No. 24-____

IN THE

Supreme Court of The United States

RICHARD ROGALINSKI, Individually and
on behalf of the class,
Petitioner,
-v-

META PLATFORMS, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Andrew Z. Tapp (Bar No. Florida 310876)
Counsel of Record
METROPOLITAN LAW GROUP, PLLC
1971 West Lumsden Road, #326
Brandon, Florida 33511-8820
(813) 228-0658
Email: Andrew@Metropolitan.Law
February 14th, 2024

QUESTIONS PRESENTED

The Executive Branch of the United States Government acted in concert with Meta Platforms, Inc., to censor protected speech.

The questions presented are:

1. Whether the Petitioner sufficiently stated a claim for relief under the First Amendment of the United States Constitution.

2. Whether the Petitioner's allegations that Meta Platforms was a State Actor were sufficient to survive a Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss.

3. Whether the First Amendment prohibits the Federal Government from instructing and compelling private social media platforms in the identification, censorship, and removal of protected speech from their platforms.

PARTIES TO THE PROCEEDINGS

The Petitioner is Richard Rogalinski, Individually and on behalf of the putative class.

Respondent below is Meta Platforms, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner, Petitioner, Richard Rogalinski, has no parent company, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Rogalinski, Individually and on behalf of the putative class, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions below (*See* Pet. App. "A", 1a) are published at 2023 U.S. App. LEXIS 30524. The district court's opinion (*See* Pet. App. "A", 9a) is published 2022 U.S. Dist. LEXIS 142721.

JURISIDICTION

The Federal Circuit entered judgment on November 16th, 2023. *See* Pet. App. A, 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

INTRODUCTION

This petition raises an issue of great importance pertaining to the Government-involved censorship of protected speech on social media platforms, an activity which members of this Court have specifically identified as "antithetical to our democratic form of government." *Murthy vs. Missouri*, 144 S.Ct. 7, 8 (2023) (Alito, J., dissenting). This Court has recognized that social media platforms such as Facebook have become the "modern public square" and exercise "enormous control over speech." See *Packingham vs. North Carolina*, 137 S. Ct. 1730, 1737 (2017) and *Biden vs. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J. Concurring). So expansive is Facebook's reach that just last year the Court noted that more than 2 billion people were active monthly users of the platform. *Twitter, Inc. vs. Taamneh*, 143 S. Ct. 1206, 1215 (2023). Having usurped the role of the town square, Meta has a blotted history with censorship – often removing content or limiting its distribution based upon its message, ideas, or subject matter to prevent others from seeing it. Appx 37a. The Government noticed this power and identified Meta as an opportunity to skirt the First Amendment and control the exchange of content and ideas based upon their subject matter and message.

Traditionally, the Government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago vs. Mosley*, 408 U.S. 92, 95 (1972). Yet it plainly sought to do so in 2021 and was not shy to admit it in a White House press conference in July

2021. Thus, we have reached the crescendo of tension between the fundamental underpinnings of our national fabric, and the evolution of our technology.

"Applying old doctrines to new digital platforms is rarely straightforward." *Biden* 141 S.Ct. at 1221. Indeed, the Court has struggled for years on how to deal with the First Amendment and the internet. However, this case provides an opportunity for the Court to set a course for how protected speech will remain protected for the rest of our Nation's history.

The issue of Government involved censorship is not going to go away on its own, and instead is likely only to increase as our technology continues to evolve. This issue must be addressed, and without guidance from the Court, there seems little hope of having a national standard.

STATEMENT OF THE CASE

The Respondent, who is intentionally and profitably involved in the business of providing a public forum for the exchange of ideas and thoughts, engaged in the censorship of political speech authored by its users during the spring and summer months of 2021, in joint coordination with (and at the direction of) the Federal Government – a fact which was laid bare in statements made by President's then Press Secretary, Ms. Jennifer Psaki, on July 15th, 2021. Appx-33a-35a. The Petitioners allege in the Complaint that their political speech was censored as a result of this state action on the part of the Respondent. Appx-35a, 38a-41a, ¶¶ 23, 34-39.

The Respondent, having rebranded from Facebook, Inc., to Meta Platforms, Inc. during the pendency of this matter, contended that the Petitioners' complaint seeking redress for the constitutional violations should be dismissed upon grounds that it is not a state actor. In support, the Respondent claimed the Petitioners alleged neither that the Respondent performs an exclusively public function, nor that the government is somehow involved through coercion or joint participation in the action.

Facts Alleged in the Complaint

The Petitioners Complaint (Appx-26a-53a) alleged that specific actions taken by the Respondent amounted to the direct censorship (via removal, concealment, alteration, or appendment) of the Petitioners' First Amendment protected speech. See Appx-35a, 38a-41a, 49a-52a: ¶¶ 23, 31-40; 66-84. Though the Petitioners acknowledged in the Complaint that the Respondent is a private entity not typically subject to the restrictions of the constitution, its activity and joint work with the Federal Government qualified it as a "state actor." See Complaint Appx-44a, ¶¶51-55.

To support their claims, the Petitioners offered the public statements of the President of the United States' then Press Secretary, Ms. Jennifer Psaki's, who outlined exactly what activities the Government was involved in with the Respondent pertaining to the restriction and censorship of posts made by the Petitioners. See Complaint Appx 33a-35a, ¶22. An

excerpt of Press Secretary Psaki's statement is as follows:

> "Q. Thanks, Jen. Can you talk a little bit more about this request for tech companies to be more aggressive in policing misinformation? Has the administration been in touch with any of these companies and are there any actions that the federal government can take to ensure their cooperation, because we've seen, from the start, there's not a lot of action on some of these platforms.
>
> Ms. Psaki: Sure. Well, first, we are in regular touch with these social media platforms…
>
> In terms of actions, Alex, that we have taken – or we're working to take, I should say – from the federal government: We've increased disinformation research and tracking within the Surgeon General's office. We're flagging problematic posts for Facebook that spread disinformation…" *Id.*

The Petitioners' allegations noted that Press Secretary Psaki was specifically describing actions taken by the Federal Government ("flagging problematic posts for Facebook that spread" a category of information which the Administration views as improper) as a direct response to the specific question posed to the Administration about what efforts it was undertaking to "ensure their

cooperation" in being "more aggressive in policing misinformation." *Id*.

As argued by the Petitioners in their briefing to the lower courts, Press Secretary Psaki's statements were not made in a vacuum. Instead, they were specifically intended to show that the White House was compelling compliance from the Respondent (amongst other social media companies), who had not been as cooperative as the Federal Government would have liked.

Indeed, Press Secretary Psaki complained that the Respondent had not been faster to clamp down on protected speech: "all of [the 12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms] remain active on Facebook, despite some even being banned on other platforms…" Appx-13a. The actions taken by the White House and the Respondent were listed separately from advisory and guidance suggestions that the Government had made to social medial companies, as was noted later in Ms. Psaki's statements:

> "There are ***also*** proposed changes that we have made to social media platforms, including Facebook, and those specifically are four key steps." Appx-34a. Emphasis Added.

Ms. Psaki further stated that the Office of the President of the United States pushed for the Respondent to utilize additional censorship methods such as concealing posts that the State found to be

"problematic" through the modification of their "feed algorithm" (which is responsible for distributing the user's communications to others). *Id*.

Mr. Rogalinski is a former Army Ranger, a husband, father, and small business owner residing in Florida. He, as well as the members of the putative class, utilizes Facebook as a primary means for expressing protected speech and to engage in public discourse. In 2021, Mr. Rogalinski wrote often about COVID-19, including posts pertaining to the origin of the virus, the ineffectiveness of masks, and potential treatments for the disease. In response, Meta utilized its suite of censorship tools against him.

On April 6th, 2021, Mr. Rogalinski wrote,

> "Some of that science stuff laying out how masks do nothing to prevent the spread of [COVID-19] and they're actually harmful to your health. Haven't seen any of that science stuff saying otherwise. Just talking heads who want to spread fear and control you." Appx 39a.

Meta responded by appending a statement to Mr. Rogalinski's post, providing a hyperlink and writing, "Missing Context. Independent fact-checkers say this information could mislead people. See why." *Id*

The following month, on May 6th, 2021, Mr. Rogalinski posted an article from Tucker Carlson discussing how many Americans had died after taking the COVID vaccine. Appx 39a-40a. Again, the

Defendant appended Mr. Rogalinski's post, stating, "Missing Context. Independent fact-checkers say this information could mislead people. See why." *Id*.

The censorship efforts of Meta increased the following month, likely in response to White House pressure. On June 13th, 2021, Mr. Rogalinski posted an image of a Tweet made by Dr. David Samadi, a board-certified urologist and Direct of Men's Health at St. Francis Hospital in Roslyn, New York, which stated:

> "I want to ensure that everyone understands the gravity of the situation here. Hydroxychloroquine worked this whole time. The media said it would literally kill you if you took it simply because POTUS promoted it as a cure." Appx 40a.

