No. _____

In the

Supreme Court of the United States

COLLEEN HUBER,

Petitioner,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; TWITTER, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Dr. Colleen Huber sued President Biden (in his official capacity) and Twitter for censoring Dr. Huber's speech on Twitter critical of the Biden administration's COVID-19 vaccine policies. To this end, the First Amended Complaint alleges facts to plausibly evidence a conspiracy to have Twitter censor speech critical of the Biden administration's vaccine policies on behalf of the administration.

The Ninth Circuit concluded that there was no state action because the alleged facts and their reasonable inferences did not sufficiently allege a conspiracy (*i.e.*, a meeting of the minds) for Twitter to do that which the Biden administration could not lawfully do itself. Specifically, the panel turned to the Ninth Circuit's "alternative explanation" rationale to conclude that an alternative explanation (*i.e.*, Twitter acting on its own to enforce its "Terms of Service") required Petitioner to allege facts tending to exclude the alternative explanation.

The questions presented are twofold.

- Whether an alternative explanation of non-liability requires additional facts beyond a plausible claim that tend to exclude the alternative explanation pursuant to Rules 8(a) and 12(b)(6).
- Whether a conspiracy between the federal government and a social media company to censor protected speech requires more than the reasonable inferences derived from the expressly alleged facts in the First Amended

Complaint to establish state action at the pleading stage.

PARTIES TO THE PROCEEDING

The Petitioner is Dr. Colleen Huber.

The Respondents are Joseph Biden, Jr., in his official capacity as President of the United States, and Twitter, Inc. (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is unofficially reported at 2022 U.S. App. LEXIS 35107 and 2022 WL 17818543. The opinion of the district court appears at App. 5 and is unofficially reported at 2022 U.S. Dist. LEXIS 48660 and 2022 WL 827248. The denial of the petition for rehearing en banc appears at App. 36 and is reported at 2023 U.S. App. LEXIS 9472.

JURISDICTION

The memorandum disposition of the court of appeals was entered on December 20, 2022. App. 1-4. A petition for rehearing was denied on April 20, 2023. App. 36-37. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES AND CONSTITUTIONAL PROVISION INVOLVED

Rule 8(a) provides in relevant part as follows: "(a) Claim for Relief. A pleading that states a claim for relief must contain: . . .; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; . . . ." Fed. R. Civ. P. 8(a)(2).

Rule 12(b)(6) provides in relevant part as follows: (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted; . . . ." Fed. R. Civ. P. 12(b)(6).

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

The district court dismissed the First Amended Complaint ("FAC") in relevant part pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on March 18, 2022 (ER-3), holding that Petitioner did not allege sufficient facts to establish the conspiracy prong of the joint action test of state action as set out in *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)." App. 12-25.

Petitioner filed her notice of appeal on March 24, 2022. ER-46–47.

On December 20, 2022, the Ninth Circuit ruled in favor of Respondents, affirming the dismissal in an unpublished memorandum. App. 1-4. The panel held that the FAC "does not contain any nonconclusory allegations plausibly showing an agreement between Twitter and the government to violate her constitutional rights." App. 3. The appellate court provided no substantive analysis. To support its conclusion, however, the panel turned to the "alternative explanation" rationale as a basis to conclude that "an allegation is not plausible where there is an 'obvious alternative explanation' for alleged misconduct." App. 3 (citing *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1055 [9th Cir. 2019] quoting [*Ashcroft v.*] *Iqbal*, 556 U.S. 662, 682 [2009]). The panel concluded that the FAC was not plausible because "Huber's allegations do not 'tend to exclude the possibility' of the alternative explanation that

Twitter, in suspending her account, was independently enforcing Huber's violation of Twitter's Terms of Service." App. 3.

Petitioner filed a timely petition for rehearing en banc, which was denied. App. 36-37. This petition follows.

As set forth below, the panel's decision creates a circuit split regarding the application of the "alternative explanation" rationale first espoused by this Court in *Twombly*. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567-68 (2007). *See* Sup. Ct. R. 10(a) (providing that a conflict among the circuits is a basis for review by this Court). That is, the federal appellate courts are divided over whether an "alternative explanation" requires a plausible claim to provide factual allegations that "tend to exclude" the alternative explanation. In addition, the Ninth Circuit's unpublished memorandum opinion purportedly affirming dismissal following *de novo* review provides scant analysis applying the law to the facts other than to say that the FAC's allegations of state action are conclusory. This case implicates the need for the Court's supervisory power. *Id*. Accordingly, the Court should grant this petition.

