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

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

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

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

**PLAINTIFF’S OPPOSITION TO  
DEFENDANT TWITTER, INC.’S  
SPECIAL MOTION TO STRIKE  
COUNT II OF THE COMPLAINT  
[ECF 61]**

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



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**SUMMARY OF ARGUMENT**

1  
2 In a perverse inversion of California anti-SLAPP law, Twitter seeks to invoke anti-SLAPP to  
3 avoid liability for its role in a documented scheme to act, in concert with the State of California, to  
4 suppress the political speech of Plaintiff Rogan O’Handley and countless others. California’s anti-  
5 SLAPP statute, however, “embodies the public policy of *encouraging* participation in matters of public  
6 significance,” not excluding people from it. *Hailstone v. Martinez*, 169 Cal.App.4th 728, 738 (2008)  
7 (citation omitted) (emphasis added). The statute seeks to accomplish this aim by deterring lawsuits  
8 “brought primarily to chill the valid exercise of the constitutional rights of freedom of speech.” Cal.  
9 Civ. Proc. Code § 425.16(a). As set forth below, Mr. O’Handley’s state law claim under California’s  
10 Liberty of Speech Clause, Cal. Const., art. 1, § 2, does not even implicate—much less chill—Twitter’s  
11 right to free expression.

12 As an initial matter, the Court should not reach the merits of Twitter’s anti-SLAPP Motion  
13 because Twitter failed to file it within 60 days of being served the Complaint. *See* Cal. Code Civ. Proc.,  
14 § 425.16(f); *compare* ECF No. 17 *with* ECF No. 61. Despite missing its deadline by 42 days, Twitter  
15 filed its untimely Motion without requesting leave to do so and without providing an explanation for  
16 the delay. *Platypus Wear, Inc. v. Goldberg*, 166 Cal. App. 4th 772, 775 (2008) (stressing that courts  
17 should be wary of granting a party the right to file a late anti-SLAPP motion); *see Newport Harbor*  
18 *Ventures, LLC v. Morris Cerullo World Evangelism*, 4 Cal.5th 637, 645 (discussing the potential for  
19 abuse with a late filed anti-SLAPP). What’s more, the analytical premise of Twitter’s Motion is limited  
20 to whether Mr. O’Handley’s state constitutional claim satisfies the Rule 12(b)(6) pleading standard—  
21 giving rise to arguments that are entirely duplicative of Twitter’s concurrently-filed motion to dismiss.  
22 Twitter’s untimely and duplicative Motion does not further the purpose of the anti-SLAPP statute and  
23 should not be entertained by the Court.

24 Twitter fares no better on the merits. To satisfy its burden under anti-SLAPP’s first prong,  
25 Twitter must establish that Mr. O’Handley’s suit “arises from an act in furtherance of the defendant’s  
26 rights of petition or free speech.” *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1188  
27 (9th Cir. 2017). Twitter has not met its burden. The lynchpin of Mr. O’Handley’s claim is that Twitter  
28 censored and retaliated against him for his protected speech, eventually permanently suspending his

1 account and prohibiting Mr. O’Handley from engaging in political discussions with the hundreds of  
2 millions of other Twitter users. Twitter’s conduct—namely, silencing Mr. O’Handley at the request of  
3 the state and other actors—is not an act in furtherance of Twitter’s right of free speech. Indeed, it is not  
4 communicative or expressive at all. Twitter has not proffered any evidence or argument suggesting that  
5 it intended to convey any particular message by censoring Mr. O’Handley. Instead, Twitter relies on  
6 nebulous concerns about “democracy,” a public policy concern that is no way furthered by Twitter’s  
7 censorship actions. *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1570  
8 (2009) (holding that a dispute’s connection to “a broad and amorphous public interest” is not sufficient  
9 to warrant anti-SLAPP protection). Because Twitter failed to meet its *prima facie* burden, its Motion  
10 fails.

11 As discussed in greater detail in Mr. O’Handley’s currently filed opposition to Twitter’s motion  
12 to dismiss, there is no state action requirement under California’s Liberty of Speech Clause. *See*  
13 *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (2000). Even if there were, Twitter constitutes  
14 a state actor for purposes of the Liberty of Speech Clause because its platform is “freely and openly  
15 accessible to the public.” *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013,  
16 1033 (2001); *see also Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 905 (1979) (*Pruneyard I*),  
17 *aff’d*, 447 U.S. 74 (1980) (*Pruneyard II*). Twitter’s remaining arguments relying on the First  
18 Amendment to the U.S. Constitution and Section 230(c)(1) are no more persuasive. Mr. O’Handley’s  
19 claim simply does not arise from, and the relief he seeks would not affect, Twitter’s expressive  
20 activities, but rather Twitter’s surreptitious punishment and silencing of Mr. O’Handley.

21 Mr. O’Handley respectfully requests that the Court strike, or, alternatively, deny Twitter’s anti-  
22 SLAPP Motion. Pursuant to California Code of Civil Procedure Section 425.16(c)(1), Mr. O’Handley  
23 further requests that the Court award him attorney’s fees and costs incurred opposing Twitter’s  
24 frivolous Motion in an amount to be established, absent agreement of the parties, based on a subsequent  
25 motion that Mr. O’Handley may file within 14 days of the Court’s ruling.

