

1 TYLER BURSCH, LLP  
2 Robert Tyler (STATE BAR NO. 179572)  
3 rtyler@tylerbursch.com  
4 Nada Higuera (STATE BAR NO. 299819)  
5 nhiguera@tylerbursch.com  
6 25026 Las Brisas Road  
7 Murrieta, California 92562  
8 Telephone: 951-600-2733  
9 Facsimile: 951-600-4996

7 LIBERTY JUSTICE CENTER  
8 Daniel Suhr, pro hac vice admitted  
9 dsuhr@libertyjusticecenter.org  
10 M.E. Buck Dougherty III, pro hac vice admitted  
11 bdougherty@libertyjusticecenter.org  
12 James McQuaid, pro hac vice admitted  
13 jmcquaid@libertyjusticecenter.org  
14 440 N. Wells Street, Suite 200  
15 Chicago, Illinois 60654  
16 Telephone: 312-637-2280  
17 Facsimile: 312-263-7702  
18 *Attorneys for Plaintiff Justin Hart*

15 **UNITED STATES DISTRICT COURT**  
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 JUSTIN HART,  
19 Plaintiff,

20 v.

21 META PLATFORMS, INC., f/k/a Facebook,  
22 Inc.; TWITTER, INC.; VIVEK MURTHY in  
23 his official capacity as United States  
24 Surgeon General; and JOSEPH R. BIDEN,  
25 JR. in his official capacity as President of the  
26 United States,

27 Defendants.  
28

**Case No. 3:22-cv-00737-CRB**

**PLAINTIFF’S MOTION TO AMEND  
COMPLAINT PURSUANT TO RULE 15**

Judge: Hon. Charles C. Breyer  
Date: December 16, 2022  
Time: 10:00 AM  
Ctrm: Courtroom 6

Action Filed: August 31, 2021  
Trial Date: None

## Introduction

Plaintiff, Justin Hart, seeks leave of this Court to amend his original Complaint (“Compl.”) under Fed. R. Civ. P. 15 with his Amended Complaint attached as Exhibit A and supporting Exhibits (“Am. Compl.”). Plaintiff’s amendment is based on information obtained for the first time in response to his FOIA claim and requests to the Department of Health and Human Services (“HHS”) and the Office of Management and Budget (“OMB”).

## Factual Background

*Plaintiff’s federal non-FOIA claim was dismissed.*

Plaintiff commenced this action in August of 2021, alleging six counts against the Defendants: President Biden, Surgeon General Murthy<sup>1</sup> (collectively, “the Federal Government Defendants”); Meta Platforms, Inc.,<sup>2</sup> and Twitter, Inc. (collectively, “the Social Media Defendants”). One count was a FOIA claim specifically against HHS and OMB; the other five were a combination of federal and state supplemental claims resulting from allegations of joint action between the Federal Government Defendants and the Social Media Defendants in violation of Plaintiff’s First Amendment rights.

On May 5, 2022, this Court dismissed Hart’s federal claim against the Social Media Defendants and Federal Government Defendants and declined to exercise supplemental jurisdiction over the state law claims, leaving only Hart’s FOIA claim against the Federal Government Defendants. Order, Dkt. 87. The Court did so based on a finding that Plaintiff had not pled and could not plead sufficient facts to establish joint action to prove a First Amendment violation.

But, in doing so, this Court explicitly left the door open for an amended complaint: “However, Hart still has a FOIA claim against HHS and OMB as to his request for information about the Federal Defendants’ supposed communications with Facebook and Twitter about his accounts.” *Id.* at 18, citing Compl. ¶¶ 66-74.

---

<sup>1</sup> President Biden and Surgeon General Murthy direct, respectively, OMB and HHS.

<sup>2</sup> f/k/a Facebook, Inc., Meta will be referred to as “Facebook” where appropriate.

1 “If Hart prevails and learns facts that plausibly suggest that ‘the state has so  
2 far insinuated itself into a position of interdependence with [Facebook and  
3 Twitter] that it must be recognized as a joint participant’ in enforcing their  
company policies, the Court will permit amendment.”

4 *Id.*, quoting *Gorenc v. Salt River Project Agr. Imp. & Power Dist.*, 869 F.2d 503, 507 (9th  
5 Cir. 1989). Plaintiff now seeks to amend his Complaint in accordance with this Court’s  
6 Order based on the new information uncovered in his FOIA claim.

