

# 25-2709-CV

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## United States Court of Appeals *for the* Second Circuit

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ALEX BERENSON,

*Plaintiff-Appellant,*

– v. –

DONALD TRUMP, President of the United States, in his official capacity,  
ANDREW M. SLAVITT, Senior Advisor to the COVID-19 Response  
Coordinator, in his official capacity, ROBERT FLAHERTY, Director of Digital  
Strategy at the White House, in his official capacity, VIVEK H. MURTHY,  
Surgeon General of the United States, in his official capacity,  
UNITED STATES OF AMERICA,

*Defendants-Appellees,*

SCOTT GOTTLIEB, M.D., former FDA Commissioner and member  
of the Board of Directors of Pfizer, Inc., ALBERT BOURLA,

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### **BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT**

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## INTRODUCTION

In 2020, former *New York Times* reporter and independent journalist Alex Berenson emerged as a critic of the public policy response to the COVID-19 pandemic and later the vaccines. A276-277. Twitter became the primary outlet for his journalism which earned him hundreds of thousands of followers while the company resisted calls from third parties to censor his reporting. A277-278, 336. As late as March 2021, a Twitter executive personally assured Berenson that his “name has never come up in discussions around” the company’s misinformation policies. A283.

In April 2021, senior White House officials met privately with Twitter to discuss COVID-19 vaccine misinformation. A294-296. Twitter’s internal records from that meeting show that only one name came up: Alex Berenson, someone federal officials labeled “ground zero” for COVID-19 misinformation. A295. After the meeting, Twitter promptly reviewed Berenson’s account. A247. One of Twitter’s top lobbyists recounted how federal officials were “not satisfied” with the company’s moderation, and that Twitter was “asked to join several other calls” which “were very angry in nature.” A299.

At first Twitter backed Berenson’s right to report, as the company had previously. A247. Then, after months of unrelenting pressure, everything changed. In mid-July 2021, just hours after President Biden accused social media companies

“killing people” for allowing so-called COVID-19 misinformation on their platforms, Twitter locked Berenson out of his account for the first time. A307. Shortly after, former White House COVID-19 Advisor Andrew Slavitt and Pfizer, Inc. director Scott Gottlieb held behind-the-scenes meetings with Twitter, contacts Twitter itself linked to the Government’s overall efforts regarding social media. A313-315.

On August 28, 2021, Twitter permanently suspended the journalist’s account, making international news. Just days before Twitter banned Berenson, one of the company’s lobbyists discussed how he was keeping the White House, Slavitt, Gottlieb updated on the company’s COVID-19 misinformation effort as part of an effort “to keep the target off our back.” A324. Gottlieb—a board member of one of the COVID-19 vaccine manufacturers which sold more than \$100 billion of the shots—delivered the knock-out blow to Berenson’s reporting through that same lobbyist who personally pushed Gottlieb’s complaint about the tweet that led to Berenson’s ban through Twitter’s content moderation channels on a Saturday night. A256, 327-331.

Though actions on Berenson’s account required leadership approval, A320, the move blindsided Twitter’s Chief Executive Officer and top lawyer, who both internally stated Berenson should not have been banned. A331. But the damage was done. Just as debate about the federal government mandating COVID-19

vaccines for tens of millions of Americans reached a fevered pitch, Berenson lost access to the most important outlet for his reporting and his hundreds of thousands of followers. A336-338.

This is not a Hollywood script about the excesses of state and corporate power in America. This is not speculation built on a chain of increasingly attenuated inferences. This is a true story. And in the district court's view, even though the Government conceded the First Amendment violations on the merits, A540-541, the story ends at the pre-discovery, pleadings stage with no legal accountability for anyone involved. Unless this Court reverses.

### **JURISDICTIONAL STATEMENT**

The district court entered judgment on September 30, 2025. SA64. Berenson filed his notice of appeal on October 27, 2025. A554. This Court has jurisdiction under 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

1. Whether the district court erred in declining to extend the damages remedy in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to this case.
2. Whether the district court erred in dismissing Berenson's 42 U.S.C. § 1985(3) claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

3. Whether the district court erred in dismissing Berenson’s tortious interference with contract claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

### STATEMENT OF THE CASE

On July 14, 2025, the district court dismissed Berenson’s First Amendment, 42 U.S.C. § 1985(3), and tortious interference with contract claims against Slavitt, Gottlieb, and Pfizer Chief Executive Officer Albert Bourla. SPA 1-52. On September 29, 2025, the district court dismissed Berenson’s First Amendment and Section 1985(3) claims against the other Defendants. SPA 53-63. This appeal followed.

#### **I. Journalist Alex Berenson Builds an Audience on Twitter in 2020 and 2021. The Company Rejects Third Party Calls to Censor His Content Regarding COVID-19.**

Alex Berenson is an independent journalist and former *New York Times* reporter who previously broke many front-page stories about questionable practices in the pharmaceutical industry. A270. In 2020, Berenson emerged as a vocal critic of the public policy response to COVID-19, questioning the underlying evidentiary basis for business and school closures. A276. As he reported on COVID-19, Berenson’s Twitter following grew from around 7,000 followers in January 2020 to more than 229,000 in March 2021. A276, 291. In 2021 alone, Berenson’s Twitter feed received more than one billion impressions. A276.

Early in the COVID-19 pandemic, third parties began objecting to Berenson's reporting and the platform Twitter was giving him. In late March 2020, one critic, from the Imperial College London, went so far as to assert that Berenson's reporting and others repeating his claims were "ultimately putting lives at risk." A277. Despite the complaints, Twitter declined to censor Berenson. A278.

In May 2020, the company publicly revised its content moderation policy regarding COVID-19. *Id.* In a tweet, Berenson raised concerns about what the policy change meant for free speech on the platform. A279. Hours after Berenson's tweet, Twitter's then-Chief Executive Officer Jack Dorsey followed Berenson's account on the platform. *Id.* Then a Twitter executive, who acknowledged Berenson was raising "nuanced points," personally assured Berenson that the company was working to allow "factual debate." *Id.*

In November 2020, Berenson welcomed the initial reports emerging from clinical trials for the COVID-19 mRNA vaccines. He pointed to reporting from clinical trials on the Pfizer and BioNTech shot as well as the Moderna vaccine as "legitimately good news" and "good topline vaccine news," respectively. A280. Nevertheless, he raised questions about the details of the clinical trials for the vaccines. The same Twitter executive who had previously contacted Berenson assured him in December 2020 that these questions "should not be an issue at all." A282. When Twitter announced its five-strike COVID-19 misleading information

policy in March 2021, the executive told Berenson “your name has *never* come up in the discussions around these policies.” A283 (emphasis added).

After another journalist complained about Berenson’s reporting, Twitter did a “deep dive” into his account in March 2021 and concluded “he avoids making demonstrably false or misleading claims about COVID-19 vaccines.” A283-284. The company “took action” against one of Berenson’s tweets that argued the mRNA shots are “more properly described as a gene therapy,” but Twitter gave him no notice this was a “strike” under the COVID-19 misleading information policy, and Berenson did not lose access to his account or audience. A284.<sup>1</sup> What is more, as late as either late April or early May 2021, despite Twitter’s increasingly restrictive COVID-19 misinformation policies, Twitter had concluded that “Berenson had not violated any Twitter policies at that time.” A297.

## **II. After President Biden Takes Office, Federal Officials Target Berenson’s Reporting on Twitter in Spring 2021, Causing the Platform to Audit the Journalist’s Account as They Pressure Other Companies.**

Even before taking office, President Biden referred to the decision to get a COVID-19 shot as one of “life and death,” promising to “confront this historical

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<sup>1</sup> The lack of notice also meant that the Twitter executive who previously promised Berenson to “try to ensure you’re given a heads up before an action is taken,” A383, never gave Berenson notice, further indicating the anomalous nature of the strike against Berenson’s account. In his correspondence with Berenson, the executive mentioned that “I am not always made aware of [enforcement actions] before they’re executed.” *Id.* Not only did Berenson not know about the first strike against his account, but neither apparently did the Twitter executive.

challenge with the full strength of the federal government.” A285. Consistent with this promise, the Biden Administration began pressing social media companies to remove posts that raised questions about mRNA shots within days of President Biden’s inauguration. A289. Shortly afterwards, the White House asked Twitter to meet. Lauren Culbertson, Twitter’s head of government affairs for the United States and Canada, wrote later that “one of the first meeting requests from the Biden White House was about COVID-19 misinformation . . . Biden’s staff focused on vaccines and high-profile anti-vaxxer accounts, including Alex Berenson.” A293.

