

HONORABLE BARBARA J. ROTHSTEIN

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

ROBERT F. KENNEDY, JR., a citizen of
New York, JOSEPH MERCOLA, M.D., a
citizen of Florida, RONALD CUMMINS, a
citizen of Minnesota, and CHELSEA
GREEN PUBLISHING, INC., a Vermont
Corporation,

Plaintiffs,

v.

U.S. Senator ELIZABETH WARREN,

Defendant.

No. 21-cv-01508-BJR

DEFENDANT SENATOR
ELIZABETH WARREN'S MOTION
TO DISMISS PURSUANT TO
12(b)(1) AND 12(b)(6)

1 **I. INTRODUCTION**

2 This case is a misguided attempt to prevent public officials from speaking out against false
3 and misleading information about COVID-19 vaccines and treatments. Plaintiffs improperly frame
4 a letter Senator Warren sent to Amazon as a “thinly veiled threat” simply because she asks Amazon
5 to take steps to stop facilitating the spread of COVID-19 misinformation and respond to several
6 requests for information. If the letter was a “threat” it was a poor one; Plaintiffs do not allege,
7 because they cannot, that Amazon removed the book from its website in response to the letter.

8 The Department of Justice has already moved to dismiss the claims against Senator Warren
9 in her official capacity for lack of jurisdiction or, in the alternative, to grant summary judgment on
10 those claims in her favor. Dkt. # 30, p.1. That motion remains pending. Senator Warren now moves
11 to dismiss Plaintiffs’ Complaint against her in her personal capacity, with prejudice, pursuant to
12 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), because (1) there is no “case or
13 controversy” within the meaning of Article III, (2) Senator Warren is entitled to both qualified and
14 *Noerr-Pennington* immunities, and (3) Senator Warren’s letter cannot plausibly amount to a First
15 Amendment violation as a matter of law.¹

16 **I. FACTUAL ALLEGATIONS**

17 Plaintiffs’ claims center on a letter Senator Warren sent to Amazon’s Chief Executive
18 Officer on September 7, 2021, raising concerns about Amazon’s role in disseminating
19 misinformation about COVID-19 vaccines and treatment and requesting information about
20 Amazon’s practices that promote the spread of such information. Dkt. #1 ¶ 7. In her letter, Senator
21 Warren also “nam[ed] certain books” as examples of books containing COVID-19 misinformation,
22

23 _____
24 ¹ The undersigned counsel certifies that counsel for the parties conferred about the present motion by telephone on
March 4, 2022 and concluded that no agreement could be reached to obviate the need for this motion.

1 including Plaintiffs’ book, *The Truth About COVID-19: Exposing the Great Reset, Lockdowns,*
 2 *Vaccine Passports, and the New Normal.* *Id.* ¶ 7.

3 As noted in Senator Warren’s letter, “[the book] asserts that vitamin C, vitamin D, and
 4 quercetin—supplements sold on Mercola’s website—can prevent COVID-19 infection,” and that
 5 “vaccines cannot be trusted.”² In her letter, Senator Warren cited to sources that directly refute
 6 Plaintiffs’ COVID-19 misinformation. *Id.* The Senator further stated that “[g]iven the seriousness
 7 of this issue, I ask that you perform an immediate review of Amazon’s algorithms and, within 14
 8 days, provide both a public report on the extent to which Amazon’s algorithms are directing
 9 consumers to books and other products containing COVID-19 misinformation and a plan to modify
 10 these algorithms so that they no longer do so.” *Id.* at 5. Senator Warren did not describe any
 11 consequence if Amazon chose not to comply with her request. *Id.* Senator Warren also asked
 12 Amazon to respond to several requests for information by September 22, 2021:

- 13 1. What are Amazon’s existing policies regarding the listing, promotion, and sale
 14 of books and other products containing COVID-19 misinformation on its
 platform?
- 15 2. What specific actions has Amazon taken to address the spread of COVID-19
 misinformation via search results or other uses of its platform?
- 16 3. Why do Amazon’s search algorithms prominently list books with COVID-19
 misinformation?
- 17 4. Why do books with COVID-19 misinformation receive “Best Seller” tags from
 18 Amazon? What criteria does Amazon use to award these tags, and what steps does
 Amazon take to highlight products containing the tag?

19 *Id.* Senator Warren also posted the letter to Amazon on her website. Dkt. # 1 ¶ 14.

