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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15

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

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

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

**PLAINTIFF’S OPPOSITION TO
STATE DEFENDANTS’ MOTION TO
DISMISS (FRCP Rule 12(b)(1) and
FRCP Rule 12(b)(6))
[ECF 59]**

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



TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUMMARY OF ARGUMENT viii

INTRODUCTION AND BACKGROUND 1

LEGAL STANDARDS 2

ARGUMENT 3

I. There is a direct causal link between the State’s actions and O’Handley’s injuries..... 3

II. Twitter is a state actor 3

III. O’Handley takes issue with the State’s censorship of his speech, not its own 5

IV. Defendants discriminated against O’Handley based on his perceived association with an ideological group and applied the statute differently to conservative speakers than to self-identified liberals 6

V. The State set in motion the acts inflicting O’Handley’s constitutional injuries 8

VI. Elections Code Section 10.5 is void for vagueness as-applied to O’Handley 8

VII. Defendants conspired to deprive O’Handley of his rights under 42 U.S.C. 1985(3) 9

VIII. Constitutional prohibitions on viewpoint discrimination and retaliation are clearly established 10

CONCLUSION 13



TABLE OF AUTHORITIES

Cases

1

2

3 *Abcarian v. McDonald,*

4 617 F.3d 931 (7th Cir. 2010)7, 10

5 *Allen v. Wright,*

6 468 U.S. 737 (1984).....2

7 *American Sugar-Ref. Co. v. Louisiana,*

8 179 U.S. 89 (1900).....10

9 *Apodaca v. White,*

10 401 F. Supp. 3d13

11 *Ashcroft v. al-Kidd,*

12 563 U.S. 731 (2011)11

13 *Ashcroft v. Iqbal,*

14 556 U.S. 662 (2009).....2

15 *Barnum Timber Co. v. EPA,*

16 633 F.3d 894 (9th Cir. 2011)3

17 *Bell Atlantic Corp. v. Twombly,*

18 550 U.S. 544 (2007).....2

19 *Benigni v. City of Hemet,*

20 879 F.2d 473 (9th Cir. 1989)8

21 *Bible Believers v. Wayne Cty., Mich.,*

22 805 F.3d 228 (6th Cir. 2015)10

23 *Board. Of Regents of State Colleges v. Roth,*

24 408 U.S. 564 n. 14 (1972).....8

25 *Cameron v. Brock,*

26 473 F.2d 608 (6th Cir. 1973)10

27 *Care v. Nevada Gaming Control Bd.,*

28 279 F.3d 873 (9th Cir. 2002)1, 12

City & Cty. of San Francisco,

940 F. Supp. 2d 1071 (N.D. Cal. 2013)12

Conklin v. Lovely,



1 834 F.2d 543 (6th Cir.1987) 10

2 *Country Classic Dairies, Inc. v. Montana, Dep’t of Commerce Milk Control Bureau,*
 3 847 F.2d 593 (9th Cir. 1988)..... 7

4 *Crowe v. County of San Diego,*
 5 608 F.3d 406 (9th Cir. 2010). 10

6 *Dirks v. Grasso,*
 7 449 F. App'x 589 (9th Cir. 2011)..... 13

8 *Dobosz v. Walsh,*
 9 892 F.2d 1135 (2nd Cir. 1989)..... 13

10 *Enquist v. Oregon Dept. of Agr.,*
 11 553 U.S. 591 (2008)..... viii

12 *Foxworthy v. Buetow,*
 13 492 F. Supp. 2d 974 (S.D. Ind. 2007)..... 12

14 *Franklin v. Fox,*
 15 312 F.3d 423 (9th Cir. 2002). 3

16 *Freeman v. City of Santa Ana,*
 17 68 F.3d 1180 (9th Cir. 1995) 9

18 *Fusaro v. Cogan,*
 19 930 F.3d 241 (4th Cir. 2019) 11

20 *Galloway v. Louisiana,*
 21 817 F.2d 1154 (5th Cir. 1987) 10

22 *Glasson v. Louisville,*
 23 518 F.2d 899 (6th Cir. 1975) 10

24 *Grayned v. City of Rockford,*
 25 408 U.S. 104 (1972)..... 9

26 *Griffin v. Breckenridge,*
 27 403 U.S. 88 (1971)..... 9

28 *Hope v. Pelzer,*
 536 U.S. 730 (2002)..... 12

Johnson v. County of San Bernardino,
 No. EDCV 18-2523-GW-AFMX, 2020 WL 5224350, at *25 (C.D. Cal. June 24, 2020) 13



1 *Keating v. Carey*,
706 F.2d 377 (7th Cir. 1983) 10

2

3 *Lane v. Salazar*,
911 F.3d 942 (9th Cir. 2018) 1, 9

4

5 *Lazy Y Ranch Ltd. v. Behrens*,
546 F.3d 580 (9th Cir. 2008). 1, 8

6 *Life Ins. Co. of N. Am. v. Reichardt*,
591 F.2d 499 (9th Cir. 1979) 9, 11

7

8 *Lockary v. Kayfetz*,
917 F.2d 1150 (9th Cir. 1990) 8

9

10 *Lugar v. Edmondson Oil Co.*,
457 U.S. 922 (1982)..... 3, 4

11

12 *Maya v. Centex Corp.*,
658 F.3d 1060 (9th Cir. 2011). 3

13

14 *McComas v. City of Rohnert Park*,
No. 16-CV-02705-TEH, 2017 WL 1209934, at *7 (N.D. Cal. Apr. 3, 2017)..... 13