In April 2021, Andrew Slavitt, the Senior Advisor to the White House’s COVID-19 Response Coordinator, and Rob Flaherty, Director of Digital Strategy at the White House, met with representatives of Twitter. The invitation for that meeting included Flaherty, Slavitt, another White House official, and an employee of “HHS/OASH,” the division within the Department of Health and Human Services (“HHS”) which houses the Surgeon General’s office. A294.<sup>2</sup> Flaherty

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<sup>2</sup> The Surgeon General’s Office was and remains within the Office of the Assistant Secretary for Health within the Department of Health and Human Services. *Office of the Assistant Secretary for Health Organizational Chart*, Dep’t Health & Human Servs., <https://www.hhs.gov/ash/about-ash/organizational-chart/index.html>; *Office of the Assistant Secretary for Health Organizational Chart*, Dep’t Health & Human Servs., <http://web.archive.org/web/20210508070051/https://www.hhs.gov/ash/about-ash/organizational-chart/index.html> (archival version from May 8, 2021).

recounted that “he believes, but is not sure, that Lauren Culbertson from Twitter attended the meeting.” A406.

During that meeting, “they,” meaning at least Slavitt and Flaherty, targeted Berenson by asking “one really tough question about why Alex Berenson hasn’t been kicked off from the platform.” A294. The Twitter employee who reported on this conversation did not say the White House targeted any other user by name. The employee distinguished the question about Berenson from other questions, which were “pointed but fair—and mercifully we had answers.” *Id.* The employee recounted that “[t]hey allege that they’ve done some data visualization that show [Berenson]’s . . . ground zero for covid misinformation that radiates outward.” A295. In a separate internal discussion, a Twitter employee noted “they really wanted to know about Alex Berenson” because “he was the epicenter of disinfo that radiated outwards to the persuadable public.” *Id.* In this regard, the concern was plausible vaccine skepticism like Berenson’s, not more bizarre claims about microchips being in the COVID-19 vaccines. A291.

To deflect the White House’s pressure, Twitter promised it would perform an in-depth review of Berenson’s account. A296. As a result, Berenson, the journalist whose name a Twitter executive said “has never come up in the discussions around these policies” as late as March 2021, A283, faced an extra layer of scrutiny, a government-coerced violation of his rights.

As Slavitt and his White House colleagues pressed on Twitter, they were also in communication with Facebook. Three days before the April 2021 meeting with Twitter, Facebook executive Nick Clegg, who previously served as Deputy Prime Minister of the United Kingdom, reported that Slavitt was “outraged—not too strong a word to describe his reaction—that we did not remove” a meme featuring Leonardo DiCaprio. A297-298. Clegg “countered that removing content like that would represent a significant incursion into traditional boundaries of free expression in the US,” but Slavitt rejected that position. A298.

In other words, another social media company explicitly warned Slavitt the White House might be violating the First Amendment with its censorship demands just three days before he pushed Twitter for Berenson’s removal. Reflecting on these and other contacts with the federal government in 2021, Mark Zuckerberg, the chief executive officer of Meta, the company that owns Facebook, later wrote that “senior officials from the Biden Administration, including the White House, repeatedly pressured our teams for months to censor certain COVID-19 content.” A299. In early 2025, Zuckerberg recounted how federal officials would “scream” and “curse” at Meta employees regarding alleged vaccine misinformation, calling the experience “brutal.” Thomas Barrabi & Ariel Zilber, *Biden Officials “Screamed” at Meta Execs to Take Down Vaccine Posts: Mark Zuckerberg*, N.Y.

Post (Jan. 10, 2025, 3:11 PM ET), <https://nypost.com/2025/01/10/business/biden-officials-screamed-at-meta-execs-to-take-down-vaccine-posts-mark-zuckerberg/>.

Meanwhile, the pressure on Twitter continued. The White House held “several other calls” that “were very angry in nature” with Twitter about the company’s refusal to deplatform users. A299. Meanwhile, Berenson continued reporting on Twitter, criticizing President Biden while accusing the CDC of “l[ying] when it said myocarditis wasn’t a risk.” A301.

### **III. Federal Pressure on Social Media Platforms Intensifies as Berenson is Locked Out of His Twitter Account for the First Time.**

The COVID-19 vaccines themselves seemed to be working during the spring of 2021. A301. However, in July 2021, the vaccines abruptly began to show signs of failure. A302. Coronavirus infections soared in Israel, the first country to mass vaccinate its adult population. *Id.* While cases had dropped in Israel to near zero in the spring, between June 15 and July 15, the numbers soared 75-fold. A301-302. Deaths and hospitalizations also rose, causing health officials to contemplate boosters and the Biden Administration to consider vaccine mandates, a move which the administration knew would be both legally controversial and anger many Americans. A260.

In July 2021, the federal government’s pressure campaign intensified. On July 15, Surgeon General Murthy published an advisory on health misinformation. A304. Dr. Murthy called on social media companies, including Twitter, to

“[i]mpose clear consequences for accounts that repeatedly violate platform policies.” *Id.* The same day, at a press conference with Murthy, White House Press Secretary Jen Psaki stated “we are in regular touch with these social media platforms.” A306. Psaki also said the federal government “recommended—proposed that they [(the companies)] create a robust enforcement strategy that bridges their properties and provides transparency.” *Id.* Though she called for “transparency” from the platforms the previous day, Psaki did not reveal that White House officials had asked Twitter a “really tough” question regarding Berenson’s continued access to the platform. *Id.*

Hours after Psaki’s remarks, President Biden added his perspective. After a reporter asked “[o]n COVID-19 misinformation, what’s your message to platforms like Facebook,” President Biden said “[t]hey’re killing people.” A307. President Biden’s remarks were not limited to Facebook, and media reporting on his comments noted that immediately with headlines like “‘They’re killing people’: Biden blames Facebook, *other social media* for allowing COVID-19 misinformation.” *Id.* (emphasis added).

Less than four hours after President Biden’s comments and Psaki’s press briefing, Twitter locked Berenson out of his account for the first time. *Id.* Shortly after President Biden’s comments, media reported that “[t]he White House is assessing whether social media platforms are legally liable for misinformation

spread on their platforms.” *Id.* The White House also publicly pondered changes to Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which provides crucial and extremely valuable lawsuit protection to social media companies.

A308.

Twitter acted to quell the threat. On July 20, Lauren Culbertson, the company’s top U.S. lobbyist, wrote that she and her team “met with the Surgeon General’s Office ahead of his announcement,” an apparent reference to Dr. Murthy’s July 15 health misinformation advisory, “and have established a positive partnership,” *id.*, adding that she hoped “*to further distinguish us from Facebook,*” A309 (emphasis added). As noted above, by that time, as Mark Zuckerberg recounted, the White House had pressured Facebook “for months” to censor COVID-19 content. A299.

Culbertson reported further that her team was working “on a playbook in case the White House decides to turn on Twitter.” A309. Though the lobbyist said she “ha[d] no indication that will happen right now, the politics are ripe as the Administration struggles to hit their vaccination goals and Delta rages.” *Id.* Describing Twitter’s “**overall strategy**,” Culbertson explained that “we’re aiming to be productive, responsive, and honest partners to the Biden Administration and keeping this under the radar and behind the scenes as much as possible given the heated political landscape and litigation risks.” *Id.* (emphasis in original).

