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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

14 **ROGAN O’HANDLEY,**

15 Plaintiff,

16 v.

17 **ALEX PADILLA, et al.,**

18 Defendants.

3:21-cv-07063-CRB

**STATE DEFENDANTS’ REPLY TO
PLAINTIFF’S OPPOSITION TO MOTION
TO DISMISS**

Date: December 16, 2021
 Time: 10:00 a.m.
 Dept: 6 (17th Floor)
 Judge: The Honorable Charles R. Breyer
 Trial Date: Not set
 Action Filed: June 13, 2021

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INTRODUCTION AND SUMMARY OF ARGUMENT

Section 10.5 of the California Elections Code directs the Secretary of State’s Office of Election Cybersecurity (OEC) to identify and mitigate misleading information that could suppress voter turnout or disrupt the orderly administration of elections. Plaintiff’s complaint alleges that, under this statute, OEC identified a single social media post by plaintiff as misleading and informed Twitter about it. Twitter, in turn, determined to apply its content-moderation policies to this post and at least four others not identified by OEC. Plaintiff challenges these actions as evidencing a broad conspiracy among OEC, Twitter, and other private actors to quell the speech of political conservatives. He seeks not only declaratory and injunctive relief but also to recover punitive damages from five officers and employees of the Secretary of State’s Office named in their individual capacities.¹

Plaintiff’s opposition to the State’s motion to dismiss confirms that this Court lacks subject matter jurisdiction to entertain plaintiff’s claims. The complaint pleads no facts suggesting that plaintiff’s alleged harm—Twitter’s application of multiple “strikes” to plaintiff’s account for violations of its civic integrity policy—is fairly traceable to the actions of OEC. The entire action should therefore be dismissed for lack of Article III standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–43 (1976).

Even if plaintiff could establish standing, his opposition fails to overcome the basic fact that Twitter is a private actor. The complaint’s allegations, taken as true, do not demonstrate the close cooperation and interdependence necessary to prove state action under the “joint action” or “nexus” tests. Therefore, plaintiff’s section 1983 claims, directed at Twitter’s private conduct, cannot proceed. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128 (9th Cir. 2012).

The complaint also fails to state free speech, equal protection, due process, void-for-vagueness, and civil conspiracy claims. Plaintiff’s speech claims fail because the act of reporting a single post to Twitter as misleading is protected government speech. The claim that that the

¹ In addition to the five defendants named in their individual capacities, the complaint also names Secretary of State Dr. Shirley N. Weber in her official capacity; together, they are referred to here as “State Defendants.”

1 State Defendants selectively enforced Elections Code section 10.5 to discriminate against
2 political conservatives fails because the Equal Protection Clause does not protect against speech-
3 based retaliation, and also because it fails to articulate a plausible theory of selective enforcement
4 based on a suspect classification not involving speech. The due process claim must be dismissed
5 because there is no due process protection from Twitter’s private actions and no protectable
6 property interest in plaintiff’s Twitter account. The complaint fails to state a vagueness claim
7 because Elections Code section 10.5 does not regulate public conduct. And the civil conspiracy
8 claim cannot proceed because 42 U.S.C. §1985 does not protect “individuals who questioned
9 election processes and outcomes” from class-based animus as a matter of law.

10 The opposition also fails to rebut the State Defendants’ showing that the five defendants
11 named in their individual capacities are entitled to qualified immunity. Plaintiff provides no
12 authority for the proposition that reporting false or misleading information about elections to a
13 third-party social media platform is a clearly established infringement of constitutional rights.
14 Accordingly, all five defendants named in their individual capacities should be dismissed from
15 this action, to the extent any of plaintiff’s claims survive dismissal.

16 For the reasons set forth below and in the State Defendants’ opening memorandum, the
17 motion to dismiss should be granted, and the complaint dismissed without leave to amend.

18 ARGUMENT

19 I. PLAINTIFF FAILS TO ESTABLISH THAT HIS ALLEGED INJURY IS FAIRLY 20 TRACEABLE TO THE STATE DEFENDANTS’ CONDUCT

21 The opposition fails to rebut the State Defendants’ showing that plaintiff’s claimed injury is
22 not fairly traceable to the OEC, and he therefore lacks Article III standing. A bevy of cases “hold
23 that a plaintiff failed to establish that an injury was traceable to a defendant when the injury
24 would arise only if some third party decided to take the action triggering the injury.” *Ass’n of*
25 *Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 546 (6th Cir. 2021)
26 (collecting cases). For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426
27 U.S. 26, the plaintiffs challenged a revenue ruling conferring tax-exempt status to hospitals that
28 denied non-emergency medical services based on financial ability on the grounds that it

1 discouraged the provision of services to lower-income patients. The Supreme Court found that
2 the plaintiffs lacked standing to challenge the revenue ruling on a theory that the revenue ruling
3 encouraged hospitals to limit services to indigent plaintiffs as a matter of internal policy, which
4 rested within the hospitals' discretion, thus breaking the chain of causation. *Id.* at 41–43.

