

**No. 21-16210**

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

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

v.

META PLATFORMS, INC., a Delaware corporation;  
MARK ZUCKERBERG, a California resident;  
SCIENCE FEEDBACK, a French corporation;  
THE POYNTER INSTITUTE FOR MEDIA STUDIES, INC.,  
a Florida corporation; and DOES 1-20,  
*Defendants-Appellees.*

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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

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**APPELLANT'S MOTION FOR JUDICIAL NOTICE**

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Pursuant to Rule 201 of the Federal Rules of Evidence and Rule 27 of the Federal Rules of Appellate Procedure, Appellant CHILDREN’S HEALTH DEFENSE (“CHD”), through its counsel, hereby moves this Court to take judicial notice of the appended documents (35-pages) from the Centers for Disease Control and Prevention’s (“CDC’s”) second interim release in response to America First Legal’s (“AFL’s) Freedom of Information Act (“FOIA”) request of May 4, 2022, assigned No. 21-01575. The CDC FOIA documents have a direct relation to matters at issue here because they confirm the plausibility of CHD’s allegations of joint action and show that while Appellee Meta Platforms, Inc. (“Meta”) says publicly that “to *identify* misinformation, Meta relies on independent and non-partisan third-party fact checkers [like co-defendants Poynter and Science Feedback] to review potentially misleading information posted to Facebook[,]” (Meta Opp. Brief, Dkt. #34, at 15-16) (emphasis added), *privately – i.e., in a manner hidden from public view - the CDC itself identifies* COVID information for Meta which the CDC contends is false and misleading. The CDC accomplishes this in regular, formalized, and secret “Be on the Lookout” meetings between Meta and the CDC’s so-called “trust teams,” and by way of specialized “reporting channels,” regular email communications, power point slides, and training modules. (Exh. A.)

Meta’s appellate brief minimizes -- to the point of concealment from this Court -- the role that the CDC actually plays in identifying purported COVID

misinformation, and in working closely with Meta to censor such content. *See e.g.*, Dkt. #34 at 14 (“Meta’s Commitment To *Independent* Fact-Checking Of Health Related Misinformation”) (referring to Poynter and Science Feedback as *the* “independent” “fact-checkers”) (emphasis added). Missing from Meta’s “statement of the case” and, indeed from its entire presentation before the lower court and this Court, is basic candor as to the ongoing role the CDC plays in identifying, encouraging, facilitating, and jointly accomplishing Meta’s censorship of COVID-related content on its platform. *See, e.g.*, ABA Model Rules of Professional Conduct R. 3.3 (2002) [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/) (last accessed July 29, 2022).

The CDC FOIA release is clearly relevant to this appeal since the essence of the district court’s judgment was that CHD’s allegations of “general statements [] by Zuckerberg, [or] Facebook, [] about ‘working to remove misinformation’ with the CDC do not support the inference that Facebook (or Zuckerberg) worked in concert with the CDC to censor CHD’s speech[.]” 1 ER 23-24. Indeed, the district court determined that CHD had not and *could not* plausibly allege that “the government was actually involved in [those] decisions;” hence, “leave to amend would be ‘futile.’” 1 ER 27 (emphasis added), 47. But, as these CDC FOIA documents reveal, the CDC in fact has been closely and directly involved in those

types of decisions; specifically, the CDC, at a minimum, identifies particular social media posts and types of content as COVID “misinformation” to Meta’s “trust team,” by sharing power point slides, by participating in training modules, and by regularly meeting to discuss what the CDC considers problematic materials.

Federal Rule of Evidence 201 (“Rule”) permits this Court to take judicial notice of facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Rule 201(b)(2). Judicial notice may be requested “at any stage in the proceedings,” and must be taken “if a party requests it and the court is supplied with the necessary information.” Rule 201(c), (d), (f).