Two days later, Culbertson flagged a proposed bill introduced by Senator Amy Klobuchar on section 230, asking Twitter’s Vice President of Global Public Policy to “give a heads up to” Vijaya Gadde, Twitter’s general counsel, and the company’s deputy general counsel Sean Edgett. *Id.*

#### **IV. As Federal Officials Continue Pressuring Social Media Companies, the Targeting of Berenson’s Journalism Reaches a New Level.**

On July 10, 2021, the Saturday before President Biden accused social media companies of “killing people” for not censoring speech about COVID-19, Berenson commented on the federal government’s failure to persuade Americans to take a COVID-19 vaccine during the Conservative Political Action Conference. A302-303. The next day, Dr. Anthony Fauci, President Biden’s Chief Medical Advisor, called Berenson’s comments “horrificing,” and described the journalist as “someone saying that it’s a good thing for people not to try and save their lives.” A303.<sup>3</sup> The day after Fauci’s nationally televised criticism of Berenson, Andrew Slavitt took his colleague’s remarks a step further. During a media appearance on July 12, Slavitt said he wanted to “get rid of all this garbage coming out of CPAC,” a reference to Berenson’s remarks which the host had played for Slavitt. *Id.*

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<sup>3</sup>At deposition in *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), Fauci did not deny further discussing Berenson, but testified that such discussions “may have occurred, I don’t recall.” A303.

By July 2021, Slavitt was purportedly out of the White House and the federal government, though he remained in close contact with his former colleagues, a fact he made public. During a podcast he hosted that month, Slavitt spoke of his continued contacts with government personnel, such as White House Press Secretary Jen Psaki and CDC Director Dr. Rochelle Walensky. A304 In an interview published in late July 2021, Slavitt referenced being “on the phone with and talking to the White House and the CDC . . . as often as people need me and usually that’s on a daily basis when things get to crunch time.” A310.

Privately, Slavitt continued to push platforms to censor constitutionally protected speech about COVID-19, leveraging his government connections. On July 19, three days after President Biden’s “killing people” remark, Facebook’s Nick Clegg wrote that “I’ve spent the last several days pretty well non stop on this Covid/Biden furore, including tel cals with Andy Slavitt on several occasions.” A309. Clegg reported that Slavitt related “overnight advice on how to understand where the [White House] is coming from” and that Slavitt “claims he is trying to be helpful by passing on our POV to the Surgeon General before” a scheduled meeting. A310. Slavitt complained about COVID-19 vaccine content, citing the White House’s interests. “The WH wants FB to come clean with how many people see these posts and what it’s doing about them,” Slavitt said. *Id.* “I want to really stay out of the middle and want you guys to communicate.” *Id.*

As he cloaked himself in the authority of the White House during his discussions with Facebook, Slavitt pressed Twitter to act against Berenson. Late in the evening on July 18, Slavitt asked for an audience with Twitter lobbyist Todd O’Boyle to discuss “a policy matter.” A313. The proposed “[f]ully bipartisan convo” was to feature Slavitt, whose White House e-mail was listed in the signature block of the e-mail, and Dr. Scott Gottlieb, M.D., former FDA Commissioner under President Trump. *Id.* Slavitt elsewhere confirmed that Gottlieb was in “pretty regular” contact with him and the White House throughout winter and spring 2021. A312.

The following day, July 19, Gottlieb wrote to O’Boyle regarding “a handful of accounts on Twitter that are fueling dangerous and false narratives on key public health issues related to the pandemic.” A314. Gottlieb took direct aim at “a subset of accounts that are being frequently cited to me as authoritative sources by conservatives, even members of Congress, because they are verified accounts—even if those accounts are spreading clearly false information.” *Id.* Though he did not mention Berenson by name, Gottlieb’s description fit the journalist’s account. *Id.* O’Boyle responded within the hour, noting he had “suggested the three of us,” i.e., himself, Slavitt, and Gottlieb, “talk.” A315.

Five minutes later, O’Boyle forwarded his own response to Culbertson. *Id.* Culbertson rapidly forwarded O’Boyle’s note to Twitter’s Vice President of Public

Policy for the Americas. “Heads up that we **could be** next.” *Id.* “Todd and I are triaging,” Culbertson wrote. *Id.* She next drew a direct parallel to Facebook. “The other backchanneling suggests that we’re on much better footing than FB but need to keep the responsiveness. I’ll let you know if we think it’s going to go sideways. Hopefully, we can keep us in a good place.” *Id.* Culbertson made no distinction between the pressure from Slavitt and Gottlieb’s efforts and the overall pressure from the White House and the Surgeon General. *See id.* And Culbertson’s reference to “other backchanneling” should be read in conjunction with the Facebook emails discussing Slavitt’s backchannel communications to the White House.

On July 23, Gottlieb followed up on his July 19 message to O’Boyle. “I am likely to be discussing some of my perspectives below on TV this weekend and wanted to see if you still wanted to connect so I may have the benefit of your views,” Gottlieb wrote. A316. The same day, O’Boyle worked on scheduling a conference call with Slavitt and Gottlieb. *Id.* O’Boyle reported that he spoke with the White House’s Rob Flaherty the same day. A317. O’Boyle told Flaherty that Twitter would follow a “whole-of-society” approach to COVID-19 misinformation, echoing Surgeon General Murthy’s demands. *Id.* O’Boyle noted

that Flaherty “acknowledged the steps we’re taking and asked for time to meet soon.” *Id.*<sup>4</sup>

Slavitt held a conference call with O’Boyle on July 26. A316. The next day, Twitter issued its third COVID-19 strike against Berenson. On July 28, Slavitt contacted O’Boyle again, claiming the journalist “knows he’s gone” and was “milk[ing] Twitter for audience.” A317.

On July 24 or July 25, Slavitt interviewed Bourla. A317. Later, on July 28, around the same time as Berenson’s third strike, Bourla held a meeting at the White House, presumably about COVID-19 vaccine matters. A318. Of note, Bourla was accompanied to the White House not by a senior Pfizer scientist or medical officer, but the company’s general counsel. *Id.* Given the concerns the White House raised about COVID-19 misinformation throughout that month, it is reasonable to infer that the issue was discussed during the July 28 meeting. For his part, in November 2021, echoing President Biden’s claim social medial companies were “killing people” by platforming voices like Berenson’s, Bourla accused

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<sup>4</sup> O’Boyle did not state that Flaherty mentioned Berenson. Flaherty stated elsewhere that “the last time” he “recalls discussing Berenson with employees from Twitter” was a conversation with someone he “thinks was Todd O’Boyle” after a meeting “in or around the Spring of 2021, at which Alex Berenson was mentioned.” A406. Like Fauci’s deposition answers, Flaherty’s words fall short of a denial that Flaherty discussed Berenson with Twitter in the summer of 2021, including on July 23.

COVID-19 vaccine skeptics of being “criminals because they have cost literally millions of lives.” A318.

On July 30, O’Boyle responded to Slavitt’s e-mail by sending Slavitt a link to Berenson’s fourth strike. “He’s on a 7 day suspension,” O’Boyle explained. “Further violations of the rules will result in permanent suspension.” A319-320. The tweet itself addressed Pfizer. On July 29, Berenson the following regarding a “preprint” that offered an update on the results of Pfizer’s key clinical trial of its mRNA COVID-19 shot:

The pivotal clinical trial for the @pfizer #COVID-19 vaccine shows it does nothing to reduce the overall risk of death. ZERO.

15 patients who received the vaccine died; 14 who received placebo died.

The end.

The trial blind is broken now. This is all the data we will ever have.

A319. The tweet received more than 2,000 retweets and more than 2.3 million views. *Id.*

Twitter’s in-house counsel later wrote “one of our employees [(Todd O’Boyle)] shared information about [Berenson’s] account they probably should not have, informing the external party that Berenson was on his last strike and would be suspended if he violated again.” A161. O’Boyle broke the company’s rules to provide this update to Slavitt. With four strikes under Twitter’s COVID-19

misleading information policy, Berenson's account was on the verge of a fifth strike and permanent suspension. A329.