5 So too here. The complaint alleges that OEC made an independent decision to flag a single
6 social media post by plaintiff, without directing any further action on Twitter's part. Twitter then
7 allegedly applied its civic integrity policy to determine that the post should be identified as
8 "disputed" and that a strike should be applied to plaintiff's account. The complaint alleges that
9 Twitter enforced its policy against other posts by plaintiff without contending that OEC played
10 any role whatsoever in those determinations. Like the hospitals in *Simon*, Twitter's internal
11 policies authorized it to label and remove plaintiff's posts and ultimately suspend his account.
12 Indeed, the decision to enforce its policies against plaintiff was ultimately within Twitter's sole
13 discretion and thus not traceable to OEC's execution of its responsibility to mitigate misleading
14 election information under section 10.5.

15 Plaintiff's opposition, like the complaint, attempts to fill in gaps in the causal chain with
16 bald conclusions that defendants' respective actions did not simply occur in parallel, but reflect
17 "orchestrat[ion]" of and "agree[ment] to" a broad conspiracy. *E.g.*, Pl.'s Opp to State Defs.' Mot.
18 to Dismiss ("Opp.") 3, ECF No. 68 (arguing that Twitter, in applying strikes to plaintiff's
19 account, took "coordinated steps...in furtherance of a conspiracy in which each Defendant had a
20 planned, assigned, and specialized role"). For example, the opposition argues that OEC's use of
21 "a dedicated portal Twitter created" was tantamount to a government demand to censor plaintiff's
22 speech. *Id.* at 3. Plaintiff's conclusory allegations that Twitter applied its own content-
23 moderation policies at the behest of, or due to a conspiracy with, governments is unsupported by
24 specific factual allegations, and this "disentitles them to the presumption of truth." *Ashcroft v.*
25 *Iqbal*, 556 U.S. 662, 681 (2009). The complaint does not allege that the Secretary of State's
26 office played any role in the creation of the Partner Support Portal. To the contrary, an email
27 appended to the complaint makes clear that the Partner Support Portal was created by Twitter
28 alone, that at some point Twitter decided to extend participation in the Portal to state elections

1 officials (including OEC), and that Twitter asked defendant National Association of Secretaries of
2 State (NASS) to help it publicize that fact. Compl. Ex. 2, 1, ECF No. 1-2. Although plaintiff
3 contends that the Secretary of State’s reports of mis- and disinformation “[p]resumably” received
4 “priority” treatment from Twitter, Compl. ¶ 33, ECF No. 1, the complaint fails to allege facts that
5 would establish that using the Partner Support Portal entitled OEC—or any other state or local
6 elections official using the Partner Support Portal, for that matter—to any influence over
7 Twitter’s independent content-moderation decisions. Whether a post should be labeled as
8 “disputed” is determined by the application of specific criteria developed by Twitter in its civic
9 integrity policy. *See* State’s Request for Jud. Notice (RJN), Ex. A, 3–5, ECF No. 59-1. Any user
10 can report policy violations, *id.* at 5–6, and whether to act on those reports rests solely with
11 Twitter. Thus, taking as true the allegation that OEC allegedly used the Partner Support Portal to
12 report false or misleading election information to Twitter, Compl. ¶¶ 32–33, that still would not
13 constitute an act in furtherance of a conspiracy.

14 Further, the complaint alleges no facts to support its inferential leap that OEC’s stated
15 reason for doing so—to comply with its legitimate statutory mandate under Elections Code
16 section 10.5—is pretextual, and that OEC’s actual purpose was to conspire with private actors to
17 suppress conservative speech. Contrary to plaintiff’s claims of “myriad [sic] direct
18 communications demonstrating extensive communication,” Opp. 4, the complaint alleges no
19 interaction between any defendants that plausibly suggests such intent. Indeed, while the
20 complaint cites various public documents from the Secretary of State’s Office, the *only* alleged
21 direct communication between OEC and Twitter concerning plaintiff was to flag his “audit every
22 California ballot” post. The conclusory nature of plaintiff’s assertions regarding the extent and
23 purpose of collaboration between OEC and the other defendants renders them too hypothetical
24 and implausible to support an inference that the State Defendants’ actions caused the termination
25 of plaintiff’s Twitter account. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011).²

26 ² The three cases cited by plaintiff regarding the “fairly traceable” prong of the standing
27 analysis are not instructive here beyond their general acknowledgment that, in order for a multi-
28 step chain of causation to support standing, the connection between each link must be stronger
than “tenuous” or “hypothetical.” Opp. 3. None of their alleged harms is predicated on the

1 Because this defect is inherent to plaintiff’s claims and cannot be corrected by amendment, the
2 complaint should be dismissed without leave to amend for want of standing.