INTRODUCTION

In general, this case presents a constitutional challenge that asks how far may the government go utilizing private actors to censor speech of which the government disapproves. In contemporary times, this question has enormous consequences for liberty in general, political freedom in particular, and free speech most particularly. Large social media

platforms and their concentration of economic power are relatively new to the law. Their unique ability to control the social and political messaging of public sentiment through hidden algorithms and even outright censorship has become a battleground for those in different and even adversarial political camps.

We note here that this is not some marginal consequence that robbed Dr. Huber of her participation in the marketplace of ideas as a lone voice in the wilderness. Beyond the facts expressly alleged in the FAC, we now have the benefit of a much fuller and disturbing picture of the way in which government has employed its authority and reach to control discourse on critical matters of public concern by partnering with social media platforms to censor protected speech for and on behalf of the government. *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585, at *5-*111 (W.D. La. July 4, 2023). No one who values free speech as the cornerstone of our democracy can read the factual findings in *Missouri v. Biden* and not understand the dire implications of an apathetic response.

In this context, this petition provides the Court an opportunity to resolve the conflicting circuit applications of the "alternative explanation" rationale mentioned in *Twombly* and *Iqbal*. To be sure, Rule 12(b)(6) has an important gatekeeping role in "weeding out meritless claims. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). This case, however, highlights how the circuit courts have taken the explanatory language of an "alternative explanation" in *Twombly* and *Iqbal* and converted it

into a distinct rationale but with conflicting applications across the different circuits.

FACTUAL BACKGROUND

The relevant facts before the courts below and as alleged in the FAC are as follows:

Prior to the conspiracy, Twitter and the other social media platforms were not sufficiently censoring speech critical of the government's COVID vaccine policies on their own accord and for their own business purposes (*i.e.*, pursuant to their "Terms of Service"). FAC ¶ 42 at ER-32 ("The companies have repeatedly vowed to get rid of such material on their platforms ***but gaps remain in their enforcement efforts***.") (emphasis added).

The Biden administration was in direct communication with Twitter about the failure of the social media giant to censor disfavored COVID speech. *Id*. ("The White House has been reaching out to social media companies including Facebook, Twitter and Alphabet Inc's Google about clamping down on COVID misinformation and getting their help to stop it from going viral, a senior administration official said.").

The White House considered its effort existential and akin to a wartime effort. (*Id*.)

As a result, the Biden administration pronounced publicly that it sought a ***direct engagement*** with Twitter not merely to censor speech, the viewpoint of which the Biden administration disapproved, but also to instruct Twitter exactly ***how to censor*** the objectionable speech and how to do it ***quickly***. *Id*. ("We are talking to them ... so they understand the

importance of misinformation and disinformation ***and how they can get rid of it quickly***.") (emphasis added).

Twitter publicly acknowledged this direct engagement wherein the government is not only communicating to Twitter to do more to censor speech on the government's behalf than Twitter was previously prepared to do on its own via the Terms of Service, but also instructing Twitter how to censor this disfavored speech and how to do it quickly. *Id.* ("A Twitter spokesman said the company is 'in regular communication with the White House on a number of critical issues including COVID-19 misinformation.'").

Just a few weeks later, Twitter publicly discloses a "partnership" with the Biden administration to "elevate" government-favored speech about COVID vaccines. FAC ¶ 52 at ER-33.

Shortly after the public announcements of Twitter's "direct engagement" with the Biden administration to censor speech critical of the governments vaccine policies, Twitter banned Petitioner from its platform. FAC ¶¶ 32-41 at ER-28-32.

Thus, we know directly from these non-conclusory, quite factually explicit allegations that Twitter had not censored speech pursuant to its Terms of Service sufficiently for government purposes. This is key because this fact was demonstratively ignored by the courts below to conclude that Respondents' "alternative explanation" that it was merely and innocently enforcing its own Terms of Service and not acting in furtherance of its conspiracy with the

government was so overwhelmingly plausible that all the facts and reasonable inferences of a conspiracy were neutered and rendered merely possible.

