth strike, or his rights to appeal. Only after he sued and then settled litigation against the company did Twitter reinstate his account. (*Id.* ¶ 221.)

Less than two weeks after Twitter banned Mr. Berenson, President Biden announced vaccine mandates that compelled tens of millions of American adults to choose between their

livelihoods and their right to determine whether they should receive mRNA shots. (*Id.* ¶ 227.) Mr. Berenson was a key voice for many of these Americans who, like Mr. Berenson, had decided not to take any of the COVID-19 vaccines, but he was excluded from this critical debate.

The effect of the suspension on Mr. Berenson was immediate, concrete, and negative. Overnight, he lost access to his more than 300,000 Twitter followers, the primary outlet for his reporting. (*Id.* ¶ 223.) He lost the chance to engage with government and public health officials on Twitter and to promote his longer form journalism on Substack. (*Id.*) Mr. Berenson's content was not just suppressed; rather he was completely excluded from the world's largest, most important digital public forum. (*Id.* ¶ 227.) Twitter since acknowledged its actions was wrong, publicly stating Mr. Berenson's "tweets should not have led to his suspension." (*Id.* ¶ 30.) And Twitter's own internal documents show its highest-ranking executives, Mr. Dorsey and Ms. Gadde, objected to Mr. Berenson's permanent suspension. (*Id.* ¶ 210.)

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "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." *Id.* This is not a "'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

ARGUMENT

I. Mr. Berenson has Article III standing for his First Amendment claims against the Federal Defendants.

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'" *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007). To meet this threshold

standing requirement, "a plaintiff must not only establish (1) an injury in fact[5] (2) that is fairly traceable to the challenged conduct, but he must also seek (3) a remedy that is likely to redress that injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021).

A litigant's "burden to demonstrate standing increases over the course of litigation." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). "[T]he burden for establishing standing is less stringent when facing a motion to dismiss than it is when seeking preliminary injunctive relief." *Boelter v. Hearst Commc'ns, Inc.*, 192 F. Supp. 3d 427, 437 (S.D.N.Y. 2016). "At the preliminary injunction stage," a "plaintiff must make a clear showing that she is likely to establish each element of standing," *Murthy*, 144 S. Ct. at 1986 (internal quotation marks omitted), and later on at summary judgment a litigant must adduce "by affidavit or other evidence 'specific facts'" to show standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting Fed. R. Civ. P. 56(e)). By contrast, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* And those allegations must be "construe[d] . . . in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The allegations in Mr. Berenson's first amended complaint are sufficient to establish standing at the Rule 12 stage.

A. Mr. Berenson's censorship injuries are fairly traceable to the Federal Defendants.

For standing to exist, an injury must be "fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). But-for causation is not required. *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019) ("A plaintiff is not

[5] The Federal Defendants do not appear to contest Mr. Berenson's contention that he suffered an injury in fact through his various suspensions from Twitter culminating in his August 2021 permanent suspension.

required to show that a statute is the sole or the but-for cause of an injury."); *Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 195 (3d Cir. 2004) ("Article III standing demands a causal relationship, but neither the Supreme Court nor our Court has ever held that but-for causation is always needed."). "A defendant's conduct that injures a plaintiff but does so only after intervening conduct by another person, may suffice for Article III standing." *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016).

When third parties are involved in the traceability analysis, a "plaintiff must show at the least that third parties will likely react in predictable ways." *California v. Texas*, 141 S. Ct. 2104 (2021) (internal quotation marks omitted). A plaintiff who suffered a content-moderation injury on a social media platform must "link their past social-media restrictions to the defendants' communications with the platforms." *Murthy*, 144 S. Ct. at 1988-89. These links become more difficult to draw when a social media platform "moderated similar content long before any of the Government defendants engaged in the challenged conduct." *Id.* at 1987. In that regard, plaintiffs must show "that a particular defendant pressured a particular platform to censor a particular topic *before* that platform suppressed a particular plaintiff's speech on that topic." *Id.* at 1988.

Mr. Berenson's pleading is sufficient to establish standing under *Murthy*'s traceability framework. While third parties complained about Mr. Berenson's reporting, Twitter defended the journalist's right to speak. In March 2020, Mr. Berenson began critically covering the public policy response to the COVID-19 pandemic. (Dkt. 80-1 ¶ 72-73.) Early on in the pandemic, the Imperial College London contacted Twitter, asking the company to "delete" Mr. Berenson's tweet challenging Professor Neil Ferguson's epidemiology models. (*Id.* ¶ 74.) The company declined to do so "at this time as it does not violate the COVID-19 misleading information policy." (*Id.* ¶ 75.)

Later, when Twitter announced its five-strike policy in March 2021 following regulatory authorization of the COVID-19 vaccines, the same Twitter executive assured Mr. Berenson again that his "name has *never* come up in discussions around these policies." (*Id.* ¶ 93 (emphasis added).) Twitter even did a "deep dive" on Mr. Berenson's account in mid-March 2021, concluding "he avoids making demonstrably false or misleading claims about COVID-19 vaccines." (*Id.* ¶ 95.) The first "strike" against Mr. Berenson's account was issued on March 15, 2021, but Mr. Berenson received no notice of it and it did not do anything to action his account." (*Id.* ¶ 95.)

President Biden was inaugurated in January 2021. According to Twitter's Lauren Culbertson, "one of the first meeting requests from the Biden White House was about COVID-19 misinformation" with a "focus[] on vaccines and high-profile anti-vaxxer accounts, including Alex Berenson." (*Id.* ¶ 115.) Whether that "first meeting request[]" was in January 2021 or later is unclear at this pre-discovery stage.

On April 21, 2021, Twitter met with the White House and an employee from HHS, potentially from the Surgeon General's Office, for a "Twitter Vaccine Misinfo Briefing." (*Id.* ¶ 116.) By that time, the White House was concerned with vaccine hesitancy, particularly plausible skepticism. (*Id.* ¶ 111.) During the meeting, a Twitter employee reported, unlike other "questions were pointed but fair" but for which "mercifully we had answers," that "they"—meaning at least Mr. Slavitt, Mr. Flaherty, and the HHS employee—"had one really tough question about why Alex Berenson hadn't been kicked off the platform." (*Id.* ¶ 117.)

This meeting had immediate impact. Twitter had done a "deep dive" on Mr. Berenson's reporting the previous month, but to satisfy the Federal Defendants' demands, Twitter conducted yet another review of the journalist's account, concluding again that Mr. Berenson had not

violated any company policy. (*Id.* ¶¶ 122-23.) Twitter's government-induced review was itself a "discrete instance of content moderation," *Murthy*, 144 S. Ct. at 1987, the full effects of which are not known at the pre-discovery stage.[6]

Having sustained this discrete injury, Mr. Berenson's position on the platform worsened in July 2021. Four days after Dr. Fauci condemned Mr. Berenson's remarks as "horrifying" on national television, (Dkt. 80-1 ¶ 137), Surgeon General Murthy released his "Confronting Health Misinformation" advisory, recommending, among other things, that platforms provide "clear consequences for accounts that repeatedly violate platform policies," (*id.* ¶ 141). Asked on July 16 "what's your message to platforms like Facebook" regarding "COVID-19 misinformation," President Biden said, "They're killing people." (*Id.* ¶ 148.) Four hours after President Biden's remark, Twitter locked Mr. Berenson out of his account for the first time, issuing the journalist his second strike under the company's COVID-19 policy. (*Id.* ¶ 149.)

On July 23, while still in the White House, Mr. Flaherty spoke to Twitter's Todd O'Boyle. Mr. O'Boyle recounted that he told Mr. Flaherty that Twitter would follow a "whole-of-society" approach to COVID-19 misinformation. (*Id.* ¶ 173.) Mr. Flaherty "acknowledged" Twitter's actions "and asked for time to meet soon." (*Id.*) Twitter issued its third and fourth strikes against Mr. Berenson's account on July 27 and July 30, respectively, resulting in account locks. (*Id.* ¶¶ 174, 180.) The fifth, ban-inducing strike *came four days* after Mr. O'Boyle reported to the White House, Dr. Gottlieb, and Mr. Slavitt about "all the good work" Twitter was doing "about covid and vaccines" to "*keep the target off our back*." (*Id.* ¶ 193 (emphasis added).)

