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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15
16 ROGAN O’HANDLEY,
17 Plaintiff,
18 v.

19 ALEX PADILLA, in his personal capacity;
20 SKDKNICKERBOCKER, LLC, a Delaware
company; PAULA VALLE CASTAÑON, in her
21 personal capacity; JENNA DRESNER, in her
personal capacity; SAM MAHOOD, in his personal
22 capacity; AKILAH JONES; in her personal
capacity; SHIRLEY N. WEBER, in her official
23 capacity as California Secretary of State;
TWITTER, INC., a Delaware corporation;
24 NATIONAL ASSOCIATION OF SECRETARIES OF
STATE, a professional nonprofit organization;
25
26 Defendants.

Case Number: 3:21-CV-07063-CRB

**PLAINTIFF’S OPPOSITION TO
DEFENDANT NATIONAL
ASSOCIATION OF SECRETARIES OF
STATE’S MOTION TO DISMISS
(FRCP Rule 12(b)(2) and FRCP Rule
12(b)(6))
[ECF 58]**

**Date: December 16, 2021
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Charles R. Breyer**

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1 **SUMMARY OF ARGUMENT**

2 This Court has specific jurisdiction over the National Association of Secretaries of State
3 (“NASS”) because NASS purposefully directed its activities toward California. *Mavrix Photo, Inc. v.*
4 *Brand Techs., Inc.*, 647 F.3d 1218, 1227-32 (9th Cir. 2011). Additionally, Plaintiff’s claims arose out
5 of or related to NASS’s activities within California. *Id.* Plaintiff pleads sufficient facts to establish
6 both prongs of the Ninth Circuit’s test for specific personal jurisdiction.

7 First, NASS must be said to have 1) committed an intentional act, 2) expressly aimed at the
8 forum state, and 3) causing harm that the defendant knows is likely to be suffered in the forum state.
9 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).
10 Here, NASS (1) intentionally, (2) facilitated the Secretaries of States’ reporting of
11 “mis/disinformation” to Twitter using a “Partner Support Portal” that NASS set up and authored
12 “guidance” on how to report “mis/disinformation.” Compl. ¶¶ 27-32, Exs. 2-4. This (3) caused harm
13 to Plaintiff because the California Office of Elections Cybersecurity (“OEC”) circulated this guidance
14 and used NASS/Twitter’s Partner Support Portal to infringe on Mr. O’Handley’s rights. Compl. ¶¶ 31-
15 33. Second, it must be said that “but for” a defendant’s activity, a plaintiff’s claims would not have
16 arisen. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). Plaintiff’s claims arose out of NASS’s
17 forum-related activities, in that, OEC reported Plaintiff’s Twitter content to Twitter using NASS’s
18 guidance and the Partner Support Portal it helped create and highly encouraged its members to use.
19 Compl. ¶¶ 31-32, 75.

20 NASS is a state actor under the two-prong *Lugar* test as NASS’s actions were taken with
21 knowledge of, and in furtherance of, California Elections Code § 10.5 (b)(2), (c)(8), and NASS
22 conspired with and jointly acted with the OEC, Twitter, and other Defendants to censor disfavored
23 political speech. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Collins v. Womancare*, 878
24 F.2d 1145, 1151 (9th Cir. 1989).

25 Finally, Mr. O’Handley sufficiently pled facts showing a conspiracy under 42 U.S.C.
26 §1985(3). Defendants conspired to censor disfavored speech; NASS was a willing participant in that
27 conspiracy and agreed to its aims; and Defendants, including NASS, took numerous acts in
28 furtherance thereof, including creating in coordination with Twitter—and repeatedly and emphatically

1 encouraging its members to use—a dedicated portal to expedite speech censorship requests. Even if
2 this Court determines NASS is a private actor, because NASS did not argue that O’Handley failed to
3 plausibly plead violations of his Constitutional rights, NASS is still liable under 42 U.S.C. § 1985(3).
4 *See Pasadena Republican Club v. Western. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021).