15

16 *Michigan v. Defillippo*,
443 U.S. 31 (1979)..... 12

17

18 *McLean v. Int’l Harvester Co.*,
817 F.2d 1214 (5th Cir. 1987) 10

19

20 *Means v. Wilson*,
522 F.2d 833 (8th Cir. 1975) 10

21

22 *Merritt v. Mackey*,
932 F.2d 1317 (9th Cir. 1991). viii

23

24 *Metro Display Advert., Inc. v. City of Victorville*,
143 F.3d 1191 (9th Cir. 1998). 12

25

26 *Noako Ohno v. Yuko Yasuma*,
723 F.3d 984 (9th Cir. 2013) 4

27

28 *O’Brien v. Welty*,
818 F.3d 920 (9th Cir. 2016) 13

Panagacos v. Towery,
501 F. App’x 620 (9th Cir. 2012)..... 13



1 *Pasadena Republican Club v. Western Just. Ctr.*,
 2 985 F.3d 1161 (9th Cir. 2021).9

3 *Peltier v. Sacks*,
 4 328 F. Supp. 3d 1170 (W.D. Wash. 2018)..... 13

5 *Pendleton v. St. Louis County*,
 6 178 F.3d 1007 (8th Cir.1999) 13

7 *Pinkerton v. U.S.*,
 8 328 U.S. 640 (1946).....4

9 *Quezada v. McDowell*,
 10 No. 518CV00251VBFMAA, 2019 WL 3806406, at *10 (C.D. Cal. July 10, 2019) 13

11 *Rawson v. Recovery Innovations, Inc.*,
 12 975 F.3d 742 (9th Cir. 2020)4

13 *Rosenberger v. Rector and Visitors*,
 14 515 U.S. 819 (1995)..... 12

15 *Rutan v. Republican Party of Ill.*,
 16 497 U.S. 62 (1990)..... 11

17 *Scott v. Ross*,
 18 140 F.3d 1275 (9th Cir. 1998) 10

19 *Sever v. Alaska Pulp Corp.*,
 20 978 F.2d 1529 (9th Cir. 1992) 10, 11

21 *Sutton v. Providence St. Joseph Medical Ctr.*,
 22 192 F.3d 826 (9th Cir. 1999)4

23 *Towery v. Brewer*,
 24 672 F.3d 650 (9th Cir. 2012)7

25 *Trulock v. Freeh*,
 26 275 F.3d 391 (4th Cir.2001) 13

27 *Tsao v. Desert Palace, Inc.*,
 28 698 F.3d 1128 (9th Cir. 2012) viii, 4

United States v. Alvarez,
 567 U.S. 709 (2012).....2



1
 2 *United States v. Rodriguez*,
 3 360 F.3d 949 (9th Cir.2004) 9
 4 *United States v. Wyatt*,
 5 408 F.3d 1257 (9th Cir.2005) 1, 9
 6 *Usher v. City of Los Angeles*,
 7 828 F.2d 556 (9th Cir. 1987) 3
 8 *Vaster v. Hudgins*,
 9 No. CV-13-5031-EFS, 2016 WL 676398, at *9 (E.D. Wash. Feb. 18, 2016) 13
 10 *Villarreal v. City of Laredo, Texas*,
 11 No. 20-40359, 2021 WL 5049281 (5th Cir. Nov. 1, 2021) 12
 12 *VIP of Berlin, LLC v. Town of Berlin*,
 13 593 F.3d 179 (2d Cir. 2010)..... 9
 14 *Wedges/Ledges of Cal., Inc. v. Phoenix, Ariz.*,
 15 24 F.3d 56 (9th Cir. 1994) 8
 16 *West v. Shea*,
 17 500 F. Supp. 3d 1079 (C.D. Cal. 2020) 12
 18 *Whitney v. California*,
 19 274 U.S. 357 (1927)..... 2
 20 **Statutes**
 21 5 U.S.C. § 2302(b)(1)(E) 11
 22 8 U.S.C. § 1231(b)(3)(A)..... 11
 23 18 U.S.C. § 227..... 11
 24 20 U.S.C. § 1232h(b)(1) 11
 25 29 U.S.C. § 3248(a)(2)..... 11
 26 42 U.S.C. § 12635(a)(1)..... 11
 27 42 U.S.C. § 5057(a)(1)..... 11
 28 42 U.S.C. § 9821(a) 11
 42 U.S.C. § 9849(a) 11
 42 U.S.C. § 1983..... 1, 4, 9, 11, 13



1 42 U.S.C. § 1985(3) 1, 9, 10, 11

2 Cal Bus & Prof. Code §14102 8

3 California Elections Code §10.5 1, 9

4 **Rules**

5 Fed.R.Civ.Pro.12(b)(1) 2

6 Fed.R.Civ.Pro. 12(b)(6) 13

7 **Constitutional Provisions**

8 U.S. Const. amend. I 13

9

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1 **SUMMARY OF ARGUMENT**

2 Plaintiff Rogan O’Handley has standing to assert his claims because he has plausibly pled a
3 direct causal chain leading from the State’s actions to his constitutional injuries. *See Maya v. Centex*
4 *Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). As the Complaint alleges in detail, Defendants Alex
5 Padilla, Paula Valle, Jenna Dresner, Sam Mahood, and Akilah Jones (collectively, “Individual State
6 Defendants”) along with the Secretary of State’s office (collectively, the “State” or the “State
7 Defendants”) injured Mr. O’Handley by the foreseeable acts of the Defendants’ conspiracy, taken in
8 concert to further the goals of their shared objectives.

9 The law treats Twitter as a state actor because it conspired with the State to censor disfavored
10 speech. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). The Complaint includes
11 numerous allegations, including quotes from direct communications among Defendants, coordinating
12 the creation of a “national narrative” regarding election administration and speech censorship.
13 Concluding that their own affirmative messaging was insufficient to promote their “national narrative,”
14 Defendants took the unprecedented and unconstitutional step of creating a streamlined process for
15 government officials to identify speech to be censored by social media platforms. Defendants created
16 an online system with a portal specifically designated for state officials to submit censorship “requests”
17 which placed government censorship requests at the “top of the queue” at Twitter. The result was a
18 98% takedown rate.