In response to this statement, Meta wholly censored the post – concealing it from public view altogether. The Respondent then labelled the post "False Information" and appended an article from nearly a year earlier contending that Hydroxychloroquine was an ineffective treatment for COVID-19. Appx 40a-41a.

Two business days after the White House Press briefing, Mr. Rogalinski filed his Complaint against Meta, contending that the company was a state actor. In support of this, the Complaint charged:

> "52. In the instant case, the President of the United States, and his retinue, have

> specifically instructed [Meta] to flag and censor specific statements made by the Plaintiffs, labelling them false, misleading or otherwise casting doubt upon the credibility because they are deemed to be 'misinformation' by the administration…
>
> "54. In short, the action by the Administration has all but eliminated the private elements of decision making by [Meta], and conferred by specific directive obligations upon the Defendant in the regulation of free speech…
>
> 56. Furthermore, the specific actions compelled by the Government and executed by the Defendant were flatly unlawful as the Government may not suppress lawful speech, even as a means to suppress unlawful speech." Appx 44a-45a.

Judicial Proceedings to Date

The district court agreed with Meta, contending that the actions Meta took were before the Government's statement. Appx-20a. The district court did not address the Petitioner's contention that the pressure had existed even before the Government's statement. Further, the district court found that the Petitioner had not alleged specific facts to show a conspiracy between the State and Meta. *Id*. Of course, no discovery had been conducted, so concealed coercion or encouragement could hardly be plead with specificity.

Similarly, the district court held that even if the government assisted companies in identifying users who posted alleged misinformation, the Petitioner failed to allege that the government ever had any "focus specifically on him." App'x-21a.

The Ninth Circuit agreed, noting that the Petitioner's "allegations regarding flagging posts and proposing changes, without any threat or even 'positive incentives,' are not sufficient to support a plausible inference coercion." App'x-4a, citations omitted.

REASONS FOR GRANTING PETITION

To begin with, the 9th Circuit's decision in this case is in conflict with *Bell Atlantic Corp. vs. Twombly*, 550 U.S. 544 (2007) and *Jackson vs. Metropolitan Edison Co.*, 419 U.S. 345 (1974) in that it imposes higher pleading standards than are appropriate for a case involving allegations of concealed Government activity to abridge protected speech, and ignores specific inferences of alleged nexus between the Government and an alleged state actor.

Further, this case represents a vital opportunity for the Court to address the issues presented in *Biden vs. Knight First Amendment Inst. At Columbia Univ.*, 141 S.Ct. 1220 (2021), which was dismissed as moot, in that there remains considerable friction between public forums hosted on social media platforms and the users' rights to free speech, especially considering the closer ties between the

Government and Meta alleged in this matter than those alleged between Twitter and the Government there.

Additionally, this case is an opportunity for the Court to round out a trifecta of cases: *Moody vs. NetChoice, LLC*, Case No. 22-277, represents the authority of the States to regulate or prohibit censorship in social media companies; and *State of Missouri, et. al. vs. Biden*, Western District of Louisiana, Case No. 3:22-CV-01213 (which has most recently been before the Court as *Murthy vs. Missouri*, 144 S.Ct. 7 (2023), and is destined to come back again), in which the States seek relief against the Federal Government for its part of the censorship conducted during and after 2021. This matter presents the end-users, those who are directly impacted by censorship, and their ability to bring suit to prevent the violation of their rights under the First Amendment.

Finally, though not least among the reasons, this issue is of great public interest. Virtually all of protected speech is exchanged through social media platforms such as the Respondent's Facebook. This was particularly true during the COVID-19 lockdowns, some of which remained in effect during the period of time in which the allegations of this matter occurred. If the Government quietly coerces or encourages the abridgment of free speech in one of the few arteries through which Americans exercise their First Amendment rights, it is imperative that those aggrieved have access to the courts for redress, even where those quiet coercive or encouraging activities

cannot be found readily in a Government press briefing.

I. **The 9th Circuit's Holding Conflicts with *Twombly* and *Jackson***

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. vs. Twombly*, 550 U.S. 544, 555-556 (2007). Citations and quotations omitted. In *Twombly*, this Court noted that "plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage, it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [the alleged activity]." *Id* at 556.

With respect to issues involving violations of constitutional rights, this Court has previously acknowledged that there may be circumstances where government action is not facially obvious, and that further factual inquiry (requiring discovery) is necessary.

In *Jackson vs. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), this Court noted that "the true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met." *Id* citing *Burton vs. Wilmington Parking*

Authority, 365 U.S. 715 (1961). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* at 722.

Given *Twombly* and *Jackson*, the Petitioner's Complaint provided a factual basis for a reasonable inference that a nexus existed between Meta's censorship activity, and the Government who acknowledged publicly that they were seeking to direct and compel the Respondent's censorship activity.

The Complaint in this matter included specific allegations that (1) the Government had given specific instructions to the Respondent to censor specific protected speech; (2) the Government's actions compelled the Respondent to conduct such requested censorship activities; (3) the Respondent complied with the Government's instructions and censored the Petitioner; and (4) such censorship was unconstitutional and thereby damaged the Petitioner. There was no allegation that the activity had only begun after the White House's July 15th, 2021, press briefing. Instead, the allegations suggested the press briefing was but an acknowledgment of activity which was already occurring.

In deciding that the Petitioner's Complaint should be dismissed, the 9th Circuit stated that "Rogalinski does not advance theories other than coercion to attempt to meet [the nexus test]. Rogalinski fails to state a claim under the nexus test because his allegations do not support a plausible inference that the government coerced Meta." Appx-4a. Such failure was evidently because the Petitioner

failed to identify a threat or positive incentives that were involved with such coercion. *Id*.

To begin with, the 9th Circuit's decision is in conflict with *Twombly* and *Jackson* in that the court flatly acknowledged that the Petitioner had advanced theories of coercion. This alone should have been more than adequate to infer a nexus between the Government's stated objectives and activities and those of the Respondent who carried out the Government's wishes. Certainly, the allegations of the Complaint were clear enough to be understood that the Petitioner was alleging specifically that the Respondent's conduct was not of its own choosing, and was tied inextricably to the wishes of the Government.

Second, the 9th Circuit's decision is in conflict with *Twombly* because the reasonable inference of the presence of a nexus was as well alleged as it possibly could have been – especially considering that the Complaint was filed a mere two business days after the White House Press Briefing. As noted in *Jackson*, the private actions of the Government in violating constitutionally protected activity may not be immediately obvious. *Jackson* 419 U.S. at 351. A detailed inquiry (e.g., discovery) is required in order to determine whether or not such violation is present. *Id*. Such discovery was necessary in the *Missouri, et. al. vs. Biden* matter (W.D. LA, Case No. 3:22-cv-01213), and has led to amendments of the complaint in that matter.

Finally, the 9th Circuit's decision is in conflict with *Twombly* because it fails to acknowledge that Federal Rule of Civil Procedure 8 only requires allegations sufficient to suggest that the discovery

process would reveal relevant evidence to support the underlying claim. *Twombly* 550 U.S. at 559. Even if the Petitioner could not recite the exact coercive or encouraging methods utilized by the Federal Government in its manipulation of the Respondent, it is exceedingly likely that it would have been exposed. Thus, the 9th Circuit's restrictive decision in this matter is in conflict with this Court's past precedent.

II. Unresolved Issues from *Biden vs. Knight First Amendment Inst. At Columbia Univ.*

This Court was unable to address the issue of whether or not President Trump's decision to block users from interacting with his Twitter account was violative of the First Amendment. *Biden vs. Knight First Amendment Inst. At Columbia Univ.*, 141 S.Ct. 1220 (2021). In that matter, the Second Circuit had held that the President's Twitter account had been a public forum, and that his decision to block users amounted to a violation of the First Amendment. *Id* at 1221. In the change of administrations, this Court lost the ability to resolve the issue, as noted by Justice Thomas:

> "The Second Circuit feared that then-President Trump cut off speech by using the features that Twitter made available to him. But if the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital

> platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions. This petition, unfortunately, affords us no opportunity to confront them." *Id* at 1227.

This case provides the opportunity to address the power that social media companies have over Americans' First Amendment free speech rights, albeit in more clear terms. Here, unlike in *Biden*, the Government *and* the social media company were involved in abridging protected speech. This permits the Court to address the boundaries of Meta's specific censorship activities both individually, and in concert with the Government.

Similar to *Biden*, however, is that the glaring concern here is the smothering of speech by a dominating digital platform more or less under the control of only a handful of people. Those few who hold the strings of what subject matter is permitted to be exchanged currently are only going to gain more authority and power as more powerful software tools (such as Artificial Intelligence) become standard in the moderation of content and user experience.

Worse yet, it is not altogether unimaginable that eventually such activity would be delegated entirely to Artificial Intelligence, leaving that much less room for a whistleblower to identify unconstitutional activity initiated by only a handful of people, though inflicted upon hundreds of millions of Americans. There is no doubt that this Court must weigh in *before* that happens. This case is the ideal

vehicle to do so as it addresses concealed coercion or encouragement, and obvious Government and social media involvement without concern of a potential change in administration next year that could moot the matter.