We also know from the factual allegations that the Biden administration considered Twitter's failure to censure speech pursuant to its Terms of Service to be a threat to the country's national security and very existence ("wartime effort").

Further, the Biden administration took this partnership with Twitter to the point that it had to literally instruct Twitter not only what it should censor but how to do so quickly enough to satisfy the government.

So what may we now reasonably infer from the above facts? We may quite reasonably infer that Twitter and the Biden administration reached an agreement—whether verbal or non-verbal agreement (*i.e.*, a conspiracy in the form of a meeting of the minds[1])—for Twitter to do that which the Biden administration was instructing Twitter to do but could not do itself legally. This inference is heightened beyond reasonableness precisely because we know

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[1] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 153-54 (1940); *United States v. Heck*, 499 F.2d 778, 787 (9th Cir. 1974) ("A conspiracy is defined as a combination of two or more persons to accomplish some unlawful purpose, or some lawful purpose by unlawful means. It is a partnership for criminal purposes in which each member becomes the agent for every other member [. . .], when the conspiracy has been proven to exist, and that the person charged was one of its members."); *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) (To prove a conspiracy between a private entity and the government, "an agreement or meeting of the minds to violate constitutional rights must be shown.") (cleaned up).

that Twitter had heretofore not censored speech satisfactorily pursuant to its own business interests and we also know that the government went beyond jaw-boning or utilizing the bully-pulpit of the White House and actually instructed Twitter on what to do and how to do it quickly.

Beyond this natural and reasonable inference, we may infer that Twitter's decision to censor Dr. Huber's speech was the result of that agreement. Again, this inference is persuasively reached because we know that prior to the publication of these facts, Twitter did not apply its Terms of Service to Dr. Huber and others sufficiently for government purposes. *Iqbal*, 556 U.S. at 678. ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.") (citations omitted).

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts Are Split on the Application of the Alternative Explanation Rationale.

A. *Iqbal* and *Twombly*'s Use of the Obvious Alternative Explanation.

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). Circuit courts have applied the alternative explanation rationale in a variety of inconsistent ways, some of which, notably the Ninth Circuit's, are

in opposition to this Court's use. We begin with the proper understanding of the "obvious alternative explanation" rationale arising from *Twombly* and *Iqbal*.

When speaking of possibility, plausibility, and probability in the context of 12(b)(6)'s very important gatekeeping function for federal litigation, one is referring to a commonsense or experience-based application of statistics. *Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); *Twombly*, 550 U.S. at 565 ("The nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.") The use by the Court of the terms possibility, plausibility, and probability are the words we use when speaking of our common sense experience with statistical outcomes that cannot be measured by a scale or mathematics.

It is a spectrum (that includes impossible and certainty as the two extremes) without a definitive spectral boundary where possible outcomes end and plausible outcomes begin. To be yet more explicit, an outcome or claim of liability is possible when the favored outcome or explanation is one of any number of outcomes or explanations such that to rely on any one outcome or explanation is unreasonable. It is possible that one might win a lottery with

astronomical odds, but it would be unreasonable to rely on the winnings in advance of the drawing to pay this month's mortgage. Plausibility, on the other hand, means to say that while there are several possible outcomes or explanations, the favored one reaches the level at which one may reasonably rely. At its height, plausibility reaches fifty percent. Thus, if an outcome is determined by a coin toss, there are two plausible outcomes, either of which would be a reasonable choice if circumstances dictated one must choose.[2] Probability is obviously speaking of an outcome one would expect occurs more than half of the time. Precisely because of the fact that these expressions of statistical outcomes are not measurable, at least not in the judicial context, the boundaries separating these spectral bands are often unclear. Thus, judicial experience and common sense are employed.