3 **II. PLAINTIFF CANNOT ESTABLISH THAT TWITTER’S PRIVATE CONDUCT IS FAIRLY**
4 **ATTRIBUTABLE TO THE STATE**

5 As explained in the State Defendants’ opening memorandum, plaintiff cannot obtain relief
6 for his claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 without first establishing that the
7 alleged infringements resulting from the suspension of his Twitter account could be attributable to
8 the State. Plaintiff has failed to do so.

9 As an initial matter, plaintiff argues without basis that the State Defendants have somehow
10 “conceded” that the alleged constitutional violations—that is, the measures taken by Twitter to
11 label plaintiff’s posts as “disputed,” and to suspend and later terminate his Twitter account—
12 satisfy the first prong of the “fair attribution” analysis under *Lugar v. Edmonson Oil Co.*, 457
13 U.S. 922 (1982). *Lugar* held that conduct allegedly causing the deprivation of a federal right is
14 “fairly attributable” to a state if it is (1) “caused by the exercise of some right or privilege created
15 by the State or by a rule of conduct imposed by the State or by a person for whom the State is
16 responsible,” *id.* 37–38, and (2) the party alleged to have caused the deprivation is a state actor.
17 Contrary to plaintiff’s argument, the State Defendants’ opening memorandum makes clear that
18 the harms asserted by plaintiff resulted from Twitter’s independent enforcement of its content-
19 moderation policies, as distinct from any right, privilege, or rule established by the State. *See,*
20 *e.g.*, State Mem. in Supp. of Mot. to Dismiss (“State Mem.”) 5, ECF No. 59-1 (discussing
21 Twitter’s civic integrity policy), *id.* 7 (“Twitter alone had the power to determine to label of the
22 post as disputed and apply a strike to plaintiff’s account”); *id.* 8 (all complaint allegations of

23 existence of a conspiracy under which the actions of one defendant were attributed to another, or
24 to a third party not before the court. *See Maya*, 658 F.3d at 1060 (finding plaintiff had standing to
25 challenge defendants’ failure to disclose lending practices which, if true, directly caused plaintiff
26 to purchase home at inflated price); *Barnum Timber Co. v. U.S. Env’t Prot. Agency*, 633 F.3d 894
27 (9th Cir. 2011) (holding plaintiff alleged sufficient causal connection between agency’s
28 designation of creek as “impaired” by pollution and the diminished value of plaintiff’s creekside
property to maintain standing); *Ocean Advocs. v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 860
(9th Cir. 2005) (finding causal link between alleged conduct (planned construction of extension to
oil tanker dock) and its claimed harm (increased ship traffic and risk of oil spills)). The basis on
which each case found sufficient allegations of causation for standing purposes is therefore
distinguishable from the instant challenge alleging Twitter acted as an “arm of the OEC.” Opp. 3.

1 disciplinary actions against Plaintiff “are attributed to Twitter”); *see also* RJN Ex. A. Twitter’s
2 authority to moderate content posted on its platform does not flow from Elections Code section
3 10.5, nor is it a power traditionally held by the State. *Manhattan Cmty. Access Corp. v. Halleck*,
4 139 S. Ct. at 1934 (“A private entity . . . who opens its property for speech by others is not
5 transformed by that fact alone into a state actor); *Howard v. Am. Online Inc.*, 208 F.3d 741, 754
6 (9th Cir. 2000). Regardless, even if the State Defendants had not specifically addressed the first
7 prong of the *Lugar* analysis, this would not “concede[]” anything. Opp. 3. Whereas a party
8 opposing a motion or other request for relief can waive a point by failing to address it, a
9 defendant does not waive or concede an argument not raised affirmatively in a motion to dismiss.