III. A Trifecta of Cases

Later this month, the Court will hear from a number of States that are attempting to regulate social media companies' censorship activities in the case, *Moody vs. NetChoice, LLC*, Case No. 22-277. That matter will address what control the Federal Government can levy over companies such as Meta, and the relationship between those two parties. It does not, however, provide a vehicle to deal with violations of the First Amendment impacting American broadly.

Similarly, *State of Missouri, et. al. vs. Biden*, Western District of Louisiana, Case No. 3:22-CV-01213 has already been before the Court once (*Murthy vs. Missouri*, 144 S.Ct. 7), and is destined to return perhaps a number more times. Just as *Moody vs. NetChoice*, this matter also deals with the States and the Federal Government and involves the other half of the allegations at issue in this case. The States are suing the Government to prevent the same censorship activity that the Petitioner seeks to prevent from the other side with the Respondent. They are opposite sides of the same coin and permit the Court to address all facets of the actions taken by the Federal Government to curtail speech during and about the pandemic.

This matter is the ideal candidate to address the issue of social media companies' involvement in Government censorship from the side of the private entities. Given the other issues presented in this case, such an opportunity should be taken advantage of.

IV. This is the Issue of Our Time

It is unlikely that most of the framers of the United States Constitution could conceive of a world in which their most significant ideals would have such a broad application. In a letter dated July 15th, 1817, from John Adams to Thomas Jefferson, Adams laid out a dream for what he hoped our First Amendment could be:

> "When people talk of the freedom of writing, speaking or thinking, I cannot choose but laugh. No such thing ever existed. No such thing now exists: but I hope it will exist. But it must be hundreds of years after you and I shall write and speak no more."

He was right, of course. Adams died 198 years ago. It took the industrial revolution, a civil war, two world wars, the advent of computing, the cold war, the advent of the internet, and then the inception of social media and algorithms, but it happened. Now, everyone in America has the ability to speak their mind to dozens, hundreds, millions of people from their cell phone while they wait in line for takeout food.

If we don't address censorship, especially like that which occurred in 2021 between the Government and the Respondent, it's likely we'll have witnessed

the rise and fall of Free Speech just since the turn of the millennium.

In many nations, such a rise and fall has already come to pass. China, Iran, North Korea, Russia, and Saudi Arabia all have versions of the internet which are heavily monitored and overseen by government interests, lest protests and revolution foment. People are tracked and repressed, their communications curtailed or blocked, even those on Meta's platforms Facebook and Instagram. And now, it's here.

Such imposition upon rights always first appears in benign ways. Two weeks to flatten the curve. Then a month. Then three months, and no church. Then a year, a mask, a vaccine, and a unified government effort to prevent "misinformation." What began as the noble effort to save lives morphed into a prohibition of discussing politically incorrect viral treatments, or politically incorrect science. It didn't matter that there seemed to be no evidence supporting social distancing or mask mandates, or that schools were closed and the elderly died alone. "Misinformation" was the enemy now and our Government was at the forefront of the war, using Meta as a weapon.

We watched our civilization collapse in real time. It wasn't nuclear bombs or world war. It was fear – and to what spectacular use fear was put. Our only weapon against fear is knowledge, information, communication. And when we lost everything else to the lockdowns, all we had left was communication. All we had left was the First Amendment.

This is not a question of political solutions – further laws and regulations aren't necessary. This Court already has the means by which to lay the foundation to protect that which has been incubating since James Madison wrote the First Amendment – our ability to express ourselves *en masse* without being abridged by a government, acting in good faith or otherwise.

This is the legal issue of our time, and while the Court has taken some opportunities to lay the groundwork for the protection of speech in the digital age, the opportunities for thorough decisions from the Court may not ever be as manifest as they are coming from the cases arising out of the pandemic.

This case, coming in the time that it has, with the parties involved and the factual circumstances surrounding it, is an important opportunity for the Court to act.

CONCLUSION

This Court has recognized the exercise of protected speech in the United States has moved from the street corners of the town square to the digital walls of social media websites like that of Respondent's "Facebook" platform. Though the benefit of this relocation from the town square to the internet has acted to increase the number of participants exchanging ideas and points of view, the change has also acted to consolidate control of protected speech into the hands of but a few. What was once the exercise of protected speech in thousands of municipalities, upon hundreds of thousands of street corners, spread amongst dozens and dozens of

states, all now runs through but a handful of private companies such as Meta Platforms – companies which have publicly acknowledged, as Meta has, that they utilize a variety of tools to censor, restrict, and remove that free speech.

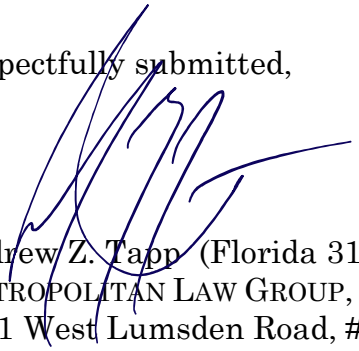
In the time of COVID, the temptation for the United States' Government to reach out and grasp these tools must have been titanic. So much private and protected opinion discourse amongst the millions of citizens utilizing Facebook about the disease, its treatments, and its origin must have acted to drown out the Government's carefully constructed messages. The temptation to use these tools, to take control of the conversation proved too much, and the United States Government, including the Office of the President of the United States, acted to use these tools – and then gave a press briefing to outline their acts and intentions.

This is an important issue of vital Constitutional Rights for the Court. But it is also an opportunity to correct a conflict that exists between the 9th Circuit's decision and past decisions from this Court pertaining to the pleading standards under the Federal Rules of Civil Procedure. It is an opportunity to address an issue left undecided in the wake of *Biden vs. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021) – and an opportunity that does not run the risk of becoming moot over the course of the next year as elections take place. Finally, it's an opportunity for this Court to address the issue of Government directed censorship of speech between the social media companies and the Americans which utilize them. The Court is already addressing other

aspects of this issue, including the opposing side of the coin as set out in *Missouri, et. al. vs. Biden*.

The Petitioner respectfully requests this Honorable Court grant the Petition for Writ of Certiorari and accept the Petitioner's case for consideration.

Respectfully submitted,



Andrew Z. Tapp (Florida 310876)
METROPOLITAN LAW GROUP, PLLC
1971 West Lumsden Road, #326
Brandon, Florida 33511-8820
(813) 228-0658
Email: Andrew@Metropolitan.Law

APPENDIX

United States Court of Appeals
For the Ninth Circuit
2023 U.S. App. LEXIS 30524

RICHARD ROGALINSKI, Individually and on behalf of the class,
Plaintiff-Appellants,

v.

META PLATFORMS, INC.,
Defendant-Appellee.

No. 22-16327
Submitted: October 17, 2023

Decided: November 16, 2023

Appeal from the United States District Court
Northern District of California, at San Francisco.
Charles R. Breyer, District Judge. (3:22-cv-02482-CRB)

OPINION

MEMORANDUM*

Richard Rogalinski ("Rogalinski") appeals from the district court's dismissal under Fed. R. Civ. P. 12(b)(6) of his First Amendment claims against Meta Platforms, Inc. ("Meta" or "Facebook"). We have appellate jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for failure to state a claim. Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1114 (9th Cir. 2021). We affirm.

Rogalinski's First Amendment allegations, as described in his complaint, stem from Meta's actions in relation to three Facebook posts Rogalinski published in April, May, and June 2021. In the first two posts, Rogalinski questions the utility of masks and vaccines, respectively, to prevent the spread of COVID-19, and in the third [*2] shares a tweet promoting the use of hydrochloroquine to treat COVID-19. Meta appended a statement to the first two posts stating "Missing Context. Independent fact-checkers say this information could mislead people. See Why," and hid the third post from public view, labelling it "False Information."

Rogalinski alleges this constitutes state action because of statements then-White House Press Secretary Jennifer Psaki made at a July 15, 2021 press briefing, including "we are in regular touch with

these social media platforms," and "[w]e're flagging problematic posts for Facebook that spread disinformation."

"To survive a motion to dismiss, the complaint must contain sufficient 'well-pleaded, nonconclusory factual allegation[s],' accepted as true, to state 'a plausible claim for relief.'" Beckington v. Am. Airlines, Inc., 926 F.3d 595, 604 (9th Cir. 2019) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679-80, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

1. Rogalinski attempts to show Meta's "seemingly private behavior may be fairly treated as that of the State itself," *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (9th Cir. 2001) (internal citations omitted), for purposes of the First Amendment under two theories. First, he alleges the nexus test is met because the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be [*3] that of the State." *Am. Mfrs. Mut. Ins. Co., v. Sullivan*, 526 U.S. 40, 52, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)). Rogalinski relies on Psaki's statements regarding "flagging posts," and the White House's "proposed changes" to Meta, among others, to show coercion under the nexus test.