**V. Twitter Permanently Suspends Berenson's Account, Violating its Own Rules in the Process.**

As Twitter began to take action against Berenson's reporting, there was resistance at the highest levels of the company. On July 16, Twitter Chief Executive Officer Jack Dorsey objected to Berenson's second strike. "Doesn't seem right to me. These are queries," Dorsey wrote to Twitter's general counsel Vijaya Gadde. A320. Within Twitter's trust and safety department, the unit tasked with enforcing the company's misinformation rules, it was understood that Berenson's account would not be actioned without "sign off from leadership." *Id.*

In other words, Twitter's leaders were trying to balance the company's prior commitment to protect free speech and Berenson's account with the rising government pressure it faced. But its lobbyists, who faced the Biden Administration's anger directly, were primarily concerned about assuaging the White House and ending any potential threats to the company's section 230 protection. On July 30, Culbertson, who previously discussed Twitter being "productive, responsive, and honest partners to the Biden Administration," A309, stated that "it would be ideal to move fast" to issue a fourth strike against Berenson's account, A321. O'Boyle continued managing Slavitt's expectations. On

July 31, the day after Culbertson advised swift action against Berenson's account, O'Boyle told Slavitt "[o]ur process takes time, but it catches malactors." A430.

In early and into late August 2021, Twitter took no further direct action against Berenson's account. A323. On August 24, after FDA's decision to approve a full Biologics License Application for Pfizer's COVID-19 vaccine, O'Boyle reported to Culbertson that he "fielded inquiries from the WH as well as former WH advisor (and frequent cable talker) Andy Slavitt about our approach." A440. "I sent WH, Andy [Slavitt], and Scott Gottlieb (former Trump admin covid advisor and frequent cable talker) notes to this effect." *Id.* By grouping the three together, O'Boyle indicated he viewed Slavitt and Gottlieb's nominally private approaches as part of the federal government's outreach. A324. "This Administration has said repeatedly they feel FB under communicates and has been less than forthcoming when they do talk," O'Boyle wrote, again comparing Twitter's position to Facebook. A440. "I'm leaning into overcommunicating Twitter's covid work *to keep the target off our back.*" *Id.* (emphasis added).

Gottlieb reached out the same day, complaining about Berenson's reporting, claiming his journalism "is what's promoted on Twitter" and "why Tony," meaning Dr. Anthony Fauci, "needs a security detail." A325. O'Boyle scheduled a call with Gottlieb and Culbertson to discuss. *Id.* The call quickly turned to Berenson. *Id.* An internal Slack channel related to the call shows a reference to "Berenson 4th

COVID-19 strike as of 7/27,” indicating that Twitter apprised Gottlieb of Berenson’s status under the company’s misinformation policies. *Id.*

The following day, Saturday, August 28, Gottlieb sent an e-mail to O’Boyle flagging one of Berenson’s tweets, which said the following:

It doesn’t stop infection. Or transmission.

Don’t think of it as a vaccine.

Think of it—at best—as a therapeutic with a limited window of efficacy and terrible side effect profile that must be dosed IN ADVANCE OF ILLNESS.

And we want to mandate it? Insanity.

A327. Twitter initially only labeled the tweet as misleading, and Berenson clarified that he was not “suggesting that anyone specific not be vaccinated, only that mandates don’t make sense.” A328.

But O’Boyle personally shepherded Gottlieb’s report, repeatedly pressing a junior member of Twitter’s “Strategic Response Team” to issue a strike against the tweet, which would lead to the immediate and permanent suspension of Berenson’s account. A329. That night at 4:36 p.m. Pacific time, the junior employee did so.

A330. O’Boyle then flagged the suspension for Twitter’s legal department, and the company later issued a public statement confirming the suspension. A330-331.

Despite Twitter’s policy of requiring leadership approval of actions against Berenson’s account, O’Boyle did not notify any executives of his efforts to force

Berenson's suspension, and Twitter general counsel Vijaya Gadde was surprised by the ban. That night, she wrote to managers in Twitter's trust and safety division, "Hi all – did we perm suspend Alex berenson? Typically these are flagged to me first? Did I miss something?" A331.

After Berenson briefly activated an alternative Twitter account, Gottlieb informed O'Boyle. A332. O'Boyle rapidly forwarded the complaint to Twitter's moderation team. *Id.* When the moderation team did not immediately respond, O'Boyle brought in a Twitter lawyer to ensure Berenson's alternative account was censored. *Id.*

The next morning, Sunday, August 29, Gadde reported that she "had a chance to discuss" the action with Dorsey "and he doesn't believe we made the right decision here." *Id.* "I'd like to reconsider our action here," she continued. *Id.* "From the beginning, we wanted to leave room for people to have discussion in this space, and certainly discussion around vaccine mandates feels like an area we should allow to happen," concluding "I don't believe a perm suspension is warranted." *Id.* Gadde also stated Berenson's account should be reinstated on appeal, *id.*, but the company did not officially notify him of his fifth strike, or his rights to appeal. Only after he sued and then settled litigation against the company did Twitter reinstate his account. A335-336.

Not only was Berenson’s ban against the express wishes of the company’s two highest-ranking executives, the process violated Twitter’s own internal operating procedures. Yoel Roth, who served as Twitter’s Head of Trust and Safety at the time of Berenson’s suspension, wrote that, unlike companies like Meta, Facebook’s owner, Twitter “maintained a strict separation between teams responsible for lobbying and government relations and the teams responsible for direct content moderation activities.” A334. “While members of Twitter’s public policy and legal teams are shown receiving a wide range of reports, their actions in every case are to funnel those reports into operational processes that result in independent review and evaluation.” A334-335. But in Berenson’s case, the wall of separation fell. O’Boyle did not merely report the ban-inducing strike, he demanded the moderation team deliver the result that the conspirators demanded: Berenson’s deplatforming from Twitter.

Less than two weeks after Twitter banned Berenson, President Biden announced vaccine mandates that compelled tens of millions of American adults to choose between their livelihoods and their right to determine whether they should receive mRNA shots. A338. Berenson was a key voice for many of these Americans who, like Berenson, A268, had decided not to take any of the COVID-19 vaccines, but he was excluded from this critical debate.

Overnight, Berenson lost access to his more than 300,000 Twitter followers, the primary outlet for his reporting. A336. He lost the chance to engage with government and public health officials on Twitter and to promote his longer form journalism on Substack. A336-337. Berenson’s content was not just suppressed; rather he was completely excluded from the world’s largest, most important digital public forum. A338. Twitter since acknowledged its actions were wrong, publicly stating Berenson’s “tweets should not have led to his suspension.” A337. And Twitter’s own internal documents show its highest-ranking executives, Dorsey and Gadde, objected to Berenson’s permanent suspension. A331.

## **VI. A New Presidential Administration Concedes the Underlying First Amendment Violations. The District Court Dismisses Berenson’s Claims.**

Shortly after taking office in January 2025, President Trump issued an Executive Order on censorship. Restoring Freedom of Speech and Ending Federal Censorship, Exec. Order No. 14,149, 90 Fed. Reg. 8,243 (Jan. 28, 2025). In the Executive Order, President Trump stated that “[o]ver the last 4 years, the previous administration trampled free speech rights by censoring Americans’ speech on online platforms, often by exerting substantial coercive pressure on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech that the Federal Government did not approve.” *Id.* at 8,243. The Executive Order states that “[u]nder the guise of combatting ‘misinformation,’ ‘disinformation,’ and ‘malinformation,’ the Federal Government infringed on the

constitutionally protected speech rights of American citizens across the United States in a manner that advanced the Government’s preferred narrative about significant matters of public debate,” and that “Government censorship of speech is intolerable in a free society.” *Id.*

President Trump set as “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.” *Id.* Another policy he ordered is to “identify and take appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech.” *Id.*

In view of the Executive Order, the Government abandoned its argument that Berenson “fail[ed] to state a plausible First Amendment claim.” A541. The Government otherwise maintained its position on standing and arguments against Berenson’s Section 1985(3) claim. A540. In two separate orders, the district court dismissed Berenson’s claims against all the Defendants with prejudice. SPA 1-63. Berenson appealed.