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1 **INTRODUCTION**

2 NASS spearheaded efforts to create a “national narrative” to censor disfavored political speech
3 under the guise that conservative viewpoints calling for greater election transparency constituted
4 “misinformation.” Compl. ¶¶ 27-31, Exs 2-4. In furtherance of that mission, NASS worked specifically
5 with Twitter, a California resident corporation, to create a “Partner Support Portal” for secretaries of
6 state to report private speech for censorship. NASS included OEC in this plan to censor disfavored
7 speech, and much of that speech, predictably, came from California residents. Compl. ¶¶ 28-29, 32,
8 Exs. 2-4.

9 NASS does not contest any of O’Handley’s constitutional claims. NASS nowhere suggests that
10 O’Handley has failed to present plausible allegations of the violations of his First and Fourteenth
11 Amendment rights, or a violation of his rights under the Liberty and Speech Clause of the California
12 Constitution. Instead, NASS’s defense rests solely on the argument that this Court does not have
13 personal jurisdiction over NASS, and that NASS cannot be fairly described as a state actor.

14 This Court does have specific jurisdiction over NASS, however, because NASS purposefully
15 directed its activities to California. And NASS is a state actor because of its joint actions with the OEC
16 and its willful participation in Defendants’ conspiracy to censor speech. Further, because NASS does
17 not contest the plausibly plead violations of O’Handley’s state and federal constitutional rights, even
18 if this Court determines NASS is a private actor, private actors are still liable for their participation in
19 conspiracies to violate constitutional rights under 42 U.S.C. § 1985(3). This Court should deny NASS’s
20 Motion to Dismiss.

21 **STATEMENT OF FACTS**

22 In 2018, California created the Office of Elections Cybersecurity (“OEC”) within the California
23 Secretary of State’s office (“SOS”), to “assess,” “mitigate,” “monitor and counteract false or misleading
24 [electoral] information [online].” Cal. Elec. Code § 10.5. The OEC seized on the phrase “counteract []
25 false or misleading information” as a license to quash politically-disfavored speech, and the SOS’s
26 office partnered with the private Defendants and others in a conspiracy to “work[] closely and
27 proactively with social media companies to . . . *take down sources of misinformation as needed . . .*”
28 Compl. ¶ 25 (emphasis added).

1 Defendant NASS is a professional organization for state Secretaries of State. Compl. ¶ 18. In
2 the lead up to the 2020 election, NASS established direct channels of communication between member
3 Secretaries of State and social media companies to “create a more national narrative” surrounding the
4 election by facilitating the removal of speech deemed “misinformation.” Compl. ¶¶ 27, 30. In a series
5 of emails sent between August 8 and November 2, 2020, NASS Director of Communications Maria
6 Benson notified members that NASS had coordinated with Twitter to create a separate dedicated portal
7 for election officials to “flag concerns directly to Twitter” that Benson assured would be “bumped to
8 the head of the queue.” Compl. ¶¶ 28-31. Benson asked members to give a “heads up” when they saw
9 “mis- or disinformation” on social media. Compl. ¶ 30. As a NASS member, the California Secretary
10 of State’s office participated in this portal through its Office of Elections Cybersecurity (“OEC”).
11 Compl. ¶¶ 31-33.

12 Plaintiff, Rogan O’Handley is a licensed attorney and political commentator. Compl. ¶ 70. On
13 November 12, 2020, Mr. O’Handley authored a Twitter post stating: “Audit every California ballot[.]
14 Election fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect
15 the integrity of that state’s elections[.]” Compl. ¶ 72. In response to Mr. O’Handley expressing a
16 political opinion implicitly critical of then-Secretary of State Alex Padilla’s handling of the 2020
17 election, OEC utilized the portal established and promoted by NASS to label Mr. O’Handley’s post,
18 implausibly and absurdly, “voter fraud” and “flag” it to Twitter—“flag” serving as a euphemism for a
19 censorship instruction. Compl. ¶¶ 33–34, 61, 74-76. Twitter took prompt action upon OEC’s directive,
20 appending commentary that asserted Mr. O’Handley’s claim was “disputed” and adding a strike to Mr.
21 O’Handley’s account. Compl. ¶¶ 76-80. Under Twitter’s strike system, each strike results in progressive
22 penalties, and an account that incurs five strikes is removed permanently. *Id.*