[6] The extent to which Twitter might have reduced the reach of Mr. Berenson's posts as a response to the April 2021 meeting is unknown. Such shadow-banning would have been a compromise to the outright ban which was the premise of the White House and HHS' "really tough question," (*id.* ¶ 117), while still providing the Federal Defendants with some of the relief they desired.

The censorship links Mr. Berenson has articulated at the pleading stage are far more concrete than those drawn by the litigants in *Murthy* who received "extensive discovery" at the more burdensome preliminary injunction phase. *Id.* at 1984. The private doctors in *Murthy*, none of whom were specifically targeted like Mr. Berenson, "[e]ach faced [their] first social-media restriction in 2020, before the White House and the CDC entered discussions with the relevant platforms." *Id.* at 1989. Mr. Berenson's known "restrictions" post-date the April 2021 meeting.[7] Similarly, healthcare activist Jill Hines, another litigant in *Murthy*, and also not specifically targeted by the government, adduced "one or two potentially viable links," but the Supreme Court found "Facebook was targeting her pages before almost all of its communications with the White House and the CDC." *Id.* at 1992. By contrast, as late as March 2021, a Twitter executive advised Mr. Berenson his "name has *never* come up in discussions around" the platform's COVID-19 policies. (Dkt. 80-1 ¶ 93 (emphasis added).)

The Federal Defendants charge that Mr. Berenson "makes little effort to connect specific actions taken by President Biden, Flaherty, or Murthy to distinct actions taken by Twitter that injured [him] in concretely described ways." (Dkt. 99 at 23.) Not so. Mr. Berenson alleged that President Biden made his "killing people" remark four hours before Twitter locked the journalist's account for the first time. (Dkt. 80-1 ¶ 149.) Further showing President Biden's connection, a day after the White House-HHS meeting in which Mr. Berenson was discussed by name, Mr. Flaherty told YouTube executives his concerns about "vaccine hesitancy"—the same concern on the agenda for the April 2021 meeting with Twitter[8]—were "shared at *the highest (and I mean the highest) levels* of the [White House]," a reference to President Biden. (*Id.* ¶ 109.)

[7] The first strike against Mr. Berenson's account in March 2021 led to no discernible consequences much less "restrictions" in the form of temporary or permanent suspension.

[8] Mr. Flaherty stated the April 2021 meeting "was about vaccine hesitancy and Twitter's efforts to combat misinformation and disinformation on the platform." (Dkt. 80-3 at 58.)

Mr. Flaherty participated in the April 2021 meeting. (*Id.* ¶ 116.) Mr. Flaherty continued to remain in touch with Twitter's Todd O'Boyle, the same lobbyist who pushed Mr. Berenson's ban through on August 28, corresponding with Mr. O'Boyle on July 23 and August 23 and 24. (*Id.* ¶¶ 173, 193.) The Federal Defendants say those contacts were made "without any mention of Berenson," (Dkt. 99 at 23), but that is an inference drawn against Mr. Berenson at odds with the rule that pleadings are construed "in favor of the complaining party." *Warth*, 422 U.S. at 501.[9]

The Federal Defendants commit the same error with Dr. Murthy, whom they claim Mr. Berenson fails to link to Twitter's actions. (Dkt. 99 at 23). As noted above, an HHS employee within the same division that houses the Surgeon General's Office was on the invite for the April 2021 meeting where Mr. Berenson was discussed and identified as the "epicenter of disinfo" regarding COVID-19. (Dkt. 80-1 ¶¶ 116, 119.) On July 20, just as the White House announced potential Section 230 reforms, Twitter's Lauren Culbertson reported how the company "met with the Surgeon General's Office ahead of his announcement." (*Id.* ¶ 153.) Again, concluding Mr. Berenson was mentioned only once, in April 2021, is a pre-discovery inference drawn in violation of *Warth*. It also ignores Mr. Slavitt's July 2021 contacts with Twitter.

The Federal Defendants assert that Mr. Berenson's allegations demonstrate "Twitter was exercising its own independent judgment as to him." (Dkt. 99 at 25.) To the contrary, the allegations show a breakdown in Twitter's normal moderation processes. Twitter violated its "strict separation" policy between its government relations and content moderation teams in Mr. Berenson's case, as the same employees involved in the April 2021 meeting, gave input on the journalist's strikes. (Dkt. 80-1 ¶¶ 187, 218-19.) Mr. O'Boyle personally shepherded the fifth

[9] In his interrogatory response, Mr. Flaherty stated that he had another contact with Twitter regarding Mr. Berenson "probably a week or two" after the April 2021 meeting, and that "is the last time that [he] recalls discussing Mr. Berenson with employees from Twitter." (*Id.*) Not only is that short of a denial, it also leaves open the possibility that Mr. Flaherty discussed Mr. Berenson with Mr. Slavitt and Dr. Murthy.

strike, pressing a junior employee to deliver the ban. (*Id.* ¶¶ 203-207.) The fifth strike came four days after Mr. O'Boyle, who viewed Mr. Slavitt, Dr. Gottlieb, and the White House as connected, commented that he wanted "to keep the target off our back." (*Id.* ¶ 193.) Not only did Twitter later concede Mr. Berenson's account should have never been suspended, (*id.* ¶ 225), its highest-ranking executives, Mr. Dorsey and Ms. Gadde, determined his suspension was not warranted at the time, (*id.* ¶ 210). Mr. Berenson was only reinstated after he sued Twitter. (*Id.* ¶ 221.) There was nothing "independent" about the suspensions, to include the permanent ban, or the litigation-induced reinstatement.

The Federal Defendants also point to the gap in time between the April 2021 meeting and Mr. Berenson's subsequent suspensions and ultimate deplatforming to dismiss any causal connection. (Dkt. 99 at 25 n.13) This argument is misguided for at least four reasons. First, it ignores the immediate, documented harm Mr. Flaherty, Mr. Slavitt, and the HHS employee's April 2021 meeting with Twitter caused Mr. Berenson, subjecting his reporting to additional, government-induced company scrutiny. That was injury in and of itself caused by the Federal Defendants with "a strong temporal connection" to the conduct at issue. *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 180 (2d Cir. 2005). Mr. Berenson, a journalist whose "name ha[d] never come up in the discussions around these policies," (Dkt. 80-1 ¶ 83), became the subject of concern at Twitter's highest levels . Second, there were other, subsequent meetings between the White House and Twitter which "were very angry in nature" about COVID-19 misinformation and de-platforming disfavored accounts. (*Id.* ¶ 127.)[10] Third, and related, to the

[10] The Federal Defendants complain Mr. Berenson failed to allege "when these calls took place, who exactly participated in them, or what specifically was discussed during them." (Dkt. 99 at 24.) They also assert that Mr. Berenson does not allege whether "Flaherty or Slavitt participate in these alleged phone calls, or that Berenson's account was discussed." (*Id.* at 20 n.10.) This is the Rule 12 stage. Given Mr. Berenson's status as a COVID-19 disinformation "epicenter," (Dkt. 80-1 ¶ 119), there is ample reason to infer that his account was discussed during these later "angry" discussions. The Federal Defendants are asking this Court to draw the opposite inference in violation of *Warth*.

extent temporal correlation is "probative" for traceability purposes, *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 213 (4th Cir. 2020), Mr. Berenson's suspensions all occurred after the meeting. Fourth, this argument ignores the later outreach from Mr. Slavitt and Dr. Gottlieb, which Twitter viewed as connected to the White House.