20 Although Plaintiffs allege that “*as a direct result* of Senator Warren’s letter” to Amazon, a
 21 *different* bookseller, Barnes & Noble, notified the book’s publisher by email that it would no longer

22 ² Plaintiffs selectively quote, and thereby incorporate, Senator Warren’s letter into their Complaint, which is attached
 23 in its entirety as Exhibit A to the Declaration of Ben Stafford (“Ex. A”). *See also* Letter from Senator Elizabeth Warren
 to Amazon CEO Andy Jassy, (Sep. 7, 2021), available online at
 24 <https://www.warren.senate.gov/imo/media/doc/2021.9.7%20Letter%20to%20Amazon%20on%20COVID%20Misinformation.pdf> (last visited Mar. 4, 2022).

1 sell an e-book version, they make no assertions that link this decision to Senator Warren’s letter—
 2 or even indicate that Barnes & Noble was aware of such letter. *Id.* ¶ 15 (emphasis added). Indeed,
 3 the book is still being sold on both Amazon and Barnes & Noble’s websites.³ Plaintiffs routinely
 4 allege facts, not on personal knowledge, but instead entirely on “information and belief.” In fact,
 5 Plaintiffs recognize that “it is impossible for Plaintiffs to know with certainty whether, as a result
 6 of Senator Warren’s letter” Amazon is suppressing or otherwise demoting their book, but
 7 nevertheless speculatively allege “that Amazon is in fact covertly taking such action.” *Id.* ¶ 17.⁴

8 Plaintiffs initiated this lawsuit on November 7, 2021, two months after Senator Warren’s
 9 letter was sent. Dkt. # 1, p.17. Plaintiffs assert claims against the Senator in her individual and
 10 official capacities, alleging that she violated the First Amendment and deprived Plaintiffs of rights
 11 and privileges under the U.S. Constitution. *Id.* ¶¶ 90-110. Plaintiffs seek injunctive relief against
 12 the Senator in her official capacity and damages against her in her personal capacity. *See id.*, p.17.

13 On December 9, 2021, Plaintiffs filed a motion for injunctive relief against Senator Warren
 14 “in her official capacity” only. Dkt. # 7, p. 1.⁵ On January 7, 2022, counsel for Senator Warren
 15 waived service. Senator Warren timely files this motion to dismiss. Fed. R. Civ. P. 12(a)(1)(A)(ii).

16 II. STANDARDS OF REVIEW

17 Rule 12(b)(1) requires dismissal for “lack of subject matter jurisdiction.” Fed. R. Civ. P.
 18 12(b)(1). Where the plaintiff lacks standing, the Court lacks subject matter jurisdiction and must
 19

20 ³ Joseph Mercola & Ronnie Cummins, *The Truth About COVID-19: Exposing The Great Reset, Lockdowns, Vaccine*
Passports, and the New Normal, Barnes & Noble [https://www.barnesandnoble.com/w/the-truth-about-covid-19-](https://www.barnesandnoble.com/w/the-truth-about-covid-19-doctor-joseph-mercola/1138725260?ean=9781645021513)
[doctor-joseph-mercola/1138725260?ean=9781645021513](https://www.barnesandnoble.com/w/the-truth-about-covid-19-doctor-joseph-mercola/1138725260?ean=9781645021513) (last visited Mar. 4, 2022).

21 ⁴ On September 22, 2021, Amazon answered Senator’s Warren letter (which was published online), responding to her
 22 requests for information and explicitly stating that it “continue[s] to list the books in question.” Ex. B Charlotte
 Schubert, *COVID-19 misinformation still featured on Amazon, months after inquiries from lawmakers*, Geekwire
 23 (Dec. 14, 2021, 10:04 AM), [https://www.geekwire.com/2021/covid-19-conspiracy-books-still-featured-on-amazon-](https://www.geekwire.com/2021/covid-19-conspiracy-books-still-featured-on-amazon-months-after-inquiries-from-lawmakers/)
[months-after-inquiries-from-lawmakers/](https://www.geekwire.com/2021/covid-19-conspiracy-books-still-featured-on-amazon-months-after-inquiries-from-lawmakers/).

24 ⁵ Claims Senator Warren in her official capacity were fully briefed as of February 14, 2022. Dkt. # 40, p.13. Senator
 Warren, in her personal capacity, joined in opposition to the motion for injunctive relief. Dkt. # 31, p.1.

