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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11	ROGAN O' HANDLEY,	)	
12		)	CASE NO. 3:21-cv-07063-CRB
13	Plaintiff,	)	<b>REPLY OF DEFENDANT</b>
14		)	<b>NATIONAL ASSOCIATION OF</b>
15	vs.	)	<b>SECRETARIES OF STATE IN</b>
16	ALEX PADILLA, in his personal capacity;	)	<b>SUPPORT OF ITS MOTION TO</b>
17	SKDKNICKERBOCKER, LLC, a	)	<b>DISMISS PLAINTIFF'S</b>
18	Delaware company; PAULA VALLE	)	<b>COMPLAINT PURSUANT TO</b>
19	CASTAÑON, in her personal capacity;	)	<b>FEDERAL RULE OF CIVIL</b>
20	JENNA DRESNER, in her personal	)	<b>PROCEDURE 12(b)(2) AND</b>
21	capacity; SAM MAHOOD, in his personal	)	<b>12(b)(6)</b>
22	capacity; AKILAH JONES; in her personal	)	Hearing Date: December 16, 2021
23	capacity; SHIRLEY N. WEBER, in her	)	Time: 10:00 a.m.
24	official capacity as California Secretary of	)	Judge: Honorable Charles R.
25	State; TWITTER, INC., a Delaware	)	Breyer
26	corporation; NATIONAL ASSOCIATION	)	Courtroom: 6, 17 <sup>th</sup> Floor
27	OF SECRETARIES OF STATE, a	)	
28	professional nonprofit organization,	)	
	Defendants.	)	

REPLY OF DEFENDANT NATIONAL ASSOC. OF  
SECRETARIES OF STATE IN SUPPORT OF ITS  
MOTION TO DISMISS

CASE NO. 3:21-cv-07063-CRB

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1           **I. INTRODUCTION**

2           National Association of Secretaries of State’s motion to dismiss explained  
3 why this case should be dismissed on both jurisdictional and substantive grounds.  
4 Plaintiff’s opposition fails to rebut the explanations and authorities given. This Court  
5 should dismiss.

6           NASS is not subject to the jurisdiction of this Court. Plaintiff’s opposition  
7 does not address, and thereby concedes, the lack of general jurisdiction. Plaintiff’s  
8 opposition argues there is specific jurisdiction on “purposeful availment” grounds,  
9 but he does not allege facts sufficient to establish such availment – much less present  
10 any evidence controverting NASS’s declaration establishing a lack of California  
11 contacts. NASS is not a California resident, and the purposeful availment  
12 requirement severely restricts jurisdiction over nonresidents. Contrary to Plaintiff’s  
13 arguments, sending emails to California does not establish purposeful availment or  
14 California jurisdiction. Plaintiff argues that jurisdiction is proper because his claim  
15 involves social media, and “the location of virtually all social media platforms,  
16 including Twitter, is in California.” (Docket No. 67, p. 5:11.) Under Plaintiff’s  
17 theory, California has jurisdiction over anything that has to do with social media.  
18 That untenable proposition is supported by no case or other authority.

19           Even if there were personal jurisdiction, NASS cannot be liable for allegedly  
20 violating Plaintiff’s Constitutional rights because NASS is a private actor, not a state  
21 actor. Plaintiff tries to establish a conspiracy or joint action primarily by putting  
22 some interesting spins on his own allegations, arguing they say things they do not.  
23 No matter the spin, the fact remains that all NASS allegedly did was pass along, via  
24 an email to its members, information about a portal for reporting election  
25 mis/disinformation to Twitter. NASS did not create the portal. NASS is not even  
26 copied on any the reports regarding Plaintiff’s speech set forth in the complaint. One  
27 email from a private entity copying and pasting information about a reporting portal

1 sent at the request of another private entity is insufficient to establish state action or  
2 a conspiracy to violate Plaintiff's Constitutional rights.

3 **II. FACTS AS THEY ARE PLED, AND NOT AS REINVENTED**

4 Plaintiff's opposition attempts to change the facts alleged in the complaint  
5 conveniently in his favor. Despite the fact that his complaint states otherwise, as do  
6 his oppositions to the other defendants' motions to dismiss, Plaintiff now claims (and  
7 only in his opposition to NASS's motion to dismiss) that NASS worked with or  
8 coordinated with Twitter to "create" a "Partner Support Portal." (Docket No. 67, pp.  
9 1:4-5, 2:6-7, 6:11, 9:10-11.) The complaint and its attached exhibits, however, make  
10 it clear that NASS played **no role** in creating the portal. Instead, they show that  
11 NASS passed on the portal information to its members as requested by Twitter.

