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17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA**  
19 **SAN FRANCISCO DIVISION**

20  
21 **ROGAN O’HANDLEY,**  
22 **Plaintiff,**  
23  
24 **v.**  
25 **ALEX PADILLA, et. al.,**  
26 **Defendants.**

Case No. 3:21-cv-07063-CRB

**DEFENDANT TWITTER, INC.’S  
REPLY IN SUPPORT OF MOTION  
TO DISMISS THE COMPLAINT**

Hearing Date: December 16, 2021  
Courtroom: 6-17th Floor  
Time: 10:00 AM  
Judge: Hon. Charles R. Breyer

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1 **SUMMARY OF ARGUMENT**

2 O’Handley’s opposition brief confirms that his claims all fail as a matter of law for multiple  
3 independent reasons.

4 *First*, O’Handley’s federal constitutional claims must be dismissed because the Complaint does not  
5 plausibly plead state action. He does not allege that Twitter ever consulted, conferred, or otherwise  
6 discussed with the California Office of Election Cybersecurity (“OEC”) either its review of content or its  
7 decision-making process—in O’Handley’s case or any other. Instead, his core theory is that a single report  
8 from OEC officials, flagging one of his Tweets, transformed all of Twitter’s subsequent, independent  
9 content-moderation decisions relating to his account into state action. Courts have repeatedly recognized  
10 that this type of informational exchange falls far short of the kind of “substantial ... cooperation” that  
11 can transform the decisions of private companies into state action. Mot. 8-9. That is true regardless of  
12 whether the government or the private party (or both) provides the information. *See Mathis v. Pac. Gas &*  
13 *Elec. Co.*, 75 F.3d 498, 503-504 n.4 (9th Cir. 1996). And because the Complaint shows that Twitter decided  
14 whether to act on government-reported Tweets based on an independent review and application of its  
15 own platform Rules, not because the government told it to, the Complaint does not raise a plausible  
16 inference that Twitter and OEC conspired to violate O’Handley’s constitutional rights. Decisions “made  
17 by [a] private part[y] according to professional standards that are not established by the State”—like  
18 Twitter’s in this case—fall far short of plausibly establishing joint action. *Blum v. Yaretsky*, 457 U.S. 991,  
19 1008 (1982).

20 *Second*, O’Handley’s claim under the California constitution fails for the same reason. His  
21 argument that the free speech clause has no state action requirement is contrary to the uniform views of  
22 California courts, the Ninth Circuit, and courts in this District. *See, e.g., Guevarra v. Seton Med. Ctr.*, 642 F.  
23 App’x 683, 687 (9th Cir. 2016); *Golden Gateway Ctr. v. Golden Gateway Tenants, Ass’n*, 26 Cal. 4th. 1013, 1031  
24 (2001) (plurality); *Yu v. Univ. of La Verne*, 196 Cal. App. 4th 779, 790 (2011). His attempt to circumvent  
25 the state action requirement by asking this Court to dramatically expand the narrow, idiosyncratic  
26 exception that the California Supreme Court identified several decades ago for the common areas of a  
27 large outdoor shopping center in *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899 (1979), is unavailing.  
28 Courts have uniformly refused to extend *Pruneyard* to websites and online platforms like Twitter. And any

1 effort to apply the California constitution’s free speech clause to Twitter’s content-moderation decisions  
2 would violate Twitter’s own First Amendment rights under the U.S. Constitution by forcing it to  
3 disseminate messages with which it disagrees.

4 *Third*, O’Handley’s claim under 42 U.S.C. § 1985(3)—a provision intended to combat the violent  
5 efforts of the Ku Klux Klan and its allies to thwart the Reconstruction amendments—fails because that  
6 provision does not reach alleged conspiracies of a non-racial, political nature. *United Bhd. of Carpenters &*  
7 *Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 836 (1983). Even if it did, the Complaint is devoid  
8 of any allegations that raise a plausible inference that Twitter conspired with Defendants to discriminate  
9 against O’Handley based on his political affiliation. It does not identify any other so-called  
10 “conservatives” whose election-related content Twitter removed, let alone any allegations that Twitter  
11 removed that content at a higher rate than so-called “liberals” expressing the same views.

12 *Fourth*, all of O’Handley’s claims run squarely into Twitter’s own First Amendment rights because  
13 they are based on its editorial decisions about what messages to display on its platform. O’Handley is  
14 wrong to suggest that when Twitter makes such decisions, whether at the general level of formulating  
15 Rules for its platform or at the granular level of applying those Rules and exercising its judgments about  
16 particular content or speakers, it does not engage in expression. Twitter is not required to identify any  
17 particularized, articulable message that its actions relating to O’Handley’s Tweets and account conveyed,  
18 *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), but even if it were,  
19 those actions, taken in the context of its overall public policies about civic integrity and the labels it affixed  
20 to O’Handley’s Tweets, plainly conveyed Twitter’s view that election-related misinformation threatens  
21 serious harm to society.

22 *Fifth*, subsection 230(c)(1) of the Communications Decency Act provides an independent basis to  
23 dismiss O’Handley’s claims. O’Handley is wrong that subsection 230(c)(1) does not apply to a platform’s  
24 decision to moderate a plaintiff’s own content. Courts in this District have squarely rejected that argument  
25 in decisions affirmed by the Ninth Circuit. *See, e.g., Fyke v. Facebook, Inc.*, 2019 WL 11288576, at \*2 (N.D.  
26 Cal. June 18, 2019), *aff’d*, 808 F. App’x 597 (9th Cir. 2020); *Riggs v. MySpace, Inc.*, No. 2009 WL 10671689,  
27 at \*3 (C.D. Cal. Sept. 17, 2009), *aff’d*, 444 F. App’x 986 (9th Cir. 2011). Under well-established law,  
28 subsection 230(c)(1) applies so long as *Twitter* did not create or develop the content at issue. Since all of

1 O’Handley’s claims seek to hold Twitter liable for its decisions to remove his Tweets, and ultimately to  
2 suspend him from its platform on account of those Tweets, they are barred by subsection 230(c)(1).