Mr. Berenson's injuries are well within timing the Second Circuit has accepted in other cases. *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 111 (2d Cir. 2010) (noting there is no bright line test for determining the outer limits of a temporal relationship that is "too attenuated to establish causation," noting that five months is not too long); *Gorman-Bakos v. Cornell Co-op Ext. of Schenectady Cty.*, 252 F.3d 545 (2d Cir. 2001) (denying summary judgment to defendant in retaliation claim under Section 1983 where a series of adverse events occurring two to four months after plaintiff publicly complained a program). And in 2004, a Southern District of New York court found that "'strong temporal correlation,' standing alone, is sufficient to sustain an inference" of injury. *Pellegrino v. County of Orange*, 313 F. Supp. 2d 303, 316-17 (S.D.N.Y. 2004). Similarly, the Second Circuit ruled in 2003 that the "close proximity" of a public official's complaint about a billboard containing an anti-gay message and the resulting "public outcry" were evidence that the complaint had led the billboard company to remove it, violating the free speech rights of the plaintiffs who had purchased it. *Okwedy v. Molinari*, 333 F.3d 339, 334 (2d Cir. 2003) (per curiam) .

The cases the Federal Defendants rely on are all distinguishable. Like the litigants in *Murthy*, none of the plaintiffs in those cases pled that they were specifically targeted by the White House or other state actors. *Changizi v. Dep't of Health & Hum. Servs.*, 82 F.4th 492, 498 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2716 (2024) (noting failure to provide "specific allegations of the content of behind-the-scenes communication" and that "[t]his would be a

different case if, for example, additional facts were alleged in the complaint that would allow a conclusion that, under the totality of the circumstances, Twitter's actions were compelled or coerced by the federal government"); *Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028, 1031 (D.C. Cir. 2022) (alleging that a single member of Congress sent letters to various social media platforms, but not that the plaintiff association had been specifically targeted); *Doe v. Google LLC*, No. 21-16934, 2022 WL 17077497, at *2 (9th Cir. Nov. 18, 2022) (alleging various public statements by legislators and legal actions, but no direct targeting); *Hart v. Facebook Inc.*, No. 22-CV-737-CRB, 2023 WL 3362592, at *3 (N.D. Cal. May 9, 2023) (noting "the lone mention" of plaintiff in amended complaint was Defendant Dr. Gottlieb "complain[ing] about [plaintiff]'s posts to a Twitter lobbyist"). The first amended complaint breaks ground other plaintiffs have not, with allegations about *both* the generalized government pressure on the social media platforms as well specific targeting of Mr. Berenson's speech.

B. Mr. Berenson bears a substantial risk of future injury.

"To obtain forward-looking relief, the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them." *Murthy*, 144 S. Ct. at 1993. In this regard, "the past is relevant only insofar as it predicts the future." *Id.* at 1992.

At the outset, Mr. Berenson approaches this standing element with more "momentum" than Jill Hines, the one litigant in *Murthy* the Supreme Court assumed had "eked out a showing of traceability for her past injuries." *Murthy*, 144 S. Ct. at 1992. Mr. Berenson's pleading goes beyond Ms. Hines', establishing Twitter's historical resistance to third party calls to censor his reporting, and the subsequent, government-induced change in the way the company handled his account, culminating in his ultimate suspension over the stated objections of Twitter's two highest-ranking executives. And Mr. Berenson has pled that all at the less demanding Rule 12

stage without the benefit of the "extensive discovery," *id.* at 1984, Ms. Hines received for her preliminary injunction motion.

Twitter reinstated Mr. Berenson and he continues to report on the platform. (Dkt. 80-1 ¶ 233.) He does this even as the federal government continues to promote COVID-19 vaccines, (*id.* ¶ 229), and reports circulate about ways the government can investigate Elon Musk, Twitter's new owner, and his business ventures. (*Id.* ¶ 231.) Further, Mr. Berenson has pled he was specifically denied a White House tour after he published an article related to President Biden, which had nothing to with COVID-19 (*Id.* ¶¶ 234-35.)

The Federal Defendants deny Mr. Berenson is at risk of future injury. (Dkt. 99 at 27.) They maintain Mr. Berenson "offers no allegations whatsoever of impending harm." (*Id.*) This analysis rests on a false premise: that Mr. Berenson has only identified an interest in reporting on COVID-19. (*Id.* at 28 n.16.) To the contrary, Mr. Berenson has articulated an interest in speaking generally—and he has. (Dkt. 80-1 ¶ 233-24.) Not only that, he has alleged that the White House retaliated against him for his non-COVID-19 reporting as late as summer 2024. (*Id.* ¶ 235.)[11] The Federal Defendants also point to Twitter disclaiming its COVID-19 policy, but that understates Mr. Berenson's right to report on other matters. Finally, the Federal Defendants dismiss Mr. Berenson's future-oriented concerns as speculative. (Dkt. 99 at 29.) This argument again limits Mr. Berenson's future interests to speaking on COVID-19 and overlooks this past summer's White House tour retaliation. The Federal Defendants also ignore the pre-discovery

[11] The Federal Defendants consign their treatment of Mr. Berenson's July 2024 injury to a footnote. (Dkt. 99 at 27 n.15.) Contrary to their claim, the White House tour denial was not only to "his family," but also to Mr. Berenson himself. (Dkt. 80-1 ¶ 235 (alleging a tour was denied "for Mr. Berenson *and his family*") (emphasis added).) Further, the Federal Defendants argue that "this alleged injury is utterly unrelated to allegations that Twitter censored his speech at the behest of the Federal Defendants." (Dkt. 99 at 27 n.15.) But Mr. Berenson alleged the retaliation was a response to his "previous work," i.e., the very reporting at issue in this litigation. (Dkt. 80-1 ¶ 235.)

posture of this case.[12] Mr. Berenson is not required "to demonstrate that is literally certain that the harms [he] identif[ies] will come about," but rather that there is a "'substantial risk' that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). Mr. Berenson has met that burden at the Rule 12 stage.

C. Mr. Berenson seeks targeted relief to address harms.

The final requirement for Article III standing is redressability. An injury is redressable if there is "a non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Mr. Berenson is a current Twitter user. (Dkt. 80-1 ¶ 233.) As explained above, he is at risk from future, government-induced censorship. Like the plaintiff in *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2715 (2024), Mr. Berenson is seeking an injunction preventing the Federal Defendants from "censor[ing] [his] speech." *Id.* at 1162 (internal quotation omitted). Also like the plaintiff in *O'Handley*, because the "redressability issue" can be resolved in his favor, particularly at the Rule 12 stage, "he has standing to seek injunctive relief" against the Federal Defendants. *Id.*

In denying Mr. Berenson's injuries are redressable, the Federal Defendants assert that no injunction against them "could require Twitter . . . to rescind or modify its policies on misinformation." (Dkt. 99 at 30.) Mr. Berenson is not asking for that. Rather, he is asking for

[12] The Fifth Circuit's recent rejection of Robert F. Kennedy, Jr. and Children's Health Defense's bid for standing in the ongoing *Murthy* litigation noted the "extensive discovery" the district court allowed in that case. *Missouri v. Biden*, No. 24-30252, 2024 WL 4664015, at *1 (5th Cir. Nov. 4, 2024). The Fifth Circuit denied the organization had standing largely because the White House and CDC disbanded its COVID-19-related efforts. *See id.* at *3. Kennedy lacked standing he did "not trace any of the platforms' content-moderation actions . . . back to the government." *Id.* at *4. Mr. Berenson has articulated broader speech interests and has a much stronger traceability theory. Even so, the district court in that case recently granted additional jurisdictional discovery on the standing issue, which would also be appropriate here. *Missouri v. Biden*, Case No. 3:22-cv-01213-TAD-KDM, ECF No. 404 (W.D. La. Nov. 8, 2024).

what the *Murthy* Court said a "court *could* prevent," namely "these Government defendants from interfering with the platforms' independent application of their policies." *Murthy*, 144 S. Ct. at 1995. In *Murthy*, the Supreme Court found that because "the available evidence indicates that the platforms have enforced their policies against COVID-19 misinformation even as the Federal Government has wound down its own pandemic response," it was "unlikely" for an injunction "to affect the platforms' content-moderation decisions." *Id.* But here, as the Federal Defendants argue, Twitter no longer has a COVID-19 misinformation policy. (Dkt. 99 at 15-16.) So an injunction could provide relief, particularly given Twitter's new ownership.