1 dismiss the case. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v.*
2 *Citizens for a Better Env't*, 523 U.S. 83, 101, 118 (1998)). To establish standing, a plaintiff must
3 demonstrate injury, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559
4 (1992). The plaintiff “bears the burden of establishing these elements.” *Id.* at 561. Because courts
5 “have an independent obligation to determine whether subject-matter jurisdiction exists,” *Arbaugh*
6 *v. Y&H Corp.*, 546 U.S. 500, 514 (2006), they are not limited to the arguments raised by the parties
7 when considering a Rule 12(b)(1) motion, and they are free to consider materials outside the
8 pleadings. *Tarhuni v. Sessions*, 692 F. App’x 477, 477 n.1 (9th Cir. 2017).

9 Rule 12(b)(6) requires dismissal when a plaintiff “fail[s] to state a claim upon which relief
10 can be granted.” Fed. R. Civ. P. 12(b)(6). To plead a viable claim, the allegations must transcend
11 the “speculative,” “conceivable,” and “possible” and “state a claim to relief that is plausible on its
12 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57, 566–67, 570 (2007). The Court must
13 disregard “legal conclusions” and “conclusory statements” and must scrutinize factual allegations
14 to ensure that they are more than “‘merely consistent with’ a defendant’s liability.” *Ashcroft v.*
15 *Iqbal*, 556 U.S. 662, 677–79 (2009). Dismissal under Rule 12(b)(6) can be based on the lack of a
16 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
17 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). In considering a
18 Rule 12(b)(6) motion, the Court may take judicial notice of facts incorporated by reference in the
19 complaint, *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), as well as “court filings and
20 other matters of public record.” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6
21 (9th Cir. 2006). “[D]oing so does not convert a Rule 12(b)(6) motion to one for summary
22 judgment.” *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

III. AUTHORITY AND ARGUMENT

A. The Court lacks jurisdiction because Plaintiffs fail to establish they have standing.

To establish standing, Plaintiffs must have suffered “an injury in fact” that is “fairly traceable to the challenged action of the defendant,” and “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61 (internal quotation omitted). Plaintiffs fail to satisfy this “irreducible constitutional minimum,” *id.* at 560, leaving this Court without jurisdiction.

To satisfy Article III’s injury-in-fact requirement, “a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). Many of Plaintiffs’ allegations of injury are speculative, as they acknowledge. *See* Dkt. # 1 ¶ 17 (“it is impossible for Plaintiffs to know . . . whether, as a result of Senator Warren’s letter, Amazon has, or is now, covertly demoting, downgrading, or otherwise suppressing *The Truth About COVID-19*”). This “hypothetical” harm is not “distinct and palpable,” *Warth v. Seldin*, 422 U.S. 490, 501, or “‘real and not abstract,” *Spokeo*, 578 U.S. at 340.

The other harms Plaintiffs allege fail the second prong of the Article III test: causation. “[T]here must be a causal connection between the injury and the conduct complained of,” *Lujan*, 504 U.S. at 560, and the injury must not be “th[e] result [of] the independent action of some third party not before the court,” *id.* (quotation omitted). Plaintiffs allege that Amazon will not categorize the book as “medical work” or promote the book in its algorithm, but Plaintiffs do not claim—because they cannot—that Amazon *had* categorized the book as a medical work or promoted the book in some way, only to reverse course after and in response to Senator Warren’s inquiry. Dkt. # 1 ¶ 85. Indeed, Amazon’s response to Senator Warren’s letter does *not* suggest that

1 they made any changes in response to her inquiry; they simply provided her with information and
2 explicitly said that Plaintiffs' book remains on its platform. *See* Ex B.

3 Plaintiffs also allege in a conclusory fashion that, "as a direct result of Senator Warren's
4 letter," "Barnes & Noble[] notified the publisher" of Plaintiffs' book "that it would no longer sell
5 the work as an e-book." Dkt. # 1 ¶ 15. But the decision was reversed, *id.* ¶ 16. and Plaintiffs do
6 not claim that e-book sales ever stopped. Plaintiffs allege no facts that, if proven, would support
7 their conclusion that the Barnes & Noble's "editorial decision," *id.* ¶ 84, was caused by Senator
8 Warren's inquiry of Amazon, and not "many others in her political party," *id.* ¶ 10, the medical
9 community, or public opinion. In fact, Plaintiffs fail to allege that Barnes & Noble *was even aware*
10 *of* Senator Warren's inquiry to Amazon. This Court need not credit such speculative and bare
11 allegations. *Twombly*, 550 U.S. at 557 (finding "a conclusory allegation of agreement at some
12 unidentified point does not supply facts adequate to show illegality").⁶