19 This conspiracy to censor speech alleges joint action and a nexus between Twitter and the State
20 Defendants and constituted a serious breach of Mr. O’Handley’s First Amendment rights. The State’s
21 given reasons for censoring Mr. O’Handley’s public request for an audit are illogical, and demonstrate
22 nothing but pretext—presumably because Mr. O’Handley’s opinions implicitly criticized then
23 Secretary of State Padilla. At the time of Mr. O’Handley’s tweet, Padilla was positioning himself as a
24 candidate for the position he has now assumed, U.S. Senator from the State of California.

25 By singling out a specific classification of tweets—conservative election audit requests—for
26 censorship, the State also violated the Equal Protection clause. California’s Office of Elections
27 Cybersecurity (OEC) cannot discriminate by ideology. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580,
28 583, 590 (9th Cir. 2008).

1 State officials “set[] in motion” the acts which also deprived Mr. O’Handley of his property
2 and liberty interests without notice or a hearing. *Merritt v. Mackey*, 932 F.2d 1317, 1371 (9th Cir.
3 1991). Further, Elections Code §10.5 is void for vagueness as applied to Mr. O’Handley because (i)
4 its prohibitions were not clearly defined, (ii) it did not establish minimum guidelines to govern
5 enforcement, and (iii) it reached constitutionally protected expression requiring greater specificity.
6 *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005); *Lane v. Salazar*, 911 F.3d 942, 950 (9th
7 Cir. 2018). Mr. O’Handley did not have a reasonable opportunity to know what he was purportedly
8 prohibited from saying.

9 In addition to a conspiracy under 42 U.S.C. § 1983, Defendants also conspired under 42
10 U.S.C. § 1985(3) to censor speech that they determined would contradict their official “national
11 narrative” on election administration. Their acts in furtherance of their conspiracy included
12 correspondence to identify and block disfavored speech, creating and using a dedicated portal to
13 identify speech targeted for state censorship, and giving Padilla a reward for his prolific censorship
14 actions.

15 Finally, the Individual State Defendants are not entitled to qualified immunity. Their
16 discrimination against Mr. O’Handley for his viewpoint and retaliation against him for the content of
17 his speech on behalf of the State are so “patently violative of fundamental constitutional principles”
18 that “any person of reasonable prudence would be bound to see [the] flaws” in the Individual State
19 Defendants’ conduct here. *Care v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002).

20 Should the Court find the allegations supporting any count deficient, Mr. O’Handley
21 respectfully requests the Court permit leave to amend to cure any pleading defects.

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INTRODUCTION AND BACKGROUND

Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.
- Justice Anthony Kennedy
United States v. Alvarez, 567 U.S. 709, 723 (2012).

“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.” *United States v. Alvarez*, 567 U.S. 709, 727 (2012). Under the First Amendment, the only permissible government response to “misinformation” is more speech, not censorship. This constitutional truth, and the State Defendants’ open disregard of it, lies at the center of this case.

In 2018, California enacted California Election Code §10.5, creating a Ministry of Truth—misleadingly christened the Office of Election Cybersecurity—within the Secretary of State’s office. OEC’s statutory mandate included authority to “counteract” “false or misleading” election information, which OEC took as both a license and invitation to quash politically disfavored speech. The OEC embraced its speech-censoring role with gusto. As the OEC explained with chilling frankness, “our priority is working closely with social media companies *to be proactive* so when there’s a source of misinformation, *we can contain it*” and “*take down sources of misinformation as needed.*” Compl. ¶ 24–25 (emphasis added). Defendant Padilla described this symbiotic relationship with social media platforms as a “partnership.” Compl. ¶ 65.

In furtherance of this “partnership,” and as a part of Defendants’ goal to “create a more national narrative” concerning election integrity, Defendants built a dedicated reporting channel (“Twitter Portal”) to route the State’s censorship “requests” to Twitter with totalitarian efficiency. The Twitter Portal bumped OEC requests “to the head of the [censorship] queue,” and 98% of the OEC reported posts were “promptly removed.” Compl. ¶¶ 29, 64. Defendants’ definition of “misinformation” was expansive, including not only factual claims, but also politically inconvenient opinions. Compl. ¶ 72. Practically speaking, OEC labeled opinions that could harm Democrats, including Padilla and Defendant SKDK’s client Joe Biden, as “misinformation.” Compl. ¶ 2, 72.

Such “misinformation” flashed across the screen of one of SKDK’s thought police on November 12, 2020, when Mr. O’Handley implicitly criticized Defendant Padilla’s handling of

1 California elections in a tweet suggesting that California’s 2020 general election should be audited. *Id.*
 2 Up until that time, Twitter had never sanctioned Mr. O’Handley. Compl. ¶ 81. Although some liberals
 3 also took to Twitter to urge election transparency, Defendants focused their speech censorship efforts
 4 on conservatives because of the implicit political messages in their speech, and Mr. O’Handley was
 5 now in their sights. Compl. ¶ 83. SKDK swiftly forwarded Mr. O’Handley’s comment to the OEC as
 6 “misinformation”; OEC, in turn, branded it “voter fraud” and passed it on to Twitter; and Twitter duly
 7 retaliated against Mr. O’Handley for his speech, both by appending a public label on the tweet claiming,
 8 absurdly, that Mr. O’Handley’s opinion was “disputed,” and issuing a “strike” against his Twitter
 9 account. Compl. ¶¶ 75-80. Mr. O’Handley now became a person of intense interest to Twitter’s speech
 10 monitors, who soon issued strikes against his account for the temerity of suggesting a commission on
 11 the 2020 election to restore confidence in election integrity. In short order Mr. O’Handley was banned
 12 from Twitter as a direct result of Defendants’ focused, coordinated political censorship program.
 13 Compl. ¶¶ 81, 83, 84-89.