12 While Plaintiff needs to make it appear as if NASS played a role in creating  
13 the portal to salvage his case against NASS, this need, however, great, simply cannot  
14 make the facts or his allegations into something they are not. Plaintiff needs to show  
15 that NASS somehow engaged with Twitter, a California based company, to create  
16 the portal at issue to convince this Court it has specific jurisdiction over NASS where  
17 none exists. Creating facts to try to dispute the motion is improper.

18 The complaint alleges that "Twitter asked NASS to let its members know **it**  
19 **[Twitter] created** a separate dedicated way for election officials to 'flag concerns  
20 directly to Twitter.'" (Docket No. 2, ¶ 28 (emphasis added).) Exhibit 2 attached to  
21 the complaint contains the following statement in the email from NASS: "Twitter  
22 also asked me to let you guys know a couple of items...copy/pasted below:... (2) We  
23 [Twitter] are onboarding state and local election officials onto Twitter's Partner  
24 Support Portal..." (Docket No. 2, Ex. 2.)

25 Plaintiff asserts the same in his opposition to Twitter's motion to dismiss,  
26 claiming that "Twitter established the "Partner Support Portal" and created "direct  
27 channels of communication" for the OEC to report speech it deemed

1 “misinformation.”<sup>1</sup> (Docket No. 69, pp. 1:25-26 and 5:9-10.) Further, in his  
 2 opposition to the State Defendants’ motion to dismiss, Plaintiff states that “[b]y  
 3 using a dedicated portal Twitter created....” (Docket No. 68, p. 3:10-11.)

4 Try as he might, Plaintiff will never be able to establish that any defendant  
 5 other than Twitter created that portal. Twitter’s own motion to dismiss makes clear  
 6 that Twitter created the portal. (Docket No. 60, p. 3:5-6.) Therefore, Plaintiff’s  
 7 attempt to deem NASS a “co-creator” is disingenuous at best. NASS **did not** create  
 8 the Twitter portal but at most allegedly merely passed on information about the  
 9 portal to its members. NASS was not privy to any of the communications on the  
 10 portal. NASS played no role in determining what was reported via the portal. There  
 11 is no allegation that any of NASS’s members in California actually used these portals  
 12 to report issues with Plaintiff’s political speech. NASS is not even copied on any the  
 13 reports or emails regarding Plaintiff’s speech set forth in the complaint.

14 Plaintiff’s claims arise from the alleged suppression of speech by others.  
 15 NASS had no control over what was done once it members utilized the portal  
 16 provided in the email. NASS could not foresee that simply sending such an email  
 17 would result in the “unilateral activity” of others, which in turn resulted in Plaintiff’s  
 18 alleged injuries.

19 **III. PLAINTIFF FAILED TO SHOW HOW THIS COURT HAS**  
 20 **PERSONAL JURISDICTION OVER NASS.**

21 Plaintiff concedes that this Court does not have general jurisdiction over  
 22 NASS by not even addressing the issue in his opposition. Plaintiff instead focuses  
 23 his arguments on specific personal jurisdiction. Plaintiff’s opposition makes clear,  
 24

25 <sup>1</sup> Inconsistently with what he argues against NASS, Plaintiff spends an entire  
 26 section in his opposition to Twitter’s motion to dismiss claiming that Twitter  
 27 partnered with the OEC to create the Partner Support Portal. (Docket No. 69, pp. 3-  
 5.)



1 however, that he is incapable of carrying his burden of establishing specific  
2 jurisdiction in this Court.

3 Plaintiff relies heavily on *Mavrix Photo, Inc. v. Brand Technologies, Inc.*  
4 647 F.3d 1218 (9th Cir. 2011), but that decision is readily distinguishable. There,  
5 Mavrix Photo, a Florida company with California ties, filed a lawsuit in the Central  
6 District of California against Brand Tech, an Ohio corporation, for copyright  
7 infringement. Brand allegedly posted celebrity photos taken by Mavrix on Brand’s  
8 website without Mavrix’s permission. *Id.* at 1223. Brand moved to dismiss for lack  
9 of personal jurisdiction. The district court denied Mavrix’s request for leave to  
10 conduct jurisdictional discovery and granted the motion to dismiss.