Courts regularly take judicial notice of “matters of public record,” *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012); and of FOIA records, specifically. *See, e.g., Eakin v. United States DOD*, Case No. 5:16-cv-972-RCL, 2022 U.S. Dist. LEXIS 120499, \*9 (W.D. Tx. July 8, 2022); *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, Case No. No. MD 16-2695 JB/LF, 288 F. Supp. 3d 1087, 1211-1212 (D.N.M. 2017) (“the FOIA disclosure makes the document ‘capable of accurate and ready determination by resort to [a] source[] whose accuracy cannot reasonably be questioned’ under Fed. R. Evid. 201(b)”); *New York Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 110 & n.9 (2nd Cir. 2014) (ruling that an official disclosure made in response to a

FOIA request typifies the kind of document judicially noticeable); *In re American Apparel, Inc. Shareholder Litig.*, 855 F. Supp. 2d 1043, 1064 (C.D. Cal. 2012) (Morrow, J.) (“Because plaintiffs obtained the documents by making a FOIA request, the court will take judicial notice of them as matters of public record.”). This Court may also take notice of “proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (taking notice of documents filed in state appeal) (quoting *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)).

The CDC FOIA-released documents submitted herewith were obtained by AFL in the course of proceedings in *America First Legal Foundation v. Centers for Disease Control and Prevention*, Case No. 22-cv-00978-APM (D.D.C. filed April 8, 2022). Thus, these documents obtained in connection with such proceedings are judicially noticeable in this appeal.

Finally, this Court has inherent authority to supplement the record in extraordinary cases. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2013) (citing *Dickerson v. Alabama*, 667 F.2d 1364, 1366-68 & n.5 (11th Cir. 1982)). This case, involving as it does allegations of government-enabled suppression and chilling of CHD’s (and a free citizenry’s) free speech rights on an ongoing basis is

such an extraordinary case. Respectfully, supplementation of the record to include CDC documents which bear directly on whether CHD's allegations of CDC-enabled censorship are "plausible," or whether further evidence-taking would be "futile," should be permitted.

The CDC FOIA released-documents include the following *five* email communications between CDC and Meta, and attachments thereto, and a related communication between CDC and Twitter:

(1) On March 18, 2021, Ms. Carol Crawford (CDC) emailed Ms. Meredith Lightstone (Twitter) re "Vaccine misinformation" that "we are working with Census to leverage their infrastructure to identify and monitor social media for vaccine misinformation. *We would like the opportunity to work with your trust team on a regular basis to discuss what we are seeing.*" (Exh. A.) Item (6) *infra* corroborates that Meta is also part of this regular working group.

(2) On May 6, 2021, Ms. Crawford (CDC) emailed Mr. Payton Ineme and Ms. Genelle Adrien (Facebook) with CDC's request that Facebook block specific posts as "disinformation." (*Id.*)

(3) On May 10, 2021, Mr. Iheme (Facebook) emailed Ms. Crawford (CDC) to share Facebook's COVID-19 Misinformation Reporting Channel to enable CDC and Census to make direct reports to Facebook's "trust team," and to

“onboard” the CDC team to Facebook’s “Misinfo casework/reporting channel.”

*(Id.)*

(4) On May 12, 2021, Ms. Crawford (CDC) emailed Mr. Itheme (Facebook) requesting that he set up a CDC “training meeting” for their “misinformation reporting channel.” *(Id.)*

(5) On May 28, 2021, Ms. Crawford (CDC) apparently met with Facebook to share posts which the CDC categorized as “misinformation,” provided Facebook with the CDC’s powerpoint slides, and requested that Facebook “[p]lease do not share outside your ‘trust and safety teams.’” *(Id.)* The first set of slides concern CDC-branded misinformation “advisories” about post-COVID-vaccine “shedding”; the purported death of a 2-year old child after receiving a COVID-vaccine; information about VAERS-reports; COVID-vaccines as “bioweapons” or part of some de-population scheme, contain microchips, or are related in some way to Bill Gates. The second set of slides concern CDC purported-“misinformation” “advisory” concerning posts that could reduce vaccine acceptance by raising questions about the “eligibility” of 12- to 15-year old adolescents for the COVID-vaccine.