14 As Justice Brandeis stated in *Whitney v. California*, “[i]f there be time to expose through
 15 discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be
 16 applied is more speech, not enforced silence.” 274 U.S. 357, 377 (1927), *overruled in part on other*
 17 *grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). The State violated this bedrock principle of
 18 our constitutional order, however, when under the guise of protecting a gullible public from election
 19 misinformation, it conspired with Defendants to censor Mr. O’Handley’s disfavored opinions.

20 LEGAL STANDARDS

21 A plaintiff must establish Article III standing to assert his claims, including proof of injury-in-
 22 fact, causation, and redressability. Fed. R. Civ. Pro. 12(b)(1); *Allen v. Wright*, 468 U.S. 737, 750
 23 (1984). To survive a Rule 12(b)(6) motion, a complaint must only plead “enough facts to state a claim
 24 to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 570 (2007).
 25 Plausible means “factual content that allows the court to draw the reasonable inference that the
 26 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court
 27 “must presume all factual allegations of the complaint to be true and draw all reasonable inferences in
 28 favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

ARGUMENT

I. There is a direct causal link between the State’s actions and Mr. O’Handley’s injuries.

To show an injury in fact, a defendant need not be the injury’s “sole source” or “proximate cause” as 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 are not hypothetical or tenuous and remain plausible.” *Maya*, 658 F.3d at 1070 (citation omitted).

Mr. O’Handley was directly injured by the foreseeable acts of Defendants’ conspiracy, whose objectives the State and Individual State Defendants, along with Twitter, all orchestrated, agreed to, and contributed overt acts to further. Compl. ¶¶ 56–57, 68, 74. By using a dedicated portal Twitter created to streamline state censorship submissions for priority action to “flag” Mr. O’Handley’s post, which was a mere expression of opinion that could not even be “false” or “fraudulent,” the State and Individual State Defendants were doing nothing less than instructing Twitter to “take down” tweets, which Twitter did 98% of the time. Acting as the arm of the OEC, Twitter punished Mr. O’Handley for his speech by issuing a strike against his Twitter account. Compl. ¶¶ 72–78. These were not “independent decisions,” but coordinated steps taken in furtherance of a conspiracy in which each Defendant had a planned, assigned, and specialized role. Penalizing Mr. O’Handley for his expressed viewpoint caused an injury in fact, and there is a direct causal chain between the State’s actions and the injury.

II. Twitter is a state actor.

“[M]ost rights secured by the Constitution are protected only against infringement by governments,” so “the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (internal citation omitted). *Lugar*’s two-part “fair attribution” test asks (1) whether the deprivation was “caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person whom the State is responsible,” and (2) whether “the party charged with the deprivation ... may be fairly said to be a state actor.” *Id.* at 937. The State does not contest, and therefore concedes, that Mr. O’Handley’s claims meet *Lugar*’s “state policy” prong as it acted pursuant to California

1 Elections Code § 10.5. *See* ECF No. 59 8-10. Instead, the State argues Twitter cannot fairly be described
2 as a state actor under the “public function,” “state compulsion,” “nexus,” or “joint action” tests. *Rawson*
3 *v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). Here, however, the joint action and
4 nexus tests are met.

5 The presumption that private conduct does not constitute governmental action may be
6 overcome by demonstrating state officials and private actors jointly “acted in concert in effecting a
7 particular deprivation of constitutional rights.” *Tsao*, 698 F.3d at 1140. It is a “well-accepted principle
8 that a private party’s joint participation in a conspiracy with the state provides a sufficient nexus to
9 hold the private party responsible as a governmental actor.” *Sutton v. Providence St. Joseph Medical*
10 *Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (citing *Lugar*, 457 U.S at 941). Conspiracy is a fact issue and
11 is shown if a defendant was a “willful participant” in “an agreement or meeting of the minds to violate
12 constitutional rights” and that an actual deprivation of rights resulted from that agreement. *Dennis v.*
13 *Sparks*, 449 U.S. 24, 27-28 (1980); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). All conspirators
14 may be held liable for the reasonably foreseeable acts of co-conspirators. *Pinkerton v. U.S.*, 328 U.S.
15 640, 645 (1946); *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (“As a conspirator, the citizen
16 is liable, in civil as in criminal law, for the wrongful acts of the other conspirators committed within
17 the scope of the conspiracy.”). And even absent a conspiracy, “[j]oint action exists where the
18 government affirms, authorizes, encourages, or facilitates unconstitutional conduct.” *Noako Ohno v.*
19 *Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013). Similarly, “close nexus/joint action” exists when the
20 scheme is “complex and deeply intertwined.” *Rawson*, 975 F.3d at 750.

21 The fact that no social media company has ever been treated as a state actor under § 1983 might
22 be relevant if any plaintiff had ever filed a complaint alleging facts, and documentation to support those
23 allegations, that were remotely like the ones Mr. O’Handley does here. The public-private
24 “partnership” detailed in the pleadings here, however, is unprecedented. The facts alleged and
25 documented in the Complaint include a myriad of direct communications demonstrating extensive
26 coordination; Twitter providing the government with special platform access and responsiveness not
27 available to the general public; and a 98% success rate for the State’s demands for speech censorship.