11 The Ninth Circuit reversed, because Brand’s numerous ties to California were  
12 sufficient to establish specific jurisdiction. *Id.* at 1227-1228. Those California ties  
13 included the fact that Brand makes money from third-party advertisements for jobs,  
14 hotels, and vacations in California. Brand’s website also featured a “Ticket Center,”  
15 which linked to the website of a third-party vendor that sells tickets to nationwide  
16 events including events in California. Brand had agreements with several California  
17 businesses including a California internet advertising agency and a California  
18 wireless provider who designs and hosts on its servers a version of celebrity-  
19 gossip.net accessible to mobile phone users. Also, a California firm designed  
20 Brand’s website and performed site maintenance. Further, Brand entered into a  
21 “link-sharing” agreement with a California-based national news site. Thus, even  
22 though Brand had no offices, real property, or staff in California, and was not  
23 licensed to do business in California, and paid no California taxes, its ties to  
24 California were numerous. *Id.* at 1222, 1227.

25 Nothing comparable is alleged as to NASS, much less in evidence.

26 Plaintiff and *Mavrix Photo* cite *Calder v. Jones*, 465 U.S. 783 (1984), which  
27 requires that the defendant must have (1) committed an intentional act, (2) expressly



1 aimed at the forum state, (3) causing harm that the defendant knows is likely to be  
 2 suffered in the forum state. *Id.* at 1228. However, courts have been warned not to  
 3 focus too narrowly on this third “effects” prong.

4 Subsequent cases have struggled somewhat with *Calder's* import, recognizing  
 5 that the case cannot stand for the broad proposition that a foreign act with  
 6 foreseeable effects in the forum state will always give rise to specific  
 7 jurisdiction. We have said that there must be “something more”.... We now  
 8 conclude that “something more” is what the Supreme Court described as  
 9 “express aiming” at the forum state.”

10 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006)

11 There was no issue with the first prong of the test in *Mavrix*; rather the focus  
 12 was on the second and third prongs. As regards the second prong, the Court of  
 13 Appeals found that Brand used *Mavrix's* copyrighted photos as “part of its  
 14 exploitation of the California market for its own commercial gain.” *Mavrix Photo*,  
 15 *supra*, 647 F.3d at 1229. The court noted that “Brand makes money by selling  
 16 advertising space on its website to third-party advertisers: the more visitors there are  
 17 to the site, the more hits that are made on the advertisements; the more hits that are  
 18 made on the advertisements, the more money that is paid by the advertisers to Brand.  
 19 A substantial number of hits to Brand's website came from California residents.” *Id.*  
 20 at 1230. In sum, Brand operated a popular website “with a specific focus on  
 21 California.” *Id.* The economic loss suffered by *Mavrix* in California was foreseeable  
 22 because a significant numbers of Californians would have bought the magazines  
 23 where *Mavrix's* photos would have been featured just to see the photos. Instead, they  
 24 saw them on Brand’s website, thereby destroying the California-based value. *Id.* at  
 25 1231-1232.

26 Plaintiff’s reliance on *Mavrix* is insufficient to establish jurisdiction over  
 27 NASS here. The facts are not even remotely similar. The business at issue in *Mavrix*  
 28 is not at all the type of “business” conducted by NASS. NASS is a non-profit,  
 nonpartisan professional organization for public officials. It serves as a medium for

1 the exchange of information between states and fosters cooperation in the  
2 development of public policy. It does not solicit business or operate a website where  
3 hits are important. Thus, Plaintiff's reliance on website cases is unavailing.

4 More like this are cases involving membership companies such as NASS. For  
5 example, in *Szabo v. Med. Info. Bureau*, 127 Cal.App.3d 51 (1981), the plaintiff  
6 brought suit in California against MIB, Inc. (formerly known as Medical Information  
7 Bureau), and several life insurance companies under the Federal Fair Credit  
8 Reporting Act. MIB, a non-profit membership corporation made up of  
9 approximately 750 life insurance companies, was formed to arrange for the  
10 interchange of information between members. MIB's principal office was located in  
11 Boston, Massachusetts, so MIB brought a motion to quash service of process. The  
12 evidence introduced by plaintiff in opposition to the motion was an affidavit by one  
13 of plaintiff's attorneys to the effect that ten years ago he worked for a consulting firm  
14 which designed computer programs for several California insurance companies, and,  
15 in the course of that employment, he learned that California life insurance companies  
16 were using information obtained from MIB as a basis for denying or rating  
17 insurance. The trial court found this insufficient to establish jurisdiction and granted  
18 the motion to quash. *Id.* at 53.