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**ARGUMENT**

**I. O’Handley’s Federal Constitutional Claims Fail For Multiple, Independent Reasons**

**A. O’Handley Fails To Plausibly Plead State Action**

O’Handley relies on only the joint-action test for state action. As Twitter has explained (Mot. 11), that test is demanding. Joint action “requires a *substantial* degree of cooperative action,” *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) (emphasis added), with respect to the “particular decision challenged,” *Mathis*, 75 F.3d at 503-504 n.4, or a conspiracy between a private actor and the government specifically to violate the plaintiff’s constitutional rights, *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989). It ordinarily arises only where a private actor wields governmental authority, *see Howerton v. Gabica*, 708 F.2d 380, 384 n.9 (9th Cir. 1983), or is deputized by the government to enforce the government’s laws, *see Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1132 (9th Cir. 2012).

Here, the Complaint does not plausibly allege that Twitter wielded governmental authority or that the government deputized Twitter to enforce a state law to label O’Handley’s Tweets or ultimately suspend his account. Compl. ¶¶ 72-88. Rather, as the Complaint acknowledges, the challenged actions were taken pursuant to Twitter’s own Rules regarding election misinformation. Compl. ¶¶ 3, 88. Nor does the Complaint allege that OEC played any role in Twitter’s review and determination that even the one O’Handley Tweet that OEC reported violated the Twitter Rules. Indeed, aside from that lone report, the Complaint does not allege any other communication between OEC and Twitter regarding O’Handley’s account or Tweets. And despite having obtained OEC’s files through public records requests, O’Handley does not allege that OEC reported any of his four other Tweets, posted months later, that Twitter determined also violated its Rules and that ultimately led Twitter to permanently suspend his account.

**1. The Complaint Fails To Allege Substantial Cooperation Between Twitter And The OEC**

OEC’s one-time, one-way communication regarding one Tweet that OEC believed violated Twitter’s Rules falls far short of the kind of “substantial degree of cooperation” required to establish joint action. Mot. 8-10; *Mathis*, 75 F.3d 503-504 n.4 (even repeated consultation and information sharing between a private company and government did not establish joint action); *Deeths v. Lucile Slater Packard Children’s Hosp. at Stanford*, 2013 WL 6185175, at \*10-11 (E.D. Cal. Nov. 26, 2013) (conferral between state and private actor throughout investigation insufficient to constitute state action). None of O’Handley’s

1 contrary arguments (Opp. 3-8) can change this conclusion.

2 O’Handley erroneously argues that OEC’s use of Twitter’s Partner Support Portal (the “Portal”)
 3 raises a plausible inference of joint action because the Portal allegedly provided OEC with “direct channels
 4 of communication” to report misinformation, which Twitter then allegedly reviewed on an expedited
 5 basis. Opp. 5. But government officials convey information to private actors in countless circumstances,
 6 often hoping to persuade them to act. Mot. 13-14 (newspapers sources, employer background checks,
 7 hospital health guidelines). And courts have uniformly held that mere exchanges of information between
 8 governmental and private entities cannot amount to joint action. *See* Mot. at 8-9 (collecting cases).

9 O’Handley attempts to distinguish the cases Twitter cites because they involved transmission of
 10 information from a private actor to the government, whereas here information flowed from the
 11 government to Twitter. Opp. 6-7. But he offers no principled reason why that distinction matters. Nor
 12 is it supported by any case law. In *Mathis*, for example, the Ninth Circuit held that a far greater amount
 13 of consultation and information-sharing—flowing in both directions—between a private company and a
 14 governmental task force regarding a personnel issue did not turn the *private company’s* decision to discharge
 15 an employee into state action. 75 F.3d at 503-504. Indeed, if anything, state action should be harder to
 16 establish where, as here, a private entity acts adversely to the plaintiff allegedly in response to information
 17 received from the government, than where the private entity supplies information that allegedly causes
 18 the government to take an *official action* alleged to be unconstitutional, because only in in the latter scenario
 19 does the private entity have to rely on the “mantle of [state] authority” to complete the alleged violation.
 20 *Compare Mathis*, 75 F.3d at 504 (finding no joint action where ultimate adverse action was private
 21 employer’s discharge of its employee), *with Howerton*, 708 F.2d at 385 (finding joint state action where
 22 private actors “cloaked themselves with authority of the state” by causing police officers to effectuate an
 23 eviction).<sup>1</sup> And the mere fact that a government agency reported content that it believed violated Twitter’s

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24  
 25 <sup>1</sup> O’Handley’s repeated invocation of *Lugar* is inapposite. There, the Court found state action where a
 26 private actor invoked *governmental authority* to effectuate the constitutional violation—specifically, a state
 27 attachment procedure pursuant to which state agents unlawfully seized the plaintiff’s property. *Lugar v.*
 28 *Edmondson Oil Co.*, 457 U.S. 922, 940 (1982). O’Handley errs, in particular, in suggesting that Twitter does
 not contest that its challenged actions satisfy *Lugar’s* so-called “first prong” because they were undertaken
 “pursuant to state statute.” Opp. 3. As Twitter directly explained (Mot. 11), the Complaint fails to
 plausibly allege that Twitter was wielding, or acting pursuant to, any governmental authority—under
 Elections Code § 10.5 or otherwise—as opposed to simply enforcing its own private Rules.

1 Rules does not plausibly establish that the agency coopted Twitter into carrying out an unconstitutional  
2 scheme. Twitter’s content-moderation decisions—“made by [a] private part[y] according to professional  
3 standards that are not established by the State”—fall far short of plausibly establishing joint action. *Blum*,  
4 457 U.S. at 1008.