In both *Iqbal* and *Twombly*, the Court's application of the "obvious alternative explanation" was merely a way to explain that when the complaint's explanation of liability falls on the indeterminate boundary between possible and plausible, an "obvious alternative explanation" tips the scales in favor of merely possible. It should go without saying, but it needs to be said given certain judicial applications of the alternative explanation rationale (as explained below), that a complaint might very well articulate a plausible claim of liability even in the face of another more "obvious alternative explanation." That is, an

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[2] Obviously, it would not be reasonable to bet your life on a coin toss unless circumstances dictated that you must. In such a case, either choice would be plausible.

obvious alternative explanation or a "natural explanation" (*Twombly*, 550 U.S. at 569) might be the more plausible explanation (*i.e.*, the more reasonable explanation) among other plausible (*i.e.*, reasonable) explanations, but it does not *ipso facto* convert the complaint's plausible claim to a mere possible one.

Moreover, if a claim is in and of itself only possible, to assert an ***obvious*** alternative explanation is simply another way of saying that the outcome alleged by the complaint is statistically implausible because the odds of the alternative explanation are so high. For example, and returning to the lottery, an allegation lacking concrete facts at least suggesting that someone cheated during the lottery drawing are manifestly only possible because the odds of losing, *a priori*, are so high (*i.e.*, "obvious alternative explanation"). Thus, "obvious" in this context does not mean obvious in common parlance, in which case it means "easy to see, recognize, or understand."[3] In the vernacular, an obvious alternative explanation could be one that is plausibly equal to, less than, or more than the claim alleged in the complaint, albeit obviously an alternative explanation. Our coin toss analogy is one example of an alternative explanation that is obvious but no more or less obvious than the favored explanation. Rather, "obvious" as used in *Twombly* means statistically overwhelming such that the complaint's claim is necessarily only possible insofar as it is not statistically a reasonable one.

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[3] Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/obvious (last accessed on July 18, 2023).

We turn now to the circuits.

B. The Circuit Courts Are Split on the Application of the Alternative Explanation Rationale.

1. The Fourth Circuit's Clearly Articulated Application Is Perfectly Aligned with *Twombly-Iqbal*.

In *Houck v. Substitute Trustee Services, Inc.*, the Fourth Circuit articulated a correct and clear application of the alternative explanation rationale:

> It is well established that a motion filed under Rule 12(b)(6) challenges the legal sufficiency of a complaint, *see Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009), and that the legal sufficiency is determined by assessing whether the complaint contains sufficient facts, when accepted as true, to "state a claim to relief that is plausible on its face," *Iqbal*, 556 U.S. at 678, (quoting *Twombly*, 550 U.S. at 570). This plausibility standard requires only that the complaint's factual allegations "be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.
>
> In light of these well-established principles, we agree with Houck that the district court's articulated standard was erroneous. While the court correctly accepted the complaint's factual allegations as true, it incorrectly undertook to determine whether a lawful alternative explanation appeared more likely. To survive a motion to dismiss, a plaintiff need not demonstrate that her right to relief is probable

> or that alternative explanations are less likely; rather, she must merely advance her claim "across the line from conceivable to plausible." *Id.* at 570. If her explanation is plausible, her complaint survives a motion to dismiss under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation. The district court's inquiry into whether an alternative explanation was more probable undermined the well-established plausibility standard.

Houck v. Substitute Tr. Servs., Inc., 791 F.3d 473, 484 (4th Cir. 2015) (cleaned up). The Fourth Circuit has cited *Houck* regularly and consistently. *Tutt v. Wormuth*, No. 19-2480, 2021 U.S. App. LEXIS 26986, at *5-6 (4th Cir. Sep. 8, 2021) (quoting *Houck,* 791 F.3d at 484) ("Rather, '[i]f [a plaintiff's] explanation is plausible, her complaint survives a motion to dismiss under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation.'"); *Jesus Christ is the Answer Ministries, Inc. v. Balt. Cty.*, 915 F.3d 256, 263 (4th Cir. 2019) (quoting *Houck,* 791 F.3d at 484) ("And as with all claims, at the motion to dismiss stage 'a plaintiff need not demonstrate that her right to relief is probable or that alternative explanations are less likely; rather, she must merely advance her claim 'across the line from conceivable to plausible.'"); *Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) (citing *Houck*, 791 F.3d at 484) ("The question is not whether there are more likely explanations for the City's action, however, but whether the City's impliedly proffered reason . . . is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation

that it renders BNT's claim of pretext implausible."); *Alive Church of the Nazarene, Inc. v. Prince William Cty.*, 59 F.4th 92, 104 (4th Cir. 2023) (quoting *Jesus Christ Is the Answer Ministries, Inc. v. Balt. Cnty.*, 915 F.3d at 263 ("If a plaintiff sufficiently alleges a prima facie case of discrimination [in a RLUIPA claim], a court may not dismiss that claim, 'even if the defendant advances a nondiscriminatory alternative explanation for its decision, and even if that alternative appears more probable.'").