13 The redressability prong of standing overlaps with causation, and Plaintiffs fail to satisfy
14 it as well. Senator Warren's inquiry was sent to Amazon over six months ago, and Plaintiffs' book
15 and e-book continue to be sold on its platform.⁷ Assuming, purely for the sake of argument, that
16 Senator Warren's letter was somehow unlawful, even "[p]ast exposure to illegal conduct does not
17 in itself show a present case or controversy . . . if unaccompanied by any continuing, present
18 adverse effects." *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 507 (9th
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20 ⁶ Plaintiffs also allege that "[i]ndependent booksellers are refusing to sell Plaintiffs' book" and their books are not
21 being sold in brick-and-mortar stores. Dkt. # 1 ¶¶ 88-89. Plaintiffs do not plead that these refusals only happened after
22 Senator Warren's inquiry or because of it. There are many other reasons that booksellers may not want to display a
23 book, particularly one urging readers not to get vaccinated against COVID-19 during the pandemic. Such "allegations
24 are too vague to plead successfully his standing." *Thomas v. Mundell*, 572 F.3d 756, 763 (9th Cir. 2009).

⁷ *See* Joseph Mercola & Ronnie Cummins, *The Truth About COVID-19: Exposing The Great Reset, Lockdowns, Vaccine Passports, and the New Normal*, Amazon (Apr. 29, 2021), https://www.amazon.com/dp/1645020886/ref=cm_sw_em_r_mt_dp_XZRJNQQ1QE0K32FJ111S (last visited Mar. 4, 2022); Barnes & Noble, <https://www.barnesandnoble.com/w/the-truth-about-covid-19-doctor-joseph-mercola/1138725260?ean=9781645021513> (last visited Mar. 4, 2022).

1 Cir. 1991) (quotation omitted). Plaintiffs have no continuing harm, and the booksellers allegedly
2 suppressing Plaintiffs’ book are not before this Court.

3 The closest analog to this case is *Ass’n of Am. Physicians & Surgeons v. Schiff*, Case No.
4 1:20-cv-106 (D.D.C. 2020). Congressman Schiff sent letters to Amazon, Google, and Facebook
5 “to encourage them to use their platforms to prevent what [Congressman] Schiff asserted to be
6 inaccurate information on vaccines” and “request[ing] information about what actions the
7 companies currently take to address misinformation about vaccines on their platforms.” 518 F.
8 Supp. 3d 505, 510 (D.D.C. 2021), *aff’d sub nom.* 23 F.4th 1028 (D.C. Cir. 2022). He also issued a
9 press release with copies of his letters. *Id.* Plaintiff AAPS alleged that Amazon terminated it from
10 one of its programs, Twitter added public health disclaimers, and traffic to its website decreased.
11 *Id.* at 511. The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed.

12 In dismissing AAPS’s claims, the district court held its allegations were insufficient to
13 satisfy Article III. *Id.* at 513-15. It found AAPS failed to satisfy the causation element of standing
14 because the harms AAPS alleged were the result of third-party companies, and Schiff’s letters “did
15 not advocate for any specific action.” *Id.* at 516 (“These allegations are not plausible and ignore
16 the innumerable other potential causes for the actions taken by the technology companies.”); *see*
17 *also Schiff*, 23 F.4th at 1034 (same). The district court also concluded that AAPS failed to plead
18 redressability “for the same reasons they fail to show causation.” 518 F. Supp. 3d at 516 (finding
19 it “not plausible” that companies would revise their policies on medical information because “one
20 congressman” retracted his “public statements about vaccine misinformation”).

21 As in *Schiff*, Plaintiffs’ case “depends on an analytical leap based on bald speculation rather
22 than allegations of fact.” *Id.* at 515; *Schiff*, 23 F.4th at 1034–35 (D.C. Cir. 2022) (“It is far less
23 plausible that the companies’ actions were a response to one legislator’s inquiry than that they

1 were a response to widespread societal concerns about online misinformation.”). The Court should
2 similarly dismiss Plaintiffs’ Complaint for lack of standing.