5 Similarly unavailing are O’Handley’s attempts to distinguish *FAN* and *CHD* on the basis that the  
6 alleged information-sharing in those cases post-dated the content-moderation decisions alleged to be  
7 unconstitutional. Opp. 7-8. Those facts do nothing to detract from the core holdings Twitter cites in its  
8 motion to dismiss: that informational exchange does not raise a plausible inference of joint action (*FAN*),  
9 and neither do general statements of cooperation between the government and a private actor (*CHD*).  
10 O’Handley’s attempt to distinguish *Prager* suffers from the same defect (Opp. 8): while *Prager* did not  
11 address the particular state action theory alleged here, it nevertheless confirmed that digital internet  
12 platforms do not suddenly become state actors merely by “open[ing] their property to user-generated  
13 content.” *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020).

14 The other allegations O’Handley highlights do nothing to change the conclusion that Twitter  
15 independently decided that O’Handley’s Tweets violated its Rules. He points to his allegation about a  
16 press statement in which an OEC official claimed that 98 percent of the 300 posts that OEC flagged for  
17 Facebook and Twitter were removed. Opp. 5; Compl. ¶ 64. But that statistic combines *both* Facebook’s  
18 and Twitter’s response to government reports, and thus says little about Twitter’s individualized approach  
19 to reviewing such reports. And an exhibit to his Complaint shows that Twitter routinely *declined* to take  
20 down content OEC reported through the Portal. *See* Compl. Ex. 9 (indicating that, in 7 out of 23 instances,  
21 Twitter *did not remove* content that OEC had reported through the Portal).

22 More importantly, O’Handley’s singular focus on statistics misunderstands the nature of the joint  
23 action test. Even if Twitter had taken down nearly all of the posts that OEC officials flagged as election  
24 misinformation (an allegation belied by the aforementioned exhibit), the Complaint still fails to plausibly  
25 plead state action because it does not allege that OEC officials participated in Twitter’s review of the  
26 reported content, or that Twitter’s review was based on anything other than its own evaluation of whether  
27 the reported content violated its own platform Rules. Notwithstanding his extensive search of public  
28 records, O’Handley cannot point to any interactions between Twitter and OEC that suggest otherwise.

1 To the contrary, as his Exhibit 9 shows, in every instance in which Twitter responded to an OEC report,  
2 Twitter described its decision to take or not take any enforcement action by referencing its own review of  
3 its own Rules. *See, e.g.*, Compl. Ex. 9 at 2-3 (“*After our review*, we’ve locked the account for breaking our  
4 rules regarding civic integrity.... We’re writing to let you know that *after a review*, we didn’t find a violation  
5 of our civic integrity policy in the content you reported.” (emphases added)). And in each instance, there  
6 is no allegation that Twitter communicated with OEC about either Twitter’s review of the content or its  
7 decision-making process; it merely conveyed, in some cases, the final outcome of its process. *Id.*

8 O’Handley also fixates on an email exchange between Twitter and OEC regarding a *different*  
9 Twitter account holder. Opp. 5. But that exchange merely shows that Twitter conveyed the outcome of  
10 its review to OEC; nothing about the exchange raises a plausible inference that the government was  
11 involved in Twitter’s review of the reported Tweet. And even more importantly, that exchange does not  
12 establish, as Ninth Circuit law requires, that there was a “substantial degree of cooperation” between  
13 Twitter and OEC with respect to the particular actions O’Handley alleges violated *his rights*: namely,  
14 Twitter’s labelling of *his* Tweets and suspension of *his* account. *See Mathis*, 75 F.3d at 503. On that critical  
15 front, O’Handley fails to allege that OEC and Twitter communicated with each other regarding him or  
16 his Tweets beyond the lone, one-way report about a single Tweet discussed above. *See* Compl. ¶¶ 75-81.  
17 That one-off report is a far cry from the “substantial cooperation” that could transform Twitter’s decision  
18 to label that Tweet and all of its later moderation of O’Handley’s account into joint action with OEC.

## 19 **2. O’Handley’s Recitation Of General Conspiracy Principles Does Not Save** 20 **His State Action Theory**

21 O’Handley fares no better in attempting (Opp. 4-5) to concoct state action based on an alleged  
22 conspiracy between Twitter and OEC. Apart from his formulaic recitation of general conspiracy  
23 principles (Opp. 4), O’Handley does not point to any allegations that raise a plausible inference that  
24 Twitter entered into an agreement with the government to violate O’Handley’s constitutional rights. *See*  
25 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A pleading that offers labels and conclusions or a formulaic  
26 recitation of the elements of a cause of action will not do.” (internal quotation marks omitted)).

27 To the extent O’Handley’s conspiracy theory relies on statements from an OEC official to the  
28 press that OEC was “working closely with social media companies” to “contain” “misinformation” (Opp.  
5), that reliance is misplaced. Statements of cooperation between OEC and Twitter to combat “erroneous

1 or misleading” social media posts (Opp. 5 (quoting Compl. ¶ 64)) do not indicate a shared intent to violate  
2 O’Handley’s constitutional rights. Those statements suggest, at most, that Twitter and OEC had a shared  
3 goal of preventing misinformation on Twitter’s platform. But the Ninth Circuit has made clear that merely  
4 having some common goal is insufficient to establish conspiracy if there was no shared goal to violate the  
5 plaintiff’s constitutional rights. *See Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002); *see also Gallagher v.*  
6 *Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995) (holding that a public university’s acquiescence  
7 to private security officers’ allegedly unconstitutional pat-down searches of concert patrons did not  
8 amount to conspiracy, despite shared goal of producing a profitable event).