23 Prior to OEC using the portal created and promulgated by NASS to instigate the censorship of
24 O’Handley’s post, Twitter had never taken disciplinary action against Mr. O’Handley’s account. Compl.
25 ¶¶ 61, 81. Having now labeled him as a spreader of “misinformation,” however, Twitter began to apply
26 a demonstrably heightened level of scrutiny to Mr. O’Handley. Compl. ¶¶ 81-87. Within a few months,
27 Twitter imposed an additional four strikes on Mr. O’Handley’s tweets. Compl. ¶¶ 84-89. Upon issuing
28 the fifth strike, Twitter permanently suspended Mr. O’Handley’s account. Compl. ¶¶ 87-89.

1 Twitter serves as the primary social channel for American political commentary. *Id.* ¶ 90. As a
 2 full-time political commentator with over 440,000 Twitter followers, Twitter’s ban had a direct and
 3 detrimental impact on Mr. O’Handley’s job. *Id.* ¶¶ 91-94.

4 Praising the success of OEC’s censorship efforts, NASS awarded the California Secretary of
 5 State’s office its annual IDEAS (“Innovation, Dedication, Excellence & Achievement in Service”) Award
 6 for 2020, stating that OEC’s censorship program constituted “significant state contributions to
 7 the mission of NASS.” Compl. ¶¶ 63-65. According to the California Secretary of State’s application
 8 for the award, social media companies removed 98% of the nearly 300 instances of “misinformation”
 9 reported by OEC through the dedicated portal promoted and established by NASS. Compl. ¶ 64.

10 LEGAL STANDARD

11 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a plaintiff must establish Article
 12 III standing to assert his claims, including proof of injury-in-fact, causation, and redressability. *Allen*
 13 *v. Wright*, 468 U.S. 737, 750 (1984). Rule 12(b)(1) attacks can be either facial, confining the court’s
 14 inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint.
 15 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). For facial attacks, courts accept the jurisdictional
 16 allegations in the complaint as true. *See Whisnant v United States*, 400 F.3d 1177, 1179 (9th Cir. 2005).

17 To survive a Rule 12(b)(6) motion, a complaint must plead “enough facts to state a claim to
 18 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Plausible
 19 means “the plaintiff pleads factual content that allows the court to draw the reasonable inference that
 20 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The
 21 court “must presume all factual allegations of the complaint to be true and draw all reasonable
 22 inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.
 23 1987).

24 ARGUMENT

25 I. This Court has Personal Jurisdiction Over NASS.

26 This Court has specific jurisdiction over NASS. Courts in the Ninth Circuit analyze specific
 27 jurisdiction under a three-prong test:

28 //

1 (1) The non-resident defendant must *purposefully direct his activities* or consummate some
 2 transaction with the forum or resident thereof; *or* perform some act by which
 3 he *purposefully avails himself* of the privilege of conducting activities in the forum, thereby
 invoking the benefits and protections of its laws; (2) the claim must be one which arises
 out of or relates to the defendant's forum-related activities; and (3) the exercise of
 jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

4 *Mavrix Photo*, 647 F.3d at 1227–28. A plaintiff “bears the burden of satisfying the first two prongs,”
 5 and if the plaintiff is successful, the defendant is “to set forth a compelling case that the exercise of
 6 jurisdiction would not be reasonable.” *Id.* at 1228 (citation omitted).

7 **A. The Complaint’s allegations describe purposeful direction.**

8 Under the first prong, a plaintiff must establish that the defendant either purposely availed itself
 9 of the privilege of conducting activities in the state, or purposely directed its activities toward the state.
 10 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). For constitutional claims,
 11 this circuit has applied the “Calder test” pursuant to *Calder v. Jones*, 465 U.S. 783 (1984). *Yahoo!*, 433
 12 F.3d at 1206. That test questions whether 1) a defendant “committed an intentional act, 2) “expressly
 13 aimed at the forum state,” and 3) “causing harm that the defendant knows is likely to be suffered in the
 14 forum state.” *Id.* (quoting *Schwarzenegger* 374 F.3d at 803). “[T]he ‘brunt’ of the harm need not be
 15 suffered in the forum state,” meaning that “it does not matter that even more harm might have been
 16 suffered in another state.” *Id.* at 1207.

