# No. 21-16210

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

CHILDREN'S HEALTH DEFENSE,
a Georgia non-profit organization,

*Plaintiff-Appellant*,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, a California resident;
THE POYNTER INSTITUTE FOR MEDIA STUDIES, INC.,
a Florida corporation; SCIENCE FEEDBACK, a French corporation,

*Defendants-Appellees*.

Appeal from the Judgment of the United States District Court
for the Northern District of California, Case No. 3:20-cv-05787-SI
Honorable Susan Illston, United States District Judge

# AMICUS CURIAE BRIEF IN SUPPORT OF CHILDREN'S HEALTH DEFENSE AND REVERSAL

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal representation at no charge to individuals whose constitutional rights have been threatened or violated, and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute is interested in this case because it touches upon core questions of the right to freedom of expression which is the bedrock for preservation of individual liberty that both the federal elements of our constitutional structure and the Bill of Rights were created to protect and preserve.

The Rutherford Institute writes in support of the appeal filed by Children's Health Defense ("CHD") from the judgment rendered in the district court on June 30, 2021 dismissing CHD's claims against Facebook, Zuckerberg, and Poynter ("Defendants"). The purpose of this Brief is to support CHD's first cause

[1] *Amicus* certifies that counsel of record for Children's Health Defense, Facebook, Inc., Mark Zuckerburg, and The Poynter Institute for Media Studies, Inc. have consented to *Amicus* filing a brief in support of CHD. *Amicus* thus files this brief pursuant to Fed. R. App. P. 29(a)(2). Although Science Feedback is named in the title of this case, the claims against Science Feedback were dismissed without prejudice by the district court due to lack of service, and Science Feedback has not appeared in this matter; thus, no consent was obtained or needed from Science Feedback. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief.

of action in its Second Amended Complaint for First and Fifth Amendment (*Bivens*) violations.

## SUMMARY OF ARGUMENT

In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the United States Supreme Court unequivocally recognized the importance of an individual's right to participate in social media by striking down a state's prohibition on a convicted felon having access to the internet. In an 8-0 ruling, the Court held that the prevalence of social media in the current time renders it nearly impossible to have "a voice" in any meaningful way without access to such technology. The court held that the state did not have a compelling interest in silencing Packingham's voice on social media even though he was a convicted felon.

*Packingham* demonstrated the high court's recognition of the prevalence and importance of the internet generally, and social media platforms in particular, and that depriving an individual of access to these platforms effectively quells their right to express themselves. The court found that the state of North Carolina did not have a compelling state interest to infringe on Packingham's fundamental first amendment rights.[2]

[2] Recently, Justice Clarence Thomas noted that the enormous control which digital platforms have over speech makes them like a communications utility. *Biden v. Knight First Amendment Institute*, 141 S.Ct. 1220, 1224 (2021) (Thomas, J., concurring).

Of course, *Packingham* showed a clear case of state action—a state law. However, a less obvious but no less genuine form of state action[3] has been pled in CHD's Second Amended Complaint (also referred to as "SAC"). CHD pled numerous concrete instances wherein Defendants have censored, censured, de-monetized and de-platformed CHD's postings thereon at the *direct* behest of government actors, who have made it clear that their orders are aimed at the *content* of CHD's postings. CHD pled the names of the individual state actors, branches of government and administrations, what they have told Defendants to do, when they have told Defendants to do it, and how Defendants unequivocally acquiesced to the direct orders of the government actors and admitted doing so.

CHD set forth concrete facts that far surpass the amount needed to invoke state action, as explained in *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir. 2020), and in *Divino Group, LLC v. Google, LLC et.al*., 2021 WL 5175 (N.D. Cal. Jan. 6, 2021). As discussed more fully below, the threshold for state action was not met in those cases, but state action by private companies could have been found if the nexus between those actors and the government been established. That nexus has been established by CHD in this case here.

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[3] The term "state action" as used herein includes the concept of "government action" that applies to actions by the government of the United States.

Both *Prager* and *Divino Group* are distinguishable from the case at bar because neither were able to plead a nexus between any government action and the private company defendant. The courts in both of those cases stated that what was lacking was a direct connection to government action which caused the harm. Yet, in both of those cases, the parties were given leave to amend by the respective courts.

In this case, CHD alleged a significant number of state actions performed by Defendants which directly led to the censorship of CHD on social media based *exclusively* upon content that the government found objectionable. Without being able to proceed in this lawsuit, CHD and others similarly situated would be left without any remedy for violation of their constitutional rights inflicted by government officials using big tech as their deputized proxy. Indeed, if the Court does not find CHD's pleading of state action sufficient here, it is difficult to imagine what level of detail would be needed to overcome the granting of a Rule 12(b)(6) motion based upon a failure to plead state action.