9 Also wrong is O’Handley’s contention (Opp. 5-6) that the existence of the Portal establishes there  
10 was a “meeting of the minds” between Twitter and OEC pursuant to which Twitter would remove  
11 whatever content OEC flagged as misinformation. As explained, *supra* 3-4, one of O’Handley’s own  
12 exhibits (Compl. Ex. 9) undermines any such inference. Further, O’Handley’s attempt to manufacture  
13 conspiracy through allegations that Twitter often acted upon content OEC reported (Opp. 5-6) fails to  
14 address the central defect Twitter identified with that theory (Mot. 12-13): the Complaint does not raise  
15 a plausible inference of a shared motive between OEC and Twitter to violate his constitutional rights.

16 At the very most, O’Handley’s allegations regarding the Portal simply indicate that Twitter listened  
17 to OEC’s views on what content might constitute election misinformation. But Ninth Circuit law is clear  
18 that a plaintiff cannot establish conspiracy merely by pointing to a private actor’s “acquiescence in the  
19 direction of state officials”; O’Handley must plausibly allege that Twitter agreed with OEC specifically to  
20 “violate constitutional rights.” *Taylor*, 880 F.2d at 1048; *Fonda v. Gray*, 707 F.3d 435 (9th Cir. 1983);  
21 *Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107-108 (7th Cir. 1991) (for conspiracy  
22 based on retaliation against speech, the plaintiff must allege that both the state and private actor possessed  
23 a shared retaliatory motive). To the extent O’Handley asserts that Twitter agreed to retaliate against him  
24 for criticizing Mr. Padilla and other Democratic California election officials’ approach to election  
25 administration (Compl. ¶ 99), or to take down O’Handley’s posts because he expressed so-called  
26 “conservative political views” (Opp. 9-10), the Complaint is devoid of any allegations that raise a plausible  
27 inference that Twitter harbored those motives, whether in setting up the Portal, labeling O’Handley’s  
28 Tweets, or suspending his account. Instead, the Complaint’s allegations merely indicate that Twitter

1 sometimes took enforcement action against Tweets reported through the Portal, including one of  
 2 O’Handley’s Tweets, because Twitter determined the Tweets violated its own Rules (such as its  
 3 prohibition on posting misleading information about elections)—not because the posters of those Tweets  
 4 had expressed “conservative” viewpoints or criticized candidates or officials of a certain political party.  
 5 Compl. Ex. 2 (describing Portal as a way for stakeholders to flag concerns regarding “technical issues”  
 6 and “content on the platform that may violate [Twitter’s] policies”); Ex. 3 (describing Portal similarly);  
 7 Ex. 9 (explaining Twitter’s responses to reported Tweets in terms of whether or not they violated Twitter’s  
 8 own Rules).<sup>2</sup>

9 **B. O’Handley’s Due Process And Equal Protection Claims Have Multiple Other**  
 10 **Defects**

11 O’Handley’s opposition offers no meaningful response to the other defects that, as Twitter has  
 12 explained (Mot. 14 n.3), also foreclose his due process and equal protection claims.

13 *1. Due Process.* Although O’Handley newly asserts that the “good will of a business” is a protected  
 14 property interest under California law (Opp. 8), he does not explain what “good will” he supposedly lost  
 15 from Twitter’s suspension of his account. And to the extent he relies on damage to reputation alone to  
 16 establish loss of goodwill, that is not sufficient to support a due process claim. *See WMX Techs., Inc. v.*  
 17 *Miller*, 197 F.3d 367, 374 (9th Cir. 1999) (“Reputation is not the equivalent of the goodwill of a business.”).  
 18 As for his asserted liberty interest in pursuing an occupation, O’Handley cites only a single stray remark  
 19 by a concurring judge in a state court opinion for the proposition that a social media influencer is a  
 20 “profession.” Opp. 9. That is hardly enough. And even if it were, the Complaint does not plausibly  
 21 allege that Twitter’s suspension of his account deprived him of the ability to continue being a “social  
 22 media influencer”; there are several other large social media platforms through which he can speak. *See*  
 23 *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 573 (1972) (state’s failure to rehire did not implicate  
 24 plaintiff’s liberty interest in pursuing an occupation because it did not “foreclose[] his freedom to take  
 25 advantage of other employment opportunities”). Likewise unavailing is O’Handley’s argument that  
 26 Twitter impinged on his liberty interest in “free speech.” Opp. 9. As his sole citation for that point shows,  
 27

28 <sup>2</sup> O’Handley refers in passing to a “nexus” between OEC and Twitter (Opp. 8), but does not say how any  
 nexus theory he may be seeking to advance is different from his attempt to fabricate state action based on  
 a joint action theory. Any such theory thus fails for the same reasons as his joint action theory.

1 that liberty interest is implicated when the “*State* would directly impinge upon interests in free speech,”  
2 and thus not when a private actor like Twitter moderates content. *Id.* (quoting *Roth*, 408 U.S. at 575 n.14).

3       2. *Equal Protection*: O’Handley has no answer to Twitter’s explanation (Mot. 14 n.3) that his equal  
4 protection claim fails because (in addition to lack of state action), the Complaint’s vague allegations of  
5 pretext do not plausibly plead that Twitter’s suspension of his account lacked a rational basis. His  
6 opposition offers only a single case, *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007), as  
7 support for his argument that Twitter’s decision to suspend his account—and not the accounts of certain  
8 unnamed “liberal” Twitter account holders—was irrational or arbitrary. Opp. 9. But that case does not  
9 help him. In fact, the Ninth Circuit stated in *Engquist* that “class of one” claims—such as the one  
10 O’Handley tries to assert here, Opp. 9—can succeed in only “extreme” instances of arbitrary treatment.  
11 478 F.3d at 994, 996. There is nothing extreme about the Complaint’s allegations of arbitrary treatment.  
12 Indeed, as explained, *infra* 7-8, aside from one bare allegation of differential treatment, unsupported by  
13 factual enhancement, Compl. ¶ 83, the Complaint is entirely devoid of any alleged facts that could raise a  
14 plausible inference that Twitter failed to take down Tweets by so-called “liberals making almost identical  
15 claims regarding election administration,” Opp. 9. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

## 16 **II. O’Handley’s Remaining Claims Fail On The Merits**

### 17 **A. O’Handley Fails To State A Claim Under Section 1985**

18 O’Handley’s opposition does not begin to come to grips with the multiple defects Twitter  
19 identified in his Section 1985(3) claim. *See* Mot. 14-16.