The Federal Defendants also complain about the scope of Mr. Berenson's request for injunctive relief. (Dkt. 99 at 31.) That objection is premature. This litigation is at the Rule 12 stage. Mr. Berenson's future-oriented request is to prevent further First Amendment violations, not flatly restrain Federal Defendants from "engaging with Twitter directly" or "engaging in a wide range of government speech." (Dkt. 99 at 31.)

II. Separation of powers does not bar Mr. Berenson's claims against President Biden.

Even if the Federal Defendants are correct that injunctive relief is unavailable against President Biden, an argument the district court in *Knight* rejected, *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 578 (S.D.N.Y. 2018), declaratory relief is still available. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court indicated plaintiff's injury would be redressed "by a declaratory judgment that the cancellations [under the Line Item Veto Act] are invalid." *Id.* at 433 n.22. Similarly, in *Knight*, the district court ordered declaratory relief. *Knight*, 302 F. Supp. 3d at 579. At a minimum, the same relief is available for Mr. Berenson here.

III. Mr. Berenson's first amended complaint states a plausible First Amendment claim.

A. The Federal Defendants coerced Twitter's content moderation decisions generally and specifically with respect to Mr. Berenson.

"Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Vullo*, 602 U.S. at 180. In order "[t]o state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech." *Id.* at 191. Some "helpful guideposts" in this inquiry include "[c]onsiderations like who said what and how, and what reaction followed." *Id.* "A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decision making authority over the plaintiff, or *in some less-direct form*." *Okwedy*, 333 F.3d at 344.

Mr. Berenson's first amended complaint sets out a plausible First Amendment claim. The tactics in this case were at least as coercive as what the Second Circuit found actionable under the First Amendment in *Okwedy*, a case the *Vullo* Court cited approvingly. *Vullo*, 602 U.S. at 190. In *Okwedy*, the plaintiff posted messages on billboards in Staten Island condemning homosexuality. 333F.3d. at 341. The "Borough President of Staten Island" contacted the billboard company, calling the billboard "unnecessarily confrontational and offensive" and stating "that [its] message conveys an atmosphere of intolerance which is not welcome in our Borough" before noting the company "owns billboards on Staten Island and derives substantial economic benefits from them." *Id.* at 341-42. The company backed out of its contract with plaintiff. *Id.* at 342. The district court dismissed the plaintiff's claim, relying on the fact that the defendant Borough president "did not have direct regulatory or decision making authority over"

the billboard company. *Id.* at 343. The Second Circuit reversed the district court, because "a jury could find that [the defendant's] letter contained an implicit threat of retaliation." *Id.* at 344. The Second Circuit instructed that the district court "should have viewed the language of [the defendant's] letter in the light most favorable to plaintiffs." *Id.* at 344.

Here, the Federal Defendants' course of conduct did not involve just one letter as in *Okwedy* or just one meeting. Like the regulated entities in *Vullo*, Twitter received the Federal Defendants' message "loud and clear" and the company reacted predictably. *Vullo*, 602 U.S. at 192. The Federal Defendants went further than state actors did in other cases courts found viable First Amendment claims. *See Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (reversing grant of defense summary judgment in case where village administrator sent letter to newspaper); *Doyle v. James*, No. 23-CV-71 (JLS) (HKS), 2024 WL 2158385, at *7 (W.D.N.Y. May 13, 2024) (finding that plaintiffs stated First Amendment claim against New York Attorney General who sent letter advising against holding a meeting and citing various state laws).

The Federal Defendants' argument against this conclusion largely consists of parsing Mr. Berenson's first amended complaint. As part of this effort, they distinguish between the April 2021 meeting and purported general statements. (Dkt. 99 at 37-41.) But *Vullo* says the Federal Defendants' statements are to be "viewed in context." 602 U.S. at 193. The proposed first amended complaint contains ample context. The campaign to de-platform Mr. Berenson began in April 2021, where Mr. Slavitt, Mr. Flaherty, and an HHS employee identified him as "ground zero for covid misinformation." (*Id.* ¶ 118.) That subsequent actions—Surgeon General Murthy's advisory, President Biden's "killing people" remark, the documented contacts Mr. Flaherty had with Twitter in July and August 2021—did not mention Mr. Berenson by name does not mean that the Federal Defendants were not "attempting to suppress" his speech. (Dkt. 99 at 39.) At this

stage of the litigation, the plausible inference that Federal Defendants continued to pressure Twitter about Mr. Berenson's account—the only account specifically mentioned in their April 2021 meeting—should be drawn for Mr. Berenson.

The Federal Defendants also cast the conduct at issue as permissible government speech. (Dkt. 99 at 37-38.) They argue "White House officials did not dictate to Twitter what action it must take." (*Id.* at 37.) This overlooks the evidence of coercion in the first amended complaint, starting with the government-induced review of Mr. Berenson's account in April 2021. (Dkt. 80-1 ¶ 122.) Twitter knew of the pressure being placed on Facebook, and the company believed it was "on much better footing than FB but needed to keep up the responsiveness." (*Id.* ¶ 170.) Later, in August 2021, Mr. O'Boyle said his goal was "to keep the target off our back." (*Id.* ¶ 193.) And critically, Twitter suspended Mr. Berenson over the objections of its two highest-ranking executives, Mr. Dorsey and Ms. Gadde. (*Id.* ¶ 210.)

B. For the purposes of Mr. Berenson's First Amendment and Section 1985(3) claims, Mr. Slavitt must be viewed as a state actor even after he left the White House.

The coercion comes into focus even greater focus when the allegations against Mr. Slavitt are taken into account. (Dkt. 99 at 36.) The Federal Defendants maintain Mr. Berenson has not alleged facts showing Mr. Slavitt was a state actor after he left the White House. To the contrary, Mr. Berenson alleged that after Mr. Slavitt officially left, he contacted Mr. O'Boyle, one of the Twitter employees present at the April 2021 meeting, connecting Mr. O'Boyle to Dr. Gottlieb. (Dkt. 80-1 ¶ 166.) Lest Mr. O'Boyle forget his relationship with the White House, Mr. Slavitt prominently displayed his government email address in the signature line of the note he sent Mr. O'Boyle. At the same time, Mr. Slavitt stated he was "talking to the White House and the CDC" sometimes even "on a daily basis." (*Id.* ¶ 157.) What is more, Twitter perceived Mr. Slavitt and Dr. Gottlieb's contacts as linked to the government, stating in response to an inquiry from Dr.

Gottlieb "we could be next" in July 2021, (*id.* ¶ 170), and grouped the White House, Mr. Slavitt, and Dr. Gottlieb together in an email four days before Mr. Berenson's suspension. (*Id.* ¶ 193.)

At the end of his podcast with Mr. Clegg of Facebook, which was broadcast on July 21, 2021, Mr. Slavitt offered a fuller description of his role:

> This goes to the shuttle diplomacy of [sic] over the weekend, in my conversations with both Facebook and with the people, the administration. And I think what needs to happen is I think Facebook and their peers, Twitter, everyone else they need to come together. And I think they should make a commitment that they're going to make a substantial change. And that substantial change would look something like this, they're going to cut down on the amount of false information that people who haven't been vaccinated, see, by 80%. So that will end up being able to say that for people who weren't vaccinated, they'll be seeing 80% less misinformation.

Clegg Podcast, *supra*. To be clear, during the same week as he was pushing Twitter to ban Mr. Berenson, Mr. Slavitt referred to himself as being a "shuttle diplom[at]" between Facebook and the Biden Administration, which he had just left, and making specific suggestions that Facebook and Twitter should follow.