10 With respect to the second *Lugar* prong, which is dispositive, the opposition makes clear
11 that plaintiff cannot overcome the strong presumption that Twitter is not a state actor under either
12 the “joint action” or “nexus” tests. Addressing the “nexus” test, plaintiff relies on the complaint’s
13 defective, conclusory allegations of conspiracy to suggest that this case is on similar footing to
14 cases like *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), which held that that a private actor engaged
15 in a “corrupt conspiracy” with an official actor (there, bribing a judge to enter an injunction)
16 could be acting under color of state law. Opp. 4. Here, however, plaintiff has failed to plead the
17 elements of a conspiracy, State Mem. 15, and his reliance on the same inadequate conspiracy
18 allegations to demonstrate a nexus between OEC’s exercise of its responsibilities under section
19 10.5 and Twitter’s independent acts to enforce its own terms of use is misplaced.

20 Looking to other circumstances in which courts have found a close nexus for state action
21 purposes, plaintiff fares no better. The Ninth Circuit has identified the following factors as
22 relevant to the establishment of a nexus: (1) the organization is mostly comprised of state
23 institutions; (2) state officials dominate decision making of the organization; (3) the
24 organization’s funds are largely generated by the state institutions; and (4) the organization is
25 acting in lieu of a traditional state actor. *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950
26 (9th Cir. 2008). The complaint fails to allege that Twitter meets any of these factors.

27 Plaintiff also comes up short under the “joint action” test,” which requires a showing that a
28 state has “so far insinuated itself into a position of interdependence with [Twitter] that it must be

1 recognized as a joint participant in the challenged activity.” *Gorenc v. Salt River Project Agric.*
2 *Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Burton v. Wilmington*
3 *Parking Auth.*, 365 U.S. 715, 725 (1961)). “Mere passive acquiescence in the direction of state
4 officials generally is not sufficient,” *Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir. 1989); rather,
5 the private and government actors must have specifically agreed to “violate constitutional rights.”
6 *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983).

7 The joint action authorities on which plaintiff relies confirm that allegations that would
8 demonstrate the requisite levels of “cooperation and interdependence” are lacking from the
9 complaint. For example, in *Tsao v. Desert Palace, Inc.*, private security guards at a casino were
10 found to act under color of state law under the “joint action” test where the local police
11 department had delegated the authority to issue citations to appear in court. Because the guards
12 were trained by local police, could obtain private arrest records from local police, and had
13 authority to compel cited persons to appear in court, they were found to be acting under color of
14 state law. 698 F.3d at 1140. Here, however, plaintiff has not alleged that state officials have
15 trained Twitter’s employees or vested them with the authority to carry out a government function
16 that Twitter would otherwise lack the authority to do. Rather, Twitter’s private authority to
17 moderate content posted to its platform flows from Twitter’s agreement with all of its users that it
18 may do so as an express condition of their use. Twitter exercises no authority from the state, nor
19 do state officials play any role in how Twitter chooses to exercise its discretionary enforcement
20 power. Indeed, the allegations regarding the successive strikes applied to plaintiff’s Twitter
21 account—with which, the complaint concedes, OEC had nothing to do, Compl. ¶¶ 84–89—
22 confirm that Twitter carries out its enforcement activities quite independently of OEC’s actions.
23 As such, the complaint lacks the indicia of cooperation and interdependence needed to establish
24 joint action.

25 Because the complaint fails to plead facts that would show Twitter’s conduct is fairly
26 attributable to the State, its federal claims should be dismissed without leave to amend.

1 **III. PLAINTIFF FAILS TO ESTABLISH THAT OEC’S MITIGATION OF ELECTION**
2 **MISINFORMATION IS NOT GOVERNMENT SPEECH**

3 The State Defendants’ moving papers establish that the complaint fails to state free speech
4 claims under the State and Federal constitutions because to find a violation of either would
5 necessarily abridge the government’s ability to speak freely. In opposition, plaintiff attempts to
6 portray the State Defendants’ actions as the “censorship” and “remov[al]” of speech, while
7 maintaining that these actions do not implicate any government speech. Opp. 5. This distinction
8 cannot hold. The sole allegation in the complaint concerning plaintiff’s Twitter account
9 attributed to any State Defendant is that an unnamed OEC employee contacted Twitter to flag a
10 single post by plaintiff. That flag was an inherent expression of the Secretary of State’s views
11 that the post in question is misleading and would interfere with election administration. Compl. ¶
12 76.