For analytical purposes, an important case from the Fourth Circuit is *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015). Here, the appellate court was dealing with a 12(b)(6) dismissal of an antitrust conspiracy similar to *Twombly*. The court carefully explained the problem of treating the alternative explanation rationale as some kind of evidentiary balancing between the parties' competing theories, and the fact that district courts had fallen into that trap based upon a misreading of *Twombly/Iqbal*:

> Importantly, *Twombly*'s requirement to plead something "more" than parallel conduct does not impose a probability standard at the motion-to-dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. at 678. Courts must be careful, then, not to subject the complaint's allegations to the familiar "preponderance of the evidence" standard. *Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010). When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. But it is not our task

> at the motion-to-dismiss stage to determine "whether a lawful alternative explanation appear[s] more likely" from the facts of the complaint. *Houck*, 791 F.3d at 484. Post-*Twombly* appellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases. *See, e.g., Evergreen Partnering Grp.*, 720 F.3d 33, 50 (1st Cir. 2013); *Erie Cnty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868-69 (6th Cir. 2012); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 189 (2d Cir. 2012).

SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 425 (4th Cir. 2015) (cleaned up). *SD3* is further noteworthy because the majority explicitly rejected the district court's and the dissent's view that the existence of an obvious or more likely alternative explanation necessarily renders allegations merely possible. *Id.* at 483 and 445 (dissent).

2. The Second, Sixth, Eighth, and D.C. Circuits Align with the Fourth Circuit and Petitioner's View of the Proper Application of the Alternative Explanation Rationale.

The Second, Sixth, Eighth, and D.C. Circuits appear to have applied the alternative explanation rationale in a way that aligns with the Fourth Circuit and Petitioner's. *Palin v. N.Y. Times Co.*, 940 F.3d 804, 815 (2d Cir. 2019) ("[I]t is not the district court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory. The test is whether the complaint is plausible, not whether it is

less plausible than an alternative explanation."); *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012) ("We have held that the mere existence of an 'eminently plausible' alternative, lawful explanation for a defendant's allegedly unlawful conduct is not enough to dismiss an adequately pled complaint because pleadings need only be 'plausible, not probable.' *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011)."); *Strike 3 Holdings, LLC v. Doe*, 448 U.S. App. D.C. 159, 167, 964 F.3d 1203, 1211 (D.C. Cir. 2020) ("Amicus contends that the district court's reasoning was correct because there is an 'obvious alternative explanation'" for the John Doe's alleged conduct: that someone else with access to the IP address in question committed the alleged infringement. It is undoubtedly true that individuals other than the IP address subscriber may have been responsible for the infringement at issue. On these facts, however, we do not find this alternative explanation so obvious as to render Strike 3's claim against the subscriber facially implausible.").

The Eighth's Circuit's decision in *McDonough v. Anoka County*, 799 F.3d 931, 945-46 (8th Cir. 2015), is especially instructive as to a point made earlier (*infra* at 10 ["In both *Iqbal* and *Twombly*, the Court's application of the 'obvious alternative explanation' was merely a way to explain that when the complaint's explanation of liability falls on the indeterminate boundary between possible and plausible, an 'obvious alternative explanation' tips the scales in favor of merely possible."]). In other words, a claim plausible on its face is not rendered merely possible by virtue of an obvious alternative explanation. The obvious

alternative explanation rationale is only dispositively useful when confronted with a claim that lies on the fuzzy line between possible and plausible.[4] Thus, the *McDonough* court explained:

> Courts considering a motion to dismiss may choose to begin by identifying allegations that are no more than conclusions and therefore are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. Courts may then review the remaining allegations to determine whether they are sufficient "to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. Courts should consider whether there are lawful, "obvious alternative explanation[s]" for the alleged conduct, because "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678, 682 (quoting *Twombly*, 550 U.S. at 557, 567). If the alternative explanations are not sufficiently convincing, however, the complaint states a plausible claim for relief, because "[f]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet & Floor*

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[4] As also explained earlier (*infra* at 11), "to assert an obvious alternative explanation is simply another way of saying that the outcome alleged by the complaint is statistically implausible because the odds of the alternative explanation are so high."