Under the "joint action" test, the Supreme Court has held repeatedly a private person can be found to be a state actor if he willfully participates in actions that violate civil rights. "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *United States* v. *Price*, 383 U.S. 787, 794 (1966). Here, in July and August 2021, a few weeks after leaving the White House, Mr. Slavitt was not merely a willful but an eager participant in a censorship conspiracy that *he himself* had helped launch months before. He continued to talk to his colleagues in the Biden Administration as he had during the spring. His contact at Twitter remained Todd O'Boyle, the company's key White House lobbyist. "The touchstone of joint action with the state is often a plan, prearrangement, conspiracy, custom, or policy." *Savarese v. City of New York*, 547 F. Supp. 3d 305, 340 (S.D.N.Y. 2021). Ample evidence shows after he left the White House,

Mr. Slavitt simply continued to follow the "plan" and "prearrangement" he had already made with other Biden Administration officials during his time at the White House.

Courts in the Second Circuit have found state action on far less evidence than this. At the summary judgment stage, a district court recently found a jury question on state action where a witness in a murder trial "was a willful participant in joint activity with the State Police that evinced an eagerness to work alongside them that far surpasses the endeavors of ordinary civilians." *Harris v. Tioga Cnty.*, 663 F. Supp. 3d 212, 243 (N.D.N.Y. 2023), *appeal dismissed*, No. 23-503, 2024 WL 4179651 (2d Cir. Sept. 13, 2024). Another district court declined to dismiss a state action claim against a private actor who headed an inmate education program where the allegations showed defendant's "voluntary agreement and participation" with the state of Connecticut's decision to require inmate participants to sign a form—even though the private party had allegedly "voiced initial displeasure" about the requirement. *Whipper v. Green*, No. 3:23-CV-27 (SVN), 2024 WL 3252333, at *14 (D. Conn. July 1, 2024). Mr. Slavitt's voluntary participation in the Federal Defendants' activities goes beyond what was found could be state action in these cases. The out-of-circuit, law enforcement case the Federal Defendants rely on is inapposite.[13] Courts routinely find that private citizens do not become state actors merely by reporting alleged crimes to police, but those rulings are irrelevant here. Even after he left the White House, Mr. Slavitt acted on behalf of the Biden Administration and under color of law as he violated Mr. Berenson's rights.

[13] The case, *Moody v. Farrell*, 868 F.3d 348 (5th Cir. 2017), involved a section 1983 claim brought by an ex-wife whose former husband complained to the police. *Id.* at 350. Finding against state action, the court found that "the record indisputably shows that the [police] conducted an investigation and independently determined that probable cause existed to arrest [the ex-wife]." *Id.* at 353. This case deals with coercion of a private entity.

C. The Federal Defendants violated Mr. Berenson's access to a public forum.

The Supreme Court has recognized that a social media platform can be a public forum. *See Lindke v. Freed*, 601 U.S. 187 (2024). The Second Circuit made a similar finding in *Knight*, which the Supreme Court ultimately dismissed as moot, ruling that President Trump "blocking [users] from viewing, retweeting, replying to, and liking his tweets" violated the First Amendment even though there were various "workarounds" to the those limitations. *Knight*, 928 F.3d at 238.[14]

In this case, the Federal Defendants all utilize Twitter. (Dkt. 80-1 ¶ 61.) At various times, Mr. Berenson engaged with the accounts. (*Id.* ¶¶ 113-14, 131-32.) Unlike what President Trump did, the Federal Defendants did not just issue an individualized block against Mr. Berenson's account; rather, they worked to get him banned entirely. What the Federal Defendants did here would be akin to coercing a press conference venue to dismiss a reporter because the government disliked his questions, instead of taking a direct approach by revoking press credentials. *Cf. Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 321 (S.D.N.Y. 2020) (describing revocation of CNN reporter Jim Acosta's credentials by the Trump White House). And "a government official cannot do indirectly what she is barred from doing directly." *Vullo*, 602 U.S. at 190.

Further, the Second Circuit has previously found that privately owned spaces can become public fora that must be open to all journalists once some are invited. In *American Broadcasting Companies, Inc v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977), the Second Circuit ruled that a political candidate could not invite some reporters but not others to his privately owned campaign headquarters. As the court explained: "Once there is a public function, public comment, and

[14] The Federal Defendants maintain that *Knight* is not binding and has no persuasive value. (Dkt. 99 at 33 n.19.) The Supreme Court cited *Knight*. *Lindke*, 601 U.S. at 194. District courts also continue to cite *Knight*. *See, e.g.*, *Evans v. Herman*, No. 4:22-CV-2508, 2023 WL 4188347, at *3 (S.D. Tex. Apr. 24, 2023), *report and recommendation adopted*, No. 4:22-CV-02508, 2023 WL 4188466 (S.D. Tex. June 26, 2023).

participation by some of the media, the First Amendment requires equal access to all of the media . . . once the press is invited . . . there is a dedication of those premises to public communications use." *Id.*

One year later, a district court found that the New York Yankees and Bowie Kuhn, the commissioner of baseball, could not bar a female reporter from locker rooms at Yankee Stadium. The court found that Kuhn's effort to segregate the locker room was "state action," even though Major League Baseball and the Yankees are private entities. *Ludtke v. Kuhn*, 461 F. Supp. 86 (S.D.N.Y. 1978). The court in *Ludtke* quoted the Supreme Court's explanation in *Burton v. Wilmington Pkg. Auth*, 365 U.S. 715, 722 (1961), that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Ludtke*, 461 F. Supp. at 93. It is that sifting of facts Mr. Berenson seeks here.

IV. Mr. Berenson has a viable *Bivens* claim.

Mr. Berenson does not dispute that the remedy in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), has not been extended to the First Amendment violations at issue here. He acknowledges the higher hurdle erected for such a claim, but maintains his claim meets the standard.

Under the framework that the Supreme Court endorsed in *Ziglar v. Abbasi*, 582 U. S. 120 (2017), a court considering a *Bivens* claim must first determine if it is novel. *Id.* at 139. Mr. Berenson's claim, which depends on the First Amendment rather the Fourth, Fifth, or Eighth, is novel. In such a case, the court must then decide if any "special factors" require dismissing the claim. *Id.* at 140. In *Ziglar*, the Court outlined several possible factors that force dismissal. The first two mentioned are whether the claim is an attempt "at altering an entity's policy" and whether it is has brought against officials for "the acts of others." *Id.* Mr. Berenson's claim does not require dismissal under either factor. He does not seek to alter the Biden Administration's

stated goal of encouraging COVID-19 vaccinations, or its efforts to use social media platforms to do so. And he seeks to hold Mr. Slavitt and the other Defendants accountable only for their own actions. Another special factor courts must consider is whether Congress has made available other avenues of relief, such as agency administrative processes. *Egbert*, 596 U.S. at 493. In this case, no such "alternative remedial structure" exists.

In *Ziglar*, the Supreme Court also counseled against allowing *Bivens* actions against "Executive Officials," *id.* at 140, but the official defendants in that case included the director of the Federal Bureau of Investigation and the Attorney General—cabinet-level officers of the United States responsible for setting national policies. In contrast, Mr. Flaherty was a mid-level White House functionary not subject to Senate confirmation. Mr. Slavitt may not have met the definition of an "executive official" at all, as he held only a temporary post as a "special government advisor" that did not require him to file the standard public financial disclosure forms required for higher-level executive branch officials.

In *Ziglar*, the Supreme Court concluded that "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide." *Id.* at 136. Here, such an impact will likely be nonexistent. The reason is that in deciding *Murthy*, the Supreme Court raised the bar that would-be plaintiffs must meet to show standing in similar social media censorship cases so sharply that only plaintiffs like Mr. Berenson are likely to meet it. Granting relief here will not lead to a flood of similar cases, as those litigants will lack standing. It will merely provide Mr. Berenson a chance for damages in this exceptional instance.