17 For example, in *Mavrix Photo*, 647 F.3d at 1225, the court found specific jurisdiction despite
 18 the defendant having “no offices or staff in California, [] not [being] registered to do business in the
 19 state, ha[ving] no registered agent for service of process, and pay[ing] no state taxes” but “allow[ing]
 20 other entities to solicit business by taking advantage of [defendant’s] existing use base.” Specific
 21 jurisdiction was found because a “substantial number of hits to [defendant’s] website came from
 22 California residents,” which demonstrated the defendant’s knowledge about its California user base,
 23 which it exploited for its own gain. *Id.* at 1226.

24 In another example, an Ohio non-profit trade association had “3,000 member stores serving
 25 colleges, universities, and grade-schools” in the United States and internationally. *Amazon.com, Inc. v.*
 26 *National Ass’n of College Stores, Inc.*, 826 F.Supp.2d 1242, 1246 (W.D. Wash. 2011). There, the non-
 27 profit sent a letter to Amazon concerning what it believed to be anti-competitive advertisements near
 28 their stores and, eventually, sought to involve Amazon in an arbitration type proceeding. *Id.* at 1247.

1 Amazon declined to participate in the dispute resolution process and instead filed a declaratory
2 judgement action in Washington federal court. *Id.* at 1251. The non-profit claimed the Court lacked
3 personal jurisdiction to hear the case. *Id.* at 1248. The district court found personal jurisdiction because,
4 among other reasons, the non-profit “expressly aimed its actions at Washington by individually
5 targeting Amazon” and “the effects of [the non-profit’s] challenge to Amazon’s continuing use of its
6 advertising claims were primarily felt in Washington, where Amazon was headquartered.” *Id.* at 1254-
7 55.

8 Here, as in *Marvix*, NASS furthered its efforts to “create more national narrative” and the
9 “mission of NASS” by creating “direct channels of communication” between secretaries of state,
10 including California’s OEC, and California-based Twitter. Compl. ¶¶ 27, 30, 63, 66-68. Given that the
11 location of virtually all major social media platforms, including Twitter, is California, NASS knew that
12 a “substantial number” or amount of the censorship of social media use would originate in California,
13 and that Twitter and other social media companies would act on censorship directives in this State. Like
14 the non-profit in *Amazon.com*, NASS had members across the country, but demonstrated its “aim” at
15 California by “individually” engaging with both Twitter and OEC, both located in California. The
16 “effects” have been “primarily felt” in California, where both Twitter and OEC are located.
17 Accordingly, by specifically targeting both Twitter and OEC, NASS has purposely availed itself of the
18 privilege of conducting activities in the state of California.

19 NASS cites *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102 (1987), to
20 argue that California has no jurisdiction over it because NASS does not have bank accounts, offices,
21 agents, or employees in California, nor has it directed any of its advertising specifically toward
22 California.¹ ECF No. 58 14:18-25. The crux of *Asahi*’s holding, however, was that the “placement of a
23 product into the stream of commerce, without more, is not an act of the defendant purposefully directed
24 toward the forum state.” *Id.* at 112. Here, NASS did far more than merely releasing a product into the
25 populace with no foresight of where it would land. Rather, NASS specifically coordinated with both
26 Twitter and OEC, both located in California, to engage them on their “mission” to “create a national

27 _____
28 ¹ It is not clear what kind of “advertising” an association of state secretaries of state would direct at
any given state, so this factor should be entitled to no weight.

1 narrative” and to censor “mis/disinformation.” Compl. ¶¶ 26-33, Exs 2-4. This was far more intentional,
2 specific, and directed to California.