## ARGUMENT

### THE DISTRICT COURT'S DISMISSAL OF CHD'S SECOND AMENDED COMPLAINT UNDER RULE 12(b)(6) MUST BE REVERSED BECAUSE CHD HAS PLED SUFFICIENT FACTS THAT DEFENDANTS VIOLATED CHD'S FIRST AMENDMENT RIGHTS IN THEIR ROLE AS GOVERNMENT ACTORS

### A. Whether state action exists is a fact-bound inquiry, and CHD has met the threshold pleading requirements precluding a dismissal of its claims under Rule 12(b)(6).

The U.S. Supreme Court set forth a three-part test which amounts to a totality of the circumstances test for the existence of state action in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 298 (2001). That test considers the following factors: (1) whether the private party's conduct results from the state's exercise of coercive power; (2) whether the state provides significant overt or covert encouragement in an activity; and (3) whether the private party operates as a willful participant in the government activity. *Brentwood Acad.*, 531 U.S. at 296; *see also Johnson v. Knowles*, 113 F.3d 1114, 1115 (9th Cir. 1997) (willful participation by private party in joint activity with government actors is all that is required to find state action).

CHD alleged facts evidencing that Defendants herein were *de facto* state actors under all three factors. For example, the CHD cited a letter which Congressman Adam Schiff sent to Defendants, threatening their immunity from suit under section 230 of the Common Decency Act if Defendants failed to censor content on their sites which Schiff and other congress members found objectionable. (SAC pars. 60-69.) CHD further alleged that Defendants were pressured by the United States Congress to suppress content that "casts doubt on the efficacy of vaccines," and that Defendants acted in partnership with

government actors including the CDC, a federal agency, and the CDC's proxy, the WHO, while Defendants promoted the CDC as the ultimate authority in the subject. (See, *e.g.*, SAC paras. 1, 40-51; 56-64; 70, 98-104; 308,312, 364-368.) CHD also pleaded that Zuckerberg repeatedly stated he was working directly with the government on these issues. (SAC pars 49-45; 69-70; 308.)

These are but a few examples cited in CHD's Second Amended Complaint which show that this Court must reverse the district court's decision to dismiss CHD's claims. CHD has met, if not surpassed, the pleading threshold for setting forth facts which allege Defendants were *de facto* deputized federal state actors who violated CHD's First Amendment rights under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Indeed, the Supreme Court has made it plain that whether a nominally private entity's acts constitute government action is a "necessarily fact-bound inquiry," *Brentwood Acad.* 531 U.S. at 298 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)). Thus, such a case is not suitable or appropriate for resolution on a motion to dismiss under Rule 12(b)(6).

Because there are a range of circumstances which can point to the government being behind a nominally private decision, courts should be loath to grant a motion to dismiss for failure to allege state action, particularly when the facts are construed in the light most favorable to the plaintiff and the claim need

only be "plausible" on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As discussed herein, CHD set forth compelling facts and circumstances showing that Defendants were operating as *de facto* government agents.

Moreover, dismissal of CHD's claims without permitting any factual development of the circumstances surrounding the censorship and de-platforming of CHD was an abdication of the responsibility of the district court to ensure that fundamental rights of free speech are not violated by *sub rosa* governmental action. As the Supreme Court has declared:

> The judicial obligation is not only to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on a State for conduct it could not control, but also to assure that constitutional standards are invoked when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed.

*Brentwood Acad.*, 531 U.S. at 295 (internal citations and quotation marks omitted).

### B. CHD alleged sufficient facts to state a claim of government action by Defendants, making this case distinguishable from *Prager* and *Divino*.

In *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir. 2020), Prager University sued Google for censoring its content on the latter's platform, arguing that the defendants should be considered state actors under the public function test. Similar to CHD, Prager University is an educational 501(c)(3)(c) corporation

which filed a complaint against YouTube LLC ("YouTube") and Google LLC ("Google") alleging *inter alia*, a cause of action for violations of the First Amendment to the United States Constitution stemming from the defendants censoring, restricting, and filtering the content of videos based upon Prager's conservative viewpoint and political ideology. Prager's argument was that, in holding itself out as fora encouraging speech activity and asserting viewpoint neutrality, the defendants were state actors under the "public function test."

The Court outlined the limited occasions where courts have allowed the conversion of private action into public function, state action. The cases have been limited to activities performed by the private actor which were traditionally the exclusive prerogative of the state. *Marsh v. Alabama*, 326 U.S 501 (1946); *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1214 (9th Cir. 2002). Examples of functions that have qualified have been to private entities, holding public elections, governing a town and serving as an international peace-keeping force. *Brunette*, 294 F.3d at 1214; *Dobyns v. E-Systems, Inc.* 667 F. 2d 1219, 1226-1227 (5th Cir. 1982).