But Rogalinski's allegations regarding flagging posts and proposing changes, without any threat or even "positive incentives," *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023), are not sufficient to support a plausible inference of coercion. *Cf. Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987) (finding deputy county attorney's threat to prosecute the private entity constituted "coercive power," converting the private entity's responsive conduct into state action under 42 U.S.C. § 1983). And while there are "different versions of the nexus test," *O'Handley*, 62 F.4th at 1157, Rogalinski does not advance theories other than coercion to attempt to meet it. Rogalinski fails to state a claim under the nexus test because his allegations do not support a plausible inference that the government coerced Meta.

2. Second, Rogalinski alleges that Meta's actions constitute state action under the joint action test, which "asks whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (cleaned up). Rogalinski relies on Psaki's statements regarding communication between [*4] the White House and social media platforms, as well as the government's "flagging" posts, to argue that Meta "acted willfully and voluntarily" with the government to censor statements.

But Rogalinski does not allege facts sufficient for supporting a plausible inference that Meta took any action at all in response to the posts flagged by the government, much less that Meta willfully participated in a censorship action. See *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 504 (9th Cir. 1996) (finding "consultation and information sharing" that did not lead to the challenged actions could not support a joint action theory). Therefore, Rogalinski fails to state a claim under the joint action test.

AFFIRMED.

CONCUR

R. Nelson, Circuit Judge, concurring:

I concur in the disposition to affirm the district court. Plaintiff did not sufficiently allege that the government coerced Meta Platforms, Inc. ("Meta" or "Facebook") to suppress speech. And Plaintiff did not seek leave to amend the complaint. That is enough to resolve this case.

But the gist of the underlying allegations is troubling. They suggest that the White House's coercive actions show hostility to our country's commitment to free expression and the free exchange of ideas. Our sister circuit has found [*5] these claims—when sufficiently pleaded—troubling enough to affirm an injunction

against federal activities. See *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), stayed sub nom. *Murthy v. Missouri*, No. 23A243, 2023 U.S. LEXIS 4210, 2023 WL 6935337 (U.S. Oct. 20, 2023). The Fifth Circuit held that the evidence produced in that case showed "a coordinated campaign" of enormous "magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life." *Id.* at 392. Although the Supreme Court stayed that injunction pending appeal, three justices dissented because "censorship of private speech is antithetical to our democratic form of government." *Murthy*, 2023 U.S. LEXIS 4210, 2023 WL 6935337, at *1, 4 (Alito, J., dissenting).

Had Plaintiff here alleged sufficient facts consistent with those alleged in *Missouri v. Biden*, the case, in my view, should have been allowed to proceed. But the differences are material. The complaint in *Missouri v. Biden* alleged that "numerous federal agencies" engaged in various "meetings and communications" to "pressure" social media companies to "take down" and "suppress" the "free speech of American citizens." 2023 U.S. Dist. LEXIS 114585, 2023 WL 4335270, at *44 (W.D. La. July 4, 2023). And that complaint detailed extensively how the White House engaged in numerous forms of coercive conduct by repeatedly pressuring Facebook to remove speech it did not like. See 2023 U.S. Dist. LEXIS 114585, [WL] at *45-48.

Such allegations are absent here. The complaint [*6] here focuses on statements made by then-White House Press Secretary Jennifer Psaki, who commented in a press briefing that the White House was "in regular touch with these social media platforms" and "flagging problematic posts for Facebook that spread disinformation." These more minimal allegations cannot show state action because they include no governmental threats or even positive incentives. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012); *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023). Nor can we grant leave to amend because Plaintiff never asked us to do so. See *Unified Data Services, LLC v. FTC*, 39 F.4th 1200, 1208 (9th Cir. 2022) (declining to remand with leave to amend because plaintiffs did not ask for such relief). But the pattern of alleged behavior by our country's leadership is nonetheless troubling.

Our country's democratic traditions demand a robust marketplace of ideas where we can exchange diverse, contrasting, and even controversial opinions. A coordinated effort between private and government actors to censor ideas, no matter how contentious or offensive those ideas may be, offends the First Amendment. By limiting the ability of the government to silence unpopular ideas, the First Amendment places its trust in society's common wisdom. The people, not the government, bear the responsibility to

discern the truth. A free and open marketplace of ideas [*7] can create complex challenges of discerning truth, but such complexity does not justify the suppression of speech.

United States District Court
Northern District of California
2022 U.S. Dist. LEXIS 142721

RICHARD ROGALINSKI, et al.,
Plaintiff,
v.
META PLATFORMS, INC.,
Defendant.

22-cv-02482-CRB
Decided and Filed, August 9th, 2022

OPINION

Richard D. Bennett, United States District Judge

Plaintiffs Israel K. Negash and Ethio, Inc., d/b/a Suno

ORDER GRANTING MOTION TO DISMISS

Plaintiff Richard Rogalinski alleges that Defendant Meta Platforms, Inc. ("Meta") violated the First Amendment of the United States Constitution when it censoring his Facebook posts about COVID-19. See Compl. (dkt. 1). Purporting to represent a class of similarly situated Facebook users, Rogalinski alleges that Meta took this action in concert with the Biden Administration. Meta moves to dismiss, arguing that Rogalinsky has not pleaded state action. See MTD (dkt. 51). Finding oral argument unnecessary, the Court GRANTS the motion and denies leave to amend.

I. BACKGROUND

A. Parties

Rogalinski is a resident of Florida. Compl. ¶ 28.

The putative class members are individuals whose comments about COVID-19 [*2] were allegedly censored by Meta beginning on January 20, 2021. Id. ¶ 29. Rogalinski asserts that "[u]pon information and belief," the putative class contains potentially millions of members, but that only Meta knows the true number. Id. ¶ 61.

Meta is a corporation with its principal place of business in Menlo Park, California. Id. ¶ 30. Meta operates Facebook, among other online services. MTD at 1. In operating Facebook, Meta deploys tools and resources to moderate content on the platform. Id.; Compl. ¶ 31.

B. Facts

1. Allegations Against Meta

Between April and June 2021, Meta appended warnings to or hid certain of Rogalinski's Facebook posts. Compl. ¶ 37. First, on or about April 6, 2021, Rogalinski posted a message doubting the efficacy of masks: "Some of that science stuff laying out how masks do nothing to prevent the spread of [COVID-19] and they're actually harmful to your health. Haven't seen any of that science stuff saying otherwise. Just talking heads who want to spread fear and control you." Id. Meta responded by appending a warning to the post that it was "missing context," and providing a link to a site with additional information. Id. Second, on May 6, 2021, Rogalinski posted [*3] another message critiquing the COVID-19 vaccine rollout, which he implied was part of Bill Gates' "depopulation agenda," and linking to an article by Fox News talk show host Tucker Carlson. Id.; Ex. C (dkt. 1-3). Meta responded by appending the same missing context warning. Compl. ¶ 37. Third, on June 13, 2021, Rogalinski posted a screenshot of a Tweet from a urologist promoting hydroxychloroquine as a cure for COVID-19. Id. Meta again responded by appending a warning to the post, this time labeling it

as "false information" and hiding it from public view. *Id*.

Although the complaint does not cite any other specific instances, Rogalinski asserts generally that "[t]he COVID-19 statements [on Facebook] of Putative Members of the Class were censored, or their statements made immediate subject of rebuke or discredit from the Defendant at the behest of the federal government." Id. ¶¶ 38-39. In his opposition, Rogalinski asserts that that the administration "specifically acknowledge[d] identifying at least 12 persons who are members of the described Class, which it targeted for censorship." Opp'n (dkt. 57) at 5.

2. Statements by Federal Officials

Rogalinski alleges that Meta's "efforts to censor [*4] information had come in communion with, if not at the behest of efforts by the Executive Branch of the Federal Government to restrict public statements and comments which clashed with the dogmatic narrative adopted by the new administration and Facebook." Id. ¶ 22.

At a press conference on July 15, 2021—after Meta took action against Rogalinski's posts—White House Press Secretary Jen Psaki responded to a question about the administration's "request for tech companies to be more aggressive in policing misinformation" by stating: "we are in regular touch with these social media platforms," and "[w]e're flagging problematic posts for Facebook that spread disinformation." Id. Psaki continued by outlining the administration's four recommendations for social

media platforms: (1) measure and publicly share information on the impact of misinformation; (2) create a robust enforcement strategy across platforms; (3) act faster to take down harmful posts; and (4) promote quality information sources in their algorithms. Compl. Ex. A (dkt. 1-1) at 16-17. In support of cross-platform enforcement strategy proposal, Psaki noted that "there's about 12 people who are producing 65 percent of anti-vaccine [*5] misinformation on social media platforms," and that "[a]ll of them remain active on Facebook, despite some even being banned on other platforms, including . . . ones that Facebook owns." Compl. Ex. A at 16.

C. Procedural History

On July 19, 2021, Rogalinski filed his complaint in the District Court for the Middle District of Florida. Compl. After early delays due to confusion over Meta's agent for service, on February 10, 2022, Meta moved to dismiss the complaint or to transfer the case to this district in light of the forum selection clause in Facebook's Terms of Service. Mot. to Dismiss or Transfer (dkt. 27). On April 22, the case was transferred to this district. Order Granting Mot. To Transfer (dkt. 31). Meta now moves to dismiss, which Rogalinski opposes. MTD; Opp'n.

