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18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 ROGAN O’HANDLEY,  
21  
22 Plaintiff,  
23  
24 v.

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

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

**PLAINTIFF’S OPPOSITION TO  
DEFENDANT SKDKNICKERBOCKER,  
LLC’S MOTION TO DISMISS (FRCP  
Rule 12(b)(2) and FRCP Rule 12(b)(6))  
[ECF 57]**

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



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1 **SUMMARY OF ARGUMENT**

2 Plaintiff Rogan O’Handley has standing because he suffered constitutional injury from  
 3 Defendants’ conspiracy to censor disfavored speech, a conspiracy in which Defendant  
 4 SKDKnickerbocker (“SKDK”) was a willing and active participant. Mr. O’Handley suffered actual  
 5 injury when the Defendants conspired to censor, and did censor, his legally protected free speech  
 6 criticizing the government. “Governmental action designed to retaliate against and chill political  
 7 expression strikes at the heart of the First Amendment.” *Mendocino Env’tl Ctr. v. Mendocino Cty.*, 14  
 8 F.3d 457, 464 (9th Cir. 1994) (cleaned up); *see also, Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561  
 9 (1992). SKDK alerted the Office of Elections Cybersecurity (“OEC”) of O’Handley’s tweet, OEC  
 10 labeled O’Handley’s speech as “voter fraud” and “flagged” it to Twitter Inc. (“Twitter”) to censor.  
 11 Compl. ¶¶ 33–34, 74–81. The causal chain between SKDK’s actions and the constitutional injury is  
 12 thus direct, and not “hypothetical or tenuous.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir.  
 13 2011). Based on these facts, Mr. O’Handley has standing.

14 Mr. O’Handley’s Complaint further plausibly pleads facts sufficient for his six claims for relief.  
 15 *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). SKDK is a state actor under the two-  
 16 prong *Lugar* test, as SKDK’s actions were taken pursuant to its contract with the OEC and under  
 17 California Elections Code § 10.5 (b)(2), (c)(8); and SKDK jointly acted and conspired with the OEC  
 18 and other Defendants to censor disfavored political speech. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922  
 19 (1982); *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989).

20 The First Amendment’s “broadest protection” is for political speech, which is at the “core” of  
 21 the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), *superseded by statute on other grounds*  
 22 *as stated in McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003). The California Constitution’s  
 23 speech protections are even stronger. *See Robins v. Pruneyard Shopping Ctr.* 23 Cal.3d 899, 910 (Cal.  
 24 1979) (“*Pruneyard I*”), *aff’d sub nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)  
 25 (“*Pruneyard II*”). “Speech concerning public affairs . . . is the essence of self-government.” *Garrison*  
 26 *v. Louisiana*, 379 U.S. 64, 74-75 (1964). “Governmental action designed to retaliate against and chill  
 27 political expression strikes at the heart of the First Amendment.” *Mendocino Env’tl Ctr.*, 14 F.3d at 464  
 28 (cleaned up). Defendants’ conspiracy to censor disfavored political speech as part of a government-

1 corporate conspiracy is anathema to the First Amendment and to the California Constitution’s Liberty  
2 of Speech Clause.

3 Defendants violated the Equal Protection Clause by selecting “a particular course of action . . .  
4 because of . . . its adverse effects on an identifiable group”—in this case, political conservatives—  
5 without a rational basis. Compl. ¶ 83; *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)  
6 (cleaned up); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 583, 588 (9th Cir. 2008). Defendants also  
7 selectively enforced the law against conservatives, using the law as “a pretext for an impermissible  
8 motive.” *Lazy Y*, 546 F.3d at 591.

9 SKDK, through its participation in the conspiracy, denied Mr. O’Handley due process because  
10 it “set[] in motion a series of acts by others which . . . would cause others to inflict the constitutional  
11 injury” in this case by depriving Mr. O’Handley of property and liberty interests without a hearing.  
12 *Merritt v. Mackey*, 932 F.2d 1317, 1371 (9th Cir. 1991) (internal citation omitted).

13 Finally, Mr. O’Handley has shown Defendants conspired to deprive him of his constitutional  
14 rights based on his conservative political affiliation, and discrimination on the basis of political  
15 affiliation falls within the protections of § 1985(3). *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499,  
16 505 (9th Cir. 1979). For these reasons, Defendant SKDK’s motion to dismiss should be denied entirely,  
17 or Mr. O’Handley should be granted leave to amend to cure any perceived pleading defects.