3 **B. Plaintiffs fail to state a claim upon which relief may be granted.**

4 **1. Senator Warren is entitled to qualified immunity.**

5 Federal officials receive qualified immunity when their conduct “does not violate clearly
6 established statutory or constitutional rights of which a reasonable person would have known.”
7 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Butz v. Economou*, 438 U.S. 478, 507 (1978). In
8 analyzing qualified immunity, the Court examines “(1) whether there has been a violation of a
9 constitutional right; and (2) whether that right was clearly established at the time of the officer’s
10 alleged misconduct.” *Saved Mag. v. Spokane Police Dep’t*, 19 F.4th 1193, 1198 (9th Cir. 2021).
11 The Court has discretion to decide which of the two prongs “should be addressed first in light of
12 the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 236. “Addressing the
13 second prong before the first is especially appropriate where ‘a court will rather quickly and easily
14 decide that there was no violation of clearly established law.’” *Jessop v. City of Fresno*, 936 F.3d
15 937, 940 (9th Cir. 2019) (quoting *Pearson*, 555 U.S. at 239).

16 Unlike in 42 U.S.C. § 1983 suits, claims against federal officers for violations of
17 constitutional rights have only been recognized in certain contexts. As a result, in *Bivens* actions,
18 the Court “engage[s] in a two-step inquiry,” “first inquir[ing] whether the request involves a claim
19 that arises in a ‘new context’ or involves a ‘new category of defendants’” and then “ask[ing]
20 whether there are any ‘special factors that counsel hesitation.’” *Boule v. Egbert*, 998 F.3d 370, 385
21 (9th Cir. 2021), *cert. granted in part* (2021) (quotation omitted).

22 This case involves a new context: “The Supreme Court has never explicitly recognized a
23 *Bivens* remedy for a First Amendment claim,” *Vega v. United States*, 881 F.3d 1146, 1153 (9th
24 Cir. 2018) (citing *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012)), and the case implicates a

1 different constitutional right than established *Bivens* remedies in the Fourth, Fifth, and Eighth
2 Amendment contexts. Although the Ninth Circuit recently extended *Bivens* to a First Amendment
3 *retaliation* claim, the novel First Amendment claims here are substantially different: they are based
4 upon a 1963 Supreme Court case concerning restraints on obscenity. They are also brought against
5 a new kind of defendant—a sitting United States Senator. And special factors counsel against
6 extending *Bivens* to this claim, including the critical and decidedly novel context of the COVID-
7 19 pandemic and the implications on public health of misinformation about the same.

8 But even assuming Plaintiffs’ First Amendment *Bivens* action against Senator Warren were
9 cognizable, Plaintiffs cannot “rely on abstract formulations of First Amendment law that define
10 their rights at a high level of generality” to establish a claim. *Saved Mag.*, 19 F.4th at 1199 (citing
11 *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). Instead, the “clearly established law [inquiry]
12 must be particularized to the facts of the case.” *Id.* The law needs to give Senator Warren “fair
13 notice that her conduct was unlawful.” *Kisela*, 138 S. Ct. at 1152.

14 No case provides that notice. Even where courts have found that the case before them
15 involves factual similarities to *Bantam Books*, 372 U.S. 58 (1963)—the case Plaintiffs rely upon
16 in bringing this action—they have affirmed grants of qualified immunity where an officer could
17 have reasonably believed their action would not be viewed as a threat. In *Zieper v. Metzinger*, 474
18 F.3d 60 (2d Cir. 2007), for example, the Second Circuit held that “because *Bantam Books* [and
19 another case] present examples of threats that are more direct on their face than those defendants
20 used here, these cases were not ‘closely analogous’ enough to the circumstances here to give the
21 defendants’ fair warning of the illegality of their actions.” *Id.* It granted defendants qualified
22 immunity. *Id.* at 71. Another case involved even more parallels to *Bantam Books*, including
23 commissions established to investigate pornography and letters sent to various distributors.

1 *Playboy Enterprises, Inc. v. Meese*, 746 F. Supp. 154, 160 (D.D.C. 1990), *aff'd sub nom.*
 2 *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991). The district court there held that
 3 “[w]hile the facts in *Bantam* are similar to those in the instant case, *Bantam* can be distinguished
 4 from this case based on several crucial facts” so granting qualified immunity was warranted. *Id.*

5 As in these cases, and as a threshold matter prior to reaching the merits, the Court should
 6 find that the specific rights at issue here were not clearly established so as to give Senator Warren
 7 sufficient notice of liability and should grant her qualified immunity.