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim for which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies

when a complaint lacks either a "cognizable legal theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.,* 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim [*6] is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

If a court dismisses a complaint for failure to state a claim, it should "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment."

Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

Meta moves to dismiss, arguing that Rogalinski has failed to plausibly allege that Meta was a state actor. The Court agrees.

A. State Action

The Ninth Circuit recently reaffirmed that "a private entity hosting speech on the Internet is not a state actor" subject to the Constitution. See *Prager Univ. v. Google LLC,* 951 F.3d 991, 995 (9th Cir. 2020) ("Despite [*7] YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment."). The Supreme Court explained that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930, 204 L. Ed. 2d 405 (2019).

However, in rare cases, action by a private party can constitute state action. See *Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021) (noting the four different tests that the Supreme Court has employed to determine if a private party engaged in state action). Rogalinski argues that Facebook engaged in state action under either of two theories: a "joint action" theory and a "nexus" theory. See Opp'n at 8-9.

1. Hart v. Facebook

Earlier this year, this Court heard *Hart v. Facebook*, in which the plaintiff also alleged that Meta (then Facebook) violated his First Amendment rights by flagging posts that allegedly contained COVID-19 misinformation. No. 22-CV-00737-CRB, 2022 U.S. Dist. LEXIS 81820, 2022 WL 1427507 (N.D. Cal. May 5, 2022). Like Rogalinski, Hart relied on allegations about the July 15 press conference to show state action. Hart pointed to Psaki's statements, the Surgeon General's statements at the same press conference, and statements by President Biden encouraging companies to [*8] combat disinformation. See 2022 U.S. Dist. LEXIS 81820, [WL] at 3.

The Court rejected Hart's arguments of joint action or government coercion and dismissed the claims against Facebook. 2022 U.S. Dist. LEXIS 81820, [WL] at 11. The Court based its order on at least four related but essentially independent grounds: (1) Facebook much more plausibly was enforcing its own misinformation policy; (2) the government's statements were phrased only as vague recommendations; (3) the government's supplying of information to Facebook did not plausibly suggest involvement in Facebook's decisions; and (4) there was no indication of government involvement in action specifically toward *Hart*. 2022 U.S. Dist. LEXIS 81820, [WL] at 10-14.

Rogalinski acknowledges *Hart* but argues for a different outcome on two grounds. See Opp'n at 4-8. First, Rogalinski contends that, while much of the censorship alleged by Hart and Rogalinski had occurred before Psaki's statement, the putative class here also includes the twelve individuals she mentioned, who purportedly suffered censorship later. Id. at 5. Second, Rogalinski seems to argue that the Court in Hart mistakenly conflated Psaki's four recommendations for social media platforms (which were "clearly suggestions") with her comment about flagging problematic [*9] posts (which were "not merely advisory, but rather [was] taken in an effort to coerce compliance from the defendant"). See *Id*. at 5-6.

These distinctions fail. The twelve individuals Psaki mentioned are not relevant: Rogalinski cannot assert their claims without having a claim of his own. See *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 560 (9th Cir. 2010) ("When a named plaintiff has no cognizable claim for relief, she cannot represent others who may have such a claim." (cleaned up)). And even if those individuals were relevant, Psaki mentioned them only in her discussion of the four recommendations that Rogalinski admits were "clearly suggestions." See Compl. Ex. A at 16-17 ("There also proposed changes that we have made to social media platforms, including Facebook, and those specifically are four key steps. . . . Second, that we have recommended — proposed that they create a robust enforcement strategy . . . . there's about 12 people who are producing 65 percent of anti-vaccine misinformation. . . ."). Thus, on Rogalinski's own view, the government was merely "suggest[ing]" that the

companies pay attention to these (unnamed) individuals.

Further, Rogalinski's distinctions address none of the other key grounds for this Court's conclusion in Hart. [*10] Rogalinski "does not come close to pleading state action under either theory." See *Hart*, 2022 U.S. Dist. LEXIS 81820, 2022 WL 1427507, at *5.

2. Nexus and Joint Action

Rogalinski argues that the allegations satisfy the nexus test because "the State chose the targets and content of the statements that it deemed worthy of the Defendant's censorship," which indeed "resulted in actual censorship." Opp'n at 10. He contends that they satisfy the joint action test because the government and Meta "communicated directly and specifically about the censorship actions and did in fact engage in the act together by sharing responsibility for the two-step process of censorship, with each party being responsible for half of the censorship action." Id. at 11. The Court disagrees. Because the tests largely overlap, it will address them together. Accord *O'Handley v. Padilla*, No. 21-CV-07063-CRB, 579 F. Supp. 3d 1163, 2022 U.S. Dist. LEXIS 4491, 2022 WL 93625, at *18 (N.D. Cal. Jan. 10, 2022) ("For the same reasons the Complaint does not meet the joint action test, it also does not meet the nexus test.").1

The nexus test "asks 'whether there is a sufficiently close nexus between the State and the

challenged action of the regulated entity so the action of the latter may be fairly treated as that of the state itself.'" *Gorenc v. Salt River Project Agr. Imp. & Power Dist.,* 869 F.2d 503, 506 (9th Cir. 1989) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)); see also *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 955 (9th Cir. 2008) (listing factors to consider, including whether the [*11] funds of the organization come from the state and whether state officials dominate its decision-making).

Similarly, the joint action test asks "whether the state has 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." Gorenc, 869 F.2d at 507 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961)). "[A] bare allegation of such joint action will not overcome a motion to dismiss." DeGrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000). The Supreme Court has explained:

> [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.

Blum v. Yaretsky, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982). And this circuit requires "substantial cooperation" or that the private entity and government's actions be "inextricably intertwined." *Brunette v. Humane Society of Ventura Cnty.*, 294 F.3d 1205, 1211 (9th Cir. 2002). Although "[a] conspiracy between the State and a private party to violate constitutional rights may also satisfy the joint action test," id., the private and government actors must have actually agreed to "violate [*12] constitutional rights," *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983).

First, as in Hart, the allegations strongly suggest that Meta's decisions were entirely its own. As Rogalinski admits, "pressure began to mount" on Meta before Psaki's statement, and Meta had formed a "dogmatic narrative about COVID-19 and its vaccinations." Compl. ¶¶ 18-19. Rogalinski admits that Meta took action against (what it viewed as) COVID-19 misinformation before any government statement. Indeed, all of the alleged censorship against Rogalinski occurred before any government statement. *Hart*, 2022 U.S. Dist. LEXIS 81820, 2022 WL 1427507, at *6. At the press conference, Psaki noted that Meta had already taken action to ban some people from certain platforms. Compl. Ex. A at 16. Rogalinski has not rebutted the eminently plausible conclusion that Facebook acted alone. See *Hart*, 2022 U.S. Dist. LEXIS 81820, 2022 WL 1427507, at *7-8 (noting that Facebook's Terms of Service established that (1) the company had a misinformation policy; and (2) it enforced it); see also Twombly, 550 U.S. at 557 (allegations of secret illegal conduct are insufficient

where they are consistent with plausible legal explanations).

Second, even if the government assisted companies in identifying users who posted alleged misinformation, Rogalinski fails to allege that the government ever had any focus specifically on him. [*13] See *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 933 (N.D. Cal. 2021) (finding no state action absent an allegation that a state actor took "specific action with regard to [plaintiff] or its Facebook page"); *Daniels v. Alphabet Inc.*, 2021 U.S. Dist. LEXIS 64385, 2021 WL 1222166, at *6 (N.D. Cal. Mar. 31, 2021) (same where "[p]laintiff does not allege that the federal government directed a particular result with respect to his . . . videos"). Rogalinski emphasizes that Psaki supposedly admitted to focusing on twelve individuals. Opp'n at 5. But Psaki never indicated that the government was targeting them; she only recommended that social media companies create cross-platform strategies. See Compl. Ex. A at 16. And Rogalinski fails to identify the individuals or their posts, so he does not plausibly allege that they suffered injury or that the government participated in that injury. Furthermore, even if the government did target these individuals—and even if it took joint action against them—Rogalinski fails to plausibly allege that he is in this group or sufficiently comparable in influence to have suffered the same treatment.

Third, even if the government provided Meta with information about Rogalinski, that (without more) is insufficient because the government can work with a private entity without converting that entity's

later decisions into state [*14] action. See Blum, 457 U.S. at 1010 (finding no state action where government did not "dictate the decision . . . in a particular case"). In *Mathis v. Pacific Gas Company*, 75 F.3d 498, 501 (9th Cir. 1996), PG&E conducted an undercover operation in close partnership with the county narcotics Task Force, after which PG&E made a "decision to exclude [the plaintiff] from the plant." The plaintiff argued that PG&E's decision was joint action attributable to the county because the decision was based on information uncovered in the investigation. The Ninth Circuit disagreed, emphasizing that the plaintiff's "challenge is limited to PG&E's decision-making process after the investigation was completed." Id. at 504. "Whether or not [the county's] previous acts facilitated the decision, the mantle of its authority didn't." *Id*. PG&E independently decided to exclude the plaintiff, so there was no joint action. Id.