20 O’Handley’s only response to Twitter’s argument that his Complaint fails to plausibly allege the  
21 sort of “class based” animus that Section 1985 requires (Mot. 15-16) is that he has alleged a conspiracy to  
22 discriminate based on “political affiliation”—specifically, animus against “conservative political views.”  
23 Opp. 10-11. But as Twitter’s opening brief demonstrated (Mot. at 14-16), discrimination based on political  
24 affiliation is simply not a kind of class-based animus that is cognizable under Section 1985.

25 In an effort to dig out from that deep hole, O’Handley cites (Opp. 10-11) *Life Ins. Co. of N. Am. v.*  
26 *Reichardt*, 591 F.2d 499 (9th Cir. 1979). But *Reichardt* did not hold that discrimination based on plaintiffs’  
27 status as “political opponents” or “supporters of a different political candidate” meets the statute’s “class-  
28 based” animus requirement. *Id.* at 502-03. Instead, it merely noted that, as of that time, courts adjudicating

1 claims under Section 1985(3) “ha[d] not limited its protection to racial or otherwise suspect  
2 classifications.” *Id.* at 505. After *Reichardt*, however, the Supreme Court specifically declined to extend  
3 Section 1985(3) to “wholly non-racial, but politically motivated conspiracies.” *Carpenters*, 463 U.S. at 836.  
4 As the Court explained there, stretching that provision to cover political conspiracies would have far-  
5 reaching consequences, arguably providing a remedy for any claim that a political party interfered with  
6 another’s freedom of speech, even if it merely “encourag[ed] the heckling of its rival’s speakers” or  
7 “disrupt[ed] ... the rival’s meetings.” *Id.* And any such construction would turn federal courts into  
8 “monitors of campaign tactics in both state and federal elections”—a “role that [they] should not be quick  
9 to assume.” *Id.* None of the cases that O’Handley cites on this point, *Opp.* 11 n.4, help his argument;  
10 they are all out-of-Circuit and either pre-date *Carpenters* or rely on an interpretation of Section 1985(3) that  
11 the Court rejected in that case.

12 Further, although O’Handley states in his opposition that Twitter acted with “animus” towards  
13 “conservative political views,” (*Opp.* 10) he makes no attempt to define what those views are or why  
14 Twitter’s actions towards such views evinced animus. *See Bray v. Alexandria Women’s Health Clinic*, 506 U.S.  
15 263, 267–68 (1993) (plaintiff alleging Section 1985 conspiracy must show that “some racial, or perhaps  
16 otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action”). His bald  
17 assertions thus do not come close to plausibly pleading class-based animus under Section 1985. *See*  
18 *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1145 (9th Cir. 2021) (“[C]onclusory allegations of law ... are  
19 insufficient to defeat a motion to dismiss.”).

20 To the extent O’Handley is arguing that Twitter focused its so-called “censorship efforts on  
21 conservative requests for transparency in election processes rather than the same calls from self-identified  
22 political liberals,” (*Opp.* 9), he offers no factual allegations to support that argument. The Complaint does  
23 not identify any so-called “conservatives” whose election-related content Twitter removed, let alone any  
24 allegations that Twitter removed that content at a higher rate than so-called “liberals” expressing the same  
25 views. And as Twitter already explained (*Mot.* 10-11), the exhibits to O’Handley’s own Complaint  
26 demonstrate that Twitter consistently stated that it had established the Portal to allow government and  
27 non-government actors to flag content that may violate Twitter’s Rules and tied the content-moderation  
28 decisions it took in response to Portal reports back to those Rules—not the political affiliation of any

1 speaker. Compl. Exs. 2, 3, 9. O’Handley’s bare allegation of political animus thus comes nowhere close  
2 to satisfying the plausibility threshold required to survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678.

3 Nor is O’Handley able to offer a meaningful response to Twitter’s showing that the Complaint  
4 falls far short of alleging that Twitter conspired to violate O’Handley’s constitutional rights—that is, that  
5 it agreed to retaliate against him for expressing certain political views that were critical of Democratic  
6 officials, or to take down O’Handley’s posts because he expressed so-called “conservative political views.”  
7 Mot. 15. His sole response is to insist that he has adequately pleaded conspiracy for purposes of  
8 establishing state action with respect to his claims under Section 1983. Opp. 10. But as demonstrated  
9 above, *supra* 1-5, his Complaint does not come close to plausibly alleging state action under Section 1983.

#### 10 **B. O’Handley Fails To Allege Twitter Violated California’s Constitution**

11 O’Handley’s opposition makes no effort to respond to Twitter’s argument (Mot. 16-17) that his  
12 state law claim must be dismissed because it fails to satisfy the element of state action. Instead, it merely  
13 notes in passing that the California Constitution’s free speech clause may not require state action. Opp.  
14 12-13 n.6. But as further explained in Twitter’s reply in support of its motion to strike (herein, “MTS  
15 Reply”), the Ninth Circuit and courts in this District have uniformly concluded that state action is required  
16 for a claim under the California Constitution’s free speech provision. MTS Reply 6-7. Thus, O’Handley’s  
17 failure to plausibly plead state action dooms his state law claim too.