28 //

1 The State’s analysis glosses over the joint action/nexus tests, and the avalanche of supporting
2 claims, with a conclusory, one-sentence denial stating the complaint lacks allegations of “significant”
3 involvement. ECF 59:15. If these interactions aren’t “significant,” however it is hard to imagine what
4 would be: The OEC, in its own words, “work[ed] closely and proactively with social media companies
5 to...take down sources of misinformation,” and all the Individual State Defendants agreed to this
6 conspiracy and committed acts in furtherance of it because it was, *according to the State’s brief*, part
7 of their job description. ECF 59 11:3; Compl. ¶ 23-25. For example, Defendant Mahood, together with
8 Defendant Paula Valle, “requested” that Twitter take down a tweet “ASAP.” Compl. ¶ 34. Twitter
9 responded only hours later (on a holiday) that “this Tweet has been removed” and—demonstrating
10 Twitter’s virtually complete obeisance—and “Please don’t hesitate to contact me if there is anything
11 else we can do.” Compl. ¶ 35. Defendant Akilah Jones was tasked with tracking SKDK’s work, created
12 a template to make SKDK’s misinformation briefings clearer, and regularly identifying what speech
13 social media companies should censor. This speech-monitoring and censorship “partnership,” in the
14 word used by Defendant Padilla, was so effective that he proudly took credit for it when Defendant
15 NASS gave him an award for it.

16 Each and every Individual State Defendant played a role in coordinating with social media
17 companies to censor Mr. O’Handley’s speech, including the transformation—by virtue of their
18 flagging Mr. O’Handley’s first “offending” tweet to Twitter through the portal—of Mr. O’Handley
19 from a Twitter user with no strikes to, very soon thereafter, a former, and permanently banned, ex-user.
20 Compl. ¶¶ 77-81. Twitter willingly and knowingly participated in this coordinated government
21 program to censor private political speech, and this is state action.

22 **III. Mr. O’Handley takes issue with the State’s censorship of his speech, not its own.**

23 The State’s only defense against Mr. O’Handley’s claims of viewpoint discrimination and First
24 Amendment retaliation is that State speech is also at issue here. It is not, and the State’s argument is a
25 red herring.

26 Mr. O’Handley never suggests that the State cannot communicate its own message, and he
27 makes no claim here of a right to interfere with that speech. What he does claim is that the First
28 Amendment and the California Liberty of Speech Clause *prevent the State from acting to remove Mr.*

1 *O’Handley’s speech from the public discourse because of the viewpoint expressed.* The facts here
 2 establish that the State conspired with the other Defendants to censor and retaliate against Mr.
 3 O’Handley’s disfavored speech. OEC and the Individual State Defendants’ own admissions repeatedly
 4 demonstrate the truth of Mr. O’Handley’s allegations about what they did to silence him. *See* Compl.
 5 ¶ 24–25 (“We work closely and proactively with social media companies to...take down sources of
 6 misinformation.”), 26–35, 64–65.

7 These facts belie the State’s claim that its censorship of Mr. O’Handley is justified to mitigate
 8 “misinformation that could *suppress voter turnout or disrupt the orderly administration of elections.*”
 9 ECF 57 3:5-7 (emphasis added). Opinions about election audits, or even audits themselves, do not
 10 suppress voter turnout or disrupt the orderly administration of elections. They are after-the-fact,
 11 independent examinations of voting records to ensure the accuracy of the vote. Second, Mr. O’Handley
 12 tweeted his comment on November 12, 2020—more than a week *after* the November 3, 2020, election.
 13 For this reason alone, his expression of an opinion *could not* have suppressed turnout or disrupted the
 14 administration of an election that took place in the past. And finally, Mr. O’Handley’s tweet was,
 15 indeed, the expression of an *opinion*. The State asserts that its actions were reasonable because Mr.
 16 O’Handley’s statement was false or misleading, but it does not say how, because Mr. O’Handley
 17 expressed no concrete fact *to* combat.

18 The fact is simply that the State censored Mr. O’Handley’s speech because it disapproved of
 19 his viewpoint. The State’s reasoning smacks of pretext and is anathema to this Nation’s bedrock free
 20 speech principles.

21 **IV. Defendants discriminated against Mr. O’Handley based on his perceived association**
 22 **with an ideological group and applied Elections Code § 10.5 differently to conservative**
 23 **speakers than to self-identified liberals.**

24 Mr. O’Handley seeks relief under the Equal Protection Clause based upon his classification as
 25 a conservative. “In an equal protection claim based upon selective enforcement of the law, a plaintiff
 26 can show that a defendant’s alleged rational basis for his acts is a pretext for an impermissible motive.”
 27 *Engquist*, 478 F.3d at 993. “The first step in equal protection analysis is to identify the...classification
 28 of groups.” *Country Classic Dairies, Inc. v. Montana, Dep’t of Commerce Milk Control Bureau*, 847
 F.2d 593, 596 (9th Cir. 1988). “To accomplish this, a plaintiff can show that the law is applied in a

1 discriminatory manner or imposes different burdens on different classes of people.” *Freeman v. City of*
 2 *Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). Defendants focused “their censorship efforts on
 3 conservative requests for transparency in election processes rather than the same calls from self-
 4 identified political liberals.” Compl. ¶ 83. This allegation, taken as true for the purposes of this motion,
 5 identifies both a disfavored and a favored classification.¹

6 Rational basis review is appropriate for cases of differential treatment based upon a political or
 7 ideological classification. *See, e.g., Lazy Y*, 546 F.3d at 583, 588 (discrimination based upon ties to
 8 conservationists); *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (stating “political
 9 affiliation” is the appropriate basis for an Equal Protection claim). Additionally, on a motion to dismiss,
 10 a court is not required “to accept [the Defendants’] explanation” for differential treatment. *Lazy Y*, 546
 11 F.3d at 590. Rather, the court reviews whether there is a rational basis for the distinction alleged by the
 12 plaintiff. *Id.* at 590. Here, there is no rational basis for the Defendants’ censorship of conservative, but
 13 not liberal, calls for election transparency. Compl. ¶ 83; *Guillemard-Ginorio v. Contreras-Gomez*, 585
 14 F.3d 508, 529 (1st Cir. 2009) (“government officials may not sanction a citizen because of his political
 15 affiliation”).