The Federal Defendants make two additional arguments against extending *Bivens* in their motion to dismiss, but neither is dispositive. They claim that "the availability of injunctive relief against unconstitutional conduct—which Berenson is seeking in this very action—is reason

enough to limit the power of the Judiciary to infer a new *Bivens* cause of action." (Dkt. 99 at 43 (internal quotation marks omitted).) To the extent *Murthy* forecloses equitable relief, this availability would be illusory in Mr. Berenson's case—damages would be all that is left.

Finally, the Federal Defendants argue that because "Berenson's *Bivens* claims call into question the Biden administration's entire alleged policy of encouraging social media platforms to take more robust steps to combat misinformation, they necessarily implicate national security and foreign policy." (Dkt. 99 at 44.) But they present no evidence to support that argument, and the Second Circuit has historically been wary of the use of "national security" claims to justify First Amendment violations. *See, e.g.*, *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

In *Ziglar*, the Supreme Court noted, "Bivens does vindicate the Constitution by allowing some redress for injuries." *Id.* at 134. Even in *Egbert*, it declined to overturn *Bivens*, or say that *Bivens* relief could never be extended. And Mr. Berenson's claims do not fall under the rubric of First Amendment retaliation, as in *Egbert*, or any of the other broad categories for which the Court has refused to extend *Bivens*.

The path to a viable *Bivens* claim is narrow. Mr. Berenson has met it.

V. Mr. Berenson states a plausible claim for relief under 42 U.S.C. § 1985(3).

"To state a cause of action under § 1985(3), a plaintiff must allege (1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999).

The Federal Defendants contend that Mr. Berenson's Section 1985(3) claim should be dismissed for two reasons: first, because Section 1985(3) does not apply to federal officials; and

second, because Mr. Berenson has not adequately alleged conspiracy and failed to allege membership in a protected class. These arguments lack merit.

A. Section 1985(3) extends to claims against federal officials.

The Federal Defendants first invite this Court to adopt a minority view which the Second Circuit has directly called into question and that courts in this district have already declined to apply, by finding that Section 1985(3) does not cover claims against federal officers. (Dkt. 99 at 45-47.) This argument should be squarely rejected.

The Second Circuit has specifically noted "that the development of case law since *Gregoire*[15] has eroded any basis for interpreting that decision to render Section 1985(3) inapplicable to federal officials." *Iqbal v. Hasty*, 490 F.3d 143, 176 (2d Cir. 2007), *rev'd on other grounds sub nom. by Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Since the late 1970s, courts in this district have reached the same result. *See Wahad v. F.B.I.*, 813 F. Supp. 224, 232 (S.D.N.Y. 1993) (concluding that the "[t]he scope of § 1985(3) shall not be narrowed by allowing federal agents to escape liability under it"); *Peck v. United States*, 470 F. Supp. 1003, 1011 (S.D.N.Y. 1979) (holding claims against federal officers are actionable under Section 1985(3)); *Moriani v. Hunter*, 462 F. Supp. 353, 355-56 (S.D.N.Y. 1978) ("I can not see how the Second Circuit's rule that [§] 1985(3) does not apply to federal officer survives *Griffin v. Breckenridge*, 403 U.S. 88 (1971). . . . Unless there is a rationale, unknown to the past cases, for holding that federal officers are not persons' under s 1985(3), there is no longer any reason to exclude from coverage federal officers acting under color of federal law."); *see also Colon v. Sawyer*, No. 9:03-CV-1018, 2006 WL 721763 (N.D.N.Y. March 20, 2006) (holding that "federal officials and employees may be

[15] *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), is a pre-*Griffin* case that some courts had used to support their holdings that Section 1985(3) claims did not apply to federal officers. *Iqbal v. Hasty*, 490 F.3d at 176.

liable" under Section 1985(3)). This is also consistent with the views of at least six other federal circuit courts of appeal.[16]

The Federal Defendants rely on *Alharbi v. Miller*, 368 F. Supp.3d 527, (E.D.N.Y. 2019), and an unpublished, nonbinding opinion from another district court, *Sabir v. Licon-Vitale*, No. 20 Civ. 1552, 2022 WL 1291731 (D. Conn. Apr. 29, 2022), which found federal officials to be outside the scope of Section 1985(3). (Dkt. 99 at 46.) Those cases are a minority view, and for good reason. The contrary, majority position follows from the Supreme Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), as the Third Circuit recently explained:

> In *Griffin*, the Supreme Court held that § 1985(3) can reach purely private conspiracies because the statute's failure to require the "deprivation to come from the State . . . . can be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' *whatever their source*."

Davis, 962 F.3d at 114 (quoting *Griffin*, 403 U.S. at 97). The same rationale holds here.

B. Mr. Berenson states a claim under Section 1985(3).

1. Mr. Berenson's first amended complaint contains allegations supporting the existence of an actionable Section 1985(3) conspiracy.

A Section 1985(3) conspiracy is actionable if "one or more persons engaged therein, do or cause to be done, any act in furtherance of the object of the conspiracy." *Wahad v. F.B.I.*, 813 F. Supp. 224, 231 (S.D.N.Y. 1993) (internal quotations omitted). Proof of an explicit agreement is not required but "can be established by showing that the parties have a tacit understanding to carry out the prohibited conduct." *Id.* (internal quotations omitted). The Second Circuit has

[16] *Davis v. Samuels*, 962 F.3d 105, 115 (3d Cir. 2020) (describing "a significant consensus" that Section 1985(3) applies to federal officials; *Cantú v. Moody*, 933 F.3d 414, 419 (5th Cir. 2019) (noting that Fifth Circuit precedent holds that section 1985(3) precedent "may not have aged well"); *Federer v. Gephardt*, 263 F.3d 754, 758 (8th Cir. 2004) (holding Section 1985(3) extends to federal officials); *Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1984), *cert denied*, 470 U.S. 1084 (1985), *overruled in part on other grounds by Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (same); *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (allowing plaintiff leave to plead Section 1985(3) claim against United States marshals); *Dry Creek Lodge, Inc. v. US*, 515 F.2d 926, 931 (10th Cir. 1975) (allowing Section 1985(3) claim against federal officials).

"recognized that . . . 'conspiracies are by their very nature secretive operations,' and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir. 1999) (quoting *Rounseville v. Zahl*, 13 F.3d 625, 632 (2d Cir. 1994)).

When a "complaint does more than merely allege in vague terms that an agreement and 'alliance' was formed; [and] it undergirds these allegations with a factual backdrop that explains both the motivation and occasion for such a conspiracy," that is enough to state a plausible conspiracy claim. *Glacken v. Inc. Vill. of Freeport*, No. 09 CV 4832 DRH AKT, 2012 WL 894412, at *9 (E.D.N.Y. Mar. 15, 2012). Mr. Berenson's first amended complaint contains a voluminous "factual backdrop" describing in detail the motivations of the Federal Defendants, their targeting of his speech, and their contacts with Twitter and with one another—all culminating in his permanent Twitter suspension. Mr. Berenson established that Mr. Slavitt introduced Dr. Gottlieb to Twitter's Todd O'Boyle. (Dkt. 80-1 ¶ 166.) Mr. Berenson also alleged that Dr. Murthy and the two other private conspirators, Drs. Gottlieb and Bourla, appeared on Mr. Slavitt's show during July 2021, the same month Twitter suspended him for the first time. (*Id.* ¶¶ 143, 162, 175.) Mr. Berenson alleged that the federal and private conspirators—including Dr. Gottlieb—repeatedly directed their complaints about him to the same Twitter executive, Todd O'Boyle. All this while Mr. Slavitt acted as an intermediary with Facebook and the White House and Surgeon General. (*Id.* ¶ 156.) Mr. Berenson's allegations "raise a reasonable expectation that discovery will reveal evidence of the [alleged misconduct.]" *Rother v. NYS Dept. of Corr. & Cmty. Supervision*, 970 F. Supp.2d 78, 103 (N.D.N.Y. 2013).