The *Prager* Court found that defendants YouTube and Google did not perform functions which were traditionally the exclusive prerogative of the state, and therefore, there was no state action under the First Amendment under the "public functions" test. As Prager did not plead any other theory of state action

under the First Amendment, the Defendant's Rule 12(b)(6) motion was granted, and Prager was given leave to amend its Complaint to allege state action. Prager appealed the district court's decision, which was affirmed by the Ninth Circuit. *Prager University*, 951 F.3d 991 (9th Cir. 2020).

Following on the heels of *Prager* was a ruling on a Rule 12(b)(6) motion in *Divino Group LLC v. Google LLC,* 2021 WL 51715 (N.D. Cal. Jan. 6, 2021), wherein Divino Group filed a complaint alleging censorship and restriction of its content based upon its LGBTQ political identities and viewpoints. Divino Group claimed its First Amendment rights were violated under the "public function" test, arguing that since defendants designated themselves a public forum for free expression, defendants had thereby taken on the traditional and exclusive governmental function of regulating speech. The court noted that this theory of public function was already rejected by the Ninth Circuit when it held that the hosting of speech in a private platform is not a "traditional and exclusive government function," required for it to fall within the purview of the "public function test." *Prager*, 951 F.3d. at 997-98.

Divino Group's second argument was that the defendants' statutory protection against immunity under section 230 of the Common Decency Act amounts to government endorsement of the defendants' alleged discrimination against Divino Group's speech based upon content. The Court rejected this

argument. First, Divino Group had brought its claim under 42 U.S.C. § 1983, which applies exclusively to actions taken under color of state law, rather than federal law. A claim for a federal violation of constitutional rights must be brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* 403 U.S. 388 (1971). But Divino Group did not plead a *Bivens* claim. The court also remarked that a private entity could be considered a state actor when the government compels the private entity to take a particular action. *Divino*, 2021 WL 51715, *6 (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)). However, the court found Divino Group did not plead any such compulsion, although it was given leave to amend.

In the instant case, CHD is not relying upon the doctrine of public function as the legal basis for its First Amendment claims against Defendants. The gravamen, and indeed the literal pleading of CHD's Second Amended Complaint is that the federal government, through multiple government officials and actors, including but not limited to Congressman Adam Schiff, directed, instructed, encouraged and compelled Facebook to censor the content of CHD expressly because the government did not want any viewpoints contrary to its own on the efficacy of vaccinations in general and COVID-19 vaccinations in particular.

CHD has in fact made and pled a *Bivens* claim in its Second Amended Complaint, and otherwise met the pleading requirements for its First Cause of Action against Defendants.

### C. The district court's judgment must be reversed to enable CHD to procced with this lawsuit so as to avoid grave injustice and lack of a remedy where the government acts through private companies to violate constitutionally protected rights.

CHD's Second Amended Complaint makes numerous allegations supporting its contention that federal actors and agencies encouraged, coerced, and jointly participated in the censorship of CHD's expression on Facebook. It is axiomatic that these allegations must be accepted as true for purposes of a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. at 678. As the Supreme Court held in *Brentwood Acad.*, 531 U.S. at 298, the courts must remain available to those whose fundamental liberties are infringed by the government acting in a clandestine matter through private entities. Indeed, it is particularly crucial that CHD's allegations of government direction of the suppression of expression by the Defendants be fully and fairly heard in light of growing evidence that the federal government is co-opting the social media found so important in *Packingham* to squelch disfavored speech.

For example, in March 2020, the United States government held a meeting with Facebook, Google (YouTube's owner) and other tech giants for the purpose of enlisting their assistance in suppressing information related to COVID-19.

Numerous media outlets reported that on or about March 11, 2020, the White House held a meeting with tech companies, including Facebook and Google, in which the White House chief technology officer asked for the companies' help in spreading accurate information and preventing the spread of misinformation about the coronavirus outbreak.[4] As reported by *The Washington Post*, White House chief technology officer Michael Kratsios met with representatives of the tech companies to enlist their help in augmenting the government's efforts in the fight against the coronavirus, hoping that Silicon Valley might foster the government's efforts to track the outbreak and disseminate accurate information:

> "Cutting edge technology companies and major online platforms will play a critical role in this all-hands-on-deck effort," Michael Kratsios, the White House's chief technology officer, said in a statement. "Today's meeting outlined an initial path forward and we intend to continue this important conversation."[5]

The focus of the meeting was in getting corporate entities such as Facebook and Twitter to stop the spread of any so-called coronavirus conspiracy theories on

[4] See, e.g., Hatmaker, Taylor, "White House asks tech leaders for help with coronavirus response," *TechCrunch.com* (March 11, 2020), https://techcrunch.com/2020/03/11/white-house-cto-kratsios-tech-facebook-google-meeting/.