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**RELEVANT BACKGROUND**

1  
2 As set forth in detail in Plaintiff Rogan O’Handley’s Complaint, this action arises from a  
3 concerted, joint effort by several state officials, including Defendant Alex Padilla, then California  
4 Secretary of State, and private entities, including Defendant Twitter, Inc., to suppress Mr. O’Handley’s  
5 political speech on Twitter. In 2018, California established the Office of Elections Cybersecurity  
6 (“OEC”) purportedly to “educate voters” with “valid information” concerning elections. Compl. ¶ 2;  
7 *see also* Cal. Elec. Code, § 10.5. Almost immediately, however, the OEC seized upon statutory  
8 language stating OEC could “counteract” “misinformation,” and began an unprecedented campaign of  
9 government speech censorship based entirely on the viewpoint expressed by the speaker. Following a  
10 closed-door, closed-bid process which garnered bi-partisan condemnation, the OEC partnered with  
11 Democrat partisan consulting firm, Defendant SKDKnickerbocker, LLC (“SKDK”), for the purpose of  
12 identifying political hit lists of disfavored speech—lists which, not coincidentally, also nearly  
13 exclusively supported the personal political ambitions of SKDK’s Democrat clients. Compl. ¶¶ 56-58.  
14 The State Defendants further entered a “partnership” with Twitter, creating a dedicated portal to  
15 streamline and “bump to the top of the queue” state requests to suppress politically disfavored speech.  
16 Twitter fulfilled these censorship instructions 98% of the time. Compl. ¶¶ 64.

17 In particular, on November 12, 2020, Mr. O’Handley, a lawyer and political commentator with  
18 a substantial and growing Twitter following, tweeted a public call to “Audit every California ballot /  
19 Election fraud is rampant nationwide and we all know California is one of the culprits / Do it to protect  
20 the integrity of that state’s elections.” Compl. ¶ 72. SKDK promptly flagged this seemingly innocuous  
21 opinion post as “disinformation.” Compl. ¶ 76. The State Defendants then labeled it as “election fraud”  
22 and “flagged” the post for Twitter, which in turn appended commentary asserting that Mr. O’Handley’s  
23 claim was “disputed,” and added a “strike” to Mr. O’Handley’s Twitter account status. Compl. ¶¶ 77-  
24 78.

25 Over the course of the next several weeks, through February 22, 2021, Mr. O’Handley  
26 continued to tweet his opinions about his election integrity concerns. Compl. ¶¶ 84-86. Now subjected  
27 to even closer scrutiny by Defendants, Mr. O’Handley’s tweets earned him four additional “strikes,”  
28 resulting in his permanent suspension from Twitter. Compl. ¶ 88. Mr. O’Handley’s final offending post

1 consisted of the words “[m]ost votes in American history” and a picture of the U.S. Capitol building.  
 2 Compl. ¶ 87. Twitter’s sole explanation for the suspension was that Mr. O’Handley purportedly  
 3 violated Twitter’s rules about “election integrity.” Compl. ¶ 88. It provided no explanation of how Mr.  
 4 O’Handley’s tweet—posted well after the 2020 election had been certified and a new President  
 5 installed—could conceivably manipulate or interfere with an election. Compl. ¶ 89.

6 On June 17, 2021, Mr. O’Handley filed his Complaint with the U.S. District Court, Central  
 7 District of California, alleging, *inter alia*, that Twitter violated his state law rights secured by the  
 8 California Constitution, Article 1, § 2(a). Also referred to as the “Liberty of Speech Clause,” this state  
 9 constitutional provision provides that “every person may freely speak, write and publish his or her  
 10 sentiments on all subjects.” Cal. Const. art. 1, § 2(a).<sup>1</sup> The action was transferred to this Court on  
 11 September 10, 2021, pursuant to the Parties’ stipulation. ECF No. 35.

## 12 **OBJECTIONS TO EVIDENCE<sup>2</sup>**

13 Mr. O’Handley objects to the Declaration of Thomas G. Sprankling in its entirety. ECF Nos.  
 14 61-1-61-7. Mr. O’Handley’s Complaint does not incorporate by reference, or refer at all to, Twitter’s  
 15 User Agreement or its January 12, 2021, public announcement. *Compare* ECF No. 1 *with* ECF Nos.  
 16 61-2; 61-6. While the Complaint refers in passing to Twitter’s “terms of service” and “civic integrity  
 17 policy,” they are not documents on which Mr. O’Handley’s Complaint “necessarily relies,” *Coto*

18 \_\_\_\_\_  
 19 <sup>1</sup> In an effort to simulate a claim by Mr. O’Handley that could possibly be construed as affecting its  
 20 own free speech rights, Twitter cynically construes Mr. O’Handley’s state law claim as encompassing  
 21 a challenge to “Twitter’s decisions to label Mr. O’Handley’s Tweets.” ECF No. 61. Mr. O’Handley’s  
 22 state law claim challenges only Twitter’s retaliatory actions against Mr. O’Handley for his expressive  
 23 activities on the platform, issuing strikes against him and ultimately banning him from the platform.  
 24 Compl. ¶ 134 (“Twitter, therefore, may not prohibit expressive activity which impinges on  
 25 constitutional rights.”).

26 <sup>2</sup> Twitter’s anti-SLAPP Motion urges only that Mr. O’Handley failed to satisfy Rule 12(b)(6) pleading  
 27 standard. ECF No. 4:9-11. Accordingly, Mr. O’Handley is neither required, nor permitted, to submit  
 28 evidence in opposition to the Motion. *Planned Parenthood Fed’n of America, Inc. v. Center for Med.*  
*Progress*, 890 F.3d 828, 834 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018); *Networks, Inc. v.*  
*Maddow*, 8 F.4th 1148, 1156 (9th Cir. 2021). To the extent the Court construes any portion of  
 Twitter’s Motion as a factual-based challenge, Mr. O’Handley requests an opportunity to conduct  
 related discovery. *See Planned Parenthood*, 890 F.3d at 834 (“discovery must be allowed, with  
 opportunities to supplement evidence based on the factual challenges, before any decision is made by  
 the court”).