### **STANDARD OF REVIEW**

This Court “review[s] *de novo* a district court’s dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the

plaintiff’s favor.” *Vaughn v. Phoenix House New York Inc.*, 957 F.3d 141, 145 (2d Cir. 2020) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable.” *Id.* This is not a “‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

## ARGUMENT

### **I. What Happened to Berenson Merits Extending *Bivens* to Remedy the First Amendment Violations the Government Concedes Occurred Here. The District Court Erred by Refusing to Do So.**

This case’s posture is remarkable. At the early stages of this litigation, and after Berenson added even more detailed allegations in his proposed first amended complaint, the Government argued that Berenson failed to state a First Amendment claim on the merits. The Government now concedes that federal officials violated the First Amendment. A540-541. President Trump’s Executive Order acknowledges that “[o]ver the last 4 years, the previous administration trampled free speech rights by censoring Americans’ speech on online platforms, often by exerting substantial coercive pressure on third parties” and that “the Federal

Government infringed on the constitutionally protected speech rights of American citizens across the United States.” 90 Fed. Reg. at 8,243. President Trump further ordered an investigation into “past misconduct” and “appropriate remedial actions.” *Id.* The remaining question is not whether federal officials violated the First Amendment, but whether Berenson has any remedy for the violation of his constitutional rights.

Though the Executive Order does not contain an express citation to *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), it covers the conduct at issue in that case. The Executive Order refers to the Government “exerting substantial coercive pressure” on social media companies, 90 Fed. Reg at 8,243, not targeting individual users. None of the plaintiffs in *Murthy*, who had the benefit of “extensive discovery” at the more burdensome preliminary injunction phase for standing purposes, *id.* at 1984, were individually targeted like Berenson. They also faced restrictions before the Government contacted the platforms. *Id.* at 1989 (noting, of the plaintiff doctors, that “[e]ach faced [their] first social-media restriction in 2020, before the White House and the CDC entered discussions with the relevant platforms); *id.* at 1992 (noting that “Facebook was targeting [another plaintiff’s] pages before almost all of its communications with the White House and the CDC”).

By contrast, as late as March 2021, a Twitter executive advised Berenson his “name has *never* come up in discussions around” the platform’s COVID-19

policies. A283 (emphasis added). Berenson’s restrictions started after the White House and HHS’s April 2021 meeting.<sup>5</sup> Berenson’s position on the platform got worse after further contacts from the Government during the summer of 2021. Twitter locked Berenson out of his account hours after President Biden’s remark that social media companies were “killing people” for allowing COVID-19 vaccine misinformation. A307. On July 23, while still in the White House, Flaherty spoke to Twitter’s Todd O’Boyle. O’Boyle recounted that he told Flaherty that Twitter would follow a “whole-of-society” approach to COVID-19 misinformation. A317. Flaherty “acknowledged” Twitter’s actions “and asked for time to meet soon.” *Id.* Twitter issued its third and fourth strikes against Berenson’s account on July 27 and July 30, respectively, resulting in account locks. A317, 320. The fifth, ban-inducing strike *came four days* after O’Boyle reported to the White House, Gottlieb, and Slavitt—which O’Boyle grouped together—about “all the good work” Twitter was doing “about covid and vaccines” to “*keep the target off our back.*” A324 (emphasis added).

Regardless of Berenson’s traceability theory, which is stronger than any of the *Murthy* plaintiffs’ theories, the Executive Order makes it “the policy of the United States to . . . ensure that no Federal Government officer, employee, or agent

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<sup>5</sup> The first strike against Berenson’s account in March 2021 led to no discernible consequences much less “restrictions” in the form of temporary or permanent suspension. A284.

engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen.” 90 Fed. Reg. at 8243. The Order further requires that “[n]o Federal department, agency, entity, officer, employee, or agent may act or use any Federal resources in a manner contrary” to this policy. *Id.* The Executive Order declares the conduct at issue illegal and forbids further similar future conduct against Berenson and others.

Given that the Government has effectively conceded declaratory and injunctive relief in the Executive Order, that leaves “compensatory relief,” which if “traceability” exists—and it does here—“is the whole ball game.” *Murthy*, 144 S. Ct. at 1987. Berenson sought damages in his original complaint and proposed first amended complaint. *See* A91, 347. Damages are available under *Bivens*, which Berenson concedes the Supreme Court has not extended to First Amendment claims.

In *Ziglar v. Abbasi*, 582 U.S. 120 (2017), the Supreme Court provided a two-step framework for extending *Bivens*. First, a court must first determine if the claim is novel. *Id.* at 139. This one is. In a case like this, the court must then decide if any “special factors” require dismissing the claim. *Id.* at 140. In *Ziglar*, the Supreme Court outlined several possible factors that force dismissal. The first two mentioned are whether the claim is an attempt “at altering an entity’s policy” and whether it is has brought against officials for “the acts of others.” *Id.*

Neither of those factors warrant dismissal here. Far from “altering an entity’s policy,” Berenson’s claim is entirely consistent with the Executive Order which contains “the policy of the United States,” which is 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.” 90 Fed. Reg at 8,243. The Executive Order even says such “policy” includes “identify[ing] and tak[ing] appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech.” *Id.* *Bivens* damages in this case are entirely consistent with this announced policy.

Regarding the “acts of others,” the Supreme Court raised concerns about how “allowing a *Bivens* action against the Executive Officials” in that case “might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties” in view of litigation demands. *Ziglar*, 582 U.S. at 141. The Supreme Court also counseled that “these claims would call into question the formulation and implementation of a general policy.” *Id.*

But the Executive Order itself contemplates these burdens. The Executive Order requires “[t]he Attorney General, in consultation with the heads of executive departments and agencies, shall investigate the activities of the Federal Government over the last 4 years that are inconsistent with the purposes and

policies of this order.” 90 Fed. Reg. at 8,243.<sup>6</sup> The Executive Order further contemplates “a report to be submitted to the President, through the Deputy Chief of Staff for Policy, with recommendations for appropriate remedial actions to be taken based on the findings of the report.” *Id.* This litigation would supplement this already ongoing investigation into past conduct. Nor is there any “alternative remedial structure” from Congress available here. *Ziglar*, 582 U.S. at 137.

In *Ziglar*, the Supreme Court concluded that “the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide.” *Id.* at 136. But again, this litigation would supplement the investigative work already taking place. At the same time, because the standing bar erected in *Murthy* is so high, it will be difficult for any would-be plaintiff to meet it. In other words, allowing this case to move forward is unlikely to bring about a flood of similar cases, because those litigants will not be able to show traceability.

The district court declined to extend *Bivens*, citing what it called “the incredibly high bar” to such claims erected in *Egbert v. Boule*, 596 U.S. 482

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<sup>6</sup> In *Ziglar*, the Supreme Court also counseled against allowing *Bivens* actions against “Executive Officials,” *id.* at 140, but the official defendants in that case included the director of the Federal Bureau of Investigation and the Attorney General—cabinet-level officers of the United States responsible for setting national policies. In contrast, Flaherty was a mid-level White House functionary not subject to Senate confirmation. Beyond that, the Executive Order expressly contemplates collaboration with “the heads of executive departments and agencies.” 90 Fed. at 8,243. This litigation does not present further burden on these high-level officials beyond what has already been ordered to take place.

(2022). SPA 32. The district court found that “Congress is plausibly better suited to ascertain the appropriate boundaries of the government’s involvement in social media and content regulation, and to determine whether to allow a damages action.” SPA 30. In this regard, the district court raised concerns that extending *Bivens* in a case like this would mean “officials could be liable even despite the fact that our jurisprudence recognizes that the Free Speech Clause does not require the government to maintain viewpoint neutrality when speaking about its course of action, and in fact actively tolerates pressure by such officials.” SPA 31.