In *O'Handley*, this Court applied Mathis to find no state action. 2022 U.S. Dist. LEXIS 4491, 2022 WL 93625, at *10. The Court noted *O'Handley's* argument that "without [the government's] flagging *O'Handley's* tweet to Twitter, [he] wouldn't have had his first tweet labeled." *Id*. (cleaned up). But the Court observed that Mathis had rejected this exact argument: PG&E may have used information from the government investigation, but its decision was still [*15] its own. *O'Handley* had failed to allege state action because "there is no evidence or even allegation that the government played any role in Twitter's 'internal . . . decisions,' to label [his] tweets, or to add strikes to and ultimately suspend [his] account." *Id*. (quoting Mathis, 75 F.3d at 504). So too with Meta's internal

decisions about Rogalinski. As the Court explained in Hart:

> "[E]ven if the White House had specifically communicated with these companies about Hart's post or tweet, [the companies'] enforcement of [their] policy as to that post or tweet would still not be joint action. One party supplying information to another party does not amount to joint action. See *Lockhead v. Weinstein*, 24 Fed. App'x 805, 806 (9th Cir. 2001) ("[M]ere furnishing of information to police officers does not constitute joint action"); Fed. Agency of News, 432 F. Supp. 3d at 1124 ("supplying information to the state alone [does not amount] to conspiracy or joint action") (alteration added). The one-way communication alleged here falls far short of "substantial cooperation." See *Brunette*, 294 F.3d at 1212. After all, the Federal Defendants did not "exert[] control over how [Facebook or Twitter] used the information [it] obtained." See *Deeths v. Lucile Slater Packard Children's Hospital at Stanford*, 2013 U.S. Dist. LEXIS 168347, 2013 WL 6185175, at *10 (E.D. Cal. Nov. 26, 2013).

Hart, 2022 U.S. Dist. LEXIS 81820, 2022 WL 1427507 at 7. Aligned interests or "mere approval of or acquiescence in the initiatives of a private party is not sufficient to [*16] justify holding the State responsible for those initiatives." Blum, 457 U.S. at 1004-05.

As Rogalinski fails to plead state action under either his joint action or nexus theories, his First Amendment claim fails as a matter of law. And because Rogalinski does not come close to alleging state action, the Court concludes that amendment would be futile and denies leave to amend. Leadsinger, 512 F.3d at 532.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion to dismiss without leave to amend.

IT IS SO ORDERED.

Dated: August 9, 2022

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

JUDGMENT

Having granted Defendant's motion to dismiss without leave to amend, see Order Granting MTD (dkt. 61), the Court hereby enters judgment for Defendant Meta Platforms, Inc. and against Plaintiff Richard Rogalinski.

IT IS SO ORDERED.

Dated: August 9, 2022

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

Footnote 1

At times, Rogalinski also gestures at the argument that Facebook was coerced by the government. See Opp'n at 7 (arguing that Psaki's statements were aimed at "coercing compliance from the Defendant who had not been as cooperative as the federal government would have liked"). Yet Rogalinski later abandons it. See Opp'n at 13 ("There's no indication that Facebook was forced into its part of this endeavor . . . the Defendant acted willfully and voluntarily . . . ."). In any case, the Court agrees that there is no indication that any coercion occurred. See *Zhou v. Breed*, 2022 U.S. App. LEXIS 1119, 2022 WL 135815, at *1 (9th Cir. Jan. 14, 2022).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD ROGALINSKI**,** Individually
and on Behalf of the Class,

Case No.:

Plaintiffs

Division:

-vs-

FACEBOOK, INC., a Foreign Corporation,

Defendant

_____/

CLASS ACTION COMPLAINT FOR FIST AMENDMENT VIOLATIONS

Jury Trial Requested

The Plaintiffs, RICHARD ROGALINSKI, individually and on behalf of the Putative Class Members, hereby sues the Defendant, Facebook, Inc., upon the grounds set forth herein, and based upon the knowledge and information of the Plaintiff, the Putative Class Members, and the information available to their counsel.

Background

1. If ever there were a keystone in the systemic-structure of the United States Government, a single component which conferred a quintessential quality to the American people and the history of the world's longest-lived continuous democratic republic, it is the First Amendment to the United States Constitution.

2. This forty-five-word statement grants its constituents the right to free speech (amongst other things) and is the heart and soul of American culture. The foundation for our political system of governance can most significantly be attributed to this amendment, and a credible argument can be made that its implementation has been the most consequential factor in the longevity of the country. Indeed, it is the underpinnings for our creativity, scientific achievements, and cultural evolution.

3. When this "great bulwark of liberty" was crafted by the House and Senate in 1789, it was well

understood to be of the utmost importance to the fledgling republic for its ability to keep the federal government from trampling upon the liberty of its constituents – and more importantly, to prevent the imposition of a dogmatic national narrative, as had been exercised over the then-contemporary populace by the British crown and church.

4. The drafters' concerns for the protection of free speech proved prescient over the ensuing centuries. Other democracies which failed to protect the free speech rights of their populace, perhaps none more memorably than that of the German Weimar Republic, fell to authoritarianism, dictatorship, and systemic collapse.

5. In our nation, however, the judiciary has proven to be the vanguard of the right to free speech. More than two-centuries of case law has shown Congress and the executive branch content to abridge the right from time to time, only to be held in check by the courts. Through the civil war, two world wars, a severe depression, the civil rights movement, and the cold war, the right to free speech has thrived and grown.

6. As the right to free speech developed over the centuries, the venues for such right have evolved as well. Originally exercised on soapboxes in

town squares and marketplaces, free speech rights have carried over to radio and television broadcasts, expanded past city limits to suburban venues such as malls and schools, and taken root in such subtle locations as vehicle license plates.

7. Ultimately, the soapbox, town square and to a lesser degree, the common marketplace, went the way of the horse and the 8-track. Gone are the common forums provided by these public venues, especially as modern retailers like Amazon and Walmart shift away from in person sales and rely more significantly on their customer's internet connectivity.

8. In the demise of the antiquated venues for public expression and discourse, new digital public forums grew to replace them. Software companies like the Defendant, Facebook, opened their doors to create such a public, commonly accessed venue. Much like their predecessors, these digital venues are open to members of the public, such as the Plaintiffs, and the proprietors derive their income from advertising to their attendees and facilitating sales between third party merchants and the potential customers who attend the venue.

9. For more than two-decades, the Defendant has been at or near the forefront of the new digital

public forum. As we sit in 2021, the Facebook has wholly rebuilt the antiquated town square and marketplace in its own image, providing its attendees with both a digitized marketplace (the "Facebook Marketplace") and a digitized public forum for discourse.

10. The Defendant's function and services in modern times is identical to that of the public forums originally contemplated by Congress when the First Amendment was crafted, and subsequently passed by the nation.

The First Global Pandemic of the Postmodern Digital Age

11. The onset of 2019 Novel Coronavirus (COVID-19) in the latter months of 2019 presented the first world-wide pandemic of the postmodern digital age. Though the United States had weathered pandemics before, it had been at least sixty (60) years since the last one, and slightly more than a hundred years since the most well-known pandemic of the Late-Modern Era: the Spanish Flu.

12. Scientific and lay theories regarding the virus' origin, infection prevention and treatment methods were immediately plentiful. The topic dominated the news-cycle to the exclusion of virtually all other subjects for months.

13. Subsequent state and municipal government shutdowns of public areas, private businesses and schools, in addition to strict prohibitions against gathering and social activities, drove the entirety of public discourse on the topic (include that of the Plaintiffs) to the last bastions of public forum: internet based social-media offered by the Defendant, Facebook, and less than a handful of other platforms.

14. With this sudden concentration of discourse under its moderation, the Defendant had newfound and immense power to control the content and direction of the public conversation through the modification, redaction and labelling of statements made by its public users, including those of the Plaintiffs.

15. All the while, the scientific community reeled from the speed at which the COVID-19 pandemic swept the world, often debating widely and publicly about the origin, methods of transmission, symptoms and treatments for the disease.

16. Memorably, even the U.S. Center for Disease Control and Prevention (CDC) seemed to lack a consistent message to the public regarding proper precautions, as guidance from the CDC as late as March, 2020 stated that wearing masks was unnecessary for healthy individuals.

17. Weeks later, the CDC reversed its position saying that masks were absolutely necessary. Mask mandates issued by the Federal, state and municipal governments sprang up virtually overnight thereafter.

18. Whether accurate or not (a subject of no small scholarly debate even at the date of filing of this Complaint), pressure began to mount on the Defendant to begin filtering, curating, labelling or outright censoring publicly posted comments and statements deemed to contain "misinformation" about the still widely debated attributes of the virus.

19. Despite an ever-changing and incomplete landscape of research findings, anecdotal evidence and scientific theories, the Defendant formed a dogmatic narrative about COVID-19 and its vaccinations.