18 Similarly unavailing is O’Handley’s attempt to evade the state action requirement by arguing that  
19 social media companies like Twitter should be shoehorned into the narrow, idiosyncratic exception to the  
20 state action requirement that the California Supreme Court announced decades ago in the *Pruneyard* case  
21 for the outdoor common areas of large shopping centers, Opp. 12-14. O’Handley offers no response to  
22 Twitter’s argument that many courts—including several in this District—have explicitly rejected attempts  
23 to extend *Pruneyard* to websites and online platforms. Mot. 17 (collecting cases). Although he argues that  
24 “no court has held that *Pruneyard* . . . does not apply to Twitter,” Opp. 14, he offers no basis to distinguish  
25 Twitter’s platform from Vimeo, LinkedIn, and other online platforms courts have held do not fit within  
26 the *Pruneyard* exception. Nor can O’Handley’s efforts to radically expand *Pruneyard*’s scope be squared  
27 with how California courts have subsequently applied that doctrine. *See* MTS Reply 7-8.

28 O’Handley further errs in arguing that Twitter is a “traditional public forum” merely because it

1 allegedly opens its platform to the public. Opp. 13-14. It is “wishful thinking” to interpret *Pruneyard* as  
2 turning any large business into a public forum so long as it is “open to the public.” *Albertson’s, Inc. v. Young*,  
3 107 Cal. App. 4th 106, 117-118 (2003). And in any event, as already explained (Mot. 16) and further  
4 shown elsewhere (MTS Reply at 8), Twitter does not open its platform to all members of the public as a  
5 general forum for unlimited speech dissemination. O’Handley offers no response to this key distinction,  
6 which by itself confirms that Twitter falls well outside *Pruneyard’s* narrow carve-out.

7 Nor does O’Handley meaningfully grapple with Twitter’s argument (Mot. 19) that any court order  
8 compelling Twitter to carry messages with which it disagrees, or holding Twitter liable for exercising  
9 editorial judgment over what content may appear on its platform, would violate Twitter’s own rights under  
10 the First Amendment—a concern that was not present in *Pruneyard*. As explained further below, *infra* 11-  
11 12, O’Handley’s effort to relegate Twitter’s editorial judgments to “conduct” undeserving of First-  
12 Amendment protection (Opp. 15-16) is meritless. Because the First Amendment protects Twitter’s  
13 decision to condition access to its platform on extensive content-based rules and its editorial judgments  
14 to remove from its platform content with which it disagrees, *Pruneyard* cannot be extended to override  
15 Twitter’s decisions to label some of O’Handley’s Tweets and permanently suspend his account. *See*  
16 *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019).

17 O’Handley’s opposition also fails to offer any persuasive answer to Twitter’s showing (Mot. 17-  
18 18) that expanding *Pruneyard* to encompass his claim would render Twitter and other privately run online  
19 platforms powerless to prevent their communities of users from being overrun with all manner of hateful,  
20 violent, offensive, and otherwise harmful (yet First Amendment-protected) speech. O’Handley appears  
21 to concede that his position would lead to exactly the “parade of horrors” Twitter forecasts,  
22 acknowledging—as he must—that the regime he envisions would “require[]” Twitter and other online  
23 platforms “to abide by the restraints limiting the regulation of speech” that apply to traditional public fora  
24 like parks and streets. Opp. 13. What that would mean, however, is that just as the predominantly Jewish  
25 town of Skokie, Illinois had to endure swastika-brandishing Nazis parading in its neighborhoods, *Nat’l*  
26 *Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43 (1977), as the state of Ohio was not free to criminalize  
27 speech of a KKK leader touting the benefits of violent political dissent, *Brandenburg v. Ohio*, 395 U.S. 444,  
28 447 (1969), and as Congress was forbidden from criminalizing the distribution of videos depicting animal

1 cruelty, *United States v. Stevens*, 559 U.S. 460, 464 (2010), Twitter and countless other *privately operated* online  
 2 platforms would be barred from adopting and enforcing the many content-based moderation policies they  
 3 now employ to shield their communities of users from the flood of violent, hateful, and otherwise  
 4 offensive speech that would otherwise proliferate on their services. Such a regime would leave Twitter  
 5 and those other platforms with “the unappetizing choice [between] allowing all comers or closing the  
 6 platform altogether.” *Halleck*, 139 S. Ct. at 1931. Extending *Pruneyard* to private online platforms would  
 7 thus do far more to inhibit free speech than to promote it.

### 8 **III. O’Handley’s Claims Against Twitter Are Barred By The First Amendment And Section** 9 **230 Of The Communications Decency Act**

#### 10 **A. The First Amendment Protects Twitter’s Right To Decide Whether And How To** 11 **Publish O’Handley’s Election-Related Tweets**

12 O’Handley erroneously argues that because he alleges Twitter’s decision to remove him from the  
 13 platform constituted state action, Twitter’s First Amendment rights have no bearing here. Opp. 15.  
 14 “Even if state action were present ... there is still the freedom to exercise subjective editorial discretion”  
 15 over the speech that Twitter chooses to disseminate. *See Associates & Aldrich Co. v. Times Mirror Co.*, 440  
 16 F.2d 133, 135 (9th Cir. 1971). And even if the law were otherwise, any remedy would need to be tailored  
 17 to intrude on Twitter’s rights as minimally as possible. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753,  
 18 764–66 (1994); *Sindi v. El-Moslimany*, 896 F.3d 1, 30-32 (1st Cir. 2018). Moreover, the Supreme Court has  
 19 made clear that Twitter’s rights as a private speaker also bear heavily on the question of whether Twitter  
 20 served as a state actor in the first place, encouraging courts to proceed cautiously when applying state-  
 21 action doctrine to avoid “eviscerat[ing] certain private entities’ rights to exercise editorial control over  
 22 speech and speakers on their properties or platforms.” *Halleck*, 139 S. Ct. at 1932; *see NetChoice, LLC v.*  
 23 *Paxton*, No. 1:21-CV-840-RP at \*12 (W.D. Tex. Dec. 1, 2021) (“Social media platforms have a First  
 24 Amendment right to moderate content disseminated on their platforms.”). Concluding that Twitter  
 25 becomes a state actor simply by making decisions about the content on its platform that are—  
 26 sometimes—consistent with the wishes of various government officials or agencies would deprive Twitter  
 27 of its right to make independent editorial judgments about what speech it wishes to disseminate. So would  
 28 prohibiting Twitter from considering reports by government officials and experts in determining whether  
 content violates its rules. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 n.2 (1980) (Stewart, J.,

1 concurring) (“The right to speak implies a freedom to listen. The right to publish implies a freedom to  
2 gather information.”).