19 The California Court of Appeal affirmed because "the only contact [MIB] has  
20 with California arises from the fact that its members are life insurance companies  
21 located throughout the country, including California." *Id.* at 54.

22 From the evidence before the trial court it appears that MIB did not have  
23 sufficient contacts with California such as to comply with the due process  
24 requirements of fair play and substantial justice. The contacts it has are all  
25 collateral, to wit, the fact that it has as members, insurance companies which  
26 do business in the state. These member insurance companies can be compared  
27 to the existence of Volkswagen repair centers throughout the country, which  
28 was rejected as a basis for jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*.

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*Id.* at 55.

*Szabo* cited multiple cases from around the country that reached the same result.

In *Midwest Fur Producers Ass'n v. Mutation Mink B. Ass'n.*, 102 F.Supp. 649 (D.Minn.1951), a trade association headquartered in Wisconsin was not amenable to suit in Minnesota even though members were located in Minnesota and the Association's activities benefited members in Minnesota. In *Elizabeth Hospital, Inc. v. Richardson*, 167 F.Supp. 155, aff'd 269 F.2d 167 (8th Cir. 1958), cert. denied, 361 U.S. 884, [] (1959), a national medical association headquartered in Illinois was held not amenable to suit in Arkansas even though it had a local member association in that state. In *People v. Brotherhood of Painters, Etc.* (1916) 218 N.Y. 115, 112 N.E. 752, it was held that an international union organized as an unincorporated association and headquartered in Indiana was not amenable to suit in New York even though a local union which was a member of the international union was located in New York.

*Id.* at 54-55.

Thus, while Plaintiff can cite to all the internet-based cases he likes, the fact remains that they are inapplicable to NASS. NASS did not use the internet to solicit business in California or directly from Plaintiff from a website. NASS simply sent an email to its membership with a message from Twitter that contained a portal for reporting election mis/disinformation.

Plaintiff gets closer to the proper argument when he cites *Amazon.Com, Inc. v. National Association of College Stores, Inc.*, 826 F.Supp.2d 1242 (W.D. Wash. 2011.) Closer, but no cigar: there are glaring differences with this case. Washington-based Amazon brought action against not-for-profit trade association National Assoc. of College Stores (“NACS”), representing the campus retailing industry, seeking a declaration that Amazon’s use of certain textbook advertising claims did not violate the Lanham Act as NACS claimed in its letters to Amazon. NACS moved to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction.

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1 The district court denied the motion. (*Id.* at 1246-1248.)

2 The *Amazon* court found that the Washington had specific jurisdiction based  
3 on NACS’s actions, which included sending letters to Amazon and initiating a  
4 challenge against Amazon’s advertising claims before the National Advertising  
5 Division of the Council of Better Business Bureaus (“NAD”).

6 [U]nder the *Calder* effects test, NACS’s actions relate to Washington because  
7 (1) NACS acted intentionally when it initiated its challenge to Amazon's  
8 advertising claims in the NAD (2) NACS expressly aimed its actions at  
9 Washington by individually targeting Amazon, the Washington-based  
10 plaintiff; and (3) the effects of NACS’s challenge to Amazon’s continuing use  
11 of its advertising claims are primarily felt in Washington, where Amazon is  
12 headquartered. [] Second, the lawsuit arises from NACS’s forum-related  
activities because, but for NACS’s initiation of the NAD proceeding, Amazon  
would have had no need for a judicial declaration of its right to continue to  
use its advertising claims.

13 *Id.* at 1255.

14 NASS’s actions are nothing like those of NACS in *Amazon*. NASS did not  
15 initiate any type of proceeding against a California entity or Plaintiff, thereby  
16 causing Plaintiff’s injuries in California. NASS did not “target” anyone, much less  
17 Plaintiff. NASS sent an email with information about a portal created by Twitter to  
18 its members at Twitter’s request. California was not targeted. NASS simply sent an  
19 email to all of its 48 Secretary of State members and nothing more. Such “contact”  
20 is insufficient to establish specific jurisdiction over NASS in this Court.