3 Similarly, NASS’s cite to *PREP Tours, Inc. v. American Youth Soccer Organization*, 913 F.3d
4 11 (1st Cir. 2019), does not help it. There, a youth soccer organization in California had emails, phone
5 calls, and a text message to get a “price quote” for a “possible trip,” where it was communicated that
6 there were other destinations that were possible. *Id.* at 15. PREP Tours sued the youth soccer
7 organization in Puerto Rico alleging a violation in tort for a failure to negotiate in good faith. *Id.* The
8 court found the parties did not have “the kind of ongoing and close-working relationship” to create a
9 “substantial connection.” *Id.* at 23.

10 Contrast this with the actions of NASS. NASS did far more than send a few inquiring emails.
11 NASS actually set the ball in motion, creating a “Partner Support Portal” in partnership with Twitter,
12 and then repeatedly encouraging its membership to join the portal, giving its members guidance and
13 direction on portal use, using the portal to itself request speech censorship on behalf of its members,
14 and serving as a liaison between Twitter and its members. Compl. ¶¶ 31-33. NASS also affirmed that
15 the reporting of social media content furthered their “mission” by awarding OEC for their efforts,
16 lauding OEC’s speech censorship accomplishments which it facilitated. Compl. ¶¶ 63-65, Exs 7-8. This
17 is far different from the open-ended inquiry discussed in *PREP Tours*.

18 **B. The claim arises out of or relates to NASS’s forum-related activities.**

19 The Ninth Circuit uses a “‘but for’ test to determine whether a particular claim arises out of
20 forum-related activities and thereby satisfies the second requirement for specific jurisdiction.”
21 *Ballard*, 65 F.3d at 1500. “The question, therefore, is this: but for [defendant’s] contacts
22 with...California, would [plaintiff’s] claims...have arisen?” *Id.* Thus, for example, in *Amazon.com*,
23 “but for [the non-profit’s] initiation...Amazon would have had no need for a judicial declaration of its
24 right...” 826 F.Supp.2d at 1255. In *Panavision Int’l, L.P. v. Toebben*, 141 F.3d 1316, 1322 (9th Cir.
25 1998) for example, a defendant who had registered domain names on the internet with the name of
26 the plaintiff’s own trademarks injured the plaintiff in California, and “but for” defendant’s conduct,
27 the injury would not have occurred.

28 Here, “but for” NASS “spearhead[ing] efforts” to create a “national narrative” and by helping

1 to build “direct channels of communication” between OEC and Twitter to “flag concerns directly to
 2 Twitter” through the creation of a NASS’s “Partner Support Portal,” OEC would not have been able to
 3 so easily report and quickly censor Mr. O’Handley’s speech. *See* Compl. ¶¶ 26-33. California is the
 4 world epicenter of social media conglomerates. Without NASS’s efforts within California to create the
 5 social media relationships, structures, and culture by which private companies such as Twitter would
 6 join with government to censor speech, it could not have happened. Regrettably, it did.

7 NASS claims, nonetheless, that all it did was send some emails to the other Defendants in this
 8 action. ECF No. 58 17:7-15 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).
 9 In *World-Wide Volkswagen*, Oklahoma did not have jurisdiction over a New York car dealer when
 10 that car was later involved in an accident. *See generally* 444 U.S. 286. This, the Court ruled,
 11 constituted “unilateral activity of those who claim some relationship with a nonresident defendant,”
 12 which “cannot satisfy the requirement of contact with the forum state.” *Id.* at 298.

13 The allegations against NASS are not “unilateral” activity, however. NASS did not merely send
 14 an email into the ether, with no control over the destination. Rather, the allegations show regular back-
 15 and-forth communications between NASS and California resident OEC, and between NASS and
 16 California Resident Twitter, regarding speech censorship on Twitter. Compl. ¶¶ 26-33, Exs. 2-4. The
 17 emails are not the activity, but the smoking gun proving the activity: a memorialization of the ongoing
 18 coordination between the Defendants directed at and involving California’s government, businesses,
 19 and even its citizens.