(6) On June 17, 2021, Ms. Crawford (CDC) emailed Mr. Itheme and Ms. Ginelle Adrien (Facebook), along with Twitter and Google/YouTube recipients “Re: CDC working group meeting,” to cancel their scheduled BOLO (“be on the

lookout”) call due to the June 18 federal holiday, and shared the CDC powerpoint slides for that call with the group. (*Id.*) These CDC misinformation “advisory” set of slides concerns the safety of the COVID-vaccine ingredients, or that “spike” proteins from the COVID-vaccines have an effect on fertility or “other harmful effects”; cause individuals to become magnetic; and that vaccinated individuals cannot travel by airplane because of risk of blood-clots.

In sum, these CDC FOIA emails and attachments constitute newly-discovered, judicially noticeable evidence that powerfully supports the “plausibility” of CHD’s allegations that (1) CDC and Meta work together to censor a wide swath of purported COVID and vaccine “misinformation,” which directly impacts CHD, and its chairman, Mr. Robert F. Kennedy, Jr.; and (2) United States governmental actors have heavily involved themselves in ongoing decisions and actions by Meta to block social media content, which reaches and chills CHD in the exercise of its free speech rights. CHD has been chilled from posting to their Facebook page actual VAERS data, analyses of that data, and viewpoints concerning its significance; posts about the potential “harmful effects” of COVID-vaccine “spike” proteins; and posts about the safety, efficacy, and cost-benefit ratio of COVID-vaccines for 12-to-15-year old adolescents.

## CONCLUSION

For all of these reasons, this Court should grant Appellant CHD's motion for judicial notice.

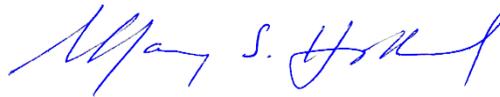
Dated: July 29, 2022

Respectfully submitted,



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ROBERT F. KENNEDY, JR.  
Founder and Chairman  
Children's Health Defense



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MARY S. HOLLAND  
General Counsel  
Children's Health Defense



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ROGER I. TEICH

Counsel for Appellant  
Children's Health Defense

## **DECLARATION OF COUNSEL IN SUPPORT OF MOTION**

I, ROGER TEICH, declare under penalty of perjury under the laws of the United States that the following is true and correct of my own knowledge:

I am a member of the State Bar of California and the Bar of the Ninth Circuit Court of Appeals. I am local counsel for Appellant CHD in this action. This declaration is made in support of CHD's motion for judicial notice. If called as a witness, I could and would testify competently to the facts herein, except where stated on information and belief.

The briefing on appeal is complete, and oral argument was held on May 17, 2022.

On July 27, 2022, I obtained a copy of what AFL has publicly represented to be the CDC's 286-page interim FOIA production made in response to AFL's May 4, 2022 FOIA request no. 21-01575. "AFL lawsuit reveals damning CDC documents proving government collusion with big tech to censor free speech and promote Biden Administration propaganda," <https://www.aflegal.org/news/afl-lawsuit-reveals-damning-cdc-documents-proving-government-collusion-with-big-tech-to-censor-free-speech-and-promote-biden-administration-propaganda> (last accessed July 29, 2022). On July 28, 2022, I obtained a copy of what AFL represents to be the CDC's July 26, 2022 FOIA release letter. True and correct

copies of excerpts of those FOIA released documents obtained from AFL's website and of that CDC transmittal letter are attached hereto as Exhibit A.

On information and belief, these documents have been generated by the CDC in the normal course of business, and are normally contained in its files and records, subject (with certain exemptions) to production in response to FOIA requests. I could not have discovered these documents any sooner in the exercise of reasonable diligence because the CDC released them to AFL as a consequence of federal proceedings just three days ago, on July 26, 2022.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in San Francisco, California on July 29, 2022.



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ROGER I. TEICH

**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2022, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.



Roger Teich  
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Children's Health Defense