

1 HARMEET K. DHILLON (SBN: 207873)
harmeet@dhillonlaw.com
2 RONALD D. COLEMAN (*pro hac vice* forthcoming)
rcoleman@dhillonlaw.com
3 KARIN M. SWEIGART (SBN: 247462)
ksweigart@dhillonlaw.com
4 DHILLON LAW GROUP INC.
5 177 Post Street, Suite 700
6 San Francisco, CA 94108
Telephone: (415) 433-1700
7

8 MARK E. TRAMMELL (*pro hac vice* forthcoming)
mtrammell@libertycenter.org
9 CENTER FOR AMERICAN LIBERTY
5100 Buckeystown Pike, Suite 250
10 Frederick, MD 21704
Telephone: (703) 687-6212
11

12 Attorneys for Plaintiff ROGAN O’HANDLEY

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

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

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: 2:21-CV-07063-CRB

**PLAINTIFF’S OPPOSITION TO
DEFENDANT TWITTER, INC.’S
MOTION TO DISMISS (FRCP Rule
12(b)(6)) [ECF 60]**

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



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SUMMARY OF ARGUMENT

1
2 Plaintiff Rogan O’Handley has alleged facts sufficient to state a plausible claim on all of his
3 claims for relief against Defendant Twitter, Inc. (“Twitter”).

4 As an initial matter, Mr. O’Handley has alleged that Twitter is a state actor for purposes of his
5 claims under 42 U.S.C. § 1983 because Twitter (1) took action pursuant to California Elections Code
6 § 10.5 and (2) jointly acted and conspired with the California Secretary of State’s Office of Elections
7 Cybersecurity (“OEC”) and the other Defendants to censor disfavored political speech. *See Lugar v.*
8 *Edmondson Oil Co.*, 457 U.S. 922 (1982); *see also Mendocino Env’tl Ctr. v. Mendocino Cty.*, 14 F.3d
9 457, 464 (9th Cir. 1994). Specifically, Defendant NASS facilitated channels of communication
10 between Twitter and the OEC; Defendant SKDK notified the OEC of Mr. O’Handley’s tweet, which
11 contained constitutionally protected speech; OEC labeled Mr. O’Handley’s speech as “voter fraud”
12 and “flagged” it to Twitter; and Twitter censored the speech, ultimately removing the tweet (and others)
13 from its platform and banning Mr. O’Handley. Compl. ¶¶ 33–34, 74–81. All these roles were planned
14 and orchestrated in concert by the Defendants, including Twitter, and the joint action and conspiracy
15 are clear. Defendant Padilla described the relationship with Twitter as a “partnership” to facilitate the
16 take down and censorship of disfavored speech, and indeed, Twitter dutifully removed 98% of the
17 tweets “flagged” by the OEC. Compl. ¶ 64-65. On these facts, Mr. O’Handley has plausibly alleged
18 that Twitter is a state actor for purposes of his § 1983 claims.

19 Moreover, Mr. O’Handley’s substantive allegations are sufficient to plausibly allege claims
20 against Twitter. First, Twitter does not dispute that Mr. O’Handley has sufficiently alleged a First
21 Amendment infringement claim against it.

22 Second, Mr. O’Handley has sufficiently alleged a due process claim because Defendants
23 interfered with his property and liberty interest in pursuing his career as a social media influencer
24 through his use of Twitter’s platform. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14
25 (1972); *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989); *see also* Cal. Bus & Prof. Code
26 §14102.

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1 Third, Mr. O’Handley has sufficiently alleged an equal protection claim because Defendants
2 censored his conservative political speech, ignoring liberals making almost identical claims regarding
3 election maladministration. *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007).

4 Fourth, Mr. O’Handley has sufficiently alleged that Defendants conspired to deprive him his
5 constitutional rights based on his conservative political affiliation, and discrimination on this basis falls
6 within the protections of § 1985(3). *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir.
7 1979).

8 Fifth, Mr. O’Handley has sufficiently alleged that Defendants violated the Liberty of Speech
9 Clause of the California Constitution. In *Robins v. Pruneyard Shopping Center*, the California
10 Supreme Court held that a privately owned shopping mall was a public forum under the Liberty of
11 Speech Clause. 23 Cal.3d 899, 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub nom. PruneYard Shopping*
12 *Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”); *see also Fashion Valley Mall, LLC v. Nat’l*
13 *Labor Relations Bd.*, 42 Cal. 4th 850, 857 (Cal. 2007). In today’s digital age, Twitter is the “functional
14 equivalent” of what shopping centers were to public discourse when *Pruneyard I* was decided in 1979.
15 *Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App. 5th 649, 664 (Ct. App. 2019) *review denied*
16 (Sept. 25, 2019). In fact, Twitter and other social media websites have displaced shopping centers as
17 the central locus of public discourse in our nation. *Packingham v. North Carolina*, 137 S. Ct. 1730,
18 1735 (2017) (“While in the past there may have been difficulty in identifying the most important places
19 . . . for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in
20 particular.” (emphasis added)). Twitter is an open forum whose sole purpose is for public discourse,
21 and, given the size of Twitter’s user pool, there is no risk that Twitter’s users’ views will be ascribed
22 to Twitter itself. In any event, Twitter is free to distance itself from any of its users’ posts with which
23 it disagrees. For these reasons, Twitter is a public forum under *Pruneyard I*.

24 Finally, Twitter’s defenses—the First Amendment and 47 U.S.C. § 230(c)(1)—do not shield it
25 from liability. Because Twitter is a state actor on the facts alleged in the Complaint, any First
26 Amendment rights it may otherwise have must necessarily yield to the constitutional rights of its users.
27 *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that any “Constitutional rights of owners of
28 [privately owned town]” must give way to the First Amendment rights of its citizens and visitors).

1 Twitter does not have a First Amendment right to censor Mr. O’Handley’s speech, much less to ban
2 him from its platform, anyway. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,
3 547 U.S. 47 (2006); *Pruneyard II*, 447 U.S. 74. Allowing Mr. O’Handley to “speak” using its platform
4 is an act, not speech, and hosting the speech of millions of others is not inherently expressive. And, as
5 with Mr. O’Handley’s claim under the Liberty of Speech Clause, there is no risk that anyone browsing
6 Twitter would think that Mr. O’Handley’s tweets were Twitter’s speech. Accordingly, Twitter had no
7 constitutional right to treat Mr. O’Handley the way it did.

8 Twitter’s argument under § 230(c)(1) also fails. First, it is well-settled that § 230(c)(1) does
9 not apply to federal constitutional claims, nor does it apply to claims for injunctive or declaratory relief.
10 *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020); *Mainstream*
11 *Loudon v. Bd. of Trustees*, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998). Section 230(c)(1) immunizes
12 internet companies such as Twitter only from claims arising from the handling of content created by
13 *third parties*—*i.e.*, third parties to the claim by the plaintiff against the internet company. *Barnes v.*
14 *Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009); *Fair Housing Council of San Fernando Valley v.*
15 *Roommates.Com*, 521 F.3d 1157, 1162 (9th Cir.2008) (*en banc*). By contrast, Mr. O’Handley is
16 presenting a *first-party* claim—*i.e.*, a claim arising from the handling of content that he himself created.
17 Accordingly, Twitter’s interpretation of § 230 should be rejected.