21 **IV. NASS CANNOT BE HELD LIABLE FOR ANY OF**  
22 **PLAINTIFF’S ALLEGED INJURIES BECAUSE NASS DID**  
23 **NOT CONSPIRE TO CAUSE PLAINTIFF HARM, AND NASS**  
**WAS NOT A STATE ACTOR.**

24 Plaintiff’s contention that NASS does not take issue with the alleged first  
25 prong of a ‘two-prong test’ in *Lugar v. Edmondson Oil Co., Inc.* (1982) 457 U.S.  
26 922, is incorrect. *Lugar* described a two-part “*approach*” to the question of whether  
27 the conduct allegedly causing the deprivation of a federal right may be fairly

1 attributable to the State:

2 First, the deprivation must be caused by the exercise of some right or privilege  
 3 created by the State or by a rule of conduct imposed by the state or by a person  
 4 for whom the State is responsible....Second, the party charged with the  
 5 deprivation must be a person who may fairly be said to be a state actor. This  
 6 may be because he is a state official, because he has acted together with or has  
 7 obtained significant aid from state officials, or because his conduct is  
 8 otherwise chargeable to the State. Without a limit such as this, private parties  
 9 could face constitutional litigation whenever they seek to rely on some state  
 10 rule governing their interactions with the community surrounding them.

11 Although related, these two principles are not the same. They collapse into  
 12 each other when the claim of a constitutional deprivation is directed against a  
 13 party whose official character is such as to lend the weight of the State to his  
 14 decisions. (Citation omitted). The two principles diverge when the  
 15 constitutional claim is directed against a party without such apparent  
 16 authority, i.e., against a private party.

17 *Id.* at 937.

18 Where the second part of the approach is not met, there can be no  
 19 constitutional violation or “deprivation [] caused by the exercise of some right or  
 20 privilege created by the State or by a rule of conduct imposed by the state or by a  
 21 person for whom the State is responsible.” *Id.* at 922, 937. Plaintiff’s contention in  
 22 his opposition that “NASS does not contest that Mr. O’Handley has met his burden  
 23 under prong one” (Docket No. 67, p. 8:8) is therefore incorrect. Because Plaintiff  
 24 cannot establish that NASS was a state actor, his complaint fails to state any valid  
 25 claims against NASS under either the federal or California constitutions.

26 **A. NASS has not willfully engaged in any conspiracy to violate  
 27 Plaintiff’s Constitutional rights.**

28 Plaintiff incorrectly argues that the pleadings “plausibly allege that NASS  
 29 conspired with Defendants to deprive individuals of their constitutional rights.”  
 30 (Docket No. 67, p. 8:26-27.) (Notably, Plaintiff does not contend NASS conspired  
 31 to deprive *him* of *his* Constitutional rights.) In support of this bold and incorrect

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1 statement, Plaintiff cites to paragraph 99 of his complaint, but it reads as follows:

2 Upon information and belief, discovery will show Twitter's stated reasons for  
3 suspending Mr. O'Handley were pretextual. Twitter's real reasons for  
4 suspending Mr. O'Handley do not stem from a violation of Twitter's terms of  
5 service, but from the content of his speech raising concerns about election  
6 administration and integrity, specifically concerns related to the work of then-  
7 California Secretary of State Alex Padilla. The trigger for Twitter's censorship  
of Mr. O'Handley was its coordination and conspiracy with other Defendants  
to silence the protected speech of many Americans.

8 Paragraph 99 contains (1) facts against other defendants and (2) a legal  
9 conclusion at the end. By citing to this paragraph for support, Plaintiff seems to be  
10 saying “because I said the defendants conspired, it must be so, the court has to accept  
11 the allegations as true.” This ignores the familiar and well-established precept that  
12 a court does not accept as true legal conclusions couched as factual allegations.  
13 “While we do accept all of the factual allegations in the complaint as true, [] we do  
14 not accept legal conclusions in the complaint as true, even if ‘cast in the form of  
15 factual allegations.’” *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir.  
16 2014) (citation omitted). Plaintiff’s conclusory complaint is bereft of truly factual  
17 allegations sufficient to establish a conspiracy.