16 The State Defendants also argue that the claim cannot move forward because “the ‘class-of-one’
 17 doctrine does not apply to forms of state action that ‘by their nature involve discretionary
 18 decisionmaking.’” ECF NO. 59 12: 23-25 (citing *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012)).
 19 Mr. O’Handley’s claims are not limited by class-of-one analysis for the reasons discussed above. *See*
 20 *Lazy Y*, 546 F.3d at 592. Yet even if they were, Mr. O’Handley would still prevail as “the rational
 21 relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary”
 22 as were the actions against Mr. O’Handley here. *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir.
 23 1990); *see also* Section III.

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26 _____
 27 ¹ The State complains that Mr. O’Handley did not specifically identify any such instances, but at this
 28 stage of the proceedings, he is only required to provide plausible factual allegations, not specific
 examples. ECF No. 59 12:8-20; *Iqbal*, 556 U.S. at 678.

1 **V. The State set in motion the acts inflicting Mr. O’Handley’s constitutional injuries.**

2 When a private party deprives a citizen of employment, government officials are liable if they
3 “set[] in motion a series of acts by others which ... would cause others to inflict the constitutional
4 injury.” *Merritt*, 932 F.2d at 1371 (internal citation omitted). Mr. O’Handley alleged that the State
5 Defendants did this when they “intentionally solicited Twitter to suspend [his] account.” Compl. ¶¶
6 152-153. Certainly these allegations, taken as true, “caused” or “set in motion” a constitutional
7 deprivation, and, as set forth above, the actual acts in question are alleged in detail.

8 Because of Defendants’ conduct, Mr. O’Handley was deprived of both property and liberty
9 interests without a hearing. With property, the “right to pursue an occupation” is a recognized liberty or
10 property interest subject to due process rights. *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir.
11 1989). “A protected property interest is present where an individual has a reasonable expectation of
12 entitlement deriving from existing rules...such as state law.” *Wedges/Ledges of Cal., Inc. v. Phoenix,*
13 *Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (internal citation omitted). Further, in California, the “good will of
14 a business” is a recognized property interest. Cal Bus & Prof. Code §14102. Mr. O’Handley’s
15 occupation and the good will of his business were reliant upon access to Twitter, and he had a reasonable
16 entitlement deriving from existing rules, with which the State’s censorship actions interfered. Compl.
17 ¶¶ 94, 150.

18 Regarding liberty interests, “[w]hen a State would directly impinge upon interests in free
19 speech” the Supreme Court has “held that opportunity for a fair adversary hearing must precede the
20 action, whether or not the speech or press interest is clearly protected under substantive First
21 Amendment standards.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972). That
22 includes suppressing content. *Id.* (“necessity of procedural safeguards before a State makes a large-scale
23 seizure of a person’s allegedly obscene books, magazines, and so forth.”). Mr. O’Handley received no
24 procedural safeguards here: Defendants decided what he could and could not say and executed their
25 decision with neither notice nor a hearing.

26 **VI. Elections Code § 10.5 is void for vagueness as-applied to Mr. O’Handley.**

27 “[A]n enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v.*
28 *City of Rockford*, 408 U.S. 104, 108 (1972). Laws must “give the person of ordinary intelligence a

1 reasonable opportunity to know what is prohibited.” *Id.* When a statute “is capable of reaching
 2 expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of
 3 specificity than in other contexts.” *Lane*, 911 F.3d at 950 (quoting *VIP of Berlin, LLC v. Town of Berlin*,
 4 593 F.3d 179, 186 (2d Cir. 2010)). In an as-applied challenge, a statute is void for vagueness (and thus
 5 an unconstitutional deprivation of due process) if the statute (1) does not define the conduct it prohibits
 6 with sufficient definiteness and (2) does not establish minimal guidelines to govern enforcement. *United*
 7 *States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005) (quoting *United States v. Rodriguez*, 360 F.3d 949,
 8 953 (9th Cir. 2004)).

9 Section 10.5 is void for vagueness because it grants the OEC the right to “counteract false or
 10 misleading information”—terms that are not defined in the statute. OEC and the Individual State
 11 Defendants nonetheless interpreted the word “counteract” as a license to censor First Amendment-
 12 protected speech they deemed, in their sole discretion, to be “false or misleading.” Even if § 10.5 were
 13 lawful, Mr. O’Handley had no way of knowing what it prohibited, while OEC officials had unbridled
 14 discretion to determine what speech warranted action. Nor would Mr. O’Handley have any way of
 15 knowing that the OEC had a special “fast track” relationship that enabled it to feed “offending” social
 16 media content to Twitter for punishment. The obvious, inherent danger in this combination of ambiguity
 17 and unbridled government discretion was realized in OEC’s actions to censor Mr. O’Handley’s speech.
 18 *See Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011); *see also* Section III.

19 **VII. Defendants conspired to deprive Mr. O’Handley of his rights under 42 U.S.C. § 1985(3).**

20 The elements of a conspiracy under 42 U.S.C. § 1985(3) are: (1) a conspiracy; (2) “for the
 21 purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal
 22 privileges and immunities under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation
 23 of rights. *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 502 (9th Cir. 1979) (quoting *Griffin v.*
 24 *Breckenridge*, 403 U.S. 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action,
 25 § 1985(3) extends to purely private action as long as one co-conspirator is a state actor. *Pasadena*
 26 *Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021). Here, the State Defendants argue
 27 that Mr. O’Handley’s § 1985(3) claim should be dismissed because the Complaint does not allege (1)
 28

1 the existence of a conspiracy or (2) “class-based” treatment. ECF No. 59 14-15. Each of these
2 arguments is mistaken.