In *Egbert*, the Supreme Court declined to discard *Bivens*, *Egbert* 596 U.S. at 502, but noted that extending its remedy is not appropriate if “there is any reason to think that Congress might be better equipped to create a damages remedy,” *id.* at 492. The Supreme Court did not extend *Bivens* to First Amendment retaliation claims. *Id.* at 498-501. One reason is that “[a] plaintiff can turn practically any adverse action into grounds for a retaliation claim,” which can “set off broad-ranging discovery.” *Id.* at 499 (internal quotation marks omitted). Another is that the “prospect of personal liability under the First Amendment” might deter officials from performing “their duties.” *Id.* (internal quotation marks omitted). Ultimately, the Supreme Court concluded that these issues were better suited for Congress, not the federal courts. *Id.* at 500.

The plaintiff in *Egbert* claimed a border patrol agent “retaliated against him” after the plaintiff filed an excessive force claim after the agent reported the plaintiff to Washington State authorities and the Internal Revenue Service. *Id.* at 489. “[A]fter a year-long investigation, Border Patrol took no action” against the agent for “for his alleged use of force or acts of retaliation.” *Id.* at 490.

But this case differs crucially from *Egbert*. Berenson is not making a “retaliation” claim. He is not alleging that government officials acted against him after he exercised his First Amendment rights against them, but rather that they attempted to keep him from exercising them at all by coercing Twitter to remove him from the platform. They did not try to punish him for his speech, but to keep him from speaking further. This claim is about Berenson’s core First Amendment right as an American to speak—and not just on vaccine mandates but on any issue which he chose to use his Twitter account.

Further, Berenson has a stronger factual basis for his complaint than the plaintiff in *Egbert*. Whether the agent in *Egbert* retaliated against the plaintiff was speculative. Berenson’s claims are based on Twitter’s own internal reactions to repeated contact from federal officials and subsequent actions against Berenson’s account. The claims in *Egbert* were also dismissed after an agency investigation. No such investigation occurred here.

The Supreme Court’s concerns about “broad-ranging discovery” are also not applicable to this case. As noted above, *Murthy*’s standing hurdle presents further obstacles to potential plaintiffs. Under *Murthy*’s standing doctrine, government officials are free to express their viewpoints to social media platforms aggressively, even if the downstream effect is to suppress speech on the platform, because traceability is difficult to show. At the same time, the Executive Order shows that the conduct at issue here is not in the ordinary course. Here, the incumbent Executive Branch has itself publicly condemned the prior administration’s coercive censorship practices and directed steps to “correct past misconduct,” 90 Fed. Reg. at 8,243, underscoring that what is at issue here not a legitimate, protected “duty” the law should insulate from accountability.

The district court cited *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024), for the proposition that “the Free Speech Clause does not require the government to maintain viewpoint neutrality when speaking about its course of action, and in fact actively tolerates pressure by such officials,” expression which extending *Bivens* to this case would chill. SPA 31. But in reversing this Court’s decision dismissing *Vullo* at the Rule 12 stage, the Supreme Court required a “plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff’s speech.” *Id.* at 191. Berenson has met that

standard, as the Government itself conceded. A540-541. That concession is consistent with this Court's own prior cases, including *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam) (reversing dismissal of claim against local government official whose threatening letter to a billboard company conveying a message condemning homosexuality "should have viewed the language of [the defendant's] letter in the light most favorable to plaintiffs"), which the Supreme Court cited in *Vullo* itself. *Vullo*, 602 U.S. at 190; *see also Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (reversing grant of defense summary judgment in case where village administrator sent letter to newspaper).

The practical effect of the district court's ruling is worth noting, particularly now given widespread concerns about civil rights and the aggressive conduct of federal officials. *See, e.g., Adam Liptak, A Legal Tool for Holding ICE Agents to Account, Hiding in Plain Sight*, N.Y. Times (Feb. 2, 2026), <https://www.nytimes.com/2026/02/02/us/ice-lawsuits-states.html>. No *Bivens* remedy here means the Government can violate a journalist's fundamental First Amendment rights and face no legal consequences. Former government employees cannot be enjoined and the Executive Order moots declaratory relief. Under this framework, the Government can violate the First Amendment, concede it did so, and walk away unscathed.

## **II. The District Court Erred by Dismissing Berenson’s 42 U.S.C. § 1985(3) Claim.**

“To state a cause of action under § 1985(3), a plaintiff must allege (1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff’s person or property, or a deprivation of a right or privilege of a citizen of the United States.” *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999).

The district court dismissed Berenson’s Section 1985(3) claim for failure to state a claim. SPA 33-41. The district court held that Berenson’s claim failed because he did not plausibly allege the existence of a cognizable Section 1985(3) class or discriminatory animus. *Id.* The court did not “analyze the conspiracy element or the alleged underlying First Amendment violation,” SPA 34, the latter which it noted later the Government “conceded,” SPA 59 n.4.

### **A. Berenson Adequately Alleges Invidious, Class-Based Discrimination.**

To state a Section 1985(3) claim, “there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Griffin v. Breckendrige*, 403 U.S. 88, 102 (1971). The *Griffin* Court imposed that to avoid creating a “general federal tort law.” *Id.* at 101-02. In *Carpenters v. Scott*, 463 U.S. 825 (1983), in the context of another purely private

conspiracy, the Supreme Court reaffirmed *Griffin*'s race-based or class-based animus requirement. *Carpenters*, 463 U.S. at 834. Regarding the more amorphous "class-based" prong, the Supreme Court left open the idea that class-based could encompass "political views or activities," but held that "*economic* views, status, or activities" did not qualify. *See id.*

This Court has extended Section 1985(3)'s "class-based" requirements well beyond race to other protected, mutable categories such as political affiliation, *see Keating v. Carey*, 706 F.2d 377, 388 (2d Cir. 1983) (holding that "allegations that the defendants conspired against [plaintiff] because he was a Republican satisfies the *Griffin* requirement under § 1985(3) of class-based animus"); *see also Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989) (declining to overturn *Keating* but finding that plaintiff had only alleged individual discrimination); *Rini v. Zwirn*, 886 F. Supp 270 (E.D.N.Y. 1995) (applying *Keating* and holding that allegations that defendants were motivated by plaintiffs' membership in the Republican Party satisfied the protected class requirement under Section 1985(3)), and religion, *Jews for Jesus v. Jewish Comm. Rel. Council of N.Y., Inc.*, 968 F.2d 286 (2d Cir. 1992) (affirming that "class-based animus" includes religion and holding plaintiff group raised fact issues for trial). District courts in the Second Circuit have extended Section 1984 to disability, *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993) (holding disabled individuals may be a class protected by Section 1985(3)),

sexual orientation. *Jenkins v. Miller*, 983 F. Supp. 2d 423, 459 (D. Vt. 2013), and to a religious cult founded in 1982. *Zhang Jingrong v. Chinese Anti-Cult World Alliance (CACWA)*, 287 F. Supp. 3d 290 (E.D.N.Y. 2018).

The case of *Lederman v. Giuliani*, No. 98 Civ.2024LMM/JCF, 2007 WL 1623103 (S.D.N.Y. June 5, 2007), illustrates the flexibility of the Section 1985(3) class requirement. In *Lederman*, the plaintiff was arrested in connection with his activities with an organization called A.R.T.I.S.T., “a group comprised of street artists who advocate for greater rights and privileges under the First Amendment for street artists.” *Id.* at \*1. The Court denied defendants’ motion for summary judgment finding that “[w]hether or not A.R.T.I.S.T. qualifies as a political affiliation of satisfying the second element of a 1985(3) claim, where ‘class-based’ animus is a requirement according to *Griffin* is an issue of material fact” for the jury who could see it as “merely ‘a group of individuals who share a desire,’” or who “could perceive it as a political group with an agenda disapproved of by Defendants.” *Id.* at \*5; *see also Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (holding that a plaintiff’s “political views” provided a sufficient basis for class-based discrimination); *Johnson-Kirk v. OB GYN Womenservices, P.C.*, No. 93-CV-0702E(F), 1995 WL 307589, at \*7 (W.D.N.Y. May 15, 1995) (indicating that the court would consider motion for leave to amend where plaintiff, an anti-

abortion protestor, was arrested and brought claims against private and government defendants but had failed to allege class-based animus).