1 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010), as is required for incorporation by  
 2 reference. Compl. ¶ 99 (“Twitter’s real reasons for suspending Mr. Mr. O’Handley *do not* stem from a  
 3 violation of Twitter’s terms of service....”). Accordingly, the Court should sustain this objection and  
 4 decline to consider these materials when ruling on Twitter’s Motion.

## 5 ARGUMENT

### 6 I. THE COURT SHOULD STRIKE TWITTER’S UNTIMELY ANTI-SLAPP MOTION.<sup>3</sup>

7 Twitter filed its anti-SLAPP Motion 42 days past its 60-day deadline of August 24, 2021—a  
 8 full 102 days after being served with the Complaint. *Compare* ECF No. 17 with ECF No. 61. California  
 9 law provides that “[a] party may not file an anti-SLAPP motion more than 60 days after the filing of  
 10 the complaint, unless the trial court affirmatively exercises its discretion to allow a late filing.”<sup>4</sup>  
 11 *Platypus*, 166 Cal. App. 4th at 775 (citing Cal. Code Civ. Proc., § 425.16(f)); *see also Olsen v.*  
 12 *Harbison*, 134 Cal. App. 4th 278, 286 (2005); *Kunysz v. Sandler*, 146 Cal. App. 4th 1540, 1543 (2007).  
 13 The purpose of the statutory deadline is to avoid “tactical manipulation” by a defendant attempting to  
 14 benefit from the delays that often attend anti-SLAPP proceedings. *Platypus*, 166 Cal. App. 4th at 783;  
 15 *see also Planned Parenthood Fed’n of Am.*, 890 F.3d at 832 (allowing interlocutory appeal).

16 While the court “enjoys considerable discretion in determining whether to allow [a] late filing  
 17 . . . [it] must exercise this discretion consistent with the purposes of the statute and must be mindful  
 18 that the 60–day deadline is the general rule.” *San Diegans for Open Gov’t v. Har Constr., Inc.*, 240 Cal.  
 19

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20 <sup>3</sup> California courts are encouraged to strike, rather than deny, untimely anti-SLAPP motions to prevent  
 21 the moving party from abusing its right to immediately appeal the order. *Hewlett-Packard Co. v.*  
 22 *Oracle Corp.*, 239 Cal. App. 4th 1174, 1187 (2015). This concern is equally valid in the federal arena.  
 23 *See Planned Parenthood*, 890 F.3d at 832. Accordingly, if this Court is inclined to reject Twitter’s  
 24 Motion as untimely, the Court should issue an order “striking” the Motion.

25 <sup>4</sup> Federal courts applying California law consistently enforce the 60-day deadline where, as here, a  
 26 defendant files a late anti-SLAPP motion challenging only the legal sufficiency of the plaintiff’s  
 27 claims. *Kendricks v. Collect Access, LLC*, No. 519CV01134ODWSHKX, 2021 WL 256802, at \*5  
 28 (C.D. Cal. Jan. 26, 2021) (denying motion as untimely); *Novel v. Los Angeles Cnty. Sheriff’s Dep’t et*  
*al.*, No. 219CV01922RGKAGR, 2020 WL 3884437, at \*2 (C.D. Cal. Mar. 30, 2020); *Sansoe v. Ford*  
*Motor Co.*, No. C 13-5043 PJH, 2014 WL 2215914, at \*4 (N.D. Cal. May 29, 2014), *aff’d*, 668 F.  
*App’x* 718 (9th Cir. 2016) (“Ford neither requested leave of court to file the motion after the 60 days  
 had elapsed, nor provided any persuasive justification in its moving papers for the late filing.”).

1 App. 4th 611, 624 (2015) (internal citations omitted); *Platypus*, 166 Cal. App. 4th at 775–76, 782–84,  
2 787 (A “trial court must be wary about freely granting a party the right to file an anti-SLAPP motion  
3 past the 60–day deadline.”). In determining whether to permit a late motion, “the most important  
4 consideration is whether the filing advances the anti-SLAPP statute’s purpose of examining the merits  
5 of covered lawsuits in the early stages of the proceedings.” *San Diegans for Open Gov’t*, 240 Cal. App.  
6 4th at 624; *see also Platypus*, 166 Cal. App. 4th at 775–76, 782–84, 787; *Chitsazzadeh v. Kramer &*  
7 *Kaslow*, 199 Cal. App. 4th 676, 682 (2011). Other relevant factors include the length of the delay, the  
8 reasons for the late filing, and any undue prejudice to the plaintiff. *San Diegans for Open Gov’t*, 240  
9 Cal. App. 4th at 624.

10 Here the Court should not permit Twitter to file its untimely Motion because doing so will not  
11 further the aims of California’s anti-SLAPP statute. As drafted, Twitter’s Motion does not actually “test  
12 the foundation” of Mr. O’Handley’s state law claim beyond that of a generic motion to dismiss under  
13 Rule 12(b)(6), which Twitter has also filed. ECF No. 61 5:9-11; ECF No. 60. Even in relation to the  
14 anti-SLAPP Motion, this Court must adhere to the standards governing federal pleadings in their  
15 entirety, including by permissively granting Mr. O’Handley leave to amend. *Verizon Delaware, Inc. v.*  
16 *Covad Commc’ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004); *see also Jiang v. KNTV Television LLC, et*  
17 *al.*, 21-cv-01293-LB, 2021 WL 4710717 (N.D. Cal. 2021). Any tactical manipulation that Twitter may  
18 hope to achieve with its untimely Motion runs contrary to established public policy and judicial  
19 prudence. *See Hewlett-Packard*, 239 Cal. App. 4th at 1186.