8 **2. Plaintiffs fail to plausibly allege a First Amendment violation.**

9 In support of their First Amendment claim, Plaintiffs rely exclusively on the line of cases
 10 under *Bantam Books*, arguing that Senator Warren’s letter “effected an unconstitutional prior
 11 restraint” on their First Amendment rights. Dkt. # 1 ¶ 93. But *Bantam Books* and its progeny are
 12 plainly distinguishable from this case.⁸

13 In *Bantam Books*, the “Rhode Island Commission to Encourage Morality in Youth” was
 14 tasked with reviewing obscene language “tending to the corruption of the youth” and authorized
 15 “to investigate and recommend the prosecution of all violations” of the State’s general laws. 372
 16 U.S. at 59-60. The Commission sent letters to distributors explicitly threatening legal sanctions
 17 unless they removed publications that the Commission found objectionable. *Id.* at 62, 68. The
 18 notices also said that “Chiefs of Police” had been given the names of the objectionable publications
 19 and stated that the Commission had a duty to recommend to the Attorney General purveyors of
 20 obscenity for prosecution. *Id.* Further, the notices said that the Attorney General would “act” for

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 22 ⁸ In a single paragraph, Plaintiffs allege viewpoint discrimination. *See* Dkt. #1, ¶ 94. “Viewpoint discrimination occurs
 23 when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject.”
 24 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009). Because Senator Warren has not “imposed . . . any
 prohibitions” of Plaintiffs’ viewpoint, Plaintiffs “have failed to allege a colorable viewpoint discrimination claim.”
Am. Fam. Ass’n, Inc. v. City & Cnty. of S. F., 277 F.3d 1114, 1125 (9th Cir. 2002) (dismissing the same).

1 the Commission in the case of “non-compliance” and thanked recipients for their “cooperation.”

2 *Id.* And the notice was followed by a police visit to the targeted distributors. *Id.* at 63.

3 In short, the Commission informed distributors that it had given their names to the police
4 and would refer non-cooperators to the Attorney General for prosecution. In finding a First
5 Amendment violation, the Court acknowledged that though the plaintiff was technically “‘free’ to
6 ignore the Commission’s notices, in the sense that his refusal to ‘cooperate’ would have violated
7 no law,” his “compliance with the Commission’s directives was not voluntary.” *Id.* at 68.

8 The Ninth Circuit recently underscored *Bantam Books*’ limited scope in analyzing whether
9 Twitter’s First Amendment retaliation claim against the Texas Attorney General was ripe for
10 review. The Ninth Circuit distinguished the notices in *Bantam Books* from the Attorney General’s
11 communication to Twitter because “unlike the Commission, the OAG [did] not allege[] that the
12 law has been broken” but instead “started an investigation and requested documents.” *Twitter, Inc.*
13 *v. Paxton*, No. 21-15869, 2022 WL 610352, at *6 (9th Cir. Mar. 2, 2022). The court rejected
14 Twitter’s argument that the statement “[a]s AG, I will fight them with all I’ve got” created an
15 “immediate First Amendment injury that [the] court[s] may remedy,” *id.*

16 This case, too, is markedly different from *Bantam Books* in many ways—and the action
17 alleged is far less threatening than that of the Texas Attorney General in *Twitter*.⁹ First, and most
18 significantly, Senator Warren did not make the sorts of explicit threats of criminal prosecution at
19 issue in *Bantam Books*. She did not tell Amazon that she had referred it to the police. She did not
20 threaten to recommend to the United States Attorney General that it be prosecuted. Senator Warren
21 did not purport to have any authority to refer Amazon for criminal prosecution or legal sanctions,

22 _____
23 ⁹ Plaintiffs mischaracterize the Supreme Court’s ruling in *Bantam Books*—claiming it held that state officials violated
24 the First Amendment “by sending letters to booksellers warning that the sale of certain named books was potentially
unlawful.” Dkt. #1 ¶ 2. Nowhere in the decision does the Supreme Court use the phrase “*potentially* unlawful.” Rather,
the Commission provided a threat of prosecution—which was followed with visits from police officers.

1 nor ever threaten to do so. Unlike *Bantam Books* where the Commission had the authority to
2 “recommend prosecution” for distributors who did not remove objectionable publications,
3 Plaintiffs fail to allege that Senator Warren is somehow authorized to issue sanctions to Amazon
4 for selling Plaintiffs’ book (nor could they).¹⁰

5 Second, and unlike in *Bantam Books*, Senator Warren did not identify any law violated, or
6 say that Amazon’s actions were in fact unlawful. Taken as a whole, Senator Warren’s letter was
7 an *inquiry* to Amazon regarding its mechanisms for detecting books containing COVID-19
8 misinformation, not a threat of sanctions for failing to remove Plaintiffs’ book, as in *Bantam Books*.