The Federal Defendants attack the sufficiency of Mr. Berenson's conspiracy pleading. (Dkt. 99 at 48.) They maintain that Mr. Berenson's first amended complaint does not detail "when" certain calls between the Federal Defendants and Twitter "took place," the participants,

and the contents of the discussion. (*Id.*) They also charge Mr. Berenson with failing to allege that Dr. "Murthy ever discussed Berenson with anyone or took action against him." (*Id.* at 49.) Regardless, as the Federal Defendants concede, Mr. Berenson did allege the time, place, and agenda for the initial, critical meeting between Twitter and White House officials Mr. Flaherty and Mr. Slavitt and an HHS employee within the same operating division as Dr. Murthy—the meeting at which the conspirators took their first explicit action. It defies "common sense," *Iqbal*, 556 U.S. at 664, to conclude Dr. Murthy never heard of Mr. Berenson, who White House officials believed was "ground zero for covid misinformation," (*id.* ¶ 118), or never mentioned Mr. Berenson to Twitter even as Dr. Murthy raced to stop COVID-19 misinformation. This is another adverse inference against Mr. Berenson that is inappropriate at the Rule 12 stage.

Mr. Berenson's complaint goes far beyond establishing "parallel conduct" directed at Twitter, as the Federal Defendants maintain. (Dkt. 99 at 49.) There is no "obvious alternative explanation" for what happened in this case as there was in *Twombly*. *Id.* at 567. What happened here is not, as the Supreme Court later said of *Twombly*, "more likely explained by lawful, unchoreographed free-market behavior." *Iqbal*, 556 U.S. at 680. Twitter defended Mr. Berenson's right to speak on its platform until, after the Federal Defendants' multi-faceted, targeted campaign, the company permanently suspended his account. The suspension was not only erroneous, it was internally opposed by the company's chief executive officer and general counsel. (Dkt. 80-1 ¶ 210.) Unlike the plaintiffs in *Twombly*, Mr. Berenson has direct evidence of this—he is not only relying on circumstantial proof, though he has pled that, too. It would have been akin to the *Twombly* plaintiffs providing direct evidence of the defendant companies intending to enter agreement to restrain trade with each other—something that would have been enough to survive a Rule 12(b)(6) challenge in that case.

The cases the Federal Defendants rely on for their *Twombly*/*Iqbal* challenge to Mr. Berenson's complaint are distinguishable. The plaintiff in *Rother v. NYS Dep't of Corr. & Cmty. Supervision*, 970 F. Supp. 2d 78 (N.D.N.Y. 2013), an employment discrimination case, "at most, alleged somewhat parallel action in that each of the Defendants allegedly discriminated against her in some way." *Id.* at 103. By contrast, Mr. Berenson alleged collaboration and coordination. The court in *Cooper v. Clancy*, No. 9:19-CV-362 (GLS/ML), 2023 WL 2624334 (N.D.N.Y. Mar. 24, 2023), dismissed a defendant because the plaintiff did "not provide any examples" of the defendant's involvement, but otherwise let the Section 1985(3) case proceed. *Id.* at *6. Mr. Berenson has included numerous examples, which will be further informed by discovery.

The intracorporate conspiracy doctrine does not save the Federal Defendants from this claim, either. (Dkt. 99 at 50.) The "single corporate entity" doctrine "does not apply to federal agencies as it does business entities," because "[i]f federal agencies were viewed as business entities, § 1985(3) would be ineffective to deal with potential conspiracies within the government." *Wahad v. F.B.I.*, 813 F. Supp 224, 232 (S.D.N.Y. 1993) (denying summary judgment relating to Section 1985(3) conspiracy between defendant and other federal agents). The Supreme Court has not decided the issue of whether the intracorporate conspiracy doctrine applies to federal officials for Section 1985(3) claims, although it has indicated "that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under § 1985(3)." *Ziglar*, 582 at 154. But this finding has no application here because Mr. Flaherty and Dr. Murthy work in different departments, the former at the White House and the latter at HHS. For the same reason, the other cases cited by the Federal Defendants are equally inapplicable. *See Hartline v. Gallo*,

546 F.3d 95 (2d Cir. 2008) (suit against police officers in the same department); *Little v. City of New York*, 487 F. Supp.2d 426 (S.D.N.Y. 2007) (same).

2. Mr. Berenson adequately alleges invidious, class-based discrimination.

To state a Section 1985(3) claim, "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102. The *Griffin* Court imposed that to avoid creating a "general federal tort law." *Id.* at 101-02. In *Carpenters v. Scott*, 463 U.S. 825 (1983), in the context of another purely private conspiracy, the Supreme Court reaffirmed *Griffin's* race-based or class-based animus requirement. *Carpenters*, 463 U.S. at 834. Regarding the more amorphous "class-based" prong, the Court left open the idea that class-based could encompass "political views or activities," but held that "*economic* views, status, or activities" did not qualify. *See id.*

The Second Circuit has extended Section 1985(3)'s "class-based" requirements well beyond race to other protected, mutable categories such as political affiliation, *see Keating v. Carey*, 706 F.2d 377, 388 (2d Cir. 1983) (holding that "allegations that the defendants conspired against [plaintiff] because he was a Republican satisfies the *Griffin* requirement under § 1985(3) of class-based animus"); *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989) (declining to overturn *Keating* but finding that plaintiff had only alleged individual discrimination); *Rini v. Zwirn*, 886 F. Supp 270 (E.D.N.Y. 1995) (applying *Keating* and holding that allegations that defendants were motivated by plaintiffs' membership in the Republican Party satisfied the protected class requirement under Section 1985(3)), religion, *Jews for Jesus v. Jewish Comm. Rel. Council of N.Y., Inc.*, 968 F.2d 286 (2d Cir. 1992) (affirming that "class-based animus" includes religion and holding plaintiff group raised fact issues for trial), disability, *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993) (holding disabled individuals may be a class protected by Section 1985(3)). Another extended the law to sexual orientation. *Jenkins v. Miller*,

983 F. Supp. 2d 423, 459 (D. Vt. 2013). And another to a religious cult founded in 1982. *Zhang Jingrong v. Chinese Anti-Cult World Alliance (CACWA)*, 287 F. Supp. 3d 290 (E.D.N.Y. 2018).

The case of *Lederman v. Giuliani*, No. 98 Civ.2024LMM/JCF, 2007 WL 1623103 (S.D. N.Y. June 5, 2007), illustrates the flexibility of the Section 1985(3) class requirement. In *Lederman*, the plaintiff was arrested in connection with his activities with an organization called A.R.T.I.S.T., "a group comprised of street artists who advocate for greater rights and privileges under the First Amendment for street artists." *Id.* at *1. The Court denied defendants' motion for summary judgment finding that "[w]hether or not A.R.T.I.S.T. qualifies as a political affiliation of satisfying the second element of a 1985(3) claim, where 'class-based' animus is a requirement according to *Griffin* is an issue of material fact" for the jury who could see it as "merely 'a group of individuals who share a desire,'" or who "could perceive it as a political group with an agenda disapproved of by Defendants." *Id.* at *5; *see also Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (holding that a plaintiff's "political views" provided a sufficient basis for class-based discrimination); *Johnson-Kirk v. OB GYN Womenservices, P.C.*, No. 93-CV-0702E(F), 1995 WL 307589, at *7 (W.D.N.Y. May 15, 1995) (indicating that the court would consider motion for leave to amend where plaintiff, an anti-abortion protestor, was arrested and brought claims against private and government defendants but had failed to allege class-based animus). With respect to at least the political identity of those unvaccinated against COVID-19, Mr. Berenson is entitled to have a trier of fact determine whether the class he has identified is merely a group of individuals who share a "desire" or whether it could be perceived as a "political group with an agenda disapproved of by Defendants." *Lederman*, 2007 WL 1623103, at *5.