20. In February 2021, the month following the inauguration of President Joseph (Joe) Biden and his administration, the Defendant acknowledged that it had begun to "crack down" on public statements and comments made by participants on its public forum.

21. Some of the information the Defendant specifically began to censor included, but was not limited to: (1) statements that the origin of COVID-19 was man made; (2) statements casting

doubt as to the efficacy of the vaccines; (3) statements casting doubt upon the safety of the vaccinations; and (4) statements pertaining to relative danger of the virus itself.

22. On July 15th, 2021, United States President Joe Biden's Press Secretary, Ms. Jennifer Psaki, brought to light that the Defendant's efforts to censor information had come in communion with, if not at the behest of efforts by the Executive Branch of the Federal Government to restrict public statements and comments which clashed with the dogmatic narrative adopted by the new administration and Facebook:

> "*Q*: Can you talk a little bit more about this request for tech companies to be more aggressive in policing misinformation? Has the administration been in touch with any of these companies and are there any actions that the federal government can take to ensure their cooperation, because we've seen, from the start, there's not a lot of action on some of these platforms.
>
> *Ms. Psaki:* Sure. Well, first, we are in regular touch with these social media platforms, and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team, given, as Dr. Murthy conveyed, this is a big

issue of misinformation, specifically on the pandemic.

In terms of actions, Alex, that we have taken – or we're working to take, I should say – from the federal government: We've increased disinformation research and tracking within the Surgeon General's office. ***We're flagging problematic posts for Facebook that spread disinformation***. We're working with doctors and medical professionals to connect – to connect medical experts with popular – with popular – who are popular with their audiences with – with accurate information and boost trusted content so we're helping get trusted content out there…

There are also proposed changes that we have made to social media platforms including Facebook, and those specifically are four key steps.

One, that they measure and publicly share the impact of misinformation on their platform. Facebook should provide, publicly and transparently, data on the reach of COVID-19 – COVID vaccine misinformation…

Second, that we have recommended – proposed that they create a robust

enforcement strategy that bridges their properties and provides transparency about the rules…

Third, it's important to take faster action against harmful posts. As you all know, information travels quite quickly on social media platforms; sometimes it's not accurate. And Facebook needs to move more quickly to remove harmful, violative posts – posts that will be within their policies for removal often remain up for days. That's too long. The information spreads too quickly.

Finally, we have proposed they promote quality information sources in their feed algorithm. Facebook has repeatedly shown that they have the levers to promote quality information. We've seem them effectively do this in their algorithm over low-quality information and they've chosen not to use it in this case." See Exhibit A attached hereto. Emphasis added.

23. The Plaintiffs have made public statements regarding COVID-19 on the Defendant's public forum platform, which were censored by the Defendant because the statements were inconsistent with the interests of the Government. Many of the Plaintiffs' statements which were censored by the Defendant have

subsequently been broadly accepted as likely factually accurate, despite their prior designation as misinformation.

24. Furthermore, these public statements and comments made by the Plaintiffs were made as part of their rights to free speech.

Jurisdiction and Venue

25. This Court has jurisdiction over the subject matter of this action pursuant to the 1st Amendment of the United States Constitution, in addition to 28 U.S.C. §1331, 1332, and 28 U.S.C. §§2201-2202.

26. With respect to the Class Action components of this matter, jurisdiction is proper before this Court in accordance with 28 U.S.C. §1332(d) as the proposed class consists of over one-million Members; the Members of the proposed class, including the Plaintiff, are citizens of states different from the Defendant's home state; and the aggregate amount in controversy exceeds $5,000,000.

27. Venue is proper in the Middle District of Florida under 28 U.S.C. §1391(b)(2), (d) and (e)(1). A substantial part of the events giving rise to this claim occurred within the Middle District of the State of Florida.

Parties

28. Plaintiff Richard Rogalinski is a natural person domiciled in the Middle District of Florida.

29. The Plaintiff Class Members ("Putative Class Members") include individuals who have resided within the United States between January 20th, 2021 and the present, and had their statements or comments on Facebook regarding COVID-19 censored by the Defendant, and were damaged thereby.

30. Defendant Facebook, Inc., is a foreign corporation with a principal place of business at 1601 Willow Road, Menlo Park, California, and conducts business throughout the world, including within the State of Florida and the remainder of the United States.

Statement of Facts:

31. As part of its operation of the public forum it has created, Facebook has developed a number of tools that it utilizes to remove, hide, censor, append or alter statements (hereinafter "Censorship Tools") made by participants registered with the company.

32. It regularly uses these Censorship Tools to moderate public and private conversations on its platforms, including Facebook and Instagram.

33. The Federal Government, as discussed above, has admitted that it provides instructions to the Defendant regarding which accounts and which statements it finds to contain COVID-19 information inconsistent with its dogmatic narrative. The Federal Government further acknowledged that the Defendant follows these instructions and utilizes its Censorship Tools against the persons identified by the Federal Government.

34. At the direction of the President of the United States, his highest levels of staff members, and other Federal Government agencies and officials, the Defendant has engaged in a course of conduct to censor, limit and otherwise chill the Plaintiffs rights to free speech as they pertain to COVID-19.

35. These statements by the Plaintiffs were expressions of their beliefs regarding healthcare and politics as they pertain to COVID-19 and were intended and offered to further public discourse.

36. Accordingly, these statements are afforded protection as free speech under the First Amendment of the United States Constitution.

37. Examples of such censorship and chilling of free speech include, but are not limited to the following:

a. On or about April 6th, 2021, Plaintiff Rogalinski, a participant on the Defendant's social media platform, posted a comment to his page discussing the utilization of masks and facial coverings to prevent the spread of COVID-19.

> "Some of that science stuff laying out how masks do nothing to prevent the spread of [COVID-19] and they're actually harmful to your health.
>
> Haven't seen any of that science stuff saying otherwise. Just talking heads who want to spread fear and control you." Exhibit B.

b. The Defendant, in response, appended a statement to Plaintiff Rogalinski post:

> "NCBI.NLM.NIH.GOV (*i*)
>
> www.ncbi.nlm.nih.gov
>
> Missing Context. Independent fact-checkers say this information could mislead people. See Why."

c. Weeks later, on May 6th, 2021, Plaintiff Rogalinski posted another COVID-19 related comment to his page, this time raising issues with COVID-19 vaccines and citing an article

from Fox News's Tucker Carlson regarding how many Americans had died after taking the COVID vaccine. Exhibit C.

d. The Defendant appended the Plaintiff's statement with its own: "Missing Context. Independent fact-checkers say this information could mislead people. See Why."

e. On June 13th, 2021, Plaintiff Rogalinski posted an image of a Tweet (a statement made via Twitter) by Dr. David Samadi, a board certified urologist and Director of Men's Health at St. Francis Hospital in Roslyin, NY. The content of the Plaintiffs statement included the language in the tweet:

> "I want to ensure that everyone understands the gravity of the situation here.
>
> Hydroxychloroquine worked this whole time.
>
> The media said it would literally kill you if you took it simply because POTUS promoted it as a cure.." Exhibit D

f. The Defendant hid the post from public view, labelling it "False Information" and then cited

a USA Today article from nearly a year earlier (July 21st, 2020), indicating that the drug Hydroxychloroquine was an ineffective treatment for COVID-19.

38. Furthermore, Putative Members of the Class also exercised the First Amendment rights pertaining to beliefs and statements regarding COVID-19 in order to engage in the public discourse hosted on the public forum operated by the Defendant, Facebook.

39. The COVID-19 statements of Putative Members of the Class were censored, or their statements made immediate subject of rebuke or discredit from the Defendant at the behest of the Federal Government.

40. Such action by the Defendant had a chilling effect upon the Putative Class Members' future statements, or otherwise censored speech entitled to protections under the First Amendment.

41. Furthermore, the Defendant's actions against the Putative Class Members' statements amounted to unconstitutional censoring of speech entitled to protections under the First Amendment.

Facebook: A State Actor

42. The constitutional guarantee of free speech is a guarantee only against abridgement by federal or state government. *Hudgens vs. NLRB*, 424 U.S. 507, 513 (1976).

43. For purposes of stating a valid First Amendment claim against a private entity (rather than a governmental one), a claimant must demonstrate that there is a sufficiently close nexus between the Government and the challenged action of the private entity so that the action of the private entity may be fairly treated as that of the State itself. *Jackson vs. Metro. Edison Co.,* 419 U.S. 345, 351 (1974).

44. It is without dispute that typically facilities or locations that are deemed to be public forums are usually operated by governments, and those spaces in the post-modern era have increasingly become within the digital domain of the internet.

45. The Defendant, as noted by the Supreme Court in *Packingham vs. North Carolina*, 137 S.Ct. 1730, 1735 (2017), is one of the most popular sites where the exchange of views and speech occurs.

46. This was exacerbated by COVID-19's impact upon the non-digital societal outlets that were previously permissible. Curfews, gathering in groups, religious activity, and political activities

were all either curbed or outright verboten by various municipal government fiat, thereby increasing the importance of the public's access to sites like the Defendant's.