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**INTRODUCTION AND BACKGROUND**

Prior to the 2020 election, the State of California undertook an unprecedented, unconstitutional campaign to censor the speech of private speakers on social media platforms.<sup>1</sup> Under a \$35-million-dollar contract, the State outsourced an important censorship role to Defendant SKDK, who, at the same time it was acting as the State’s speech censorship bloodhound, was also serving as a political consultant for Democrat presidential candidate Joe Biden. SKDK’s state contract required it to furnish “Misinformation Daily Briefings” (“MDBs”) to OEC staff in furtherance of Defendants’ larger censorship efforts to create a “national narrative” and quash conservative viewpoints as “misinformation.” ECF No. 57 2:20-21; Compl. ¶¶ 25, 32-35, 37, 42, 57, 56-68. OEC flagged speech identified by SKDK to social media companies—through priority VIP pathways—for censorship. *Id.*

The right to criticize our government is a core constitutional right. Defendants’ exercise of government force to censor political speech, of which SKDK was an integral part, flies in the face of the ideals upon which our nation was founded, and is actionable in this Court.

**LEGAL STANDARD**

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a plaintiff must establish Article III standing to assert his claims, including proof of injury-in-fact, causation, and redressability. *Allen v. Wright*, 468 U.S. 737, 750 (1984). SKDK makes a facial 12(b)(1) attack, meaning complaint allegations are accepted as true. *Whisnant v. U.S.*, 400 F.3d 1177, 1179 (9th Cir. 2005).

Per Rule 12(b)(6) motion, a complaint must plead “enough facts” that a claim “is plausible on its face,” *Twombly*, 550 U.S. at 570, and “factual content that allows the court to draw the reasonable inference” that the defendant is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court “must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

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<sup>1</sup> Factual details of the Defendants’ relationships and conspiracy are addressed more fully in the Statement of Facts section in the concurrently filed Plaintiff’s Opposition to Defendant National Association of Secretaries of State’s Motion to Dismiss which, in the interest of judicial economy, Plaintiff incorporates here in full.



**ARGUMENT**

**I. SKDK injured Mr. O’Handley through its active and direct participation in the conspiracy to censor protected First Amendment speech.**

For an “injury in fact,” a plaintiff must establish an invasion of a legally protected interest which is concrete and particularized, and actual or imminent. *Lujan*, 504 U.S. at 560. A defendant need not be the injuries’ “sole source” or “proximate cause,” so long as the link is “not tenuous or abstract.” *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 845, 860 (9th Cir. 2005). A “causation chain does not fail simply because it has several links,” provided those links “remain plausible.” *Maya*, 658 F.3d at 1070.

Here Mr. O’Handley was injured by the foreseeable consequences of the Defendants’ conspiracy, whose objectives SKDK both agreed to and contributed overt acts towards. Compl. ¶¶ 56–57, 68, 74. Mr. O’Handley’s injury is not limited to his ultimate removal from Twitter, as the strikes issued against his account also served to chill protected speech. *Id.*

Mr. O’Handley utilized Twitter to publicly criticize Defendant Padilla’s oversight of California elections, suggesting that every California ballot should be audited “to protect the integrity of the state’s elections.” Compl. ¶ 72. In response, pursuant to their government contract with the very government official O’Handley’s offending tweet critiqued, SKDK labeled Mr. O’Handley’s opinion as “misinformation.” *Id.* at ¶¶ 57–61. The State then “flagged” the post to Twitter under the indicator of “voter fraud.” Compl. ¶¶ 72–78. “Flagging” a tweet to Twitter was another way of asking Twitter to “take down” a tweet. Compl. ¶ 34. Twitter complied with these “requests” from OEC an astonishing 98% of the time. Compl. ¶64 Twitter punished Mr. O’Handley for criticizing a California state official’s job performance by appending commentary asserting that Mr. O’Handley’s tweet was false and issuing a strike against his account. Compl. ¶¶ 72–78. Penalizing Mr. O’Handley for his State-disfavored speech, even absent any subsequent removal by Twitter, is an injury-in-fact. There is a direct causal connection between SKDK’s actions and the injury.

**II. SKDK acted pursuant to State contract and Elections Code § 10.5 and conspired with Defendants to violate Mr. O’Handley’s federal constitutional rights.**

“State action may be found if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” *Lugar*, 540 U.S.

1 at 922 (cleaned up). Under *Lugar*'s two-step state action analysis, the plaintiff must show (a) that the  
 2 alleged deprivation of rights is fairly attributable to a state policy, and (b) that a private party may be  
 3 fairly described as a state actor. *Collins*, 878 F.2d at 1151.