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INTRODUCTION

In 2018, California created the OEC within the California Secretary of State’s office (“SOS”), to “assess,” “mitigate,” “monitor and counteract false or misleading [electoral] information [online].” Cal. Elec. Code § 10.5. The OEC, under the direction of Defendant Padilla, seized on the statutory phrase “mitigate [] false or misleading information” as a license to quash politically-disfavored speech, and the SOS’s office partnered with the private Defendants, including Twitter, in a conspiracy to censor speech. As OEC described its purpose: “We work[] closely and proactively with social media companies to . . . take down sources of misinformation as needed . . .” Compl. ¶ 25.

In a November 2020 Twitter post, or “tweet,” Mr. O’Handley expressed his opinion that California’s elections should be audited, an opinion that is held by many California voters. Compl. ¶¶ 72-73. SKDK labeled Mr. O’Handley’s opinion as “misinformation” to the OEC. *Id.* ¶ 74. The OEC then “flagged” the tweet as “voter fraud” to Twitter—“flag” serving as a euphemism for a request to censor the speech—and Twitter acted on it by appending commentary that Mr. O’Handley’s stated opinion was “disputed” and adding a strike to his account. *Id.* ¶¶ 33–34, 74–81. Ultimately, the tweet (and others) were removed pursuant to Defendants’ agreement to work together to stamp out conservative viewpoints, pursuant to which Twitter banned Mr. O’Handley from its platform. *Id.* ¶ 88. As set out below, the law is clear that Twitter may not conspire and act jointly with a state actor and then claim its status as a private entity shields it from liability under § 1983.

STATEMENT OF FACTS

Defendant Twitter is a social networking service with roughly 330 million monthly active users. Compl. ¶ 17. Twitter serves as the primary social platform for political commentary in the United States. Compl. ¶ 90. Mr. O’Handley is a licensed attorney and political commentator who utilized Twitter to communicate with his audience. Compl. ¶ 70. At its zenith, over 440,000 Twitter users followed Mr. O’Handley’s account. Compl. ¶ 92.

In the lead-up to the 2020 presidential election, Twitter established the “Partner Support Portal” (hereafter, the “Portal”), a dedicated reporting mechanism that enabled government officials, their agents, and other select entities to “flag speech” deemed misinformation “directly to Twitter” for removal and have their requests “bumped to the head of the queue.” Compl. ¶¶ 27-31. As a participant

1 in the Portal, the California Secretary of State, through its Office of Elections Cybersecurity (“OEC”),
 2 “worked closely and proactively” with Twitter to identify expressions of disfavored political speech
 3 for removal or suppression. Compl. ¶¶ 25, 32. As demonstrated through emails exchanged between
 4 Twitter and OEC, and the existence of the dedicated portal itself, Twitter placed a high priority on
 5 OEC’s requests for censorship, taking action on the OEC’s censorship recommendations 98% of the
 6 time. Compl. ¶¶ 33-35, 64.

7 On November 12, 2020, Mr. O’Handley tweeted, “Audit every California ballot[.] Election
 8 fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect the
 9 integrity of that state’s elections[.]” Compl. ¶ 72. Twitter took no action against Mr. O’Handley’s
 10 expression of opinion—that is, until OEC flagged it on November 12, 2021. Compl. ¶¶ 72-77. On
 11 November 17th, Twitter appended commentary to Mr. O’Handley’s tweet, asserting that his “claim”
 12 was “disputed.” Compl. ¶¶ 76-81. Twitter also assessed a “strike” against his account. *Id.* Under
 13 Twitter’s strike system, each strike results in progressive penalties, and an account that incurs five
 14 strikes is removed. Compl. ¶ 79-80.

15 Prior to OEC directing Twitter to suppress Mr. O’Handley’s tweet, Twitter had never taken
 16 disciplinary action against Mr. O’Handley’s account. Compl. ¶ 81. After the OEC identified him to
 17 Twitter as a target of its “partnership,” however, Twitter began to apply a demonstrably heightened
 18 level of scrutiny to Mr. O’Handley’s Twitter activity. Compl. ¶¶ 81-87. Consequently, between January
 19 and February of 2021, Twitter assessed four strikes against Mr. O’Handley’s account for tweets
 20 expressing innocuous political opinions. Compl. ¶¶ 84-87. On February 22, 2021, Twitter completed
 21 the process instigated by OEC’s direction to suppress Mr. O’Handley’s political speech, by
 22 permanently suspending his account. Compl. ¶¶ 87-89. Mr. O’Handley’s final post—which resulted in
 23 his fifth strike and ban from the site—consisted of a photograph of the U.S. Capitol with the caption,
 24 “Most votes in American history.” Compl. ¶ 87. Twitter has not said whether it considers that claim
 25 published by Mr. O’Handley to have been “false,” “fraudulent,” or both.

LEGAL STANDARDS

26
 27 To survive a Rule 12(b)(6) motion, a complaint must plead “enough facts to state a claim to
 28 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim

1 is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable
 2 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 3 (2009). When evaluating a Rule 12(b)(6) motion, the court “must presume all factual allegations of the
 4 complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” *Usher v. City*
 5 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

6 ARGUMENT

7 **I. Twitter’s “partnership” with the OEC, including creating a dedicated portal to** 8 **facilitate OEC’s speech censorship and a 98% takedown rate of success, made** 9 **Twitter a joint actor with OEC.**

10 “[M]ost rights secured by the Constitution are protected only against infringement by
 11 governments”; therefore, “the conduct allegedly causing the deprivation of a federal right [must] be
 12 fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (internal
 13 citation omitted). “The ultimate issue . . . is [whether] the alleged infringement of federal rights [is]
 14 attributable to the government.” *Pasadena Republican Club v. W. Just, Ctr.*, 985 F.3d 1161, 1167 (9th
 15 Cir. 2021). Yet “private behavior” may be treated as state action “if there is such a close nexus between
 16 the State and the challenged action that seemingly private behavior may be fairly treated as that of the
 17 State itself.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2000)
 18 (cleaned up). *Lugar* sets forth a two-part test to resolve the question of “fair attribution.” 457 U.S. at
 19 937. First, “the deprivation must be caused by the exercise of some right or privilege created by the
 20 State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.” *Id.*
 21 Second, “the party charged with the deprivation must be a person who may be fairly said to be a state
 22 actor.” *Id.*

23 Twitter does not contest, and therefore concedes, that Mr. O’Handley’s claims meet *Lugar*’s
 24 first prong—*i.e.*, that the deprivation at issue here was made “with the knowledge of and pursuant to
 25 state statute,” specifically, California Elections Code § 10.5. *American Mfrs. Mut. Ins. Co. v. Sullivan*,
 26 526 U.S. 40, 50 (1999) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970)). Instead,
 27 Twitter takes issue with *Lugar*’s second prong, arguing that it cannot be fairly described as a state actor.
 28 This Circuit utilizes four tests to determine if a private party is a state actor: 1) the “public function”

1 test, 2) the “state compulsion” test, 3) the “nexus” test, and 4) the “joint action” test. *Lugar*, 457 U.S. at
 2 939; *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). Twitter makes just a
 3 single reference to *Lugar* (ECF No. 60 7:11-12), however, and never engages with the on point and
 4 relevant case law that establish it as a state actor in this circumstance.