[5] Romm, Tony, "White House asks Silicon Valley for help to combat coronavirus, track its spread and stop misinformation," *The Washington Post* (March 11, 2020), https://www.washingtonpost.com/technology/2020/03/11/white-house-tech-meeting-coronavirus/.

their platforms.[6] Acting on this government mandate, on March 16, Facebook, Google and other tech companies issued a statement pledging to "jointly combat[] fraud and misinformation about the virus, elevating authoritative content on our platforms, and sharing critical updates in coordination with government healthcare agencies around the world."[7]

Following this March 2020 meeting, aggressive censorship, including de-platforming emerged as the policy of Defendants, working in conjunction with government entities to block the online publication of ideas that do not comport with government messaging regarding the COVID-19 pandemic and other health-related issues. Such government directed actions have stymied CHD and other public interest groups in their ability to speak on issues of public concern to the audience that follows CHD and these issues. Censorship of the kind CHD has been subjected to is increasing at a rate that poses a serious threat to the freedoms of all people, regardless of their views. Moreover, it is wholly contrary to universal principles of freedom of speech which are the very foundation for representative

[6] Kean, Sean, and Sherr, Ian, "White House asks tech companies for help battling coronavirus," *C/NET* (March 12, 2020), https://www.cnet.com/news/white-house-asks-tech-companies-for-help-battling-coronavirus/.

[7] Shu, Catherine, and Shieber, Jonathan, "Facebook, Reddit, Google, LinkedIn, Microsoft, Twitter and YouTube issue joint statement on misinformation," *TechCrunch.com* (March 16, 2020), https://techcrunch.com/2020/03/16/facebook-reddit-google-linkedin-microsoft-twitter-and-youtube-issue-joint-statement-on-misinformation/.

democracy. What is at stake is no less than freedom of speech itself because of the coordinated actions of large technology corporations with control over access to information colluding with government entities to stifle any forms of dissent which challenge a chosen status quo.

The importance of this issue raised by CHD's Second Amended Complaint alleging government actors using private tech companies to do their bidding cannot be overstated. In her article, *Incitement at 100--And 50--And Today: Words We Fear: Burning Tweets & the Politics of Incitement*, 85 Brook. L. Rev. 37 (2019), Rachel VanLandingham points out that Congress regularly summons social media executives and representatives, whom they then instruct to crack down on objectionable speech that Congress itself cannot lawfully censor. As another journalist observed:

> What matters is that we're seeing a consistent and accelerating pattern of powerful plutocratic institutions collaborating with the US-centralized empire to control what ideas people around the world are permitted to share with each other, and it's a very unsafe trajectory.[8]

As a civil liberties organization whose purpose is to ensure the preservation of a robust First Amendment, especially as it pertains to free speech and a free

[8] Johnstone, Caitlin, "Why You Should Oppose the Censorship of David Icke (Hint: It Has Nothing to Do With Icke)," *Medium.com* (May 2, 2020), https://medium.com/@caityjohnstone/why-you-should-oppose-the-censorshipofIcke.

press, The Rutherford Institute is gravely concerned about the possibility that Defendants' social media platforms herein censored, censured, labeled, demonetized, and deactivated the social media platforms for CHD, all at the bidding of the U.S. government in order to silence views which the government disapproves. There is every indication that this collusion will continue. Quite simply, the censorship of online speech at government behest constitutes government action in violation of the First Amendment's guarantee of free speech and the Universal Declaration of Human Rights.[9]

Because CHD's Second Amended Complaint clearly pled facts supporting its allegations that Defendants have acted as *de facto* deputized actors, *amicus curiae* submits that the totality of the circumstances test which must be applied to determine state action forecloses the possibility that the granting of a Rule 12(b)(6) motion would be proper in this case, and is further concerned that granting the motion to dismiss in the face of such detailed pleadings of state involvement and coercion would render it a near impossibility to plead sufficient facts showing the government acting by proxy through technology in the future.

[9] As Article 19 of the Universal Declaration of Human Rights affirms: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." https://www.un.org/en/universal-declaration-human-rights/.

## CONCLUSION

The Rutherford Institute respectfully submits that CHD's pleadings in this matter as governed by the applicable law require this Court to allow CHD's case to go forward. As such, The Rutherford Institute urges this Court to reverse the judgment of the district court which granted Defendants' Motion to Dismiss under Rule 12(b)(6), and allow CHD's case to proceed on its merits and for these crucial issues to be adjudicated.

Respectfully submitted,

Dated: November 4, 2021

THE RUTHERFORD INSTITUTE
BY: s/John W. Whitehead
Counsel for *Amicus Curiae*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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