47. The Supreme Court's commentary in *Packingham* seems to acknowledge the eventuality that we have arrived at: social media companies such as the Defendant have become an integral and necessary component of the public forum whereby Americans express their rights to freedom of speech.

48. This is indeed the product of social media's own intentions, albeit one with consequences.

49. For purposes of the instant case, the Defendant generally serves a governmental function in providing the public forum for their participants, such as the Plaintiffs in this matter, to exchange ideas and information freely.

50. However, the Defendant is not automatically a "state actor" just based upon the provision of their social media networks to the public. See *Freedom Watch, Inc., vs. Google, Inc.*, 386 F.Supp3d 30, 40 (D.D.C. 2019), citing *Lloyd Corp. vs. Tanner*, 407 U.S. 551, 569 (1972) ("nor does property lose its private character merely because the public is generally invited to use it for designated purposes.")

51. The transformative circumstances which must be present to change the Defendant's actions from those of a private entity to those of a state actor involve the presence of governmental authority conferred upon the private entity.

52. In the instant case, the President of the United States, and his retinue, have specifically instructed the Defendant to flag and censor specific statements made by the Plaintiffs, labelling them false, misleading or otherwise casting doubt upon the credibility because they are deemed to be "misinformation" by the Administration.

53. Such action is governmental in nature by its very definition: it is the executive branch issuing edicts and instructions to a private entity operating a public forum on how to moderate the public space.

54. In short, the action by the Administration has all but eliminated the private elements of decision making by the Defendant, and conferred by specific directive obligations upon the Defendant in the regulation of free speech.

55. Thereby, the Defendant became a State Actor as soon as it began accepting specific directives issued by the Governmental Administration.

56. Furthermore, the specific actions compelled by the Government and executed by the Defendant were flatly unlawful as the Government may not suppress lawful speech, even as a means to suppress unlawful speech. *Ashcroft vs. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

Class Action Allegations

57. The Plaintiff and the Class bring this lawsuit pursuant to Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure on behalf of the following proposed class (hereafter the "Class"):

> ***All Facebook platform Members, Users or Participants who reside within the United States, and between January 20th, 2021 and today, had their public statements, comments or posts on the Facebook platform censored, modified, hidden, appended or curtailed by the Defendant, and where were damaged thereby.***

58. Subject to such other information as may be discovered through the course of this litigation and discovery, the definition of the Class may be expanded or narrowed by amendment or amended complaint.

59. Specifically excluded from the Class are the Defendant, its officers, directors, agents,

trustees, parents, children, subsidiaries, trusts, representatives, employees, principals, servants, partners, joint venturers, or any entities controlled by the Defendant, and its heirs, successors, assigns or other persons or entities related to or affiliated with the Defendant and/or its officers and/or directors, in addition to the judge assigned to this action, and any member of the judge's immediate family, as well as any magistrates assigned to this action, judicial law clerks or other members of the court's immediate staff.

60. Numerosity: The Members of the Class are so numerous that individual jointer is impractical. Upon information and belief, Plaintiff Rogalinski and the Class alleges that the Class contains hundreds of thousands, if not millions of Members. Although the precise number of Putative Class Members is unknown to the Plaintiff and the class, the true number of Putative Class Members is known by the Defendant, and thus, may be notified of the pendency of this action by first class mail, electronic mail, social media, and/or published notice.

61. Existence and Predominance of Common Questions of Law and Fact: Common quests of law and fact exist as to all Members of the Class and predominate over any questions affecting

only individual Putative Class Members. These common legal and factual questions include, but are not limited to the following:

a. Whether the Defendant's conduct violated the First Amendment of the United States Constitution.

62. Typicality: Plaintiff Rogalinski and the Class's claims are typical of the claims of other Members of the Class in that the Defendant, with the authority and direction from the Office of the President of the United States, censored, appended, modified, or hid protected speech on its platform, and otherwise acted to chill the Plaintiff and Class's rights to free speech upon the public forum operated by the Defendant.

63. Adequacy of Representation: Plaintiff Rogalinski and the Class will fairly and adequately protect the interests of the Class. Plaintiff and the Class have retained counsel experienced in complex litigation, and the Plaintiff and the Class intend to vigorously prosecute this action. Further, Plaintiff and the Class have had no interests that are antagonistic to those of the Class.

64. Superiority: A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Putative Class Members is relatively small

compared to the burden and expense that would be entailed by individual litigation of their claims against the Defendant. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs committed against them. Furthermore, even if the Putative Class Members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised in this lawsuit. Conversely, the class action litigation form provides the benefits of adjudication of the issues in a single proceeding, economies of scale, and comprehensive supervision by a single court and presents no unusual management difficulties under the circumstances here.

65. Other Grounds for Certification: The Class may also be certified because:

    a. The prosecution of separate actions by individual Putative Class Members would create a risk of inconsistent or varying adjudication with respect to individual Putative Class Members that would establish incompatible standards of conduct for the Defendant;

b. The prosecution of separate actions by individual putative Class Members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Putative Class Members not parties to the adjudications, or substantially impair or impeded their ability to protect their interests; and/or

c. The Defendant has acted or refused to act on grounds generally applicable to the Class as a whole, thereby making appropriate final injunctive relief with respect to the Members of the Class as a whole.

COUNT I: VIOLATION OF FIRST AMENDMENT RIGHT TO FREE SPEECH

66. Plaintiffs incorporate by reference all preceding paragraphs.

67. Under the Free Speech Clause of the First Amendment to the United States Constitution, exists the right to exercise free and unabridged speech to which the Plaintiffs are entitled.

68. Plaintiff Rogalinski and the Putative Class Members are users and account holders and participants in the Defendant's social media platform, including the platform known generally as Facebook.

69. Facebook serves to provide a public forum for users/participants to communicate the exchange of ideas and information for public consumption. These messages can generally be viewed by or shared with anyone on the internet, including other members of the public or specific subsections thereof, based upon the participant's preferences.

70. Plaintiffs utilized Facebook for its intended purpose: namely to express their views publicly on a regular basis.

71. Some of these views and statements expressed by the Plaintiffs involved information, discussions and debates regarding the numerous facets of the COVID-19 pandemic.

72. Included in these statements were comments on the origin of the COVID-19 pandemic, its transmission, prevention and treatment options, and general political comments regarding enforcement thereof.

73. At the direction of the Federal Government, or in communion therewith, Facebook flagged Plaintiffs' posts dealing with the aforementioned subjections by redacting, hiding, removing or appending additional information onto the messages.

74. Such actions were intended to censor information which the Government had termed "misinformation," and specifically intended to control the course of public opinion by removing objectionable material or otherwise casting aspersions upon the statements themselves.

75. This censorship, modification, redaction or abridgment caused Plaintiffs' posts to be difficult or impossible to view in the public forum either by erasure and concealment by Facebooks Censorship Tools.

76. The posts, statements and comments were directly impacted as well, either through covering Plaintiffs' posts so that individuals had difficulty viewing Plaintiffs' posts, or by appending statements to tell a reader that the Plaintiffs' public statements were false or otherwise invalid.

77. According to the Administration of President Joe Biden, the United States Government specifically indicated what users, content and information what should be flagged, censored, and removed regarding the COVID-19 virus.

78. Facebook subsequently engaged in the censorship directed by the Federal Government, causing its activities to be converted to that of a state actor.

79. Therefore, Facebook's actions were that of a governmental actor, and thereby are subject to the restrictions set forth in the First Amendment.

80. The government's actions by telling Facebook what to censor, modify or remove on their website related to COVID-19 directly caused the injury to Plaintiffs' First Amendment right to engage in political speech.

81. One of the most important uses to the First Amendment's right to engage in political speech is to engage in dissident views from the government.

82. The Defendant's actions to block Plaintiffs' views or state that such views were "misinformation," false or otherwise inaccurate, their activity was tantamount to disfavoring dissident speech in favor of the acceptable dogmatic information approved by the Government.

83. Absent injunctive and declaratory relief against Defendant Facebook, the Plaintiffs continue to be irreparably harmed as the Defendant continues to censor their protected speech.

84. The Plaintiffs demand a Jury Trial.

WHEREFORE, the Plaintiffs, Richard Rogalinski, and the Putative Class Members, respectfully request

this Honorable Court enter Judgment against the Defendant, declaring such censorship to be unconstitutional under the First Amendment, enjoining them from future restrictions on the Plaintiffs free speech as it pertains to COVID-19, awarding the Plaintiffs their attorney's fees and costs, and for compensation of such other damages resulting from the Defendant's unconstitutional activity which the Court deems just and proper under the circumstances.

Dated: July 19th, 2021

Respectfully Submitted:

Andrew Z. Tapp
Andrew Z. Tapp, Esq.
Florida Bar No.: 68002
Metropolitan Law Group, PLLC
1971 W. Lumsden Road, #326
Brandon, Florida 33511
(813) 228-0658
Andrew@Metropolitan.Legal
LaJeana@Metropolitan.Legal