5 **II. Twitter is fairly described as a state actor because of its undisputed “partnership”**
 6 **with the OEC to censor disfavored speech.**

7 A plaintiff successfully pleads state action by alleging that state officials and private actors
 8 jointly “acted in concert in effecting a particular deprivation of constitutional rights.” *Tsao v. Desert*
 9 *Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). It is a “well-accepted principle that a private party’s
 10 joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party
 11 responsible as a governmental actor.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840
 12 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941). A plaintiff may establish a conspiracy by alleging a
 13 defendant was a “willful participant” in “an agreement or meeting of the minds to violate constitutional
 14 rights” and that an actual deprivation of rights resulted from that agreement. *Dennis v. Sparks*, 449
 15 U.S. 24, 27-28 (1980); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). Participants need not know
 16 “exact details of the plan,” and must only share “the common objective of the conspiracy.” *Franklin*,
 17 312 F.3d at 441. Agreement may be inferred on the basis of circumstantial evidence. *Mendocino Env’tl*
 18 *Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999).

19 Allegations that defendants committed acts that “are unlikely to have been undertaken without
 20 an agreement” support the inference of conspiracy. *Id.* “Whether defendants were involved in an
 21 unlawful conspiracy is generally a factual issue and should be resolved by the jury, so long as . . . the
 22 jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and thus
 23 reached an understanding to achieve the conspiracy's objectives.” *Id.* at 1302 (cleaned up). Once a
 24 conspiracy to violate constitutional rights is established, all conspirators may be held liable for the
 25 reasonably foreseeable acts of co-conspirators. *Pinkerton v. U.S.*, 328 U.S. 640, 645 (1946); *Proffitt v.*
 26 *Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (“As a conspirator, the citizen is liable, in civil as in
 27 criminal law, for the wrongful acts of the other conspirators committed within the scope of the
 28 conspiracy.”). And even without evidence of a conspiracy, “[j]oint action exists where the government

1 affirms, authorizes, encourages, or facilitates unconstitutional conduct.” *Noako Ohno v. Yuko Yasuma*,
2 723 F.3d 984, 995 (9th Cir. 2013).

3 The pleadings, taken as true, contain ample allegations to plausibly establish the existence of
4 joint action for the purposes of a 12(b)(6) motion. Twitter was a willful participant in OEC’s mission
5 and was entwined with, interdependent with, cooperated with, and conspired with OEC and the other
6 Defendants. OEC cultivated a “close working relationship” with social media companies, including
7 Twitter. Compl. ¶¶ 24-25, Ex. 2. As OEC explained, “[O]ur priority is working closely with social
8 media companies to be proactive so when there’s a source of misinformation, *we* can contain it” and
9 “take down sources of misinformation as needed.” *Id.* (emphasis added). Twitter created “direct
10 channels of communication” for the OEC to report speech it deemed “misinformation,” and far from
11 being treated just like any other member of the public, OEC censorship reports were “bumped to the
12 head of the queue” with a 98% takedown success rate. Compl. ¶ 29, Ex. 3.

13 The interconnectedness of the OEC and Twitter is further demonstrated by an email exchange
14 between Defendant Sam Mahood and Twitter employee Kevin Kane on December 30, 2019. Mahood
15 “flagged” a tweet to Kane and said: “We would like this tweet taken down ASAP to avoid the spread
16 of election misinformation. Please let us know if there is anything else we can do to facilitate this
17 request.” Compl. ¶ 34. Mahood sent his email at 9:05 PM, and Kane responded before 8:00 AM the
18 next morning, which was New Year’s Eve: “*Thank you for reporting, this Tweet has been removed.*
19 *Please don’t hesitate to contact me if there is anything else we can do.*” Compl. ¶ 35 (emphasis added).
20 As efficient as this process was—the OEC spoke, and Twitter nearly immediately made it so—over the
21 next eleven months, OEC officials and NASS worked with Twitter to streamline their speech takedown
22 processes through the dedicated Twitter Portal. Compl. ¶ 36.

23 While Twitter urges, in its papers, that it has always acted independently, only “sometimes”
24 acquiescing to the OEC’s censorship requests, Defendant Padilla painted a much different picture when
25 he said that, in the 2020 election cycle, the OEC “discovered nearly 300 erroneous or misleading social
26 media posts that were identified and forward to Facebook and Twitter to review and *98 percent of those*
27 *posts were promptly removed.*” Compl. ¶ 64 (emphasis added). Indeed, there is no record of any system
28 used by Twitter for confirming, independently, that OEC-flagged posts were in fact “erroneous or

1 misleading.” This was, as Defendant Padilla described their relationship, a “partnership” in censorship.
2 Compl. ¶ 65.

3 Thus in November 2020 the OEC used the Twitter Portal to report one of Mr. O’Handley’s
4 tweets to its “partner” Twitter. The system worked as designed and OEC’s request to censor Mr.
5 O’Handley’s speech jumped to the “head of the queue.” Compl. ¶¶ 65–65, 74-80. Twitter understood
6 its role, and, as it did 98% of the time, it censored the tweet and, eventually, Mr. O’Handley entirely.
7 *Id.* On these facts, Mr. O’Handley has provided detailed, plausible allegations by which “the jury can
8 infer . . . that the alleged conspirators had a meeting of the minds and thus reached an understanding to
9 achieve the conspiracy’s objectives.” *Mendocino Env’tl Ctr.*, 192 F.3d at 1301.

10 **A. Twitter’s citation of inapplicable and distinguishable case law does not negate its role**
11 **as a state actor under the *Lugar* factors.**

12 It is telling that, to avoid the obvious conclusion that it was working hand in glove with the OEC
13 to censor Mr. O’Handley, Twitter would prefer that the Court view it as a criminal witness or
14 informant¹—as if it were a crime for Mr. O’Handley to express his opinion. The analogy is not merely
15 strained; it is inapposite, as are the cases Twitter relies on, because the allegations here demonstrate that
16 Twitter was a willing private actor that partnered with the OEC to censor speech.

17 Two additional authorities cited by Twitter are similarly inapposite. In *Deitrich v. John*
18 *Ascugua’s Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) (ECF No. 60 9:26-27), the court held that
19 defendants who complained about political activity at their permitted event were not state actors because
20 “merely complaining to the police does not convert a private party into a state actor.” Likewise, *Deeths*
21 *v. Lucile Slater Packard Children’s Hosp. at Stanford*, No. 1:12-CV-02096-LJO, 2013 WL 6185175,
22 *10 (E.D. Cal. Nov. 26, 2013) (ECF No. 60 9:3-14), held that supplying information to social workers

23 _____
24 ¹ ECF No. 60 7:13-14 (citing *Franklin*, 312 F.3d 423 (no state action against a daughter who witnessed
25 a father murder a friend)); 7:14-15, 10:1-21, 12:7 (citing *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498
26 (9th Cir. 1996) (no state action against a private company who permitted a sting operation at its
27 facility because the government had no input on the company’s decision to fire an employee)); 7:21-
28 23 (citing *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989) (a prison guard deciding not to testify in a
criminal proceeding is not a state action)); 7:23-24, 12:20 (citing *Fonda v. Gray*, 707, 707 F.2d 435
(9th Cir. 1983) (a bank permitting government investigators to review bank records is not state
action)); 8:19-21 (citing *Lockhead v. Weinstein*, 24 F. App’x 80 (9th Cir. 2001) (a criminal witness’
testimony is not state action even if she is lying)).

1 is not state action. Mr. O’Handley’s allegations go far beyond merely providing information for
2 government investigations or prosecutions, however. Indeed, Twitter has the analogy backwards.