3 O’Handley is also wrong that Twitter’s editorial decisions about what messages to display do not  
4 convey a message. Opp. 15-16. Twitter’s policies regarding what speech is permitted on its platform are  
5 themselves plainly speech: They set out Twitter’s views on what role it wants to play in society and in the  
6 public exchange of ideas. They also set out Twitter’s views on what types of speech are appropriate or  
7 productive to share with its community of account holders. Twitter’s actions enforcing those policies are  
8 expressive too—they are the means by which Twitter strives to ensure that its contributions to the public  
9 debate do not include speech or speakers that it deems harmful, inappropriate, or otherwise unfit for  
10 sharing on its platform. This is exactly like a newspaper’s editors deciding the paper will not publish  
11 certain articles, editorials, or advertisements. *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258  
12 (1974). And it is just like a parade organizer’s decision not to include certain participants that seek to  
13 express a message that conflicts with the organizer’s own, *see Hurley*, 515 U.S. at 559, or a bookstore’s  
14 selection of books or magazines it will or will not offer for sale, *cf. Smith v. People of California*, 361 U.S. 147,  
15 152 (1959).

16 The cases O’Handley cites (Opp. 15-16) are inapposite. The U.S. Supreme Court’s decisions in  
17 *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.* (“FAIR”), 547 U.S. 47 (2006), and *Pruneyard Shopping Ctr. v.*  
18 *Robins*, 447 U.S. 74 (1980), both addressed whether a law that required certain property owners to allow  
19 outside individuals onto their property violated the owners’ First Amendment rights. Both decisions held  
20 that merely allowing the individuals onto the premises was not “inherently expressive”; that the laws  
21 therefore regulated conduct, rather than speech; and that (unlike the parade organizer in *Hurley*) the  
22 property owners’ “own message was [not] affected by the speech it was forced to accommodate.” *FAIR*,  
23 547 U.S. at 63; *Pruneyard*, 447 U.S. at 88. But Twitter is not a mere property owner; it operates a  
24 communications platform dedicated to gathering, curating, and disseminating news and information.  
25 O’Handley does not merely ask for access to Twitter’s offices or to hold up a sign in its parking lot. His  
26 theory is that Twitter should be compelled to disseminate certain Tweets—messages intended to express  
27 a view—on its communications platform. Unlike the recruiting services at issue in *FAIR*, and the  
28 operation of a shopping center in *Pruneyard*, that activity “is inherently expressive.” *FAIR*, 547 U.S. at 66.

1 And compelling Twitter to publish content that violates its editorial policies would necessarily interfere  
2 with its own expression, which as explained, is effectuated by its adopting and enforcing of those policies.

3 **B. Section 230 Also Bars O’Handley’s Claims**

4 As Twitter explained (Mot. 18-21), 47 U.S.C. § 230(c)(1) independently bars O’Handley’s claims  
5 because they seek to hold Twitter liable for publisher conduct pertaining to content originating from  
6 another—namely, O’Handley’s own Tweets. His arguments to the contrary are unavailing.

7 O’Handley’s suggestion that Section 230 does not apply to his constitutional claims (Opp. 17) has  
8 no support in law or reason. He has not identified any case rejecting a private platform’s claim to Section  
9 230 immunity from such a claim. In *FAN*, Facebook did not argue that Section 230 barred the plaintiff’s  
10 First Amendment claim. *See Fed. Agency of News LLC v. Facebook, Inc.*, (“*FAN*”), 432 F. Supp. 3d 1107,  
11 1116 (N.D. Cal. 2020). And the defendant in *Mainstream Loudoun v. Board of Trustees of Loudoun County*  
12 *Library* was a public library that the court thought fell outside the scope of Section 230’s protection entirely.  
13 2 F. Supp. 2d 783, 790 (E.D. Va. 1998). It is not surprising that O’Handley cannot identify any precedent  
14 for his position. Subsection 230(c)(1) does not, on its face, distinguish between constitutional and other  
15 claims. Nor is there anything unusual about applying Section 230 to constitutional claims. Like qualified  
16 immunity, Section 230 provides a defense against liability for alleged constitutional violations. As for  
17 O’Handley’s California constitutional claim, the plain language of Section 230 prohibits liability from being  
18 imposed “under *any* State or local law that is inconsistent” with its provisions, 47 U.S.C. § 230(e)(3), and  
19 California’s constitution obviously constitutes “State ... law.” (emphasis added). Courts have thus  
20 routinely held that Section 230 bars claims under the California constitution’s free speech clause. *See, e.g.,*  
21 *Doe v. Twitter, Inc.*, 2021 WL 3675207, at \*33 (N.D. Cal. Aug. 19, 2021); *Domen v. Vimeo, Inc.*, 433 F. Supp.  
22 3d 592, 603 (S.D.N.Y. 2020), *aff’d on other grounds*, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

23 O’Handley likewise errs in asserting (Opp. 17) that Section 230 does not bar claims for declaratory  
24 and injunctive relief. It is not clear why he argues that such relief is carved out from Section 230, given  
25 that he disclaims seeking reinstatement of his account in opposing Twitter’s motion to strike. Opp. 15.  
26 In any event, he is wrong that Section 230 is so limited. Notwithstanding the lone, old, and never-followed  
27 district court decision he cites (*Mainstream Loudoun*), it is well settled, including in the Circuit from which  
28 that decision emanated, that Section 230 bars claims for injunctive and declaratory (as well as monetary)