> *Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d at 458.

McDonough v. Anoka Cty., 799 F.3d at 945-46 (8th Cir. 2015).

3. The Ninth Circuit Requires a Complaint that Tends to Exclude an Alternative Explanation.

The Ninth Circuit has adopted a theory of the alternative explanation rationale that requires a plaintiff to provide sufficient facts that tend to negate or "exclude" the alternative explanation. As we will discuss shortly and as we've noted above, this cannot be correct as a matter of logic, and certainly not at the pleading stage pre-discovery, because an alternative explanation may exist side-by-side with a viable claim of wrongdoing irrespective of whether the alternative explanation is equally plausible or more plausible than plaintiff's claim. Thus, the Ninth Circuit recently described the "tends-to-exclude" requirement in the context of a 12(b)(6) motion as follows:

> Rueda Vidal alleges that the officers seized and arrested her without reasonable suspicion or probable cause. Defendants offer the "obvious alternative explanation" that the officers were aware of her immigration status, giving them reasonable suspicion to seize her and probable cause for her arrest. *Twombly*, 550 U.S. 544 at 127. "When faced with two possible explanations . . . plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation. Something

> more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). The facts alleged by Rueda Vidal may support an inference that she was targeted by the officers even though they did not know she was undocumented, but do not tend to exclude the more plausible alternative explanation that her immigration status had been checked before the officers arrived at her house to make the arrest.

Vidal v. Bolton, 822 F. App'x 643, 644 (9th Cir. 2020); s*ee also Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1166-67 (9th Cir. 2022); *Eclectic Props. E., Ltd. Liab. Co. v. Marcus & Millichap Co.*, 751 F.3d 990, 998-99 (9th Cir. 2014); *Petzschke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729 F.3d 1104, 1108 (9th Cir. 2013) (same); *but see SmileDirectClub, Ltd. Liab. Co. v. Tippins*, 31 F.4th 1110, 1117 (9th Cir. 2022) (illustrating the Ninth Circuit does not apply the "tend-to-exclude" requirement consistently).

Indeed, this tends-to-exclude requirement was explicitly relied upon by the panel and implicitly by the district court below. App. 3 ("Huber's allegations do not 'tend to exclude the possibility' of the alternative explanation that Twitter, in suspending her account, was independently enforcing Huber's violation of Twitter's Terms of Service."); App. 17 (holding that Twitter had unfettered right to censor Petitioner's speech by virtue of its Terms of Service

and "[t]here is no showing here that the action taken by Twitter on Plaintiff's account was not an independent one.").

As far as we can tell, the Ninth Circuit stands alone in requiring allegations that "tend to exclude" an alternative explanation at the 12(b)(6) stage of the proceedings. Before turning to how the other circuits address this unique Ninth Circuit requirement, it is worthwhile to place the holding in the context of the facts here. Twitter, like all social media platforms, include within their respective terms of service that it can do just about anything it wishes in just about any way it wishes. And it is true that a plausible alternative explanation is that Twitter acted entirely independent of the Biden administration based solely on the Terms of Service.

But it is also true, and Petitioner would contend more so, that Twitter acted pursuant to its conspiracy with the government to censor speech critical of the administration's vaccine policies. The facts are not just consistent with this conclusion but strongly suggestive. Thus, and as noted above, Twitter had not censored speech critical of the vaccine policies sufficient for government purposes. Consequently, the Biden administration, treating the crisis as an existential "war effort," directly engaged with Twitter not only to show Twitter what to censor, but literally how to do so, and to do so quickly. Almost immediately thereafter, Petitioner's Twitter account was shut down.