20 Twitter also did not request leave to file the Motion or offer any explanation for its delay.  
21 Significantly, Mr. O’Handley will likely be prejudiced by Twitter’s delayed filing. The Parties  
22 stipulated—at Twitter’s request—to transfer venue to this Court. ECF No. 33. Mr. O’Handley expressly  
23 refuted the veracity of Twitter’s venue arguments but nevertheless stipulated to the transfer. *Id.* He did  
24 so in light of Twitter’s lapsed deadline to file an anti-SLAPP motion and under the express belief that,  
25 following the transfer of the action to this Court, the Parties would agree upon and propose a schedule  
26 for the filing of “motions to dismiss the complaint,” not untimely special motions to strike. *Id.* Twitter  
27 requested and received two extensions to its 21-day deadline to respond to the Complaint. ECF Nos.  
28 17, 30. Neither stipulation contemplated a change to Twitter’s 60-day deadline under state law to move



1 to strike the Complaint. *See Sansoe*, 2014 WL 2215914, at \*4. Twitter’s subsequent attempt to file its  
 2 untimely Motion materially alters the Parties’ positions in a manner prejudicial, or potentially  
 3 prejudicial, to Mr. O’Handley.<sup>5</sup> The Court should therefore strike the Motion in its entirety.

4 **II. TWITTER FAILED TO MEET ITS BURDEN UNDER PRONG ONE OF THE ANTI-  
 5 SLAPP ANALYSIS.**

6 **A. Mr. O’Handley’s California constitutional claim does not arise from Twitter’s  
 7 protected speech.**

8 To prevail on an anti-SLAPP motion to strike, “the defendant must first make a prima facie  
 9 showing that the plaintiff’s suit arises from an act in furtherance of the defendant’s rights of petition or  
 10 free speech.” *Jordan-Benel*, 859 F.3d at 1188. An “act in furtherance” includes, among other things,  
 11 “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right  
 12 of free speech in connection with a public issue or an issue of public interest.” Cal. Code Civ. Proc. §  
 13 425.16(e)(4); ECF No. 61 5:1-3 (relying on the catchall subsection (e)(4)). Courts determine whether a  
 14 defendant has met this burden by asking two questions: (1) From what conduct does the claim arise?  
 15 and (2) Is that conduct in furtherance of the rights of petition or free speech?” *Jordan-Benel*, 859 F.3d  
 16 at 1190.

17 **1. Twitter’s actions to silence Mr. O’Handley give rise to Mr. O’Handley’s claim.**

18 For purposes of anti-SLAPP, “the conduct from which a claim arises is the conduct that  
 19 constitutes the specific act of wrongdoing challenged by the plaintiff.” *Jordan-Benel*, 859 F.3d at 1191;  
 20 *see also Renewable Res. Coal., Inc. v. Pebble Mines Corp.*, 218 Cal. App. 4th 384, 387 (2013) (“the  
 21 gravamen of an action is the allegedly wrongful and injury-producing conduct that provides the  
 22 foundation for the claims”). “Even if a defendant engages in free speech activity that is relevant to a  
 23 claim, that does not necessarily mean such activity is the basis for the claim.” *Jordan-Benel*, 859 F.3d  
 24 at 1190. California’s Supreme Court has explained, “that a cause of action arguably may have been  
 25 ‘triggered’ by protected activity does not entail that it is one arising from such . . . . [T]he critical

26 \_\_\_\_\_  
 27 <sup>5</sup> Plaintiff is unaware of any authority permitting a trial court to revive a lapsed, anti-SLAPP filing  
 28 deadline following a venue change. However, California state courts may, as a matter of discretion,  
 reset a still-pending deadline that had not lapsed prior the commencement of the venue change. *South  
 Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 653 (2011).

1 consideration is whether the cause of action is based on the defendant’s protected free speech . . .”  
2 *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002); *see also City of Cotati v. Cashman*, 29 Cal. 4th 69, 78  
3 (2002).

4 In *Jordan-Benel*, for example, the Ninth Circuit held that California’s anti-SLAPP statute did  
5 not apply to a contract claim involving the defendant movie studio’s production of *The Purge* films.  
6 859 F.3d at 1192-93. There, the plaintiff alleged that the defendant stole the plaintiff’s idea for the series  
7 without compensating the plaintiff, in breach of the parties’ implied contract. *Id.* at 1191. The defendant  
8 invoked California’s anti-SLAPP statute because the claim rested on the allegation that the defendant  
9 released cinematic productions, a canonical example of free expression. *Id.* at 1191. In ruling for the  
10 plaintiff, the Ninth Circuit concluded that the defendant’s alleged “specific act of wrongdoing” was a  
11 plain old failure to pay, not the defendant’s creation of the films. *Id.* In fact, the plaintiff “desperately  
12 wanted the film to be made.” *Id.* Accordingly, the anti-SLAPP statute did not apply to the plaintiff’s  
13 claim.

14 Here, Mr. O’Handley asserts a claim under Article 1, Section 2 of the California Constitution,  
15 which provides that “[e]very person may freely speak, write and publish his or her sentiments on all  
16 subjects . . .” Cal. Const. art. 1, §2(a). As relevant here, under the Liberty of Speech Clause, “private  
17 property can constitute a public forum for free speech if it is open to the public in a manner similar to  
18 that of public streets and sidewalks.” *Fashion Valley Mall, LLC v. National Labor Relations Bd.*, 42  
19 Cal. 4th 850, 858 (2007). In such circumstances, the owners’ rights “are held in subordination to the  
20 rights of society,” and the principles of free speech apply. *Pruneyard I*, 23 Cal. 3d at 906.

