



U.S. Department of Justice

United States Attorney
Southern District of New York

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August 1, 2025

By ECF

The Honorable Jessica G.L. Clarke
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Berenson v. Biden, et al.*, No. 23 Civ. 3048 (JGLC)

Dear Judge Clarke:

This Office represents the Federal Defendants in the above-referenced action. We write respectfully to provide a further status report pursuant to the Court's Order dated July 21, 2025 (ECF No. 130), and to inform the Court regarding certain developments pertaining to the federal individual capacity defendants and the federal official capacity defendants.

First, as to the question posed by the Court in its July 21 Order, the Federal Defendants do not intend to seek a continued stay of this action as to them.

Second, the federal individual capacity defendants¹ respectfully urge the Court to grant their pending motion to dismiss (ECF Nos. 98-99, 110) on the same grounds on which the Court dismissed the claims against the non-stayed, non-federal defendants in its July 14, 2025 Opinion and Order (ECF No. 127, "MTD Order"). With the exception of the tortious interference claim, which is not asserted against any Federal Defendant, all of the reasoning set forth in the MTD Order also applies to the federal individual capacity defendants and supports dismissal of the claims against them.

Third, the federal official capacity defendants only² hereby withdraw their reliance on the arguments set forth in Section III of the Memorandum of Law in Support of the Federal

¹ The federal individual capacity defendants are Robert Flaherty, former Director of Digital Strategy at the White House, sued in his individual capacity; and Dr. Vivek Murthy, former Surgeon General of the United States, sued in his individual capacity. The federal individual capacity defendants do not withdraw any of the arguments made on their behalf in the Federal Defendants' pending motion to dismiss (ECF Nos. 98-99, 110).

² The federal official capacity defendants are former President Joseph R. Biden, Jr., sued in his official capacity, replaced pursuant to the operation of Federal Rule of Civil Procedure 25(d) by President Donald J. Trump; Dr. Vivek Murthy, former Surgeon General of the United States, sued in his official capacity, replaced pursuant to the operation of Rule 25(d) by current Deputy U.S. Surgeon General, Rear Admiral Denise Hinton; and the United States of America, replacing former official capacity defendant Robert Flaherty.

Defendants’ Motion to Dismiss the First Amended Complaint (ECF No. 99, “Fed. MTD”, at 23-30), which asserts that the First Amended Complaint fails to state a plausible First Amendment claim. On January 20, 2025, the President issued Executive Order 14,149, titled “Restoring Freedom of Speech and Ending Federal Censorship.” *See Restoring Freedom of Speech and Ending Federal Censorship Executive Order*, 90 Fed. Reg. 8243 (Jan. 28, 2025). The Executive Order formally announced that “[i]t is the policy of the United States to . . . ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen . . . [and] that no taxpayer resources are used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen.” *Id.* §§ 2(b)-(c). In doing so, the Executive Order denounced “coercive pressure [by the Federal Government] on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech.” *Id.* § 1. In addition, the Executive Order outlined that the Government will “identify and take appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech,” *id.* § 2(d), and ordered “[t]he Attorney General, in consultation with the heads of executive departments and agencies, [to] investigate the activities of the Federal Government over the last 4 years” and submit a report with “recommendations for appropriate remedial actions to be taken based on the findings of the report,” *id.* § 3(b). The federal official capacity defendants respectfully request that the Court evaluate their motion to dismiss only on the remaining threshold grounds articulated therein.

We thank the Court for its consideration of this submission.

Respectfully,

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