4 **A. SKDK's actions were taken pursuant to State contract, policy, and statute.**

5 *Lugar*'s first prong one asks "whether the claimed deprivation has resulted from the exercise of  
 6 a right or privilege having its source in state authority." *Lugar*, 540 U.S. at 939. This "state policy" test  
 7 "ensures that the alleged deprivation is fairly attributable to a state policy." *Collins*, 878 F.2d at 1151  
 8 (9th Cir. 1989); *see also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999)  
 9 (prong one met by statute requiring private collection of SSNs); *Fred Meyer, Inc. v. Casey*, 67 F.3d  
 10 1412, 1414 (9th Cir. 1995) (prong one met by constitutional provision authorizing signature gathering).  
 11 "A procedural scheme created by the statute obviously is the product of state action," as is challenged  
 12 conduct "ascribed to [a] government decision," and undertaken pursuant to the authority of a state  
 13 official. *Lugar*, 540 U.S. at 940.

14 Here, OEC entered a \$35 million contract with SKDK to fulfill OEC's statutory objectives, and  
 15 by contract required SKDK to provide daily briefings regarding "election-related misinformation."  
 16 ECF No. 57 2:20-21; Compl ¶ 37. SKDK's actions were taken pursuant to State contract, OEC policy,  
 17 and State statute. *Id.*

18 **B. SKDK was a state actor by virtue of its participation in Defendants' conspiracy to**  
 19 **violate constitutional rights**

20 The presumption that private conduct does not constitute governmental action may be overcome  
 21 by demonstrating state officials and private actors jointly "acted in concert in effecting a particular  
 22 deprivation of constitutional rights." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012).  
 23 SKDK argues it cannot fairly be described as a state actor under the "public function," "state  
 24 compulsion," "nexus," or "joint action" test. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747  
 25 (9th Cir. 2020). Here, however, the joint action and nexus tests apply to SKDK's acts.

26 **1. SKDK was part of Defendants' conspiracy to violate constitutional rights**

27 It is a "well-accepted principle that a private party's joint participation in a conspiracy with the  
 28 state provides a sufficient nexus to hold the private party responsible as a governmental actor." *Sutton*,

1 192 F.3d at 840 (citing *Lugar*, 540 U.S. at 941); *Price v. Hawaii*, 939 F.2d 702, 708-09 (9th Cir. 1991).  
2 Conspiracy is a fact issue for a jury to decide and is shown if a defendant was a “willful participant” in  
3 “an agreement or meeting of the minds to violate constitutional rights” and that an actual deprivation of  
4 rights resulted from that agreement. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Franklin v. Fox*, 312  
5 F.3d 423, 441 (9th Cir. 2002). All conspirators may be held liable for the reasonably foreseeable acts of  
6 co-conspirators. *Pinkerton v. U.S.*, 328 U.S. 640, 645 (1946); *Proffitt v. Ridgway*, 279 F.3d 503, 507  
7 (7th Cir. 2002) (“As a conspirator, the citizen is liable, in civil as in criminal law, for the wrongful acts  
8 of the other conspirators committed within the scope of the conspiracy.”).

9 The pleadings, taken as true, plausibly allege that SKDK conspired with Defendants to deprive  
10 individuals of their constitutional rights. Compl. ¶ 99. Defendants had a meeting of the minds that they  
11 would create a “national narrative” regarding “election misinformation” by working hand-in-glove with  
12 social media companies to censor disfavored speech and punish those responsible. Compl. ¶¶ 21, 24–  
13 25, 28– 32, 34– 35, 57– 61, 66, 74. Actions in furtherance of the conspiracy included creating a state  
14 agency to “monitor and counteract false or misleading information,” outsourcing this task to SKDK with  
15 instructions to identify social media “election misinformation,” and “working closely and proactively”  
16 with social media companies to “take down sources of misinformation.” *Id.* Defendants even created  
17 “dedicated reporting pathways” in cooperation with social media companies to facilitate their  
18 conspiracy. *Id.* at ¶ 25. Forming a confederation to censor disfavored political speech in violation of the  
19 Constitution, Defendants acted in furtherance of the conspiracy by regularly reporting and silencing  
20 speech through dedicated reporting channels at social media companies. SKDK’s role here was worth,  
21 to the Defendants, every penny of the \$35 million it was paid, and Mr. O’Handley’s constitutional  
22 injuries were the reasonably foreseeable result.