Berenson alleges that he was “speaking on behalf of an identifiable class of Americans who had chosen not to receive a COVID-19 vaccine.” A257. That class “includes a disproportionate number of African-Americans, political conservatives, and evangelical Christians.” A344. The political nature of the class was not lost on the Government itself. In February 2021, while serving in the White House, Slavitt stated that COVID-19 vaccine hesitancy “may be political.” A287. Berenson was targeted because he was viewed as “the epicenter of disinfo that radiated outwards to the persuadable public.” A295. In other words, Berenson was the most effective spokesperson to and on behalf of Americans who declined a COVID-19 vaccine. Whether the class Berenson alleges exists is merely a group of individuals who share a “desire” or a “political group with an agenda disapproved of by Defendants” is a jury question. *Lederman*, 2007 WL 1623103, at \*5. It is not fit for resolution at the pre-discovery stage of this litigation.

The district court held otherwise. Though the district court acknowledged that this Court “reaffirmed its holding in *Keating* that Section 1985(3) covers classes beyond race,” SPA 35, it cited *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993), and concluded that “[t]he alleged class of unvaccinated individuals is little more than a ‘group of individuals who share a desire to engage

in conduct that the § 1985(3) defendant disfavors’; here, that conduct is not getting vaccinated against COVID-19.” SPA 36 (quoting *Bray*, 506 U.S. at 269).

In *Bray*, the Supreme Court rejected the notion that “opposition to abortion reflects an animus against women in general.” *Id.* at 269. The record showed the motivation was opposition to abortion. *Id.* at 270. *Bray* required “at least a purpose that focuses upon women *by reason of their sex*—for example (to use an illustration of assertedly benign discrimination), the purpose of ‘saving’ women *because they are women* from a combative, aggressive profession such as the practice of law.” *Id.*

The kind of discrimination *Bray* recognized as actionable exists here. Defendants targeted Berenson’s speech by reason of his status as a representative speaking for and to unvaccinated Americans. The “really tough question” White House officials asked in April 2021 and the subsequent pressure campaign were aimed at keeping Berenson from speaking to and preventing unvaccinated Americans from reading his reporting. They explicitly aimed their censorship efforts at people who were unvaccinated, as Slavitt himself explained on his podcast when he called for platforms “to cut down on the amount of false information *that people who haven’t been vaccinated see.*” Andy Slavitt, *Is COVID Misinformation Killing People? (with Facebook’s Nick Clegg)*, <https://lemonadamedia.com/podcast/is-covid-misinformation-killing->

[people-with-facebooks-nick-clegg/](#) (emphasis added). The district court erred when it found that the conduct at issue in the conspiracy “is not getting vaccinated against COVID-19”—it is whether unvaccinated people as a class have a First Amendment right to speak and hear opinions and reporting without federal interference.

The district court further relied on this Court’s decision in *Gleason* to dispose of Berenson’s claim. SPA 38. According to the district court, “Berenson has not alleged facts showing anything more than that Berenson was in political and philosophical opposition to the federal government’s COVID-19 policies,” which the court ruled is insufficient for Section 1985(3) purposes. SPA 38.

The district court misread *Gleason*. The plaintiff in *Gleason* “alleged only that he was discriminated against because he was a political opponent of the defendants and was extremely vocal in his opposition to their management.” 869 F.2d at 695. This Court noted “that the complaint does not disclose who besides [the plaintiff] may belong to this purported class” and that the plaintiff’s “only claim is that he was discriminated against as an individual.” *Id.* This Court quoted Justice Blackmun’s dissenting opinion in *Scott* approvingly, that “the intended victims [of discrimination] must be victims not because of any personal malice the conspirators have toward them, but because of their membership in *or affiliation*

*with a particular class.*” *Id.* (quoting *Scott*, 463 U.S. at 850 (Blackmun, J., dissenting)) (emphasis added).

Berenson’s Section 1985(3) claim falls outside the *Gleason* framework for at least two reasons. First, Berenson has alleged that he was more than just a “political and philosophical” opponent of Defendants, but rather that he was “speaking on behalf of an identifiable class of Americans who had chosen not to receive a COVID-19 vaccine.” A344. The class includes more people than just Berenson. Second, Defendants targeted Berenson both because of his membership in and “affiliation” with unvaccinated Americans—his rapport, influence, and reach into the “persuadable public.” A295.

**B. Berenson Adequately Alleges Discriminatory Animus.**

Even assuming the existence of a protected class, the district court held that Berenson failed to allege Defendants acted with discriminatory animus toward that class. According to the district court, Defendants targeted Berenson because of their concerns about “misinformation,” not his vaccination status. SPA 39-41.

At the Rule 12 stage, the district court is required to “draw[] all reasonable inferences in [Berenson’s] favor.” *Vaughn*, 957 F.3d at 145. Berenson does not just allege that Defendants did not approve of his content. He alleges they targeted him because his content was reaching and persuading unvaccinated Americans—the class—and that preventing unvaccinated Americans from hearing his message was

their goal. A295. Put another way, Defendants sought to silence Berenson to control the class. That is actionable animus under Section 1985(3).

The district court’s contrary conclusion—that the Defendants had “common and respectable reasons” to oppose “misinformation,” SPA 39—improperly weighed the evidence at the pleading stage. Even an “assertedly benign” purpose such as “saving” women from the practice of law can still constitute discriminatory animus. *Bray*, 506 U.S. at 270. This means even if Defendants believed they were saving lives—and saving the unvaccinated from themselves—the reasonable inference that they were targeting Berenson for at least his “affiliation” with the class remains. As such, whether Defendants “knew about” Berenson’s COVID-19 vaccination status is beside the point. SPA 40. Defendants knew Berenson was the leading spokesman, “ground zero,” for the class they targeted.

### **III. The District Court Erred by Dismissing Berenson’s Tortious Interference Claims.**

In New York, “[t]ortious interference with contract requires [(1)] the existence of a valid contract between the plaintiff and a third party, [(2)] defendant’s knowledge of that contract, [(3)] defendant’s intentional procurement of the third-party’s breach of the contract without justification, [(4)] actual breach of the contract, [(5)] and damages resulting therefrom.” *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424, 668 N.E.2d 1370, 1375 (N.Y. 1996). The district

court dismissed Berenson’s tortious interference claims for failure to plausibly allege the fourth element, breach of his contract with Twitter. SPA 50-52.<sup>7</sup>

To reach that conclusion, the district court first construed Twitter’s Terms of Service and the COVID-19 Misleading Information Policy. The district court emphasized the “any or no reason” language in the Terms of Service related to account termination. SPA 46. It then described the COVID-19 Misleading Information Policy as “aspirational rather than a fundamental change to Twitter’s express notice, in the Terms of Service, that it could suspend or terminate an account for *any or no reason*.” SPA 48.

The only court to assess Berenson’s contract claim against Twitter in live litigation against the company rejected this approach. In *Berenson v. Twitter, Inc.*, No. C 21-09818 WHA, 2022 WL 1289049 (N.D. Cal. Apr. 29, 2022), Judge William H. Alsup considered the same Terms of Service with the same “any or no reason” clause and found that “Twitter’s conduct here modified its contract with plaintiff and then breached that contract by failing to abide by its own five-strike

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<sup>7</sup> The district court also found that Berenson “d[id] not appear to attempt to explain how Bourla tortiously interfered with any alleged contract, and instead focuses only on Gottlieb and Slavitt.” SPA 41. Berenson alleges facts showing that Gottlieb and Bourla maintained a close working relationship, A311, and that Bourla called speakers like Berenson “criminals because they have cost literally millions of lives.” A318. Given their contact, and Bourla’s stated opposition to so-called misinformation, it is a reasonable inference at the Rule 12 stage that Bourla was aware of and supportive of Gottlieb’s efforts to deplatform Berenson.

policy and its specific commitments set forth through its vice president.” *Id.* at \*2. The district court acknowledged this holding but declined to follow it, noting it was “not binding.” SPA 47.