9 Third, the context here is clearly dissimilar—demanding that small vendors remove
10 magazines containing obscenity and asking a massive corporation like Amazon what actions it is
11 taking to prevent the spread of COVID-19 misinformation in the height of a global pandemic are
12 not comparable situations for protected speech. What is more, Plaintiffs acknowledge that “many
13 others in the Senator’s political party” share her views on their book. Thus, to suggest that Senator
14 Warren’s letter alone, rather than public sentiment or the editorial judgments of third parties, led
15 to any particular action on the part of Amazon or other booksellers is an obvious overreach.

16 Plaintiffs’ reliance on the Seventh Circuit’s decision in *Backpage.com, LLC* is similarly
17 misplaced. In *Backpage.com, LLC*, the county sheriff sent letters to credit card companies on his
18 official letterhead stating, “As the Sheriff of Cook County, a father and a caring citizen, I write to
19 request that your institution ***immediately cease and desist*** from allowing your credit cards to be
20 used to place ads on websites like Backpage.com.” *Backpage.com, LLC v. Dart*, 807 F.3d 229,

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¹⁰ Plaintiffs’ sole support for their claim that Senator Warren issued a “thinly veiled threat” to Amazon is her use of
the phrase “potentially unlawful.” Dkt. # 1 ¶ 7. But Plaintiffs take Senator Warren’s words out of context, which she
used in conjunction with highlighting Amazon’s role more generally in “providing consumers with false and
misleading information about FDA-authorized KN95 masks” and disseminating misinformation about COVID-19 on
its platform beyond the sale of Plaintiffs’ book. Ex. A at 1.

1 231 (7th Cir. 2015) (emphasis added). He also wrote that their involvement with Backpage.com
2 had “become increasingly indefensible,” and that “[f]inancial institutions . . . have the legal duty
3 to file ‘Suspicious Activity Reports’ to authorities in cases of human trafficking and sexual
4 exploitation of minors,” citing to the federal money-laundering statute, 18 U.S.C. § 1956, and thus
5 implying prosecution for their failure to comply. *Id.* at 232. The credit card companies followed
6 the sheriff’s orders. *Id.* In finding a First Amendment violation, the court reasoned that the “[w]hat
7 matters is the distinction between attempts to convince and attempts to coerce.” *Id.*

8 Senator Warren’s letter to Amazon is, again, readily distinguishable. It was sent as cases
9 of the deadly delta variant spiked, set out multiple pages of heavily cited background information,
10 stated her position, and asked Amazon for information to stop the spread of misinformation about
11 COVID-19. *See generally* Ex. A. At most, the letter aimed to *persuade* Amazon to act based on
12 this counter-information, it did not *coerce* with a threat of legal sanctions. A sheriff’s demand to
13 “immediately cease and desist” while referencing the recipient’s legal responsibilities and legal
14 authority, by contrast, plainly sought to coerce with the threat of criminal prosecution.

15 This case is more akin to the numerous cases in which courts have declined to find a First
16 Amendment violation under *Bantam Books*.¹¹ Plaintiffs’ lawsuit is itself an effort to chill criticism

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19 ¹¹ *See VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1172 (10th Cir. 2021), *cert. denied sub nom. Vdare*
20 *Found. v. Colo. Springs, Co.*, No. 21-933, 2022 WL 585900 (U.S. Feb. 28, 2022) (affirming motion to dismiss and
21 distinguishing *Bantam Books* because “nothing in the [Defendant’s] Statement was plausibly a threat, order, mandate,
22 or exercise of control over a private entity’s decision-making process”); *Penthouse Int’l, Ltd.*, 939 F.2d at 1016
23 (holding that public officials were entitled to criticize publishers of pornography where letter contained no threat or
24 intimidation of intent to prosecute or prescribe publisher’s conduct); *R.C. Maxwell Co. v. Borough of New Hope*, 735
F.2d 85, 86 (3d Cir. 1984) (finding no First Amendment violation where officials wrote a letter to the lessor of a
billboard space “firmly suggest[ing] that Citibank remove the unsightly billboards” and mentioning “the pending
billboard ordinance, and the possibility that Citibank might find itself subject to legal proceedings if the billboards
remained where they stood”); *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 38–39 (2d Cir. 1983) (finding no
violation where official sent letters to retail stores requesting that they refrain from selling a controversial board game,
as letter could not reasonably be interpreted as “intimating that some form of punishment or adverse regulatory action
will follow” where official did not refer to specific adverse consequences for failure to respond or have power to
impose sanctions for noncompliance).