7 *The New Information*

8 In summary, information revealed to Plaintiff for the first time in response to his FOIA  
9 request and claim, as well as other contemporaneous FOIA responses in other similar cases  
10 (the “New Information”) reveals the following: 1) Facebook offered the federal government  
11 \$15 million in free COVID-19 public health advertising to promote its public health  
12 message on the Internet. Am. Compl. ¶¶ 35-37 and supporting Exs. 1, 2) The federal  
13 government accepted this gift, with a condition and limitation on Facebook’s use of the  
14 name of HHS, its sub-agency the Centers for Disease Control and Prevention (“CDC”), or  
15 any other agency when promoting the government’s public health message, as well as a  
16 requirement that Facebook “clear all publicity materials . . . with HHS and CDC” before  
17 posting on the Internet. *Id.* ¶¶ 38-41 and Ex. 2, 3). The CDC and Federal Government  
18 Defendants coordinated its COVID “misinformation” response with the Social Media  
19 Defendants by holding regular “be-on-the-lookout” meetings and by providing Facebook  
20 with examples of the sort of COVID-19 messages it wanted censored on the Internet that  
21 contradicted the government’s public health message. *Id.* ¶¶ 42-47 and Exs. 3-7, 4).  
22 Facebook shared survey data with the CDC and held meetings with government  
23 representatives to address vaccine hesitancy on Facebook’s platform. *Id.* ¶ 61 and Exs. 8,  
24 5). Facebook used proprietary tools to monitor social media posts on the Internet that  
25 contradicted the federal government’s COVID-19 narrative and reported such posts to the  
26 federal government. *Id.* ¶ 69-71 and Exs. 9, 10, 6). Facebook adjusted its policies and  
27 algorithms to align with misinformation policies set forth by the Federal Government  
28 Defendants in determining whether to delete posts from the Internet, and Facebook

1 employees were defensive and submissive toward their federal masters, scurrying to “do  
2 more” to “limit[] the spread of harmful misinformation” as the Federal Government  
3 Defendants “call[ed]” and directed them to do. *Id.* ¶¶ 74-82 and Exs. 11, 12, 7). And all of  
4 this happened *prior* to Plaintiff’s suspension from the Social Media Defendants’ platforms  
5 and his valid public health messages being deleted by the Social Media Defendants from  
6 the Internet in July 2021.

## 7 LEGAL STANDARD

8 As responsive pleadings have already been served, a plaintiff seeking to amend his  
9 complaint at this stage must seek leave of the court to do so. Fed. R. Civ. P. 15(a). Leave to  
10 amend “shall be freely given when justice so requires.” *Id.* This policy is “to be applied with  
11 extreme liberality.” *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th  
12 Cir. 2001) (cleaned up). Thus, leave to amend is given unless the opposing party can  
13 establish “bad faith, undue delay, prejudice to the opposing party, and/or futility.” *Id.*  
14 (cleaned up).

## 15 ARGUMENT

### 16 I. Amendment is justified due to the discovery of the New Information.

17 In response to Hart’s FOIA request in this case and other similarly-timed FOIA  
18 requests, HHS and OMB have produced information demonstrating that the government  
19 has, indeed, “so far insinuated itself into a position of interdependence . . . that it must be  
20 recognized as a joint participant” in enforcing the Social Media Companies’ Covid  
21 “misinformation” policies. *Gorenc*, 869 F.2d at 507. Whereas previously Plaintiff could only  
22 speculate as to the nature of the Federal Government Defendants’ relationship with the  
23 Social Media Defendants based on publicly available statements, Plaintiff now has  
24 evidence, produced by the Federal Government Defendants themselves, showing exactly  
25 how far the federal government has “insinuated itself” into the Social Media Defendants’  
26 COVID “misinformation” policies. *See* Am. Compl. Exs. 1-12; *ante* at 3. Whereas he could  
27 previously only cite a press conference held *after* Facebook began taking action against him  
28 (Facebook Motion to Dismiss, Dkt. 73 at 6), the New Information conclusively proves that

1 the joint action between the Federal and Social Media Defendants predates the actions the  
2 Social Media Defendants took against him. And where previously Plaintiff had to make do  
3 with “general statements about working together,”<sup>3</sup> Plaintiff now has documented evidence  
4 that the Social Media Defendants worked at the government’s request to censor dissenting  
5 views and provided the government with regular updates on its progress, and the Social  
6 Media Defendants did not follow their own “misinformation” policies. This is precisely the  
7 information the Court sought in its Order: proof that “the state has so far insinuated itself  
8 into a position of interdependence with [Facebook and Twitter] that it must be recognized  
9 as a joint participant.” Dkt. 87 at 18, quoting *Gorenc*, 869 F.2d at 507. The Court said in  
10 its order that it would permit such an amendment. *Id.* Indeed, it should do so based on the  
11 New Information.

## 12 **II. No good reason exists to deny amendment.**

13 “In the absence of any apparent or declared reason – such as undue delay, bad  
14 faith or dilatory motive on the part of the movant, repeated failure to cure  
15 deficiencies by amendments previously allowed, undue prejudice to the  
16 opposing party by virtue of allowance of the amendment, futility of the  
17 amendment, etc. – the leave sought should, as the rules require, be freely  
18 given.”

19 *Foman v. Davis*, 371 U.S. 178, 183 (1962) (citation omitted). None of these reasons to deny  
20 amendment exist here.