## 23 **2. SKDK jointly acted with the State and other Defendants to censor political speech.**

24 Under Ninth Circuit law, private parties may also be state actors under a blended “close  
25 nexus/joint action” test. *Rawson*, 975 F.3d at 750. Even without evidence of a conspiracy, “[j]oint action  
26 exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct”  
27 and there is “interdependence” with a private party. *Noako Ohno v. Yuko Yasuma*, 723 F.3d 984, 995  
28 (9th Cir. 2013). Joint action is found where “the state significantly involves itself in the private parties’



1 actions and decisionmaking,” is “deeply intertwined” with the actions of private parties, and the state  
 2 and private parties are “jointly responsible.” *Rawson*, 975 F.3d at 750-53. Under §1983, a “substantial  
 3 degree of cooperative action” shows state action. *Sable Commc’ns of Cal. Inc. v. Pacific Tel. & Tel.*  
 4 *Co.*, 890 F.2d 184, 189 (9th Cir. 1989). For the same reasons that SKDK and OEC “conspired” with  
 5 OEC, they were also “interdependen[t],” “deeply intertwined,” and “jointly responsible” for  
 6 O’Handley’s constitutional injuries. The OEC “affirmed, authorized, encouraged, and facilitated”  
 7 SKDK’s conduct by hiring SKDK, requesting the MDBs, and working with social media companies to  
 8 punish speech. Compl. ¶¶ 21, 24–25, 28– 32, 34– 35, 57– 61, 66, 74.

9 SKDK’s brief mentions, but does not grapple with, the joint action test, the requirements for  
 10 establishing a §1983 conspiracy, or the ample case law demonstrating that a conspiracy qualifies as  
 11 joint action. While SKDK’s defense is muddy, the interconnectedness, encouragement, and significant  
 12 involvement of the Defendants in the conspiracy to censor speech is clear; SKDK was a state actor  
 13 acting under color of state law.

14 **III. Mr. O’Handley pleads facts sufficient to support a reasonable inference of SKDK’s  
 liability.**

15 Under §1983, a conspiracy “can enlarge the pool of responsible defendants by demonstrating  
 16 their causal connections to the violation.” *Lacey v. Maricopa Cty.*, 693 F.3d 896, 935 (9th Cir. 2012).  
 17 SKDK is liable for the reasonably foreseeable actions of its coconspirators because of its participation  
 18 in the State’s plan to punish disfavored speech, and Mr. O’Handley has pled facts sufficient to draw a  
 19 reasonable inference that SKDK is liable for all of his claims, either due to its own actions or the  
 20 reasonably foreseeable actions of its coconspirators. See Section II B 1.

21 **A. State action designed to retaliate against and chill political expression strikes at the heart  
 22 of the First Amendment.**

23 The First Amendment prohibits laws “abridging the freedom of speech” and provides its  
 24 “broadest protection” to political speech, which is a “core” First Amendment’s concern. *Buckley*, 424  
 25 U.S. at 14. “In a republic where the people are sovereign,” this heightened protection “reflects our  
 26 profound national commitment to the principle that debate on public issues should be uninhibited,  
 27 robust, and wide-open.” *Id.* (cleaned up). “The First Amendment . . . presupposes that right conclusions  
 28 are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative

1 selection.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (cleaned up). The government  
 2 “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”  
 3 *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (cleaned up).

4 The government may not impose content-based restrictions on political speech unless it can  
 5 satisfy strict scrutiny. *Buckley*, 424 U.S. at 636; *Citizens United v. Fed. Election Comm’n*, 558 U.S.  
 6 310, 340 (2010); *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir.  
 7 2012); *see also Reed v. Town of Gilbert*, 576 U.S. 155 at 163 (2015)(noting that “[c]ontent-based laws  
 8 . . . are presumptively unconstitutional”). To satisfy strict scrutiny, speech restrictions must “further[]  
 9 a compelling interest” and be “narrowly tailored to achieve that interest.” *Citizens United*, 558 U.S. at  
 10 340; *Bullock*, 698 F.3d at 745. It is the government’s burden to demonstrate that its actions satisfy strict  
 11 scrutiny. *Citizens United*, 558 U.S. at 340; *Bullock*, 698 F.3d at 745. This test applies whether the  
 12 government directly censors the speech, or a state actor—that is, a private person or entity acting on the  
 13 state’s behalf—does the censoring. *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002).

14 The government is also prohibited from retaliating for protected expression. *Perry v.*  
 15 *Sindermann*, 408 U.S. 593, 598 (1972); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429  
 16 U.S. 274, 287 (1977). For a First Amendment retaliation claim, plaintiff must allege: (1) he “engaged  
 17 in constitutionally protected activity”; (2) “the defendant's actions would chill a person of ordinary  
 18 firmness from continuing to engage in the protected activity”; and (3) “the protected activity was a  
 19 substantial motivating factor in the defendant's conduct.” *Ariz. Students’ Assn. v. Ariz. Bd. of Regents*,  
 20 824 F.3d 858, 867 (9th Cir. 2016) (cleaned up). “In recognizing one’s protected interest in commenting  
 21 on government officials’ actions, . . . state action designed to retaliate against and chill political  
 22 expression strikes at the heart of the First Amendment.” *CarePartners, LLC v. Lashway*, 545 F.3d 867,  
 23 877 (9th Cir. 2008) (cleaned up).