13 Plaintiff does not dispute that “the Free Speech Clause has no application” to expressive
14 conduct by the government. Nor could he. *See Pleasant Grove City, Utah v. Sumnum*, 555 U.S.
15 460, 467 (2009) (collecting cases); *id.* (“[I]t is not easy to imagine how government could
16 function if it lacked this freedom”); *Delano Farms Co. v. Cal. Table Grape Comm’n*, 4 Cal. 5th
17 1204, 1210 (2018). Instead, plaintiff argues that his “audit every California ballot” post was not
18 misleading, and therefore the “flag” must have been an attempt to “censor” him. That is a
19 speculative leap, not a factual allegation that must be taken as true. Further, whether plaintiff
20 agrees with OEC’s views of the post has no bearing on the fact that OEC’s identifying it as
21 misleading, and then explaining why to Twitter, is itself a form of expressive conduct on the part
22 of the Secretary that is not subject to First Amendment scrutiny. *Cf. Keller v. State Bar of Cal.*,
23 496 U.S. 1, 12–13 (1990) (“If every citizen were to have a right to insist that no one paid by
24 public funds express a view with which he disagreed, debate over issues of great concern to the
25 public would be limited to those in the private sector, and the process of government as we know
26 it radically transformed.”).

27 Because plaintiff has failed to establish that the complaint states a free speech claim under
28 either the State or U.S. Constitutions, both claims warrant dismissal.

1 **IV. THE COMPLAINT FAILS TO ALLEGE THAT SECTION 10.5 HAS BEEN ENFORCED**
 2 **DISCRIMINATORILY BASED ON PLAINTIFF’S POLITICAL AFFILIATION**

3 The State Defendants have established the complaint fails to identify a discernible suspect
 4 class that was allegedly denied equal protection, alleging only that plaintiff was targeted for “his
 5 expression of the opinion that California . . . should audit its elections to protect against voter
 6 fraud.” State Mem. 12. Plaintiff’s opposition attempts to clarify the ambiguity in his pleading by
 7 arguing that plaintiff’s protected status is that of one who makes “conservative requests for
 8 transparency in election processes rather than the same calls from self-identified political
 9 liberals.” Opp. 7 & Compl. ¶ 83; *compare with* Compl. ¶¶ 2, 4, 66, 138–148 (alleging that
 10 plaintiff’s speech was “disfavored” and targeted for “seek[ing] greater government
 11 accountability” without reference to his political persuasions). Plaintiff’s argument confirms that
 12 the factual predicate for his equal protection claim is his speech criticizing state government, and
 13 not membership in any suspect class. Thus, the Equal Protection Clause is not implicated, and the
 14 claim must be dismissed. *AIDS Healthcare Found. v. Los Angeles Cnty.*, No. CV 12–10400 PA
 15 (AGRx), 2013 WL 12134048, at *8 (C.D. Cal. Mar. 18, 2013) (noting a majority of circuits have
 16 held that “allegations that a plaintiff was treated differently in retaliation for the exercise of First
 17 Amendment rights do not implicate the Equal Protection Clause”).

18 Even if plaintiff’s equal protection allegations were not grounded in the First Amendment,
 19 the complaint would still fail to state a claim because it does not allege sufficient facts to establish
 20 that OEC implemented section 10.5 to discriminate against political conservatives who support
 21 increased transparency in elections.³ The complaint pleads no specific facts that would indicate
 22 that OEC declined to flag posts by liberal commentators calling for election transparency. *Wayte*
 23 *v. United States*, 470 U.S. 598, 608 (1985) (holding that selective enforcement claims “require
 24 petitioner to show both that the passive enforcement system had a discriminatory effect and that it
 25 was motivated by a discriminatory purpose”). Plaintiff cites *Iqbal*, 556 U.S. at 678, for the

26 _____
 27 ³ The complaint’s dearth of factual allegations regarding the State Defendants’
 28 purportedly selective application of section 10.5 lends further support to the State Defendants’
 argument that the equal protection claim should be evaluated under a “class-of-one” theory. *See*
 State Mem. 12.

1 proposition that it is sufficient for pleading purposes to identify the suspect and non-suspect
2 classifications without supporting allegations that, if true, would establish differential treatment.
3 Opp. 7 n. 1. Contrary to plaintiff’s argument, simply alleging that “Defendants focused their
4 speech censorship efforts on conservative requests for transparency in elections processes rather
5 than the same calls from self-identified political liberals,” without further factual detail, does not
6 pass muster under *Iqbal*. 556 U.S. at 678 (“Although for the purposes of a motion to dismiss we
7 must take all of the factual allegations in the complaint as true, we are not bound to accept as true
8 a legal conclusion couched as a factual allegation,” citations and quotation marks omitted). Thus,
9 the equal protection claim, which should be dismissed without leave to amend.