While Petitioner's facts actually do "tend to exclude" the alternative explanation of acting independently pursuant to the Terms of Service, why

is that necessary? Indeed, the facts might suggest that Twitter terminated the account based upon Twitter's illegal partnership with the Biden administration to censor speech utilizing its "legal" contractual right to do so provided by its Terms of Service. To this point, it is rudimentary conspiracy law that a co-conspirator in a conspiracy requiring an overt act satisfies the "act in furtherance of" requirement even by engaging in a perfectly legal act (*i.e.*, terminating an account based upon a contractual right to do so) if the act is to further the conspiracy. *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts where one or more of such parties do any act to effect the object of the conspiracy. The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.") (cleaned up); *United States v. Hirokawa*, 342 F. App'x 242, 247 (9th Cir. 2009) (same) (citing *Braverman*); *United States v. Nelson*, 852 F.2d 706, 713 (3d Cir. 1988) (approving the following jury instructions: "In order to find a defendant guilty of conspiracy in Counts 1 and 4, you must also find beyond a reasonable doubt that one or more overt acts were committed in furtherance of the conspiracy by one or more persons you find to be members of the conspiracy. An overt act is an act knowingly committed by one of the conspirators in an effort to effect, achieve, or accomplish some object or purpose of the conspiracy. The act itself need not be criminal in nature if considered separately and apart from the

conspiracy. It may be as innocent on its face as the act of meeting, writing a letter, depositing a check, or talking on the telephone. However, it must be an act that follows and tends toward the accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.").

4. Every Other Circuit that Has Addressed the "Tends-to-Exclude" Requirement Has Rejected It.

In expressly rejecting the "tends to exclude" requirement, the Fourth Circuit most succinctly explained its rationale:

> Similarly, courts must be careful not to import the summary-judgment standard into the motion-to-dismiss stage. At summary judgment in a § 1 case, a plaintiff must summon "evidence tending to exclude the possibility of independent action." *Twombly*, 550 U.S. at 554; *see also Monsanto*, 465 U.S. 752, 764 (1984); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). But the motion-to-dismiss stage concerns an "antecedent question," *Twombly*, 550 U.S. at 554, and "[t]he 'plausibly suggesting' threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility' standard for summary judgment," *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010). Thus, "[a]lthough *Twombly*'s articulation of the pleading standard for § 1 cases draws from summary judgment jurisprudence, the standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct."

> *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 n. 21 (3d Cir. 2010). "[T]here is no authority . . . for extending the [*Monsanto/Matsushita*] standard to the pleading stage." *Erie Cnty.*, 702 F.3d at 869. Indeed, such an extension would be wholly unrealistic, as "a plaintiff may only have so much information at his disposal at the outset." *Robertson* v. Sea Pines Real Estate Cos., 679 F.3d 278, 291 (4th Cir. 2012). Here, for instance, SawStop was three months into its case and had not conducted any discovery when the defendants moved to dismiss. We can hardly expect it to have built its entire case so early on.

SD3, LLC, 801 F.3d at 425-26. The Sixth Circuit has joined the Second and Third Circuits mentioned above in the Fourth Circuit's *SD3* holding as rejecting the tends-to-exclude requirement. *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868-69 (6th Cir. 2012) (following the same analysis as in *SD3*).

It is worth noting here in conclusion that the Ninth Circuit's unique imposition upon a plaintiff to provide evidence tending to exclude the alternative explanation is not a harmless one. Rule 12(b)(6) provides an important gatekeeping function for federal litigation. Plausibility fulfills that role. But as we noted at the outset, plausibility must have some objective meaning lest the courts, in calling balls and strikes, are free to expand or shrink the strike zone to suit their personal tastes or ideological preferences. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020). Logic dictates that alternative plausible explanations, as in this case, may exist side-by-side and should be

able to remain so at the pre-discovery stage. Imposing a tends-to-exclude obligation on deserving plaintiffs, as in this case, alleging serious violations of our most fundamental and cherished liberty, is to reduce the 12(b)(6) standard to a subjective, quite possibly ideologically-driven judicial veto to what would otherwise be meritorious claims.