18 Likewise, Plaintiff directs this Court to Exhibit 2 attached to his complaint in  
19 support of his conspiracy claim, but the exhibit is to the contrary. In that exhibit,  
20 NASS passed along the portal information to all of its members as requested by  
21 Twitter. NASS makes no directives about the portal and in fact tells its members that  
22 they are free to use the CIS (“Center for Internet Security) tool instead. “Up to you!”  
23 (Docket No. 2, Ex. 2.) That is a far cry from any coordination or conspiracy, or from  
24 a meeting of the minds with Twitter or anyone else that all reporting must be done  
25 through the Twitter portal, or that Plaintiff’s speech be squelched.

26 As in his jurisdictional arguments, Plaintiff “spins” the facts alleged in his  
27



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1 complaint to try to show conspiracy. His opposition contends that “NASS gave  
2 California’s OEC guidance regarding how to report mis-disinformation directly to  
3 social media companies such as Twitter.” (Docket No. 67, p. 9:15-16.) Plaintiff cites  
4 to paragraph 31 of his complaint in support of this contention, but it states instead:

5 NASS wanted election officials to have NASS’s email guidance regarding  
6 how to report “mis/disinformation” directly to social media companies  
7 “handy” directly prior to election day as election officials “prepare[d] for  
8 battle.” A true and correct copy of Maria Benson's November 2, 2020, email,  
9 as obtained through a public record request, is attached to this complaint as  
Exhibit 4. (Docket No. 1, p. 8:18-22.)

10 As pointed out in NASS’s motion, nowhere does Exhibit 4 reference election  
11 officials getting “prepared for battle.” Also, this paragraph makes no reference to the  
12 OEC, much less to NASS giving the OEC guidance on making reports about election  
13 mis/disinformation. The spin Plaintiff puts on his own factual allegations is enough  
14 to make one dizzy.

15 Regardless of the spin, the alleged facts are simply that NASS sent an email  
16 with Twitter’s portal information to all of its members, one of which is the California  
17 Secretary of State. NASS was not a “willful participant in joint action with the State  
18 or its agents.” *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).<sup>2</sup> NASS is alleged to have  
19 passed on information about Twitter’s portal, and nothing more. NASS’s actions, as  
20 evidenced in the exhibits attached to Plaintiff’s complaint, simply do not  
21 demonstrate the necessary animus to rise to the level of a conspiracy or anything

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25 <sup>2</sup> Plaintiff quotes *Dennis* as stating a conspiracy exists when a defendant was a  
26 “willful participant” in “an agreement or meeting of the minds to violate  
27 constitutional rights.” (Docket No. 67, p. 8:14-16.) The second part of that  
quotation is not from *Dennis*. NASS nevertheless agrees that it is a necessary part  
of conspiracy.



1 other than passing along information that could be useful to its members who work  
2 in the election field.

3 **B. NASS is not a joint actor with the State.**

4 The only test pursuant to which Plaintiff deems NASS a “state actor” is the  
5 joint action test. Plaintiff argues that NASS “affirmed, authorized, encouraged and  
6 facilitated the plan to have Secretaries of State and the OEC, report disfavored tweets  
7 directly to social media.” (Docket No. 67, p. 10:19-20.) Putting aside the legal  
8 conclusions and rhetoric, where are the actual facts that establish that NASS  
9 encouraged any person or entity to report “disfavored tweets?” What are “disfavored  
10 tweets?” The alleged actions of NASS are actually very simple. Regardless of the  
11 nefarious adjectives and adverbs Plaintiff uses to characterize it, the only relevant  
12 fact is that NASS sent its members, including the California Secretary of State, an  
13 email with a portal created by Twitter, a private entity, for reporting election  
14 mis/disinformation pursuant to a request from Twitter. That’s it. That’s all she wrote.

15 Plaintiff attempts to argue that NASS’s actions are distinguishable from those  
16 in *Polk v. Yee*, 481 F. Supp. 3d 1060, 1066 (E.D. Cal. 2020) because they were more  
17 than an “administrative action” but that is exactly what the email NASS sent was,  
18 and it was sent on behalf of a **private entity**, to wit Twitter. NASS is a non-profit,  
19 nonpartisan professional organization for secretaries of state that serves as a medium  
20 for the exchange of information, including regarding elections. (Reynolds Dec. ¶¶ 3  
21 and 6.) Elections are under the authority of the secretary of state in many states.  
22 Sending emails to its members about how to report election mis/disinformation is  
23 part of the administrative tasks NASS’s members expect it to perform.