10 **V. PLAINTIFF HAS NO DUE PROCESS INTEREST IN HIS TWITTER ACCOUNT**

11 Plaintiff’s opposition fails to establish that a due process interest could ever attach to a
12 private social media company’s content-moderation decisions. And even if it could, plaintiff fails
13 to establish any protected liberty or property interest in the account itself.

14 Plaintiff contends that he has a business interest in the continued operation of his Twitter
15 account that arises from his “‘reasonable expectation of entitlement deriving from existing
16 rules . . . such as state law.’” Opp. 8, quoting *Wedges/Ledges of Cal., Inc. v. Phoenix, Ariz.*, 24
17 F.3d 56, 62 (9th Cir. 1994). A reasonable expectation forms where the law or rule in question
18 supplies “‘an articulable standard’ sufficient to give rise to a legitimate claim of entitlement.”
19 *Wedges/Ledges of Cal., Inc.*, 24 F.3d at 63 (recognizing expectation of entitlement of license to
20 operate arcade games arising from city ordinance requiring city treasurer to issue licenses based
21 solely on whether the game is a “game of skill,” as defined by the ordinance) (quoting *Parks v.*
22 *Watson*, 716 F.2d 646, 657 (9th Cir. 1983)).

23 The state law giving rise to plaintiff’s asserted expectation of entitlement is an 11-word
24 statute, enacted in 1872, providing simply that “[t]he good will of a business is property and is
25 transferable.” Opp. 8, citing Cal. Bus. & Prof. Code § 14102. To the extent this statute supplies
26 an “articulable standard” giving rise to a claim of entitlement, the entitlement attaches to a
27 “business,” meaning “a professional, commercial or industrial enterprise with assets,” as distinct
28 from an individual person. See *In re Marriage of McTiernan & Dubrow*, 133 Cal. App. 4th 1090,

1 1098–1099 (2005). *In re Marriage of McTiernan* declined to recognize a due process interest in
2 the petitioner’s career as a film director, despite his demonstrable professional success as
3 reflected in the gross revenues of his films, as well as his expectation in the “continued patronage
4 of his services” as a director, because section 14102 endows the capacity to generate goodwill
5 only to a “business,” and not a “person doing business.” *Id.* at 1098 (“No California case has held
6 that a natural person, apart and distinct from a ‘business,’ can create or generate goodwill.”).
7 Plaintiff’s former Twitter account was associated with him as an individual and is not itself a
8 business. If the expectation of a director’s future patronage from moviegoers does not amount to
9 business goodwill, by extension, neither would the expectation of future patronage of plaintiff’s
10 followers on Twitter, even taking as true the complaint’s allegations that plaintiff’s popularity on
11 social media led him to be offered media appearances and speaking opportunities. Compl. ¶ 93.
12 Because plaintiff’s Twitter account is not capable of creating goodwill, Plaintiff has no property
13 interest in continued access to his account.

14 Plaintiff also contends that the defendants’ actions deprived him of his property interest in
15 pursuing his chosen occupation. Opp. 8 (citing *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th
16 Cir. 1989)). As the State Defendants have already demonstrated, there is no procedural due
17 process right to continue one’s occupation. State Mem. 13. The *Benigni* case upon which
18 plaintiff relies concerns a substantive due process claim alleging denial of the right to pursue
19 one’s chosen application. The complaint here does not attempt to state a substantive due process
20 claim, but rather frames plaintiff’s injury as arising from the lack of notice and an opportunity to
21 be heard before the suspension of his account. Compl. ¶¶ 149–158. Further, plaintiff could not
22 plead a substantive due process claim without allegations establishing that he is “unable to pursue
23 an occupation” as a political commentator—on any media platform—by reason of the termination
24 of his Twitter account. Here, however, the complaint alleges that plaintiff has more than two and
25 half million followers across multiple social medial platforms, not including Twitter, and that he
26 has appeared over 75 times on national television news programs in 2020 and 2021. Compl. ¶¶ 9,
27 70. As such, plaintiff has failed to establish that a property interest in one’s private vocation can
28 support a procedural due process claim as a matter of law.

1 Finally, plaintiff’s claimed liberty interest in his ability to use Twitter, premised on the
2 alleged impairment of his free speech rights, is derivative of plaintiff’s failed free speech claims,
3 and should be dismissed alongside them without leave to amend.