24 Here Mr. O’Handley alleges that Defendants violated both these prohibitions. First, Defendants  
 25 censored Mr. O’Handley’s political speech based on its content. It is well established that “political  
 26 speech” includes “discussions of candidates, structures and forms of government, the manner in which  
 27 government is operated or should be operated, and all such matters relating to political processes.” *Mills*  
 28 *v. Alabama*, 384 U.S. 214, 218-19 (1966). Specifically, the Complaint alleges that Defendants targeted



1 O’Handley’s tweets because he suggested that California should audit its 2020 election results, and that  
 2 the Defendants did not take similar actions against indistinguishable requests for election transparency  
 3 from self-identified liberal speakers. Compl. ¶¶ 3, 74-87, 108-11, 120. Based on the content of  
 4 O’Handley tweets, SKDK, under its contract with OEC and in concert with Twitter, acted jointly to  
 5 monitor O’Handley’s speech, bring disfavored utterances to Twitter’s attention, and punishing Mr.  
 6 O’Handley for the content of his speech. *Id.* These allegations establish that Defendants imposed  
 7 content-based restrictions on political speech, thus triggering strict scrutiny.

8 In fact, Defendants’ actions were not merely content-based; rather, because they were based on  
 9 the message O’Handley was conveying with this tweets, Compl. ¶ 83, thereby also constituting  
 10 viewpoint discrimination. *Reed*, 576 U.S. at 168 (“[D]iscrimination among viewpoints—or the  
 11 regulation of speech based on “the specific motivating ideology or the opinion or perspective of the  
 12 speaker”—is a “more blatant” and “egregious form of content discrimination.”). Like restrictions on  
 13 political speech, restrictions on speech that discriminate on the basis of viewpoint are subject to strict  
 14 scrutiny. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017). Defendants do not identify  
 15 any “compelling interest” they might have had in suppressing O’Handley’s speech, nor do they explain  
 16 how their actions were “narrowly tailored” toward that end.

17 The Complaint also states a claim for First Amendment retaliation. Compl. ¶ 103. Mr.  
 18 O’Handley’s tweets were indisputably protected activity under the First Amendment, as political speech  
 19 is at the core of the First Amendment’s protections. *Mills*, 384 U.S. at 218-19; *Ariz. Students’ Ass’n*,  
 20 824 F.3d at 867; *see also* Compl. ¶ 113. And as a coconspirator, SKDK is liable for the foreseeable results  
 21 of other coconspirators’ acts; in this case, the resulting injuries from the State and Twitters’ actions to  
 22 censor Mr. O’Handley including the strike against his Twitter account, his eventual Twitter ban, and the  
 23 resulting harm to his occupation and business. Compl. ¶¶ 75–90, 93, 94. These allegations establish the  
 24 requisite chilling of Mr. O’Handley’s expressive rights. And far from being just a “characterization” of  
 25 O’Handley’s speech as SKDK argues, Defendants’ actions directly burdened *and* silenced O’Handley’s  
 26 speech, exactly the consequence SKDK itself admits violates the First Amendment. *Meese v. Keene*,  
 27 481 U.S. 465, 478, 480 (1987); ECF No. 57 11:9-15.

28 //

1           **B. SKDK is liable for violations of the California Constitution’s Liberty of Speech Clause.**

2           The Liberty of Speech Clause of the California Constitution provides: “Every person may freely  
3 speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this  
4 right. A law may not restrain or abridge liberty of speech or press.” Cal. Const., art. I, § 2. This clause  
5 grants “broader rights to free expression than does the First Amendment to the United States  
6 Constitution.” *Fashion Valley Mall, LLC v. Nat’l Labor Relations Bd.*, 42 Cal. 4th 850, 857 (2007);  
7 *see also, Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (2000).

8           For the reasons fully addressed in Plaintiff’s Opposition to Twitter’s Motion to Dismiss, state  
9 action is not required under the Liberty of Speech Clause. *Golden Gateway Ctr. v. Golden Gateway*  
10 *Tenants Association*, 26 Cal. 4th. 1013, 1036 (Cal. 2001). Even if Twitter were not a state actor (it is  
11 for the reasons discussed in Section II) the broader protections of the California Constitution require  
12 Twitter to abide by the Liberty and Speech Clause. *Robins v. Pruneyard Shopping Ctr.* 23 Cal.3d 899,  
13 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74  
14 (1980) (“*Pruneyard II*”). Twitter gives individuals unrestricted access to its platform, is public in  
15 character, provides “an essential and invaluable forum for exercising the rights of free speech and  
16 petition,” and allowing Mr. O’Handley’s speech would not interfere with Twitter’s normal business  
17 operation. *Id.* Twitter “restrained” and “abridged” Mr. O’Handley’s speech by issuing a strike against  
18 his account and ultimately banning him from the site. Compl. ¶¶ 68, 74–77, 99, 141; Cal. Const., art. I,  
19 § 2. Twitter’s speech censorship under California’s Liberty of Speech Clause was a reasonably  
20 foreseeable result of the conspiracy—the conspiracy specifically aimed to censor opinions like  
21 O’Handley’s to create the desired “national narrative”—and SKDK is rightly liable for violations  
22 stemming from the conspiracy’s aims.