20 **II. NASS conspired with the other Defendants to violate federal constitutional rights.**

21 “State action may be found if, there is such a close nexus between the State and the challenged
 22 action that seemingly private behavior may be fairly treated as that of the State itself.” *Lugar*, 457 U.S.
 23 at 922 (cleaned up). Under *Lugar*’s two-step state action analysis, the plaintiff must show (a) that the
 24 alleged deprivation of rights is fairly attributable to a state policy, and (b) that a private party may be
 25 fairly described as a state actor. *Id.* at 937; *Collins*, 878 F.2d at 1151. NASS does not contest *Lugar*’s
 26 first prong, instead claiming that it cannot be fairly described as a state actor under *Lugar*’s second
 27 prong.

1 The presumption that private conduct does not constitute governmental action may be
 2 overcome, however, by demonstrating state officials and private actors jointly “acted in concert in
 3 effecting a particular deprivation of constitutional rights.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128,
 4 1140 (9th Cir. 2012). If a plaintiff satisfies *Lugar* prong one, the Supreme Court has established four
 5 tests to determine whether a private defendant may be deemed a state actor under prong two: (1) the
 6 public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental
 7 nexus test. *Lugar*, 457 U.S. at 937; *Rawson v. Recovery Innovations, Inc.* 975 F.3d 742, 747 (9th Cir.
 8 2020). Here, NASS does not contest that Mr. O’Handley has met his burden under prong one, and, as
 9 shown below, NASS is a state actor under the joint action and nexus tests.

10 **1. NASS willfully engaged in Defendants’ conspiracy to violate constitutional rights.**

11 It is a “well-accepted principle that a private party’s joint participation in a conspiracy with the
 12 state provides a sufficient nexus to hold the private party responsible as a governmental actor.” *Sutton*
 13 *v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941);
 14 *see also Price v. Hawaii*, 939 F.2d 702, 708-09 (9th Cir. 1991). A conspiracy exists when a defendant
 15 was a “willful participant” in “an agreement or meeting of the minds to violate constitutional rights”
 16 and that an actual deprivation of rights resulted. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).
 17 Participants need not know “exact details of the plan,” but must share “the common objective of the
 18 conspiracy.” *Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). Agreement may be
 19 inferred from circumstantial evidence, such as the actions of the defendants. *Mendocino Env’tl Ctr. v.*
 20 *Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999). A showing that defendants committed acts that
 21 “are unlikely to have been undertaken without an agreement” may support the inference of
 22 conspiracy. *Id.* “Whether defendants were involved in an unlawful conspiracy is generally a factual
 23 issue and should be resolved by the jury . . .” *Id.* at 1302 (cleaned up). Once a conspiracy to violate
 24 constitutional rights is established, all conspirators may be held liable for the reasonably foreseeable
 25 acts of co-conspirators. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946).

26 The pleadings plausibly allege that NASS conspired with Defendants to deprive individuals of
 27 their constitutional rights. Compl. ¶ 99. Defendants had a meeting of the minds, as evidenced by the e-
 28 mails between NASS, OEC, and Twitter showing that NASS communicated with OEC regarding a

1 “mis/disinformation reporting channel” and “how to report mis/disinformation.” Compl. Exs. 2-3. And
 2 one internal NASS email states, “Twitter asked me to let you guys know...[about] training on creative
 3 and effective content strategies on Twitter in advance of the U.S. Election” and “onboarding state and
 4 local election officials onto Twitter’s Partner Support Portal.” Compl. Ex. 2.