21 Given the nature of Mr. O’Handley’s claim, the wrongful conduct giving rise to Mr.  
22 O’Handley’s injury is, as it must be, Twitter’s *retaliatory strikes and eventual removal* of Mr.  
23 O’Handley from its platform as a state actor, thereby restricting Mr. O’Handley’s ability to “freely  
24 speak, write and publish his [] sentiments on all subjects.” *See* Cal. Const. art. 1, §2(a). It is not, as  
25 Twitter suggests, Twitter’s own public announcements, policies, or other written expressions. *See*  
26 Compl. ¶3. Mr. O’Handley’s claim simply does not require, nor do the factual allegations rest on,  
27 Twitter engaging in expressive activity of any sort. Indeed, Mr. O’Handley welcomes Twitter to speak  
28 freely on all issues, including those with which he disagrees. Now that the conduct at issue has been



1 identified, the Court should turn next to determining whether that conduct was done in furtherance of  
 2 Twitter’s right of free expression.

3 **2. Twitter failed to establish that its censorship of Mr. O’Handley was in**  
 4 **furtherance of its right of free expression.**

5 While the “California Supreme Court has not drawn the outer limits of activity that furthers the  
 6 exercise of free speech rights . . . [o]ne sensible place to start is to determine whether the activity in  
 7 question is ‘speech’ under First Amendment law.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 904 (9th  
 8 Cir. 2010). Not all conduct constitutes an act of expression, and not all expression constitutes protected  
 9 speech. *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65-66 (2006) (*FAIR*)  
 10 (conduct regulated by challenged law was not “inherently expressive”); *PruneYard II*, 447 U.S. at 88;  
 11 *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1218 (2010) (anti-SLAPP statute did not apply to claims arising  
 12 from cyberbully’s threats). Conduct is not expressive unless there exists “[a]n intent to convey a  
 13 particularized message” and the surrounding circumstances indicate that “the likelihood was great that  
 14 the message would be understood by those who viewed it.” *Spence v. State of Wash.*, 418 U.S. 405,  
 15 410–11 (1974).

16 Banning someone from a social media platform is not a form of speech. Indeed, it is not  
 17 necessarily communicative at all. Nor is penalizing Mr. O’Handley by issuing a strike against him and  
 18 ultimately removing him from Twitter “an intent to convey a particularized message.” *Spence*, 418 U.S.  
 19 at 410-11. Certainly Twitter has not submitted testimony or other evidence suggesting that it did, in  
 20 fact, intend to convey a message by its actions. It also offers no evidence that any such message was of  
 21 a particularized nature, as opposed to actions merely tangential to Twitter’s adoption of new or different  
 22 terms of service or its determination to put itself at the disposal of censorious government agencies-  
 23 which, as it happens, Twitter did not disclose until long after. Even if such an intent did exist at the time  
 24 of Mr. O’Handley’s strikes and removal from the platform, there is no evidence that Twitter’s users, the  
 25 public, or any other intended recipient of such a “message” would likely have understood it. Here the  
 26 only reason this scheme and Twitter’s participation in it came to light was due to a public records request  
 27 filed with the government. *See* Compl. Exs. 1-8. Twitter, unused to explaining its actions, bears the  
 28

1 burden on its anti-SLAPP Motion to establish these threshold factual matters, yet it made no effort to  
2 meet that burden.

3 The cases cited by Twitter, ECF No. 61 5. fail to persuade otherwise because the defendant in  
4 each case either spoke or sought to speak a particularized message. *Kronemyer v. Internet Movie*  
5 *Database Inc.*, 150 Cal. App. 4th 941, 947 (2007) (concerning the defendant’s publication of movie  
6 credits); *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424  
7 (9th Cir. 2014) (news videos); *La Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 989 (S.D. Tex. 2017)  
8 (Facebook posts); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 196 (2017) (same); *Zhang v.*  
9 *Baidu.com Inc.*, 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014) (search results); *Isaac v. Twitter, Inc.*, No.  
10 21-CV-20684, 2021 WL 3860654, at \*2 (S.D. Fla. Aug. 30, 2021) (alleged defamatory statements);  
11 *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, at \*9 (N.D. Fla. June 30,  
12 2021) (preliminarily enjoining statute forbidding certain speech). None of these defendants were found  
13 to have expressed a message simply through the surreptitious silencing of another.

14 The only other cases cited by Twitter on this point involve a bona fide newspaper refusing to  
15 devote free space to a political candidate, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), and  
16 a plaintiff seeking “prominent” placement of ads on the defendants’ websites, *Langdon v. Google, Inc.*,  
17 474 F. Supp. 2d 622, 629 (D. Del. 2007). ECF No. 61 5. Neither case involves facts remotely similar to  
18 this case. *See NetChoice, LLC*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, at \*8 (discussing the  
19 fundamental differences between newspapers and social media platforms). Since Twitter failed to  
20 establish that Mr. O’Handley’s claim arises from conduct in furtherance of Twitter’s speech activities,  
21 its Motion should be dismissed.

22 **B. Twitter’s censorship of Mr. O’Handley is not connected with a public issue.**

23 The anti-SLAPP statute applies where “[a] cause of action against a person aris[es] from any  
24 act of that person in furtherance of the person’s right of petition or free speech under the United States  
25 Constitution or the California Constitution in connection with a *public* issue.” Cal. Code Civ. Proc., §  
26 425.16(b)(1) (emphasis added); *see also id.* at § 425.16(e)(4). In a two-part analysis, the Court must  
27 ask (1) “what public issue or [] public interest the speech in question implicates—a question []  
28 answer[ed] by looking to the content of the speech,” and (2) “what functional relationship exists

1 between the speech and the public conversation about that public interest.” *FilmOn.com Inc. v.*  
2 *DoubleVerify Inc.*, 7 Cal. 5th 133, 149-150 (2019). Twitter cannot satisfy either step of the analysis.