1 relief. *See, e.g., Enhanced Athlete Inc. v. Google LLC*, 479 F. Supp. 3d 824 (N.D. Cal. 2020) (declaratory relief);  
2 *Asia Econ. Inst. v. Xcentric Ventures LLC*, 2011 WL 2469822, at \*7 (C.D. Cal. May 4, 2011) (injunctive relief);  
3 *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003) (injunctive relief), *aff'd*, 2004 WL  
4 602711 (4th Cir. Mar. 24, 2004); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 983-986  
5 (10th Cir. 2000) (same); *Hassell v. Bird*, 5 Cal. 5th 522, 540 (2018) (same). As one court explained, it would  
6 make little sense to read Section 230 as permitting injunctive relief, which can be “at least as burdensome”  
7 as damages and is “typically more intrusive.” *Noah*, 261 F. Supp. 2d at 540.

8 Finally, O’Handley offers a jumble of meritless arguments to the effect that subsection 230(c)(1)  
9 has no application where the platform is sued for removing the plaintiff’s own content or barring the  
10 plaintiff from the platform. That proposition is flatly contrary to a uniform body of case law in the Ninth  
11 Circuit and this District (as well as many other courts). *See, e.g., Fyke*, 808 F. App’x at 598 (9th Cir.)  
12 (subsection 230(c)(1) immunity for “de-publishing pages that [plaintiff] created and then re-publishing  
13 them for another third party”); *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App’x 526, 526 (9th Cir. 2017)  
14 (subsection 230(c)(1) bars suit based on Facebook’s “hosting, and later blocking, [plaintiff’s] online  
15 content”); *Riggs*, 444 F. App’x at 987 (9th Cir.) (subsection 230(c)(1) bars claims challenging MySpace’s  
16 deletion of plaintiff’s profiles); *FAN*, 432 F. Supp. 3d 1107 (subsection 230(c)(1) bars suit challenging  
17 Facebook’s decision to suspend plaintiff); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at \*4 (N.D. Cal. May  
18 9, 2019) (applying subsection 230(c)(1) to plaintiff’s challenge to Facebook’s suspension of plaintiff and  
19 removal of his posts).

20 The rationales O’Handley offers for ignoring this large body of contrary case law are meritless.  
21 He primarily argues that subsection 230(c)(1) does not apply to “first-party content” (which he defines as  
22 content provided by the plaintiff) as opposed to “third-party content” (which he defines as content  
23 provided by a person or entity other than the plaintiff and the service provider). Courts in this District  
24 have rejected this exact argument in decisions affirmed by the Ninth Circuit. They have held that a  
25 plaintiff’s own content is “information provided by another content provider” because “‘third-party  
26 content’ is used to refer to content created entirely by individuals or entities other than the interactive  
27 computer service provider.” *Sikhs for Justice (“SFJ”), Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094 (N.D.  
28 Cal. 2015), *aff’d*, 697 F. App’x 526 (9th Cir. 2017); *see also Fyke*, 2019 WL 11288576, at \*2 (same), *aff’d*, 808

1 F. App'x 597 (9th Cir.). As these cases rightly recognize, subsection 230(c)(1) distinguishes between  
2 content that was created or developed entirely by a person or entity other than service provider, on the  
3 one hand, and content that was created or developed (at least in part) by the service provider itself, on the  
4 other. *See* 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated  
5 as the publisher or speaker of any information provided by *another* information content provider.”  
6 (emphasis added)). *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), did not hold otherwise. Rather, it  
7 simply used the phrase “third-party content” as a shorthand for content provided by a person or entity  
8 other than the service provider. *Id.* at 1105.

9 O’Handley also claims, citing only one unpublished order from a court in Florida, *e-ventures*  
10 *Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029 (M.D. Fla. 2017), that applying subsection 230(c)(1) to  
11 claims in which a plaintiff challenges removal of his own content renders subsection 230(c)(2) superfluous.  
12 Opp. 18-19. He fails to mention, however, that every court to have considered *e-ventures*’s interpretation  
13 has rejected it. *See, e.g., Domen*, 433 F. Supp. 3d at 603; *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 33 (2021).  
14 For good reason. As the Ninth Circuit has explained, applying (c)(1) to depublishing decisions creates no  
15 superfluity because (c)(1) does not apply when the service provider depublishes content that it “developed,  
16 even in part,” while (c)(2) does. *Barnes*, 570 F.3d at 1105; *see also Fyke*, 808 F. App'x at 598.

17 O’Handley likewise errs in asserting (Opp. 17-18) that applying subsection (c)(1) to removal of  
18 content effectively writes the good-faith requirement out of the statute. Subsection (c)(2) provides an  
19 “additional shield [of] liability,” extending to “even those who cannot take advantage of subsection (c)(1),”  
20 *Barnes*, 570 F.3d at 1105, and it is those defendants who must demonstrate good faith in order to be  
21 entitled to immunity. For the same reason, the subsections are entirely compatible and the specific-  
22 controls-the-general canon—which applies only to “conflict between laws”—is inapplicable. *Nitro-Lift*  
23 *Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012); *see also Karczewski v. DCH Mission Valley LLC*, 862 F.3d  
24 1006, 1015 (9th Cir. 2017) (“When confronted with an irreconcilable conflict in two legal provisions, we  
25 may apply the interpretive principle that the specific governs over the general.”).

26 In sum, none of O’Handley’s efforts to circumvent Section 230 immunity is meritorious, and thus,  
27 that immunity alone dooms his claims.

**CONCLUSION**

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: December 1, 2021

Respectfully submitted,

/s/ Patrick J. Carome

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of these filings to all registered counsel.

Dated: December 1, 2021

By: /s/ Patrick J. Carome  
PATRICK J. CAROME