3 First, Mr. O’Handley has alleged and shown the existence of a conspiracy, *see* Section II B 1,
4 and the standard for a § 1985(3) conspiracy is the same as under § 1983. *Compare Scott v. Ross*, 140
5 F.3d 1275, 1284-85 (9th Cir. 1998) *with Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010).

6 Second, Mr. O’Handley has alleged the conspiracy at issue here was motivated by “class-
7 based” animus against conservative political views. Compl. ¶ 83. A plaintiff satisfies the “class-based”
8 requirement if either: (1) “the courts have designated the class in question a suspect or quasi-suspect
9 classification requiring more exacting scrutiny” or (2) “Congress has indicated through legislation that
10 the class required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).
11 Both criteria are met here. While the Ninth Circuit has not yet ruled on the question of whether political
12 affiliation is a suspect or quasi-suspect class,² it has determined that allegations of discrimination on
13 the basis of political affiliation require the same “exacting scrutiny” required to meet the “class-based”
14 discrimination requirement of § 1985(3). *Reichardt*, 591 F.2d at 505. In *Reichardt*, the Circuit
15 observed that discrimination based on plaintiffs’ status as either (1) “political opponents” of defendants
16 or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to state a claim
17 under § 1985(3). *Id.* This observation is in line with numerous other courts, which have held that
18 political affiliation satisfies the “class-based” requirement under § 1985(3).³ Here, Mr. O’Handley
19

20 ² Other courts have concluded that political affiliation is a suspect class. *See Abcarian v. McDonald*,
21 617 F.3d 931, 938 (7th Cir. 2010) (“political affiliation” a suspect classification). Moreover, the
22 Supreme Court has both stated in dicta that political affiliation is a suspect class, *see Am. Sugar-Ref.*
23 *Co. v. State of Louisiana*, 179 U.S. 89, 92 (1900) (noting that discrimination based on “political
24 affiliations” would be “a denial of the equal protection of the laws”), and held that it is protected in
25 certain settings, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (holding that
26 government employers may not “condition [] hiring decisions on political belief”); *Fusaro v. Cogan*,
27 930 F.3d 241, 261 (4th Cir. 2019) (“[A]n election regulation that plausibly burdens First Amendment
28 rights on the basis of viewpoint, political affiliation, or class should be subject to strict scrutiny.”).

³ *See, e.g., McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination on the
basis of “political beliefs or associations” is covered under § 1985(3)); *Galloway v. Louisiana*, 817
F.2d 1154, 1159 (5th Cir. 1987) (same); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (same);
Keating v. Carey, 706 F.2d 377, 386-88 (7th Cir. 1983) (“Republicans are a protected class” under §
1985(3)); *Means*, 522 F.2d at 836 (§ 1985(3) claim available for allegations of discrimination against
political opponents); *Cameron*, 473 F.2d at 610; (discrimination against “supporters of a political

1 alleges that Defendants conspired to deprive him his constitutional rights based on his conservative
 2 beliefs. Under *Reichardt*, this is sufficient to allege “class-based” treatment. Moreover, Congress has
 3 “indicated through legislation” that political affiliation requires “special protection” through scores of
 4 statutes that designate political affiliation as a protected class in a variety of settings.⁴ *Sever*, 978 F.2d
 5 at 1536. These and other laws demonstrate that discrimination on the basis of political affiliation is
 6 sufficient for a claim under § 1985(3). *Id.*

7 **VIII. Constitutional prohibitions on viewpoint discrimination and retaliation are clearly**
 8 **established.**

9 Under *Ashcroft v. al-Kidd*, the party asserting qualified immunity must demonstrate that the
 10 complaint fails to allege “(1) that the official violated a statutory or constitutional right, and (2) that the
 11 right was ‘clearly established’ at the time of the challenged conduct.” 563 U.S. 731, 735 (2011). The
 12 State Defendants have not met their burden, nor can they on these facts.

13 Ordinarily, a plaintiff defeats a claim of qualified immunity by citing case law arising from
 14 analogous circumstances. Similar cases are “not necessary,” however, when “a general constitutional
 15 rule already identified in the decisional law may apply with obvious clarity to the specific conduct in
 16 question, even though the very action in question has [not] previously been held unlawful.” *Villarreal*
 17 *v. City of Laredo, Texas*, No. 20-40359, 2021 WL 5049281, at *1 (5th Cir. Nov. 1, 2021) (quoting *Hope*
 18 *v. Pelzer*, 536 U.S. 730, 741 (2002)). An official may be liable for enforcing a statute that is so “patently
 19 candidate” is covered under § 1985(3)); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th
 20 Cir.1975) (§ 1985(3) claim available for allegations of discrimination on the grounds of political
 21 opinion), overruled on other grounds by *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 236 (6th
 Cir. 2015).

22 ⁴ *See, e.g.*, 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation” in
 23 personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his life
 24 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. §
 3248 (prohibiting discrimination in program access on the basis of “political affiliation” to programs
 28 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).