23           **C. SKDK is liable for discrimination against Mr. O’Handley based on his perceived politics**

24           The Equal Protection Clause ensures that “all persons similarly situated should be treated alike.”  
25 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To prevail on an equal protection  
26 claim under the “Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a  
27 discriminatory effect and the [state officers] were motivated by a discriminatory purpose.” *Rosenbaum*  
28 *v. City & Cty. of S.F.*, 484 F.3d 1142, 1152 (9th Cir. 2007) (*citing Wayte v. United States*, 470 U.S. 598,

1 608 (1985)). Discriminatory “implies that the decision maker . . . selected . . . a particular course of  
2 action . . . because of . . . its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v.*  
3 *Feeney*, 442 U.S. 256, 279 (1979) (cleaned up).

4 “The first step in equal protection analysis is to identify the . . . classification groups.” *Country*  
5 *Classic Dairies, Inc. v. Montana, Dep’t of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir.  
6 1988). “To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or  
7 imposes different burdens on different classes of people.” *Freeman v. City of Santa Ana*, 68 F.3d 1180,  
8 1187 (9th Cir. 1995). In cases of differential treatment based upon a political or ideological  
9 classification, normally rational basis review applies. *See, e.g., Lazy Y Ranch*, 546 F.3d at 583, 588  
10 (discrimination based upon ties to conservationists). When, however, the “defendant’s alleged rational  
11 basis for his acts is a pretext for an impermissible motive,” the Court need not accept the stated motive  
12 on a motion to dismiss. *Id.* That is the case here, and the “real question” is “whether there is a rational  
13 basis” to discriminate based upon Plaintiffs’ alleged reason for discrimination. *Id.* at 590. To ultimately  
14 prove a discriminatory effect, therefore, the claimant must show that similarly situated individuals were  
15 not punished under the law. For purposes of a 12(b)(6) motion, however, a plaintiff need only plead a  
16 sufficient factual basis for his claim. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Twombly*,  
17 550 U.S. at 570.

18 Here the Complaint alleges that Defendants’ conspiracy focused “their censorship efforts on  
19 conservative requests for transparency in election processes rather than the same calls from self-  
20 identified political liberals.” Compl. ¶ 83. SKDK singled out Mr. O’Handley’s speech because of his  
21 perceived conservative ideology. *Id.* There is no rational basis for Defendants’ censorship of  
22 conservatives who requested election audits, but not prominent, vocal, liberal voices calling for the  
23 same, unless the basis for the censorship was pretext for unlawful discrimination. Compl. ¶¶ 68, 74–77,  
24 99, 141. There is no legitimate reason SKDK’s stated governmental interest of “protecting the integrity  
25 and accuracy of elections” would only flow to conservative voices requesting audits rather than  
26 similarly situated liberal voices absent pretext. *Id.*; ECF No. 57 13:16-18. This is not equal protection  
27 under the law. *Lazy Y Ranch*, 546 F.3d at 588.

28 Mr. O’Handley’s equal protection claims do not, as SKDK argues, rely on “class of one”

1 analysis, because he was discriminated against based on his classification in an identified group. *See*  
 2 *Lazy Y*, 546 F.3d at 592. Even if he were arguing under the class of one analysis, however, he would  
 3 still prevail as “the rational relation test will not sustain conduct by state officials that is malicious,  
 4 irrational or plainly arbitrary” as were the actions against Mr. O’Handley here. *See Lockary v.*  
 5 *Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

6 **D. The violation of Mr. O’Handley’s due process rights was a reasonably foreseeable result**  
 7 **of the conspiracy**