3 As discussed above, Twitter’s retaliation against Mr. O’Handley was not a statement, but a non-  
4 expressive act to chill and suppress another’s speech. *Supra*, I(A)(2). Because Twitter’s conduct is not  
5 in-and-of-itself communicative, it is incapable of implicating any issue, let alone a public issue within  
6 the meaning of the anti-SLAPP statute. *See Hailstone*, 169 Cal. App. 4th at 738 (the constitutionally  
7 protected activity “must, at a minimum, occur in the context of an ongoing controversy, dispute or  
8 discussion, such that it warrants protection by a statute that embodies the public policy of encouraging  
9 participation in matters of public significance”). By extension, there can be no functional relationship  
10 between Twitter’s non-existent speech and a public conversation of any sort. *See FilmOn.com*, 7 Cal.  
11 5th at 146, 150 (there should be “some degree of closeness between the challenged statements and the  
12 asserted public interest,” and the “focus of the speaker’s conduct should be the public interest.”).

13 Twitter’s reliance on a profound, albeit generalized, public sentiment about “democracy itself”  
14 does not alter this analysis. ECF No. 61 6:11. The fact that “a broad and amorphous public interest”  
15 can be connected to a specific dispute is not sufficient to meet the statutory requirements of the anti-  
16 SLAPP statute. *World Fin. Grp.*, 172 Cal. App. 4th at 1570. “By focusing on society’s general interest  
17 in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint  
18 is based, defendants resort to the oft-rejected, so-called synecdoche theory of public issue in the anti-  
19 SLAPP statute, where [t]he part [is considered] synonymous with the greater whole.” *Id.* (quotations  
20 omitted). The focus must properly be centered on “the specific nature of the speech rather than the  
21 generalities that might be abstracted from it . . .” *Id.* (citing *Commonwealth Energy Corp. v. Investor*  
22 *Data Exchange, Inc.*, 110 Cal. App. 4th 26, 34 (2003)). The specific conduct at issue here is Twitter’s  
23 censorship of Mr. O’Handley, not Twitter’s views on democracy; indeed, to the extent Twitter’s  
24 censorious conduct had in any effect on democracy, it was a negative one, not a positive one.

25 Finally, the mere fact that Twitter’s platform reaches “many millions of people,” does not, as  
26 Twitter argues, independently satisfy the public-interest requirement. ECF No. 61 6:28. It is a well-  
27 settled principle of California anti-SLAPP jurisprudence that a “person cannot turn otherwise private  
28 information into a matter of public interest simply by communicating it to a large number of people.”

1 *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016) (quotation omitted). Even so, there is no evidence  
 2 that Twitter did in fact communicate its strikes against Mr. O’Handley, or its ultimate banning of Mr.  
 3 O’Handley’s account, to anyone other than Mr. O’Handley. Compl. ¶ 88. For these reasons, Twitter  
 4 has not established that its censorship of Mr. O’Handley was in furtherance of a protected activity in  
 5 connection with a public issue, and its Motion fails.

6 **III. MR. O’HANDLEY’S CALIFORNIA CONSTITUTIONAL CLAIM IS**  
 7 **SUFFICIENTLY PLED.**

8 Twitter raises three challenges with respect to the legal sufficiency of Mr. O’Handley’s state law  
 9 claim under California’s Liberty of Speech Clause, Cal. Const. art. 1, §2. Fed. R. Civ. P. 12(b)(6). For  
 10 the reasons discussed below and, in more depth, in Mr. O’Handley’s concurrently filed opposition to  
 11 Twitter’s motion to dismiss, Twitter’s challenges fail.

12 **A. California’s Liberty of Speech Clause contains no state action requirement.**

13 Twitter cites to the California Supreme Court’s plurality decision in *Golden Gateway* in support  
 14 of its argument that “state action” is required under the Liberty of Speech Clause. 26 Cal. 4th. at 1031.  
 15 ECF No. 61 8:1-2. Only three Justices in that case, however, would have held that the Liberty of Speech  
 16 Clause requires “state action.” *See Id.* And prior to *Golden Gateway*, the California Supreme Court did  
 17 not require “state action” under the Liberty of Speech Clause, *Gerawan Farming*, 24 Cal. 4th at 492  
 18 (observing that the Liberty of Speech Clause “runs against the world, including private parties as well  
 19 as governmental actors”). Further, no California Supreme Court decision has held otherwise since.

20 Yet even assuming state action were required to establish a claim under the Liberty of Speech  
 21 Clause (it is not), Twitter’s first argument is predicated on the incorrect assumption that Twitter was  
 22 acting *solely* as a private entity under state law. Under California’s Liberty of Speech Clause, “the  
 23 actions of a private property owner constitute state action . . . if the property is freely and openly  
 24 accessible to the public.” *Golden Gateway*, 26 Cal. 4th at 1033; *see also Pruneyard I*, 23 Cal. 3d at 908.  
 25 In *Pruneyard I*, the California Supreme Court held that a privately owned shopping center could not  
 26 prohibit reasonably exercised speech and petitioning activities on its premises. 23 Cal. 3d 899. To  
 27 support its holding, the Court “relied heavily on the functional equivalence of the shopping center to a  
 28 traditional public forum—the downtown[] or central business district[.]” *Golden Gateway Ctr.*, 26 Cal.  
 4th at 1032 (additionally emphasizing “the public’s unrestricted access”). The court also noted that “to