1 violative of fundamental constitutional principles” that “any person of reasonable prudence would be
 2 bound to see its flaws.” *Care*, 279 F.3d at 881 (citing *Michigan v. Defillippo*, 443 U.S. 31, 38 (1979)).
 3 This principle applies here where, even if the statute itself is facially valid, the OEC’s pattern of
 4 enforcement—censoring and punishing private speech from public discourse because of the speech’s
 5 viewpoint—is so beyond the pale and patently absurd that no reasonable person would consider it
 6 constitutional. As the Fifth Circuit wrote in comparable circumstances, “[t]his is not just an obvious
 7 constitutional infringement—it’s hard to imagine a more textbook violation of the First Amendment.”
 8 *Villarreal*, No. 20-40359, at *1 (citing cases where courts denied qualified immunity in the absence of
 9 an analogous fact pattern, but where the behavior was nonetheless so “flagrantly unconstitutional” that
 10 qualified immunity did not apply).

11 Courts have long held that viewpoint discrimination is so fundamental a constitutional principle
 12 that qualified immunity will not protect a government official engaged in it, even absent a prior
 13 analogous factual scenario. *See, e.g., Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191,
 14 1196 (9th Cir. 1998). The Supreme Court has stated that “[i]t is axiomatic that the government may not
 15 regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector and*
 16 *Visitors*, 515 U.S. 819, 828 (1995). The impermissibility of viewpoint discrimination is “a self-evident
 17 or universally recognized truth.” *Metro Display Advert.*, 143 F.3d at 1196. “[T]he proposition should
 18 be and is obvious to everyone.” *Id.* (denying qualified immunity to government official who engaged
 19 in viewpoint discrimination because it is obviously unconstitutional).⁵ Here, the Individual State
 20 Defendants targeted Mr. O’Handley’s speech for censorship because of its viewpoint, a universally
 21 recognized constitutional violation that should be “obvious to everyone.”

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 24 ⁵ *See also CuvIELLO v. City & Cnty. of San Francisco*, 940 F. Supp. 2d 1071, 1088 (N.D. Cal. 2013)
 25 (denying motion to dismiss qualified immunity claim stating it was “beyond debate” that “government
 26 officials may not disadvantage speakers based on their viewpoint.”); *West v. Shea*, 500 F. Supp. 3d
 27 1079, 1087 (C.D. Cal. 2020) (denying motion to dismiss defendant based on qualified immunity
 28 because the impermissibility of viewpoint discrimination is a “universally recognized truth”);
Apodaca v. White, 401 F. Supp. 3d 1040, 1060 (S.D. Cal. 2019) (same); *Peltier v. Sacks*, 328 F. Supp.
 3d 1170, 1183 (W.D. Wash. 2018) (same); *Panagacos v. Towery*, 501 F. App’x 620, 623 (9th Cir.
 2012) (same); *Dirks v. Grasso*, 449 F. App’x 589, 592 (9th Cir. 2011) (same).

1 Additionally, “[r]etaliatio[n] for engaging in protected speech has long been prohibited by the
2 First Amendment,” and, like viewpoint discrimination, courts regularly deny qualified immunity to
3 government officials without a directly analogous fact pattern because the principle is clearly
4 established. *O’Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016) (Rule 12(b)(6) dismissal was
5 inappropriate in First Amendment retaliation case, concluding that the “constitutional right to be free
6 from retaliation” was clearly established).⁶ Here, the Individual State Defendants retaliated against Mr.
7 O’Handley and acted to censor and punish him for his constitutionally protected speech with which they
8 disagreed, speech implicitly critical of Defendant Padilla’s job performance.⁷

9 **CONCLUSION**

10 For the reasons discussed herein, Mr. O’Handley respectfully requests this Court deny the
11 State’s motion, in its entirety. In the alternative, Mr. O’Handley requests leave to amend to cure any
12 pleading defects.

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15 ⁶ See also *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) (“The First Amendment guarantees an
16 individual the right to speak freely, including the right to criticize the government and government
17 officials. To protect that right, public officials are prohibited from retaliating against individuals who
18 criticize them.”); *Pendleton v. St. Louis Cnty.*, 178 F.3d 1007, 1011 (8th Cir. 1999) (“This Court
19 repeatedly has held that retaliation against the exercise of First Amendment rights is a basis for section
20 1983 liability.”); *Dobosz v. Walsh*, 892 F.2d 1135, 1141 (2nd Cir. 1989) (stating that “the proscription
21 of retaliation for a plaintiff’s exercise of First Amendment rights had long been established”);
22 *Foxworthy v. Buetow*, 492 F. Supp. 2d 974, 984 (S.D. Ind. 2007)(denying qualified immunity because
23 retaliation against speech is clearly established constitutional violation); *McComas v. City of Rohnert
24 Park*, No. 16-CV-02705-TEH, 2017 WL 1209934, at *7 (N.D. Cal. Apr. 3, 2017) (same); *Quezada v.
25 McDowell*, No. 518CV00251VBFMAA, 2019 WL 3806406, at *10 (C.D. Cal. July 10, 2019) (same);
26 *Vaster v. Hudgins*, No. CV-13-5031-EFS, 2016 WL 676398, at *9 (E.D. Wash. Feb. 18, 2016) (same);
27 *Johnson v. Cnty. of San Bernardino*, No. EDCV 18-2523-GW-AFMX, 2020 WL 5224350, at *25
28 (C.D. Cal. June 24, 2020) (same).

29 ⁷ Yet even if the State Defendants had not so flagrantly violated the law, this is exactly the type of
30 egregious example highlighted by Justice Thomas in his recent dissent from denial of cert in *Hoggard
31 v. Rhodes* that warrants the Supreme Court revisiting its grant of qualified immunity to officials in
32 non-emergency situations. After all, why should these officials, who had “time to make calculated
33 choices about enacting or enforcing unconstitutional policies, receive the same protection as a police
34 officer who makes a split-second decision to use force in a dangerous setting?” __ U.S. __, 141 S. Ct.
35 2421, 2422, (2021) (Mem.) (Thomas, J., respecting denial of cert.).

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