5 NASS took other actions in furtherance of the conspiracy. In its capacity as a membership
 6 organization composed of high ranking government officials, it “spearheaded” conspiracy efforts by
 7 creating “direct channels of communication between Secretaries of States’ staff and social media
 8 companies”—including, again, Twitter in San Francisco—“to facilitate the quick take-down of speech
 9 deemed ‘misinformation.’” Compl. ¶¶ 26-27. In fact, NASS served as an intermediary between Twitter
 10 and OEC. Compl. ¶¶ 28-29, Exs. 2-3. This included working with Twitter to create a dedicated method
 11 for elected officials to “flag concerns,” or identify censorship targets, “directly to Twitter.” Compl. ¶
 12 28, Ex. 2. NASS worked to get reports by a Secretary of State’s office, such as OEC, “bumped to the
 13 head of the queue” At Twitter. Compl. ¶ 29, Ex. 3. NASS asked its members—government officials,
 14 including Defendant Padilla—to give it a “heads up” when they saw mis/disinformation so it could
 15 “create a more national narrative.” Compl. ¶ 30, Ex. 4. NASS also gave California’s OEC guidance
 16 regarding how to report mis/disinformation directly to social media companies such as Twitter. Compl.
 17 ¶ 31, Ex. 4. Finally, OEC circulated NASS’s guidance and used the portal that NASS set up to report
 18 Mr. O’Handley’s tweet. Compl. ¶¶ 31-33, Ex. 4.

19 **2. NASS jointly acted with the State and other Defendants to censor political speech.**

20 Under Ninth Circuit law, private parties can also be state actors under a blended “close
 21 nexus/joint action” test. *Rawson*, 975 F.3d at 748-750. Even without evidence of a conspiracy, “[j]oint
 22 action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional
 23 conduct” and there is “interdependence” with a private party. *Noako Ohno v. Yuko Yasuma*, 723 F.3d
 24 984, 996 (9th Cir. 2013). Joint action is found where “the state significantly involves itself in the private
 25 parties’ actions and decisionmaking,” is “deeply intertwined” with the actions of private parties, and
 26 the state and private parties are “jointly responsible.” *Rawson*, 975 F.3d at 750-53. Under § 1983, a
 27 “substantial degree of cooperative action” shows state action. *Sable Comme’ns of Cal. Inc. v. Pacific*
 28 *Tel. & Tel. Co.*, 890 F.2d 184, 189 (9th Cir. 1989). For the same reasons that NASS and OEC

1 “conspired” with OEC and Twitter, they were also “interdependen[t],” “deeply intertwined,” and
 2 “jointly responsible” for O’Handley’s constitutional injuries. NASS “affirmed, authorized,
 3 encouraged, and facilitated” OEC’s system to report social media posts that the Defendants did not
 4 like, as evidenced by their awarding OEC for their censorship efforts. Compl. ¶ 64. NASS is wrong
 5 that “there is no allegation that the California Secretary of State used these portals....” ECF No. 58
 6 21:19-20; *see* Compl. ¶¶ 32, 61. To the contrary, NASS instructed OEC on how to report to Twitter,
 7 and OEC received and distributed those instructions, and utilized the portal for its censorship. *Id.*;
 8 Compl. Ex. 4. Similarly, NASS argues that it “did not tell the California Secretary of State to report
 9 Plaintiff’s tweets.” ECF No. 58 21:19-22. But NASS recognizes that OEC’s efforts “contribut[e] to the
 10 mission of NASS.” Compl. Ex. 8. Similarly, OEC “affirmed, authorized, encouraged, and facilitated”
 11 NASS’s efforts by their use of the portal set up by NASS to report social media content and by
 12 circulating their guidance. Compl. ¶¶ 31-33, Ex. 4.

13 NASS primarily relies on *Polk v. Yee*, 481 F.Supp.3 1060 (E.D. Cal. 2020), which involved a
 14 state agency deducting dues on behalf of a union. ECF No. 58, 20:23-21:15. There, the union was not
 15 a state actor because the state’s involvement was akin to an “administrative task.” *Id.* at 1067 (citing
 16 *Belgau v. Inslee*, 359 F. Supp. 3d 1000 (W.D. Wash. 2019)). The Court observed that the “plaintiffs
 17 have not alleged the State Defendants affirm[], authorize[], encourage[], or facilitate[]....” *Id.* at 1068
 18 (quoting *Noako Ohno*, 723 F.3d at 996). But, as previously stated, NASS has affirmed, authorized,
 19 encouraged and facilitated the plan to have Secretaries of State, including OEC, report disfavored
 20 tweets directly to social media. The facts alleged here satisfy the very factors that were lacking in *Polk*.