Instead of following Judge Alsup’s ruling, the district court adopted the rationale in *Morton v. Twitter, Inc.*, No. 20-CV-10434, 2021 WL 1181753 (C.D. Cal. Feb. 19, 2021). In *Morton*, a model alleged that Twitter failed to enforce its “Non-consensual nudity policy” against a third-party user. *Id.* at \*5. The court rejected the claim in part because the plaintiff “has not pointed to any contractual provisions, such as in Twitter’s terms of service, that imposed a duty on Twitter to suspend offending accounts.” *Id.*

Berenson’s case is substantially different. In the journalist’s case, “Twitter allegedly established a specific, detailed five-strike policy regarding COVID-19 misinformation and its vice president gave specific and direct assurances to plaintiff regarding his posts pursuant to that policy.” *Berenson*, 2022 WL 1289049, at \*2. Twitter’s policy contained defined consequences for violations. A486. All this was sufficient to modify the “any or no reason” language in Twitter’s Terms of Service, which is what Judge Alsup determined applying California law as required by Twitter’s contract. A453. The conclusion is further supported by the fact that the Terms of Service lack a merger or anti-modification clause, *see* A444-454, and the terms must be construed against Twitter as the drafter, *Berenson*, 2022 WL

1289049, at \*2 (citing *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233, 248, 376 P.3d 506, 514 (Cal. 2016)). What is more, “[u]nder California law, a written agreement may be modified by the parties’ conduct, even if the written agreement includes a clause expressly prohibiting modification.” *Alvarado Orthopedic Rsch., L.P. v. Linvatec Corp.*, No. 11-CV-246-IEG RBB, 2013 WL 2351814, at \*4 (S.D. Cal. May 24, 2013). Twitter modified its terms with Berenson.

The district court reasoned that “even if the five-strike policy could be seen as a modification of the Terms of Service, it could not be read as a modification to Twitter’s unambiguous reservation of the ability to remove content or suspend an account for any reason or no reason at all.” SPA 49. Judge Alsup rejected the same argument, holding that “Twitter’s argument that plaintiff’s reliance was unreasonable because the alleged representations contradicted a written agreement is inapposite given the explicit COVID-19 misinformation policy.” *Berenson*, 2022 WL 1289049, at \*3. And that holding is consistent with California law which controls the Terms of Service. *See Wagner v. Glendale Adventist Med. Ctr.*, 216 Cal. App. 3d 1379, 1388, 265 Cal. Rptr. 412, 418 (Cal. Ct. App. 1989) (“When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom. In that circumstance, it would be equally inequitable to deny

the relying party the benefit of the other party's apparent modification of the written contract." ).<sup>8</sup>

The conduct of those involved in deplatforming Berenson confirm the modification. None of them, including Twitter, treated Berenson as a user who could be terminated "at will." From the April 2021 meeting between the White House, HHS, and Twitter onward, Twitter made it clear to third parties it was actively applying its rules to Berenson. Slavitt monitored Berenson's strike count. A320. O'Boyle told Slavitt "our process takes time," which is inconsistent with Berenson being an at-will user. A262. Internal Twitter notes from a teleconference with Gottlieb show Berenson's fourth strike status was discussed. A326. And of course, Twitter itself acknowledged that "Berenson's Tweets should not have led to his suspension at that time." A337. Twitter's admission is entirely inconsistent with an at-will relationship.

Moreover, the Supreme Court has instructed that a defendant's belief in the invalidity of the underlying obligation does not defeat a tortious interference claim. *See Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 646 (2015) (citing *Restatement (Second) of Torts* § 766, cmt. i (1979)) ("While the invalidity of a

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<sup>8</sup> The district court cited *Songfi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876 (N.D. Cal. 2015), for the proposition that "conduct authorized by a contract cannot give rise to a claim for breach of that agreement." SPA 49. Unlike Berenson's relationship with Twitter, allegations supporting modification of the YouTube terms of service at issue in that case are entirely absent. *See id.* at 884-85.

contract is a defense to tortious interference, belief in validity is irrelevant.”).

Under that principle, even if the defendants genuinely believed Twitter’s “any or no reason” clause permitted Berenson’s suspension, their subjective belief is no defense.

The district court also takes issue with Berenson’s modification theory. The district court held that Twitter executive Brandon Borrman’s statements to Berenson were “too vague to create a contract” and could not modify the Terms of Service. SPA 49-50. Again, Judge Alsup rejected this argument, determining that Borrman’s statements considered “[c]ollectively” with the COVID-19 Misleading Information Policy itself “plausibly qualify as a clear and unambiguous promise that Twitter would correctly apply its COVID-19 misinformation policy and try to give advance notice if it suspended plaintiff’s account.” *Berenson*, 2022 WL 1289049, at \*3.

The district court also faulted Berenson for failing to allege that Slavitt or Gottlieb “knew about Borrman’s statements” and “any relationship or connection between Borrman and O’Boyle, Culbertson, or other Twitter executives discussed therein.” SPA 51-52. As noted above, Berenson alleges that Slavitt and Gottlieb both knew about the COVID-19 Misleading Information Policy and that Twitter was actively applying it to Berenson in connection with the journalist’s ongoing

access to the platform. Regardless of whether Borrmann talked to O’Boyle or Culbertson, the question is whether third parties induced the breach.

The final ground for the district court’s holding is that “even if the Court considered the COVID-19 Misleading Information Policy as a modification to the Terms of Service, Twitter did not violate it” because the policy “contemplated accidental suspensions” and “provided a remedy to such individuals.” SPA 52. This alternative ground is flawed for at least three reasons.

The first is that Berenson’s suspension from Twitter was not “accidental”—it was deliberate, induced by third-party pressure, and it violated the company’s own rules. As such, there was no accidental suspension to remedy.

Second, the existence of an appeal mechanism does not negate a breach or otherwise bar Berenson’s claim. A breach of contract occurs when it happens. *See Spear v. California State Auto. Assn.*, 2 Cal. 4th 1035, 1042, 831 P.2d 821, 825 (Cal. 1992) (“A contract cause of action does not accrue until the contract has been breached.”). In this case, the last breach was Twitter imposing the fifth strike and permanent suspension against the express wishes of its CEO and General Counsel. A331-332. Tellingly, in its case against Berenson, Twitter did not argue that the journalist failed to exhaust the contractual equivalent of his administrative remedies against the company prior to filing suit. *See Berenson*, 2022 WL 1289049, at \*1-4. There is a good reason for that. The COVID-19 Misleading

Information Policy provided a user whose “account was locked or suspended in error . . . *can* submit an appeal.” A486 (emphasis added). The policy’s language is permissive, not mandatory.

Third, Berenson’s factual allegations, which must be accepted as true at the Rule 12 stage of this litigation, demonstrate that Twitter did not meaningfully offer Berenson an appeal and that any such appeal would be futile. The company did not notify Berenson of his right to appeal after his suspension. A331. Twitter’s press statement said that Berenson “has been permanently suspended for repeated violations of our COVID-19 misinformation rules,” giving no indication of an appeal. A330-331. Twitter’s General Counsel Vijaya Gadde—who was surprised to learn of Berenson’s ban—wrote internally that she wanted to “reconsider” the action and that “I don’t believe perm suspension [of Berenson] is warranted.” *Id.* Despite this, the company issued a public statement confirming the suspension and took no action to reinstate Berenson’s account. A330-331. When Berenson activated an alternative account, Gottlieb reported it to O’Boyle, who immediately had it suppressed. A332. There was never any indication that an appeal, even if offered, would give Berenson relief. And ultimately, when Berenson sued the company—the ultimate “appeal”—it litigated against him and did not reinstate him until it settled the journalist’s claim after the district court denied the company’s motion to dismiss.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Plaintiff-Appellant Alex Berenson certifies that this brief:

(1) complies the type-volume limitation of Second Circuit Local Rule 32.1(a)(4)(A) because it contains 11,417 words, including footnotes and excluding the he brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) and Second Circuit Local Rule 32.1 because this document has been prepared using Microsoft Word for Microsoft 365 MSO and is set in 14-point Times New Roman font.

/s/ James R. Lawrence, III  
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