3 The allegation is not that Twitter complained to the police or cooperated by giving information
4 to social workers so authorities could take appropriate action. Here it was *the government going to*
5 *Twitter so Twitter could take “appropriate” (albeit unconstitutional) action as if it were the government*
6 *itself*. And Twitter was far from passive in this process. Besides emailing the OEC and offering its
7 services as needed, Twitter enabled the Twitter Portal and ensured that the OEC and other government
8 agencies received priority action on their censorship targets. Mr. O’Handley has more than adequately
9 alleged that Twitter acted in concert and conspired with a state agency to censor speech.

10 Twitter’s reliance on *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D.
11 Cal. 2020) (“*FAN*”), does not help it either. ECF No. 60 8:24-9:2. There, a Russian organization’s
12 online content was suppressed by Facebook, which ultimately shut the account down. *Id.* at 1113. There,
13 again, however, “Facebook [was] providing information to Special Counsel,” *id.*, not the other way
14 around. That decision turned on the fact that “Plaintiffs [made] no allegations that the federal
15 government or a state government had any involvement in Facebook’s removal of [the organization’s]
16 profile, page, and content.” *Id.* at 1121. Here, by contrast, Mr. O’Handley has alleged OEC *did* have
17 involvement in Twitter’s censorship of his speech. Additionally, in *FAN*, all government involvement
18 “post-date[d] the relevant conduct that allegedly injured Plaintiffs.” *Id.* at 1125. Here, the conduct pre-
19 dated the deprivation. *Compare* Compl. ¶¶ 28-29 with Compl. ¶ 76.

20 *Children’s Health Def. v. Facebook, Inc.*, No. 20-cv-05787-SI, 2021 WL 2662064 (N.D. Cal.
21 June 29, 2021) suffers a similar defect. ECF No. 60 11:27-12:7. There, Facebook took steps to censor
22 online content related to vaccines by placing information labels over disputed content, disabling the
23 content creator’s ability to dispute actions taken by Facebook, shadow-banning the organization, and
24 disabling its donation portal. *Id.* at *4-5. The court found the plaintiff’s vague claims of cooperation and
25 a letter from a member of Congress sent *after* Facebook had already started censoring the content were
26 not sufficient to establish joint action. *Id.* at *12. In contrast, the state presence here is not a single
27 Congressman, but an entire state agency, and an extensive paper trail establishes the symbiotic
28 relationship between the parties. Far from amorphous claims of cooperation or acquiescence, Mr.

1 O’Handley has provided evidence of direct communication from OEC to Twitter requesting speech
 2 censorship, and immediate action pursuant thereto. Additionally, Twitter’s adverse actions taken against
 3 Mr. O’Handley occurred after OEC and NASS had set up the portal with Twitter for the purposes of
 4 reporting speech, and after a specific report *about* Mr. O’Handley’s speech. *Compare* Compl. ¶¶ 28-29;
 5 Ex. 2 *with* Compl. ¶¶ 74-78. Here, the causation is direct, not attenuated.

6 Finally, the circumstances here are distinguishable from the other internet company cases
 7 referenced in Twitter’s Memorandum in which there is nothing like the coordination with a government
 8 agency alleged and documented here. In *Prager University v. Google LLC*, 951 F.3d 991, 997-98 (9th
 9 Cir. 2020), Prager University tried to establish its claim under the public function test, not the joint
 10 action or nexus tests. In *Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000), the plaintiffs argued that
 11 AOL was a public utility. And in *Kim v. Apple, Inc.*, No. 14-1034 (ABJ), 2014 WL 3056136 (D.D.C.
 12 July 7, 2014), the *pro se* litigant’s complaint did not even mention the government and was dismissed
 13 *sua sponte*. In contrast, here Mr. O’Handley has plausibly alleged that Twitter acted jointly and with
 14 such a close nexus with government that it was a state actor.

15 **III. Mr. O’Handley has alleged plausible facts to support all his federal claims.**

16 In what might fairly be called a drive-by footnote at ECF No. 60, 14:19-20, Twitter attempts to
 17 dispense with most of Mr. O’Handley’s § 1983 claims with one sentence arguments.² These arguments
 18 are each unavailing.

19 Twitter purports to dispose of Mr. O’Handley’s due process claim by asserting that he has no
 20 “protected property interest in pursuing a career as a social-media influencer or in using Twitter for his
 21 business.” *Id.* Mr. O’Handley, however, was deprived of both property *and* liberty interests without a
 22 hearing. The “right to pursue an occupation” is a recognized liberty or property interest subject to due
 23 process rights. *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989). “A protected property
 24 interest is present where an individual has a reasonable expectation of entitlement deriving from existing
 25 rules.” *Wedges/Ledges of Cal., Inc. v. Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (cleaned up). And
 26 in California, the “good will of a business” is a recognized property interest. Cal Bus & Prof. Code §

27 _____
 28 ² Twitter does not argue that Mr. O’Handley’s First Amendment claims lack merit in the event this
 Court deems it a state actor.

1 14102. Mr. O’Handley had a right to pursue his occupation, and entitlement deriving from existing rules
2 from which he derived an occupational benefit, including business goodwill. Compl. ¶¶ 94, 150. There
3 are no grounds to establish a different rule for people who make their livings using social media. Indeed,
4 “social media is becoming so influential that being a social media influencer is now a profession.”
5 *Godwin v. Facebook, Inc.*, 160 N.E.3d 372, 387 (Ohio. Ct. App. 8th 2020).

6 With regard to liberty interests, “[w]hen a State would directly impinge upon interests in free
7 speech” the Supreme Court has “held that opportunity for a fair adversary hearing must precede the
8 action, whether or not the speech or press interest is clearly protected under substantive First
9 Amendment standards.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972). That
10 includes suppressing content. *Id.* Defendants impinged on Mr. O’Handley’s free speech interests
11 without a hearing in violation of due process. Compl. ¶¶ 149–158.

12 Mr. O’Handley seeks relief under the Equal Protection Clause based upon his classification as
13 a conservative, as Defendants focused “their censorship efforts on conservative requests for
14 transparency in election processes rather than the same calls from self-identified political liberals.”
15 Compl. ¶ 83. “In an equal protection claim based upon selective enforcement of the law, a plaintiff can
16 show that a defendant’s alleged rational basis for his acts is a pretext for an impermissible motive.”
17 *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007). On a motion to dismiss, a court
18 is not required “to accept [Defendants’] explanation” for differential treatment. *Id.* at 583, 590. Rather,
19 the court must determine whether there is a rational basis for the distinction alleged by the plaintiff. *Id.*
20 at 590. Here, there is no rational basis for Defendants’ censorship of conservatives but not liberals
21 making almost identical claims regarding election administration concerns.

22 Twitter states that, in a number of judicial circuits, “allegations that a plaintiff was treated
23 differently in retaliation for the exercise of First Amendment rights do not implicate the Equal Protection
24 Clause.” ECF No. 60 14:25-28 n.3 (*quoting AIDS Healthcare Found. v. Los Angeles Cnty.*, No. CV 12-
25 10400 PA (ARGx), 2013 WL 12134048, *8 (C.D. Cal. Mar. 18, 2013)). “At least twice,” however, “the
26 Supreme Court has analyzed speech-based equal protection claims that were coupled with First
27 Amendment Claims without suggesting that the claims’ common analytical predicate foreclosed one
28

1 claim or the other.” *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012) (citations
2 omitted). This Court should not follow the Central District’s lead down the wrong path.