8 The procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to  
 9 remove or significantly alter interests “comprehended within meaning of either ‘liberty’ or ‘property,’”  
 10 *Paul v. Davis*, 424 U.S. 693, 711 (1976), and protects a liberty or property interest in pursuing the  
 11 “common occupations or professions of life.” *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238–  
 12 39 (1957); *Chalmers v. Los Angeles*, 762 F.2d 753, 757 (9th Cir.1985).  
 13 “[S]ocial media is becoming so influential that being a social media influencer is now a profession.”  
 14 *Godwin v. Facebook, Inc.*, 160 N.E.3d 372, 387 (Ohio. Ct. App. 8th 2020). To demonstrate a violation  
 15 of due process rights, a plaintiff must show 1) an inability to pursue a profession and 2) “that this  
 16 inability is due to the actions that were clearly arbitrary and unreasonable, having no substantial relation  
 17 to the public health, safety, morals, or general welfare.” *FDIC v. Henderson*, 940 F.2d 465, 474 (9th  
 18 Cir. 1991). The fact that a private entity and not the government itself deprived the plaintiff of his  
 19 employment does not shield those responsible from liability where, as here, the state “set[] in motion a  
 20 series of acts by others which [they knew] or reasonably should [have known] would cause others to  
 21 inflict the constitutional injury.” *Merritt*, 827 F.2d at 1371. Additionally, California recognizes  
 22 business goodwill as a property interest, that is, “the expectation of continued public patronage.” Bus.  
 23 & Prof.Code, § 14100. Thus, when a recognized property interest is at stake, the Supreme Court has  
 24 held that “some kind of hearing is required at some time before a person is finally deprived of his  
 25 property interests.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (cleaned up).  
 26 Additionally, with regard to liberty interests, “[w]hen a State would directly impinge upon interests in  
 27 free speech,” the Supreme Court has held that “opportunity for a fair adversary hearing must precede  
 28 the action, whether or not the speech or press interest is clearly protected under substantive First

1 Amendment standards.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n. 14 (1972). That  
 2 includes suppressing written content. *Id.* (discussing the “necessity of procedural safeguards before a  
 3 State makes a large-scale seizure of a person’s allegedly obscene books, magazines, and so forth”).

4 As discussed above, Defendants’ censorship was not merely “at the will and pleasure” of  
 5 Twitter, as SKDK disingenuously suggests, but was rather “caused” and “set in motion” by Defendants’  
 6 acts in furtherance of the conspiracy—including SKDK’s very active involvement. The actions SKDK  
 7 set in motion ended in Twitter banning O’Handley, and impinging on his livelihood as a political  
 8 commentator. Compl. ¶ 93–99. The conspiracy interfered with the business goodwill he had created  
 9 with his over 440,000 Twitter followers. Compl. ¶ 71. And as Mr. O’Handley has alleged, he has every  
 10 reason to believe that discovery will show that Twitter’s stated reasons for his suspension were  
 11 pretextual, given that the tweets for which he was punished were innocuous. Compl. ¶ 93–99. The  
 12 evidence will show, instead, that Twitter, at the behest of the OEC and SKDK, punished O’Handley for  
 13 daring to criticize the job performance of the Secretary of State and aspiring U.S. Senator, Defendant  
 14 Padilla.

15 **E. Mr. O’Handley has established a conspiracy under 42 U.S.C. § 1985(3).**

16 The elements of a § 1985(3) conspiracy are: (1) a conspiracy; (2) “for the purpose of depriving . . .  
 17 any person or class of persons of the equal protection of the laws, or of equal privileges and  
 18 immunities under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation of rights.  
 19 *Reichardt*, 591 F.2d at 502 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971)). Unlike §  
 20 1983, which requires the existence of state action, § 1985(3) extends to purely private action if one  
 21 co-conspirator is a state actor. *Pasadena Republican Club v. Western. Just. Ctr.*, 985 F.3d 1161, 1171  
 22 (9th Cir. 2021). Here, SKDK argues that O’Handley’s § 1985(3) claim should be dismissed because  
 23 the Complaint does not allege (1) the existence of a conspiracy, (2) “class-based” treatment, or (3) the  
 24 existence of any cognizable injury. SKDK is mistaken in every respect.

25 First, O’Handley has alleged and shown the existence of a conspiracy, *see* Section II B 1, and  
 26 the standard for a 1985(3) conspiracy is the same as under § 1983. *Compare Scott v. Ross*, 140 F.3d  
 27 1275, 1284-85 (9th Cir. 1998) with *Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010).  
 28 Second, O’Handley has alleged the conspiracy at issue here was motivated by “class-based” animus

1 against conservative political views. Compl. ¶ 83. A plaintiff satisfies the “class-based” requirement if  
2 either: (1) “the courts have designated the class in question a suspect or quasi-suspect classification  
3 requiring more exacting scrutiny” or (2) “Congress has indicated through legislation that the class  
4 required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). Both  
5 criteria are met here.