The Federal Defendants argue that *Dolan v. Connolly*, 794 F.3d 290 (2d Cir. 2015), requires "inherited or immutable characteristic[s]" for the proposed class. *Id.* at 296; (Dkt. 99 at

50). But that language relates to the Court's rejection of the plaintiff's contention that Section 1985(3) "encompasses classes of jailhouse lawyers and members of an [inmate liaison committee]." *Dolan*, 794 F.3d at 294. In the preceding paragraph, the Court affirms *Keating*'s holding that political affiliation is covered. *See id.* Because political affiliation and religion are not immutable traits, the Federal Defendants' immutable characteristics standard does not apply to the class-based analysis under Second Circuit precedent.

The Federal Defendants next analogize Mr. Berenson's "purported class of those who chose *not to* receive the COVID-19 vaccine" to the "class of women who chose *to* seek abortions" which the Supreme Court rejected in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). (Dkt. 99 at 51.) That comparison fails for a threshold reason. The Supreme Court rejected "women seeking an abortion" as "a qualifying class" because "[t]he record in this case does not indicate the petitioner's demonstrations are motivated by a purpose . . . directed specifically at women as a class." *Bray*, 506 U.S. at 269. What would be actionable, the Court explained, is "a purpose that focuses on women *by reason of their sex*—for example . . . the purpose of 'saving' women *because they are women* from a combative, aggressive profession such as the practice law." *Id.* at 270. (emphasis in original).

That is the kind of actionable, purpose-driven animus Mr. Berenson has alleged here. The Federal Defendants targeted Mr. Berenson for the purpose of cutting his reporting off from the "persuadable public"—the Americans who had declined to take a COVID-19 vaccine. (Dkt. 80-1 ¶ 119.) The "really tough question" asked by the White House officials in April 2021 and the subsequent pressure campaign were aimed at keeping Mr. Berenson from speaking to and preventing unvaccinated Americans from reading his reporting. They explicitly aimed their censorship efforts at people who were unvaccinated, as Mr. Slavitt himself explained on his

podcast when he called for platforms "to cut down on the amount of false information *that people who haven't been vaccinated* see." Clegg Podcast, *supra* (emphasis added).

Bray also did not present a political class question. President Biden himself referred to so-called "pandemic politics" which "are making people sick, causing unvaccinated people to die." *Id.* This is in addition to Mr. Slavitt's observations on the political connections to vaccination status, including when he served in the White House. Mr. Slavitt asserted that refusal to take one of the COVID-19 vaccines is not "necessarily a political thing," but rather that "it may be political." (Dkt. 80-1 ¶ 101.) That is a jury question.

The Federal Defendants' reliance on *Bray* is misplaced for another reason. That case involved a purely private conspiracy. *Bray*, 506 U.S. at 278. The conspiracy at issue in this case spans the White House, another federal department, and private actors. What gives rise to Mr. Berenson's Section 1985(3) claim is not the machinations of purely private actors, but a "public-private partnership aimed at censoring critics of the federal government and the COVID-19 vaccines." (Dkt. 80-1 ¶ 226.) The *Bray* Court's concern about transforming Section 1985(3) into a "general federal tort law" is cabined here because of the nature of the allegations and the federal government's involvement in the censorship at issue. The Federal Defendants' argument that Mr. Berenson failed to state a constitutional violation is addressed above. (Dkt. 99 at 53.)

VI. The Federal Defendants are not entitled to qualified immunity.

Qualified immunity protects public officials "from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Deskovic v. City of Peekskill,* 894 F. Supp.2d 443, 451 (S.D.N.Y. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).[17] Reasonableness is

[17] Qualified immunity is a shield against civil damages, *Harlow v. Fitzgerald*, 457 U.S. 800, 803 (1982), not injunctive relief, *see Vincent v. Yelich*, 718 F.3d 157, 176 (2d Cir. 2013).

"judged against the backdrop of law at the time of conduct." *Deskovic*, 894 F. Supp.2d at 451. Even at the summary judgment stage, objective reasonableness requires a showing that no reasonable jury when "viewing the evidence in the light most favorable to the [p]laintiff could conclude that defendant's actions were objectively unreasonable in light of clearly established law." *Id.* (quoting *O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003)). If the law was not clearly established, the immunity defense "ordinarily should fail." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The issue here is whether it was clearly established that the Federal Defendants' conduct violated the First Amendment.

The Supreme Court's unanimous *Vullo* decision establishes that. Even before that decision, however, precedent in the Second Circuit would have compelled the same conclusion. O*kwedy*, a 2003 Second Circuit decision discussed above, and cited by the Supreme Court in *Vullo*, established that a public official's implicit threat of retaliation against a third-party publisher of another's message is enough to state a First Amendment claim. 333 F.3d at 342-44.

Zieper v. Metzinger, 474 F.3d 60 (2d Cir. 2007), also put the Federal Defendants on notice that coercive conduct of this type would violate the First Amendment. In *Zieper*, the court found that a genuine issue of material fact existed as to whether the defendants in that case, an FBI agent and Assistant United States Attorney, engaged in sufficiently threatening conduct to violate the plaintiff's free speech rights. The conduct at issue was the FBI agent's statement to the plaintiff's attorney that FBI agents were on their way to plaintiff's house after the attorney conveyed that plaintiff would not take down a video that the agent had asked to be removed from the internet. *Id.* at 66. While the court found that "the First Amendment prohibits 'implied threats to employ coercive state power to stifle protected speech'" was well established in law, it found that defendants were entitled to qualified immunity because the Second Circuit's pre-existing law

would "not have made apparent to a reasonable officer that defendants' actions crossed the line," but the court set the line going forward. *Id.* at 70-71.

Here, the totality of the facts and circumstances of the White House threats, including the actions taken by Mr. Flaherty and Dr. Murthy, is at least as coercive as the conduct at issue in *Zieper*. What is more, the White House, including former COVID-19 advisor Mr. Slavitt, hid what they did, indicating these officials knew what they were doing violated the First Amendment. Despite a Facebook executive warning him about free speech concerns, (Dkt. 80-1 ¶ 126), Mr. Slavitt targeting Mr. Berenson in April 2021, repeatedly discussing him in the press, and publicly celebrating his Twitter ban, he told *The Atlantic* in August 2022, "I think his name was in a magazine article," and that "I don't remember anything else about him." (*Id.* ¶ 215.)

In light of the Second Circuit's admonition in *Zieper* in 2007 and other Second Circuit precedent, it is clear that a reasonably competent public official would know that her actions had crossed from persuasion to coercion, thus negating the defense of qualified immunity. In any event, it would be inappropriate to dismiss Mr. Berenson's claims at this stage of the litigation, before discovery, when a reasonable jury could conclude that the actions taken by the Federal Defendants were coercive and thus violated the First Amendment. *See*, *e.g.*, *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999) (holding "summary judgment on qualified immunity is not appropriate when facts are in dispute that are material to a determination of reasonableness"); *Wahad*, 813 F. Supp. at 230 (denying on summary judgment on qualified immunity defense); *Lederman*, 2007 WL 1623103, at *3 (finding fact issue on qualified immunity defense).

CONCLUSION

For the foregoing reasons, Mr. Berenson respectfully prays that this Court denies the Federal Defendants' motion to dismiss.

Respectfully submitted, this 15th day of November, 2024.

By: */s/ James R. Lawrence, III*
JAMES R. LAWRENCE, III
NC State Bar No. 44,560*
ANTHONY J. BILLER
NC State Bar No. 24,117*
ENVISAGE LAW
2601 Oberlin Rd, Suite
Raleigh, NC 27608
Phone: 919.755.1317
Facsimile: 919.782.0452
Email: jlawrence@envisage.law

SEAN P. GATES (SBN 186247)*
Illovsky Gates & Calia LLP
155 N. Lake Avenue, Suite 800
Pasadena, CA 91101
Phone: 626.508.1715
E-mail: sean@illovskygates.com

DAVID J. HOFFMAN
Attorney at Law
254 W. 15th Street Apt 2C
New York, New York 10011
Phone: 917.701.3117
E-mail: djhoffman@djhoffmanlaw.com

* admitted pro hac vice