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

4 The elements of a § 1985(3) conspiracy under are: (1) a conspiracy; (2) “for the purpose of
5 depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges
6 and immunities under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation of rights.
7 *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 502 (9th Cir. 1979) (quoting *Griffin v. Breckenridge*,
8 403 U.S. 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action, § 1985(3)
9 extends to purely private action as long as one co-conspirator is a state actor. *Pasadena Republican*
10 *Club*, 985 F.3d at 1171. Here, Twitter argues that Mr. O’Handley’s § 1985(3) claim should be
11 dismissed because the Complaint does not allege (1) the existence of a conspiracy or (2) “class-based”
12 treatment. Both of these arguments are mistaken.

13 First, Mr. O’Handley has alleged and shown the existence of a conspiracy, *see* Section II B 1, and
14 the standard for a conspiracy under § 1985(3) is the same as under § 1983. *Compare Scott v. Ross*,
15 140 F.3d 1275, 1284-85 (9th Cir. 1998) with *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir.
16 2010). Thus, Mr. O’Handley has also alleged a conspiracy under § 1985(3).

17 Second, Mr. O’Handley has alleged the conspiracy at issue here was motivated by “class-based”
18 animus against conservative political views. Compl. ¶ 83. A plaintiff satisfies the “class-based”
19 requirement if either: (1) “the courts have designated the class in question a suspect or quasi-suspect
20 classification requiring more exacting scrutiny” or (2) “Congress has indicated through legislation that
21 the class required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).
22 Both criteria are met here. While the Ninth Circuit has not yet ruled on the question of whether political
23 affiliation is a suspect or quasi-suspect class in general,³ it has determined that allegations of
24

25 ³ Other courts have concluded that political affiliation is a suspect class. *See Abcarian v. McDonald*,
26 617 F.3d 931, 938 (7th Cir. 2010) (“political affiliation” is a suspect classification). Moreover, the
27 Supreme Court has both stated in dicta that political affiliation is a suspect class, *see Am. Sugar-Ref.*
28 *Co. v. State of Louisiana*, 179 U.S. 89, 92 (1900) (noting that discrimination based on “political
affiliations” would be “a denial of the equal protection of the laws”), and held that it is protected in
certain settings, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (holding that
government employers may not “condition [] hiring decisions on political belief”); *Fusaro v. Cogan*,

1 discrimination on the basis of political affiliation require the same “exacting scrutiny” required to meet
 2 the “class-based” discrimination requirement of § 1985(3). *Reichardt*, 591 F.2d at 505. In *Reichardt*,
 3 the Circuit observed that discrimination based on plaintiffs’ status as either (1) “political opponents”
 4 of defendants or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to
 5 state a claim under § 1985(3). *Id.* This observation is in line with numerous other courts, which have
 6 held that political affiliation satisfies the “class-based” requirement under § 1985(3).⁴ Here, Mr.
 7 O’Handley alleges that Defendants conspired to deprive him his constitutional rights based on his
 8 conservative beliefs. Under *Reichardt*, this is sufficient to allege “class-based” treatment.

9 Moreover, Congress has “indicated through legislation” that political affiliation requires “special
 10 protection” through scores of statutes that designate political affiliation as a protected class in a variety
 11 of settings.⁵ *Sever*, 978 F.2d at 1536. These and other laws demonstrate that discrimination on the basis
 12 of political affiliation is sufficient to state a claim under § 1985(3). *Id.*

13
 14 930 F.3d 241, 261 (4th Cir. 2019) (“[A]n election regulation that plausibly burdens First Amendment
 15 rights on the basis of viewpoint, political affiliation, or class should be subject to strict scrutiny.”).

16 ⁴ See, e.g., *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination on the
 17 basis of “political beliefs or associations” is covered under § 1985(3)); *Galloway v. Louisiana*, 817
 18 F.2d 1154, 1159 (5th Cir. 1987) (same); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (same);
 19 *Keating v. Carey*, 706 F.2d 377, 386-88 (7th Cir. 1983) (“Republicans are a protected class” under §
 20 1985(3)); *Means v. Wilson*, 522 F.2d 833, 836 (8th Cir. 1975) (§ 1985(3) claim available for
 21 allegations of discrimination against political opponents); *Cameron v. Brock*, 473 F.2d 608, 610 (6th
 22 Cir. 1973); (discrimination against “supporters of a political candidate” is covered under § 1985(3));
 23 *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (§ 1985(3) claim available for
 24 allegations of discrimination on the grounds of political opinion), *overruled on other grounds by Bible*
 25 *Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 236 (6th Cir. 2015).

26 ⁵ See, e.g., 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation” in
 27 personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his life
 28 or freedom would be threatened based on “political opinion”); 18 U.S.C. § 227 (prohibiting
 government employees from influencing private employment decision based on “political
 affiliation”); 20 U.S.C. § 1232h(b) (providing that students shall not be requiring to disclose their or
 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
 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 Twitter cites *Schultz v. Sundburg* and *Dodge v. Evergreen Sch. Dist. No. 114* in support of its
 2 argument, but neither of these cases support dismissal. In *Schultz*, the Ninth Circuit held that
 3 discrimination against a “transitory coalition of state representatives” was insufficient to demonstrate
 4 “class-based” discrimination “[b]ecause there has not been any governmental determination that such
 5 a class merits special protection.” 759 F.2d 714, 718 (9th Cir. 1985). Similarly, in *Dodge*, the plaintiff
 6 framed his “class-based” allegations in terms of discrimination against “MAGA supporters,” and he
 7 “identifie[d] no congressional statutes or court decisions extending federal protection to this group.”
 8 No. 3:20-CV-05224-RBL, 2020 WL 4366054, at *5 (W.D. Wash. July 30, 2020). Here, by contrast,
 9 Mr. O’Handley has identified both case law and Congressional enactments that demonstrate allegations
 10 of discrimination based on “political affiliation” are sufficient under § 1985(3).

11 **V. Twitter’s actions violate California’s Liberty of Speech Clause**

12 The Liberty of Speech Clause of the California Constitution protects the right of every person to
 13 “freely speak, write and publish his or her sentiments on all subjects.” Calif. Const. art. 1 § 2(a). This
 14 clause “grants broader rights to free expression than does the First Amendment to the United States
 15 Constitution.” *Fashion Valley Mall, LLC v. Nat’l Labor Relations Bd.*, 42 Cal. 4th 850, 857 (Cal. 2007).
 16 Specifically, as relevant here, under the Liberty of Speech Clause, “private property can constitute a
 17 public forum for free speech if it is open to the public in a manner similar to that of public streets and
 18 sidewalks.” *Id.* at 858. Indeed, “[t]he more an owner, for his advantage, opens up his property for use
 19 by the public in general, the more do his rights become circumscribed by the statutory and constitutional
 20 rights of those who use it.” *Id.* at 858-59 (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)).

21 The seminal case involving the application of this doctrine is *Robins v. Pruneyard Shopping*
 22 *Center*, where the California Supreme Court held that a privately owned shopping mall was a public
 23 forum under the Liberty of Speech Clause. 23 Cal.3d 899, 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub*
 24 *nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”). In so holding, the
 25 Court took note of “the growing importance of the shopping center” to civic life and public discourse.
 26 *Id.* at 907 and n.5; *see also Fashion Valley*, 42 Cal. 4th at 858.⁶ In evaluating whether private property

27 _____
 28 ⁶ Twitter cites to the California Supreme Court’s plurality decision in *Golden Gateway Ctr. v. Golden Gateway Tenants Association* in support of its argument that “state action” is required under the Liberty of Speech Clause. 26 Cal. 4th. 1013, 1017-1035 (Cal. 2001). However, only three Justices in

1 is subject to the Liberty of Speech Clause, California courts evaluate three factors: “the nature, purpose,
 2 and primary use of the property; the extent and nature of the public invitation to use the property; and
 3 the relationship between the ideas sought to be presented and the purpose of the property's occupants.”
 4 *Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App. 5th 649, 664 (Ct. App. 2019), *review denied*
 5 (Sept. 25, 2019) (stating that “private shopping malls . . . do not represent the outer limits of private
 6 property that may be subject to [the Liberty of Speech Clause]”). Applying these factors here leads
 7 inescapably to the conclusion that Twitter is a public forum under California law.