1 prohibit expressive activity in the centers would impinge on constitutional rights beyond speech rights,”  
 2 including the “right to . . . petition government for redress of grievances . . .” *Pruneyard I*, 23 Cal. 3d  
 3 at 907 (citing Cal. Const. art. 1, § 3). Twitter, of course, itself boasts that it provides a free platform  
 4 open to “hundreds of millions of people around the world.” ECF No. 61 1:4-5; *see also* Compl. ¶ 17;  
 5 ECF No. 61-3 (“Twitter’s purpose is to serve the public conversation”). The widespread use of the  
 6 platform for communicative purposes runs the gamut from political commentary and news, to  
 7 pornography. Compl. ¶ 90; *see also* ECF No. 61-2 (disclaiming to users that they may be exposed to  
 8 “offensive, harmful, inaccurate or otherwise inappropriate” material). As illustrated by the facts of this  
 9 case, users of this modern-day public square frequently petition their government for redress of  
 10 grievances on Twitter. Compl. ¶¶ 83, 86.

11 While Twitter has adopted a “code of conduct,” its terms do not restrict the public’s access to  
 12 the platform to a degree commensurate with the privately owned medical centers, apartment complexes,  
 13 or individual homes that courts have found not to be sufficiently accessible to the public to give rise to  
 14 a free speech claim under California’s constitution. *Compare Golden Gateway*, 26 Cal. 4th at 1031-32  
 15 *with Fashion Valley Mall*, 42 Cal. 4th at 865 (defendant forbade “persons from urging customers to  
 16 boycott a store in the mall”); *Pruneyard I*, 23 Cal. 3d at 902 (defendant forbade “any tenant or visitor  
 17 to engage in publicly expressive activity, including the circulating of petitions, that is not directly related  
 18 to the commercial purposes”). Because Twitter’s platform is “freely and openly accessible to the  
 19 public,” Twitter may be held liable for silencing Mr. O’Handley in violation of the Liberty of Speech  
 20 Clause.

21 **B. Twitter has no cognizable First Amendment rights under the facts alleged here.**

22 Twitter argues that it has a First Amendment right to exclude users from its platform, but nothing  
 23 in Mr. O’Handley’s Complaint infringes on that right, because Mr. O’Handley has not asked to be  
 24 reinstated. *See* Compl. Prayer for Relief. Furthermore, Twitter is alleged to be a state actor, and  
 25 accordingly, any First Amendment rights it may have must necessarily yield to Mr. O’Handley’s First  
 26 Amendment rights. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that any “Constitutional  
 27 rights of owners of [privately owned town]” must give way to the First Amendment rights of its citizens  
 28 and visitors); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 396 (D. Conn. 1985) (“[A] state actor does

1 not have a First Amendment right of free expression, at least in those situations in which such a right  
2 would conflict with the First Amendment rights of citizens.”); *see also Manhattan Cmty. Access Corp.*  
3 *v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (“The Free Speech Clause of the First Amendment constrains  
4 governmental actors and protects private actors.”).

5 Even if Twitter were not a state actor, as discussed fully in Mr. O’Handley’s Opposition to  
6 Twitter’s Motion to Dismiss, excluding users from Twitter’s platform is *conduct*, not constitutionally  
7 protected speech, and Twitter does not have a constitutional right to exclude users from its platform.  
8 After all, “[r]equiring someone to host another person’s speech is often a perfectly legitimate thing [for  
9 the government] to do.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082,  
10 2098 (2020) (Breyer, J., dissenting on other grounds, joined by Ginsburg & Sotomayor, JJ.); *see also*  
11 *FAIR*, 547 U.S. at 65; *Pruneyard II*, 477 U.S. at 87. The First Amendment does not preclude the  
12 government from taking steps to ensure that private entities do not “restrict, through physical control of  
13 a critical pathway of communication, the free flow of information and ideas.” *Turner Broad. Sys., Inc.*  
14 *v. FCC*, 512 U.S. 622, 657 (1994).

15 Even if Mr. O’Handley were requesting a court order requiring Twitter to reinstate Mr.  
16 O’Handley’s account (he is not), it would not violate the First Amendment because it does not require  
17 Twitter to speak at all. Instead, it would compel Twitter to perform an act, namely, allowing Mr.  
18 O’Handley to speak on its platform. *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059 (N.D.  
19 Cal. 2007) (holding that a website operator could be compelled to host the profile of same-sex couple  
20 seeking to adopt). Such an act would not interfere with Twitter’s own speech and would be entirely  
21 congruent with Twitter’s sole purpose of serving as a forum for the speech of others. ECF No. 61-3.  
22 The First Amendment is simply not implicated by Mr. O’Handley’s requested relief.

### 23 **C. The Communications Decency Act Does Not Bar Mr. O’Handley’s Claim**

24 Subsection 230(c)(1) of the Communications Decency Act (“CDA”) states that “[n]o provider  
25 or user of an interactive computer service shall be treated as the publisher or speaker of any information  
26 provided by another information content provider.” 47 U.S.C. § 230(c)(1). “Information content  
27 provider” is § 230’s term for internet users, such as Twitter users, who provide information or other  
28 material online that “interactive computer services,” such as Twitter, publish. Section 230 is silent about



1 liabilities arising from platforms’ own actions or speech—it only speaks to liability from “information  
 2 provided by *another* content provider.” *Id.* (emphasis added); *see also Barnes v. Yahoo!, Inc.*, 570 F.3d  
 3 1096, 1108 (9th Cir. 2009). Section 230 grants no protection to an internet platform for its own actions  
 4 which are unrelated to “another content provider.” *See Hassell v. Bird*, 5 Cal.5th 522, 545 (2018)  
 5 (“Section 230 allows these litigation burdens to be imposed upon the *originators* of online speech.”)  
 6 (emphasis in original).<sup>6</sup>