Indeed, as we all know, and as is true in this case, all of the dominant social media platforms build into their respective terms of service an alternative explanation for cases such as this (*i.e.*, we can do whatever we want) and further require venue and choice-of-law in Northern California. If plaintiffs are required at the pre-discovery stage to come up with evidence that tends to exclude the alternative explanation, they would likely have to have access to internal documents or emails with government officials providing some inference that the company is acting contrary to its terms of service. That kind of evidence is typically only available when whistleblowers risk violating their non-disclosure employment covenants or when the states sue and can choose a venue outside of the Ninth Circuit because they are not parties to the terms of service. *See, e.g., Missouri v. Biden*, 2023 U.S. Dist. LEXIS 114585, at *34-*35 nn.117-121 (listing just one of literally dozens of examples of the partnership between the social media platforms [Twitter in this instance] and government officials for the purpose of censoring protected speech on behalf of the government even when the company objected on the grounds that it did not violate its terms of service or policies).

II. The Circuit Court's Unpublished Memorandum Concludes (Erroneously) that the FAC is Conclusory but the Court's De Novo Review Provides No Substantive Analysis Beyond the Tends-to-Exclude Requirement.

Seemingly, the first and principle basis for the panel's affirmation of dismissal following de novo review is derived from the following single sentence in its unpublished memoranda: "Here, the complaint does not contain any nonconclusory allegations plausibly showing an agreement between Twitter and the government to violate her constitutional rights." App. 3. No analysis of the FAC's allegations precedes or follows this sentence (other than the short discussion of the tends-to-exclude requirement). De novo review (of a 12(b)(6) dismissal) necessarily entails a review of the district court's ruling de novo. App. 2. A de novo review grants no deference to the lower court's rulings. *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012). This is especially true in a First Amendment context. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

Given the facts of the FAC as set out above and the panel's one sentence, it is entirely guesswork to assess how or why the FAC's allegations and reasonable inferences are conclusory. Further, the district court's opinion is of little assistance. An appellate court may affirm a dismissal on the basis provided by the district court in whole, in part, or for altogether other reasons than as set out by the trial court if the ultimate disposition of dismissal was proper. In other words, the district court might very well have misunderstood

the law entirely and still be affirmed on other grounds. *J. E. Riley Inv. Co. v. Commissioner*, 311 U.S. 55, 59, 61 S. Ct. 95, 97 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action."). The panel's Memorandum does not say why it affirmed simply that "[t]he district court properly dismissed Huber's constitutional claims because she failed to sufficiently allege state action." App. 1.

Moreover, the district court's opinion consistently characterizes the expressed allegations as conclusory, ignores entirely any reasonable inferences arising from those factual allegations, and provides no real analysis. The critique of the dissent by the majority in *SD3* comes to mind:

> The dissent underscores the weakness in its position by mischaracterizing the factual allegations in SawStop's complaint as "conclusory" in an effort to avoid them. It may be that the dissent doesn't believe the complaint's detailed allegations, but that skepticism does not render the allegations "conclusory." *See Iqbal*, 556 U.S. at 681 (explaining allegations cannot be called "conclusory" merely because a judge views them as "extravagantly fanciful," "unrealistic," or "nonsensical"). Indeed, just two weeks after *Twombly*, the Supreme Court reversed one of our sister circuits for making much the same error. See *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) (reversing dismissal of a complaint as "conclusory" where the complaint alleged harm only by saying that prison officials "endanger[ed] his life" by taking away needed

> treatment). And, as a practical matter, demanding more than the particularized allegations that SawStop offered here would compel an antitrust plaintiff to plead evidence -- and we have already expressly refused to impose such a requirement. *See Robertson*, 679 F.3d at 291.

SD3, LLC, 801 F.3d at 430-31.

This is not the time or place to rehash Petitioner's critique of the district court opinion set out in her opening and reply briefs before the Ninth Circuit. But what Petitioner believes can be said with some confidence is that given the expressed facts of the FAC and the reasonable inferences flowing from them, the panel's one sentence describing the FAC's allegations of state action based upon a conspiracy as conclusory is but a fig leaf to get to the real basis for its affirmance: the alternative explanation rationale and the Ninth Circuit's clearly erroneous requirement of additional facts tending to exclude Twitter's explanation.

In the final analysis, Petitioner's FAC properly sets forth sufficient allegations of state action and should not have been dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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