### 21 **1. There was no undue delay, bath faith, or repeated failure to cure 22 deficiencies by previous amendments.**

23 This is Plaintiff’s first attempt to amend his complaint. To the extent that there has  
24 been a delay, the primary cause was HHS and OMB failing to respond to Hart’s FOIA  
25 request of July 22, 2021. HHS and OMB made their final production on June 3, 2022,  
26 nearly a year after Plaintiff made his FOIA request. Plaintiff has now analyzed those  
27 documents thoroughly so as to not waste this Court’s time with further amendment in the

---

28 <sup>3</sup> Facebook’s Motion to Dismiss, Dkt. 73 at 5 (cleaned up). *See also* Twitter’s Motion to Dismiss, Dkt. 70 at 9.

1 future.

2 In addition, this Court (and its predecessor in the Southern District of California) has  
3 been generous in granting the Defendants additional time to file their briefs or respond to  
4 Plaintiff's FOIA request. *See* Dkts. 11, 21, 26, 64, 91. It would be the height of hypocrisy  
5 now for Defendants to turn around and complain about undue delay when they have taken  
6 nearly a year to produce FOIA documents that were required under law to be produced  
7 months ago.

8 **2. Amendment will not unduly prejudice the opposing parties.**

9 Undue prejudice occurs when a complaint is amended late in the proceedings—shortly  
10 before trial or after the close of discovery. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.  
11 1994); *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991). Specifically, prejudice  
12 arises from “expense, delay, and wear and tear on individuals and companies,” *Kaplan*, 49  
13 F.3d at 1370 (quoting district court opinion), for example, where prior discovery is nullified  
14 or future discovery required that was not required by the original complaint, *Jackson v.*  
15 *Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990), or where “numerous new claims” are  
16 added “so close to trial,” *Texaco*, 939 F.2d at 799. Contrast *Telephia Inc. v. Cuppy*, 2005  
17 U.S. Dist. LEXIS 59653, at \*6 (N.D. Ca.) (amendment allowed when “almost two months of  
18 fact discovery remained”). Here, amendment is sought even earlier in the schedule.  
19 Defendants cannot claim that they would suffer any prejudice by amendment.

20 **3. Amendment is not futile.**

21 “A claim is considered futile and leave to amend to add it shall not be given if there is  
22 no set of facts which can be proved under the amendment which would constitute a valid  
23 claim or defense. Denial of leave to amend on this ground is rare.” *Netbula, LLC v. Distinct*  
24 *Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003). *Accord Green Valley Corp. v. Caldo Oil Co.*,  
25 No. 09cv4028-LHK, 2011 U.S. Dist. LEXIS 44540, 2011 WL 1465883, at \*6 (N.D. Cal. Apr.  
26 18, 2011) (noting “the general preference against denying a motion for leave to amend  
27 based on futility.”). The preference in this Circuit is to grant leave to amend, and then  
28 address the sufficiency of the new complaint through a 12(b)(6) motion to dismiss, rather

1 than litigating the amended complaint's merits through the futility prong. *Id. Accord Lillis*  
2 *v. Apria Healthcare*, No. 12-cv-52-IEG (KSC), 2012 U.S. Dist. LEXIS 144775, 2012 WL  
3 4760908, at \*1 (S.D. Cal. Oct. 5, 2012) ("their arguments to the sufficiency of the proposed  
4 pleadings, even if merited, remain better left for full briefing on a motion to dismiss.").

5 The Court dismissed Plaintiff's original complaint because Plaintiff "fail[ed] to come  
6 close to alleging that Facebook and Twitter's enforcement of their misinformation policies  
7 against him were state action." Dkt. 87 at 18. The Court denied leave to amend at the time  
8 because Plaintiff could not make a sufficient allegation on speculation alone. But the Court  
9 left the door open for amendment, acknowledging that Plaintiff could "learn[] facts that  
10 plausibly suggest that 'the state has so far insinuated itself . . .'" *Id.*, quoting *Gorenc*, 869  
11 F.2d at 507. In doing so, the Court implicitly acknowledged that such an amendment would  
12 not be futile.

### 13 CONCLUSION

14 For the foregoing reasons, Plaintiff Justin Hart seeks leave to amend his Complaint. As  
15 indicated above, a true and correct copy of his proposed Amended Complaint is attached as  
16 Exhibit A to this filing along with supporting Exhibits evidencing the New Information.  
17

18  
19 Dated: October 20, 2022

Respectfully submitted,

20 s/ Daniel Suhr

21 Daniel Suhr, pro hac vice admitted

22 dsuhr@libertyjusticecenter.org

23 M.E. Buck Dougherty III, pro hac vice admitted

bdougherty@libertyjusticecenter.org

24 James McQuaid, pro hac vice admitted

jmcquaid@libertyjusticecenter.org

LIBERTY JUSTICE CENTER

440 N. Wells Street, Suite 200

Chicago, Illinois 60654

Telephone: 312-637-2280

Facsimile: 312-263-7702

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Robert Tyler (STATE BAR NO. 179572)  
rtyler@tylerbursch.com  
Nada Higuera (STATE BAR NO. 299819)  
nhiguera@tylerbursch.com  
TYLER BURSCH, LLP  
25026 Las Brisas Road  
Murrieta, California 92562  
Telephone: 951-600-2733  
Facsimile: 951-600-4996

*Attorneys for Plaintiff Justin Hart*