8 Indeed, just as shopping malls were when *Pruneyard I* was decided in 1979, Twitter is today
 9 “the functional equivalent of a public forum.” *Id.* As the United States Supreme Court recently
 10 observed, “[w]hile in the past there may have been difficulty in identifying the most important places .
 11 . . for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in
 12 particular.” *Packingham*, 137 S. Ct. at 1735. In short, Twitter is at least as important to public discourse
 13 today as shopping centers were in 1979, and likely much more so. While common areas in a shopping
 14 center are incidental its primary purpose of housing retail stores, for example, Twitter’s sole purpose is
 15 hosting public discourse. Indeed, the “extent and nature of the public invitation to use” Twitter’s
 16 platform also counsels in favor of a holding that it is a public forum under federal Constitutional law as
 17 well. *See, Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, No. 20 CIV. 7670 (CM), 2021
 18 WL 3173804, at *9 (S.D.N.Y. July 27, 2021) (noting that Twitter is “open to the public” at all times).

19 Certainly the Court should not be swayed by Twitter’s forecasted parade of horrors threatened
 20 by subjecting it to responsibility for acting as the government’s censorship enforcer. Even if Twitter is
 21 deemed a public forum under the Liberty of Speech Clause, it will simply be required to abide by the
 22 restraints limiting the regulation of speech that have applied to public fora for decades, rules that are

23 _____
 24 that case would have held that the Liberty of Speech Clause requires “state action.” *Id.* Further, prior
 25 to *Golden Gateway*, the California Supreme Court said that “state action” was not required under the
 26 Liberty of Speech Clause, *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (Cal. 2000)
 27 (observing that the Liberty of Speech Clause “runs against the world, including private parties as well
 28 as governmental actors”), and since that case was decided, no California Supreme Court case has held
 otherwise. In any event, to the extent the Liberty of Speech Clause requires “state action” (and it does
 not), “state action” is met when, as here, the property at issue is the “functional equivalent” of a
 shopping mall for speech purposes.

1 designed to foster speech, not suppress it. *Gathright v. City of Portland*, 439 F.3d 573, 578 (9th Cir.
2 2006) (“First Amendment jurisprudence is clear that the way to oppose [allegedly] offensive speech is
3 by more speech, not censorship, enforced silence or eviction from legitimately occupied public space.”).
4 This is entirely consistent with Twitter’s own acknowledged function as a forum for social discourse,
5 discussion and debate.

6 Constitutions are written to endure; to remain relevant, they must be interpreted in the context
7 of the technological advances society has produced. Modern shopping centers would have been
8 unfathomable to Californians in 1849, yet in *Pruneyard I* the California Supreme Court held—130 years
9 later—that the principles embodied in the Liberty of Speech Clause demanded that they be considered
10 places of free public expression. While no court has held that *Pruneyard I* applies to Twitter, no court
11 has held that *Pruneyard I* does *not* apply to Twitter either. Instead, it appears that no court has decided
12 the issue either way. In this situation, courts should be especially solicitous of individual rights. *See*
13 *Packingham*, 137 S. Ct. at 1736 (cautioning that that courts “must exercise extreme caution before
14 suggesting that the First Amendment provides scant protection for access to [the Internet]”). Indeed,
15 the California Supreme Court has tacitly acknowledged this fact in its statutory interpretation, *see, e.g.*,
16 *White v. Square, Inc.*, 7 Cal. 5th 1019, 1030 (2019) (websites are covered by the Unruh Civil Rights
17 Act); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) (websites are “public forums” under the anti-
18 SLAPP statute). It is but a small step now to hold, 40 years later, that these same principles apply to
19 what is indisputably the public forum of our digital age. This Court should follow suit and acknowledge
20 that Twitter is a public forum under California’s progressive Liberty of Speech Clause.⁷
21
22
23
24

25 ⁷ Under the Liberty of Speech Clause, content-based restrictions on speech are subject to strict
26 scrutiny, meaning that they are invalid unless the defendant can demonstrate that they are “necessary
27 to serve a compelling state interest” and “narrowly drawn to achieve that end.” *Fashion Valley*, 42
28 Cal. 4th at 865. Twitter’s actions against Mr. O’Handley—which were based on the viewpoint
expressed his tweets, (Compl. ¶¶ 72-88, 98-99, 114-116, 120)—do not satisfy strict scrutiny. Indeed,
Twitter does not argue otherwise.

1 **VI. Neither Twitter’s First Amendment Rights, nor any rights conferred by Section 230,**
 2 **have any application here.**

3 Twitter argues that Mr. O’Handley’s claims against it are barred by the First Amendment and §
 4 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1). Neither of these arguments has merit.

5 **A. Twitter has no cognizable First Amendment rights on the facts alleged here.**

6 Twitter argues that it has a First Amendment right to exclude users from its platform. But this is
 7 not a “deplatforming” case, and Mr. O’Handley has not asked this Court to order that his account be
 8 reinstated. *See* Compl. Prayer for Relief. Further, as shown in Section II, Twitter did not act as a private
 9 actor here, but a state actor, thereby choosing by its actions to limit its own First Amendment rights.
 10 *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that any “Constitutional rights of owners of
 11 [privately owned town]” must give way to the First Amendment rights of its citizens and visitors);⁸
 12 *Libin v. Town of Greenwich*, 625 F. Supp. 393, 396 (D. Conn. 1985) (“[A] state actor does not have a
 13 First Amendment right of free expression, at least in those situations in which such a right would conflict
 14 with the First Amendment rights of citizens.”).

15 In any event, any right Twitter may have to ban users is not grounded in a constitutional free
 16 speech right. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (“*FAIR*”), the Supreme
 17 Court held unanimously that private law schools had no First Amendment right not to allow campus
 18 access to military recruiters based on the law schools’ disagreement with the military’s “don’t ask don’t
 19 tell” policy. 547 U.S. 47, 70 (2006). The Court observed that the statute requiring access “regulates
 20 conduct, not speech.” *Id.* at 60. Here, too, Mr. Handley’s claims concern Twitter’s conduct, not its
 21 speech. Similarly, in *Pruneyard II*, the United States Supreme Court held that the California Supreme
 22 Court’s decision in *Pruneyard I* did not violate the shopping center owners’ First Amendment rights
 23 because the shopping center was “not limited to the personal use of [its owners]” but was instead “a
 24 business establishment that is open to the public.” 477 U.S. at 877. For this reason, “[t]he views
 25 expressed by members of the public . . . [would] not likely be identified with those of the owner.” *Id.*
 26 To the extent they could be, the owners were free to “expressly disavow any connection with the

27 ⁸ To be clear, Mr. O’Handley does not cite *Marsh* for the proposition that Twitter is a state actor.
 28 Instead, Mr. O’Handley cites *Marsh* for the proposition that, because Twitter is a state actor, any First
 Amendment rights it may otherwise have must give way to Mr. O’Handley’s First Amendment rights.