7 Here, Mr. O’Handley seeks to hold Twitter liable for punishing and prohibiting Mr. O’Handley  
 8 from speaking; he makes no claim against Twitter “for [its] publishing or speaking the content of other  
 9 information service providers.” *See Barnes*, 570 F.3d at 1108; *Demetriades v. Yelp, Inc.*, 228 Cal. App.  
 10 4th 294, 313 (2014). Indeed, as discussed above, Mr. O’Handley does not seek to hold Twitter liable  
 11 for expressive conduct whatsoever. Section 230(c)(1) therefore has nothing to say about Mr.  
 12 O’Handley’s claims because Twitter is not a “publisher or speaker,” but an entity punishing another for  
 13 his speech on behalf of the government. Indeed, as discussed in Mr. O’Handley’s opposition to Twitter’s  
 14 motion to dismiss, because Twitter acted as a state actor for purposes of evaluating Mr. O’Handley’s  
 15 First Amendment claim under 42 U.S.C. § 1983, § 230(c)(1) is of no effect. A mere statute cannot  
 16 narrow the protections afforded Mr. O’Handley by the First Amendment to the United States  
 17 Constitution. Accordingly, Twitter’s Motion fails.<sup>7</sup>

18 //  
 19 //  
 20 //  
 21 //

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22 <sup>6</sup> Section 230(c)(2) addresses providers’ good faith removal of another’s content. *Malwarebytes, Inc.*  
 23 *v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., concurring in the denial of  
 24 certiorari). Twitter does not rely on this subsection, presumably because it cannot satisfy its  
 25 requirement that Twitter act in good faith. Moreover, Mr. O’Handley’s claim seeks redress from  
 26 Twitter’s complete prohibition of future speech.

27 <sup>7</sup> Further, the Ninth Circuit stands as an outlier in applying anti-SLAPP in federal court. *See Makaeff*  
 28 *v. Trump Univ., LLC*, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., concurring). “These  
 interloping state procedures have no place in federal court,” and either the Ninth Circuit should revisit  
 its prior, unworkable anti-SLAPP precedent, or the Supreme Court should clarify federal courts’ roles  
 vis-à-vis state court anti-SLAPP procedures. *Travelers Casualty Ins. Co. of America v. Hirsch*, 831  
 F.3d 1179, 1182 (9th Cir. 2016) (Kozinski, C.J., concurring).



1 **IV. THE COURT SHOULD AWARD MR. O’HANDLEY ATTORNEY’S FEES AND**  
2 **COSTS INCURRED IN OPPOSING TWITTER’S UNTIMELY, FRIVOLOUS**  
3 **MOTION.**

4 Section 425.16(c)(1) of the California Code of Civil Procedure provides that “if the court finds  
5 that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court  
6 shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to  
7 Section 128.5.” Cal. Code Civ. Proc., § 425.16(c)(1); Cal. Civ. Proc. Code § 128.5 (“A trial court may  
8 order a party, the party’s attorney, or both to pay any reasonable expenses, including attorney’s fees,  
9 incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended  
10 to cause unnecessary delay.”). “Frivolous” is defined as: “totally or completely without merit, or for the  
11 sole purpose of harassing an opposing party.” Cal. Civ. Proc. Code § 128.5(b)(2); *see also Moore v.*  
12 *Shaw*, 116 Cal. App. 4th 182, 199 (2004) (the defendant’s conduct in drafting a termination agreement  
13 was a private transaction unconnected to any “public issue” or “issue of public interest” and “totally  
14 devoid of merit”).

15 Here, Twitter’s anti-SLAPP Motion is frivolous and was plainly filed for improper purposes.  
16 *Kailikole v. Palomar Cmty. Coll. Dist.*, No. 18-CV-02877-AJB-MSB, 2020 WL 6203097, at \*3 (S.D.  
17 Cal. Oct. 22, 2020). Twitter not only filed its untimely Motion without leave of court, it did so without  
18 even requesting leave or offering any explanation for its delay. Twitter further failed to mount a genuine  
19 attempt to establish the applicability of the anti-SLAPP statute; in support of its Motion, Twitter filed a  
20 single declaration from a non-percipient witness attaching terms of service unrelated to Mr.  
21 O’Handley’s claim as if this were “just another deplatforming case”—presumably what Twitter would  
22 like this Court to believe. Instead of establishing Twitter’s engagement in expressive activities or  
23 challenging the factual sufficiency of Mr. O’Handley’s claim, Twitter merely rehashed duplicative  
24 arguments raised in its concurrently pending motion to dismiss. Accordingly, the Court should award  
25 Mr. O’Handley attorney’s fees and costs in opposing Twitter’s meritless filing. The precise amount  
26 should be established, absent agreement of the parties, based on a subsequent motion that Mr.  
27 O’Handley may file with 14 days of the Court’s ruling.

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**CONCLUSION**

For the foregoing reasons, Plaintiff Mr. O’Handley respectfully requests that the Court strike, or, alternatively, deny Twitter’s anti-SLAPP Motion. Pursuant to California Code of Civil Procedure Section 425.16(c)(1), Mr. O’Handley further requests that the Court award him attorney’s fees and costs incurred opposing Twitter’s Motion in an amount to be established, absent agreement of the parties, based on a subsequent motion that Mr. O’Handley may file within 14 days of the Court’s ruling.

Respectfully submitted,

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Date: November 5, 2021

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