6 While the Ninth Circuit has not yet had the occasion to determine whether political affiliation  
7 is a suspect or quasi-suspect class, numerous other courts have come to that conclusion. *See Abcarian*  
8 *v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (“political affiliation” is a suspect classification); *see*  
9 *also, American Sugar-Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900) (discrimination based on  
10 “political affiliations” would be “a denial of the equal protection of the laws”). Neither has the Ninth  
11 Circuit directly found political beliefs covered by §1985(3), as have a host of other circuits. *See, e.g.,*  
12 *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination on the basis of  
13 “political beliefs or associations” is covered under § 1985(3)); *Galloway v. Louisiana*, 817 F.2d 1154,  
14 1159 (5th Cir.1987) (same); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir.1987) (same); *Keating v.*  
15 *Carey*, 706 F.2d 377, 386-88 (7th Cir. 1983) (“Republicans are a protected class” under § 1985(3));  
16 *Means v. Wilson*, 522 F.2d at 836 (8th Cir. 1975) (§ 1985(3) claim available for allegations of  
17 discrimination against political opponents); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973);  
18 (discrimination against “supporters of a political candidate” is covered under § 1985(3)); *Glasson v.*  
19 *Louisville*, 518 F.2d 899, 906 (6th Cir.1975) (§ 1985(3) claim available for allegations of  
20 discrimination on the grounds of political opinion), *overruled on other grounds by Bible Believers v.*  
21 *Wayne Cty., Mich.*, 805 F.3d 228, 236 (6th Cir. 2015).

22 The Ninth Circuit has, however, determined that allegations of discrimination on the basis of  
23 political affiliation require the same “exacting scrutiny” required to meet the “class-based”  
24 discrimination requirement of § 1985(3). *Reichardt*, 591 F.2d at 505. In *Reichardt*, the Ninth Circuit  
25 observed that discrimination based on plaintiffs’ status as either (1) “political opponents” of  
26 defendants or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to  
27 state a claim under § 1985(3), and this is in line with numerous other courts which have applied  
28 heightened scrutiny to discrimination based on political affiliation. *See Rutan v. Republican Party of*



1 *Illinois*, 497 U.S. 62, 78 (1990) (government employers may not “condition [] hiring decisions on  
2 political belief”); *Fusaro v. Cogan*, 930 F.3d 241, 261 (4th Cir. 2019) (“[A]n election regulation that  
3 plausibly burdens First Amendment rights on the basis of viewpoint, political affiliation, or class  
4 should be subject to strict scrutiny.”).

5 Here Mr. O’Handley alleges that SKDK conspired to deprive him of his constitutional rights  
6 based on his conservative political affiliation. Under *Reichardt*, this allegation is sufficient to allege  
7 “class-based” treatment. Congress has also “indicated through legislation” that political affiliation  
8 requires “special protection” through scores of statutes that designate political affiliation as a  
9 protected class in a variety of settings.<sup>2</sup> *Sever*, 978 F.2d at 1536. These and other enactments  
10 demonstrate that discrimination based on political affiliation is sufficient to state a claim under §  
11 1985(3). *Id.*

12 Finally, SKDK’s argument that Mr. O’Handley has not alleged injury is frivolous. A  
13 “deprivation of any right or privilege of a citizen of the United States” is an injury under § 1985(3).  
14 As specifically pled in the Complaint and analyzed at length above, Defendants’ actions deprived Mr.  
15 O’Handley of his First and Fourteenth Amendment rights. *Griffin*, 403 U.S. at 103. Mr. O’Handley’s  
16 allegations are plainly sufficient to demonstrate a cognizable injury under § 1985(3).

17 //  
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21 \_\_\_\_\_  
22 <sup>2</sup> *See, e.g.*, 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation”  
23 in personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his  
24 life or freedom would be threatened based on “political opinion”); 18 U.S.C. § 227 (prohibiting  
25 government employees from influencing private employment decision based on “political  
26 affiliation”); 20 U.S.C. § 1232h(b) (providing that students shall not be requiring to disclose their or  
27 their parents’ “political affiliation[]” in connection with federal educational programs); 29 U.S.C. §  
28 3248 (prohibiting discrimination in employment and program access on the basis of “political  
affiliation” to programs under the Workforce Innovation and Opportunity Act); 42 U.S.C. § 5057  
(prohibiting discrimination in program access on the basis of “political affiliation” to programs under  
the Domestic Volunteer Service Act); 42 U.S.C. § 9821 (same under Community Economic  
Development Act); 42 U.S.C. § 9849 (same under Head Start Act); 42 U.S.C. § 12635 (same under  
National Community Service Act).



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**CONCLUSION**

For the reasons discussed herein, this Court should deny SKDK’s Motion to Dismiss. In the alternative, O’Handley requests leave to amend to cure any perceived defects in the pleading.

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Date: November 5, 2021

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