24 In trying to distinguish NASS’s actions from those of the union in *Polk*,  
25 Plaintiff once again cites to legal conclusions he somehow believes become facts  
26 simply because they are alleged. Plaintiff claims “[f]or the same reason that NASS  
27 and OEC “conspired” with OEC [sic] and Twitter, they were also “interdependent,”

1 “deeply intertwined,” and “jointly responsible for O’Handley’s constitutional  
2 injuries.” (Docket No. 67, p. 9:29-10:2.) Nefarious non-factual adjectives are no  
3 substitute for facts. The reason Plaintiffs does not allege any actual facts establishing  
4 joint action between the state and NASS is because there are none.

5 **V. CALIFORNIA’S LIBERTY OF SPEECH CLAUSE CAN ONLY**  
6 **BE VIOLATED BY A STATE ACTOR, NOT A PRIVATE**  
7 **ENTITY LIKE NASS.**

8 Plaintiff wrongly contends *Golden Gateway Center v. Golden Gateway*  
9 *Tenants Assn*, 26 Cal.4th 1013 (2001) is not precedential law establishing a state  
10 action requirement before California’s free speech clause can be violated. Plaintiff  
11 instead cites to *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468 (2000) for the  
12 proposition that California’s Liberty Free Speech Clause “runs against the world,  
13 including private parties as well as governmental actors.” (Docket No. 67, p. 11:3-  
14 7.) He is wrong; the *Gerawan* statement was dicta; and this exact issue has already  
15 been addressed by this very district.

16 In *Campbell v. Feld Ent. Inc.*, No. 12-CV-4233-LHK, 2014 WL 1366581, at  
17 \*6–8 (N.D. Cal. Apr. 7, 2014), the court looked at this same issue and granted a  
18 motion to dismiss. Plaintiffs, members of an animal rights activism group, sued  
19 circus promoters for intentionally interfering with plaintiffs’ California free speech  
20 rights by preventing plaintiffs from engaging in protests and videotaping the circus  
21 animals. Defendants filed a motion to dismiss based on, among other things, the lack  
22 of state action on the part of the defendants. Defendants cited to *Golden Gateway* to  
23 support their position. Plaintiffs pointed to *Gerawan*. The court aptly summarized  
24 the positions of the parties, very similar to those before this Court, as follows:

25 Plaintiffs counter that because *Golden Gateway* was a plurality opinion, it is  
26 not binding. Plaintiffs instead point to *Gerawan Farming, Inc. v. Lyons*, in  
27 which the California Supreme Court stated that “article I’s right to freedom of  
28 speech, unlike the First Amendment’s, is unbounded in range” and “runs

1 against the world, including private parties as well as governmental actors.”  
 2 (Citation omitted.) As both the lead opinion and the dissent in *Golden*  
 3 *Gateway* acknowledge, however, the statement in *Gerawan* is dicta and not  
 4 binding on California courts. (Citation omitted.) Furthermore, because there  
 5 was no question that there was a state actor in *Gerawan*, the California  
 6 Supreme Court did not analyze the state actor limitation issue. (Citation  
 7 omitted.)

8 The *Campbell* court looked to other California Supreme Court cases and  
 9 determined that that court would likely hold that Article I, Section 2 includes a state  
 10 actor limitation, except where the private actor operated what amounts to a public  
 11 forum. “Nothing in those decisions suggests a broader application of Article I,  
 12 Section 2 to other private actors.” *Campbell, supra*, 2014 WL 136658 at \*6-7, citing  
 13 *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979) (Article 1, Section 2  
 14 protects the reasonable exercise of speech right in privately-owned shopping  
 15 centers); *Fashion Valley Mall, LLC v. NLRB*, 42 Cal.4th 850, 858 (2007) (a  
 16 privately-owned shopping center could become a public forum if opened to the  
 17 public “in a manner similar to that of public streets and sidewalks”); *Ralphs Grocery*  
 18 *Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal.4th 1083, 1093  
 19 (2012) (entrances and exits to a grocery shopping center do not constitute public fora  
 20 subject to Article I, Section 2 limitations).

21 Plaintiffs do not point to any cases, and the Court has not found any, in which  
 22 the California Supreme Court has explicitly extended the protection of Article  
 23 I, Section 2 to interference by private individuals outside of the context of a  
 24 private actor's ownership of property that has been opened to the public such  
 25 that the private property in essence becomes a public forum. The Court  
 26 observes that other federal district and California courts have found that a state  
 27 action limitation is required under Article I, Section 2. (String citations  
 28 omitted.)