1 message by simply posting signs in the area where the speakers . . . stand.” *Id.*; see also *FAIR*, 547 U.S.
 2 at 60; *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059 (N.D. Cal. 2007) (requiring adoption
 3 website to host user does not “compel [the website owner] to say anything”). Moreover, hosting others’
 4 speech is not inherently expressive, and Twitter does not “speak” by that act any more than law schools
 5 “speak” through their recruiters or owners of shopping mall “speak” through their patrons. *FAIR*, 547
 6 U.S. at 63-64; *PruneYard II*, 477 U.S. at 87; *Butler*, 486 F. Supp. 2d at 1059 (“Simply ‘publishing’
 7 information written by [third parties by putting it on the internet] does not suffice to transform
 8 defendants’ . . . conduct into speech.” (cleaned up)); see also *Texas v. Johnson*, 491 U.S. 397, 404
 9 (1989) (First Amendment applies only to expressive conduct where “an intent to convey a *particularized*
 10 message was present” (emphasis added)).

11 Arguing otherwise, Twitter relies on a trio of Supreme Court cases—*Hurley v. Irish-American*
 12 *Gay, Lesbian and Bisexual Group of Boston, Incorporated*, *Pacific Gas & Electric Company v. Public*
 13 *Utilities Commission of California*, and *Miami Herald Publishing Company v. Tornillo*—each of which
 14 is distinguishable because the parties in those cases were conveying a message that would have been
 15 interfered with by the compelled hosting. Indeed, in *FAIR*, the Supreme Court distinguished each of
 16 these cases on precisely these grounds. 547 U.S. at 64. In short, “[t]he First Amendment’s command
 17 that government not impede the freedom of speech” does not preclude the government from taking steps
 18 to ensure that private entities do not “restrict, through physical control of a critical pathway of
 19 communication, the free flow of information and ideas.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.
 20 622, 657 (1994).⁹

21 Finally, Twitter should be careful what it wishes for here. As the Ninth Circuit recently held, “a
 22 website that creates or develops content by making a material contribution to its creation or development

23 ⁹ Twitter’s First Amendment argument is not salvaged by its citation to a smattering of lower court
 24 cases, each of which is easily distinguishable. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30
 25 (D. Del. 2007) (involving decision over what advertisements to run); *Zhang v. Baidu, Inc.*, 10 F. Supp.
 26 3d 433, 443 (S.D.N.Y. 2014) (holding results of internet search engine algorithm is protected speech);
 27 *La’Tierjira v. Facebook, Inc.*, 272 F. Supp. 2d 981, 991 (S.D. Tex. 2017) (discussing Texas anti-
 28 SLAPP law); *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, at *9 (N.D.
 Fla. June 30, 2021), *appeal filed sub. nom. NetChoice, LLC v. Att’y Gen.*, No. 21-12355 (11th Cir.
 July 13, 2021) (preliminarily enjoining sweeping Florida statute that contained various content-based
 prohibitions on social media websites).

1 loses § 230 immunity.” *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021) (internal quotes and
2 citations omitted). If indeed Twitter maintains that the process of banning users or content constitutes
3 expressive conduct, it is arguably putting forth a rationale for stripping it of any immunity under Section
4 230, which it nonetheless asserts as a defense below.

5 **B. Section 230(c)(1) has no application here.**

6 Twitter’s argument under § 230(c)(1) fares no better. Section 230(c)(1) states that “no provider
7 . . . of an interactive computer service [(hereinafter, “ICS”)] shall be treated as the publisher or speaker
8 of any information provided by another information content provider.” An “information content
9 provider” refers to the third party who is “responsible . . . for the creation or development of
10 information.” 47 U.S.C. § 230(f)(3).

11 As an initial matter, as the District Court for the Northern District of California recognized in
12 *FAN*, § 230 “does not immunize a defendant from constitutional claims.” 432 F. Supp. 3d at 1116; *see*
13 *also Mainstream Loudon v. Board of Trustees*, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998) (observing
14 same). *Cf. Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1162
15 (9th Cir.2008) (*en banc*) (applying § 230(c)(1) to claims under the Fair Housing Act). Moreover, §
16 230(c)(1) does not apply to claims “for declaratory and injunctive relief.” *Mainstream Loudon*, 2 F.
17 Supp. 2d at 790; *see also* 47 U.S.C. § 230(3)(e) (providing that § 230 creates immunity from “liability,”
18 not declaratory or injunctive relief). Accordingly, Mr. O’Handley’s claims for declaratory and
19 injunctive relief survive § 230(c)(1), regardless of the legal theory.

20 In any event, the facts here do not come within § 230(c)(1), which protects only attempts to
21 hold an ICS liable for claims arising from the publication of content by a third party. *Barnes v.*
22 *Yahoo!, Inc.*, supports this conclusion. In *Barnes*, the plaintiff sued Yahoo under a state law
23 negligence theory akin to defamation for failing to remove lewd photographs of her that her ex-
24 boyfriend had posted to Yahoo’s website. 570 F.3d 1096, 1099 (9th Cir. 2009). The Ninth Circuit
25 held that prevailing under § 230(c)(1) requires the existence of three elements: “(1) a provider . . . of
26 an [ICS] (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided
27 by another information content provider.” *Id.* at 1101-02 (emphasis added). As for the third element,
28 it was undisputed that the content at issue was provided by a third party to the claim by the plaintiff

1 against Yahoo—namely, the plaintiff’s ex-boyfriend. *Id.* at 1101. Accordingly, the Ninth Circuit
2 concluded that § 230(c)(1) applied. *Id.* at 1103.

3 Here, by contrast, the content at issue—O’Handley’s tweets—was not created by “another
4 content provider.” Instead, it was created by O’Handley himself. Accordingly, Twitter does not meet
5 the third element of the *Barnes* test. Unlike *Barnes*, which involved a claim by a user against an ICS
6 due to its handling of *third-party content*, O’Handley’s claim is a *first-party* claim—*i.e.*, a claim by
7 the originator of the content against the ICS. Section 230(c)(1) does not apply to first-party claims.

8 Twitter relies on *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094-1095
9 (N.D. Cal. 2015) (“*Sikhs*”), for the proposition that § 230(c)(1) applies to first-party claims, but *Sikhs*
10 is inapposite for several reasons.