4 **VI. PLAINTIFF’S VAGUENESS CLAIM FAILS BECAUSE PLAINTIFF CANNOT ESTABLISH**
5 **THAT SECTION 10.5 GOVERNS PUBLIC CONDUCT**

6 Plaintiff’s opposition fails to establish that section 10.5 of the Elections Code is void for
7 vagueness. It argues that the statute does not define what it means to “counteract false or
8 misleading information,” and thus provides no notice of what it prohibits. Opp. 9. But as the
9 State Defendants’ motion explains, section 10.5 of the Elections Code cannot be challenged as
10 vague because it does not regulate public conduct. Rather, it guides the exercise of OEC’s
11 discretion in carrying out its mandate, which includes, as relevant here, “assess[ing] . . . false or
12 misleading information regarding the electoral process” and “mitigat[ing] the false or misleading
13 information.” Cal. Elec. Code, § 10.5(c)(8); see *United States v. Beckles*, __ U.S. __, 137 S. Ct.
14 886, 895 (2017) (holding that the U.S. Sentencing Guidelines could not be challenged as vague
15 because, in establishing advisory ranges to guide courts in the application of criminal sentencing,
16 they did not “bind or regulate the primary conduct of the public,” citations and quotations
17 omitted). Because section 10.5 does not regulate the conduct of plaintiff or any other private
18 citizen, there can be no risk that it will be arbitrarily enforced against plaintiff or deter speech.⁴

19 Although plaintiff does not dispute that section 10.5 is directed at OEC, he contends that
20 section 10.5 is nevertheless vague because it poses an “obvious, inherent danger” in allowing
21 “unbridled government discretion.” Opp. 9. As the Supreme Court observed in *Beckles*, it “ha[s]
22 never suggested that unfettered discretion can be void for vagueness.” *Beckles*, 137 S. Ct. at 895.
23 Further, plaintiff cannot fairly complain to lack notice of the obvious outcome from the exercise
24 of OEC’s authority under section 10.5. The prospect that OEC would identify social media posts
25 as false or misleading in the course of executing its responsibility to “mitigate false or misleading
26 information” is self-evident. Plaintiff’s defective vagueness claim should be dismissed without

27 ⁴ Because section 10.5 does not proscribe speech, plaintiff’s contention that the statute
28 requires greater specificity than vagueness challenges outside of the First Amendment context is
unavailing. Opp. 9 (quoting *Lane v. Salazar*, 911 F.3d 942, 950 (9th Cir. 2018).)

1 leave to amend.

2 **VII. PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER SECTION 1985 FOR ENGAGING IN**
 3 **“DISFAVORED” CONDUCT**

4 Section 1985 does not apply to plaintiff, and the opposition fails to establish otherwise.
 5 Plaintiff contends that the State Defendants’ actions were motivated by class-based animus
 6 against politically conservative speakers. But the complaint makes clear that the alleged animus
 7 was aimed specifically at “individuals who questioned election processes and outcomes,” with
 8 whose views the State Defendants “disagreed.” As the Supreme Court has recognized, a “class”
 9 whose shared characteristic is “a desire to engage in conduct that the § 1985(3) defendant
 10 disfavors” does not suffice to establish class-based animus for section 1985 purposes—
 11 “[o]therwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3)
 12 by simply defining the aggrieved class as those seeking to engage in the activity the defendant has
 13 interfered with.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269 (1993)
 14 (dismissing claim alleging anti-abortion protesters engaged in conspiracy under section 1985 in
 15 part because “persons seeking abortion” did not constitute a class for section 1985 purposes).

16 Plaintiff relies incorrectly on *Life Insurance Co. of North America v. Reichardt*, 591 F.2d
 17 499 (9th Cir. 1979), for the proposition that political affiliation can be a suspect or quasi-suspect
 18 classification under section 1985. *Reichardt*, an equal protection case filed on behalf of all
 19 female purchasers of disability insurance, considered whether sex was a suspect classification. It
 20 made no findings regarding political affiliation as a suspect class status beyond citing two cases
 21 from outside the Circuit to establish that section 1985 was not limited strictly to race-based
 22 classifications. *Id.* 505. Further, as plaintiff himself is the only conservative critic of election
 23 processes and outcomes whose speech is identified in the complaint as having been targeted,
 24 *Reichardt* is also distinguishable as a putative class action.