Based on these precedents, **the Court agrees that under California law, Article I, Section 2 includes a state actor limitation such that Article I, Section 2 protects only against the interference by state actors of citizens’**

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**exercise of speech rights in a public forum.** In certain limited situations in which a private actor opens his land to the public such that the land becomes a public forum, a private actor may satisfy the state actor limitation. **Absent this limited exception, California law does not support holding a private actor liable under Article I, Section 2** for interference with another private actor's exercise of speech rights in a public forum.

*Campbell, supra*, 2014 WL 136658 at \*7-8 (emphasis added). There is simply no basis for holding NASS, a private entity without a public forum, liable to Plaintiff under California Liberty of Speech clause.

**VI. PLAINTIFF HAS NOT ADEQUATELY PLED A CLAIM PURSUANT TO 42 U.S.C. § 1985(3) OR A CONSPIRACY BETWEEN NASS AND ANY DEFENDANTS SUFFICIENT TO ESTABLISH A CLAIM UNDER 42 U.S.C. § 1985(3).**

Plaintiff mistakenly argues that NASS failed to contest that Plaintiff's Constitutional rights were violated. In its moving papers, NASS clearly argued that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great American Fed. S & L Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Thus, **if a plaintiff's "allegations are insufficient to support a claim based on a violation of his constitutional rights," then "his allegations of a conspiracy to violate these constitutional rights do not state a claim."** *Pelozza v. Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th Cir. 1994)." (Docket No. 58 [Motion], pp. 25:23 – 26:1 (emphasis added).)

As a case Plaintiff cites points out, "§ 1985(3) requires at least one of the wrongdoers in the alleged conspiracy to be a state actor. Indeed, the Supreme Court has held that 'an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy.'" *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021) (citation omitted), cert. denied, No. 20-1773, 2021 WL 4733327 (U.S. Oct. 12, 2021) (rejecting 1985(3) claim against private association). Because

1 Plaintiff has not and cannot adequately allege a conspiracy as established in Section  
2 IIIA above, there can be no cause of action against NASS for a violation of Section  
3 1985(3) or any other Constitutional claim, and therefore, no viable cause of action  
4 against NASS.

5 **VII. THE COURT SHOULD DISMISS WITHOUT LEAVE TO**  
6 **AMEND**

7 Where “allegation of other facts consistent with the challenged pleading could  
8 not possibly cure the deficiency,” then “dismissal without leave to amend is proper.”  
9 *Benavidez v. County of San Diego*, 993 F.3d 1134, 1155 (9th Cir. 2021) (citations  
10 omitted) (affirming dismissal without leave); *Great Minds v. Office Depot, Inc.*, 945  
11 F.3d 1106, 1112 (9th Cir. 2019) (same, even where no prior amendments).

12 That is just the case here. There is no conceivable way Plaintiff could amend  
13 his complaint to overcome the evidence establishing that NASS is not subject to this  
14 Court’s jurisdiction. And Plaintiff would have to allege facts wildly inconsistent with  
15 his complaint and its attachments to have any hope of establishing a prima facie  
16 claim against NASS. The Court should dismiss without leave to amend.

17 **VIII. CONCLUSION**

18 NASS should be dismissed from this action pursuant to Rule 12(b)(2) because  
19 the Court has neither general nor specific personal jurisdiction over NASS.  
20 Plaintiff’s opposition failed to establish otherwise. On that basis alone, this motion  
21 should be granted.

22 NASS should also be dismissed pursuant to Rule 12(b)(6) because Plaintiff’s  
23 complaint fails to state a claim upon which relief can be granted. NASS is a private  
24 entity, not a government or state actor. Nothing alleged in Plaintiff’s complaint can  
25 make NASS a joint actor with the State. NASS engaged in an administrative task of  
26 sending an email to its 48 Secretary of State members with portal information  
27 provided by Twitter for the reporting of election mis/disinformation. NASS did not

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1 conspire with any person or entity to cause Plaintiff harm and Plaintiff neither  
2 adequately alleged, nor provided any evidence, otherwise. NASS is not responsible  
3 for the conduct of which Plaintiff complains and therefore, all Plaintiff’s claims  
4 against NASS should be dismissed.

5 Respectfully submitted,

6 Dated: December 1, 2021

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