21 **III. California’s Liberty of Speech Clause does not include a state actor requirement.**

22 There is no state actor requirement under California’s Liberty of Speech Clause. NASS cites to
 23 the plurality opinion in *Golden Gateway Cntr. v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013
 24 (2001) (ECF No. 58 25:5-20), to suggest otherwise, but the concurring opinion creating the fourth vote
 25 for the prevailing party in that case specifically *did not join* the state action portion of the plurality
 26 opinion. *Id.* at 1042 (“by proposing to reach the state action issue...the lead opinion says more than it
 27 needs to, and more than is supported by our prior decisions.”). There were not four votes on the
 28

1 California Supreme Court for the plurality’s view that the California constitution required state action.
2 If anything, there were four votes against it.

3 Instead, the last major direction provided by the California Supreme Court garnering a majority
4 came in *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 492 (2000), decided by four justices and
5 therefore carrying more precedential weight than the plurality opinion in *Golden Gateway*. In *Gerawan*
6 *Farming* the court confirmed that the California Liberty of Speech Clause’s scope “runs against the
7 world, including private parties as well as governmental actors.” *Id.* at 492. This echoes the court’s
8 earlier reasoning and holding in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979), where
9 the court found a private shopping center was bound by article I, section 2 because the plaintiffs were
10 “rightfully on [the] premises because the premises are open to the public during shopping hours.” *Id.*
11 at 905. California courts have not designated a specific test for state action under its Constitution. But,
12 because article I, section 2 applies “against the world, including private parties” California’s state actor
13 requirement is arguably less stringent than the federal one. Thus, for the same reasons that NASS is a
14 state actor under the federal standard, there is even more legal basis to find that it is a state actor under
15 California law.

16 **IV. Mr. O’Handley has pled a conspiracy under 42 U.S.C. § 1985(3).**

17 The elements of a § 1985(3) conspiracy are: (1) a conspiracy; (2) “for the purpose of depriving . .
18 . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities
19 under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation of rights. *Life Ins. Co. of*
20 *North America v. Reichardt*, 591 F.2d at 502 (9th Cir. 1979) (*quoting Griffin v. Breckenridge*, 403 U.S.
21 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action, § 1985(3) extends to
22 purely private action as long as one co-conspirator is a state actor. *Pasadena Republican Club*, 985
23 F.3d at 1171.

24 Here, for the reasons thoroughly discussed in Section II, Mr. O’Handley has alleged all the elements
25 of a conspiracy. He has alleged that Defendants conspired to censor speech for the purpose of depriving
26 conservative speaker’s equal protection under the law, Defendants took many acts in furtherance such
27 as creating a Twitter portal to facilitate speech censorship, OEC is a state actor, and O’Handley was
28 injured by having his speech censored.

1 NASS's sole argument under 42 U.S.C. § 1985(3) is that "if a plaintiff's 'allegations are insufficient
 2 to support a claim based on a violation of his constitutional rights,' then 'his allegations of a conspiracy
 3 to violate those constitutional rights do not state a claim.'" ECF No. 58, 25:25-28 (quoting *Pelozo v.*
 4 *Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th Cir. 1994)). But nowhere does NASS
 5 provide *any* argument that O'Handley has failed to allege a violation of his Constitutional rights, and
 6 by that failure, NASS has conceded the point that Mr. O'Handley has stated viable claims for violations
 7 of his First and Fourteenth amendment rights. Compl. Counts I, III, and IV. Even if NASS were found
 8 to be a private actor for the purposes of 42 U.S.C. §1983 (which Plaintiff does not concede for the
 9 reasons discussed in Section II above), as a private actor NASS is liable under 42 U.S.C. § 1985(3) for
 10 violations of O'Handley's First and Fourteenth Amendment rights because of its participation in
 11 Defendants' conspiracy to censor speech.

12 CONCLUSION

13 For the reasons discussed herein, this Court should deny NASS's Motion to Dismiss. In the
 14 alternative, O'Handley requests leave to amend his complaint to cure any perceived pleading defects
 15 as determined by the Court.

16
 17 Date: November 5, 2021

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