11 First, the claim in *Sikhs* was statutory, not constitutional. Second, not only did *Barnes* involve
12 only third-party content, the Ninth Circuit took pains to specify that its holding pertained only to
13 “third party” claims. 570 F.3d at 1101 (“By its terms, . . . section (c)(1) only ensures that in certain
14 cases an [ICS] will not be treated as the speaker or publisher of *third-party content*[.]”); *id.* (“The
15 question before us is how to determine when, for purposes of this statute, a plaintiff’s theory of
16 liability would treat a defendant as a publisher or speaker of *third-party content*.”); *id.* at 1102 (“[A]
17 plaintiff cannot sue someone for publishing *third-party content* simply by changing the name of the
18 theory from defamation to negligence.” (emphasis added)); *id.* at 1105 (“Subsection (c)(1) . . . shields
19 from liability all publication decisions . . . with respect to content generated . . . by *third parties*.”).
20 The phrase “third party content” can refer to only one thing—content created by a third party in
21 relation to a claim by the plaintiff, and not the plaintiff himself. *See e-ventures Worldwide, LLC v.*
22 *Google, LLC*, No. 2:14-cv-646, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (interpreting *Barnes*
23 to provide that the content at issue must be created by “a different entity or person from either the
24 plaintiff or the [ICS]”); *see also Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct.
25 13, 14 (2020) (“*Malwarebytes II*”) (Thomas, J., concurring in the denial of certiorari) (observing that
26 “§ 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of *third-party*
27 content . . . simply by hosting . . . that content” (emphasis added)).
28

1 Third, interpreting § 230(c)(1) to apply to first-party content would be inconsistent with the
 2 background, text, and structure of § 230. Section 230(c)(1) was enacted to reverse the result in
 3 *Stratton Oakmont*, which held that an internet service provider was liable to the plaintiff for content
 4 posted by a third party. See *Roommates*, 521 F.3d at 1164. Interpreting § 230(c)(1) to apply to first-
 5 party content would stretch § 230(c)(1) far beyond its intended purpose. Moreover, a holding that the
 6 general immunity set forth in § 230(c)(1) applies to the removal of first-party content—despite the
 7 fact that § 230(c)(2)(A) specifically applies to the removal of content—would violate rule that, in
 8 statutory construction, the “specific governs the general.” *Long Island Care at Home, Ltd. v. Coke*,
 9 551 U.S. 158, 170 (2007). This is important because the immunity granted under § 230(c)(2)(A)
 10 requires a finding that the ICS acted in “good faith.” 47 U.S.C. § 230(c)(2)(A). Twitter’s overbroad
 11 interpretation of § 230(c)(1) would thus impermissibly result in the “good faith” requirement
 12 effectively being read out of the statute. *e-ventures*, 2017 WL 2210029, at *3 (“[I]nterpreting [§
 13 230(c)(1) to apply to first-party claims] results in the general immunity in (c)(1) swallowing the more
 14 specific immunity in (c)(2).”).¹⁰

15 //

16 To be sure, the Ninth Circuit has stated, in an unpublished opinion, that interpreting §
 17 230(c)(1) to apply to first-party content would not render § 230(c)(2)(A) superfluous because §
 18 230(c)(1) does not apply in the situation where the ICS itself “developed, [in whole or] in part, the
 19 content at issue” whereas § 230(c)(2)(A) does. *Fyk v. Facebook, Inc.*, 808 F. App’x 597, 598 (9th Cir.
 20 2020). This opinion is not binding, see *Pedroza v. BRB*, 624 F.3d 926, 931 (9th Cir. 2010) (holding
 21 that unpublished opinions are not precedential), and it is not persuasive either. When ICSs police
 22 their websites, they almost always remove harmful information created by their users, not themselves.
 23 It would be extremely odd for Congress to create two immunities—one in § 230(c)(1) and the other in
 24 § 230(c)(2)(A)—with different standards that apply to the exact same situation in the vast majority of
 25 instances. Moreover, a “good faith” requirement is only meaningful when an ICS removes content

26 _____
 27 ¹⁰ Twitter did not invoke the § 230(c)(2)(A) here, presumably because it recognizes that it cannot
 28 satisfy the “good faith” requirement. This Court should not interpret § 230 in such a manner that it
 gives Twitter a way out the back door when Congress has closed the front.

1 created by someone other than itself, but according to Twitter’s interpretation of § 230, an ICS could
 2 take advantage of § 230(c)(1)—thus avoiding the “good faith” requirement—in every case in which
 3 the removed content was created by a user, *which is the only situation in which the “good faith”*
 4 *requirement makes sense*. This absurd result simply cannot be the result Congress intended. *See*
 5 *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542–543 (1940) (“[I]nterpretations of
 6 a statute which would produce absurd results are to be avoided if alternative interpretations consistent
 7 with the legislative purpose are available.”).

8 Fourth, adopting Twitter’s overbroad interpretation of § 230(c)(1) would lead to other absurd
 9 results that Congress cannot possibly have intended. Assume, for example, that a Black Twitter user
 10 alleged that Twitter banned him from its platform because of his race. Twitter’s interpretation of §
 11 230(c)(1) would result in it being immunized for the race discrimination claim. *See, e.g., Sikhs*, 144
 12 F. Supp. 3d at 1094-1095 (concluding that § 230(c)(1) provided Facebook immunity from race
 13 discrimination claim). Such an overbroad result cannot possibly be what Congress intended in
 14 enacting § 230(c)(1). As Justice Thomas recently noted, “[b]efore giving companies immunity from
 15 civil claims for . . . race discrimination, [courts] should be certain that is what [§ 230(c)(1)]
 16 demands.” *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., concurring in the denial of certiorari).

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19 In sum, Mr. O’Handley’s claim has nothing to do with third-party content, and, for that reason,
 20 § 230(c)(1) does not apply here. ¹¹

21
 22 ¹¹ The second element of the *Barnes* test, which interpreted the phrase “publisher or speaker” in §
 23 230(c)(1) to mean “reviewing, editing, and deciding whether to publish or withdraw from publication
 24 third-party content,” has been harshly criticized on several grounds, including that the phrase should be
 25 interpreted to provide immunity when internet companies “unknowingly decline to exercise editorial
 26 functions” but not when they “decide to exercise those editorial functions.” *See, e.g., Malwarebytes II*,
 27 141 S. Ct. at 17-18 (Thomas, J., concurring in the denial of certiorari) (criticizing *Barnes* on this
 28 ground). Indeed, the Ninth Circuit in *Barnes* admitted that its interpretation of the phrase “publisher or
 speaker” might be incorrect, but it believed itself to be constrained by circuit precedent. *Barnes*, 570
 F.3d at 1105 n. 11. Although this Court is bound by *Barnes*, O’Handley contends that, based on the
 background, text, and structure of § 230, *Barnes* incorrectly interpreted the term “publisher or speaker”
 and that § 230(c)(1) does not apply where, like here, an internet company affirmatively removes content.
 O’Handley reserves the right to press that argument before the Ninth Circuit should the need arise.

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CONCLUSION

For the foregoing reasons, the Court should deny Twitter’s Motion to Dismiss. If the Court grants Twitter’s Motion in any part, O’Handley asks the Court for leave to amend to cure any pleading deficiencies.

DHILLON LAW GROUP INC.

Date: November 5, 2021

By: /s/ Harmeet K. Dhillon
HARMEET K. DHILLON (SBN: 207873)
harmeet@dhillonlaw.com
RONALD D. COLEMAN
(*pro hac vice* forthcoming)
rcoleman@dhillonlaw.com
KARIN M. SWEIGART (SBN: 247462)
ksweigart@dhillonlaw.com
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, CA 94108
Telephone: (415) 433-1700

MARK E. TRAMMELL
(*pro hac vice* forthcoming)
mtrammell@libertycenter.org
CENTER FOR AMERICAN LIBERTY
5100 Buckeystown Pike, Suite 250
Frederick, MD 21704
Telephone: (703) 687-6212

Attorneys for Plaintiff ROGAN O’HANDLEY

The Court need not reach this question here in order to rule in O’Handley’s favor. Even assuming *Barnes*’s interpretation of the phrase “publisher or speaker” in § 230(c)(1) was correct, that section does not apply here because, as noted in the text, O’Handley is making a first-party claim against Twitter based on its removal of content created by him, and § 230(c)(1) does not apply to first-part claims. O’Handley simply makes the argument to preserve it for appellate purposes.