1 of the information they peddle regarding COVID-19. But the Ninth Circuit “agree[s] with the host
2 of other circuits that recognize that public officials may criticize practices that they would have no
3 constitutional ability to regulate, so long as there is no actual or threatened imposition of
4 government power or sanction.” *See Am. Fam. Ass’n*, 277 F.3d at 1125 (affirming dismissal of
5 free speech claim where city officials criticized anti-gay speech and adopted resolutions urging
6 television stations not to air it because there was “no sanction or threat of sanction” for
7 noncompliance). Plaintiff cannot plead a plausible First Amendment claim.

8 **3. Senator Warren is entitled to *Noerr-Pennington* immunity.**

9 The *Noerr-Pennington* doctrine “is based on and implements the First Amendment right
10 to petition.” *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000). “In the Ninth Circuit, the *Noerr-*
11 *Pennington* doctrine provides immunity from both federal and state statutory and common-law
12 liability.” *Mercer Publ’g, Inc. v. Smart Cookie Ink, LLC*, No. C12-0188JLR, 2012 WL 12863934,
13 at *2 (W.D. Wash. July 25, 2012). The *Noerr-Pennington* doctrine is an available defense in
14 constitutional tort actions for government officials. *Manistee Town Ctr. v. City of Glendale*, 227
15 F.3d 1090, 1092–93 (9th Cir. 2000) (“This kind of petitioning may be nearly as vital to the
16 functioning of a modern representative democracy as petitioning that originates with private
17 citizens.”). In determining whether to grant immunity under *Noerr-Pennington*, courts consider
18 whether the defendant’s conduct constitutes a protected petitioning activity and whether the
19 proposed liability imposes a burden upon that activity. *Kearney v. Foley & Lardner, LLP*, 590 F.3d
20 638, 644 (9th Cir. 2009). If the answers are yes, courts will grant Rule 12(b)(6) motions to dismiss
21 to preserve the “breathing space” guaranteed by the First Amendment. *Sosa v. DIRECTV, Inc.*,
22 437 F.3d 923, 931-33 (9th Cir. 2006); *see also Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1063
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1 (9th Cir. 1998) (“the danger that the mere pendency of the [damages] action will chill the exercise
2 of First Amendment rights requires more specific allegations than would otherwise be required”).

3 Senator Warren’s inquiry to Amazon constitutes protected petitioning activity. Although
4 Amazon is a private company, “the law of th[e 9th] circuit establishes that communications
5 between private parties are sufficiently within the protection of the Petition Clause to trigger the
6 *Noerr–Pennington* doctrine, so long as they are sufficiently related to petitioning activity.” *Sosa*,
7 437 F.3d at 935. The Supreme Court has held that “[a] publicity campaign directed at the general
8 public and seeking government action is covered by *Noerr–Pennington* immunity.” *Manistee*
9 *Town Ctr.*, 227 F.3d at 1092 (citation omitted). Here, the petitioning activity is Senator Warren’s
10 fact-finding and information gathering to better understand the need for legislation to protect
11 consumers from COVID-19 misinformation and inquiries into Amazon’s compliance with the
12 *COVID-19 Consumer Protection Act*. As Footnote 1 in her inquiry indicates, Senator Warren had
13 communicated with Amazon about its role in COVID-19 misinformation related to KN95 masks.
14 *See* Ex. A at 1. Senator Warren also published the inquiry in a press release, describing the
15 “seriousness of the issue” of COVID-19 misinformation and companies like Amazon’s role.

16 This lawsuit burdens Senator Warren’s First Amendment right to petition. Plaintiffs are
17 forcing a sitting United States Senator to defend a lawsuit for inquiring into the COVID-19
18 misinformation practices of a large company and bringing attention to the issue through a press
19 release. The Court should thus grant Senator Warren immunity under the *Noerr–Pennington*
20 doctrine and dismiss Plaintiffs’ case on that basis.

21 IV. CONCLUSION

22 For the reasons set forth above, Senator Warren respectfully requests that the Court
23 dismiss Plaintiffs’ claims against her in her personal capacity in their entirety with prejudice.

1 Dated: March 8, 2022

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CERTIFICATE OF SERVICE

I, William B. Stafford, certify under penalty of perjury that on March 8, 2022, a copy of the foregoing was sent via the Court’s electronic filing system to the following:

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