25 For these reasons, plaintiff’s claim under section 1985 fails and should be dismissed.

26 **VIII. THE FIVE INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED ON QUALIFIED**
 27 **IMMUNITY GROUNDS**

28 Plaintiff’s opposition fails to rebut the State Defendants’ argument that the five defendants

1 named in their personal capacities are entitled to qualified immunity. Acknowledging that he
2 cannot prove a “clearly established” constitutional right by relying on analogous precedent,
3 plaintiff contends instead that analogous authority is not necessary where the alleged
4 constitutional violation “is so beyond the pale and patently absurd that no reasonable person
5 would consider it constitutional.” Opp. 11-12, citing *Villareal v. City of Laredo*, No. 20-40359,
6 2021 WL 5049281 (5th Cir. Nov. 1, 2021), and *Carey v Nevada Gaming Control Bd.*, 279 F.3d
7 873 (9th Cir. 2002). This already-high standard becomes harder still to satisfy when, as here, the
8 alleged constitutional infringement is attributable to the acts of a third party (here, Twitter), rather
9 than a public official. See *Zaloga v. Borough of Moosic*, 841 F.3d 170, 177 (3d Cir. 2016) (“[I]t
10 has never been established that a governmental official who does not himself retaliate but instead
11 pressures another individual to retaliate . . . can be held personally liable”). Under such
12 circumstances, the “defendant’s conduct must be of a particularly virulent character. It is not
13 enough that defendant speaks critically of plaintiff or even that defendant directly urges or
14 influences the third party to take adverse action. Rather, defendant must ‘threaten’ or ‘coerce’ the
15 third party to act.” *McLaughlin v. Watson*, 271 F.3d 566, 573 (3d Cir. 2001) (dismissing First
16 Amendment retaliation claim on qualified immunity grounds). Here, the complaint alleges no
17 such threats or coercion, which sharply distinguishes *Metro Display Advertising Inc. v. City of*
18 *Victorville, et al.*, 143 F.3d 1191 (9th Cir. 1998), in which city councilmembers expressly
19 threatened to terminate a transit operator’s contract if it did not remove pro-union advertisements
20 that the councilmembers acknowledged they could not take down themselves on account of “First
21 Amendment problems.” *Id.* at 1196.

22 Plaintiff’s opposition to qualified immunity rests solely upon the broad supposition that
23 “viewpoint discrimination is so fundamental a constitutional principle that qualified immunity
24 will not protect a government official engaged in it.” But the Supreme Court has “repeatedly told
25 courts . . . not to define clearly established law at a high level of generality” such as this. *Ashcroft*
26 *v. al-Kidd*, 563 U.S. 731, 742 (2011) (“The general proposition, for example, that an unreasonable
27 search or seizure violates the Fourth Amendment is of little help in determining whether the
28 violative nature of particular conduct is clearly established.”). By the same token, plaintiff’s

1 observation that viewpoint discrimination by the government violates the First Amendment sheds
2 no light on whether reporting misleading information about elections to a third-party social media
3 platform clearly establishes a violation of that right.

4 Plaintiff has failed to identify any constitutional infirmity in Elections Code section 10.5, or
5 the State Defendants' implementation of it, that meets this exacting standard. Section 10.5, as it
6 relates to Plaintiff's claims, directs state elections officials to take three actions: (1) to "[a]ssess
7 . . . false or misleading information regarding the electoral process," (2) "mitigate the false or
8 misleading information," and (3) "educate voters, especially new and unregistered voters, with
9 valid information." Cal. Elec. Code § 10.5(c)(8). Reporting false or misleading information to
10 Twitter is not so "patently violative of fundamental constitutional principles," *Carey*, 279 F.3d at
11 881, that a reasonable OEC employee would have understood not to do so—especially when any
12 Twitter user can flag a false or misleading post, and that doing so in no way obligates Twitter to
13 take any further action in response. *See* State Mem. at 7-8, 10-11. Plaintiff's allegations are thus
14 distinct from those in *Villareal v. City of Laredo*, in which a citizen journalist arrested for
15 questioning a police officer about the identity of local victims under the authority of a state law
16 criminalizing the solicitation of non-public information from public employees that had never
17 previously been enforced. 2021 WL 5049281, at *2.

18 Because plaintiff cannot state claims of viewpoint discrimination or First Amendment
19 retaliation—much less violations of "clearly established" constitutional rights—all five State
20 Defendants named in their personal capacities should be dismissed from this action.

21 **IX. PLAINTIFF DOES NOT DISPUTE SECRETARY WEBER'S SOVEREIGN IMMUNITY**
22 **FROM SUIT UNDER THE STATE CONSTITUTION AND ANY CLAIM FOR DAMAGES**

23 Plaintiff's opposition papers do not dispute that the Eleventh Amendment bars his claim
24 under the Free Speech clause of the California constitution, along with any claim for damages,
25 against Secretary Weber. State Mem. 17. Accordingly, these claims should be dismissed.

26 **CONCLUSION**

27 For the foregoing reasons and those in the State Defendants' opening memorandum,
28 plaintiff's complaint should be dismissed without leave to amend.

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Dated: December 1, 2021

Respectfully submitted,

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